

THE HIGH COURT

2008 7175 P

BETWEEN

PATRICK O'SULLIVAN

PLAINTIFF

AND

VINCENT ROGAN AND MAIRE MORAN, BOTH PRACTISING UNDER THE STYLE AND TITLE OF ROGAN AND MORAN SOLICITORS

DEFENDANTS

Judgment of Mr. Justice Hedigan delivered on the 16th day of October, 2009.

1. The plaintiff in the within proceedings is a retired farmer now aged 90 years and residing at Fatima Nursing Home, Tralee, Co. Kerry.
2. The defendants are solicitors practising under the name of Rogan and Moran solicitors of New Street, Cahirciveen, Co. Kerry.
3. In the within proceedings the plaintiff claims damages for negligence, misrepresentation, breach of contract, breach of duty and breach of statutory duty. The claim arises from a transaction involving the sale of lands which transaction was concluded on the 19th March, 1999. The claim is that the defendants failed to properly advise the plaintiff in transferring his property at a substantial undervalue which amounted to divesting himself of his entire property.
4. A plenary summons was issued on the 1st September, 2008. On the 5th September, 2008 a statement of claim was served. On the 8th September, 2008 an appearance was entered and on the 17th February, 2009 a defence was entered. This defence denied all allegations and pleaded both contributory negligence and also that the proceedings were statute-barred. In a reply dated the 16th March, 2009 the plaintiff pleaded that the case was not statute-barred in particular because of the fraudulent concealment of a cause of action on the part of the plaintiff. They relied upon s. 71 of the Statute of Limitations, 1957. This statutory provision is as follows:-

"71(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either –

(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

5. The motion before the Court is to strike out the proceedings as being statute-barred. This motion is by way of the determination of a preliminary issue. The trial of the preliminary issue was directed by Mr. Justice Ryan on the 22nd June, 2009. I am told this order is not available.
6. The plaintiff has emphasised that he is not making a case for damages for fraud but alleges that the failure of the defendants to advise the plaintiff at the time, i.e. March, 1999, that he had a cause of action against them due to their failure to properly advise him on the transaction involved amounted to a fraudulent concealment.
7. It is agreed the normal limitation period would be six years and that therefore time should have run on the 18th March, 2005. This being so the proceedings would be three years and five months out of time. If, however, they were proceedings to which s. 71 of the Statute of Limitations applied then the proceedings would not be barred because the date of discovery of the action the plaintiff had was not until some time later. It seems to be accepted that if this later date is to be found by the Court as the date of discovery of the alleged fraudulent concealment then the proceedings are caught by s. 71 and are not, therefore, statute-barred.
8. The gravamen of the plaintiff's argument is that the defendants well knew that they were not properly advising the plaintiff and although fraud is not alleged, this amounts to conduct which is covered by the definition of "fraudulent concealment".
9. The defendant who is the moving party argues that the plea of fraudulent concealment is, in fact, nothing more than the claim of negligence that was pleaded in the statement of claim. The plaintiff, it is argued, has done no more than repeat the allegation of negligence.
10. I am referred to and have considered the judgments in *Kitchen v. Royal Air Force Association* [1958] 1 WLR 563, (pp.572 – 573), *Heffernan v. O'Herlihy* [1998] IEHC 211, *Applegate v. Moss* [1971] 1 QB 406, *Keane v. Victor Parsons & Co* [1973] 1 WLR 29 and *J. MacH & J.M.* [2004] IEHC 32.

In the most unusual facts of this case it is not clear, nor can it be at this preliminary stage, just what the precise actions were surrounding the events which gave rise to these proceedings. It seems clear there was a long standing relationship of solicitor and client in place. It is claimed the solicitors did not properly advise the plaintiff who was then 80 years old and as a result he divested himself of all his property for little or no return. Concealment of the fact that what the solicitors did or failed to do could amount to a cause of action against them in favour of the plaintiff is the fraudulent concealment within the meaning of s. 71 upon which the plaintiff relies.

11. In *Kitchen v. Royal Air Force Association*, Lord Evershed said therein when dealing with s. 26(b) of the United Kingdom Limitations Act 1939 which had equivalent wording to s. 71 of the Statute of Limitations, 1957:-

"It is now clear ... that the word "fraud" in s. 26(b) of the Limitation Act 1939 is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in Beaman v. A.R.T.S. Ltd. that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define 200 years ago and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."

Considering the same section further in *Applegate v. Moss* [1971] 1 QB 406, the Master of the Rolls Lord Denning said that s. 26 of the Limitation Act 1939, applied whenever the defendant's conduct had been such:-

"as to hide from the plaintiff the existence of his right of action, in such circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim."

12. The conduct which might amount to fraudulent concealment was further considered by Denning M.R. in *Keane v. Victor Parsons & Co.* [1973] 1 WLR 29 (at pp. 33-34):-

"In order to show that he concealed the right of action by fraud, it is not necessary to show that he took active steps to conceal his wrongdoing or breach of contract. It is sufficient that he knowingly committed and did not tell the owner anything about it. He did the wrong or committed the wrong secretly. By saying nothing he kept it secret. He conceals the right of action. He conceals it by fraud as those words have been interpreted in the cases. To this word 'knowingly' there must be added 'recklessly'."

At page 34 the Master of the Rolls continued:-

"If however the defendant was quite unaware that he was committing a wrong or a breach of contract it would be different. So if by an honest blunder he unwittingly commits a wrong ..., or a breach of contract ... then he could avail himself of the Statute of Limitations."

This decision has been approved of in the Irish jurisdiction in *McDonald v. McBain* [1991] ILRM 764.

13. What exactly was the conduct of the defendants in this case at the time? It is not clear and I believe cannot become clear until the full facts of the case are teased out. If it turns out that what occurred amounts to the kind of conduct referred to in *Kitchen*, *Applegate* and *Keane*, then it may well be that s. 71 will apply and save the plaintiff from the statute. If, on the other hand, it is found to be conduct which whilst negligent was unattended by fraudulent or deceitful behaviour then, as pointed out by Denning M.R. at p. 34 of *Victor Parsons*, the defendant may avail himself of the statute.

Decision

14. Owing to the centrality of the defendants' conduct in relation to the events at the time and owing to the inevitable conflicts in relation thereto which can only be resolved by plenary hearing, I cannot come at a preliminary stage to any conclusion as to whether s. 71 applies. I will therefore remit the issue to plenary hearing. It seems to me that it is only when the facts of this case are fully teased out that it will be clear whether s. 71 applies or not.

For the sake of clarity I hold the plea of fraudulent concealment has been properly particularised by letter of 7th May, 2009 and now remains to be proved at plenary hearing.