

THE HIGH COURT

2000 No. 8665 P

BETWEEN

JAMES MOLEY

PLAINTIFF

AND
COLIN FEE

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 27th April, 2007.**The plaintiff's claim as pleaded**

1. These proceedings were commenced by plenary summons which issued on 25th July, 2000 between the plaintiff and Thomas Fee (the Deceased). The Deceased died on 16th January, 2005. Probate of his will was granted to the defendant on 22nd December, 2005. Subsequently, by order of the Master dated 11th May, 2006, it was ordered that the proceedings be carried on and prosecuted between the plaintiff and the defendant. In effect, the defendant is sued as personal representative of the Deceased.

2. At the hearing of the action the plaintiff was given leave, somewhat reluctantly, to amend his statement of claim. The factual basis of the plaintiff's claim as pleaded in the amended statement of claim is as follows:

The Deceased was formerly the owner of "certain lands situated at Wavecrest Drive, Blackrock, Dundalk, in the County of Louth, comprised within Folio No. 12029".

In or about the month of April, 1975 the defendant agreed to sell "a part of" that property to Patrick McEneaney and a part to Gerard Cumiskey for a consideration of IR£300 each and Mr. McEneaney and Mr. Cumiskey each paid to the defendant (meaning the Deceased) the agreed consideration of IR£300.

As a result of the agreement (which in a reply dated 13th July, 2001 to notice for particulars was stated to be a verbal agreement) and in consideration of the payment of IR£300 each, the Deceased permitted Mr. McEneaney and Mr. Cumiskey to enter upon and take possession of the lands and carry out work of site improvement. Subsequently, Mr. Cumiskey placed a mobile home on his portion "of the said site". Mr. McEneaney and Mr. Cumiskey have each enjoyed ownership and possession of their respective portions "of the said site" and have exercised such rights to the exclusion of all others without any objection from the Deceased.

In or about the month of September, 1999 Mr. McEneaney and Mr. Cumiskey agreed to sell their respective portions of the said property to the plaintiff and the plaintiff has paid the agreed consideration.

The Deceased by his solicitor alleged that the plaintiff had trespassed on the land and threatened to take action against him.

3. The basis in law of the plaintiff's claim as pleaded is that by reason of the payment of the full consideration by Mr. McEneaney and Mr. Cumiskey to the Deceased, as alleged, each of them was entitled to the freehold interest in his respective portion of the property. By entry into possession of the property and continuing in sole and exclusive occupation by Mr. McEneaney and Mr. Cumiskey, any right or title of the Deceased has been statute barred. Mr. McEneaney and Mr. Cumiskey having paid the full purchase price for the property, the Deceased was a trustee of the property for Mr. McEneaney and Mr. Cumiskey. The plaintiff, having purchased the interest of Mr. McEneaney and Mr. Cumiskey, is entitled to the property.

4. The first relief which the plaintiff claims is a declaration that he is entitled to the freehold interest "in all the property situated at Wavecrest Drive, Blackrock, Dundalk in the County of Louth". Additionally, he seeks declarations that the title of the Deceased is statute barred and, alternatively, that the Deceased was a trustee for Mr. McEneaney and Mr. Cumiskey. The plaintiff also seeks an order directing the defendant to convey or transfer the freehold interest "in the said property" to the plaintiff. If necessary, the plaintiff also seeks an order appointing a trustee for the purposes of conveying the property to Mr. McEneaney and Mr. Cumiskey and/or the plaintiff. An order is sought in the amended statement of claim which was not sought in the original statement of claim: an order for the rectification of the register "in respect of a portion of Folio 12029 County Louth, the subject of the proceedings herein".

5. In recording the plaintiff's claim as pleaded, I have highlighted what I consider to be vagueness and uncertainty as to the property the subject of the proceedings. While this was not an issue during the hearing of the proceedings, it is an issue for the court in the light of the evidence. However, I will return to that aspect of the matter later.

6. In his defence, the defendant has traversed all of the allegations made by the plaintiff in relation to the dealings between the Deceased and Mr. McEneaney and Mr. Cumiskey. In particular the defendant has denied that Mr. McEneaney and Mr. Cumiskey entered into and continued in sole and exclusive occupation of the property and it is further denied that Mr. McEneaney and Mr. Cumiskey paid the purchase price to the Deceased. Alternatively, the defendant asserted that, if there was an agreement between the Deceased and Mr. McEneaney and Mr. Cumiskey, it is unenforceable for failure to comply with the Statute of Frauds (Ireland) 1695. Alternatively, the entitlements of Mr. McEneaney and Mr. Cumiskey under the alleged agreement are statute barred. The defendant has also alleged that Mr. McEneaney and Mr. Cumiskey were guilty of laches.

7. The defendant has also counterclaimed against the plaintiff, asserting that the Deceased was the registered owner of lands comprised in Folio 12029 and that the Deceased was at all times entitled to possession of the property. There followed an allegation of trespass and of slander of title by the institution and maintenance of these proceedings. The relief sought in the counterclaim is an injunction restraining the plaintiff from interfering with the defendant's property and damages for, *inter alia*, trespass and slander of title.

8. In his reply and defence to counterclaim the plaintiff joined issue with the defendant on the defence. Specifically, he asserted that the Deceased had by his solicitor in open correspondence acknowledged that he had sold "the said property" to the plaintiff's predecessors in title, Mr. McEneaney and Mr. Cumiskey. It would appear that the defendant did not seek to identify the "open correspondence" by seeking particulars.

The facts: what happened between 1975 and 1977

9. In relation to the events between 1975 and 1977, the court heard the evidence of Mr. McEaney and Mr. Cumiskey, who were called by the plaintiff, Mr. Cumiskey having appeared in answer to a subpoena. Two of the Deceased's children, the defendant and Gillian McBride, were called by the defendant in relation to those events. At the time, the defendant was a small boy and Mrs. McBride was in her late teens. Mr. John Igoe, a retired garda, and Mr. Hugh Cafferty were also called by the defendant. By agreement, a planning file maintained by Louth County Council was admitted in evidence.

10. In the late 1960s the Deceased, who was a builder, developed a small estate of six bungalows at Blackrock, County Louth, which came to be known as Wavecrest Drive. When he had the development completed he had a plot of land which lay between the rear of some of the bungalows and the sea shore left over.

11. At this point, I digress to address the confusion which the documents which have been put in evidence create. On the basis of the most recent certified copy of Folio 12029 put in evidence (certified as of 29th September, 2005), that folio relates to part of the townland of Haggardstown, comprising 0.1518 hectares, equivalent to just over one-third of an acre. The Deceased was registered as owner of these lands in the Land Registry on 1st November, 1967. The *lis pendens* registered in relation to these proceedings is registered as a burden on the folio. However, when these proceedings were instituted it would appear that there was a larger area registered on the folio, because the copy of the land certificate put in evidence discloses that an area comprising 0.3200 hectares was transferred off the folio on 30th October, 2003 and is now registered on Folio 24964F, County Louth. On the second day of the hearing a copy of Folio 24964F was put in evidence and this shows that, as recently as 30th October, 2003, Nora Molloy was registered as full owner on that folio, although a sketch map on the planning file suggests that the Molloy interest dates back to 1975. The *lis pendens* is also registered as a burden on that folio. Why the *lis pendens* is registered against the land of Nora Molloy, who is not a party to the proceedings, was not explained. The confusion is compounded by two further factors. First, the transfer dated 27th February, 2003 from Mr. McEaney and Mr. Cumiskey to the plaintiff, to which I will refer later, purports to transfer part of Folio 12029 "containing .182 acres, or thereabouts metric measure (sic)" to the plaintiff. The map annexed to that transfer, which was drawn by a building surveyor, gives the area outlined in red as 0.182 acres (equivalent to .0735 hectares). Secondly, the claim for rectification in the plaintiff's amended statement of claim relates to "portion of Folio 12029". The final element of confusion is that, while the filed plan in relation to Folio 24964F has not been put in evidence, the filed plan in relation to Folio 12029 as at 29th September, 2005 would suggest that the "sliver", as one of the witnesses, Mr. John Woods, described it, transferred to Folio 24964F is half the size of the lands remaining on Folio 12029, not twice the size as the area given in the folios would suggest.

12. The foregoing confusion could have been easily avoided if the plaintiff had produced a map of the disputed plot based on an up to date ordnance survey map and had related it to the relevant Land Registry folio, which appears to be Folio 12029, as it now is. For present purposes I am proceeding on the basis that the plot of land in dispute, which I will refer to as the disputed plot, is the area depicted on the aerial photograph put in evidence, which is bounded on the west by a hedge separating it from two bungalows in Wavecrest Drive, on the east by the seashore, on the north by a row of conifers, which I assume separates it from Nora Molloy's back garden and on the south by a "wireless" post and wire fence. I am also assuming that this plot is registered on Folio 12029 in the name of the Deceased, but that it comprises less than one-fifth of an acre.

13. Returning to what happened in 1975, I am satisfied on the evidence that around April, 1975 the Deceased orally agreed to sell the entirety of the disputed plot to Mr. Cumiskey and Mr. McEaney on the basis that it would be divided lengthwise from west to east, so that Mr. Cumiskey would get the northern half together with an entrance and Mr. McEaney would get the southern half less the entrance. Each area would have been capable of accommodating a mobile home. Each agreed with the Deceased to pay IR£300 for his take.

14. I am also satisfied on the evidence that shortly after the agreement was reached some works were carried out on the disputed plot to render it suitable to take two mobile homes. Some levelling work was done and in late April, 1975 a few consignments of gravel were put on the land. When that work had been done, at the end of April, 1975 Mr. Cumiskey, with the assistance of the Deceased, attempted to bring a mobile home onto his portion of the disputed plot. The residents in Wavecrest Drive obstructed entrance to the disputed plot. Garda Igoe was called and the attempt was abandoned. However, that night or the next day, probably by stealth, Mr. Cumiskey succeeded in putting his mobile home on his portion of the disputed plot. I think the probability is that the mobile home was *in situ* for over two years, as Mr. Cumiskey testified, and that Mr. Cafferty was mistaken in his recollection that it was there for only three or four weeks. Nothing turns on this conflict, however.

15. What happened immediately after the mobile home was brought on the site was that the residents in Wavecrest Drive complained to the planning authority, Louth County Council. An enforcement notice under the then in force s. 31 of the Local Government (Planning and Development) Act, 1967 was served on Mr. Cumiskey, as occupier, and on the Deceased, as owner, to compel removal of the mobile home. Following non-compliance, proceedings were initiated in Dundalk District Court. It is not clear what the outcome of the proceedings was. In any event, some time in 1975 Mr. Cumiskey applied to Louth County Council for planning permission for "retention of caravan on site" at Haggardstown, Blackrock". On 29th June, 1976, Louth County Council issued a notice of decision to refuse planning permission on the ground that the area was zoned for recreational use, which had been the consistent policy of the planning authority since the early 1950s to retain it as a public open space. Mr. Cumiskey appealed to An Bord Pleanála. The appeal was determined against him on 2nd June, 1977, when An Bord Pleanála refused the permission on the ground that the site formed part of a prominent headland overlooking the foreshore and that a caravan on the location would be detrimental to the visual amenities of the area. The zoning for recreational use was considered reasonable. Mr. Cumiskey's evidence was that when he was informed of that decision, he removed the mobile home from the disputed plot. I accept his evidence on this.

16. I am satisfied that the actions of Mr. McEaney and Mr. Cumiskey in April, 1975 and Mr. Cumiskey's actions thereafter were referable to the fact that there was an oral agreement between them and the Deceased to purchase the disputed plot. The real issue in this case is what impact the opposition of the residents in Wavecrest Drive and, ultimately, the refusal of planning permission by An Bord Pleanála had on that agreement. In addressing that issue it is necessary to consider what else Mr. McEaney and Mr. Cumiskey did on foot of the agreement.

17. It is clear on the evidence that Mr. Donal McArdle, a solicitor practising in Dundalk, acted for the Deceased in connection with the transaction. Mr. McArdle subsequently became a judge of the District Court and he has been dead for a long number of years. The firm of Patrick Quinn & Co., solicitors practising in Dundalk, acted for both Mr. McEaney and Mr. Cumiskey and, in particular, in 1975 Mr. Roger MacGinley was dealing with the matter for them. Mr. MacGinley is still practising as a solicitor in Dundalk. He was not called as a witness.

18. Mr. Cumiskey's evidence was that he paid the agreed sum of IR£300 in cash to Mr. MacGinley's office, Patrick Quinn & Co. He was under the impression that Patrick Quinn & Co. were the Deceased's solicitors but that patently was not the case. He received a receipt for the money from Patrick Quinn & Co. His evidence was that that receipt referred to the money and the size of the disputed plot he was acquiring. The receipt was not forthcoming at the hearing because later, around 1999, Mr. Cumiskey gave the receipt to

the plaintiff. The plaintiff's evidence was that he brought the receipt in to Mr. MacGinley to find out more about it. When he called some time later, the receipt had been mislaid.

19. Mr. McEneaney's evidence was that he paid the sum of IR£300 by cheque. He was able to produce the cheque stub, for what it was worth, which suggested that the cheque was dated 2nd April, 1975 and was for IR£300. Mr. McEneaney's evidence was that his wife wrote the cheque and that the payee was the Deceased. He testified that he brought the cheque to the office of Mr. McArdle and that he gave it to a girl who was there. It occurred to me that Mr. McEneaney's recollection on that point might not be correct because Patrick Quinn & Co. were acting for him, as correspondence which emanated subsequently makes clear. Moreover, Mr. McEneaney testified that he gave two pieces of paper which the Deceased gave him, which I understand to have been plans of the two sites carved out of the disputed plot, to Patrick Quinn & Co. However, the defendant seems to have accepted Mr. McEneaney's evidence on that point.

20. The items of correspondence from Patrick Quinn & Co. which Mr. McEneaney and Mr. Cumiskey possessed and which were put in evidence do corroborate the existence of an oral agreement between the Deceased, on the one hand, and Mr. McEneaney and Mr. Cumiskey, on the other hand, in 1975. The earliest letter put in evidence was a letter of 26th August, 1975 from Patrick Quinn & Co. to Mr. McEneaney telling him that they had received a contract from the Deceased's solicitors and asking him to call at his convenience. That letter would suggest that, while a deal had been done, the intention was that there would be a formal contract. It is not clear whether a formal contract was executed. Mr. McEneaney's evidence was that he could not say that he went in to sign a contract. Chronologically, the next letter is a letter dated 11th March, 1977 from Patrick Quinn & Co. to Mr. Cumiskey and his wife, the heading of which refers to a transaction involving the Deceased and the addressees in relation to a plot of ground at Haggardstown. In the letter the addressees were asked to call to the office some days later to sign the sub-division form, which obviously was the form on which the consent of the Land Commission to sub-division pursuant to s. 12 of the Land Act, 1965, which would have been necessary at the time, would have been applied for. There was a further letter of 8th June, 1977 from Patrick Quinn & Co. to Mr. Cumiskey advising him of the result of the appeal to An Bord Pleanála and pointing out that it marked the end of the procedures which would be open for practical purposes. Mr. Cumiskey was asked to get in touch with the office.

21. The first two items of correspondence suggest the existence of an ongoing conveyancing transaction. However, it is not clear on the evidence whether contracts were signed or what arrangements were made in relation to the purchase money between the office of Patrick Quinn & Co. and the office of Donal McArdle. What is clear is that the position of the Deceased at all times was that he did not receive the purchase money. Notwithstanding the refusal of planning permission, the conveyancing files in both offices seem to have remained open after 1977. The last item of correspondence put in evidence was a letter dated 20th October, 1981 from Patrick Quinn & Co. to Mr. McEneaney referring to the transaction from the Deceased to him and the transaction from the Deceased to Mr. Cumiskey. In the letter it was stated that the office had been in contact with Donal McArdle & Co. regarding the production of a map to be told that Mr. McEneaney and Mr. Cumiskey were to have the map prepared. Mr. McEneaney was requested to contact the office. Again, it is not clear whether anything arose out of that letter. If there were formal contracts entered into, there is no evidence that they were completed and there is certainly no suggestion that either Mr. McEneaney or Mr. Cumiskey got title from the Deceased.

The position on the ground between 1977 and 1999

22. Mr. Cumiskey's evidence was that his portion of the disputed plot was dormant for a number of years and he did not do anything in relation to it. Occasionally, if he was in Blackrock, he would go and look at it but it was overgrown. His home was at Tray, Culloville, County Monaghan in 1975 and still is. In the course of cross-examination he did say he believed he owned it, but he said he was not using it and it was of no value to him. He said it was of no interest to him.

23. The evidence of Mr. McEneaney, who at all material times lived in Dundalk, was quite similar to Mr. Cumiskey's. He said he had lost all interest in his portion of the disputed plot when it became apparent that he could not put a caravan on it. He was not going to spend money on it. He visited the site occasionally when out walking the dog, perhaps every three to six months. Once he saw a neighbour putting rubbish on it and he asked him to remove it and he did.

24. The Deceased's home was within a hundred yards of the disputed plot. He also owned a caravan park in the vicinity. The evidence of the defendant was that the Deceased dumped grass from the caravan park on the disputed plot until about 1987, when the caravan park was developed for housing, and continued thereafter to dump grass from his residence on it. Mr. Cafferty corroborated the defendant's evidence of a continued use by the Deceased of the disputed plot after the incident in April, 1975. He recollected the Deceased driving onto the disputed plot with a tractor and trailer carrying 40 or 45 gallon barrels, digging a hole, dumping material and covering up the hole. That practice continued until the Deceased closed his caravan park, which Mr. Cafferty testified occurred probably in 1982 or 1983. Mr. Cafferty's evidence was that he saw the Deceased dumping material on at least three or four occasions. He also corroborated the evidence of the defendant in relation to the entrance to the disputed plot from where the estate road ends immediately to the south of the adjoining house of the Cotter family. The defendant's evidence was that the gate piers at that point were damaged when a delivery truck reversed and they were rebuilt by the Deceased and that the Deceased hung a gate and that he had a key to the gate. The defendant's evidence was that this happened about twenty years ago. Mr. Cafferty recollected seeing the Deceased repairing the piers of the gate years after the incident in April, 1975. He also recollected that there was a gate at that point and that there was a chain on the gate. However, the chain was taken off later and then eventually the gate came off. While, as I have already stated, I believe Mr. Cafferty is mistaken in his recollection that Mr. Cumiskey's mobile home was only on the disputed plot for three or four weeks, overall, I find his evidence to be reliable. Like the other residents of Wavecrest Drive he had a continuing interest in what was happening on the disputed plot. Indeed, in the context of describing the Deceased's dumping activities, he observed that he did not know which was the greater evil, which I understand to refer to the presence of a mobile home or the dumping activity.

25. Mr. John Woods, who is a partner in the firm of Woods Ahern Mullen, who are acting for the defendant in these proceedings, testified that he visited the disputed plot with the Deceased eight, nine or ten years ago. Mr. Woods' recollection was that there was a gate accessing the disputed plot but they did not go in through the gateway between the piers because the area was all overgrown. They crossed over the broken down wire on the southern boundary. The context of that visit was discussions between the owner of adjoining property and the Deceased in relation to the acquisition by the adjoining owner of the disputed plot from the Deceased. However, discussions came to nought.

The plaintiff's involvement

26. The plaintiff's involvement commenced around 1999. At the time he was living in Crossmaglen, County Armagh, where he still lives. He was 75 years of age. He had retired from the building trade, in which he had worked for other people. He had been in receipt of the old age pension since he was 65 years of age, as had his wife. He had no bank account.

27. Mr. Cumiskey's evidence was that the plaintiff approached him and asked him to sell his site at Blackrock and he sold it to him for

IR£500, representing what he had paid in 1975 and his expenditure on the site. Mr. Cumiskey's lack of curiosity was quite extraordinary: he neither asked the plaintiff what he proposed to do with the site, nor did he ask the plaintiff how he found out about Mr. Cumiskey's ownership of it. He did not speak to Mr. McEneaney about the transaction with the plaintiff and he was quite philosophical about the fact that Mr. McEneaney made a better bargain with the plaintiff.

28. According to Mr. McEneaney, he was approached by the plaintiff who told him he had bought Mr. Cumiskey's site, that he understood that Mr. McEneaney had the other half and asked would he sell. Mr. McEneaney said he would. They haggled over the price and eventually agreed on IR£1,200.

29. The plaintiff's evidence was that his wife is originally from Blackrock and she wanted a chalet there. When he approached Mr. Cumiskey he knew that he had a site but he did not know where it was. He paid Mr. Cumiskey and Mr. McEneaney in Irish pounds – £1,700 between them – with cash he kept in the house. He was not surprised that the disputed plot was going for so little. He did not know anything about the title difficulties.

30. However, the plaintiff set about getting the disputed plot put into his own name. He instructed Peter McGuinness of the firm of Esther McGahon McGuinness & Company, who are acting for him in these proceedings, in 1999. The plaintiff told Mr. McGuinness that he had paid Mr. Cumiskey and Mr. McEneaney for the disputed plot, neither had a solicitor acting and they had no title. Mr. McGuinness drew up acknowledgements to be signed by both. Mr. McEneaney attended at the office of Mr. McGuinness on 9th September, 1999 and, in the presence of Mr. McGuinness, who witnessed his signature, he signed an acknowledgement to the effect that he had purchased a site from the Deceased, that he had paid the Deceased, but no formal assurance was completed. He also confirmed that he had disposed of his interest to the plaintiff for the sum of IR£1,200, and acknowledged receipt of that money. He confirmed that he would execute a deed of assurance to vest the lands in Mr. Moley. A similar acknowledgement was signed by Mr. Cumiskey but he did not attend Mr. McGuinness's office. He signed it in the presence of Michael Rice, who is a son-in-law of the plaintiff and resides in Dundalk.

31. Subsequently, after these proceedings were instituted, the transfer dated 27th February, 2003, to which I have already referred, was executed by Mr. McEneaney and Mr. Cumiskey.

32. I found the plaintiff's evidence as to how he came to acquire the interests of Mr. McEneaney and Mr. Cumiskey highly implausible. I think it reasonable to infer that he was fronting for somebody and that the probability is that that person was Michael Rice. Having said that, the plaintiff has acquired such, if any, interest as Mr. McEneaney and Mr. Cumiskey had in the disputed plot.

Implications of the Deceased's death

33. What precipitated these proceedings, as pleaded in the statement of claim, was that the Deceased alleged that the plaintiff was trespassing on the disputed plot and threatened proceedings. Some of the correspondence which passed between the plaintiff's solicitors and the defendant's solicitors has been put in evidence, but not all of it. The only item of correspondence which I consider it necessary to comment on was a letter of 31st March, 2000 from the defendant's solicitors to the plaintiff's solicitors in response to a letter from the plaintiff's solicitors dated 23rd March, 2000, which was not put in evidence. In the letter it was stated that the defendant's solicitors had been instructed that the Deceased had furnished a map to Mr. McEneaney and Mr. Cumiskey "showing the lands agreed to be sold" and asking for a copy of the map. The letter stated that the Deceased's instructions were that he was "only prepared to deal with" Mr. McEneaney and Mr. Cumiskey "on the basis of the map furnished". If it is this letter which is referred to as the "open correspondence" in the plaintiff's reply, in my view it is of no probative value as to what happened in 1975 and it certainly does not constitute a sufficient note or memorandum for the purpose of the Statute of Frauds.

34. Because of the death of the Deceased in January, 2005 the court has only heard one side of what transpired between Mr. McEneaney and Mr. Cumiskey, on the one hand, and the Deceased, on the other hand, in 1975. A statement by the Deceased taken by his solicitor in July, 2001 in connection with these proceedings, which was not signed by the Deceased, has been put in evidence. According to the statement, the Deceased had agreed to sell to Mr. McEneaney and Mr. Cumiskey in 1975, IR£600 was paid to the Deceased's solicitor, Donal McArdle, but nothing was signed. The incident in which access for Mr. Cumiskey's mobile home was blocked is referred to and the statement goes on to say that the mobile home never went on the disputed plot, that Mr. Cumiskey was going to apply for planning permission and that that was the last he (the Deceased) had heard of the matter. He never signed anything nor did he ever get any money. That statement is so incorrect on aspects of the matter which are verifiable that, even if admissible, it would be of no probative value. Mr. Cumiskey's mobile home was on the land and the transaction between the Deceased and Mr. McEneaney and Mr. Cumiskey was generating correspondence between the solicitors as late as 1981. The evidence of Mr. John Woods, who took the statement from the Deceased, was that it was difficult to take instructions from the Deceased because he was deaf. However, his complaint was that he never got the money. Mr. Woods' assumption, for what it is worth, was that the sum of IR£600 which the Deceased told him was given to Mr. McArdle went back when the deal did not go through.

35. The Deceased made his last will and testament on 25th May, 1998. He made two specific devises of property, one of his house to one daughter and another of an interest he had in a licensed premises in the town of Dundalk to another daughter. He also specifically bequeathed his car and caravan to a third daughter. He devised and bequeathed the residue of his estate amongst his five children equally. Counsel for the plaintiff tried to make something of the fact that the Deceased did not deal specifically with the disputed plot in his will. In my view, nothing of significance can be deduced from that fact alone.

36. The disputed plot was returned on the Inland Revenue Affidavit sworn by the defendant for the purposes of Capital Acquisitions Tax on 6th December, 2005 on the basis that it was owned by the Deceased at the date of his death. The value ascribed to the disputed plot, which was described as comprising 1.518 hectares and as being registered on Folio 12029, was €300,000. Mr. Michael Lavelle, an auctioneer carrying on business in Dundalk and Drogheda gave evidence that he gave the valuation for the purposes of the Inland Revenue affidavit. His evidence was that the disputed plot was worth IR£500 in 1975, in 1999 it was worth €200,000, and in 2003 it was worth €275,000. In November, 2005 he valued it at €300,000 for probate purposes and that was a conservative valuation. I found that evidence utterly unconvincing, particularly as I note that the Deceased's house on a site of .1 hectare was returned on the Inland Revenue Affidavit at €475,000. Mr. Lavelle acknowledged that he did not know how the disputed plot was zoned for planning purposes when he valued it but he valued it on the assumption that it would be possible to get planning permission for a residence on it. Having regard to the evidence, in my view, he was not entitled to make that assumption. On the basis of the evidence, the likelihood of obtaining planning permission to build anything on the disputed plot seems remote.

Submissions on the law

37. The case made on behalf of the plaintiff at the hearing was premised on Mr. McEneaney and Mr. Cumiskey having agreed to purchase and the Deceased having agreed to sell the disputed plot for IR£600 and the consideration due under that agreement having been fully discharged. On that basis, it was submitted that Mr. McEneaney and Mr. Cumiskey became the beneficial owners of the entire interest, and the Deceased merely retained the legal estate. In other words he was a trustee for the beneficial owners, so that

the defendant now stands in his shoes as trustee. The alternative proposition advanced on behalf of the plaintiff was that Mr. McEneaney and Mr. Cumiskey, having been given possession by the Deceased in 1975, have retained possession and have carried out acts consistent with their ownership. They have had the necessary *animus possidendi* to bar the title of the Deceased, it was submitted, and such title was extinguished by 1987. Counsel for the plaintiff advanced an argument in reply which is not quite consistent with that argument, namely, that even if Mr. McEneaney and Mr. Cumiskey had made no use of the disputed plot after the refusal of planning permission in 1977, that does not alter their status as beneficial owners. No steps were taken to dispossess them. He submitted that, as a trustee, the Deceased was not a person in whose favour time ran under the Statute of Limitations, 1957, because of the definition of "trustee" in s. 2(2)(a).

38. On behalf of the defendant, it was submitted that, if there was an agreement which is specifically enforceable, the persons to enforce it were Mr. McEneaney and Mr. Cumiskey, not the plaintiff. It was submitted that, insofar as the plaintiff was suing in reliance on the transfer of 27th February, 2003, that transfer was at a gross undervalue, was not adequately stamped and thus was tainted with illegality and the court should not recognise or give cognisance to it. It was further submitted that insofar as the plaintiff's case for enforceability was based on the plaintiff having partly performed the agreement, the acts of Mr. McEneaney and Mr. Cumiskey in 1975 did not constitute acts of part performance so as to take the case out of the Statute of Frauds. In support of that proposition counsel for the defendant referred to a judgment of this Court (McWilliam J.) delivered on 5th May, 1978 in *Philip M. Howlin v. Thomas F. Power (Dublin) Limited* (Unreported), in which it was stated that the principle established by the authorities appears to be that, where the party seeking relief in proceedings has taken some step in pursuance of the contract which has left him in such a position that it would amount to a fraud or be inequitable on the part of the other party to rely on the fact that there was no sufficient memorandum of the contract, the case is taken out of the statute and the court will enforce the contract. It was submitted that Mr. Cumiskey did not suffer any prejudice by placing the caravan on the disputed plot, because he removed it subsequently. It was further submitted that the payment of money was not an act of part performance. It is not necessary to comment on the defendant's submissions on part performance because the position adopted by counsel for the plaintiff in reply was that this is not a case of suing on a contract and seeking specific performance. The plaintiff's position is that, as successor in title of Mr. Cumiskey and Mr. McEneaney, he is the full beneficial owner of the disputed plot. It was also submitted on behalf of the defendant that the plaintiff should not be afforded equitable relief because he has not come with clean hands, this, in essence, being the illegality argument, and that, as there had been a delay of 25 years in bringing the proceedings, relief should be refused on the ground of laches.

Conclusions

39. Counsel for the plaintiff objected that the defendant had not pleaded that the transaction under which the plaintiff claims to have derived beneficial title was tainted with illegality. The reason, presumably, was because the transfer of 27th February, 2005 post-dated the defendant's defence and counterclaim. The defendant could have sought to amend the defence after receiving the transfer on discovery. Clearly an allegation that a contract is tainted with illegality should be specifically pleaded.

40. Apart from that, I am not satisfied that the case of illegality has been made out. The transfer was stamped *ad valorem* on the consideration which passed from the plaintiff to Mr. McEneaney and Mr. Cumiskey. As I understand the defendant's argument, it is that, on the basis of the defendant's contention that the consideration of IR£1,700 was a gross undervalue, the transfer should have been stamped *ad valorem* on the value of the property and adjudged duly stamped. I have already indicated that I do not accept Mr. Lavelle's evidence of valuation. That being the case, and there being no other evidence of valuation, I am not prepared to hold that the transfer was not properly stamped and that the transaction between the plaintiff and Mr. McEneaney and Mr. Cumiskey is tainted with illegality.

41. Dealing with the case which the plaintiff has made, that it is the beneficial owner of the disputed plot in succession to Mr. McEneaney and Mr. Cumiskey who were the beneficial owners by reason of paying the full purchase money on foot of their agreement with the Deceased, the relevant legal principle is quite clear even if its application to the facts here is anything but clear. The principle was re-stated by the Supreme Court in *Coffey v. Brunel Construction* [1983] I.R. 36, in which Griffin J. stated (at p. 43):

"... the principles which apply in a case such as this are quite clear and have been followed for more than one hundred years. Where a binding contract for the sale and purchase of land has been made, and the entire purchase money has been paid, the purchaser becomes entitled to the entire beneficial interest in the lands and the vendor becomes a bare trustee for the purchaser. In *Rose v. Watson* Lord Cranworth said at p. 683 of the report:-

'There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate.'

The principles laid down in that case have been universally acted upon since and are now settled law ..."

42. If that principle applied here, so that from, say, April or May, 1975 the Deceased was a bare trustee and Mr. McEneaney and Mr. Cumiskey were the beneficial owners, in my view, if the Deceased had continued in possession adverse to the title of Mr. McEneaney and Mr. Cumiskey, the Statute of Limitations, contrary to the plaintiff's submission, could have run in his favour. Section 2(2)(a) of the Statute of Limitations, 1957 provides that "trustee" therein does not include "a person whose fiduciary relationship arises merely by construction or implication of law and whose fiduciary relationship is not deemed by any rule of law to be that of an express trustee". A vendor who is deemed by law to be a bare trustee by reason of receipt of the full purchase money under a binding agreement is a constructive trustee. In Ireland, a constructive trustee can acquire a possessory title against the beneficiary. In consequence, even if the purchase money was paid to and received by the Deceased, if the Deceased was in possession from 1977 onwards to the exclusion of Mr. McEneaney and Mr. Cumiskey he could have barred their beneficial ownership. On the other hand, if Mr. McEneaney and Mr. Cumiskey, having paid the purchase money to the Deceased, were in possession of the disputed plot to the exclusion of the Deceased from 1975 to 1987, the outstanding legal estate in the Deceased would have been barred.

43. The real difficulty in this case is in determining what the true factual situation was. I have no doubt but that the Deceased verbally agreed to sell the disputed plot to Mr. McEneaney and Mr. Cumiskey on the terms alleged. Moreover, I have no doubt that the Deceased assisted Mr. Cumiskey in getting the mobile home on the disputed land. It would appear that the intention was that there would be a formal agreement executed. Whether that meant that the coming into existence of a binding agreement was postponed until the formal agreement was executed is not clear. What is clear is that, despite the involvement of solicitors on both sides for six years, the transaction was never completed. As to the payment of the purchase money, I accept that both Mr. McEneaney and Mr. Cumiskey parted with the agreed sum. It would appear that, for whatever reason, neither sought nor got a refund. However, I am not satisfied that the Deceased received the purchase money or any part of it. Neither Mr. McArdle, as the solicitor for the vendor, if he received a cheque from Mr. McEneaney (and no evidence was adduced that the cheque was negotiated), nor Mr. MacGinley, as the solicitor for the purchaser, who received cash from Mr. Cumiskey, was likely to part with the money until the transaction was completed. The transaction was never completed. It is not good enough for the plaintiff to assert

that the question of the money was a matter between the Deceased and the solicitors. The rationale of the principle on which the plaintiff relies is that the agreed purchase money is substituted for the land in the vendor's hands. The onus of proving that the Deceased got the purchase money was on the plaintiff and the plaintiff has failed to discharge that onus.

44. As to who was in possession of the disputed plot from 1977 onwards, it is absolutely clear on the evidence that neither Mr. Cumiskey nor Mr. McEneaney occupied or exercised acts of ownership over the disputed plot of the type that would constitute possession for the purposes of the Statute of Limitations. Apart from that, in my view, neither of them had the necessary *animus possidendi*. Counsel for the plaintiff referred to the decision of this Court (Barron J.) in *Seamus Durack Manufacturing Limited v. Considine* [1987] I.R. 677. It is worth quoting the passage from the judgment of Barron J. in which he deals with the necessity for *animus possidendi*. He said (at p. 683):

"Adverse possession depends upon the existence of *animus possidendi* and it is the presence or absence of this state of mind which must be determined. Where no use is being made of the land and the claimant knows that the owner intends to use it for a specific purpose in the future, this is a factor to be taken into account. The principle has relevance only insofar as that, when this factor is present it is easier to hold an absence of *animus possidendi*."

45. Of course no question arises here of either Mr. McEneaney and Mr. Cumiskey, on the one hand, or the Deceased, on the other hand, having some specific purpose for the disputed plot in the future. The importance of the passage is that it points to the fact that the claimant to a possessory title requires a particular state of mind, the intention to possess.

46. This case is very unusual in that both Mr. McEneaney and Mr. Cumiskey testified that they had lost interest in the disputed plot after 1977. In contrast, the evidence shows that the Deceased did exercise acts of ownership over the disputed plot after 1977. Moreover, the fact that he brought Mr. Woods to see the disputed plot some time in the late 1990s in the context of discussions for a sale to a third party, suggests that he considered himself the owner of the disputed plot and in possession thereof at all times. In my view, he remained the owner thereof until his death.

47. The only inference which can be drawn from the facts is that both sides considered that the transaction was not worth pursuing when planning permission was refused in 1977 and that it was impliedly terminated, if not expressly. I find it difficult to understand why Mr. McEneaney and Mr. Cumiskey did not seek a return of the monies they gave to the solicitors involved. However, they have recouped that loss from whomever the plaintiff fronts for. That person acquired no title from Mr. Cumiskey or Mr. McEneaney. As he walked into this situation with his eyes wide open he is deserving of no sympathy.

Order

48. There will be an order dismissing the plaintiff's claim and vacating the *lis pendens*.

49. As I consider that neither injunctive relief nor a declaration is necessary on the defendant's counterclaim, and as there has been no evidence of any damage suffered by the Deceased or his estate due to the actions of the plaintiff, I propose making no order on the defendant's counterclaim.

Costs

50. I do not propose dealing with the costs issue until it is established to the satisfaction of the court whether the disputed plot has a rateable valuation and, if so, what it is.