

THE HIGH COURT

2006 3411 P

IN THE MATTER OF THE ESTATE OF PATRICK DEMPSEY, LATE OF BALLINAMONA, CLARA IN THE COUNTY OF KILKENNY

BETWEEN

MICHAEL PRENDERGAST

PLAINTIFF

AND

NEIL MCLAUGHLIN

DEFENDANT

JUDGMENT of Mr. Justice O’Keeffe delivered on the 20th day of May, 2009

1. In these proceedings, the Plaintiff claims a declaration that he is entitled on the death of the late Patrick Dempsey, Deceased, formerly of Ballinamona, Clifden in the County of Kilkenny, to the entire beneficial interest of the lands comprised in the estate of the said Deceased at Ballinamona, Clara in the County of Kilkenny, pursuant to promise made to, and reliance by the Plaintiff thereon during the lifetime of the said Deceased that the interests in these lands would devolve to the Plaintiff after his death and further pursuant to consideration given by the Plaintiff.

2. On 21st day of April, 2008, the High Court made an order pursuant to O. 25 of the Rules of the Superior Courts directing that the following point of law be determined as a preliminary issue prior to the substantive hearing of this action.

Whether the Plaintiff’s claim is statute barred pursuant to the provisions contained in Part II and in particular Section 9 of the Civil Liability Act 1961, as amended, and pursuant to the provisions contained in the Statute of Limitations Act 1957, as amended, by the Statute of Limitations (Amendment) Act 1991.

3. The following facts are agreed by the Defendant and the Plaintiff for the purpose of determining the preliminary issue between the parties and strictly without prejudice to the Defence delivered herein. For the purpose of the substantive hearing, no admissions are being made on behalf of the Defendant herein.

(i) The Defendant is the personal representative of the late Patrick Dempsey, Deceased, formally of Ballinamona, Clara in the County of Kilkenny, who died on 28th August, 2003 (hereinafter “the Deceased”). The Deceased died intestate and a Grant of Letters of Administration Intestate were taken within the name of the Defendant as a lawful nephew of the Deceased on 27th February, 2006.

(ii) The Plaintiff is a farmer and resides at Clarabricken, Clifden, County Kilkenny.

(iii) John Dempsey was the late brother of the Deceased, and died on 11th July, 2000 and made his last Will and Testament on 7th April, 1997. The said, John Dempsey, bequeathed the farmlands hereinafter mentioned to the Deceased together with a small legacy of the Plaintiff in the sum of £2,000 (€2,539.48). A grant of probate was extracted by the Deceased in the estate of his brother, John Dempsey on 18th December, 2000.

(iv) The Deceased and late John Dempsey were bachelors who lived together in the farmhouse and land situate at Ballinamona, Clara, County Kilkenny and contained in Folio 2516, Register of Freeholders, County Kilkenny.

(v) The farmlands situate at Ballinamona consisted of approximately 85 to 90 acres and were in the sole ownership of the late John Dempsey. The Deceased was the owner of a separate farm at Rathbourne, County Kilkenny and consisting of approximately 156 acres and contained in Folio 859, Register of Freeholders, County Kilkenny.

(vi) The Plaintiff was a neighbour of the Deceased.

(vii) The Plaintiff alleges and for the purpose of trying the preliminary issue, it is agreed that he assisted both the Deceased and the late John Dempsey in working and maintaining the farmlands at Ballinamona for a period in excess of 25 years prior to the date of the death of the Deceased and the late John Dempsey in working and maintaining the farmlands at Ballinamona for a period in excess of 25 years prior to the date of the death of the Deceased.

(viii) The Plaintiff alleges and it is agreed for the purpose of the preliminary issue, that the Plaintiff was repeatedly told by the late John Dempsey and the Deceased that the farmlands at Ballinamona would be left to him after both had died. The Plaintiff relied upon these repeated promises and assurances by both the late John Dempsey and the Deceased continued to provide assistance in the management and running of the farm at Ballinamona and thereby acted to his prejudice.

(ix) It is alleged and agreed for the purpose of the preliminary issue, that in or about the month of July 1998, that a meeting took place between the late Patrick Dempsey, the Deceased William Dempsey, also Deceased (being a brother of the said Patrick and John Dempsey and the Plaintiff. At the said meeting, John Dempsey stated he was leaving the lands in Ballinamona to the Plaintiff. It is alleged and agreed for the purpose of trying the preliminary issue that John Dempsey, Patrick Dempsey and William Dempsey agree to this arrangement and with this assurance the Plaintiff continued to provide assistance in the working of the farm at Ballinamona.

(x) It is agreed that the late John Dempsey died on 11th July, 2000 and by his last Will and Testament dated 7th April, 1997, demised and bequeathed the farmlands at Ballinamona to the late Patrick Dempsey together with a small legacy to the Plaintiff in the sum of €2,539.48 (IR£ 2,000) after the death of the late John Dempsey, the Plaintiff continued to provide assistance on the farmlands at Ballinmona.

(xi) It is alleged and agreed for the purpose of trying the preliminary issue, that some 6 or 7 weeks before the death of the said Patrick Dempsey, Deceased, on 28th August, 2003, the Deceased asked the Plaintiff to visit him. The Deceased informed the Plaintiff at the said meeting that he had given instructions to a solicitor, Mr. Martin Crotty, Solicitor of 45 Parliament Street, Kilkenny, to make a Will and that in the Will he was leaving the farm at Ballinamona to the Plaintiff. Thereafter, the Plaintiff continued to assist the Deceased with the management and maintenance of the farmlands at Ballinamona until his unexpected death on 28th August, 2003.

(xii) It is agreed solely for the purpose of trying the preliminary issue that on or about July 2003, the Plaintiff instructed his solicitor, Martin Crotty, to make a draft Will, which said Will was never executed.

4. In Part II of the Civil Liability Act 1961 (hereinafter "the 1961 Act"), section 9 provides as follows:-

"(1) In this section 'the relevant period' means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.

(2) No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of the deceased person unless either –

(a) proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or

(b) proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires."

Section 8 of the 1961 Act provides as follows:-

"(1) On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate.

(2) Where damage has been suffered by reason of any act in respect of which a cause of action would have subsisted against any person if he had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of subsection (1) of this section, to have been subsisting against him before his death such cause of action in respect of that act as would have subsisted if he had died after the damage was suffered."

5. Section 6 of the 1961 Act defines an excepted cause of action as meaning:-

"(a) a cause of action for breach of promise to marry or for defamation or for seduction or for inducing one spouse to leave or remain apart from the other or for criminal conversation, or

(b) any claim for compensation under the Workmen's Compensation Act, 1934."

The Submissions of the Defendant

6. Mr. Robert Haughton, S.C. on behalf of the Defendant submitted that the Plaintiff's cause of action is "a subsisting cause of action" within the meaning of section 8 of the 1961 Act. As such, it survives against the estate of the Deceased as the claim is based on the sole ground that the Deceased failed to fulfil the alleged promise that he had made in his lifetime to bequeath certain lands to the Plaintiff in consideration of the Plaintiff continuing to assist him (and his predeceased brother) in their farming work. It was, therefore, a claim based on an alleged breach of contract and had been so pleaded.

7. The Deceased died on 23rd August, 2003 and as there was no proceedings in being at the time of his death therefore in order to come within the relevant limitation period provided by section 9 of the 1961 Act, these proceedings ought to have been commenced within two years of that event, that is on or before 22nd August, 2005. Proceedings were not commenced until the plenary summons issued on 25th July, 2006. Hence, it was submitted the Plaintiff's claim was statute barred under the provisions of section 9(2)(b) of the 1961 Act. Section 9 of the Act provides that no proceeding shall be maintained in respect of "any cause of action whatsoever which has survived against the estate of a Deceased person" unless those proceedings come within paragraphs (a) or (b). Reference was made to the words in section 9(2) "any cause of action whatsoever". It was submitted that the meaning of this phrase is clear and unambiguous, that the words should be given their natural and ordinary meaning in accordance with the norms of the statutory interpretation. Reference was made to *D.B. v. Minister for Health and Children* [2003] 3 I.R. 12, where the Supreme Court reiterated with approval the dicta of the Supreme Court in *Howard v. Commissioners of Public Work* [1994] 1 I.R. 101 including the following passage from Denham J.:-

"Statutes should be construed according to the intention expressed in the legislation. The words used in the statute best declare the intent of the Act. Where the language of the statute is clear we must give effect to it, applying the basic meaning of the words."

8. It was submitted that there was no necessity to look beyond the literal interpretation of the words themselves as they are clear, unambiguous and do not suggest or imply any degree of the consistency or absurdity. The phrase "any cause of action whatsoever" must include all actions that can be maintained by one person against another or howsoever arising including proceedings including equitable relief. The use of the words "whatsoever" brings all actions into account.

9. It was submitted that even if one is to take the purposive approach to the interpretation of the sub-section, the

inclusion of "*all causes of action*" must be considered in the light of the goals sought to be achieved by s. 9 in limiting the liability of an estate to claims brought within a defined period and to thereby allow the estate to be duly administered without delay and, hence, at latest, after the expiry of the relevant time period. In support of this, reference was made to the Supreme Court decision in *Moynihan v. Greensmyth* [1977] 1 I.R. 55.

10. It was submitted that the legislature intended to introduce an absolute time period outside of which the estate of the deceased person could not be troubled by any litigation, notwithstanding the possible harshness that might occur.

11. Section 9 was not introduced by the legislature, it was contended, as an amendment to any of the provisions of the Statute of Limitations 1957. The section is not expressed in those terms, as it would be, if it were a simple amendment to s. 11 of the Statute of Limitations 1957. The section is expressed in absolute terms and was introduced as an all-encompassing provision, providing an omnibus limitation period in all causes of action surviving the death of the person. No exceptions are permitted, in direct contrast to s. 11 (9)(a) of the Statute of Limitations 1957, and to s. 45 of the Statute (as inserted by s. 126 of the Succession Act 1965). In the latter case, the limitation period is inserted in the original Statute, thus providing a new limitation period for claims to a share in the estate of a deceased person. No qualifications were expressed to s. 9 of the 1961 Act, and if the legislature had intended that there should be exceptions of special cases, it would have amended the Statute of 1957, or provided that the specific s. 9 be subject to those provisions of the Statute.

12. It was submitted that the plaintiff's cause of action in these proceedings, whether in contract, quasi-contract or equity, fell within the statutory definition of "*any cause of action whatsoever*".

13. It was submitted that whilst the common law rule that death ended all actions in personal torts has now been usurped by s. 8 of the 1961 Act, s. 9 applies to "*any cause of action on which is survived against the estate of a deceased*". The cause of action which the Plaintiff sues upon is founded on breach of an alleged promise. At para. (1) of the reliefs sought, this plaintiff seeks a declaration of beneficial interest of the lands "*pursuant to promise made to and reliance by the plaintiff thereon . . . and further pursuant to consideration given by the plaintiff.*" Similarly, the second relief sought by the plaintiff is an order for the "*performance of the said promise*".

14. The plaintiff's cause of action, it was submitted, is founded in contract or quasi-contract. The plaintiff was suing the defendant in his capacity as personal representative of the Deceased, Patrick Dempsey, for breach of the Deceased's promise to bequeath the lands to the plaintiff. That breach could only have occurred during the lifetime of the Deceased and the cause of action therefore accrued before the death of the Deceased.

15. The Deceased cannot breach a promise *post mortem*. It was submitted that the same principle applies in the case of quasi-contract. However, to the extent that the Plaintiff may base his claim on promissory estoppel, it would be a claim not arising after the death of the Deceased, but a claim subsisting, because that claim can only be founded on some unconscionable conduct of the deceased during his lifetime. The plaintiff's cause of action arises on the failure of the deceased to execute a Will bequeathing the lands to him during his lifetime, even though evidence relating to such cause of action may emerge after death but the plaintiff's cause of action, if there is such, subsisted during the lifetime of the deceased.

16. The defendant relied on the decision of Fennelly J. in the Circuit Court appeal case of *Corrigan v. Martin* (Unreported, 13th March, 2006) where the court held that a cause of action on foot of a promise to leave lands to a plaintiff, was a cause of action subsisting at the date of death and consequently the provisions of s. 9(2) applied. In that case, the plaintiff being a nephew of the deceased had injured himself on the defendant's farm. The deceased was uninsured and agreed that he would transfer or devise the lands to the deceased in consideration for the plaintiff's forbearance in suing the deceased. In addition, the plaintiff also pleaded that he worked on the farm. Fennelly J. at p. 6 of his judgment categorised the plaintiff's cause of action as one falling within s. 8(1) as follows:-

"Firstly, I am satisfied that the correct interpretation of the plaintiff's cause of action's in the light of the section [8] is that the obligation of the deceased was to perform the contract during his lifetime and not at the moment of his death. Hence, the cause of action was complete immediately before his death. It is unnecessary to decide how long before the death. The cause of action, therefore, subsisted at the moment of death and survived against his estate by virtue of section 8(1). Secondly, I am satisfied that the Oireachtas intended by the strong and clear language of section 9(2) to apply a maximum two year limitation period to all claims against the estates of deceased persons. Section 8(1) applies to 'all cause of action (other than excepted causes of action) subsisting against him' (none of the excepted cases is relevant). The Oireachtas intended that provision to apply to all causes of action coming into existence right up to the point of death itself. It is unreal and almost metaphysical to distinguish between causes of action existing immediately prior to the death and those which matured on the death itself. I do not believe that the Oireachtas can have intended to make such fine distinction. It would serve no useful purpose which has been identified in this case."

17. Fennelly J. also approved the *dicta* of O'Higgins C.J. in the Supreme Court in *Moynihan v. Greensmyth* at 372, where the stated:

"One relevant consideration is that those charged as executors or administrators of estates of deceased persons are entitled and, indeed, bound to carry out their tasks with reasonable expedition and that creditors of the estate and, ultimately, the beneficiaries are entitled to have the estate administered within a reasonable time. I believe the Oireachtas deliberately chose to impose a short but fair time limit on claims so that these desirable objectives would be achieved."

18. Fennelly J. dismissed the plaintiff's submission that as the Statute of Limitations Act 1957, did not impose a statutory limitation period for claims seeking specific performance, that s. 9(2) does not apply to such claims as there is no "*relevant period*" within the meaning of s. 9(1). The court held that s. 9(2) was clear in that no action was maintainable unless it was instituted within the earlier of the time period set out in s. 9(2)(a) or (b) and stated at p. 8:-

"The important and governing words are the introductory ones. The action cannot be maintained unless the plaintiff can bring himself within one of the two subparagraphs, in this case subparagraph (b). This is not affected

by the fact that there is "no relevant period" for the purposes of the Statute of Limitations. The applicable period is the one which "first expires". That may or may not be the two year period. If the "relevant period" expired within two years of death, the claim is barred. If there is no such period, it is barred after two years. I believe this interpretation is in accordance with common sense and the clear intention of the legislature."

19. Accordingly, it was submitted the plaintiff's cause of action, if not based on common law but on equitable grounds, only comes within s. 9(2) and is not maintainable against the estate of the Deceased since it falls outside of the relevant periods allowed under either paras. (a) or (b). The Act of 1961 permitted of no exceptions based on equity.

20. As an alternative argument, the defendant submitted that "damage" complained of by the plaintiff is the loss of property and that the "act" which the plaintiff complains of is the failure by the deceased to devise or bequeath the lands prior to his death. He referred to the plaintiff's claim that the "damage" may have been discovered after death and that no cause of action accrued before death. If that is the case (which was not accepted by the defendant) the provisions of s. 8(2) apply and the cause of action is one deemed to have been subsisting if the deceased died after he had suffered the damage. This is because under the section the damage is deemed to have been suffered before the deceased died and therefore the cause of action was one which was subsisting before his death.

21. He submitted that if there was doubt as to interpretation of s. 8(2), the court must adopt a purposeful purposive approach and that the statutory purpose behind s. 8(2) is to provide a finite time period within which a third party, other than a beneficiary under a Will, may make a claim against a deceased and to allow the estate of the deceased to be administered in a timely fashion.

Submissions of the Plaintiff

22. Mr. David Hardiman, S.C., on behalf of the plaintiff, submitted that the plaintiff's claim was to enforce the fulfilment of a promise upon which, for many years, he placed reliance by acting to his material detriment. The claim lies in equity and is long established as equitable/proprietary/promissory estoppel by giving rise to a constructive trust. The circumstances from which such a claim can arise is a promise of inheritance as was evidenced in *Basham v. Basham*, [1987] 1 A.E.R. 405 and *McCarron v. McCarron*, (Supreme Court, 13th February, 1997). Alternatively, it was submitted that a promise can be made which does not give rise to a dispute until a testamentary context arises.

23. He referred to two decisions of Barron J., the first in *Reidy v. McGreevy and Others*, (High Court, 19th March, 1993) and *Governor and Company of Bank of Ireland v. Kathleen O'Keeffe*, (High Court, 3rd December, 1986). In the *Reidy* case, the son of the deceased claimed to be remunerated for staying at home and working his father's land over two periods prior to the father's death. He claimed that on both occasions he did so as the result of promises by his father that if he did so he would exercise a special power of appointment vested in him (the father) in favour of the plaintiff. The claim was based upon the existence of a constructive trust and in relation to an issue concerning the statute of limitations, Barron J. stated at p. 5:-

"The claim based upon the existence of the constructive trust is covered by the decision of Costello J., in J.R., a Ward of Court, delivered on 2nd October, 1992. Where it would be unconscionable to disregard a promise such as that alleged here, the Court will declare the existence of a constructive trust. The question which arises here is whether such a claim is one available against the promisor and so capable of being barred after the lapse of two years from the date of his death."

The nature and extent of the claim is dependent upon the facts. What may be unconscionable upon one set of facts, may not be upon another set. So, depending upon the facts, the plaintiff may be entitled to an estate in property; to a charge over it; or to nothing. But whatever the facts, the claim could not be maintained until the death of the testator because it could not have been ascertained until then, that he had failed to honour his promise. Of course if he had repudiated his promise in his life time, this would have given rise to a cause of action at that stage."

24. In *Bank of Ireland v. O'Keeffe*, the bank issued proceedings against the defendant as legal personal representative of her late husband Michael O'Keeffe who died on 11th February, 1982. The proceedings were in respect of monies due on a continuing guarantee. A demand for payment on foot of the guarantee was made against the deceased's estate on 6th May, 1982 and the proceedings were issued on the 19th February, 1985, Barron J. at p. 50 stated:-

"The claim which is brought is one which was not maintainable until after demand made and no cause of action could have arisen until such demand was made – see In re: J. Brown's estate, Brown v. Brown, [1893] 2 Ch 300. In that case there was a joint and several covenant in a mortgage by the deceased and his son to pay the principal on demand and in the meantime to pay interest. The deceased joined in the mortgage as a surety only. Seven years after his death a demand had been made against his estate on foot of the covenant. It was held that no cause of action had accrued against his estate until such demand. It seems to me that similarly in the present case no cause of action existed whereby the plaintiff could sue either the deceased or his estate until demand had been made. Since demand was not made until after the death of deceased, it follows there was no cause of action subsisting against him at the date of death."

25. The plaintiff submitted that a will speaks from death and that the failure of will to satisfy a promise cannot speak any earlier. Any concept about wrong in law or equity involves both obligation and breach. It was submitted that the defendant's concept of limitation in this case confuses the two elements. Until the contingency in a promise is breached, no wrong is done. However, it is submitted that the operation of s. 9 of the 1961 Act is based on the survival of a subsisting cause of action against a deceased. Until the deceased in this case died or the execution of his Will (or perhaps until the defendant refused to honour the deceased's promise), no cause of action arose. It was submitted that this was the fundamental logic which underlined the judgment of Barron J. in *Reidy's* case. It was submitted that no special principle of interpretation of s. 9 was required. Its meaning was plain, where a person can be sued whilst alive, the claim must be issued within two years of his death at the latest. This is not changed merely because section 9 refers to "any cause of action whatsoever".

26. It was submitted that the promise of inheritance creates an interest equivalent to that of a beneficiary who has six

years right of action after death. There is no discordance it was submitted in the availability of this period with any policy of finality. A personal representative can be sued on his contract for the same length of time, and if he distributes without regard to liabilities, he may likewise be sued. If the defendant argues that a period of two years manifested a policy for early closure of claims the argument shows no awareness of the context of administration.

Supplemental submissions

27. The plaintiff submitted that two fundamental points of difference arose from the present case and the decision in *Corrigan v. Martin*. Firstly, it was stated in *Corrigan* the application was to "transfer and/or devise". It was stated that the court expressly found that "the correct interpretation of the plaintiff's cause of action . . . is that the obligation of the deceased was to perform the contract during his lifetime and not at the moment of his death." This was an inescapable conclusion if the plaintiff's claim pleaded a "transfer" which could only be *inter vivos*. First, it was claimed that the decision was based on such an interpretation and was of no wider effect. Secondly, it was claimed that the part played in the *Corrigan* case by the deceased's death was no more than the last point at which his obligation could be fulfilled. His death was not a point in time at which the obligation arose, but merely the point in time to which the obligation extended. It was submitted that no reference was made in *Corrigan's* case to circumstances in which an obligation arises specifically and only by Will as in the testamentary case of equitable estoppel. It was claimed that the *Corrigan* decision had no discussion of or application to testamentary estoppel claim that the only authority in this area is *Reidy v. McGreevy*.

Decision

28. Reverting to the statement of agreed facts, the relevant facts are:-

"That the plaintiff was repeatedly told by the late John Dempsey and the deceased that the farmlands at Ballinamona would be left to him after both had died. The plaintiff relied upon these repeated promises and assurances by both the late John Dempsey and the deceased, continued to provide assistance in the management and running of the farm at Ballinamona and thereby acted to his prejudice..."

29. Relevant facts state that in or about July 1998 a meeting took place between the late Patrick Dempsey, the Deceased, William Dempsey also deceased (being a brother of the said Patrick and John Dempsey) and the plaintiff. At the said meeting, John Dempsey stated that he was leaving the lands at Ballinamona to the plaintiff, the Deceased asked the late John Dempsey to leave the lands at Ballinamona to the Deceased and that the Deceased in turn bequeath them to the plaintiff. It was alleged and agreed, John Dempsey, Patrick Dempsey and William Dempsey agreed to this arrangement and with this assurance, the plaintiff continued to provide assistance in the working of the farm at Ballinamona.

30. I accept the defendant's submission that the plaintiff's cause of action is founded in contract or *quasi* contract as the plaintiff is suing the defendant in his capacity as personal representative of the deceased, Patrick Dempsey for breach of the deceased's promise to bequeath the lands to the plaintiff. The breach could only have occurred during the life time of the deceased and the cause of action therefore accrued before the death of the deceased. I also conclude, based on the agreed facts that the plaintiff's claim can alternatively be based on promissory estoppel or equity. As such it is not a claim arising after the death of the Deceased but a claim subsisting at death, namely, the failure of the Deceased to execute a Will bequeathing the lands to the plaintiff during his lifetime. I do accept that the evidence relating to such cause of action emerged after death, the plaintiff's cause of action in contract, *quasi* contract or in equity subsisted during the lifetime of the Deceased. I reject the plaintiff's submission to the contrary.

31. Furthermore, I prefer the reasoning of Fennelly J. in *Corrigan v. Martin* to that of Barron J. in *Reidy's* case. In the *Corrigan* case Fennelly J. analysed in detail the interplay between ss. 9 and 8 of the Act. There is no such analysis or examination of the two sections in the *Reidy* case. In referring to s. 8(1) which applies to "all cause of action (other than excepted causes of action) subsisting against him" Fennelly J. stated:-

"The Oireachtas intended that provision to apply to all causes of action coming into existence right up to the point of death itself. It is unreal and almost metaphysical to distinguish between causes of action existing immediately prior to the death and those which matured on the death itself. I do not believe the Oireachtas can have intended to make such a fine distinction. It would serve no useful purpose which has been identified in this case."

I would in particular adopt the foregoing passage.

32. In my opinion the facts in *Bank of Ireland v. O'Keeffe* are distinguishable to the instant case, the cause of action only arose once the letter of demand had been sent on foot of the guarantee.

33. When a cause of action has survived the estate of the deceased while two alternative periods are provided under s. 9(2)(a) and (b), subparagraph (a) does not apply as no action was pending the date of death of the deceased.

34. In *Corrigan v. Martin*, Fennelly J. had to consider an agreement whereby the Deceased would "transfer and/or devise the lands to" the Plaintiff. The factual position in that case is that it refers to a "transfer" but is also based on an obligation to "devise" the lands to the Plaintiff. In the instant case there is an obligation as set out on the agreed facts, that the Deceased in turn bequeath the lands to the Plaintiff. The words of Fennelly J. are apt in the present case in:-

"That the obligation of the deceased was to perform the contract during his lifetime and not at the moment of his death. Hence the cause of action was completed immediately before his death...the cause of action, therefore subsisted at the moment of death and survived against his estate by virtue of section 8(1)."

35. The period provided under (b) is the earlier of the relevant period, being the expiry of the limitation period under the provisions contained in 1957 Act or alternatively the period of two years from the date of death of the deceased. As the deceased died on 28th August, 2003 proceedings ought to have been issued by 27th August, 2005, the period of two years after the death of the deceased. The proceedings did not issue until the 25th July, 2006 and accordingly the plaintiff's claim whether it arises in contract, quasi contract or in equity is statute barred.

