

THE HIGH COURT

Record Number 2004 No. 2404 P

BETWEEN

MARY MARGARET ROSE ANN KEARNS, JOHN PATRICK KEARNS AND ITA FRANCES PATRICIA FALLON

PLAINTIFFS

AND

MCCANN FITZGERALD (FORMERLY CALLED MCCANN FITZGERALD ROCHE AND DUDLEY)

DEFENDANTS

Judgement of Mr Justice Michael Peart delivered on the 2nd day of April 2008

1. In these proceedings the plaintiffs sue as the three surviving beneficiaries of the last Will of Dr Daniel Kearns, their father, who died on the 12th December 1979, and as the beneficiaries of the estate of his widow, their mother, who in turn died on the 28th February 1990, and who was also a beneficiary under that Will. The plaintiffs are also the beneficiaries of their mother's estate. For the purpose of this judgment, I shall refer to the plaintiffs' late father as "the deceased".

2. The defendants are the firm of solicitors engaged by the executors of their late father's Will for the purpose of extracting a Grant of Probate, and distributing the estate in accordance with the terms thereof.

3. The plaintiffs claim that as a result of negligence on the part of the defendants they have suffered a financial loss, and they seek damages as a result.

4. The plaintiffs' claim arises from the fact that, while the defendants in the course of carrying out their instructions became aware that certain monies forming part of their late father's estate were held on deposit as Allied Irish Banks, and included this sum in the Inland Revenue Affidavit which was sworn for the purposes of extracting that grant of probate, they failed, following in the issue of that Grant of Probate, to gather in that sum and distribute same to the beneficiaries entitled to it, being these plaintiffs and their late mother.

5. The Defence delivered by the defendants on the 29th July 2004 contains the usual traverse, but in addition, contains a plea that the plaintiffs' claim is statute-barred by reason of the provisions of the Statute of Limitations in 1957 and/or the Statute of Limitations (Amendment) Act 1991.

6. At the hearing of this action before me, it was agreed by the parties that the Court should decide the issue in relation to the Statute of Limitations as a preliminary issue.

Background facts

7. The deceased, as I have stated already, died on the 12th December 1979, leaving a Will dated the 14th January 1977 in which he, in effect, left all the rest and residue of his property both the real and personal as to one half thereof to his wife, and the remaining half to his three children [the plaintiffs].

8. Within less than one month from the date of death of the deceased, the defendants set about the task of establishing the assets comprising the deceased's estate, and, in due course, ascertained that there were two sums on deposit with Allied Irish Banks at their branch at Lower O'Connell Street, Dublin, totalling at the sum of IR£3968.99. Those sums are included, along with details of some other assets, in the Inland Revenue Affidavit sworn by the plaintiffs' late mother in her capacity as one of the Executors named in the deceased's Will, the second Executor having renounced his rights as executor.

9. Grant of Probate issued on the 16th July 1980. By letter dated 3rd February 1981 the defendants wrote to the third named plaintiff informing her that the administration of the deceased's estate was almost complete, apart from the sale of some Australian company shares, and enclosed a cheque for £720.46 being the share of the estate due to her, a copy of the Executor's cash account and, finally, their own bill of costs. The letter indicated that the bill of costs could be paid from the balance of money which they were holding in their client account. This letter concluded by stating that if she had any queries in relation to the matter, she should make contact with the author of that letter.

10. It can be inferred from this letter that the third named plaintiff was the point of contact with the defendants, otherwise one would have expected that letter to be addressed to the plaintiffs' mother, who was the acting Executrix. The Court understands from what was stated in court that for some years prior to her death in 1990, the plaintiff's mother was in poor health and was living with the first and third named plaintiffs.

11. The cash account referred to set out certain items of expenditure consisting of the solicitor's costs and legacies paid out, as well as sums received. The sums of money held at Allied Irish Banks are not included among the "receipts". It is accepted by the defendants that these monies were not gathered in from Allied Irish Banks following the issue of the Grant of Probate, and therefore were not distributed at that time during the course of the administration of the estate of the deceased by the defendants.

12. These sums remained on deposit at Allied Irish Banks. However, on the 24th June 2002 Allied Irish Banks wrote to the first named plaintiff informing her that they had received her name from the defendants, after they had written to them regarding the Dormant Accounts Act 2001 which, they stated, required them to identify all accounts which had been dormant for 15 years or more, and if these accounts were still dormant as at the 31st March 2003, the balances would be transferred to the National Treasury Management Agency. They advised the first named plaintiff that they still held an account in her late father's name and requested her to contact them so that they could finalise matters. They informed her also that that they had written to her sister, the third named plaintiff, in similar terms.

13. By letter dated August 2002, Allied Irish Banks wrote to the first named plaintiff confirming that her late father's accounts had been closed and that they had disbursed the funds in accordance with her instructions.

14. It is accepted by the defendants that the letter dated 24th June 2002 from Allied Irish Banks was the first occasion upon which the plaintiffs became aware that these monies existed, since they were not privy to the details contained in the Inland Revenue Affidavit. I have already referred to the fact that their mother, who had sworn the Inland Revenue Affidavit, had died on 28 February 1990.

15. The plaintiffs commenced the within proceedings by the issue of a Plenary Summons on the 26th February 2004, being well within

a period of six years from the date of the said letter, but quite clearly well outside a period of six years from the 3rd February 1981, being the date of the letter from the defendants which enclosed the executor's cash account.

Statutory provisions

16. Section 11 (2) (a) of the Statute of Limitations Act, 1957, as amended by Section 3 (2) of the Statute of Limitations (Amendment) Act, 1991 provides:

" subject to paragraph (c) of this subsection and to section 3 (1) of the Statute of Limitations (Amendment) Act, 1991, an action founded on tort shall not be brought after the expiration of six years from the date on which the course of action accrued."

17. Section 11, subsection (2) (c) is not relevant to the plaintiff's claim. Neither is section 3 (1) of the 1991 Act relevant to the present claim since it is not a personal injuries action.

18. Since the plaintiffs rely upon the provisions of section 72 of the Act, I should set out in that provision which provides as follows:

"72. -- (1) where, in the case of any action for which a period of limitation is fixed by this Act, the action is for relief from the consequences of mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered." (my emphasis)

19. Reference has also been made to section 45 of the Act, and that section provides:

"45. -- (1) subject to section 46 of this Act, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such a state, whether under a will or on intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued.

(2) and subject to section 46 of this Act, no action to recover arrears of interest in respect of any legacy or damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due."

20. However, this claim is not to a claim to a share in an estate of a deceased person. It is a claim in negligence, and s. 45 has no relevance.

Submissions

21. The plaintiffs contend in relation to the limitation period that time should run only from 24th June 2002, being the date on which they first became aware of the fact that these monies existed and had not been paid to the beneficiaries as part of the administration of the deceased's estate. They submit that this is the date upon which this cause of action accrued for the purposes of section 11 (2) (a) of the Act.

22. The defendants on the other hand contend that the cause of action accrued on or about the 3rd February 1981, being the date on which they wrote to the third named plaintiff informing her that the Administration of the estate of her late father was almost complete and when they enclosed a copy of the Executor's cash account. They submit that it was on that date that the fact that monies on deposit with Allied Irish Banks had not been gathered in and distributed should have been apparent to the Executrix, the plaintiffs' mother, who had sworn the Inland Revenue Affidavit. In answer to that, the plaintiffs state on the other hand that their mother by then was aged and in failing health, and would not have been in a position to appreciate and understand the contents of the Executor's cash account, even if she had seen it. As I have already stated it appears that at that stage the plaintiff's mother was living with and being looked after by the first and third named plaintiffs.

23. In support of their submission that the period of limitation should be deemed to have commenced only from the date upon which they actually discovered the "mistake" by the defendants in failing to gather in and disperse the AIB monies, the plaintiffs have referred to the court to the judgement of Pearson J. in *Phillips-Higgins v. Harper* [1954] All ER.116 where on the facts of that case, which are very different to the present case, a similar provision in the English Limitation Act, 1939 to section 72 of the Act here, was considered. Without going into the facts of that case, I am satisfied that it has no relevance to the present case, and, indeed, even in that case, the mistake upon which that plaintiff relied was found not to be the type of mistake intended to be covered by the section. Section 72 of the Act here is clearly intended to apply to a situation where a plaintiff seeks relief from the consequences of a mistake in the context for example of a contract entered into as a result of a mistake and where the action is seeking relief by way of rescission or rectification. The present action by the plaintiffs is an action for damages arising from an alleged negligent act by the defendants, and is clearly only an action in tort to which the case referred to has no relevance. The alleged error by the defendants cannot be equated with a mistake in the context of s. 72 of the Act.

24. The plaintiffs also submit that if their claim is held to be statute barred this would constitute a breach of their property rights guaranteed by Article 1 of the first protocol to the European Convention on Human Rights. In my view, this right under the Convention is not engaged in the present application, since what is at stake is not a right to property, but a right to claim damages for negligence. The fact is that the money in question has been paid to the plaintiffs, including deposit interest on that sum from the date on which it was placed on deposit. What the plaintiffs are seeking is damages on the basis that if they had received this money earlier, they would have been able to use it in a manner which would have benefited them more than the interest earned on that sum while it remained on deposit.

25. The plaintiffs' right to litigate is not an absolute right. Certain statutory controls are in place by virtue of the Statute of Limitations Act 1957, as amended, as to the time within which a plaintiff must commence his/her action. The plaintiffs' action must be considered by reference to the provisions of section 11 (2) (a) of the Act, as amended which is very specific. That section makes it absolutely clear that where the cause of action arises from a tort, and in this case negligence, the proceedings must be issued not later than six years from the date upon which the action accrued. There is no provision within that section, such as applies in the case of a personal injuries claim, where the date of the plaintiff's knowledge is a relevant matter for consideration in relation to the time within which proceedings must be commenced. The fact that certain amendments in relation to personal injuries actions alone were incorporated in the amending legislation in 1991 is an important indication that in relation to other actions founded on tort, a plaintiff's state of knowledge is not a relevant consideration.

26. It is relevant also that the constitutionality of section 11 of the 1957 Act, as amended, was upheld by the Supreme Court in *Tuohy v. Courtney* [1994] 3 IR. 1. In his judgement, at page 47, Finlay CJ stated:

"It cannot be disputed that a person whose right to seek a legal remedy for a wrong is barred by a statutory time limit before he, without fault or neglect on his part, becomes aware of the existence of that right, has suffered a severe apparent injustice and would be entitled reasonably to entertain a major sense of grievance.

So to state however does not of itself solve the question as to whether a statute which in a sense permits that to occur is by that fact inconsistent with the Constitution."

27. From the plaintiff's standpoint, it is understandable that they would feel a sense of grievance that they are barred from pursuing a claim in circumstances where they feel that they had no opportunity within the limitation period to realise that they had a cause of action against the defendants. They are however not in a unique position in that respect. There have been other plaintiffs in their situation who have been unable to pursue an action for damages in similar circumstances. A case in point is *Irish Equine Foundation Ltd v. Robinson* [1999] 2 ILRM 289. In that case, the plaintiff had engaged a firm of architects to design and supervise the construction of a premises. In 1986 a certificate of completion was signed. In 1991 there was an ingress of water through the ceiling of the premises causing damage. The plaintiffs commenced proceedings in January 1996, being within six years of the date of that ingress of water. The plaintiff contended that it was not until that damage was caused that it became aware of the alleged defects giving rise to the action in negligence. That claim was found to be statute barred on the basis that the alleged negligent design of the premises would have been discoverable upon an examination of the premises by an expert when the premises were completed. One can draw an analogy between the situation of that plaintiff and the plaintiffs in the present case, since the alleged error on the part of the defendants herein could have been discovered when the executor's cash account was enclosed with the defendant's letter dated the 3rd February 1981.

28. While I have every sympathy for the plaintiffs' predicament, in the circumstances where they themselves did not know that part of their late father's estate comprised the monies on deposit in Allied Irish Banks until they heard about it in June 2002, there is no doubt in my mind that, given the provisions of section 11 to which I have referred, the cause of action accrued upon receipt of the letter from the defendants dated 3rd February 1981. In these circumstances, their claim is statute barred, and these proceedings must be dismissed.