

THE HIGH COURT**2007 1570 P****BETWEEN****TASK CONSTRUCTION LIMITED AND EDWARD GAFFNEY****PLAINTIFFS****AND****WILLIAM B. DEVINE, SOLICITORS, PRACTISING UNDER THE STYLE AND TITLE OF BCM HANBY WALLACE AND COMPANY****DEFENDANT****JUDGMENT delivered by Ms. Justice Dunne on the 30th day of January 2009**

The proceedings herein were commenced by plenary summons issued on the 1st March, 2007. An undated statement of claim was delivered containing some 71 paragraphs. A notice of motion was issued on behalf of the defendant on the 18th April, 2007. That motion first came before me for hearing on the 4th June, 2008. At that hearing I made an order joining Mr. Edward Gaffney as a plaintiff in the proceedings. The relief sought in the notice of motion sought as follows:-

"(1) An Order dismissing or striking out the plaintiffs' claim on the basis that the subject matter of the claim is res judicata and/or that the plaintiff is estopped from bringing the claim because of issue estoppel.

(2) In the alternative, an Order, pursuant to the inherent jurisdiction of this honourable Court, dismissing or striking out the plaintiffs' claim that it amounts to an abuse of the process of this honourable Court.

(3) An Order, pursuant to Order 19, rule 27 of the Rules of the Superior Courts, or alternatively pursuant to the inherent jurisdiction of his Honourable Court, striking out the entire of the plaintiffs' statement of claim or such part thereof as to this Honourable Court seems fit on the basis that it is scandalous.

(4) An Order pursuant to the provisions of the Statute of Limitations 1957 dismissing the plaintiffs' action on the basis that it is statute-barred.

(5) An Order restraining the plaintiffs from instituting any further proceedings against the defendant without first obtaining leave of the Court."

Further ancillary relief was sought.

Following the hearing on that occasion I declined to make the order sought at para. 1 of the notice of motion. I was however, satisfied that the statement of claim of the plaintiffs as before the Court was scandalous and an abuse of the process of the Court and on that basis I determined that part of the statement of claim be struck out, namely, paras. 34 to 70. That left before the Court paras. 1 to 33 inclusive and para. 71 of the statement of claim. I then directed the plaintiff to deliver an amended statement of claim to reflect the order made by me and I adjourned the balance of the motion, namely an issue as to the Statute of Limitations to be heard at a later date. The matter then appeared before me from time to time for mention. Ultimately, the matter came back before me for hearing in relation to the outstanding issue on the notice of motion on the 17th December, 2008.

As I have mentioned the matter came back before me on a number of occasions for mention. This was to ensure that the amended statement of claim had been delivered and to allow a defence to be filed before the issue of the Statute of Limitations was heard and determined. It transpired that there was some confusion on the part of the plaintiffs as to what steps were required to be taken. This is perhaps understandable as the company was not represented before the Court and Mr. Gaffney appeared on his own behalf. At one of the "for mention" hearings, it became apparent that the plaintiffs had delivered a further amended statement of claim to the defendant. This statement of claim contained some six paragraphs (there was some dispute about this - initially, it appears that a three paragraph statement of claim was received by the defendant but I accept that the plaintiffs at all times intended to rely and tried to provide the defendant with a six paragraph statement of claim. Some mishap or confusion led to the defendant only receiving the first three paragraphs of that statement of claim.) In any event, I pointed out to Mr. Gaffney that he could not simply deliver a further statement of claim without leave of the Court. As it was indicated to me that the plaintiffs intended to rely on that statement of claim, I gave leave to the plaintiffs to deal with the matter on the basis that they were now relying on the six paragraph statement of claim. A defence was delivered on the 24th June, 2008 in which inter alia, the Statute of Limitations was pleaded.

An affidavit of William B. Devine was sworn on the 25th July, 2008 setting out the basis of the application to dismiss the proceedings on the grounds that the same are statute-barred. Five affidavits were sworn by Mr. Gaffney in response - on the 1st July, 2008, a second affidavit on the 1st July, 2008, the 7th July, 2008, the 30th September, 2008 and the 10th November, 2008. I do not propose at this point to refer in detail to the affidavits save to say this: in each of the affidavits sworn herein by Mr. Gaffney subsequent to the hearing on the 4th June, 2008, it is stated that the ruling of the Court on that date was to refuse the relief sought in paras. 1, 2, 4, 5 and 6 of the defendant's notice of motion. The affidavits go on to state:-

"That the issue of the Statute of Limitations does not apply as the pleading of stamp duty is re-stated and that cause of action did not occur until February 2006 when I first saw the purported Deed of 24th September, 1986."

Given the various averments to the like effect in the affidavit sworn by Mr. Gaffney, it is clear that he is under a serious misapprehension as to what occurred on the 4th June, 2008. That aspect of the defendant's motion was not refused but adjourned pending the completion of the pleadings in the case as I have stated above. Having clarified that aspect of the matter for the benefit of Mr. Gaffney on the 17th December, 2008, I proceeded to hear the application to dismiss the proceedings on the basis that the same are statute barred. For ease of reference I think it would be helpful to set out in full the statement of claim now relied on by the plaintiffs:-

"1. On or about the 24th September, 1986, the defendant, William B. Devine, as solicitor for the first named plaintiff did, negligently prepare and execute a Deed of Transfer for the sale of his client's property at 4A, Knocklyon Road, Templeogue, Dublin, 16, which served to dispose of the property for the sum of £6,000 when at the time the property was valued at £60,000.

2. In the circumstances the plaintiff suffered a loss of 90% of the value of the property, in an act that was ultra vires the object of the client, a limited liability company.

3. The plaintiff claims compensation in the amount of 90% of the value of the property at December, 2006, the date of the plaintiffs notification of proceedings, in the sum of €2,880,000 being 90% of the then value of €3,200,000.

4. The plaintiff re-states the claim that there was an insufficient stamping on the purported deed of transfer and, as such, constitutes Revenue fraud.

5. In the circumstance the matter of part 10 – 127 of the Stamp Duty Consolidation Act 1999 will apply.

6. In the circumstances the matter of s. 8(3 and 4), of the Stamp Duty Act 1999 will apply".

As is apparent from the above, it is contended by the plaintiffs that the defendant negligently prepared a Deed of Transfer for the sale of a property at 4A, Knocklyon Road, Templeogue, at a sum of £6,000 at a time when the property was valued at £60,000. The loss alleged to accrue to the plaintiff is now said to be €2,880,000 as of December, 2006. The loss is said to be that of "the plaintiff" although it is not entirely clear from the statement of claim how the second named plaintiff is affected by the alleged loss. It is also contended that the Deed of Transfer was insufficiently stamped and that this amounts to a fraud on the Revenue.

The defendant herein swore an affidavit on the 25th June, 2008. That affidavit deals with the issue of the Statute of Limitations in the context of the amended statement of claim. In his affidavit, the defendant set out the background to this matter. Between 1981 to 1987, he acted as a solicitor for the first named plaintiff and its directors, Kenneth Gaffney and Helena Gaffney. Helena Gaffney (now deceased) was the mother of Edward and Kenneth Gaffney. In 1986, certain lands, part of Folio 9679, County Dublin, were transferred from the first named plaintiff to Helena Gaffney. This transfer is at the heart of these proceedings. The Deed of Transfer was exhibited in an affidavit sworn by Edward Gaffney on the 7th July, 2008. It is stated in the deed of transfer that it is in respect of all the property in Folio 9679 of the Register of Freeholders. The address of Mrs. Gaffney is given as 4, Knocklyon Road, and it is certified that the transaction does not have a value in excess of £6,000. In correspondence between the Land Registry and the defendant which is also exhibited in the same affidavit, it appears that the Land Registry was informed that the transfer was in respect of all of the lands in the Folio and that the lands consisted of a building site.

The defendant in his affidavit set out in detail the findings of Her Honour Judge Linnane in Circuit Court proceedings in which the history of ownership of the property is outlined by the learned Circuit Court Judge in her judgment at p. 2 as follows:-

"Task Construction Limited was registered as full owner in 1982. The defendant and his mother were directors of that company and by Deed of Transfer dated the 24th September, 1986 the premises in question together with a plot of land to the rear was transferred to the second named plaintiff and she was registered as full owner in 1988. The defendant's solicitor dealt with that transaction. In or around 2002 the plot to the rear was transferred by the second named plaintiff to the defendant and by transfer dated the 19th June, 2003 the second named plaintiff executed a voluntary transfer of the house into the joint names of herself and the first named plaintiff. On the 5th February, 2004 the second named plaintiff executed an enduring power of attorney in favour of the first named plaintiff."

The second named plaintiff in those proceedings was Helena Gaffney and the defendant was Kenneth Gaffney.

I do not think it is necessary to outline in detail the full history of the lengthy disputes involving Kenneth Gaffney, Task Construction Limited, Helena Gaffney and William B. Devine, save and insofar as it may be necessary for the purpose of considering whether or not these proceedings are statute barred. However, to the extent that it is necessary, it may be relevant to deal with some further details as to the background to this matter in order to bring the situation up to date.

As can be seen from the passage quoted above from the judgment of Her Honour Judge Linnane in 2002, a plot of land to the rear of 4 or 4A Knocklyon Road, was transferred by Helena Gaffney to Kenneth Gaffney. By a transfer dated the 19th June, 2003, a voluntary transfer at the property at 4A Knocklyon Road, into the joint names of Helena Gaffney and her daughter, Alice Dorris took place. It seems to me to be clear that the genesis of these proceedings springs from the effect of that transfer. As a result of that transfer, Alice Dorris became the sole owner to that property on her mother's death, with the result that Edward and Kenneth Gaffney derived no benefit from that property on the death of their mother.

The transfer to Kenneth Gaffney of the site to the rear of the property in 2002, contained the following recital:-

"Helena Gaffney, . . . the registered owner in consideration of the natural love and affection she has for her son Kenneth Gaffney . . . hereby transfers as beneficial owner part of the property contained in Folio 9679 County Dublin . . . to her son."

A map was attached to the transfer showing the plot to be transferred.

The amended statement of claim relied on by the plaintiffs herein alleges negligence against the defendant in the preparation of the Deed of Transfer of the property at 4A Knocklyon Road, in 1986. On the face of it, the claim is statute barred. In order to avoid the apparent affect of the statute of limitations, it is pleaded that there was insufficient stamp duty paid on the Deed of Transfer and that this amounts to revenue fraud. The statement of claim then goes on to say as follows:-

"5. In the circumstances the matter of part 10 - 127 of the Stamp Duty Consolidation Act 1999, will apply.

6. In the circumstances the matter in s. 8(3) and (4) of the Stamp Duty Consolidation Act 1999, will apply."

The argument of the plaintiffs appears to be that in the stamping of the Deed of Transfer insufficient duty was paid on the transfer and that this amounts to a fraud on the Revenue, thus preventing the Statute of Limitations from barring the proceedings. Section 71(1) of the Statute of Limitations 1957, provides as follows:-

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

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

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

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

The first point to note is that in considering the affect of s. 71 and the postponement of the limitation period by reason of fraud, the claim by the plaintiff must involve a claim for damages against a defendant who has caused a loss to the plaintiff as a result of the alleged fraud. Alternatively it must be shown that the right of action has been concealed by the fraud of the defendant. In these proceedings, the alleged fraud could only be a fraud on the Revenue if indeed there is any fraud. It is impossible to see how such an alleged fraud could have occasioned any loss to the plaintiffs or either of them. It any event, even if there was a fraud on the Revenue, and I am far from convinced that there was, despite the many affidavits sworn herein by Mr. Edward Gaffney, such a fraud is a matter for the Revenue to pursue – not the plaintiffs herein.

In the course of the statement of claim reference was made to the provisions of the Stamp Duty Consolidation Act, 1999. Whilst it is a Consolidation Act it expressly provides at s. 160(2) as follows:-

"This Act shall not apply in relation to stamp duty on –

(a) instruments specified in Schedule 1 which were executed before the date of the passing of this Act."

Accordingly the Stamp Duty Consolidation Act 1999, has not bearing on the stamping of the Deed of Transfer of 1986. Mr. Conlon, in his submissions on behalf of the defendant pointed out that the Deed was stamped in accordance with the terms of the Stamp Act 1891. Section 12(5) of that Act provides as follows:-

"Every instrument stamped with a particular stamp denoting either that it is not chargeable with any duty or is duly stamped, shall be admissible in evidence and available for all purpose notwithstanding any objection relating to duty."

I cannot see any basis on the papers before me, bearing in mind the allegations contained in the affidavit of Mr. Gaffney and the submissions made herein by both parties to reach the conclusion that there was a fraud on the plaintiffs within the meaning of s. 71(1) of the Statute of Limitations 1957, as amended, such that the present proceedings are not statute barred. The allegation before the court is that there was a fraud on the Revenue in the amount of stamp duty payable on the Deed of Transfer. I am far from satisfied that such a fraud has occurred, but even if it was the case that there had been such a fraud, that does not assist the plaintiffs in the circumstances of this case.

I noted previously that Mr. Gaffney avers in the course of his affidavit to the fact that the cause action "did not occur until February 2006, when I first saw the purported Deed of the 24th September, 1986". The cause of action alleged in this case is negligence in the preparation and execution of that Deed. The Deed was executed on the 24th September, 1986. Assuming for the sake of argument that there was negligence on the part of the defendant, the tort was complete in September 1986. That is when the cause of action accrued to any party who suffered a loss as a result of the alleged negligence. Mr. Gaffney seems to be attempting introduce a test of "discoverability". This is a concept that has been rejected by the courts in a number of cases, eg. Morgan v. Park Developments Limited [1983] I.L.R.M. 156, Hegarty v. O'Loughran [1990] 1 I.R. 14, Doyle v. C. and D. Providers (Wexford) Limited [1994] 3 I.R. 57 and Touhy v. Courtney [1994] 3 I.R. 1. It is clear from those authorities that in a case such as this, the test of discoverability does not apply.

Finally I should note that even if there was the alleged negligence on the part of the defendant and even if the proceedings are not statute barred. It is difficult to see what if any loss was caused to the second named plaintiff herein as a result of the alleged or any negligence.

In conclusion I am satisfied that these proceedings are statute barred.

