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THE HIGH COURT

1986 No. 5417P

BETWEEN

MAURICE O'CONNELL

PLAINTIFF

AND

DERMOT J. O'MEARA, THOMAS D. O'MEARA

AND JAMES E. WALSH

PRACTISING UNDER THE STYLE OF

DAVID J. O'MEARA AND SON SOLICITORS

DEFENDANTS

Judgment of Mr. Justice Lynch delivered the 3rd day of  
October, 1988.

This is an action for damages against a firm of Solicitors for the negligence of a deceased former partner in connection with a transfer dated the 9th of July 1979 to the Plaintiff of an undivided half share in a farm of approximately 108 acres of land the subject matter of Folio 40640 of the Register of Freeholders County Cork. The lands in question are part of the lands of Rossacon situate in the Barony of Duhallow and County of Cork and the transferor was one John Noonan who

died in August 1987. While liability was put in issue on the defence as delivered it was abandoned at the trial before me and the action accordingly proceeded as an assessment of damages only.

The action arises out of a previous action brought by the said John Noonan deceased then a Ward of Court suing by the Committee of his estate Matthew Murphy as Plaintiff and the Plaintiff herein as Defendant and bearing Record Number 2135P of 1986 in which the said John Noonan claimed to set aside the said transfer dated the 9th of July 1979. Those proceedings were heard by me on the 18th, 19th and 20th of March and the 7th of April 1987 and I delivered a reserved Judgment on the 10th of April 1987. The parties to this action although not the same parties as the parties to the previous action have nevertheless agreed to be bound by the findings, the Orders and the accounts contained in my said Judgment of the 10th of April 1987 for the purposes of this action and therefore this Judgment is in that sense supplemental to my Judgment of the 10th of April 1987 in that previous action and must be read with it.

The claim by the Plaintiff in this action is that if it were not for the negligence of the deceased former partner of the Defendants the Plaintiff would as a matter of high probability have become the beneficial owner of an undivided half share in the said lands as joint tenant with the said John Noonan now deceased who retained the other half share. This action was commenced by a Plenary Summons dated the 30th of May 1986, that is to say before the death of the said John Noonan and consequently there is no claim in the pleadings in this

action that the Plaintiff would by survivorship now be entitled to the absolute ownership of the entirety of the lands. For reasons which appear hereafter even if such a claim were made and allowed it would make no appreciable difference to the figures having regard to the one third share in the lands left to the Plaintiff by the Will of the said John Noonan deceased and to the fact that even on an intestacy the Plaintiff would also succeed to a one third share in the said lands. For the purpose of achieving finality in this matter I deal hereafter with the position arising out of the possibility of succession by survivorship on the part of the Plaintiff.

If the transfer had not been set aside the Plaintiff would have remained entitled to the half share in the lands transferred to him subject to a liability to pay for the support of the said John Noonan in Nazareth House, Mallow, County Cork so long as he lived. The Plaintiff paid for the support of the said John Noonan in Nazareth House up to the 31st of December 1982 and there is owing to the said Nazareth House in respect of the period from the 1st of January 1983 to the death of the said John Noonan in August 1987 a total sum of £20,217. In assessing the damages I have to restore the Plaintiff as best I can to the financial position which he would now enjoy if there had been no negligence by the Defendants' deceased partner. The Plaintiff would now have the half share in the lands subject to that liability of £20,217. The Plaintiff would have had to retain the lands unsold so long as the said John Noonan lived and the lands must therefore be valued at their present value and not the valuation which they may have had on the 9th of July 1979. The evidence of the

Auctioneer and Valuer called on behalf of the Plaintiff, a Mr. Cohan, is that the lands at the present time have a value of £120,000. It follows therefore that the Plaintiff's half share in the lands would be worth £60,000. One has to discount this figure of £60,000 however for the risks that if the deceased had been independently advised he might not have executed the transfer at all and also that if the transfer had included a revocation clause the deceased might have revoked the transfer. In my opinion the appropriate discount from the figure of £60,000 in respect of these risks is one sixth which leaves the loss to the Plaintiff at £50,000. The Plaintiff would however have had to support the deceased in Nazareth House the outstanding cost of which is £20,217. As I have discounted the value of the lands by one sixth I must do likewise with the figure for the cost of support of the deceased which accordingly reduces that indebtedness to a sum of £16,847.50. Deducting this sum from the £50,000 leaves the net loss to the Plaintiff in a sum of £33,152.50.

If the transaction had been properly carried out the Plaintiff had a prospect of succeeding to the half share in the lands which the said John Noonan had retained. That half share would now have a value of £60,000. However once again discount has to be given for the risks already referred to by me, namely, that the transaction might not have gone through at all if the deceased had had independent advice or that the deceased might have lawfully revoked the transfer altogether if as it ought to have done the transfer had contained a power of revocation. In addition, without a total revocation the

deceased could have severed the joint tenancy at any time so that his retained half share would not have gone by survivorship to the Plaintiff and certainly if he had been taken into wardship as he was in fact, although he might not have been if matters had been run smoothly and the transfer had been properly drawn, the whole transaction could have been revoked. For these added risks it seems to me that the appropriate discount must be at least one third leaving the loss to the Plaintiff in respect of his prospects of succeeding by survivorship to the half share in the lands retained by the deceased at £40,000. The Plaintiff, however, under the as yet unproved Will of the deceased gets one third of not quite the whole of the lands: one third of the whole of the lands would have a value of £40,000 and a figure of £10,000 is nominated as coming out of this so that the value might be £3,000 less to the Plaintiff under the as yet unproved Will of the deceased. If that Will is not proved for any reason then there will be an intestacy in which event the Plaintiff would succeed to one third share in the whole of the lands as a next of kin which would have a valuation of the £40,000 thus cancelling out completely any loss in respect of the Plaintiff's prospects of succession by survivorship. I therefore do not add anything to the amount of damages to be awarded to the Plaintiff in respect of his loss of prospects of succession by survivorship.

The Plaintiff also claims £106,000 being the present approximate outstanding balance including accrued interest of a loan by Trinity Bank to him. The Plaintiff claims that he negotiated that loan for the purpose of purchasing and developing certain lands by erecting warehouses thereon in

order to generate funds to assist him (inter alia) in paying the Nazareth House charges. The Plaintiff is primarily a businessman rather than a farmer. I am satisfied that the transaction in question with Trinity Bank was a commercial transaction entered into by the Plaintiff with a view to personal profit which would of course have incidentally assisted the Plaintiff to provide for the deceased's maintenance but which was in reality a private commercial venture for himself. Moreover the Plaintiff still has some of the lands so purchased with at least one if not more warehouses thereon and no evidence as to the value of such remaining lands and warehouse or warehouses was tendered. The value of such remaining lands and buildings thereon would clearly have to be set off against any outstanding debt if allowable as an item of damage in this case. However, I am satisfied that the outstanding debt due to Trinity Bank is too remote to be allowable as an item of damage in this case and I therefore disallow it.


There remains an item of £16,970.58 found by me in my Judgment of the 10th of April 1987 to be due by the Plaintiff to the estate of the said John Noonan deceased. This sum is claimed by the Plaintiff as a further item of damage in these proceedings allegedly having been sustained by him as a result of the negligence of the Defendants' deceased partner. That sum is in fact the total of the moneys of the said John Noonan deceased which I found to have been received by the Plaintiff over and above all moneys dispersed by the Plaintiff for

the benefit of the said John Noonan deceased. The sum is not an item of loss or damage sustained by the Plaintiff: on the contrary it is an item of benefit received by the Plaintiff and which he is bound to repay. It is not recoverable as an item of damage in these proceedings and I accordingly disallow it.

The net result will therefore be as follows.

I declare that the Plaintiff is entitled to be indemnified by the Defendants against the costs awarded to the said John Noonan deceased then a Ward of Court against the Plaintiff herein as Defendant in the said proceedings Record Number 2135P of 1986. I further declare that the Plaintiff is entitled to be indemnified by the Defendants against his own costs on a Solicitor and Client basis of defending the said proceedings Record Number 2135P of 1986.

I award to the Plaintiff a sum of £33,152.50 as damages against the Defendants together with interest thereon from the 11th of April 1987 to the 3rd of October 1988 inclusive in the sum of £5,390 making a total award of £38,542.50. I also award to the Plaintiff against the Defendants his costs of these proceedings.

Signed:   
KEVIN LYNCH

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Appearances

For the Plaintiff: Brian Demsey, S.C. and  
Willis Walshe, B.L.,  
instructed by Messrs. Martin  
Sheehan & Company, Solicitors.

For the Defendants: Frank Clarke, S.C., and  
John O'Connor, B.L.,  
instructed by Messrs. Giles J.  
Kennedy & Co., Solicitors.



Authorities Cited in Argument

1. Finlay .v. Murtagh (1979) I.R. 249.
2. Midland Bank Trust Company Limited .v. Hett Stubbs & Kemp (1978) 3 WLR 167.
3. Livingstone .v. Rawyards Coal Company (1880) 5 AC 25.
4. Milangos .v. George Frank (Textiles) Ltd (1976) AC 443.
5. Dodd Properties (Kent) Limited .v. Canterbury County Council (1980) 1 WLR 433.
6. County Personnel Limited .v. Pulver Company Limited (1987) 1 AER 289.
7. McGregor on Damages (1988 Edition), paragraphs 13.09: 12.05 3.61 and 3.62.
8. Richardson .v. Mellish (1824) 2 Bingham 229.
9. Chaplin .v. Hicks (1911) 2 KB 786.
10. The Empress of Britain (1913) 29 TLR 423.
11. Wall .v. Hegarty (1980) ILRM 124.
12. Ford .v. White & Co (1964) 1 WLR 885.
13. Jackson Professional Negligence, paragraphs 4.126 and 4.130.
14. Kitchen .v. Royal Airforce Association (1985) 1 WLR 563.

