THE HIGH COURT

[2020] IEHC 612

[Record no. 2014/10185 P.]

BETWEEN

MICHAEL MCPHILIPS

PLAINTIFF

AND

ERIC D. GLEESON, JOHN P. KEAN AND ERIC GLEESON
ALL PRACTISING UNDER THE STYLE AND TITLE OF GLEESON & KEAN SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered ex tempore on 24th day of November, 2020

Introduction

1. This application is brought by the defendants seeking the trial of a preliminary issue as to whether the plaintiff's action against them is barred by virtue of the provisions of the Statute of Limitations 1957, as amended.

2. Very briefly, the plaintiff's action against the defendants is one for damages in respect of negligence, breach of duty, breach of contract and breach of trust alleged to have occurred on the part of the defendants, who acted as his solicitors in respect of an investment of €2.5 million, which the plaintiff made in a particular venture in 2006. It is the plaintiff's case that the defendants, as his solicitors, were to ensure that in return for his investment of the funds, he was to receive a 25% unencumbered interest in a particular property. The plaintiff alleges that in the events which transpired, the defendants released a large portion of his money to the solicitor acting for two of his former partners, who fraudulently converted the funds for their own purposes.

3. In their defence, the defendants take issue with all of the allegations of negligence, breach of duty, breach of contract and breach of trust made against them and take issue with the assertions of fact made by the plaintiff in his statement of claim. In particular, they deny the nature and extent of the retainer of them as alleged by the plaintiff in his pleadings. In their defence, they also plead that the plaintiff's action against them is statute barred, having regard to the fact that the event which is the cause of complaint by the plaintiff, being the release of funds to the solicitors acting for his former partners, took place on 19th October, 2006 and the plenary summons issued against them on 3rd December, 2014.

4. In his reply to defence, the plaintiff has pleaded that he is entitled to the benefit of s.71 of the 1957 Act. That section provides that where, in the case of an action for which a period of limitation is fixed by the Act, if the right of action is concealed by the fraud of the defendant, or his servant or agent, the period of limitation shall not begin to run until the plaintiff has discovered the fraud, or could with reasonable diligence have discovered it.

5. For the purposes of this application, it has been submitted on behalf of the defendants that they would be prepared to accept the allegations of fact as made by the plaintiff at their high water mark, while reserving the right to contest those assertions at the trial of the action in the event that the preliminary issue was determined against them. In short,

the defendants argue that even at their height, the matters asserted by the plaintiff are not sufficient to constitute fraudulent concealment such as to bring him within the ambit of s.71 of the 1957 Act. They want that issue determined as a preliminary issue.

The Substantive Proceedings

6. It is necessary to set out the substantive proceedings between the parties in a little more detail. The plaintiff's case is that on or about 27th July, 2006, he agreed with a number of prospective partners to invest the sum of €2.5 million in the purchase of a development site, in consideration for which he would be registered with a 25% unencumbered interest in the property. The plaintiff took out a loan from Allied Irish Banks plc, which was secured against another property owned by the plaintiff. On 1st September, 2006 the bank released €575,000 directly to the solicitors acting on behalf of two of the plaintiff's partners.

7. On 19th October, 2006, the defendant solicitors forwarded the balance of the investment of €1,925,000 to the same solicitors. That sum of money was not in fact put towards the purchase of the property by the plaintiff's former partners. The plaintiff never received a 25% unencumbered interest in the property. The plaintiff alleges that the release of the money in circumstances where he did not get the 25% unencumbered interest in the property, occurred as a result of the professional negligence of the defendants. It is pleaded that but for the negligence of the defendants, the plaintiff's funds would not have been released and the transaction would not have proceeded. The undisputed evidence is that the development site was already encumbered in favour of a financial institution by the two partners at the time the plaintiff made his investment.

8. In his statement of claim, as well as pleading that the defendants were negligent in releasing the money without securing the plaintiff's interest in the property, he also makes the case against them that once the investment had become lost, the defendants acted in breach of their duty towards him as their client by failing to disclose any, or any potential, conflict-of-interest between them and the plaintiff; by failing to advise the plaintiff to instruct alternative solicitors and by continuing to act on behalf of the plaintiff, when they knew or ought to have known that it was inappropriate and otherwise than in the plaintiff's interests to continue to act on his behalf in the transaction.

9. By notice dated 1st July, 2020, the plaintiff served particulars of the matters that he alleged constituted fraudulent concealment on the part of the defendants, in which he pleaded that in or about 2009, the defendants had advised the plaintiff to institute proceedings against two of his former partners on the basis that they were the only parties bearing any responsibility for his loss. It was alleged that the defendants knew that those representations and/or advice was incorrect and/or they were reckless as to the true position. He further pleaded that they knowingly or recklessly misrepresented the factual and legal position concerning liability for the plaintiff's loss and in so doing they breached their obligations to him. He pleaded that in doing so, they concealed his cause of action against them; in particular, in representing to him that the only persons responsible for his loss were the two former partners, the defendants knowingly or recklessly concealed their own responsibility for the plaintiff's loss. The plaintiff pleaded

that he had relied on the defendants' advice in this regard and instituted proceedings against the two partners.

10. It was pleaded that it was unconscionable for the defendants to have acted in the manner complained of against them as set out in the statement of claim and in the further particulars of concealment. It was pleaded that in such circumstances it would be inequitable to permit the defendants to rely upon the provisions of the Statute of Limitations, 1957.

11. The plaintiff pleaded that he was unaware of the true facts in the matter, or that the defendants had breached their obligations to him and did not discover and could not have discovered that he had a cause of action against the defendants until he engaged new solicitors in or about 2013. It was only then that the plaintiff became aware, or could reasonably have become aware of the acts constituting the concealment pleaded against the defendants.

12. As already noted, a full defence has been filed by the defendants. Therein, they deny the nature of the retainer as alleged by the plaintiff and they deny all of the allegations of wrongdoing made against them in the statement of claim. They also plead that the plaintiff's action against them is statute barred. As the pleadings have closed, they are also deemed to deny, or put in issue all of the allegations of concealment as set out in the amended reply, which has yet to be served on behalf of the plaintiff.

The Present Application

13. The defendants submitted that for the purposes of the trial of a preliminary issue, they are prepared to accept the assertions of fact made by the plaintiff at their high water mark. They reserve the right to contest these assertions of fact in the event that the preliminary issue should be determined against them. It was submitted that this was the appropriate course to adopt where one was seeking the trial of a preliminary issue on a point of law: see *McCabe v. Ireland* [1999] 4 I.R. 151, where it was stated as follows at p. 157:-

> *"The facts relevant to the preliminary issue must not be in dispute, but they may be agreed for the purposes of the preliminary issue of law only without prejudice to the right to contest the facts if the actual determination of the preliminary issue should not dispose of the matter at issue. The facts must be agreed or the moving party must accept, for the purposes of the trial of the preliminary issue which he raises, the facts as alleged by the opposing party."*

14. On behalf of the defendants, Mr. Bredin BL submitted that even if the facts as alleged by the plaintiff were taken at their highest, they did not constitute fraudulent concealment for the purposes of s.71 of the 1957 Act. This was due to the fact that the plaintiff did not assert that he was unaware of any essential elements of his claim against the defendants, or that any of those elements were somehow concealed from him. His case was simply that he was unaware of the import or legal significance of those matters and was unaware that those matters formed the basis of a claim against the defendants.

15. Counsel submitted that the central point in the plaintiff's claim was summarised in paras. 8 and 9 of his affidavit sworn on 26th November, 2019 where he stated as follows:-

> *"8. Had the true position been revealed to me, and in particular the conflict-of-interest as between my position and that of my then solicitors, I would have sought alternative advice immediately and instituted proceedings against the defendants at an earlier date.*
>
> *9. I do not believe that it is just and equitable for the defendants to be able to rely upon their own failure to advise me in order to defeat my actions against them. It has at all times been clear that the foregoing constitutes the basis upon which my case is made. In particular the statement of claim clearly pleads at paragraph 12, inter alia, that the claim is advanced on the basis that the defendants failed to advise me to instruct alternative solicitors."*

16. In this regard counsel relied on the decision in *Komady Ltd v. Ulster Bank Ireland Ltd* [2014] IEHC 325 where Peart J. held that the bank had not been guilty of fraudulent concealment in relation to certain Swaps, because at all material times the plaintiff had all the necessary information about these instruments. It had only been as a result of the financial crash and a subsequent review of its finances in 2012, that had led the plaintiff to become aware that he had a possible cause of action against the defendant. However, the defendant had not engaged in any fraudulent concealment of any facts and as a result the plaintiff's action was held to be statute barred against the bank. Peart J. stated as follows at para. 55:-

> *"Much reliance is placed by the plaintiffs on the existence of the fiduciary relationship between the parties at the time these Swaps were entered into. I can agree that such a relationship could impose a greater obligation of disclosure upon the bank. But in my view, even given that relationship for the purpose of this preliminary issue, the fact remains that everything that the plaintiffs needed to know in order to get any advice on these Swaps was known to them by the 18th July 2006. They had the Swap agreements they entered into. They knew what their conservative financial objectives were and that they had explained them to the bank. They knew also that the bank had not explained these Swaps to them. They knew that they thought that they were some sort of fixed rate interest agreement. By October 2006, if not sooner, they certainly knew that it was possible that they would have to pay money to the bank in circumstances where they were 'out of the money'. In my view if they had gone to a solicitor at any time after July 2006, and sought advice as to whether these Swaps met their conservative financial objectives, they would have been in a position to provide all the necessary information in order to get such advice, and to decide if the Swaps had been mis-sold. Instead, they did nothing until they ran into financial difficulties in 2012 whereupon a financial review was undertaken and they received advice to the effect that these Swaps had not been suitable for the purposes in July 2006. The fiduciary relationship does not add anything to those facts. The coming into force of the*

MiFID in November 2007 adds nothing of relevance to those facts. It did not suddenly reveal to the plaintiffs some vital fact that was not available to them from July 2006 and which was essential to their knowledge that they had a cause of action."

17. Counsel submitted that the facts in this case were very similar to that in the *Komady* case, because here the plaintiff knew that he had retained the defendants as his solicitors; he knew the basis of their retainer; he knew that he had given them money for the purpose of investment on particular terms as alleged by him; he knew that he had not got what he hoped for as a result of the investment, being a 25% unencumbered interest in the property; therefore he had all the necessary information if he thought that he had a complaint to make against his former solicitors. They had not concealed any material facts from him, nor had they concealed any acts that they had done on his behalf.

18. It was submitted that there was a simple issue of law that could be determined by way of a preliminary issue: namely whether the matters alleged by the plaintiff against the defendants were capable at law of amounting to fraudulent concealment and therefore would be sufficient to defeat the plea made by the defendants that the plaintiff's action against them was statute barred.

19. The defendants also relied on the decision in *O'Dwyer v. Daughters of Charity of St. Vincent de Paul & Others* [2015] 1 I.R. 328 where Hogan J stated as follows at para. 49:-

"It is clear, therefore, the fraud must either consist of conduct which is concealed from the plaintiff or of the failure to disclose the existence of facts known only to the defendant which, if disclosed would found a cause of action. In the present case the plaintiff knew that she was being asked to give an informal consent to the adoption and that the child was less than six months old at the time he was given up for adoption in July 1969. The plaintiff was thus aware of all the critical facts necessary to found the cause of action. It is equally true that the first defendant did not disclose that its conduct was or might have been illegal, but, for the reasons just stated this, in itself does not amount to fraudulent concealment within the meaning of section 71 (1) (b) of the Act of 1957."

20. It was submitted on behalf of the defendants that by directing the trial of a preliminary issue on the Statute of Limitations point, there would be a very considerable saving of both time and costs. Counsel estimated that the trial of the preliminary issue would take approximately one day, whereas the trial of the full substantive action would take approximately 5/6 days. In these circumstances it was submitted that it was both sensible and just that the court should direct the trial of a preliminary issue as sought in the notice of motion.

21. In the alternative, Counsel submitted that even if the court were to hold against him in respect of his application for the trial of a preliminary issue, the court should direct that there should be a modular trial, whereby the issue on the Statute of Limitations should be tried first as part of the determination of the proceedings.

22. In response, Mr Rogers SC on behalf of the plaintiff, submitted that notwithstanding the defendants' offer to take the plaintiff's assertions of fact at their high water mark, as set out in the draft statement of facts, that was not sufficient to determine the issue of fraudulent concealment. It was submitted that fraudulent concealment was much wider than the concept of fraud at common law. In this regard counsel referred to the leading English decisions that had been referred to by Hogan J. in the *O'Dwyer* case. In particular, counsel referred to the dicta of Evershed M.R. in *Kitchen v. Royal Air Force Association* [1958] 1 WLR 563 where he stated as follows at pp. 572/573:-

> *"It is now clear that the word 'fraud' in the section which I have read, is by no means limited to common law fraud or deceit. Equally it is clear, having regard to the decision in Beuman v ARTS Ltd that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define 200 years ago, and I certainly shall not attempt to do so now, but it is, I think clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned is an unconscionable thing for one to do towards the other."*

23. Counsel also referred to the dicta of Denning M.R. in King v. Victor Parsons and Company [1973] 1 WLR 29 where he stated at pp. 33/34:-

> *"The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive: but that does not matter. He has kept the plaintiff out of the knowledge of his right of action and that is enough see Kitchen v Royal Air Force Association [1958] 1 WLR 563. If the defendant was, however, quite unaware that he was committing a wrong or breach of contract, it would be different. So if by an honest blunder he unwittingly commits a wrong (by digging another man's coal), or a breach of contract (by putting in an insufficient foundation) then he could avail self of the Statute of Limitations."*

24. Counsel also referred to the decision in *O'Sullivan v. Rogan & Moran (t/a Rogan & Moran Solicitors)* [2009] IEHC 456, which involved an action by an elderly gentleman of 90 years of age against his former solicitors in relation to a transaction that was concluded in March 1999, some nine years prior to the institution of the proceedings; wherein he claimed that his former solicitors had failed to properly advise him in relation to the transfer of his property at a substantial undervalue, which it was alleged amounted to divesting the plaintiff of his entire property. It was noted that there had been a long-standing relationship of solicitor and client between the parties. It was alleged that the solicitors had not properly advised the plaintiff, who was 80 years of age at the relevant time.

25. In the course of his judgment, Hedigan J. referred to the decision in *Applegate v. Moss* [1971] 1 QB 406 where Denning M.R. held that s.26 of the Limitations Act, 1939, which was similar to the Irish s.71 provision, applied whenever the defendant's conduct had been such "*as to hide from the plaintiff the existence of his right of action, in such*

circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim".

26. In the *O'Sullivan* case, Hedigan J held that in relation to what exactly was the conduct of the defendant solicitors in the case at the relevant time, was not clear and he believed that it could not become clear until the full facts of the case were teased out. For that reason, he held that the issue was not one that could be determined by way of a preliminary issue and he remitted the matter back to plenary hearing. Counsel submitted that the present case was on all fours with the *O'Sullivan* case.

27. It was submitted that in this case, the key issue under s.71 was discoverability of the right of action and that depended on the nature of the special relationship between the plaintiff and the defendants as his former solicitors. In order to determine that question, it was necessary to examine closely the nature of the interactions between the plaintiff and the defendants before, during and in particular, after the disastrous investment.

28. It was submitted that it was necessary to have regard to the fact that the plaintiff was making the case that by advising the plaintiff to embark on litigation against the two former partners as his sole avenue of redress, the defendants were concealing their own potential liability arising out of the events and were eating up the limitation period within which an action could be taken against them. In that regard the investment had occurred by the release of funds by the defendants in October 2006 and the proceedings were commenced against the partners in 2009; so the plaintiff was fast running out of time within which to bring an action against the defendants, when those proceedings were issued.

29. It was submitted that there was a duty on the defendants to recognise the potential or actual conflict-of-interest that arose in the circumstances and to advise the plaintiff to go to another solicitor. They had not done that; in fact they had done the opposite, they had advised him to pursue his former partners. It was submitted that it would be necessary for the court to examine very closely the evidence even by the plaintiff and the supporting documentary evidence, in order to come to a conclusion whether the defendants had in fact engaged in fraudulent concealment as envisaged by s.71.

30. It was submitted that the court had to have regard to efficiency, in particular the saving of time and money that could be achieved by directing the trial of a preliminary issue; but the court also had to be satisfied that it was possible to do justice by deciding the issue by way of a preliminary issue rather than by means of a unitary trial.

31. Counsel stated that the *Komady* case was different to the present case, as that had been a banking transaction and the bank had not hidden any facts. The facts had been known to the plaintiff all along and therefore the issue whether the action was statute barred against the bank was suitable to be determined by way of a preliminary issue. It was submitted that this was not possible in the present case, where the issue of fraudulent concealment and the question of the discoverability of the cause of action against the defendants could only be determined once the court heard oral evidence on the matter.

32. In relation to the question of the direction of a modular trial, Counsel submitted that such mode of trial was normally only utilised in very large complex cases, where there were distinct issues for determination, each of which would take a substantial period at hearing. In such circumstances it may be appropriate to direct that one aspect of the case would be determined on a modular basis independent of the second or subsequent aspects. However, that did not arise in this case where the issues could be determined together within a relatively short period of 5/6 days. Accordingly, it was submitted that it was not appropriate to direct a modular trial in this case.

Conclusions

33. The court has had regard to the affidavits filed in respect of this application and to the pleadings in the substantive action. The court has also had regard to the very able arguments of counsel on behalf of each of the parties. The matters that must be taken into consideration when deciding whether it is appropriate to direct the trial of a preliminary issue on a point of law, were set out by the Supreme Court in *Campion v. South Tipperary County Council* [2015] 1 I.R. 716, in the following way:-

- *There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.*

- *There must exist a question of law which is discrete and which can be distilled from the factual matrix as presented.*

- *There must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be will not be sufficient.*

- *The greater the impact which a decision on the preliminary issue(s) is likely to have on the entire case, the stronger will be the argument for making the requested order.*

- *Conversely if irrespective of the court's decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order.*

- *Exceptionally however, even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.*

- *As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate.*

- *It must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful to retain the traditional separation of such matters.*

- *'Convenience' therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation.*

- *The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties.*

- *The court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally*

- *Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do.*

34. Having considered these principles, I am not satisfied that it is appropriate to direct the trial of a preliminary issue in this case. I accept the argument put forward on behalf of the plaintiff that the issue of discoverability of the cause of action which is central to the issue of concealment under s.71 of the 1957 Act, will depend entirely on the state of knowledge of the plaintiff at various times. That in turn will be determined by what was said to him by his former solicitors down through the years when they acted for him in connection with this investment. I am satisfied that the only way that this issue can be properly determined is by hearing oral evidence from both parties and by having regard to such supporting documentation as may be available.

35. The defendant has offered to accept the plaintiff's case at its high water mark for the purposes of the determination of a preliminary issue, but those assertions include allegations that the defendants deliberately encouraged him to commence proceedings in 2009 against his former partners as a means of concealing their culpability in connection with the investment and as a means of "*running down the clock*" in respect of any action that may be brought against them. Those aspects are not dealt with in the draft statement of facts proposed by the defendants. I doubt that the defendants would be willing to go so far as to make admissions in respect of those matters, even for the purposes of the trial of the preliminary issue, because if they did so, that would effectively involve an admission of fraudulent concealment on their part; thereby obviating the need for the trial of the preliminary issue.

36. The court notes that in the *O'Dwyer* case, Hogan J at para. 45 noted the submission made on behalf of the plaintiff that the first defendant's failure to inform her of the fact that the procedures allegedly followed by them in relation to the adoption of her son were in

breach of her legal rights constituted concealment by fraud for the purposes of s.71 of the Act of 1957; he went on to state:

> *"Counsel, nevertheless, cited no authority in support of the proposition that a failure by the defendant positively to inform the plaintiff that the former's conduct was in breach of the latter's legal rights amounts to a concealment of a right of action by fraud within the meaning of section 71(1) (b) of the Act of 1957."*

37. However, the court is of the view that the circumstances in this case are materially different to those in the *O'Dwyer* case. In this case there was a relationship of solicitor and client between the parties at the relevant time. A solicitor is under a duty to always act in the best interests of his or her client, even if that involves acting against his or her own personal interests. At the very minimum it includes avoiding a conflict-of-interest with the client. In such circumstances I think that it is certainly arguable that once there was a potential liability on the part of the solicitors arising out of the failed investment in 2006, there was a duty on them to advise the plaintiff to consult another solicitor. These are issues on which oral evidence is required.

38. I am satisfied that this case is similar to the decision in *O'Sullivan v Rogan* where Hedigan in J held that what exactly constituted the conduct of the solicitors at the relevant time, could not become clear until the facts of the case had been teased out. I am satisfied that similar considerations apply in this case.

39. I am satisfied that oral evidence is required in order to do justice for both parties. Such evidence will involve all the evidence that is likely to be called at the substantive action, so there would be no benefit to directing the trial of a preliminary issue. Accordingly, I refuse the first relief sought by the defendants.

40. I also refuse to direct a modular trial in this case. Modular trials are suitable in complex litigation involving clearly distinct issues, which will each take a considerable period of time at hearing. In such circumstances it may be sensible to deal with one issue first, particularly if that issue may determine whether it is necessary to embark on a hearing in relation to the second or subsequent issues, or may shorten the hearing of those issues. In other words by dealing with the action on a modular basis, it may obviate the need for extensive evidence on subsequent issues, thereby saving time and costs. However, in this case it has been estimated that the full trial of the action will take only 5/6 days, so there is no real benefit to directing a modular trial. I am satisfied that the interests of justice and indeed the interests of efficiency, lie in favour of a unitary trial. Therefore, I refuse to direct a modular trial in this case.

41. The parties may deliver written submissions in relation to the form of the final order and in relation to costs and on any other matter that may arise, within 14 days of receipt of this judgement.