

**THE HIGH COURT**

**[2016 No. 3907 P]**

**BETWEEN**

**CATRIONA CUNNIFFE**

**PLAINTIFF**

**AND**

**MICHAEL CUNNIFFE AND MARTINA WHYTE**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Meenan delivered on the 13th day of May, 2020**

**Background**

1. The plaintiff, the first named defendant and the second named defendant are three of the four children of the late Patrick Joseph Cunniffe (the deceased) who died, intestate, on or about 30 September 1987. At the time of his death the deceased was a widower and was survived by his four children. The plaintiff was born on 21 July 1970 and was seventeen when her father died.
2. The second named defendant was elected by her siblings to administer the estate of the deceased. In her role as administrator, the second named defendant swore the inland revenue affidavit, on 3 May 1988, and same was filed with the Revenue Commissioners. The certificate for the High Court Probate, dated 12 July 1988, stated the estate amounted to €243,870.00.
3. The estate of the deceased comprised of land, stocks, cash, insurance policies, household goods, farm stock and a car. The liabilities for the estate totalled IR £9,558.00. In addition to this, settlement terms were agreed with the Revenue Commissioners arising from the failure of the deceased to pay income tax and a sum of IR £64,292.00 was paid.
4. It would appear that all of the siblings of the deceased, including the plaintiff and both defendants, agreed that the first named defendant would continue to run the farm as he had done since he left school at fourteen years of age in the early 1980s. All of the existing livestock and machinery were transferred to the first named defendant for the ongoing operation of the farm.
5. Letters of administration were granted on 16 November 1988 and the second named defendant commenced the formal administration of the estate after the receipt of the letters of administration.
6. The primary assets of the estate of the deceased were the farm and the cash assets. It would appear, as mentioned earlier, that it was the view of the siblings of the deceased that as the farm was transferred to the first named defendant, the remaining cash assets of the estate would be divided amongst the other siblings equally. These cash assets were mainly contained in various investment products which had staggered dates for maturity. It was agreed that in order to maximise the return of these assets, the division of the monies should take place on the maturity of the assets and not before then. The defendants maintain that this agreement was reflected in a written family settlement

which was signed by all the siblings. I will refer to this family settlement later in the judgment.

7. The second named defendant maintains that payments were made to the plaintiff in August 1988, January 1989, May 1989, and November 1995. A further distribution was made to the plaintiff in the early 2000s on the maturity of the deceased's last savings bond in the sum of €10,000. In total, the plaintiff received the sum of IR £29,076.08 together with the sum of €10,000. The first named defendant received property and assets to the value of IR £127,242.00 together with the sum of IR £5,713.00. The second named defendant received IR £23,174.10 and €10,000. The fourth sibling received a sum of IR £22,434.00 and €10,000.

### **The proceedings**

8. The plaintiff initiated these proceedings by the issue of a plenary summons on 4 May 2016. A lengthy Statement of Claim was delivered on 11 December 2017, which I will summarise, as best I can. The plaintiff accepts that it was agreed by herself and her other siblings that it would have been the wish of the deceased that the first named defendant get the farm. The plaintiff maintains that following the settlement with the Revenue for the deceased's unpaid income tax that, in order to avoid paying capital acquisitions tax and gift tax, the first named defendant would remain in possession of the farm without any claim being made by the other siblings. However, the plaintiff further maintains that she was assured by both defendants *"that the family home house would always be there for her regardless of title, possession, or ownership and that the plaintiff would be entitled to full access and possession of same as and when she opted to avail of same..."*.
9. The plaintiff claims that she did have access to the family home but that around 2003/2004 the first named defendant disconnected the water supply to the house and moved the solid fuel range cooker, making the house uninhabitable.
10. In the Statement of Claim, the plaintiff maintains that the first named defendant did not uphold his promise to her that the family home would always be there for her. The plaintiff claims that she has *"a genuine and rightful claim to her share entitlement in the estate"* of the deceased based on the first named defendant's *"guarantee"* that her rights to the family home *"would always be respected"*. The plaintiff claims that she agreed not to contest the claim of the first named defendant to the farm and lands on the basis of the first named defendant's *"promise"* that the family home would always be there for her.
11. In the Statement of Claim, and elsewhere in these proceedings, the plaintiff emphasises the point that at the time of the death of the deceased, and for a period thereafter, she was a *"minor"* and did not attain the age of eighteen years until 21 July 1988. The plaintiff details her own educational career and the fact that she obtained a professional qualification. Further, the plaintiff accepts that she received a number of payments over the years from the estate of the deceased.

12. The Statement of Claim sets out a number of reliefs which the plaintiff seeks against the defendants, including declarations that the family home is the sole property of the plaintiff and that legal ownership of same be transferred into her sole name. The plaintiff also seeks orders giving a full accounting of the administration of all the assets of the estate of the deceased together with a full statement from the second named defendant setting out and scheduling what lands were involved and how they came to be registered in the sole name of the first named defendant. In addition, the plaintiff seeks damages for, *inter alia*, breach of fiduciary duty, negligence, personal injuries and consequential loss. The plaintiff also seeks damages for negligent misstatement and/or misrepresentation, breach of statutory duty referring to the provisions of the Succession Act, 1965, the Settled Land Acts, 1882-1890 and the Conveyancing Acts, 1881-1911.
13. The first named defendant delivered his Defence on 19 June 2018, and the second named defendant on 26 July 2018. Both Defences plead, *inter alia*, that the plaintiff's claim, if any, is statute barred and that the claim ought to be dismissed by reason of delay. Further, the second named defendant seeks to rely upon what she describes as a "*deed of family settlement*" from 1995. This document was exhibited in a grounding affidavit of Michael Collins, Solicitor on record for the first named defendant. This document provides that the plaintiff, second named defendant, and the other sibling, Padraic Cunniffe, would disclaim all their rights and interests in the estate of the deceased "*to the intent that Michael Cunniffe [the first named defendant] be the sole remaining person entitled to inherit under the intestacy of the said Patrick Joseph Cunniffe, deceased*". In consideration of this, the first named defendant agreed to pay the plaintiff, second named defendant, and Padraic Cunniffe the sum of IR £30,000 each.
14. The plaintiff delivered a Reply to both Defences. In both replies the plaintiff contests the validity of the "*deed of family settlement*".

#### **Application before the Court**

15. Both defendants issued motions seeking orders seeking to have the plaintiff's action dismissed on the grounds that it discloses no reasonable cause of action and/or is frivolous and/or vexatious and is statute barred pursuant to the provisions of the Statute of Limitation Acts, 1957 (as amended).
16. It seems to me that the appropriate way to deal with this application is to first consider whether or not the plaintiff's claims are statute barred, so it is necessary to identify the claims that are actually being made.
17. There are, essentially, three claims being brought by the plaintiff. Firstly, a claim that, following representations concerning the family home, she agreed not to contest the lands of the deceased being vested in the first named defendant. Secondly, a claim against the second named defendant arising out of the administration of the estate of the deceased. Thirdly, a personal injury claim.
18. The first claim of the plaintiff is, in my view, one of misrepresentation on the part of one or both of the defendants. In her Statement of Claim and affidavit opposing this

application, the plaintiff states that she continued to live in the family home for extended periods until 2003, at which point she alleges that the first named defendant took a number of steps to make the home uninhabitable. Thus, it would appear that on some date in 2003 (or, possibly, 2004, being the year also referred to in the Statement of Claim) was when this cause of action accrued. Given the provisions of s. 11 (2) of the Statute of Limitations Act, 1957 (as amended) (the Act of 1957), such a claim is now clearly statute barred given that proceedings were only commenced in May, 2016.

19. The second claim against the second named defendant as administrator of the estate is subject to the time provided for in s. 45 of the Act of 1957. Section 45, as amended by s. 126 of the Succession Act, 1965 provides: -

*"45.(1) Subject to section 71, no action in respect of any claim to the estate of a deceased person or to any share or interest in such estate, whether under a will, on intestacy or under section 111 of the Succession Act, 1965, shall be brought after the expiration of six years from the date when the right to receive the share or interest accrued."*

This section was considered by the Supreme Court in *Gleeson v. Feehan* [1993] 2 I.R. 113. Although this case concerned an action by a personal representative of a deceased owner of land seeking recovery of the land, Finlay C.J. stated at p. 122: -

*"Whilst it is not essential for the decision in this case, and I prefer to reserve a concluded view on the matter until it arises in a case in which it is necessary to determine it, it would appear that there is authority for the proposition that the right of a next-of-kin to share in the estate of an intestate and to sue the personal representative for that share accrues not at the date of the death of the intestate, but rather at the date at which the particular property in respect of which the claim is being made comes into the hand of the personal representative..."*

20. It would therefore appear to be the case that the six years commences from the date when the particular property in respect of which the claim is being made comes into the hands of the personal representative.
21. Identifying the relevant date in the circumstances of this case is not straightforward. Probate was granted to the second named defendant on 16 November 1988 and, subsequently, it is alleged that there was a family settlement in 1995. However, the settlement agreement as is exhibited in the affidavit of Mr. Collins is undated. Further, the plaintiff refers to her signature as being a "*purported signature*" and hers is the only signature that is unwitnessed. Thus, there may be an issue concerning this document that contains the family settlement. However, the defendants also rely on the fact that the last distribution of property on the estate of the deceased, being monies from certain investment policies, were distributed in 2004 when, at the latest, this was when the six years commenced. I accept this submission. It would therefore follow that this claim is also statute barred.

22. As for the claim for personal injuries, it is clear from the Statement of Claim that, from the plaintiff's view, matters were going wrong at the latest in 2003/04 and this, apparently, was the source of her upset and consequent personal injury. The proceedings were clearly issued well outside the time provided for the bringing of such a claim. The plaintiff makes no attempt to rely upon the "date of knowledge" provisions of the Statute of Limitations (Amendment) Act, 1991. Thus, this claim is also statute barred.
23. In her submissions to the Court, the plaintiff, who appeared in person, appeared to make the case that as she was a minor when her father died in 1987 so that the various provisions of the Statute of Limitation Acts do not impact on her. Whilst she was a minor, this was undoubtedly the case, but she attained her majority in September, 1988 so thereafter the relevant time limits apply.
24. In her written submissions, the plaintiff seeks to rely upon the provisions of s. 71 of the Act of 1957. It should be noted that there is no such plea in the Reply which she delivered to each of the Defences. Section 71 provides: -

*"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..."*

25. Having raised s. 71, notwithstanding that it was not pleaded as it ought to have been, this is an issue which will have to be resolved. If the plaintiff can bring herself within the provisions of s. 71, this would afford a defence to the plea that her action is statute barred. This does not apply to the personal injury action, which is clearly statute barred. This is an issue which cannot be resolved on affidavit.

### **Conclusion**

26. To meet the situation referred to, I am going to direct a hearing as to whether or not the plaintiff is entitled to rely on the provisions of s. 71 of the Act of 1957. For the purposes of this hearing I am going to direct the plaintiff, within six weeks of the date of this judgment or order, provide the following to each of the defendants: -
- (i.) Full and detailed particulars concerning the fraud she is relying upon for the purposes of s. 71 of the Act of 1957;
  - (ii.) When this alleged fraud occurred and who perpetrated it;
  - (iii.) The date or dates upon which the plaintiff discovered the "fraud"; and
  - (iv.) The circumstances under which the plaintiff discovered the "fraud" alleged.

27. I will adjourn the motion before the Court for a period of eight weeks so as to enable the defendants to consider responses forthcoming from the plaintiff.