Neutral Citation No: [2013] NICh 5 | *Ref:* **DEE8720**

Ex Tempore Judgment: approved by the Court for handing down | *Delivered:* **16/01/2013**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN

FLEET STOTHER COOKE

v

KENNETH IRVINE COOKE AND MALCOLM DOUGLAS COOKE

DEENY J

Application

[1] In this action Fleet Stother Cooke, as he is known in this jurisdiction, has issued proceedings against his brothers Kenneth Irvine Cooke and Malcolm Douglas Cooke. This action bears the record number 2009/100662. I raise this as there have been a number of other proceedings between these parties, some but not all relating to the estate of their late mother, Mrs E. V. Conway. The proceedings have been of some complexity. I myself have given three rulings in recent months on different aspects of them. One of those rulings was on a summons of 2nd August received by the court on 3rd August 2011 moved by the defendants striking out portions of the plaintiff's Statement of Claim. That matter was adjourned on several occasions as appears from the previous ruling of mine to allow Mr Fleet Cooke to amend the Statement of Claim and time was given to allow him to do that, but ultimately I struck out his Statement of Claim, I think it was his third Statement of Claim, relating to these proceedings.

[2] The defendants then brought the summons with which I deal today, which is dated 28th November 2012 and lodged in court on that day, seeking to strike out the proceedings completely, brought by the Writ of Summons which is all that stands at the moment, on the basis that the endorsement thereupon discloses no cause of action. They do so on foot of Order 18 Rule 19 of the Rules of the Court of Judicature as is implicit, at least, in that summons. Mr Mark Orr QC who appears with

Mr Maurice Neeson for the defendants confirms he is relying on Order 18 Rule 19(1a). The Rule states the following:

> "The court may at any stage of the proceedings order to be struck out or amended any pleading of the indorsement of any Writ in the action, or anything in any pleading or in the indorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence as the case may be……."

[3] I observe that there are three other grounds which can be supported on affidavit. For example in this case the endorsement on the Writ of Summons ends with the words: "more Writs will follow" which might be an element the defendants could rely on in support of a claim for the proceedings being vexatious. But that is not the stand that the defendants are taking here. The defendants are saying that there is no cause of action disclosed in this endorsement.

[4] I think it is right to remind myself that the Rule says no reasonable cause of action is shown; the court should not be distracted by a mere chimera or possibility of somebody construing a cause of action which would be no reasonable cause of action. I have adverted to these matters relatively recently, as I am reminded, in Shaw v Patterson, but that is in a rather different context I feel. Mr Daly, who on this occasion appears, and I think I should say the first occasion on which he appears, for Mr Fleet Cooke, responded to the summons on behalf of the plaintiff in the action properly drawing to the court's attention several of the relevant authorities including a decision of Mr Justice Carswell as he then was in O'Dwyer v Chief Constable [1997] NI 403 to the effect that this power in the court should only be exercised in plain and obvious circumstances. I respectfully agree with that and I respectfully accept the view that there is a high hurdle for the defendants to get over.

[5] One then looks at the endorsement on the Writ and I will set it out in full for the purposes of this ruling.

> "The Plaintiff's claim is for [deletions] BREACH OF TRUST to recover my business I, started in 1960. And fully managed to 1970 which is now part changed to quarry equipment, repair's etc. And for compsation (sic) for loss of (?) earning's while I had to care for E.V. Conway our mother. The agreement that Ken and Malcolm Cooke would use my business on the condition's (sic) that they would make sure E.V. Conway would benefit from money earned from my business to support and care for her as also the business was located on mother's farm. Ken and Malcolm Cooke have failed to

> comply with the conditions agreed and for four business ventures I had to abandon (?) in Cambridge while caring for E.V. Conway. More writs will follow."

One can see, as Mr Daly puts it very properly, that it is inelegant and poorly crafted by the litigant. The courts strive to allow for such factors and the court will strive not to penalise a lay litigant for lack of experience and lack of legal training and I do not do so here. But I do have to discern whether underneath this language used by the plaintiff there is a cause of action. It is alleged there was a breach of trust. Mr Orr properly refers to and Mr Daly rightly does not dispute that there is a widely regarded summary of the elements of that in Halsbury Laws of England Vol 48 at paragraph 501 relating to the meaning of a Trust and it reads as follows:

> "Where a person has property or rights which he holds or is bound to exercise for and on behalf of another or others, or for the accomplishment of some particular purpose or particular purposes, he is said to hold the property or rights in trust for that other or those others or for that purpose or those purposes and he is called a trustee. A trust is a purely equitable obligation and is enforceable only in a court in which equity is administered. The trustee holds the property or must exercise his rights of property in a fiduciary capacity, and stands in a fiduciary relationship to the beneficiary.
>
> The property affected by a trust (the "trust property" or "trust estate") must be vested in the trustee, whether the property is a legal estate, a legal right or an equitable interest, where the legal title is vested in some other person."

[6] Mr Orr invites the court to then analyse this Writ of Summons in the light of that helpful summary and the first thing he points out is manifestly correct: that for there to be a breach of trust here, which is the ostensible cause of action, there must be a trust in the first place and he submits that plainly there is not a trust. The plaintiff's claim does not say that he transferred any property or rights in property whether legal or equitable to his brothers. The claim begins by saying "to recover my business I started in 1960" and it goes on to make several further references to the business of the plaintiff at that time which he is saying he handed over in colloquial terms, but I have to use the precise words he uses in a moment, to his brothers in return for them agreeing to care for their mother. The failure to care for the mother would be the breach. It is, of course, not something that the brothers accept, in any way, that they did fail to care for their mother; in fact she remained on the farm with them, but that is not something I have to address for the purposes of this summons.

[7] There is no assertion of ownership of land here or of property rights. There is a reference to a business which has allegedly been changed to quarry equipment/repairs etc. So there is nothing Mr Orr submits which can be the subject of the trust. Mr Daly does not apply to amend the Writ of Summons. I can well see why. As Mr Orr reminds the court there is evidence before this court, evidence which was not disputed before by Mr Fleet Cooke in the other case, that the land was in fact owned by the mother of these 3 men, Mrs E. V. Conway, and there was no question of legal title or even an equitable interest vested in anyone else. Now I do not take into account the absence of evidence in regard to Order 18 Rule 19(1a) because it is not right to do so. I only mention the evidence point as making it understandable why there is no application to amend, even at this incredibly late stage, an application that would be an extremely difficult one but I can see why because the fact of the matter is that Mr Fleet Cooke was at various times the executor of his mother's estate. He fought these proceedings and it was never claimed that he had a legal interest in property as such, particularly in 1970. Indeed that appears on the endorsement because he says at one point that the business was "located on mother's farm". So the endorsement itself confirms that and so it does appear that the proceedings fail at that first hurdle, albeit a high hurdle in Mr Daly's submission, that there was simply no property or property rights here to be vested. Business covers a multitude of activities and is not synonymous with property.

[8] Mr Orr makes a further and consistent submission here that in any event as Halsbury says undoubtedly rightly the property "must be vested in the trustee". The height of the endorsement is and I quote: "the agreement that Ken and Malcolm would use my business on the conditions that they would make sure E. V. Conway would benefit from money earned from my business to support and care for her as also the business was located on mother's farm". So the allegation is not of vesting. Of course, as there is no property, there is nothing to vest so to that extent Mr Fleet Cooke is right not to claim anything other than use of the business he would say he was conducting on the farm in 1970. But clearly there is not a vesting there even if one were to attempt to interpret business in a way that I think would be inappropriate so at that second hurdle the proceedings would appear to fall also.

[9] They are not saved by the concluding words of the main part of the endorsement which read "and for four business ventures I had to abandon in Cambridge while caring for E. V. Conway". That seems to be an additional complaint because Mr Cooke, the court knows from the other proceedings, claims that he came back to look after his mother and he gave up a business which he conducted in Cambridge under the name of Paul Sanderson, a name he prefers to use when in England where he is currently based. There is no cause of action to be shown there. Counsel also referred to Valentine's Civil Proceedings in the Supreme Court at paragraph 11.178 and 11.179 and the author says at 11.179:

> "Ground (a) must be determined on the face of the pleading without evidence and the cause pleaded must be unarguable or almost uncontestably bad."

One of the two authorities cited for that proposition is Lonrho Plc v Fayed [1992] 1 A.C. 448. The leading opinion was given by Lord Bridge of Harwich. This was an episode in the long running litigation between Lonrho, whose leading director was Mr Tiny Rowland and Mr Mohammed Al Fayed and it was, as here, an application to strike out pleadings under Order 18 rule 19 and Lord Bridge deals with this topic at page 469 pointing out that phrase relied on otherwise, that it is "only to be used in plain and obvious cases".

[10] I do not think I need quote further from that judgement. However, I do want to say one or two words more. If the defendants' case needed bolstering, and of course he would say it does not, Mr Orr also relies on the uncertainty of the matter relied on. If, as Lord Bridge reminds one in his opinion, one takes the plaintiff's case at its height, as one should, could he succeed? Now without prejudice to what I have said already he is saying that he handed over a business not property but if Mr Orr is wrong in thinking that is a fatal point, he then goes on to say nor did he vest it in his two brother Kenneth and Malcolm but again if he is wrong about that and if I am wrong about that because I accept counsel's submissions, he then points out that the endorsement says that the brothers "would make sure E. V. Conway would benefit from money earned from my business to support and care for her". He says that renders this alleged trust void for uncertainty as well as everything else.

[11] One thing is manifestly clear here. Mr Daly did not refer to any written agreement of in or about 1970. In this same action I have heard, of course, Mr Cooke himself, defend his Statement of Claim and he at no stage contended that there was a written agreement or note or memorandum of writing relating to this alleged agreement; that is not a question not only of not taking evidence but simply applying common sense. But of course the Writ does not claim that, the Writ does not say by written agreement of, signed between the parties on the blank day of blank. So the agreement I have to infer, and as I say I know from all the previous hearings, is an alleged oral agreement. Now how can the plaintiff possibly succeed in persuading the court without any written agreement or note or memorandum in writing, even if he got over the first two hurdles of not having vested some kind of property in his brothers, how does he get over the difficulty of showing that they are in breach of whatever the alleged conditions were of this alleged oral agreement made 42 years ago?

[12] It seems to me that that is really unarguable. One cannot see how he would succeed in that. In the phrase of Lord Justice Fletcher Moulton in Dyson v Attorney General [1911] 1KB 410, the cause of action is "obviously and almost incontestably bad". To allege that these men are in breach of an oral agreement made in or about 1970 on which they are being sued on 15 September 2009 means that he is really talking about some breach that has happened in the previous twelve years and it seems to me really beyond the bounds of a reasonable cause of action to suggest that he could persuade a court that he can remember the conditions so clearly as to show that his brothers were in breach of them some 37 or more years later, when he

himself has been unable to express the case in the Statements of Claim, the court has already found, in a coherent form. But as I say that is not essential - that is only to bolster a case which seems to me a hopeless case.

[13] The background to this application with which I deal with before is that the court has patiently, I believe, dealt with the various claims of Mr Cooke. We have had a lengthy hearing in June 2012, I do not have the full details before me, but it was only after some days of evidence that the parties asked for time to reach an agreement and did reach an agreement which was fully opened to the court and which seemed a very sensible agreement and which seemed to be in the interests of the plaintiff. The plaintiff, for some reason best known to himself, declined to agree that this action should be included in the settlement of the other proceedings. That was his right but on testing it one can see that this is not only an unwise decision on his part, he should take what he is entitled to under the agreement of last June, but as the defendants contend these proceedings do not disclose any reasonable cause of action and I therefore strike them out on foot of the defendants' summons.