

Neutral Citation No: [2017] NIQB 86

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: COL10425

Delivered: 12/10/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

2016 No. 21023

BETWEEN:

GERARD McKERNAN AND ORLA McKERNAN

Plaintiffs;

-and-

**ALASDAIR GIBSON, JANE GIBSON
AND FRANCIS JASON McDONALD**

Defendants.

COLTON J

[1] The plaintiffs in this action bring an application to join three parties as defendants pursuant to Order 15 Rule 6 and Order 20 Rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980.

Background

[2] The plaintiffs' claim against the defendants arise from a conveyance dated 8 February 2006 whereby the defendants agreed to sell and the plaintiffs agreed to buy the property contained within Folios AN2042, 30515 and AN4519, County Antrim as registered in Northern Ireland Lands Registry and a portion of area delineated on the map attached to the contract and surrounded by a red line, which such property was occupied under a possessory title ("the property").

[3] The contract for sale included a special condition that the defendants would apply to the Land Registry by way of application by first registration for registration of the possessory title and would furnish the said Land Certificate in respect of the possessory title after registration.

[4] The sale of the property was completed on 8 February 2006 and since that date the plaintiffs have been in exclusive use and possession of the property.

[5] The plaintiffs allege that wrongfully, and in breach of contract, the defendants have failed to comply with the special condition in that they have failed to furnish the said Land Certificate in respect of the possessory title for the property after registration. They allege that this failure represents a continuing breach of the contract, in particular the special condition, by the defendants, which the defendants have failed to remedy despite repeated requests by the plaintiffs.

[6] The plaintiffs say that the defendants are in breach of contract and they seek damages for the alleged breach.

[7] The plaintiffs served a specially endorsed writ with a statement of claim on 4 March 2016.

[8] The first and second defendants entered an appearance on 14 April 2016 via their solicitors, Stewarts. A defence was served on 27 July 2016 in which they deny any breach of contract. The first and second defendants say that in fact they complied with the special condition, that they applied for first registration promptly on or about 24 February 2006 in accordance with the special conditions. They say that in effect the title was not perfected by reason of unforeseen circumstances which were not contemplated by the special condition, in particular that there had been prior registration to a third party of the land in respect of which first registration was sought. They say that the delay in perfecting the title has also been occasioned by the actions and omissions of the plaintiffs.

[9] They further rely on a limitation defence, and assert in the alternative that the plaintiffs' claims are barred by reason of delay, laches and acquiescence.

[10] The title has now in fact been perfected and the only issue relates to damages.

The proposed additional parties

[11] At the time of the conveyance an undertaking was given by Mr Norman Scott, solicitor on 8 February 2006. Mr Scott was the solicitor for the defendants at that time and was a partner in the firm of solicitors F J Orr and Company.

[12] The relevant part of the undertaking was as follows:

“As at completion, we can confirm our undertaking to complete in accordance with contract and in particular;

...

(2) To lodge in the Land Registry and effect registration of possessory title and to furnish Land Registry Folio and Certificate Land Registry map in respect thereof ...”

[13] The plaintiffs say that this undertaking was not fulfilled and they therefore seek an order pursuant to the supervisory jurisdiction of the court as to compensation in respect of failure to comply with the undertaking or alternatively damages for breach of contract as to the undertaking.

[14] At the time the undertaking was given Mr Scott was a partner in F J Orr and Co solicitors, with Mr Samuel Murdoch Beattie, solicitor.

[15] The partnership terminated on 31 December 2007 and Mr Scott joined Stewarts solicitors in January 2008.

[16] Pursuant to an authority signed by the current first and second defendants dated 3 January 2008 all deeds, Wills and files in their name were ultimately transferred to Mr Scott. These documents appear to have been received on 6 March 2009.

[17] Mr Scott continued to work on behalf of the first and second defendants in his capacity as a solicitor for Stewarts until the time of his death in October 2010. Stewarts solicitors continue to act on behalf of the first and second defendants in this matter.

[18] In order to assert their claim in respect of the undertaking the plaintiffs seek to join the following parties.

- (i) Rosemary Temple-Scott as personal representative of the estate of Norman Scott deceased.
- (ii) Samuel M Beattie (the plaintiffs no longer pursue an application to join Joanne M Beattie and Sydney Brown as they were not partners with Mr Scott in F J Orr and Co Solicitors).
- (iii) Stewarts solicitors (a firm).

The Applicable Law

[19] Order 15, Rule 6(2)(b) of the Rules of the Court of Judicature allows the court at any stage of proceedings, to add, inter alia:

“(i) Any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) Any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”

[20] The discretion vested in the court under Order 15 is a wide one and the threshold for meeting the test is a low one. Valentine’s text on Civil Proceedings in the Supreme Court notes that an application by a plaintiff to add or substitute a defendant will usually be granted subject to paying costs thrown away.

[21] Each of the proposed new parties has filed affidavits opposing the application. At the hearing I heard submissions on behalf of each of the parties.

[22] Mr Hopkins BL appeared on behalf of the plaintiffs and moving party.

[23] Mr Donald Eakin, Solicitor, appeared on behalf of Rosemary Temple-Scott.

[24] Mr Samuel M Beattie appeared in person.

[25] Mr Richard Shields BL appeared on behalf of Stewarts solicitors.

[26] I will consider each party in turn.

Rosemary Temple-Scott

[27] Rosemary Temple-Scott is the personal representative of the estate of Norman Scott deceased.

[28] Mr Scott was the solicitor who gave the relevant undertaking.

[29] The plaintiffs’ case in relation to this proposed defendant is straightforward. Firstly, there is a question or issue between the plaintiffs and Mr Scott (through his estate) in relation to an alleged breach of the undertaking. This issue clearly arises “out of, relates to and/or is connected with the relief or remedy claimed” in this action.

[30] In his able submissions Mr Eakin points out that Mrs Temple-Scott had absolutely nothing to do with the issue in question. It has not been proposed that she be sued in a personal capacity but purely in her capacity as representative of the estate of her late husband.

[31] The real substance of his submissions relate to his argument that there has not been any breach of the undertaking and also the issue of delay.

[32] As to the former I accept that there is a real issue here. The affidavit sworn by Ms Moody from Stewarts Solicitors sets out the steps that were taken by Mr Scott to comply with the undertaking. It is clear that he certainly lodged the application in the Land Registry in accordance with the undertaking, but the real issue is whether or not he was able to “effect registration” in accordance with the undertaking. I accept that there is an issue here and a potential defence. However, this is not for me to determine at this stage, rather this is a matter to be determined at trial. If Mr Eakin is correct then, like the defendants, he will enjoy a defence to the plaintiffs’ claim and his client can recover costs if successful.

[33] As to delay this again is a matter to be determined at trial. If his submission is correct in terms of delay/limitation then his client clearly enjoys a delay/limitation defence. This is not a case where a limitation period has expired between the issue of the proceedings and the application to join. If he and the defendants are correct then the limitation defence existed at the time of the issue of proceedings in March 2016 so there is no prejudice in respect of this particular issue. Ultimately it will be for the court to determine whether, as the plaintiff alleges, there was a continuing obligation arising from the undertaking or, whether as the defendants assert, the limitation period has long expired on the basis of an undertaking given on 8 February 2006. Mr Eakin is critical of the plaintiffs’ solicitors in their failure to finalise matters in relation to resolving issues on the title and this too will be a matter which will undoubtedly be the subject of enquiry in the course of the trial.

[34] For these reasons I grant the application that Rosemary Temple-Scott as personal representative of the estate of Norman Scott deceased should be joined as a defendant to this action.

Samuel M Beattie

[35] It is clear from Mr Beattie’s affidavit and from his helpful submissions that at the relevant time he was a partner of Mr Scott in F J Orr and Co solicitors, who gave the undertaking at issue in this case. As a matter of law it was accepted quite properly by Mr Beattie, that as a partner in F J Orr and Co at the time the deceased gave the undertaking, he can be held liable along with the deceased on foot of that undertaking.

[36] Like Mr Eakin he too says that the plaintiffs cannot establish a breach of the undertaking and is also guilty of delay sufficient to sustain a limitation defence. These are matters which are clearly at issue between the parties and it would not be appropriate for the court to make a determination on these issues at this stage. They are matters for trial. The relevant point is that there is an issue to be determined between the parties.

[37] For these reasons I grant the plaintiffs' application that Samuel M Beattie be joined as a defendant in the action.

Stewarts Solicitors

[38] This proposed defendant is the firm of solicitors with whom the deceased practised after giving the relevant undertaking. Can this firm of solicitors be held liable in law for the undertaking given by Mr Scott when he was a partner in F J Orr and Co solicitors?

[39] The affidavit filed on behalf of Stewarts by Charles Edward Stewart is unequivocal.

[40] He says at paragraph 3 of his affidavit that Mr Scott joined the firm as an employee, from F J Orr and Company solicitors (hereinafter FJ Orr). He held the title of salaried partner and he had no equitable interest in Stewarts Solicitors. He goes on to say as follows:

“9. As is often the case when a solicitor moves from one firm to the other, Mr Scott had clients for whom he worked sign a form of authority to allow the release of their files by FJ Orr. However, it is the sole right of clients whether they chose to follow their solicitor of choice when they move to a new firm (hence why forms of authority were sent to clients when Mr Scott moved to this firm).

10. Mr Beatty (the other equity partner in the firm of Stewarts solicitors) and I did not agree, nor would ever have agreed, to Mr Scott or anyone else joining the firm on the basis that we would assume responsibility for liabilities/risks resulting from actions during their career, or their management of files, prior to their involvement with this firm. It is inconceivable that we would even have contemplated that course of action. If that course of action had been mentioned by Mr Scott, we would have rejected that out of hand for a number of reasons, not least to have

agreed to that would have exposed the firm to potential risks/claims that could not be quantified or assessed properly.”

[41] It is clear that Stewarts had nothing whatsoever to do with the conveyance in 2006 or the undertaking given in 2006. It appears that F J Orr, Solicitors, were paid for their work on that transaction. Mr Scott did not join Stewarts until approximately two years after the transaction was completed. He did not give any undertaking after commencing employment with Stewarts in relation to this matter. I agree with Mr Shields’ submission that there is simply no basis upon which an undertaking given by Mr Scott when he was a partner with F J Orr can be attached to a firm of solicitors who employed him years later.

[42] The plaintiffs counter by saying that the existing defendants subsequently became clients of Stewarts. There is no doubt that in accordance with the authority given by the said defendants they transferred their business to Stewarts and that Mr Scott continued to work on their behalf in relation to this matter. That does not in my view mean that Stewarts also became responsible for the undertaking given previously. The plaintiffs further rely on the fact that the notepaper of Stewarts solicitors refers to “Stewarts solicitors incorporating Norman Scott formerly of F J Orr and Co Belfast”. I do not accept that this means that the firm had taken over any of F J Orrs/Mr Scott’s liabilities. I accept what Mr Stewart says in this regard namely that:

“17. It was a form of respect for Mr Scott, and as a PR exercise for his clients, who were fully aware of his seniority and experience that Mr Beatty and I decided to make reference to Mr Scott under letterhead.”

[43] A final matter which the plaintiffs rely on in this regard is the assertion by Mr Samuel M Beattie in correspondence with the plaintiffs’ solicitors to the effect that the deceased “took with him to Stewarts all his existing clients and their files. As far as we are concerned he took with him the liability of any undertakings given on their behalf either before or after his relocation ... We understand Stewarts paid Mr Scott for whatever business he brought with him and in view of their statement that he was incorporated into their practice believe that they are liable to complete or comply with everything that is given.”

[44] In his affidavit Mr Beattie goes on to assert that if there has been any breach of the undertakings given in 2006 they occurred during Mr Scott’s employment by Stewarts or by the other solicitors employed by Stewarts having conduct of the transaction on behalf of the existing defendants.

[45] Whilst the plaintiffs have taken these assertions into account when moving this application it seems to me that on an objective basis these arguments are unsustainable. The evidence of Mr Stewart is unequivocal as to the basis upon which Mr Scott was employed and there is no legal basis for a suggestion that the liability for the undertakings transferred to Stewarts at that point.

[46] I have come to the conclusion that there is no legal basis for an assertion that Stewarts solicitors are responsible for an undertaking given by Mr Scott in 2006 in the circumstances of this case. The fact that Mr Scott continued to represent the existing defendants when he took up employment with Stewarts does not mean that that firm can be liable for the undertaking. They would of course be liable for any proven negligence by him in the course of his work for the defendants after 2008, but that is not the basis of any alleged cause of action here.

[47] I therefore refuse the application to join Stewarts as a defendant in this action.

[48] In refusing the application I am conscious that it remains open for the plaintiffs to issue separate proceedings against Stewarts and open to Mr Samuel M Beattie to issue third party proceedings against Stewarts if either consider there is merit in so doing.