Neutral Citation No. [2011] NICh 15 | *Ref:* **DEE8245**

Ex tempore Judgment approved for handing down. | *Delivered:* **29/6/2011**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

LAVINMORE LLP

Applicant;

-and-

PENFIELD PROPERTIES LIMITED
McCARTAN TURKINGTON AND BREEN
AND DEREK KANE

Respondents.

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DEENY J

[1] This matter comes before the court today on foot of a summons of 2 June 2011 brought by the second and third defendants in the action of Lavinmore LLP against Penfield Properties Limited and McCartan Turkington and Breen, solicitors and Derek Kane a solicitor at the relevant time in that respectable firm of solicitors.

[2] Penfield Properties Limited no longer plays any part in the action. The plaintiff sues because it says it was not given good title to property it purchased by Penfield Properties Limited and it blames the solicitors who were acting in the matter for misleading the plaintiff in effect as to the nature of the title and says that the conduct of the third defendant in particular was such as to amount to deceit by way of recklessness from which certain consequences helpful to the plaintiff would follow.

[3] The case ran for some 6 days in December 2010. It was initially thought that a period of 8 days would suffice to hear it or indeed 6 working days but sadly that proved a far too optimistic estimate as after some 6 days the plaintiff's case was not yet complete.

[4] The matter was then adjourned until 28 September 2011 to be completed over the period of the subsequent fortnight.

[5] The position is that someone on the defendant's part, either Mr Agnew, solicitor, for the second and third defendants or a Mr Thompson, who is apparently the claims manager for the professional indemnity insurers to the second and third defendants, then saw fit to seek a further opinion on the matter from Mr Stephen Gowdy. Mr Stephen Gowdy is a very respectable and well known and able lawyer and he was consulted about this matter. He apparently provided some initial response orally. A meeting was arranged, unfortunately not for some 2 months, and then there was a further chronology set out in the affidavit of the solicitor or one of the solicitors, Sean Robb, of Agnew Andress Higgins supporting the application, which showed that there was a further meeting with Mr Gowdy. That is one contact and two meetings and then he subsequently provided a report on 11 May 2011 which was served on the plaintiff on 13 May 2011. The plaintiff was then served on 25 May 2011 with a proposed amended defence.

[6] Mr Gowdy feels that this whole matter has been conducted under a misapprehension and that in fact because of the provisions of the Land Registration Act (Northern Ireland) 1970 the plaintiffs had been given good title. The plaintiff, through Mr Horner QC and through Mr Keys in his helpful affidavit (a) disputes that that is right and (b) disputes that even if to some degree it was right it was a good and marketable title for the purposes that the other party had made clear it needed a title at that time. These are matters that I have concluded will have to be decided by the court and it is right that the court should not make a decision that might be erroneous in law. That is one of the most powerful reasons in support of the second and third defendants' first application which is to be allowed to proceed with their amended defence at this time and for the rest of the action to be conducted on the basis of that amended defence making that new case.

[7] Mr Lockhart QC, who appears with Mr McMahon for the second and third defendants, has quite properly referred in the skeleton argument to the authorities on this point. The general principle of those, as it happens, English authorities but also in the courts in Northern Ireland is that amendments are allowed even at a late stage if they can be done without injustice. Mr Horner says there is a balancing act here and I accept he is right about that and I can readily accept the great disappointment his clients must feel, having heard their case run well as Mr Horner submits it had in the December hearing to suddenly find themselves being attacked on a completely different front some 5 or 6 months later and only 3 months before the renewal of the hearing. I can understand their distress and disappointment at that even though they are contending that this fresh attack will ultimately fail. Extra costs will be incurred but as is clear on the authorities that can be addressed by a costs order.

[8] I have concluded on balance therefore that it is just to allow the second and third defendants to amend the defence in the way sought. I give leave for that. I give leave for the plaintiff to amend its reply as it thinks fit within 6 weeks of today.

[9] Mr Lockhart on behalf of the second and third defendant goes further than that. He has a second limb to his application and that is that he be entitled to abandon his first expert in the field of conveyancing, Mr Maurice McIvor and substitute for him Mr Stephen Gowdy. Mr Horner very strongly objects to this course of action as has been set out in the affidavit previously referred to by Mr Keys and in Mr Horner's submissions. I have taken into account not only Mr Keys' affidavit but the first affidavit of Mr Robb and the second affidavit which I have read of Mr Seamus Agnew on behalf of the second and third defendants. The court has to ask itself whether having allowed the amendment it is necessary to allow Mr Gowdy to be substituted as a witness and then whether it is just and fair to do so. Mr Horner relies on Order 1 rule 1 legitimately enough and on the general wish of the court, of course, to act fairly between the parties.

[10] I briefly set out what seemed to me the opposing arguments but I am not to be taken as reciting every one which have been ably put before the court by senior counsel nor do I necessarily put them in any particular order.

[11] Mr Lockhart has two strong points in his favour. One, he says it is a matter for him as to which witnesses he calls on behalf of his client and it is not normal or customary for the court to dictate to a party whom they choose to call. If they omit to call the right person then they may fail. It is true to say there is a residuary power on the part of the court to call witnesses itself if it is necessary in the interests of justice but that doesn't really arise here. I respect that point but bear in mind of course that he and those instructing him have already elected to put forward Mr Maurice McIvor and that they did so well before the trial of the action and retained him at the trial of the action and for some months thereafter. I also bear in mind that this is not a case where the first expert witness has become unable to appear through death or illness nor is it a case where Mr Lockhart says "well somebody recommended this expert to us but when I got hold of him I discovered he was incompetent, he hadn't prepared his work properly, he will be a hopeless witness and I am not calling him". What he is saying is that he would prefer to call Mr Gowdy because this is Mr Gowdy's point. He thinks Mr McIvor now accepts the point but he is certainly not attacking the competence of Mr Maurice McIvor and indeed mentioned that he was retained for the same party as Mr Lockhart in some other professional negligence case against a solicitor. It seems to me that those are important points to bear in mind.

[12] Mr Lockhart has a further strong point namely that Mr Faris, the plaintiff's expert conveyancer, had not yet given evidence let alone Mr

McIvor. Therefore the evidence hasn't been given so what by implication he says is the harm in changing his witness.

[13] One difficulty I perceive in that is that in the present conduct of cases in this Chancery Court but akin to that in other divisions of the High Court in serious and complex matters directions were given. The expert reports had been exchanged. They had been responded to in writing. Meetings had been held between the experts. What is more Mr Lockhart put his case to a number of Mr Horner's witnesses. He says most of that would still stand but some part of his case he would have to put afresh to those persons. But what is to be done with the fact that Mr McIvor's report is there. I read it, albeit some months ago, and it was sitting here and it may not be present to my mind but what is to be done with it? The report is to be taken from the files - no doubt that can be done and could be done but Mr Neil Faris, the other very respectable conveyancing expert called by the plaintiff, would in effect have to rewrite his report to respond to Mr Gowdy's report now. And so I have to forget what I read about in Mr Faris' report. And not only does the court as a tribunal of fact which, of course, I sit as in the Chancery Division have to do that but I have to bear in mind the principle evoked by Lord Hewart, Lord Chief Justice in the King v Sussex Justices that justice must not only be done but seen to be done. There must be an impression there seems to me justifies Mr Horner's submissions as to the upset felt by his clients that the court may not be able to put fully from its mind the earlier material put in by Mr McIvor on behalf of the defendants and therefore to some degree they are getting two witnesses.

[14] That is not by any means the only point on behalf of the plaintiff. Generally it is an unattractive proposition and one that the court would deprecate for parties to go witness shopping and expert shopping. It is indeed unfair to the more impecunious party and Mr Horner legitimately reminds the court that pursuant to Order 1 rule 1A one should try and deal with the parties on an equal footing. I take the point on board.

[15] So the court certainly does not want to encourage, on the contrary it wants to discourage, any tendency for people to mend their hands by not only getting second opinions but by changing horses in what is mid stream. I do not and Mr Horner does not accuse the defendants of sharp practice here. The case was not taken out by some device to allow this to be done. The case was taken out for the well known reason that it had taken longer than people had anticipated. So there is no question of sharp practice and I make that clear but it doesn't end the matter. The point being made by Mr Gowdy so far as I can judge it from the affidavits and the conclusions, because I thought it preferable not to read his report in the circumstances, is a point of statutory interpretation which it seems to me can be made by counsel. Of course, in conveyancing contract cases sometimes conveyancers are not called and counsel simply make the submissions to the judge. If it is a good point I am

confident that able counsel such as Mr Lockhart and Mr McMahon can make it to the court. But in addition they have the benefit of calling Mr McIvor and if it is again a good point no doubt Mr McIvor can, in so far as it is appropriate for an expert to do so, make the point to me too. If he is unconvinced of the point well so be it and then counsel will have to make it on their own.

[16] The alternative is to let Mr Gowdy be called and attempt to disentangle Mr McIvor's earlier evidence but I accept the submission of the plaintiff that it would be exceptionally difficult to disentangle it here.

[17] Furthermore I am concerned about the fact, very properly disclosed I may say by the solicitors for the second and third defendants, that they also consulted Mr Arthur Moir, former and now retired Registrar, and that he attended the meeting with Mr McIvor, counsel, solicitors and Mr Stephen Gowdy on 28 February. Now that is certainly not putting the parties on an equal footing. They consult with two potential witnesses. They choose in fact three, the man they already have and two other men and they choose the best one – Mr Gowdy apparently in their judgment. How is that to be remedied? I don't know if Mr Moir has given a written report, I imagine not; I would have been told if he had but how is the unfairness of that to the plaintiff to be remedied? Is Mr Moir to be tendered by the defendants to be cross examined by Mr Horner? Is that fair to Mr Horner who doesn't know what Mr Moir's views are on the matter? It will certainly add to the expense and length of trial. But without doing that and to allow Mr Gowdy to be called it does seem to me unfair.

[18] Then there is the way in which this arose. It's either the claims manager for the insurer or the insurer's solicitors who contacted Mr Gowdy. Mr Gowdy is not apparently on any retainer for the insurers and appears for both sides in these cases. I entirely accept that but he is on a panel appearing for these very same insurers. Again that may not preclude him and indeed I find it doesn't in normal circumstances preclude him acting as an expert when he acts for both sides rather than invariably for one side and I am clear on that point but in the very unusual circumstances existing here is it not a relevant consideration to take into account when one looks at whether this would be a just and fair approach to adopt.

[19] Taking these points into account and the other submissions of counsel I find I am not persuaded that it is proper to allow the second and third defendants to substitute Mr Gowdy for Mr McIvor. I appreciate that this is a very serious matter, perhaps for the third defendant in particular, but if it is a good point that Mr Gowdy has drawn attention to it is a good point and I am confident that I will be able to so find it as a good point with the help of counsel and Mr McIvor.

[20] I give leave for Mr McIvor to amend his report and serve a supplementary report; 4 weeks for a supplementary report from Mr McIvor and 4 weeks again for Mr Faris to respond.