Neutral Citation [2013] IEHC 263

THE HIGH COURT

Record No. 2011/2114P

MAURA HEGARTY

PLAINTIFF

AND

D. & S. FLANAGAN BROTHERS BALLYMORE LIMITED, NATIONAL HOUSE BUILDING GUARANTEE COMPANY LIMITED, MICHAEL ARCHER, AND P.J. MORAN

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 31st day of May 2013

1. Before the court is an application brought by the third named defendant which seeks to have him struck out as a defendant in the proceedings pursuant to O. 15, r. 14 of the Rules of the Superior Courts or in the alternative for an order pursuant to O.19, r. 28 of the rules of the Superior Courts striking out the proceedings as against him on the grounds that they disclose no reasonable cause of action and are frivolous and vexatious, or pursuant to the inherent jurisdiction of the court. Alternatively, an order is sought pursuant to O. 63, r. 9 of the rules setting aside the order of the Master of the High Court of the 20th June, 2012 joining the third named defendant as a party to the proceedings.

2. The background to the present application is that the plaintiff alleges that on or about the 2nd November, 1999 she entered into a building contract with the first named defendant which would see it construct a dwelling at 22 Hyde Court, Roscommon. The third named defendant, an engineer, was instructed in relation to the proposed development. It appears the instructions came from a company called Shellac Limited. Mr. Sean Flanagan who might be described as the principal of the first named defendant is also the principal of Shellac Limited. It appears that on 29th September, 1999 the third named defendant issued a Foundation Inspection Certificate in respect of the property and that on the 7th June, 2000 he issued a certificate of compliance with the planning permission.

3. The plaintiff took up residence in April, 2001 and in December of that year or January, 2002 she noticed cracks on the walls of the property but her initial assumption was that these were settlement cracks.

4. By reference to the pleadings it seems that the plaintiff has now been advised that there are significant defects in the property and specifically has been advised that the foundation was placed on unsuitable ground and the roof structure was insufficiently supported. An Equity Civil Bill was served upon the first named defendant in May, 2007. By order of the Roscommon County Registrar the second named defendant was added as a co-defendant in April, 2009 and was served with an Amended Equity Civil Bill. In December, 2010 the proceedings were transferred to the High Court by order of the Country Registrar. An order of the Master of the High Court on 4th March, 2011 adopted the proceedings as if the action had commenced in the High Court by Plenary Summons. By order of the Master of the High Court on the 20th June, 2012 the third named defendant was joined to the proceedings as a co-defendant. In the course of an affidavit sworn by way of response to the motion now before the court, the plaintiff contends that she was unaware that the third named defendant had certified the foundations of the property until the foundation certificate was made available as part of the discovery process on the 24th January, 2012. Proceedings were served upon the third named defendant which claimed that the Inspection Certificate which stated that the foundations were in substantial compliance with the Building Regulations 1997 and adequate for the purpose for which they were intended was issued negligently and/or in breach of duty including breach of statutory duty. So far as the certificate of compliance of planning permission is concerned it is pleaded that the plaintiff relied on the certificate. Damages are claimed against the third named defendant for negligence and/or breach of duty including breach of statutory duty and/or misrepresentation.

5. In the course of the affidavit sworn by the plaintiff she makes the case that the limitation period in respect of her claim did not begin to run until the date of knowledge of the certificate; the 24th January, 2012.

6. The first matter that requires consideration is whether the procedure that has been adopted is appropriate. The general position is that a party may be joined as a defendant even in circumstances where there are issues as to whether any claim would be statute barred. Generally speaking the Statute of Limitations is a matter of defence. However different considerations arise where a claim is clearly and manifestly statute barred. The issue was considered in the case of *Hynes v. Western Health Board* [2006] IEHC 55 (Unreported, High Court, Clarke J., 8th March, 2006). There, Clarke J. commented as follows:-

> "3.2 I have come to the view that the general proposition, to the effect that a defendant can be joined in proceedings notwithstanding there being issues as to the applicability of the statute to his case, is subject to an exception that the court retains a discretion not to join a defendant where the statute would clearly apply and where in the words of Budd J. [*O'Reilly v. Granville* [1971] I.R. 90] the joining of such a defendant would be "futile".
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> 3.3 It would, it seems to me, be inappropriate for a court to impose upon parties (and indeed the court itself) the burden of dealing, in a wholly unnecessary way, with a number of applications and hearings where the end result of all such applications would necessarily mean that the case against the individual concerned would be dismissed as being manifestly statute barred. A contrary view would, it seems to me, be inconsistent with the policy inherent in the jurisdiction of the court to dismiss a manifestly ill-founded cause of action as identified in *Barry v. Buckley* [1981] I.R. 306.
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> 3.4 I am, therefore, satisfied that the court should not, in a clear case, join a defendant where it is manifest that the case as against that defendant is statute barred and where it is also clear that the defendant concerned intends to rely upon the statute.
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> 3.5 However I am also of the view that *O'Reilly v. Granville* is authority for the proposition that the court should not enter into an inquiry as to whether a claim may or may not be statute barred on the hearing of a procedural motion seeking to join a defendant (or, as here, where a defendant having been joined seeks by a similar procedural motion to have the earlier order set-aside). On that aspect of the matter the only question which the court should ask itself on such an application is as to whether the claim as against the defendant concerned is clearly statute barred. If there is any doubt whatsoever about that fact, then the defendant should be joined, if it is otherwise appropriate so to do, and the issue of the claim being or not being statute barred should be dealt with the in the ordinary way as appropriate to the

circumstances of the case including, if so appropriate, by means of a preliminary issue."

7. Similarly, the Supreme Court in *O'Connell v. The Building and Allied Trades Union* [2012] IESC 36 (Unreported, Supreme Court, 12th June, 2012) came to a similar conclusion with MacMenamin J. stating at paragraph 36:

> "a co-defendant can be joined in proceedings, notwithstanding there being an issue as to whether the statute of limitations applies to his or her case [but that] the court retains a discretion not to join a defendant, but only where the statute would very clearly apply, or where, in the words of Budd J., the joinder of such a defendant would be futile.".

8. In this case there is no doubt that the third named defendant intends to rely on the statute of limitations. The question therefore is whether the claim against the third named defendant is clearly and manifestly statute barred and whether there are any circumstances which would prevent the third named defendant from relying upon the statute. Counsel for the third named defendant says that the limitation period began to run either on the date on which the plaintiff relied on the planning certificate, which was the 2nd November. 1999 or, at the very latest, when damage manifested in December, 2001/January, 2002. The plaintiff has relied on the decision of Herbert J. in *O'Donnell v. Kilsaran Concrete* [2001] 4 I.R. 183. However, I do not believe that case assists the plaintiff as Herbert J. did not find it necessary to express an opinion on what he described as the "vexed question of discoverability" because he concluded that the property damage in question was attributable to an excess of iron pyrites in the construction blocks and was of recent origin, having come into existence not long prior to October, 1998, in a situation where the plenary summons was issued on the 4th June, 1999, which was well within the limitation period.

9. In the present case there is no basis for concluding that damage was not manifest by December, 2001/Janaury, 2002. All the authorities in this area were reviewed by Dunne J. in *Murphy v. McInerney Construction Limited and James Griffin* [2008] IEHC 323 (Unreported, High Court, Dunne J., 22nd October, 2008). Having conducted that exercise she observed as follows:-

> "I find it difficult to come to any conclusion other than that the question of a discoverability test simply does not arise. It is quite clear from the authorities referred to above that a discoverability test does not avail a plaintiff when dealing with a plea that a claim is statute barred under Irish Law".

10. In *Irish Equine Foundation Limited v. Robinson* [1999] I.R. 442, Geoghegan J. was dealing with the construction of an equine centre where a final certificate had issued in November, 1987 and proceedings were issued in January, 1996. The plaintiffs claimed that as there had been no manifestation of damage until the leaks occurred the limitation period only ran from that time. However, it was held that the defects in the building could have been detected by experts at any stage after the construction of the building. The defects had manifested themselves from the time the building had been erected and the statutory period commenced from then.

11. Geoghegan J. commented as follows:

> "It is obvious from those dates that the action in contract is clearly statute barred. It is trite law that the limitation period commences on the date of the breach of contract and not on the date when the damage is caused. In other words, a breach of contract *per se* gives rise to a cause of action. The only question which I have to consider, therefore is whether the action in so far as it is founded on tort, (i.e. the tort of negligence) is likewise statute barred. The contention of the plaintiff is that there was no damage, or at least no damage manifested itself, until the ingress of water through the ceiling of the centre in late 1991. If the period commenced on that date then, quite obviously, the action in so far as it is founded on tort is not statute barred.
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> It is common case that discoverability, as such, cannot be relevant in considering what is the appropriate commencement date in respect of the limitation period. On this point at least, the view of the House of the Lords taken in *Pirelli v. Oscar Faber and Partners* [1983] 2 A.C. 1, represents Irish Law also. This is quite clear from the decision of the Supreme Court in *Hegarty v. O'Loughran* [1990] 1 I.R. 148, even though that particular case dealt with personal injuries and not damage to a building. The reasoning contained in the several judgments in *Hegarty v. O'Loughran* and the criticism voiced of the decision of Carroll J. in *Morgan v. Park Development* [1983] I.L.R.M. 156, indicate beyond doubt that the Supreme Court rejects the discoverability test no matter what the nature of the damage claimed is."

12. In my view the case law in this jurisdiction points to a very clear, albeit very harsh, conclusion. The time-limit on negligence actions begins to accrue on the date on which damage manifests itself, and not from the date on which the damage is discovered. In laying out this principle, McCarthy J. in *Hegarty v. O'Loughran* states at page 164:

> "The fundamental principle is that words in a statute must be given their ordinary meaning and, for myself, I am unable to conclude that a cause of action accrues on the date of discovery of its existence rather than the date on which, if it had been discovered, proceedings could lawfully have been instituted. I recognize the unfairness, the harshness, the obscurantism that underlies this rule, but it is there and will remain there unless qualified by the legislature or invalidated root and branch by this court."

The above passage illustrates that counsel for the third named defendant was correct in claiming that the time limit for taking an action against his client ended in January 2008 at the latest.

It is clear from the above cases, and particularly in *Hynes v. Western Health Board* and in O'Connell that a court ought to consider two main questions when hearing a motion to join a party as a defendant. Those questions, as seen at paragraph 38 of *O'Connell*. are:

> i) Whether the claim as against the intended defendant is "clearly and manifestly statute barred", and
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> ii) Whether "there are no circumstances in which the intended defendant would be debarred either in law or equity from relying upon the statute"

In considering the facts and the legal submissions, both the above questions can be answered in the affirmative. As the claim against the third named defendant is clearly statute barred I will grant the relief sought.

13. In my view, it is indeed clear or manifest that the claim is statute barred. On the view of the facts most favourable to the plaintiff, the cause of action accrued in January, 2002, but the proceedings against the third named defendant were not commenced until 20th June, 2012, more than ten years later. As the issue of discoverability does not arise, it is clear that the claim is statute barred. It would be to do a disservice to the parties to decline to make the orders sought by the moving party now and instead to

compel a further application. Accordingly, I will make the orders sought by the third named defendant.