

THE HIGH COURT

[2014 No. 4753 P.]

BETWEEN

MARK SMITH

PLAINTIFF

AND

MARK CUNNINGHAM, KEVIN SOROHAN, ANNE MARIE SOROHAN AND PAUL KELLY PRACTISING UNDER THE STYLE AND TITLE OF
PAUL KELLY AND COMPANY SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 26th day of June, 2018.

Introduction:

1. The application before this Court is on behalf of the fourth named defendant herein seeking an order that the plaintiff's claim is statute barred by virtue of the provisions of the Statute of Limitations Act 1957 (as amended) ("the Act of 1957").
2. In April 2006, the plaintiff and his then wife entered into negotiations with the second and third named defendants for the purchase of property situated at Gubardorish, Drumlish, County Longford ("the property"). The property was constructed by the second and third named defendants in pursuance of planning permission granted by Leitrim County Council on 4 March 2004. The planning permission was subject to some twelve conditions.
3. On or about 23 March 2006, the first named defendant, an engineer, issued a certificate to the effect that the construction complied with planning permission and Building bye-law Regulations. In July 2006, in purported reliance on this certificate, the plaintiff entered into a contract to purchase the property for the sum of €240,000. For the purposes of this transaction, the plaintiff and his then wife retained the professional services of the fourth named defendant, a solicitor.
4. Some two years after these events, the plaintiff and his then wife entered into a contract to sell the property for the sum of €280,000. This contract was subject to a number of conditions, one being that the property had been constructed in accordance with the conditions of the planning permission and Building bye-law Regulations.
5. On or about 10 June 2008, the plaintiff became aware that the conditions for the grant of planning permission had not been complied with and the property was now considered as being an unauthorised development by Leitrim County Council, who had referred the matter to the Building Control and Enforcement Officer. It followed therefore that the contract for sale of the property which the plaintiff had entered into was now subject to a condition which could not be complied with.
6. Subsequently, the plaintiff received a 28-day notice from the purchaser of the property requiring completion of the sale by 12 October 2008. The plaintiff could not comply with this notice and on 16 October 2008 the purchaser rescinded the contract.
7. The property remained on the market but no further offers were received. The plaintiff claims that in March 2010 the property was valued at less than €100,000.
8. On 26 May 2014, these proceedings were commenced by issue of a plenary summons. The statement of claim was delivered on 25 August 2014. The plaintiff claims damages for, inter alia, negligence and breach of duty. The plaintiff claims that the fourth named defendant, its servants or agents were negligent and in breach of duty in failing to ensure that the plaintiff got a good marketable title to the property and failed to ensure that all legal preconditions were met. The plaintiff also maintained a claim for breach of contract against the fourth named defendant, its servants or agents in the same terms as in the claim for negligence and breach of duty.
9. As a preliminary issue, the fourth named defendant claims that the plaintiff's claim is barred by virtue of the provisions of the Act of 1957.

Relevant Dates:

10. For the purposes of determining the issue the relevant dates are:-

- i. 23 March 2006 – the first named defendant issued a certificate of compliance with planning permission and Building Regulations;
- ii. April 2006 – the plaintiff and his then wife entered into negotiations with the second and third named defendants for the purchase of the property;
- iii. 12 July 2006 – in purported reliance on the said certificate, the plaintiff and his then wife purchased the property for a total sum of €240,000;
- iv. 28 May 2008 – the plaintiff and his then wife entered into a contract to sell the property for a sum of €280,000;
- v. 10 June 2008 – the plaintiff became aware that certain conditions of the planning permission in respect of the property had not been complied with;
- vi. 14 September 2008 – the proposed purchasers of the property served a 28-day notice requiring the plaintiff to complete the sale of the property by 12 October 2008;
- vii. 16 October 2008 – the purported purchasers rescinded the contract as the plaintiff could not complete the sale, due to the alleged non-compliance with the conditions attached to the planning permission;
- viii. 26 May 2014 – the plaintiff issued the plenary summons seeking damages for negligence, breach of duty and breach of contract.

Issue:

11. This Court has to determine whether the plaintiff's cause of action accrued on or after 27 May 2008, that being within six years of the date of issue of the plenary summons and thus not statute barred by the Act of 1957. Although the plaintiff had made a claim for breach of contract, he is relying on his claim for negligence and breach of duty.

Statutory Provisions:

12. Section 11(2)(a) of the Act of 1957 provides:-

"(2)(a) Subject to paragraph (c) of this subsection and to section 3(1) of the Statute of Limitations (Amendment) Act, 1991, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Paragraph (c) is not of relevance to this application and the Statute of Limitations (Amendment) Act 1991 is concerned with actions for personal injury.

Submissions of the Parties:

13. Mr. Paul Fogarty B.L., on behalf of the fourth named defendant, submitted that the plaintiff's cause of action, if any, being the tort of negligence accrued in July 2006 when the plaintiff purchased the property on the basis of what is alleged to have been a false certificate of compliance with the conditions attached to the planning permission. He submitted that it was on that date that the damage occurred. Thus in July 2006 there was both negligence, breach of duty and damage so that for the purposes of the Act of 1957 the plaintiff's cause of action accrued and time began to run. As the plenary summons was not issued until 26 May 2014, in excess of six years from July 2006, it follows, according to counsel, that the plaintiff's action is now statute barred.

14. Mr. Brendan Muldowney, solicitor on behalf of the plaintiff admitted that the negligence and breach of duty occurred in July 2006, i.e. when the false certificate was purportedly relied upon, but submitted to the Court that the damage to the plaintiff only occurred when the contract for the sale of the property was rescinded in October 2008 and the resulted in the alleged financial loss. On this submission, for the purpose of the Act of 1957, the plaintiff's cause of action did not accrue until October 2008 which was within six years of the issue of the plenary summons.

15. Both parties agreed that in order for an action in negligence to "accrue" there had to be both an act of negligence and damage. Whereas there was no disagreement as to when the negligence and breach of duty occurred, i.e. July 2006, there was disagreement as to when the damage occurred so as to start time running.

Consideration of Submissions:

16. The issue as to when the "damage" occurs, in a case such as this, so as to start time running has been considered on many occasions by courts in this jurisdiction and the neighbouring jurisdiction. This Court has had the benefit of the recent decision of the Supreme Court in *Brandley and Another v. Deane and Another* [2017] IESC 83. The judgment of the court was delivered by McKechnie J. on 15 November 2017 and approved in May 2018. *Brandley v. Deane* considered the commencement of the six-year limitation period for property damage claims. Though the action before this Court is not a property damage claim as such, the principles as set out in the judgment of McKechnie J. apply.

17. At para. 2 of his judgment McKechnie J. stated:-

"2. As will become clear over the course of the judgment, there would appear to be five distinct possible starting points from which the clock might run for the purposes...

3. i. The date of the wrongful act – this refers to the date on which the defendant committed the act or omission said to constitute the wrong, even if the consequent damage did not result on that same date. This is the date of the breach of duty.
- ii. The date that the damage occurs – this refers to the date on which the loss which is sought to be recovered actually happened, even where that is subsequent in point of time to the wrong which caused it.
- iii. The date that the damage is manifest – this refers to the date on which the damage was capable of being discovered and capable of being proved, even if there was no reasonable or realistic prospect of that being so.
- iv. The date of discoverability – this refers to the date on which the damage could or ought with reasonable diligence to have been discovered.
- v. The date on which the damage is actually discovered – this refers to the date on which the plaintiff in fact discovered the property damage."

18. At para. 111:-

"111. The reason is this: the above-cited case law puts it beyond doubt that time will not begin to run until the cause of action accrues; equally, it is unquestionable that a cause of action in negligence is not complete until actionable damage has occurred..."

At para. 138, having referred to s. 11(2)(a) of the Act of 1957:-

"viii. I do not see any reason why the manifestation of the damage should not therefore also be the proper start point in property damage claims, particularly as it is well understood that the potential for injustice to a plaintiff is every bit as real in such cases as it is in personal injuries claims. Despite some hesitation in the case law about so declaring, to my mind there is no reason to treat the two differently for limitation purposes. I would, therefore, hold that time starts to run for limitation purposes in property damage claims from the date when the damage is manifest."

"x. As regards what constitutes damage, I accept that there is a definite distinction between a "defect" and the subsequent damage which it causes. Time runs from the manifestation of damage, rather than of the underlying

defect. Thus it is not the latent defect which needs to be capable of discovery: it is the subsequent physical damage caused by that latent defect."

19. It seems to me that fundamental to the decision of McKechnie J. is the distinction between "defect" and "damage". Whereas a "defect" can occur at one point in time the resulting "damage" can occur at another. Thus, in this case, the "defect" occurred in July 2006, i.e. when the false certification of compliance was purportedly relied upon, but the "damage" did not occur to the plaintiff until the contract for the sale of the property was rescinded in October 2008, in excess of two years after the occurrence of the defect.

20. Counsel for the fourth named defendant relied upon the Privy Council decision in *Maharaj v. Johnson* [2015] UKPC 28. This case concerned a defect in title which arose when land was conveyed by a vendor pursuant to a power of attorney in February 1986. In January 2008, some 22 years later, when the purchaser of the lands sought to offer the land as security, a defect in the power of attorney was alleged by the bank involved. The claimants sued the lawyer who had been involved in drawing up the power of attorney for damages for negligence and breach of duty. The defendant maintained that the claim was statute barred under the relevant legislation.

21. In its judgment, the Privy Council ("the board") posed the question, at para. 14, "[w]hen did the claimants suffer the damage as a result of the defendants' breach of duty?" The majority decision of the board was delivered by Lord Wilson:-

"22. The present case is an obvious case of a flawed transaction: it was flawed because it did not convey to the claimants a legal interest in the land and, in the absence of the defendants' breach of duty, they would have entered into an analogous transaction in which it was conveyed to them. The inquiry then becomes: was the value of a full equitable interest in the land on 6 February 1986 measurably less than the value then of a full legal and equitable interest in it? If so, the claimants then suffered actual damage and their action in tort is time-barred..."

The board thus held that the transaction in February 1986, under the power of attorney, was a "flawed transaction" and that was when the damage occurred.

22. Applying the reasoning of the board to the instant case, it would follow that the transaction of July 2006, whereby the plaintiff and his then wife acquired the property, was a "flawed transaction" and this was the point when the damage occurred. In my view, however, this reasoning is clearly not consistent with that of the Supreme Court in *Brandley v. Deane*. On reading the judgment of the board it is clear that the board did not have regard, as McKechnie J. did, to the fundamental distinction between "defect" and "damage". Thus I am satisfied that *Maharaj v. Johnson* is not an authority upon which the fourth named defendant can rely.

Conclusion:

23. In applying the principles set out in *Brandley v. Deane* to the instant case, no damage occurred until the plaintiff and his then wife came to sell the property in 2008 despite there being a defect in the plaintiff's title which occurred when they acquired the property in July 2006. In my view, the precise date that the plaintiff's cause of action accrued was 16 October 2008, the date that the contract for sale was rescinded and the plaintiff suffered the alleged loss. It would have been open to the purchaser to complete the sale for the agreed price notwithstanding the defect in the title and thus the plaintiff would have suffered no loss. However, as the purchasers of the property opted to rescind the contract for sale, as they were entitled to do, that was the point that the damage occurred.

24. By reason of the foregoing, I hold that the plaintiff's claim for negligence and breach of duty against the fourth named defendant is not statute barred by virtue of the provisions of the Act of 1957.