Neutral Citation Number: [2011] IEHC 98

THE HIGH COURT

2001 11994 P

BETWEEN

NOEL MANNING

PLAINTIFF

AND

THE NATIONAL HOUSE BUILDING GUARANTEE COMPANY LIMITED AND THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 4th day of March, 2011.

1. The application

1.1 On this application the first defendant seeks the following alternative reliefs:

> (a) an order dismissing the plaintiff's claim against the first defendant for want of prosecution on the grounds of unconscionable and inexcusable delay, in respect of which relief the first defendant invokes Order 122, rule 11 of the Rules of the Superior Courts 1986 (the Rules) and the Court's inherent jurisdiction; or
>
> (b) as regards the proceedings against the first defendant, an order striking out or dismissing or staying the proceedings on the grounds that the pleadings disclose no reasonable cause of action, are frivolous and vexatious, are bound to fail, are clearly unstateable and are an abuse of the process of the Court, in respect of which reliefs the first defendant invokes Order 19, rule 28 of the Rules and the Court's inherent jurisdiction.

1.2 On 7th October, 2008 the second defendant (the Minister) issued a notice of motion seeking *inter alia* an order dismissing the plaintiff's claim against the Minister for want of prosecution. That motion came on for hearing on 18th November, 2009. By order of the Court (Murphy J.) of that day it was ordered by consent that the proceedings as against the Minister be struck out. Accordingly, the Minister is no longer a defendant in these proceedings.

2. The plaintiff's claim as pleaded

2.1 The characterisation by the plaintiff of the parties originally in these proceedings in the statement of claim delivered on 26th July, 2001 and their respective roles in relation to the various elements of the plaintiff's claim which I will identify later are as follows:

> (a) It is stated that the plaintiff specialises in the design and construction of fire safety systems in the building industry and has patented a system for the prevention of the spread of fire from one building to another called the FireBar system.
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> (b) It is stated that the first defendant at all material times has operated, pursuant to an agreement between the building industry and the Minister, as a regulatory body to ensure that acceptable standards are achieved and maintained in the building industry.
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> (c) It is stated that the Minister is responsible pursuant to s. 3 of the Building Control Act 1990 (the Act of 1990) for making regulations in relation to the design and construction of buildings.

While, for present purposes, the Court accepts that the assertions at (a) and (c) above are correct, the assertion at (b) above is not correct. It is clear on the evidence that the first defendant is not a regulatory body and that this has been acknowledged by the plaintiff. In fact, the first defendant is a company incorporated by the Construction Industry Federation to operate the guarantee or warranty scheme in place for the benefit of purchasers of new houses and apartments, which is known as HomeBond, and, indeed, some of the features of HomeBond are later described in the statement of claim.

2.2 A major element of the plaintiff's case centres on building regulations made by the Minister pursuant to the Act of 1990. The primary focus in the statement of claim is on building regulations made pursuant to s. 3 of the Act of 1990. In the statement of claim, as I understand it, it is intended to refer to the Building Regulations 1997 (S.I. No. 497 of 1997) (the 1997 Regulations). Two aspects of the 1997 Regulations are highlighted. The first is the provisions of Part B of the Second Schedule thereof, which lay down standards for the design and construction of buildings so as to contain the spread of fire. The second is that, pursuant to Article 7 thereof, the Minister published a document entitled "Technical Guidance Document on Fire Safety" (the Guidance Document) for the purpose of providing guidance to persons involved in the building industry in relation to the fire safety provisions of Part B of the Second Schedule. For present purposes, I consider that it is not necessary to get involved in the technical aspects of the plaintiff's complaints of inadequacy in providing guidance in relation to fire safety matters against the first defendant and the Minister. Suffice it to say that the plaintiff contends that the Guidance Document is inadequate in giving guidance as to the design and construction of party walls so as to achieve the objective of the 1997 Regulations in relation to the containment of the spread of fire internally. A similar allegation is made against the first defendant in relation to the House Building Manual (the Manual), which it has published for the guidance of its builder customers, and which the plaintiff pleads is based on the Guidance Document. Specifically, the plaintiff alleges that both the Guidance Document and the Manual contain a diagram which is defective in that compliance with it would not achieve the objective of the 1997 Regulations.

2.3 The plaintiff makes the allegation that both defendants had knowledge of the alleged inadequacy of the standards on fire safety contained in the Guidance Document and the Manual for some considerable time by reason of independently monitored tests carried

out in 1981, 1982 and 1983, which it is alleged also demonstrated that the FireBar system did comply with the requirements contained in the 1997 Regulations in relation to the spread of fire. Further, it is the plaintiff's case that the first defendant has failed to change the Manual and the second defendant has failed to amend the Guidance Document, notwithstanding repeated requests of the plaintiff to do so. It is alleged that, in failing to modify the Guidance Document and the Manual and in failing to give any or any adequate recognition to the FireBar system, which it is alleged is the sole system available in Ireland to meet the requirement of the building regulations, the defendants –

> (a) have been negligent and have acted in breach of duty and breach of statutory duty,
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> (b) are in breach of their statutory duty under the Act of 1990 and the 1997 Regulations, and
>
> (c) are guilty of gross negligence.

2.4 The plaintiff alleges that the effect of the actions of the Minister is that practically all builders of new homes and apartments work to the standards of fire safety set out in the Guidance Document and the Manual and opt for systems which are cheaper than FireBar. Further, it is alleged against both defendants, by reference to the design and construction of party walls as provided for in the Guidance Document and the Manual, that builders have no incentive to install a more expensive but safer system of fire protection. The marketing of the FireBar system has been hindered, it is alleged, by the manner in which the defendants operate fire safety standards in the building industry.

2.5 Another major element of the plaintiff's case, as pleaded, is based on an allegation by the plaintiff that the marketing of the FireBar system has been hindered by the first defendant having "effectively prohibited the use of the FireBar system". The basis for this allegation, as pleaded, is a letter of 27th March, 2000 from the first defendant to Kingscroft Developments Ltd. (Kingscroft) following inspections by the first defendant at Kingscroft's at development sites in Swords, Lucan and Leixlip. An extract from that letter is quoted in the statement of claim. To put the extract in context it is necessary to refer to the entirety of paragraph 3 of the letter which states as follows:

> "Fire stopping at party walls. On the sites in Swords and Lucan it was noted that metal channel type of fire stopping was being used. On the site in Swords we were advised by Colin McGuirk that a representative of FireBar stated that this was HomeBond required. We totally refute this allegation and point out that the fire stopping detail and method of construction carried out on the sites was totally unacceptable. In situations where the metal strip was being used in an attempt to achieve fire stopping, this was totally unacceptable and not only would it cause problems with fire stopping but also will cause problems with respect to potential water penetration."

The last sentence of that quotation is quoted in the statement of claim.

2.6 In the letter of 27th March, 2000 Kingscroft was informed of the requirements of the first defendant in the penultimate paragraph which, insofar as is relevant, stated:

> "We now require your proposals for addressing these issues on site. These will include … to lift the tiles at the party wall area and ensure that the method of construction for fire stopping complies with the requirements of the Irish Building Regulations. ….. We also advise that we require independent certification on the fire stopping … ."

Following the quotation from the letter of 27th March, 2000, it is pleaded in the statement of claim that builders who used the FireBar system could not obtain a HomeBond certificate and that the houses and apartments that used that system were rendered virtually unsaleable. In their response dated 13th November, 2002 to a notice for particulars raised by the solicitors for the first defendant, the solicitors then on record for the plaintiff replied to a request for details of houses or apartments alleged to have been virtually unsaleable on the ground alleged as follows:

> "We understand that the plaintiff is not aware of any individual house or apartment in which the FireBar system was used which has been ultimately refused a HomeBond certificate and was therefore unsaleable. The point being made in paragraph 16 of the statement of claim was that in view of [the first defendant's] comments, Kingscroft … were, by inference, entitled to assume that a house incorporating the FireBar system would not obtain a HomeBond certificate. It is submitted this would render a house virtually unsaleable".

2.7 The legal basis of the plaintiff's claim for relief, as pleaded, by reason of the alleged misleading and incorrect statements contained in the letter of 27th March, 2000 is that the first defendant was guilty of negligence and negligent misstatement, which is continuing. However, there is a recognition in the plaintiff's replying affidavit in answer to this application that the first defendant may have abandoned its "open hostility" to the plaintiff's product in or around September 2004.

2.8 In outlining another element of the plaintiff's case, the plaintiff variously characterises the role of the first defendant as the operator of the HomeBond scheme and does so somewhat inconsistently. First, it is alleged that, because eligibility for State grants for new houses is conditional on the availability of a HomeBond guarantee, the first defendant is in a powerful, if not dominant, position in the Irish market in determining the materials and systems used in the construction of new houses and apartments. Later it is alleged that, because the members of the first defendant constitute the bulk of the building industry in Ireland, the first defendant is in a dominant position in the Irish building market, and that, by limiting access to production and technical developments in that market to the prejudice of the plaintiff, it is abusing that dominant position. That allegation is preceded by an assertion that the manner in which the first defendant operates the HomeBond scheme – with fire safety standards which are known to be inadequate while maintaining low costs for its members – has the effect of restricting access to the house building market and restricting technical development and investment in that market.

2.9 The remaining elements of the plaintiff's case were originally targeted at both defendants. In the statement of claim the plaintiff asserts that the FireBar system is the only system available which provides effective compliance with the provisions of the 1997 Regulations. It is contended that the defendants, being aware of the independent tests carried out and the effectiveness of the FireBar system, have not acted in a fair and reasonable manner or in accordance with fair procedures and natural justice in consideration of and recognition of the adequacy of the FireBar system. Finally, it is asserted that the inadequate standards introduced by the defendants in respect of fire safety constitute an infringement of the plaintiff's right to earn a livelihood.

2.10 The reliefs sought by the plaintiff in the statement of claim are the following:

> (a) a declaration that the FireBar system is in full compliance with the provisions of the 1997 Regulations;

(b) a declaration that the Manual is not in compliance with the 1997 Regulations;

(c) a declaration that the Guidance Document is not in compliance with the 1997 Regulations;

(d) damages for –

(i) breach of duty and breach of statutory duty;

(ii) breach of the Competition Acts 1991 – 1996,

(iii) negligence and negligent misstatement;

(iv) breach of fair procedures and natural justice;

(v) breach of the constitutional right to earn a livelihood.

3. Procedural chronology

3.1 The following is the chronology of the procedural aspects of the proceedings as against the first defendant:

24th July, 2001:	plenary summons issued
26th July, 2001:	statement of claim delivered
8th March, 2002:	request for further and better particulars from first defendant
13th November, 2002:	replies to request
26th August, 2003:	defence delivered by the first defendant
4th May, 2004:	notice of change of solicitor for plaintiff
16th June, 2004:	first defendant's application for discovery
8th July, 2004:	order for discovery
9th December, 2004:	application of first defendant to compel discovery
28th January, 2005:	plaintiff's affidavit of discovery
4th May, 2005:	plaintiff's request for voluntary discovery from the first defendant
20th May, 2005:	refusal of request by first defendant
25th November, 2006	plaintiff's further request for voluntary discovery
2nd February, 2007:	further refusal of request by first defendant
6th February, 2007:	notice of intention to proceed
29th May, 2008:	plaintiff's motion for leave to amend statement of claim
24th June, 2008:	notice of intention to proceed
18th November, 2009:	order of the Court (Murphy J.) recording that the plaintiff did not wish to proceed with motion to amend statement of claim
	awarding costs of that motion to the first defendant
	ordering that by consent the plaintiff's proceedings against the Minister be struck out and that the issue of costs of the Minister's motion be adjourned
27th November, 2009:	order of the Court (Murphy J.) dealing with the issue of costs between the plaintiff and the Minister

3.2 It is necessary to make some observations on the above chronology by way of explanation. The second notice of intention to proceed was not alluded to either in the grounding affidavit supporting this application sworn by Dr. Eugene Farrell on behalf of the first defendant or in the written submissions of the first defendant. However, the plaintiff in his replying affidavit has averred that the notice of intention to proceed dated 24th June, 2008 was served on both defendants and was followed by considerable activity between the plaintiff and the Minister, of which the first defendant was kept apprised. Having regard to the totality of the evidence before the Court, that is to say, the grounding affidavit of Dr. Farrell, the replying affidavit of the plaintiff and the second affidavit of

Dr. Farrell, what I understand to be the position in relation to the plaintiff's application to amend the statement of claim is that it was initiated by a notice of motion dated 29th May, 2008, which was returnable on 25th June, 2008. However, the issuance of the notice of motion was technically defective because no proceeding had been taken in the action for in excess of a year before it was issued. That was corrected by the service of the second notice of intention to proceed on 24th June, 2008. The motion to amend the statement of claim was given a new return date. That motion was in being until the order made on 18th November, 2009 when it was effectively withdrawn. It is clear from the perfected order that counsel for the first defendant was present in Court on 18th November, 2009 and that the costs of the motion to amend the statement of claim were awarded to the first defendant against the plaintiff. As is clear from what I have said above, the consent order striking out the proceedings against the Minister was also made on 18th November, 2009. However, the issue of costs as between the plaintiff and the Minister was adjourned until 27th November, 2009, so that the perfected order bears the date 27th November, 2009.

3.3 This application was initiated by a notice of motion dated 27th May, 2010.

4. Strike out for want of prosecution/delay?

4.1 The Court has had the benefit of helpful outline written submissions from both parties on both issues which arise on the application of the first defendant. In relation to the application to strike out for want of prosecution and delay there was very little divergence between the parties as to the relevant principles applicable to such an application, which are well established.

4.2 The applicable principles were summarised by the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in the judgment of Hamilton C.J. at p. 475 *et. seq*. In the recent past they have received the imprimatur of the Supreme Court in *Desmond v. M.G.N.* [2009] 1 I.R. 737 and in *McBrearty v. North Western Health Board* [2010] IESC 27. On this application the application of the foregoing principles gives rise to the following issues:

> (a) whether the first defendant has established that there has been inordinate and inexcusable delay on the part of the plaintiff in prosecuting the proceedings;
>
> (b) even if the delay has been both inordinate and inexcusable, whether, on the facts, the balance of justice is in favour of or against the proceeding of the case; and
>
> (c) in considering where the balance of justice lies –
>
> > (i) whether the delay and consequent prejudice, on the facts of the case, are such as to make it unfair to the first defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
> >
> > (ii) whether there has been a delay on the part of the first defendant and, if so, whether such delay or conduct of the first defendant amounts to acquiescence on the part of the first defendant in the plaintiff's delay,
> >
> > (iii) whether by its conduct the first defendant has induced the plaintiff to incur further expense in pursuing the action, the weight being attached to this factor depending on the circumstances, and
> >
> > (iv) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause serious prejudice to the first defendant, which, in my view, is the factor to which most weight should be attached.

4.3 It was submitted on behalf of the first defendant that there has been inordinate delay on the part of the plaintiff in prosecuting these proceedings, in that the proceedings commenced just short of ten years ago in 2001 and the pleadings closed in October 2004 when the Minister's defence was delivered. While it is true that, given that the plaintiff has never delivered a reply, the matter could have been set down for trial over six years ago when the defence was delivered, the first defendant's application for discovery against the plaintiff was still ongoing at that stage. However, from the time the plaintiff made discovery in January 2005 until it brought the motion to amend the statement of claim almost three and a half years later, in my view, there was inordinate delay on the part of the plaintiff because the plaintiff's two requests for discovery from the first defendant, which were refused, were not pursued and did not advance the process. The fact that the plaintiff's motion to amend its statement of claim was pending for another year and a half and then was effectively withdrawn exacerbated the delay on the part of the plaintiff. I have no doubt that the delay in prosecuting the proceedings as against the first defendant was inordinate by the time the first defendant initiated its application to strike out for want of prosecution in May 2010.

4.4 The explanations for the delay advanced by the plaintiff in his replying affidavit are the following;

> (a) that there was a degree to which it was difficult for persons, obviously meaning the plaintiff's legal advisers, to get "fully *au fait*" with the matter because of the amount of correspondence and other papers generated over nearly thirty years and the time it took the legal advisers to feel that they had properly grasped the technical issues;
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> (b) changes of legal advisers, both solicitors and counsel;
>
> (c) the detail which had to be addressed by the plaintiff, for example, in responding to the first defendant's request for further particulars.

Further, counsel for the plaintiff sought to advance as an excuse the fact that in the relatively recent past the plaintiff was involved in "a key application", that is to say, the Minister's application to strike out, which occupied the time of the plaintiff and his legal advisers. None of the foregoing matters, in my view, amounts to a reasonable explanation for the delay on the part of the plaintiff in prosecuting his action against the first defendant. Accordingly, I have come to the conclusion that the delay in prosecuting the proceeding was inexcusable.

4.5 Even though I have found that the delay on the part of the plaintiff in prosecuting the proceedings against the first defendant has been inordinate and inexcusable, nonetheless, in exercising the Court's discretion, I must consider whether the balance of justice is in favour of striking out the proceedings or allowing them to continue, having regard to the factors outlined in the *Primor* case. On the crucial issue as to whether the first defendant is likely to be prejudiced in the defence of the action at this remove, so that there is a substantial risk that it will not have a fair trial, Dr. Farrell in his grounding affidavit has asserted that the first defendant is prejudiced because the plaintiff relies on events which occurred close to thirty years ago, referring to the tests carried out in 1981,

1982 and 1983 relied on in the statement of claim and adverting to his own memory difficulties in relation to those tests. His evidence is that he can only remember being in attendance at one test and he cannot recall when it took place or any of the details, nor can he recall carrying out a detailed inspection of the test houses. He also has difficulty in identifying the personnel of the first defendant who would have interacted with the plaintiff since the 1980s and some at least of them are no longer employed by the first defendant and may not be readily available to the first defendant. Apart from pointing out that the first defendant has not identified any witness who will not be available to it because of delay, the answer of counsel for the plaintiff to the prejudice complaints is that the case will not be "a recollection case" but will be an "expert evidence" case analogous to the *McBrearty* case, a "documents case" and a "legal issues case". It was submitted that the tests, once proven, will speak for themselves and Dr. Farrell's recollection will not add anything.

4.6 While the nature of the tests is not explained in the evidence before the Court, I assume they are capable of being replicated. In any event, the first defendant was aware that the plaintiff was basing his case as to the inadequacy of the standards prescribed in the Guidance Document and the Manual and the superior quality of the FireBar system on the tests for approximately nine years before the issue of prejudice was raised. I am not satisfied that the delay in prosecuting these proceedings has caused, or will cause, the first defendant serious prejudice, nor am I satisfied that the delay gives rise to a substantial risk that is not possible for the first defendant to fairly defend the proceedings. I attach some weight to the fact that the first defendant actively defended the proceedings until it received the plaintiff's discovery in January 2005 and addressed the plaintiff's two requests for voluntary discovery, albeit in a negative manner. I also attach some weight to the fact that the first defendant apparently resisted the plaintiff's application to amend the statement of claim and was rewarded for doing so by being awarded its costs against the plaintiff, when he effectively withdrew the application. Finally, I attach some weight to the fact that the first defendant stood by for over a year and a half from the initiation by the Minister of his motion to strike out for want of prosecution before bringing a similar application.

4.7 For all of the foregoing reasons I have come to the conclusion that the balance of justice does not favour striking out the proceedings at this juncture merely for want of prosecution or delay.

5. Strike out on the ground of no cause of action?

5.1 On the issue as to whether the proceedings should be struck out under the Rules or under the Court's inherent jurisdiction on the ground that the pleadings disclose no cause of action or on the ground that the proceedings are bound to fail and constitute an abuse of process, once again the law is well established and there is little or no controversy as to the legal principles applicable. Both parties referred to the recent decision of the High Court (Clarke J.) in *Salthill Properties Ltd. and Brian Cunningham v. Royal Bank of Scotland Plc and Ors*. [2009] IEHC 207, where the relevant principles are outlined. While the application of the first and second defendants in that case to have the proceedings dismissed invoked the doctrine of *res judicata* and the rule in *Henderson v. Henderson*, which was a special feature of the case, the exposition of the legal principles in relation to the broad issue of dismissal on the basis that the action is bound to fail is relevant to this application.

5.2 As Clarke J. pointed out (at para. 3.1) the leading case on the topic is the decision of Costello J. in *Barry v. Buckley* [1981] I.R. 306. It is instructive to quote in part the following passage from the judgment (at p. 308) quoted by Clarke J.:

> "… the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: … . The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; … . This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, … ."

5.3 An important aspect of the judgment of Clarke J. from the perspective of the first defendant is to be found in para. 3.9, in which he considers the approach which the Court should take to the evidence presented on an application to dismiss, stating:

> "It has often been noted that an application to dismiss as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established."

Clarke J. went on, in para. 3.10, to emphasise the different role which documents may play in proceedings. In cases, such as the example quoted in the above quotation, involving contracts and the like, the document itself may govern the legal relations between the parties, so that the Court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned. He differentiated other cases where the documents are not vital in themselves save that they may cast light on the underlying facts which may be at the heart of the proceedings concerned, referring to correspondence, minutes of meetings, memoranda and the like, which do not, of themselves, create legal relations between the parties. He emphasised, in para. 3.11, the importance of not confusing cases which are dependent on the documents themselves with cases where the documents may be a guide as to the underlying facts which need to be determined in order to resolve the issues between the parties. He dismissed a submission made on behalf of the plaintiffs that the Court was not entitled to engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the Court (in para. 3.12), pointing out that there is nothing to prevent a defendant producing contractual documents governing the relations between the parties and attempting to persuade the Court that the plaintiff, who has asserted that he entered into a contract with the defendant which contained certain express terms, has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses.

5.4 However, in a passage (in para. 3.13), which was relied on by the counsel for the plaintiff in this case, Clarke J. indicated that the Court need not, and should not, require a plaintiff to be in a position to show a *prima facie* case on an application to dismiss in order that such application should fail. He pointed out that there have been many cases where the crucial evidence which allowed a plaintiff to succeed only emerged in the course of the proceedings. He summarised the position as follows (in para. 3.14):

> "It is clear from all of the authorities that the onus lies on the defendant concerned to establish that the plaintiff's claim is bound to fail. It seems to me to follow that the defendant must demonstrate that any factual assertion on the part of the plaintiff could not be established. That is a different thing from a defendant saying that the plaintiff has not put forward, at that time, a *prima facie* case to the contrary effect."

5.5 The first basis on which the first defendant contends that the plaintiff's case is bound to fail is that his claim for relief, both declaratory and for damages, in reliance on the contents of the Manual is bound to fail. It was asserted that this is a fact which the plaintiff has indirectly acknowledged, in that the plaintiff does not contend that the Manual does anything other than reflect the contents of the Guidance Document prepared by the Minister, thus raising the question as to how it could give rise to a cause of action against the first defendant. The more fundamental basis on which the viability of the case based on the Manual is challenged is that, the plaintiff having abandoned his claim against the Minister on foot of the Guidance Document, he can have no claim against the first defendant arising from the contents of the Manual, which merely mirrors the contents of the Guidance Document. The response of the plaintiff was that the withdrawal of the claim against the Minister does not have the consequences contended for because, it was asserted, the plaintiff has not abandoned his entitlement to seek a declaration that the contents of the Manual and of the Guidance Document are not in compliance with the 1997 Regulations. However, insofar as it needed to be addressed, that answer did not address an assertion of the first defendant that s. 35(1)(h) of the Civil Liability Act 1961 (the Act of 1961) has come into play. That paragraph provides that for "the purposes of determining contributory negligence" –

> "where the plaintiff's damage was caused by concurrent wrongdoers and after the occurrence of the damage the liability of one of such wrongdoers is discharged by release or accord made with him by the plaintiff, while the liability of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer whose liability is so discharged;"

What the first defendant argued was that, the plaintiff, having agreed to release the Minister from the proceedings, has thereby become responsible for the acts of the Minister, so that the plaintiff cannot hope to recover against the first defendant in relation to the contents of the Manual since it is based on the contents of the Guidance Document for which the plaintiff is now responsible by virtue of s. 35(1)(h).

5.6 In my view, the argument based on s. 35(1)(h) is somewhat convoluted and, in any event, on its face, falls short of the test which the Court has to apply, which is whether the plaintiff's claim against the first defendant is bound to fail. The issue which that test raises in relation to the element of the plaintiff's case based on the publication and continuance of the Manual in the form which the plaintiff contends is defective is whether the first defendant has established that the plaintiff cannot obtain the reliefs he claims in reliance on his allegations of wrongdoing against the first defendant in relation to the Manual.

5.7 In relation to the declaratory relief claimed by the plaintiff, in my view, the position is as follows:

> (a) Counsel for the first defendant was correct in his submission that a declaration that the FireBar system is in full compliance with the 1997 Regulations cannot be pursued against the first defendant having regard to the case pleaded against the first defendant. As a matter of fact, the first defendant does not have a regulatory function in relation to the making or the enforcement of the 1997 Regulations. It is the Minister who bears that responsibility. The Minister is no longer in the case.
>
> (b) Similarly, the declaration sought in relation to the Guidance Document, which, in substance, would appear to be a declaration that there is an internal inconsistency in the Guidance Document between the text and a diagram, cannot be maintained against the first defendant. The Guidance Document is the Minister's document. That declaration could only be obtained against the Minister, who is no longer in the case.
>
> (c) The application for a declaration that the Manual is not in compliance with the 1997 Regulations is obviously targeted at the first defendant. However, it is common case that, in the Manual, the first defendant has replicated the Guidance Document which was issued by the Minister under the 1997 Regulations, which, in turn, were made by the Minister on the authority conferred on him by the Act of 1990. The plaintiff has abandoned his claim against the Minister that the Guidance Document is not in compliance with the building regulations and, having regard to what I have stated at (b) above, he cannot pursue the claim in relation to the Guidance Document against the first defendant. Accordingly, there is no basis on which the Court could hold that the Manual is not in compliance with the 1997 Regulations.

5.8 It is important to emphasise that the first defendant is a private company; it is not a public organisation. Insofar as the plaintiff has a cause of action against the first defendant arising out of his complaints against the first defendant, he is limited to private law remedies. In his replying affidavit the plaintiff has averred that his primary objective has been a public interest objective – the development of structural fire safety. That is manifestly a worthwhile objective. However, if the plaintiff were to attempt to pursue it by alleging wrongdoing against a public body, such as the Minister, an issue as to whether the plaintiff would have *locus standi* might arise. It is neither necessary nor appropriate to address that issue here. However, as regards the first defendant, the issues which arise in these proceedings relate to whether the plaintiff is bound to fail in his pursuit of private law remedies for the wrongs he alleges against the first defendant.

5.9 Although the claim for damages for breach of statutory duty was not relied on by counsel for the plaintiff in support of his opposition to the first defendant's assertion that the plaintiff's case is bound to fail, the claim for damages for breach of duty, in essence, negligence, was in issue and needs to be considered in relation to the element of the plaintiff's case based on the Manual. In answer to the allegation of negligence, it was the position of the first defendant that it does not owe a duty of care to the plaintiff, not merely, as the response of the plaintiff suggested, that there has been a failure on the part of the plaintiff to plead explicitly the nature of the duty of care in the statement of claim. On what I consider to be the crucial question, counsel for the first defendant asked rhetorically, what duty of care does his client owe to the plaintiff? That question has to be addressed in the context of the plaintiff's complaint in relation to the Manual. Apart from the complaint that it does not comply with the 1997 Regulations, which on the basis of what is stated at 5.7 above, I consider cannot be pursued, the nub of the complaint as to the impact of the Manual on the plaintiff, as pleaded, is that it sets too low a standard, thereby inducing the first defendant's builder customers of fire safety systems not to opt for the plaintiff's dearer, but safer, system. The first defendant operates a guarantee scheme which the construction industry funds for the benefit of purchasers of new houses and apartments. It cannot be gainsaid that the first defendant must ensure that the standards it imposes in relation to the design and construction of the premises in respect of which it issues guarantees to the purchasers are fully compliant with the law. It unquestionably owes a duty of care to the purchasers of the premises to ensure such compliance. However, in my view, the first defendant owes no duty to providers of services to building contractors, such as the FireBar system, to impose standards which are conducive to the marketing of the product of a particular service provider as against another, even if the product of the former is superior. Therefore, the plaintiff's claim in negligence based on the content of the Manual is unstateable.

5.10 The second major element of the plaintiff's claim, as pleaded, is the alleged prohibition by the first defendant of the use of the FireBar system by builders availing of the HomeBond scheme. While he acknowledged that the complaint, as pleaded, is limited to the letter of 27th March, 2000 to Kingscroft, it was suggested by counsel for the plaintiff that the plaintiff believes that there were other

similar actions on the part of the first defendant and the possibility of the plaintiff seeking an amendment of the statement of claim was mooted. Counsel for the first defendant pointed out that there is no affidavit evidence to support the suggestion, which is true. He also pointed out that the plaintiff had withdrawn an application to amend the statement of claim, as outlined earlier. The jurisprudence does recognise that "if the statement of claim admits of an amendment which might …, save it and the action founded on it, then the action should not be dismissed", *per* McCarthy J. in *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425 at p. 428. However, there is no factual basis on which the Court could conclude that an amendment to the statement of claim, if sought, would be granted at this late stage in the process, almost a decade after the proceedings were initiated, and, even if leave to amend was granted, it would save the plaintiff's case. Accordingly, the Court must address this element of the plaintiff's claim by reference solely to the letter of 27th March, 2000.

5.11 As the passages from the letter of 27th March, 2000 quoted above disclose, what the letter of 27th March, 2000 conveyed to Kingscroft was that the fire stopping detail and method of construction which had been carried out on the sites which had been inspected was totally unacceptable and the basis on which they were unacceptable was explained. The direction which the first defendant issued to Kingscroft was to ensure that the method of construction for fire stopping complied with the 1997 Regulations. That letter did not, on any construction of it, prohibit the use of the FireBar system or material forming part of that system. I do not think it is open to the interpretation, as suggested by counsel for the plaintiff, that it was condemnatory of the plaintiff's product and was wholly destructive. The letter outlined deficiencies and required remedial works not only in relation to fire stopping, but also in relation to the fixing of tiles and the placing of damp-proof courses under windows.

5.12 Moreover, Dr. Farrell in his second affidavit exhibited correspondence which post-dated the letter of 27th March, 2000 which, it was contended, illustrated that the plaintiff acknowledged at the time that the fire stopping at the Kingscroft sites was incorrectly installed. Having regard to the analysis contained in the judgment of Clarke J. in the *Salthill Properties Ltd*. case, I think it is appropriate that the Court consider that correspondence on this application. By letter dated 27th April, 2000 from the plaintiff to the first defendant, which was addressed to Dr. Farrell, the plaintiff commented on the contents of the letter of 27th March, 2000 to Kingscroft, a copy of which had been furnished to him by Kingscroft. Having stated that he had spoken with the first defendant's Inspector by phone in relation to the "incorrect or otherwise installation" of the FireBar system in certain houses at Lucan, the plaintiff continued:

> "I am in absolute agreement with [the Inspector's] observations, as I have inspected same to find that the ***units were indeed incorrectly fitted***. I have met with the tiling contractor's personnel on site … to make the necessary arrangements for the inspection of same by me, in their presence. The Tiling contractor was quite apologetic for the errors made on the installation of the firebreaks." (Emphasis in original).

The plaintiff went on to state that he had obtained an undertaking from the tiling contractor to have the problem, which he described as "this most serious error", corrected and to ensure that such errors would not be repeated. While the letter of 27th April, 2000, which ran to ten pages, went on to complain that the first defendant had failed in his duties to its members to issue a directive regarding a fire stopping method, which the plaintiff contended was "an inherent known design failure", it was a clear acknowledgement that the approach adopted by the first defendant in the letter of 27th March, 2000 in relation to fire stopping at party walls of the premises which had been inspected was justified.

5.13 Accordingly, the plaintiff's claim of interference by the first defendant with its business in reliance on the letter of 27th March, 2000 is bound to fail. In any event, it would appear that, given that the plaintiff has acknowledged that he is not aware of any house or apartment which has been denied certification by the first defendant on account of the use of the Firebar system, even if he could establish that the letter of 27th March, 2000 was the source of some tortious liability on the part of the first defendant, he would be unable to prove any loss arising from that wrong.

5.14 In relation to the remaining elements of the claim, as pleaded in the statement of claim, on which considerably less emphasis was laid by counsel for the plaintiff than the major elements with which I have dealt above, I would make the following observations.

5.15 No proper analysis of the plaintiff's claim for damages based on an alleged breach of the Competition Acts 1991 to 1996 was advanced on behalf of the plaintiff, although it was submitted that the situation is now governed by the Competition Act 2002 and that there has been a breach of s. 5 of that Act. Counsel for the first defendant was dismissive of that claim, stating it was unstateable on the ground that the first defendant is in the business of selling bonds for the benefit of house purchasers and it is not in the business of regulating fire safety systems. It was further submitted that the plaintiff has no *locus standi* to advance the case against the first defendant on the basis of alleged anti-competitive measures. Fortunately, having regard to the inadequacy of the submissions of both sides, I find it unnecessary to wander into the realms of competition law. The factual foundation of this element of the plaintiff's claim is that, in operating its guarantee business, the first defendant applies fire safety standards which are known to be inadequate and to be contrary to law, thereby restricting access, including the plaintiff's access, to the house building market and restricting technical development and investment in that market. That foundation has to be considered in the light of the current status of the element of the plaintiff's claim based on the Manual, which I have already found to be unsustainable, but the basis of which is that the first defendant applies fire safety standards laid down in the Guidance Document made by the Minister under the 1997 Regulations, which, in turn, were made by the Minister under the Act of 1990. As the plaintiff has abandoned his challenge to the validity of the Guidance Document, the only inference which the Court can draw is that the first defendant is applying fire safety standards which are adequate and in accordance with law. Accordingly, in my view, the factual basis of the competition law element of the claim must fall away, and with it this element of the claim.

5.16 The element of the claim based on fair procedures and natural justice has no foundation either in reality or in law. The first defendant was under no obligation to the plaintiff to recognise the FireBar system in adopting the standards for containing the spread of fire which it imposes on its builder customers, who avail of HomeBond guarantee to provide comfort to, and a legal remedy for, the purchasers of new houses and apartments.

5.17 Likewise, the element of the case in which the plaintiff seeks to pursue a claim for damages for breach of his constitutional right to earn a living against the first defendant has no foundation in reality or in law. I understood counsel for the plaintiff to acknowledge that, although indicating that the claim was not being withdrawn.

5.18 In summary, every element of the plaintiff's claim is bound to fail for the reasons set out above.

6. Order

6.1 There will be an order dismissing the plaintiff's claim pursuant to the Court's inherent jurisdiction on the ground that it is bound to

fail.