



**THE COURT OF APPEAL**

**[2015 No. 245]**

The President  
Irvine J.  
Hogan J.

**BETWEEN**

**LIAM BRANDLEY AND WJB DEVELOPMENTS LIMITED**

**PLAINTIFFS/APPELLANTS**

**AND**

**HUBERT DEANE T/A HUBERT DEANE & ASSOCIATES AND JOHN LOHAN T/A JOHN LOHAN GROUND WORKS CONTRACTORS**

**DEFENDANTS/RESPONDENTS**

**JUDGMENT of the Court delivered by the President on 2nd March 2016**

1. This is an appeal by the plaintiffs from the decision of the High Court (Kearns P.) dismissing their claim on the ground that it was statute-barred. The issue is when the cause of action accrued and the 6-year time period began to run.
2. The plaintiffs issued their plenary summons on 30th November 2014, claiming damages in breach of contract and negligence against the defendants in respect of the construction of two houses at Williamstown, County Galway. Mr. Liam Brandley, the first plaintiff, was the developer of the houses, operating through his company, WJB Developments Ltd. The first defendant, Mr. Deane, was the supervising consulting engineer who certified compliance with planning permission and building standards. The second defendant, Mr. Lohan, was the ground works contractor whose work included the foundations of the houses.
3. Each of the defendants pleaded the Statute of Limitations. The first defendant, Mr. Deane, brought an interlocutory motion to have the action against him dismissed on the ground of the Statute of Limitations. In a judgment of 28th November 2014, Barr J. refused the application because the matter could not be determined on the basis of the affidavits before the court. He permitted the plea to remain as a live issue in the defence, but held that there was such a factual dispute between the parties that it prevented the matter being dealt with on affidavit. Thereafter, the two defendants brought motions on notice for the dismissal of the plaintiffs' claim and those matters came for hearing and were determined by Kearns P. on 16th April 2015 on oral evidence. The President acceded to the defendants' applications and dismissed the action. From that order, the plaintiffs appeal.
4. Before furnishing the relevant dates by way of preface to the discussion of the issue, it is relevant to note that each of the defendants acknowledged that he was negligent in the manner alleged by the plaintiffs. Mr. Deane accepted that he should have inspected the work at the time when the foundations were installed and that he was also negligent in certifying compliance with planning permission and building regulations in respect of the houses as a whole which he did on 4th September 2004. As for Mr. Lohan, he acknowledged that the foundations that he installed were defective and that he was negligent in that respect.
5. The relevant dates are as follows.
  - The foundations were completed in March 2004.
  - On 4th September 2004, Mr. Hubert Deane issued his Certificate of Compliance with planning permission and with the building regulations.
  - The evidence before the President was that the houses in question, namely, the second and third houses of the scheme of three were completed in January/February 2005.
  - In December 2005, Mr. Brandley observed that cracks had appeared in each of the houses.
  - The plenary summons was issued on 30th November 2010.
6. The question, accordingly, to be decided on this appeal is when the plaintiff's cause of action accrued: was it in 2004, in March or in September, as to which it does not matter because each is more than six years before the proceedings were instituted, or is it, as the plaintiffs contend, in December 2005 when the cracks appeared?
7. The parties are not in dispute about some fundamental points. It is agreed that the test is not based on discoverability; that is appropriate to personal injury actions by reason of the amendment of the Statute of Limitations, but it does not arise in regard to property damage of this kind. The question is when did the plaintiffs suffer damage by reason of the negligence of the defendants? When was the tort of negligence complete?
8. The first defendant, Mr. Deane, is represented by Mr. Fogarty S.C. who submits that the foundations of the premises were laid in March 2004 and that is the date from which the Statute of Limitations began to run. The foundations were defective from the outset and those defects were obvious and discernible and that condition would have been discovered by Mr. Deane had he inspected at that time. Mr. Deane agreed with that point in cross-examination by Mr. Fox S.C. for the second defendant, Mr. Lohan. Mr. Fogarty's case is that the plaintiffs could have commenced proceedings at the point where the foundations had been laid in March 2004. Mr. Fogarty is keen to make the distinction between the discovery of the defect and the existence of the defect and the damage which he places at the time when the foundations were installed in March 2004.
9. Mr. Fox S.C. for the second defendant, Mr. Lohan, makes the same submission. He says that the cause of action against his client

was complete at the time when the defective foundation was installed in March 2004. The plaintiffs could have sued at that point. If Mr. Deane had complied with his obligation and had not been negligent, then he would have inspected, in or about March 2004, and would have discovered the defective foundations which represented the negligent performance by Mr. Lohan of his particular duties. The case is that the foundations were defective since March 2004 and loss and damage were thereby caused to the plaintiffs. He emphasises that the test is not one of discoverability of the damage, but of the occurrence of damage.

10. The plaintiffs' case is that the tort of negligence is not complete until damage has been caused. Mr. Lyons S.C. for the plaintiffs agrees that the test is not discoverability, but he does emphasise that neither is it the simple fact that one can point at a particular moment to conduct that is characterised as negligent. That is not sufficient; there must be loss or damage as a result of the negligence in question. He cites *Hegarty v. O'Loughran* [1990] 1 I.R. 148 at 153 per Finlay C.J. as follows:

"A tort is not completed until such time as damage has been caused by a wrong, a wrong which does not cause damage not being actionable in the context with which we are dealing. It must necessarily follow that a cause of action in tort has not accrued until at least such time as the two necessary component parts of the tort have occurred, namely, the wrong and the damage."

11. The plaintiffs' essential point is that although the negligent installation of the foundations and the negligent certification are outside the 6-year period, the damage that happened as a result came about within the period.

12. The plaintiffs, in written submissions, make further citations from the same authority to the effect that the cause of action does not accrue until some damage actually occurs.

13. Fennelly J. in *Gallagher v. ACC Bank* [2012] 2 I.R. 620 at 656, said:

"I do not think the cause of action accrues when there is a mere possibility of loss. To hold otherwise would be doubly unfair to the plaintiff. If he sues early, he may be unable to quantify his loss. The defendant may be able to point to imponderables and uncertainties and argue reasonably that the plaintiff is unable to prove on the balance of probabilities that he has suffered any actual damage. If, on the other hand, the plaintiff waits until his loss materialises, his claim will be held to be statute-barred, if mere possibility of loss is the test."

14. Mr. Lyons points out that the onus of proof is on the defendants to establish the factual basis for their applications.

### Decision

15. It seems to me that the learned President was in error in this case. It is clear that negligence by itself without the accompaniment of damage or loss is not actionable. The plaintiffs did not suffer damage at the time when the defective foundations were installed. When the defective foundation was put in, the only complaint that the plaintiffs could have had was that the foundation was defective. They had not suffered any damage at that point – there was merely a defective foundation – but that is not damage of a kind that is actionable in tort. Indeed, it seems to me to be very questionable whether there was an action in breach of contract at that time, but I do not have to consider that on this appeal.

16. Recent jurisprudence in the neighbouring jurisdiction makes clear that financial loss in respect of specific defects does not give rise to a cause of action in negligence unless the defects result in damage to other property, see *Robinson v. P.E. Jones (Contractors) Ltd.* [2011] 3 WLR 815.

17. The evidence here is that the foundation of these houses was defective, but it did not cause damage at that time. It caused damage in December 2005. The evidence is not that there was hidden damage which became discoverable at a later point; it is that the damage resulting from the defective foundations happened in December 2005.

18. It seems to me to be clear that no damage resulted to the plaintiffs in March 2004 when the foundations were installed. I do not agree that the plaintiffs had any right of action at that point. They could not prove any loss. Moreover, it seems to me that it would have been quite open to the second defendant, Mr. Lohan, or the first defendant, as the consulting engineer, to have subsequently discovered or decided to investigate the condition of the foundations. They would have been entitled to put right any defects that they identified and the plaintiffs would have had no right of action as a result. There could have been some delay in the completion of the project, but that would have given rise to entirely different considerations. In respect of the specific acts of negligence, the fact that the defendants might have identified the defects and remedied them is an illustration of the absence of loss at that point and the unavailability to the plaintiffs of any right of action there and then.

19. It is true that a plaintiff might consider, in appropriate circumstances, an action for anticipatory breach of contract or might consider repudiating the agreement, but we are not concerned with that question here, but merely with the right of action in negligence. In that respect, these various observations that I have made are no more than an expatiation upon the proposition outlined in *Hegarty v. O'Loughlan*, namely, that the cause of action does not arise until loss or damage have been sustained by the plaintiff.

20. In the circumstances, it seems to me that the situation here is clear and that the defendants have pitched the beginning of the period of limitation at too early a point that does not take account of the requirement that damage be actually suffered by the plaintiff in order to complete the cause of action.

21. I would, accordingly, allow the appeal and remit the matter to the High Court. In view of the express admissions made by the defendants as to the negligence on their parts, it would seem to me to be that the case should proceed as an assessment of damages, but that issue is not before this Court and so I would leave it as a question to be decided if it arises appropriately because of the positions adopted by the defendants in the High Court.