[2019] IEHC 590

THE HIGH COURT

[2013/9713 P.]

BETWEEN

MICHAEL NOBLE

PLAINTIFF

AND

DEIRDRE ANN BONNER & ORS.

DEFENDANTS

JUDGMENT of Ms. Justice O'Regan delivered on the 30th day of July, 2019

Issues

1. The discreet issue which comes before the Court at this time is as to whether or not the plaintiff's claim against the defendants is statute barred.

2. Although a statement of agreed facts is not put before the Court, nevertheless the defendants accept that the matter will be dealt with by the Court on the basis of the facts as set out in the plaintiff's pleadings (see para. 5 of the grounding affidavit on behalf of the defendants sworn by Paul Glenfield on the 21st of June, 2017).

Background

3. The plaintiff issued the within proceedings by way of plenary summons of the 12th of September, 2013 which was served on the 10th of September, 2014 on the defendants being members of a firm of solicitors practising under the style and title of Matheson Solicitors (herein after "the Firm").

4. The claim of the plaintiff against the Firm is one for damages for negligence and breach of contract. In the Statement of Claim of the 11th of February, 2015 at para. no. 31, extensive particulars of negligence and breach of contract are set out, all of which relate to asserted acts or omissions on the part of the Firm in or about the execution and completion of two agreements of the 24th of November, 2000, a subsequent contract for sale of the 23rd of February, 2005 and subsequent transfer of lands.

5. In or about the year 2000 the plaintiff was the party entitled to be registered as full owner of the lands and premises described in folios 2186F and 16658F respectively of the Register of Freeholders, County of Wicklow. Prior to engaging the Firm, the plaintiff had concluded, by way of offer of the 30th of June, 2000 and acceptance of the 3rd of July, 2000, an agreement with Celtic Waste Limited (subsequently known as Green Star Holdings Limited) to enter into a single transaction forming two parts (see para. 27 of the amended Statement of Claim by the within plaintiff against Green Star Properties Limited, record no. 2013 no. 3081P).

6. Both parts of the transaction are dated the 24th of November, 2000, the first part being an agreement between the plaintiff and Celtic Waste affording Celtic Waste an option to purchase the lands aforesaid for the purchase sum of €3.5m on completion of certain conditions and on the basis of certain royalty payments being made to the plaintiff. The second agreement afforded an option to the plaintiff from Celtic Waste enabling the plaintiff to buy back the lands subject as in said agreement provided. In para. 27 of the amended Statement of Claim against Green Star Properties Limited & Ors., aforesaid, the plaintiff claims he would not have entered into the first option agreement to sell the land in the absence of the second option agreement being executed granting the option to buy back the lands.

7. On the 24th of November, 2004 Celtic Waste gave notice that the pre-conditions to the exercise of the option in the first agreement had been fulfilled and thereafter on the 20th of January, 2005 Celtic Waste, then known as Green Star Holdings Limited, gave notice of its intention to exercise the option.

8. In the event the relevant contract and ultimate transfer were executed in favour of Green Star Properties Limited.

9. Initially an entirely separate company was registered as owner of the relevant lands on the 29th of September, 2005 due to an error within the Property Registration Authority and this error was corrected whereby Green Star Properties Limited became registered owner in 2012. In any event Green Star Holdings Limited was not registered as full owner either in 2005 or subsequently.

10. The plaintiff was paid the royalty payments up to and including the period concluding on the 31st of December, 2011 (see para. 19 of the plaintiff's affidavit sworn on the 26th of January, 2018). The plaintiff was advised by letter of the 4th of February, 2013 that no further royalty payments would be made.

Dispute

11. By reason of the foregoing the plaintiff asserts that he did not suffer loss by reason of the 2000 transactions or the 2005 transactions until royalty payments ceased to be paid and therefore his plenary summons is within time. This argument is consistent with the assertion that the two agreements of November 2000 were two parts of a single transaction and accordingly it appears that both parties are asserting that the option to buy back in favour of the plaintiff and the royalty payments to him were all part of a singular integrated transaction.

12. The defendants assert that by reason of the fact that Green Star Holdings Limited was not the purchaser in the contract or transfer of 2005 and was not the registered owner as and from the 29th of September, 2005 or at any time thereafter, a significant portion of the plaintiff's loss or damage arose on execution of the contract and transfer or at the latest on the registration of a party other than Green Star Holdings Limited as full owner of the relevant property. The defendants identify such asserted loss as: -

(1) An inability to enforce royalty payments thereafter; and

(2) loss of the right to exercise the buy-back option.

Submissions

13. It is common case between the parties that s.11(2)(a) of the Statute of Limitations 1957 provides: -

> *"Subject to para. (b) of this subsection and to s.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."*

14. Furthermore, the parties agree that for a cause of action to accrue in tort such as negligence or breach of contract there must be a wrongful act or omission on the part of the defendants and damages must be suffered.

15. The defendants assert that the within matter is a flawed transaction type case with the relief of damages being claimed therefore comprises a claim for economic loss (at para. 37 of the replying affidavit of the plaintiff aforesaid it is acknowledged that the completion of the contract in 2005 was flawed as there was no security for ongoing payment of royalties and no availability of the buy-back option thereafter).

16. On this basis the defendants assert that the decision in *Irish Equine v. Robinson* [1999] I.R. 442 and *Gallagher v. ACC Bank plc*, [2012], 2IR 620 are relevant. The defendants also suggest that the judgment of Mr. Justice Peart of the 26th of June, 2014 in *Komady Limited v. Ulster Bank Limited* [2014] IEHC 325 is also relevant.

17. On the other hand the plaintiff relies on the Supreme Court decision of *Brandley v. Deane* [2017] IESC 83 when McKechnie J. made reference to the *Irish Equine* judgment and the *Gallagher* judgment aforesaid. The plaintiff also relies on the judgment of Mr. Justice Meenan in *Smith v. Cunningham* [2018] IEHC 600.

18. The plaintiff has urged that the UK authorities should not be relied upon and although the defendants have opened the UK authority of *Maharaj v. Johnson* [2015] UK PC 28, the defendants do acknowledge that the UK case law might be considered persuasive only.

19. In the events I am satisfied that it will be possible to resolve the issue without reference to any of the UK authorities.

Jurisprudence

20. *Irish Equine* involved a preliminary issue as to whether or not the plaintiff's claim was statute barred. The claim concerned the supervision and construction of the Irish Equine Centre at County Kildare, the seventh named defendant having been retained by the plaintiffs in December 1979. Plans were prepared in 1982 and the relevant defendant issued a certificate of practical completion in March 1986 with a final certificate issuing in November 1987. In late 1991 there was an ingress of water through the ceiling. The plaintiff sued the relevant defendant for damages by reason of alleged faulty design of the roof. At page 8 of his judgment Mr. Justice Geoghegan indicated that the claim was for pure economic loss. The Court held that if the roof was defectively designed then this would have been manifest to any expert who examined it at any time and accordingly, the plenary summons having been issued on the 4th of January, 1996 it was held that the action founded on negligence in the design of the roof was clearly statute barred.

21. It should be noted that Mr. Justice McKechnie in *Brandley* made reference to the *Irish Equine* judgment and distinguished same from the matter that was before him on the basis that the claim before Mr. Justice Geoghegan was that of pure economic loss and there was no question of a latent defect (see para. 138 of the *Brandley* judgment). In the events Brandley did not overrule *Irish Equine*.

22. In *Gallagher* the main judgment was given by Mr. Justice Fennelly with a concurring judgment by Mr. Justice O'Donnell. The Court, including Mr. Justice McKechnie, was unanimous in its decision. At para. 41 Mr. Justice Fennelly recognised that the statute of limitations left it to common law to identify the date of accrual of a cause of action within the meaning and application of s.11 of the 1957 Statute. It was acknowledged that negligence was not actionable until there was proof of actual damage. The case concerned the purchase of a bond which from the outset was never likely to make the necessary return required by the plaintiff. The bond could not be encashed within the five year eleven months' term thereof. At page 658 of the reported judgment, Mr. Justice Fennelly indicated that it was inescapable that the plaintiff's claim as pleaded was damages by reason of the purchase of the bond and accordingly the cause of action accrued at that time. This was the case notwithstanding that the plaintiff asserted that there was no evidence of damage to him prior to maturity. The court held on the pleaded facts damage arose on the purchase of the bond. At para. 44 of the judgment three categories of damage was recognised namely, personal injury, damage to physical objects and financial loss. At para. 50 of the judgment it was acknowledged that in accordance with the prior decision of *Hegarty v. O'Loughran* [1991] IR 148, the word "*provable*" in the context of the commencement of a cause of action did not import any requirement of knowledge. The court also disagreed with the manner in which the UK *jurisprudence* determined when the relevant limitation period would commence and at para. 101 Mr. Justice Fennelly indicated that in this regard the policy of the Oireachtas was to be gleaned from the wording of the statute. The court was satisfied that mere possibility of loss was not sufficient to trigger the accrual of a cause of action, however, uncertainties do not prevent accrual provided there is actual loss sustained. At para. 131 Mr. Justice O'Donnell indicated that the thrust of the plaintiff's claim was that the investment should not have been entered into and the only uncertainty thereafter was the credit which might be allowed to the defendant.

23. In the matter of *Komady*, Mr. Justice Peart held that damage was occasioned at the date of execution of the contract although no one could estimate at that time the likely damage to arise. The court also indicated the fact that the plaintiff didn't realise damage arose was irrelevant.

24. The *Brandley* judgment concerned the commencement date of the six-year limitation period for a property damage claim founded in the tort of negligence (see para. 1 and para. 128 of the judgment). At para. 3 Mr. Justice McKechnie posited five separate possible alternative dates upon which a cause of action might be said to accrue with option three ultimately being preferred by the court namely the date that the damage is manifest.

25. At para. 110 of the judgment the damage is manifest when it is capable of being discovered and capable of being proved as by virtue of the wording of s.11(2)(a) of the Statute, accrual cannot be said to occur before damage has been occasioned.

26. Although the plaintiff suggests that this judgment relates to claims involving pure economic loss in fact para. 107 of the judgment (including sub-paragraph X) refer to latent effects and physical damage and the decision of *Gallagher* is discussed but not overruled. At para. 84 it is acknowledged that a discoverability test does not apply notwithstanding that this would provide clarity and defeat the harshness and injustice of the applicable test.

27. Under para. 108 the court summarised authorities and indicated that;

a) the commission of a wrongful act of itself was not sufficient – actual damage is necessary;

b) the mere possibility of loss will not suffice but some level of probability will be necessary in most situations;

c) damages may be caused at the time of the wrongful act or that act may simply initiate a course of action that will result in loss at some later date.

28. In para. 120 having referred to the decision in *Irish Equine* Mr. Justice McKechnie was of the view that *Irish Equine* was drawing a distinction between the time when the clock might start to run in pure economic loss cases on the one hand and in property damage claims on the other.

29. In *Smith* Mr. Justice Meenan referred to *Brandley* and acknowledged that same refers to a property damage claim as opposed to a pure economic loss claim but nevertheless was satisfied that the judgment provided guidance in respect of the claim before Mr. Justice Meenan which was for pure economic loss. Based upon the principles identified in *Brandley*, Mr. Justice Meenan was satisfied that no loss occurred until the plaintiff's title could not be sold and in those circumstances the Court was satisfied that the plaintiff's claim was not statute barred.

Decision

30. (1) Both parties in this matter contend for the option in favour of the plaintiff to buy back the property and the payment of royalties as being part of an integrated transaction (and this is consistent with the fact that upon non-payment of the royalties the plaintiff commenced proceedings in respect of not only the non-payment of the royalties but also the non-availability of the buy-back option).

(2) Although it was not possible in 2005 to quantify the loss suffered by the plaintiff (in the words of Mr. Justice O'Donnell in *Gallagher* the only uncertainty was the credit which might be allowed to the defendant) nevertheless the plaintiff did suffer loss immediately upon conclusion of the transaction in early 2005 and could have proceeded with an action against the Firm thereafter, such damage being: -

(a) A loss of a right to enforce the payment of royalties; and

(b) a loss of a right to exercise the option to buy back the 102 acre property.

Accordingly, the loss or damage sustained in 2005 was not mere possibility of loss but rather amounted to actual loss.

(3) It is immaterial that Green Star Properties Limited was not the registered owner on the 29th of September, 2005 until it was rectified in 2012 – the material fact is that a party other than Green Star Holdings Limited was registered as full owner.

(4) The extensive particulars of negligence and breach of contract set forth in para. 31 of the Statement of Claim of the 11th of February, 2015 complain of acts and omissions on the part of the Firm in 2000 and 2005 and on the pleaded facts therefore it is inescapable that damage was occasioned on the conclusion of the transactions in 2005.

(5) I am satisfied that the decision in *Gallagher* remains the relevant *juris prudence* to be applied in economic loss cases however, even if I am incorrect in this regard and the test identified in *Brandley* is the appropriate test, I am satisfied that loss was occasioned to the plaintiff in 2005 and the cause of action arose at that time, the damage being manifest namely, capable of being discovered and capable of being proved (see para. 110 of that judgment). In this regard the identity of the purchasing party in the contract and in the transfer together with the identity of the party actually registered as owner in September 2005 were matters all capable of being discovered and capable of being proved by the end of 2005. As a

discoverability test is not the relevant test either in economic loss cases or in property damage cases the date of actual knowledge of the plaintiff on the negligence act and accrual of the cause of action in favour of the plaintiff is immaterial despite the harshness that this can give rise to (see para. 138(iv) of *Brandley*).

Conclusion

31. In the event I am satisfied that the defendants have discharged the burden of proof on the defendants to establish that the institution of proceedings against the Firm by plenary summons of the 12th of September, 2013 was outside the time limits provided by s.11(2)(a) of the Statute of Limitations 1957 and accordingly by the 12th of September, 2013 the plaintiff's claim was already statute barred.