

THE HIGH COURT

[2010 No. 10994 P.]

BETWEEN

LIAM BRANDLEY AND WJB DEVELOPMENTS LIMITED

PLAINTIFFS

AND

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

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 28th day of November, 2014

1. In this application, the first named defendant seeks an order dismissing the plaintiffs' case against the first named defendant, same having become statute barred as against the first named defendant.

2. The action arises out of the construction of two properties situate at Nos. 2 and 3 Sycamore Crescent, Williamstown, Co. Galway. There was also a third dwelling, No. 1, of which more will be said later in the judgment. The plaintiff was the developer of three townhouses at the said location. He engaged the first named defendant, a consulting engineer, to supervise and certify the construction works. The second named defendant was engaged to do works in relation to the foundations of the property.

3. The three houses were developed in early 2004. The raft foundations for the three houses were completed in March 2004. These works were carried out by the second named defendant. The work was inspected by the first named defendant.

4. By letter dated 5th April, 2004, the first named defendant stated as follows to the manager of Allied Irish Bank's branch in Castlerea:-

"I hereby certify that the raft foundation is now complete for the construction of three No. townhouses on the above project.

I have inspected the development at the above location and in my opinion the construction thereof complies substantially with the layout presented to the planning authority and also complies substantially with the new building regulations."

5. By letter dated 7th July, 2004, the first named defendant wrote to the manager of the AIB branch at Castlerea, informing him that he had inspected the development to superstructure complete stage and he formed the opinion that the construction thereof complied substantially with the layout presented to the planning authority and also complied with the new building regulations. By letter dated 23rd July, 2004, the first named defendant gave the same opinion to roof complete stage of the project.

6. On 4th September, 2004, the first named defendant issued a Certificate of Supervision in relation to Nos. 2 and 3 of the development. At para. 2 of the certificate, the first named defendant stated as follows:-

"2. That I supervised the erection of the property at the above address including the designing and supervising and the construction of the foundations and I inspected same when opened and poured."

7. Also on 4th September, 2004, the first named defendant issued a Certificate of Compliance in respect of the two properties. He certified that he had made periodic inspections of the relevant works during the course of the construction thereof and in his opinion, the construction of the properties complied substantially with the grant of planning permission and substantially with all building regulations applicable thereto and was structurally sound.

8. This represents the last involvement that the first named defendant had in relation to the properties.

9. The property at No. 1 Sycamore Crescent had been sold to a Mr. Aiden Connelly. He discovered defects in the property and instituted proceedings against the plaintiff in these proceedings, and against the first and second named defendants. That action was heard over three days on 14th, 15th and 16th November, 2011. The plaintiff succeeded as against the second and third named defendants, being the first and second named defendants in these proceedings. His claim against the first named defendant (the plaintiff herein) was not successful.

10. The first named defendant in the present application is seeking an order striking out the plaintiffs' claim against it on the basis that their claim as against the first named defendant is statute barred. The first named defendant submitted that as the last involvement of the first named defendant in relation to the properties, was the issuance by him of the certificates on 4th September, 2004, even assuming that he was negligent in the supervision of, or certification of the works, any proceedings against him would have become statute barred as and from 3rd September, 2010.

11. The plenary summons in this action was not issued until 30th November, 2010. In their statement of claim, the plaintiffs allege that the foundations in each house were defective.

12. The first named defendant submits that if the first named defendant was negligent in his supervision and certification of the works, the breach of contract and tort of negligence occurred at that time. It was irrelevant that the damage to the property may not have become discoverable until some later date.

13. In this regard, the first named defendant relied on the decision in *Hegarty v. D. & S. Flanagan Brothers Ballymore Limited and Ors* [2013] IEHC 263, and in particular to the following portion of the judgment of Birmingham J.:-

"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."

14. The first named defendant also referred to the decision of Dunne J. in *Murphy v. McInerney Construction Limited & Anor* [2008] IEHC 323, where the learned judge reviewed the applicable Irish and UK authorities and came to the following conclusion:-

"I have to say that having regard to the various decisions to which reference has already been made, 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."

15. Later in the course of her judgment, Dunne J. stated as follows:-

*"Having regard to the pleadings in this case and the facts agreed before me I cannot come to the conclusion that the cause of action against the first and second named defendants accrued within the six years prior to the issue of these proceedings. There is nothing whatsoever to suggest that the damage complained of occurred within that time-frame. What is contended is that 'the latent defects became manifest' within the time frame. That is nothing short of a discoverability test. Contrary to the position as set out and found by Herbert J. in the case of *O'Donnell v. Kilsarin Concrete Limited*, this is not a case where one could say that the damage was of recent origin."*

16. The first named defendant submits that even taking the case as pleaded by the plaintiffs at its highest, and assuming that the first named defendant had been negligent in relation to the supervision and certification of the works, this led to the conclusion that the damage was caused by the events in 2004, culminating in the issuance of the certificates on 4th September, 2004. This was more than six years prior to the issue of the plenary summons on 30th November, 2011 and accordingly, the case was statute barred as against the first named defendant.

17. In response, the plaintiffs state that there is a conflict of facts between the plaintiffs and the first named defendant in relation to when the damage was actually caused to the plaintiffs' properties. In these circumstances, they submit that it is not appropriate to determine the matter on affidavit evidence. They point out that in the *Murphy* case, cited above, there had been an agreed statement of facts which had enabled the judge to determine the matter by reference to the statement of agreed facts and the pleadings, without the need for oral evidence.

18. The plaintiffs submit that based on their expert evidence that the damage to the property occurred some time after completion of the property in December 2004, and probably in August 2005. They set out their objection to the matter preceding to a determination on affidavit at para. 7 of the affidavit of the plaintiffs' solicitor sworn on 15th September, 2014, as follows:-

"I say and believe that in the circumstances outlined above that the date of accrual of the plaintiffs' cause of action for the purposes of consideration of the first named defendant's plea in relation to the Statute of Limitations is within six years of the date of issue of the plenary summons herein on 30th November, 2010. That is some time after the completion of the subject property in December 2004 and probably in August 2005. I say and believe that the date of accrual is the date on which the damage arising from the defendants' negligence and breach of duty occurred to the plaintiffs' property. I say and believe that 'damage' in this context must mean damage of such consequence as to be considered significant and actionable and not a minor matter (as minor cracking, for instance, would be considered). I further say and believe that if the first named defendant contends for a different date of accrual, the facts are not agreed between the parties and the first named defendant's motion herein is misconstrued."

19. In essence, the plaintiffs claim that where there are disputed issues of fact, such as when the actual damage to the property occurred, it is not appropriate to determine such conflicts on affidavit evidence. The first named defendant contends that if there was damage, it occurred when inadequate foundations were laid in early 2004, or at the latest when the first named defendant certified the works on 4th September, 2004. The plaintiffs argue that their engineering evidence will be to the effect that actual damage to the property occurred at a later, unspecified time but within six years of the issuance of the plenary summons. In these circumstances, it is contended that the accrual of the cause of action arose when the damage occurred to the property.

20. I am of opinion that where there is a factual dispute between the parties, such as to when the actual damage occurred to the property, such dispute cannot be determined on affidavit evidence. It will be necessary for the court to hear oral evidence from the parties and from their expert witnesses prior to reaching any conclusion on the Statute of Limitations point.

21. Accordingly, I refuse the first named defendant's application to have the plaintiffs' action dismissed as being statute barred against the first named defendant. This is due to the fact that such issue cannot be determined on the basis of the affidavits currently before the court. However, the plea can remain as a live issue in the defence of the first named defendant. It can be determined as part of the defence at the trial of the action.

22. The first named defendant in its notice of motion actually sought an order directing the trial of the preliminary objections raised in its defence by means of a preliminary issue directed pursuant to O. 25 of the Rules of the Superior Courts 1986, as amended. I have considered whether the defendants' objections should be tried as a preliminary issue. It seems to me that as virtually the same evidence would be called on the trial of the preliminary issue as in the main action, it is preferable that the Statute of Limitations plea should be determined at the trial of the substantive action. This is all the more appropriate as I have been informed that the action is due for hearing in December 2014. Although the first named defendant has indicated that he will be applying for an adjournment due to an impending medical operation on the same date.

23. The first named defendant also raised the fact that the plaintiffs' claim should be dismissed on grounds of delay in prosecuting the proceedings. By letter dated 15th November, 2010, the solicitor for the first named defendant wrote to the plaintiffs' solicitor in the context of the proceedings being brought by Mr. Connelly. In the course of that letter, the defendants' solicitor stated:-

"I wish also to say that it would appear appropriate that when your client issues his own proceedings, that such proceedings be simply issued and held in abeyance pending the outcome of this case."

24. The following is a brief history of the chronology of these proceedings:-

- 30th November, 2010 – plenary summons issued
- 13th December, 2010 – appearance entered on behalf of first named defendant
- 9th March, 2011 – plaintiffs deliver statement of claim
- 5th March, 2012 – motion seeking judgment in default of defence as against both defendants
- 14th March, 2012 – motion for judgment was adjourned to 30th July, 2012
- 25th July, 2012 – defence of the second named defendant was filed
- 25th July, 2012 – second named defendant serves notice of indemnity/contribution
- 30th July, 2012 – both defendants given time for late filing of defence (not necessary as against second named defendant)
- 11th October, 2012 – warning letter to first named defendant regarding its defence
- 15th November, 2012 – defence of the first named defendant delivered
- 14th November, 2012 – first named defendant issues notice of indemnity/contribution
- 13th July, 2013 – first named defendant seeks voluntary discovery
- 3rd March, 2014 – voluntary discovery made by the plaintiff
- 30th April, 2014 – plaintiffs lodge a reply to first named defendant's defence
- 1st May, 2014 – notice of trial served
- 14th July, 2014 – voluntary discovery made by first named defendant
- 15th July, 2014 – the present motion was issued

25. In the circumstances, I am satisfied that while the present action was not prosecuted with great speed, there was not such delay on the part of the plaintiffs such as to disentitle them from bringing the action herein.

26. Finally, the plaintiff suggested in the supplemental affidavit of Ciaran Madigan sworn on 15th October, 2014, that the first named defendant should not be allowed to resist judgment on the basis that the liability issues between the plaintiff and the defendants were determined in favour of the present plaintiffs in the proceedings brought by Mr. Connelly.

27. I do not think that such plea is well founded. Firstly, the parties in this action are different to the Connelly action. There, Mr. Connelly had carriage of the proceedings as the plaintiff. We do not know what case he made against the defendants. It would not be fair to saddle the first named defendant with liability due to the fact that the plaintiff in that action did not succeed against the present plaintiff, but did succeed against the present defendants. Secondly, the issues are not identical, due to the fact that the first named defendant has raised the defence under the Statute of Limitations, which was not available to him in the Connelly action. In these circumstances, I am satisfied that the issues between the parties in the within proceedings are not *res judicata*.