Neutral Citation Number: [2010] IEHC 218

THE HIGH COURT

2009 3119 P

BETWEEN

EDMOND MOLONEY AND JACQUELINE MOLONEY

PLAINTIFFS

AND

BRENDAN LIDDY, NICHOLAS HUGHES, BRIAN ROE PRACTISING UNDER THE STYLE AND TITLE OF HUGHES AND LIDDY, SOLICITORS

DEFENDANTS

AND

KENNETH MEEHAN AND JW LEVINS, PRACTISING AS MEEHAN LEVINS PARTNERSHIP AND MEEHAN LEVINS PARTNERSHIP LIMITED

THIRD PARTIES

JUDGMENT of Mr. Justice Clarke delivered on the 1st of June, 2010

1. Introduction

1.1 This application to dismiss relates to proceedings which stem from the same facts as the proceedings in *Moloney & Anor v. Lacey Building and Civil Engineering Ltd & Ors* [2004 313 P] (the "original proceedings"). The third parties are founding members in a firm of architects practising under the name of the Meehan Levins Partnership, (the "Architects"). That firm was initially engaged by the plaintiffs ("the Moloneys") to design a dwelling house. Problems arose during the construction of the house and the Moloneys instigated a claim against the Architects and Lacey Building and Civil Engineering Ltd, the contractors of the house, (the "Contractors"). There was a delay in the serving of the plenary summons against the Architects, in relation to which I set aside a renewal order of that summons for the reasons set out in a judgment of 21st January last, *Moloney & Anor v. Lacey Building and Civil Engineering Ltd & Ors* [2010] IEHC 8.

1.2 In these proceedings, the Moloneys claim against the firm of solicitors who represented them in relation to the original proceedings, Hughes and Liddy solicitors (the "Solicitors"), for damages arising out of the delay in serving the plenary summons on the Architects such that the original proceedings are now struck out. In February last, the Architects were joined to these proceeding as third parties. In essence, it is alleged that the Architects are concurrent wrongdoers with the Solicitors responsible to the Moloneys for the same damage. In joining the Architects as third parties, the Solicitors are seeking a contribution from the Architects pursuant to Section 21 of the Civil Liability Act 1961.

1.3 The Architects sought to have the third party proceedings against them dismissed, stayed and/or struck out. The Architects argued that there were two potential bases on which proceedings ought to be dismissed, stayed or struck out, which were:-

> A. That on a proper construction of the relevant provisions of the Civil Liability Act 1961, ("the 1961 Act") the Architects and the Solicitors are not concurrent wrongdoers in respect of the same damage in the sense in which that term is used in s. 21 of the 1961 Act. On that basis it is said that there is no legal basis for the Solicitors' claim for a contribution or indemnity from the Architects with the result that it is contended that the Solicitors claim on the third party issue is bound to fail. A further subsidiary issue concerning the interpretation of the term "wrong" as used in s. 21 of the 1961 Act, is also made which would, if correct, have similar consequences;
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> B. In the alternative, it is suggested that it amounts to an abuse of process on the part of the Solicitors, in all the circumstances of the case, to seek to litigate issues against the Architects when those issues have been dismissed in proceedings brought by the Moloneys and where, it is said, the Solicitors were the prime instigating party in the application made by the Moloneys which sought to have the summons in the original proceedings renewed.

1.4 It should be noted that, in the papers filed, the Architects also raised an issue as to whether the third party proceedings had been instigated as soon as practicable as required by the Rules of the Superior Courts. However, in the light of a replying affidavit filed on behalf of the Solicitors, counsel on behalf of the Architects accepted that the court could not conclude that any inexplicable delay occurred and consequently abandoned that aspect of his application.

1.5 Some short number of days after the hearing I indicated to the parties that I was satisfied that the third party proceedings against the Architects should be dismissed as being bound to fail but that I would give reasons for that conclusion at a later date. This judgment, sets out those reasons. In setting out those reasons it is first necessary to turn briefly to the background to these proceedings, which are set out in more detail in the judgment of 21st January, 2010.

2. Factual and Procedural Background

2.1 By way of background, the Moloneys hired the Architects and the Contractors, in and around 1996, to design and construct a dwelling house. By letter dated 28th February, 2002, the Moloneys terminated the Architects' retainer. The reasons for the termination were started as being purported defects in the construction of the property and the timeliness and quality of the Contractors' workmanship. A plenary summons issued on 9th January, 2004, against both the Architects and the Contractors but existence of such a summons was not communicated to the Architects until 2006 and then only obliquely. Ultimately service of the plenary summons was not attempted until 2008, at which time the summons was out of date and had not been renewed. In May, 2009 the Moloneys made a renewal application in relation to the plenary summons, at the request of the Solicitors, under O. 8 of the Rules of the Superior Courts.

2.2 The main reason given for the failure to serve the plenary summons within the time prescribed by the Rules of the Superior Court was that the Solicitors were said to be waiting to examine an expert report and intended to serve a statement of claim along with the summons. An order renewing the summons was made on 11th May, 2009. An application was brought by the Architects to set aside the renewal of the summons, which application was heard on 18th December, 2009. In my judgment of 21st January, 2010, I decided that the "good reason" for renewal requirement in O. 8 had not been met and that, even if there was such a good reason for the renewal, the balance of justice in all circumstances would not have favoured the renewal. Accordingly, the order renewing the summons was set aside. No appeal has been taken against this decision.

2.3 The present proceedings were instituted by plenary summons dated 2nd April, 2009. The statement of claim contends that the Moloneys retained the Solicitors for professional advice about their rights of action as against the Architects and the Contractors in respect of the construction of the dwelling house. It is said that the Solicitors undertook to act as solicitors for and on behalf of the Moloneys in the commencement and prosecution of any litigation arising from the design/construction of the relevant dwelling house. The Moloneys now allege that the Solicitors failed to take any action against the Architects and/or the Contractors until such time as the Moloneys' action for damages had become statute-barred by virtue of the Statute of Limitations Act 1957. The Moloneys claim that it was an implied term in the contract of retainer that the Solicitors would exercise all due and proper skill, care and diligence in instituting and prosecuting all or any litigation on their instructions. The Moloneys claim that because of the negligence and/or breach of contract on the part of the Solicitors, they have lost all prospects of recovering damages against the Architects in respect of the claim as set out in the original proceedings and have been delayed in their ability to effect suitable remedial work to enable the dwelling house to be inhabitable and thereby have suffered loss and damage.

2.4 On 9th November, 2009, the Solicitors sought an adjournment of these proceedings pending the determination of validity of the renewal of the summons in the original proceedings, and an order was granted in this respect. As mentioned above, I dismissed the original proceedings on 21st January, 2010. The motion for the adjournment was then struck out on consent. On 22nd February, 2010, the Solicitors applied for and were granted liberty to issue and serve a third party notice on the Architects. A Third Party Notice issued on 24th February, 2010. A third party statement of claim was delivered on 19th March, 2010.

2.5 In passing it should be noted that it appears that the Contractors are no longer trading and that there would be no point in pursuing any claim against the Contractors at this stage. Against that background it is necessary to turn to the Architects' case.

3. The Architects' Submissions

3.1 The principal focus of the argument made on behalf of the Architects on this application concerned the proper interpretation of s. 21 of the 1961 Act, which provides as follows:-

> "(1) Subject to the provisions of this Part, a concurrent wrongdoer (for this purpose called the claimant) may recover contribution from any other wrongdoer who is, or would if sued at the time of the wrong have been, liable in respect of the same damage (for this purpose called the contributor), so, however, that no person shall be entitled to recover contribution under this Part from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.
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> (2) In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault, and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any contributor shall amount to a complete indemnity."

3.2 It is s. 21 which alters the position which prevailed at common law and which was to the effect that concurrent wrongdoers could not sue each other for a contribution to any liability which might be found in favour of a relevant plaintiff. Section 21 was designed to remove the undoubted injustice which might be caused to a defendant who found himself sued in circumstances where there was a concurrent wrongdoer, and where the party sued had no ability to enforce an appropriate contribution to the relevant damages that might be awarded in favour of the plaintiff, from that concurrent wrongdoer.

3.3 Essentially, the Architects contended that the phrase "same damage" as appears in s. 21(1) of the 1961 Act, cannot be met in the circumstances of this case. It was said that the damage which the Solicitors may, if the Moloneys' case is proved, be said to have caused to the Moloneys is the loss of the opportunity to bring proceedings against both the Architects and the Contractors. On the other hand, it is said that the damage caused to the Moloneys by the Architects (if liability be established) relates directly to any defects in the relevant dwelling house which might be attributed to failings on the part of the Architects either in design, supervision, certification or the like.

3.4 While it was accepted that there are similarities between the matters that would go into the calculation of the amount of damages to be awarded in the event of the Moloneys establishing liability in either case, it is said that it is not, as a matter of law, the same damage. As an additional point under this heading it is suggested that the phrase "would if sued at the time of the wrong" refers to the circumstances prevailing when any wrong might have been committed by the Solicitors. On the basis of that construction of the relevant phrase, it is said that, by definition, a wrong was only committed by the Solicitors when the proceedings as against the Architects had become statute barred so that there could not, at that time, have been any potential liability on the Architects. For that reason also it is said that s. 21(1) does not apply.

3.5 The Architects further submitted that they should not be exposed to multiple litigation and accordingly, that the court had an inherent jurisdiction to stay or dismiss proceedings which abuse the due process of the administration of justice where to do otherwise would undermine its effectiveness or integrity.

4. The Solicitors' Submissions

4.1 Counsel for the Solicitors argued for a different construction of s. 21 of the 1961 Act. In particular, it was argued that the provisions of the 1961 Act concerning concurrent wrongdoers, and s. 21 most especially, indicate an intention that there be a broad entitlement to recover a contribution. On that basis, it is said that the claim made against the Solicitors is in substance as to the same damage as the claim made as against the Architects on the basis that both relate directly to the alleged defects in the relevant dwelling house.

4.2 So far as the interpretation of the term "wrong" in s. 21 is concerned, attention is drawn to the provisions of s. 31 of the 1961 Act which undoubtedly allows a defendant to bring a claim for a contribution within an extended limitation period, being one which is for two years after the earlier of the conclusion, or alternatively the settlement, of the claim brought by the plaintiff against that defendant. Against that background it is submitted that it is clear that the proper construction of s. 21 does not exclude a defendant seeking a contribution from a party in circumstances where the direct claim by the plaintiff against that party might ordinarily be

statute barred.

4.3 In addition, counsel on behalf of the Solicitors contested the allegation that the attempt to seek a contribution from the Architects amounted to an abuse of process. In particular, in that context, counsel placed reliance on the extended limitation period to which I have referred. On that basis it was suggested that there was nothing abusive in maintaining proceedings which were otherwise statute barred by means of reliance on the extended limitation period contained in s. 31.

4.4 Against the background of those general submissions, I now turn to an analysis of the issues which arose. I turn first to the construction of s. 21.

5. The Construction of Section 21

5.1 So far as the principal issue between the parties is concerned, the main difference between the competing submissions concerned the proper approach to the phrase "same damage". In *Hussey v. Dillon & Ors* [1995] 1 I.R. 111, the Supreme Court gave some consideration to the meaning of the term "same damage" as used in s. 21. However, it is clear from both the majority (Blaney J.) and minority (Egan J.) judgments that the primary focus of the court in that case was in analysing the actual items of damage that might be said to have arisen from the respective alleged wrongdoing of the separate defendants in question. That analysis led to the conclusion that, with some limited exceptions, most items of damage were either attributable to one or the other (in the majority view) so that the same items did not arise in both cases. While of some assistance Hussey is, therefore, really concerned with a somewhat different question.

5.2 The Architects place reliance on *Wallace v. Litwiniuk* [2001] 92 Alta L.R. (3d) 249, a decision of the Court of Appeal of Alberta, which was quoted with approval by the House of Lords in *Royal Brompton Hospital NHS Trust v. Hammond & Ors* [2002] 1 W.L.R. 1397. It is, of course, important to start by noting that judgments of foreign jurisdictions in relation to relevant statutory regimes within those jurisdictions need to be carefully analysed in order to ascertain whether they are, in fact, persuasive in this jurisdiction. Where the reasoning of the court concerned derives in material part from the wording of the relevant foreign statute, which wording is not reproduced in an Irish corresponding provision, then great care needs to be exercised in applying such judgments in this jurisdiction. Helpfully the judgement in *Wallace* (at para. 10) sets out the provisions of the relevant Alberta legislation which makes it clear that claims for a contribution are, in the words of that legislation, confined to liabilities "in respect of the same damage". It will be recalled that the same phrase is to be found in s. 21 of the 1961 Act. Likewise, it is clear that the same term is to be found in the United Kingdom Civil Liability (Contribution) Act 1978, which was under consideration in *Royal Brompton Hospital*. This is, therefore, a case where the key phrase "the same damage" appears in all relevant legislation. The authorities are, therefore, clearly relevant and, in my view, highly persuasive. As pointed out in the speech of Lord Bingham in *Royal Brompton Hospital* at p. 1401, the term "damage" does not mean "damages", noting that the same point had been made by Roch L.J. in *Birse Construction Limited v. Haiste Limited* [1996] 1 W.L.R. 675 at p. 682.

5.3 It should immediately be noted that there are differences between the Alberta, United Kingdom and Irish legislation. The categories of persons qualifying are differently described. However, in each case there is a limitation by reference to the requirement that whatever persons may qualify within the terms of the respective sections must potentially be liable in respect of "the same damage". The differences in the sections are not, therefore, material to the question of the proper interpretation of the phrase "the same damage".

5.4 The decision of the Court of Appeal of Alberta is particularly apposite as it concerns an attempt, as here, by a firm of lawyers to seek a contribution from the party who was said to be liable to their former client in circumstances where the lawyers concerned failed to bring proceedings against that party in a timely fashion, such that the proceedings became statute barred. In that context, and in characterising the plaintiff's claim against her lawyers, the court said the following at para. 32:-

> "The compensation which she presently seeks from the respondents is not damages for her physical injuries, but damages for what she would have obtained had the original claim being brought. In both cases she sought <u>damages</u> but that is not to say she sought the same damages. The damage is different. As stated in *Sorenson* at pp. 611-612:-
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> > 'The "damage" allegedly caused by the appellant (solicitor) is mutually exclusive to the "damage" caused by (the negligent driver), since only by the extinction of the right to recover the latter did the former come into existence.'"

5.5 While dealing with *Wallace* it is also important to note that the purpose of legislation of the general type under consideration in that case (as here) is well described at para. 25 of the judgment where the following is stated:-

> "The variously named statutes were passed to avoid the common law rule that there is no contribution between joint tort-feasors. As the common law rule had developed, it applied not only to claims for contribution towards damages, but also to claims for contributions towards the costs of defending proceedings, and extended from joint tort-feasors to several, concurrent tort-feasors…"

The court went on to note, at para. 29, that:-

> "The decisions all recognise that the right to contribution between or among joint tort-feasors depends on the extent to which the legislation ameliorates the common law rule. Where the statute does not create a right, the common law prevails and there is no right to contribution."

5.6 It seemed to me that Wallace is a highly persuasive authority. As pointed out the claim is not to the same damage. The claim by a disappointed litigant against a solicitor who allows the statute to run is a claim for the loss of opportunity to bring effective proceedings and achieve either a settlement of same, or a determination by the court on the merits. The original claim, which has been lost by virtue of the expiry of the statute, was, of course, of a different character being, in the circumstances of *Wallace*, a negligence claim for personal injury, and in the circumstances of this case, a negligence and allied claim against a firm of architects.

5.7 As pointed out in *Wallace*, the fact that the calculation of damages in both cases may be analogous (in the sense that the calculation of the amount of damages to which a successful plaintiff may be entitled may be based on the same general considerations) is not the point. However, even that analogy is a long way short of being complete.

5.8 All of the authorities on the award of damages against lawyers for depriving their client of an opportunity to bring proceedings by allowing limitation periods to expire make it clear that, in assessing the damages to be awarded the court must have regard to the prospects of success which the client might have had in the event that the proceedings were able to be considered on their merits. It is true that the court may well award what appears to be the full value of the lost claim, or something approximating to it, in

circumstances where it is felt that the client was deprived of bringing an action which had a significant chance of success. But it is also true that in very weak cases nominal or very small damages will be awarded and in cases where a significant risk attached to the bringing of the clients case, an appropriate deduction will be made to reflect the risk of losing. While in a somewhat different context, the judgment of the Supreme Court in *Phillip v. Ryan* [2004] 4 I.R. 241, and the English authorities referred to in that case, make clear that the court should reach a general assessment on the likelihood or otherwise of a hypothetical event, relevant to damages, being likely to have occurred or not.

5.9 It is clear, therefore, that in the event that the Moloneys establish liability for negligence against the Solicitors the court, in assessing damages, will be required to have regard to the likely extent of the full value of the Moloneys' claim lost by the Solicitors' negligence, but also will be required to have proper regard to any significant risks that the Moloneys might have faced in maintaining that litigation. The court will not decide the case against the Architects and give the Moloneys the damages that they would have obtained. Rather, the court will assess the value of the loss of opportunity by reference to the full value of the claim coupled with any significant risk on liability.

5.10 It must be noted that that exercise is an entirely different exercise to the one which would have been conducted had the Moloneys' proceedings against the Architects been commenced and proceeded with in a timely fashion so that no limitation barrier arose. In those circumstances, the court would consider all issues of liability and quantum and come to whatever decision might be considered appropriate on the law and the facts.

5.11 Apart altogether from theory, there are real differences of substance and practice between the two methods of approaching the calculation of damages. To illustrate that difference (by reference to a hypothetical case – it not being appropriate to say anything about the merits or otherwise of any of the claims that might arise in these proceedings), it is only necessary to consider a claim which might have been maintained by a litigant in circumstances where the amount of the claim was fixed (for example, because it comprised solely of special or calculatable damages which were not, in themselves, in dispute), but where there was a significant risk (whether of fact or law) on the question of liability. For the purposes of this exercise I will assume that the relevant claim was worth €100,000.00, but that an objective assessment of the risks of winning and losing put the litigant's chances at 50/50. Two very different scenarios would apply depending on whether that litigant pursued his original claim, on the one hand, or pursued a claim against his lawyers by reason of having lost the original claim due to lapse of time, on the other.

5.12 In the former case, the court would consider the question of liability and come to a conclusion on it. The litigant would either get nothing if he lost on liability or, €100,000.00 if he won. While it might, of course, be possible that he might be able to settle the case for something around €50,000.00 in those circumstances, the court's role would involve no such exercise. Rather the court would decide the question of liability on the merits and either award the full sum or nothing, depending on its view on that liability issue.

5.13 In contrast, in the event that the same litigant lost his original claim by virtue of delay on the part of his lawyers, the court would be likely to award him something of the order of €50,000.00 having regard to the value of the claim lost, but also paying due regard to the risk that the claim might not have been successful.

5.14 That analysis demonstrates that, even so far as the calculation of "damages" is concerned, there can be real and substantial differences between the proper and logical approach of the court in the assessment of damages when considering a claim against a lawyer for causing a litigant to lose an original claim on the one hand, and the approach of the court in considering that original claim itself, on the other.

5.15 I was more than satisfied, therefore, that the fact that there may be some broad analogy between the considerations which a court may properly have regard to in considering such an original claim and a claim against lawyers for delay such as caused the original claim to be statute barred, does not in any way suggest that, even as a matter of the calculation of damages, the claim can properly be said to be in respect of "the same damage". In addition, for the reasons identified in *Wallace*, I was satisfied that there is a real, substantial and significant difference between the nature of the damages as and between the two types of cases. One relates to damages caused by an actual original wrongful event on the part of the original contemplated defendant. The other relates to damages for the loss of an opportunity to bring proceedings in respect of that original event and to decide such matters as whether same should be compromised or be allowed go to the court for determination and gain the benefit of the result of any such settlement or judicial determination.

5.16 The differences in damage are real and substantial, both as to their nature and as to the proper approach to their quantification. They cannot be said, therefore, in my view, to be the "same damage" in the sense in which that term is used in s. 21.

5.17 In those circumstances, it seemed to me that the Solicitors' claim against the Architects in the third party proceedings was bound to fail. It was bound to fail because, as a matter of common law, as is clear from all the authorities, no claim between concurrent wrongdoers is allowed. Such a claim is only maintainable, if at all, if it comes within s. 21 of the 1961 Act. For that to be so, then the liability of the concurrent wrongdoers must be for "the same damage". For the reasons which I have sought to analyse there is no basis on which a claim against an architect for negligence in design or supervision and against a solicitor for negligence in allowing an original claim against that architect to become statute barred, relate to the same damage in the sense in which that term is used in the section. The Solicitors' claim in this case does not, therefore, come within s. 21 of the 1961 Act. That being so, there is no other basis on which it can properly be maintained and it is, therefore, in my view, bound to fail.

6. Some other Considerations

6.1 I should briefly touch on the other points which arose in the course of argument before me. It is true, as was pointed out by counsel for the Solicitors, that s. 31 of the 1961 Act does provide an extended limitation period in the case of claims for contribution or indemnity. There is, of course, a logic in that situation. Leaving aside the clear obligation on a party wishing to claim a contribution or an indemnity to do so by means of a third party application and to do so as soon as may be practicable, it nonetheless must be the case that, in some such circumstances, an application properly brought in a timely fashion will be brought outside the original limitation period. A summons can properly be served, without any intervention on the part of a court, for a period of six months after it is issued. It follows that a plenary summons can legitimately be served, without any need for renewal, outside of the original limitation period. No obligation to move promptly could fall on a defendant so served until that defendant had received a statement of claim and had a reasonable opportunity to consider whether the issues raised in the statement of claim were such as might warrant joining the relevant third party. It follows that the orderly processing of a third party claim in accordance with all relevant legal obligations can, in some cases, lead to the service of a third party notice at a period well beyond the expiry of the original limitation period.

6.2 In those circumstances, it did not seem to me that it could be an abuse of process, *per se,* to seek to join as a third party a person against whom the original claim of the plaintiff might be statute barred. Something more would, in my view, be needed. In

order to determine whether, in all the circumstances, a particular invocation of an entitlement which would otherwise arise to join a third party outside the original limitation period, but within the limitation period specified in s. 31, might amount to abuse of process, would involve a detailed inquiry into all of those relevant circumstances. While it was, having regard to my earlier findings, unnecessary to address this issue on the facts of the instant case, I am inclined to the view that it would not be appropriate to conduct such an inquiry within the limited confines of a motion such as is currently before the court. That is not to say that at trial (whether of all issues or a preliminary issue directed to that question) it may not be appropriate for the court to consider all relevant circumstances in determining whether an abuse of process arises.

6.3 It was also unnecessary for me to determine the precise "wrong" which is spoken of in s. 21. However, having regard to the provisions of s. 31 and the fact that that section contemplates bringing a claim for contribution outside of the original limitation period, I am inclined to the view that counsel for the Solicitors is correct in his argument and that, on that aspect of the case, the Architects would not have been entitled to have the proceedings as against them dismissed.

7. Conclusions

7.1 However, for the reasons which I have analysed, I was satisfied that the law so far as the main issue which was in controversy between the parties is clear. A claim against an architect for negligent architectural services does not give rise to a claim involving the "same damage" as a claim against a solicitor for allowing an original potential claim against the same architect to become statute barred. For those reasons, the law being clear, I was satisfied that the Solicitors' claim on the third party proceedings was bound to fail and must be dismissed. I so indicated to the parties.

7.2 I will, therefore, make an order dismissing the third party proceedings.