Neutral Citation Number: [2008] IEHC 323

THE HIGH COURT

2004 No. 18899 P

BETWEEN

MICHAEL MURPHY AND MARY M. MURPHY

PLAINTIFFS

AND

MCINERNEY CONSTRUCTION LIMITED AND JAMES A. GRIFFIN

DEFENDANTS

Judgment delivered by Ms. Justice Dunne on the 22nd day of October 2008

1. The plaintiffs claim damages against the first named defendant for negligence and breach of duty arising out of the construction of and repair to a dwelling house at 1 Muckross Close, Powerscourt, Co. Waterford. They also claim damages for negligence breach of duty and breach of contract arising out of an inspection and survey of 1 Muckross Close, Powerscourt, Co. Waterford prior to their purchase of that dwelling house. The inspection concerned took place on the 25th of September, 1997. It is now conceded by the plaintiffs that the claim against the second named defendant arising in respect of an alleged breach of contract based on the inspection and survey of the dwelling house by the second named defendant on the 25th September, 1997, is statute barred.

2. The principal complaint made by the plaintiffs against the first named defendant as set out in the statement of claim is that the first named defendant was negligent and in breach of duty in constructing the property in May 1987. In 1996 it is alleged that the first named defendant acknowledged defects in the structure of the property to its then owner and agreed with the then owner to carry out repairs and remedial works to the property. Thus it is alleged that the first named defendant was negligent and in breach of duty in constructing the property and in effecting the said repair and remedial work thereto.

3. Insofar as the second named defendant is concerned it is pleaded that he was negligent and in breach of duty in the inspection and examination of the property and in preparation of his report on the structural condition of the property for the plaintiffs which report was furnished on the 25th September 1997.

4. Each of the defendants herein has pleaded that these proceedings are statute barred under and by virtue of the Statute of Limitations 1957. The reply to the defence in each case is similar and I will quote expressly from that furnished to the defence of the first named defendant, where it is pleaded as follows:-

> "It is denied the plaintiffs' claim is barred by the provisions of s. 11(2)(a) of the Statute of Limitations Act (sic) 1957, or at all. The plaintiffs will contend their cause of action accrued upon the discovery of the first named defendant's negligence and breach of duty when the latent defects in the property became manifest and within six years prior to the issue of the within proceedings."

5. Section 11(2)(a) of the Statute of Limitations 1957, as amended, provides:-

> "Subject to paragraph (c) of this subsection and to subsection 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."

6. An order was made on the 26th November, 2007 directing the trial of a preliminary issue as to whether or not the plaintiffs' claim is statute barred. Certain facts have been agreed by the parties for the purpose of the trial of this preliminary issue. They are as follows:-

> 1. That the first named defendant constructed No. 1 Muckross Close, Powerscourt, Co. Waterford in 1987 and that in 1996 the first named defendant acknowledged defects in the structure of the property to its then owner, George McDonald and agreed with Mr. McDonald to carry out repairs and remedial works to the property.
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> 2. That in or about the month of September 1997, the plaintiffs were desirous of purchasing a property known as No. 1 Muckross Close, Powerscourt, Co. Waterford.
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> 3. That in September 1997, the plaintiffs retained the second named defendant to inspect the aforesaid property and to advise on its structural condition prior to the completion of negotiations with the purchase of the property in consideration of the sum of €145.20.
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> 4. That on the 25th September, 1997, the second named defendant furnished his report of that date to the plaintiffs' solicitor which concluded that the principle structural elements of the property were deemed to be in good structural order with no apparent defects.
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> 5. That it was a term or condition of the contract of retainer between the plaintiffs and the second named defendant and/or the second named defendant warranted and represented that he had and would exercise all reasonable care, skill and diligence as a consultant engineering the inspection and examination of the property and in furnishing his report on the structural condition of the property. =
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> 6. That the second named defendant acted in breach of contract, negligently and in breach of duty in failing to exercise all due care, skill and diligence in the inspection and examination of the property and in the preparation of his report.
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> 7. That the first named defendant was negligent and in breach of duty in constructing the property and in affecting the said repair and remedial work thereto.
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> 8. That the particulars of loss are as pleaded.
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> 9. That these proceedings commenced by issue of plenary summons on the 30th September, 2004.

7. So far as those agreed facts are concerned, those in relation to the alleged breach of contract of the second named defendant are no longer of any relevance, given the acceptance that the claim against the second named defendant in respect of breach of contract is statute barred.

8. The principal point made on behalf of the defendants herein is that the house in question was constructed in 1987, remedial works were carried out in 1996 and any defects now complained of in the structure or indeed in relation to the remedial works carried out were in existence at that time and indeed in 1997, when the property was purchased by the plaintiffs. Thus, they say, the period of six years had expired since the cause of action accrued and that the proceedings were issued more than six years after the cause of action accrued. The plaintiffs contend that the cause of action against the first and second named defendants in negligence accrued when the latent defects in the property became manifest or as it was put in the affidavit of Rory O'Connor, solicitor, sworn herein on the 19th November, 2007, on behalf of the plaintiffs referring to the plea contained in the Reply to Defence:-

> "Therein the plaintiffs rely on the contention that their cause of action accrued upon discovery of the first named defendant's negligence and breach of duty, when the latent defects in the property became apparent and when they became aware of the first named defendant's negligence and breach of duty which discovery occurred within six years prior to the issue of the within proceedings."

9. Thus, it can be seen that the plaintiffs contend that the statute does not run until the date of the discovery of the defects alleged. Each of the defendants in their respective submissions have rejected this contention and have relied on the Supreme Court decision in the case of *Hegarty v. O'Loughran* [1990] 1 I.R. 14, in which the Supreme Court rejected the concept of a discoverability test and held that the Statute of Limitations runs from the date on which damage happens or occurs and not on the date that the damage or defect was discoverable.

10. Prior to the decision of the Supreme Court in the case of *Hegarty v. O'Loughran*, the interpretation of s. 11(2)(a) of the Statute of Limitations was considered in the case of *Morgan v. Park Developments Limited* [1983] ILRM 156. The facts of that case are not dissimilar from those of the present case. In that case the plaintiff had purchased a house from the defendants in 1962. Shortly after moving into the house, the plaintiff notified the defendants of defects which had occurred in the premises. The defendants repaired the defects including a large crack in the corner of the house which reappeared and required further repairs by the defendants in 1965. The plaintiff was informed that the crack was merely a settlement crack and that it would take some years to settle. Nothing further was done by the plaintiff until 1975 when he had an extension built to the house and his contractor unsuccessfully attempted to repair the wall. In 1979 he consulted an architect who told him that the problem was with the foundations of the house which had resulted in a major structural fault. Proceedings were issued in 1980 and the defendants claimed that the plaintiff's case was statute barred and that the proper date of accrual of a right of action was when the damage had occurred and when the breach of contract was committed. The plaintiff submitted that the date of accrual was when the damage was discoverable and that this had been postponed by reason of a representation made by the defendant's agent, who had lulled the plaintiff into a false sense of security by saying that the crack was a settlement crack and that this was sufficient to preclude the defendants from pleading the statute. It was held in that case that the date of accrual in the action for negligence in the building of a house is the date the defect either was discovered or should have reasonably been discovered. It was further held that the date of accrual of the right of action under the plaintiff's contract with the defendant was the date in 1965, when the defendants had finished the remedial works. In the circumstances of that case the court was of the view that the plaintiff's claim was statute barred and the view expressed by the defendant's foreman as to the nature of the crack in the wall was held to be merely a statement of opinion and not sufficient to enable the plaintiff to prove fraudulent concealment. In the course of her judgment at p. 160 Carroll J. made the following comment:-

> "However, it seems to me that the provisions regarding fraud or mistake do not preclude the interpretation which takes the date of discoverability as the date of accrual. In my opinion the provisions of s. 71 can co-exist with that interpretation. Therefore of the two possible interpretations I prefer the one adopted in the *Sparham-Souter* case which has the date of discoverability as the date of accrual. Whatever hardship there may be to a defendant in dealing with a claim years afterwards, it must be less than the hardship to a plaintiff whose action is barred before he knows he has one. The latter interpretation appears to me indefensible in the light of the constitution.
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> Accordingly I hold that the date of accrual in an action for negligence in the building of a house is the date of discoverability, meaning the date the defect either was discovered or should reasonably have been discovered."

11. In that case a particular feature was the issue of concealment and the provisions of s. 71(1) of the Statute of Limitations which provides as follows:-

> "Where, in the case of an action for which a period of limitation is fixed by this Act, either –
>
> > (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
> >
> > (b) the right of action is concealed by the fraud of any such person, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

12. The concealment in that case relied on but rejected as insufficient to amount to fraudulent concealment was the statement by the defendant's agent, the site foreman that the crack was merely a settlement crack that would take some years to settle.

13. In the course of her judgment in that case Carroll J. referred, *inter alia*, to the decision in *Pirelli General Cable Works Limited v. Oscar Faber and Partners* [1983] 2 W.L.R. 6 in which the House of Lords held that the accrual of a right of action in actions for negligence in the construction or design of a building was the date the damage came into existence and not the date when the damage was discovered or should with reasonable diligence have been discovered. That decision is one which has been characterised in the English courts as producing a result that is "harsh and absurd". The House of Lords in the *Pirelli* case applied the decision of the House of Lords in the case of *Cartledge v. E.F. Jopling and Sons Limited* [1963] A.C. 758, which held that s. 26 of the Limitation Act 1939, (which was similar in terms to s. 71 of the 1957 Statute of Limitations), made it impossible to hold that a cause of action ought not to accrue until the injury is discovered. Carroll J. declined to follow the decisions of the English courts referred to above. She was of the view that a law that could be characterised as "harsh and absurd" could not be constitutional. (See p. 160 of her judgement.)

14. Notwithstanding the views of Carroll J., the decision in the case of *Cartledge v. E. F. Jopling and Sons* was approved by the Supreme Court in the case *of Hegarty v. O'Loughran*, referred to above, in the course of which the Supreme Court overruled the decision of the High Court in *Morgan v. Park Developments*. The facts of the *Hegarty* case are somewhat different in that it concerned an action for damages for personal injury. In that case the plaintiff underwent surgery to her nose performed by the first defendant in 1973. Because the surgery was unsuccessful in 1974, the second named defendant performed a remedial operation which subsequently began to deteriorate by 1976. Proceedings were instituted against both defendants in 1982, claiming damages for personal injuries. The defendants denied negligence and pleaded that the claim was statute barred by reason of the provision of s. 11(2)(b) of the Act of 1957. It was held in the High Court that the date on which the cause of action accrued was the date on which

the act causing the injury was committed and that therefore the plaintiff's claim was statute barred. That decision was appealed to the Supreme Court and it was argued that the court should adopt an interpretation of s. 11(2)(b) consistent with the provisions of the Constitution of Ireland 1937 and that an interpretation of "accrual of the cause of action" such that the date of accrual could arise before the plaintiff was aware of the existence of the cause of action failed to vindicate the plaintiff's constitutional right to litigate. It was held by the Supreme Court*, inter alia*, that the cause of action accrued at the time when provable personal injury capable of attracting compensation occurred to the plaintiff which was the completion of the tort alleged to have been committed against her; that the tort of negligence was not complete until damage had been caused by the defendant's wrongful act; that since the provisions of s. 71 of the Act of 1957, provided that in the case of fraud, time did not begin to run against a plaintiff until the fraud was discovered or could, with reasonable diligence have been discovered, by implication in cases where there was no allegation of fraud, time began to run whether or not the damage could have been discovered; that the presumption in favour of a constitutionally valid construction of a statute only applied where there were two or more possible interpretations of a statute and the provisions of s. 11(2)(b) were so clear that only one interpretation was open to the court; that it was not unconstitutional for the legislature to set a time limit (even if such limit was absolute) within which a particular action had to be brought, that such limit represented a balance between the plaintiff's right to litigate and the defendant's interest in certainty in relation to potential liability.

15. Finlay C.J., in the course of his judgment, expressly rejected the decision of Carroll J. in the case of *Morgan v. Park Developments* at p. 155 of his judgment, when, having referred to the decision in *Cartledge v. E.F. Jopling and Son*, he stated:-

> "Carroll J. in the course of her judgment in *Morgan v. Park Developments* [1983] I.L.R.M. 156, dealing with the decision in *Carthledge v. E.F. Jopling and Son* [1963] A.C. 758, and the decision in *Pirelli General Cables Limited v. Faber* [1983] 1 A.C. 1, which followed that case, pointed out that the position in our law was different from that in the law of England by reason of our Constitution and the existence of a presumption of constitutional validity in the construction of the statutes of the Oireachtas. This distinction is correctly identified but becomes relevant only if there are two or more alternative constructions of the statutory provisions open.
>
> After careful consideration I find that I must disagree with Carroll J. in the conclusion reached by her in *Morgan v. Park Developments* [1983] ILRM 156, that two or more alternative constructions of s. 11(2)(a) of the Act of 1957, are open and if I reach that conclusion I must also find it impossible to conclude that two alternative constructions of the provisions of s. 11(2)(b) of that Act are open."

16. He went on to comment:-

> "In legislation creating a time limit for the commencement of actions, the time provided for any particular type of action; the absolute or unqualified nature of the limit; whether the court is vested with a discretion in certain cases in the interest of justice; and the special instances, if any, in which exceptions from the general time limit are provided, are, with others, all matters in the formulation of which the legislation must seek to balance between, on the one hand, the desirability of enabling persons with causes of action to litigate them, and on the other hand the desirability of finality and certainty in the potential liability which citizens may incur into the future.
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> It is quite clear that what is sometimes classified as the harshness and injustice of the person failing to bring a cause of action to trial by reason of exceeding a time limit not due to his or her own particular fault, may well be counterbalanced by the harshness and injustice of a defendant called upon to defend himself at a time when by the passage of years his recollection, the availability of his witnesses and even documentary evidence relevant to a claim in contract or tort have disappeared."

17. He went on to conclude:-

> "…that the proper construction of this subsection is that contended for on behalf of the defendants and that it is that the time limit commenced to run at the time when a provable personal injury, capable of attracting compensation, occurred to the plaintiff which was the completion of the tort alleged to be committed against her."

18. In the same case Griffin J. at p. 158 of his judgment stated:-

> "The period of limitation therefore begins to run from the date on which the cause of action accrued, i.e. when a complete and available cause of action first comes into existence. When a wrongful act is actionable per se without proof of damage, as in, for example, libel, assault or trespass to land or goods, the statute runs from the time at which the act was committed. However, when the wrong is not actionable without actual damage, as in the case of negligence, the cause of action is not complete and the period of limitation cannot begin to run until that damage happens or occurs."

19. In the course of the submissions made by counsel on all sides herein, reference was made to number of decisions in which the concept of a discoverability test has been considered. It was considered in the case of *Touhy v. Courtney* [1994] 3 I.R. 1, a case in which the interpretation of the phrase "the date on which the cause of action accrued" was considered and in which the Supreme Court also had to consider the issue of the constitutionality of the Statute of Limitations 1957. That case upheld the constitutionality of the limitation period at issue and it was further noted in that case that the legislature was not obliged to introduce a "date of discoverability" rule by way of exception to the periods of limitation provided for by the Act of 1957, merely because of the fact that there existed a jurisdiction in the courts to dismiss a claim against a defendant (if brought within a limitation period) on the grounds that there had been gross delay in instituting the proceedings. Subsequently in the case of *Doyle v. C. & D. Providers (Wexford) Limited* [1994] 3 I.R. 57, O'Hanlon J. commented on the state of the law as follows:-

> "The relevant provisions of the Statute of Limitations, 1957, which apply in relation to actions in contract and tort are to be found in s. 11 of the Act, which provides that actions founded on simple contract and actions founded on tort (with certain exceptions which do not apply) 'shall not be brought after the expiration of six years from the date on which the cause of action accrued.'
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> The interpretation of the phrase 'the date on which the cause of action accrued' was considered by the court in the cases referred to and the constitutionality of the limitation period was challenged in *Touhy v. Courtney* [1994] 3 I.R. 1, but unsuccessfully.
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> The strictness of the rule was ameliorated in relation to claims for damages for personal injuries in the Act of 1991, s. 3 of which provided that time should begin to run from the date on which the cause of action accrued 'or the date of knowledge (if later) of the person injured'. However, this left unchanged the general rule already recited in relation to

other claims based on breach of contract and tort. The justification for the failure of the Oireachtas to relax the stringent rule of limitation in such other actions, even in relation to cases where the plaintiff did not become aware of the damage caused for a long time after the cause of action accrued, through no fault of his own, is spelt out in the judgment of the Supreme Court, delivered by Finlay C.J., in *Touhy v. Courtney* [1994] 3 I.R. 1."

20. In the light of those decisions, is there any possibility that the plaintiffs' case herein is not statute barred? Is the contention in the Reply to Defence correct, namely, that the cause of action accrued when the latent defects in their property became manifest and apparent and when they became aware that the defendants were negligent and in breach of duty, as suggested. It is worth recalling the words used by Finlay C.J. in the case of *Touhy v. Courtney* referred to above at p. 47, where he stated:-

> "It cannot be disputed that a person whose right to seek a legal remedy for wrong is barred by a statutory time limit before he, without fault or neglect on his part, becomes aware of the existence of that right has suffered a severe apparent injustice and would be entitled reasonably to entertain a major sense of grievance.
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> So to state however does not of itself solve the question as to whether a statute which in a sense permits that to occur is by that fact inconsistent with the Constitution.
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> Statutes of limitation have been part of the legal system in Ireland for very many years and were a feature of the system of law operating in force in Ireland apparently both before and after the Act of Union and have continued from 1922 up to the present (cf. the judgment of Griffin J. in *Hegarty v. O'Loughran* [1990] 1 I.R. 148 at p. 157).
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> The primary purpose would appear to be, firstly, to protect defendants against stale claims and avoid the injustices which might occur to them were they asked to defend themselves from claims which were not notified to them within a reasonable time.
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> Secondly, they are designed to promote as far as possible expeditious trials of action so that a court may have before it as the material upon which it must make its decision oral evidence which has the accuracy of recent recollection and documentary proof which is complete, features which must make a major contribution to the correctness and justice of the decision arrived at.
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> Thirdly, they are designed to promote as far as possible and proper a certainty of finality in potential claims which will permit individuals to arrange their affairs whether on a domestic, commercial or professional level in reliance to the maximum extent possible upon the absence of unknown or unexpected liabilities."

21. Thus it would appear that the position in law is clear. However, reliance has been placed by counsel on behalf of the plaintiffs on the decision of the High Court in the case of *O'Donnell v. Kilsarin Concrete Limited* [2002] 1 ILRM 551, a decision of Herbert J. and on the case of *Invercargill City Council v. Hamlin* [1996] A.C. 624, a decision of the Privy Council. Before considering that decision, I want to look at the decision in the case of *O'Donnell v. Kilsarrin Concrete Limited* referred to above. In that case the plaintiffs entered into a contract with the second defendant to build a dwelling house in May 1987. An Architect's Certificate of Practical Completion was issued in March 1988. In 1991, cracks appeared in the outside walls. The area was re-plastered and no further difficulties arose until 1997 when a civil engineer was consulted by the Architect after cracking in the plaster in the same area was discovered. This cracking was due to the presence of a certain mineral in the concrete block. The engineer was satisfied that these cracks were of "recent origin" but it was unable to express any opinion on the 1991 cracking. He accepted that the concrete blocks were unsuitable and defective from the outset. In June 1999, the plaintiffs claimed damages for a breach of contract and negligence against the defendants. It was held that the plaintiffs were statute barred from a action for breach of contract but not statute barred from taking an action for negligence in that the cause of action in contract accrued when the breach of contract occurred and time for the purposes of the statute of limitation ran from the time of the occurrence of that breach. Secondly it was held that in the case of negligence, time began to run once the damage occurred. The court expressly followed the decision of the Supreme Court in the case of *Touhy v. Courtney*. In the course of his judgment, it was noted by Herbert J. that counsel for the plaintiffs in that case argued that the damage did not occur until 1997 or 1998, and that accordingly their cause of action did not accrue until then. Counsel for the defendants argued that the damage occurred in 1988 or alternatively in 1991 and that accordingly the plaintiff's right to recover in tort is time barred. Herbert J. concluded at p. 191 of the judgment as follows:-

> "In the present case, I am satisfied on the evidence that the damage only came into existence not long prior to October 1998, or in the terminology used by Geoghegan J. was not manifest until then. It is not necessary for the court to express an opinion on the vexed question of 'discoverability', because in this case the damage having come into existence not long prior to October 1998, it was drawn to the attention of Mr. Lawlor in May 1998 and by Mr. McLoughlin in October 1998 and the plenary summons was issued on the 4th June, 1999, well within the limitation period."

22. In those circumstances it was found that the cause of action in negligence was not time barred. The reference in that passage to Geoghegan J. is a decision of the High Court (Geoghegan J.) in the case of *Irish Equine Foundation Limited v. Robinson* [1999] I.R. 442. That was a case in which a construction of an equine centre took place. A certificate of completion was issued in March 1986, with a final certificate in November 1987. Water started leaking through the ceiling in 1991 and the plaintiff issued proceedings in January 1996. The statute was raised as a defence. The plaintiff claimed that, as there had been no manifestation of the damage until the leak had occurred, the limitation period only ran from that time. It was held by the High Court that the defects in the building could have been detected by experts at any stage after the construction of the building. The defects had manifested themselves from the time the building had been erected and the statutory period had commenced running from then. At p. 448 of his judgment Geoghegan J. stated:-

> "It would seem to me that if the roof, the subject matter of this action, was defectively designed for the reasons suggested by the plaintiff, this would have been manifest at any time to any expert who examined it. I agree with the submission in this regard made by counsel for R.K. & D., that if experts with the same qualifications as these defendants had been retained just after the roof was constructed to inspect and report and, assuming that the plaintiff's allegations are correct, they could and would have reported that the roof was defectively designed. I am satisfied, therefore, that in so far as this action is founded on negligence in the design of the roof, it is clearly statute barred."

23. Geoghegan J. further commented as follows at pp. 444 – 445 of his judgment:-

> "It is obvious from those dates that the action in contract is clearly statute barred. It is trite law that the limitation period commences on the date of the breach of contract and not on the date when the damage is caused. In other words, a breach of contract *per se* gives rise to a cause of action. The only question which I have to consider, therefore,

is whether the action in so far as it is founded on tort, (i.e. the tort of negligence) is likewise statute barred. The contention of the plaintiff is that there was no damage, or at least no damage manifested itself, until the ingress of water through the ceiling of the centre in late 1991. If the period commenced on that date then, quite obviously, the action in so far as it is founded on tort is not statute barred.

It is common case that discoverability, as such, cannot be relevant in considering what is the appropriate commencement date in respect of the limitation period. On this point at least, the view of the House of Lords taken in *Pirelli v. Oscar Faber & Partners* [1983] 2 A.C. 1, represents Irish law also. This is quite clear from the decision of the Supreme Court in *Hegarty v. O'Loughran* [1990] 1 I.R. 148, even though that particular case dealt with personal injuries and not damage to a building. The reasoning contained in the several judgments in *Hegarty v. O'Loughran* and the criticism voiced of the decision of Carroll J. in *Morgan v. Park Developments* [1983] I.L.R.M. 156, indicate beyond doubt that the Supreme Court rejects the discoverability test no matter what the nature of the damage claimed is."

24. It is interesting to contrast that view of Geoghegan J. with the views expressed by Herbert J. on the "vexed question of discoverability". 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.

25. As mentioned above, counsel on behalf of the plaintiffs also placed reliance on the decision in the case of *Invercargill City Council v. Hamlin* [1996] A.C. 624. In that case a firm of builders in New Zealand built a house for the plaintiffs in 1972. During the course of its construction a building inspector employed by the City Council carried out a number of inspections as required by the city bye laws and approved the foundations. In 1974 cracks began to appear in the building and in 1989 the plaintiff called in another builder who told him that the foundations were defective. In 1990 the plaintiff commenced proceedings against the builders and the Council seeking a sum as the cost of repairs. It was held, *inter alia*, that in the particular context of latent damage to a building that the plaintiffs claim was for economic loss rather than for physical damage to the house or foundations; that such loss occurred only when the market value of the house had been depreciated by reason of the defective foundations having been discovered, the measure of the loss being the cost of repairs if it was reasonable to repair or that depreciation in the market value if it was not; and that, accordingly, the judge had applied the correct test under the law of New Zealand in holding that the plaintiffs cause of action had accrued when the defects would have become apparent to any reasonable home owner and, since there were no grounds for disturbing the findings of fact, the plaintiff's action had been brought in time and the Council were liable for damages in negligence. The Privy Council declined to follow the decision in *Pirrelli*. Particular emphasis was laid on the fact that the loss in the case was economic loss which occurred only when the market value of the house concerned had been depreciated by reason of the defective foundations having been discovered. In the course of the judgment of the Privy Council in that case, Lord Lloyd of Berwick commented at p. 648 as follows:-

"In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable home owner would call in an expert. Since the defects would then be obvious to a potential buyer or his expert, that marks the moment when the market value of the building is depreciated and therefore when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss would then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not. . . .

This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention, and which led to the rejection of the *Pirrelli* decision [1983] 2 A.C. 1, by the Supreme Court of Canada in the *Kamloops* case, 10 D.L.R. (4) 641. The approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected. Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action."

26. He went on to comment:-

"It is regrettable that there should be any divergence between English and New Zealand law on a point of fundamental principle. Whether the *Pirrelli* case, [1983] 2 A.C. 1, should still be regarded as good law in England is not for their Lordships to say. What is clear is that it is not good law in New Zealand."

27. It is my view that the decision does not assist this Court in reaching a decision. The law in this jurisdiction is clear as to the interpretation of the Statute of Limitations. In any event, the plaintiffs have not sought to make out a case for damages for economic loss in their pleadings.

28. The phrase "the date on which the cause of action accrued" is key to the determination of the issue that arises in this case. The interpretation of that phrase has been considered by the courts in this jurisdiction and the Supreme Court has made clear how it should be determined. It is necessary in applying the interpretation of that phrase to consider the facts of this case. One of the points made by counsel on behalf of the plaintiffs was that the cause of action was not complete until such time as it was clear that the cracks in the property were structural. This did not become known to the plaintiffs until 2000 when a further inspection was carried out in respect of the property. It was argued that until this time the plaintiffs could not have sued. The plaintiffs when purchasing the property in 1997 took the prudent course of having the property surveyed. Although there were visible cracks apparent at that time it was not clear to the plaintiffs that the cracks were structural. In this context I think it is important to consider and look at the particulars raised on behalf of the second named defendant in this respect and the replies thereto.

29. In a letter of the 21st March, 2006, the following particulars were raised and replies were furnished on the 14th July, 2006, as follows:-

"5. Particularise (a) the remedial works which had been carried out to the property, reference to which is made a para. 8.2 of the statement of claim; and (b) the condition or efficacy of the same as at 25th September, 1997.

Reply: The plaintiffs will furnish full details of the remedial works carried out to the property upon obtaining discovery from the first named defendant. Without prejudice, the plaintiffs believe that settlement cracks in the upstairs portion of the property were repaired by the first named defendant over the duration of a number of days. The condition of the remedial works as and at the 25th September, 1997, will be furnished upon receipt of discovery from the first named defendant.

> 6. Specify the manner in which the second named defendant's inspection and examination of the property was "inadequate" as pleaded at para. 8.3 of the statement of claim.
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> Reply: The second named defendant's inspection and examination was inadequate in that he failed to identify and ascertain that remedial works had been carried out to the property and failed to attach any or any adequate significance to the cracks he observed in the structure.
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> 10. State whether it is alleged by the plaintiff's that the defects referred to in the two preceding paragraphs were (a) manifest and (b) ought to have been evident to the second named defendant.
>
> Reply: We refer you to the second named defendant's report attached herewith. The second named defendant noted some cracks which "were not considered to be any cause for alarm or any cause of immediate threat to the integrity of the structure, nevertheless ought to be attended to". The two areas were (a) on the external face of the garage wall and (b) on the plasterwork of the chimney. The plaintiff asserts that the second named defendant noted the cracks in question, but failed to attach any or any adequate or proper significance to same."

30. 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.

31. The words of McCarthy J. in the case of *Hegarty v O'Loughran* at p.164 are apposite:-

> "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 on the date on which, if it had been discovered, proceedings could lawfully have been instituted. I recognise 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."

32. As mentioned above, the rule has been qualified by the legislature in the case of personal injuries actions but the attempt in *Tuohy v Courtney* to invalidate the rule failed. Unfortunately, it follows that the plaintiffs' claim is statute barred.

33. I want to deal briefly with one final matter raised on behalf of the plaintiffs in the written and oral submissions. It was suggested that the underlying causes for the development of the structural defects were hidden and concealed from the plaintiffs, both after the initial construction works and by the subsequent remedial works. Accordingly it was contended on behalf of the plaintiffs that the defects were "concealed" within the meaning of s. 71 of the Statute of Limitations 1957. It was also contended that this was unconscionable and thus brought s. 71 into play. Counsel for the first named defendant took particular issue to this argument being made. It was pointed out that the plaintiffs had not raised any issue in their pleadings in respect of s. 71 of the Statute of Limitations 1957. I have to say that I accept that submission. In order to rely on s. 71, the plaintiffs would have had to lay the ground for making such an assertion. No attempt to do so has been made either in the pleadings themselves or in any other appropriate way. There are simply no facts before the court that could lead to such a conclusion. In those circumstances, s. 71 cannot be relied upon by the plaintiffs.