THE HIGH COURT

Record Number: 2006 No. 1352P

Between:

Kevin Agar and Nina Saul

Plaintiffs

And

Basil Conroy and Company Limited

Defendant

Judgment of Mr Justice Michael Peart delivered on the 30th day of March 2012:

1. On the 24th March 2006 the plaintiffs issued a Plenary Summons in which they claim damages against the defendant for negligence, negligent misstatement and misrepresentation, as well as for breach of contract. The background to these claims is that prior to signing a contract for the purchase of a house, the plaintiffs engaged the defendant company, being a firm of chartered quantity surveyors and building costs accountants, to inspect the house and provide them with a structural survey and valuation report.

2. The defendant provided duly inspected the property and provided such a report dated 8th December 1999, and in reliance upon it the plaintiffs executed the contract to purchase the house. The report did not disclose serious cracks and defects in the walls of the house, which the plaintiffs became aware of only about one year after they went into occupation of the house after they had completed the purchase.

3. The plaintiffs went into occupation of the house in or about April 2000 according to the Statement of Claim. The date on which the Contract for Sale was signed by the plaintiffs having placed reliance upon the defendant's report is not pleaded in the Statement of Claim. Neither do the Plaintiff's Replies to Particulars.

4. The defendant has by motion sought to have a preliminary issue determined as to whether the plaintiffs' claim is statute-barred both in respect of the breach of contract claim and the claims in tort. The plaintiffs accept that the claim in contract is statute-barred since it is clear from the date of the report that the proceedings were not instituted within a period of six years from the date of the contract, which was entered prior to the 8th December 1999. However, they contend that the claims in tort are not statute-barred, since whatever be the date on which they executed the Contract for Sale, the fact is that they entered into occupation of the house on some date in April 2000 and therefore within the period of six years preceding the date of issue of their proceedings on the 24th March 2006, and that it can only be upon the payment of the purchase monies and their occupation of the premises thereafter that they suffered loss, that loss being an essential component of the torts alleged and therefore the date upon which their cause of action accrued.

5. The defendant has in the past in a previous affidavit on a different motion, for example the affidavit of Hugh Millar, solicitor, maintained that the plaintiff's claim was statute barred in its entirety after the 8th December 2005 both in contract and in tort being six years after the date of the report dated 8th December 1999. Mr Millar's grounding affidavit on the present motion is to like effect. Indeed, the first written legal submissions prepared in March 2011 rely upon the date of the report as the date from which time should run, that date being the date upon which the alleged wrong was done. In their legal submissions the plaintiffs had submitted that while for tort purposes the alleged wrong occurred in December 1999 when the report was prepared, the tort was not completed until after they went into occupation of the house, following completion of the sale, and that was in April 2000, and therefore within six years preceding the date of issue of the proceedings. Up to that point neither the plaintiffs nor the defendant seem to have had a copy of the Contract for Sale, or if they did it was undated.

6. However, in its supplemental legal submissions, the defendant has relied for the first time on the date of execution of the Contract for Sale as being the date upon which the plaintiffs should be held to have acted to their detriment on foot of the defendant's report, because it is from that date that the plaintiffs entered into an unconditional and binding contract for the purchase of the property, and one which they were thereafter bound to complete. The defendant's solicitor had no role to play in the sale of the property, and therefore did not have a copy of the actual Contract for Sale, and was unaware of the date upon which it had been executed by the purchasers and the Vendors. But he has sworn an affidavit on the 8th December 2011, the admission into evidence of which the plaintiffs object on the basis that it contents are entirely hearsay in nature. His inquiries from the Vendors' solicitors have satisfied Mr Millar that the date of execution of the Contract for Sale by the Vendors, and which post-dated by some weeks the execution thereof by the plaintiffs/purchasers, precedes the date of issue of these proceedings by more than six years.

7. Accordingly the defendant is now in its final legal submissions that even if the plaintiffs are correct in saying that whereas the alleged wrong was committed by the defendant when it furnished the report in December 1999, but that the damage was sustained in order to complete the tort of negligence only when they acted upon the report, the date on which they so acted must be the date on which they became bound into an unconditional contract for the purchase, and not the date on which they completed the sale and entered into occupation, since the latter date is simply the date which would be relevant to a discoverability test, which under law is not the correct test. Therefore the situation seems to be that if the relevant date for the purpose of the statute issue is the date on which the plaintiffs became bound to complete the purchase, and if the date of that contract as put forward by the defendant as a result of Mr Millar's inquiries is correct, the claim is statute barred in tort, but if it is the date on which the purchase was completed the proceedings have been issued within time.

8. However, the plaintiffs on the present motion have objected to the admission into evidence of the affidavit sworn by Mr Millar and in which he has exhibited a copy of the undated Contract for Sale, and a copy of certain correspondence which passed between the purchasers' solicitor and the vendors' solicitor in relation to that contract and its execution. That contract and correspondence if properly admitted into evidence would certainly on a prima facie basis present an obstacle to the plaintiffs as it seems to make clear a date for the Contract for Sale. It should be borne in mind also that the plaintiffs' solicitor in these proceedings is the same solicitor

who acted for them in this purchase and would have his own file which would assist in ascertaining if the date being put forward by Mr Miller, based on his inquiries and the copy correspondence exhibited is correct or not. However, they submit that this motion on the preliminary issue may proceed only on the basis of either agreed facts between the parties, or in the absence of such agreement, on the basis of the facts as they are disclosed in the Statement of Claim.

9. The defendants' solicitor made efforts to agree the facts for the purpose of this preliminary issue. In that regard he corresponded with the plaintiffs' solicitor as far back as 6th July 2009 which was over two years after the question of whether or not these claims were statute barred had been first raised in correspondence in March 2007. A draft of facts for agreement was furnished, but did not contain any fact to be agreed as to the actual date of the contract for sale. It referred to the date of the report, the date on which the plaintiffs went into occupation of the house, and also to the date on which they first became aware of the cracks in the wall and other matters, but not the date of the contract as at that time in 2009 the defendants' solicitor was not aware of it, not having by then inspected the vendors' solicitor's file. While that letter was formally acknowledged by letter dated 16th July 2009, there was no substantive response from the plaintiffs' solicitor until 13th May 2010 when they wrote to the defendant's solicitors stating that they had been advised by Counsel that the plaintiffs' case has been set forth in the Statement of Claim and Replies to Particulars, and that if the defendant wished to have a preliminary issue tried in relation to the statute issue it could do so only by Particulars.

10. The defendant submits that given the information which has now come to hand as to the actual date of the contract for sale, this Court is in as good a position now as at trial to decide on the basis of that date whether the plaintiffs' claims in tort are statute barred, and that the Court should so determine even though the date of the contract is not pleaded and is not an agreed fact, since it is indisputable from the contents of the vendors' solicitor's file, and has not been disputed on affidavit by the plaintiffs, even though their solicitor acted for them in the purchase transaction, and would have their own file in relation to it in order to contradict the evidence gathered if it was possible to do so. The defendant submits that it would be in ease of costs and court time and resources to determine the issue now, rather than go through what is felt to be the pointless exercise of waiting for the full trial of the action in order to decide the stature issue in the light of oral evidence which is unlikely to alter the essential facts, namely the date upon which the plaintiffs herein were bound into the contract and had no option but to complete it.

11. The plaintiffs on the other hand have argued that the determination of the issue even by reference to the date of the contract is not as easy as the defendant maintains, as there would be other factual issues which the Court would have to determine, such as whether on the date of the contract the plaintiffs were obliged under the contract to insure the premises. That question arises for argument in the plaintiffs' submission because of certain reliance placed by the defendant on a decision of the English Court of Appeal in *Byrne v. Hall Pain & Foster* [1999] 2 All ER 400. In so far as the defendant relies on English authority as to the plaintiffs' obligation to complete the purchase once the contract was signed by all parties, they submit that this Court would have to be satisfied by relevant expert evidence of English law that the conveyancing law and practice referred to in that case was the same as the law and practice in this jurisdiction, and they say that there are differences. They submit also that this Court would need to hear factual evidence in relation to the execution of the contract by the parties, and as to the date of closing of the purchase transaction, and that the hearsay evidence contained in Mr Millar's affidavit should not be simply accepted for the establishment of these essential facts.

12. Hugh O'Neill SC for the defendant and moving party has, as I have stated, placed reliance upon the Court of Appeal decision in *Byrne v. Hall Pain & Foster* [supra] - the facts of which have a similarity to those in the present case. In that case the plaintiffs entered into a contract for the purchase of the lease of a flat in reliance upon a surveyor's report, and subsequently discovered faults which had not been referred to in the report. It was pleaded by the defendants that the plaintiffs had not commenced proceedings within six years from the accrual of the cause of action. The Court of Appeal concluded that the cause of action accrued not on the date when the defendants were discovered but on the date upon which the vendor and purchaser *"exchanged contracts"* which was more than six years preceding the commencement of proceedings, and their claims were therefore statute barred. The basis for that conclusion was that it was following the exchange of contracts that the purchaser plaintiffs became irrevocably committed to acquiring the lease, and to which they would not have committed themselves but for the negligent report provided by the defendants. The date of exchange of contracts, and therefore the date on which the plaintiffs had suffered damage, was outside the six year limitation period, even though the completion date was within the said period. In that case a question arose as to whether the statute issue should be left to the trial judge at hearing. Simon Browne L.J. was satisfied that since no further evidence was required than was already available there was nothing to be gained by postponing a decision on the statute issue. In that case the date of exchange of contracts was not in dispute between the parties. Neither was the date of completion. But the Court was satisfied on authority that there could be no doubt that the applicable date from which time must be calculated was the date of exchange and not the date of completion. In that regard he stated:

> *"The central point which I apprehend was being made is that the purchaser is on any view damaged by purchasing in reliance upon a negligent over-valuation. But for that he would not have bought. No more would he have exchanged contracts to buy. 'He suffers actual damage by parting with his money and receiving in exchange property worth less than the price he paid' (see [1998] 1 All ER 305 at 308, [1997] 1 WLR 1627 at 1630 per Lord Nicholls.) But I can see no distinction in principle between 'parting with his money and receiving in exchange property at completion and, as will generally occur on exchange, paying a deposit and becoming committed to pay the balance on completion. True, it is not until completion that the purchaser receives the property in the sense of the legal estate in the property. On exchange, however, he obtains a very real interest in the property, and for example, must insure it."*

13. Michea! P.O'Higgins SC for the plaintiffs places emphasis on the final phrase *"and for example, must insure it"*, and submits that this is a vital distinction between the law in England upon the exchange of contracts, and the law here and has referred to the Law Society's standard Conditions of Sale which provide that until the purchaser pays over the balance of purchase monies the vendor retains that obligation and remains liable to the purchaser in that regard until the purchase is completed. He seeks to distinguish the case on that basis, and submits that this Court could not place reliance on that decision without expert evidence as to the law in England and before this Court could decide that under Irish law the purchaser was under an irrevocable obligation to complete after he/she has paid a deposit. In addition, of course, as I have already stated, he submits also that this Court cannot know on agreed facts or on the basis of the pleadings precisely on what date the Contract for Sale was executed by both parties and therefore the date on which the action in tort accrued, even if it to be accepted that it is the date of the Contract for sale which is the relevant date rather than the date of completion. On this basis he submits that the issue should be allowed to remain for argument at trial when all relevant evidence can be called.

14. Returning again to the objection by Mr O'Higgins to the admissibility of the hearsay affidavit filed by Mr Millar which exhibits the copy Contract for Sale and correspondence which he obtained following a perusal of the vendors' solicitor's file, he has referred to the provisions of Order 25, rule 1 RSC under which the present application is brought by the defendant. It provides:

> *"1. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by*

the judge who tries the cause at or after trial provided that by consent of the parties, or by order of the Court on the application by either party, the same may be set down for hearing and disposed of at any time before the trial.

2. If, in the opinion of the Court, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set off, counterclaim or reply therein, the Court may dismiss the action or make such other order therein as may be just. "

15. Mr O'Higgins has referred to the judgment of Lynch J. in *McCabe v. Ireland* [1999] 4 I.R. 151 where in relation to this rule, Lynch J. stated at p. 157:

"A preliminary issue of law obviously cannot be tried in vacuo: it must be tried in the context of established or agreed facts. The facts relevant to the preliminary issue must not be in dispute, but they may be agreed for the purpose of the preliminary issue of law only without prejudice to the right to contest the facts if the actual determination of the preliminary issue should not dispose of the matter at issue. The facts must be agreed or the moving party must accept, for the purpose of the trial of the preliminary issue which he raises, the facts as alleged by the opposing party. "

Mr O'Higgins submits that the facts are not agreed for the purpose of the present application, particularly in relation to the date of the Contract for Sale, and neither is that important fact evident from the Statement of Claim or the Replies for Particulars. He rejects the suggestion made by the defendant that these relevant facts can be gleaned and established by reference to the contents of Mr Millar's affidavit, and I have already explained in more detail the basis of that objection.

16. Mr O'Higgins has referred also to the judgment of Denham J. (as she then was) in *Nyembo v. The Refugee Appeals Tribunal* [2007] IESC 25. During the course of her judgment the learned judge noted that there was a dispute on the facts in the case, and that there was no agreement as to the relevant facts. She stated:

"I am satisfied that the procedure laid down under Order 25, r.1 corresponds to the old hearing on demurrer, and may not be availed of where facts giving rise to the point of law are in dispute between the parties."

17. Mr O'Neill nevertheless asks rhetorically what facts are in reality in dispute given the contents of Mr Millar's affidavit as to the date by which the plaintiffs and their vendor became bound into the Contract for Sale. He is clearly of the view that even if oral evidence was to be given by appropriate witnesses at trial as to the date of this Contract for Sale it would be clearly established that the date is that to which Mr Millar has averred in his affidavit, and that it is a waste of both Court time and costs for the matter not to be decided on the present application.

18. I am satisfied that it would not be appropriate in the face of facts which have not been agreed, and on the basis of a fact that does not emanate from the pleadings themselves, but rather from a hearsay affidavit, to take what is the drastic step from the plaintiffs' point of view of dismissing their claims in tort. It is clear from the authorities to which I have referred that it is inappropriate for the Court to do so where facts are not agreed and the pleadings do not assist in relation to the critical fact as to the date of the contract for sale.

19 I propose therefore refusing the present application at this stage so that the case in tort can proceed to a hearing, at which stage the trial judge may decide to hear at the outset whatever oral evidence is relevant to the issue raised on the statute, and determine first the issue of whether the claims are statute barred. That will be a matter for that judge to determine, and, if he or she decides that the claims in tort are indeed statute barred based on the oral evidence adduced, whether in the light of that evidence the plaintiffs have acted reasonably in not accepting the date of the Contract for Sale as being that set forth in Mr Millar's affidavit. I will reserve the question of the costs of the present motion to the full hearing of the case so that a decision in relation to the costs of the present application can be determined by reference to such evidence and the outcome of the issue itself. It would not be appropriate for me on this application to determine the costs of the application in favour of the plaintiffs, even though in one sense they have successfully resisted the present application for the reasons which I have stated.