

## THE HIGH COURT

[2012 No. 7302 P]

BETWEEN

BREFFINI MORGAN

LAURA MORGAN

PLAINTIFFS

AND

FAIRVIEW DEVELOPMENTS LIMITED

PATRICK RUXTON (TRADING AS PATRICK RUXTON ARCHITECTURAL SERVICES)

LIBERTY CORPORATE CAPITAL LIMITED

DEFENDANTS

**EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the day of 10th day of March, 2016**

1. This is an application by the plaintiffs for an order under O. 15 (13) of the Rules of the Superior Courts to add Ruxton Architectural Services Limited as a defendant to the action. The application was strenuously resisted by the second named defendant, Mr. Patrick Ruxton.

2. In *Hynes v. Western Health Board* [2006] IEHC 55 Clarke J. put the general proposition relevant to the grounds for resistance as follows:-

*"A defendant can be joined in proceedings notwithstanding there being issues as to the applicability of the statute[of limitations] subject to an exception that the court retains a discretion not to join a defendant where the statute would clearly apply and where, in the words of Budd J., the joining of such a defendant, would be "futile"."*

3. I note the judgment of Birmingham J. in *Hegarty v. DNS Flanagan Brothers Ballymore Limited* [2013] IEHC 263 where the claim was dismissed against the defendant as being "clearly statute barred".

4. Suffice to say that Mr. Ruxton, on behalf of his company the proposed defendant, contends that the plaintiffs' claim will be found to be statute barred and that this Court should accept same as manifest.

5. On a preliminary point, there are issues of fact and opinion which this Court cannot resolve by reference to affidavit evidence only. The Court in this type of application effectively has to take the plaintiff's submissions at their height.

6. The plaintiffs in the original and proposed amended statement of claim referred to the purchase of the house which is the subject of a claim in August, 2006. In the amended Statement of Claim reference is made to plaster falling off and the originating plenary summons was issued on 25th July, 2012.

7. On 30th June, 2011, the plaintiffs' solicitors received an undated letter from Mr. Ruxton in reply to their letter of claim which did not specifically alert the solicitors to the fact that Mr. Ruxton was going to assert that he had certified and carried out the other acts giving rise to the alleged cause of action through his limited liability company.

8. At this point, the Court notes particularly that the professional indemnity insurance certificate dated 12th December, 2005 which is alleged to be relevant by the plaintiffs named Mr. Ruxton and not his company.

9. The defence served on behalf of Mr. Ruxton hedges bets by referring to Mr. Ruxton's company while also pleading matters in defence of the company.

10. In view of the Court of Appeal judgment in *Brandley v. Keane* [2016] IECA 54 which confirms that a cause of action does not arise until loss or damage have been sustained, the issues of fact and opinion which remain in dispute and the potential for the plaintiffs to deliver a reply to any defence on behalf of Mr. Ruxton's company that the true identity of the company was concealed within the meaning of s. 71 of the Statute of Limitations Act, 1957, the Court is not in a position to determine the issue of conscionability and recognises that it may be an issue at the trial.

11. Was it an honest blunder on behalf of Mr. Ruxton or was it concealment? It is noteworthy that the application in *Hynes* by the defendant doctor who had been joined was not similar to this application where the company of an existing defendant is sought to be joined.

**Costs**

12. Order 99 (4 A) of the Rules of the Superior Courts requires this Court to make an award of costs save where it is not possible to adjudicate upon liability for costs on the basis of the interlocutory application. Order 99 provides that costs follow the event unless the Court for special cause to be mentioned in the order shall otherwise direct.

13. Counsel for the second named defendant strenuously resisted the application of the plaintiffs and this Court has determined the motion in favour of the plaintiff. No special cause has been identified and therefore the Court directs the second named defendant to discharge the costs of this application with a stay on the execution of that order until these proceedings are determined. A different point of consideration may have arisen if the application was made on behalf of Ruxton Architectural Services Ltd but it is not making what would be effectively a preliminary issue point that may arise following the delivery of its defence. It is not before the Court.