Neutral Citation [2016] IEHC 434

THE HIGH COURT

[2014 No. 5957 P]

BETWEEN

SPENCER WILKINSON, EMILY HURLY-WILKINSON,

JOSHUA HURLEY-WILKINSON (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND EMILY HURLY-WILKINSON) AND

BENJAMIN HURLEY-WILKINSON (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND EMILY HURLY-WILKINSON)

PLAINTIFFS

AND

ARDBROOK HOMES LIMITED, PADDY MCGEE (WEXFORD) LIMITED, NATIONAL HOUSE BUILDING GUARANTEE COMPANY LIMITED TRADING AS HOMEBOND AND MHL & ASSOCIATES LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 22nd day of July, 2016.

1. The plaintiffs have brought proceedings seeking damages for personal injuries against each of the four defendants arising from the purchase of a residential property in a scheme of residential units in Mallow, Co. Cork. The first and second plaintiffs are husband and wife, and third and fourth plaintiffs are their children. The parents entered into a building contract for the construction of what was to become their family home on 13th November, 2006, and as a result of what they say are very serious defects in the premises, the family has vacated the house and claim to have suffered personal injuries consequent upon the damp condition of the house.

2. This judgment is given in a motion by the third defendant, the National House Building Guarantee Company Limited trading as HomeBond ("HomeBond"), which provided a warranty to the purchasers in respect of the construction of the premises. HomeBond seeks an order that the action against it be struck out on the ground it is bound to fail, and invokes the inherent jurisdiction of the court as well as O. 19, r. 28 of the Rules of the Superior Courts.

3. The first and second plaintiffs also commenced breach of contract proceedings against HomeBond and the other defendants under the building agreement in which HomeBond is sued on foot of the guarantee or warranty issued to those plaintiffs on 4th October, 2006.

4. The personal injuries summons issued on 8th July, 2014, after the plaintiffs had obtained an authorisation to commence the proceedings from the Personal Injuries Assessment Board.

The claim as pleaded

5. The claim against HomeBond in these proceedings is made in breach of contract and negligence, and is expressly linked to what is described as a "warranty in relation to the building in respect of major structural defects". Personal injuries, loss, damage, inconvenience and upset are claimed to have been suffered by the plaintiffs by reason of the breach of contract and negligence of HomeBond, its servants or agents, and the particulars of negligence pleaded are that HomeBond failed:

> (a) To provide cover in line with the HomeBond guarantee in circumstances where a major structural defect exists and where the plaintiffs have complied with all notification requirements under the said HomeBond agreement.
>
> (b) To properly certify adequately or at all the foundations of the dwelling before the concrete was poured.
>
> (c) To certify adequately or at all the roof construction of the dwelling by wrongly issuing the final completion certificate.

6. Certain facts are not in dispute. HomeBond provided the warranty and a HomeBond engineer or architect inspected the laying of the foundations and certain other structural works in the course of construction, and thereafter issued a final notice and the written warranty. The primary fault with the premises relates to defective foundations and has resulted in significant damp penetration. HomeBond issued a certificate before the sale closed and the building contract was completed by the parties thereto. Significant structural repair work, possibly including demolition and reconstruction, will be required and the plaintiffs have abandoned the dwelling by reason of health concerns.

7. The plaintiffs claim, in particular, that HomeBond did not merely approve the drawings but engaged in an active inspection of the premises in the course of construction and that the certificate provided by it must be seen in that context.

8. In the present application, I propose, in line with the authorities, to assume that the defects in respect of which the plaintiffs claim are in whole or in part covered by the structural warranty provided by HomeBond.

The HomeBond guarantee

9. The HomeBond guarantee gives a degree of comfort to purchasers of newly built dwellings, and provides a warranty limited to €200,000 in respect of structural defects that become apparent in a newly built dwelling within ten years of the date of the bond. The HomeBond guarantee is part of the general legal framework put in place on the purchase of a newly built dwelling, and the HomeBond guarantee is furnished in the course of the conveyancing transaction and is usually processed through the solicitors for the purchaser. A builder must seek approval from HomeBond, and a builder or developer becomes a member of HomeBond once it satisfies certain conditions of registration. It is not doubted that HomeBond did provide the guarantee for the structural works in question or that the builder was a member of the HomeBond scheme. As part of the documentation provided by the builder or developer the plaintiffs obtained the benefit of the guarantee or warranty.

10. Certain provisions of the HomeBond guarantee are relevant to this action. Clause 3.6(b) of the agreement provides, under the heading "Exclusions from/Limitations to liability - Major Defects", the following exclusion of liability:

> "Neither HomeBond nor its servants or agents shall have any liability whatsoever (and irrespective if how it arises) to a purchaser in relation to any claim for damages, expenses or other compensation relating to any act or omission concerning the dwelling. In particular, HomeBond shall have no liability in relation to:
>
> • any negligence or default in inspecting (or failing to inspect a dwelling); or
>
> • investigating a purchaser's complaint."

11. It is important to note in the context of this judgment that no argument was made by the plaintiffs that this limitation does not operate against them.

12. When the building works were deemed to be complete, HomeBond issued what was called a Final Notice (the "Final Notice") which contained the following:

> "This Notice is subject to the Terms and Conditions of the HomeBond Agreement and neither HomeBond nor its servants or agents shall accept any liability for any negligence or default in inspecting or failing to inspect the Dwelling in respect of the issue or contents of this Notice, in investigating complaints, or otherwise howsoever or whatsoever."

13. The guarantee or warranty, therefore, in its express terms was limited to the provision of a warranty in respect of structural defects and expressly excluded any claim for damages arising, *inter alia*, from the issuing of the Final Notice or in respect of any negligence in inspecting or failing to inspect a dwelling the subject matter of the warranty.

14. The present proceedings are founded in a claim that HomeBond negligently issued a certificate of completion, or negligently carried out an inspection of the premises, and in particular of the foundations and the roof construction, and that in the circumstances the Final Notice was wrongfully and negligently issued.

Order 19, Rule 28

15. Order 19, rule 28 of the Rules of the Superior Courts permits the court to stay or dismiss proceedings which are shown to be frivolous or vexatious. The jurisdiction exercised under that rule is separate and distinct from the inherent jurisdiction of the court to strike out proceedings on the grounds that the action is not sustainable or is bound to fail. In any application under the rule, the court is constrained by being confined to an analysis of the claim as pleaded and will exercise its jurisdiction on the assumption that the facts pleaded will be established at trial. If, as a result of that analysis, the court takes the view that the claim does not give rise to a cause of action, the claim will be dismissed or stayed.

16. In his recent judgment in *Burke & Anor v. Beatty* [2016] IEHC 353, Noonan J. exercised the jurisdiction under O. 19, r. 28 to strike out part of the claim by the plaintiffs against a defendant in which damages for an alleged conspiracy were claimed. Noonan J. made the point, which I will return to later in the context of the pleadings in this case, that "*pleadings exist to define the issues which the court has to determine*" (para.14).

17. On the other hand, where the court is exercising its inherent jurisdiction to dismiss proceedings, it may take a broader approach and may look outside the pleadings in order to assess whether the claim is bound to fail and if it can be shown to be such, the continued maintenance of those proceedings is an abuse of process. As explained in a series of decisions of Clarke J., including *Salthill Properties Limited & Anor. v. Royal Bank of Scotland plc & Ors.* [2009] IEHC 207 and *Keohane v. Hynes & Anor.* [2014] IESC 66, that jurisdiction is one that will be "*sparingly exercised*". In that context, the court will examine the evidence on affidavit presented by a plaintiff, and will determine whether the plaintiff could possibly establish the facts presented. As Clarke J. said in *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21:

> *"…cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance."*

18. The sparing exercise of the jurisdiction involves the court hearing a motion to strike out as being scandalous or vexatious and bound to fail, in not merely taking a plaintiff's pleaded case at its height, but will have to assess whether arguably those matters pleaded or deposed to on affidavit could possibly be established at trial, and if there is a possibility that the case could possibly succeed it ought not be dismissed. Were the test to be more stringent, and were a plaintiff obliged to establish that he or she will arguably succeed, or were the court to require a credible basis for establishing facts, the court hearing the motion could fall into the error of assessing the credibility of the evidence, and failing to recognise that at trial, or even in the course of pre-trial procedures such as discovery, the facts may take a particular course and the court hearing a motion would be depriving a plaintiff of an action that could possibly succeed.

19. Thus, the approach of the court hearing a motion such as the present is to ask whether the plaintiff could possibly succeed on the case as pleaded and in the light of the facts asserted, and only if it is satisfied that a plaintiff could not possibly establish those facts, or could not possibly succeed on the pleadings, should the proceedings be struck out.

20. The decision of Noonan J. in *Burke & Anor. v. Beatty*, is an illustration of this, in that he refused to strike out the claim insofar as it sought damages for alleged professional negligence, but did strike out the claim in conspiracy as he considered that the claim as pleaded did not disclose any alleged wrongdoing against the defendant, and that even if a claim was established, no actionable loss arose. His findings in that case were that the plaintiff's allegation of conspiracy led to a loss to a third party and not to the plaintiff.

The difference between the inherent jurisdiction and that under Order 19, r.28

21. Costello J. in *Barry v. Buckley*, [1981] I.R. 306 struck out the proceedings in the exercise of his inherent jurisdiction to prevent an abuse of court process. This is the approach taken by Clarke J. in *Lopes v. Minister for Justice, Equality and Law Reform*. In order to sustain an application under O.19, r.28 a moving party must establish to the court that even if the facts as pleaded, and presumably also those facts as asserted on replying affidavits to the motion, were established, that the claim would necessarily fail as a matter of law. That was apparent in *Barry v. Buckley,* in which Costello J. made it clear that relief under O. 19 r. 28 could not succeed because the plaintiff's claim as pleaded did disclose a cause of action on its face, the action being pleaded in specific performance grounded on a plea that a contract existed.

22. In *Lopes v. Minister for Justice, Equality and Law Reform*, the Supreme Court considered that the only possible evidential basis for the plaintiff's claim was the documentary evidence which wholly governed the legal relations between the parties and the court

exercised its inherent jurisdiction, having taken the view that the pleadings were essentially pleas of fact, and contained the necessary pleas to found the allegations of bias, discrimination and corruption that it could not unequivocally be said that the pleadings, on their face, did not disclose a cause of action.

23. Clarke J. dealt with the application on the basis that the case was:

> *"…wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss."*

24. Clarke J. considered that the action should be dismissed in the inherent jurisdiction of the court, as the provisions of O. 19, r.28 were obviously not available as the court would be obliged to assume that the facts pleaded would be established and that therefore on the face of the pleadings, the action could succeed. The Supreme Court accepted that the decision of Hanna J. in striking out the proceedings in the inherent jurisdiction of the court as being bound to fail. was correct and dismissed the appeal.

25. In the later judgment of *Keohane v. Hynes & Anor*., Clarke J., delivering the judgment of the Supreme Court, again returned to the question of proceedings which depended to a large extent on the documentary evidence. As he said at para. 6.9:

> *"In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations."*

Analysis of the claim in the present proceedings

26. It seems to me that that the subject case comes within the category of proceedings in respect of which the rights and obligations of the parties are defined by the HomeBond agreement. Therefore, it is a case akin to the class of proceedings described by Clarke J. in *Keohane v. Hynes & Anor*., and the Supreme Court decision in *Jodifern Ltd. v. Fitzgerald* [1999] IESC 88, [2000] 3 I.R. 321. There are no conflicts of fact apparent on the affidavits and the plaintiffs take as their starting point the HomeBond agreement. That agreement is in the form of a warranty in respect of which liability outside the strict confines of the warranty are expressly excluded. The claim as pleaded is precisely the form of claim which is excluded by Clause 3(6) of the agreement, namely a claim arising from negligence in the inspection of, or by reason of the failure to inspect, the dwelling, or a negligence relating to an act or omission concerning the dwelling. The relationship between the parties was one governed wholly by the HomeBond document, and in the absence of any plea or any fact which might ground an alternative source of those obligations, and accordingly the proceedings must be considered within the legal relations established by the agreement, and not otherwise. As I noted, there is no plea, or proposition advanced in the affidavit evidence in reply to the motion, that the limitation clause did not govern the relationship between the parties.

27. Costello J. in the seminal judgment *Barry v. Buckley* was dealing with an action for specific performance, and exercised the inherent jurisdiction of the court to dismiss the proceedings, having noted that the agreed facts established beyond doubt that there was no concluded contracts between the parties, or no note or memorandum sufficient to satisfy the Statute of Frauds, on foot of which the claim might be maintained. Costello J. also rejected the argument that the plaintiff could rely on an act of part performance to support the claim, as the agreed facts disclosed that no concluded agreement had been reached because the parties had agreed that no binding contract would exist until the written contract in a standard form had been executed by both parties, and the deposit paid. Costello J. dismissed the claim on the grounds that "*considerable injustice could result if the matter is not disposed of now*" at motion stage and held that to allow the case to proceed would be an abuse of court process. The application was dealt with on a construction of the documentary evidence and on the basis of agreed facts.

28. The plaintiff's plead their action on the HomeBond guarantee or warranty, but on a true construction of the documents they exclude the claim, and the documentary evidence cannot possibly sustain the claim. In those circumstances, it seems to me that the HomeBond agreement does not sustain these proceedings, and indeed expressly excludes it.

Claim in tort

29. Furthermore, I agree with the assertion made by counsel for HomeBond that the claim is made both in contract and in tort, but insofar as the claim in tort might have the effect that the obligation of HomeBond would be greater than that found expressly in the contract, the claim will fail. In that, he relies on the judgment of the Supreme Court in *Kennedy & Ors. v. Allied Irish Banks Plc. & Anor.* [1998] 2 I.R. 48 at p. 56.

30. A similar conclusion was arrived at by the Supreme Court in *Pat O'Donnell & Company Limited v. Truck and Machinery Sales Limited* [1998] 4 I.R. 191, where at p.199 O'Flaherty J. expressed the proposition thus:

> *"Where it is more advantageous to sue in tort, it would be incongruous if a non-contracting party was able to avail of these advantages while a contracting party could not…*
>
> *However, it should be emphasised that the general duty of care in tort cannot be manipulated so as to override the contractual allocation of responsibility between the parties. Thus if, for instance, a contract provides, whether expressly or by necessary implication, that the defendant is not liable for a particular risk, then the law of tort should not be allowed to contradict that."*

31. O'Flaherty J. said that as the terms of the contract had been complied with, the counterclaimant had to establish that duties otherwise owed by the plaintiff had been breached.

32. The plaintiff has not pleaded any special relationship or any assumption by HomeBond of responsibility outside the contractual relationship, and no reliance is pleaded, for example, on a representation or other extra-contractual nexus that might have grounded a parallel or other duty in negligent misstatement. The claim is pleaded as arising out of the contract, and while it is pleaded in negligence, the claim in negligence is for the negligent performance of the contractual obligations.

33. I consider that pleas in tort are broadly similar to those considered by the Supreme Court in *Pat O'Donnell & Company Limited v. Truck and Machinery Sales Limited*, and accordingly that the claim for negligence is bound to fail, because the claim is one founded wholly in contract and the contract itself expressly excludes liability for such negligence.

Brennan v. Flannery & Ors.
34. Counsel for the plaintiff relies on the decision of Dunne J. in *Brennan v. Flannery & Ors.* [2013] IEHC 145, and asserts that her decision is authority for the proposition that to be actionable the HomeBond agreement must be signed by both parties. The question of a signature arose in the present case in that the document exhibited by HomeBond in the grounding affidavit did not contain the signature of the first and second plaintiffs.

35. The judgment of Dunne J. was given in the context of the claim by the plaintiff, *inter alia*, against HomeBond arising from the purchase by the plaintiff of a newly built house in Co. Roscommon. Dunne J. expressed herself satisfied on the facts before her that the plaintiff had signed the HomeBond guarantee, and that she was aware of the limitations in that guarantee, the same limitations that are found in the present case.

36. The plaintiff had suggested in the course of her evidence, that she was unaware of the nature of the documentation she had signed when she purchased the premises, and in particular that the HomeBond document that she received contained only one page. The question of whether she had signed the document was relevant to whether she knew of the limitation clause, and Dunne J. held that she did, because her signature was found on the second page, the reverse of that document, the single sheet containing writing on both sides. There is nothing in the decision of Dunne J. which suggests that the HomeBond guarantee had to be signed by the plaintiff, and I cannot accept the argument of the plaintiff that the finding of Dunne J. points to a finding that that signature was necessary. No other authority is advanced for that proposition.

37. No assertion is made that the plaintiffs were unaware of the limitation in the HomeBond guarantee, and no credible assertion is made that in order to bind the plaintiffs to the burden of that limitation, that their signature was required.

38. Further, the judgment in *Brennan v. Flannery & Ors*, is important in another respect and in the present case, I come to the same conclusion as Dunne J. did with regard to the nature of the guarantee or warranty provided by HomeBond:

> *"In all the circumstances of this case, I cannot come to the conclusion that the plaintiff has established that HomeBond owed a duty of care to the plaintiff giving rise to liability for all the defects in the dwelling house as contended for by the plaintiff."*

39. Dunne J. also noted that there was no relationship between the plaintiff and HomeBond prior to the signing of the guarantee and that there was no argument of any representation made by HomeBond over and above the express terms of the guarantee itself. Dunne J. rejected the argument of the plaintiff that the guarantee meant on its true construction that HomeBond was providing a warranty and amounted to a misrepresentation or gave an impression or guarantee of quality and credibility.

40. Dunne J. rejected too the argument that a duty of care arose, and distinguished *Ward v. McMaster & Ors.* [1988] 1 I.R. 337, as in that case a special relationship and a statutory duty did exist between the parties which gave rise to a duty in tort.

41. I find myself unable to distinguish the analysis of Dunne J. in *Brennan v. Flannery & Ors.*, from the circumstances in the present case, and I am in agreement as to the meaning and effect of the HomeBond agreement which she analysed in some considerable detail. That decision of Dunne J. was upheld on appeal in an *ex tempore* judgment of the Court of Appeal, save that the Court of Appeal reversed her finding with regard to the financial limit on the guarantee which she had held was not operative in that case for the reasons she outlined.

42. Further, counsel for the plaintiff asserts the judgment of Dunne J. may be distinguished in another respect. It is asserted that by attending at the site and inspecting the foundations, and certifying the foundations before the concrete was poured, that HomeBond, through its servants or agents, more than merely provided a contractual guarantee, but also warranted the quality of the work by taking a step which it did not need to take. In that context, I cannot accept the argument that those facts alone could, if established at trial, have the effect that the plaintiffs would succeed in their claim because the claim as pleaded is not founded, even by way of an ancillary or subsidiary claim, on the assumption of an additional liability by HomeBond as a result of such an inspection or otherwise. The claim is pleaded as stemming from the contract and not from any additional task willingly undertaken by a servant or agent of or by HomeBond. This is apparent from the plea in negligence which I have outlined above, and those pleas of negligent acts or omissions are of a failure to certify the works or the act of negligently issuing the final notice.

43. This is a plea in breach of contract, framed as a plea for negligently breaching the contract, or negligently failing to perform the contractual obligations. It is not a claim arising from a collateral contract, misrepresentation or arising as a result from or the assumption of special or additional duties by HomeBond or its servants or agents.

44. I cannot, for that reason either, distinguish the judgment of Dunne J. in *Brennan v. Flannery & Ors.*

Court should exercise jurisdiction sparingly
45. Finally, counsel for the plaintiffs argues that as the jurisdiction of the court to strike out a claim ought to be sparingly exercised, that I should take account of the fact that there are extant breach of contract proceedings against HomeBond arising from the building agreement, and that there is no additional burden on HomeBond in having to defend the personal injuries proceedings, and both cases are to be heard together, albeit they have not been consolidated. I reject that argument, and the defence of a personal injury summons will result in the expenditure of costs and time by HomeBond, including the engagement of medical experts to examine the plaintiffs and the other work associated with the claim in this case.

Conclusion
46. For all of the reasons stated above, because this is a claim which is founded in a contract of warranty contained in a written document, and because that contract expressly excluded liability for the claim as pleaded, and because no special relationship is claimed to have come into existence, either as a result of a representation or the assumption of additional liabilities by the third defendant, I propose in the exercise of my inherent jurisdiction to strike out the claim of the plaintiffs against HomeBond, the third named defendant in the proceedings, on the grounds that the claim is bound to fail.