Neutral Citation Number: [2014] IEHC 377

THE HIGH COURT

[2012 No. 3202 P]

BETWEEN

CHRISTOPHER WALTER AND SUSANNA RODRIGUEZ

PLAINTIFFS

AND

PETER CROSSAN AND CROSSAN HOMES LIMITED AND DAVID FENTON, JAN HAYES, TERENCE B. MCGRATH AND GRÁINNE O'HANLON PRACTISING UNDER THE STYLE AND TITLE OF HAYES MCGRATH SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on 24th July, 2014

1. Can a plaintiff in an action for negligence recover damages for the upset and inconvenience caused by a breach of a duty of care which is owed to them where that upset, distress and inconvenience falls short of nervous shock and psychiatric injury? This is essentially the issue which arises in this application which is brought on behalf of the third, fourth, fifth and sixth defendants ("the Hayes McGrath defendants") to have the negligence proceedings against them struck out pursuant to the provisions of O. 19, r. 28 or, alternatively, pursuant to the inherent jurisdiction of the court. It is also contended that the proceedings should also be struck out in the absence of an authorisation from the Personal Injuries Assessment Board under s. 12(1) of the Personal Injuries Assessment Board Act 2003 ("the 2003 Act") on the basis that the claim is really one for personal injury which required the prior authorisation of the Board before such proceedings could be issued.

2. The issue arises in the following way. In July, 2006 the plaintiffs, who are husband and wife, contend that they entered into an agreement with the first defendant, Peter Crossan, to purchase lands and premises at No. 2 Avondale Court, Ballyguile, County Wicklow. This agreement also entered into an agreement for the construction of a house to be built by the second defendant, Crossan Homes Ltd., in accordance with a particular planning permission bearing record number 02-6245, which permission was held by the Crossan defendants. Messrs. Hayes McGrath are a firm of solicitors who acted for the Crossan defendants in connection with this sale and conveyance of land.

3. One of those conditions ("condition 2") contained in the planning permission was that the sum of €32,943.80 was to be paid in respect of the site at No. 2 Avondale Court to Wicklow County Council for the provision of roads, water, sewerage and recreational amenities.

4. The conditions of sale required that the vendor provide "written confirmation from the local authority of compliance with all conditions involving financial contributions." In the amended statement of claim delivered on 14th February 2014 the plaintiffs allege that the first defendant in his capacity as a director of the second defendants certified in writing that the levies specified in condition 2 of the planning permission had been paid to the Council so that this condition was complied with. The plaintiffs further allege that this certificate was inaccurate and misleading and in that respect the Crossan defendants are sued both in negligence and for breach of contract. Since the Crossan defendants were not a party to this motion and since they have not been heard in relation to this matter, I refrain from any further comment in relation to these particular allegations.

5. The plaintiffs then allege that on foot of this certificate they paid over the funds for the house purchase for the benefit of the Crossan defendants and that the funds were released by Hayes McGrath in their capacity as the solicitors for the Crossan defendants prior to formal confirmation from the local authority either that the terms of condition 2 had been complied with or the production of any receipts from the Council in that regard. The sale closed at the end of July 2006, but it appears that the Council wrote to Hayes McGrath on 4th August 2006 shortly thereafter to the effect that the payments due in respect of condition 2 for 2 Avondale Court were still outstanding. The plaintiffs further allege that Hayes McGrath:

> "negligently parted with the plaintiffs' funds and further failed to notify the plaintiffs' solicitor that the said certificate being furnished was inaccurate and therefore in breach of planning permission reg. ref. no. 02/6245."

6. I should pause at this point to observe in the interests of fairness that Messrs. Hayes McGrath have indicated that they will deny these allegations should the matter go to full trial. Nevertheless, it is equally clear that for the purposes of an application of this kind I must also assume that, generally speaking at least, the plaintiffs will be in a position to prove all factual matters contained in their pleadings: see *Ennis v. Butterly* [1996] 1 I.R. 426, 430-431, *per* Kelly J.

7. I might also observe that while the plaintiffs allege that in this respect there was a breach of contract on the part of Hayes McGrath, there is nothing at all to suggest that there was such a contractual relationship between them and Hayes McGrath. I will therefore proceed on the basis that the action against *these particular defendants* is for negligence and breach of duty only. (The claim for breach of contract as against the Crossan defendants is a different matter entirely.)

8. Following the completion of the sale, the Mr. Walter and Ms. Rodriguez moved into 2 Avondale Court which had by then become their family home. So far as they were concerned, they had acquired a full and complete title to the property, including a full planning permission to use and occupy the dwelling for this purpose. Yet an unpleasant surprise awaited them, because it is common case that on 22nd March, 2011, the plaintiffs received a notification from Wicklow County Council to the effect that this financial contribution had not been paid and that the sum of some €36,322 was now due and owing by them to the Council.

9. It seems clear that this communication came entirely out of the blue and it requires but little imagination to accept that the terms of this letter must have been extremely upsetting and distressing for Mr. Walter and Ms. Rodriguez. The letter was described as a warning letter for the purposes of s. 152 of the Planning and Development Act 2000 and it invited the Walters to make submissions under s. 152(4) of the 2000 Act on the question as to whether their dwelling was unauthorised dwelling. The letter was rounded off with what amounted to an implied threat of future criminal prosecution under s. 154, as the writer summarised the nature of possible

criminal penalties open under the section, including - if you please - the possibility of a prosecution upon indictment.

10. It is equally accepted that the solicitors for Wicklow County Council subsequently sent a formal demand letter to the plaintiffs requiring the payment of this sum within a period of fourteen days on 9th August, 2011. That letter also indicated that the Council threatened to issue injunction proceedings pursuant to s. 160 of the Planning and Development Act 2000 as against both the Walters and the Crossan defendants, with the letter writer saying that the "Council cannot be expected to elect between respective defendants."

11. While the Council are not a party to the proceedings – and thus have not been heard on this motion – I should have thought that they could indeed have been expected to choose between these potential defendants. After all, a cursory examination of the surrounding facts would have revealed that the Walters were completely innocent parties who relied upon assurances given by others. These assurances were accepted by them in perfect good faith in the course of a conveyancing transaction in respect of what, after all, was the acquisition of their family home. The correspondence further suggests that the Council and the Crossan defendants had had extensive dealings with regard to the issue of the payment of the development levies in respect of 2 Avondale Court and other properties.

12. Yet for their pains, the Walters received a series of threats – there is, I fear, no other word for it – from officialdom couched in imperious and, many might think, insolent language. While it would be unfair to dwell on this in the absence of the Council in the proceedings, I cannot nonetheless help but thinking but that, objectively speaking, this treatment of the Walters has been most disappointing. If law-abiding and upright citizens are treated in this fashion by agents of the State, is it any wonder that their loyalty and fidelity to the State is put to the test?

13. At all events, there matters stood until 19th March, 2013, when the planning compliance section of Wicklow County Council wrote to the second defendant. In that letter the Council referred to earlier correspondence regarding use of part of a cash security held for other developments in the Wicklow are to pay for the outstanding contributions due in respect of Avondale Court. The writer continued:

> "I can confirm that the Council is agreeable to transfer €24,020.00 of the cash security held for Aughrim Hall to cover the contributions outstanding for No. 2 Avondale Court. On this basis they confirm that Condition 2 of 02-6245 has been complied with for No. 2 Avondale Court. I am to advise that although the above condition has been complied with in respect of the above planning permission, it does not necessarily imply that all other conditions pertaining to this application have been complied with."

14. Messrs. Hayes McGrath point to these developments to support their claim that the matter is now moot and is now at an end. Yet there is rather more to this business than that. There can be no doubt whatever but the receipt of correspondence from a State agency which alleges the non-payment of significant sums said to be due to the State or one of its agencies and which threatens a range of civil and criminal sanctions is deeply unpleasant and upsetting. This is especially so where - as here - such correspondence is entirely unexpected and where the recipients are completely innocent of any wrongdoing. Adding insult to injury, the correspondence from the Council casually threatened the Walters with a criminal prosecution. The tone of the correspondence from the Council was peremptory and uncompromising.

15. One can therefore readily accept that the Walters suffered acute distress and upset as a result of these demands and threats which unfairly hung over them in the period between March 2011- March 2013. It may also be accepted that the relationship between the Hayes McGrath defendants, as solicitors for the developer defendants, and the Walters as purchasers of the property developed by their client was sufficiently close as to give rise to a duty of care on the part of these defendants so far as the issue of certification was concerned: see, e.g., the judgment of Barrington J. in *Wall v. Hegarty* [1980] I.L.R.M. 124 and the judgments of Keane and Barron JJ. in *Doran v. Delaney* [1998] IESC 66, [1998] 2 I.R. 61.

16. This is especially so if – as the plaintiffs allege – as the solicitors for the developer, Messrs. Hayes McGrath had given the Walters to understand that all the requisite conditions of the planning permission had been met prior to the completion of the sale.

17. The issue which, however, arises in this motion is not then the existence of a duty of a care or even whether there was a breach of it (though this is denied by the McGrath defendants). The question is rather a different one, namely, whether even accepting that there was such a duty of care and that it was breached, the nature of the loss and injury suffered by the Walters is cognisable *in an action for negligence* as distinct to an action for breach of contract.

18. There is no doubt but that damages for distress and inconvenience of this kind are at least in principle recoverable in an action for breach of contract. Thus, damages can be recovered for upset and disappointment arising from an unsatisfactory holiday: (*Jarvis v. Swan Tours Ltd.* [1973] Q.B. 223) or where a wedding party are wrongly denied access to food and drinks which a public house had agreed to supply for a post-wedding reception (*Dinnegan v. Ryan* [2002] IEHC 55) or where a worker is wrongfully denied the early retirement he had been promised and for which he had made arrangements (*Browne v. Iarnród Eireann (No.2)* [2014] IEHC 117). Damages for inconvenience can also be awarded for breach of contract in respect of the construction of a defective dwelling: see, e.*g., Johnson v. Longleat Properties Ltd*. [1976-77] I.L.R.M. 93, *Quinn v. Quality Homes Ltd*. [1976-77] I.L.R.M. 314, *Leahy v. Rawson* [2004] 3 I.R. 1 and *Mitchell v. Mulvey Developments Ltd*. [2014] IEHC 37.

19. It is true that in the building cases it is sometimes said that such damages are awarded by reason of the negligence of the developer or other building professional. But in none of these cases have damages been awarded *independently* of any breach of contract. In reality, therefore, the award of damages for inconvenience in these building cases is to represent the loss of expectation *in respect of the performance of the contract* brought about by the negligence and breach of contract on the part of the defendant. While the scope of recovery in contract and tort is generally similar, there are also at times subtle differences which reflect the fact that in contract the plaintiff is also entitled to be compensated for disappointment and loss of enjoyment in respect of the loss of expectation for which he or she has actually contracted. As McMahon J. put it in *Johnson* ([1976-77] I.L.R.M. 93, 105):

> "It appears to me that in principle damages may be awarded for inconvenience or loss of enjoyment when these are within the presumed contemplation of the parties as likely to result from the breach of contract. That will usually be the case in contracts to provide entertainment or enjoyment, but there is no reason why it should not also be the case in other types of contracts where the parties can foresee that enjoyment or convenience is likely to be an important benefit to be obtained from the due performance of that contract."

20. Where – as in the present case – there is no such contractual relationship, it is clear from the case-law that damages for inconvenience and upset of this nature are not recoverable. This is illustrated by two relatively recent decisions of this Court, *Larkin*

v. Dublin City Council [2007] IEHC 416, [2008] 1 I.R. 391 and *Hegarty v. Mercy University Hospital, Cork* [2011] IEHC 435.

21. In *Larkin* the plaintiff was a full time fireman who entered a competition for the prestigious post of sub-officer. He was later informed that he had been successful and received a letter to this effect. He received the praise and congratulations of friends and colleagues. A few days later it emerged that a mistake had been made and the plaintiff was informed that he had been unsuccessful. He was deeply upset as a result and found that he could not return to work for several months. Although he did not suffer any psychiatric illness, his general practitioner gave evidence that he had suffered an acute stress reaction. The plaintiff claimed damages for what Clark J. described as the "upset, emotional upheaval and distress caused by the negligent assessment of his marks and the consequent raising and dashing of expectations."

22. While accepting that the Council owed the plaintiff a duty of care and that it had been breached in the circumstances, Clark J. also noted that cases such as *Kelly v. Hennessy* [1995] 3 I.R. 253 establish that damages may only be awarded in negligence actions for nervous shock or psychiatric injury. This, however, was not such a case ([2008] 1 I.R. 391, 397-398):

> "The plaintiff did not and does not suffer from a recognisable psychiatric condition. He suffered undoubted upset, humiliation, sensitivity and disappointment but required no treatment or medical intervention. His employers quite correctly offered a full and unreserved apology as soon as the mistake was discovered and he was offered €5,000 as an *ex gratia* payment. Counselling was offered and availed of. A period of six months paid leave was permitted during which time he stayed away from work while leading a normal life. He then returned to the work which he loves and where the uncontroverted evidence is that he is an excellent and committed firefighter. He has not established any psychiatric illness such as depression or indeed any other illness. He is therefore akin to the person who suffers grief and distress who for public policy reasons is excluded from the recovery of damages. While there was a breach of duty it did not give rise to any injury which entitles the plaintiff to recover damages."

23. A similar view was taken by Irvine J. in *Hegarty* in a case where a seriously ill patient was (incorrectly) told by hospital personnel that he had contracted the MRSA virus. She nonetheless took the view that in the absence of proof of psychiatric injury or nervous shock, there was no compensatable injury in an action against the hospital:

> "The height of the plaintiff's evidence was that he experienced very high levels of stress and anxiety in or about the time he was diagnosed as being MRSA positive. The Court heard no evidence from any medical practitioner to the effect that the plaintiff had, as a result of the negligence alleged, developed any recognisable psychiatric injury. Evidence of any actionable injury was seriously lacking in the case advanced on the plaintiff's behalf and without actionable damage, stress and anxiety alone are insufficient to support a claim. Negligence is not complete until an alleged breach of duty goes on to cause damage to the extent recognised by the law and no such damage was demonstrated in this case. Thus, having regard to the decisions of the court in a long line of legal authority, which perhaps had its infancy in the decision of the Supreme Court in *Kelly v. Hennessy* [1995] 3 I.R. 253 and was more recently considered by Clark J. in *Larkin v. Dublin City Council* [2008] 1 I.R. 391, the plaintiff's claim as a matter of law is not sustainable."

24. There are, of course, other cases where acute forms of mental distress may be compensated. The singular case of *Wilkinson v. Downton* [1897] 2 Q.B. 57 provides one such example. In that case the defendant falsely told the plaintiff as a practical joke that her husband had been injured in an accident involving a horse-drawn vehicle and that he was lying prostrate on the ground with his legs broken and that he had summoned her to fetch him. While the plaintiff's husband returned safely by train from the races at Harlow that evening, the effects on the plaintiff by reason of the telling of this practical joke were nonetheless dramatic. She became violently ill, her hair turned white and she seems to have suffered a severe psychiatric illness as a result.

25. The plaintiff sued for damages in an action on the case. Wright J. held the defendant liable on the ground that ([1897] 2 Q.B. 57,58-59):

> "he had wilfully done an act calculated to cause physical harm to the plaintiff, that is to say, to infringe her legal right to personal safety and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification for the act."

26. An essential element of the tort in *Wilkinson v. Downton* is that the words were spoken falsely (and so the wrongful act went beyond mere negligence) and were calculated to and did in fact cause physical harm. It may well be that, in any event, the injuries in *Wilkinson v. Downton* would nowadays be recognised as coming within the established category of nervous shock in the manner described by the Supreme Court in *Kelly v. Hennessy*.

27. There are also other cases where the common law of negligence may have to be supplemented and developed over time in order to give full effect to the constitutional requirements in relation to the protection of the person in Article 40.3.2. I touched upon this in my judgments in *Sullivan v. Boylan (No.1)* [2012] IEHC 389 and *Sullivan v. Boylan (No.2)* [2013] IEHC 104. In that case the plaintiff had been harassed and subjected to threats within her own house by a debt collector to the point whereby she was afraid to leave her own home. I held that in those circumstances the plaintiff could recover damages for breach of her constitutional rights to the protection of the person (Article 40.3.2) and the inviolability of the dwelling (Article 40.5). As I pointed out in *Sullivan (No.1)*:

> "One might equally contend that the actions of the [debt collector] were calculated to physical harm to Ms. Sullivan and that they did in fact do so. It would nevertheless be artificial to extend the rule in *Wilkinson v. Downton* in this fashion. In the latter case the *injuria* was the acute physical harm which the plaintiff had suffered. It is true that in the present case Ms. Sullivan lost weight and in the end was prescribed a mild sedative to assist her to have sleeping pattern restored.

But there the comparisons end, as unlike *Wilkinson v. Downton*, the claim here is not really for physical injury at all. It is rather for the acute distress caused by the outrageous invasion of her personal space which is the very essence of the inviolability guarantee in Article 40.5. This guarantee is complemented by the protection of the person in Article 40.3.2, the effect of which, if I may venture to repeat what I said in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235 is that:-

> "By solemnly committing the State to protecting the person, Article 40.3.2 protects not simply the integrity of the human body, but also the integrity of the human mind and personality."

I might further repeat what I said on this point in *Sullivan (No.1)*:

> "In the present case it requires little imagination to visualise the acute mental distress which Ms. Sullivan suffered as a result of this outrageous conduct. The citizen's right to the security of his or her person necessarily implies that the

subjection by unlawful means of any person to what would objectively be regarded as acute mental distress must be regarded as amounting in itself to a breach of Article 40.3.2.'"

28. While it may therefore be allowed that as cases such as *Sullivan* show that the extent of the recovery of damages in negligence may yet have to be supplemented or developed over time in appropriate cases in order to ensure that the requirements of Article 40.3.2 in respect of the protection of the person are more completely satisfied, the present case is not such a case. The essence of the award of damages for breaches of constitutional rights in *Sullivan* was that it was the result of the wrongful invasion of the plaintiff's personal space within her own dwelling which caused her acute mental distress. While the plaintiffs' distress in the present case might just possibly approximate to that of the plaintiff in *Sullivan*, the other wrongful conduct which had made the plaintiff in that latter case effectively a prisoner within her own home and which was the triggering factor in the damages award is simply not present here.

Conclusions

29. In these circumstances, I feel compelled to strike out the case as against the Hayes McGrath defendants alone pursuant to the inherent jurisdiction of the Court. I take this step reluctantly, but do so only on the very narrow ground that the injuries which the plaintiffs suffered (mental distress, upset and inconvenience falling short of nervous shock or psychiatric illness) are not recoverable in an action for negligence, as distinct from an action for breach of contract.

30. For these reasons, it is unnecessary to consider any issue arising by reason of the 2003 Act.