THE COURT OF APPEAL

CIVIL

Court of Appeal Record Number: 2023/171

Whelan J.
Noonan J.
Meenan J.

BETWEEN/

BRIAN MCDONAGH, MAURICE MCDONAGH AND KENNETH MCDONAGH

APPELLANTS

- AND –

ULSTER BANK IRELAND DAC, NORMAN GINNELLY, PAUL MCCANN, PATRICK DILLON, CBRE, PROMONTORIA ARAN, LINK ASI LIMITED, CONOR MAHER AND ALAN MONAGHAN

RESPONDENTS

JUDGMENT of Mr. Justice Charles Meenan delivered on the 18th day of January 2024

Introduction: -

1. This is an appeal against the judgment and order of the High Court (Quinn J.) wherein he found that the plaintiff's claim against the fifth named defendants ("CBRE") was barred pursuant to the provisions of s. 11 of the Statute of Limitations Act 1957 (as amended) ("the Act") and that the action be dismissed. The issue before the High Court was when the time allowed by the Act for the commencement of proceedings started to run. The appellants claimed damages for negligence and breach of duty on the part of CBRE in giving a valuation

for a 33-hectare site at Kilpeddar, County Wicklow ("the lands") where the appellants planned to develop a data centre. The lands were the security for a loan advanced by the first named defendant ("the bank"). In order to identify the date upon which time began to run for the purposes of the Act, the High Court had to identify the date upon which the damage alleged by the appellants occurred.

2. The appellants also maintained that their cause of action against CBRE was concealed by fraud, thus preventing time to run as per s. 71 of the Act.

3. Notices of Discontinuance were served on all defendants other than CBRE.

Background: -

4. The background to these proceedings was set out in some detail by the trial judge. In summary, in July 2007 the appellants purchased the lands having borrowed some €21.5m from the bank and investing a further sum of €4.5m. For the purposes of this transaction CBRE valued the lands at €56m, also in July 2007. It would appear that CBRE was instructed by the appellants, who discharged its professional fee, though, as will further appear, there was a dispute as to who instructed CBRE. In any event the valuation report was addressed to the bank. On 3 August 2007, the acquisition of the property was completed, and the appellants executed a mortgage in favour of the bank.

5. The appellants never repaid the loan or any part of it. On 13 March 2013 the appellants and the bank entered into what is referred to as the "compromise agreement". This agreement was also not adhered to by the appellants and there then followed the inevitable litigation which has resulted in several lengthy and detailed judgments both of this Court and the High Court.

6. Under the compromise agreement the liabilities of the appellants to the bank, which then stood as a sum in the region of €25m, were to be written off in return for a payment by the appellants of some €5m and the sale of certain properties including the lands by a target

date, being 31 July 2014. However, the said agreement also provided that in the event of the failure by the appellants to comply with the terms of the agreement or in the event that the lands were not disposed of, the bank would be at liberty to take whatever steps it deemed fit on foot of the security held by it.

7. The appellants did not comply with the compromise agreement. On 11 April 2018 the bank formally demanded the payment for a sum of €27,470,404.15. On 2 July 2018 the High Court (Twomey J.) granted the bank judgment in the sum of €22,947,202.85.

8. In the course of the proceedings before Twomey J. the appellants argued, *inter alia*, that there was no breach of the compromise agreement and that receivers, appointed by the bank pursuant to its security, were invalidly appointed.

9. On 26 June 2013 the bank commenced proceedings against CBRE, claiming damages for negligence and breach of duty in respect of the said valuation report. These proceedings were compromised, without admission of liability, by CBRE who paid the bank €5m and a contribution towards its costs. The bank, though not legally obliged to do so, credited the €5m received against the monies owing by the appellants.

10. On 6 April 2022 the Court of Appeal upheld the findings of Twomey J. concerning, *inter alia*, breach of the compromise agreement and the validity of the appointment of the receivers.

11. In addition to not repaying the monies borrowed or honouring the compromise agreement, the appellants engaged in deception. As mentioned, the compromise agreement required that the appellants sell the lands by 31 July 2014. In the proceedings before Twomey J. the appellants asserted that on 13 June 2014 they had sold the lands by signing a document described as a "Heads of Agreement". Under this "agreement", the appellants were purporting to sell the land for a price of €1,501,000 to a company called "Granja Limited". Twomey J. held that Granja Limited was a "front" for the first named appellant

and therefore not a contract for the true sale of the lands as was required by the compromise agreement. In the course of the hearing of this application in the court below, the appellants acknowledged that this agreement was a "sham".

12. On 1 February 2021 the bank disposed of the lands for a sum of €3m. On 12 February 2021 these proceedings were issued, though now only continued against CBRE.

CBRE proceedings: -

13. CBRE entered an appearance on 24 February 2021. The appellants delivered a statement of claim dated 14 March 2022 and subsequently an amended statement of claim was delivered, dated 23 July 2022. I will be referring in some detail to the contents of the amended statement of claim later in this judgment.

14. CBRE delivered its defence on 27 September 2022. By way of a preliminary plea, it was pleaded that the appellants' claim was statute barred. The appellants and the respondents, having exchanged affidavits and an agreed statement of facts, agreed that the issue on the statute of limitations be heard notwithstanding that there was no order of court directing the trial of a preliminary issue.

Relevant statutory provisions

15. Section 11 of the Act provides as follows: -

> "11–(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued -
>
> (a) actions founded on simple contract;
>
> (b) actions founded on quasi-contract;
>
> ---
>
> (2)(a) --- 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 --"

16. Section 71 of the Act provides: -

"71–(1) Where, in the case of an action for which the period of limitation is fixed by this Act, either -

(a) the action is based on the fraud of the defendant or his agent or 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. ---"

Judgment of the High Court: -

17. The trial judge set out in some detail the background events and an account of the various legal proceedings. Both parties accepted that any action for breach of contract would commence on the date of the breach, being July 2007 when CBRE furnished its valuation. The parties were also in agreement that the cause of action in negligence would accrue as and from the date when the damage occurred. The plenary summons was issued on 12 February 2021. Thus, if the trial judge determined that the damage occurred on a date earlier than 13 February 2015, the appellants proceedings would be statute barred.

18. The trial judge considered a number of leading authorities as to when it could be said that the damage occurred in cases such as this. Having considered, *inter alia*, *Gallagher v ACC Bank* [2013] ILRM 145, *Brandley v Deane* [2018] 2 IR 741, *Cantrell v Allied Irish Banks* [2020] IESC 71 and *Smith v Cunningham* [2021] IECA 268 and [2023] IESC 33, the trial judge set out the principles which he considered to be most relevant to the facts of the instant case at para. 148: -

"(1) The six-year limitation period in a negligence action (apart from a claim for personal injuries) runs from the date on which the cause of action accrued (section 11(2)(a) of the Act of 1957.)

(2) The Act contains no definition of the 'accrual' of a cause of action, but the time limit runs only from the date on which the tort has become actionable by reason of the occurrence of loss or damage. See *Cantwell(sic) v AIB,* (*per* O'Donnell J.) and *Brandley v Deane* (*per* McKechnie J.) there is no 'discoverability' test.

(3) Certain torts are actionable *per se*. Negligence is not such a tort and it has only become complete and actionable when the damage has occurred. Without such damage, no cause of action has accrued.

(4) Evidence is required before a determination can be made that loss has occurred (see *Ubaf v European American Bank Corporation*, as cited with approval by O'Donnell J. in *Cantwell(sic*).

(5) In identifying the date on which a cause of action has accrued, it is necessary to establish that every fact which it would be necessary for the plaintiff to prove at trial in order to support his right to a judgment of the court, must have come into existence (see Collins J. in *Smith v Cunningham* and Finlay C.J. in *Hegarty v O'Loughlin*).

(6) In many cases the harmful act or event and the occurrence of loss or damage will arise simultaneously. This may be obvious in cases of physical damage to property, or may become obvious in certain other circumstances, such as where a flawed title has been acquired due to the negligence of a solicitor. In economic loss cases it will frequently not be the case that the damage has occurred simultaneously with the harmful act.

(7) A mere possibility or a contingency of loss is not sufficient to ground an action (*per* Fennelly J. in *Gallagher v ACC Bank*, McKechnie J. in *Brandley v Deane* and Collins J. in *Smith v Cunningham*).

(8) Where a transaction involves both benefits and burdens, loss or damage arises if and when the *"balance"* is adverse to the plaintiff. In a negligent valuation case, such as this, that balance becomes adverse when the value of the property falls below the aggregate of the debt incurred, together with interest, and the plaintiffs' own investment or the debt or investment is lost.

(9) The fact that the quantum of loss and damage is unascertained on a given date does not mean that loss has not occurred on or before that date. There are many cases where a court at trial is required to determine quantum which includes damages for future losses. Certainty of the quantum of the loss does not preclude accrual of the cause of action. In *Smith v Cunningham*, Collins J. emphasised that there will be cases in which damage sufficient to ground a cause of action will have occurred well before the point at which the quantum of loss has become known or capable of definitive qualification."

19. The trial judge examined the case that was pleaded by the appellants to identify the date when they claimed the damage occurred so as to start time running: -

"161. It is clear from the summons and both versions of the statement of claim, that the plaintiffs hold the position that when the proceedings were issued by Ulster Bank on 26 June 2013, the plaintiffs had by that time, at the latest, incurred a loss for which they were entitled to be compensated. This must rest on the proposition that every fact necessary to establish the cause of action had by that date come into existence, the requirements stated by Collins J. in *Smith v Cunningham* and Finlay CJ in *Hegarty v O'Loughlin* (op cit)."

20. The trial judge then considered the events of 2013 and 2014. The compromise agreement was entered into on 13 March 2013, which provided the sale of the lands by 31 July 2014. A receiver was appointed on 1 October 2014. Though the plaintiffs had

submitted that the loss did not occur until the lands were sold on 1 February 2021 the trial judge concluded: -

> "171. In their many complaints about the Compromise Agreement and the validity of the receivers' appointment it is clear that the plaintiffs regarded the event of the appointment of receivers on 1 October 2014 as an adverse event causing loss.
>
> 172. The plaintiffs submit that none of the events of 2013 or 2014 prove that the value of the property had fallen below the aggregate of the amounts which they borrowed and invested and recorded there is no proof that a loss had occurred on those dates. In fact there is evidence that by then the value of the property was lower. (See paragraph 150 above).
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> 173. It is submitted that the mere fact of the appointment of a receiver does not of itself prove anything in relation to the value of an asset over which the receiver is appointed. That is generally correct, but in this case the receiver's appointment, triggered by the plaintiffs' defaults, deprived the plaintiffs of any measure of control which they would otherwise have retained over the asset and therefore any prospect of developing the property in accordance with their original plans. The fact that the plaintiffs persisted in the course of the Judgment Proceedings in challenging the actions of the Bank, albeit unsuccessfully, illustrates that they regarded the appointment of the receiver as a wrongful act which occurred in 2014 and which caused them losses.
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> 174. The fact that the precise amount of the shortfall as regards the loan only became clear after the Bank had obtained its judgment and after the property had been sold at a price of €3 million does not alter the fact that the plaintiffs had suffered the loss of their investment on the occurrence of the events of 2013 and 2014."

21. The trial judge then considered the appellants' claim under s. 71 of the Act. The appellants' claim for fraudulent concealment rested on what they described as being a failure of CBRE to disclose the bank's proceedings against them. The trial judge looked at the connection, if any, between the CBRE/bank proceedings and the instant proceedings: -

> "181. In terms of any connection between the substance of the Ulster Bank proceedings and these proceedings, the most which the plaintiffs say, in the first statement of claim at para. 40 is that the uncovering of the 'secret settlement agreement' revealed that the Bank had 'misappropriated proceeds of the settlement of €5 million, which should have been applied to reduce the plaintiffs' account with the first named defendant'. Clearly that invokes no fact touching on the cause of action against CBRE."

and concluded: -

> "185. Finally, I have already concluded that the cause of action accrued when the plaintiffs, by their own default, lost their opportunity to avail of the property the subject of the valuation to repay the Bank debt and to profit from their investment, on the occurrence of events in 2013 and 2014 and at the latest on 1 October 2014 all of which were known to the plaintiffs. The existence, progress or settlement of the Bank's claim against CBRE are not facts which reveal the cause of action, and the plaintiffs have not pointed to any such facts concealed by CBRE."

22. The trial judge found that the damage being claimed by the appellants occurred on various dates prior to 13 February 2015 and no case of fraudulent concealment had been made out by the appellants pursuant to s. 71 of the Act. Thus, the within proceedings were statute barred and an order was made dismissing them.

Notice of appeal: -

23. The various grounds set out in the notice of appeal are brief and devoid of any detail. The grounds advanced are, essentially, that the trial judge *"erred in law and in fact"* in finding that the damage occurred in 2013 and 2014 and in finding that s. 71(1)(b) of the Act did not apply to the facts and circumstances of the case.

Submissions: -

24. The appellants represented themselves at the appeal. The first named appellant spoke on behalf of the other appellants. In the course of making his submissions, the first named appellant read from a written submission which he accepted he had not prepared himself. Unfortunately, the person or persons who prepared the submission were not familiar with the various grounds of appeal set out in the notice of appeal. However, for the purposes of deciding this appeal the court will, in addition to the oral submissions, consider the various issues raised in the appellants' written submissions which were drafted by the appellants' then legal representatives.

25. In the course of hearing the appeal, the first named appellant's principal submission was that time under the Act did not run until 1 February 2021, the date upon which the lands were sold for €3m. He submitted that that was the date on which the damage occurred.

26. In their written submissions, the appellants distinguished *Smith v Cunningham* and *Cantrell v AIB*, which were cases where the damage occurred at the time of the impugned transaction. It was submitted that in the instant case, the date of the compromise agreement or the appointment of the receiver related to the inability of the appellants to repay the loan rather than a diminution in the value of the lands.

27. The appellants further submitted that the trial judge was not entitled to rely on the *"Granja"* agreement as it was a *"sham"* agreement. This submission was made even though the appellants themselves devised and participated in this *"sham"* agreement.

28. On the issue of fraudulent concealment under s. 71, of the Act the first named appellant submitted to the court, following questioning by the court, that the operable fraud was that in the bank proceedings against it CBRE maintained that the appellants had engaged them whereas in the instant proceedings CBRE maintained that it was the bank that engaged them.

Consideration of appeal: -

29. The Act of 1957 clearly states that time commences to run when the cause of action accrues. A cause of action in tort accrues where there is a duty between the parties, that duty has been breached and the consequent damage has occurred. Identifying a point in time when the damage has occurred, in cases such as this, has been the subject of several recent decisions both of this court and the Supreme Court. The decisions in *Cantrell v AIB* and *Smith v Cunningham* have brought much clarity to the difficult process of identifying a point in time when it can be said the damage has occurred. In doing so, it can be said that these decisions have also brought clarity to identifying the point in time when it can be said that the operative damage did not occur.

30. As to when the damage occurred in the instant case, the first step is to identify the time when the appellants maintain they suffered the damage being claimed for. This necessitates an analysis of the statement of claim. In this case, both the original statement of claim and the amended version appear to have been drafted by the appellants themselves. Under the heading "Loss and Damage Suffered by the Plaintiff" the following is stated: -

> "By reason of the negligence and/or breach of duty and/or breach of contract and/or misrepresentation and/or negligent misstatement on the part of the fifth named defendant (CBRE) the plaintiff has suffered considerable loss and damage.
>
> - Had the plaintiffs been advised of the true value of the property they would not have invested their money and would not have borrowed the sum of €21.5m.

- The value of the property never constituted proper security for the sums invested and borrowed by the plaintiff.

As a consequence, the plaintiff has suffered significant losses. The full extent of the loss and monetary damage suffered by the plaintiff has now been quantified after the disposal of the property the subject matter of these proceedings."

(emphasis added)

A further paragraph of the amended statement of claim reads: -

"**Actions taken and consequences resulting from the negligent valuation provided by CBRE**

16. A compromise agreement was entered into between the bank and these plaintiffs in March 2013. …"

Based on these passages in the amended statement of claim, it is clear that the appellants believed that the damage which they are claiming for occurred when the money was borrowed from the bank and security entered into in July/August 2007 or when the compromise agreement was entered into, dated 13 March 2013. Both dates are prior to 13 February 2015, the operative date for the Act in these proceedings.

31. As for the appellants' submission that the loss and damage did not occur until 1 February 2021, when the lands were sold for €3m, this is not consistent with what is pleaded in the statement of claim where reference is made to the "full extent of the loss". Further, the submission is contrary to the law as stated by Collins J. in the Court of Appeal decision in *Smith v Cunningham* (subsequently upheld by the Supreme Court [2023] IESC 33) where he states at para. 34: -

"…(16) It follows from the above that there may be 'damage' sufficient for a cause of action in negligence to accrue, well before the point at which the plaintiff is in a position to quantify a claim for 'damages'. Thus, in *Gallagher*, the plaintiff's claim

was held to have accrued at the time he entered into the investment even though his actual loss could be quantified only at the end of its term, almost six years later. Similarly, in *Cantrell*, the time(s) of accrual identified by the Supreme Court significantly predated the point at which the investor's loss could have been quantified or, indeed, the point at which it could be said with certainty that they would suffer a loss."

and, at p. 36: -

"42. In this context, it is important to recall that the law does not require that damages be quantified or quantifiable before damage can be said to have been suffered such as to complete the tort of negligence. …" (emphasis in original)

32. The trial judge correctly identified a number of dates upon which it was clear that the damage to the appellants occurred: -

(i) July/August 2007 when, in reliance on the valuation report furnished by CBRE, the appellants borrowed from the bank €21,500,000 and invested a further sum of circa €4,500,000 (as per "statement of agreed facts").

(ii) 13 March 2013 the date upon which the appellants and the bank entered into the compromise agreement.

(iii) 1 October 2014 the date upon which receivers were appointed by the bank over the lands.

33. Looking at the above dates in more detail, the terms of the appellants' amended statement of claim clearly indicate that the appellants believed that they suffered damage on the date when, in reliance on the CBRE valuation report, they borrowed monies from the bank and invested a further sum.

34. It is clear that the terms of the compromise agreement of 13 March 2013 established that damage to the appellants had occurred. Under the agreement, the appellants were to pay

a sum of €5m to the bank and the lands were to be sold by a specified date. It was clear that the actual value of the lands was well short of the valuation provided by CBRE. The said agreement provided that the entire proceeds from the sale of the lands was to be remitted to the bank without deduction. It must have been clear to the appellants that on entering into the agreement they had lost their investment of €4.5 million. Further, in their statement of claim the appellants state that the compromise agreement was entered into "resulting from the negligent valuation provided by CBRE" (see para. 30 above).

35. On 1 October 2014, the bank appointed receivers over the land. The trial judge stated at para. 173 that the receivers' appointment deprived the appellants *"of any measure of control which they would otherwise have retained over the asset and therefore any prospect of developing the property in accordance with their original plans.."*. Thus, the appointment of the receivers could not be seen as being anything other than causing damage to the appellants.

36. It is not necessary to identify any of the above dates as being the specific date upon which damage occurred. All of these dates are prior to 13 February 2015. Thus, the trial judge was correct in holding that the appellants' claim against CBRE is barred pursuant to the provisions of s. 11 of the Act.

37. The facts of this case do not come anywhere close to establishing that the appellants' right of action against CBRE was concealed by fraud. At all stages the appellants were aware that CBRE had provided a valuation in respect of the lands and that they had discharged a fee of €10,000 for the valuation. The bank issued proceedings, subsequently settled, against CBRE on foot of the valuation. The appellants complained that the bank failed to inform them or join them in these proceedings. Such an alleged failure could not be considered to be a fraudulent concealment of the appellants' possible action against CBRE in respect of the same valuation report.

38. In the course of his submissions the first appellant, on behalf of all the appellants, identified the *"concealment"* as being the different stances taken by CBRE in the bank proceedings and the proceedings taken by the appellants. In the bank proceedings, CBRE allegedly claimed that they were engaged not by the bank but by the appellants, whereas in the appellants proceedings CBRE took the opposite position. Adopting such a stance in both proceedings does not amount to *"fraudulent concealment"* but rather is putting the appellants on proof that they engaged CBRE to provide the valuation report.

Conclusion: -

39. By reason of the foregoing, the appellants' appeal will be dismissed, and the order of the High Court affirmed. As for costs, the provisional view of the court is that as the respondent has been entirely successful, an order for costs ought to be made against the appellants. If the appellants wish to oppose this order, they may do so by furnishing written legal submissions (not exceeding 1,500 words) within 14 days of the date of the delivery of this judgment and the respondents may reply to such written submissions (also not exceeding 1,500 words) within 14 days thereafter. In default of such submissions being received, an order in the terms proposed will be made.

40. As this judgment is delivered electronically, Whelan and Noonan JJ. have authorised me to record their agreement with it.