AN CHÚIRT UACHTARACH
THE SUPREME COURT

S: AP:IE: 2021:000148

[2023] IESC 13

O'Donnell C.J.
O'Malley J.
Woulfe J.
Hogan J.
Murray J.

Between/

MARK SMITH

Plaintiff/Appellant

and

MARK CUNNINGHAM, KEVIN SOROHAN, ANNE MARIE SOROHAN

AND PAUL KELLY PRACTISING UNDER THE STYLE AND TITLE

OF PAUL KELLY AND COMPANY SOLICITORS

Defendants/Respondents

JUDGMENT of Mr. Justice Gerard Hogan delivered the 25th day of May 2023

I.

1. This appeal raises once again the question of when a cause of action in tort has accrued for the purposes of s. 11(2)(a) of the Statute of Limitation 1957 ("the 1957 Act"). While the concept of the accrual of a cause of action and its significance for limitation periods has deep

roots in the fabric of our legal system – going back at least to the Common Law Procedure Amendment Act (Ireland) 1853 if not, indeed, earlier – its application in the modern era has become increasingly problematic and difficult. As the present appeal illustrates, this is perhaps especially true in the context of claims for financial loss arising from the negligent performance of professional services.

2. Some of these difficulties have been caused by substantive developments in the law of negligence. In an earlier era, many of the claims of this kind would have sounded in contract only and, as O'Donnell J. observed in *Gallagher v. ACC Bank* [2012] IESC 35, [2012] 2 IR 620, a claim in contract may be said to have "accrued" for the purposes of s. 11(2)(a) of the 1957 Act with a simple contractual breach. In the years since the 1957 Act was first enacted the substantive law of tort has, however, developed in a manner which, perhaps, was not adequately captured by the drafters of that legislation.

3. One first saw the expansion of the scope of the tort of negligent misstatement via the decision in *Hedley Byrne v. Heller & Co.* [1964] AC 465. The second such development was the decision of this Court in *Finlay v. Murtagh* [1979] IR 249 where it was held by this Court that actions for professional negligence sounded in both contract and tort. The combined effect of these two decisions – particularly the latter – was to open up the possibility of a differential time period arising from the same events depending on whether the action sounded in contract or tort. Specifically, in many cases, the cause of action in negligence was postponed to the date when the damage manifested itself. This Court has previously determined that this is the date on which provable damage is objectively capable of being discovered even if, in the words of McKechnie J. in *Brandley v. Deane* [2017] IESC 83, [2018] 2 IR 741, at 747, "there was no reasonable or realistic prospect of that being so."

4. All of this gives rise to a number of almost existential problems for key aspects of our law of limitations. First, it is not clear why the running of time should be postponed in respect

of one cause of action (contract) but not another (negligence) where both arise from the same incident or event. Second, as a series of cases (including the present appeal) have shown, the question of when time begins to run in respect of tortious claims for damages is itself fraught with uncertainty and this uncertainty thus defeats one of the key objects of any limitations law, namely, that the ordinary litigant should with reasonable diligence be able to learn when the running of time commenced. To adopt the language of O'Donnell J. in *Cantrell v. Allied Irish Banks* [2020] IESC 71 [at 132] the damage attending the accrual of a cause of action must – if at all possible - be of a kind of "real actual damage" in respect of which "a person would consider commencing proceedings." Third, there remains the problem – and, as we shall presently see, an issue in view in this appeal – of latent damage, i.e., where the damage has occurred (and with that the running of time) but before a prospective plaintiff could reasonably have become aware of this. The Oireachtas has addressed this latter problem in the case of personal injuries via the Statute of Limitations (Amendment) Act 1991, but the issue remains unaddressed in the case of other forms of latent damage such as (typically) the loss caused by the negligent performance of professional services.

II.

5. The underlying facts giving rise to this appeal have been comprehensively set out in the lead judgment which Murray J. is about to deliver and with which I agree. It is clear that there were a variety of planning issues arising from the construction of the dwelling in 2004 which had been subsequently purchased by the plaintiff and his then spouse in July 2006. It is perhaps a matter of first impression, but at least some of these issues which were first raised by the local planning authority, Leitrim County Council, in its letter of 10th June 2008 seemed to be (relatively) minor. The as-built front façade had been enlarged to accommodate the installation of quoins; the rear and lateral boundaries were not supported by timber post-and rail fencing with the installation of native tree species and the front row hedge-way had been (wrongly)

retained. Condition 2 of the permission had also required a revised dwelling design to be submitted to the Council prior to the commencement of the development and the Council maintained that this had not been done.

6. Of the conditions which had not been complied with the issue of the windows was, however, probably the most serious: the windows which had been installed in the plaintiff's dwelling at the time of its original construction by the first owner of the property in 2004 were not in compliance with the terms of the actual planning permission which had been granted by Leitrim County Council. Indeed, the Council had previously indicated that permission for the use of these particular type of windows would be refused.

7. The plaintiff (and his then wife) only acquired the property some two years later by deed of transfer dated 12th July 2006 having purchased it from the original owners. The property was subject to a mortgage in favour of their lender, Start Mortgages. The purchase was only completed by them following the provision of an engineer's certificate of compliance with planning permission and planning regulations. This certificate attested that the house had been constructed in accordance with the terms of the planning permission. It was then only on receipt of a letter of 10th June 2008 that this issue of non-compliance emerged following correspondence with Leitrim County Council.

8. By this stage the plaintiff had, however, agreed a contract for the sale of property in May 2008 for a price approximating to the original purchase price. It was the emergence of the issue of non-compliance with the original planning permission which was ultimately to frustrate the completion of that proposed sale in a timely fashion in October 2008. The prospective purchasers had served a 28-day completion notice on the plaintiff and his then wife, but since they were unable to show good title within the period stipulated in the completion notice, the prospective purchasers were entitled to – and did, in fact – withdraw from the sale.

9. This had disastrous consequences for the plaintiff since by this stage the Irish economy was in very sharp decline following the onset of the banking crash in September 2008. This in turn had led to a precipitous decline in house prices. The value of the property accordingly declined from €240,000 in May 2008 to less than €100,000 in 2009. Start Mortgages ultimately acquired possession of the property since by then – compounding his woes - the plaintiff had become unemployed and could not service the mortgage on the property. The property was subsequently sold by the mortgagee at a fraction of the price which the plaintiff had originally paid. Retention permission was ultimately granted by the Council on the 5th November 2008, but this, unfortunately, came a few weeks too late for the plaintiff.

10. The present proceedings were commenced by a plenary summons dated 26th May 2014. The fourth defendant (a firm of solicitors) maintains that the action is statute-barred and in the High Court it brought a preliminary motion seeking an order dismissing the proceedings on this ground. All of this raises the question of whether the action is statute-barred and, specifically, when time ran for this purpose. There are, I think, three possibilities.

11. First, it might be said that the plaintiff only suffered loss following the collapse of the contract for sale of the dwelling in October 2008. This was the view taken by Meenan J. in the High Court and, if this view is correct, the present action would not be statute-barred.

12. Second, it might be said that the loss occurred at the date of the acquisition of the property in May 2006 since – on this view, *ex hypothesi* – the plaintiff had acquired something less than in respect of which he had paid inasmuch as his title to the property was now defective and required to be remedied by reason of the planning difficulties. This was the view taken by Collins J. in his judgment for the Court of Appeal.

13. Third, it might be said that time ran from about 10th June 2008 as this was the date on which the planning authority stated that the house had not been constructed in compliance with the planning permission and that it proposed to take enforcement action in respect of the

property. In support of this argument, one might observe that if the Council had expressly stated that it regarded these non-compliance issues as immaterial or essentially *de minimis* then the plaintiff would (arguably) have suffered no loss, since on that basis there would have been no impediment to the sale of the house at the price then agreed with the prospective buyer. If time ran from June 2008, the proceedings would not then be statute-barred.

14. If the matter were *res integra* so that the law was starting from a blank piece of paper, then there might be a lot to be said in turn for each of these propositions. Yet in the light of the definitions of the terms "accrual", "cause of action" and "damage" by this Court in cases such as *Brandley* and *Cantrell* I find myself compelled to the conclusion that, essentially for the reasons given by Collins J. in the Court of Appeal and by Murray J. in the judgment he is about to deliver, the damage in the present case manifested itself in this particular sense at the date of the completion of the contract in May 2006, even though no purchaser could realistically have been aware of this at the time. It follows that time accordingly ran from that date given that the damage was, in the words of McKechnie J. in *Brandley*, "capable of being discovered and capable of being proved by the plaintiff" ([2017] IESC 83, at 111, [2018] 2 IR 741, at 790), even if it was inherently unlikely or improbable that any plaintiff would discover this at that time.

15. This conclusion is also follows from the decision of this Court in *Tuohy v. Courtney* [1994] 3 IR 1. Here the plaintiff had acquired in 1978 what he thought was the freehold interest in a particular property. It transpired that what had been acquired was a leasehold interest with no right to acquire the freehold. The interest acquired "was of very substantially less value that the purchase price which he had paid in 1978 and…[it] was not in general terms a good marketable title": [1994] 3 IR 1, at 40 per Finlay C.J. The plaintiff only discovered this in 1985 when he consulted a different firm of solicitors. It was not disputed that – as Lynch J. had

concluded in the High Court – the plaintiff could not reasonably have discovered this critical fact prior to that date.

16. The action was nonetheless held to be statute-barred on the basis that the cause of action had in fact accrued in 1978 as this was the date on which the plaintiff had acquired (unbeknownst to himself) a defective title. This Court nevertheless rejected a challenge to the constitutionality of the sub-section, a point to which I will later return. This Court's conclusion in respect of the date of the accrual of the action in *Tuohy* is yet another authority which points unequivocally to the fact that the cause of action in the present case arose in May 2006 – being the date on which the plaintiff purchased the property with the defective planning permission – even though the plaintiff could not reasonably have discovered this fact prior to the letter from Leitrim County Council of 10th June 2008 altering him to the nature of the non-compliance issue.

17. In *Cantrell* O'Donnell J. spoke (at [132]) of a requirement that "damage for the accrual of a cause of action must bear a close relationship to the layperson's understanding of that term. That is real actual damage, which a person would consider commencing proceedings for." I respectfully agree. Viewed against that backdrop, however, there is an argument to the effect that no one would really consider suing immediately in respect of non-compliance with a planning permission *as such*, especially given that (as here) some of these defects were either verging on the *de minimis* (such as the retained hedgerows) or else were capable of straightforward correction involving the expenditure – and not necessarily by a plaintiff – of relatively small sums of money (the quoins and the windows might come into this category of defect). It might well be unrealistic to expect plaintiffs to sue immediately in such circumstances. Compliance issues in respect of planning permissions are by no means uncommon. In practice the next step for most occupants and their advisers would in all

probability be to engage with the planning authority with a view to resolving matters in an informal way.

18. On that view, the damage here really crystallized only on 10th June 2008 with the letter from Leitrim County Council which confirmed that it, qua planning authority, considered that these matter were not in its view simply *de minimis* and, what is more, threatened enforcement action.

19. As Murray J. demonstrates, the weight of authority is nonetheless against the plaintiff in respect of this argument. It might have been different had there been expert evidence to the effect that, viewed objectively, *all* of these planning discrepancies were, in effect, *de minimis* and insubstantial so that they did not amount to "real actual damage" of the kind contemplated by O'Donnell J. in *Cantrell.* If, for example, the (wrongfully) retained hedgerows had been the only non-compliance issue, then it would be hard to say that the damage occurred in 2006 when the property was acquired. If this had been the case, then the damage would only have occurred in June 2008 when the Council decided nonetheless to object and when it threatened to take enforcement proceedings.

20. I reach this conclusion with no sense of enthusiasm at all because the potential for considerable injustice is manifest. Consider the present case. The plaintiff had retained the services of professional persons to advise him regarding the issues of compliance with planning permission and the building regulations. There was nothing at all to suggest that the ensuing certificates of compliance were in any way defective and so, one might ask, why a house-purchaser should devote time and effort in examining the minutiae of a planning permission to see whether the house did in fact comply with its strictures? Absent a passion for architecture and the detail of the Building Regulations few house purchasers would have the time, inclination or enthusiasm for this purpose to pore over the fine print of the planning permission and to examine the house plans and drawings for compliance with its terms. Even if he or she

did so there is no guarantee at all that such an error could be detected by the amateur unfamiliar with such matters, not least when the professionals retained by them had already failed to do so. I accept, of course, that by reason of the happenstance that he (and his then wife) subsequently decided to sell the property the plaintiff in this case did indeed learn all of the relevant facts by June 2008 so that in these circumstances he had in fact ample time in which to commence these proceedings.

21. There is nevertheless something profoundly wrong about the way in which s. 11(2)(a) of the 1957 Act can actually operate if time can run against a plaintiff in this essentially arbitrary and haphazard fashion and, with only a slight change in the facts, it *might* well have done so in this particular case. This was pointed out by the Law Reform Commission in its *Report on the Statute of Limitations* (LRC 64-2001) and *Limitation of Actions* (LRC 104-2011). Members of this Court have frequently drawn attention to this problem, most recently O'Donnell J. in his judgments in both *Gallagher* and *Cantrell*.

III.

22. There is a further issue here as well. The very language of Article 40.3.1° and Article 40.3.2° of the Constitution guarantee that a plaintiff's personal and property rights will be adequately respected and vindicated. Here the shadow of *Tuohy v. Courtney* [1994] 3 IR 1 lies over this area of the law. In this case Finlay C.J. drew attention to the other counter-vailing factors which the Oireachtas was entitled to take into account, including, for example, the necessity to avoid stale claims and a limitation period which imposed essentially open-ended liability on defendants. The Chief Justice then stated ([1994] 3 IR 1, at 47):

> "….[in] a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from

an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."

23. Finlay C.J. further added (at 48) that the Court must further ascertain "whether the extent and nature of such hardship [imposed by the legislation] is so undue and so unreasonable having regard to the proper objectives of the legislation as to make it constitutionally flawed."

24. I cannot help thinking that, with respect, aspects of this reasoning and the ultimate conclusion of the Court in *Tuohy* may well have to be re-visited in some future case. Similar concerns have already been voiced by O'Donnell J. at the conclusion of his judgment in *Cantrell* and I respectfully agree. The considerations mentioned by Finlay C.J. in *Tuohy* are, of course, perfectly valid ones. But the most important consideration surely is that in this situation the defendant's own negligence has served to hide from the plaintiff – admittedly not intentionally – the fact that he or she has or at least may have a cause of action.

25. Section 71(1)(b) of the 1957 Act admittedly contains a saver for concealed fraud, but this only applies where the tortfeasor knowingly or recklessly commits the wrong and elects furtively or by silence to conceal the wrong: see, e.g., *King v. Victor Parsons & Co*. [1973] 1 WLR 29; *O'Dwyer v. Daughters of Charity of St. Vincent de Paul* [2015] IECA 226, [2015] 1 IR 328. This saver has, however, has no application at all to a case like the present one because there is no suggestion at all that any of the defendants knew or realised that the certificate of compliance was incorrect until the letter from Leitrim County Council arrived in mid-June 2008.

26. Any proportionality analysis must, I suggest, start from this premise and address the basic injustice which a lack of reasonable discoverability rule inevitably presents. It is, of course, true to say that, as O'Higgins C.J. observed in *Moynihan v. Greensmyth* [1977] IR 55, at 71, the guarantee of protection in Article 40.3.2° is qualified by the words "as best it may"

and that this "implies circumstances in which the State may have to balance its protection of the right as against other obligations arising from regard for the common good." In this context of a claim in tort for professional negligence these "other obligations" might well include factors such as the need for certainty, the desirability of expedition and the avoidance of stale claims.

27. The terms of the proportionality test actually articulated by Finlay C.J. in *Tuohy* are, however, difficult to reconcile with the express words of Article 40.3.2° itself ("protect as best it may from unjust attack and, in the case of injustice done, vindicate…the property rights of every citizen.") The State can hardly be said to fulfilling that constitutional obligation if the test for review of that decision by the judicial branch depends on whether the balance struck by the Oireachtas is "contrary to reason and fairness."

28. It is clear from the structure, context, language and history of the Constitution that the protection of fundamental rights is that contained in the Constitution *as interpreted by the judiciary*. Article 28.2 and Article 15.4 respectively make clear that the Government and the Oireachtas are, of course, obliged to respect and uphold the Constitution. This means that it is presumed that other branches of government will discharge their constitutional duties, and this is the very basis of the presumption of constitutionality in respect of both executive and legislative acts: see the judgment of O'Byrne J. in *Buckley v. Attorney General* [1950] IR 67, at 80.

29. With the possible exception of certain types of cases closely associated with core functions attributed by the Constitution to other branches of government – one thinks here of the foreign affairs powers given to the Executive by Article 29.4.1° or the taxation raising powers vested in the wider Oireachtas (and the Dáil in particular) which are recognised by the provisions of Article 17.1.2° and Articles 21 and 22 – there is simply no foundation in the constitutional text for any more elevated presumption of constitutionality. Whether, therefore,

the fundamental rights provisions of the Constitution have been violated by an Act of the Oireachtas is, subject to the presumption of constitutionality, ultimately a matter for the judiciary to determine.

30. Viewed from the standpoint of principle, therefore, there are reasons to think that the decision in *Tuohy v. Courtney* represents a wrong turning on the part of this Court which no lapse of time should make us hesitate to correct.

IV.

31. All of this is lies perhaps for a more detailed consideration in another future case. Given the potential for manifest unfairness — even arbitrariness – in the application of our rules regarding the accrual of a cause of action and the running of time in cases of claims of negligence in respect of non-personal injury, this is, I feel, an area which the Oireachtas might with advantage wish to re-consider. For the moment, however, it suffices to say that unsatisfactory as it is, the language of s. 11(2)(a) of the 1957 Act compels me to the conclusion that time ran in the present case from the date of the acquisition of the property in May 2006 since on the particular facts of this case – albeit unbeknownst to him at that time – the plaintiff had at that point acquired a defective title such as would have entitled him to sue. Viewed objectively, these facts presented a case of admittedly relatively minor planning issues with regard to the title. Yet since it cannot be said that *all* of these planning non-compliance issues were *de minimis* or purely insubstantial it follows there was nonetheless actual damage to the plaintiff upon the completion of the conveyance of the property in 2006 even if he did not – and could not realistically – have realised this at that time and even if he only came to learn of it in June 2008 when he went to sell the property. This damage was, however, sufficient to trigger the accrual of the cause of action in negligence and, consequently, the running of time for the purposes of this particular claim.

32. I accordingly agree with Murray J. that the present proceedings are, indeed, statute barred, and I would accordingly dismiss this appeal.