Neutral Citation No. [2008] NIQB 121

Ref: **GIL7285**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **24/10/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

DARREN FALLIS

Plaintiff;

And

DEREK ELLIOTT

Defendant.

GILLEN J

Application

[1] This application comes before the court as a preliminary issue to determine whether the plaintiff's cause of action is barred by virtue of the provisions of the Limitation Order (NI) 1989(the 1989 Order), the leave of the Master having been granted for such trial by Order dated 21 February 2008.

Background facts

[2] It is the plaintiff's case that in 1998 he engaged the services of the defendant, an architect, in the construction of a house in Enniskillen.

[3] The house was completed in or about September 1998 and the defendant provided a practical completion certificate on 1 October 1998. The plaintiff claims that in or about the Spring of 1999 cracks began to appear and gradually increased . Initially the plaintiff put the cracks down to the effects of settlement in new-build.

[4] Over the Summer of 1999 the plaintiff alleged that he became increasingly concerned about the cracks and contacted the defendant by telephone. It is the plaintiff's case that the defendant informed him that it was normal settlement and assured him that there was nothing to worry about. I observe at this stage that the defendant by way of affidavit of 4 June 2008 disputes that such a conversation occurred as asserted by the plaintiff. It is his case that apart from one brief telephone call in which the plaintiff requested a copy of the certificate for re-mortgaging purposes, he had no further contact with him following issue of his Completion Certificate.

[5] Mr Berry, who appeared on behalf of the defendant and Mr Horner QC who appeared on behalf of the plaintiff with Mr Maxwell both accepted that in an application of this nature which relied on affidavit evidence without the benefit of cross examination, the court must accept the plaintiff's evidence at its height. This court reserves the right to revisit any factual conclusion upon which my findings are based should the oral evidence at the hearing of this action reveal a different factual basis than that set out in the affidavits currently before me.

[6] The plaintiff further asserts that the defendant told him that the cracking was not his responsibility and that he should contact Building Control. It is the plaintiff's case that when he did contact Building Control, he was told that it was the architect's responsibility.

[7] Between June and August 2000 the cracking allegedly became progressively worse. When the plaintiff attempted to re-mortgage his property a further advance was refused due to the state of the premises. The plaintiff moved out of the premises in or about January 2000.

[8] Mr Fallis then made a claim on his building insurance. His loss adjusters at that stage instructed the firm of Taylor & Boyd, structural engineers, in or about the month of March 2001 .They reported on 3 May 2001. That report declared that based on the limited site investigation it would appear that the dwelling, either wholly or partially, had been constructed with inadequate foundations on peat substrata. It goes on to allege that peat is an unsuitable load bearing substratum which is highly susceptible to volumetric changes associated with moisture content variations. The conclusion is that the defects which are evident in the bungalow were primarily the result of differential settlement due to an inadequate substructure.

[9] The plaintiff did not issue a Writ of Summons in this matter until 15 June 2006. This was a claim for loss and damage sustained by the plaintiff by reason of the breach of contract and negligence of the defendant in and about the provision of architectural services in relation to the design and specifications for the premises and in and about the supervision and

certification of the works at the premises. On 24 October 2006 the defendant entered an appearance. On 6 December 2007 an Order was made that unless the plaintiff served a Statement of Claim within 21 days of service the action was to be struck out. On 20 December 2007 the plaintiff served a Statement of Claim. The defendant served a Defence on 12 February 2008 denying liability and relying on the provisions of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order").

The statutory context

[10] Article 4 of the 1989 Order provides, inter alia, that an action founded on simple contract may not be brought after the expiration of 6 years from the date on which the cause of action accrued.

[11] Article 6 provides that "an action founded on tort may not be brought after the expiration of 6 years from the date on which the cause of action accrued".

[12] Article 11, where relevant, provides as follows:

> "(1) This Article applies to any action for damages for negligence, other than one to which Article 7 applies, where the starting date for reckoning the time limit under paragraph (3)(b) falls after the date on which the cause of action accrued.
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> (2) An action to which this Article applies may not be brought after the expiration of the period applicable in accordance with paragraph (3).
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> (3) That period is either –
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> > (a) 6 years from the date on which the cause of action accrued; or
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> > (b) 3 years from the starting date as defined by paragraph (4), if that period expires later than the period mentioned in sub paragraph (a).
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> (4) For the purposes of this Article, the starting date for reckoning the time limit under paragraph (3)(b) is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for

bringing an action for damages in respect of the relevant damage and a right to bring such action.

(5) In paragraph (4) "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both –

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in paragraph (7)

. . .

(7) The other facts referred to in paragraph (5)(b) are –

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

. . .

(9) For the purposes of this Article a person's knowledge includes knowledge which he might reasonably have been expected to acquire –

(a) from the facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek.

[13] Article 71 of the 1989 Order, where relevant, provides that "where in any action for which a time is fixed by this Order, either –

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake, the time limit does not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

(2) For the purposes of paragraph (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

Principles governing the interpretation of the Statutory Provisions

[14] The question for this court to decide in considering the implications of Article 71 of the 1989 Order is not whether the plaintiff *should have discovered* that the defendant had deliberately concealed facts from him, but whether he *could with reasonable diligence have so discovered.* The burden of proof is on him. He must establish that he could not have discovered the deliberate concealment without exceptional measures which he could not reasonably have been expected to take. (See Paragon Finance v. DB Thakerar and Co [1999] 1 All ER 400 at 417).

[15] The phrase "could with reasonable diligence have discovered it" set out in Article 71(1) of the 1989 Order does not mean doing everything possible, nor necessarily the use of any means at the plaintiff's disposal nor even necessarily the doing of anything at all, but simply the doing of that which an ordinarily prudent person in the plaintiff's position would do having regard to all the circumstances. In other words what would a prudent person in the position of the plaintiff, having received the assurances of the defendant as alleged by the plaintiff in this instance, thereafter do in light of his conversation with the Building Control authorities. (See Peco Arts Inc v. Hazlitt Gallery Limited [1983] 3 All ER 193 at p 199(g)).

[16] Where Article 71(1)(b) of the 1979 Order refers to deliberate concealment by the defendant, this does not apply where the defendant has been unaware that he has been committing a breach of duty. This Article deprives a defendant of a limitation defence in two situations: first, where he took active steps to conceal his own breach of duty after he had become aware of it: and secondly, where he was guilty of deliberate wrong doing, and, he concealed or failed to disclose it in circumstances where it was

unlikely to be discovered for some time. It does not, however, deprive a defendant of a limitation defence where he was charged with negligence if, being unaware of his own error or his failure to take proper care, there had been nothing for him to disclose. Negligence is unlikely to be deliberate and the defendant may well be unaware of it. If, afterwards, he discovered the error and deliberately concealed it from the applicant, his conduct may come within Article 71(1)(b). Whilst he remains ignorant of the error and of his inadvertent breach of duty, there is nothing for him to disclose. (See Cave v. Robinson Jarvis and Rolf (a firm) [2001] 2 All ER 641 per Lord Millett at p 647 paras 24 and 25.

[17] The standard of proof and the evidence necessary to invoke the provisions of Article 7 were discussed in Cave v. Robinson, Garvis and Rolff (a firm) [2001] 2 All ER 641 at 656 paragraph 60 per Lord Millett when he said –

> "A claimant who proposes to invoke s32(1)(b) (*the comparable to Article 71(1)(b)of the 1989 Order*) in order to defeat a Limitation Act defence must prove the necessary facts to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probability standard and inferences could of course be drawn from suitable primary facts but, nonetheless, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult. Sub section (2) (*the comparable to Article 71(2) of the 1989 Order)* however, provides an alternative route. The claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. If the claimant can show that the defendant knew he was committing a breach of duty, or intended to commit the breach of duty – I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach – then, if the circumstances are such that the claimant is unlikely to discover for some time that the breach of duty has been committed,

> the facts involved in the breach are taken to have been deliberately concealed for sub-s(1)(b) purposes."

[18] Mr Berry helpfully drew my attention to Foreman v. O'Driscoll and Partners [2004] 2 All ER 616 which reinforced the principle of deliberate concealment. Initial negligence, followed by further negligence in not informing someone of that negligence, whether by act or omission initially, does not suffice to constitute deliberate concealment. On the other hand Mr Horner QC helpfully drew my attention to Khan v. National Union of Rail, Maritime and Transport Workers January 17 2000 unreported, CA where the Court of Appeal thought it arguable that a letter from a firm of solicitors which advised the claimant to go elsewhere because her trade union had withdrawn its support, but which contained no reference to any question of negligence, might amount to a concealment under s.32 (1)(b).

[19] I consider that the most comprehensive pronouncement on the appropriate approach to s. 32(1)(b) (*the comparable to Article 71(1)(b) of the 1989 Order*), is found in the judgment of Park J in Ms Elaine Williams v. Fanshaw Porter and Hazelhurst [2004] EWCA Civ 157 at paragraph 14 where he referred to four points which should be noted –

> "(i) The paragraph does not say that the right of action must have been concealed from the claimant: it says only that a fact relevant to the right of action should have been concealed from the claimant.
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> (ii) Although the concealed fact must have been relevant to the right of action, the paragraph does not say, and in my judgment does not require, that the defendant must have known that the fact was relevant to the right of action. In most cases where s.32(1)(b) applies the defendant probably will have known that the fact or facts which he concealed were relevant but that is not essential. All that is essential is that the fact must actually have been relevant, whether the defendant knew that or not. The paragraph does of course require that the fact was one which the defendant knew, because otherwise he could not have concealed it. But it is not necessary in addition that the defendant knew that the fact was relevant to the claimant's right of action.
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> (iii) The paragraph requires only that any fact relevant to the right of action is concealed. It does

> not require that all facts relevant to the right of action are concealed.
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> (iv) The requirement is that the fact must be overcome as "deliberately concealed".
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> It is, I think plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with a claimant, but in the course of which conscientiously decided to depart from what he would normally have done and to keep quiet about it".

[20] I consider that a lay person who employs the services of an architect is in principle entitled to assume that the work has been competently done and is not required to obtain a second professional opinion as to the quality of that work. Obviously there will come a point when he becomes aware of the problem. But he cannot be considered to have discovered a factual defect as long as the defendant is telling him the opposite of that fact. (See E G Collins v. Brebner [July 2006, 2000 unreported, CA] and he has no compelling documentary evidence to suggest that the defendant was lying or wrong.

Conclusions

[21] I commence my conclusions by observing that the hearing of this matter as a preliminary issue contains certain frailties within. An application which may require the court to determine competing factual assertions is usually unsuitable for determination in hearings that rely on affidavit evidence. Hence preliminary points of law can, to adopt the words of Lord Scarman in Tilling and another v. Whiteman [1979] 1 All ER 737, be "too often treacherous shortcuts". I have taken the plaintiff's case at its height in this matter but I reserve the right to revisit my factual findings in the event of my determining, having heard the oral evidence of the parties, that I was misled or had reached an unsustainable factual finding at this stage.

[22] On the evidence before me at this hearing however, I have concluded that I should dismiss the defendant's application.

[23] I am satisfied at this stage that the plaintiff has discharged the burden on the balance of probabilities of showing that the defendant was aware of facts

relevant to the plaintiff's cause of action and has deliberately concealed them from him.

[24] Upon being informed by the plaintiff that cracks had occurred, I consider that the defendant would normally have informed his client that the laying of foundations on a vegetable matter such as peat was unsuitable for load bearing purposes and could be a possible cause of the cracking. It is clear from the letter exhibited to the defendant's affidavit of 4 June 2008, which he had written in response to the plaintiff's letter of claim of October 2001, that this defective foundation was prima facie a matter of which he was well aware. To have informed the plaintiff in 1999 that this problem of cracking was one of normal settlement and to have assured the plaintiff that he had nothing to worry about when he was aware that the contrary might well be the case, amounted in my view to a deliberate withholding of relevant information with the intention of so doing. I have determined that this is information which he ordinarily would have disclosed in the normal course of his professional relationship with the plaintiff. He must have been aware that the plaintiff was relying upon him as an expert in this field and that the plaintiff would have no evidence to the contrary. I conclude that this amounts prima facie to a breach of his duty to him at common law and in contract. I therefore believe that in remaining silent about this matter there is evidence that he consciously decided to depart from what he would normally have done.

[25] I am satisfied that the plaintiff acted prudently and with reasonable diligence in accepting the assertion of his expert namely the defendant. I do not consider that when Building Control had denied liability, it was imprudent or lacking in diligence for the plaintiff to continue to accept the assertion of the expert that he had retained and trusted who continued to assure him as to the cause. No evidence has been put before me as to the level at which he was so advised by Building Control. I find nothing to suggest that the assertion by Building Control carried the same professional weight as that of the defendant or that evidence was produced to the plaintiff which would have caused a reasonably prudent and diligent person in his position to question the unequivocal assertion of his architect.

[26] The circumstances did change when the plaintiff received a report on behalf of the loss adjuster namely Taylor and Boyd. This advice carried all the weight and experience of a structural engineer. In the absence of evidence to the contrary, I consider that the report from this firm of structural engineers was the first opportunity for the plaintiff to reasonably question the assertion of the defendant and to consider a cause of action against him. In my view until that date he had no compelling evidence to suggest that the defendant had been misleading him.

(27) In all the circumstances I therefore refuse to hold that the plaintiff's cause of action is barred by virtue of the provisions of the Limitation Order

(NI) 1989 and I determine that the plaintiff is entitled to invoke the provisions of Article 71 of the Order.