

Neutral Citation No: [2015] NICA 79

Ref: GIL9802

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

Delivered: 04/12/2015

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BRENDA HARKIN

Plaintiff;

-and-

BRENDAN KEARNEY AND COMPANY, SOLICITORS
SEAN FOX T/A GLEN BUILDERS LIMITED
PAT FAHY, SOLICITORS
ADP ARCHITECTS
PLANNING DEPARTMENT
ROAD SERVICE
LAND REGISTRY
GREENBELT GROUP LIMITED
MEMERY CRYSTAL, SOLICITORS
COLLEYS VALUERS
BIRMINGHAM MIDSHIRES
ARTHUR COX SOLICITORS
CRL MANAGEMENT LTD

Defendants.

Before: Gillen LJ, Weatherup LJ and McBride J

GILLEN LJ (giving the judgment of the court)

[1] In these proceedings the plaintiff seeks to advance claims against some thirteen defendants. She has issued a statement of claim, variously amended, against all the defendants

[2] At the centre of this case is the purchase by the plaintiff of a dwelling house at 20 Creaghmore Glen, Drumquin, Omagh, County Tyrone ("the property").

[3] All of the defendants, except one namely the second defendant, have brought applications before the Master pursuant to Order 18 Rule 19(1)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules") seeking to have the plaintiff's statement of claim struck out on the ground that it did not disclose a

reasonable cause of action. Some of the defendants have also applied to have the plaintiff's statement of claim struck out on the basis that it did not comply with Order 18 Rule 7(1) of the Rules i.e. it did not "contain only a statement in summary form of the material facts on which the party pleading relies for her claim". It is only necessary to deal with the former application.

[4] These applications were heard by the Master on the same day on 22 October 2014. He delivered a substantive judgment on 8 January 2015 in which in summary the Master declined to strike out the plaintiff's pleadings so far as it related to negligence and breach of contract by the first defendant but struck out the pleadings as disclosing no reasonable cause of action in respect of all other causes of action she had brought against the first defendant. He made no order in respect of the second defendant who had no application before the court. He struck out all pleadings as disclosing no reasonable cause of action in the causes of action against all the other defendants and ordered the plaintiff to bear the costs.

[5] The plaintiff appealed to the High Court. O'Hara J heard the appeal and delivered judgment on 1 May 2015. In short, O'Hara J dismissed the plaintiff's appeals and varied the Master's order to make clear that the plaintiff's claim that her human rights had been breached were also dismissed.

[6] By a judgment delivered on 8 June 2015, O'Hara J ordered the plaintiff to pay the defendant's costs of her unsuccessful appeal against the Master's order.

[7] On 30 June 2015 the plaintiff applied to the judge for leave to appeal to the Court of Appeal. The judge refused that application in an ex tempore judgment.

[8] The plaintiff now applies to the Court of Appeal for leave to appeal against the judgment of O'Hara J. It is well established law that the test to be applied on a leave application is that leave should be granted unless there is no realistic prospect of success on appeal. See Smith v Cosworth Casting Processes Ltd. Practice Note [1997] 1 WLR 1538G and Moffatt v Moffatt [2015]NICA 61 Accordingly, before deciding if we would grant leave, we have considered the merits of the appeal.

[9] Ms Simpson QC, who appeared on behalf of the tenth, eleventh and twelfth defendants submitted that this was an interlocutory matter which was the subject of the appeal and that O'Hara J had treated it as such. On 8 June 2015 the judge appears to have issued an order refusing the appellant's request to extend time to appeal. On 12 June 2015 the plaintiff lodged a notice/requisition application to the Court of Appeal. A valid appeal against an interlocutory judgment must be brought within 21 days pursuant to Order 59 Rule 4(1)(a). It was Ms Simpson's contention that if this is an interlocutory judgment the appellant was already out of time when she served her notice of appeal. Even if time was to be extended by this court she would still require the leave of the court to appeal against an interlocutory judgment.

[10] This court is very conscious of the well-known principles in Davis v Northern Ireland Carriers [1979] NI 29 per Lowry LCJ .It was considered in Magill v Ulster Independent Clinic and Others [2010] NICA 33 and Benson v Morrow Retail [2010] NIQB 14. This court should consider the merits of an appeal that had general and not merely particular significance in considering the issue of extension of time. We are satisfied that the instant case does not contain any matter of general significance. We were also conscious of course that at least with regard to the tenth, eleventh and twelfth defendants the appellant now sought to introduce fresh allegations of misfeasance in public office and “suppression of new substantive and credible evidence”.

[11] Nonetheless we concluded at the outset of this hearing that the reasons for the delay were probably connected with the appellant’s position as a personal litigant and the hearings on costs may have confused her as to when time commenced to run. Whilst this should not in any way cause the court to distort the rules or the requirements of due process, nonetheless we considered that it was appropriate in the particular circumstances of this case to extend time and permit the appellant to seek leave to appeal without taking into account the time element.

Factual background

[12] Master McCorry in the course of his judgment set out the basic facts of this case at paragraphs [1] and [2] as follows:

“On an unspecified date in late 2007 or January 2008 the plaintiff purchased from the second defendant Sean Fox t/a Glen Builders Limited a site on which there was to be constructed a new build house in a development which was to become known as Creaghmore Glen, Drumquin, County Tyrone. Her site subsequently became No. 20 Creaghmore Glen. It was understood by the plaintiff that the site included a private open space, that is in simple terms, a part of the plaintiff’s garden but upon which she was limited by covenants in terms of how she should use it. However after the house was constructed, and some considerable time after she understood the conveyance had been completed, the plaintiff found that what she had understood to be a private open space was in fact a public open space, which was not part of her property. In addition, as a result of conveyancing flaws she had not been transferred good marketable title to the property and when she attempted to sell it some years later she was unable to do so.

The plaintiff has sued a wide range of defendants including:

- Her own solicitor Brendan Kearney solicitors (first defendant).
- The builder/vendor Sean Glen Fox t/a Glen Builders (second defendant).
- The second defendant's solicitors Patrick Fahy and Company, sued as Pat Fahy solicitors (third defendant).
- ADP Architects, the architect engaged by the second defendant to design the development (fourth defendant).
- The Planning Department, the Land Registry and Department of Regional Development Road Service (fifth, sixth and seventh defendants).
- Greenbelt Group Limited, a management company who were to manage the site upon completion (eighth defendant).
- Memery Crystal solicitors, a firm of English solicitors engaged by the second defendant in respect of various legal procedures including to sign the land registration form (ninth defendant).
- Colleys Valuers, engaged by Birmingham Midshires Bank, a subsidiary of Bank of Scotland, to value the property for the purposes of the plaintiff's mortgage application (tenth defendant).
- Birmingham Midshires who granted her a mortgage on the security of the property are the eleventh defendant.
- Arthur Cox is a firm of solicitors engaged by that bank after the first defendant failed to produce good title to the property comprising their security in respect of the plaintiff's mortgage (twelfth defendant).
- Construction Register (Management) Limited was to provide a ten year warranty in respect of the site (thirteenth defendant)."

Order 18 of the Rules

[13] Order 18, Rule 19(1) of the Rules provides:

“(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

- (a)
- (b) it is scandalous, frivolous or vexatious; or
- (c)
- (d) it is otherwise an abuse of the process of the court,

and may order the action may be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

[14] Order 18 Rule 19(2) provides that no evidence shall be admissible on an application under paragraph (1)(a), that is an application to strike out pleadings as disclosing no reasonable cause of action. The applications have to be heard by reference to the pleading which is called into question and the relevant law. The court therefore cannot take into account affidavit evidence or matters relating to evidence in skeleton arguments or oral submissions as outlined by Master McCorry in [5] of his judgment.

[15] The object of Order 18 is to ensure that the court exercises its inherent power to prevent misuse of its procedures which would be manifestly unfair to a party’s litigation before it or would otherwise bring the administration of justice into disrepute amongst right thinking people. (See Lord Diplock in Hunter v Chief Constable of West Midlands Police [1982] AC 529 at 536.

[16] The confused state of the appellant’s pleadings is dealt with in some detail in Master McCorry’s judgment at paragraph [9] et seq. This court need do no more than advert to the confusion as set out by Master McCorry in that judgment.

[17] Given that no evidence is admissible on an application under Order 18 Rule 19(1)(a) the vast array of information contained in the plaintiff’s files is irrelevant to this exercise. She failed to grasp the point in the hearing before O’Hara J or indeed before this court that what is being analysed in this application is whether in the statement of claim there is, as O’Hara J said in [2] “a thread in respect of each defendant which starts with the facts which are alleged, continues when an identified duty is owed to that defendant and there is breach of that duty and concludes with the plaintiff having suffered loss and damage as a result”.

[18] In essence, the cases made against the individual defendants seemed to be as follows:

The first defendant

[19] Allegations of breach of contract, deceit, breach of duty and care, and fraudulent acts are contained without any real specificity of the causes of action. This defendant is sued as a solicitor who represented and advised the plaintiff for the purposes of her purchase of the site and house. The Master allowed the case to proceed on the basis of negligence and breach of contract and has only dismissed the allegations of fraud which seem to be entirely baseless on the pleadings before us. We have no doubt that this is the correct decision. There is no other basis for the claim against this defendant as currently pleaded and we affirm the decision of O'Hara J.

The second defendant

[20] The second defendant is the developer and vendor of the development within which the property bought by the plaintiff is located. The case against this second defendant continues because no application has been made to strike the case out.

[21] Hence, as O'Hara J sagely observed, if it is the case that the plaintiff has bought a property with defective title the two obvious and central defendants must now necessarily be the vendor who was supposed to grant her good title and her own solicitor was supposed to represent and protect her interests.

[22] However the plaintiff is not content pursuing these two parties but has insisted on expanding her claim to bring in an array of other defendants.

The third defendant

[23] The plaintiff believes this third defendant was a joint developer with the second defendant of the property which she bought. He was the vendor's solicitor. As such he owed no duty of care to the plaintiff and the claim of fraud against him, as with the other defendants, is without substance. Master McCorry set this out in considerable detail. There is no basis for the claim against this defendant as currently pleaded and we affirm the decision of O'Hara J.

The fourth defendant

[24] This defendant is a firm of architects retained by the second defendant to prepare plans for submission to the planning authorities. It was not engaged by the plaintiff. The plaintiff alleges gross negligence "bordering on tort of deceit" and a breach of duty of care. This defendant had no nexus with the plaintiff and owed her no duty of care. She makes no mention of negligent misstatement pursuant to the principles of Hedley Byrne v Heller in her claim and no pleading is made containing

any basis upon which such a claim could be based. There is no foundation for the claim against this defendant as currently pleaded and we affirm the decision of O'Hara J.

The fifth, sixth and seventh defendants

[25] These defendants are sued as the Planning Department, Road Service and Land Registry. Allegations of gross negligence, breach of care and breach of statutory duty of care are made. No statutory duty on these bodies is pleaded and therefore there can be no breach of statutory duty. There is no pleading giving rise to a special relationship between her and any of these bodies capable of giving rise to a duty of care. In the case of the Land Registry there is complete absence of any particulars of misrepresentation being pleaded. There is no foundation for the claims against these defendants as currently pleaded and we affirm the decision of O'Hara J.

The eighth defendant Greenbelt Group Limited

[26] This defendant had an agreement with the second defendant whereby when the development was completed and certification provided Greenbelt would take over the maintenance of the open spaces. In the event this defendant asserts the development was never completed and the agreement had not come into effect in that open spaces had never been transferred.

[27] It is difficult to discern from the amended pleadings what role the plaintiff ascribes to this defendant which could conceivably give rise to any duty of care owed by it or breach of duty of care. The covenants which she alleges were breached are inadequately pleaded and, as Master Corry asserted, "her claims under the heading 'Negligence and/or Gross Negligence Bordering on Tort of Deceit' is neither the one thing nor the other". The pleadings disclosed no reasonable cause of action against this defendant. There is no foundation for the claim against this defendant as currently pleaded and we affirm the decision of O'Hara J.

The ninth defendant

[28] This defendant appears to have acted for the eighth defendant Greenbelt Group Limited in the formulation of an arrangement between it and the second defendant. Given that there is no relationship or contractual nexus between the eighth defendant and the plaintiff capable of giving rise to a duty of care, it is, as the Master pointed out, impossible to see how there could be any relationship between solicitors engaged by the eighth defendant and the plaintiff. No proper basis for imposing such a duty of care is pleaded and could not arise in any conceivable manner. Accordingly there is no foundation for the claim against this defendant as currently pleaded and we affirm the decision of O'Hara J.

The tenth defendant Colleys Valuers

[29] This defendant is a firm of valuers engaged by Birmingham Midshires to provide a valuation of the property for the bank's use for the purpose of determining the adequacy of the security in respect of the loan being offered to the plaintiff. The condition of the property and the size of the site save insofar as it influenced its value were not the subject matter of the report. There is no relationship between the plaintiff and this defendant capable of giving rise to a duty of care. The causes of action alleged are gross negligence and duty of care. Once again there is no nexus whatsoever between the plaintiff and this defendant. The claim of "positive acts of dishonest assistance" are unsubstantiated in the pleadings. Accordingly we find no foundation for the claim against this defendant as currently pleaded and we affirm the decision of O'Hara J.

The eleventh defendant Birmingham Midshires

[30] This defendant provided the mortgage facilities for the plaintiff enabling her to purchase the property. It engaged the valuer, namely the tenth defendant, to prepare a valuation report on the adequacy of its security. It has no responsibility for the certification of title, registration of the mortgage or any other duty of care to the plaintiff in respect of these matters. The Master has correctly indicated that the causes of action pleaded as fiduciary duty, gross negligence and duty of care to a third party require her to demonstrate such a relationship as would be capable of giving rise to a duty of care. None exists on the pleaded case. She also pleads breach of warranty but does not refer to the nature of any warranty or how it would arise in this instance. The tort of deceit is without any basis. Insofar as she now alleges public acts of concealment by deliberate dishonesty by this bank either individually or in collusion with Arthur Cox, there is nothing whatsoever to substantiate such an allegation. Accordingly there is no foundation for the claim against this defendant as currently pleaded and we affirm the decision of O'Hara J.

The twelfth defendant Arthur Cox and Company

[31] This defendant was instructed by the eleventh defendant in relation to possible proceedings against the third defendant in respect of the defective title affecting its security. It has nothing to do with the plaintiff to whom it owes no duty of care. There is no foundation for the allegation of "public acts of concealment by deliberate dishonesty" against this defendant on the pleaded material. Accordingly there is no foundation for the claim against this defendant as currently pleaded and we affirm the decision of O'Hara J.

The thirteenth defendant CRL Management Limited

[32] The plaintiff asserts that the new underwriters G.P.I. Insurance for CRL Management instructed CRL Management to issue a warranty for her property. The fact of the matter is that Ms Harkin did obtain a mortgage in any event. We agree

with the argument put forward by this defendant that the duty owed by the provider of a warranty certificate is limited to ensuring that the warranty certificate was valid. There is no averment to the effect that a claim under the warranty has been refused and she has not suffered any loss as a result of this defendant. The pleadings establish no basis for a claim in deceit or that this defendant knowingly or intentionally issued a false cover note or warranty. There is nothing pleaded which would support her conclusions. The pleadings in this aspect of the case are hopelessly inadequate. Accordingly we find no foundation for the claim against this defendant as currently pleaded and we affirm the decision of O'Hara J.

[31] In short there is much to be said for the summation of O'Hara J at [7] of his judgment where he said:

“The plaintiff’s case against the fourth to the thirteenth defendants is that they were induced by the second and third defendants to provide fraudulent assistance to them, by the exercise of undue influence over them, so as to alter the property which she had intended to buy to the one with which she has ended up with. Quite apart from the fact that such a chain of events is inherently unlikely, the plaintiff has not set out in her Statement of Claim an identifiable or coherent cause of action against any of these defendants.”

[32] Finally, we endorse entirely the view of O'Hara J that the allegation by this plaintiff that her human rights had been breached has not been developed in any coherent way or addressed in a meaningful fashion before this court. We therefore affirm the decision of O'Hara J to strike out any allegation made against the defendants for breach of the plaintiff's human rights.

Conclusion

[33] We have concluded that leave to appeal in this case should be refused because there is no realistic prospect of success against the order of O'Hara J. In the circumstances therefore leave is refused and the decision of O'Hara J affirmed.

[34] We shall now invite the parties to address us on the issue of costs.