



LITIGATION AND DISPUTE RESOLUTION

Irish Supreme Court Provides Clarity on the Statute of Limitations in a Property Damage Claim

by **Shane Neville**

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Upholding a decision of the Court of Appeal, the Irish Supreme Court has unanimously held that a claim in tort for property damage was issued within the statutory limitation period of six years.

The Court of Appeal had earlier overturned the decision of the High Court in *Brandley and WJB Developments Limited v Hubert Deane T/A Hubert Deane & Associates and John Lohan T/A John Lohan Ground Works Contractors* (High Court 2010/10994P and Appeal 2015/245).

Background

Mr Brandley and WJB Developments Limited, the developers and plaintiffs, initiated proceedings against the defendants on 30 November 2010, claiming damages for breach of contract and negligence arising from the construction of two houses in County Galway. The first-named defendant, Mr Deane, was the supervising consulting engineer, who certified compliance with planning permission and building standards. The second-named defendant, Mr Lohan, was the groundworks contractor, whose work included the foundations of the houses. The developers (who continued to own the houses) argued that the large irreparable cracks, which had appeared in the external walls of the houses and which had rendered the houses unsafe, were a result of defective foundations and the negligence of the defendants.

The defendants pleaded that the developers' claim was "statute-barred" under the Statute of Limitations 1957, meaning that the time limit of six years for the developers to initiate proceedings had already passed by the time proceedings began. The crucial dates identified by the parties and the court are listed below.

Date	Event
March 2004	Foundations were completed
September 2004	First-named defendant engineer issued a certificate of compliance with planning permission and building regulations
January/February 2005	Houses were completed
December 2005	First-named plaintiff/developer observed cracks in the houses

Date	Event
30 November 2010	Plaintiffs/developers issued proceedings

The case to be decided in the High Court was whether or not the developers' claim was "statute-barred" as a claim in negligence. In other words, did all of the necessary elements of negligence first exist in March 2004 as argued by the defendants or in December 2005 as argued by the developers?

The developers (as plaintiffs) argued that "damage", an essential element of the tort of negligence, did not occur until December 2005.

The defendants argued that the six-year statutory period of limitation began to run in March 2004, when the foundations were installed. The defendants contended that the foundations were so fundamentally defective that the developers had a full cause of action in negligence/tort in March 2004. The defendants also argued that, to hold that the cause of action only accrued in December 2005, would effectively introduce a "discoverability" test, similar to that used in cases involving negligent acts causing personal injury.

High Court and Court of Appeal

On 16 April 2015, the then President of the High Court, Mr Justice Kearns, held that the developers' claim was "statute-barred" on the basis that the relevant Irish decisions in this area – including the judgment of Mr Justice Barr in *Murphy v McInerney Construction Limited* [2008] IEHC 323 – "firmly exclude a discoverability test as being the relevant starting date". The learned High Court judge concluded that the developers' case became "statute-barred" six years after the foundations were installed. The developers' claim was dismissed.

The Court of Appeal (Ryan, Irvine and Hogan JJ) on 2 February 2016 overturned the High Court's decision and held that the developers' proceedings were issued on time and were not "statute-barred".

Supreme Court

The defendants appealed the Court of Appeal's decision to the Supreme Court.

Taking an opportunity on 15 November 2017 to provide clarity on the law, Mr Justice McKechnie (with Clarke CJ, MacMenamin, Dunne and O'Malley JJ concurring) provided an 81-page written judgment. Holding that the plaintiffs' claim was issued within time and not "statute-barred", Mr Justice McKechnie stated:

"... I accept that there is a definite distinction between a "defect" and the subsequent damage which it causes. Time runs from the manifestation of damage, rather than of the underlying defect. Thus it is not the latent defect which needs to be capable of discovery: it is the subsequent damage caused by that latent defect..."

The Supreme Court held that a "discoverability" test should not apply and, instead, the statutory period of limitation should run from when the damage became "manifest":

"... it is not so easy to pin down precisely what is meant by "manifest", and especially how one might differentiate it from the "discoverability test" as it appears in [case law]. From a reading of the case law, I understand "manifest" to mean the date on which damage is capable of being discovered by a plaintiff..."

In deciding the case, Mr Justice McKechnie stated:

"... without loss or damage attaching to... defects, no cause of action exists. The damage was completed in December, 2005..."

Conclusions

Although specific to its facts, the Supreme Court's decision affirms a number of general principles:

1. A cause of action in damages, for a non-personal-injury claim, accrues only at the time that "damage" becomes "manifest".
2. Damage is "manifest" when it is capable of being discovered (irrespective of whether it has or has not been discovered or ought to have been discovered).
3. In a construction context, there may be a distinction between defective work, such as the installation of defective foundations, and actual damage occurring or becoming manifest.
4. A "discoverability" test does not apply in respect of non-personal-injury claims in tort/negligence.
5. Causes of action in contract and in tort/negligence may accrue at different points in time.

This case reminds us that non-personal-injury claims for negligence against those involved in the construction industry, including engineers and architects, may in certain circumstances be initiated and successfully prosecuted more than six years after the defective work was carried out. This may have particular implications for the professional indemnity insurers of construction-related professionals.

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