Neutral Citation: [2012] IEHC 614

THE HIGH COURT

[2010 No. 1138 P]

BETWEEN

CHARLES GALLAGHER LIMITED

PLAINTIFF

AND

IRISH ASPHALT LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Birmingham delivered the 27th day of April, 2012

1. The matter now before the Court represents the latest chapter in the pyrite litigation saga. At issue is a motion brought by the defendant, Irish Asphalt Limited ("Irish Asphalt"), to stay the proceedings brought by the plaintiff, Charles Gallagher Ltd. ("Gallagher") until a Supreme Court appeal in a case entitled *James Elliot Construction Limited* ("Elliot") *plaintiff/respondent v. Irish Asphalt Limited, defendant/appellant* has concluded. Also listed before the Court was a motion brought by the plaintiff seeking to have the present proceedings brought by Charles Gallagher Ltd. against Irish Asphalt Ltd. consolidated with proceedings brought by the plaintiff against a company known as Joe Miley & Partners (Dublin) Ltd. ("Miley"). However, in a situation where the two motions would not have been disposed of within the day, and when there was some uncertainty or vagueness about the intentions of Miley, the consolidation motion was not proceeded with at this stage.

2. In 2000, the plaintiff purchased a site in Donabate, County Dublin, on which it built a housing estate known as "Somerton" comprising 121 houses. In 2003, the plaintiff purchased a second and adjoining site on which it built an estate known as "Carr's Mill" comprising 153 houses. Each estate was built on a phased basis over a number of years. According to the plaintiff, most of the groundwork for the two estates was carried out by Miley under contract to Gallagher. Again, according to the plaintiff, Miley sourced the infill required for the groundwork from Irish Asphalt.

3. In October 2008, cracking appeared in one house, 106, Somerton. Investigation into the cause began. The plaintiff's case is that the cause of the cracking was a phenomenon known as "pyrite heave". Following the emergence of apparent problems at 106, Somerton, a process of examining other houses in the developments was commenced and this is said to have revealed difficulties with some, but by no means all, houses. There seems to be some uncertainty about the exact number of houses alleged to have been affected, as of the time of the delivery of the statement of claim in the proceedings against Miley, it seems that 84 houses had been tested, and of those, the results from forty were found to indicate the presence of infill with excessive pyrite levels. However, in the course of argument for the present motion, counsel for the plaintiff indicated that, in fact, 67 houses were affected.

4. An overview of the pyrite heave phenomenon was offered by Charleton J., the trial judge in the *Elliot* case, who quoted from a document prepared by the Comité Technique Québécois D'étude Des Problèmes De Gonflement Associés À La Pyrite (CTQ-M200). He did so as follows:-

> "Pyrite (FeS^2) is the main iron sulphide responsible for swelling and is also one of the most abundant minerals on the planet. Pyrite is found in several different types of rock, in fairly low percentages (< 1%).
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> Pyrite exists in different forms, namely massive (chemically stable) and "framboidal" (chemically unstable). The framboidal form is characterised by an agglomeration of very small cubic crystals (not visible to the naked eye) with a very large specific surface. In some conditions, this form of pyrite can oxidise in the presence of water and react with other minerals present in the same rock to form gypsum. Gypsum, when it forms, occupies a much greater volume than pyrite, causing swelling of the granular backfill. The swelling produces cracking and causes concrete floor slabs to heave. In some cases, especially in garages, the foundation walls may also crack and be displaced outwards.
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> The chemical solutions formed during pyrite oxidation can be absorbed by the concrete, causing the concrete floor slab to sulfatize and heave. The swelling, thus, has two constituent elements, namely swelling of the aggregate and intrinsic swelling of the concrete slab.
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> This chemical reaction is generally slow, and it takes between 10 and 15 years after the building is constructed before it is visible to the occupants. Slab displacement levels vary, but can be as high as 5mm per year.
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> The chemical reaction can remain active over long periods (more than 40 years, for example). The speed and extent of the reaction will depend on several factors, including the depth of the backfill, the percentage and type of pyrite present, the water content and porosity of the materials, and so on.
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> Problematic aggregate is generally composed of significant percentages of argillaceous limestone and argillaceous shale. These rocks are composed mainly of clay minerals and carbonates ($CaCO^3$) in varying proportions. They also contain variable percentages of pyrite, but generally not more than 1%.
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> Because these types of rock contain significant percentages of clay minerals, they are more permeable to air and water and less resistant to gypsum crystallization.
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> The percentages of these types of rock in aggregate can vary considerably. For example, materials with very high swelling potential may be mixed with others that have negligible swelling potential, and there are, of course, many intermediate materials between these two extremes. The geographical sectors most affected by swelling are located close to geological formations rich in that particular type of rock, which is mined locally and may be used as granular backfill under concrete floor slabs.

> Most aggregates used as underfloor backfill contain pyrite and other sulphurs, but a very large percentage of buildings will never exhibit symptoms of pyrite-related problems. This is because pyrite found in hard rock with low clay mineral contents does not oxidize and the materials remain stable".

5. On the 8th February 2010, the plaintiff issued two plenary summonses, one naming as defendant Irish Asphalt Ltd., and the other naming as defendant Joe Miley & Partners (Dublin) Limited.

6. So far as the present proceedings are concerned, the plaintiff sought a declaration that the defendant was obliged to indemnify the plaintiff in respect of all costs, expenses, losses, liabilities and claims (including all and any of the foregoing occasioned by compromise) including the costs of all remedial works necessitated or compensation paid by the plaintiff arising from the supply by the defendant of aggregate infill susceptible to swelling and containing unacceptable excessive levels of pyrite, which aggregate infill was used in the construction and development of residential units and developments known as Somerton and Carr's Mill at Donabate, County Dublin.

7. The present proceedings and the parallel proceedings against Miley are the latest to focus on the issue of pyrite heave. What emerges from the earlier litigation is that it is indisputable that litigation involving pyrite tends to be remarkably lengthy and remarkably costly.

8. For example, proceedings entitled *Hansfield Developments and Others, Plaintiffs v. Irish Asphalt Limited and Others, Defendants* were at hearing before Gilligan J. for more than 150 days when the case settled following mediation. Strikingly, the settlement came during the course of the plaintiff's evidence and before even that phase of the case had reached a conclusion. Then, the case of *James Elliot Construction Limited v. Irish Asphalt Limited*, or more accurately, the liability aspect of that case, was heard by Charleton J. over 58 days and judgment on the liability aspect was delivered on 25th May, 2011. All the indications are that the trial of the present dispute will take at least as long as the *Elliot* case, and indeed, very possibly longer, given that *Elliot* involved only one building, albeit a large building, a youth centre, while the present litigation would involve many different dwellings constructed over a significant period of time which would add to the complexities of the situation.

9. Litigation on this scale is enormously expensive. I have been told that the costs relating to expert witnesses alone in the *Hansfield* proceedings ran to many hundreds of thousands of Euro, if not actually into the millions.

10. To put the present application in context, the situation is that, following the delivery of the judgment of Charleton J. in the *Elliot* case, discussion took place in relation to quantum and the basis of an agreement was reached. There followed an application by Irish Asphalt, the unsuccessful defendant, for a stay on the judgment and order insofar as it related to liability. On the basis of an undertaking to apply to the Supreme Court for an expedited hearing, Charleton J. was prepared to grant a stay. In accordance with the undertaking given to the trial judge, the matter has been mentioned to Denham C.J. who has given directions in relation to the exchange of legal submissions. It is a measure of the complexity of the matter that the appellant's submissions amount to approximately 250 pages, and leave had to be sought to file submissions of that length as it was a departure from the normal practice of the Supreme Court. Overall, I think it fair to say that the appeal in the *Elliot* case is being actively case-managed before the Supreme Court. In those circumstances, Irish Asphalt Ltd., the defendant in the present proceedings, and the defendant/appellant in the *Elliot* case, now seeks to stay the present case until after the conclusion of the Supreme Court appeal in *Elliot*.

11. The defendant and moving party contends that if this case is not stayed and it is allowed to come on for hearing, there will be a waste of costs on a massive scale. Requiring the moving party to defend the present proceedings while preparing for the Supreme Court appeal would be onerous in the extreme and place an enormous strain on its resources. If, on the other hand, the matter is stayed pending the determination of the appeal, it says that the parties will benefit from having had a judgment of the Supreme Court which will deal with a number of issues that are common to the two cases, and while not identical in all respects, are related, in the sense of being similar to the issues that will have to be addressed in the present case. This can be expected to result in a significant saving in court time and both sides would benefit from a significant saving in costs.

12. The plaintiff says that the suggested saving on court time and costs is illusory. The plaintiff claims that Irish Asphalt has failed to identify a single issue in the *Elliot* appeal which will actually determine any issue in the present case. The plaintiff says that it wants to get its case on, and if it is delayed in doing so, this will be a case of justice being delayed and thus of justice being denied.

13. Not only will the plaintiff suffer this it is said, but so, too, will homeowners, who are in the position of having to continue living in houses with cracked walls, distorted and rising floors, jamming doors and so on. All homeowners in houses that are apparently affected by pyretic heave are utterly unable to sell their houses even if they want to, or, indeed, if they need to.

14. There is agreement between the parties that the Court has an inherent jurisdiction to stay any proceedings. The plaintiff, however, is quick to add that it is a jurisdiction to be exercised sparingly as it represents an interference with the right of access to the courts. It is also agreed that the manner in which the acknowledged jurisdiction should be exercised has been considered recently by Clarke J. in *Kalix Fund Limited v. H. S.B.C Institutional Trust Services (Ireland) Limited* [2010] 2 I.R. 581, a judgment given in the context of two cases amongst a large number brought arising out of the collapse of Bernard Madoff Investment Securities. As both sides place such important on that decision it seems necessary to quote from it at some length. In the course of his judgment, Clarke J. commented as follows:-

> "45. It does seem to me, at the level of principle, that a court has a discretion, in ordering its business, to ensure that scarce court resources and the resources of parties to litigation are not inappropriately wasted by an unnecessary duplication of litigation. In addition it is, of course, important that measures are taken to minimise the risk of any inconsistent determinations arising from different proceedings. It is for reasons such as those, that the practice has grown up over recent years of cases being linked as a purely procedural measure to ensure that a series of cases which have common factors are assigned to a single judge, who will determine all relevant issues across the range of cases concerned.
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> 46. Likewise, even within a single case, it is clear that the court retains a discretion to direct that a sequenced rather than unitary trial of all relevant issues should take place: see *Cork Plastics Manufacturing v. Ineos Compounds Ltd*. [2008] IEHC 93, [2008] 1 ILRM 174. That case also contains a discussion of the factors which are likely to be relevant in considering whether a unitary or sequenced trial ought be directed.
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> 47. Again, at the level of principle, it seems to me that similar (but not necessarily identical) considerations apply where the court is faced with a number of actions involving, at least to some significant extent, the same or similar issues.

48. It seems to me to follow that the court has an inherent jurisdiction to manage the conduct of a series of cases which are connected by reason of having significant factual or legal overlap for the purposes, in the words of Kelly J. in *Re Norton Healthcare Limited* [2005] IEHC 441, [2006] 3 IR 321 of bringing about 'a just and expeditious trial whilst seeking to minimise costs' (at p. 331). Applied to a number of cases, the obligation is to ensure that each party to each of the cases nonetheless will achieve, as best as can be done, a just and expeditious trial, but also that, across the range of cases, costs be minimised and scarce court resources not be wasted.

49. Again, at the level of principle, it seems to me that in assessing how to manage a series of cases, connected in the fashion in which I have identified, the court needs, amongst other things, to take into account the following factors:-

(a) the fact that each individual plaintiff is entitled to have that plaintiff's proceedings determined in an expeditious manner, subject only to ensuring that there is no disproportionate added expense or drain on court time imposed;

(b) a consideration of the extent to which the first case to be tried is likely to bind all other cases in whole or in part. For example, in any set of common litigation where there is a legal issue arising in each case which may be significant or, indeed, determinative of important issues (such as liability) it is, in practical terms, so that the first case which happens to be tried (no matter how the matter is managed or not managed) will determine that legal issue in a way that will, in substance, bind all subsequent cases. Factual decisions relevant to, for example, a defendant's liability may or may not be in the same category depending on the extent to which a plaintiff who was not involved in the first case may be taken, either as a matter of law or as a matter of practicality, to be bound by the decision in that case. Obviously, the greater the extent to which all other proceedings will be governed by the first case to be run, the more value there is in ensuring that the cases generally are managed in a fashion which allows the common issues to be resolved in a speedy fashion, but does not permit any unnecessary additional expense to be incurred in progressing and bringing to trial other proceedings save to the extent that those other proceedings involve issues which will or may need to be litigated in any event;

(c) the need to ensure that any measures adopted which have the effect of preventing one or more cases from progressing in the way in which they might ordinarily be expected to progress, were they to be considered on a stand alone basis, are no more than is necessary and proportionate to achieve the end of preventing unnecessary expense or use of court time. In that context, it is relevant to note the process which I have put in place in *Kelly v. Lennon* [2009] IEHC 320, [2009] 3 I.R. 794. In that case, some but not all of the issues which arose in the relevant proceedings were governed by an arbitration clause. For the reasons set out in my judgment in that case, I came to the view that the arbitration clause was binding and that there was no legitimate basis on which the issues governed by the arbitration clause should not be remitted to arbitration. However, there were other issues in the case which had not been referred to arbitration. In those circumstances I placed a stay on any further progress of the proceedings insofar as they related to the issues which were remitted to arbitration. However, I allowed the case to proceed to the close of pleadings on the other issues. Having formed a view that, on balance, it was more appropriate that the issues remitted to arbitration should be tried first, I directed that the court proceedings should not progress beyond the close of pleadings until the arbitration had been completed. It seems to me that a party should, in principle, be allowed to progress their proceedings as far as can be done without risking any disproportionate duplication, expense or waste of court time.

50. It also seems to me that a decision on whether the various issues which arise across all of the relevant proceedings concerned need to be tried at one trial or in a series of sequenced trials (whether relating only to one or a number of cases) is a matter that should be determined by reference to the general considerations which I set out in *Cork Plastics Maufacturing v. Ineos Compound Ltd.* [2008] IEHC 93, [2008] 1 ILRM 174 coupled with the additional considerations which I have identified as being applicable to a series of cases. It should be noted, in that context, that there is no reason in principle why a large number of cases could not come to trial at the same time but that, in the context of a sequenced trial, of all of the cases, the issues which arise in the various cases could not be tried in a logical fashion with only those parties who had a logical and legitimate interest in the particular set of issues then currently being tried, having an entitlement to be heard in respect of those issues. Before passing from this latter point, it should also be noted that parties whose interests may be affected by a particular decision will, in most cases, be entitled to be heard before any decision is made which is binding on that party, and which is material to the interests of the party concerned. It does not, however, follow that a party who has nothing to add to the argument or factual basis relevant to the issue concerned would be entitled to the costs of being present while the issue was, in substance, being tried between other parties. Even in relatively straightforward litigation it is, as I have pointed out, the case that the first case to run of a series may well determine either as a matter of law or as a matter of practicality issues likely to arise in subsequent cases. It does not follow that each of the parties to the subsequent cases are entitled to be heard in the case first to be run. Even if a series of cases are run together it does not follow that a party who has nothing to add to an issue but who may, in some way, be said to be affected by the issue can be entitled to expect to be paid its costs of attendance unless it has something material to add to the process."

15. In seeking to apply those principles, among the facts that I identify as relevant to the current issue are these:-

(i) When the present litigation comes to trial, the case will be a very lengthy one, which will be extraordinarily costly for the parties involved and will impose considerable demands on court resources;

(ii) Issues that will be considered in the course of the Supreme Court appeal are clearly relevant to issues that will have to be decided in the present proceedings;

(iii) While the Supreme Court decision will be highly relevant and will impact on the present case, probably significantly, it is unlikely, subject to some possible exceptions, to determine issues in the present case. The defendant has made clear that it is not suggesting that it regards itself as bound by the outcome of the *Elliot* appeal;

(iv) The present proceedings are still at an early stage. A very detailed notice of particulars dated 4th August, 2011, was served by the defendant which remains unanswered. Clearly, much remains to be done before there could be any question of the case being certified as ready for trial;

(v) If the case is delayed at its present stage, it is impossible to know how long it will remain in that state, that is so in particular because the defendant/appellant in the *Elliot* case has indicated that it is seeking a reference in respect of certain issues to the European Court of Justice;

(vi) If the case is stayed in its present state and at its present stage, and is reactivated and progressed towards a hearing only after the *Elliot* appeal has been disposed of, either as a result of the appeal having been heard and judgment delivered, or on the basis of the appeal having been compromised, the stay is likely to be a lengthy one, probably running to several years;

(vii) Any significant delay impacts not just on the plaintiff but on individual homeowners. In that regard, it appears there is further pyrite litigation in the pipeline so there has to be concerns about the plaintiff, and by extension, Somerton and Carr's Mill homeowners losing their place in the queue;

(viii) The defendant is seeking to stay the proceedings because of the existence of an appeal that is pending before the Supreme Court. However, one should not lose sight of the fact that the issues in the *Elliot* case that are said to be relevant to the present proceedings and were litigated over approximately 60 days, and which were the subject of a very detailed reserved judgment running to 108 closely-typed pages, have to date, in broad terms, been decided against the defendant and moving party seeking the stay and in favour of the plaintiff.

16. Taking into account these factors, it seems to me that it would be unfair to the plaintiff to stay the proceedings at their present stage. In that regard, it has to be pointed out that at this stage, and in advance of a defence being delivered, we do not even know for certain that liability is going to be put in issue.

17. On the other hand, it seems to me that it would be wasteful of court resources and would not be in the interests of either party to allow the case come to trial when waiting for the judgment of the Supreme Court might assist in the resolution of some of the issues. I will therefore, direct that the case should not come on for hearing until the determination of the Supreme Court is available or further order. However, the restriction is in relation to coming on for trial only, and preparation should continue so that there can be a trial without significant delay once the Supreme Court proceedings have come to an end. I am conscious of the fact that preparing for trial will impose burdens on the parties and perhaps, in particular, on the defendant, which finds itself committed on more than one front, but the extent of the burden should be ameliorated somewhat by the knowledge that the trial date for the present proceedings will now be some time away. The approach I am proposing, of allowing the case to be put in the state of readiness but not actually brought on for trial, is consistent with the approach of Clarke J. in *Kelly v. Lennon*. I will discuss with counsel the appropriate form of orders to give effect to the conclusion that I have reached.