Neutral Citation Number: [2010] IEHC 276

THE HIGH COURT

2006 4349 P

ANDREWS CONSTRUCTION LIMITED

PLAINTIFF

AND

LOWRY PILING LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Hedigan delivered on the 13th July 2010

1. The defendant in the proceedings herein applies in this motion to strike out the proceedings on the grounds of inordinate, inexcusable and unreasonable delay. At the hearing of the motion, the application was based primarily upon the ground that the plaintiff herein, having been sued in other proceedings by homeowners in respect of houses purchased by them from the plaintiff did not join the defendant as third party in those proceedings. They settled those proceedings without any participation by the defendant and without reference to them. They now seek indemnity in these proceedings for the loss incurred in settling those proceedings.

The Parties

2. The plaintiff company is a developer. It built a housing development in Mullingar, County Westmeath called Petitswood Manor ("the development"), during the years 1999-2000.

3. The defendant company operates a piling business. It was contracted by the plaintiff to carry out piling works on the development in question. The piling works involved driving a column of wood or steel into the ground to provide support for a the houses in question.

The Facts

4. The defendant undertook the piling works at the development on the 13th August, 2000. Following completion of the houses, significant structural problems became apparent. These were found in numbers 119 and 120 Petitswood Manor. Cracking became apparent in the rear walls of those two houses on either side of the party walls between those houses. Solicitors engaged by the two sets of householders wrote to the plaintiff regarding these problems on the 16th April, 2003, and on the 12th May, 2003, respectively. Proceedings were instituted against the plaintiff herein by the purchasers of 119 Petitswood Manor on the 30th July, 2003, by way of plenary summons and proceedings were instituted against the plaintiff herein by the purchaser of 120 Petitswood Manor on the 11th February, 2004.

5. The plaintiff retained DBFL Consulting Civil and Structural Engineers ("DBFL") to report on the defects in the houses. An initial inspection report, based on a purely visual inspection, was prepared by Mr. Paul Forde, Consultant Engineer, and is dated the 9th June, 2003. The walls of the properties were not opened up or stripped out for the purpose of this inspection. Mr. Forde's report concluded that the most likely cause of the cracking in the walls had been the failure or, at least the partial failure, of the pile beneath the junction of the rear wall with the party wall. To ensure that no further cracking occurred, Mr. Forde advised that it would be necessary to install remedial underpinning piles in the vicinity of the rear wall junction with the party wall. He also suggested that Lowry Piling Limited be requested to submit remedial proposals. The letter stated *inter alia* as follows:-

> *"Based on the pattern of the cracking observed it is our opinion that the most likely cause of the cracking in the walls has been the failure, or at least partial failure, of the pile beneath the junction of the rear wall with the party wall.*
>
> *In order to ensure that no further progression of cracking takes place it will be necessary to install remedial 'underpinning piles' in the vicinity of the rear wall junction with the party wall. Techniques are available which allow this work to be carried out from outside the houses. We would suggest that you inform the firm which carried out the original piling and request that they submit remedial proposals as a matter of urgency. We will be pleased to check and approve any such proposal on your behalf. In the interim it would be prudent to install a number of glass 'tell-tales' so that any further progression in the cracking can be monitored and assessed."*

6. Around this time the defendant herein was aware of the structural defects in the properties and the investigations which were taking place. It carried out its own investigations and ultimately its consultants, O'Connor Sutton Cronin, Consulting Structural Engineers produced a report dated the 9th September, 2005. This report was furnished to the plaintiff on the 19th May, 2006, a synopsis of that report having been forwarded to the plaintiff some months earlier in a letter from the defendant's insurers, by letter dated the 22nd November, 2005. The tenor of the report was that there were other reasons for the settlement that occurred in the foundations apart from the piling works.

7. In a letter dated the 5th December, 2003, DBFL confirmed its recommendation contained in its initial report of the 9th June, 2003 that remedial works comprising of the installation of underpinning piles should be carried out.

8. On the 20th March, 2004, the defendant sent a potential remedial solution by fax to DBFL. This potential solution was referred to in a report of DBFL dated the 31st March, 2004. A joint inspection between the defendant and DBFL was also carried out and is alluded to in another report of DBFL dated the 3rd February, 2005. In the letter from the defendant's insurers to DBFL dated the 22nd November, 2005, it was indicated that the defendant did not accept liability for the defects that had arisen as follows:-

> *"On the evidence available, a case has not been made out against Lowry Piling. No evidence has been adduced to indicate that the piling contractor was negligent or deviated from approved standards of care or workmanship. We have identified what we believe are the more plausible reasons for the failure in this case which point to defective pile/ground beam interface or a defect induced in the pile during excavation of the ground beams. This was the responsibility of the*

main contractor. No doubt you will discuss the above findings with your own Engineer before considering High Court proceedings that we will vigorously contest on behalf of Lowry Piling."

9. The proceedings involving the homeowners were compromised in December 2004, by letter dated the 21st December, 2004, to the owners of 119 Petitswood Manor and by letter dated the 17th December, 2004, to the owner of 120 Petitswood Manor in full and final settlement. As part of the settlement the plaintiff agreed to provide alternative houses to the owners of the properties and to pay damages and legal expenses. The total sum of the settlement paid by the plaintiff was €448,792.68.

10. On the 19th September, 2006, the plaintiff issued a plenary summons seeking an indemnity or, in the alternative, a contribution in respect of its losses together with other reliefs against the defendant. An appearance was entered by the defendant on the 1st November, 2006. A statement of claim was then delivered by the plaintiff on the 11th May, 2007. The defendant issued a notice for particulars on the 13th September, 2007, and received replies on the 8th February, 2008. A defence was delivered on the 30th January, 2008. A notice of intention to proceed was served by the plaintiff's solicitors on the 11th March, 2009, and a notice for trial was served on the 15th April, 2009.

The parties' submissions

11. Mr. Jolly B.L., for the defendant, argued that these proceedings were instituted against it some six years after it carried out works and that the plaintiff had, as a result, failed to prosecute the claim against the defendant with due expedition. There has been, in his submission, inordinate, inexcusable and unreasonable delay on the part of the plaintiff in prosecuting and maintaining the proceedings against the defendant. He relies on the judgment of the Supreme Court in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in this regard. He argued further that the plaintiff chose not to bring third party proceedings against the defendant in the proceedings between it and the homeowners. In contrast, he argued that there has been no delay or acquiescence on the plaintiff's part. He contended that s.27 of the Civil Liability Act 1961 ("the Act of 1961") imposed an obligation on a party seeking an indemnity or contribution to proceed as soon as was reasonably possible and that the inaction of the defendant breached this obligation. He submitted that no good reason has been advanced as to why third party proceedings were not brought. He characterized the delay in bringing proceedings for a contribution or indemnity against the defendant as being unjust and prejudicial to it. He relied on the judgment of the Supreme Court in *ECI European Chemical Industries Limited v. MC Bauchemie Muller GmbH and Company* [2007] 1 I.R. 157 regarding the interpretation of s.27 of the Act of 1961.

12. Mr. Mullooly B.L., for the plaintiff, contends that the cause of the damage to the houses had not been fully investigated or ascertained before the settlement of the proceedings between his client and the homeowners. It was only when the cause of the damage became known that the plaintiff instituted these proceedings against the defendant. He argues that the decision to settle the claims by the homeowners was in accordance with the plaintiff's duty to mitigate its loss, that the defendant had not been prejudiced by those settlements and that the defendant's experts' report was only furnished to the plaintiff on the 19th May, 2006.

13. He conceded that whilst a claimant is not precluded from making an indemnity or contribution claim by separate action, such a claim may be refused as a matter of discretion. In exercising this discretion that a Court should consider why a third party notice was not served and whether there were good reasons for it not being served in accordance with s.27 of the Civil Liability Act 1961, as held in *ECI European Chemical Industries Limited v. MC Baucheie Muller GmbH* [2006] I.E.S.C. 16. He referred to the comments of Peart J. in *Tuohy v. North Tipperary County Council* [2008] I.E.H.C. 63 who held in that case that time ran from when the plaintiff was first in a position to know that the claim against the defendant was possible to pursue. The complex structural investigations and issues on the facts of this case were emphasized and he submitted that these had a bearing on the time the proceedings were brought.

The Law

14. Section 27 of the Act of 1961 provides as follows:-

"27.—(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part-

(a) shall not, if the person from whom he proposes to claim contribution is already a party to the action, be entitled to claim contribution except by a claim made in the said action, whether before or after judgment in the action; and

(b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. If such third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed."

Decision

15. It was accepted by both sides in these proceedings that a third party notice must be served as soon as is reasonably possible, as is expressly stipulated in s.27(1)(b) of the Act of 1961. The question for the court is what the term "*reasonably possible*" means in the context of this case. A useful summary of the interpretation of s.27(1)(b) of the Act of 1961 by the superior courts is contained in the judgment of McMahon J. in *Robins v. Coleman & Ors* [2009] I.E.H.C. 486. The relevant passage reads as follows:-

"2.2 From the case law dealing with the interpretation and application of s. 27(1)(b) of the Civil Liability Act 1961, some rules are clear:-

(i) The purpose of the Act is to ensure as far as possible that a multiplicity of actions is avoided and that all questions of liability in the same dispute should be dealt with in the same litigation, if possible. (See Connolly v. Casey [2003] 1 I.R. 345 (Supreme Court); Gilmore v. Windle [1967] I.R. 323 and Board of Governors of St. Laurence's Hospital v. Staunton [1990] 2 I.R. 31).

(ii) The onus lies on the concurrent wrongdoer/defendant to prove that it acted "as soon as is reasonably

possible". (See McElwaine v. Hughes (Unreported, High Court, Barron J., 30th April, 1997) and Dillon v. MacGabhan (Unreported, High Court, 24th July, 1995).

(iii) In determining what the phrase means, 'as soon as is reasonably possible', all the facts of the case have to be taken into account. (See Connolly v. Casey (supra) and Molloy v. Dublin Corporation [2001] 4 I.R. 52.)

(iv) An element of caution is required before a third party notice is served especially where an allegation of professional negligence is involved. (See Connolly v. Casey (supra) and Greene v. Triangle Developments Ltd. [2008] IEHC 52.)

(v) If a concurrent wrongdoer/defendant does not serve a third party notice 'as soon as is reasonably possible' (or at all), he may still maintain an independent action at a later date after the determination in the substantive claim, but in that event the court reserves a discretion to refuse a contribution if it thinks it is appropriate to do. (See s. 27(1)(b) and Board of Governors of St. Laurence's Hospital v. Staunton (supra).)"

16. The term "*reasonably possible*" was explored by the Supreme Court in the case of *Molloy v. Dublin Corporation & Ors*. (Unreported, Supreme Court, 28th June, 2001). Murphy J., who delivered the only judgment, stated as follows:-

"The terms in which the time limit was expressed do appear severe. The use of the word 'possible' rather than the word 'practicable', as is invoked elsewhere, suggests a brief and inflexible time limit. It might suggest that if it is physically possible to serve the appropriate notice within an identified period, that any further delay would be impermissible. However, such a draconian approach would be inconsistent with the nature of the problems to be confronted by a defendant and of the decisions to be made by him or his advisors. The statute is not concerned with physical possibilities but legal and perhaps commercial judgments. Proceedings cannot and should not be instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon. It is in that context that the word 'possible' must be understood. Furthermore, the qualification of the word 'possible' by the word 'reasonable' gives a further measure of flexibility. As Barron J. pointed out in McElwaine v. Hughes (Unreported, High Court, Barron J., 30th April, 1997) at p.6 of the unreported judgment:-

> *'Clearly the words 'as soon as reasonably possible' denotes that there should be as little delay as possible, nevertheless, the use of the word 'reasonable' indicates that circumstances may exist which justify some delay in the bringing of the proceedings."*

On the facts of the case before him Murphy J. found that there was delay in instituting proceedings and he proceeded to dismiss the appeal brought by the second named defendant challenging the decision of the High Court to set aside the third party order on the basis of the second named defendant's delay.

17. In *ECI European Chemicals Industries Limited v. McBauchemie Muller GmbH and Company* [2006] I.E.S.C. 15. Geoghegan J. considered an appeal against an order to set aside a third party notice on the grounds that it had not been served "*as soon as is reasonably possible"* within the meaning of s.27(1)(b) of the Civil Liability Act, 1961. He considered the import of s.27 (1)(a) and (b) as being as follows:-

"As can be seen quite clearly there is no ambiguity in paragraph (a). If a defendant wants to make an indemnity or contribution claim in a concurrent wrongdoer capacity against a co-defendant he must make his claim within the same proceedings. He is precluded from bringing a separate action.

Paragraph (b) however, deals with a different situation. This is where the indemnity or contribution claim is made against somebody who is not a party to the action. The first part of that paragraph mandates the defendant claimant to serve a third-party notice upon the non-party against whom the claim is being made "as soon as is reasonably possible". Unlike paragraph (a) however, paragraph (b) does not prescribe that the claim for contribution may only be brought by way of third-party proceedings and not by a separate action. If the paragraph had contained only its first sentence, such a requirement might be taken as implied. It has been held in this court, however, that the second sentence in paragraph (b) must necessarily lead to the conclusion that a claimant who does not serve the third-party notice as soon as is reasonably possible and, therefore, does not comply with the first part of the sentence is not necessarily precluded from making an indemnity or contribution claim by separate action but such claim may be refused by the court as a matter of discretion."

Geoghegan J., having considered the relevant authorities, accepted that it would be permissible in some cases for a defendant to make a third-party claim otherwise than by a third party notice, in a separate action. He went on to examine the circumstances in which a court should exercise its discretion to reject the proceedings. In this regard he stated as follows:-

"In order to determine what the nature of the court's secondary discretion is, it would seem prudent to consider first what would happen if no third-party notice had ever been served. Since the clear purpose of the legislation is to ensure that as far as possible third-party issues would be heard in the original plaintiff's action, I find it difficult to accept that the court would only be entitled to reject the independent action if prejudice to the defendant in that action is proved. This does not necessarily mean that the issue of prejudice does not come into play at all. I will return to it in due course. First and foremost, however, it would seem to me that the court would have to consider was there a good reason why the statutory requirement of serving a third-party notice as soon as is reasonably possible was not complied with. This consideration must include not merely the failure to serve a third-party notice but the failure to serve one as soon as reasonably possible. The court, therefore, would have to consider what was the latest date on which a third-party notice ought to have been served. If there was no good reason why a third-party notice could not have been served in accordance with the Act, then, I would take the view that in most cases, irrespective of any question of prejudice, the new proceedings should be rejected. There may be exceptional cases in which as a matter of justice the action should not be rejected on that account alone. Otherwise, a clear obligation to adopt a third-party procedure could become hopelessly weakened to the point of being meaningless.

In considering for the purposes of the first part of the subsection whether a third-party notice has been served as soon as is reasonably possible it is clear on the authorities now that the surrounding circumstances may be taken into account.

…

There was no evidence of prejudice in this case and, therefore, the issue of prejudice does not arise. My view, which would itself be obiter, would be that procedural prejudice only would be relevant. I would reiterate however that the prejudice issue, if it arises at all, only arises after the court is satisfied that there was a good reason why the third-party notice was not served in accordance with the Act and in that connection any matter already decided on an application to set aside the third-party notice must be treated as res judicata."

18. From the above, it is clear that prejudice to the defendant in proceedings was not deemed by Geoghegan J. to be a necessary ingredient to establish that a claim against a defendant should be dismissed and indeed he held that it only fell to be considered after it had been found that there was a good reason why the third-party notice was not served in accordance with the Act of 1961.

19. In *Cedardale Property Co. Ltd. & Ors v. Deansgrange Development Ltd & Ors* (Unreported, High Court, 13th November, 2008), Irvine J. stated:-

'It is important to note that the applicants (the third party) are adamant that the main proceedings relate to matters of which they had no awareness at any material time.'

2.11 In considering the phrase, therefore, one must bear in mind that the policy behind this part of the Act is to ensure that all disputes relating to the same matter are before the court at the same time and, secondly, that there is no unreasonable delay in serving the third party notice such as might slow down unduly the progress of the case."

20. A third party notice was not served on the defendant in the original proceedings. In considering whether this Court should exercise its discretion under s.27 (1)(b) of the Act of 1961 the circumstances of the case as a whole must be taken into account. The evidence in this case demonstrates that the plaintiff was aware that there was a serious issue with the piling works that had been undertaken on the two properties in the development as early as the 9th June, 2003. Although, the plaintiff now makes the case that the cause of the damage did not fully come to light until after the settlement of the original proceedings, it is clear from the report of its own consultants that problems with the piling works had been identified and that specific remedial works were recommended. It is clear the plaintiff was aware at that time that the defendant herein was most likely to be directly involved in the causation of the problem. Notwithstanding this, the plaintiffs did not proceed to join the defendants in those proceedings. They, instead, proceeded to settle the case with the homeowners in December 2004 and did not issue proceedings against the defendant until the 19th September, 2006. The defendants, though aware of the proceedings the home owners had taken against the plaintiff, were not involved. The case was settled without any participation by them or reference to them. This despite the fact they had been actively involved with identifying the cause of the cracking in the walls and in proposing a remedial solution.

21. I am satisfied that in these circumstances the justice of this case lies in favour of a finding for the defendant. The plaintiff in my view acted unreasonably in not seeking to join the defendant to the original proceedings once it had received the report from DBFL of 9/6/03. Due to this the defendant was deprived of an opportunity to participate in the defence and settlement of the case. In the light of this finding it is not necessary to deal with the issue of prejudice to the defendants. Nonetheless I think it is appropriate to note that the defendants herein are prejudiced by the delay *ipso facto* in involving them in this dispute by reason of the ten years that has elapsed to date. I think it would have been far preferable for both plaintiff and defendant herein had a third party notice been served as soon as the first proceedings were served on the plaintiff herein. On the evidence then available to the plaintiff it could reasonably have done so. Nothing in the evidence before the court suggests it would have been any less likely that the case could have been settled when it was had the defendant been involved at that time. No good or sufficient reason has been advanced by the plaintiff as to why a third party notice was not served. In the result, on the basis of the judgment of the Supreme Court in the *ECI* case, I find that the court ought not to exercise its discretion in allowing the plaintiff proceed in separate proceedings.

The motion is allowed.