NEUTRAL CITATION NUMBER [2012] IEHC 349

THE HIGH COURT

[2009 No. 10633 P]

BETWEEN

KEVIN O'HALLORAN AND TERESA O'HALLORAN

PLAINTIFFS

AND

KEN FETHERSTON AND BERNADETTE FETHERSTON AND BLACKROCK INNS LIMITED AND ELLEN CONSTRUCTION LIMITED AND PAUL C. O'DWYER TRADING AS O'DWYER AND ASSOCIATES AND WYG IRELAND LIMITED

DEFENDANTS

AND

MCKELAN CONSTRUCTION LIMITED

THIRD PARTY

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 31st day of July, 2012

1. This is an application to set aside a third party notice because it is said that the requirements of s. 27 of the Civil Liability Act 1961, that such a notice be served as soon as reasonably possible were not met.

2. The fifth named defendant was the architect of a building in which the plaintiffs purchased an apartment in late 2004. It is noteworthy that he did not perform a supervisory role during the construction of the building and carried out no inspections of the building works as they progressed. Whilst this is very often a function assigned to the architect on a project, this was not what happened in this case.

3. The third party was the main sub-contractor for the project and is said to have carried out most of the building works on the site. The main contractor (the fourth named defendant) is in liquidation, a factor which may explain why the main contractor has not sought to join its sub-contractor - something one might expect where there are allegations of shoddy building works.

4. The plaintiffs say that they have suffered from significant damp and mould problems at their home and that remedial efforts have failed. On 3rd September, 2009, their solicitors wrote 'O'Byrne' letters to five intended defendants but of these only two were ultimately sued. I note that though the third party was indicated as an intended defendant in the O'Byrne letter, the plaintiffs ultimately did not sue the third party. I also note that the plaintiffs have not now sought to join the third party as a co defendant.

5. A statement of claim was delivered on 1st March, 2010, and para. 15 alleges negligence and breach of duty by the architect in the design, specification and construction of the property. Reasonably elaborate particulars of this plea are set out describing the absence of insulation, missing membranes, non-complaint U-values, absence of a thermal brake, absence of vertical damp-proof coursing and other matters all connected with what the plaintiffs assert is the cause of the dampness in the apartment. The plaintiffs also say that an opinion on compliance furnished by the fifth named defendant was false, inaccurate and misleading. The reason I refer to the detail contained in the statement of claim is to show that all of the defendants are elaborately informed that the plaintiffs believe that the dampness is caused by poor design and construction and inadequate materials. As the fifth named defendant was not a supervisor of the works, he could not have known of inadequate materials or poor constriction methods. Nor could he have known of any deficiencies covered up by completed works.

6. An exchange of particulars took place between the plaintiffs and the fifth named defendant which provided quite technical detail of allegations of want of compliance with Building Regulations amongst other matters.

7. The fifth named defendant delivered its defence on 1st November, 2010. The defence notes the involvement of the third party in the construction of the apartment and there are numerous references to matters in respect of which the third party had responsibility. Based on this, the third party says that on the date of the delivery of the defence, the fifth named defendant had sufficient knowledge to join it as a party.

8. For the most part, the references to the third party in the fifth named defendant's defence assert what the third party's responsibilities were, but make no clear allegations against the third party except that para. 20 of the defence says:-

> *"If, which is not admitted, there was not substantial compliance with the Building Regulations at the time that the fifth named defendant issued the said Opinion, it was due to the negligence of McKelan Construction Ltd. and/the The Sixth Named Defendant and/or Lucas Engineering Services who provided the Confirmations of Compliance with the said Building Regulations on which the said Opinion solely relied."*

9. By comparison, the allegations in the third party notice are much clearer. It asserts:

> *" ..... damage to the plaintiffs apartment was caused by the negligence and breach of duty, including breach of statutory duty, of the proposed third party as a direct result of using a non-standard method of construction, failing to carry out adequate remedial works and failing to comply with design specifications provided by the fifth named defendant particularly in relation to insulation specifications contained in the said design"*

10. In its application for liberty to issue and service a third party notice, the fifth named defendant avers as follows:-

> *"A detailed inspection of the plaintiffs' apartment was carried out by the fifth named defendant's expert recently. This inspection involved inspection of opened up works that had been carried out on behalf of the Plaintiffs and/or the Third*

Named defendant. It should be noted that the Fifth Named Defendant was contracted in a very limited capacity to issue certificates based purely on visual inspection of the built works and therefore this was the first time that the Fifth Named Defendant was aware of the standard of works underneath the completed surfaces. The said expert inspection has revealed defects which are a direct result of the proposed third party departing from the design of the Fifth Named Defendant could not have been aware of until the works were opened up."

11. That averment was made at about the end of February 2012. It does not inform the court when precisely the inspection was carried out or what efforts had been made to arrange the inspection.

12. In the second affidavit of the fifth named defendant (sworn on 20th July, 2012) further detail is given in relation to the inspection of the plaintiffs' apartment. The Court is told that the plaintiffs facilitated an inspection on 19th July, 2011 - some eight months after the defence was delivered. The plaintiffs excavated holes in the floor of their apartment to facilitate an inspection of the insulation of the floor slab by the fifth named defendant's expert. On the same day, a detailed and invasive inspection of the rest of the apartment was conducted and this included an investigation of the cavity insulation and ventilation. The fifth named defendant's expert produced a report on 25th October, 2011.

13. I accept that the investigations carried out by the fifth named defendant's expert armed him with sufficient information to ground procedings against the third party and this is information which he did not have at the time the defence was filed. There is a significant difference between the general references and allegations relative to the third party in the defence and the specific allegations contained in the third party notice, as set out above. In this connection I note the comment by McMahon J. in *Robins v. Coleman et al* [2010] 2 I.R. 18, at 194, as follows:

"[37] In this context, it should be pointed out that there is a big difference between making a general precautionary statement by way of general pleading in litigation and swearing an affidavit particularising an allegation of professional negligence. In my view, it would be unsafe to conclude from such a general pleading that the pleader had sufficient knowledge to justify allegations of professional negligence against a third party or to abandon the prudent caution of restraint that such a course of action requires. This point is well made by Denham J in Connolly v. Casey [2000] 1 I.R 345, where she says at p. 350:

> *'Even though there were pleas in the defence relevant to the third party, there is a difference between a general plea in a defence and swearing an affidavit setting out the basis on which it is alleged counsel [i.e. the proposed third party} was negligent. A statement from Mr. Murphy was relevant to this. It was not unreasonable to have sought a statement from Mr. Murphy and awaited its arrival, it was a prudent action'."*

14. Clearly, the particular caution with which the law requires parties to approach suing in professional negligence does not pertain in this case. However, the decision to issue a writ, or in this case to serve a third party notice, is a significant one and it would be unwise to so proceed without what is perceived to be reliable evidence of the fault of an intended defendant or third party

15. In the recent decision of *EBS Building Society v. William E. Leahy and Others* [2010] IEHC 456, Hogan J. usefully summarises recent judicial comment on s. 27 of the Civil Liability Act 1961, as follows:

"9. The objectives of this sub-section are by now so well established in the voluminous case-law on the topic that it is scarcely necessary to set them out at length here. Briefly, the I96I Act seeks to avoid a multiplicity of actions arising out of the same dispute, so that where possible all issues involving plaintiffs, defendants and third parties are heard either together or in a sequenced trial: see, e.g., Governor of St. Laurence's Hospital v. Staunton [1990] 2 IR. 31, Connolly v. Casey [2003] 1 IR . 345 and Robins v. Coleman [2009] IEHC 486.

10. Second, the concept of what is "as soon is reasonably possible" within the meaning of s. 27(1)(b) is a relative one and depends on the circumstances of the case: see, e.g., Connolly v. Casey, .Molloy v. Dublin Corporation [2001] 4 JR. 52 and Robins v. Coleman. The Oireachtas did not seek to fix a set time period, but rather imported a concept of relative urgency which is designed to compel the defendant to seek to issue a third party notice with all deliberate speed having regard to all the relevant circumstances. As Murphy J explained in Molloy [2001]4 JR. 52 at 56-57):

'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 ... "

16. By enacting section 27 of the 1961 Act, not only did the Oireachtas intend to achieve efficiency in litigation by linking cases arising from the same facts, it may also be said that the Oireachtas intended to avoid the problem of conflicting judgments which might arise if cases arising from the same nexus are tried at different times by different courts. In my opinion, the requirement in s. 27 that a third party notice be served as soon as is reasonably possible is intended to ensure that the writs between the parties and all procedural steps be completed in a manner that permits the various actions to be tried either together or sequentially, and by the same court. Thus, when one is considering whether a third party notice has been served *"as soon as is reasonably possible"*, one may have regard to the effect any delay has on the achievement of joined or sequential trials. It is noteworthy in this case that the application to issue and serve a third party notice was served on the plaintiffs and that no complaint has been identified to this Court from the plaintiffs as to any delay the third party proceedings will cause to its action, which, I understand, is due to be heard in the spring of 2013.

Conclusion

17. The delay in this case is approximately fourteen months from the delivery of the defence to the service of the third party notice. I accept that the fifth named defendant prudently sought to inspect physically the plaintiffs' apartment before suing the third party. No complaint was addressed to me that undue delay attended this process though it took 8 months. The fifth named defendant's expert produced a report in October 2011, following the inspection approximately three months earlier, and leave to issue the third party notice was sought on 28th February, 2012. The 14- month delay is in the danger zone in relation to the sort of delay under discussion (though an even longer delay could well fall within an acceptable period if properly justified), but I find that the fifth named defendant has discharged its burden of persuading the Court that it acted as soon as was reasonably possible in obtaining additional information which permitted it to engage in a decision making process as to whether to sue the sub-contactor. While this process of gathering information compiling a report and deciding to sue was not conducted quickly neither could it be said that it was unreasonably slow. A fixed period for joining third parties has not been set by the Oireachtas in section 27 of the 1961 Act. Instead, it has given the Court a discretion to determine what period is appropriate and in my view when the Court is considering a period of a little over a year, the

court should strive to achieve the main purpose of section 27- *i.e.*, joined or immediately sequential trials for all parties to avoid duplication of hearings and possibly conflicting results.

18. I have also considered two other factors in deciding not to set aside the third party notice. The fifth named defendant says that it anticipated that another of the defendants (namely, the main contractor) would seek to join its sub-contractor as a third party given its presumed state of knowledge about the involvement of the third party in the building project. This was not an unrealistic expectation on the part of the fifth named defendant although the fact the main contractor did not ultimately do so highlights the danger of waiting for another party to join a third party to proceedings.

19. The other factor I have considered is that no real prejudice is suffered by the third party arising from the 14-month delay. Though the third party claims that seven years have passed since it was last involved in the project, such period is not solely or even mainly attributable to the actions of the architect. Even if the third party notice had issued immediately after the delivery of the defence, the period between the last involvement of the third party and such an event would have been about six years. The extra year or so occasioned by the delivery of the third party notice, in my opinion, does not ground a plea of prejudice and, fairly, counsel for the third party did not press this matter.

20. I refuse to make an order setting aside the third party notice, but in view of pending trial of the main action, I require the parties to engage with the Court to establish a strict timetable for exchange of pleadings and any interlocutory matters in the third party proceedings to ensure that the plaintiffs' action proceeds as planned and that the third party action closely accompanies that action. I will hear the parties on the timing of all matters pertaining to the third party action.