Neutral Citation Number: [2011] IEHC 258

THE HIGH COURT

2010 6472 P

BETWEEN

ATLANTIC DISTRIBUTORS LIMITED

PLAINTIFF

v.

SEAN BRENNAN

DEFENDANT

Judgment of Mr. Justice Hedigan delivered the 28th day of June 2011

1. The plaintiff is limited liability company involved in the construction industry. Its registered offices are located at Unit 50, Briarhill Business Park, Ballybrit, Co Galway. The defendant is a Consulting Engineer who resides at Brockagh, Castlegar, Co Galway.

2. The defendant seeks the following reliefs:-

(i) An order refusing the Plaintiff's claim for contribution and/or indemnity pursuant to section 27(1) (b) of the Civil Liability Act 1961 and dismissing the proceedings herein.

(ii) Further or in the alternative, an Order dismissing the proceedings herein as disclosing no cause of action and/or being bound to fail.

(iii) Further or other Order as to this Honourable Court shall deem meet.

(iv) Costs.

3.1 The plaintiff is a construction company. It constructed a property known as No. 21 The Woods, Cappahard, Tulla Road, Ennis, Co Clare. The defendant is a Consulting Engineer who designed the foundations of the property and issued a Certificate of Structural Integrity with respect to same on the 29th June, 2001. The owners of the property Michael and Olivia Flynn instituted proceedings against the plaintiff on 19th July, 2006, alleging that there had been a failure in the raft foundation which had resulted in serious structural defects to the dwelling. A letter was sent by the Flynn's solicitors to the plaintiff's solicitors on 8th January, 2007, which enclosed an expert report dated 27th November, 2006, detailing the failure of the foundations. The Flynn's solicitors delivered a statement of claim on 15th January, 2007 to the plaintiffs solicitors. The plaintiff's solicitors claim that they wrote to the defendant in January 2007, advising of the failure of the raft foundations and the intention to join him as a third party to the proceedings. The defendant denies receiving this letter.

3.2 By letter dated the 24th November, 2008, the plaintiff's solicitors again wrote to the defendant advising of the failure of the raft foundation. The letter noted that the problems must have occurred as a result of a breach of duty (including breach of statutory duty) by the defendant in the provision of services to the plaintiff, and in particular the provision by the defendant of a Certificate of Structural Integrity with respect to the raft foundation dated the 29th June, 2001. The letter concluded "in accordance with the above please note that therefore we propose to join you as a third party to the aforementioned proceedings..." On the 14th October, 2009, the plaintiff's solicitors wrote to the defendant stating their intention to join him as a defendant but advising that it was "instructed by Counsel that it may not be feasible to bring such an application at this stage. With that in mind we hereby formerly put you on notice that in the event the matter goes for hearing and there is an award against our client we propose to pursue your client pursuant to the Civil Liability Acts..." Notwithstanding the above correspondence an application to issue and serve a third party Notice was filed on the 17th December, 2009. By order dated the 25th January, 2010, the plaintiff was granted liberty to issue and serve a third party notice on the Defendant. On the 4th February, 2010, the third party notice was filed and issued from the Central Office. The third party notice was sent to the defendant on the 12th February, 2010.

3.3 An application was made to set aside the Order granting leave to issue and serve the third party notice and striking out the third party notice dated the 4th February, 2010. By order of this Honourable Court dated the 24th February, 2010, Clarke J. set aside the third party proceedings and struck out the third party notice. It was held by Clarke J that the third party notice was not issued and served as soon as reasonably possible and that the defendant was also prejudiced by the delay in this matter. On 2nd March, 2010, the High Court awarded damages in favour of the Flynn's against the plaintiff in the sum of €297,647.17. The hearing of the action proceeded by way of assessment alone, and evidence from eight witnesses was heard. An allowance in the assessment of damages was made for a sum of €38,000.00, paid by the National House Building Guarantee Scheme in damages.

3.4 By letter dated the 8th March, 2010, the solicitors for the plaintiff wrote to the solicitors for the defendant advising of their intention to issue proceedings to recover all sums incurred in the Flynn proceedings. On the 7th July, 2010, the plaintiff instituted proceedings seeking an indemnity and or contribution with respect to the award of damages and costs in the Flynn proceedings pursuant to section 21 of the Civil Liability Act 1961. In the within proceedings the defendant seeks an order refusing the plaintiff's claim and dismissing the proceedings taken by the plaintiff against him.

Submissions on behalf of the Defendant

4.1 The defendant submits that the indemnity and contribution sought in these proceedings are sought on the same grounds as the third party notice that was issued in the Flynn proceedings. The plaintiff is again claiming breach of duty (including breach of statutory duty) and negligence regarding the design and supervision of the raft foundation. The defendant argues that the Court is

faced with the same delay that Clarke J found to be unacceptable in the third party proceedings. At the application to set aside the third party notice Clarke J found two periods fell for consideration. The first period arose between the delivery of the statement of claim on 15th January, 2007, and the issuing of a letter to the defendant, advising of the intention to join him as a third party on the 24th November, 2008. This was a period of 22 months. Clarke J accepted for the purposes of the application that the 24th November, 2008, was the time when Atlantic became aware of its cause of action against Mr. Brennan. However, there was no real explanation as to why this had taken 22 months. Even if it had been necessary to take legal advice, gather documents etc, this could only have explained a part of that delay.

The second period of delay arose from the 24th November 2008, until the third party notice was filed on 17th December 2009. The factors identified by Atlantic as justifying this delay included that professional negligence actions should not be pursued without an appropriate basis or report, and the hope that matters could be resolved with Homebond. Clarke J found that these factors did not give Atlantic licence not to join Mr Brennan. Atlantic did not act with reasonable expedition and a delay of over one year could not be justified. There were conflicting authorities as to whether prejudice was required. However Clarke J was satisfied that prejudice did arise in the case. If Mr Brennan remained in the case, either the case would have to be adjourned to the prejudice of the plaintiff or the third party issue would have to be dealt with separately which was contrary to the policy that all matters should be tried together.

4.2 The defendant submits that he is prejudiced by the failure to serve the third party notice as soon as was reasonably possible in the Flynn proceedings, and the subsequent hearing and determination of those proceedings and the assessment of damages in his absence. The plaintiff now seeks an indemnity and contribution having failed to act with reasonable and sufficient expedition so as to include the defendant in the original proceedings. In addition a second hearing on both liability and damages might well have to follow if the proceedings herein are allowed to proceed. The indemnity is sought on the same grounds as the third party notice. Counsel for the defendant submits that the issue of delay in this case has been determined and is now *res judicata*. Indeed the plaintiffs solicitor now submits that he discovered on reading over his file that he had in fact notified the defendant of the claim as far back as 29th January, 2007. In the third party proceedings the plaintiff's case was that the delay was from the 24th November, 2008. It now admits the delay was even longer. The plaintiff points out that the defendant has known about the defects for a number of years yet he has not inspected the property for himself. Counsel for the defendant submits that as the defendant was not a party to the proceedings, there was no reason for him to inspect the property. The plaintiff is seeking to make the defendant party to a claim where he was not part of the original proceedings and did not have an opportunity to test the evidence. The plaintiff argues that no prejudice was suffered in this case. However, the defendant submits that, for the issue of prejudice to arise, the plaintiff would have firstly to show that there was a good reason for not serving the third party notice. *ECI European Chemicals Industries Limited v Mc Bauchemie Muller GmbH and Company* [2006] I.E.S.C. 15 concerned an appeal against an order to set aside a third party notice on the grounds that it had not been served "as soon as reasonably possible" within the meaning of s. 27 (1)(b) of the Civil Liability Act, 1961. Geoghegan J held at paragraph 16:-

> "The fact that surrounding circumstances are relevant to the issue of whether a third-party notice has been served as soon as reasonably possible creates a difficulty in the way of an independent action claiming contribution in a case where the third-party notice has been set aside, as happened here. Issues of "*reasonableness*" which must necessarily have arisen in the application to set aside the third-party notice and were determined by the judge hearing that application may not in some instances be reopened in the independent action on the basis of *res judicata*. The reasonableness issue however for the purposes of the first sentence in the subsection relates to the time aspect only and there may in any given case be other non-temporal issues giving rise to a good reason why a third-party notice was not served in accordance with the Act. Again, before any issue of prejudice could conceivably arise (and I am by no means sure that it can arise) that issue would have to be determined by the court, that is to say, the issue of whether there was a good reason why the third-party notice was not served. Since *prima facie* there would be no good reason the onus of proof, in my opinion, is on the defendant claimant for contribution. If the claimant fails in that onus the discretion ought normally to be exercised against permitting him to pursue the claim for contribution by separate action…"

Thus argues the defendant that in order for the issue of prejudice to arise the plaintiff would have to show that there was a good reason for not serving the third party notice. The defendant submits that the plaintiff has not supplied a good reason for its failure in this regard.

5. Submissions on behalf of the Plaintiff

5.1 The plaintiff points out that on the 29th January, 2007, it informed the defendant of the failure of the raft foundation and that it had obtained an Engineers Report and Statement of Claim from the Flynn Solicitors. Mr Greaney Managing Director of the plaintiff company avers at paragraph 3 of his affidavit dated the 19th May, 2011, that the defendant was aware of the structural defects since at least September, 2005. The defendant was sent a copy of a notification which Clare County Council sent to the defendant on the 9th August, 2005, raising concerns about cracking in the walls of the property. On 21st October, 2005, Clare County Council requested information about the property; this request was forwarded by post and fax the defendant. By way of follow up Mr Callanan, an employee of the plaintiff phoned the defendant to discuss the matter. Mr Greaney avers at paragraph 5 of his affidavit that he spoke with the defendant shortly after the 29th January, 2007, and indicated that his company would have no option but to join the defendant as a third party. Mr Greaney states that the defendant acknowledged this and said he would inform his insurance company. Clearly Mr Brennan has had ample time to examine the premises and fairly meet this claim.

5.2 The plaintiff's solicitor Mr Sheehan points out that when he originally brought the application to join the defendant as a third party he relied on a letter of the 24th November, 2008. Mr Sheehan avers at paragraph 6 of his affidavit of 12th November, 2010 that it was only after reading over his file in preparation for the indemnity action that he discovered that he had in fact notified the defendant as far back as 29th January, 2007, of the intention to join him as a third party. The plaintiff would have moved in a more timely fashion against the defendant but for its belief that the problem with the property would be resolved with Homebond. Between March, 2007, and September, 2008, the plaintiff was in constant contact with Homebond in an attempt to resolve the matter. Mr Crotty who worked for Homebond, advised the plaintiff that Homebond would come to an agreement with the Flynn's in respect of works to be carried out. The Flynn's were anxious to deal with Homebond rather than the plaintiff however on 23rd October, 2007, the Flynn's applied to join Homebond as a defendant. It became clear around September, 2008, that Homebond could not agree a schedule of works with the owners. At that stage the plaintiff realised there was little prospect of resolving the matter through Homebond and again informed the defendant by letter dated the 24th November, 2008, of the intention to join him as a third party. The plaintiff faced the difficulty that an application to join the defendant as a third party would be outside the time prescribed by the Superior Court Rules. This difficulty was adverted to in the letter of the 14th October, 2009, addressed to the defendant who was informed that it was intended to join him as a third party however in the event he was not a party to the proceedings and if the Court made an award against the plaintiff, then the plaintiff would take action pursuant to the Civil Liability Act for indemnity and or

contribution.

5.3 The plaintiff submits that the defendant had adequate opportunity to investigate the alleged structural defects in the raft foundation since 2007 or indeed the 24th November 2008. The defendant has had every opportunity to put himself in as good a position as the plaintiff as regards the Flynn's claim. At the hearing both the plaintiff's Engineers and the Flynn's Engineers were of the view that having regard to the extent and nature of the cracks in the said dwelling house the house was structurally unsound due to failure of the raft foundation. It is not correct for the defendant to state that a second hearing is now necessary in respect of liability and damages. In any event the defendant could not make this assertion in the absence of a detailed inspection of the dwelling.

5.4 The defendant argues that the Court is faced with the same delay that Clarke J found to be unacceptable in the third party proceedings. The plaintiff however submits that the facts have changed. We now have the letter of the 29th January, 2007, proving that the defendant knew since that time of the problems with the property and the plaintiff's intention to join him as a third party. In the proceedings before Clarke J it was thought that the defendant was first notified by letter dated the 24th November, 2008. Another crucial difference is that Clarke J was constrained because the third party notice was heard in February 2010 and the trial was to take place in March 2010 therefore it was felt that if the third party notice was granted this would prejudice the defendant as he would not have sufficient time to prepare for the trial. The plaintiff submits that the lack of prejudice in this case should outweigh the time delay. In the case *ECI European Chemicals Industries Limited v Mc Bauchemie Muller GmbH and Company* [2006] I.E.S.C. 15 it was held that before any issue of prejudice could arise the issue of whether there was a good reason why the third-party notice was not served would have to be determined by the court. The onus of proof was on the defendant claimant for contribution. Geoghegan J held at paragraph 16:-

> "If the claimant fails in that onus the discretion ought normally to be exercised against permitting him to pursue the claim for contribution by separate action."

The plaintiff puts special emphasis on the words "ought normally". The plaintiff submits that these words indicate that in exceptional circumstances the Court can find in favour of a defendant claimant for a contribution notwithstanding its failure to adduce good reasons for its failure to serve the third party notice in accordance with the 1961 Act. The plaintiff submits that exceptional circumstances exist in this case. The defendant has been aware at all times of these proceedings he now seeks to avoid them on a technicality, in these circumstances it would be unjust to allow the plaintiff to escape liability. He has suffered no prejudice as he is not in worse a position now than when he was first notified in January 2007. The property is still standing so he can inspect it and fairly meet this claim.

Decision of the Court

6.1 The defendant designed the foundations of a property in Ennis, County Clare which was constructed by the plaintiff. The owners of this property instituted proceedings against the plaintiff on 19th July, 2006, alleging that there had been a failure in the raft foundation. In January 2007 the owners delivered a statement of claim to the plaintiff. The plaintiff claims that it wrote to the defendant at this time notifying him of their intention to join him as a third party to the proceedings. The defendant denies receiving this letter. In November, 2008, solicitors for the plaintiff again wrote to the defendant advising of the intention to join the defendant as a third party, the defendant accepts receiving this letter. On the 25th January, 2010, the plaintiff was granted liberty to issue and serve a third party notice on the defendant. An application was made to strike out the third party notice on the 4th February, 2010. On the 24th February 2010, the third party notice was struck out. Clarke J. held that the third party notice was not issued and served as soon as reasonably possible and that the defendant was also prejudiced by the delay in this matter. On 2nd March, 2010, damages of €297,647.17 were awarded in favour of the Flynn's against the plaintiff. On the 7th July, 2010, the plaintiff instituted proceedings seeking an indemnity and or contribution with respect to the award of damages and costs in the Flynn proceedings. In the within proceedings the defendant seeks an order refusing the plaintiff's claim pursuant to section 27 of the Civil Liability Act 1961 and dismissing the proceedings taken by the plaintiff against him.

6.2 Section 27 of the Civil Liability Act 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—
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> (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."

6.3 The defendant submits that in these proceedings the Court is faced with the same delay that Clarke J found to be unacceptable in the third party proceedings. At the application to set aside the third party notice Clarke J found two periods fell for consideration. The first period arose between the delivery of the statement of claim on 15th January, 2007, and the issuing of a letter to the defendant, advising of the intention to join him as a third party on the 24th November, 2008. This was a period of 22 months. Clarke J found that there was no real explanation as to why this had taken 22 months. Even if it had been necessary to take legal advice, gather documents etc, this could only have explained a period of that delay. The second period of delay arose from the 24th November 2008, until the third party notice was filed on 17th December 2009. The defendant submitted that the reason for the delay was the hope that matters could be resolved with Homebond. The Judge found this factor did not justify the failure to join the defendant, the plaintiff had not acted as soon as was reasonably possible and a delay of over one year could not be justified.

6.4 The plaintiff submits that the facts are different to those which faced Clarke J in the third party proceedings. The plaintiff now points to the letter of the 29th January, 2007, which proves that the defendant knew since that time of (a) the problems with the property and (b) the plaintiff's intention to join him as a third party. This letter was not available to Clarke J. It seems to me that this letter does not help the plaintiff's case. In fact it weakens the plaintiff's case as the plaintiff is required to show that it acted as soon as was reasonably possible. The delay is now even longer than the delay that Clarke J found to be unacceptable.

6.5 The plaintiff argues that the defendant has suffered no prejudice. He is not in a worse position now than when he was first notified of the plaintiff's intention to join him as a third party in January 2007. The property in question is still standing and the defendant can still go and inspect the property and fairly meet this claim. The defendant on the other hand argues that the issue of

prejudice only arises if the plaintiff could show that there was a good reason for not serving the third party notice. In the case *ECI European Chemicals Industries Limited v Mc Bauchemie Muller GmbH and Company* [2006] I.E.S.C. 15 it was held by Geoghegan J. at paragraph 16:-

> "…before any issue of prejudice could conceivably arise (and I am by no means sure that it can arise) that issue would have to be determined by the court, that is to say, the issue of whether there was a good reason why the third-party notice was not served. Since *prima facie* there would be no good reason the onus of proof, in my opinion, is on the defendant claimant for contribution. If the claimant fails in that onus the discretion ought normally to be exercised against permitting him to pursue the claim for contribution by separate action. …"

The defendant submits that Clarke J has already found that there were no good reasons why the third-party notice was not served. The plaintiff however submits that the words "ought normally" indicate that in exceptional circumstances the Court may find in favour of a defendant claimant for a contribution notwithstanding its failure to adduce good reasons why the third-party notice was not served. The plaintiff submits that exceptional circumstances exist in this case because the defendant has been aware at all times of these proceedings and the property is still standing and he can inspect the property and meet this claim. It seems to me that the mere fact that the house is still standing does not create any "exceptional circumstance". The circumstances in this case are much the same as any case involving property where a defendant has neglected to institute third party proceedings.

6.6 It seems to me that the plaintiff cannot get over the problem that it is essentially asking this Court to consider the same matters Clarke J has already considered. In *ECI European Chemicals Industries Limited v Mc Bauchemie Muller GmbH and Company* [2006] I.E.S.C. 15 it was held by Geoghegan J. at paragraph 16:-

> "Issues of "*reasonableness*" which must necessarily have arisen in the application to set aside the third-party notice and were determined by the judge hearing that application may not in some instances be reopened in the independent action on the basis of *res judicata*."

In this case, Clarke J determined the issue of delay and it seems to me that the issue of whether the delay was reasonable cannot successfully be reopened in this case on the basis of *res judicata*. I consider myself bound by the decision of Clarke J that the plaintiff has delayed unreasonably. In these circumstances, I have no alternative but to grant the relief sought by the defendant herein.