Neutral Citation: [2015] IEHC 786

THE HIGH COURT

COMMERCIAL

[2013 No. 13733 P]

BETWEEN

SSE RENEWABLES (IRELAND) LIMITED

PLAINTIFF

AND

WILLIAM AND HENRY ALEXANDER (CIVIL ENGINEERING) LIMITED AND AECOM LIMITED

DEFENDANTS

AND

NORTHSTONE (N.I.) LIMITED

THIRD PARTY

JUDGMENT of Mr. Justice Hedigan delivered the 11th day of December, 2015

1. In this application the second defendant seeks the trial of three preliminary issues. These are:

> (1) In circumstances where the plaintiffs pleaded loss and damage constitutes pure economic loss, is the plaintiff's claim for damages for negligence and breach of duty against the second named defendant bound to fail on the grounds that no actionable damage has been sustained and the alleged tort is therefore incomplete.
>
> (2) In circumstances where the plaintiff has pleaded that (a) it relied on the professional advice, skill and competence of the second named defendant, and (b) that the second named defendant assumed responsibility towards the plaintiff by providing ongoing advice and professional services directly to the plaintiff and that the second named defendant knew that the plaintiff required a design that was free from defects and suitable or fit for the purposes stated in the employer's requirements, is the plaintiff's claim for damages bound to fail where the communications pleaded as constituting an assumption of responsibility by the second named defendant post date the completion of the design works.
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> (3) In the event that the plaintiff is not entitled to maintain the pleaded claims in tort against the second named defendant, can the first and second named defendants nevertheless be treated as concurrent wrong doers vis-à-vis the plaintiff in respect of any alleged defects in the design of the works the subject of these proceedings?

2. I referred at the outset of this application to the summary of the jurisprudence in this case made by McKechnie J. in *Campion v. South Tipperary County Council* [2015] IESC 79 as outlined in this court's judgment of the 8th of December 2015. I propose to consider the application in accordance with the relevant principles outlined there.

3. The first of these is that the jurisdiction is a discretionary one and should be exercised with caution. A number of cases cited to me in this application involved warnings by experienced judges in Ireland and the UK on the dangers involved in dividing trials piecemeal into stages or modules. My own experience of dealing with length of proceedings cases in the European Court of Human Rights where the judicial systems of 47 European countries were reviewed, was that the most tardy jurisdictions were those that dealt with cases both civil and criminal in a modular or piecemeal fashion. Those countries, notably the common law countries, that tried cases in a unitary fashion, were the least likely to offend the right to a trial within a reasonable time. Thus the warnings of experienced judges in Ireland and the UK are vindicated in my experience of the other 45 member states of the Council of Europe.

In the Commercial Court where the mission is to provide an expeditious resolution of commercial disputes, the court should be even more wary of the primrose path to preliminary hearing. There may well be circumstances where a point of law is so clear and the facts so undoubtedly agreed, that the preliminary point or points do recommend themselves for preliminary resolution. In this court however it should be crystal clear that this is the case and that preliminary resolution will in fact help. The danger of injustice in dealing with cases piecemeal is very real. So also is the danger of increasing delay and cost. As has already been observed, experience teaches that the longer way round is frequently the quickest way home.

4. Turning to the question of a saving of time and cost were this application to be allowed. In this regard, I have ascertained that a trial of the full case could be commenced in March 2016. It is considered that the case may take about twelve weeks. From what I have heard this is a realistic estimate. The case thus is on the very brink of a hearing. I am told and I accept that much of the pre-trial work has been done. Discovery has been made and witness statements are being finalised including expert reports. Thus a great deal of the cost has already been incurred and a great deal of the work already has been done. What remains is the cost of the trial itself i.e. brief fees and solicitor's fees. These will undoubtedly be substantial. I have also to take into account the possibility that after the determination of the preliminary issue there may be an appeal of the decision made therein. One of the two main issues to be tried is as to whether the plaintiff can sue for pure economic loss. It is clear that this difficult question involves firstly the question as to whether the plaintiff can sue for pure economic loss and secondly whether in fact that is what it is suing for in these proceedings. The first part of this is agreed as being unclear in law. Common law jurisdictions throughout the world have struggled for some time with this vexed question. The answers have not been consistent. In Ireland the issue has still not been resolved. It is therefore entirely possible if not indeed likely, that any decision made on this question on a preliminary basis will be appealed. It is possible to foresee that a Court of Appeal decision of such a vexed question may itself be appealed to the Supreme Court. Such a succession of hearings is likely to take the best part of another two to three years and involve substantial cost. It is hard to see how exchanging an imminent full hearing for such potential lengthy delay would be in keeping with any requirement that there will be a saving of time and costs.

5. It seems to me that there is a serious question as to whether facts are agreed. The second defendant/moving party says it agrees the facts as pleaded. Yet these are not agreed as to their meaning. The second defendant says the plaintiff has only pleaded certain ex post facto advices as a Negligent Misstatement. It argues that this is something that cannot be relied upon. Yet the plaintiff denies they are limited to the ex post facto representation specified by them in their replies to particulars because they are explicitly stated to be only by way of example. There appears to me to be some force in the plaintiff's argument in this regard. At this stage I do not have to decide that particular issue. I must however conclude that there is at least some dispute on these highly material facts.

6. No discrete question of law is agreed as being ready to try. The issue of pure economic loss has already been referred to at para. 2. As no clear answer seems available as to whether there can be a remedy in tort for such a loss, I fail to see how it can be regarded as a discrete legal issue. At least some of the cases to which I was referred, allowed pure economic loss in certain fact based situations e.g. a special relationship or damage to property. But since there is no agreement on such facts in this case, I do not think this issue could be described as a discrete question of law.

7. It appears clear that even if the issues proposed were to be decided in the second defendant's favour, there would still remain issues to be tried between the second defendant and other parties on the basis of the notices of indemnity and contribution served. The second defendant will thus remain in the case. Moreover, it is very difficult at this pre preliminary stage to disentangle those issues that might be determined from those that would remain. Thus the impact in the main case of a decision on any or all three of the preliminary issues is impossible to assess. The same goes for the question as to whether what might be resolved is so substantial as to make it worthwhile determining at a preliminary hearing. For the same reason this is impossible to assess at this stage.

8. For the above reasons I am unconvinced that the trial at a preliminary hearing of the three issues raised should be ordered by the court. As a fallback position, Mr. Mulcahy senior counsel for the second defendant, asks the court to consider directing a modular trial. This might recommend itself insofar as the case might be divided into two parts – the first to determine liability, the second to determine quantum. I have given careful consideration to this proposal. However I have come to the conclusion that this also would not be desirable at this stage. This is because I see little benefit to such a modus operandi. It seems at this pre preliminary stage that most of the evidence will focus on the liability issue. The assessment of damage may well be relatively straightforward. Large parts of quantum may even be agreed. What is involved is the cost of the remediation of the problems identified and a loss of revenue caused thereby. I am not satisfied that any significant saving of time and cost would be achieved by separating the two. The same problem of an appeal process from the preliminary decision might also lead to a substantial period of delay. The unitary trial being the default option, I will not order a modular trial. Thus the second defendant's application for the trial of preliminary issues is refused.