Neutral Citation: [2014] IEHC 208

THE HIGH COURT

[2010 No. 11704 P.]

BETWEEN

JAMES ELLIOT CONSTRUCTION LIMITED

PLAINTIFF

AND

IRISH ASPHALT LIMITED, LAGAN HOLDINGS LIMITED, LAGAN CONSTRUCTION LIMITED AND LINSTOCK LIMITED

DEFENDANTS

JUDGMENT of Mr Justice Ryan delivered the 11th April, 2014

This is an application by the plaintiff to consolidate two separate cases. This plaintiff is a contractor that carried out building work for Ballymun Regeneration Limited pursuant to a contract to construct 124 residential units at a site in Ballymun, Dublin 11. In the other case, which has Record No. 2011 2976 P., Ballymun Regeneration Limited is suing the same defendants. The two plaintiffs allege that there was pyrite in the filling that the first defendant supplied for use in the building and that it was subject to rapid and severe expansion and it was unsuitable for use as filling material in building work. As a result of the use of this defective material, damage was done to the building and building work and substantial remedial operations had to be carried out, with the result that this plaintiff as the building contractor and Ballymun Regeneration Limited as the employer suffered substantial loss and damage.

The hardcore with pyrite in it was supplied by the first defendant to the building contractor, James Elliot Construction Limited, for use in the buildings being constructed for Ballymun Regeneration Limited. The hardcore came from the fourth defendant's quarry. The other two defendants are sued on foot of guarantees that it is alleged that they provided to the first defendant.

The plaintiff's action in this case is pleaded in breach of contract and/or negligence as against the first and fourth defendants. As against the second and third defendants, declarations are sought that they are liable on foot of guarantees in the event of default of the first defendant. In addition, this plaintiff seeks a declaration that the plaintiff is entitled to be indemnified by the first defendant in respect of any claim that may be brought by Ballymun Regeneration Limited, or any other party, arising from the use of the defective material at the Ballymun building works.

The Ballymun Regeneration Limited case – 2011 No. 2976 P. – is brought against the same defendants in negligence. Similar declarations are sought on the basis of the guarantees as against the second and third defendants. In addition, Ballymun Regeneration Limited claims a declaration of entitlement to indemnification by the first defendant in respect of any claim that may be made against Ballymun Regeneration Limited by any other party arising out of the use of the defective hardcore.

By notice of motion dated the 13th March, 2013, James Elliot Construction Limited seeks an order consolidating this action with the Ballymun Regeneration Limited proceedings pursuant to O. 49(6) of the Rules of the Superior Courts.

In the grounding affidavit for the motion, Mr Patrick Elliot, director of the plaintiff company in this case, deposes that Ballymun Regeneration Limited is claiming the same reliefs as against the same defendants except that no claim for damages or breach of contract is made, since there was no contract between that company and the first defendant, Irish Asphalt.

> "The claims in negligence made against the first named defendant, the claims made on foot of the guarantees given by the second and third named defendants and the claim for a declaration of indemnity made against the first named defendant are all effectively the same as the claims brought by JEC in these proceedings."

In the circumstances, Mr Elliot says that it would be appropriate to have the actions consolidated since the two actions arise out of the same facts the reliefs claimed in them overlap and the defendants are identical. He exhibits a draft statement of claim that it is proposed to serve in the event that the order is made.

Mr Elliot also refers to an agreement that Elliot's and Ballymun have made for the carrying out of remedial works necessitated as he says by the use of the defective hardcore.

Mr Matthew Stevens, Senior Executive Architect, of Ballymun Regeneration Limited supports the application on behalf of his company.

Mr Peter Lennon, solicitor for the first and fourth defendants, in his replying affidavit of the 16th May, 2013, resists the application for consolidation made by the plaintiffs. He says that subject to the determination of the court, it may be appropriate to have the cases heard together, rather than being consolidated and his clients would be agreeable to that course. Mr Lennon then proceeds to address a series of questions.

The first point is whether there is a common question of law or fact of sufficient importance in the two cases. Mr Lennon emphasises the various differences, beginning with the fact that one case is pleaded in contract and the other is in contract with an alternative plea in negligence. As to the latter, Mr Lennon argues that the reality is that the Elliot case is a contract action and not a case in negligence. That gives rise of course to certain differences in proof and Mr Lennon lists out the difference that will exist because one case is in negligence and the other in contract. He says that the alleged losses of the companies are different. Secondly, Mr Lennon proposes that there will not be a substantial saving of expense or inconvenience if there is consolidation as opposed to non consolidation. He actually suggests that consolidation will lead to a longer trial and additional costs. Finally, he suggests that there is or may be prejudice to the defendants in the event of consolidation.

Mr Conor Owens, solicitor for the second and third defendants also swears an affidavit opposing consolidation. He follows the same pattern as Mr Lennon in addressing the issues that arise in a motion to consolidate. He says first that because there are different plaintiffs the two actions are different. He points out the nature of the two claims, one being in contract and one being in negligence.

Mr Owens refers to previous proceedings that were brought by Elliot's against Irish Asphalt, but I do not think that that other case is relevant to this motion. Mr Owens repeats the points made by Mr Lennon and he says that the questions of liability of the second and third defendants under the guarantees will be distinct in the case of each of these plaintiffs. He agrees that there would not be a substantial saving and that there is a considerable danger of confusion and/or miscarriage of justice. On this point he said that this would "be caused by the conflation of the plaintiff's and Ballymun Regeneration Limited claims".

Mr Elliot responds in another affidavit dated the 11th June, 2013, and then Mr Lennon and Mr Owens in turn reply to Mr Elliot's responding affidavit.

Mr Elliot points out that if the first and fourth defendants are agreeable that the cases should be heard together, then it makes little sense that they should not also be consolidated. Mr Elliot endeavours to carry out a point by point rebuttal of Mr Lennon's rejection of the motion to consolidate. He sets out a series of specific and, as he contends, substantial savings that will be made if the action is consolidated.

Then Mr Lennon returns to the fray with his second affidavit in which he takes issue with Mr Elliot and goes on to query the nature of the agreement between the two plaintiffs whose actions are sought to be consolidated.

Mr Owens also engages in some further rebuttal and argument in the course of his second affidavit.

The Law
Order 49(6) of the Rules of the Superior Courts provides:-

> "Causes or matters pending in the High Court may be consolidated by order of the Court on the application of any party and whether or not all the parties consent to the order."

It is agreed between the parties that the principles to be applied are as stated by the Supreme Court in *Duffy v. News Group Newspapers Limited* [1992] 2 I.R. 369. The questions are:-

> (1) Is there a common question of law or fact of sufficient importance?
>
> (2) Will there be a substantial saving of expense or inconvenience?
>
> (3) Is there a likelihood of confusion or of a miscarriage of justice if the actions are joined or consolidated?

Counsel have emphasised the points made in the affidavits in favour of and against consolidation. Mr Buttanshaw, for the plaintiff, argues that there is a strong case for consolidation in accordance with the *Duffy* principles. He says there are indeed common questions of law and fact that are of sufficient importance and that there will be a substantial saving of expense and inconvenience. As to the likelihood or confusion or miscarriage of justice, he dismisses that as a possibility.

Opposing the application, Mr Cregan S.C. highlights the difference between an action in contract and one in negligence. He maintains that the Elliot proceedings, although nominally brought in negligence as well as contract, are in fact actions in contract only in reality. He points out that it is practically impossible for the Elliot claim to succeed in negligence if it fails in contract. This point indeed has been conceded on behalf of Elliot in a different action arising out of other building work. I do not think that I am in any great bound or ought to be influenced by such a concession made in a different case and in circumstances that are not known to me. Nevertheless, I think that the point that Mr Cregan makes is well taken, namely that it is difficult if not impossible to envisage circumstances in which the plaintiff in the Ballymun Regeneration case could succeed in negligence having failed in contract.

It does seem to me on the face of it that there is a strong argument for consolidation, notwithstanding the various differences that counsel for the opposing defendants is able to identify. There is a difference in the nature of the actions as between contract and negligence. Having said that, the factual matrix giving rise to the two cases is the same, the plaintiffs are closely related by contract, the physical nature of the damage over which they are suing is the same and the four defendants are common to both. These striking similarities constitute a powerful nexus between the cases, the plaintiffs and the defendants.

The background facts are the same. The cases are concerned with damage to buildings and building work allegedly brought about by defective hardcore which was supplied by the first and fourth defendants.

The cases of each plaintiff against the second and third defendants appear to be also extremely similar. Again, accepting the differences between negligence and contract, the fact is in respect of these defendants that the liability that they are alleged to have to the plaintiffs is the same, namely under the guarantees.

Therefore, while it can be said that the nature of the causes of action are different and that is correct and that the nature of the loss and damage in each case is different, which is also correct, the underlying factual matrix that gives rise to the whole action in each case is precisely the same, that is the supply of hardcore allegedly containing pyrite which then allegedly caused sever damage to buildings and building work. That is an enormous similar fact that arises in each case.

It seems almost unanswerable that there would be a saving in costs if there is one action rather than two actions. Mr Elliot has set out the details of the savings in costs in his second affidavit. There is also the matter of convenience. It seems to me that there is obvious merit in joining the two actions rather than having them travel separately.

In regard to Mr Lennon's suggestion that the cases should be heard together, but not consolidated, I have to say I cannot see much merit or advantage in that suggestion. It strikes me as being a realistic and pragmatic posture by a party who is seeking to find reasons to oppose consolidation but who is obliged to acknowledge and recognise the obvious, strong connections that exist between the cases.

I really cannot see any argument for having the two cases heard together instead of having them consolidated. And it does strike me that there could be substantial inconvenience if they were to be heard one after the other rather than at the same time, but if they are heard at the same time I cannot see how there is any practical difference in having them consolidated, except for the fact that there is a formal acceptance in the event of consolidation and there is as I believe a significant lessening of costs.

As to the question of prejudice, inconvenience or injustice, there is no rational basis for thinking that there is a likelihood of confusion or of miscarriage of justice if the actions are consolidated.

I propose therefore to make the order for consolidation on foot of the notice of motion.