NEUTRAL CITATION NUMBER [2011] IEHC 538

THE HIGH COURT

[2009 No. 8128 P]

[2009 No. 342 COM]

BETWEEN

DONATEX LIMITED AND BERNARD MCNAMARA

PLAINTIFFS

AND

DUBLIN DOCKLANDS DEVELOPMENT AUTHORITY

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered the 15th April, 2011

1. Introduction

1.1 This case raises yet again the question of whether it is appropriate to direct a modular trial. In the proceedings generally the plaintiffs ("Donatex" and "Mr. McNamara") claim that the defendant ("DDDA") is guilty of misrepresentation and breach of warranty of authority arising out of a shareholders agreement entered into by the respective parties in relation to a company called Beebay. Becbay was incorporated as a vehicle to be utilised by the parties with a view to furthering an underlying transaction being the acquisition of the well known Irish Glass Bottle site on the Pool beg Peninsula. It is now a matter of some significant public notoriety that that purchase has gone very wrong with the current value of the site being only a fraction, it would appear, of what was paid for it.

1.2 One of the issues raised in the proceedings concerns an allegation on the part of Donatex that the DDDA did not, in fact, have legal power to enter into an agreement of the type encompassed in the shareholders arrangement to which I have referred. It is that issue, and associated matters, that Donatex and Mr. McNamara seek to have tried as a first module of these proceedings.

1.3 The DDDA does not contest, at the level of principle, the fact that the court has a jurisdiction, in an appropriate case, to direct a modular trial. Rather, the DDDA says that this case is not the type of case where it would be appropriate to direct a modular trial.

1.4 It seems to me that I should start, therefore, by reviewing the basis on which the court will direct a modular trial.

2. The Jurisdiction

2.1 Both sides made reference to my own decision in *Cork Plastics (Manufacturing) v. Ineos Compound (UK) Limited* [2008] IEHC 93. In *Cork Plastics* I set out a number of factors which it seemed to me might be appropriate for the court to consider in the deciding whether the directing of a modular trial would be a good idea in any individual case. I see no reason to depart from the views which I expressed in *Cork Plastics*.

2.2 I should, however, also note two more recent decisions. In *Atlantic Shellfish Limited & Anor v. Cork County Council & Ors* [2010] IEHC 294, Laffoy J. had to consider an application by the defendants in that case for a modular trial. Having been referred by the moving parties to my judgment in *Cork Plastics*, Laffoy J. noted that I had, in an earlier judgment in the same case, refused to direct the trial of a preliminary issue. On the facts of the case before her, Laffoy J. said, at para. 7.9, the following:-

> "While counsel for the state parties relied on that analysis, which gives very useful guidance when the court is determining whether a modular approach should be adopted to the hearing of any action, in my view, it is not necessary to consider it in this case because, as I will demonstrate, I do not believe that what is proposed here is in fact a modular approach of the type envisaged by Clarke J.."

2.3 I would simply wish to add that I fully agree with the approach of Laffoy J. in *Atlantic Shellfish*. There is a long standing line of jurisprudence, to which it is unnecessary to refer here, which demonstrates the views of the courts that the direction of preliminary issues (in the traditional model) is something that, while permissible and possible, should only be engaged in after careful consideration. The longest way round being often the shortest way home is perhaps a useful synopsis of the thinking which underlies that jurisprudence. The point which Laffoy J. was making is that it is not appropriate to use an application for a modular trial as a backdoor method of seeking to have the court determine that which is, in truth, a preliminary issue, to be tried in circumstances where the court would not, on the basis of the existing jurisprudence, order the trial of a preliminary issue in the first place.

2.4 The reason for the court's reticence in ordering the trial of preliminary issues is not based on any technical consideration of the law or the Rules of the Superior Courts. Rather, it is based on the experience of the courts that the directing of preliminary issues of that type can often, at the end of the day, make litigation more costly and complex rather than less so. There is no logical or rational basis, therefore, for directing a modular trial of an issue which the court would decline to direct to be tried as a preliminary issue on those same practical grounds.

2.5 I should also note the decision of Charleton J. in *McCann v. Desmond* [2010] IEHC 164 in which a useful summary of the relevant considerations to be applied in deciding whether to direct a modular trial is set out at para. 7. The first two items mentioned are designed to direct the court's attention to making sure that what is proposed amounts to a logical division of the case (with no significant overlap into other parts not to be tried in the course of the first module) and to the question of whether a division is, in all the circumstances, likely, in truth, to lead to a saving of time and expense. I do not understand the approach of Charleton J. to differ in any material way from my own comments on those same questions as set out in *Cork Plastics.* It might, usefully, be then said that the first overall consideration for the court is as to convenience. Is there a logical division on the basis of which it is convenient to try this case in a modular fashion?

2.6 Item 3 of the matters to which Charleton J. directed attention is the question of prejudice. That issue was, likewise, an issue which I addressed in *Cork Plastics*. The second question is, therefore, as to whether a party might be prejudiced in an unfair way by a modular trial.

2.7 The fourth item identified by Charleton J. is, perhaps, a proviso to that last item being that the court should not place any significant weight on a perceived tactical advantage or disadvantage (rather than true prejudice). I fully agree with the approach of Charleton J. under that heading. It also seems to be consistent with the broad considerations which I analysed in *Cork Plastics*.

2.8 It may, in truth, be convenient to say that there are, therefore, two broad considerations which the court has to consider:-

> A. whether there is a logical division of the case into modules as a result of which it is realistic to hope that so dividing the case will truly save time and costs; and
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> B whether there might be any true prejudice to any of the parties (as opposed to mere tactical disadvantage) as a result of the proposed division.

2.9 It seems to me that those overall considerations reflect the views which I expressed in *Cork Plastics*, which Laffoy J. expressed in *Atlantic Shellfish* and which Charleton J. expressed in *McCann v. Desmond*. The reservation which Laffoy J. expressed in *Atlantic Shellfish*, with which, as I have indicated, I fully agree, really forms part of the first question. If, in truth, what is sought to be directed as a first module is the sort of issue which the court would not have directed to be tried as a preliminary issue then it will not, in reality, be convenient or cost effective to try such an issue as a first module any more than it would have made sense to try it as a preliminary issue.

2.10 Against the background of those general principles it is necessary to say just a little about the issues which arise in these proceedings.

3. The Issues in the Proceedings

3.1 At the risk of oversimplification it seems to me that it is possible to conveniently group the issues likely to be raised at any trial as follows:-

> A. It is said that various oral assurances were given by senior officers of the DDDA to Donatex and to Mr. McNamara concerning the nature of the ability of the DDDA to facilitate a LUAS line to the site with a consequential improved density ratio and a "fast tracked" process in relation to development permission to which the Irish Glass Bottle site could be subjected as a result of the specific statutory powers of the DDDA. The DDDA denies the fact of those representations;
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> B. It is said that the DDDA warranted that it had legal authority to enter into the relevant shareholders agreement in circumstances where it has transpired, it is again argued, that it did not have that authority. Under this heading it is necessary to note that, in the submissions made on behalf of Donatex at the hearing before me, it was suggested that there were, perhaps, two bases on which that allegation could be sustained. The first is said to derive from the decision of Finlay Geoghegan J. in *North Wall Property Quay Holding Company Ltd & Anor v. Dublin Docklands Development Authority* [2008] IEHC 305. On that basis it is argued on behalf of Donatex that the shareholders agreement is of a type which is impermissible having regard to the findings of Finlay Geoghegan J. in *North Wall Property*. In that case, a particular agreement, whereby the DDDA was to receive property as part of an arrangement involving a certification which amounted in substance to a development consent, was found to render the relevant certification invalid. However, it is also argued on behalf of Donatex that it is entitled to claim that the DDDA did not have power to enter into the shareholders agreement on an additional and somewhat different basis. It is said that it is outside the statutory entitlement of the DDDA to enter into a complex form of commercial arrangement as result of which it is to gain profits as a developer. It should be pointed out that the DDDA strongly resist the suggestion that the shareholders agreement is in any way invalid on either of the asserted bases. However, in respect of the second leg of the accusation, the DDDA goes further and asserts that such a case is not pleaded. I propose, for the purposes of this application, to assume that that latter case is properly pleaded and will form part of the issues which need to be decided. It does not, in truth, seem to me that that question greatly affects the issue which I now have to decide. If it were appropriate to direct a modular trial in which the first module would be to decide whether the DDDA had legal power to enter into the shareholders agreement, then it is unlikely that that question would be influenced by whether that case could be made on one or two different grounds;
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> C. A number of difficult and complex legal and factual issues relating to questions which would arise in the event that the court found against the DDDA on any or all of issues A and B as to whether Donatex would, therefore, be entitled to damages and, if so, the general basis on which such damages could be claimed. Without in any way being exhaustive, there are issues concerning the extent to which damages can be awarded simply because a public body acts in excess of its powers without acting *mala fides*; issues concerning whether a representation or warranty that the public body has power to act can give rise to a claim in damages if it turns out to be wrong; questions concerning the extent to which it is necessary for Donatex to show that it relied on any relevant representations and if so whether it did, in fact, rely on any or all of the representations which are relevant in these proceedings, and many others; and
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> D. In the event that Donatex is entitled to damages on some basis, the calculation of those damages.

3.2 It will be seen that there are parallel methods by which Donatex suggests it can get to the point of establishing liability. One might loosely call those parallel methods either the oral representation route or the lack of statutory power route. In substance, what Donatex wants to do is to have tried the lack of statutory power issues first and reserve the right to run the oral representations issues at a later stage. It is, however, clear that even if Donatex succeeds under the lack of statutory power route, the issues concerning whether such a finding converts into a claim in damages will continue to arise and will need to be determined in any event.

3.3 One of the complaints initially made by the DDDA was that Donatex had not specified the precise issues which it wished to have tried at a first module in anything other than the most general of terms. Whatever about the merits of that accusation Donatex, in the immediate run-up to the hearing, produced a proposed issue paper. That issue paper was in the following terms:-

> "1. The Core Issue: The *vires* of the Defendant to enter into the arrangement and/or agreement to develop the Irish Glass Bottle Site.

The Primary Question

1.1 As a matter of law, did the Defendant have the capacity to enter into a valid arrangement and/or agreement concerning the joint development of the Irish Glass Bottle Site?

1.2 The contracts that are of particular significance to this question are the Heads of Agreement of 25th October 2006, the Shareholder's Agreement of 9th November 2006 and the Subscription Agreement of 9th November 2006.

1 .3 The statute that is of particular significance to this question is the Dublin Docklands Development Authority Act 1997.

The Subsidiary Questions

1 .4 Did the Defendant, as matter of fact and law, inquire or receive such inquiry into its capacities in the above referred regard?

1.5 Did the Defendant seek or take formal advices on those capacities?

1 .6 Did the Defendant represent that it had or had not those capacities?

1.7 Did the Plaintiffs rely on those representations?

1 .8 Does a finding that the Defendant did not have the relevant capacity give rise to the reliefs sought by the Plaintiffs, namely damages and an indemnity?"

It will be seen that, in substance, what Donatex wishes to have tried at the first module are the issues referred to at B and C in para. 3. 1 above. It is of some significance that Donatex accepts that those issues must be tried as mixed questions of law and fact. In other words it is accepted that, insofar as there may be disputed facts which are relevant to the resolution of any of those issues, then appropriate evidence will need to be led on both sides and the court will be invited to reach a final conclusion on the facts in question. It seems to me that that approach means that the proposed modular trial in this case does not have the difficulty noted by Laffoy J. in *Atlantic Shellfish*. It is not a preliminary issue in the strict sense of the word because all questions, both on law and fact, relevant to the issue in question are to be determined. No assumption as to the facts for the purposes of determining the relevant question in law are to be made.

3.4 However, there was a significant dispute between the parties as to whether, applying the principles identified in the case law to which I have referred, it is appropriate and convenient to direct a modular trial on the lines suggested and whether any prejudice might thereby flow. I turn to those questions.

4. Convenience and Prejudice

4.1 Two principal points are made by the DDDA under this heading. First, it is said that there is no recorded case where a court directed a modular trial in circumstances where, at the request of the plaintiff, one of a number of alternative means, of the relevant plaintiff establishing liability, was to be tried while the plaintiff was able to, as it were, keep in reserve an alternative means of establishing liability. While acknowledging that there were no such recorded cases, counsel for Donatex suggested that there was no reason in principle why such a division could not occur and no reason in practice, on the facts of this case, why it might not nonetheless be convenient.

4.2 The second point concerned the fact that the proposed module involves (as I think it would necessarily have to) the court going on to consider whether any lack of statutory power on the part of the DDDA could give rise, on the facts of this case, to a claim in damages or for an indemnity. It is, at a minimum, arguable that in order for Donatex to succeed it might have to persuade the court that it was actually induced to enter into the shareholders agreement by reason of the warranty of authority to be found in that agreement on the part of the DDDA. The DDDA argues that, in those circumstances, the proposed module will necessarily involve an exploration of the facts as to any purported reliance by Donatex and/or Mr. McNamara on that warranty. However, it is said that any exploration of those facts will necessarily also involve an exploration of whether Mr. McNamara and/or Donatex might be said to have placed reliance on the contested oral representations which form the basis of issue A referred to above. Thus, the DDDA argue that one of two situations must arise. The first alternative is that the DDDA would be permitted to explore, in evidence, the full picture as to the circumstances in which it might properly be said by Donatex that it had been induced to enter into the shareholders agreement by the warranty of authority. On the DDDA's case, any such exploration will necessarily involve going into the other alleged representations and the effect which they may have had on the state of mind of Mr. McNamara, and through him, on the state of mind that must be imputed to Donatex. In those circumstances the argument goes on to suggest that there would, in truth, be little saved by excluding the issues that would arise in respect of issue A referred to above, for most, if not all, of those matters would need to be explored in evidence in any event. In that eventuality the DDDA argues that there would, in truth, be no saving by directing a modular trial which split issues A and B.

4.3 The alternative scenario is that the DDDA would be limited in its ability to raise, at the first module, those broad issues concerning the factors which influenced the decision making of Donatex and Mr. McNamara. If that were to transpire, then the DDDA argues that it would be prejudiced because factual material that would arise under issue A might have a bearing in respect of issue B (on the DDDA's case it is said that it would have a bearing) and thus the DDDA would potentially suffer prejudice by the trial being split in the way suggested by Donatex.

4.4 It seems to me that that latter analysis on the part of the DDDA is correct. The question of the extent to which Mr. McNamara and Donatex were influenced by the warranty of authority on the part of the DDDA will be dealt with either on a broad or on a narrow basis. !fit is dealt with on a broad basis there will be very little saving of time. If it is dealt with on a narrow basis there is a real risk of prejudice. That alone would, in my view, be sufficient to decline to direct the modular trial suggested.

4.5 However, I also feel that the first ground raised on behalf of the DDDA, to which I have already made reference, has merit as well. I agree with counsel for Donatex that there is no reason in principle why it necessarily follows that there might not be separate trials of two parallel bases on which a plaintiff might wish to establish liability. However, there are problems that would need to be overcome before any such course of action could make sense on the facts of an individual case. Such a division can only make sense if it is implicit that it will be unnecessary for the plaintiff to pursue the second (and parallel) route to establishing liability if it succeeds on the first. Otherwise there would be no saving, for the second route would have to be pursued in any event. It is worth noting in passing that I am dealing here with a case (and this case is such) where the two alternative and parallel means of seeking to

establish liability are designed to establish a claim of broadly the same type. There may well be other cases where it is possible to divide up a plaintiff's claim into wholly distinct parts where liability under one heading gives rise to an entirely separate type of damage than liability under another heading. Different considerations may apply in such cases. However, this is a case where, broadly speaking, either route to establishing liability is designed to suggest much the same damage, *i.e*. that Donatex and Mr. McNamara got involved in a catastrophic venture due to, what is said to have been, wrongdoing on the part of the DDDA. It is only necessary to look at some of the practical consequences for the future course of this litigation that might result from directing the modular trial sought to form the view that it would be an inappropriate course of action to adopt. If Donatex wins the proposed modular issue then, presumably, there is a risk of an appeal. Would that appeal go ahead straight away? If so, then the alternative means of establishing liability would be placed in abeyance until such time as the appeal could be disposed of. That would be a particularly unfortunate eventuality in circumstances where, it would seem, the issue that would then have to be litigated in the event that the appeal was successful includes questions of whether, as a matter of fact, certain representations had been made and where the court would be called on to choose between the recollections of differing witnesses (whom, it would appear, are likely to give significantly conflicting evidence), at a time well after the event. On the other hand if Donatex and Mr. McNamara lose the first module, then it seems that the oral representation issue would have to be run in any event. There would, in those circumstances, be no saving.

4.6 In addition, the question of damages needs to be considered. In the first scenario considered earlier, the court would have to decide, in the event that the DDDA wanted to appeal, whether it should go on to assess damages straightaway or wait until the appeal was over. Either course of action would have its own problems. If the court went on to consider damages before any appeal was determined then, in the event that the appeal was successful, the case would have to come back to this Court to deal with the oral representations issue with a further hearing as to damages (which might, quite possibly, have to be calculated on a different basis) following on. If the court did not consider damages straight away then, depending on the result of the appeal, there would be a significant delay before the court came around to assessing damages.

4.7 In *Cork Plastics* I analysed, to some extent, the problems that can be encountered in respect of an appeal arising from a modular trial. It seems to me that this is the kind of case where those problems are at the upper end of the range and where the methods that might be adopted to minimise those problems are less available than in many other cases.

5. Conclusions
5.1 In all those circumstances it does not seem to me that the balance of convenience favours a modular trial in this case, certainly of the type proposed by Donatex and Mr. McNamara. There would, however, it seems to me, be some potential merit in stripping out questions connected solely with the calculation of damages (rather than questions concerned with the basis on which those calculations might be conducted).

5.2 As neither party suggested such a course of action, I do not propose making a direction in that regard unless one or other party feels that it might be appropriate to seek such an order. The order which I would have in mind, if the parties wished it, was one similar to that which was made in *Cork Plastics* whereby all issues of liability and issues of principle, concerning the entitlement of the plaintiffs to damages, were directed to be tried in a first module with questions as to the calculation of damages being left over. Whether there would be any great sense in such a model in this case is something on which I am unable to express a clear view because I am unaware of what saving might be made by stripping out issues concerning the calculation of damages. I will hear counsel further on this last matter.