

## THE HIGH COURT

Record Number: 2010 No. 3299P

## BETWEEN

Terry Coleman, Anita Coleman and Agulhas Resources Inc.

Plaintiffs

And

Offley Insurance Services Limited

Defendant

**Judgment of Mr Justice Michael Peart delivered on the 20<sup>th</sup> day of July 2012:**

1. The defendant, a firm of insurance brokers with its registered office in the United Kingdom, and at which it was served with the within proceedings, has brought a motion seeking to a number of relief's, but essentially seeks an order setting aside the service of the proceedings on it outside the jurisdiction, and/or an order striking out the Plenary Summons on the basis that this Court does not have jurisdiction to hear and determine the plaintiffs' claims under Council Regulation 44/2001, or alternatively a declaration to like effect.

2. As can be seen from the General Endorsement of Claim the plaintiffs seek damages for "*breach of contract, negligence, breach of duty (including breach of statutory duty and breach of fiduciary duty)*", as well as "*a declaration that the plaintiffs are entitled to an indemnity from the defendant*". No further details of the claim appear in the Plenary Summons. However, there is a statement on page 3 thereof that "*The Court has power under Council Regulation (EC) No. 44/2001 of 22 December 2000 to hear and determine the plaintiffs' claims and the Court shall assume jurisdiction to hear the said claim under the provisions of Article 5(1), Article 5(3) of the Regulation.*"

3. Article 5 (1) of the Regulation provides:

"A person domiciled in a Member State may, in another Member State, be sued:

1. (a) *in matters relating to a contract, in the courts for the place of performance of the obligation in question;*

(b) *for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*

- *in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*

- *in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,*

(c) *if subparagraph (b) does not apply then subparagraph (a) applies."*

4. Article 5 (3) of the Regulation provides:

"A person domiciled in a Member State may, in another Member State, be sued:

(3) *in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur. "*

5. The net issue on the present application by the defendant is whether the plaintiffs claim is a free-standing claim in tort i.e. negligence, or whether it is a claim in contract or in respect of a tort relating to a contract. In the light of the relevant case-law, the position is that if it is a claim in contract, or in respect of a tort relating to a contract, then the defendant ought to have been sued in the United Kingdom, and this Court does not have jurisdiction under Article 5(1) of the Regulation, since the contract in question, if there be one, is one where the place of performance of the contract was the United Kingdom. If on the other hand, the claim is not in contract or in relation to a tort relating to a contract, and is truly a free-standing claim in tort only, despite the way in which the claim is framed in the General Indorsement of Claim, then this Court has jurisdiction and the proceedings may be determined in this jurisdiction. Any amendment to the Plenary Summons in order to exclude any reference to contract can be dealt with in due course by way of amendment or in the Statement of Claim, as no Statement of Claim has yet been delivered. Indeed the plaintiffs accept and argue that this is a free-standing claim in tort, and will not be pursuing any remedy founded in contract.

6. The facts in this case are very simple. The defendant company had and has acted as insurance brokers for the plaintiffs in respect of various types of insurance since the 1990s. At that time the first and second named plaintiffs resided in England. Around the year 1999 the plaintiffs became the owners of a house at Sorrento Terrace, Dalkey, Co. Dublin, but continued to reside in England. They arranged through the defendant brokerage an unoccupied buildings insurance policy to cover risks to the Sorrento property. That policy was put in place. Subsequently the plaintiffs decided to carry out some building works to the house, and because the said policy excluded cover for building works and renovations being carried out without prior notice to the insurers, the defendant sought cover for same from the insurers, but they declined. The insurers to the main contractors for the works were approached but apparently they too declined to provide cover for the plaintiffs' risks. However, the defendant succeeded ultimately in obtaining a policy of insurance for the plaintiffs, and this policy issued with effect from 2<sup>nd</sup> August 2001 and was renewed until 14<sup>th</sup> February 2003 when the building works were substantially completed. From the 14<sup>th</sup> February 2004 insurances for the property were arranged

by the plaintiffs themselves with other insurers, and the defendant had no involvement in that.

7. It appears that by January 2005 a neighbour of the plaintiffs, the adjoining owner, commenced proceedings against the first and second named plaintiffs arising from alleged damage to the chimney of his adjoining house during the course of the plaintiffs' building works and for distress caused to him as a result. The defendant was first advised by the plaintiffs of the existence of those proceedings and the claim arising therein by an email sent on the 20<sup>th</sup> May 2005. According to the defendant, he was informed by the plaintiffs that since the alleged complaint related to a time during which building work were being carried out, the insurers covering those works would need to be notified under the policy, and that he was told that he should obtain necessary information about the claim from the plaintiffs' solicitor. The defendant's affidavit on this motion sets out a sequence of events which are said to have taken place following the 23<sup>rd</sup> May 2005 email. It is unnecessary to set out that sequence of events in any detail for the purpose of deciding the issue which arises on the defendant's motion.

8. Essentially, the plaintiffs are claiming against the defendant that having been requested to notify the relevant insurers of the claim being made against them by their neighbour, the defendant failed to do so, or to do so adequately, resulting in loss being suffered by the plaintiffs. Again, the details of that loss do not matter for the purpose of this motion. What this Court must consider is whether the plaintiffs' claim against the defendant is a free-standing claim in tort i.e. negligence, or whether it arises under a contract or is in relation to a contract between plaintiffs and the defendant.

9. Having considered the affidavits filed by both sides and the helpful legal submissions made by Counsel, I am satisfied that this is a claim in tort only, and that it stands free of and unrelated to any contract which there may have been at earlier dates between the parties by which the plaintiffs contracted with the defendant for the provision of insurances from time to time in the past. It seems to me that each time the plaintiffs sought that the defendant would arrange a policy of insurance, be it for house cover or car insurance or whatever a contract was entered into in that regard which on each occasion was fulfilled and completed upon the issue of the relevant policy by the insurers. If it subsequently transpired that there was some defect in the cover provided or some other defect in the policy obtained through the broker, which deprived the plaintiff of the cover which was intended, then a claim in contract and/or negligence could arise as between the plaintiffs and the broker, and possibly the insurers themselves. But in the present case there is no allegation that the policy of insurance which the defendant arranged to put in place for the plaintiffs was other than what they had requested and instructed him to do.

10. Rather, the allegation is being made that having informed the defendant of a claim by their neighbour he failed to notify or properly notify the insurers. They of course under the policy were under the duty of notification themselves. The defendant had no contractual duty under the policy or under any later contract to do so. In so far as he may have been subsequently asked to notify the insurers of the claim, took on or assumed responsibility for doing so, and may have failed to do so, it is arguable that the defendant owed a duty of care to the plaintiffs to do so properly so that they would be indemnified under the policy. If the defendant was negligent in that regard, and that loss in that event was foreseeable, and the plaintiffs suffered loss, then the defendant could be liable to the plaintiffs in negligence, but its liability would not be on foot of any contract or even be in relation to a contract, since that contract, if there was one, was to put in place a policy of insurance and that was done, and the plaintiffs make no complaint in that regard.

11. The position therefore seems perfectly clear. The only claim which the plaintiffs could have against the defendant arising from the events described in the affidavits is one under the broad head of negligence. That is on the basis of a relationship of proximity between the parties, the assumption by the defendant of a duty of care to properly notify the insurers, an alleged breach of that duty of care by failing to do so properly so that the plaintiffs were fully indemnified, and the foreseeability of loss arising as a result of such breach of duty of care. It is a classic tort claim in negligence.

12. It seems to me clear therefore that the claim is one that comes within Article 5(3) of the Regulation, and that the defendant's motion should be struck out. It will of course be necessary for the plaintiffs to make such amendment to their pleadings in due course as may be necessary in order to confine their claim to a claim in tort.