

THE HIGH COURT

[2009 2772 P]

BETWEEN

LOUISE MARIE O'CONNOR

PLAINTIFF

AND

NOEL DUFFY TRADING AS THE DUFFY GAFFNEY PARTNERSHIP, SWORDS SPORT AND LEISURE LIMITED, CKP CONSULTANTS
LIMITED TRADING AS KAVANAGH MANSFIELD & PARTNERS, JETAGE INTERNATIONAL LIMITED TRADING AS SLS GROUP,
DERRYVARAOGUE

DEFENDANTS

JUDGMENT of Mr. Justice Barrett delivered on the 28th day of February, 2014.

1. This case centres on the issue of whether a defendant to court proceedings can seek an indemnity and contribution from a co-defendant where that co-defendant has secured a stay of proceedings between itself and the plaintiff in order that arbitration proceedings between the plaintiff and that co-defendant might take place.

Facts

2. The present proceedings spring ultimately from the construction of an all-weather pitch at Mount Sackville School in Chapelizod. Following construction, one of the 15-metre light standards at the pitch collapsed and thereafter safety concerns prompted the dismantlement of the remaining seven light standards. Not surprisingly, litigation ensued.

3. The plaintiff, being the principal of the school, sued (1) Mr. Noel Duffy trading as the Duffy Gaffney Partnership, (2) Swords Sports and Leisure Limited, and (3) CKP Consultants Limited trading as Kavanagh Mansfield & Partners. Mr. Duffy was the project manager on the construction works and a partner in Duffy Gaffney Partnership which is engaged in the business of quantity surveying. Swords Sport and Leisure Limited are building contractors. Kavanagh Mansfield & Partners are architects and engineers. There is also a fourth-named defendant in the proceedings whose part in the proceedings is considered further below.

Some Preliminary Issues

4. *Identity of third-named defendant:* There is some confusion in the pleadings as to the true identity of the third-named defendant. In an affidavit of 7th October, 2013, it is averred by an officer of Piconsult Limited that the correct name of the third-named defendant is Piconsult Limited trading as Kavanagh Mansfield & Partners. This affidavit avers that Piconsult Limited was formerly CKP Consultants Limited, an averment that suggests there was merely a change of registered name by CKP Consultants Limited. Yet an affidavit of 6th July, 2009, sworn by the same individual avers that CKP Consultants Limited was in fact dissolved on 6th November, 1990. This suggests that Piconsult Limited was not formerly CKP Consultants Limited. The court requires that an affidavit is filed within two weeks of the date of this judgment that correctly identifies the third-named defendant and that counsel identify what order is being sought to correct any error arising.

5. *Joining of fourth-named defendant:* A further issue arising is that it appears from the affidavit evidence that at some time in February 2013, Jetage International Limited, trading as SLS Group, Derryvaraogue was joined by court order as a fourth-named defendant to the proceedings, being a party alleged to have some responsibility in respect of the design and erection of certain works associated with the all-weather pitch lighting at Mount Sackville. The court has not had sight of this order and requires that a copy of the relevant order be produced to the court within two weeks of the date of this judgment.

6. *Previous order of the High Court:* On 20th July, 2009, pursuant to motion on notice made by the third-named defendant, de Valera J. made an order under Order 56, rule 2 of the Rules of the Superior Courts 1986 and the provisions of section 5 of the Arbitration Act 1980 "that the proceedings herein be stayed pending further order". In a letter of 27th September, 2013, from the solicitors for the putative third-named defendant to the solicitors for the fourth-named defendant, it was suggested that the effect of the order of stay was that the third-named defendant was no longer a defendant in the proceedings. In the affidavit of 7th October, 2012, of Mr. Mansfield it is likewise suggested that "CKP Consultants Limited trading as Kavanagh Mansfield and Partners is not and has not been a Co-Defendant in the above-entitled proceedings since 20 July 2009, the date of the High Court Order [made by de Valera J.]". Leaving aside for a moment the issue as to the correct identity of the third-named defendant, it is clear that the order of de Valera J., the operative text of which is quoted above, is purely an order of stay. It does not order that the third-named defendant be struck out from the proceedings, a point that the court considers significant.

7. It was suggested before the court that the parties are *ad idem* that the order of de Valera J. in fact meant only to stay proceedings between the plaintiff and the third-named defendant. However, there is nothing on the face of the order to suggest that this is so. Nor is there any requirement that the element of court proceedings which are not the subject of an arbitration agreement must be allowed to proceed while the element of proceedings that is the subject of an arbitration agreement goes to arbitration. As Clarke J. observed in *Kelly v. Lennon* [2009] IEHC 320, [2009] 3 I.R. 794 at 806, in the course of considering an agreement for the referral of some issues arising to arbitration:

"In my view, in cases such as this, where some but not all of the issues necessary to determine a cause of action arising in proceedings are the subject of a valid and subsisting arbitration clause, the court has a discretion as to the proper course of action to adopt which should be exercised in the light of all the circumstances of the case with a view to ensuring, insofar as possible, a speedy resolution of all the issues which arise, and a final determination of the cause of action concerned, while at the same time ensuring that the court does not trespass on determining an issue which has been properly made the subject of an arbitration agreement between the parties.

I should emphasise that the discretion of which I speak does not, it seems to me, extend to the court taking over a jurisdiction to determine any issue properly referred to arbitration. Rather, the discretion is as to how the various

elements of the case (being those properly within the jurisdiction of the court and those validly referred to arbitration) should be sequenced so as to maximise the likelihood of a speedy and just resolution of all issues between the parties.”

8. Despite the fact that the parties to these proceedings may consider that the order of de Valera J. meant only to stay proceedings between the plaintiff and the third-named defendant, the order on the face of it stays the entirety of the proceedings arising. If the parties to the proceedings wish to have the order of de Valera J. varied or substituted, they may make application to do so but no such application has been made and the basis and rationale for such order would have to be identified to the court.

Notice of Indemnity and Contribution

9. As the order of de Valera J. appears on its face to stay the entirety of the proceedings arising and no application has been made to have that order varied or substituted, it is not strictly necessary for the court to consider the issue of whether a notice and indemnity can be served by one co-defendant on the other as the entirety of the proceedings have been stayed pending the outcome of the arbitration. Notwithstanding this, the court proceeds hereafter to consider the issue of whether a defendant to court proceedings can seek an indemnity and contribution from a co-defendant to those proceedings in circumstances where that co-defendant has previously secured a stay of proceedings between itself and the plaintiff in order that arbitration proceedings between the plaintiff and that co-defendant might take place.

10. A consideration of reported cases in both Ireland and England and Wales suggests that this issue has not previously been the subject of a written judgment in either jurisdiction. The court was referred by the third-named defendant to the Privy Council decision in *Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Limited and Another* [1991] 1 W.L.R. 550 and in particular to the portion of Lord Oliver of Aylmerton’s judgment, at 556, in which he considers what is the effect of an order of stay. The court was also referred to the decision of Clarke J. in *Kalix Fund Limited v. HSBC Institutional Trust Services Limited; Unione Di Banche Italiane Societa Cooperative Per Azioni trading as UBI Banca v. Thema International Fund and HSBC Institutional Trust Services (Ireland) Limited* [2009] IEHC 457, [2010] 2 I.R. 581 and, in particular, his comments at 593 as to what a stay entails.

11. The court does not propose to consider in this judgment the relevant portions of those judgments. This is because the court considers the issue arising not to be what an order of stay does but rather where the balance of justice lies when a stay that has been granted has the potential, as here, to work significant unfairness to an entity that was not party to the application for that stay. In general, of course, it should be possible to avoid this arising as an issue through the simple expedient of a party, when seeking a stay, making other co-defendants party to such application and expressly raising with the court the issue of indemnity and contribution. In this way, to paraphrase Clarke J. in *Kelly v. Lennon*, the court will be better placed to determine the best course of action to adopt in the light of all the circumstances of the case. There will of course be instances when this is not done and even when it is done the question arises as to how the court should address the challenging issues that such an application presents. After all, no matter how such an application is decided it may cause difficulties. A co-defendant may be prevented from serving notice of indemnity and contribution by virtue of a stay granted in the context of an arbitration agreement to which it is not party. Conversely, a co-defendant who enjoys the benefit of an arbitration agreement will in effect be denied the benefit of that stay if it remains possible to be served with a notice of indemnity and contribution.

12. In such circumstances it appears to the court that the balance of justice must generally favour the co-defendant who is not the beneficiary of the arbitration agreement. This is because the party who does benefit therefrom can *inter alia* seek of the court, when making application for a stay, that it make proper provision as to its liability to indemnity and contribution. Moreover, it can seek to make any other defendant/s party to the application. In addition, as a continuing party to the stayed proceedings, it is ultimately responsible for having created a situation in which the plaintiff ceases, pursuant to the order of stay, to involve that co-defendant further in the court proceedings.

Order

13. For the reasons identified above, the court proposes to make an order allowing the service of a notice of indemnity and contribution by the fourth-named defendant on the third-named defendant. However, this will require first that the order of de Valera J. be varied or substituted as the court considers that order to have stayed the entirety of the court action. The court will adjourn the present proceedings for two weeks to allow the filing of the affidavit and production of the court order referred to above and also for the parties to determine whether either or both of them wish to make any application in respect of the order of de Valera J. The parties have liberty to apply.