

THE HIGH COURT

[2014 No. 3770 P]

BETWEEN

SYLVESTER NOLAN AND ANNE NOLAN

PLAINTIFFS

AND

ELECTRICITY SUPPLY BOARD

DEFENDANT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 2nd day of December, 2015

1. In this action the plaintiffs seek damages for breach of contract and in negligence against the ESB for loss occasioned by a fire at their property at Foxfield Grove, Raheny. I have had the benefit of hearing from each of the plaintiffs and from eminent and very helpful experts on behalf of each side, Mr. Greg Duggan for the plaintiff and Mr. Tony Tennyson for the defendant.
 2. The house was built in the early 1960s. The Nolans bought the house and moved in 1975. In around 1998 the ESB meter was changed to "dual tariff". A Triton T90 shower was installed in approximately 2001, as was a modern style electrical consumer board.
 3. In 2005, works were carried out to the exterior of the house by a Mr. Coffey, who installed PVC fascia and soffit board over the original wooden fascia and soffit board to which ESB cables were clipped.
 4. It is accepted that in the course of this work, Mr. Coffey unclipped the ESB cables, and possibly moved them although on the evidence I am not satisfied that there was any significant movement of the cables as a matter of probability.
 5. Following these works the cables were effectively "enclosed" between the original wooden soffit board and the new PVC soffit board. The gap between these two boards was measured by Mr. Duggan as approximately 30 mm. The fire was to break out within this space, at a part of the wiring was where two cables were twisted and tightened together, forming a connection. A device referred to as a "connector" was then placed over the connection to make it permanent. The connector was then wrapped in material called densotape, which added to its bulk. A connector, believed to be similar to those in the plaintiffs' property, was recovered from a neighbour's house. An issue arose as to the dimensions of this connector. Mr. Duggan measured the connector from the neighbours' house, wrapped in densotape, to be 32 mm high and 22 mm wide. Mr. Tennyson measured it to be 36 mm high and 25 mm wide. It was a curious feature of the case, and perhaps illustrative of the sort of difficulty that can arise in a case that turns on a "clash of experts", that in the course of an afternoon each expert measured the same object in the same witness box a few feet away from me, using the same tape measure, and came up with different measurements. While I did not suggest it during the hearing, I could perhaps be forgiven for having briefly and privately entertained the outrageous notion of simply measuring it myself but I took the view that it was not necessary to decide between these two measurements because, whichever was correct and whatever way the connector was oriented between the soffit boards, there was at best very little gap between the connector and those soffit boards, following the 2005 works.
 6. Little change occurred in the occupancy or electrical consumption in the house between 2005 and 2013.
 7. At around 2 pm on 2nd September 2013, a fire broke out in the front corner of the plaintiffs' semi-detached house. It was common case between the experts that the location where the fire broke out was one or other of the two junctions where the cable connection was made permanent by a connector, of which there were two at this location.
 8. The plaintiffs and their two daughters that were then living in the house (two other daughters living abroad at that time) evacuated the house. Very considerable damage was done to the property and contents. Rebuilding works did not begin on the house until March 2014, and the plaintiffs resumed occupancy in July 2014. Clearly this was a very traumatic experience for the plaintiffs. They undoubtedly suffered significant inconvenience and distress.
 9. There are three issues before the court: the cause of the fire and whether it is attributable to negligence on behalf of the defendant, if so, whether there was contributory negligence, and if applicable, the amount of damages.
- Whether the defendant was negligent**
10. The plaintiffs' version of the cause of the fire was essentially that the electrical connection had aged and failed. There was some reference to the evidence to the possibility of a tight connection not having been established in the first place, but I do not consider such a suggestion to have been made out on the evidence.
 11. The defendant's version was primarily that the fire was caused by the enclosing of the cable by the soffit boards and a consequent overheating.
 12. A number of other suggestions were also canvassed which can be summarised as follows:
 1. It was suggested that the fire was caused or contributed to by the cable having been disturbed by Mr. Coffey in the course of carrying out his works, thereby leading to loosening and consequent overheating. While it is accepted that Mr. Coffey unclipped the ESB cables, and leaving aside the question of contributory negligence for the moment, I do not consider that on the totality of the evidence I could be satisfied that he moved the cables sufficiently to damage them as a matter of probability. I accept Mr. Duggan's evidence that the cables would require quite vigorous movement in order to cause damage. I therefore do not consider that the "disturbance" theory has been made out as a likely cause of the fault.

2. It was also adverted to in Mr. Tennyson's report and briefly touched on in cross-examination that works had been carried out by UPC which may have disturbed cabling. This seems to have been raised as a possibility at most and in any event was not explored with Mr. Duggan or indeed pressed by Mr. Mel Christle S.C. for the defendant.

3. Reference was made to the load being put on the system at the time of the incident, arising from electrical equipment being operated on the day. I do not consider that this ordinary use of household electricity could constitute a causative event for these purposes, nor was this suggested by Mr. Christle.

13. Before I turn to the question of deciding between the "enclosure" theory of connection failure and the "ageing" theory, which seems to be the essential issue in the case, I should clarify that the question of the enclosure of the cabling by soffit boards is relevant to two aspects of the case. The defendant argues primarily that the enclosure was causative of the fire because it accelerated the failure of the connection. But enclosure is also potentially relevant to contributory negligence in the sense that it may have increased the risk of significant consequences arising from a failure of the connection.

14. As regards the enclosure of the ESB cables by soffit boards as a cause of the fire, Mr. Tennyson in his original report said that the enclosure of the cables and the relatively high domestic load (referring to the volume of electrical equipment being used at the time) "were significant contributory factors". In his oral evidence he appeared to go somewhat further and suggested that the fire occurring some years after the installation of the new soffit board was essentially too great a coincidence to be ignored. He stated that the failure occurred within the expected lifetime of cables if they were not overloaded and were properly ventilated. If on the contrary the cables were not properly ventilated (for example by being enclosed in soffit boards), the life span would be reduced, thereby explaining the failure in September 2013.

15. While Mr. Duggan effectively accepted that the enclosure of the cables by soffit boards could have created the possibility that the consequences of failure may have been more likely to cause fire, his evidence was that the "ageing" of the wiring was the essential cause of the fire. It was stressed by Mr. Eugene Gleeson S.C. for the plaintiffs that this was supported by two elements of the evidence in particular insofar as it related to the particular wiring involved at the Nolans' house.

16. Firstly, the connectors at the neighbouring house, which I accept were probably installed around the same time as those in the Nolans' house, were in poor condition, so much so that when they were observed and identified in the course of investigating the present fire, the ESB removed them. While Mr. Tennyson did not appear to regard the damage to these connectors as altogether serious, the fact that they were removed by the defendant is somewhat supportive of an alternative view. The condition of the neighbour's connectors, despite differences in the extent to which they were exposed, supports a probability that there was some deterioration of the Nolans' connectors.

17. Secondly Mr. Duggan gave evidence that the ESB main fuse within the house showed significant signs of ageing including oxidation of the copper as well as charring. While his evidence in relation to the oxidation was not fully supported by Mr. Tennyson, the latter did effectively confirm that concerns could be expressed in relation to the charring and indeed bending of the wiring. Again, signs of defects due to age in the internal wiring seem to me to support a probability of defects in the external wiring, all other things being equal.

18. Different eminent experts may have different views and theories, and that is of course a strength of any field of intellectual endeavour. In a case where there is such a conflict, external physical evidence, illustrated as it was in this case by useful photographic evidence from both sides, can be of assistance to the court, although careful consideration of the oral evidence is also required particularly insofar as features of the physical evidence are sought to be explained. Having regard to the totality of the evidence, including the matters referred to above, I consider that the "ageing" theory is the more probable explanation for the cause of the fire; that is that the electrical wiring failed due to inherent ageing and not due to alleged accelerated ageing brought about by its enclosure between soffit boards. On that basis I hold that the defendant is liable for the damage caused, subject to a consideration of contributory negligence.

Extent of contributory negligence

19. By virtue of s. 34 (1) of the Civil Liability Act 1961, if contributory negligence is established, the court is required to reduce any damages "by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant".

20. Contributory negligence applies to recovery in contract as well as tort: see *McCord v. E.S.B.* [1980] I.L.R.M. 153 at 165.

21. An allegation that the cables or connectors were "covered with PVC", as distinct from sandwiched between soffit boards, was not fully explained or pursued at the hearing. There were two essential headings arising from the particulars of contributory negligence as set out at para. 12 of the defence that were advanced by Mr. Christle.

22. The first issue is the fact that Mr. Coffey carried out work in relation to ESB cables without notification to the ESB. Again while it is not possible to be satisfied as to what exact work was carried out in relation to the cables beyond unclipping them, it seems to me that the defendant's position that live electricity cables should not be interfered with in any way without consulting the ESB is correct. To do so constitutes fault within the meaning of s.34. The defendant has not sought to prove by direct evidence that the ESB would have taken particular steps had such notification been given but I infer that they would at a minimum have been in a position to offer advice which might have reduced the risk of any subsequent fault having serious consequences. The defendant therefore has established that the failure to notify them constitutes contributory negligence.

23. The other limb of contributory negligence alleged in the defence was the placing of the new PVC soffit board "directly underneath the original timber soffit board thereby sandwiching the original electricity supply cable between the old and new soffit boards". Even on Mr. Duggan's evidence, I am satisfied that this created an increase in the risk of serious consequences in the event of a fault developing at the site of a connector and therefore constituted contributory negligence.

24. Having regard to the degree of the contributory negligence in this case I consider that the appropriate reduction in damages pursuant to s.34 is 50%.

Amount of damages

25. Special damages were agreed at €148,831.63. General damages were to be assessed by the court. Having regard to the evidence of the plaintiffs I will assess the general damages having regard to the extent of inconvenience and distress to the plaintiffs and each of them at €40,000, giving a total value to the claim of €188,831.63 before application of a reduction for contributory negligence.

Conclusions

26. I therefore conclude as follows:

1. The more likely cause of the fire was deterioration of the wiring due to inherent ageing, which is attributable in law to the defendant. The defendant is therefore liable to the plaintiffs for the loss sustained by them.
2. I am satisfied as a matter of probability that the plaintiffs were at fault in failing to consult the ESB and in carrying out works which increased the risk of significant consequences flowing from any failure at the connectors. This constitutes contributory negligence on their part.
3. The appropriate degree of reduction of damages under s.34 of the 1961 Act in the light of this contributory negligence is 50%.
4. I assess general damages at €40,000.
5. Applying a reduction of 50% to the general damages and the agreed special damages of €148,831.63, there will be a decree in favour of the plaintiffs for €94,415.82.