Neutral Citation no. [2002] NICA 38

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Ref:	CARC3727
Delivered:	06/09/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Before: Carswell LCJ, Nicholson LJ, Campbell LJ

BETWEEN

DINGLES BUILDERS (NI) LTD

(Plaintiff) Respondent

and

(1) MOST REVEREND FRANCIS GERARD BROOKS
(2) REVEREND MATTHEW O'HARE
(3) REVEREND JOHN KEARNEY
(4) REVEREND AIDEN HAMILL
(5) REVEREND J CUSHENAN
(6) REVEREND F BROWNE

(Defendants) Respondents

(7) REVEREND JAMES POLAND

(Defendant) Appellant

(8) MICHAEL GILLEN
(9) MARTIN CHAMBERS
(10) PAUL DIGNEY

(Defendants) Respondents

CARSWELL LCJ

[1] This matter came before the court by way of an interlocutory appeal brought by leave from a decision of Girvan J given on 15 February 2002, whereby he refused the appellant's application for leave to serve a third party notice upon the plaintiff's solicitors Messrs Hewitt & Gilpin, seeking contribution under the terms of the Civil Liability (Contribution) Act 1978. At the conclusion of the hearing on 12 June 2002 we indicated that we proposed

to dismiss the appeal, but would give our reasons in writing at a later date. This judgment now contains our reasons.

[2] The plaintiff's case is that an agreement in writing was made on 2 August 2000 whereby the plaintiff, which is a development company, purchased and the first to seventh defendants (the clerical defendants), who are clergymen in the Roman Catholic Church, sold 3.4775 hectares of land in the townland of Edenderry, being the lands comprised in Folio DN 14995 Co Down, for the sum of £1,990,000. The clerical defendants, the registered owners of the lands, were described in the agreement as trustees, and claimed in their particulars that they hold the legal title to the lands in trust for the parish of Seapatrick, but it is not admitted by the plaintiff that they hold it in that capacity.

[3] The agreement was signed by one R Livingston for the purchaser, and under the heading "Signed by the Vendor" there appears simply the signature of the appellant Father Poland, the seventh defendant in the action, who is described in the pleadings as parish administrator. It is pleaded in paragraph 18 of the amended statement of claim that the appellant at a meeting on 2 August 2000 represented that he was authorised on behalf of the clerical defendants to agree to the disposal of the lands to the plaintiff and to agree a price with it and warranted that he was so authorised. The other clerical defendants have repudiated his authority and claim that he did not have authority from them to enter into the agreement. A substantial sum, comprising £1,560,000 for loss of development profits and £30,400 for professional fees and lost management time, is claimed by the plaintiff as its loss and damage.

[4] The eighth defendant is sued as the solicitor to the clerical defendants and the ninth and tenth defendants as their estate agents. In the statement of claim the plaintiff seeks damages from them for misrepresentation, negligent misstatement, negligence, deceit and breach of contract. Their liability was not in issue at the hearing of the present appeal.

[5] In the application the subject of this appeal the appellant sought to join the plaintiff's solicitors as third parties in order to claim contribution from them. The ground for the claim was that they were negligent in their conduct of the transaction, in that they failed to ascertain and to advise the plaintiff that it was necessary to join all the clerical defendants (or at least five of them if they were charitable trustees) to the agreement for the purchase of the lands if it was to be enforceable against them. They would accordingly have been liable if sued by the plaintiff and the appellant seeks contribution from them.

[6] Liability to make contribution is governed by the Civil Liability (Contribution) Act 1978 (the 1978 Act), which was passed to broaden the extent of claims for contribution permitted under previous legislation. The

history of the statutory changes to the common law is set out in the opinion of Lord Bingham of Cornhill in *Royal Brompton Hospital NHS Trust v Hammond* [2002] 2 All ER 801, where in paragraphs [2] to [4] he traces them through the *Third Interim Report* of the Law Revision Committee, the Law Reform (Married Women and Tortfeasors) Act 1935, the Law Commission's report in 1977 and the enactment of the 1978 Act.

[7] Section 1(1) of the 1978 Act provides:

> "1.-(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

That subsection has to be read with the interpretation provision contained in section 6(1):

> "6.-(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."

Section 2 prescribes the power of the court to assess the amount of contribution which may be recovered. The material portions of the section provide:

> "2.-(1) … in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.
>
> (2) … the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

[8] The action was commenced by the issue of the writ of summons on 13 September 2000. The pleadings were substantially amended, by the addition

of the eighth, ninth and tenth defendants, the plea of breach of warranty of authority against the appellant and a plea by the clerical defendants that the sale agreement was void for uncertainty. The action had been listed for hearing on 25 February 2002, but on 5 February the present application for joinder of the solicitors as third parties was brought before the judge. He dismissed the application in a written judgment given on 15 February, holding that a right of contribution or indemnity did not arise under the terms of the 1978 Act. In a supplementary judgment given on 22 February, when he gave leave to appeal, he stated that if he had held in favour of the appellant's entitlement to join the third parties he would nevertheless have exercised his discretion against permitting them to be joined.

[9] One of the factors governing this decision was the lateness of the application. In an affidavit sworn by the appellant's solicitor he states that the application had not been brought earlier (though acknowledging that it should have been) because of the escalating costs, the seriousness of the allegation of professional negligence and the complication of the proceedings for specific performance of an agreement for sale of the subject lands brought by another bidder. It is incontestable that the appellant's advisers should have moved much earlier, for they had appreciated after the service of the amended statement of claim on 3 April 2001 the possibility of instituting a claim for contribution against the solicitors. It does appear, however, that the action probably could not have proceeded on 15 February, because particulars of the plaintiff's substantial claim for loss and damage were not formally given until the further amended statement was served on 8 February 2002 (although we were informed that details had been given in earlier correspondence) and required considerable investigation.

[10] The judge held that the measure of damages which the plaintiff might recover from its solicitors was not the same as that which they could claim against the appellant. The solicitors were accordingly not "liable in respect of the same damage", with the consequence that the right of contribution or indemnity did not arise. The appellant challenged this conclusion on appeal on the ground that the judge had based it on a difference in the measure of damages, whereas he should properly have focused on the nature of the damage itself which it had sustained by reason of the default of each, as recent authority has confirmed. Counsel for the appellant submitted that that damage was the same in each claim and that the appeal should be allowed and leave given to issue the third party notice.

[11] That recent authority is contained in the *Royal Brompton Hospital* case, to which we have referred. Under a contract for the construction of new hospital premises the contractor was liable for liquidated and ascertained damages if the works were not completed by the stipulated date. Practical completion was certified to have taken place more than 43 weeks after that

date, but the architect had certified for extensions of time up to the date of actual practical completion. The contractor commenced arbitration proceedings against the employer, which counterclaimed liquidated damages, relying on the power of the arbitrator to open up, review and revise the certificates. The proceedings were settled, whereupon the employer sued the architect for professional negligence in, inter alia, certifying unduly long extensions of time. The architect brought a claim under CPR Pt 20 to issue a third party notice directed to the contractor for contribution, on the ground that it would if sued have been liable in respect of the same damage. The House of Lords upheld the decisions of the judge of the Technology and Construction Court and the Court of Appeal dismissing the application.

[12] The House of Lords affirmed the correctness of previous decisions in which it was held that "damage" in section 1 of the 1978 Act is not to be equated with "damages". Lord Bingham laid stress in his opinion on the need to establish a common liability between the party claiming and the proposed third party, the need to show that a single harm has been done, for which those parties should share responsibility. The same need was accepted by Lord Steyn at paragraph [27] and Lord Hope of Craighead at paragraph [46]. Lord Hope of Craighead expressed the principle at paragraph [47] in the following terms:

> " … the entitlement to contribution applies only where the person from whom the contribution is sought is liable for the same harm or damage, whatever the legal basis of his liability. But the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. The facts must be examined more closely in order to determine whether or not the damage is the same."

[13] Lord Steyn carried out such a close examination of the two claims in his opinion at paragraphs [22] and [23]:

> "[22] The characterisation of the employer's claim against the contractor is straightforward. It is for the late delivery of the building. This is not a claim which the employer has made against the architect. Moreover, notionally it is not damage for which the architect could be liable merely by reason of a negligent grant of an extension of time. It is conceivable that an architect could negligently cause or contribute to the delay in completion of works, eg by condoning inadequate progress of

> the work or by failing to chivvy the contractor. In such a case the contractor and the architect could be liable for the same damage. There are, however, no such allegations in the present case.
>
> [23] The essence of the case against the architect is the allegation that his breach of duty changed the employer's contractual position detrimentally as against the contractor. The employer's case is that the architect wrongly evaluated the contractor's claim for an extension of time. It is alleged that by negligently giving an extension of time in respect of an unmeritorious claim by the contractor, the architect presented the contractor with a defence to a previously straightforward claim by the employer for breach of contract in respect of delay. The employer lost the right under the contract to claim or deduct liquidated damages for the delayed delivery of the building. The contractor committed no wrong by retaining the money until the extension of time had been set aside in an arbitration. The detrimental effect on the employer's contractual position took place when the extension of time was negligently given. In such a case the employer must go to arbitration in order to restore his position. He has the burden of proof in the arbitration and has to face the uncertain prospect of succeeding in what may perhaps be a complex arbitration. The employer's bargaining position against the contractor is weakened. A reasonable settlement with the contractor may reflect this changed position: a case with a 100% prospect of success may become, for example, a case with only a 70% prospect of success."

[14] The appellant's counsel sought to distinguish the present case from the *Royal Brompton Hospital* case by bringing it within the exception mooted by Lord Steyn in paragraph [22]. They contended that the damage or harm caused by the appellant (on the hypothesis accepted for the purpose of the application) was the same as that caused by the solicitors, that the plaintiff was left with an agreement for the purchase of lands which it could not enforce, for want of execution by the requisite number of vendors. The case against the appellant is that because of his want of authority he was unable to "deliver" the trustees as a whole, with the result that the plaintiff could not enforce the agreement. The case against the solicitors is, they submitted, the

same, that if they had taken proper steps they would have ensured that the requisite number of trustees was "delivered" and the plaintiff could have enforced the agreement.

[15] Counsel for the solicitors, the respondents to the appeal, challenged the validity of the appellant's analysis. While accepting that there was a degree of congruity between the results of the default of the appellant and that of the solicitors, he contended that the damage done by each was not the same. The harm done by the appellant was that when he did not have the authority which he had warranted the plaintiff was left with an unenforceable agreement – as counsel put it, a useless piece of paper instead of a binding contract of sale. The solicitors had failed to advise the plaintiff that to make the agreement enforceable it required the joinder of all the clerical defendants, or at least five of them if they held as charitable trustees (see section 26 of the Charities Act (Northern Ireland) 1964). The harm done by the solicitors in failing to give that advice was that the plaintiff lost the chance of securing the signatures of a sufficient number of the other clerical defendants to make the agreement binding. It was not a certainty that they would all have signed the agreement, for there was another bidder in the ring who had offered a higher sum but been turned down by the appellant. Accordingly the damage was not the same and the judge had reached the right conclusion, albeit for reasons rejected by the House of Lords in the *Royal Brompton Hospital* case (which was decided after he gave his judgment).

[16] We consider that the analysis put forward by counsel for the solicitors is correct. The analogy with the situation considered in the *Royal Brompton Hospital* case is in our opinion sound, and we would not equate the present case with the possible exception mooted by Lord Steyn in his opinion at paragraph [22]. We also find convincing the analogy with the Canadian decision of *Wallace v Litwiniuk* (2001) 92 Alta LR (3d) 249, referred to with approval by Lord Steyn at paragraph [29]. In that case it was held that the harm done by lawyers who allowed a road traffic accident claim to go out of time was not the same as that done by the driver against whom the claim should have been brought. The Alberta Court of Appeal held that the negligent driving of that driver gave the plaintiff a right to claim compensation for the physical injuries which she had sustained. The negligent provision of legal services by the lawyers, on the other hand, resulted in her losing her legal action. Since what she had lost was a chance of success, which had to be discounted to ascertain its value, that was not the same harm as that done by the driver.

[17] We accordingly consider that the damage done by the appellant and that done by the solicitors (on the supposed facts) was not the same and that accordingly the case does not come within section 1 of the 1978 Act. For this reason we conclude that there was no jurisdiction to join the solicitors as third

parties and on that ground uphold the judge's decision and dismiss the appeal.

[18] The second issue which was argued before us was that of the judge's exercise of his discretion to refuse the application for joinder of the solicitors, even if he had had jurisdiction to do so. He referred to this at page 7 of his judgment given on 15 February 2002, but since he had decided in favour of the solicitors on the anterior issue he did not then express any conclusion on the question of the exercise of his discretion. When he gave his decision on 22 February on a subsequent application for leave to appeal he stated:

> "In the Judgment I raised the issue of discretion as argued by Mr Shaw in relation to whether it would be right at this stage to give leave to join the third parties. Having regard to the matters set out in the Grounding Affidavit, which indicated that thought had been given at an earlier stage to involving Hewitt & Gilpin as third party and a decision at an early stage was made not to I should put it on record that if I had been exercising my discretion had I come to different view of the law in relation to this matter I would not have granted leave. That in no way ties the hands of the Court of Appeal in relation to the matter, but it is a factor that the Court of Appeal may or may not consider to be relevant when the matter comes to that court."

[19] The appellant's counsel submitted that this was not a definite exercise of his discretion, so that the well known principles applied by this court to the review of such an exercise (as to which see, eg, our decision in *Millar v Peeples* [1995] NI 6) were not applicable. They also submitted that the judge had not given sufficient reasons for his decision and that for this reason also this court should substitute its own discretion for that of the judge: cf *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 at 122, per Arnold P.

[20] We consider that on a proper reading of the judge's statement made when giving his decision on 22 February 2002 he intended to make a definite exercise of his discretion, as a subsidiary conclusion if he should be held by this court to have been wrong on the first issue. We do not think that his remarks about the approach of this court detract from that. We should therefore be reluctant to interfere with the judge's decision, unless it is shown that he was in error in reaching it. His reasons were not expressed at any length, but it is clearly enough apparent that he founded his conclusion on the lateness of the stage at which the application was made. This was a valid

ground on which to base the exercise of his discretion and we should be slow to reverse his decision.

[21] There is, however, another ground on which the judge might have based the exercise of his discretion, which was not referred to by him and which may not have been argued before him. It would in our view possess quite substantial weight if we were ourselves exercising the discretion and it reinforces our conclusion that we should not reverse the judge's decision. If the appellant's application were allowed, the plaintiff would lose the services of his solicitors, who have prepared the case up to this stage, fairly close to trial. That is a not insignificant deprivation in itself, to which a plaintiff should not lightly be subjected. The deprivation would be particularly unfortunate in the present case, however, because the solicitors will have been bound to assemble evidence, material from the plaintiff's records and experts' reports, to support the plaintiff's claim for loss of profits from the development which it proposed to carry out. It will be in the solicitors' interest to challenge that claim and seek to reduce it. However scrupulous they may be in using the knowledge which they have gained of the strengths and weaknesses of the claim, it would put the plaintiff company in an invidious position if its solicitors, as it were, turned its own guns against it. We do not think that it should lightly be placed in such a position, and if we were to substitute our own exercise of discretion for that of the judge we should find it compelling. We accordingly do not propose to reverse the judge's exercise of his discretion against the appellant.

[21] For the reasons which we have given we reached the conclusion that the appeal of the seventh defendant should be dismissed.