

Action for specific performance – breach of warranty of authority – leave to join third party – whether third party claims in respect of same damage – meaning of “same damage” – Civil Liability (Contribution) Act 1978 section 1(1)

Ref: GIRA3161

Delivered: 15/02/2002

2000 No 2562

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN

DINGLES BUILDERS (NI) LIMITED

Plaintiff

and

- 1. MOST REVEREND FRANCIS GERARD BROOKS**
- 2. REVEREND MATHEW O'HARE**
- 3. REVEREND JOHN KEARNEY**
- 4. REVEREND AIDEN HAMILL**
- 5. REVEREND J CUSHENAN**
- 6. REVEREND F BROWNE**
- 7. REVEREND JAMES POLAND**
- 8. MICHAEL GILLEN**
- 9. MARTIN CHAMBERS**
- 10. PAUL DIGNEY**

Defendants

GIRVAN J

JUDGMENT

THE APPLICATION

This is an application brought under Order 16 Rule 2 by the applicant (“the applicant”) for leave to issue and serve a third party notice against a firm of solicitors, Hewitt & Gilpin (“the solicitors”) the solicitors currently

acting on behalf of the plaintiff in the present proceedings, who acted on behalf of the plaintiff in respect of the transaction referred to below.

On the hearing of the application Mr Lavery QC appeared with Mr Keogh on behalf of the applicant. Mr Shaw QC appeared on behalf of the plaintiff and opposed the application.

THE PROCEEDINGS

The proceedings are somewhat complex with the pleadings having been much amended on a number of occasions. As the action currently stands the plaintiff seeks to enforce an alleged contract relating to the lands in Folio DN 14995, County Down ("the lands"), comprising some 3.4775 hectares of development land. The alleged contract was made between the plaintiff as purchaser and the first to applicants (described in the pleadings as "the clerical defendants") as vendors. It is alleged that the contract was made at a meeting at which the applicant represented that he had the authority of the clerical defendants to entry into the agreement for the sale of the land by the clerical defendants to the plaintiff. The document purporting to be the contract was duly signed by the applicant on 2nd August 2000. In the contract the clerical defendants are named as "the vendors" and described as trustees. The applicant signed in his own name and the other clerical defendants did not sign. The other clerical defendants repudiated the alleged contract agreement denying that the applicant had their authority to enter into the agreement. In the alternative to the claim that the agreement was binding on all seven clerical defendants the plaintiff alleges that the applicant and the

eighth, ninth and tenth defendants (being the solicitor acting for the clerical defendants and the clerical defendants' estate agents) were guilty of misrepresentation, negligent misstatement, negligence, deceit and breach of contract. Against the applicant only it is alleged that he is guilty of breach of warranty of authority.

The plaintiff alleges that it has suffered substantial losses comprising lost profits of £1.56 million at the date of the further amended statement of claim and £30,400.00 in respect of professional fees and lost management time. It is alleged that the land in question was being purchased with a view to substantial building development by the plaintiff.

The applicant seeks to join the solicitors as solicitors acting on behalf of the plaintiff in respect of the transaction. The thrust of the case made by the applicant against the solicitors in the draft third party notice is that the solicitors failed to advise the plaintiff that the contract was not effective to bind the vendors unless authorised and executed by all the clerical defendants who were trustees of the land. In the event that it was a charitable trust the contract should have been signed by five of them. It is alleged that the solicitors failed to require the solicitors for the vendors to produce the authorisation and execution of the contract by the requisite number of trustees and failed and neglected to make any pre-contract enquires as to whether the clerical defendants under the terms of their trust had the necessary power of sale.

It is also alleged that the third party wrote into the contract a special condition (special condition 6), the effect of which was to render the contract void for uncertainty. If that it is a good point then the contract was never binding and whatever claim the plaintiff may have against Hewitt & Gilpin in that regard, the plaintiff would have no cause of action against the applicant and hence no issue of contribution in that regard would arise.

THE RELEVANT STATUTORY PROVISIONS

The application raises issues under section 1 of the Civil Liability (Contribution) Act 1978 (“1978 Act”). The material provisions of that Act are as follows:

“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).

(2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought ...

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which as been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have

been liable assuming that the factual basis of the claim against him could be established ...

2.-(1) Subject to subsection (3) below, 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 ...

(3) Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject - (a) any limit imposed by or under any enactment or by any agreement made before the damage occurred; (b) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976; or (c) any corresponding limit or reduction under the law of a country outside England and Wales; the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced ...

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) ..."

THE ISSUES

Mr Shaw QC in opposing the application contended that the application was ill founded under Order 16 Rule 1. What the applicant claims on the face

of the draft third party notice is a that any loss or damage suffered by the plaintiff was sustained wholly or in part by the negligence and breach of contract of the solicitor, and an apportionment by the court of liability as between the applicant and the third party. That was different from what Mr Lavery QC was contending in his submissions. Mr Lavery in his submission indicated that the applicant was seeking an indemnity or contribution from the solicitors thus bringing the case within Order 16 Rule 1(1)(a) rather than Rule (1)(1)(c). He made clear that he was relying on the provisions of section 1(1) of the 1978 Act. Mr Shaw contended that the Court should in its discretion refuse to permit the joinder of the solicitors at this stage on the ground that it would be unfair to the plaintiff in that it would cause undue embarrassment and a delay. The applicant could bring separate proceedings at a later stage depending on the outcome of the current proceedings. In terms of embarrassment Mr Shaw argued that the plaintiff would be obliged to find fresh solicitors at this relatively late stage of the proceedings. He pointed out the that matter had been fixed for hearing previously with no indication being given that an additional party was going to be joined. He referred to the contents of paragraph 9 of the affidavit of Mr McEvoy grounding the application to join Hewitt & Gilpin as a third party. That affidavit made clear that the applicant and his advisers had been live to the issue of whether the solicitors should be joined many months ago and a decision was taken at an earlier stage not to make an application.

At this stage I consider that the court should look at the substance of the applicant's application rather than parse too closely the draft third party notice which can be amended to reflect the substance of the case. Accordingly I shall proceed on the basis that the applicant is in effect founding this application on the basis that the matter falls within section 1(1) of 1978 Act.

Two central issues appear to me to arise. Firstly, could the applicant recover contribution from Hewitt & Gilpin in respect of the "same damage" for which the applicant may be liable to the plaintiff? Secondly, if the case falls within section 1 of the 1978 Act should the court in the circumstance refuse leave to join Hewitt & Gilpin at this stage as the third party, leaving it to the applicant to bring separate proceedings against Hewitt & Gilpin. This second issue would not arise if the first issue is decided in favour of the solicitors.

THE APPLICANT'S CLAIM FOR CONTRIBUTION OR INDEMNITY

In explaining section 1 (1) of the 1978 Act Nourse LJ in Birse Construction Ltd v Haiste Ltd [1996] 2 All ER 1 said:

"The first requirement is that there should be a person, A, who is liable in respect of damage suffered by another person, B. The second requirement is that there should be a third person, C, who is liable in respect of the same damage (whether jointly with A or otherwise). If those two requirements are satisfied, A may recover contribution from C. The question is what is meant by the words "the same damage." The only synonym for "same" being "identical", the words in their natural and ordinary sense can only mean "the damage suffered by that other person" ie B. ... the effect of the words is simply to extend as against others the right to contribution which was

formerly conferred against joint tortfeasors only by section 6 of the Law Reform (Married Women & Tortfeasors) Act 1935. That is the significance of the words whether jointly with him otherwise.”

In *Friends Provident Life (Office) -v- Hillier, Parker, May and Roden (the firm)* [1995] 4 All ER 260 developers entered into an agreement with the plaintiff for the development of a shopping centre. The plaintiff engaged the defendant firm of chartered surveyors as advisers and development consultants. Part of the defendants’ duties involved checking and authorising payments of the developers claims for the plaintiff’s share of the development costs. The developers submitted a number of claims to the plaintiff including in each a figure for notional interest. The defendant recommended to the plaintiff that it pay such sums, which it did. The plaintiff subsequently issued proceedings against the defendant alleging negligence and breach of contract for its failure to advise the plaintiff that the notional interest was wrongly included in the developers’ claims and claiming damages equal to the amount of the interest paid. The defendant issued third party proceedings against the developers claiming contribution pursuant to the 1978 Act. The Court of Appeal considered that the third party was properly joined. The 1978 Act was formulated to provide for contribution in circumstances spanning a variety of causes of action, forms of damage and remedies. It was clear from the wide language of section 6 (1) that liability to contribute was not dependant on any particular breach of duty or default nor should the reference to responsibility for damage in section 2 (1) be so narrowly construed as to have that effect.

The restitution reclaimed by the plaintiff against the developers for repayment of the notional interest, either on the basis that it was paid under a mistake of fact or for no consideration was a claim in respect of the same damage alleged by the plaintiff against the defendant being for the notional interest actually paid so as to enable the defendant to claim a contribution or indemnity against the developers under the Act. It is to be noted that what was at issue was a claim for the notional interest which the defendants allegedly negligently advised the plaintiff to pay, thereby causing the plaintiff damage and the claim against the third party was that the third party was bound to repay that same sum on the basis of the principles of restitution.

Where A sues B to recover damages to compensate him for loss in any given situation, B's right to recover contribution or indemnity from C can only arise if A could sue C to recover for the same loss or damage. Thus a right to contribution or indemnity can only arise if instead of A suing B, A could have sued C, and recovered in respect of the same damage.

The plaintiff's claim against the applicant is for loss of profits and for professional fees and management time. While the claim is variously expressed as a claim in negligence, deceit and breach of warranty of authority, it is at its heart a claim based on a breach of warranty of authority by the applicant misrepresenting his authority to bind the other clerical defendants. As stated in *Bowstead on Agency* in paragraph 9.074 the measure of damages for breach of warranty authority is the loss which the party should reasonably have contemplated as liable to result from the breach of warranty. Where a

contract is repudiated by the person on whose behalf it was made on the ground that it was made without his authority such loss is prima facie, the amount of damages that could have been recovered from him in an action if he had duly authorised and subsequently refused to perform the contract, together with the costs and expenses of any incurred in respect of any proceedings reasonably taken against him on the contract.

The question is whether the proposed third party is potentially liable for the same damage. The case made against the solicitors is in essence that they failed to notice that the transaction that the plaintiff was entering into was invalid. In such a case, the measure of damages is stated thus in Jackson & Powell on Professional Negligence of paragraph 4.244:

“Where a solicitor fails to notice that a transaction his client is entering is invalid, the normal measure of loss will be the client’s wasted expenditure. Thus in Clarke v Milford [1987] 38 DLR (4th) 139 a solicitor acting for a purchaser of land failed to notice that the vendor was unable to convey any interest in the property. The plaintiff recovered money advanced on the purchase price and taxes he paid on the property but not the diminution in value of the property.”

In this case the solicitors are not potentially liable to the plaintiff in respect of the same damage for which the applicant is potentially liable to the plaintiff. Accordingly, I do not consider that a right of contribution or indemnity arises under the 1978 Act. Accordingly leave to join Hewitt & Gilpin is refused.

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Defendants

J U D G M E N T O F

G I R V A N J
