

Neutral Citation No. [2005] NIQB 44

Ref: **COGC5299**

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

Delivered: **01/06/2005**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (COMMERCIAL LIST)**

BETWEEN:

GRANSHA HOSPITAL STAFF SOCIAL CLUB

Plaintiff;

and

**DAVID CANNING AND JOSEPH MONTEIFF TRADING AS
MC CONSTRUCTION AND JT CARUTHERS**

Defendants.

COGHLIN J

[1] This is an application on behalf of the first named defendant for an Order pursuant to Order 16 r.2 of the Rules of the Supreme Court (Northern Ireland) 1980 giving leave to the first named defendant ("this defendant") to issue a third party notice joining Peter Long and Esther Loughlin as the personal representatives of Ivan Loughlin deceased, formally practising as ADMS Architectural and Mapping Services ("the proposed third parties") as third parties in this action. For the purposes of this application the defendant was represented by Mr Spence while Mr McMahon appeared on behalf of the proposed third parties. I am grateful to both counsel for their carefully prepared and well focused submissions.

The background facts

[2] In or about 1996/1997 the plaintiff entered into a contract with the first named defendant as main contractor for the construction of a new staff social club at Gransha Hospital, Londonderry. Among other things, the construction works included the provision, installation and commissioning of a new heating system in respect of which this defendant engaged the second named defendant as a sub-contractor. Unfortunately, the heating system proved to be defective and, as a consequence, the plaintiff has claimed a total of some £40,000, together with interest, to make good the plumbing system

and ancillary works. The plaintiff also claims loss of profits in respect of any period when the plaintiffs club will be forced to close pending installation of a new heating system.

[3] It appears that the plaintiff appointed the deceased, an architectural technician, who practiced as ADMS to prepare contract documents and administer the contract. The initial site meeting seems to have taken place in June 1996 when a Clerk of Works, Jack Boyce, attended as the representative of ADMS. Mr Boyce prepared clerk of works reports on a weekly basis throughout the contract.

[4] It is alleged that a number of problems developed with the heating and plumbing system including air-locks in the hot cylinder, pin-hole leaks in the radiators and corrosion in the valves and motor. It is also alleged that there was dampness in the kitchen which indicated leakage.

[5] The experts retained on behalf of the defendants have concluded that the workmanship of the second named defendant and its plumbing contractors was sub-standard and has given rise to substantial leakage from the system. It seems that most of the pipe-work was buried in the floor screed and both experts have advised that, before this was done, testing should have been carried out in accordance with the guidelines issued by the Heating and Ventilation Contractors Association (HVCA) and Chartered Institute of Building Services Engineers (CIBSE). This guidance includes a recommendation that, before any pipe-work is buried, a pressure test should be carried out. Such testing should be witnessed by the clerk of works or the client's representative and the signature of the clerk of works or such representative should be recorded on the test documentation.

[6] It is alleged on behalf of the plaintiff that such testing should have been carried out by the deceased or his Clerk of Works, Mr Boyce, and it is further argued that the deceased should have provided a design specification for the new heating and plumbing system. It is alleged that such a specification should have spelt out the need for pressure testing of the pipes, that the clerk of works should have ensured that such a pressure test was carried out and that any pipe-work below floor level should have been contained in ducts to allow easy inspection.

[7] This defendant maintains that it was not contacted by the plaintiff in relation to problems with the heating and plumbing system until early 2002 when representatives of this defendant attended at the premises and opened the floors for the purpose of investigation. It seems that on 10 June 2002 the loss adjustor acting for the plaintiff's insurance company wrote to the plaintiff repudiating cover for the plumbing and heating system and the damage resulting therefrom and the initial letter of claim was written on 25 September 2002.

[8] The writ of summons was issued on 20 May 2003 and the statement of claim delivered on 9 December 2003. A defence was delivered on behalf of this defendant on 25 February 2004 and this defendant received a report from Mr Declan Cosgrove, Consulting Engineer, on 6 September 2004.

[9] It seems that the deceased had a long standing association with the plaintiff club and had taken part in different sporting activities. The deceased and his wife were the sole partners in the proposed third party firm although the duties of the deceased wife were purely administrative and she had no architectural qualifications. The deceased died on 24 February 2004.

[10] By summons dated 23 November 2004 the plaintiff applied to join the proposed third parties as defendants to the action in accordance with the provisions of Order 15 r.6. The said application was dismissed by Order dated the 25 day of February 2005.

The submissions

[11] On behalf of the proposed third parties Mr McMahon objected to leave being granted to this defendant on the ground of delay and significant prejudice resulting from the death of the deceased. On behalf of this defendant Mr Spence argued that, while the original document had been delivered on 9 December 2003, the statement of claim had been amended on 29 October 2004 and re-amended on 17 December 2004. Furthermore the experts advising the defendants, Mr Cosgrove, Consulting Engineer, and Mr Downie, Consultant Electrical and Mechanical Engineer, had not inspected the premises until 4 October 2004 with a report from the former becoming available at the end of October 2004 and one from the latter in November 2004. Mr Spence submitted that, even if this defendant had issued a third party notice prior to delivery of the defence on 25 February 2004, any prejudice resulting from the death of the deceased inevitably would have affected the presentation of the defence on behalf of the third party in any event and, in the circumstances, it was not unreasonable for this defendant to wait until the plaintiff's application to join the proposed third parties as defendants had been completed. I note that Mr Boyce is still available to give evidence.

[12] In Grogan v Ferrum Trading Company Limited [1996] 2 ILRM 216 Morris J expressed a view that a period of two and a half years from the delivery of the statement of claim to an application by a defendant to join a third party was quite unreasonable. In this case the original statement of claim, served on 9 December 2003 made a case of failing to test and inadequate supervision against this defendant although I consider that there is substance in Mr Spence's submission that, even if this defendant had issued a third party notice prior to the delivery of its defence, the proposed third

parties would have been compelled to conduct the defence of the third party proceedings without the assistance of the deceased. At a review on 8 September 2004 the plaintiff indicated its intention to apply for leave to join the proposed third parties as additional defendants and, in the circumstances, I do not consider that it was unreasonable for this defendant to await the outcome of this application. In Dingle's Builders (NI) Limited v Brooks and Others [2002] NICA 38 the Court of Appeal confirmed that the lateness of the application was a factor which could be taken into account by a judge considering an application under Order 16 r.2. In that case the application to issue the third party notice against the plaintiff's solicitors was brought before the judge at first instance some three weeks prior to the date for hearing of the substantive action and the Court of Appeal considered that it was "incontestable" that the defendant's advisors should have moved much earlier having appreciated the possibility of instituting a claim for some 11 months after service of the amended statement of claim. My own impression from reading the judgment is that the judge at first instance took into account not only the period of delay but also the imminence of the trial date when the relevant application was made.

[13] In this case any prejudice accruing to the potential third parties in their defence of the third party proceedings as a result of the unfortunate death of the deceased had already occurred prior to the delivery of the defence on the 25 February 2004. At that stage the delivery of the defence was probably delayed by some seven weeks. As I have already indicated, I do not think that it was unreasonable for this defendant to suspend consideration of this application pending the outcome of the plaintiff's application to join the potential third parties as co-defendants. Thus, the relevant period of delay would appear to amount to some seven or eight months. A date for the substantive hearing has yet to be fixed. In the circumstances, I am persuaded that this is a proper case in which to exercise my discretion and permit this defendant to issue a third party notice against the proposed third parties.