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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

McCALLION BROTHERS LIMITED

Plaintiff

-v-

GRAHAM FISHER, NORTHERN IRELAND HOUSING EXECUTIVE AND CLANMILL HOUSING ASSOCIATION LIMITED

Defendants

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DEENY J

[1] In this action of McCallion Brothers Limited against Graham Fisher, Northern Ireland Housing Executive and Clanmill Housing Association Limited Mr Martin McDonnell appears for the plaintiff, Mr Keith Gibson for the first defendant and Mr William Gowdy for the second and third defendants. The matter is before me on the first defendant's application to join as a third party to the action the firm of Patrick Fahy and Company, solicitors. The said firm are currently the solicitors for the plaintiff. The matter arises in this way. The plaintiff company wished to and did purchase from the first defendant the premises at 191 Duncairn Gardens, Belfast. Both purchaser McCallion Brothers Limited and vendor Graham Fisher retained solicitors. They carried out a number of searches which sadly did not reveal that Mr Graham Fisher had ceased to be the legal owner of 191 Duncairn Gardens, Belfast as it had been vested by the Northern Ireland Housing Executive. As the main action is still very much alive I shall not say too much about that, but criticism is made of the Housing Executive for not registering their Vesting Order in the Registry of Deeds. They did register subsequently in the Land Registry, by way of first registration, but Mr Stephen Gowdy, conveyancing expert for the first defendant, says they were in error in doing that.

[2] The long and the short of it is that the plaintiff has paid £198,000 for property to which there is no title. Understandably it sued the vendor and it has sued the Northern Ireland Housing Executive and also the third defendant to whom the Executive had sold the property and that party had since begun to or had demolished the premises in question for the purposes of providing housing. The point advanced by Mr Gibson is this. He wishes to join the plaintiff's solicitors. I

pause to observe that it would not be uncommon in cases of this kind, although the particular facts of this case are a little unusual undoubtedly, for a plaintiff in the position of this plaintiff to sue the then solicitors, who after all have failed to obtain good title to the property for which they had paid good money. But this was not done here. That is the right of the plaintiff and of course one does not know what advice the plaintiff company received in that regard. But Mr Gibson for the first defendant wants to join Patrick Fahy & Company third parties. He realistically accepts that the only way in which he can do this is on foot of the Civil Liability (Contribution) Act 1978. Section 8 of that Act applies it to Northern Ireland. Section 3 reads as follows:

> "Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) liable with him in respect of the same debt or damage."

Section 1(1) reads:

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

Section 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 its estate or dependents) 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)."

[3] The most important issue therefore between the parties here and to be determined by the court is whether Fahy and Company are liable in respect of the same damage as Graham Fisher the vendor. As has been said in a number of cases including the decision of the House of Lords in the Brompton Hospital case [2002] UKHL 14; [2002] 2 All ER 801; same damage is effectively the same as the same harm. But it is not the same as the same damages, plural. It is obviously a crucial concept. If one thinks of the elements of a tort, which require a duty on the tortfeasor, or alleged tortfeasor, with breach of that duty which then causes damage to the plaintiff, it can be seen therefore as the authorities say to be equivalent to loss as well.

[4] Mr Gibson's submission is that the plaintiff here is entitled to recover and therefore he is entitled to join as a contributor Fahy and Company, because Fahy and Company are liable in respect of any damage etc. here. The fact that they are not liable in the same way i.e. that they are liable if they are negligent whereas the vendor is in breach of contract having failed to give good title is expressly dealt with by Section 6(1) which refers, as I have quoted, to "whatever the legal basis of his liability whether tort, breach of contract, breach of trust or otherwise" and that certainly seems to be right. He draws attention to the leading authorities and I have heard his submissions and those of Mr McDonnell. I think it is probably necessary for me to refer to three cases. In Dingle Builders (Northern Ireland) Limited v The Most Reverend Francis Gerard Brooks and Others (2002) the Court of Appeal heard an appeal from my predecessor Mr Justice Girvan in a not wholly dissimilar case. There the plaintiff had purchased 3.47 hectares of land from, I think, the then Bishop of Dromore and other members of the clergy of the Catholic diocese involved. He did so on the strength of a single signature from a Father Poland who was one of the trustees. Subsequently the rest of the trustees or sufficient of them repudiated the contract and the plaintiff sued for, inter alia, loss of development profits, loss of professional fees etc.

[5] The Court of Appeal upheld the judgment of Mr Justice Girvan, though I have not seen his written judgment but I have the judgment of the Court of Appeal. The key paragraph it seems to me is paragraph [15] of the judgment of Lord Chief Justice Carswell and I quote:

> "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)."

Therefore he did give a judgment in the matter but I have not had the benefit of seeing that.

[6] Mr Gibson submits, and I accept his submission, that the facts before me are distinguishable from those facts. I put to Mr McDonnell who said everything possible that could be said on behalf of what are still his solicitors, his professional clients in this matter, what was the difference in harm here? The claim against the first defendant as the vendor is that the plaintiff paid £198,000 for property and did not get good title to that property. As I see it that is exactly the claim which they could bring against their own solicitors, that they paid £198,000 for a piece of property and did not get good title to it. So despite Mr McDonnell's best efforts it does seem to me that that is the same harm, at least so far as some aspects of the possible negligence. I will have to return to the question of first registration at a later date. As well as Dingle Mr Gibson and Mr McDonnell rightly draw the court's attention to two other cases. One of them is the decision of the House of Lords in Royal Brompton Hospital National Health Service Trust v Hammond and Others [2002] 2 AER 801 [2002] UKHL 14. In that case under a contract for the construction of new hospital premises the contractor had to pay or allow the employer liquidated ascertained damages at a specified weekly rate if the contractor failed to complete the works by the completion date. Practical completion was certified over 43 weeks later than the contractual completion date, but the architects under the current contract granted the contractor's extension of time up to the date on which practical completion was certified. It is perhaps simplest, without disrespect to the distinguished Law Lords who made up the court, to read the headnote in regards to the conclusion of their Lordships:

> "On the true construction of Section 1(1) of the 1978 Act the words 'the same damage' do not mean 'substantially or materially similar damage'. The legislative technique of limiting the contribution principle under the 1978 Act to the same damage was a considered policy decision. The context did not therefore justify an expansive interpretation of the words 'the same damage'. No glosses extensive or restrictive were warranted. The natural and ordinary meaning of 'the same damage' was controlling. It had been a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rested upon the fact that they, whether

> equally with B or not, were subject to common liability to A. There was nothing in Section 1(1) which in any way weakened that requirement. Indeed the use of the words in respect of the same damage emphasised the need for one loss to be apportioned among those liable. Thus when any claim for contribution fell to be decided the questions which arose for consideration were (1) what damage had A suffered; (2) was B liable in respect to that damage; and (3) was C also liable to A in respect of that damage or some of it. At the striking out stage the question had to be recast to reflect the rule that it was arguability and not liability that fell for decision. But their essential thrust was the same. In phrasing those questions it did not matter greatly whether one spoke of damage or loss or harm provided it was borne in mind that damage did not mean damages and that B's right to contribution by C depended on the damage, loss or harm for which B was liable to A corresponding even if in part only with the damage loss or harm for which C was liable to A. It follows that in order to determine whether claims were for the same damage it was necessary to conduct a legal analysis of those claims. In the instant case the employer's claim against the contractor was for late delivery of the building while the essence of the case against the architects was that their breach of duty had changed detrimentally the employer's contractual position against the contractor. Accordingly neither had a claim satisfying the statutory criterion and the appeal would therefore be dismissed."

Now I respectfully accept that analysis there and I accept Mr Gibson's submission that again that can be distinguished from the present facts before me and indeed though perhaps not expressly relied on by him the emphasis there emanating from the judgments of their Lordships emphasises that the party in the equivalent position to Mr Fahy only has to be liable to the innocent party in respect of that damage or some of it. I note in particular in paragraph [6] where Lord Bingham dealt with this and paragraph [7] which concludes with this sentence. "The employer's claim against the architect based on negligent advice and certification would not lead to the same damage because it could not be suggested that the architect's negligence had led to any delay in performing the contract". But here you could not use the same language about the parties. If, and it is very much an if at this stage, Patrick Fahy and Company were negligent it had the effect of enabling their client or permitting him, or encouraging it, as it is a limited company, to pay

the purchase price for the property when in fact the vendor had no good title : which is exactly the harm committed by the vendor.

[7] The principal judgment of the House was in fact delivered by Lord Steyn and again on reading it over the luncheon interval it seems to me that it is not inconsistent with the case made by the first defendant here. He points out, slightly unusually but at paragraph [24] he sets out the long title of the 1970 Act as follows:

> "To make new provision for contributions between persons who are jointly or severally, or both jointly and severally, liable for the same damage and in certain other similar cases where two or more persons have paid or may be required to pay compensation for the same damage and to amend the law relating to proceedings against persons jointly liable for the same debt or jointly or severally or both jointly and severally liable for the same damage."

And that is a useful reminder that it is of the essence of the relief under the Act that the parties can be jointly or severally liable, clearly severally in this case. And it seems to me also of help in reminding one that two or more persons may be required to pay compensation. Well if the plaintiff chose to sue his then solicitors, admittedly his present solicitors they may in my view, to which I will return in a moment, they may be required to pay compensation.

[8] Mr Gibson had also relied on the judgment of Sir Richard Scott, Vice Chancellor as he then was, and in fact it is cited with clear approval by Lord Steyn also in the course of his judgment and it is to this effect : it is a dictum in the case Howkins and Harrison v Tyler [2001] Lloyd's Reports PN 1 at page 4 paragraph 17 of the judgment where the then Vice Chancellor was sitting with Lord Justice Sedley and Lord Justice Aldous and he observed as follows:

> "Suppose that A and B are the two parties who are said each to be liable to C in respect of 'the same damage' that has been suffered by C. So C must have a right of action of some sort against A and right of action of some sort against B. There are two questions that should then be asked. If A pays C a sum of money in satisfaction, or on account, of A's liability to C will that sum operate to reduce or extinguish, depending upon the amount, B's liability to C? Secondly, if B pays C a sum of money in satisfaction or on account of B's liability to C would that operate to reduce or extinguish A's liability to C? It seems to me that unless both of those questions can be given an affirmative answer the case is not one to which the

> 1978 Act can be applied. If the payment by A or B to C does not pro tanto relieve the other of his obligations to C there cannot, it seems to me, possibly be a case for contending that the non-paying party whose liability to C remains unreduced will also have an obligation under Section 1(1) to contribute to the payment made by the paying party."

Now again I accept the submission that that is of assistance here. It seems to me clear that if for argument sake the vendor pays £100,000 out of this £198,000 to McCallion Brothers Limited but perhaps because they had no other means that was the only relief that McCallion Brothers Limited received that they could not turn round then and sue Mr Fahy for the whole £198,000, but they could if they were not out of time, turn round and sue him for the balance plus interest and therefore Lord Scott of Foscote, as he now is, his dictum seems to me applicable to this case and supportive of the first defendant. I note Mr McDonnell's submissions in his helpful chronology and background received by the court that this is an embarrassment to the plaintiff and the Supreme Court Practice acknowledges that as a factor which the court could take into account in the exercise of a discretion. He is quite entitled to make that point but it seems to me that the position is as follows. In support of the point it is almost inevitable that McCallion Brothers Limited will have to acquire new solicitors if I grant this application and that is clearly a nuisance to them. The case was set down last July but principally because of this issue about joining the third party it has not yet been given a trial date. Given the enormous pressure of work on the Chancery Division cases are being listed well ahead. A case like this that looks likely to last several days is not going to be listed before the Michaelmas Term at the earliest and in fact there are only four days left in this calendar year and I am speaking on 10 January 2012.

Mr McDonnell: I believe there may be a listing date very far away if I can check that.

Deeny J: I am obliged to Mr McDonnell on the rare occasion when it is proper to interrupt a judge. You are quite right; it wasn't noted here on the current file. But in any event it bears out what I am saying: it is October of 2012. Thank you 2nd to 5th October. I think there is time to change solicitors, complete the third party proceedings and hold the trial date.

[9] That leaves only one possible issue. I am not entirely clear from the note in the Supreme Court Practice whether the applicant does have to show a prima facie case in negligence against the putative third party here. But for the purposes of this ex tempore judgment I will accept that they do have to meet that test. They do so in this way. They have submitted an expert report from Mr Stephen Gowdy, solicitor. Mr Gowdy is a most experienced solicitor generally and is experienced in the conveyancing and property field. His opinion is not necessarily right of course and I make it clear again that I am not making any finding and am not to be taken to bind myself in any way with regard to whether or not Messrs Patrick Fahy and Company

discharged their duty and indeed recently I took a different view in a matter from Mr Gowdy. Having said that he does set out carefully two different respects in which the purchaser's solicitors can be criticised here. One, the Home Charter Scheme is not expressly applicable here because this was a boarded up former home. But it does recommend obtaining a Northern Ireland Housing Executive Property Certificate where the purchaser's solicitor considers it appropriate and necessary. He, knowing north Belfast, says in effect that yes one should have obtained it for a north Belfast house. Mr Fahy based in Omagh might not share that view and might well convince the court of that but it is a possible ground against him. He also says that a land registry search might have disclosed it though that might not be mandatory. I do not fully and entirely follow that given the suggestion that the Executive had failed to register it timeously. But Mr Gowdy concludes with the view that : "Fahy ought to have obtained a Property Certificate from Northern Ireland Housing Executive which may well have given an indication of the fact that the property had been vested." It seems to me that there is enough there. I did in the course of the hearing draw attention to the fact that Fahy and Company were clearly at fault in failing to effect first registration of their client's title within three months as required by statutory provisions and that would be supportive of the case in negligence. But query of course as that is after the assignment it might conceivably not therefore be the same harm. On the other hand if that had been done within the time limit first of all the third defendant would not have been involved in the case at all because they only acquired a title the following year and secondly the matter could have been much more easily sorted out, one would have thought at that time. So on balance I have reached the conclusion again not in any final way at all that the first defendant has shown enough to justify joining the third party and the third party will no doubt take their own course and may vigorously defend their conduct in this matter and if successful the first defendant will have to clearly bear the costs of their participation in the trial. But I think in the light of Mr Gowdy's opinion and of the three possible criticisms of the purchaser's solicitors I should come to that conclusion. As Mr Stephen Gowdy says at the commencement of his remarks "It is almost axiomatic, but in any conveyancing transaction the solicitor for the purchaser is obliged to investigate and to ensure that the vendor has a good and marketable title to pass on to the purchaser". It may be therefore that this is really a breach of contract case rather than a tort case so far as the third party is concerned. But in any event for the reasons that I have just given I do give the first defendant leave to join the third party.