



THE SUPREME COURT

[Appeal No: 70/2018]

**Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.**

Between/

University College Cork – National University of Ireland

Plaintiff/Appellant

and

The Electricity Supply Board

Defendant/Respondent

**Ruling of Mr. Justice Frank Clarke, Chief Justice, delivered October
21, 2020.**

1. This ruling relates to issues raised at a case management hearing conducted before the full panel which heard both the appeal in this matter brought by UCC and which is now due to hear a cross-appeal brought by the ESB.
2. The first issue raised was as to whether it was appropriate for the cross-appeal to go ahead as planned on November 16 next. For the reasons set out in the majority judgments of this Court on the appeal, certain issues have been referred back to the High Court for further determination. It was argued on behalf of the ESB that, in those circumstances, it would not be appropriate for the Court to hear the cross-appeal concerning contributory negligence at this time for, it was said, the Court could not reach any proper conclusion on the relative contributions of UCC and the ESB until the High Court determines the issues which have been remitted back to it.
3. The Court was not persuaded by that argument. It may be that, when the Court has considered the issues which arise on the cross-appeal, it will conclude that some issues may either have to be remitted back to the High Court or, indeed, deferred for further consideration by this Court in the light of the ultimate decision of the High Court on the issues already remitted back. However, the Court does not consider that the possibility that such an eventuality may arise should prevent the cross appeal going ahead to the greatest extent possible.
4. The second issue canvassed concerns the question of whether it is open to the ESB to argue, on the cross appeal, that UCC should be fixed with any liability for damage caused which can be attributed to its professional advisers on the basis of the provisions of s.35(1)(i) of the Civil Liability Act, 1961. The basis of the argument turns on the extent to which that issue was raised in the courts below and, in the light of the Court's view on that question, the extent to which it is permissible to raise the

issue on appeal to this Court in the light of the principles identified in *Lough Swilly Shellfish Growers Co-op v. Bradley* [2013] 1 I.R. 227. In the Court's view it is best to leave this issue over to be determined at the hearing of the cross appeal when the Court will be able to consider the issues in detail.

5. The third issue which requires to be determined concerns the extent to which it is open, on this cross appeal, for UCC to argue that contributory negligence in excess of 40% should be determined against UCC. The High Court fixed UCC's contribution in that percentage. The Court of Appeal did not find it necessary to make a final decision on the issue of contributory negligence given that the Court of Appeal came to the view that the ESB were not negligent in the first place. However, the Court of Appeal did observe that certain elements of the findings of the High Court on the issue of contributory negligence were not, in the view of the Court of Appeal, sustainable. For the purposes of the cross appeal to this Court the ESB does not seek to depart from those views expressed in the judgment of the Court of Appeal.

6. In the view of the Court the argument put forward which suggests that the ESB are precluded from seeking to have this Court fix a higher percentage of contribution is based on a very narrow pleading point. On that basis the Court considers that the ESB should be entitled to argue for a higher percentage of contributory negligence than that awarded by the High Court although it will, in so arguing, obviously have to face questions arising out of the fact that some of the bases on which the High Court concluded that 40% was an appropriate determination of the distribution of liability, are now longer in the case. For the avoidance of doubt and for completeness the ESB should amend their notice of cross appeal to make clear that this issue remains open before this Court.

7. On that basis the appeal will go ahead as planned.

Approved
15th - 11 - 2021
Niche