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2015/44814

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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Between:

ALAN FERGUSON AND GEORGINA FERGUSON

Plaintiffs

and

LESTER WEIR
and
WEIR JOINERY AND CONSTRUCTION LTD

and

RAYMOND GILLESPIE T/A PRESTIGE HOMES

Defendants

and

ALPHA INSULATION LIMITED

Third Party

_____

HORNER J

Facts

[1] Alan Ferguson and Georgina Ferguson are husband and wife. They are the owners of 111 Lurganeden Road, Pomeroy, Dungannon ("the Premises"). They claim that the defendants were guilty of breach of contract and negligence in and about the carrying out of design and building work at the Premises, a two-storey dwelling house.

[2] Alpha Insulation was engaged as a sub-contractor to carry out insulation work at the premises. There has been much debate as to whether the party

contracting with the defendants was Gary Johnston T/A Alpha Insulation or Alpha Insulation Ltd. On the face of the final invoice it does not appear that the contracting party was a limited liability company. However, that is a matter that does not need to be explored in this judgment.

[3] Alpha Insulation was joined as the third party on 27 October 2015. On 23 May 2016 there was a meeting of the plaintiff and the defendants' experts. No expert attended on behalf of Alpha Insulation. At that meeting it was noted that:

> "There is no evidence that the cavity insulation is causing the damp penetration that is visible in the house."

[4] On 22 June 2016 the solicitors acting on behalf of Alpha Insulation sought to be released from the action by the plaintiffs. The letter was in the following terms:

> "We refer to the above matter and acknowledge receipt of the First and Second Defendants' Statement of Claim against the Third Party. We also acknowledge receipt of the agreed minute of the joint meeting of experts which took place on 23 May 2016. We note that the experts are agreed that **there is no evidence that the cavity insulation is causing the damp penetration that is visible in the house.**
>
> It is abundantly clear that our client has no liability to any of the other parties in this litigation and we therefore invite you to discontinue proceedings against our client within 14 days. If we do not hear from you in this regard it is our intention to brief counsel, contest to this case fully and seek costs."

[5] On 25 July 2016 the defendants' solicitors replied on a without prejudice basis advising that the defendants would be willing to allow the third party proceedings to be withdrawn subject to Alpha Insulation meeting their own costs.

[6] The solicitors for Alpha Insulation replied on 25 August 2016 confirming that they had their client's authority to bear his own costs in consideration for the third party proceedings "against him being withdrawn". It went on to say that they would be grateful if the defendants' solicitors "would arrange to let us have a stamped copy of the Notice of Withdrawal as soon as possible in any event within 14 days".

[7] A Notice of Discontinuance was served by the defendants on 7 October 2016.

[8] On 15 December 2016 the defendants' solicitors again wrote to Alpha Insulation's solicitors as follows:

> "You will recall that at a joint meeting of experts on 23 May 2016 it was agreed that there was no visible evidence that the insulation was causing the damp penetration that was visible in the house. In the light of that recommendation, the position of your client as insulation contractor was reviewed and a view was taken that he could be released from the action. However, further developments have now occurred to indicate that your client should continue to be involved as a party. In October 2016, the plaintiffs unilaterally proposed further investigations in relation to the insulation, inter alia, a joint inspection took place at the dwelling on or about 9 November 2016 with Mr Barr (for the plaintiff) and Mr Hutchison (for the third defendant) both present. These inspections were facilitated by the opening up of three low level inspection holes. Following this inspection and a further inspection by our expert there is evidence of inadequate installation of the insulation in fill, works carried out by your client. As a result, on further review in the light of the fresh evidence now available, and in the light of the expert's advice on the adequacy of the insulation infill it is our client's intention to continue to hold your client responsible as the third party in these proceedings being the party responsible for conducting the insulation work."

[9] This was then followed up by letter of 8 September 2017 from the defendants' solicitors confirming that they intended to seek leave to issue third party proceedings against Alpha Insulation.

[10] The matter eventually came on for hearing in March 2019 as to whether or not the defendants are precluded from joining Gary Johnston t/a Alpha Insulation as a third party to the present proceedings.

Discussion

[11] There is a requirement for finality in our legal system. Lord Wilberforce set out clearly the reasons for this in *The Ampthill Peerage Case* [1977] AC 547, 569:

> "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to … reopen disputes. …

> Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth, … and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards**:** so the law allows appeals: [and] … allows judgments to be attacked on the ground of fraud …"

[12] However, finality does not depend on whether a decision can be appealed: see *Nouvion v Freeman* [1889] 15 App Cas 1.

[13] There is no dispute that in this case the parties agreed a withdrawal of the defendants' third party claim. This was given effect to by the defendants serving a Notice of Discontinuance. The agreement was to permit the defendants to discontinue upon terms, namely, that the third party would bear the costs that it had incurred up to that date.

[14] Foskett on Compromise (8th Edition) states at 9.38:

> "**Withdrawal or discontinuance**
>
> Subject to the appropriate rule, an action may be withdrawn or discontinued by consent either unconditionally or upon terms. Both have the effect of putting an end to the proceedings even for the purpose of enforcement of agreed terms unless they are **kept alive** specifically for such purpose. Neither course precludes the commencement of fresh proceedings based on the same cause of action unless, on the true interpretation of the terms of the agreement underlying the consent, it is clear that a discharge of all claims was intended."

[15] Phipson on Evidence at 43.05 (19th Edition) agrees and makes it clear that a decision will not be final if the proceedings are discontinued or withdrawn.

[16] So as a general proposition proceedings which have been withdrawn or discontinued can be brought again unless the underlying consent agreement prevents this. In the *Owners of the Kronprinz v the Owners of the Kronprinz (The Kronprinz and the Ardandhu)* [1887] 12 App Cas 256 HL a collision occurred between two vehicles, K and A. The owners of K brought an action for damages against the owners of A. An agreement was drawn up between the respective solicitors in which the solicitors for A's owners said that they consented **to this action being discontinued without costs on the grounds of inevitable accident**. An order was subsequently made in the following terms:

> "Upon consent of both solicitors, it is ordered that the action be discontinued, without costs, on the ground of inevitable accident."

[17] The question arose subsequently of whether the agreement and order giving effect to it represented a mutual release of all claims or whether, as the owners of K argued, there was merely a discontinuance with all matters remaining potentially open. The House of Lords held that the parties must be taken to have intended the words of the agreement and the order to have their natural and ordinary meaning, namely that this was a discontinuance, leaving the possibility for each party to reassert its rights at a later date. Had the parties used the words "this action should be dismissed, then no further proceedings would have been possible". Lord Halsbury LC said:

> "My Lords, this appeal turns upon a somewhat narrow question, namely, what is the meaning of the agreement between the parties and what is the effect of the order which purported to carry it out? Those are the only materials from which to ascertain what the agreement between the parties was. I can find no clue to what the object of the parties was except in those two documents. But it is important to observe that the parties entering into the arrangement were the two solicitors, who must be taken to be familiar with the effect and meaning of the forms which they were using. It being conceded it is a matter of law the form which they adopted was one which allowed all matters to be open and did not conclude the rights of the parties, the question of the form which they used becomes very material in construing their meaning. It would have been easy to have said that **this action should be dismissed**; and if they had said that, it is admitted that as between these two parties a bar would have been created which would have prevented any further proceeding. But they deliberately (people must be supposed to intend the reasonable consequence of their acts) adopted language

> that can only be used if it is the intention of the parties to leave themselves at large so as to reassert their rights if they please …
>
> It seems to me that the plain and obvious inference which is to be drawn from this instrument is that the parties intended that which is the plain interpretation of the language which they have used and as there is nothing to cut down that interpretation I assume that that is what they have meant; and inasmuch as that is the real meaning of the bargain a fact entered into between the parties it appears to me that it is competent for the owners of the *Kronprinz* to make this claim."

[18] In this case the parties agreed to permit the defendants to withdraw/discontinue against the third party and that the third party would bear his own costs. On the face of this order, namely for discontinuance, there is nothing to prevent the defendant from re-litigating the dispute, namely whether the third party is obliged to indemnify the defendants or to make a contribution in respect of any successful claim made by the plaintiff arising out of the insulation of the Premises and in particular the insulation installed into the cavity walls by the third party.

[19] There is no doubt that it is important that I construe the agreement reached between the defendants and the third party by which the defendants discontinued its claim for an indemnity and/or contribution against the third party so as to permit me to determine whether this precludes the defendants from reissuing a third party notice. In *AKO v Rothschild Asset Management Limited* [2002] EWCA Civ 236 Mummery LJ said as follows in respect of a dispute as to whether or not the plaintiff was barred by the principles of estoppel and res judicata from bringing a second application before the Employment Tribunal. He said at paragraph [27]:

> "Although Lennon highlights the importance of the fact that an order for dismissal has been made, the decision does not preclude the application of the general principle that a court may have regard to the facts and circumstances surrounding a consensual legal act (the matrix of fact) in order to understand its meaning and effect: *Investors Compensation Scheme Limited v West Bromwich Building Society Limited* [1998] 1 WLR 896 at 912F-913B. An order dismissing an action by consent operates in the same way as dismissal by adjudication: the cause of action expires with the dismissal and the fact of the order being made precludes fresh proceedings based upon the same or substantially the same grounds. However, in the event of a subsequent disagreement as to

> the extent of the dispute settled by a consent order, evidence of the objective background to the consent and to the making of the order would be admissible, even though direct evidence of the parties as to their subjective intentions would not be: see Foskett on the Law of Compromise (4th Edition) 1996 at paragraph 6.05."

[20] In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 Lord Hodge giving the judgment of the Supreme Court said at paras [10]-[11]:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, **A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision** Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
>
> 11. Lord Clarke elegantly summarised the approach to interpretation in the *Rainy Sky* case at para 21f. In the *Arnold* case all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can

> give weight to the implications of rival interpretations by reaching a view as to which interpretation is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing interpretations the court must consider the quality of drafting of the clause (Rainy Sky para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

[21] Applying those principles to the agreement here, the only conclusion that can be reached is that this was never intended to be a final order precluding the defendants from taking further proceedings. Both parties were legally represented by competent and conscientious solicitors. Both legal representatives would have been well aware that there were a number of options for ensuring that this was a final order which could not be re-opened, if that was what was desired. For example, the third party could have been given judgment against the defendants with no order as to costs. The third party proceedings could have been dismissed.

[22] In this case the legal practitioners in circumstances where the third party had obtained no expert evidence, but was relying on the expert evidence of the plaintiff and the defendants, which completely exonerated the third party, agreed that the defendants could discontinue with no order as to costs. In the circumstances and given that it was solicitors who were making the agreement I conclude that the ordinary meaning should be given to the words chosen and that the withdrawal/discontinuance did not amount to a final order. As such it does not preclude the defendants from later issuing further third party proceedings against the third party.

[23] In the alternative Mr Gibson urged the court to imply a term into the agreement between the defendants and the third party that the agreement was in full and final settlement of all possible claims the defendants could have against the third party. The defendants' action in issuing a further third party notice in those circumstances was an abuse of process and/or barred by cause of action estoppel. When Mr Gibson was asked to explain the basis on which a term should be implied into the final order for disposal of the claim between the defendants and the third party, which precluded any further proceedings by the defendants against the third party, Mr Gibson relied on business efficacy. However, he was unable to explain or chose not to develop the argument as to why such a term should have been the presumed intention of the parties when the agreement reached between their legally

qualified representatives was to withdraw and/or discontinue. I do not consider that business efficacy requires the court to imply a term that precludes further third party proceedings.

[24] The other means of implying a term in fact is that such a term is an obvious inference: see *Reigate v Union Manufacturing Co (Ramsbottom Ltd)* [1918] 1 KB 592 at 605. But there is no evidence at all that the defendant would have said "of course" when asked if the withdrawal/discontinuance prevented further litigation should it transpire that the experts retained by the plaintiff and the defendants were wrong and there was cogent evidence of negligence on the part of the third party who installed the insulation. If the question had been asked by an innocent bystander, then at best, the parties would have agreed to differ.

[25] Mr Gibson also raised the case of *Johnston v Gore Wood* [2002] 2 AC 1 but the facts of that case are entirely different to the facts of the present case. Lord Millet said:

> "Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.": see page 47

[26] This is not the situation here. The third party was legally represented. Neither the third party nor his legal representative on the evidence before this court was in any way misled.

Conclusion

[27] In the circumstances, I find that the defendants are entitled to issue a further Third Party Notice against the third party despite the defendants having discontinued/withdrawn an earlier Third Party Notice. There is an <u>important</u> distinction between having proceedings discontinued/withdrawn and having proceedings dismissed or obtaining judgment. The former does not usually preclude further action; the latter usually does. It is a distinction which legal practitioners can be expected to understand and appreciate when concluding settlements on their clients' behalves.