

1983 - 3483P

THE HIGH COURT

BETWEEN

GEORGE STAUNTON

PLAINTIFF

AND

TOYOTA (IRELAND) LTD AND FIELDHILL  
INVESTMENTS LTD

DEFENDANTS

AND

FLOGAS LTD

THIRD PARTY

Judgment of Mr. Justice Costello delivered the 15th day of  
April 1988.

Third Party proceedings - Civil Liability Act, 1961 - meaning of "concurrent wrongdoer" - whether Third Party may challenge jury's finding of negligence in Plaintiff's claim against Defendant - whether Defendant can adduce evidence to establish acts of negligence by Third Party other than those found by the jury - Third Party's entitlement to rely on indemnity clause in contract with Defendant.

In these Third Party proceedings the Defendants (Fieldhill Investments Ltd) claim a contribution or indemnity from the Third Party, Flogas Ltd., in respect of damages and costs awarded to the Plaintiff in an action arising out of an accident which occurred on 11 November, 1982.

The Plaintiff was injured in a fire and explosion at a filling station on the Naas Road occupied and controlled by Fieldhill. He was driving a motor car given to him by his employer (who were named as the first-named Defendants in the proceedings he instituted). Whilst visiting the filling station he backed his car into a Petroleum Liquid Gas dispenser situated on the forecourt of the filling station, knocking it down and thereby causing an escape of gas which exploded and went on fire. In his action against the two Defendants the jury found his employers to have been 18% responsible for the accident (in requiring him to drive the vehicle they supplied when the view through the rear window was obscured); that Fieldhill had been 49% responsible for the accident; and that the Plaintiff himself had been guilty of contributory negligence and responsible as to 33% for the accident. After an appeal to the Supreme Court there was a reduction in the damages which the Plaintiff had been awarded and judgment was finally given against Fieldhill for £62,573 and costs. That award is the subject of the present claim by Fieldhill against the Third Party. In relation to that claim it is relevant to note that the jury had been asked a precise question as to Fieldhill's negligence; they found that Fieldhill had been negligent "In failing to maintain suitable barriers around the liquid gas dispenser".

The Third Party proceedings and Order:

The Rules make available to defendants Third Party procedures not just for statutory claims for contribution or indemnity under the Civil Liability Act, 1961 but also for non-statutory claims arising otherwise than under the Act. In this case (no doubt because of the difficulty of establishing that the damages payable by the Defendant to the Plaintiff were a loss recoverable either by virtue of a breach of contract entered into between the Defendant and Flogas or by virtue of a breach of a duty of care which Flogas may have owed to the Defendant) the Defendant's claim for a contribution or indemnity was based on the provisions of the 1961 Act.

Leave to serve a Third Party Notice is usually given on an ex parte application and before the defence is filed (as required by the Rules) but in this case Fieldhill applied after the pleadings had been closed and on notice to the Plaintiff and their Co-Defendants. As will appear later the order that was made on 4th March 1985 on foot of that application is of significance. Liberty to issue a Third Party Notice on Flogas was given, time limits for an appearance by Flogas and subsequent pleadings were set and it was ordered that "the Third Party be at liberty to appear at the trial of this Action and to take such part therein as the trial judge shall direct and be bound by the result of the trial and that the question of the liability herein of the Third Party to make contribution to or indemnify the second-named Defendant be tried at or after the trial of this Action as the Judge shall direct". This was the usual form of order made on an application for leave to

serve Third Party Notices; it has the merit of saving the expense of a second application for directions. An appearance was entered by the Third Party but no pleadings were exchanged before the trial. The Third Party was represented at the trial by a solicitor, but did not apply to take part in it, nor was an application made to the trial judge for a direction as to the trial of the Third Party issue. Later a Statement of Claim was served by Fieldhill and a defence by Flogas and a fresh order made for the mode of the trial of Fieldhill's claim against Flogas and all this was done, apparently, by the consent of the parties.

The Defendant's claim against the Third Party:

At the trial of this issue the following facts were established. Fieldhill negotiated with the owners of the filling station for a lease of the premises to them so as to afford an outlet for the Liquid Petroleum Gas which is one of the products in which Flogas deal. Fieldhill employed a local firm (an agent for the distribution of Flogas' products) to manage the filling station and arrange for the installation of a storage tank, a dispenser and ancillary piping to enable LPG to be sold to the public. Mr. Reynolds of that firm discussed the installation of Flogas' equipment directly with Flogas and was told where and how the tank and the dispenser were to be installed. He prepared the forecourt on the instructions and the advice given to him by Flogas. During the course of the work he specifically raised with Flogas the question which subsequently figured prominently in these proceedings, namely

whether a protective barrier should be placed around the dispenser. He was instructed only to make provision in the plinth on which the dispenser was to be placed for the possible erection at a later date of a barrier. This he did, but neither he nor Fieldhill were, prior to the Plaintiff's accident, told to erect a protective barrier. LPG is, of course, a dangerous substance and requires careful handling. I am quite satisfied that both Mr. Reynolds and Fieldhill relied completely on Flogas' skill and judgment (who in this connection were correctly regarded by them as the experts) in the installation of the equipment generally and in particular in the decision which resulted in the absence of a protective barrier around the dispenser. Had they been told to erect such a barrier they would have done so.

After the installation had been completed Fieldhill and Flogas entered into a written agreement on the 25th May, 1982 for the supply of LPG to Fieldhill's premises. One of its terms provides the main plank of Flogas' defence to the present claim. By this agreement the equipment on the site (including the dispenser) was to remain Flogas' property. Fieldhill were to take a specified quantity for a specified time Flogas's PLG and in a clause which I will have to consider in much greater detail later Fieldhill agreed to indemnify Flogas in respect of claims by injured persons in certain circumstances.

The Civil Liability Act 1961, the Order of 4th March, 1985 and the Defendant's claim:

A number of different issues were raised in the course of

the hearing of this issue which involved questions on the construction of the 1961 Act. It will be convenient if I explain my conclusions on them here.

The first related to the definition of "concurrent wrongdoer" in the Act. The 1961 Act created a new statutory right which enables one "concurrent wrongdoer" to claim contribution or indemnity from another "concurrent wrongdoer" in circumstances laid down in the Act. Two persons are "concurrent wrongdoers" (a) when both are "wrongdoers" (as defined) and (b) when both are responsible (that is, legally responsible) to a Third Party for the same damage (Section 11). The statutory right conferred by the Act to claim an indemnity or contribution is only given when one concurrent wrongdoer can show that the other concurrent wrongdoer is, or if sued at the time of the wrong, would have been, liable in respect of the same damage (Section 21). This means that the statutory claim by a Defendant against a Third Party for a contribution or indemnity will only succeed if it can be shown that the Third Party committed a "wrong" in respect of which the injured Plaintiff could have sued the Third Party.

This is illustrated by the Supreme Court decision in Conole .v. Redbank Oyster Co. (1976) I.R. 191. That was a case in which the Defendants' motor vessel capsized drowning a number of passengers. The vessel had been built by a firm called Fairway Fabrications Ltd. and was unseaworthy when delivered to the Defendants shortly prior to the accident. The personal representative of one of the drowned passengers claimed damages against the owners of the vessel and they

joined as a Third Party Fairway Fabrications claiming a statutory contribution under the 1961 Act. The claim failed. It was clear that the Defendants were negligent, as they knew the boat was unseaworthy and allowed it be taken out in an overcrowded condition. But the Supreme Court held that even assuming that Fairway Fabrications had been negligent in delivering an unseaworthy boat to the Defendants, the Plaintiff on the facts of the case could not have sued Fairway Fabrications for that negligence because the default of the boats' builders was not the causa causans of the accident. Because Fairway Fabrications could not have been sued by the Plaintiffs they did not rank as a concurrent wrongdoer and so no claim for a contribution or indemnity under Section 21 arose.

In opening this case the Defendant's Counsel submitted that the Defendants should be indemnified by the Third Party because (a) Flogas' negligence or (b) Flogas' breach of contract had made them concurrent wrongdoers. I do not think that the claim based on breach of contract is sustainable. It is based on the breach of an implied term of the supply agreement of 25th May, 1982 but even if such a breach was established the Plaintiff, not being a party to it, had no right of action against the Third Party in respect of it. So Flogas were not, "concurrent wrongdoers" within the meaning of the section if the claim was based solely on a breach of a contract entered into between the Defendant and the Third Party.

As to the claim based on negligence, the Defendants to sustain a claim under the Act would have to establish not that Flogas was guilty of breach of a duty of care which it owed to them but (i) that Flogas owed a duty of

care to the injured Plaintiff, (ii) that they had breached that duty and (iii) that the injured Plaintiff could have successfully sued Flogas for the injury he sustained. It is in relation to these issues that the second issue relating to the Order of 4th March 1985 and the 1961 Act becomes relevant. The order, having given leave to Flogas to appear at the trial of the Plaintiff's claim and participate in it as directed by the trial judge provided that Flogas was to be bound by the result of the trial. This order is to be read in the light of Section 29 of the 1961 Act by which, in proceedings for contribution under the Act, the alleged concurrent wrongdoer is not entitled to resist a claim for contribution or indemnity on the ground that the claimant who has paid the injured person was not liable to such person, but that subject to that provision and to the general law of estoppel the alleged concurrent wrongdoer may dispute any question of law or fact even though that question had arisen on the liability of the claimant to the injured party. As far as the present case is concerned this means that Flogas are entitled to resist the claim for an indemnity on the ground that they owed no duty of care to the injured Plaintiff, or on the ground that any negligence of theirs was not the causa causans of the Plaintiff's damage (as the Third Party in Conole had successfully established). But Flogas are not permitted to adduce evidence (as they wished to do) for the purpose of establishing that the absence of a barrier did not amount to a breach of duty to take care of the safety of forecourt users. That issue was determined at the trial of the Plaintiff's claim and Flogas are bound by the jury's findings because this was the basis for the finding that



the Defendants were liable to the Plaintiff. This point can be illustrated by a simple example. A builder sued by an employee injured in an accident caused by the absence of a hand-rail on a portion of scaffolding may join as a Third Party the scaffolder who had contracted with him to erect the scaffolding. The Third Party could participate in the trial for the purpose of showing that a duty of care owed to the Plaintiff did not require the provision of a hand-rail. If the jury found against the Defendant on this issue it would not be open to the Third Party to adduce evidence in the Third Party proceedings with a view to establishing this point, and this would still be the position if the Third Party elected not to participate in the trial of the Plaintiff's claim (as the Third Party did here). I ruled, therefore, in the course of the present claim, that the Third Party in these proceedings could not adduce evidence whose object was to establish that the failure to maintain a barrier did not amount to a breach of duty of care to the users of the forecourt.

A third point under the Act arose as follows. In opening the case in the present claim Counsel for Fieldhill submitted that it would be established that Flogas were negligent in (i) failing to instruct Fieldhill to erect a protective barrier and (ii) in failing to ensure that there had been installed at or near the dispenser which the Plaintiff knocked down a safety excess flow valve to prevent a rapid outflow of gas in the event of the dispenser being damaged. I declined to allow Fieldhill to adduce evidence for the purpose of making this case (ii) against the Third Party. A "wrongdoer" under the Act means a person who commits or is otherwise responsible for

a "wrong". The "wrong" which Fieldhill had committed in this case as found by the jury was its negligence in failing to maintain a safety barrier. There might well have been a whole lot of other defects in the installations (including the absence of a safety excess flow valve) but these were irrelevant to the issue which I had to try, namely, whether Flogas had, concurrently with Fieldhill, committed the particular "wrong" which Fieldhill had, in the jury's opinion, committed. Evidence to establish that they might have been guilty of negligence in other respects was not, in my view, relevant.

The claim for contribution or indemnity

For reasons to be explained later Flogas cannot rely in my judgment on the indemnity clause in the supply Agreement to defeat Fieldhill's claim. This means that they are liable to Fieldhill under the Act if Fieldhill has shown that they are "concurrent wrongdoers". I think they have done so. Flogas, in my view, owed a duty of care to persons using the forecourt of the Defendant's premises as they were responsible for the installation of the equipment in which this highly dangerous substance was to be maintained on the premises and supplied to customers. There was a breach of that duty of care, as found by the jury in the Plaintiff's claim against Fieldhill, in that there was a failure to provide a protective barrier around the dispenser. Quite clearly the Plaintiff could have sued Flogas for the injury he sustained and so they were concurrent wrongdoers. What falls then for consideration is the amount of

contribution to which Fieldhill are entitled. The amount recoverable is to be such as is just and equitable having regard to the degree of Flogas' fault, and I am empowered to direct that the contribution should amount to a complete indemnity in Fieldhill's favour (Section 21). In my view it would be just and equitable that the contribution payable by Flogas should be a complete indemnity in Fieldhill's favour as the blame for the failure to provide a protective barrier was entirely Flogas'. Fieldhill's contractor specifically raised the question with Flogas and he relied completely on Flogas' expertise and the instructions given to him which resulted in the absence of the barrier.

Fieldhill are therefore entitled to judgment for the following sums:

- (a) The sum of £66,514 (being the figure of £62,573 damages ultimately determined by the Supreme Court as payable by Fieldhill to the Plaintiff, together with £3,941 for interest paid by Fieldhill on that sum to the Plaintiff).
- (b) The sum (a) was paid on 19th February, 1986. Fieldhill are entitled to claim interest on that sum to 19th February 1988 by virtue of the provisions of the Courts Act, 1981 amounting to £14,633.08.
- (c) The sums of £24,009, being the costs payable by Fieldhill to the Plaintiff.
- (d) The sum (c) was paid on 19th June 1986. Fieldhill are entitled to interest on that sum to 19th February 1988 under the Courts Act, 1981 amounting to £4,407.

(e) The amount of costs incurred by Fieldhill in defending the Plaintiff's claim in the High Court and in relation to the appeal to the Supreme Court, a sum recoverable under Section 24 of the Act. Those costs should be taxed in default of agreement with liberty to Flogas to appear and contest the claim if taxation occurs.

As Fieldhill has succeeded on this present claim they are also entitled to their costs of these Third Party proceedings.

The indemnity clause in the supply agreement

What remains now is for me to explain the reasons why I think Flogas are not protected by the Supply Agreement against this present claim.

The Supply Agreement was entered into on 25th May 1982 after the installation work had been completed. It defined the "equipment" as including a 4 tonne tank, a manual dispenser, a pump and ancillary piping, fittings and electrical connections and provided that all equipment was to remain the property of Flogas during the period of the agreement (which was to be for 5 years from 22nd May, 1982). The exemption Clause (Clause 6) was headed "Indemnity" and its first sentence provided that the Buyer (that is Fieldhill) would indemnify and keep indemnified the Seller (that is, Flogas)

"against all loss, claims, demands or expenses arising out of or resulting from any....personal injury to....third persons occasioned by the use of the Product or of the equipment on the Buyers premises or due to any failure to fulfil his obligations as to safety referred to in Clause 3(d) hereof."

The claim by the Plaintiff against the Defendants was not a claim for damages for personal injuries occasioned "by the use" of the product or the equipment, or arising from the failure of Fieldhill to carry on the obligations referred to in the Clause. Flogas cannot therefore rely on the first sentence of the paragraph. The second and third sentence reads as follows:-

"If...any person is injured...by the loss, leakage contamination, explosion, escape or failure of gas, the Seller shall be liable in respect of such... injury if and only if the... injury was directly and solely caused by the Seller or its servants...Save as aforesaid, the Seller shall not be liable for any...injury...of any kind caused by the loss, leakage, contamination, explosion, escape or failure of gas, or by any defect in the Equipment".

Whilst it is true that the Plaintiff was injured as a result of an escape of gas and its subsequent explosion I do not think that the words are apt to indemnify Flogas against a claim arising from injury caused by the circumstances of the present case. The words quite clearly cover claims arising during the currency of the agreement and embrace an escape of gas or an explosion arising from the storage of gas on the Defendant's premises and the use of the equipment on the Defendant's premises. But they are not apt to cover claims arising from acts of negligence committed by Flogas which occurred prior to the execution of the agreement nor claims arising from an escape of gas or explosion resulting from damage to the equipment caused by or contributed by Flogas' own negligence. The clause in my opinion does not grant them an indemnity arising from a claim such as the Plaintiff succeeded in establishing in the present case. Without its protection Flogas are liable as concurrent wrongdoers to grant Fieldhill a complete indemnity.

Approved  
JL  
15.4.25