THE HIGH COURT

[2021] IEHC 228

[2013 No. 737P.]

BETWEEN

MICHAEL O'DOHERTY (FERMOY) LIMITED

PLAINTIFF

AND

JAMES MCMAHON LIMITED

DEFENDANT

AND

CORK BUILDERS PROVIDERS LIMITED, M S TIMBER LIMITED

AND

TIMBER MARKETING SERVICES LIMITED TRADING AS WOOD CONCEPTS

THIRD PARTIES

JUDGMENT of Mr. Justice Allen delivered on the 26th day of March, 2021

Introduction

1. This is my ruling on what in substance are five contested discovery applications: by the defendant against each of the third parties and by each of the first and third named third parties against the defendant. In form there are three motions but the explanation for this is the happenstance that the first and third named third parties are represented by the same firm of solicitors. Moreover, although the issues between the defendant and the first third party are different to those between the defendant and the second and third named third parties, the same categories of documents are sought against all three.

2. The action has a long and moderately complex procedural history, but the factual issues appear to me to be fairly straightforward. While I do not on this interlocutory application say so, it does rather appear to me that the real issues between the parties may have been complicated by over pleading and unfocussed pleading.

Background

3. On an unspecified date in 2007 the plaintiff builder built a house and garage at 12 Cúl Chluthair, Sarsfield Court, Glanmire, County Cork for Mr. and Mrs. Ken and Shirley O'Neill. One of the materials used in the construction was plywood which, for the purpose for which it was used, ought to have been exterior grade plywood.

4. In January, 2010 Mr. and Mrs. O'Neill complained to the plaintiff that their house was not weathertight. The plaintiff inspected the house and ascribed the cause of the defects to the quality of the plywood which, it then asserted, had been supplied by the defendant builders provider.

5. The defendant is a builders provider who was at that time was said by the plaintiff to have supplied all of the plywood used by it in the construction of Mr. and Mrs. O'Neill's house. The defendant acknowledged that it had supplied plywood to the plaintiff, and that the house needed to be repaired, and the plaintiff and the defendant then agreed that it was in both of their interests that the remedial work should be carried out sooner rather than later. The remedial works were specified and costed at €140,000 plus VAT.

6. By agreement in writing dated 5th November, 2010 between the plaintiff and the defendant the defendant agreed to make a provisional or interim payment of €70,000 plus VAT towards the cost of the remedial work on the basis that the issue of the defendant's liability would be discussed and if it could not be agreed, decided by a court, and that the amount of the defendant's liability would be capped at €140,000 plus VAT, plus the costs of any proceedings that might later be necessary to compel performance by the defendant of its obligations under the agreement. It was expressly agreed that the defendant did not admit that the plywood was defective or that it was the cause of the defects in the house. The agreement provided for the supervision of the remedial words by the defendant's engineer and that the plaintiff would source the building materials from the defendant. It also provided for the labelling, careful removal, and safe storage of the plywood originally used: expressly to allow the defendant to establish the identity of its supplier – then thought to be one of two, or possibly two, suppliers – and, presumably, to facilitate expert evaluation of the quality of the material.

7. The remedial work began in November or December, 2010 and the defendant made two interim payments of €45,615.08 and €35,370.64, presumably on foot of interim certificates issued by the defendant's engineer as provided by the agreement.

8. By this action, commenced by plenary summons issued on 24th January, 2013, the plaintiff claimed damages of €78,859.28 – being the balance unpaid of the €140,000 plus VAT the subject of the interim settlement agreement – and/or a declaration that the plaintiff was entitled to an indemnity in respect of its liability to Mr. and Mrs. O'Neill. According to the statement of claim, which was delivered on 28th January, 2013, the investigations and tests which the plaintiff had carried out on the plywood had confirmed that it did not conform to the agreed specification and standard and all of the defective plywood had been supplied by the defendant.

9. In the long tradition of the Bar, the defendant's defence was cautious, putting the plaintiff on proof of the construction of Mr. and Mrs. O'Neill's house and the purchase of any sheeting and so on but the substance of the defence pleaded was (1) that the defendant was not the only supplier of the plywood sheeting used on the site, (2) that any plywood sheeting (if any) supplied by the defendant was not unmerchantable, and (3) that the cause of the defects was not the plywood but faulty design and construction and poor ventilation of the roof space. The defence also pleaded that if the sheeting was not fit for purpose, it had been sourced in good faith from M S Timber Limited and Timber Marketing Services Limited on the basis that it would meet the specification required by the plaintiff: but I do not see where this could have gone in a contract case.

10. All the appearances are that the premise of the agreement between the plaintiff and the defendant, on both sides, was that all of the plywood used in the construction of Mr. and Mrs. O'Neill's house had been supplied by the defendant to the plaintiff. Again the pleadings are circumspect. The defence pleaded that if the defendant had made the interim agreement, it had done so in reliance on the plaintiff's representation to the effect that it had been the sole supplier of plywood, and that it was a term of the agreement

that the information provided by the plaintiff had been truthful and accurate, and the defendant counterclaimed for the money which had already been paid. In its reply and defence to counterclaim the plaintiff asserted its previous belief that the defendant had been the only supplier of plywood, but denied that it had said so, or the defendant had shared that belief. The plaintiff pleaded that in the course of the remedial work it had transpired that some of the plywood used (estimated by the plaintiff to have been approximately 30%) had come from another builders provider, Cork Builders Providers Limited, but that on testing the material supplied by Cork Builders Providers was established to have been adequate and to have met the relevant standards.

11. The defence had also pleaded reliance on s. 35(i) of the Civil Liability Act, 1961 by reason of the plaintiff's failure to join Cork Builders Providers Limited as a defendant.

12. By order of the High Court made on 22nd July, 2013, on the application of the defendant, Cork Builders Suppliers Limited, MS Timber Limited and Timber Marketing Services Limited trading as Wood Concepts were joined as third parties. Appearances were entered on behalf of each by different firms of solicitors and third party statements of claim were delivered on 18th March, 2014. In the meantime, the action by the plaintiff against the defendant had been set down and certified and sent to the Cork non-jury list for trial. On or about 18th November, 2014 the action was settled between the plaintiff and the defendant for €106,000 which, taken with the interim payments, gave a total sum of €186,985.72, which the defendant now claims to recover from the third parties.

13. The third party claims limped and lurched along for years. Particulars were sought of the claims which were answered years later, after a fashion, and, in the case of the particulars sought by the second third party, following a court order. The particulars of, and vouching documentation in relation to, the plaintiff's claim against the defendant; the interim agreement of 5th November, 2010; and the settlement made between the plaintiff and the defendant in November, 2018 were provided to the second third party on 30th March, 2017. The first and third named third parties were told of the fact of the settlement of the plaintiff's claim in February, 2019 but were first provided with the details and supporting documentation when their solicitors were given the books made up for the hearing of the discovery motions. I am not at this stage asked to formally rule on the adequacy of the replies to particulars, but they are fairly uninformative. Many of the particulars sought – such, for example, as to the alleged warranties and representations – were said to be matters of evidence, which plainly they are not.

14. All of the third parties wanted to know when the sheeting had allegedly been purchased from them and were told, variously, in or around 2007, that it was within their own knowledge, and – in respect of a house said to have been built in 2007 – on various unspecified dates between 2007 and 2008.

The discovery sought by the defendant

15. On 14th April, 2020 the defendant's solicitors sent to the solicitors for the first and third named third parties a letter seeking agreement, within 21 days, to make voluntary discovery of three categories of documents, within six weeks. On the same day they sent

an identical letter to the solicitors for the second third party. Both letters went unanswered and reminders were sent in June and July. On 27th July, 2020 the second third party's solicitors asked for time, but their request was refused and the motions now before the court were issued on 10th August, 2020.

16. The first category of discovery sought against each of the third parties is:-

> *"All documentation relating to the provision of the timber/sheeting/plywood the subject of these proceedings ("the Materials") to the defendant, the plaintiff and/or Ken or Shirley O'Neill ("the plaintiff's customers") by the third parties, and to the first named third party by the second or third named third parties. This category shall include all documents, notes, memoranda and contracts relating to the orders, quotations, invoicing and/or delivery of any of the Materials to the defendant, the plaintiff and/or the plaintiff's customers by any of the third parties, and, to the first named third party by the second and/or third named third parties."*

17. Before looking at the reasons given in support of the request for this category of documents it is useful to analyse the category. The plaintiff's case against the defendant was that it ordered, and the defendant supplied to it, plywood which was to have but did not conform to an agreed quality and specification. The defendant's case against the second and third named third parties is that it ordered from them, and they supplied to it, plywood which was to have but did not conform to an agreed quality and specification. The category relates to the plywood the subject of these proceedings, that is, the plywood supplied by the defendant to the plaintiff, and used by the plaintiff in the construction of Mr. and Mrs. O'Neill's house.

18. It is difficult to understand how the third parties are supposed to know what materials were supplied by the defendant to the plaintiff and used in the construction of Mr. and Mrs. O'Neill's house. Some of it might have been supplied in 2006 and kept by the defendant in stock. Some of it might have been supplied in 2007 and delivered to the defendant's premises, or some of it might, at the request of the defendant, have been delivered to the site. A trawl through the third parties' records of the defendant's orders might – I am prepared to think probably would – show the delivery address for each order. Any order with a request for delivery to the site of Mr. and Mrs. O'Neill's house would plainly be captured but deliveries to the defendant's premises could not safely be included or excluded. To include all of the defendant's orders for 2007 would suggest that all of the material supplied by the third parties to the defendant in that year was used in the construction of Mr. and Mrs. O'Neill's house. In theory that might very well be so in the case of the second and third named third parties if, for the sake of argument, the only plywood ordered by the defendant from them was that required by the plaintiff. But if that is so, there would be no need for discovery. It seems to me that any attempt by the second or third named third parties to comply with an order in the terms sought would be completely hopeless. I cannot see how they could possibly be expected to know what the defendant might have done with any material delivered to the defendant's

premises, or what the first third party might have done with any plywood (if any) which might have been supplied by them to the first third party.

19. The reason given in support of this category is tied more to the pleadings exchanged between the plaintiff and the defendant than the issues between the defendant and the third parties, specifically between the defendant and each of the third parties who are asked to make discovery. Moreover, the reason is tied to the plaintiff's allegations against the defendant in the statement of claim and the defendant's allegations against the second and third named third parties, rather than the issues between the various parties. The point is well made by Mr. Fenton, for the first third party, that it is not referenced at all in the reason given.

20. The issues as to the represented and warranted quality and standard of the materials and the quality of the materials supplied are, as it is said, key elements to the defendant's claim against the third parties (or at least the second and third named third parties) but it does not follow that this category of documents is relevant and necessary for the fair disposal of the third party claims.

21. It is accepted that the onus is on the requesting party to show that the documents of which discovery is sought are not only relevant to the issues but necessary for the fair disposal of the claim. I suggested earlier that I thought the claim might be over pleaded. It seems to me that this is a fairly straightforward contract case. It is unlikely to be a case in which the builders provider made known to its suppliers the purpose for which the goods were required so as to rely on his skill and judgment, but rather a case in which goods were ordered by specification. It seems to me as a matter of common sense that the person best placed to know – and to have a record of – what material was ordered from each of the second and third named third parties, and what material was supplied by them, and what of that material was delivered to the site, is the defendant. The defendant's reply of 6th April, 2018 to the third named third party's solicitors' letter for further and better particulars shows that the defendant has identified the customer order numbers for the materials supplied by the third named third party. There is no suggestion that it cannot do the same in respect of the materials supplied by the second third party.

22. The agreement made between the plaintiff and the defendant on 5th November, 2010 shows that it was then intended that the board recovered from the house would be examined with a view to establishing its provenance and quality and the defendant's replies to the second third party's notice for particulars dated 30th March, 2017 shows that investigations and tests were carried out by English experts appointed by the defendant. A letter of 6th December, 2010 from the defendant's solicitors to the third named third party's solicitors enclosed a copy of a report which was said to clearly show that a substantial portion of the timber sheeting came from the third named third party, which was called upon to admit liability and pay up.

23. On the pleadings which have been exchanged between the defendant and the third parties there are issues as to what, if any, materials were supplied; the specification of

the materials which were to have been supplied; the representations, if any, made; the warranties, if any, given or to be implied; and the extent and quality of the materials actually supplied. While the case was not spelled out in these terms, I am content to find that as a matter of probability the third parties have in their possession or power documents which are relevant to these issues, but I am not satisfied that the defendant has established that the discovery sought is necessary for the fair disposal of the action.

24. In the ordinary way the defendant, who ordered and took delivery of the goods, will have a copy of the orders and the original delivery dockets and invoices, and it has not been suggested otherwise. I do not see the necessity for the second and third named third parties to make discovery of the original orders and its copies of the delivery dockets and invoices. The first third party admits that it supplied material to the defendant which it pleads was merchantable and, as I have said, the defendant has failed to give any reason in support of its request for discovery by the first third party.

25. The second category of discovery sought by the defendant against each of the third parties is:-

> *"All documents relating to the sourcing of the Materials by any of the third parties from suppliers which should include all documentation showing compliance with the provisions of Council Directive 89/106/EEC ("the Directive") as implemented by SI 198/1992 European Communities (Construction Products) Regulations, 1992 ("the Regulations"). This should include but is not limited to all documents including EC Certificates of Conformity, EC Declarations of Conformity, CE Certificates and/or EC Conformity Mark(s) as affixed to the Materials and/or a label attached to the packaging of the Materials and/or to accompanying commercial documents relating to the Materials; samples of any labels displaying CE Certificates and/or EC Conformity Mark(s) furnished to any of the third parties by suppliers of any of the Materials; shipping documents, bills of lading, commercial invoices, correspondence with the suppliers of the Materials regarding the quality of the Materials and/or test results for products of the same specification as that represented to be the specification [of] the Materials."*

26. Again, before looking at the reason given in support of the request it is useful to look at the formulation of the category. This is fundamentally a contract case. If the third parties were bound to supply goods of a particular quality or specification, it would be no answer that the goods supplied by them, if unmerchantable or not in conformity with the required specification, had been acquired by them from a reputable source. Mr. Callan, for the second third party, makes the point that there is no reference in the pleadings to the Directive or the Regulation and that his client could not have in its possession or power any stickers, labels or marks which were affixed to any materials supplied by his client. I think that that is probably right, although there is reference in the plaintiff's statement of claim to a European standard. I prefer, however, to say that the provenance of the material supplied by the third parties is irrelevant to the issue as to

whether what was supplied was merchantable. It seems to me that if it was not, it would not matter if it was festooned with stickers and labels.

27. The reason given in support of category 2 is in three paragraphs, the first two of which are identical to the first two paragraphs of the reason given for category 1, which refer to the claims made by the plaintiff against the defendant and by the defendant against the third parties, rather than the issues between the defendant and the third parties, and do not refer at all to the first third party. The reason goes on to assert that the Directive and/or Regulations provide for the essential requirements for the materials to conform with technical specifications and are of merchantable quality.

28. Leaving aside the pleading point, the substance of the defendant's case against the third parties is not that the materials were not certified, or that they did not conform to a prescribed standard, but that they did not meet what the defendant claims was the agreed standard – which happens to be the prescribed standard for plywood for use in exterior conditions. The defendant seeks discovery of documentation showing that the materials were in compliance with the prescribed standard, but its case is that the materials supplied did not comply. It seems to me that the dispute as to the quality of the material supplied will fall to be determined upon evidence of what was agreed and as to the quality of what was in fact supplied, rather than by reference to any paperwork.

29. I am not satisfied that the defendant has established that the documents in this category are relevant, still less necessary for the fair disposal of the third party claims.

30. The third category of documents sought by the defendant is:

> *"All documents relating to the attestation of conformity of any timber/sheeting/plywood materials imported or supplied by any of the third parties from January 2003 to June 2008 (including the Materials the subject matter of the proceedings). This should include all test reports arising from any test, processes or procedures carried out in furtherance of complying with the Directive and Regulations (including but not limited to Annex III of the Directive and Annex II of the Regulations – 'Attestation of Conformity with Technical Specifications') and EN 636, EN 314 and/or EN 13986 in respect of timber sheeting or plywood sheeting (including sheeting equivalent to the represented specification of the Materials the subject matter of the proceedings) imported or supplied by any of the third parties during that period."*

31. I fail entirely to understand the relevance of this category which goes beyond the plywood used in the construction of Mr. and Mrs. O'Neill's house to all of the material supplied by each of the third parties to all of their customers over a five year period. EN 636 is a European standard which provides separate specifications for plywood for use in dry conditions (EN 636-1), plywood for use in humid conditions (EN 636-2), and plywood for use in exterior conditions (EN 636-3). EN 314 is the standard for bonding, which is divided into the same categories. EN 13986 is the standard for performance characteristics, which is divided into structural and non-structural, and in the case of non-

structural applications sub-divided into internal dry, internal humid, and exterior. Somewhere in the haystack of paperwork in connection with all of the third parties' purchases of all grades of plywood over the five year period there might be found a document in relation to the sheeting used in the construction of Mr. and Mrs. O'Neill's house but if, for the sake of argument, there was, and if, for the sake of argument, it indicated compliance with the standards relevant to exterior plywood, the defendant's case, by reference to the material recovered from the house during the remediation, is that any such paperwork would be wrong.

32. The reason offered in support of this category is that Article 13(1) of the Directive provides that the agent for the manufacturer within the Community shall be responsible for the attestation that the products are in conformity with the requirements of a technical specification and that it was therefore the responsibility of the second and third named third parties to ensure that proper testing procedures were in place and so forth. I do not believe that this has been made out. The Directive imposes the responsibility for attestation on the manufacturer or his agent established within the Community. The third party statements of claim plead that the second and third named third parties were the suppliers of the offending sheeting and/or the agent of the manufacturer but absent evidence that the manufacturers were not responsible for attestation it cannot be said that the third parties were responsible as agents. In any event, an examination of procedures generally is of little or no relevance in a case which must turn on an examination of the material recovered from Mr. and Mrs. O'Neill's house.

33. I am not satisfied that the defendant has established the relevance or necessity of the documents set out in category 3.

The discovery sought by the first and third named third parties

34. While the solicitors for the first and third named third parties did not deal with the defendant's solicitors request for discovery, neither were they entirely idle. By letter dated 31st July, 2020 the solicitors for the first and third named third parties asked for the defendant's agreement to make voluntary discovery of seven categories of documents, said to be relevant and necessary for the fair disposal of the third party claims and for saving costs. By letter dated 23rd October, 2020 the defendant's solicitors agreed to make discovery of the first category but disputed the remainder, for the reasons to which I will come.

35. The first category was agreed. It is:-

> *"All documents evidencing or touching upon the origin or circumstances of alleged supply by [the] third parties of the plywood or timber product referred to at para. 3 of the third party statement of claim (which it is said was not of merchantable quality, unfit for purpose or in breach of statute and which has given rise to the claim for loss in these proceedings), to include any invoices, delivery dockets, supply notes, order forms or any documents evidencing or touching upon the alleged supply of such product by all or any of the third parties or its use at 12 Cúl Chluthair, Sarsfield Court, Glanmire, County Cork."*

36. Category 2 is:-

> *"All documents relating to the supply by the defendant of timber sheeting (however called) to the plaintiff as part of the development at Cúl Chluthair, Sarsfield Court, Glanmire, County Cork, during the years 2007/2008 and, in particular, any delivery dockets showing the source or quality of those supplies."*

37. The request for voluntary discovery did not show why discovery was sought in relation to sheeting supplied in 2008 but a supplemental affidavit of the first and third named third parties' solicitor suggests that between 2007, when the house was built, and 2010, when it was recognised that very significant remedial work was required, there was a complaint in 2008, at which time some remedial work was carried out. The 2008 remedial work, it is said, was ineffective and significant changes were later made to the design of the structure.

38. The objection to this category is twofold. First, it is said that the relevant documents relating to the issues between the defendant and the third parties are captured by category 1. Secondly, it is said that the documents in this category are relevant only to the proceedings between the plaintiff and the defendant, which have been compromised. The plaintiff, it is said, did not seek to join the third parties as defendants and therefore this category is neither relevant nor necessary.

39. It is accepted that there may be overlap between categories 1 and 2 but it is submitted that category 1 is focussed on what was supplied by the third parties to the defendant, and category 2 on what was supplied by the defendant to the plaintiff. The first and third named third parties argue that while the premise of the third party claims is that all of the material supplied to the site came from one or other of the named third parties, the possibility exists that the defendant may have had another or other suppliers. I have to say that I was not immediately convinced of this but in circumstances in which the third named third party has been told in replies to particulars that the representations and warranties allegedly made and given by it are matters of evidence and that the dates of delivery, the nature of the timber allegedly supplied, and the invoices to which the supply relates are matters within its own knowledge, I think that the third parties are entitled to the benefit of the doubt. The first and third named third parties may know or have records of what materials they supplied to the plaintiff or defendant but their knowledge of what they supplied (or the objective fact of what they supplied) is not to be confused with what the defendant claims that they supplied. There is an issue between the defendant and the third parties as to whether sufficient inspection facilities were afforded at the time and soon after the problems in the house (whatever their cause) were reported but all the appearances are that the materials were carefully documented. As was noted in argument, this is a case in which there will ultimately need to be an exchange of expert reports and an engagement between the experts. By the way, I see no reason why that should not take place sooner rather than later.

40. The second element of the objection to category 2 is a common theme to the defendant's opposition to all of the disputed categories. In a case, such as this, where there is a

claim for contribution or indemnity, *a fortiori* in a case where the plaintiff's claim against the defendant has run ahead of the third party claims and has been settled, I find it difficult to contemplate what documents relevant to the issues between the plaintiff and the defendant might not be relevant to the third party claims. The liability the subject of the third party claims is the liability which the defendant claims to have incurred to the plaintiff, which in turn was the liability which the plaintiff claimed to have incurred to the householders. Mr. and Mrs. O'Neill's claim against the builder was fairly straightforward: their newly built house was not weathertight. The builder's claim against the builders provider was slightly more complicated in that it entailed proof of the specification of the board ordered, or knowledge on the part of the supplier of the purpose for which it was required, and proof of the quality of the board supplied, and that all of the material used – or at least all of the material which had failed – had been supplied by the particular builders provider. Each of the parties who are successively sought to be fixed with liability is entitled to interrogate the claim against him. As far as Mr. and Mrs. O'Neill were concerned, their house was letting in the elements and that was that. As between the plaintiff and defendant, however, there was an issue as to whether the defects were attributable to faulty workmanship or faulty materials, and if and to the extent that the problem was faulty materials, whether or the extent to which those materials had been supplied by the defendant. By reference to the figures, it rather looks that the defendant eventually accepted its liability to the plaintiff more or less in full, but the third parties are not necessarily bound by that settlement and are entitled to make the case that the defendant paid too much, or (as appears to have happened here) paid more later than it might have paid earlier.

41. I am satisfied that the issue of provenance of all of the materials supplied by the defendant to the plaintiff is relevant to the third party claims against the first and third named defendants and that it is immaterial that the plaintiff did not seek to join these third parties as defendants.

42. The objection to categories 3, 4, 5, 6 and 7 is more or less the same and I will deal with all of these categories together.

43. Category 3 is:-

> *"All documents evidencing, touching upon or concerning the presence or cause of defects in the plywood sheeting or timber product allegedly supplied by the defendant to the plaintiff in respect of which the current proceedings are maintained."*

44. Category 4 is:-

> *"All documents evidencing or touching upon the alleged loss suffered by the plaintiff to include any settlement agreement (or the vouching or calculation of the amounts payable thereunder), payments, credits, or other contributions made by the defendant to the plaintiff arising out of or in connection with the alleged supply of*

defective products or any documents/correspondence relating to the non-performance of such settlement."

45. Category 5 is:-

"All documents relating to or touching upon the quality of workmanship executed at the property at 12 Cúl Chluthair, Sarsfield Court, Glanmire, County Cork, so far as such relates to the defective installation, ventilation or other workmanship associated with the roof construction within that premises"

46. Category 6 is:-

"All correspondence passing between the plaintiff and the defendant and between the defendant and the third parties, with reference to:

(a) The occurrence of the alleged defects,

(b) The cause of such defects,

(c) The party responsible for such defects."

47. Category 7 is:-

"All documents recording the design or construction of the roof to the premises at Cúl Chluthair, Sarsfield Court, Glanmire, County Cork, to include any amendments to the roof detail carried out or any reconstruction or change in the design of the roof"

48. Part of the objection in each case is that the category relates solely to the claim by the plaintiff and the defendant, which has been compromised. For the reasons already given I do not believe that this is well founded. The plaintiff's claim against the defendant was particularised in the statement of claim at €140,000 plus VAT for the remedial work, with credit for the monies already paid. That claim, as I have said, was settled in November, 2014 upon terms that the plaintiff would be paid €106,000 on top of the interim payments, which gave a total sum of €186,985.72. The second named third party was told of the fact and amount of the settlement four years later, and another year later was given the breakdown, such as it was. The second named third party had previously been given a copy of the agreement of 5th November, 2010 and the bill of quantities for the remedial work. This information and the documentation eventually found its way to the first and third named third parties in the week before the discovery motions were listed for hearing.

49. Categories 3, 5, and 7 are directed to the cause of the defects in the house. As there was between the plaintiff and the defendant, there is between the defendant and the first and third named third parties, an issue as to whether, or the extent to which, the defects were caused by defective plywood, on the one hand, or faulty design and workmanship, on the other. The records in relation to those issues are no less relevant to the

defendant's claim against the first and third named third parties than they were to the plaintiff's claim against the defendant.

50. Categories 4 and 6 are directed to the liability of the defendant to the plaintiff.

51. It seems to me that the defendant's position that the settlement between the plaintiff and the defendant was *res inter alios acta* is plainly wrong. If the first and third defendants are to be asked to pay all or part of what the defendant has paid out, they are entitled to know, besides how much (which, however belatedly, they now know) the breakdown of the settlement and why it was made. The total amount of the bill of quantities for the remedial work, inclusive of VAT, was €159,845.00. That was not paid when it was contemplated that it would be paid, and the settlement later made was for about €27,000 more. The first and third named third parties' request for category 4 might have been forestalled or dealt with by the provision of the particulars and documents which were given to the second named third party, but it was not, and the argument made against discovery is not a good one.

52. Category 6 is directed more to the settlement of the plaintiff's claim than the objective cause of the defects and it seems to me that it is justifiable as a separate category. This correspondence goes to the position taken by each of the plaintiff and the defendant in the prosecution and defence of the claim which, juxtaposed to the available evidence as to the cause of the defects in the house, will go to the issues as to whether the defendant was liable to the plaintiff at all, or whether the defendant ought to have recognised its liability to the plaintiff sooner than it did and could have settled the claim for less than it ultimately paid.

53. In respect of each of these categories the defendant argues that as the plaintiff did not seek to join the third parties as co-defendants the provisions of the Civil Liability Act in relation to concurrent wrongdoers do not arise. That is also incorrect. Whether a person is a concurrent wrongdoer depends upon his responsibility to a third person for the same damage and not whether or by whom he is joined as a party to proceedings. Whether the third parties were in fact concurrent wrongdoers remains to be seen, but they are not not concurrent wrongdoers because they were not joined as co-defendants.

Conclusions

54. For the reasons set out, I find that the defendant has failed to establish that the documents which it seeks are relevant and necessary for the fair disposal of the third party claims and the defendants motions against the first and third named third parties, and the second third party, must be refused.

55. For the reasons set out, I find that the first and third named third parties have established that each of the categories of documents sought by their motion are relevant and necessary for the fair disposal of the third party claims, and there will be an order accordingly.

56. I will list the motions for mention on the first day of next term to allow the defendant to identify the deponent, to decide any issue as to the time within which the defendant's discovery is to be made, and to deal with the costs of the motions.