CONSTRUCTION LAW PERIODICAL

Editor's Note

The Construction Law Periodical provides all members of the CBA with a regular summation of judgments and dispute resolution decisions drawn from Ireland and other common law and model law jurisdictions that touch upon and/or are relevant to matters of construction law and/or the resolution of construction disputes in this jurisdiction.

The Editorial Committee's endeavor is that the Periodical be a useful and habitual resource to all practitioners.

In this issue we have identified pertinent cases for your attention- including the recent decision of O'Malley J., in the case of McGee & Anor v Alcorn & Anor [2016] IEHC 59, where the Court considered the law pertaining to damages for pure economic loss in construction cases.

***Kevin McGee and Grit McGee v. Mark Alcorn and Michael Friel trading as Michael Friel Architectural Design and Surveying* [2016] IEHC 59 (unreported, High Court, O'Malley J., 5th February 2016)**

Tort – Damages & Restitution – Negligence – Pure Economic Loss – Quantum of Damages – Duty of Care – Defective Construction of House –Certificate of Compliance –Structural underpinning of foundations – Hairline cracking – Tilting – Roof sloping – Diminution in value as a result of defective works – Pecuniary loss - Failure to plead negligent misstatement

Facts: The plaintiffs sought damages against the second named defendant architect for economic loss arising out of a negligently constructed dwelling home built in 2008 by the first named defendant for which the certificates of compliance were issued by the second named defendant. The second named defendant admitted negligence on his part but alleged that he was not liable for the loss as he was not a party to the contract of sale entered into between the first named defendant builder and the plaintiffs. The second named defendant further asserted that the damages for pure economic loss could not be recovered from him in a negligence action as the plaintiffs had pleaded negligence and not negligence misstatement.

The plaintiffs and second named defendant agreed the cost of the remedial works known as 'phase one', which was carried out successfully in 2011 to address cracking in the foundations. Phase two remedial works related to reinstating the garden after the completion of phase one while phase three related to proposed works to fix a chimney. A dispute arose between the plaintiffs' engineer and the architect's engineer as to the cost of phase two and phase three of the remedial works.

The plaintiffs' expert estimated that both phases involved the removal of rooms, windows and doors, the raising of floors and the stripping out of the kitchen and utility units, valued at €277,060.99. The second named defendant's expert engineer contested the extent of the works, which he characterised as being "aesthetic" in nature. The second named defendant's expert engineer gave evidence that the slope in the roof could have been remedied at the time of phase one by way of underpinning concrete pillars. He estimated this would have costed approximately €15,000. The plaintiffs alleged that the defects associated with the house had decreased its market value by 50% while the second named defendant's valuer measured the diminution of value at 15%.

The plaintiffs argued at trial that they ought to be allowed to recover for pure economic loss arising from negligently constructed buildings or in alternative, the proximity of relationship between the parties should determine recovery. The plaintiffs submitted that negligent misstatement was a subset of negligence and accordingly that the plaintiffs relied on the certificate of compliance which contained an untrue representation of facts. The second named defendant submitted that damages for pure economic loss arising out of negligence were not recoverable under Irish law. It was further claimed that the second named defendant failed to plead negligent misstatement; that there was no statement between the parties therefore negligent misstatement could not be made, and accordingly no duty of care arose between the parties.

Held: The High Court (O'Malley, J., on 5th February 2015) found that:

- There was a duty of care between the plaintiffs and the second named defendant architect and the presence of a contract between the plaintiffs and the second named defendant was immaterial to its existence. Though the certificates of compliance were furnished to the first named defendant builder and not the plaintiffs, the only conceivable purpose of them from the builder's point of view was for presentation to a prospective buyer.
- The duty of care owed by the second named defendant was to the purchaser. It was not necessary in the within case to consider the possibility of open-ended liability to subsequent buyers years down the line.
- It was fair, just and reasonable to impose a duty of care towards purchasers on persons such as engineers and architects who provide certifications to builders.

- That while negligent misstatement was not specifically pleaded in the plaintiffs' Statement of Claim, the combined effect of the certificate of compliance, Statement of Claim, Notice for Particulars and Replies to Particulars were adequate for the purpose of making a claim of negligent misstatement. Accordingly, damages for economic loss were recoverable, *Wildgust v Bank of Ireland* [2006] 1 IR 570 considered.

- Apart from negligent misstatement, the case came within the parameters of *Ward v McMaster* [1988] IR 337 in that a sufficient relationship of proximity existed between the second named defendant and the plaintiffs giving rise to a duty of care.

- The appropriate measure for damages on foot of phase three was the diminution in the value of the property rather than the cost of reinstatement where the latter would have given unjustifiable profit to the plaintiffs. The court accepted evidence that where the tilt was barely perceptible and there were no structural impairments, diminution in value was the appropriate measure for damages. It was accepted that an astute purchaser would look for a diminution of value of approximately 25% and not 50%, *Munnelly v Calcon Limited* [1978] IR 387 followed.

- The plaintiffs were entitled to recover €25,000 for distress given the inconvenience of the noisy works and having regard to the fact that there were young children in the house.

Accordingly, the plaintiffs were awarded €75,000.

Anita Finucane B.L.

***Liberty Mercian Ltd v Cuddy Civil Engineering Ltd & Anor* [2013] EWHC 4110 (TCC); [2014] All ER (D) 118 (Jan), (Ramsay J., 19 December 2013)**

Building Contract – Specific performance of performance bond - Specific performance of contractual warranties – Contractor – Development Project for Construction of Retail plateau for future construction of supermarket – Defendant company with no assets whether damages adequate remedy – Whether impossible to obtain performance bond and warranties – Best endeavours to obtain both the performance bond and the warranties.

Facts: This was the second of two judgments delivered by Mr Justice Ramsay in these proceedings.

The proceedings arose from a development project involving the construction of a retail plateau for future construction of a supermarket.

The claimant company ("Liberty Mercian") as Employer entered into an amended form of contract for those works. A dispute arose as to, among other things, when the contract was entered into and whether the contract had been entered into by the second defendant company, Cuddy Demolition and Dismantling Limited ("CDDL"), a company carrying on business as a construction and civil engineering contractor, or by the first defendant company, Cuddy Civil Engineering Limited ("CCEL"), which at all material times had been dormant. Liberty Mercian sought a declaration that the contract had been entered into by CDDL and that CDDL had remained the contracting party. It also sought declarations that the contractor was obliged to deliver a performance bond and warranties as well as a parent company guarantee. The claimant also sought a declaration that, in the event that the contract was found to be with CCEL, it was obliged to provide a parent company guarantee from CCDL.

In his first judgment ([2013] EWHC 2688 (TCC)), Ramsay J held that the Contract was formed when it was signed in July 2010 and that the Contract was formed between Liberty Mercian as the Employer and CCEL as the Contractor and there were no grounds on which CDDL could be construed to be the Contractor or have become the Contractor by way of a claim for rectification or on the basis of an estoppel. He also held that CDDL was not CCEL's parent company so that CCEL was not obliged to provide a parent company guarantee from CDDL and he held that there was no other parent company. He reserved for further submissions the effect of there being no parent company on the obligation to provide the parent company guarantee under the Contract.

Furthermore, Ramsay J found that CCEL's obligation to supply a parent company guarantee, a performance bond and two remaining warranties from Quantum (GB) Limited to Liberty Mercian and to Waterman Transport and Development Limited ("Waterman") survived the termination of the Contract. Ramsay J also held in his first judgment that CCEL was in breach of contract in failing to supply the performance bond and the two remaining warranties and reserved for further argument the issue of whether or not on the basis of his findings, it was appropriate to order specific performance.

The second judgment of Ramsay J addressed the issue of whether or not, on the basis of his findings in the first hearing, it was appropriate to order specific performance of the performance bond and the two remaining warranties.

CCEL opposed specific performance on three grounds. First, that damages were an adequate remedy; secondly, that it was impossible for a bond or the warranties to be provided by CCEL given that the company had no assets and, thirdly, that as a matter of discretion the court should not order specific performance either at all or at that stage of the proceedings.

Held: The High Court (Ramsay J., on 19 December 2013) found that:

- Damages were not an adequate remedy for the non-provision of a performance bond. Where the chances of a judgment being satisfied are questionable, damages would *prima facie* not be an adequate remedy. The Contract was between Liberty Mercian and CCEL, a company which had no assets. In such a case the failure to provide a performance bond from an insurer or a bank could not be adequately remedied by an award of damages against CCEL.

- The undetermined issues of whether or how Liberty Mercian repudiated the Contract should not affect the position. When that issue is determined it may be that CCEL will be entitled to damages from Liberty Mercian. However, the purpose of the performance bond is to protect Liberty Mercian against any balance of sums, which may be held to be due to it from CCEL, which has no assets. In such circumstances, the existence of a claim by CCEL against Liberty Mercian does not establish that damages would be an adequate remedy.

- If CCEL could show that it could not obtain a performance bond by the use of best endeavours, and Liberty Mercian did not put forward evidence to the contrary, then the court would generally be reluctant to order a party to perform an obligation,

which, in practical terms, is impossible. The court would then have to consider what, if any, remedies were appropriate.

- CCEL could not rely on its inability to fund a performance bond to resist the granting of an order for specific performance. There was evidence that CCEL had access to funds from a third party, and CCEL had been involved as a contracting party in substantial works, which were carried out by CDDL. Therefore, it appeared that there was some arrangement, however informal, between CCEL and CDDL. This applied particularly where there had not been full disclosure of how CCEL funded the litigation and dealt with its arrangement for CDDL to carry out the works.

- Courts will not readily order specific performance of a contract that requires continued supervision by the court. However, while some supervision may be necessary in the present case in terms of the identity of the bank or the insurer and the expiry date of the bond, this type of supervision, inherent in an order for specific performance, should not preclude the court from granting that remedy.

- In relation to the warranties, damages would not be an adequate remedy for the non-provision of the warranties. The chance of the judgment being satisfied could not be rated as anything other than questionable and a claim for a warrant in favour of the third party could not be adequately compensated by an order for damages in favour of Liberty from a company with no assets. As with the non-provision of the performance bond, there had to be some relationship between CCEL and CDDL that would include an obligation by CDDL to perform the obligations that CCEL had been obliged to perform under the contract.

- While the claimant had established the rights to the performance bond and warranties, it would not be appropriate to order specific performance in circumstances where, on proper examination, the obligations to provide the performance bond and the warranties might prove to be impossible.

- The court was not satisfied that it had sufficient evidence before it to determine the merits or otherwise of CCEL's contention that it was impossible for it to comply with its obligations to provide the performance bond and warranties.

Accordingly, the court ordered CCEL to use its best endeavours to obtain both the performance bond and the warranties so that the alleged impossibility could be properly considered at another hearing at an early date.

Note: At a subsequent hearing, ('[2014] EWHC 3584 (TCC)') on 30 October 2014, Ramsay J ordered that:

- CCEL should pay the sum of £420,000 into court as substituted performance for the provision of a performance bond: and,

- There should be an order for specific performance in relation to the warranties to be provided.

Julie Maher B.L.

BAM Building Limited v. UCD Property Development Company Limited [2016] IEHC 582, (Unreported, High Court, Commercial, McGovern J., 20th October 2016)

Arbitration – Construction Contract – High Court proceedings seeking specific performance of dispute resolution clause — Application to stay High Court proceedings — Article 8 (1) of the Model Law – Section 6 of the Arbitration Act, 2010 – Construction of dispute resolution provisions — Principles applicable

Facts: These proceedings arose out of a dispute between an Employer and Contractor concerning the construction of the UCD Sutherland School of Law pursuant to a contract dated the 17 February, 2012. The matter before the Court was the defendant Employer's application pursuant to Article (8)(1) of the Model Law to stay the plaintiff's Contractor's High Court proceedings seeking, *inter alia*, specific performance of 3.11.1 of the building agreement.

The contract provided that disputes arising between the parties should, in the first instance, be referred to conciliation and, thereafter, to arbitration. A dispute arose in respect of certain materials specified for incorporation into the works, which the plaintiff maintained were illegal and which therefore rendered their specification unenforceable.

A conciliator was duly appointed and by a recommendation made on the 30 November 2015, the conciliator recommended that the defendant pay to the plaintiff the sum of €1,141,838.93.

Clause 13.1.11 of the contract provided that:

"*If the conciliator has recommended the payment of money and a notice of dissatisfaction is given, the following shall apply:*

(1) The party concerned shall make the payment recommended by the conciliator, provided that the other party first

(a) gave a notice, complying with the arbitration rules referred to in sub- clause 13.2 referring the same dispute to arbitration and

(b) gave the paying party a bond executed by a surety approved by the paying party, acting reasonably, in the form included in the Works Requirements, or if there is none, a form approved by the paying party, acting reasonably, for the amount of the payment.

(2) If, when the dispute is finally resolved, it is found that the party received payment on the conciliator's recommendation was not entitled to some or all of the amount paid, then that party shall repay the amount it was paid and found not be entitled to, together with interest."

Clause 13.2 of the contract thereafter provided that:

"*Any dispute that, under sub- clause-13.1 may be referred to conciliation shall, subject to sub- clause 13.1 be finally settled by arbitration in accordance with the arbitration rules identified in the Schedule, Part 1N. For the purposes of those rules, the person or body to appoint the Arbitrator, if not agreed by the parties, is named in the Schedule, Part 1N.*"

A notice of dissatisfaction with the conciliator's recommendation was served by the defendant and the dispute was duly referred to arbitration. However, notwithstanding the provisions of clause 13.1.11 of the contract and, notwithstanding that the plaintiff duly proffered a bond to the

defendant as provided at clause 13.1.11, the defendant did not pay, on account, the amount recommended to be paid by the conciliator. It was the defendant's position that the conciliator's recommendation was made outside of the time frame agreed for making a recommendation and, therefore, the recommendation was void. In particular, while the parties had agreed with the conciliator that he would make his recommendation by the 27th November 2015, same was not made until the 30th November 2015.

The circumstances in which the conciliator came to issue his recommendation after the time agreed by the parties was addressed in an affidavit sworn by the conciliator and they were not disputed.

In brief, it was the conciliator's position that on the 27th November 2015 he received an email from an agent of the defendant advising that the defendant required until the 30th November 2015 to provide replies to certain queries raised by the conciliator. While it was inconvenient for the conciliator, he refrained from making his recommendation until the 30th November 2015 in the circumstances.

The plaintiff issued High Court proceedings seeking various declarations including a declaration that the defendant was in breach of sub-clause 13.1.11 of the agreement in not making the on-account payment and the plaintiff sought an Order for specific performance of that subsection as against the defendant.

The defendant duly brought a Motion pursuant to the provisions of Article 8 (1) of the Model Law as adopted by section 6 of the Arbitration Act, 2010 seeking to stay the High Court proceedings.

The parties were in agreement that, in so far as the conciliator's recommendation was concerned, that matter could proceed to an arbitration process. Indeed, an arbitrator had already been appointed in respect of that issue but an arbitration had not commenced by the time that the defendant's Motion came before the court. However, it was the defendant's position that the question as to whether it was liable to make the on-account payment of the sum recommended by the conciliator was also a matter that should be determined by the arbitrator. It was in that context that the defendant sought to stay the plaintiff's High Court proceedings.

The plaintiff contended that, while the dispute in respect of the quantum of the conciliator's recommendation was within the scope of the arbitration, the issue as to whether or not the conciliator's recommendation was made out of time, and was therefore void, was not a "dispute" which the parties had agreed to refer to arbitration.

Held: The High Court (McGovern, J., on 20 October 2016) found that:

- The starting point for any interpretation of an arbitration agreement should be on the basis that, unless the language of the arbitration clause makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction, all disputes between the parties should be referred to arbitration where an arbitration clause exists: *Premium Nafta Products Limited and Ors. v. Fili Shopping Company Limited and Ors. [2007] UKHL 40 approved*;

- Clause 13.1 of the agreement includes within its ambit disputes arising under the contract and not just disputes concerning the payment of money;

- It is not for the courts to enquire whether one party's position under the dispute is tenable or not, or whether there is "*real and genuine dispute*" to be referred to arbitration. A decision on the merits of the parties' disputes is one for the arbitrator to make;

- If the court were to adjudicate upon the dispute as to whether the conciliator's recommendation was delivered late or not, the court would have to determine whether or not the defendant's agent had actual or ostensible authority from the defendant to ask for an extension of time. The court could only determine such issues if they were not within the scope of the arbitration agreement.

Accordingly, the court granted the defendant an Order staying the proceedings pursuant to Article 8(1) of the Model Law.

Micheál Munnelly B.L.

***William Henry Bailey v Kilvinane Wind Farm Limited* [2016] IECA 92, (unreported, Court of Appeal, Finlay Geoghegan J., Irvine J., and Hogan J. 16th March 2016)**

Unauthorised Development – Material Deviation – Windfarm – Locus Standi – Section 160 Application – Letters of Comfort – Substituted Consent

Facts: This action concerned an application for an order pursuant to section 160 of the Planning and Development Act 2000 ("2000 Act") that a development constituted an unauthorised development. The action arose from planning permission granted for the construction of four wind turbines in July 2002 for the benefit of the respondent. The respondent subsequently constructed three turbines ("T1, T3 and T4") in 2005. Between 2002 and 2005, the defendants engaged with the planning authority in relation to potential deviations from the plans on the basis that there was a lack of available turbine models on the market and a change in ground conditions. The planning authority issued letters of comfort and on that basis the defendants proceeded with the development with deviations to the planning permission granted. In 2012 the applicant sought orders pursuant to section 160 of the 2000 Act requiring the dismantling of T1, T3 and T4 on the basis that they were unauthorised developments.

In the intervening period a number of court proceedings commenced, issued prior to the section 160 application forming the subject matter of this decision. These proceedings were as follows:

- In April 2011 local residents requested a reference pursuant to section 5(4) of the 2000 Act as to whether the turbines constituted an "exempted development". The matter was appealed to An Bord Pleanála who ultimately concluded that the matter was not an exempted development within the meaning of the 2000 Act. This order became the subject of an application for leave to apply for judicial review of the decision. Leave was granted and the proceedings were left in abeyance awaiting a further application by the applicants.

- In June 2011 local residents appealed a decision of the planning authority to grant further planning at the site of T1, T3 and T4. An Bord Pleanála concluded that the proposed plans constituted modifications of an unauthorised windfarm and permission ought not be granted. This decision formed the basis of a further application for leave to apply for judicial review. Leave was granted and the matter was also left in abeyance awaiting a further application by the applicants.

- In May 2014 the respondents applied to An Bord Pleanála for substituted consent pursuant to section 177(c) of the 2000 Act. This application had not been heard when the section 160 application was heard by the Court of Appeal.

In the High Court the applicant, a litigant in person, argued that the turbines were unauthorised developments as they did not meet the specifications provided for in the original planning permission. It was submitted that they deviated significantly from the original plans. The applicant accepted that the turbines did not greatly infringe on his enjoyment of his land, however, it affected his neighbours. The applicant maintained that communications of the deviations in the plans were not conveyed to the residents of the area and they had difficulties obtaining any information on file with the planning authority.

The respondent submitted that the applicant lacked appropriate standing to initiate the proceedings. The respondent argued that the deviations did not materially affect the enjoyment of land. They further argued that the deviations were necessary to provide firmer ground foundations for the turbines pursuant to the *Windfarm Development Guide 2006*. The respondent stated that delays in the development of T1, T3 and T4 were due to the moratorium on applications to the Commission for Energy Regulation and a difficulty sourcing turbines from European manufacturers. The respondent submitted that there was significant financial investment in the project; and that the project had three employees and supplied wind energy to approximately 3,000 households.

Peart J. in the High Court exercised the discretion under section 160 of the 2000 Act and refused to grant the order. Peart J. took into consideration the bona fide manner in which the developer acted and the fact that the developer had sought the planning authority's approval for the modifications in advance.

The decision of Peart J. was appealed by the respondent to the Court of Appeal and Hogan J. in the Court of Appeal overturned the decision of the High Court.

Hogan J. concluded that the deviations to the construction of T1, T3 and T4 were not immaterial and constituted an unauthorised development. The court noted that the nature of the permission granted for the turbines did not allow for flexibility envisaged in the *Windfarm Development Guide* 2006.

Hogan J. carried out an assessment of the discretionary factors applicable to the case as to whether or not the court ought to refuse the section 160 application on discretionary grounds. The court accepted that there was demonstrable evidence of interference by the turbines with the enjoyment of the applicant. Hogan J. was critical of the lack of formal assessment procedures by the planning authority when communications regarding the deviations from the planning permission were received. Hogan J. took the view that no sensible developer could reasonably suppose that letters of comfort could be satisfactory acceptance of the proposed deviations. The court accepted that there were financial and economic factors for the respondents in both restraining the use of the turbines and requiring the respondents to dismantle the turbines. The court concluded that there was a public interest in requiring the planning laws to be upheld and these out-weighed the economic benefits of the operation of the turbines. In relation to the dismantling of the turbines the court concluded that there were very serious cost implications for the respondents. As such the court was willing to put a stay on this order to enable An Bord Pleanála to conclude the application for substituted consent pursuant to section 177 (c) of the 2000 Act.

Held: The Court of Appeal (Hogan J. on 16 March 2016) found that:

- That the applicant had sufficient standing to initiate a section 160 of the 2000 Act application as a neighbour living nearby, the applicant's amenities are affected by the operation of the turbines.
- That the turbines as constructed represented unauthorised development having regard to the extend of the deviations from the initial planning permission in terms of (i) location and (ii) rotor diameter size.
- That the court would not exercise its discretion under section 160 to refuse the granting of the order.
- That the court would grant an order restraining the operation of T1, T3 and T4.
- That the court would grant an order requiring the dismantling of T1, T3 and T4 and that said order was subject to a stay pending the outcome of An Bord Pleanála's determination of the respondent's application of substituted consent.

Accordingly the Court overturned the decision of the High Court on the grounds that the turbines, as constructed, were an unauthorised development pursuant to section 160 of the 2000 Act.

The court granted an order requiring the respondent to cease operating of the turbines and an order requiring the dismantling of the turbines subject to a stay pending the outcome of an application for substituted consent pursuant to section 177(c) of the 2000 Act.

Sinead Drinan B.L

***James Elliott Construction Limited v Irish Asphalt Limited* Case C-613/14, ECLI:EU:C:2016:821**

Article 267 TFEU — Jurisdiction of the Court — Directive 89/106/EEC — Harmonised Standard — Technical Standards Directive — Contractual dispute between individuals — Directive 98/34/EC

Facts: These proceedings concerned the supply of rock aggregate by Irish Asphalt Limited to James Elliott Construction Limited for use in the construction of a youth centre. The plaintiff completed construction of the building and carried out remedial works as the building showed signs of pyrite damage. The plaintiff sued for damages on the basis that the aggregates supplied were not of 'merchantable quality'.

The High Court decided in favour of the plaintiff and awarded damages. This decision was appealed by the defendant.

In December 2014 the Supreme Court ruled that the defendant's appeal should be dismissed as a matter of Irish law subject to a preliminary ruling by the Courts of Justice of the European Union ("CJEU") to assist its interpretation and final judgment of the case. The Supreme Court referred five questions to the CJEU. On 27 October 2016 the CJEU issued the preliminary ruling which followed the Opinion of the Advocate General, delivered on 28 January 2016 as follows:

1. (a) Where the terms of a private contract oblige a party to supply a product

produced in accordance with a national standard, itself adopted in implementation of a European standard made pursuant to a mandate issued by the European Commission under the provisions of Directive 89/106/EEC, is the interpretation of the said Standard a matter upon which a preliminary ruling may be sought from the Court of Justice of the European Union pursuant to Article 267 TFEU ("Treaty on the Functioning of the European Union")?

Held: The first paragraph of Article 267 TFEU is to be interpreted as meaning the CJEU has jurisdiction to give a preliminary ruling concerning the interpretation of a harmonised standard.

1. (b) If the answer to question 1(a) is yes, does EN 13242:2002 require that compliance, or breach of the said standard, be established only by evidence of testing in accordance with the (unmandated) standards adopted by CEN and referred to in EN 13242:2002, and where such tests are carried out at the time of production and/or supply; or may breach of the standard (and accordingly breach of contract) be established by evidence of tests conducted later, if the results of such tests are logically probative of breach of the standard?

Held: The harmonised standard is to be interpreted as not binding a national court, seised of a dispute regarding breach of technical specifications, such as those at issue, either as regards the method of establishing the conformity of the construction product with the contractual specifications or the time at which its conformity must be established.

2. When hearing a private-law claim for breach of contract in respect of a product manufactured pursuant to a European standard issued pursuant to a mandate from the Commission under Directive [89/106], is a national court obliged to disapply the provisions of national law implying terms as to merchantability and fitness for purpose or quality, on the grounds that either the statutory terms or their application create standards which have not been notified in accordance with the provisions of Directive 98/34 (Technical Standards Directive "TSD")?

Held: Article 1(11) of the TSD means that national provisions that specify, unless agreed otherwise, implied contractual terms regarding merchantable quality and fitness for purpose are not to be considered 'technical regulations' that require advanced communication as is a requirement under Article 8(1) the TSD.

3. Is a national court hearing a claim for breach of a private contract alleged to arise from a breach of a term as to merchantability or fitness for use (implied by statute in a contract between the parties and not modified or disapplied by them) in respect of a product produced in accordance with EN 13242:2002, obliged to presume that the product is of merchantable quality and fit for its purpose, and if so, may such a presumption only be rebutted by proof of non-compliance with EN 13242:2002 by tests carried out in accordance with the tests and protocols referred to in EN 13242:2002 and carried out at the time of supply of the product?

Held: Directive 89/106 cannot be interpreted as harmonising national rules leading to the conclusion that the presumption of fitness for use of construction products does not apply when determining if a contracting party complied with national standards.

4. If the answers to questions 1(a) and 3 are both yes, is a limit for total sulphur content of aggregates prescribed by, or under, EN 13242:2002 so that compliance with such a limit was required, inter alia, to give rise to any presumption of merchantability or fitness for use? And 5. If the answers to [questions] 1(a) and 3 are both yes, is proof that the product bore the "CE" marking necessary in order to rely on the presumption created by Annex ZA to EN 13242:2002 and/or Article 4 of Directive 89/106?'

Held: Questions 4 and 5 were raised by the Supreme Court of Ireland only in the event that the CJEU concluded an affirmative answer to questions 1(a) and 3. As such the CJEU were not required to answer questions 4 and 5.

The matter now returns to the Supreme Court for final determination.

Sinead Drinan B.L