

APPROVED

[2022] IEHC 207



THE HIGH COURT

2019 No. 3328 P.

BETWEEN

SLAWOMIR FIGIEL

PLAINTIFF

AND

SEAN DUNPHY
TRADING AS DUNPHY ENGINEERING

DEFENDANT

MAURICE POWER

THIRD-PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 April 2022

INTRODUCTION

1. This judgment is delivered in respect of an application to set aside third-party proceedings on the grounds of delay. The application is made pursuant to Order 16, rule 8(3) of the Rules of the Superior Courts.

PROCEDURAL HISTORY

2. These proceedings take the form of a personal injuries action arising out of a work-related accident on 28 June 2017. The injured party, the Plaintiff, had been employed by the Defendant as a steel erector. On the date of the accident, the

NO REDACTION REQUIRED

injured party had been working on the construction of an agricultural shed. It appears that other contractors may also have been involved in these construction works. The agricultural shed is located on lands owned by Mr. Maurice Power. It is the subsequent joinder of Mr. Power to these proceedings as a third-party that is challenged in this application.

3. The Plaintiff's case, as pleaded in the personal injuries summons and subsequent particulars, is that he had been engaged in installing cement sheeting on the roof of the agricultural shed when he was caused to slip and fall owing to the (alleged) negligence of the Defendant. It is pleaded, *inter alia*, that the Defendant failed to provide a safe place of work; failed to provide the injured party with a harness and appropriate safety boots; failed to take adequate precautions for work in wet weather; and failed to provide the injured party with appropriate training. It is also pleaded that the Defendant failed to comply with various provisions of the Safety, Health and Welfare at Work (Construction) Regulations 2013 (S.I. No. 291 of 2013).
4. The personal injuries summons issued on 26 April 2019 and the Defendant entered an appearance on 8 May 2019. Shortly thereafter, the Defendant, through his solicitor, in June 2019 instructed a firm of consulting engineers to prepare a report into the circumstances of the accident. An attempt was made to arrange a joint engineering inspection of the locus of the accident. This inspection ultimately took place on 10 February 2020.
5. The consulting engineers retained on behalf of the Defendant prepared a report dated 3 March 2020. Relevantly, the report identified that Mr. Power, as the person for whom the construction works were being carried out, might have obligations under the Safety, Health and Welfare at Work (Construction)

Regulations 2013 as the “*client*”. A client is required under Part 2 of the Regulations to appoint a competent project supervisor where the construction work involves a particular risk or where more than one contractor is involved.

6. On the basis of this engineering report, the Defendant’s solicitors issued a motion on 16 June 2020 seeking to join Mr. Power as a third-party to the proceedings. As appears from the draft third-party notice exhibited in that application, the case to be pleaded against Mr. Power is that he failed to comply with his obligations under the Safety, Health and Welfare at Work (Construction) Regulations 2013. In particular, it is alleged that Mr. Power failed to appoint a project supervisor; failed to take reasonable care for the safety of the injured party; and failed to put in place specific measures during the construction stage to address the risk of working at a height.
7. The motion seeking leave to join the third-party had been allocated a return date of 7 December 2020. On that date, the High Court (Barr J.) made an order granting leave to issue and serve a third-party notice on Mr. Power.
8. The third-party notice was duly served. An appearance was entered on behalf of Mr. Power and a defence delivered on 24 March 2021. Shortly thereafter, a motion was issued on 14 April 2021 seeking to set aside the third-party notice on the grounds that it was not served as soon as reasonably possible. The motion came on for hearing before me on 4 April 2022. Judgment was reserved until today’s date.

CHRONOLOGY

9. The chronology of the proceedings is summarised in tabular form below:

28 June 2017	Date of accident
12 June 2018	Application to Personal Injuries Assessment Board

26 April 2019	Personal injuries summons issued
7 May 2019	Notice for particulars
8 May 2019	Appearance entered by defendant
28 August 2019	Replies to particulars
10 February 2020	Joint engineering inspection
26 February 2020	Defence delivered
3 March 2020	Engineer's report on behalf of defendant
16 June 2020	Notice of motion issued to join third-party
7 December 2020	High Court order joining third-party
17 December 2020	Service of third-party notice
24 March 2021	Third-party defence delivered
14 April 2021	Motion to set aside third-party notice issued
4 April 2022	Hearing of motion

LEGAL PRINCIPLES GOVERNING SET ASIDE APPLICATION

Section 27 of the Civil Liability Act 1961

10. The principal objective of the third-party procedure is to simplify litigation and to avoid a multiplicity of actions by allowing the main proceedings and the third-party proceedings to be heard together by the same judge (*Connolly v. Casey* [1999] IESC 76; [2000] 1 I.R. 345, citing *Gilmore v. Windle* [1967] I.R. 323). That does not necessarily mean that all the issues have to be dealt with simultaneously; that may depend on appropriate orders as to the time and mode of trial of the various issues (*Kenny v. Howard* [2016] IECA 243).
11. Section 27 of the Civil Liability Act 1961 provides that a defendant, who wishes to make a claim for contribution, must serve a third-party notice as soon as is

reasonably possible. This temporal obligation is intended to ensure that the general progress of the main proceedings is not unnecessarily delayed by the third-party claim (*Kenny v. Howard* [2016] IECA 243).

12. The imposition of the statutory obligation to serve a third-party notice as soon as is reasonably possible has the practical consequence that a defendant who wishes to pursue a third-party claim is under far greater time constraints than a putative plaintiff. A putative plaintiff is allowed the full reach of the relevant limitation period within which to institute proceedings against a defendant. Thereafter, a failure by the plaintiff to comply with the time-limits prescribed under the Rules of the Superior Courts for the delivery of pleadings will not normally result in the plaintiff's claim being struck out, unless there has been inordinate and inexcusable delay. By contrast, a defendant to existing proceedings who wishes to make a claim for contribution is expected to issue the third-party proceedings within a much tighter timeframe. There are examples of third-party proceedings having been set aside where the delay is measured in months rather than years. This is so notwithstanding the generous limitation period allowed for under section 31 of the Civil Liability Act 1961.
13. The onus is on the defendant, who has joined a third-party, to explain and justify any delay. In assessing delay, the court will have regard to the fact that third-party proceedings should not be instituted without first assembling and examining the relevant evidence and obtaining appropriate advice thereon. However, the quest for certainty or verification must be balanced against the statutory obligation to make the appropriate application as soon as reasonably possible (*Molloy v. Dublin Corporation* [2002] 2 I.L.R.M. 22).

14. It is incumbent on the court to look not only at the explanations which have been given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third-party notice was served as soon as is reasonably possible (*Greene v. Triangle Developments Ltd* [2015] IECA 249).
15. The majority judgment in *Kenny v. Howard* [2016] IECA 243 indicates that whereas prejudice to the third-party might be considered in the mix, third-party proceedings may nevertheless be set aside even in the *absence* of specific prejudice. See paragraphs 25 and 28 of Ryan P.’s judgment as follows:

“It seems to me that a third party applying to set aside a notice served by a defendant could argue that he had suffered prejudice and that a shorter period than might otherwise be allowed ought to be imposed in determining what was as soon as reasonably possible. I find it difficult to understand how a defendant who is in default of the clear requirement of the subsection can escape the consequences by proposing that the third party has not suffered any specific prejudice. The authorities cited do not go as far as suggesting that the section’s impact may be defeated by demonstrating the absence of prejudice. In the present case, it seems to me that it is irrelevant whether or not [the Third-Party] has suffered prejudice by reason of the delay.

[...]

Fundamentally, it seems to me that the section requires that the time taken should be related to the necessities of the case so that the notice that is served can properly be described as being ‘as soon as reasonably possible.’ This is the key to understanding the provision. It is not a matter of criticising the conduct of the concurrent wrongdoer applicant; neither is it a matter of excusing error or default. It is a judgment about what is reasonably necessary in the circumstances of the case.”

16. Finally, the requirement to move for liberty to issue a third-party notice as soon as is reasonably possible should be regarded as also applying to the bringing of

an application to *set aside* such a notice (*Boland v. Dublin City Council* [2002] IESC 69; [2002] 4 I.R. 409).

Order 16, Rules of the Superior Courts

17. The provisions of section 27 of the Civil Liability Act 1961 are supplemented by Order 16 of the Rules of the Superior Courts. This order introduces a requirement to obtain the leave of the court to issue a third-party notice out of the Central Office of the High Court. It also introduces two specific time-limits. An application for leave to issue the third-party notice shall, unless otherwise ordered by the court, be made within twenty-eight days from the time limited for delivering the defence. In the event that leave is granted, then the third-party notice is to be served within twenty-eight days from the making of the order (unless the court directs a different timescale).
18. In the case of a personal injuries action, the defence is to be delivered within eight weeks of the service of the personal injuries summons (Order 1A, rule 8). The Rules of the Superior Courts thus envisage a timetable whereby a defendant in a personal injuries action will have delivered their defence within eight weeks, and then have applied to join a third-party within a further four weeks. Thereafter, the third-party notice should be served within four weeks of the date of the court order granting leave. This timetable reflects the objective that the third-party proceedings should not unnecessarily delay the progress of the main proceedings.

Does time run from date of application for leave or date of service?

19. There is some disagreement on the authorities as to whether delay should be calculated by reference to (i) the date upon which the third-party notice is served (*Greene v. Triangle Developments Ltd* [2008] IEHC 52), or (ii) the earlier date

upon which the motion seeking to join the third-party is issued (*McElwaine v. Hughes* [1997] IEHC 74; *Morey v. Marymount University Hospital and Hospice Ltd* [2017] IEHC 285). This question ordinarily only assumes significance in cases where there has been default on the part of a defendant in serving the third-party notice subsequent to the court order granting leave. Order 16 prescribes that a third-party notice must be issued out of the Central Office of the High Court and a copy then served within twenty-eight days. A failure on the part of a defendant to observe these procedural requirements can add to delay, and is properly to be taken into account in assessing the overall circumstances of the case and its general progress. The fact that a defendant has delayed both in applying for leave and thereafter in issuing and serving a third-party notice will be relevant as part of the assessment of delay: see, for example, *Purcell v. Córás Iompair Éireann* [2022] IEHC 4.

20. No such considerations arise on the facts of the present case. The motion to join the third-party was dealt with on the first return date and the third-party notice duly issued and served within twenty-eight days thereafter. The six-month elapse between the date of the issuance of the motion and the return date represents a circumstance outside the control of the Defendant. It is explicable by reference to the restrictions on certain types of court application introduced as part of the public health measures in respect of the coronavirus pandemic.

DISCUSSION AND DECISION

21. The application to set aside the third-party proceedings is advanced on the assumption that delay on the part of a defendant should be measured by events *prior* to the commencement of the proceedings. More specifically, it is sought

to attach significance to the timing of the procedure before the Personal Injuries Assessment Board (“*PIAB*”). As part of that procedure, a claimant is required to identify the respondent(s) against whom the assessment of damages for personal injuries is sought. The respondent will be notified by PIAB of the outcome of the assessment.

22. It is submitted on behalf of the third-party in the present case that once the (then putative) defendant, Mr. Dunphy, had been served with notice that an application for an assessment had been made to PIAB in June 2018, he should have anticipated that legal proceedings would be issued against him and should have begun taking steps to prepare his defence. In particular, it is said that consideration should have been given to the possibility of whether another party might be to blame. On this analysis, it is submitted that the Defendant had delayed for a period of two years in issuing his motion to join the third-party, i.e. the supposed delay is measured between June 2018 and June 2020 notwithstanding that the personal injuries summons was only issued and served in April 2019.
23. With respect, these submissions cannot be reconciled with the timetable envisaged under the Rules of the Superior Courts. As explained earlier, the Rules envisage a timetable whereby a defendant in a personal injuries action will have delivered their defence within eight weeks, and then have applied to join a third-party within a further four weeks. It is only if these time-limits are missed that the question of possible delay on the part of a defendant would properly arise for consideration.
24. Counsel on behalf of the third-party submitted that the timetable under the Rules of the Superior Courts should be regarded as subservient to the statutory

requirement under section 27 of the Civil Liability Act 1961 to serve a third-party notice “*as soon as is reasonably possible*”. The implication being that even where a defendant had complied with the timetable, the third-party notice might nevertheless be set aside.

25. It is correct to say that the Rules of the Superior Courts, as a form of secondary or delegated legislation, cannot amend primary legislation such as the Civil Liability Act 1961 (*Buchanan v. B.H.K. Credit Union Ltd* [2013] IEHC 439 (at paragraphs 15 to 18)). The overarching test remains whether the third-party notice had been served “*as soon as is reasonably possible*”. The fact that a defendant has failed to observe the twenty-eight day period prescribed under the Rules of the Superior Courts is not, therefore, determinative of whether the statutory requirement under the Civil Liability Act 1961 had been met. The court must make its own independent determination on that issue.
26. The twenty-eight day period nonetheless represents a useful benchmark against which to assess whether a third-party notice has been served “*as soon as is reasonably possible*”. The approach consistently adopted in the case law is to treat the statutory requirement as more generous than the twenty-eight day time-limit, with the consequence that a failure to comply with the twenty-eight day time-limit is not fatal. The Court of Appeal, in *Greene v. Triangle Developments Ltd* [2015] IECA 249, observed that the time-limit under Order 16 is not one with which the parties will normally comply or even be expected to comply.
27. The argument now urged on the court is the antithesis of the approach in the case law to date and implies that the statutory requirement is stricter than the Rules of the Superior Courts. The argument, if accepted, would entail a finding that a party who had actually complied with the timetable prescribed under the Rules

might nevertheless be held to have delayed unreasonably. This cannot be correct. It is always appropriate to have regard to the Rules in assessing the *reasonableness* of a party's conduct of litigation. The case law indicates that the court must have regard to the whole circumstances of the case and its general progress, and this involves considering the content of the Rules even if same are not determinative. A party who has endeavoured to follow the timetable prescribed under the Rules should not be penalised.

28. Applying these principles to the circumstances of the present case, the alleged delay on behalf of the Defendant falls to be assessed by reference to events subsequent to the issuance of the personal injuries summons. Had the timetable prescribed under the Rules of the Superior Courts been strictly followed, then the defence should have been delivered within eight weeks of service of the personal injuries summons, i.e. by the end of June 2019. However, it had been reasonable for the Defendant to hold off delivering his defence—and applying to join a third-party—until receipt of the Plaintiff's replies to particulars on 28 August 2019. As explained in *Connolly v. Casey* [1999] IESC 76; [2000] 1 I.R. 345, the test for the purposes of section 27 of the Civil Liability Act 1961 is whether it was reasonable to await the replies to particulars, not whether the replies received materially altered a defendant's state of knowledge.
29. The defence should, strictly speaking, have been delivered within eight weeks of receipt of the replies to particulars, i.e. by 23 October 2019; and an application for leave to issue the third-party notice should have been made within four weeks thereafter, i.e. by 20 November 2019. In the event, the motion did not issue until 16 June 2020. The notional “*delay*” in issuing the motion, when calculated by

reference to the timetable prescribed under the Rules, is thus approximately seven months.

30. I am satisfied that the Defendant has provided a reasonable explanation which justifies this lapse of time. It had been entirely appropriate for the Defendant to retain consulting engineers to investigate the circumstances of the accident. The Defendant's side had taken the sensible approach of seeking to arrange a joint inspection, whereby the representatives of the Plaintiff and Defendant would attend at the locus of the accident. The Defendant's solicitor first sent letters to the other side in this regard in June 2019, and the joint inspection was ultimately held on 10 February 2020. Whereas there was some slippage in reaching an agreed date for this joint inspection, the Defendant's side moved with expedition thereafter. The engineer's report had been prepared within a matter of weeks of the joint inspection, and the motion issued within three months of receipt of that report. The judgment in *Greene v. Triangle Developments Ltd* [2015] IECA 249 refers to the need to allow reasonable time to prepare the papers for an application to join a third-party, suggesting a period of eight to ten weeks as a matter of reasonable practice of solicitors.
31. In the event, the motion was allocated a return date of 7 December 2020. The six-month lapse between the date of the issuance of the motion and the return date is explicable by reference to the restrictions on certain types of court application introduced as part of the public health measures in respect of the coronavirus pandemic. Given the long return date, the Defendant's solicitor took the sensible precaution of notifying Mr. Power of the pending application to join him as a third-party. The letter to Mr. Power is dated 19 June 2020. Having notified him of the application, the letter respectfully suggests that Mr. Power

pass a copy of the letter to his insurers who would then be in a position to deal with the matter without further inconvenience to him.

32. It should be explained that whereas the plaintiff in proceedings must be put on notice of an application to join a third-party, the putative third-party does not have a right to be heard at that stage. The plaintiff must be put on notice of the application so as to afford them an opportunity to consider joining the putative third-party as a further defendant to the proceedings. Where, as in the present case, the plaintiff does not wish to add the third-party as a defendant, his attendance at the hearing of the motion is not necessary (Order 16, rule 1(2)). Thereafter, if the third-party wishes to challenge the third-party notice and to have it set aside, then they must bring an application pursuant to Order 16, rule 8.
33. The practical effect of the letter of 19 June 2020 was to ensure that Mr. Power was on notice of the intended claim for contribution against him at an earlier stage than required under the Rules. This reduced the risk of any prejudice being caused to Mr. Power by delay. In the event, no specific prejudice has been alleged by Mr. Power. As appears from the discussion of the judgment in *Kenny v. Howard* [2016] IECA 243 at paragraph 15 above, a defendant who had suffered prejudice can argue that a shorter period than might otherwise be allowed ought to be imposed in determining what was as soon as reasonably possible. No such consideration arises here.
34. Finally, it is necessary to consider the implications, if any, of the third-party having filed a defence to the proceedings. The Defendant seeks to make much of this, saying that the effect of same is to estop the third-party from seeking to set aside the third-party notice. Counsel on behalf of the Defendant relies in this

regard on the judgment in *Grogan v. Ferrum Trading Co. Ltd* [1996]

2 I.L.R.M. 216 (at page 221) as follows:

“I take the view that if there is to be an orderly conduct of litigation, the parties are entitled to assume that once a third party notice has been served and an appearance has been entered and a statement of claim has been sought and delivered and a defence to that third party statement of claim has been delivered, that this procedure meets with the approval of the third parties and they will not attempt to retreat from it. I believe that by adopting this procedure the third parties have forfeited their rights to make application to the court to have the procedure set aside. I believe that an argument can be addressed to support the proposition that it would be open to a third party to enter an appearance to a third party notice without prejudicing his position in order to allow him the time to consider the position and then make application to the court if so advised. However, at the stage where, having received a third party statement of claim, he enters a defence thereto he must be assumed to have received all the appropriate advices which he requires in relation to the case and these advices would, presumably, have included a consideration of the desirability of setting aside the third party notice. The delivery of the defence is, in my view, an election by the third party which precludes him thereafter from moving the court to set aside the notice. It might be argued that there is no statutory provision limiting the time for the making of this application nor is there any rule making such a provision. However, if a ‘cut-off point’ is not established then the absurd position would arise whereby an application of this nature might be made at or immediately before the hearing of the issues between the parties. I believe that a ‘cut-off point’ must be established and it seems to me that in the interest of orderly litigation that the cut-off point must be held to be not later than the entry of the defence by the third party.”

35. I respectfully agree with the general proposition that the orderly conduct of litigation demands that any application to set aside third-party proceedings be brought promptly. This proposition is consistent with the tenor of the judgment of the Supreme Court in *Boland v. Dublin City Council* [2002] IESC 69; [2002] 4 I.R. 409. I also agree that, in the vast majority of cases, the delivery of a defence to the third-party proceedings will represent a cut-off point, following

which an application to set aside the third-party proceedings will not normally be entertained.

36. Nevertheless, I am satisfied that the facts of the present case are distinguishable from those of *Grogan v. Ferrum Trading Co. Ltd.* The third-party defence delivered in these proceedings is a very short document, consisting of a single page. It is expressly pleaded that the third-party was not joined to the proceedings as soon as was reasonably possible as required by section 27(1)(b) of the Civil Liability Act 1961, and that the third-party will seek to have the claim against it struck out on the basis of delay. Moreover, the motion to set aside was issued within a matter of weeks. The third-party defence had been delivered on 24 March 2021, and the motion issued on 14 April 2021. This is not a case, therefore, where the filing of a defence could have created the mistaken impression that the third-party had accepted its joinder and would be defending the case against it solely on the merits (rather than on procedural grounds of delay). It would have been readily apparent from the content of the third-party defence that the service of the third-party proceedings was being challenged.
37. It follows that, in the very particular circumstances of the present case, the delivery of a defence by the third-party is not fatal to the application to set aside the third-party notice. The application does however fail for other reasons, as outlined above.

CONCLUSION AND FORM OF ORDER

38. The application to set aside the third-party proceedings is refused for the reasons explained herein. In brief, I am satisfied, having regard (i) to the timing of the

delivery of the replies to particulars, and (ii) to the principle that third-party proceedings should not be instituted without first assembling and examining the relevant evidence and obtaining appropriate advice thereon, that the Defendant did not delay unreasonably in seeking to join the third-party.

39. As to costs, my *provisional* view is that the Defendant, having been entirely successful in resisting the application to set aside the third-party proceedings, is entitled to his costs against the third-party in accordance with the principles prescribed under Part 11 of the Legal Services Regulation Act 2015. Costs to be adjudicated upon by the Office of the Chief Legal Costs Adjudicator in default of agreement. The costs order is to be stayed in the event of an appeal.
40. If either party wishes to contend for a different form of order than that proposed, short written submissions should be filed by 20 May 2022.

Appearances

Seán O'Mahony for the third-party instructed by FBD Solicitors

Dermot B Cahill, SC for the defendant instructed by Harrison O'Dowd Solicitors

Approved
Gareth S. Mass