

APPROVED

[2022] IEHC 4



THE HIGH COURT

2018 No. 327 P

BETWEEN

WILLIAM PURCELL

PLAINTIFF

AND

CÓRAS IOMPAIR ÉIREANN (CIÉ)
CIÉ GROUP PROPERTY MANAGEMENT
DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

DEFENDANTS

DENIS DESMOND
CAROLINE DESMOND

THIRD-PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 January 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.

NO REDACTION REQUIRED

CHRONOLOGY

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

8 March 2015	Date of alleged accident
15 January 2018	Personal injuries summons issued
14 February 2018	Appearance entered by first and second defendants
1 March 2018	Appearance entered by third defendant
8 May 2019	Defence delivered by first and second defendants
27 June 2019	Notice of change of solicitor for third defendant
25 July 2019	Notice of motion issued to join third-parties
18 November 2019	High Court order joining third-parties
1 July 2020	Irregular service of third-party notices
29 July 2020	Appearance rejected by Central Office
14 September 2020	Service of filed third-party notices
5 October 2020	Motion to set aside third-party notices issued
14 December 2021	Hearing of motion

PROCEDURAL HISTORY

3. These proceedings take the form of a claim for personal injuries. The claim arises out of a cycling accident said to have occurred on 8 March 2015. It is pleaded that the plaintiff came off his bicycle as a result of hitting an unmarked, non-standard speed ramp on Strand Road, Killiney, Co. Dublin (“*the roadway*”).
4. In brief, the claim against the defendants is that the speed ramp constituted a hazard in that it was indistinguishable from the roadway and was overshadowed by an overgrown tree. It is pleaded, *inter alia*, that the defendants failed to construct or design the speed ramp in accordance with relevant guidelines with

respect to length and height, and that they failed to put in place a clearly visible sign indicating the presence of the speed ramp.

5. The first and second defendants delivered a joint defence to the claim on 8 May 2019. For ease of exposition, these two defendants will be referred to as “*the CIÉ defendants*”. Relevantly, the defence puts the plaintiff on proof of the allegation that the CIÉ defendants constructed speed ramps on the roadway. The defence also contains pleas to the effect that the speed ramp was installed by Denis Desmond and Caroline Desmond (“*Mr. & Mrs. Desmond*”). It appears that Mr. & Mrs. Desmond are the occupiers of a dwelling house adjacent to the roadway. It is pleaded that the installation of the speed ramp had been done without the prior knowledge and/or consent of the CIÉ defendants. It is further pleaded that the CIÉ defendants are entitled to a full indemnity from Mr. & Mrs. Desmond.
6. It should be explained that the installation of the speed ramp had been the subject of contentious correspondence between the solicitors acting on behalf of CIÉ and Mr. & Mrs. Desmond, respectively, in the years 2002 and 2003. The existence of this correspondence is relevant to the state of knowledge of the CIÉ defendants. I will return to discuss this correspondence further at paragraphs 34 and 35 below.
7. A number of months subsequent to the delivery of the defence, the CIÉ defendants issued a motion on 25 July 2019 seeking leave to join Mr. & Mrs. Desmond as third-parties to the proceedings. The motion came on for hearing on 18 November 2019, and an order was made on that date joining the third-parties. The court order was formally drawn up, i.e. perfected, the following day, 19 November 2019.

8. The third-party notices should have been served on Mr. & Mrs. Desmond within twenty-eight days from the making of the order, and a sealed copy of the notices filed in the Central Office of the High Court. In the event, the time-limits in this regard were not complied with. The third-party notices were not, in fact, served until 1 July 2020, i.e. some seven months later. The service was irregular in that a copy of the third-party notices was not filed in the Central Office, with the consequence that an appearance to the third-party proceedings could not be entered. This procedural misstep was ultimately corrected by the service of the third-party notices in proper form on 14 September 2020.
9. Mr. & Mrs. Desmond issued a motion seeking to have the third-party notices set aside on the grounds of delay on 5 October 2020. The motion came on for hearing on 14 December 2021.

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 most obvious example of a disruptive effect caused by the joinder of a third-party is where the third-party notice has been issued after the pleadings in the main proceedings have closed and the case has been set down for trial. The introduction of a third-party claim at such a late stage is likely to result in a delayed hearing. It is apparent from the case law, however, that it is not only such eleventh hour joinders that are liable to be set aside.
16. The statutory 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). No such delay arises in the present case: the motion to set aside the third-party notices was issued on 5 October 2020, that is, within one month of the proper service of the third-party notices.

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

17. 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). I tend to the view that time should be taken as running from the date upon which the third-party notice is actually served. This appears to be more in keeping with the statutory language, i.e. “*serve a third-party notice upon such person as soon as is reasonably possible*”. It is only once the notice

has been served that the third-party will be on formal notice of the third-party proceedings, and that the timetable prescribed under the Rules of the Superior Court for the exchange of pleadings within the third-party proceedings will be triggered.

18. On the facts of the present case, there has been significant delay both in the making of the application for leave to issue the third-party notices, and in the service of the third-party notices following the grant of leave.

Order 16, Rules of the Superior Courts

19. 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 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).
20. 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.

21. In practice, none of these time-limits are complied with in the majority of cases. There is almost always some slippage in the delivery of the various pleadings and in the making of applications to join third-parties. 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. More recently, the Court of Appeal in *O'Connor v. Coras Pipeline Services Ltd* [2021] IECA 68 (*per* Barrett J.) described as “*regrettable*” the fact that the Rules establish time constraints which are so rigorous that they are more often honoured in the breach than the observance, with the courts expected to tolerate what appears to be a general divergence in practice from the timescale that Order 16, rule 1(3) ordains.
22. The twenty-eight day time-limit thus represents, at most, a benchmark against which the statutory requirement to move “*as soon as is reasonably possible*” might be measured.

Consequences of setting aside a third-party notice

23. The consequences for a defendant of a third-party notice being set aside are potentially severe. The defendant’s claim for contribution may only be pursued thereafter in separate proceedings and is subject to the court’s discretion under section 27(1)(b) of the Civil Liability Act 1961. The court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed.
24. The nature of this statutory discretion has been discussed in *ECI European Chemical Industries Ltd v. McBauchemie Muller GmbH* [2006] IESC 15;

[2007] 1 I.R. 156. There, the Supreme Court held that the type of considerations which are relevant in deciding whether to set aside a third-party notice will also be relevant to the exercise of the court's discretion to allow a claim for contribution in separate proceedings. The court would have to consider was there a good reason why the statutory requirement of serving a third-party notice as soon as is reasonably possible had not been complied with.

25. In those cases where a third-party notice had actually issued, only to be set aside subsequently, any matter already decided on the application to set aside the third-party notice must be treated as *res judicata*. Where the third-party notice had been set aside because it had not been served as soon as reasonably possible, then this finding will inform the exercise of the court's discretion to allow a claim for contribution in separate proceedings. The Supreme Court suggested that in most such cases, irrespective of any question of prejudice, the separate proceedings claiming contribution should be rejected. On this analysis, it is only in those cases where the third-party notice had been set aside for reasons *other than* delay that there is a likelihood of being allowed to pursue a claim for contribution thereafter in separate proceedings.
26. The Court of Appeal in *Ballymore Residential Ltd v. Roadstone Ltd* [2021] IECA 167 has queried whether the approach adopted by the Supreme Court might be thought to be an unduly narrow one. Collins J. suggested, *obiter dicta*, that if the defendant to the claim for contribution has not been materially prejudiced by a failure to utilise the third-party procedure, then it might appear difficult to understand why the court's discretion should be exercised against permitting a claim for contribution to be pursued.

27. In summary, on the current state of the authorities, the setting aside of a third-party notice on the grounds of delay may have the consequence that the defendant in the main proceedings is precluded thereafter from seeking any contribution from that party.

DISCUSSION AND DECISION

28. The personal injuries summons in these proceedings was issued on 15 January 2018. It is not readily apparent from the papers before the court as to when the summons was actually served, but given that the CIÉ defendants entered an appearance less than a month later, on 14 February 2018, it must have been served promptly.
29. Had the timetable prescribed under the Rules of the Superior Courts been followed, then the defence should have been delivered within eight weeks, i.e. by mid-April 2018 at the latest, and an application for leave to issue third-party notices made within four weeks thereafter, i.e. by mid-May 2018. As discussed at paragraphs 19 to 22 above, this timetable represents, at most, a benchmark against which the statutory requirement to serve third-party notices “*as soon as is reasonably possible*” might be measured.
30. In the event, there was a delay of some thirteen months in the delivery of the defence (8 May 2019). Thereafter, a motion seeking leave to join the third-parties issued some two months later (25 July 2019). The third-party notices were not served for a further twelve months (1 July 2020), and had to be re-served as a result of the failure to file copies in the Central Office of the High Court (14 September 2020).

31. The principal explanation offered on behalf of the CIÉ defendants for the first period of delay, i.e. that prior to the issuance of the motion seeking leave to join the third-parties, is that there were no grounds to make an application to join the third-parties prior to the delivery of the defence. More specifically, it is averred on affidavit that the application could only have been made *after* service of the defence in which liability for the alleged accident is pleaded as being attributable to the third-parties. Put otherwise, the CIÉ defendants seek to capitalise on their own failure to deliver a defence within the eight weeks prescribed.
32. With respect, it is impermissible—and entirely circular—for a defendant to seek to rely on their own delay as absolving their failure to comply with the statutory obligation to serve a third-party notice as soon as is reasonably possible. The late delivery of a defence could only ever be relevant in this context in circumstances where the defence is that of a *different* defendant and discloses an unanticipated line of defence. For example, the late defence might disclose, for the first time, that a co-defendant, who had been joined as the owner or occupier of lands on which an accident occurred, does not, in fact, have any interest in the lands. The other defendant might then need to join the actual owner or occupier as a third-party to protect its own position. Similarly, in a breach of contract case, the late defence might disclose that the wrong entity in a group of companies has been joined in the proceedings, and the named co-defendant is not privy to the contract the subject-matter of the proceedings. The other defendant might then need to join the correct company as a third-party to protect its position. Indeed, the plaintiff might well respond to the application for leave to issue third-party proceedings by seeking to add the third-party as a defendant.

33. Another contingency is where the late defence, to the surprise of the other defendant, seeks to attribute liability entirely to that defendant: see, for example, the facts of *Buchanan v. B.H.K. Credit Union Ltd* [2013] IEHC 439.
34. The circumstances of the present case are entirely different. Here, the CIÉ defendants seek to rely on the content of their own defence, not that of another defendant. Moreover, the information relied upon to join the third-parties is not newly disclosed, but rather had been within the knowledge of the CIÉ defendants long before the institution of the proceedings. It is apparent from correspondence exhibited by their own solicitor that the CIÉ defendants had been aware since 2002 and 2003 that the third-parties had installed speed ramps on the relevant roadway. The correspondence from CIÉ cites an example of a badly constructed speed ramp elsewhere resulting in a claim by an injured motorist. The relevant letter goes on to state that if Mr. Desmond wished to build a properly constructed ramp, and to put the necessary indemnities in place, then details of plans should be forwarded for CIÉ's engineers to inspect. In the interim, Mr. Desmond was requested to remove the ramp which he had constructed.
35. Having regard to this correspondence, it is apparent that, as of the date the within proceedings were served, CIÉ were already in possession of sufficient information to allow them to decide whether to pursue a third-party claim against Mr. & Mrs. Desmond. This is not a case where time was required to assemble and examine evidence: the information was already within CIÉ's knowledge. Nor is it a case involving a claim of professional negligence, such that it would be necessary to await an independent expert report.

36. I turn next to consider the second period of delay, namely the delay between the drawing up of the court order on 19 November 2019 and the service of the third-party notices on 14 September 2020.
37. It seems that a copy of the court order was not taken up by the CIÉ defendants' solicitor until 27 April 2020. No satisfactory explanation has been provided for the delay of some five months in this regard. The registrar had drawn up the order on the day immediately following the application on 18 November 2019. There should have been no difficulty taking up the order from the Central Office. This is especially so as there were no covid-related public health restrictions in force at this time. It appears from the evidence that having made an initial unsuccessful attempt to take up the order in November 2019, there was no active engagement by the solicitor with the Courts Service until April 2020. A copy of the order was then obtained by using the designated email address.
38. The third-party notices were initially served on 1 July 2020. Unfortunately, however, a copy of the third-party notices was not filed in the Central Office of the High Court at the time. This had the result that the third-parties were unable to file an appearance in the Central Office. It was, instead, necessary for the CIÉ defendants to re-serve the third-party notices on 14 September 2020.
39. In assessing the reasonableness of the delay, weight must be given to the fact that the third-parties would have been aware of the existence of the third-party proceedings from the earlier date of 1 July 2020. See, by analogy, *Greene v. Triangle Developments Ltd* [2015] IECA 249 (at paragraphs 13 and 26). Even allowing for this adjustment, however, the delay of some seven and a half months in taking up the order and serving the third-party notices was both inordinate and inexcusable.

40. There has been some suggestion that part of the delay was referable to the restrictions on movement introduced in response to the coronavirus pandemic. With respect, this does not represent a justification for the delay in serving the third-party notices. Most of the delay had already accrued prior to the coming into force of the restrictions in the latter part of March 2020. Thereafter, the court order was obtained by way of email and the notices served by post, neither of which activity was impacted by the restrictions. Moreover, the provision of legal services by practising solicitors and the attendance at court offices has always been deemed as an “*essential service*” for the purposes of the regulations.
41. For the reasons set out above, I have concluded that the CIÉ defendants have failed to discharge the onus upon them to explain and justify either period of delay. That is not, however, an end of the matter. As emphasised by the Court of Appeal in *Greene v. Triangle Developments Ltd* [2015] IECA 249, it is incumbent on the court to look not only at the explanations which were 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.
42. The objective factors identified by the Court of Appeal in *Greene* included, first, that the third-party proceedings involved an allegation of professional negligence—hence it was reasonable to await an expert’s report—and, secondly, that the delay between the delivery of the statement of claim and the initial service of the third-party notice was only ten months. Neither of these factors has a resonance in the present case.
43. Counsel on behalf of the CIÉ defendants contends that the third-parties have failed to demonstrate any specific prejudice arising as a result of the delay. This

is said to be a significant factor in favour of refusing to set aside the third-party notices.

44. With respect, these submissions tend to overstate the weight to be attached to the existence or otherwise of specific prejudice. 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.”

45. On the facts of the present case, regard has to be had to the length of the delay. The overall delay between the notional date upon which the third-party notices should have been served in accordance with Order 16 and the first attempt at

service is in excess of two years. On any objective standard, such a period of delay is excessive and unreasonable in the context of what is a straightforward personal injuries action. This is so irrespective of whether the third-parties have suffered any specific prejudice. I have concluded, therefore, that the third-party notices were not served as soon as was reasonably possible.

CONCLUSION AND FORM OF ORDER

46. The application for leave to issue and serve the third-party notices should have been brought by mid-May 2018, and thereafter the third-party notices should have been served within twenty-eight days from the making of the court order granting leave. In the event, there was inordinate and inexcusable delay by the CIÉ defendants at both stages, resulting in a cumulative delay of in excess of two years. This delay is unreasonable and disproportionate having regard to the overall circumstances of what is a straightforward personal injuries action, and having regard to the state of knowledge of the defendants in respect of the construction of the speed ramp. In the premises, the CIÉ defendants failed to comply with the requirement, under section 27(1)(b) of the Civil Liability Act 1961, to serve a third-party notice as soon as is reasonably possible. Accordingly, an order will be made setting aside the third-party proceedings on the grounds of delay.
47. As to costs, my *provisional* view is that the third-parties, having been entirely successful in their application to set aside the third-party proceedings, are entitled to their costs against the first and second named defendants in accordance with the principles prescribed under Part 11 of the Legal Services Regulation Act 2015. Such costs to include the costs of two counsel and of the

written legal submissions. 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. If either party wishes to contend for a different form of order, short written submissions should be filed by 25 January 2022.

Appearances

Frank Beatty, SC and Peter Paul Daly for the third-parties instructed by Kennedys Solicitors LLP

Ray Delahunt for the first and second named defendants instructed by Colm Costello Solicitor

Approved
Gemma S. Mans