

APPROVED

[2022] IEHC 658



**THE HIGH COURT
CIRCUIT APPEAL**

2021 No. 204 CA

BETWEEN

MIA BOWEN

PLAINTIFF

AND

H & M HENNES & MAURITZ (IRELAND) LTD

DEFENDANT

OTIS ELEVATOR IRELAND LTD

THIRD-PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 November 2022

INTRODUCTION

1. This judgment is delivered in respect of an application to set aside third-party proceedings on the grounds of delay. The matter comes before the High Court by way of an appeal from the Circuit Court.

PROCEDURAL HISTORY

2. These proceedings take the form of a personal injuries action arising out of a work-related incident on 11 October 2016. The injured party, the Plaintiff, had

NO REDACTION REQUIRED

been employed by the Defendant as a sales assistant at its retail premises at Opera Lane, Cork. The injured party's claim for personal injuries arises out of an incident whereby she had been trapped for a period of time in a lift or elevator on the premises. The pleaded case is that the injured party had been severely shocked and distressed by the incident; had suffered anxiety in the weeks thereafter; and had developed pain in her hip and her back. The injured party had been on illness benefit for a period of six months following the incident.

3. The personal injuries proceedings were, initially, pursued with reasonable expedition by the parties. The Defendant entered an appearance on 29 May 2019, having raised a notice for particulars on 27 May 2019. The Plaintiff replied to the notice for particulars on 10 September 2019.
4. Thereafter, the proceedings stalled. The Defendant did not deliver its defence until 20 November 2020, that is, some fourteen months after it had received the replies to its notice for particulars. The Plaintiff then purported to serve a notice of trial on 11 December 2020. This notice seems to have been treated as invalid and the Plaintiff served a notice of intention to proceed before serving a fresh notice of trial on 23 March 2021.
5. The Defendant eventually issued a motion, on 10 May 2021, seeking leave to serve a third-party notice. This application was allowed by the County Registrar on 15 June 2021. The Third-Party subsequently issued a motion seeking to set aside the third-party notice on 28 September 2021. This application was refused by a Judge of the Circuit Court on 2 December 2021. The Third-Party filed an appeal against this refusal on 13 December 2021. The appeal ultimately came on for hearing before me on 14 November 2022.

6. In the interim, the main proceedings, i.e. the personal injuries action, were compromised. The proceedings were struck out with an order for costs in favour of the Plaintiff on 22 February 2022. I have not been informed of the settlement amount.

CHRONOLOGY

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

11 October 2016	Date of incident
18 July 2018	Letter of claim
9 January 2019	PIAB authorisation
28 March 2019	Personal Injuries Summons
16 May 2019	Summons served on Defendant
27 May 2019	Defendant's notice for particulars
29 May 2019	Appearance entered by Defendant
10 September 2019	Replies to notice for particulars
20 November 2020	Defence delivered
11 December 2020	Notice of trial
19 February 2021	Notice of intention to proceed
23 March 2021	Notice of trial
10 May 2021	Motion to join third-party issued
15 June 2021	Order joining Third-party (County Registrar)
29 June 2021	Third-party notified of proceedings
28 September 2021	Motion to set aside third-party notice is issued
2 December 2021	Circuit Court Order refusing to set aside
13 December 2021	Notice of appeal to High Court
22 February 2022	Personal injuries claim compromised
14 November 2022	Hearing of appeal by High Court

SECTION 27 OF THE CIVIL LIABILITY ACT 1961

8. 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.
9. 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).
10. The underlying policy of the legislation is to put the third-party in as good a position as possible in relation to knowledge of the claim and the opportunity of investigating it. A defendant cannot seek to justify a delay by seeking to establish that the third-party has not been prejudiced. A third-party who seeks to set aside a third-party notice is not required to go beyond establishing that the notice was not served as “soon as reasonably possible” and is not required to show that he has been prejudiced. (*Susquehanna International Group Ltd v. Execuzen Ltd* [2022] IECA 209).
11. The corollary to the statutory obligation upon a defendant to serve a third-party notice as soon as is reasonably possible is a right, on the part of the third-party, to have the third-party proceedings set aside if they were not so served. (*Susquehanna International Group Ltd v. Execuzen Ltd* [2022] IECA 209).
12. 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).

13. In assessing any delay, regard should be had to the whole circumstances of the case and its general progress. However, delay in the service of a third-party notice may not be disregarded merely because it has not had the consequence that the progress of the main action has been delayed. The application of the statutory requirement to serve a third-party notice as soon as is reasonably possible cannot properly vary on a case-by-case basis by reference to the enthusiasm or lethargy of the particular plaintiff. (*Susquehanna International Group Ltd v. Execuzen Ltd* [2022] IECA 209).
14. 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 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.

CIRCUIT COURT RULES, ORDER 7

15. This matter comes before the High Court by way of an appeal from the Circuit Court. In determining the appeal, the High Court is, in effect, exercising the same jurisdiction as the Circuit Court. (*ACC Loan Management Ltd v. Fagan* [2021] IESC 20, [2021] 1 I.R. 781 (at paragraphs 22 and 23). Accordingly, it is necessary to consider how third-party proceedings are regulated under the Circuit Court Rules.
16. Order 7 of the Circuit Court Rules makes provision for third-party proceedings. It imposes a requirement upon a defendant, who wishes to pursue third-party proceedings, to apply for leave to issue and serve a third-party notice. The timing of such an application is regulated by Order 7, rule 3 as follows:

“Application for leave to issue the third party notice shall, unless otherwise ordered by the Court, be made after the service of an Appearance and at any time prior to the trial of the action.”
17. This rule envisages that an application to join a third-party may be made at any time prior to the trial of the action. Were this rule to be read in isolation, without reference to the Civil Liability Act 1961, it might be understood as suggesting that there is no time constraint on the joinder of a third-party. It would, however, be inappropriate to interpret the rule in such a narrow way. Such an interpretation would create conflict between the Circuit Court Rules and Section 27 of the Civil Liability Act 1961. The Circuit Court Rules are a form of secondary or delegated legislation and, as such, cannot prevail over primary

legislation such as the Civil Liability Act 1961. See, by analogy, *Buchanan v. B.H.K. Credit Union Ltd* [2013] IEHC 439 (at paragraphs 15 to 18).

18. Any potential conflict can be avoided by seeking, if possible, to give Order 7, rule 3 an interpretation which is consistent with the statutory requirement, rather than an interpretation which would render the rule *ultra vires*. Applying this approach, Order 7, rule 3 should be understood as indicating no more than that the application for leave to serve a third-party notice does not have to await the filing of any particular pleading. A defendant does not, for example, have to defer making the application for leave until such time as it has delivered its defence to the proceedings. (cf. Order 16 of the Rules of the Superior Courts). The overarching statutory obligation remains, however: the defendant must serve a third-party notice as soon as is reasonably possible. In almost all cases, this will necessitate that the application for leave to serve be made well in advance of the trial of the action.

DISCUSSION AND DECISION

19. The question of whether the Defendant served the third-party notice as soon as reasonably possible falls to be assessed by reference to events subsequent to the issuance of the personal injuries proceedings on 28 March 2019. Time does not run from the earlier date of the notification of a claim nor from the date of the application to the Personal Injuries Assessment Board. The wording of Section 27 makes it clear that the obligation to serve a third-party notice as soon as reasonably possible only arises in the context of a pending action.
20. It had been reasonable for the Defendant to hold off delivering its defence—and applying to join a third-party—until receipt of the Plaintiff's replies to particulars

on 10 September 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.

21. However, once the replies to particulars had been received, the Defendant should have moved promptly. The application for leave to serve a third-party notice should have been issued no later than the end of December 2019. This would have allowed ample time for the Defendant to finalise and deliver its defence, having considered the content of the replies to particulars, and then to prepare the motion papers for the application to serve a third-party notice.
22. In the event, however, the application was not issued until 10 May 2021, i.e. some twenty months after the replies to particulars had been delivered.
23. The Defendant has advanced three reasons as to why the lapse of time should not be characterised as unreasonable. First, it is said that time was required to obtain maintenance records, from the Third-Party, relating to the malfunctioning lift. Secondly, it is said that there were difficulties in locating the paperwork recording the contractual arrangement between the Defendant and the Third-Party. Finally, it is said that there were logistical difficulties in issuing the motion out of the Circuit Court Office caused (i) by the public health measures introduced in response to the coronavirus pandemic, and (ii) by the retirement of the County Registrar.
24. With respect, none of these reasons amounts to a reasonable justification for the delay. The Defendant had been served with the personal injuries proceedings in the second quarter of 2019. It would have been immediately obvious from the circumstances of the claim that some consideration would have to be given by

the Defendant to whether the Third-Party, which had been responsible for the servicing and maintenance of the lift, might have some liability for its malfunctioning. The Defendant should have begun to assemble and examine the relevant evidence and to obtain appropriate advice thereon. It was unreasonable for the Defendant to delay until February 2020 before obtaining the maintenance records relating to the malfunctioning lift from the Third-Party. Similarly, the delay in locating the paperwork recording the contractual arrangement between the Defendant and the Third-Party was also unreasonable. It appears from the affidavit filed that this material was internal documentation, i.e. documentation which was held by the Defendant itself. Certainly, the delay cannot legitimately be attributed to logistical difficulties caused by the coronavirus pandemic. The public health restrictions, which are said to have affected the ability of the Defendant's employees to attend at their offices, were not introduced until March 2020, i.e. some twelve months after the proceedings were issued and some nine months after the Defendant had entered an appearance to the proceedings. There should have been ample time to locate the paperwork prior to March 2020.

25. Tellingly, the Defendant, in its defence to the proceedings, had been able to articulate a claim against the Third-Party. The defence expressly pleads that any personal injuries suffered by the Plaintiff were caused by reason of the negligence, breach of contract or breach of statutory duty of Otis Elevator Ireland Ltd. It is apparent, therefore, that the Defendant had by 20 November 2020, at the very latest, been able to formulate a claim for indemnity and contribution. Yet, the motion for leave to serve a third-party notice was not issued for another six months.

26. The explanation offered for the period of delay leading up to the issuance of the motion on 10 May 2021 does not amount to a reasonable justification. The affidavit filed on behalf of the Defendant suggests that many motion lists in Cork Circuit Court were cancelled between January 2020 and April 2020 due to Covid. With respect, this averment cannot be correct: the public health restrictions were not introduced until mid- March 2020. It is also stated that, for an unspecified period, the Circuit Court Office would not accept motion papers for the purposes of issuing new motions. The onus lies with a Defendant to explain their delay. The limited affidavit evidence filed on behalf of the Defendant in the present case fails to establish that it was not possible to issue a motion in Cork prior to May 2021.
27. Finally, and for completeness, it should be noted that the Defendant had, initially, sought to resist the set aside application on the basis that the Third-Party had not suffered any prejudice as a result of the delay. In particular, it was contended that the Third-Party would have been aware, from an early stage, of the possibility of a claim against it by virtue of the following. First, employees of the Third-Party had been involved in releasing the people trapped in the lift on the day of the incident. Secondly, the Defendant had requested maintenance records from the Third-Party in February 2020.
28. These submissions were not pursued at the hearing of the motion before me, having regard to the recent judgment of the Court of Appeal in *Susquehanna International Group Ltd v. Execuzen Ltd* [2022] IECA 209. This judgment confirms that a defendant cannot seek to justify a delay by seeking to establish that the third-party has not been prejudiced.

CONCLUSION AND PROPOSED ORDER

29. The Defendant failed to serve the third-party notice as soon as reasonably possible. The main action consists of a very straightforward claim for personal injuries arising out of the malfunctioning of a lift at the Defendant's retail premises. It would have been immediately obvious from the circumstances of the claim that some consideration would have to be given by the Defendant to whether the company, which had been responsible for the servicing and maintenance of the lift, might have some liability for its malfunctioning.
30. Against this background, the failure to issue a motion for leave to serve a third-party notice within two to three months of the receipt of the Plaintiff's replies to particulars was, arguably, unreasonable. A period of some six months had already elapsed at this stage since the service of the proceedings. Certainly, the cumulative delay of twenty months thereafter is entirely unreasonable. This delay consists of a delay of fourteen months in delivering a defence and a further delay of six months in issuing the motion for leave to serve a third-party notice.
31. Accordingly, the appeal against the Circuit Court order of 2 December 2021 is allowed. The order is vacated, and an order will be made in lieu setting aside the third-party proceedings.
32. As to costs, my provisional view is that the Third-Party, having been "*entirely successful*" in its application to set aside the third-party proceedings, is entitled to recover its costs against the unsuccessful party, i.e. the Defendant. The proposed costs order would include the costs above and below.
33. If either party wishes to contend for a different form of costs order, they should notify my registrar within 14 days of today's date to arrange to have the matter listed for argument on costs.

Appearances

Eamon Marray for the Third-Party instructed by Kennedy Solicitors LLP

Kevin Callan for the Defendant instructed by Ennis & Associates LLP

Approved
Gemma S. Moss