

THE HIGH COURT

[2017 No. 10359 P]

BETWEEN

SHAUNA REILLY

PLAINTIFF

– AND –

CAMPBELL CATERING LIMITED TRADING AS ARAMARK, MOMENTUM PROPERTY SERVICES LIMITED, OUR LADY'S CHILDREN'S HOSPITAL CRUMLIN

– AND –

ISS IRELAND LIMITED TRADING AS ISS FACILITY SERVICES

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered 14th day of November, 2019.

1. These proceedings arise out of a claim for personal injuries arising from a workplace accident which allegedly occurred at a hospital premises on 11.06.2016. The plaintiff alleges, *inter alia*, that there were defects in the cleaning system at the hospital premises and that there was matter present on the floor which caused her to slip and fall.
2. The plaintiff obtained a Personal Injuries Assessment Board ("PIAB") authorisation against the first to third defendants on 20.01.2017 and 30.05.2017 respectively. The personal injuries summons issued on 16.11.2017. The fourth defendant was not initially named as a defendant to the proceedings.
3. The plaintiff obtained a PIAB authorisation against the fourth defendant on 20.02.2019 and brought a motion which had the effect of substituting the fourth defendant for the second defendant. That application was successful, an order issued on 28.03.2019, an amended personal injuries summons issued on 12.04.2019 and was served on the fourth defendant on 18.04.2019.
4. In the amended personal injuries summons, the plaintiff claims (correctly) that the fourth defendant was, at the material time of the alleged accident, the contract cleaner retained at Crumlin Children's Hospital.
5. The fourth defendant accepts that it was retained to provide contract cleaning services at Crumlin Children's Hospital at the time of the alleged accident, its retainer in this regard having been operative between 01.02.2015 and 31.01.2018. However, by reason of the factors described hereafter, the fourth defendant claims that it is severely prejudiced in its defence of the plaintiff's claim and further that the plaintiff has delayed unreasonably in seeking to join the fourth defendant to the within proceedings.
6. The plaintiff was made aware in writing as early as 20.02.2018 that the second defendant was not the provider of contract cleaning services at the locus of the accident on the date of the accident. No investigations appear from the evidence to have been made as regards identifying which was the correct party to sue in place of the second-named defendant until after a letter of 30.01.2019 was received. Thereafter the plaintiff obtained a further PIAB authorisation and delivered an amended personal injuries summons on 12.04.2019, having obtained an order which in effect allowed the fourth defendant to be substituted for the second defendant.

7. The fourth defendant claims itself to be irredeemably prejudiced by the delay in notification and prosecution of this claim, such that it cannot fairly or properly defend the claim, in particular by virtue of the following factors:
 - (i) no report of any accident was made by or on behalf of the plaintiff within eight weeks of the occurrence of the alleged accident in accordance with s.8 of the Civil Liability (Amendment) Act 2004 ("Act of 2004");
 - (ii) the first notification that the fourth defendant received of the occurrence of the alleged accident was on or about 20.02.2019, roughly 3½ years after the alleged accident;
 - (iii) immediately on becoming aware of the claim, the fourth defendant conducted inquiries and investigations in relation to same; however, this investigation has been hindered by the passage of time since the alleged accident and the fact that the fourth defendant is no longer the contractor on site at the locus of the accident following the termination of its contract in January 2018; and
 - (iv) despite carrying out the said inquiries and investigations, the fourth defendant has no record of the alleged accident (and by virtue of its no longer being the contractor in situ) will have significant difficulty in identifying, retrieving and accessing the relevant records of cleaning schedules, staff rotas and other documentation that would be necessary to defend the plaintiff's claim.

8. In summary, the fourth defendant maintains that:
 - (a) the plaintiff did not comply with the reporting obligations under s.8 of the Act of 2004;
 - (b) thereafter the plaintiff failed to instruct solicitors in relation to the matter until just prior to the expiry of the statutory limitation period;
 - (c) despite being on notice that she had named the incorrect defendant in February 2018, the plaintiff delayed a further period in excess of one year in seeking to join and serve the fourth defendant; and
 - (d) the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting the within proceedings against the fourth defendant and various consequential difficulties present for the fourth defendant in terms of its being able fairly and properly to defend the claim now brought against it.

9. What does the plaintiff have to say to all of this? Perhaps the most efficient way of describing her version of events is to set out a summary timetable of events and make certain additional comment by reference to an affidavit that has been sworn by her solicitor:

DATE	EVENT (BOLD TEXT) AND COMMENT (PLAIN TEXT)
11.06.2016	Date of alleged accident.
16.11.2017	Personal injuries summons issues.
20.02.2018	Letter received from second defendant indicating that it was not providing cleaning services at the locus of the alleged accident on the alleged date of same. From this date the plaintiff was on notice of the issue presenting in this regard. These are her proceedings and she ought to have been concerned from this point as to whether the second defendant was a correct defendant and to have taken active steps to clarify matters in this regard. It does not appear from the evidence before the court that, until receipt of the letter of 30.01.2019, any such steps were taken.
06.03.2018	Letter received from second defendant seeking confirmation that plaintiff would discontinue proceedings. Even if one allows for a little time from the receipt of the first letter, with and from the receipt of this second letter and the request for the confirmation sought therein 'alarm bells' ought now to have been sounding loudly that the second defendant was the wrong party to sue and that another party ought to have been sued in its stead. These are the plaintiff's proceedings and she ought now to have been increasingly concerned as to whether the second defendant was a correct defendant and to have taken active steps to clarify matters in this regard. It does not appear from the evidence before the court that, until receipt of the letter of 30.01.2019, any such steps were taken.
14.12.2018	Letter received from second defendant seeking confirmation that plaintiff would discontinue proceedings. It is entirely unjustifiable that by this point in time nothing had been done to ascertain the truth of matters.
30.01.2019	Letter received from second defendant seeking confirmation that plaintiff would discontinue proceedings. The plaintiff's solicitor avers that it was only with this letter that evidence was provided to support the assertion that the second defendant was not the right party to sue and hence only with this letter that it became appropriate and necessary for the plaintiff to take action as regards who to sue instead of the second defendant. The court does not accept that, following the receipt of the letters of 20.02.2018, 06.03.2018 and 14.12.2018, the plaintiff should have awaited proof of what the second defendant was asserting; or, at least, that the plaintiff could do so and expect that this would necessarily have no consequence when it came to suing the fourth defendant. The court also respectfully does not accept the contention made at the hearing that, until receipt of the letter of 30.01.2019, the plaintiff was being rightly circumspect as regards what the second defendant contended. Being rightly circumspect (and there is a place for circumspection) does not justify awaiting proof that one has sued the wrong defendant despite repeatedly being told by a reputable firm of solicitors that this is what one has done and despite repeated requests made to discontinue proceedings; and if one does delay in this regard (and the plaintiff has considerably delayed in this regard) one cannot so delay and also expect that this will necessarily yield no consequence when it comes to suing the correct defendant.

14.02.2019	Following letter of 30.01.2019, plaintiff's solicitor writes to PIAB seeking further authorisation.
20.02.2019	Further PIAB authorisation issues.
25.02.2019	Notice of Motion seeking in effect to substitute fourth-named defendant for second-named defendant.
28.03.2019	Master strikes out claim against second-named defendant and adds fourth-named defendant.
12.04.2019	Amended personal injury summons issues.
18.04.2019	Amended personal injury summons served.

10. The plaintiff contends that the fourth defendant is not irredeemably prejudiced by the alleged delay as it is open to the fourth defendant to seek *inter partes* discovery from the first and/or third defendants relating to such matters as the fourth defendant deems relevant. This contention is respectfully not accepted by the court. For a plaintiff to seek that a belatedly-joined defendant should, in the particular circumstances here presenting, rest its defence on such documentation as one or more co-defendants who were sued in a timely manner may or may not possess when it should/would have been possible for that belatedly-joined defendant to structure its case otherwise had it likewise been sued in a timely manner (and when it ought to have been possible for the plaintiff to have proceeded, or at least taken steps to proceed, in a more timely manner) is not a fair or reasonable thing to ask of such a belatedly-joined defendant; moreover, the interests of separate defendants do not necessarily align, so what one defendant has thought to do in such circumstances may not align with what another defendant would have done if sued in a more timely manner, and in any event a fellow defendant might not be as competent/shrewd as a belatedly-joined defendant in how it has proceeded up to the point that a belatedly-joined defendant is joined. All of these observations point to the unreasonableness and unfairness of what the plaintiff's solicitor contends as regards the *inter partes* correspondence.
11. There will undoubtedly be cases in which a plaintiff does not know the identity of the party who has allegedly caused certain injuries, as well as cases (as here) where a plaintiff, proceeding in good faith, mistakenly sues the wrong party. The question here is what the plaintiff should do when it begins to emerge that the latter form of mistake has been made. The court has been referred in this regard to two decisions of the Court of Appeal of England and Wales, the logic of which the court respectfully adopts and the substance of which is helpfully encapsulated in Martin Canny, *Limitation of Actions* (2nd ed., Round Hall, 2016), 273, in the following terms:

"[I]n Simpson v. Norwest Holst Southern Ltd [[1980] 1 WLR 968], following an accident at work, the plaintiff issued proceedings against the company that appeared to be named as his employer in his wage slips. It transpired that he was in fact employed by a different company within the same group of companies. The

*Court of Appeal held that time only started to run from when he should reasonably have discovered the identity of his employer, which was after they had pointed this mistake to him. This was followed in *Cressey v. E. Tim & Son* [[2005] EWCA Civ. 763]....Where the identity of the employer is uncertain, as in *Simpson*, where the legal entity owning a property is unclear...or where the identity of an employer is wrongly stated to the claimant, as in *Cressey*, while the date of knowledge may be postponed, *Rix L.J.* added that, '[i]n general I do not believe that it can be postponed for long; only as long as it reasonably takes to make and complete the appropriate enquiries'.*

[Emphasis added].

12. Hindsight is a wonderful thing; and the plaintiff did not know for certain on 20.02.2018 that she was suing the wrong party. However, in successive letters that were issued on and from that date she was repeatedly placed on notice by a reputable firm of solicitors that their client was the wrong party to be suing. The court has already indicated above how the plaintiff ought appropriately to have proceeded upon being given, and then repeatedly being given, such notice. It was not prudent or proper to do nothing until the letter of 30.01.2019 was received; and having done nothing until the letter of 30.01.2019 was received the plaintiff could not properly expect that her delay in this regard would necessarily yield no consequence when it came to suing the correct defendant. Adopting the reasoning of the Court of Appeal of England and Wales in the analogous, though not identical, cases of *Simpson* and *Cressey*, from sometime in the spring of 2018 it was possible for the plaintiff in these proceedings to start investigating who was the correct defendant, with the plaintiff being allowed a reasonable time to make and complete appropriate inquiries in this regard. Of course had the plaintiff so proceeded (and she did not) it is possible that she could have hit some 'road-block' in her inquiries that was not of her making, and which would perhaps have yielded the result that her case could now continue notwithstanding that she had still failed (if she had still failed) to discover the identity of the correct party to sue in place of the second defendant. However, one will never know whether such a 'road-block' would have been encountered because, until the letter of 30.01.2019 was received, the plaintiff elected to do nothing in the face of the repeated letters from the solicitors for the second defendant.
13. The court accepts on the facts presenting that, as contended by the fourth defendant, there has been inordinate and inexcusable delay in terms of the plaintiff's prosecuting the within proceedings against the fourth defendant, and that the balance of justice lies in favour of the court's now striking out the within proceedings as against the fourth defendant. To allow the plaintiff's case now to proceed against the fourth defendant would be an abrogation of basic fairness.