

THE HIGH COURT

[2022] IEHC 364
[2015/10468 P]

BETWEEN

AIDEEN NEWPORT

PLAINTIFF

AND

**ST. FINIAN'S DIOCESAN TRUST, ST. MARY'S PARISH PRIMARY SCHOOL AND THE
BOARD OF MANAGEMENT OF ST. MARY'S PARISH PRIMARY SCHOOL**

DEFENDANTS

AND

PURCELL CONSTRUCTION LIMITED

THIRD PARTY

JUDGMENT of Ms. Justice Bolger delivered on the 15th day of June, 2022

1. The plaintiff's claim is for personal injuries arising from an incident said to have occurred on 8 March 2013 at the defendants' school premises when the plaintiff alleges she was caused or permitted to fall on an aqua drain and grill suffering personal injuries, loss and damage. The defendants served a third party notice on 17 August 2020. This application is made by the third party to set aside that third party notice on grounds of delay. For the reasons set out below I am refusing that application.
2. The defendants concede that there was excessive delay in filing their application for a third party notice but rely on what they say was further and excessive delay by the third party in issuing the within motion to set aside the third party notice.
3. Given the defendants' concession, it is not necessary for this Court to assess the defendants' delay as they concede the delay was excessive and have offered no justification for it. Therefore, the third party is entitled to set aside the third party notice unless the defendants can satisfy the court that the third party delayed in bringing this application and that that delay was excessive and unjustifiable.
4. The relevant dates in this case are as follows:-
 - 5 November 2015: The defendants' insurance company writes to the third party.
 - 10 December 2019: The defendants issue a motion seeking leave to issue and serve a third party notice.
 - 29 July 2020: The court grants leave to issue and serve a third party notice.
 - 23 September 2020 and 3 March 2021: The third party's solicitor writes to the defendants' solicitor requesting the third party statement of claim.
 - 4 June 2021: Third party statement of claim is delivered by the defendants.

- 22 September 2021: The within notice of motion is issued to set aside the third party proceedings.
5. The defendants claim that there was a thirteen-month delay between the issuing of the third party notice and the application to set it aside. The third party seeks to rely on their repeated requests for the third party's statement of claim which they did not receive until 4 June 2021 and, thereafter, they contend that they brought the within application within three and a half months and during a time that coincided with the long vacation and covid-19 lockdowns.
 6. The defendants challenge the right of the third party to rely on the defendants' delay in filing the third party statement of claim as it was not identified in the third party's grounding affidavit. The third party similarly challenges the defendants' right to rely on its delay at all, as that delay was not identified in any affidavit as the defendants did not file a replying affidavit. However I do not consider the arguments of either side to be factual matters that require to be averred to on affidavit, particularly given the periods of delay are clearly identified by an examination of the pleadings in the case. I therefore afford no weight to the absence of averments on affidavit as to either period of delay.

The law

7. The obligation of the third party to bring an application to set aside a third party notice on grounds of delay, pursuant to O. 16, r. 8(3) of the Rules of the Superior Courts, as soon as is reasonably possible has been recognised by the Supreme Court in *Boland v. Dublin City Council* [2002] IESC 69, [2002] 4 IR 409 and confirmed more recently by the Court of Appeal in *O'Connor v. Coras Pipeline Services Ltd* [2021] IECA 68. In *Boland*, a third party notice was granted by the High Court on 8 February 1999. Thereafter, the third party entered an appearance on 22 March 1999, issued a motion to compel delivery of a third party statement of claim on 4 August 1999 which was delivered on 9 August 1999 and raised particulars on 17 August 1999 to which the defendant replied on 11 October 1999. The third party brought their motion to set aside the third party notice on 14 July 2000. In analysing that period of time, Hardiman J. held:-

"While it is difficult to imagine circumstances in which a delay by a third party until after he has himself delivered a defence to the Third Party Statement of Claim could be justified, it by no means follows that the mere fact that he has not yet delivered a defence means that the application to set aside has been brought as soon as reasonably possible."

8. Hardiman J. in analysing that to the facts of the case before him, found that the third party had not addressed delay. He held:-

"[T]he 9 month period between the delivery of particulars on the 11th October, 1999 and the issue of the Motion on 14th July, 2000, seems incapable of justification: certainly none has been advanced. Just as the onus of justifying any delay in seeking liberty to issue the Third Party Notice devolve on the Defendant, the onus of justifying delay in bringing the Motion

- to set such notice aside devolves on the Third Party. Since the First Named Third Party is the moving party here, its delay falls to be considered first."
9. He found that the third party had failed to "demonstrate that its motion has been brought as soon as reasonably possible" and, therefore, refused the application.
 10. In *O'Connor*, the application to join the third party was made on 15 January 2018, an appearance was entered on 4 April 2018, and the motion to set the third party notice aside was commenced on 26 November 2018. The third party sought to justify that delay by reference to issues they had experienced with their insurer. Barrett J. in the Court of Appeal quoted Hardiman J. in *Boland* in finding that a third party who was seeking to set aside a third party notice should "move with reasonable speed and certainly before significant costs and expenses have been incurred in the third-party procedures". Whilst the third party argued in that case that there had been some activity between the making of the third party notice and the application to set it aside, Barrett J. described the seven-month delay as "remarkable and unexplained".

Determination

11. If the period of delay in this case is to be calculated from the filing of the third party statement of claim, then I would consider a delay of three and a half months - given the time of the year and the challenges created by covid-19 - not to have been excessive or unreasonable. However, if the time runs from the issuing of the third party notice, the delay is clearly excessive.
12. The question, therefore, is whether the third party was reasonable in awaiting sight of the third party statement of claim before bringing their motion. The defendants contend that the third party knew well the case it had to meet from when it was served with the third party notice accompanied by the personal injuries summons. The personal injuries summons identifies the plaintiff's case, i.e. that she sustained injuries when she attended at the defendants' school and was caused to trip, stumble and fall when her foot caught on the raised channel of a water grid/drain. The plaintiff cites particulars of negligence specific to the condition of the water grid/drain and in how the grid/drain was installed and/or repaired. The third party notice claimed the plaintiff's injuries were caused by the third party's negligence, breach of duty and breach of contract in or about the design, construction and/or installation of the drain and drain cover at the school premises.
13. Once the third party was served with the third party notice and accompanying personal injuries summons, it knew or ought to have known the case being made by the plaintiff against the defendants and, in turn, by the defendants against it. At that point in time, the defendants had already delayed excessively in applying for the third party notice and the third party would have been able to apply to have had the notice set aside. I do not accept that it was reasonable or justifiable for the third party to await service of the third party statement of claim, particularly when the defendants were clearly engaged in further delay in filing it, necessitating two written requests from the third party's solicitors.

14. I find support for this view in the decision of Hardiman J. in Boland where he expressed difficulties in imagining:-
- "circumstances in which a delay by a third party until after he has himself delivered a defence to the Third Party Statement of Claim could be justified..."
15. If a delay by reference to waiting to deliver a defence to a third party statement of claim would be difficult to justify, then it would be equally difficult to seek to justify a delay by reference to waiting for the third party's statement of claim to be filed.
16. Each case must be considered on the whole circumstances of the case (as confirmed by Barrett J. in *O'Connor* at point 18 of his 28 key legal principles) and the individual circumstances of a case might include a justification for a delay. Here, I find no such justification in circumstances where the third party was made aware of the plaintiff's (relatively straightforward) case against the defendants and the defendants' (similarly relatively straightforward) case against it once it was served with the third party notice and the accompanying personal injuries summons.
17. I find that the third party did delay excessively in issuing this application and that this excessive delay is not justified by the circumstances of the case, including the defendants' delay in filing the third party statement of claim.
18. I refuse the third party's application to set aside the third party notice pursuant to O. 16, r. 8(3) of the Rules of the Superior Courts.

Indicative view on costs

19. As the third party has failed in its application to set aside the third party notice on grounds of delay, costs should, in accordance with s. 169 of the Legal Services Regulation Act, 2015, follow the cause and so my indicative view is that a costs order should be made in favour of the defendants. I will list the matter before me at 10:30 am on 5 July for the purpose of hearing any submissions the parties wish to make in relation to costs and/or any final orders to be made.