

THE HIGH COURT

[2023] IEHC 287
[Record No. 2019/7251 P]

BETWEEN

GERALDINE THOMPSON

PLAINTIFF

AND

THE FRANK COLGAN INVESTMENT CO LTD TRADING AS THE LUCAN SPA HOTEL
DEFENDANT

AND

HENRY J. LYONS ARCHITECTS

THIRD PARTY

JUDGMENT of Mr. Justice Barr delivered *ex tempore* on 24th May, 2023.

Introduction.

1. This is an application by the third party pursuant to O. 16, r. 8 (3) of the Rules of the Superior Courts, seeking to set aside the third-party notice issued by the defendant, which was served upon the third party on 23rd February, 2022.

2. Essentially, the third party argues that the third-party notice should be set aside because the defendant did not move as soon as was reasonably possible to issue and serve the third-party notice in these proceedings. The third party submits that, having regard to the fact that the personal injury summons issued by the plaintiff was served on the defendant on 25th November, 2019, and having regard to the fact that the motion to issue the third-party notice was not issued until 4th October, 2021, the defendant had not complied with the obligation placed upon it by s. 27 of the Civil Liability Act 1961 (hereafter referred to as "the 1961 Act"). Accordingly, it was submitted that the court should set aside the third-party notice.

Background.

3. These proceedings arise out of an accident that occurred on 5th February, 2019, when the plaintiff was leaving the defendant's hotel premises, having attended a Slimming World class. It is alleged that while traversing through the car park, she suddenly and without warning was caused to fall over a small kerb in an area of darkness within the car park, as the nearest overhead lighting lamps

were not working and were unlit. As a result of falling to the ground, the plaintiff suffered a serious fracture to her right shoulder. It is pleaded that the fracture required surgical treatment, but this was not successful. She has required treatment in the US in an effort to make a full recovery, which she has not done to date.

4. The plaintiff received an authorisation from the Personal Injuries Assessment Board on 12th July, 2019, authorising her to institute the proceedings. Her personal injury summons issued on 18th September, 2019. It was served upon the defendant on 25th November, 2019.

5. An appearance was entered on behalf of the defendant to the proceedings on 16th January, 2020. A notice for particulars was raised on behalf of the defendant at that time. In that notice for particulars the plaintiff was asked at question three, to give full and detailed particulars of how it was alleged that the accident had occurred. At question four, she was asked to give full and detailed particulars of the negligence and breach of duty alleged against the defendant. At question five, she was asked to give particulars of any breach of statutory duty alleged against the defendant. In her replies dated 15th May, 2020, she responded to question three, in relation to how the accident occurred, by referring the defendant to the description given in the personal injury summons. In relation to question four, she replied that she had sought inspection facilities of the locus of the accident, but to date those inspection facilities had not been provided. She reserved the right to furnish additional particulars of negligence, once an inspection had taken place. In response to question five, she pleaded that the defendant had been in breach of s. 3 of the Occupiers Liability Act 1995.

6. By notice of motion issued on 4th October, 2021, the defendant sought an order from the High Court giving it liberty to join the third party, a firm of architects, to the proceedings. That motion was returnable before the High Court on 31st January, 2022. On that date, the High Court (Bolger J.) made an order giving the defendant liberty to issue and serve the third-party notice on the third party. That order was perfected on 7th February, 2022. The third-party notice was issued out of the central office of the High Court on 21st February, 2022. It was served on the third party on 23rd February, 2022.

7. By notice of motion dated 26th May, 2022, the third party brought the present application, seeking to have the third-party notice set aside pursuant to O.16, r. 8 (3) of the Rules of the Superior Courts. That application was grounded on the affidavit sworn by Mr. Eoin Himpers-McLoughlin on 25th May, 2022. In that affidavit, he outlined how the defendant had sought to join the third party on the basis that that firm had been the architects who had provided services in relation to the design of the

car park in or around 2008. The actual construction works were carried out at the hotel in 2008/2009. He stated that as the plaintiff's personal injury summons had been served on the defendant on 25th November, 2019 and the third-party notice had not been served on his client until 23rd February, 2022, there had been a delay of some two years and two months in bringing the third party into the action. It was submitted that in view of the fact that the case made by the plaintiff against the defendant was relatively straightforward; and as the defendant knew of the identity of the proposed third party all along; there was no excuse for this inordinate delay in joining the third party into the proceedings.

8. It was submitted that where the defendant had all the necessary information within a relatively short period of time, a delay in the order of two years and two months in joining the third party into the proceedings, had to be seen as being excessive. It was submitted that in these circumstances, the defendant had not sought to serve the third-party notice on the third party "as soon as is reasonably possible" as provided for under s. 27 of the 1961 Act. It was submitted that in these circumstances, the court ought to set aside the service of the third-party notice on the third party.

9. On behalf of the defendant, a replying affidavit had been sworn by Mr. Ben McKenzie on 21st July, 2022. In that affidavit he had set out in chronological order all the steps that had been taken by the defendant, from the time that the personal injury summons had been served upon it in November 2019, to the date of the issuance of the notice of motion seeking to join the third party into the proceedings, on 4th October, 2021.

10. He pointed out that when the summons had been served on his client on 25th November, 2019, an appearance had been entered by his firm on behalf of the defendant on 16th January, 2020. A notice for particulars had been served on the plaintiff's solicitor at that time. An engineer had been retained to act on behalf of the defendant and to advise in the matter, in February 2020. Almost immediately thereafter, very extensive restrictions had been imposed due to the onset of the Covid-19 pandemic. These restrictions had been put in place in the middle of March 2020 and lasted until approximately June 2020.

11. The engineer, who had been retained on behalf of the defendant, was not able to carry out any inspection of the premises until June 2020. He had furnished his report in the matter in the same month. In that report, the engineer had expressed the opinion that the layout of the car park was poor. He raised the question as to whether there was some liability on the part of the architects, who had designed the layout of the car park. Upon receipt of that report, advices were taken from counsel. In July 2020,

counsel recommended that as there may be a possible claim for professional negligence against the architect who designed the layout of the car park, it would be necessary to obtain an opinion from another architect.

12. In September 2020, Mr. McKenzie retained an architect to advise in the matter. He furnished his report in December 2020. In that report, he furnished the opinion that there was liability on the part of the proposed third party, for failing to design the car park in a safe and proper manner.

13. Counsel on behalf of the defendant submitted that when one looked at that initial period of approximately 13 months, from service of the personal injury summons on the defendant in November 2019, to receipt of the architect's report in December 2020, it could not be said that there was any culpable delay on the part of the defendant. It was submitted that the defendant had acted promptly in retaining the services of an engineer in February 2020. That he had not been able to carry out his inspection until June 2020, due to the imposition of extensive restrictions due to the Covid-19 pandemic, was not a matter that could be laid at the feet of the defendant. The engineer had acted very promptly in inspecting the premises and providing his report, once the restrictions were lifted, in or about June 2020.

14. It was submitted that thereafter, the defendant's solicitor had acted appropriately in taking the advices of counsel and in following those advices, which had advised that it was necessary to obtain the opinion of an architect prior to instituting what were effectively professional negligence proceedings against another architect. It was submitted that the defendant's solicitor had not delayed in retaining the services of an appropriate architect in September 2020 and there had been no undue delay in obtaining his report in December 2020. There had been no delay by counsel, who had furnished the draft third party motion papers on 8th December, 2020.

15. The delay that ensued thereafter, in the period January to October 2021 was explained in the following way by Mr. McKenzie in his affidavit. He stated that it had been the intention when the draft motion papers had been received from counsel, to send them to their principles for approval. However, on a general review of the file in May 2021, it was noted that unfortunately, that had not been done owing to an administrative oversight, which stemmed from the fact that Mr. McKenzie had contracted Covid over the Christmas period 2020; compounded by a level 5 lockdown from 31st December, 2020 until April 2021. The draft documentation was forwarded to the insurers on 21st May, 2021. A request was made that the appropriate representative of the defendant would swear an affidavit in early course.

On 28th May, 2021, a reminder was sent to the insurers in relation to the swearing of the affidavit.

16. Mr. McKenzie stated that on 2nd June, 2021, he had received a warning letter from the plaintiff's solicitor in relation to the delivery of a defence on behalf of the defendant. Thereafter, following correspondence between the deponent, the defendant and the insurers, Mr. McKenzie spoke with the representative of the defendant directly on 8th and 9th September, 2021. Thereafter, some minor amendments were made to the draft affidavit. He stated that it was his belief that the impact of Covid-19 on the defendant's business, had affected the speed with which it was possible to finalise the draft affidavit, but he did not believe that there was any unreasonable delay in that regard. He stated that on 1st October, 2021, his firm received the sworn affidavit from the defendant. The papers were immediately forwarded to the solicitor's town agent, for the necessary motion to issue; which issued three days later on 4th October, 2021. That motion had been made returnable for 31st January, 2022, at which time the order was made. It was perfected on 7th February, 2022. The third-party notice was served on the third party on 23rd February, 2022.

17. Counsel for the defendant submitted that in looking at the period of nine months from the beginning of January 2021 to the date of issuance of the third-party notice on 4th October, 2021, the delay in issuing the motion during the first four months of 2021 was explicable by the fact that the solicitor dealing with the matter had had Covid during Christmas 2020; and there had been a level 5 lockdown in the period from the beginning of January 2021 to April 2021. Thereafter, while some of the delay had been due to administrative oversight and difficulty in obtaining final instructions from the defendant and the insurers, that had been a relatively short period of months from 1st May, 2021 to 4th October, 2021.

18. It was submitted that it was noteworthy that the third party did not allege that it had suffered any prejudice as a result of any delay that there may have been on the part of the defendant in issuing the third-party notice in the proceedings.

19. It was submitted that when one looked at the overall conduct of the proceedings and had regard to the fact that it was necessary to obtain the opinion of an architect, once the question of the possible liability of the architect who designed the car park, had been raised by the engineer in his report delivered in June 2020; and having regard to the fact that the architect's report had only come to hand in December 2020; allied to the matters already deposed to that had occurred in 2021, it was submitted that there had been no culpable delay on the part of the defendant in issuing the third-party notice

herein. It was submitted that the obligation on the defendant was to move as soon as was “reasonably possible”; it was submitted that when one had regard to all the circumstances that had arisen in this case and in particular to the very extensive lockdowns that had been imposed as a result of the Covid-19 pandemic during 2020 and 2021, it could not be said that the defendant had failed to comply with its statutory duty in relation to the issuance of the third-party notice.

Conclusions.

20. The procedure for claiming a contribution where one is sued as a concurrent wrongdoer, is set out in s. 27 of the 1961 Act. Section 27 (1) (b) is in the following terms:

27.—(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part—

(b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. If such third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed.

21. The test as to what is required of a defendant who wishes to claim a contribution by issuing a third-party notice pursuant to s. 27 of the 1961 Act, was considered by the Supreme Court in *Connolly v. Casey* [2000] 1 IR 345 and in *Molloy v. Dublin Corporation* [2001] 4 IR 52. More recently, the relevant test was set down by the Court of Appeal in *Kenny v. Howard* [2016] IECA 243, where Ryan P., delivering the majority judgment, stated as follows at para. 20:

“The court, in Connolly v. Casey, emphasised that “in analysing the delay – in considering whether the third-party notice was served as is soon as is reasonably possible – the whole circumstances of the case and its general progress must be considered” (Denham J.) That statement was understood by Finlay Geoghegan J. in Green & Green v. Triangle Developments & Wadding and Frank Fox & Associates third party [2015] IECA 249 as meaning that a court, when looking at an application to set aside a third-party notice should not only look at the explanations given by the defendant for the 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 or was not served as soon as is reasonably possible”.”

22. The court went on to hold that it was not necessary for a third party to establish any prejudice on its part, in order to be able to rely on the mandatory requirement placed upon a defendant by s. 27(1)(b) to move as soon as reasonably possible (see para. 24).

23. In relation to explanations that may be forthcoming from the defendant in relation to any delay that occurred in bringing the third party into the proceedings, Ryan P. stated as follows at para. 26:

" ... It is not sufficient simply to describe or explain the delay. In other words, compliance is not achieved by the party or his solicitor deposing to how the delay arose. And neither, it would seem, is it enough to seek to excuse the delay by reference to exigencies that can occur or tribulations that may befall a person in the ordinary course of life. In this latter category would be mistakes, misfiling of documents and errors and omissions generally. Obviously, the court cannot take too high and mighty a view about human frailty as to rule out of consideration every human error. However, the point is as I see it that for the party to describe how the delay happened is not enough; neither is it sufficient for compliance with the section to say that it happened because of a series of unfortunate events. A particular thing might have afflicted the process of management of the case; that would be understandable. But a whole series of such events brings to mind the observation of Lady Bracknell."

24. Finally, Ryan P. stated that it had to be acknowledged at the outset that the period in that case of two years, was a very long time in the case of a third-party notice.

25. In reaching its judgment herein, the court has also had regard to the very comprehensive statement of the relevant principles as set out in the minority judgment of Barrett J. in the *Kenny v. Howard* case, where, having reviewed fifteen decisions of the Supreme Court and Court of Appeal on the issue, he set out a statement of general principles at para. 50 of his judgment. It is not necessary to set out all these principles in this judgment, save to state that the court has had regard to these principles in reaching its determination herein.

26. In particular, the court accepts the general thrust of the authorities, which is to the effect that a defendant must move with reasonable speed when it wishes to join a third party into the proceedings. That obligation is consistent with the general thrust of recent case law from the Superior Courts and from the obligation placed upon the courts themselves pursuant to the European Convention on Human Rights to ensure that justice is administered in a timely manner. That obligation also finds express recognition in s. 27 of the 1961 Act.

27. The court also recognises that each case must be looked at in its own particular circumstances. Some cases are more straightforward than others. In those types of cases, one could expect a defendant to move with more speed, than may be the case in relation to an action which is very complex in relation to liability aspects of the case. In addition, the court recognises that where one is intending to make a claim against a professional person for negligence in the carrying out of their professional duties, it is entirely appropriate that one would obtain a report from a suitably qualified expert, prior to impugning the professional reputation of the proposed third party.

28. Turning to the circumstances of the present case, the court notes firstly, that the plaintiff's accident was not a particularly unusual accident, notwithstanding that it gave rise to significant injuries. It was, in effect, what is commonly referred to as a "trip and fall" accident. These are very common and do not present any particular or unusual difficulty to a defendant, or its insurers.

29. Secondly, as this was a personal injury action, the matter had to go to PIAB prior to the institution of proceedings. This meant that the defendant and its insurers were on notice of the case that the plaintiff was making against the defendant, for a reasonable period in advance of the issuance of the plaintiff's personal injury summons.

30. Thirdly, the court accepts the submission made by counsel on behalf of the defendant that the defendant moved with reasonable expedition to secure the services of an engineer to advise on the matter after service of the personal injury summons upon it. That summons had been served on the defendant towards the end of November 2019. Given that the Christmas period intervened and that the matter would have had to have gone to the defendant's insurers and they would have to retain solicitors to act on their behalf, it was not unreasonable that the engineer was not retained until February 2020.

31. Thereafter, the court has to have regard to the serious level of restrictions that were imposed on all activities throughout the State from mid-March 2020, until the end of May 2020, due to the onset of the Covid-19 pandemic. The court accepts that it was not possible for the engineer to have carried out his inspection of the locus during that period. He did so in June 2020 and furnished his report in the same month. I do not regard there having been any delay on the part of the defendant in obtaining a report from the engineer.

32. Thereafter, the defendant's solicitor acted prudently in obtaining the advices of counsel in relation to what steps were appropriate to take in light of the opinion expressed by the engineer. Counsel responded in July 2020, stating that it would be appropriate to obtain an opinion from an architect. That

there may have been some weeks delay in retaining the services of an architect, until September 2020, is excusable due to the fact that this coincided with the summer vacation.. Once the architect was retained in September 2020, he furnished his opinion reasonably promptly in December 2020. Counsel drafted the papers extremely quickly, having returned them in draft form to the solicitor on 8 December 2020. I am satisfied that in all the circumstances, there was no undue delay on the part of the defendant in progressing its prospective claim against the third party, down to December 2020.

33. However, the court is of the view that there was culpable delay on the part of the defendant in not issuing its motion seeking to join the third party into the proceedings, until 4th October, 2021. While the defendant's solicitor has put forward a number of excuses as to why the motion was not issued during this nine-month period, the court does not regard these as being a justifiable excuse for the delay that occurred. Furthermore, the court is of the view that given that there was a delay in the matter to December 2020, albeit not a culpable delay, it was all the more incumbent upon the defendant to move with speed, once the draft papers had been returned from counsel. There was no valid excuse as to why the notice of motion did not issue in the early weeks of 2021.

34. When one has regard to the overall period of delay from receipt of the personal injury summons in November 2019, to issuance of the motion seeking to join the third party on 4th October, 2021, the court is satisfied that one has to regard that as being excessive and culpable delay, such that the defendant cannot be said to have moved to join the third party into the proceedings "as soon as is reasonably possible" as required by s. 27 of the 1961 Act. Therefore, the court will grant the relief sought at paragraph (i) of the third party's notice of motion dated 26th May, 2022, and will set aside the third-party notice in this case.