

THE HIGH COURT

Record Number: 2004 No. 17054P

BETWEEN

JOANNE TUOHY

PLAINTIFF

AND
NORTH TIPPERARY COUNCIL

DEFENDANT

AND
ELIZABETH CLEARY

PROPOSED THIRD PARTY

Judgment of Mr Justice Michael Peart delivered on the 10th day of March 2008

1. By Notice of Motion dated 20th November 2007, the proposed third party seeks an order setting aside an order made by Mr Justice Charleton on the 16th July 2007 which gave the defendant liberty to join her as a third party, and/or an order pursuant to s. 27 of the Civil Liability Act, 1961 refusing contribution against the third party, and/or an order pursuant to Order 19, rules 27 or 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the Court striking out the third party proceedings.

2. The proceedings themselves arise out of the fact that the plaintiff has issued a Plenary Summons in July 2004 in which she seeks general damages for personal injuries suffered by her when the car she was driving on the 19th May 2004 went out of control at a bend in the road and hit a ditch. She alleges that the defendant herein was negligent by permitting an excessive amount of chippings to be present on the road following some resurfacing, and that this is what caused her vehicle to hit the ditch and cause her injuries.

3. In its Defence delivered on the 19th September 2007, the defendant has pleaded, apart from the usual denials, that the presence of these loose chippings on the road was due to the negligence of the proposed third party who owned the house adjacent to that stretch of road. The affidavit of the defendant's engineer sworn to ground the application to join her as a third party states that he inspected this area on the 16th September 2006, i.e. over two years after the plaintiff's alleged accident, and that there were loose chippings on the roadway. He went on to state that there is a 300mm wide strip of loose chippings along the public roadway in the general vicinity of the locus, and that the proposed third party is the owner of a house and farmyard adjacent thereto, and that if these chippings made their way onto the public road, this was her responsibility and not that of the defendant Council.

4. It is a somewhat unusual feature of this case that the application by the defendant to join the third party was made several months before the defendant delivered its Defence, though nothing turns on that. The Defence was delivered on the 19th September 2007. Of more significance is that the application to join the third party was made some sixteen months after the delivery by the plaintiff of her Statement of Claim on the 28th March 2006.

5. A further feature of the present case is that following the making of the order on the 16th July 2007 granting liberty to issue and serve a third party notice, the solicitor for the defendant purported to serve the third party with the third party notice on the 25th July 2007. This appears to have been done by either registered or ordinary post, rather than personal service, but again, nothing in particular turns on that, especially since no point of objection has been raised in that regard.

6. Following service of the third party notice, the third party's solicitor attempted to enter an Appearance thereto in the Central Office of the High Court on her behalf. But her law clerk could not do so, as he was informed that the defendant's solicitor had never in fact issued the third party notice following the making of the order in that regard on the 16th July 2007. He had simply served an unissued third party notice, even though the notice itself and the covering letter accompanying it when it was sent to the third party refers to it as being "issued pursuant to order of the High Court of the 16th July 2007".

7. Another feature of the case is that the third party was completely unaware that any claim was being made against in relation to this accident until she received the copy of the purported third party notice at the end of July 2007, which is some three years and two months later.

8. A further feature of the case is that unknown to the third party, the defendant in more recent times applied for and was granted a further order granting liberty to issue and serve the third party notice, but the defendant has agreed that that order should be vacated, since the appropriate application in the circumstances would have been to seek an extension of time to issue and serve the third party notice under the order already granted on the 16th July 2007. In the circumstances where the proposed third party had been served with a purported third party notice, any application for any further order should have been on notice to the solicitors who were known to be acting on behalf of the proposed third party.

9. Arising from these facts and circumstances, the position is that as yet no third party notice has actually been issued. That means that the defendant would need an extension of time within which to issue and serve same under the order dated 16th July 2007. The third party has applied to have that order set aside on the grounds of delay in bringing the application. If the Court decides to set aside the order of Mr Justice Charleton dated 16th July 2007 on the grounds submitted, that is an end of the matter as far as the third party is concerned. In the event that the Court declines to set aside that order, the defendant seeks an extension of time for issuing and serving the third party notice thereunder.

10. Section 27 of the Civil Liability Act, 1961 provides;

"(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this part

(a) ...

(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 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."

11. Order 16, rule 1 (3) RSC provides:

"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 or, where the application is made by the defendant to a counterclaim, the reply."

12. Cormac Clancy BL for third party submits that the defendant has failed to comply with either section 27 of the Act or the provisions of O.16, r.3 RSC. It will be recalled that the Statement of Claim in this case was delivered on the 28th March 2006, and the application to join the third party was not made until the 16th July 2007. In order to comply with the time specified by the O.16, r. 3 RSC, that application would have to have been made not later than 25th April 2006. The affidavit grounding the present application, which has been sworn by Jennifer O'Riada, the solicitor acting for the third party, refers to the fact that the defendant did not make the application for leave to issue and serve the third party notice as soon as possible following delivery of the Statement of Claim, and that no explanation for that delay has been provided. She states also that the third party notice which was served upon her client discloses no cause of action against her client, who was completely unaware of this claim being made against her until she received the purported third party notice.

13. Mr Clancy has informed the Court that no claim of prejudice arising from the delay is being made by the third party; and he submits on the basis of authority that it is unnecessary that he should do so. He submits that delay simpliciter is sufficient to justify the setting aside of the order dated 16th July 2007. He submits that the onus of justifying the delay is upon the defendant and that this onus has not been discharged.

14. Mr Clancy has referred the judgment of Hardiman J. in *Boland v. Dublin City Council* [2002] 4 IR 409, in which at p. 413 he refers with approval to a passage from a judgment of Kelly J. in *SFL Engineering Ltd v. Smyth Cladding Systems Ltd*, unreported, High Court, 9th May 1997 where it is stated:

"This provision [O.16, r.1(3) RSC] of the Rules of the Superior Courts gives expression in a concrete form to the temporal imperative contained in s. 27(1)(b) of the Act of 1961. It is to be noted that the Rules of the Superior Courts require the application to be made not within 28 days from the delivery of the Defence but within 28 days from the time limited for delivering the defence."

15. Mr Clancy has referred also to the judgment of Finlay CJ in *Board of Governors of St. Laurence's Hospital v. Staunton* [1990] 2 IR 31 where in reference to s. 27 (1)(b) of this Act, he stated:

"I am quite satisfied upon the true construction of that sub-section that the only service of a third party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third party notice claiming contribution against a person who is not already a party to the action, is a right to serve a third party notice as soon as reasonably possible. A defendant in an action seeking to claim contribution against a person who is not a party to the proceedings cannot serve any third party notice at any other time, other than as soon as reasonably possible."

16. Murphy J. in his judgment in *Boland* states that this view has been followed in a number of subsequent cases as set forth therein.

17. Roland Budd BL for the defendant has submitted firstly that the proposed third party has not demonstrated any prejudice, and that in order to succeed in her application to set aside the order on grounds of delay she has to do so. In support of that submission he has referred the Court to a judgment of Morris J. (as he then was) in *Ward v. O'Callaghan*, unreported, High Court, 2nd February 1998. That was a case where an application was made to set aside an order granting leave to issue and serve a third party notice. However, as the judgment notes, all parties were agreed that the third party in that case was not "a concurrent wrongdoer" and accordingly that s. 27(1)(b) of the 1961 Act was not applicable. The application was dealt with only under the provisions of O.16, r. 8 (3) RSC. It was therefore in the context of that rule only that Morris J. (as he then was) was satisfied that a delay of one year and four months in the service of the third party notice was not, of itself, of such significance as to constitute a ground for setting aside the third party order, and that in order to constitute such a ground "it would be necessary for the delay of this length to be coupled with circumstances which amounted to prejudice suffered by the third party based on this delay."

18. As I have said already, Mr Clancy makes no claim that the third party has suffered prejudice arising from the delay.

19. Secondly, Mr Budd submits that the replying affidavit sworn in this application by Duncan Hodgins, the solicitor acting for the defendant adequately explains and excuses the delay which occurred, and that in the absence of inordinate and inexcusable delay, the order permitting the issue and service of the third party notice ought not to be set aside, and that time should be extended thereunder for the issue and service of that notice.

20. It remains to consider therefore the said replying affidavit, and another affidavit sworn by the defendant's engineer, David Fahy, and to consider in the light of these, and all the facts and circumstances, and the law applicable, whether there has been such a non-compliance with the provisions of s. 27 of the Act, and O. 16(1)(3) RSC that the claim for contribution or indemnity being made by the defendant against third party should be barred by the setting aside of the said order.

21. Mr Hodgins in his affidavit has stated that the application to join the third party in this case was made as soon as reasonably possible in the context of delays outside the control of the defendant. He refers to the fact that the plaintiff's accident occurred on the 19th May 2004, that the Plenary Summons was served on the defendant nearly a year later on the 14th March 2005, that an Appearance was entered by him less than a month after that on the 5th April 2005, and that he sought details of the locus of the accident by letter dated 4th April 2005 to the plaintiff's solicitor so that he could arrange for an engineer to inspect same, and also asked that he be given information as to the circumstances in which the accident happened. As already noted the Statement of Claim was served on the 28th March 2006, and Mr Hodgins has exhibited a letter from him to the plaintiff's solicitor dated 4th April 2006 in which he asks for any available photographs of the locus to be sent to him so that the defendant's engineer can prepare a report and so that he himself might prepare "a proper Notice for Particulars". By the 7th April 2006 he received a photograph because he wrote back on that date to the plaintiff's solicitors acknowledging receipt of same, and going on to request that the plaintiff make contact with the defendant's area engineer so that she could clearly point out the locus to him. That letter concludes by saying that until such time as his client's engineer can prepare a report on the scene of the accident he could not advise his client fully in relation to the matter. Five days later on the 12th April 2006, the plaintiff's solicitor wrote back to Mr Hodgins asking him to request his engineer to contact the plaintiff's engineer in relation to any queries he might have in relation to the location of the accident. On the 27th April 2006, which would already be outside the period for delivery of the defendant's defence for the purpose of O.16, r.1(3) RSC, Mr Hodgins wrote to his client's area engineer sending him the photograph of the locus and asking him to make contact with the plaintiff's engineer and let Mr Hodgins have a report. On the 5th July 2006, Mr Hodgins wrote to the plaintiff's solicitors, referring to the fact that they had requested Mr Hodgins to arrange for the defendant's engineer to make contact with the plaintiff's engineer, and that

having done so, the engineer identified by the plaintiff's solicitor had stated that he was unaware of any claim being made by the plaintiff. Mr Hodgins requested these solicitors to get back to him as soon as possible as a matter of urgency as he needed to have a report prepared by the defendant's engineer. On the 10th July 2006 the plaintiff's solicitors replied by apologising for the error and gave the name of a different engineer to be contacted. That information was passed on promptly by Mr Hodgins on the 17th July 2006 and he requested a report from his engineer, David Fahy "as soon as ever possible". He sent an e-mail to Mr Fahy also on the 6th September 2006 informing him that if he would contact the plaintiff's engineer again, the latter would show him the locus. It would appear that there must have been some difficulties encountered in setting up the meeting with the two engineers. The meeting took place on the 15th September 2006

22. Apart from this correspondence it would appear that Mr Hodgins served a Notice for Particulars on the 27th April 2006, which was not replied to until the 11th January 2007.

23. From the book of pleadings provided to the Court on this application it appears that on the 20th April 2007 the defendant's engineer, David Fahy, swore an affidavit for the purpose of grounding an application to join the proposed third party. In that grounding affidavit he states that he inspected the locus on the 15th September 2006 and he stated also that "in all the circumstances there is a reasonable case to be made against the proposed third party".

24. There was some delay between the swearing of Mr Fahy's affidavit to ground the application for leave to issue the third party notice because the Notice of Motion in that regard was not issued in the Central Office until the 20th June 2007, returnable for the 16th July 2007.

25. It seems to me at this stage that it must be considered reasonable that the defendant could not reasonably be expected to have been in a position to know that there was a concurrent wrongdoer in the form of the proposed third party until after the meeting of the engineers at the locus on the 15th September 2006. Thereafter some reasonable time would have to be allowed to Mr Fahy for the preparation of his report for the defendant's solicitor, and in this regard Mr Hodgins has sworn in his replying affidavit that he received that report on the 10th January 2007, whereupon papers were sent to counsel in order to have the necessary documents drafted for the purpose of the third party notice application. As I have said, the grounding affidavit was sworn on the 20th April 2007, and in that regard Mr Hodgins has stated in his affidavit that he encountered difficulties in making contact with Mr Fahy in order to arrange for the swearing of the grounding affidavit, but he does not set forth what efforts he had to make in that regard or the nature of the difficulties.

26. He goes on to say that papers were sent by him to his Dublin Agents in early May 2007, and that when they went to the Central Office to file the motion papers, they had been informed that first of all one month's Notice of Intention to Proceed under O. 122 RSC had to be filed since more than one year had elapsed since the last step taken in the action according to the Central Office records. That matter was then attended to, and in June the Notice of Motion was duly issued and made returnable for the 16th July 2007, on which day the order was made giving the defendant leave to issue and serve the Third Party Notice.

27. These facts are submitted for the purpose of excusing the passage of time from the date on which Mr Hodgins first received the engineer's report on the 10th January 2007 until the date of the making of the order on the 16th July 2007.

28. Further delay occurred because, as I have set forth already, on the 25th July 2007 the Notice was served on the third party, but unfortunately this Notice had not been issued in the Central Office prior to service as is required, and therefore did not technically exist as a document. The order of the Court was for the issue and service of the Notice. Ms. O'Riada in her grounding affidavit herein has stated, as already set forth, that when she attempted to enter an Appearance to the Third Party Notice which had been served on her client on the 25th July 2007, she was unable to do so because the Notice had never been issued. Mr Hodgins has stated in this respect that this problem arose through what he describes as "failures of communication between my firm and our town agents". Without giving any details of what those difficulties consisted of, he goes on to state:

"I say and believe that on the basis of an understanding that there had been a difficulty at the Central Office with the perfection of the Order of Mr Justice Charleton granting liberty to issue and serve the third party notice but conscious that a time limit had been placed on the service of the order and anxious to ensure that the third party should be notified without delay I arranged for the service of the unissued third party notice on the third party within the prescribed time."

29. The records of the Central Office for this case have been produced, and it is clear from that record that the order dated the 16th July 2007 was perfected by the Registrar of the Court on the following day the 17th July 2007. The reference by Mr Hodgins to the difficulty about the order being in respect of its perfection could not be complete. It is more likely in my view that there was a failure for whatever reason to take up the perfected order promptly. It is unclear to me what exactly may have been the real difficulty, if any, in that regard. At any rate that is the reason given for the failure to actually issue the Third Party Notice ahead of the service of same. Given that the served Notice actually refers to it having been "issued" pursuant to the order, it seems more likely that the issue of same was simply overlooked, but I cannot be certain about that either. Some suggestion is obliquely made that the fault in that regard may lie with the firm of Dublin agents retained by Mr Hodgins at that time, but again there is a lack of specifics in that regard also.

Conclusions

30. There are two aspects to the present application. The first arises under s. 27 of the Act. Given that the proposed third party is a concurrent wrongdoer that provision applies. That section requires that the defendant "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". In the present case, I am satisfied that Mr Hodgins could not have been expected to have advised his client, the defendant, that the liability might rest with a third party until such time as there was evidence to support such a possibility. I have set out what he did in that regard, and while it is clear that in an ideal world the joint inspection of the locus by the engineers, and the subsequent provision of Mr Fahy's report to him could all have been achieved more swiftly, I am satisfied that Mr Hodgins, and therefore the defendant on whose behalf he was acting, acted with reasonable dispatch. It is difficult to see how any failure on the part of Mr Hodgins or his client has caused unreasonable delay such as should exclude the defendant from the provisions of s. 27 of the Act. The phrase "as soon as reasonably possible" cannot in every case be restricted to a period of 28 days from the time limited by the Rules for the delivery of a Defence, since it must be construed in the light of the facts of any one particular case. In the present case it can be construed as meaning that the defendant was obliged to serve the third party notice as soon as reasonably possible after it became known that the defendant might reasonably claim an indemnity or contribution from the proposed third party.

31. I accept, and respectfully agree, as Kelly J. concluded in *SFL Engineering Ltd v. Smyth Cladding Systems Ltd* [supra], that the subsection contains "a temporal imperative", but that imperative in the present case must be seen as applying from the time when the

defendant was first in a position to know that the claim against the proposed third party was possible to pursue.

32. In this case, in my view, it was necessary for the defendant to move with reasonable dispatch in all the circumstances following the receipt by Mr Hodgins of Mr Fahy's report on the 10th January 2007. If Mr Hodgins had delayed in commencing the task of obtaining Mr Fahy's inspection of the locus and his report, and had otherwise taken no active steps regarding the Defence of the claim, then it would be an easy task to conclude that time had passed beyond what is provided for in s. 27 (1)(b) of the Act in respect of a third party claim.

33. He has set out the steps which he took. The Court is entitled to have regard to the experience of daily practice as a solicitor, and in my view Mr Hodgins has taken appropriate and timely steps following the receipt of that report. He instructed Counsel, as would be usual, to draft the necessary papers. If he was not in a position to have the grounding affidavit sworn by Mr Fahy until April 2007, it would suggest some delay drafting same occurred, but on the other hand he has not stated the date on which he received the papers back from counsel. Nevertheless some period of time must be reasonably permissible for that drafting to be completed. Matters proceeded at a somewhat leisurely pace, it must be accepted, but in my view while that is so, the delay is not of such magnitude that the defendant should as a result be found to be outside the scope of the phrase "as soon as reasonably possible", given the facts and circumstances of this particular case.

34. The defendant served what purported to be a third party notice on the 25th July 2007. Mr Hodgins has stated that he did so in order to put the third party on notice of the claim as soon as reasonably possible. Given that the order was obtained on the 16th July 2007, the service of the notice some nine days thereafter can be seen as prompt service, overlooking for the moment the technical problem arising from the fact that it had not been issued. If it had been issued in the Central Office prior to service on the 25th July 2007, I would be of the view that it was served "as soon as reasonably possible", even though matters could have proceeded somewhat more promptly. The phrase "reasonably possible" is to be distinguished from phrases such as "as soon as possible" or "forthwith" which do not permit of much deviation. But the insertion by the Oireachtas of the word "reasonable" allows this Court to permit some tolerance for delay which actually occurs and which is explained and appears excusable, given one's knowledge of the reality of legal practice. That is not to be taken as a tolerance of unexplained or inexcusable delay where a solicitor has clearly done nothing when he/she was in a position to do something. The third party is entitled to be on notice of the claim as soon as reasonably possible, according to the subsection. In my view that occurred in this case, given that the Statement of Claim by the plaintiff was only delivered on the 28th March 2006. It is not solely the defendant's fault that it is some three years and four months after the plaintiff's accident that the third party learns of a potential liability on her part. It is relevant to note at this point again that no claim of prejudice is being made. I am not satisfied therefore that the order itself should be set aside.

35. It is unnecessary for me in this case to reach any conclusion in relation to s. 27 of the Act as to whether a claim of prejudice would affect how the Court would look at a defendant's delay. No such claim is being made. But I remark again that the case referred to by Mr Budd, namely *Ward v. O'Callaghan*, was one involving only O.16 RSC and not s. 27 of the Act.

36. Having found that the claim against the third party has not been served outside the time contemplated by s. 27 of the Act, it is necessary to address the implications of O.16 RSC principally in the context of the delays which have occurred subsequent to the making of the order dated 16th July 2007, and the application by the defendant for an extension of time for the issue and re-service of the third party notice.

37. The third party notice has not yet been issued in the Central Office, although it has been served. In order to issue it now, the time for doing so under the order dated 16th July 2007 needs to be extended. The question now is whether that time should be extended. This matter is to be considered under O.16 RSC as was the application which was the subject of the judgment of Morris J. in *Ward v. Fitzpatrick* to which Mr Budd has referred. In that case, as already described, the learned judge was of the view that the applicant to set aside the order in that case would have to show that a prejudice had resulted from the delay. In my view, for the purpose of the present case, once the Court is satisfied that there have been shown to exist certain reasons as to why the time passed for issuing the notice, and that they excuse the delay, time ought to be extended, that being within the discretion so to order pursuant to the provisions of O.122, r.7 RSC.

38. O.16, r.2 (2) provides that unless the Court otherwise orders, a third party notice shall be served not later than 28 days from the date of the order granting leave to issue and serve same. In the present case, that means that unless following the making of the order dated 16th July 2007 the notice was not issued and served on the third party by the 13th August 2007, an application for an extension of time would have been necessary. In this case it was served by the 25th July 2007. The purpose of the rule requiring the notice to be issued and served within 28 days of the making of the order has been fulfilled by what occurred in this case if one considers that purpose, as I do, to be that the third party be on notice of the claim against her as soon as reasonably possible. I am not sure that the reasons for difficulties in communication between Mr Hodgins and his Dublin agent have been made sufficiently clear to be relied upon as excusing the delay in taking up the perfected order and issuing the third party notice, but I am satisfied, especially in the absence of any prejudice being asserted by the third party that no injustice arises if the time for issuing the third party notice is now extended in order to regularise the third party claim procedures and so that this case, including the third party issue can be set down for hearing and heard without further delay.

39. I will therefore refuse the order sought by the third party in her Notice of Motion, and on the application of the defendant extend the time for issuing and serving the third party notice until the 19th March 2008.