**THE HIGH COURT**

**[2015 No. 5520 P.]**

**BETWEEN**

**MAJELLA MURRAY**

**PLAINTIFF**

**AND**
**CASTLEBAR TOWN COUNCIL AND MAYO COUNTY COUNCIL**

**DEFENDANTS**

**AND**
**AIRTRICITY UTILITY SOLUTIONS LIMITED**

**FIRST NAMED THIRD PARTY**

**AND**
**GIBBONS BUILDING AND CIVIL ENGINEERING LIMITED**

**SECOND NAMED THIRD PARTY**

**JUDGMENT of Mr. Justice Barr delivered on the 30th day of October, 2018**

**Introduction**

1. This is an application by the first named third party to set aside a third party notice which was issued against it by the defendants pursuant to Order of the High Court dated 29th January, 2018. The third party notice was served by the defendants on the first named third party on 7th February, 2018.

2. The first named third party submits that the third party notice should be set aside as the defendants did not move "*as soon as is reasonably possible*" to join it into the proceedings. The first named third party submits that as the notice of motion seeking to join them as a third party to the proceedings was only issued on 7th December, 2017, which was some four years after the date of the accident the subject matter of the proceedings and some two and a half years after the plaintiff served her personal injury summons on the defendants, the defendants were guilty of gross and inexcusable delay in seeking to join the first named third party to the proceedings. Accordingly, it is submitted that pursuant to O. 16, r. 8(3), the court should set aside the third party notice issued against it.

3. In summary, the defendants deny that in the circumstances there was any gross or inordinate delay on their part in seeking to join the third party to the proceedings. In addition, they submit that there has been no prejudice suffered by the third party due to any delay on their part in bringing the application before the court and that in such circumstances, the court should not set aside the third party notice.

**Chronology of Events**

4. This action arises out of an accident which is alleged to have occurred on 13th November, 2013, when the plaintiff was walking with her children on Pavilion Road in Castlebar, Co. Mayo. It is alleged that as a result of the negligence and breach of duty on the part of the defendants, their servants or agents, the plaintiff was caused to trip on the base of a traffic cone and loose bricks, which had been left on the public footpath by the defendants, or one or other of them. It is alleged that as a result of tripping, the plaintiff fell against a low wall and as a consequence thereof, she has suffered personal injury, loss and damage.

5. It is alleged in the affidavit sworn by Ms. Martina O'Mahony, the solicitor on behalf of the first named third party, that the defendants were notified of the plaintiff's accident in November 2013. This averment is not denied in the replying affidavit sworn by Mr. Henry Hewson, who is the solicitor on record for the defendants. I suspect that Ms. O'Mahony's assertion is correct, due to the fact that there is an obligation on a plaintiff who intends to bring an action against a defendant, to notify the proposed defendant of his intended claim within two months of the accident giving rise to the cause of action.

6. On 10th March, 2014, a letter was sent from a representative of the defendants' insurers, Ms. Ciara Hannon, to the third party, informing it of the plaintiff's accident on 13th November, 2013, and it continued as follows:-

> *"Our investigations indicate Airtricity Utility Solutions were contracted in July 2013, by Castlebar Town Council to carry out public lighting works in Castlebar. At the time of the incident, the loose bricks (that had previously covered the civil infrastructure) and damaged traffic cones were situated at the site of the public lighting works under your control."*

7. The letter went on to call upon the first named third party to provide a full indemnity to the defendants in respect of the plaintiff's claim. It further indicated that the letter would be used as a basis for seeking their legal costs against the third party should that become necessary.

8. On 25th March, 2015, the plaintiff obtained an authorisation from the Injuries Board to bring proceedings against the defendants in relation to this accident. A personal injury summons was issued on her behalf on 9th July, 2015. This must have been served promptly, because the defendants raised a notice for particulars on 15th July, 2015, and entered a formal appearance to the personal injury summons on 16th July, 2015. A notice for particulars was raised by the defendants and replies were furnished by the plaintiff on 4th December, 2015.

9. It appears that it was necessary for the plaintiff to bring a motion seeking judgment in default of defence against the defendants, because an order was made by the High Court on 17th October, 2016, giving the defendants four weeks from that date to deliver a defence. However, it would not appear that that was done. The defence was delivered on 17th February, 2017.

10. By notice of motion issued on 7th December, 2017, the defendants sought liberty to join the first named third party to the proceedings on the basis that at the material time, it had been engaged by the first named defendant to supply, install and commission public lights at various locations in Castlebar, including on Pavilion Road. It was alleged that at all material times, the first named third party had control and responsibility of the accident locus. In the grounding affidavit sworn by Mr. Padraig Kelly, for the purposes of that application, he stated that the first named third party had been appointed Project Supervisor Construction Stage (PSCS) with overall responsibility for health and safety in carrying out the associated works at the locus of the alleged accident. He stated that the alleged loose bricks (that had previously covered the civil infrastructure) and the damaged traffic cone, were allegedly situated at the site of the public lighting works and were, therefore, at the material time under the control of the first named third party.

11. In the same application, the defendants also sought liberty to serve a third party notice on the second named third party, who it was alleged were also contracted by the first named defendant to carry out works in or around the alleged accident locus. In particular, it was alleged that the second named third party was responsible for lifting paving bricks to expose public lighting pots prior to the first named third party commencing works and reinstating around the lighting columns once installed. Mr. Kelly went on to state that in correspondence with the first named third party, the first named defendant had been advised that the offending cone and bricks which were left on the public footpath and had allegedly caused the plaintiff's accident, were the property of the second named third party and on that basis, the first named third party had refused to provide an indemnity to the defendants. He stated that in the circumstances, the defendants were entitled pursuant to contract to seek indemnity from the two proposed third parties.

12. On 29th January, 2018, an order was made by the High Court (O'Connor J.) giving the defendants liberty to issue and serve a third party notice on the first named third party. The third party notice was served on it on 7th February, 2018.

13. By notice of motion dated 19th April, 2018, the first named third party sought an order pursuant to O. 16, r. 8(3) of the Rules of the Superior Courts setting aside the third party notice which had been served upon it. That motion was initially returnable for 18th June, 2018, however, it did not come on for hearing before the High Court until 22nd October, 2018.

**Submissions of the Parties**

14. Counsel for the first named third party submitted that the obligation on a defendant who wishes to claim a contribution from a person who is not already a party to the proceedings, is to serve a third party notice on such person as soon as is reasonably possible. It was submitted that that is a clear obligation placed on a defendant under s. 27(1)(b) of the Civil Liability Act 1961.

15. Counsel submitted that in this case the uncontroverted evidence of Ms. O'Mahony was that the defendant had knowledge of the accident within days of it happening in November 2013. They were aware of the potential claim that they felt they had against the third party, due to the letter that was written by their insurance representative to the third party on 10th March, 2014. Thus, it could not be argued that they had to carry out any great inquiries or investigations, nor had they to obtain any expert reports in order to enable them to be in a position to mount a claim for a contribution against the first named third party.

16. Once the proceedings were issued and served by the plaintiff in July 2015, the defendant had an obligation to move swiftly to seek to join the third party into the proceedings if it wished to make a claim for contribution or indemnity against it. It was submitted that the defendants had been guilty of gross and inordinate and inexcusable delay in failing to issue their notice of motion to join the third party to the proceedings, which was not done until 7th December, 2017. That was four years after the accident and some two and a half years after they had received the plaintiff's personal injury summons.

17. Counsel further submitted that the replying affidavit sworn by Mr. Henry Hewson on behalf of the defendants, failed to give any reasonable justification for the delay on the part of the defendants in seeking to join the first named third party to the proceedings. All he had done was indicate that as early as 10th March, 2014, the defendants had called on the first named third party to provide an indemnity to them in respect of the proceedings and had reiterated that request by further correspondence dated 3rd July, 2017. That was not a justification for the delay on their part in bringing the application to join the third party into the proceedings.

18. Furthermore, at para. 7 of his affidavit, Mr. Hewson had stated that Ms. O'Mahony had not pointed to any particular prejudice which had been suffered by the first named third party. He went on to state that the first named third party had been made aware from an early juncture of its involvement and could not in those circumstances claim that it was prejudiced as a consequence of any lack of notice. He stated that the first named third party was not deprived of the opportunity to engage an engineer to examine the road, rather they had from 10th March, 2014, to do so. Counsel submitted that the existence or absence of any prejudice to the third party, was irrelevant to the issue which the court had to determine, which was whether the defendants had moved "*as soon as is reasonably possible*" to join the third party into the proceedings.

19. Counsel for the defendants submitted that the court should not exercise its discretion to set aside the third party notice for two reasons. Firstly, it was submitted that there had not been any undue delay between the time when the personal injury summons was served on the defendants in July 2015, and when the motion seeking to join the third parties was issued in December 2017. The delay in proceeding with that application was due to the fact that the defendants had to await instructions from their insurers to make such an application. The insurers took time to investigate the circumstances of the accident thoroughly and in particular to investigate the issue as to which of the third parties may have been responsible for the alleged state of the locus on the date of the accident. As soon as instructions had been given by the insurers, the defendants had moved promptly to issue the motion seeking to join the third parties to the action.

20. Secondly, counsel submitted that even if the time period between service of the personal injury summons and the bringing of the motion to join the third parties might be seen as being excessive, there had been absolutely no prejudice to the first named third party due to such delay. This was due to the fact that as early as 10th March, 2014, the first named third party had been informed in writing of the plaintiff's action and of the intention of the defendants to make a claim seeking a contribution or indemnity from them. In these circumstances, it was submitted that the first named third party had been given every opportunity to investigate the matter. It was not a case where the first that they heard of the allegations against them was when they received the notice of motion in December 2017. They had had ample time since March 2014, to investigate the matter and to carry out such engineering or other inspection of the locus as they deemed necessary.

21. It was submitted that these two reasons were compelling reasons as to why the court should not set aside the third party notice against the first named third party.

**Conclusions**

22. A starting point for the consideration of this application must begin with the terms of s. 27(1)(b) of the Civil Liability Act 1961, which is in the following terms:-

> *"(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."*

23. In *Board of Governors of St. Laurence's Hospital v. Staunton* [1990] 2 I.R. 31, at p. 36, Finlay C.J. said of s. 27(1)(b):-

> *"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 is reasonably possible."*

24. In *Connolly v. Casey* [2000] 1 I.R. 345, Denham J. (as she then was) outlined the approach the court should take when examining the question of delay in bringing in a third party in the following terms at p. 351:-

> *"In analysing the delay – in considering whether the third-party notice was served as soon as is reasonably possible – the whole circumstances of the case and its general progress must be considered. The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see Gilmore v. Windle [1967] I.R. 323. It is appropriate that third-party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice – to the third party and to the issue of costs. To enable a third party to participate in the proceedings is to maximise his rights – he is not deprived of the benefit of participating in the main action."*

25. The meaning of the words "*as soon as is reasonably possible*" were analysed by Murphy J. delivering the judgment of the Supreme Court in *Molloy v. Dublin Corporation* [2001] 4 I.R. 52, where he stated as follows:-

> *"The terms in which the time limit was expressed do appear severe. The use of the word 'possible' rather than the word 'practicable', as is invoked elsewhere, suggests a brief and inflexible time limit. It might suggest that if it is physically possible to serve the appropriate notice within an identified period, that any further delay would be impermissible. However, such a draconian approach would be inconsistent with the nature of the problems to be confronted by a defendant and of the decisions to be made by him or his advisors. The statute is not concerned with physical possibilities but legal and perhaps commercial judgments. Proceedings cannot and should not be instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon. It is in that context that the word 'possible' must be understood. Furthermore, the qualification of the word 'possible' by the word 'reasonable' gives a further measure of flexibility."*

26. In *EBS Building Society v. Leahy* [2010] IEHC 456, Hogan J. commented on the approach that the court must take when looking at the issue of delay on the part of a defendant in seeking to join a third party, in the following terms:-

> *"The question thus becomes whether, having regard to all the circumstances, it was reasonable for a defendant to wait for the period in question before applying to join the third party, although any such permissible delay will generally be measured in weeks and months and not years."*

27. In looking at the issue of delay on the part of the defendants in this case, one has to start with the circumstances of the accident itself. It was an alleged trip and fall accident on the public footpath. Such accidents are very common. They do not involve any in depth technical investigation, such as may be the case in a medical negligence action, or in a case involving defects to a building. Secondly, it would appear that the defendants were put on notice of the accident literally within days thereof. It has been averred by Ms. O'Mahony in her affidavit that the defendants were aware of the accident in November 2013. This has not been contradicted in the replying affidavit sworn on behalf of the defendants. Thus, the defendants had ample opportunity to investigate the matter and to decide whether they had any claim for an indemnity or contribution from any third party.

28. It seems that the defendants did, in fact, reach a decision that they were entitled to claim an indemnity or contribution from the first named third party within a short period of the accident, because on 10th March, 2014, a representative of their insurance company wrote to the first named third party formally seeking an indemnity from them. Thus, by March 2014, the defendants were fully aware that they had a claim against the first named third party in respect of any proceedings that may be issued against them by the plaintiff.

29. In these circumstances, it is very difficult to understand why the defendants did not move to join the first named third party into the proceedings within a short period of the issuance of proceedings against them by the plaintiff in July 2015.

30. The reason put forward for the delay was that the defendants were awaiting instructions from their insurers that they should formally apply to join the first named third party into the proceedings. That is an entirely circular argument. A defendant cannot rely on prevarication and delay on the part of its own insurers as an excuse for its failure to join a third party as soon as reasonably possible. To enable it to do so, would effectively mean that a defendant could blame the delay and inaction on the part of its own insurers as a means of defeating an application by a third party to set aside the third party notice which, if successful, would inure to the benefit of those insurers, who would retain the benefit of the third party notice and thereby the opportunity of claiming an indemnity or contribution from the third party. In simple terms, a defendant cannot rely on the delay and inaction on the part of its own insurers so as to justify its delay in seeking to join a third party and thereby secure a benefit for its insurers.

31. I am satisfied that there was an inordinate delay on the part of the defendants in waiting almost two and a half years from the time that it was served with the personal injury summons in July 2015, until they issued their motion to join the first named third party in December 2017. In a simple straightforward case such as this, it cannot be said that such a delay is consistent with the defendants moving to join the third party as soon as is reasonably possible, as required by the statute. In the circumstances, I am not satisfied that the defendants sought to join the first named third party as soon as was reasonably possible.

32. In relation to the second argument which was urged upon the court, to the effect that even if there was delay on the part of the defendants in seeking to join the third parties into the proceedings, the court should not exercise its discretion to set aside the third party notice, due to the fact that there was no prejudice caused to the first named third party by the delay on the part of the defendants. It was submitted that no prejudice had arisen to the third parties, due to the fact that they were alerted within months of the occurrence of the accident of the fact that the defendants would be seeking an indemnity or contribution from them in respect of any liability that the defendants may be found to have to the plaintiff arising out of the accident. It was submitted that in these circumstances, the first named third party was given a reasonable and full opportunity to investigate the matter and collate such witness statements, engineering evidence and documentary evidence, as may be required to properly defend themselves at the trial of the action.

33. In response to that argument, counsel for the first named third party has submitted that the issue of prejudice is simply not relevant to any consideration that the court must undertake as to whether the third party notice should be set aside.

34. The issue as to whether prejudice is a factor which should be taken into account by a court when considering an application such

as this, is one in which there has been some divergence of opinion in more recent cases. In earlier cases, it was made clear that the question of whether or not the third party had suffered any prejudice by any delay on the part of the defendant in bringing the third party into the proceedings, was not an issue to be considered by the court in an application to set aside the third party notice. See judgments of Kelly J. in *SFL Engineering v. Smyth Cladding Systems Limited* [1997] IEHC 81, and Laffoy J. in *Murnahan v. Markland Holdings Limited* [2007] IEHC 255.

35. However, in *Ward v. O'Callaghan* [1998] IEHC 16, Morris P. was of the view that to constitute a ground for setting aside third party proceedings, it would be necessary for delay to be coupled with circumstances which amounted to prejudice which the third party had suffered based on that delay. In *Robins v. Coleman* [2009] IEHC 486, McMahon J. stated as follows in relation to prejudice:-

> *"In truth, prejudice to the third party (or absence of it) is only one factor which goes into the mix. What justification can be advanced for isolating it as a consideration that must never be taken into account? In my view, whether it is relevant in a particular case and if so what weight it is accorded in assessing reasonableness, depends on the facts of each case and it is not to be excluded a priori."*

36. Differing views have been expressed in the Court of Appeal as to the relevance of prejudice when considering the issue of delay in relation to a third party notice. In *Kenny v. Howard* [2016] IECA 243, Ryan P. delivering the majority judgment stated as follows at paras. 24 and 25:-

> *"24. The other issue raised and which was relied on by the judge in the High Court is that there is no evidence of any specific prejudice on the part of the HSE. However, even if it is difficult to see how prejudice, express or implied, could arise in the case, that is not the issue; if it is clear that the third party notice was not served as soon as reasonably possible, that is a failure of compliance with the specific mandatory requirement of section 27(1)(b). The section does not require proof of prejudice in order to rely on its terms. It is true that in Robbins v. Coleman [2010] 2 I.R. 180, McMahon J. held that the question of the presence or absence of prejudice was not to be out-ruled a priori.*
>
> *25. It seems to me that a third party applying to set aside a notice served by a defendant could argue that he had suffered prejudice and that a shorter period than might otherwise be allowed ought to be imposed in determining what was as soon as reasonably possible. I find it difficult to understand how a defendant who is in default of the clear requirement of the subsection can escape the consequences by proposing that the third party has not suffered any specific prejudice. The authorities cited do not go as far as suggesting that the section's impact may be defeated by demonstrating the absence of prejudice. In the present case, it seems to me that it is irrelevant whether or not the HSE has suffered prejudice by reason of the delay."*

37. In his dissenting judgment, Barrett J., (then sitting as a judge of the Court of Appeal), having carried out an extensive analysis of previous decisions on the question of setting aside a third party notice, came to the conclusion that prejudice to a party had to be a relevant factor in deciding whether or not a defendant had proceeded "*as soon as is reasonably possible*" (see p. 22).

38. In the subsequent decision in *Acs v. KCT Freight Limited* [2016] IEHC 625, Barrett J., (sitting as a judge of the High Court), returned to the issue of prejudice when considering an application to set aside a third party notice. In the course of the judgment, he stated that he was of the view that the dicta of Ryan P. in the *Kenny* case were *obiter dicta*. He continued:-

> *"It may be that the answer to the quandary to which Ryan P. refers lies in how matters are approached: he clearly sees prejudice as a 'get out of jail' card for someone who is otherwise in breach of s.27; but is it not more correct to see the absence of prejudice as an ingredient of reasonableness and thus an aspect of matters that prevents one from ever crossing the line into a breach of s.27?"*

39. Having regard to the issues raised in the *Kenny* case, this Court is of the view that the dicta of Ryan P. therein concerning prejudice were not *obiter dicta*. The learned High Court judge in that case, in reaching his decision not to set aside the third party notice, had come to the conclusion that in the circumstances of that case, which involved an allegation by the defendant that the proposed third party had been negligent in placing a certain patient in a particular care facility, when that patient was unsuitable for placement in such a facility, the High Court judge held that the issue whether or not there had been negligence in that regard, would be based not on *viva voce* evidence, but on the content of the patient's medical records and the care plan in existence at the time that the patient was transferred into the facility, where the assault on the plaintiff subsequently took place. It was in those circumstances, that the High Court judge came to the conclusion that there would be no prejudice suffered by the third party in being joined late into the proceedings. It seems to this Court that the dicta of Ryan P. in relation to the issue of prejudice and in particular that that issue was irrelevant to the determination of the question as to whether the third party notice should be set aside, was not an obiter dictum, but was a finding or statement of law in relation to a central issue in the application before the court.

40. In these circumstances, it seems to me that I am obliged as a judge of the High Court to follow the majority decision handed down by the Court of Appeal in *Kenny v. Ho*ward and hold that the issue of prejudice is not relevant to a consideration as to whether the third party notice should be set aside because it was not issued and served as soon as was reasonably possible as required by the statute.

41. Accordingly, applying the principles set down in *Kenny v. Howard* [2016] IECA 243, I hold that the issue as to whether the first named third party suffered any prejudice by virtue of being brought into the proceedings on foot of a notice of motion issued by the defendants in December 2017, is irrelevant to the application before the court.

42. In this case, I am satisfied that there has been no adequate explanation as to why the delay between the receipt of the personal injury summons in July 2015 and the issuance of the motion to join the third parties some two and a half years later in December 2017, should be seen as anything other than a gross and inordinate delay. I am satisfied that the third party notice was not served as soon as was reasonably possible as required by the statute. Accordingly, I will accede to the application of the first named third party to set aside the third party notice against it in this case.