Neutral Citation Number: [2009] IEHC 581

THE HIGH COURT

2004 19709 P

BETWEEN

S. DOYLE & SONS ROSCOMMON LIMITED

PLAINTIFF

AND

FLEMCO SUPERMARKET LIMITED AND J. J. RHATIGAN AND COMPANY LIMITED

DEFENDANTS

AND

FORTLYSTER LIMITED

Trading as HUGH GRIFFIN ASSOCIATES

THIRD PARTY

Judgment of Miss Justice Laffoy delivered on the 2nd day of December, 2009.

The substantive proceedings and the applications
The plaintiff in these proceedings is the owner of property at Main Street, Roscommon. In the substantive proceedings it alleges that, in the course of work carried out on the adjoining property at Main Street, Roscommon of the first named defendant (Flemco), which works were carried out by Flemco's contractor, the second named defendant (Rhatigan), serious structural damage was caused to its property. The third party (Griffin) is a firm of structural engineers, which was retained by Flemco, which prepared the structural drawings on foot of which Rhatigan undertook the development at Flemco's property.

On these applications Griffin seeks to have set aside third party notices served on it by Flemco and Rhatigan respectively on the basis that the notices were not served as soon as reasonably possible.

Factual background
At the time of the incident which gives rise to the substantive proceedings, the plaintiff's property was in use as a retail unit on the ground floor and as apartments on the upper floors. Flemco had substantially completed the development of a supermarket on its property. On 19th July, 2004, in the course of the development of Flemco's property, it is alleged that the defendants demolished the gable wall annexed to the plaintiff's and Flemco properties, causing serious structural damage to the plaintiff's property, rendering it unsafe and requiring it to be evacuated.

There followed correspondence between the plaintiff's solicitors and Flemco and Rhatigan, some of which was copied by Flemco to Griffin. Initially, Flemco formed the view that neither it nor Griffin bore any responsibility for the alleged damage to the plaintiff's property. A number of meetings and inspections took place on site, at some of which a representative of Griffin attended.

The substantive proceedings were initiated by a plenary summons which issued on 9th December, 2004. Simultaneously with the issuance of the plenary summons, the plaintiff sought injunctive relief, apparently against both Flemco and Rhatigan, seeking to restrain further works on Flemco's premises, to compel Flemco and Rhatigan to make good the plaintiff's property and to restrain Flemco and Rhatigan from trespassing or obstructing a right of way of the plaintiff. Rhatigan did not appear on the hearing of the motion, as is recited in the order of the Court (Kelly J.) made on 20th December, 2004. The motion was refused and it was ordered that the plaintiff pay Flemco's costs, the order for costs being stayed until the final determination of the proceedings.

The chronology of the substantive proceedings as between the plaintiff and Flemco/Rhatigan
After the refusal of the plaintiff's motion, nothing happened for over a year, so that before anything could happen notice of intention to proceed had to be served by the plaintiff. This was done on 20th January, 2006. Another year passed before anything happened other than a note of change of solicitor dated 17th February, 2006, filed and served on behalf of Flemco. On 30th January, 2007 the plaintiff delivered its statement of claim. This action seems to have been prompted by a motion issued by Flemco on 19th January, 2007, returnable on 12th February, 2007, to strike out the proceedings for want of prosecution for failure to deliver a statement of claim. At that stage, an appearance had not been entered on behalf of Rhatigan. That did not happen until 1st March, 2007 and appears to have been prompted by a motion brought by the plaintiff for judgment in default of appearance against Rhatigan on foot of a notice of motion of 13th February, 2007 returnable for 12th March, 2007.

It is the position of Griffin on these applications that the starting point for the Court's consideration of compliance with time requirements and whether there was delay in compliance is the delivery of the plaintiff's statement of claim on 30th January, 2007. What happened after that as between the plaintiff and Flemco and as between the plaintiff and Rhatigan will be considered separately.

As regards Flemco, by notice dated 2nd April, 2007 it raised particulars arising out of the plaintiff's claim. Following one reminder from Flemco's solicitors, to which the plaintiff's solicitors responded on the basis that their replies were being settled by counsel, the plaintiff eventually delivered the replies on 9th September, 2008. Thereafter on 21st November,

2008, almost one year and ten months after the statement of claim was delivered, Flemco delivered its defence. In the defence, after a complete traverse of the plaintiff's claim, Flemco pleaded, strictly without prejudice to the traverse, that, if the plaintiff did sustain the alleged or any damage, it was not caused by any wrong on the part of Flemco but was rather caused and/or contributed to by negligence, breach of duty and/or breach of contract on the part of Rhatigan and/or Griffin.

Rhatigan was marginally less tardy in delivering a defence. Rhatigan raised particulars on 3rd August, 2007 and they were eventually replied to on 10th September, 2008. In the meantime, on 28th July, 2008, Rhatigan had delivered its defence, almost one and a half years after the delivery of the statement of claim. In the defence, Rhatigan denied that the works carried out by it caused structural damage to the plaintiff's property, whether as a result of the alleged demolition of a gable wall or at all, and pleaded that, if the alleged or any damage occurred to the plaintiff's property, it occurred as a result of the direction of Flemco to carry out the works, which were executed non-negligently by Rhatigan in accordance with the instructions given to it by Flemco and by Griffin, in accordance with whose instructions Rhatigan was bound to act.

In relation to the chronology of the joinder of Griffin as a third party, it is appropriate to consider the approach adopted by Rhatigan separately from the approach adopted by Flemco.

Joinder of Griffin as a third party by Rhatigan
Rhatigan moved to join Griffin as a third party before it had delivered its defence. It issued a notice of motion on 17th July, 2008, which was returnable for 28th July, 2008, seeking liberty to issue and serve a third party notice on Griffin. When the matter came before the Court on 28th July, 2008 it was adjourned to the next available motion day, 13th October, 2008, the long vacation intervening, to give the plaintiff an opportunity to consider whether it wished to join Griffin as a co-defendant. When the matter was back in Court on 13th October, 2008 an order was made by the Court (Gilligan J.) giving Rhatigan liberty to issue and serve a third party notice on Griffin.

The third party notice was dated the 22nd October, 2008 and it was served on 24th October, 2008, although, on its application against Rhatigan, Griffin has contended that the service was defective because copies of the originating summons and all the pleadings delivered to that date were not served with the notice. In any event, Griffin's solicitors received the copy pleadings on 26th November, 2008. In the meantime, on 4th November, 2008 Griffin's solicitors had entered an appearance on its behalf and had required delivery of a third party statement of claim. Griffin's solicitors reiterated that requirement in a letter of 28th November, 2008. The third party statement of claim was delivered on behalf of Rhatigan on 22nd December, 2008.

Rhatigan brought a motion by notice dated 19th February, 2009, which was returnable for 2nd March, 2009, against Griffin seeking judgment in default of defence, Griffin having failed to deliver a defence. That motion was compromised on the basis that it would be struck out by consent, subject to delivery by Griffin of its defence within four weeks and the discharge of the reasonable costs of the motion by Griffin. The compromise was recorded in a letter of 25th February, 2009 from Griffin's solicitors to Rhatigan's solicitors. Subsequently, by letter dated 6th March, 2009, Griffin's solicitors intimated that they intended to bring an application to strike out Rhatigan's third party proceedings on the ground that they had not been brought "as soon as is reasonably possible" as required by s. 27(1)(b) of the Civil Liability Act 1961 (the Act of 1961). In the circumstances, the solicitors for Griffin sought confirmation that they would not be required to deliver a defence but they would discharge the costs of the motion for judgment as had been agreed. In response, by letter dated 9th March, 2009, Rhatigan's solicitors made it clear that they were relying on the agreement and required the defence within the time agreed.

Griffin delivered its defence on 26th March, 2009 and at the same time raised particulars on Rhatigan's statement of claim against it. Just over a month later, on 28th April, 2009, Griffin issued a notice of motion, returnable for 11th May, 2009, seeking to set aside the service of the third party notice by Rhatigan on Griffin on the basis of failure to serve the third party notice as soon as reasonably possible.

Joinder of Griffin as a third party by Flemco
Flemco first intimated to Griffin that it intended seeking a contribution and/or indemnity from Griffin by letter dated 20th November, 2008, threatening an application to Court to have Griffin joined as a third party to the proceedings if there was no response within fourteen days. There was no response.

Flemco's motion for liberty to issue and serve a third party notice on Griffin was brought by notice of motion dated 6th January, 2009 which was returnable for 19th January, 2009. On 19th January, 2009 the application was acceded to by the Court (Charleton J.). The third party notice was dated 12th February, 2009 and was served on 17th February, 2009, almost three months after Flemco had delivered its defence to the plaintiff's claim. At that stage, there was, by letter dated 23rd February, 2009, a complaint from Griffin's solicitors that the service was defective because, inter alia, it was not accompanied by a copy of the order of Charleton J. An application to set aside the third party proceedings was threatened.

Over two months later, by notice of motion dated 24th April, 2009 returnable for 11th May, 2009, Griffin applied to Court for an order setting aside the service of the third party notice by Flemco on the ground that it had not been served as soon as was reasonably possible.

It is not clear, on the papers before the Court, when, if at all, Griffin entered an appearance to Flemco's third party notice.

The application against Flemco was heard at the same time as the application against Rhatigan.

The law
Section 27(1) of the Act of 1961 provides:

> "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 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."

Rule 1(3) of order 16 of the Rules of the Superior Courts 1986 (the Rules) provides:

> *"An 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 counter-claim, the reply".*

As was pointed out by Clarke J. in Thomas Greene & Anor. v. Triangle Developments Ltd. & Anor. [2008] IEHC 52, in which judgment was delivered on 4th March, 2008, while it would be inappropriate to take the draconian step of setting aside a third party notice on the basis of failure per se to comply with the time limit specified in that rule, nonetheless, that time limit has to be the starting point by reference to which any delay can be assessed. In this case, the time limit would have expired in late March 2007.

Rule 8(3)of order 16 provides that third party proceedings may at any time be set aside by the Court.

The legal principles applicable to whether third party proceedings should be set aside are, in the main, well settled.

First, as Clarke J. recorded in the Greene case, the rationale behind requiring service of a third party notice within a short timeframe was, as set out in the judgment of McMahon J. in A. & P. (Ireland) Ltd. v. Golden Vale Products Ltd. (Unreported, High Court, McMahon J., 7th November, 1978 at p. 7) "to put the contributor in as good a position as is possible in relation to knowledge of the claim and opportunity of investigating it". That is patently the case, but it must be seen in the context of the scheme and purpose of s. 27(1) of the Act of 1961, which were explained by the Supreme Court in Molloy v. Dublin Corporation [2001] 4 I.R. 52. Murphy J., with whom the other judges concurred, stated as follows (at p.55):

> *"There can be little doubt as to what the scheme and purpose was. The legislature was understandably desirous of avoiding a multiplicity of actions. Instead of defendants against whom awards had been made instituting further proceedings against other parties liable to them in respect of the same set of facts – and indeed those defendants in turn perhaps instituting even more proceedings against others – the Oireachtas sought to establish a situation in which the rights and liabilities of all parties arising out of a particular set of circumstances would be disposed of in the same proceedings. It is for that reason that a defendant was given the right, with the approval of the court, to serve a third party notice on a potential defendant so that any claim against him could be disposed of at the same time as that of the claim against the actual defendant. The procedure had attractions for all of the parties and was desirable in the public interest. Nevertheless, the legislature did not preclude an unsuccessful defendant in the original proceedings from instituting a substantive action against some other party who the actual defendant contended was liable to him either in tort or in contract. What the Act of 1961 did provide, was that where the actual defendant in the original proceedings failed to avail of the third party procedure by serving the third party notice 'as soon as is reasonably possible' and resorted to his original cause of action, the relief which he might have claimed therein was subject to the statutory discretion of the court to refuse to make an order for contribution in his favour."*

Secondly, it has been recognised by the Supreme Court that there are special considerations where the claim for contribution or indemnity is based on alleged professional negligence on the part of the proposed third party in Connolly v. Casey [2000] 1 I.R. 345. In that case, Denham J., with whom the other judges concurred, stated (at p. 350):

> *"It is important in professional negligence cases to act reasonably. Proceedings must have an appropriate basis. Counsel have a duty of care."*

Later, on the correct approach to analysing delay, Denham J. stated (at p. 351):

> *"In analysing the delay – in considering whether the third-party notice was served as soon as reasonably possible – the whole circumstances of the case and its general progress must be considered. The clear purpose of the sub-section 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."*

Thirdly, it is well settled that the onus of proving that any delay arising was not unreasonable is on the defendant who served the third party notice (Molloy v. Dublin Corporation).

Fourthly, as regards the relevant parameters of delay on the part of a defendant seeking the joinder of the third party, the starting point is when the application for leave to issue the third party notice should have been made in accordance with Order 16, rule 1(3) of the Rules and the "cut-off" point is when the third party notice is actually served following the granting of leave (per Clarke J. in the Greene case).

Fifthly, while Order 16, rule 8(3) states that third party proceedings may "at any time" be set aside, there is settled jurisprudence that a third party bringing a motion to set aside a third party notice is under the same obligation as a defendant seeking to join a third party to move expeditiously, in that, the third party must initiate the application to set aside "as soon as reasonably possible" and bears the onus of justifying delay in so doing. It was so held by the Supreme Court in Boland v. Dublin City Council [2002] 4 I.R. 409. Counsel for Rhatigan relied on the following passage from the judgment of Hardiman J., with whom the other judges concurred (at p. 413):

"In relation to a motion to set aside a third party notice, in Carroll v. Fulflex International Co. Ltd. (Unreported, High Court, Morris J., 18th October, 1995) Morris J. said:-

'A motion to set aside a third party notice should only be brought before that defendant has taken an active part in the third party proceedings and I believe that an application of this nature must itself be brought within the timescale identified in s. 27(1) of the [Act of 1961], that is to say, 'as soon as reasonably possible'. While that limitation is not spelt out in the Act, I believe that a fair interpretation of the Act must envisage that a person seeking relief under s. 27 would himself move with reasonable speed and certainly before significant costs and expenses have been occurred (sic) in the third party procedures.'

In Tierney v. Sweeney Ltd. (Unreported, High Court, Morris J., 18th October, 1995, Morris J. said at p. 4:-

'I am of the view that where it is intended to make the case that a defendant has failed to move the court to set aside an order giving a defendant liberty to serve a third party notice, such an application should be brought with reasonable expedition and in accordance with the timescale reflected in s. 27(1)(b)… and save in exceptional circumstances should not extend beyond the point where a defence is delivered to the third party statement of claim.'

I respectfully agree that the statutory requirement to move for liberty to issue a third party notice, 'as soon as is reasonably possible', should be regarded as applying, also, to the bringing of an application to set aside such a notice. 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."

Finally, there is some controversy on the jurisprudence as to whether the existence or non-existence of prejudice to the third party is relevant.

In applying the foregoing principles to the factual bases of the applications, I propose considering the position of Rhatigan first.

The Court has had the benefit of comprehensive and thorough submissions from counsel for all of the parties.

Application of the legal principles to Rhatigan's third party proceedings
The claim of Rhatigan against Griffin amounts to a claim for professional negligence in that, in its statement of claim, Rhatigan alleges that Griffin, which was retained by Flemco to act as an engineer in the project, failed in its duty of designing, instructing and supervising the carrying out of the works by Rhatigan and providing the necessary drawings and advice in relation to the carrying out of works of demolition and excavation, in particular, it being alleged that Griffin provided a specification for underpinning in what is described as a "hit and miss" sequence.

The explanation advanced on behalf of Rhatigan for its delay in moving against Griffin was that, after it had entered an appearance on 1st March, 2007, it took some time to assemble information relating to the case, it raised particulars and it did not receive replies until 10th September, 2008. However, in the interim it had sought the views of an expert consulting engineer. In particular, in alleging professional negligence, it was concerned to establish with its own experts the issue of causation. It retained Messrs. Moylan and Associates from whom preliminary views were obtained in March 2008. Following an inspection in December 2007, further information was required to prepare reports. Despite requests in February 2008 to the plaintiff's engineer, Messrs. Moylan did not receive any photographs of the wall in issue. Within a short time of receiving Moylan's report confirming the existence of a sound basis for the underlying allegation of professional negligence, the necessary application to join Griffin as a third party was brought in July 2008. On the foregoing basis, it is the position of Rhatigan that the time taken for investigation was not excessive.

Aside from that, counsel for Rhatigan submitted that this application to set aside the third party notice served by Rhatigan should be dismissed having regard to the delay on the part of Griffin in initiating the application and its conduct after the service of the third party notice on it. In addition to relying on the passage from the judgment of Hardiman J. in the Carroll case, which I have quoted above, counsel for Rhatigan also relied on the decision of Morris J. in Grogan v. Ferrum Trading Company Ltd. [1996] 2 ILRM 216, and, in particular, the following passage from the judgment of Morris J. (at p. 221):

"I take the view that if there is to be an orderly conduct of litigation, the parties are entitled to assume that once a third party notice has been served and an appearance has been entered and a statement of claim has been sought and delivered and a defence to that third party statement of claim has been delivered, that this procedure meets with the approval of the third parties and they will not attempt to retreat from it. I believe that by adopting this procedure the third parties have forfeited their rights to make application to the court to have the procedure set aside. I believe that an argument can be addressed to support the proposition that it would be open to a third party to enter an appearance to a third party notice without prejudicing his position in order to allow him the time to consider the position and then make application to the court if so advised. However, at the stage where, having received a third party statement of claim, he enters a defence thereto he must be assumed to have received all the appropriate advices which he requires in relation to the case and these advices would, presumably, have included a consideration of the desirability of setting aside the third party notice. The delivery of the defence is, in my view, an election by the third party which precludes him thereafter from moving the court to set aside the notice. It might be argued that there is no statutory provision limiting the time for making of this application nor is there any rule making such a provision. However if a 'cut-off point' is not established then the absurd position would arise whereby an application of this nature might be made at or immediately before the hearing of the issues between the parties. I believe that a 'cut-off point' must be established and it seems to me that in the interest of orderly litigation that the cut-off point must be held to be not later than the entry of the defence by the third party."

The Grogan case was cited on the appeal in Boland v. Dublin City Council, as appears from the judgment of Hardiman J. (at p. 413).

On this application, counsel for Griffin sought to distinguish Griffin's position, in that it delivered its defence under threat of Rhatigan's motion for judgment in default of defence and that, following the service of the third party statement of claim on 22nd December, 2008 and the intervention of the Christmas vacation, it had to take instructions from Griffin, including from the former employee of Griffin, who was the engineer most directly concerned with the matter at all material times, which instructions it was unable to obtain until 30th January, 2009.

In my view, it was open to Griffin to defend Rhatigan's motion for judgment in default of defence on the basis that the third party proceedings should be set aside. By not doing so, and by not only delivering a defence but by raising particulars on Rhatigan's third party statement of claim, Griffin elected, to use the terminology used by Morris J. in the Grogan case, to defend the third party proceedings. This application, which was not brought for another month, was not brought as soon as reasonably possible. Accordingly, it must be dismissed.

In the circumstances it is not necessary to make any finding on the contention of Griffin that the third party notice was not served as soon as reasonably possible. While, having regard to the basis of Rhatigan's claim for contribution and indemnity against Griffin, it was necessary and prudent for Rhatigan to get expert advice, nonetheless it is difficult to see why it should have taken a year and a half to get such advice. I mention that, lest the Court be seen to be approving of, or condoning, the time span involved.

Application of legal principles to Flemco's third party proceedings
It was Flemco which retained Griffin. The basis of Flemco's claim for contribution and indemnity against Griffin is that Griffin was negligent and in breach of its duty to Flemco in the provision of expert advice and services as structural engineers. Accordingly, Flemco's claim is based on alleged professional negligence on the part of Griffin.

The explanation advanced by Flemco for the delay in initiating the application for leave to serve a third party notice on Griffin was that it was awaiting replies to the particulars it raised on the plaintiff's claim and that it was necessary to obtain a separate expert review to enable it to know where liability might ultimately rest in respect of the plaintiff's claim. As is clear from the timeline set out above, the replies to Flemco's particulars were delivered on 9th September, 2008. As regards obtaining expert advice, the evidence shows that, in response to queries from Flemco's solicitors of 17th July, 2008 and 14th August, 2008, John M. Gallagher, the consulting engineer from whom Flemco's solicitors sought advice, confirmed his view in his earlier report, the date of which is not clear, that both Griffin and Rhatigan were negligent in relation to the occurrence of the damage to the plaintiff's property. However, despite that confirmation, Flemco made no move whatsoever in relation to Griffin for three months, until the letter of 20th November, 2008 was dispatched. It was another three months before the third party notice was served.

Having regard to the jurisprudence which I have outlined earlier, the relevant period of delay in this case is approximately one month short of two years – from the time prescribed in Order 16, rule 1(3), towards the end of March 2007, to the service of the third party notice on 17th February, 2009. If this were a "stand-alone" application, despite the obvious necessity for Flemco to obtain expert advice, in my view, it could not be said that the third party notice was served as soon as reasonably possible.

However, the application is not a "stand-alone" application and the fact is that, having regard to the decision I have made on the application against Rhatigan, the third party proceedings by Rhatigan against Griffin remain and will be litigated with the plaintiff's claim. If Flemco's third party proceedings are set aside, it is still open to Flemco to institute separate proceedings against Griffin, subject to the discretion of the Court under s. 27(1)(b) of the Act of 1961. Having regard to the overriding purpose of s. 27(1)(b), as outlined by Murphy J. in Molloy v. Dublin Corporation, which is to avoid a multiplicity of actions, it seems to me that, in the unusual circumstances of this case, the proper course is to refuse the application to set aside Flemco's third party proceedings against Griffin, as the issues which arise on those proceedings are similar to the issues which will have to be dealt with in Rhatigan's third party proceedings against Griffin.

For completeness, it is appropriate to record that, in my view, whether the issue of prejudice is relevant or not, on the evidence before the Court there is no prejudice to Griffin in having to defend the third party proceedings at this juncture.

Order
There will be an order on each application dismissing the application.