THE COURT OF APPEAL

2015/343

H.C 2010 No. 9802 P

Kelly J.
Finlay Geoghegan J.
Irvine J.

CONOR MULCAHY

PLAINTIFF

AND

A.S.L. SPORTS PARK LIMITED AND ASTRA SOCCER LIMITED AND

PRIDE ENTERPRISES LIMITED

TRADING AS "FIELD TURF IRELAND"

DEFENDANTS

AND

LIMERICK V.E.C.

THIRD PARTY

EX TEMPORE JUDGMENT of Mr. Justice Kelly delivered on the 7th December 2015

1. A defendant who wishes to make a claim for contribution against a person who is not already party to a suit is obliged to comply with the provisions of s. 27(1)(b) of the Civil Liability Act 1961. That requires such a defendant to serve a third party notice upon the person who is not already joined to the suit as soon as is reasonably possible. That is a statutory obligation which has to be complied with if one is to successfully make a claim against the proposed third party.

2. The Act itself does not prescribe any period within which such an application has to be made. The procedure and the time which is relevant to such a procedure is to be found in O. 16, r. 1(3) which 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 counterclaim, the reply."*

3. There is a substantial body of jurisprudence dealing with both the statutory provision and the rule of court which effectively implements it. It is not necessary for the purposes of this ruling to refer to all of the authorities. I will content myself to by referring to just a small number.

4. The first is a decision of Hogan J. in *Buchanan v. B.H.K. Credit Union Limited and Others.* In considering the reasonableness of the time within which a third party was sought to be joined in that case he said:-

> *"Any such permissible delay will generally be measured in weeks and months and not years."*

5. His decision in that regard was approved by Kearns P. in the case of *Hennessey v. Griffin* a decision of the 13th March, 2015.

6. The last occasion upon which this Court was called upon to consider these provisions was in the decision which was delivered by Finlay Geoghegan J. in the case of *Greene v. Triangle Developments Limited,* a judgment which was delivered on the 30th July 2015. I think it is appropriate that I should quote from para. 25 of that judgment where, having considered a good deal of the jurisprudence and in particular a decision of the Supreme Court in *Connolly v. Casey* she said:-

> *"In my view, following the approach of the Supreme Court in Connolly v. Casey, it is incumbent on a trial judge, when faced with an application such as the present before the High Court, to look not only at the explanations which were given by a defendant for any purported 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."*

7. The first thing that I would like to say before considering the facts of this case is that of course the obligation to move as soon as is reasonably possible is an obligation upon the party to the suit, the defendant in other words, who wishes to join a third party. It is not an obligation on that defendant's insurer or that defendant's solicitor or indeed anybody else. It is the defendant's own obligation to ensure that the statutory provision is complied with.

8. The statutory provision itself mandates and element of urgency. A statutory requirement to act as soon as it is reasonably possible means what it says. It would be difficult to excuse a failure to comply with the statutory provision by reference to the general speed at which litigation is proceeding.

9. Turning then to the facts of this case with a view to ascertaining whether the High Court judge was correct in deciding not to set aside the third party notice, one is struck by the fact that the accident occurred in October 2008 and the litigation commenced as far back as October 2010. It is right to say that between the incident which gave rise to the injuries complained of and the commencement of the litigation, there was an inspection carried out, indeed a detailed inspection of the locus in quo.

10. In the personal injuries summons, one finds the particulars detailing how the accident occurred. The plaintiff it is said was a visitor to the premises in question. He was a member of the Moscow Brains Soccer team. During the course of a soccer game, the ball became trapped on top of a wire fence to the rear of the goalpost, where a section of netting was provided to prevent the ball from going outside the perimeter of the all weather pitch. The plaintiff was retrieving the ball when the wedding ring the plaintiff was wearing on his left hand ring finger became caught in a projecting section at the top of the mesh wire fence which formed the perimeter fencing around the pitch. This caused the plaintiff to sever his finger and as a consequence thereof, to suffer severe personal injury, loss, damage inconvenience and expense.

11. It is I think a matter of some note that in the particulars of negligence, one finds in paras. (e) (f) and (g) the following:-

> (e) An allegation that the defendants were negligent in installing the netting behind the goalpost in an unsafe manner.
>
> (f) When installing the netting failing to remove the projecting sections from the wire fence.
>
> (g) Placing the netting in an unsafe position.

12. If one were the take the rules of court literally the default in failing to join the third party commenced at the time limited for the delivery of the defence which would have been in the early part of 2011. But as Ms. McCauley correctly points out, it is the exception rather than the rule for the Rules of Court to be observed insofar as the time limit for the delivery of a defence is concerned. What we do know is that in this case the defence was actually delivered in April 2012. It is I think significant that the defence itself identifies that there is the possibility of third party involvement and that is specifically pleaded in the course of the defence.

13. What is said at subpara. (4) of para. 3 is this:-

> *"Without prejudice to the foregoing, if the plaintiff was occasioned any personal injury loss, damage or expense which is denied the same were caused or contributed to by the negligence and breach of duty of the third party company who at all material times was the party responsible for erecting the fence the subject matter of these proceedings for whose acts the defendants are not liable in law or otherwise."*

14. That plea is made in the defence delivered in April 2012. However an application to join the first third party was not made until April 2013, a full year later. Subsequently in July 2013, that third party was then joined as the third named defendant in the litigation.

15. The application to join the current third party and the appellant here was an application which was made by the existing first and second defendants and not by the newly joined third named defendant. That application came on and was dealt with in April of 2015. One finds that in the interim between the delivery of the defence and the application to join the current appellant before this Court an inspection took place on the 5th June, 2014. It must be borne in mind that at that stage the third named defendant was already a party to the suit and had been in that capacity since the preceding July.

16. It is said that it was only as a result of this inspection in June 2014, that an awareness of the possibility of a further possible claim arising came about.

17. Even though that inspection took place in June, this awareness apparently only emanated at the end of August 2014. The application for the joinder of this new third party, the appellant before this Court, did not take place until 2015.

18. There have been various explanations proffered for the delay. Some of them are by reference to the insurers; some of them by reference to the solicitors, but the plain fact is that the particulars which I have already referred to were in the originating plenary summons in 2010.

19. The possibility of third party involvement was pleaded in the defence in April 2012. Then a year went by before the first third party was joined. It was not apparently until June 2014, that the first inspection involving an engineer took place. Even from then onwards, there was further delay in the actual application to join.

20. In these circumstances is it possible to say, applying the test identified at para. 25 of the judgment of this Court in *Greene v. Triangle Developments*, that this joinder was done as soon as was reasonably possible? There has been an extraordinary lapse of time since the commencement of the proceedings. For my part, I take the view that the judge was incorrect in concluding as he did, that there should not be a setting aside of this third party notice. In my view there has not been compliance with the statutory provision which requires the application to be made as soon as is reasonably possible.

21. Having regard to all of the matters that I have alluded to by reference to the progress of the proceedings, the way in which they were pleaded, the various steps that were taken, I do not believe it correct to say that this joinder was carried out as soon as was reasonably possible. There has not been compliance with the Act or with the requirements of the Rules of Court in that regard. For my part I would allow the appeal.

Ms. Justice Finlay Geoghegan: I agree and for my part I would also allow the appeal for the reasons which have been outlined by Mr. Justice Kelly.

Ms. Justice Irvine: Yes for the reasons set out by Mr. Justice Kelly, in the course of his judgment, I would also allow the appeal.