Neutral Citation Number: [2007] IEHC 465

THE HIGH COURT

[2003 No. 1212 P]

BETWEEN

JACQUI HARTIGAN

PLAINTIFF

AND

MARTIN DONNELLY, LOWSTRAND SECURITIES LIMITED AND MILLSTREAM COURT MANAGEMENT COMPANY LIMITED

DEFENDANTS

AND

PADRAIG O'CUMIN

THIRD PARTY

Judgment of McCarthy J. delivered the 25th day of July, 2007.

1. This is an action for damages for personal injuries and other loss commenced by originating plenary summons on 29th January, 2003 and alleging negligence and breach of duty (including breach of statutory duty and contractual duty) on the part of the defendants at Millstream Court, Mill Road, Ennis, County Clare. According to the statement of claim delivered on 25th March, 2003, the plaintiff was a tenant of apartment 22 at Millstream Court. The first defendant was her landlord, the second defendant was the developer of the apartment complex and the third was the management company thereof. The plaintiff alleges that on 18th August, 2002 (apparently in the small hours of the morning), while she was present in the apartment, she was "caused to fall out of the window" and was "caused to fall a distance of 45 feet to the ground"; it appears from the particulars of injury pleaded in the statement of claim, and additional particulars furnished thereafter, that she was rendered unconscious by her fall and suffered extensive injuries, including a broken pelvis, a broken hip, a broken femur, shattering of both legs and multiple bodily injuries. As can be imaged, she was treated on an emergency basis and there seems no doubt but that the injuries were devastating although, as one might perhaps have feared, she was not rendered paraplegic but undoubtedly, as pleaded by her, she will suffer very serious long-term ill effects and the effect on her occupational and social wellbeing is described as "catastrophic"; she will apparently be subjected to numerous skin grafts, apart from extensive periods in hospital, and the injuries are such that she will no longer be able to work as (or presumably gratify an ambition to be) a part-time model, as well as participation in other occupations. Whilst it would appear that she had had a number of drinks on the evening (and early morning) before the accident, the substance of the negligence and breach of duty which she alleges against the defendants pertains to the condition or state of the apartment. It is that which ultimately led to the joinder by the first and second defendants, by third party notice, of Padraig O'Cuimin, architect of the premises and, of course, the motion now before me, by the third party, to strike out the notices on the grounds that they were not issued, "as soon as reasonably possible", as that term has been defined, pursuant to the provisions of s. 27(1)(b) of the Civil Liability Act, 1961.

2. On application by the third named defendant the plaintiff was compelled to furnish further particulars of the event in question and of the negligence of the defendants; that document was dated 1st September, 2004 and, whether or not they fall into the category of particulars of negligence or not, particulars of what will, presumably, be alleged by the plaintiff at the trial to be breaches of statutory and contractual duty (on foot of the lease of the premises dated 7th June, 2002), these do not differ substantially from the statement of claim.

3. Having regard to the fact that the plaintiff's allegations pertain to the structural condition of the premises, it is obvious why it was conceived that it was appropriate to join the third party. It appears that the second defendant and the third party agreed in October, 1997 that the latter would "design, supervise and certify the construction of the apartment complex". The order permitting the joinder of the third party by the first defendant was made on 1st December, 2004 pursuant to a notice of motion issued and filed on 19th August, 2004 and grounded on the affidavit of Patrick Judge, solicitor for the first defendant. He erroneously merely served the third party notice, the draft whereof had been exhibited in his affidavit, such service being effected on 30th November, 2004; the issue of the motion had been preceded by a letter of 9th July, 2004 from Mr. Judge, indicating an intention that, in default of agreement by the third party to take over the first defendant's defence and provide an indemnity in respect of the claim, within seven days, application would be made to the court for the relief ultimately given in that respect.

4. Messrs. L.K. Shields notified the first defendant by letter of 12th January, 2005 that the third party notice was not duly issued out of the Central Office and this fact had come to their attention when they sought to enter an appearance. The order was served, also, on 30th November, 2004 but Mr. Judge candidly admits the failure to issue the third party notice out of the Central Office by "error and inadvertence". I was told orally by counsel for the first defendant (Mr. Howard S.C.) at the hearing that Mr. Judge was not a solicitor experienced in litigation and no doubt this is the reason for his mistake. In any event, Mr. Judge did not proceed expeditiously thereafter making application *ex parte* to the court on 25th July, 2005 for an extension of time for the issue and service of the third party notice, by three weeks, grounded on his affidavit of 20th July, 2005, the notice being issued on 26th July, 2005 and thereafter served on 5th August, 2005, together with the orders of 1st November, 2004, 25th July, 2005, the plenary summons and the statement of claim. Service was accepted by Messrs. Shields and by letter dated 12th August, 2005 they requested copies of the grounding affidavit (in respect of the joinder of the third party) and all further pleadings, a request complied with under cover of a letter of 23rd September, 2005 (the third party having entered an appearance on 19th September, 2005).

5. In terms of the delay (which I will call the "relevant delay") by the first defendant in his application for leave to join, I have referred to the dates of service of the summons and the statement of claim. The first defendant sought particulars of such claim by notice of 2nd October, 2003 and replies (together with certain documents) were furnished by the plaintiff on 18th November of the same year and, as we know, nothing was done pertaining to the joinder of the third party notice until the motion in that regard was issued on 19th August, 2004, being approximately seventeen months after the delivery of the statement of claim and nine months after the reply to the notice for particulars. The first defendant ultimately delivered a defence on 8th July, 2005.

6. A number of matters are set out in the affidavit of Mr. Judge of 6th October, 2006, in reply to that of Mr. Kavanagh (grounding the application to strike out or set aside the third party notice) dated 20th July, 2006, which counsel for the first defendant have urged upon me are relevant in considering the application. In the first instance Mr. Judge refers to the fact of the notification by letter of the contemplated third party proceedings on 9th July, 2004, the omission to serve the actual notice (after obtaining an extension of time for doing so) until 5th August, 2005, the ultimate entry of an appearance by the third party on 19th September, 2005 (with a request for the delivery of a statement of claim), a request of 29th November, 2005 for inspection of the locus of the accident which apparently ultimately took place on 2nd February, 2006, and what is alleged to be culpable delay on the part of the third party in making the application to set aside or strike out the notice, pursuant to the notice of motion of 20th July, 2006, which came before the court on 9th October, 2006. I now turn to the facts pertaining to the second defendant, which are somewhat more complex.

7. Obviously the dates of issue and service of the summons and the statement of claim were the same so far as that defendant is

concerned. That defendant does not appear to have sought particulars of the plaintiff's claim. Ms. Barbara Kenny, director of the second defendant, notified her insurance brokers (Messrs. O'Leary Insurances) on 10th September, 2002 that she had received a letter from the plaintiff's solicitors seeking an admission of liability in respect of the accident (in the form of what she had called the normal "originating letter"). She heard nothing more about the matter until service of the summons (the date of which does not appear from the papers) when she instructed her solicitor (Colman Sherry) and furnished the summons to both her insurers and her solicitors; thereafter she presumed that the second defendant's insurers (Messrs. Eagle Star) were defending the action, although the first defendant's solicitor had apparently inadvertently entered an appearance on the second defendant's behalf, which, perhaps, understandably introduced some modest element of complexity into the sequence of events; in any event, judgment was entered up in default of appearance against the second defendant on 21st June, 2004 but Mr. Sherry was of the understanding as late as 8th November, 2004, that the order granting judgment had not been perfected and was not, apparently, so perfected until on or about 23rd September, 2005, Mr. Sherry thereupon issuing a motion to set aside judgment (which same was so set aside). The notices of motion, orders and affidavits pertaining to this aspect of the matter have not been furnished to me but I am satisfied as to the position. The solicitors on record for the second and third defendants are now Messrs. Kennedy Fitzgerald but Mr. Sherry was retained for the purpose of applying to set aside judgment. Ms. Kenny also refers to the fact that Mr. O'Cuimin had attended the locus on 2nd October, 2002 in her company and states that he had been on notice of the claim "from the very early stages" Mr. O'Dwyer explained a number of accidents which gave rise to a failure of Messrs. Eagle Star to defend the proceedings on behalf of the second defendant, which might shortly be described as an administrative oversight (because of the mis-filing of the claim against the second defendant and the mistaken conception that there was merely one claim and one party to whom a duty to indemnify was owed, namely the third defendant). In any event, the insurers and Mr. Kennedy and Mr. O'Dwyer directed their minds to the representation of the third defendant only (including the prospect of seeking indemnity from the second defendant), *inter alia*, including lengthy correspondence with Messrs. O'Leary Insurances for the purpose of ascertaining the status of the second and third named defendant (in particular with respect to the responsibility for common areas). An issue as to whether or not indemnity should be given also arose. Messrs. Kennedy Fitzgerald engaged in correspondence with Mr. Sherry and ultimately it was agreed that Messrs. Eagle Star owed a duty to indemnify the second defendant on 6th December, 2004 whereby Messrs. Kennedy Fitzgerald delivered a defence on 7th December, 2005. The delay from the service of the statement of claim (and the dates of service of the summons and statement of claim, incidentally, have not been furnished to me) on or about 25th March, 2003, and the order setting aside judgment on 5th December, 2005 was accordingly two years and nine months, the notice of motion seeking to join the third party being issued with expedition on 19th January, 2006 (just over a month with the Christmas vacation intervening). This, however, gives a cumulative delay of just under three years. I turn now to the law.

8. Section 28(1)(b) of the Civil Liability Act as we know provides for service of third party notice on a concurrent wrongdoer "as soon as is reasonably possible" and after service of the notice the defendant joined as third party is not entitled to claim contribution. In *The Board of Governors of St. Lawrence's Hospital v. Staunton* [1990] 2 I.R. 31, this Court had originally given liberty for the joinder as a third party of a consultant neurologist (who had given evidence at the trial in July 1987 of what was a medical negligence action); the joinder, on 9th November, 1987, thus post-dated the hearing and Finlay C.J., for the Supreme Court, said, at p. 36 –

> "I am quite satisfied upon the true construction of [the Act] 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. 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 is reasonably possible."

It was obvious in that case that that had not been done and the leave was set aside or notice struck out.

9. The position of a third party, in terms of timely application to set aside a notice, is dealt with by Morris J. in *Carroll v. Fulflex International Company Limited* (Unreported, High Court, 18th October, 1995) as follows:

> "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 time scale identified in s. 27(1) of the Civil Liability Act, 1961, that is to say, 'as soon as is 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 incurred in the third party procedures."

10. This passage was quoted with approval by Hardiman J. in *Boland v. Dublin City Council* [2002] 4. I.R. 409 and he also dealt with the onus of justifying delay, on the part of the third party, in moving to set aside the notice as follows:

> "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 the 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."

And further:

> "… Just as the onus of justifying any delay in seeking liberty to issue the third party notice devolves on the defendant, the onus of justifying delay in bringing the motion to set such notice aside devolves on the third party. Since the first third party is the moving party here, its delay falls to be considered first."

Thus, the third party is in the same position as the defendant in terms of timely application to the court. In the present case, this issue has been raised by the first and second defendants with particular reference to the fact that it was submitted that it was unreasonable for the third party to await events in respect of the second defendant so that he could move in respect of both defendants at the same time and with this I do not agree. As pointed out by Barron J. in *McElwaine v. Hughes* (Unreported, High Court, 30th April, 1997):

> "In my view the real question hinges upon what is reasonable in the particular case. This in turn depends upon the behaviour of the defendant or rather the defendant's advisers. The first question to be determined is at what point in time would a reasonably prudent solicitor acting for the defendant be in a position to advise the institution of third party proceedings."

It would appear to me that a reasonably prudent solicitor would have taken the view that the saver of costs and orderly conduct of

litigation involved would warrant a delay until it was appropriate, in point of procedure, to proceed against both defendants. Further, it seems to me reasonable (and this is common case) for any defendant (or, by analogy, any third party seeking to set aside an order) to await an expert's report or witness statements or pleadings as well as to seek advices of counsel and consider what I might term its best interests (including the commercial reality) in terms of whether or not it was best to apply to set aside. A prudent solicitor will strike a balance between these factors. In my view, expedition is not to be confused with overhasty or imprudent pursuit of applications to the court and I speak, of course, of the position applicable to both a defendant and a third party and this, it seems to me, is the tenor of all of the authorities. It seems to me, accordingly, that the third party has surmounted any obstacle to its application caused by supposed culpable delay.

11. From the sequence of events referred to above, no practical prejudice has been suffered by the third party, not only because of the third party's visit to the premises in company with Ms. Kenny on 2nd October, 2002, the originating correspondence contemplating joinder (if I may call it that), the service of a purported third party notice and subsequent further inspection. Perhaps most importantly, there is available all relevant documentary material pertaining to the engagement of the third party in the apartment complex and I think that I am entitled to assume (in default of evidence to the contrary) that the apartment complex, and in particular apartment 22, has not been subject to any change of relevance to liability. However, in *S.F.L. Engineering Limited v. Smyth Cladding Systems Limited* (Unreported, High Court, 9th May, 1997) Kelly J. held:

> "In addition to relying upon the oral assurance of Mr. Baker given in April, 1994 the defendant also seeks to rely upon correspondence and dealings between the parties prior to the institution of proceedings. This is done in an attempt to demonstrate that the third parties are not prejudiced by the delay. While I am not here concerned with any question of prejudice, that is so having regard to the decisions which I have cited, and indeed, counsel for the defendant quite properly accepted that that was not a matter with which I ought to be concerned on this application. The sole issue which I have to decide is whether the defendant served the relevant third party notices as soon as was reasonably possible. In my view it did not and consequently the third party notices must be set aside."

12. In the context of the date from which the delay must be calculated in *Connolly v. Casey* [2000] 1 I.R. 345 the Supreme Court (Denham J.) stated, in the context of delay in moving due to the fact that replies to particulars were awaited stated, that –

> "The test is whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendant's state of knowledge is not the test. The queries raised in the notice for particulars were relevant to the claim against the third party and thus it was reasonable to await the replies."

In the present case, on perusal of the first defendant's notice for particulars dated 2nd October, 2003, comprehensive information was sought *inter alia* as to what precisely caused the plaintiff to fall from the window, effectively, her state of sobriety and also as to the articles or sub-articles of certain regulations the breach whereof was pleaded. These plainly pertained substantially to the potential liability of the third party and, indeed, this Court compelled the delivery of further particulars which similarly bore upon it, but after the issue of the motion for leave to join the third party. This, of course, applies only to the first defendant and not to the second. However, in the particular circumstances of the present case it seems to me appropriate to have awaited such replies which, in the event, were delivered promptly.

13. As to the period of time which might pass between the actual issue of a third party notice and the prior application to the court by the issue of a notice of motion, in *Dillon v. MacGabhann* (Unreported, High Court, 24th July, 1991) Morris J. was prepared to take as the starting point for the calculation of the relevant period the date of issue of the notice of motion (although in that case the order was ultimately made only on 20th March, 1995, on foot of a notice of motion of 28th February, 1995, an earlier motion of 4th July, 1994 having been struck out due to oversight).

14. As conceded by the third party in *Greer v. John Sisk & Sons Limited* (Unreported, Supreme Court, 20th March, 2002) Keane C.J., for the court, stated that –

> "It does not appear to me that really any delay subsequent to that motion (seeking liberty to join) is the real concern of this application. What is the real concern is the unquestionable delay which ensued following the delivery of the statement of claim and the particulars …"

15. In *McElwaine v. Hughes* (Unreported, High Court, 30th April, 1997) it was stated by Barron J. that –

> "Although the wording of the section refers to the service of the notice, nevertheless, it seems to me that unless there are circumstances arising between the issue of the application to issue and serve a third party notice and its ultimate service following an order to that effect, that the time to be considered should end at the date of issue of the application to the court."

16. Morris J. said that –

> "However, in determining whether the service was as soon as was reasonably possible the court would have to consider all the elements which contributed to any possible delay in effecting such service including, for instance, the unfortunate circumstance in this case whereby the original notice was missed in the court list in October and struck out."

17. In conclusion as to the relevant legal principles, in *Grogan v. Furrum Trading Company Limited* [1996] 2 I.R.L.M. 216 Morris J. referred to the establishment of a "cut-off point" and expressed the view that, in the interest of orderly litigation, that should be held to be not later than the entry of the defence by the third party and in *Tiernan v. Fintan Sweeney Limited* (Unreported, High Court, Morris J., 18th October, 1995), the third party went so far as to deliver a defence; however, in the present case I do not think that the extent of the participation of the third party is of significance. Whilst I do not accept that the omission to serve (before the hearing of this motion) a statement of claim, the expense of the preparation of which was undergone by the first named defendant, after the entry of an appearance calling for it, is to be ignored, merely because of non-service, I think that the mere arrangement of an inspection of the locus was a legitimate step in the investigations or consideration of the matters to be addressed by the third party before moving and, such matters do not avail the first defendant in resisting the application in as much as he has not been prejudiced in any significant way. As to the omission to serve the third party notice, *Golden Vale plc v. Food Industries plc* [1996] 2 I.R. 221 does not assist me in reaching the conclusion that a delay in service (since it does not deal with concurrent wrongdoers) of the third party notice after leave is given is not itself fatal and, but more generally, I think that it could be said to be part of the mix of factors relevant to my decision, each case being considered in accordance with its own facts, in the light of the principles to which I have referred.

18. Two views may accordingly be taken as to the relevant period of delay, namely, that it is between the date upon which replies were received to the first defendant's notice for particulars on 18th November, 2003 and the application by notice of motion of 19th August, 2004 and the date of actual service on or about 26th July, 2005 (i.e. a period of approximately twenty months). Alternatively, the relevant period might be considered to be between 18th November, 2003 and 19th August, 2004 (a period of ten months). In the light of the authorities to which I have referred, with special reference to *Dillon v. MacGabhann* and *McElwaine v. Hughes*, which I believe have been amply dealt with above, I think that the latter period is the correct one in the particular circumstances of this case.

19. As to the subsequent delay before issue and good service I take into account the fact that the draft third party notice (perhaps one might call it the unissued third party notice) was served on 30th November, 2004; this fact does not, of course, go to the issue of whether or not there was prejudice to the third party since that is irrelevant but rather is a circumstance approaching that of merely bad service in accordance with the Rules of the Superior Courts; whilst there was considerable delay in the ultimate issue of the third party notice, thereafter, I do not believe that the period of delay is relevant but even if I am wrong, and it is relevant, the situation from 19th January, 2005, at the latest, was that issue and service was merely pending (in strictness) and hence should be largely disregarded.

20. Thus, I am of the view that the third party notice was issued and served herein, by the first defendant, for the purpose of the Act, as soon as was reasonably possible. I do not say that I have reached this conclusion without difficulty. One must exercise care in applying any principles divorced from their facts but this equally applies to anything in the nature of a mechanical application of periods of delay which were found to be fatal to a defendant in other cases; I have had regard to these periods but it would have been wrong of me to consider them save in very broad terms.

21. I turn now to the position of the second defendant which has given me greater difficulty. This defendant has undoubtedly been the victim of a series of mis-chances and, possibly above all, error or oversight on the part of her insurers as well as, it appears, unjustified doubts by them in their decision to indemnify. They certainly moved promptly, by the agency of Messrs. Kennedy Fitzgerald, after all doubts were resolved and instructions given on 6th December, 2004 since, allowing for the Christmas vacation, there is no question but that the issue of a motion on 19th January, 2005 is credit worthy. However, between 5th February, 2003 and the notice of motion on 29th January, 2005 is just under three years. We know why that occurred. The first defendant's director, Ms. Kenny, and her brokers, Messrs. O'Leary, dealt promptly with the matter and only realised that a difficulty arose when she was pursued for judgment in default of appearance, a further mis-chance occurring after that by the fact that the order was not perfected despite Mr. sherry's attempts to make this so; I think that it is proper to disregard this period, however, by analogy with the fact that on the authorities quoted above the period subsequent to the issue of a notice of motion has been substantially and similarly so disregarded. As indicated above I would have thought that the issue of a third party notice as soon as "reasonably possible" must have regard to the exigencies the system for the administration of justice, including any delays which are either largely inevitable having regard to the exigencies of lists or occur by oversight. It must be so since otherwise it must follow even if a party moved in an unambiguously prompt manner it is conceivable that issue might not take place for some time.

22. However, even if one excludes this period one is left with in the long period of inaction, excusable though it may be. It appears from Mr. O'Dwyer's affidavit, as referred to above, that considerable effort was made in addressing the question of whether or not contribution or indemnity would be sought by the third named defendant from the second defendant and it does not appear that attention was directed to the possible joinder of the third party. However I approach the matter it seems to me that having regard to the nature of the claim as evidenced by the pleadings, had Messrs. Eagle Star retained solicitors or counsel to advise them, the issue would or should have been addressed, apart altogether from the experience of relevant officials of the company in dealing with claims where the joinder of a third party (such as, perhaps, professional man like an architect, in the light pleadings) might arise. They had sufficient information for this purpose. They obtained further information from the plaintiff by the further particulars delivered on the 1st September, 2004, at the instance of their solicitors now acting for the second defendant, Messrs. Kennedy Fitzgerald, then, of course, acting on their instructions only for the third defendant. Because of the absence of any prejudice on the part of the third party in terms of defending the claim one is tempted to take a benign view of the period. However, notwithstanding the excusable nature of the delay I do not think, as a fact, and, on balance, that this defendant moved "as soon as reasonably possible"; the tenor of the case law is that the defendant is not required to proceed in haste to join a third party and ought to have the opportunity of making enquiries or considering joinder at a pace allowing for mature reflection. However, having regard to the material in the hands of the insurers it seems that from an early stage they had all relevant information. Counsel for this defendant opened *Gilmore v. Windle* [1967] I.R. 323 but that really concerned procedural issues pertaining to the joinder of third parties and the provisions as to time in of s. 27 of the Act are not addressed. The only striking feature of that case, having regard to the authorities which I have considered, is the significant delay, by present standards, between the application for leave to issue the third party notice in terms of the timescale of the action. Counsel also referred me to the provisions of the Interpretation Act 2005 as to how one might construe ambiguous or obscure provisions, with special reference to that section. However, I do not think that the provisions fall within the category of ambiguity of or obscurity. In my view the issue of what is or is not "reasonably possible" must be viewed objectively and the delay on the part of the second defendant, notwithstanding the reasons, is simply not so.

23. I therefore refuse the application of the third party to set aside the notice issued and served upon him by the first defendant and grant the application so far as it concerns the second defendant.