Neutral Citation [2016] IEHC 622

THE HIGH COURT

[2011 No. 10483P]

BETWEEN:

KEVIN GLACKIN

PLAINTIFF

– AND –

OLETTE DOHERTY, ELIZABETH FINNEGAN, BRIAN McMULLIN, PATRICK McMULLIN, AILISH MORAN, BRIAN O'MAHONY, BERNADETTE SMITH AND JAMES SWEENEY, PRACTISING UNDER THE STYLE AND TITLE OF V.P. McMULLIN, SOLICITORS

DEFENDANTS

– AND –

CALLAN TANSEY (A FIRM) AND DAMIAN TANSEY

THIRD PARTIES

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Background.

1. Mr Glackin owns certain lands in Newtowncunningham, a village in County Donegal. His family have lived there since the 1800s. His forbears were among the founders of the village. Mr Glackin is the last surviving descendant of those founders. This is a fact of which he seems keenly aware. So when he agreed, sometime around late-2005, to sell his lands to Mr David Hickey, he made it a condition of sale that the names of the founding families – Glackin, Dougal, Crockett, Dans Hill and Conal –would be used in the road and street-names of any future housing development on the lands.

2. Following oral agreement between Mr Glackin and Mr Hickey as to the sale price and the condition as to road and street-names, Mr Glackin instructed VP McMullin, the defendant solicitors, to act on his behalf. They accepted the retainer and drafted the contract of sale which was later executed between Mr Glackin and Hatton House Limited, the latter being a nominee of Mr Hickey. Mr Glackin maintains that: he relied on the defendant solicitors to include a special condition in the contract of sale whereby the purchaser would be required to obtain planning permission for a proposed development of some 50 houses by 31st December, 2006. This planning permission was to include the agreed names for various roadways and streetways; because of the requirement as to planning permission, or so it seems, the contract of sale, though executed on 30th January, 2006, mentioned a closing-date of 31st December, 2006. Again, this is what Mr Glackin maintains; precisely what instructions he gave is and remains a matter of some dispute between him and the defendants and this issue will fall to be resolved at trial.

3. In May 2006, the solicitors for Mr Hickey sent a letter purporting to waive the special conditions of the contract concerning the planning permission. Mr Hickey maintained, through his solicitors, that the special conditions of the planning permission had been inserted for *his* benefit and hence that they could be waived unilaterally by him. This being so, Mr Hickey's solicitors sought a closing-date of 20th August, 2006. Mr Glackin refused this request and, following further correspondence, relations between the parties had deteriorated to the extent that Mr Hickey issued a plenary summons on 23rd October, 2006, seeking, *inter alia*, specific performance of the contract.

4. Mr Glackin was initially represented in the specific performance proceedings by the defendant solicitors. However, it quickly became apparent that they were conflicted, not least, though not only, because Mr Glackin contended that the special condition as to planning permission and road and street-names (which the defendants had drafted) was never intended, he maintained, to be a special condition that inured for the benefit of the purchaser but was inserted to protect his cherished intention that any future development on his lands should commemorate the names of Newtowncunningham's founding families.

5. Given the conflict of interest that presented for the defendants, Mr Glackin instructed new solicitors, Damian Tansey and Associates, to represent him. His instructions to this second firm of solicitors were to defend the action brought against him and to counterclaim for rescission. Time went on, counsel were instructed, the case was admitted to the Commercial List, but before the matter was heard a settlement was reached between the parties. Pursuant to this settlement, Hatton House agreed to drop its claim for specific performance, thus effectively accepting rescission, provided Mr Glackin returned his deposit of €30k and made a contribution of €70k towards Hatton's costs. Subject to the foregoing, each party also agreed to bear its own cost of the proceedings which, in Mr Glackin's case amounted to a remarkable €268k.

6. In the within proceedings, brought by Mr Glackin against the defendants, Mr Glackin is pursuing a claim in damages in respect of the €100k (€30k + €70k) paid by him to settle the proceedings, as well as the €268k incurred by him in legal costs, being in effect the cost to him of securing a rescission. One can see why Mr Glackin might commence a claim against the defendants, at least when one has regard exclusively to his version of events, and it may of course be that the court of trial ultimately rejects his version of events. But the reason why the defendants would seek to bring a third-party claim against Callan Tansey and Mr Tansey perhaps requires some elaboration. The defendants' contention appears to be that the costs and expenses incurred by Mr Glackin in connection with the specific performance proceedings were entirely avoidable, if Mr Glackin had but agreed to the specific performance at the outset. From this starting-point, the defendants appear to contend that the costs and expenses incurred by Mr Glackin in the specific performance proceedings arise from the (alleged) negligence of Damian Tansey and Associates and Mr Tansey.

7. The sharp-eyed will doubtless have noticed that the second firm of solicitors instructed by Mr Glackin were Damian Tansey and Associates. Yet it is a firm of solicitors known as Callan Tansey and Mr Damian Tansey that have been joined as third parties. The reason for this is as follows. Sometime following the settlement between Mr Glackin and Hatton House, and for reasons unconnected to same, Mr Damian Tansey sold the work-in-progress and goodwill of Damian Tansey and Associates to a firm of solicitors by the name of CE Callan & Co. This last firm re-named itself 'Callan Tansey' and appears initially to have retained Mr Damian Tansey as a consultant, though he no longer has any connection with the firm.

8. Mr Tansey contends that (i) the proceedings against him are statute-barred, (ii) the third-party notice was not served in time, (iii) the third-party claim is unsustainable, and (iv) there is no legitimate purpose to the third-party action. Only Mr Tansey is now seeking to have the third-party proceedings struck out; on the basis that the main and third-party proceedings are sequenced in a particular

way, Callan Tansey do not seek that the third-party proceedings against them be struck out. So, when it comes to the third parties, the court only has to deal with Mr Tansey's position.

II. Timing of the Third Party Proceedings.

9. It is helpful to set out a summary chronology of facts and some accompanying narrative relevant to the issue of delay:

> 21.11.11 Plenary Summons issues.
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> 19.04.13. Statement of Claim issues (after defendants bring motion to dismiss for want of prosecution).
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> 04.06.13. Particulars raised on the Statement of Claim.
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> 21.06.13. Under O.16, r.(3) the application for leave to issue ought to have been made by this date, being 28 days from the time limited for delivering a defence to the statement of the claim. In fact, the application did not issue until 28.05.15 (just under two years later) and was not moved until 02.11.15 (over two years later).
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> 27.11.13. Replies to Particulars furnished. Defendants were aware from these Replies of the facts on which they wish to make their case against Mr Tansey.
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> 22.09.14. Discovery made to defendants. They contend that they wanted to see discovery before making a final decision on the issue of third-party liability. Even if this is so, the motion seeking leave to issue the third-party notice did not issue for another 8 months and was not heard for over 13 months.
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> 28.05.15. Motion seeking leave to issue third-party notice issues. The only notice-party to the application was Mr Glackin, represented by Callan Tansey (a firm with which, by this time, Mr Tansey had no connection). Callan Tansey sought an adjournment of this motion on the understanding that delay in determining the motion could not be taken into account when reckoning the period of time taken to deliver the notices. Mr Tansey was not a party to any such agreement, nor otherwise aware of same.
>
> 02.11.15. Defendants given leave of court (Cross J.) to issue and serve the third-party notice. Not disclosed to the High Court at this time was the fact that the Defendants had issued a letter to Callan Tansey on 24.01.13 identifying Mr Glackin's claims and stating, *inter alia,* "[I]*t is possible that your firm will be joined as a Third Party in these proceedings"*. This suggests that from a quite early stage the third-party proceedings were envisioned.
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> 11.11.15 Mr Tansey served with copy of third-party notice and for first time becomes aware of same.

III. Third-Party Notice Served in Time?

(i) Overview.

10. It is contended for Mr Tansey that, (a) contrary to s.27 of the Civil Liability Act 1961, the proceedings against him fall, in any event, to be set aside on grounds that they were not served "*as soon as reasonably possible*", and (b) neither were the proceedings served within the 28-day timeframe allowed under O.16, r.1(3) of the Rules of the Superior Courts 1986, as amended, insofar as that rule applies.

(ii) Order 16, rules 1(3) and 8(3), RSC.

11. Order 16, rule 8(3) of the Rules of the Superior Courts provides that "[T]*hird party proceedings may at any time be set aside by the court*". The most common basis for a set-aside application is that a third-party notice has not been served (i) within the time-limit laid down by O.16, r.1(3), being "*unless otherwise ordered by the court….28 days from the time limited for delivering the defence*", or (ii) "*as soon as is reasonably possible*", as required by s.27(1) of the Civil Liability Act 1961.

12. Looking first to the 28-day timeframe imposed by O.16, r.1(3), it is clear that the third-party notice was, *sensu stricto*, served two years or so out of time; it was served, it is true, with the leave of the court as granted on 2nd November, 2015, though a question-mark arises as to whether the High Court was properly apprised of all the relevant facts. There is nothing to suggest that any lapse in disclosure of the full facts was deliberate. Even with every good faith, which the court does not doubt was present, lapses happen. But the fact remains that this lapse did happen and that on 2nd November, 2015, the court was not operating on a full understanding of the facts at hand.

(iii) Section 27 of the Civil Liability Act 1961.

13. Section 27 of the Civil Liability Act 1961, provides, inter alia, as follows:

"(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 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."* [Emphasis added].

14. The court has been referred to an abundance of case-law concerning s.27. As it happens this Court sitting in another place has recently had occasion, in its dissenting judgment in *Kenny v. Howard* [2016] IECA 243, to consider the case-law concerning s.27 and to seek to reduce that case-law to a series of coherent principles. The majority in *Kenny* favoured a different application of principle

by reference to the facts at hand; however, the court does not understand there to have been any difference as to the principles applicable, save perhaps on the point of prejudice (though Ryan P.'s observations in this regard, at para.25 appear both non-committal and *obiter*, being on an aspect of matters that he expressly states to be "*irrelevant*" to the case before him). In the interests of brevity, the court proceeds by reference to its enunciation of principle in *Kenny*. That said, the court cannot but note that, consistent with an emerging trend in the case-law of the Court of Appeal, the majority in *Kenny* took a somewhat restrictive view as to the extent of the window of opportunity afforded by the phrase "*as soon as is reasonably possible*" in s.27, and this Court is of course bound by decisions of the Court of Appeal. The court turns below to each of the principles that it identified in its judgment in *Kenny*, at para.50, and which are of relevance in the within proceedings (so excepting principles [11], [15], [17]-[23] and [27]) and applies them in the context of the proceedings at hand:

(a) General Approach of Courts.

15. *"[1] The general approach of the courts has been to focus on the question of whether it was possible to join a third party earlier. Even lengthy delays have been excused where they have been explained and the third party has been unable to establish prejudice."*

16. Having regard to the above-stated facts, it is clear that it was possible to join Mr Tansey earlier. No credible reason has been offered as to why this was not done. But even if one ignores the various delays to when discovery was made on 22nd September, 2014, and the court does not accept that such an allowance falls necessarily to be made, even after discovery the motion seeking leave to issue the third-party notice did not issue for another 8 months and was not heard for over 13 months.

17. *"[2] The net issue in s.27(1)(b) applications is whether, in all the circumstances, it is reasonable for a defendant to wait for the period in question before applying to join the third party. Any such permissible delay will generally be measured in weeks and months, not years."*

18. It does not appear to the court that it was reasonable in a case where third-party proceedings were contemplated as early as 24th January, 2013, for the motion for leave to issue on 28th May, 2015. The third-party notice was served, it is true, with the leave of the court granted on 2nd November, 2015, but it does not appear that the court on that date was operating on the fullest understanding of the facts at hand, the existence of the letter of 24th January, 2013, not being known or advised to it.

(b) Purpose of Section 27(1)(b).

19. *"[3] The clear purpose of s.27(1)(b) is to ensure that a multiplicity of actions is avoided and that, where possible, all issues involving plaintiffs, defendants and third parties are heard together or in a sequenced trial.*

> *[4] A multiplicity of actions is detrimental to the administration of justice, to the third party and the issue of costs. To enable a third party to participate is to maximise his rights and see that he is not deprived of the benefit of participating in the main action."*

20. The court notes this purpose; however, the delay arising in this case has the result that the defendants did not act "*as soon as is reasonably possible*" and thus are outside the scope of protection afforded by s.27.

21. *"[5] Another purpose of requiring a notice to be served "as soon as is reasonably possible" is to put the contributor in as good a position as is possible in relation to knowledge of the claim and opportunity of investigating it."*

22. It does not appear to the court that, as a result of the delay in his being joined, Mr Tansey has been adversely impinged in this manner.

23. *"[6] In s.27(1)(b), the Oireachtas did not seek to fix a set time period, but rather imported a concept of relative urgency designed to compel the defendant to seek to issue a third party notice with all deliberate speed having regard to all relevant circumstances."*

24. The court refers to its commentary re. principle [1]. For like reason, the court does not consider that the defendant solicitors can be stated to have proceeded "*with all deliberate speed having regard to all relevant circumstances*".

(c) Totality of Circumstances Relevant.

25. *"[7] 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."*

26. This the court has done.

27. *"[8] While a court may take all the circumstances into account, there needs to be evidence as to the reasons for, and excuses for, a delay."*

The court refers to its commentary re. principle [1].

28. *"[9] What might appear a long period when stated in the abstract may, when all the circumstances are taken into account, attract the protection of s.27(1)(b)."*

29. It will be clear, for the various reasons already stated in this Part, that the court does not consider this to be a case in which the protection of s.27(1)(b) arises.

30. *"[10] Because each case must be approached with reference to its own facts, precedents are of limited value and must be looked at for guidance rather than in expectation of finding an answer to the case before the court."*

31. The court refers to its commentary re. principle [2].

(d) Meaning of "reasonably possible".

32. *"[12] The use of the word "possible" in s.27(1)(b), rather than the word 'practicable', may suggest a brief and inflexible time limit. In truth, however, the statute is not concerned with physical possibilities but legal and perhaps commercial judgments."*

33. It is under this proposition that some allowance might be contended to arise for the delays that occurred to the time of discovery on 22nd September, 2014. That, it has been indicated in the evidence, was a matter of legal judgment. But even were the court to allow for the delays up to that date, it would nonetheless conclude as it has concluded re. principle [2].

34. *"[13] 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 this context that the word "possible" must be understood."*

35. The court refers to its commentary re. principle [12].

36. *"[14] The qualification of the word "possible" by the word "reasonably" in s.27(1)(b) gives a further measure of flexibility, indicating that circumstances may exist which justify some delay in the bringing of the proceedings."*

37. It will be clear, for the various reasons already stated in this Part, that the court does not consider this to be a case in which such circumstances present.

(e) Subjective and Objective Test Arising.

38. *"[16] It is incumbent on a trial judge, when faced with a set-aside application to look not only at the explanations 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 served as soon as is reasonably possible."*

39. This the court has done.

(f) Delay When Alleging Professional Negligence.

40. *"[24] An element of caution is required before a third-party notice is served, especially where an allegation of professional negligence is involved."*

41. The court refers to its commentary re. principle [2].

(g) Prejudice.

42. *"[25] Prejudice to a relevant party has to be a relevant factor in deciding whether or not a defendant has proceeded 'as soon as is reasonably possible'."*

43. This is something of a redundant point because the court does not consider that the defendants have proceeded "*as soon as is reasonably possible*". There would be no little prejudice to Mr Tansey in terms of cost, time and stress if he were required to defend these proceedings at this time.

44. *"[26] The judicial discretion conferred by s.27(1)(b) must be exercised in accordance with fundamental constitutional principles. This not only means that the discretion must be exercised in a fashion which respects basic fairness of procedures but the court must be conscious of its obligation to uphold and apply the constitutional norms envisaged by Article 34.1 of the Constitution (as to the administration of justice), and Article 40.3.1º (regarding the protection of personal rights)."*

45. The court has sought so to do.

(iv) Some Conclusions.

46. It is clear that it was possible to join Mr Tansey to these proceedings earlier than was done. No credible reason has been offered as to why this was not done. It does not appear to the court that it was reasonable in a case where third-party proceedings were contemplated as early as 24th January, 2013, for the motion for leave to issue on 28th May, 2015. But even if one ignores the various delays to the point when discovery was made on 22nd September, 2014, even after discovery the motion seeking leave to issue the third-party notice inexplicably did not issue for another 8 months and was not heard for over 13 months. The third-party notice was served, it is true, with the leave of the court granted on 2nd November, 2015, but it does not appear that the court on that date was operating on the fullest understanding of the facts at hand, the existence of the letter of 24th January, 2013, not being known or advised to it.

IV. Third Party Claim Unsustainable?

(i) Overview.

47. Mr Tansey has also sought that these proceedings be struck out (a) under O.19, r.28 of the Rules of the Superior Courtsor, alternatively, pursuant to the inherent jurisdiction of the court, as an abuse of process.

(ii) Order 19, rule 28.

48. Order 19, rule 28, provides as follows:

"The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

49. It is clear from the judgment of O'Higgins C.J. in *McCabe v. Harding* [1984] I.L.R.M. 105 that the focus of an application under O.19, r.28 must be the pleadings themselves. And it is clear from the judgment of Denham C.J. in *Aer Rianta cpt v. Ryanair Ltd* [2004] IESC 23 that the court should be slow to exercise its jurisdiction under O.19, r.28, and should approach such applications with caution. In the within application, the defendants have not succeeded. However, as with so many applications that come before the courts, there were points of fact and law which it fell properly to be raised and argued. It seems to the court that there is consequently no basis on which to suggest that the defendants had no reasonable cause of action or that their pleadings are frivolous or vexatious. As a result, the court must decline to invoke its jurisdiction under O.19, r.28.

(iii) Abuse of Process?

50. As to abuse of process, following a consideration of applicable case-law the court sought in its judgment in *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 716, paras. 64-80, to identify the applicable principles arising. The court turns below to each of the principles that it identified in its judgment which appear relevant in the context of the within proceedings (so excepting principles [1], [7]-[9] and [12]-[16]) and applies them in the context of the proceedings at hand:

(a) What is 'Abuse of Process'?

51. *"[2]The term 'abuse of process' connotes that the process is employed for a purpose other than the attainment of the claim in the action. If proceedings are merely a 'stalking horse' to coerce the defendant in some way entirely outside the ambit of the legal claim brought, they involve an 'abuse of process'."*

52. There is no such abuse on the facts presenting.

(b) How to identify 'Abuse of Process'.

53. *"[3]Where 'abuse of process' is alleged, the question for determination is whether the party who has brought the impugned proceedings is using the legal process in a proper fashion or is abusing the process by seeking to use it to achieve an improper objective."*

54. The defendants are using the legal process in a proper, if mistaken, fashion.

55. *"[4]If there is a reasonable relationship between (a) a plaintiff's intended result, and (b) the scope of the remedy available in the proceedings brought, there is no 'abuse of process'."*

56. When it comes to the defendants here, there is such a relationship and so there is no such abuse.

57. *"[5]If there are mixed (proper and collateral) objectives, discerning whether there is abuse involves answering the question 'If it were not for the collateral purpose (so if there was only the legitimate purpose), would the plaintiff have commenced the proceedings?' If 'yes', no abuse seems to present. If 'no', abuse seems to present, assuming the collateral purpose is proven."*

58. There are no mixed objectives on the facts presenting.

59. *"[6] The test at [5] casts on 'the other party' an onus of proving what the plaintiff would not have done, if the other party proves the plaintiff formed the intention of obtaining a collateral advantage."*

60. Noted.

(c) Need for Caution before 'Striking Out'.

61. *"[10] The High Court has an inherent jurisdiction to strike out proceedings as an 'abuse of process'; this jurisdiction must be exercised with caution."*

62. The court does not consider that there is a basis for a 'strike-out' on the facts presenting.

(d) Relevant Factors in an 'Abuse of Process' Application.

63. *"[11] The court, before striking out for 'abuse of process', must: (A) be satisfied by way of evidence that the plaintiff, in commencing these proceedings, (i) has an ulterior motive, (ii) seeks a collateral advantage beyond what the law offers, and (iii) has instituted the proceedings for a purpose which the law does not recognise as a legitimate use of the remedy sought; and (B) ought always to recall the cautionary note of Keane J. in* McCauley *[McCauley v. McDermot [1997] 2 I.L.R.M. 486])."*

64. The court is not so satisfied in respect of the defendants here.

(iv) Conclusion.

65. There is no basis for striking out the within proceedings, whether pursuant to O.19, r.28 or the inherent jurisdiction of the court.

V. No Legitimate Purpose?

66. It is contended, by reference to s.35(1) of the Civil Liability Act 1961, that no legitimate purpose is served by Mr Tansey's continued involvement in the within proceedings, and that his continued involvement, at the behest of the defendants, would be wholly wasteful of costs and resources, increasing the cost and complexity of the proceedings in an unnecessary manner. Section 35(1) of the Civil Liability Act 1961 provides, *inter alia*, as follows:

> *"For the purposes of determining contributory negligence…*
>
> *(h)(i) where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer…".*

67. The effect of s.35(1)(h)(i) is that if the defendants contention that, *inter alia*, Mr Tansey is a concurrent wrongdoer is correct, Mr Glackin would be deemed to be responsible for any want of care on Mr Tansey's part. This is because Mr Glackin's claim against Mr Tansey has become statute-barred. So any (if any) damages otherwise recoverable by him would be reduced to reflect that failure. This has the result that the defendants cannot be prejudiced by the strike-out of the third party proceedings. They may wish to seek to amend their defence to plead contributory negligence against Mr Glackin. And they are free to pursue other possible lines of defence. But no legitimate purpose is served by Mr Tansey's continued involvement in the within proceedings.

VI. Conclusion.

68. For the reasons stated above, the court concludes that: (i) the third-party notice against Mr Tansey ought to be set aside pursuant to O.16, r.8(3) of the Rules of the Superior Courts 1986, as amended; and (ii) that there is no legitimate purpose to allowing the third party proceedings against Mr Tansey to continue in being. The court does not consider any abuse of process to arise in these proceedings to date.