

THE HIGH COURT

[2008 No. 7770P]

BETWEEN

ORLA KENNEDY

PLAINTIFF

AND

JOHN O'SULLIVAN AND DOROTHY WHELAN PRACTISING UNDER THE STYLE AND TITLE OF JOHNS. O'SULLIVAN SOLICITORS

DEFENDANTS

AND

ALASTAIR JACKSON, KEYGO PROPERTIES LIMITED AND CONOR O'TOOLE, GRAINNE V. WHITE, FEARGAL WHITE AND JOYCE M. COAKLEY PRACTISING UNDER THE STYLE AND TITLE OF COUGHLAN WHITE & PARTNERS SOLICITORS (A FIRM)

THIRD PARTIES

JUDGMENT of Kearns P. delivered on 13th day of July, 2012.

These proceedings arise from a claim by the plaintiff for breach of contract and professional negligence against the defendants as solicitors arising out of a conveyance of certain property in Carlow. By motion issued on the 2nd March, 2012, the third, fourth, fifth and sixth-named third parties (hereafter together referred to as 'the applicants') seek (a) an order striking out the defendants' third party claim against them on the grounds that the third party proceedings are statute barred, and/or (b) an order dismissing and/or setting aside the third party notice by reason of inordinate and inexcusable delay by the defendants in issuing the proceedings, or in the alternative (c) an order setting the matter down for hearing of a preliminary issue as to whether the defendants' claim herein is statute barred and/or whether the third party notice should be struck out for delay in issuing same.

BACKGROUND FACTS

The first and second-named third parties are the vendor and developer, respectively, of a residential development known as Dolmen Mews in Carlow. The plaintiff purchased a unit in this development by contract of sale dated the 23rd October, 2003 from the first named third party for a purchase price of €20,000. A building agreement of the same date was agreed between the plaintiff and the second-named third party for a contract price of €135,000. The defendants acted as solicitors for the plaintiff in relation to the purchase and the applicants acted as solicitors for the first and second-named third parties.

The essence of the plaintiff's claim is that she intended to use the property as her permanent residence, that the defendants were aware of this fact, and that the defendants failed to inform her that the planning permission granted in relation to the property only permitted the use of the property as a holiday apartment and led her to believe that the property was not subject to any restrictions in relation to the use thereof as a permanent dwelling house.

The plaintiff issued proceedings by way of plenary summons on the 22nd September, 2008. The defendants delivered a defence on the 25th March, 2010. In this defence, the defendants deny the plaintiff's claim and, in the alternative, claim that they relied upon a number of representations made by the applicants in relation to the property. The defendants allege in their defence that, if the plaintiff suffered the alleged loss and damage, which they deny, that the same was caused or contributed to by the applicants. The defendants issued a motion which was heard on the 26th April, 2010 by this Honourable Court, wherein they obtained an order for liberty to issue and serve a third party notice on the applicants. The order was served on the applicants on the 13th May, 2010.

The defendants delivered a third party statement of claim on the 23rd November, 2011, in which they claim *inter alia* that the applicants are responsible for any loss or damage caused to the plaintiff, which the defendants deny. The defendants claim in the said statement of claim that, prior to the execution by the plaintiff of the contract for sale and the building agreement, the first and/or second-named third parties, and/or the applicants represented to the defendants on behalf of the plaintiff, that the property was suitable and authorised for ordinary residential use. In this regard, the defendants refer to conditions in the contract of sale, the building agreement, a draft land registry transfer, a draft indenture of lease and replies to objections and requisitions on title.

An appearance has been entered to the third party proceedings and the applicants delivered a full defence to the said proceedings on the 8th March, 2012. In the said defence, the applicants put forward a preliminary objection to the within proceedings on the ground that the defendants' claim against them is statute barred. It is pleaded, further or in the alternative, that the defendants have been guilty of *laches* and/or inexcusable and unjustified delay in issuing the third party proceedings and that the defendants are not entitled to maintain the said claim and are not entitled to the relief sought.

The action between the plaintiff and the defendants was settled on the 24th January, 2012.

There is one other factual matter that should be referred to at this point. The Dolmen Mews development is the subject-matter of a number of proceedings in which similar complaints are made in relation to planning permission. Ms. Tara Cosgrove, solicitor for the defendants herein, averred in her affidavit sworn on the 24th April, 2012 that there are 10 other cases, besides the instant proceedings. The defendants herein are also defendants in two of those cases, where they acted as solicitors for purchasers and the applicants are defendants in all of them, where they acted as solicitors for the vendor and developer.

Ms. Cosgrove further avers in her affidavit that it was hoped by the defendants in the above-mentioned cases that the underlying complaints might be successfully resolved by obtaining a grant of retention permission confirming that the units in question may be used for normal residential purposes. She states that there have been ongoing attempts to regularise the planning status of the development and that the applicants have at all times been aware of and intimately involved in these attempts. Ms. Cosgrove avers, and it is accepted by the applicants, that there was an informal "cease fire" between the plaintiff in the other proceedings and the defendants in those cases, pending determination of an application for retention permission, which was ultimately refused in October

2011. Prior to the refusal of the retention permission, the plaintiff herein had applied for a hearing date, on the 5th October, 2011 and this application was adjourned pending the outcome of the planning application. On the 28th October, 2011 the matter again came before this Court and a trial date was fixed for 24th January, 2012. The defendants argue that it was in response to these developments that they reactivated the third party proceedings, which had been allowed to lie dormant in conjunction with the informal "cease fire".

SUBMISSIONS OF THE APPLICANTS

The applicants claim that the date of knowledge of the defendants is the date of conclusion of the contract for sale of the property, i.e. the 23rd October, 2003. The applicants argue in the alternative that the date of knowledge is no later than the 25th November, 2003. They state that on the 21st November, 2003, they wrote to the defendants enclosing certain documents, including a copy planning permission, Ref: PL98/661, which is the decision by An Bord Pleanála to development at the site, which referred to planning for 78 hotel suites. The defendants acknowledged receipt of the documents in question by letter to the applicants dated the 25th November, 2003.

The applicants argue that the defendants are statute barred from bringing an application to join a third party and are outside of the six-year time limit specified by s. 11(2) of the Statute of Limitations Act 1957, as amended by s. 3(2) of the Statute of Limitations (Amendment) Act 1991 (hereafter referred to as 'the 1957 Act, as amended'). In this regard, the applicants submit that the defendants had six years from the 25th November, 2003, at the latest, to issue third party proceedings, but that they only issued a motion on the 24th March, 2010, at the earliest.

The applicants further submit that the defendants did not comply with O. 16 r. 1(3) Rules of the Superior Courts which provide that an application for leave to issue a third party notice shall, unless otherwise ordered by the Court, be made within 28 days from the date limited for delivering the defence.

The applicants also submit that the defendants failed to serve a third party notice upon them 'as soon as is reasonably possible' within the meaning of s. 27(1) of the Civil Liability Act 1961. The applicants state that the defendants were well aware in advance of the plaintiff's proceedings being issued that there was an issue in relation to the property in question.

The applicants further argue that the defendants would have been aware of what defence they would make and whether there were potential parties to the proceedings when the proceedings were issued in September 2008. The applicants allege that no reasonable excuse has been put forward by the defendants in relation to the delay in issuing third party proceedings, and in failing to serve the third party notice 'as soon as is reasonably possible'.

SUBMISSIONS OF THE DEFENDANTS

The defendants state that the affidavit of Ms. Gráinne White, on which the present motion is grounded, places considerable emphasis on the date of completion of the purchase of the property in question, namely the 23rd October, 2003. The defendants submit that, as the third party claim is for contribution or indemnity, the relevant limitation period is provided by s. 31 of the Civil Liability Act 1961, which provides *inter alia* that an action for contribution can be brought within two years after the liability of the claimant is ascertained. The defendants state that the earliest date upon which their claim against the applicants would become statute barred is two years from the date on which the liability of the defendants to the plaintiff was established. The action between the plaintiff and the defendants was settled on the 24th January, 2012, and the defendants argue that the limitation period should accordingly run from that date.

The defendants deny that the third party proceedings have been issued otherwise than as soon as was reasonably possible. They state that the application for leave to issue the third party proceedings was made only nine days after delivery of the defendants' defence and before there had been any reply to their notice for particulars of the statement of claim. The defendants argue that there was no undue delay in issuing the proceedings and that the third party notice was issued promptly after the motion for leave came on for hearing and the order sought was granted.

The defendants argue in the alternative that, even if the Court were to take the view that the third party notice had not been issued and served as soon as reasonably possible, that a third party seeking the setting aside of a third party notice must himself act promptly. The applicants delivered a third party defence on the 8th March, 2012 and the defendants state that no exceptional circumstances have been put before the court by the applicants to justify the extension of the time for bringing a motion such as the present one beyond the date of delivery of the third party defence. The defendants submit that, even if the Court finds that they failed to act as soon as reasonably possible, the applicants are disentitled by virtue of their own delay in bringing the present motion.

THE STATUTE OF LIMITATIONS

Section 11(2)(a) of the 1957 Act, as amended, provides:-

"Subject to paragraph (c) of this subsection and to section 3 (1) of the Statute of Limitations (Amendment) Act, 1991, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

The applicants rely on the recent decision of the Supreme Court in *Gallagher v. ACC Bank plc*, [2012] IESC 35, in which the plaintiff claimed damages against the defendant for alleged 'mis-selling' to him of an investment bond. The plaintiff purchased the bond in September 2003 and initiated proceedings in June 2010. Charleton J. in the High Court, held that the claim was not statute barred. He stated that a cause of action ordinarily accrues on the plaintiff suffering damage. He went on to state that, since the proceedings were issued more than six years after the plaintiff had entered into the transaction of which he complained, his claim would be statute barred if he suffered damage at that time. He concluded that the action was not statute barred because "[o]n the purchase of the bond... the holders did not suffer an immediate loss but were left facing a contingent loss". On appeal to the Supreme Court, Fennelly J. held that the proceedings were statute barred. He concluded at para. 116:-

"It is to my mind inescapable that the plaintiff's claim as pleaded is that he suffered damage by the very fact of entering the transaction and purchasing the Bond. The cause of action then accrued. That was also the date when he entered into a contractual relationship with the Bank."

It should be noted at this juncture that the third party claim in this case is for contribution, up to full indemnity, in respect of the plaintiff's claim against the defendants. Section 27 (1) of the Civil Liability Act 1961 (hereafter referred to as 'the 1961 Act') provides:-

"(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for

contribution under this Part-

(a) shall not, if the person from whom he proposes to claim contribution is already a party to the action; be entitled to claim contribution except by a claim made in the said action, whether before or after judgment in the action;

(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."

The Supreme Court decision in *Board of Governors of St. Laurence's Hospital v. Staunton*, [1990] 2 I.R. 31, established that a claim for contribution is made pursuant to s. 27(1) of the 1961 Act. In *Staunton v. Toyota (Ireland) Ltd*, (Unreported, High Court, 15th April, 1988), Costello J. stated:-

"The Act of 1961 created a new statutory right which enables one 'concurrent wrongdoer' to claim contribution or indemnity from another 'concurrent wrongdoer' in circumstances laid down in the Act."

It is clear from this decision that a claim for contribution is an independent cause of action pursuant to s. 27(1) of the 1961 Act.

The relevant limitation period for a claim of contribution is not laid down by the 1957 Act, but by s. 31 of the 1961 Act, which provides:-

"An action may be brought for contribution within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater."

In *Buckley v. Lynch*, [1978] I.R. 6, the defendant issued a third-party notice pursuant to s. 27 of the 1961 Act, seeking contribution from a third party. Finlay P. (as he then was) held:-

"I have come to the conclusion that this claim for contribution is an action for contribution within the meaning of s. 31 of the Act of 1961. As I have already indicated, the right to claim contribution and the right to recover contribution are expressly conferred on a concurrent wrongdoer by s. 21 of the Act; it is a right to recover such contribution from any other wrongdoer who is, or would if sued at the time of the wrong have been, liable in respect of the same damage. In my view, the procedural provisions of s. 27 do not create two separate legal entities of which one is an action for contribution while the other is a claim for contribution, either brought within the framework of existing proceedings to which the alleged contributor is a party or brought by virtue of a third-party notice. In my view, the entire right to recover contribution, and any legal procedure created for the enforcement of that right by the Act of 1961, must be deemed to be an action for contribution and, in this context and with particular reference to this case, it seems to me that a claim for contribution made by the third-party procedure provided by s. 27 of the Act is just as much 'an action .. for contribution' as separate proceedings would be.

Therefore, in my view, the real inquiry must be about the time limit created by s. 31 of the Act of 1961 for the bringing of this claim rather than the time limit under the provisions of the Statute of 1957 for an ordinary action for damages ..."

Blayney J. stated in *Neville v. Margan*, [1988] I.R. 734:-

"How s. 31 should be construed was not fully argued before me and so I do not intend to express any definite view in regard to it, but it seems to me that it may not provide for three alternative periods, but only for two, the first being the period the injured person has for bringing an action against the contributor, and the second being whichever of two periods of two years is appropriate on the facts. If the liability of the claimant is ascertained by a judgment or a settlement, the period would be two years from the date of the judgment or settlement; if, on the other hand, the claimant has paid to the injured party 'a sum on account of his damages' as is envisaged by s. 22, or has paid a reasonable consideration for a release or accord, which under the same section is to be treated as a payment of damages, then the period of two years would run from the date of the payment of the damages or the date of the release or accord. Where a claimant's liability has been ascertained by a judgment or settlement, it seems logical that his cause of action against the contributor should be held to accrue then as he is at once in a position to formulate his claim against the contributor. And it seems wholly illogical that the claimant, by failing to pay the damages, should be able to extend the period he has for claiming against the contributor, as the defendant claims to be entitled to do here."

Clarke J. provided a useful explanation of the rationale for the extended limitation period laid down by s. 31 in *Moloney v. Liddy*, [2010] 4 I.R. 653, at p. 665:-

"[37] I should briefly touch on the other points which arose in the course of argument before me. It is true, as was pointed out by counsel for the defendants, that s. 31 of the Act of 1961 does provide an extended limitation period in the case of claims for contribution or indemnity. There is, of course, a logic in that situation. Leaving aside the clear obligation on a party wishing to claim a contribution or an indemnity to do so by means of a third party application and to do so as soon as may be practicable, it nonetheless must be the case that, in some such circumstances, an application properly brought in a timely fashion will be brought outside the original limitation period. A summons can properly be served, without any intervention on the part of a court, for a period of six months after it is issued. It follows that a plenary summons can legitimately be served, without any need for renewal, outside of the original limitation period. No obligation to move promptly could fall on a defendant so served until that defendant had received a statement of claim and had a reasonable opportunity to consider whether the issues raised in the statement of claim were such as might warrant joining the relevant third party. It follows that the orderly processing of a third party claim in accordance with all relevant legal obligations can, in some cases, lead to the service of a third party notice at a period well beyond the expiry of the original limitation period.

[38] In those circumstances, it did not seem to me that it could be an abuse of process, per se, to seek to join as a third party a person against whom the original claim of the plaintiff might be statute barred. Something more would, in my view, be needed. In order to determine whether, in all the circumstances, a particular invocation of an entitlement

which would otherwise arise to join a third party outside the original limitation period, but within the limitation period specified in s. 31, might amount to abuse of process, would involve a detailed inquiry into all of those relevant circumstances ..."

In the case at hand, the relevant limitation period is that set out in s. 31 of the 1961 Act. The limitation period is deemed to have run from the date on which the liability of the defendants to the plaintiff was established, *i.e.* the date of settlement of the action between the plaintiff and the defendants, which was the 24th January, 2012. It follows that the limitation period would not expire until the 24th January, 2014 and the third-party proceedings are not statute barred.

DELAY IN ISSUING THE THIRD PARTY NOTICE

There is an obligation on a claimant to serve a third-party notice "as soon as is reasonably possible" under s. 27 of the 1961 Act.

In *Laurence's Hospital*, Finlay C.J. stated in relation to s. 27(1) of the 1961 Act:-

"I am quite satisfied upon the true construction of that sub-section that the only service of a third-party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third-party notice claiming contribution against a person who is not already a party to the action, is a right to serve a third-party notice as soon as is reasonably possible. 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."

In *Gilmore v. Windle*, [1967] I.R. 323, the Supreme Court held that a delay of 14 months in making an application to join a third party was not unreasonable. O'Keefe J. stated at p. 337:-

"As to the point made by Mr. Finlay that the defendant had not made the application as soon as reasonably possible, the plenary summons was issued on the 30th August, 1962, and the statement of claim was delivered on the 1st October, 1962. The application for leave to issue and serve the third-party notice was not brought until the 26th February, 1964, but the delay was explained by the defendant as occasioned by the fact that other similar applications were pending before the High Court, and the defendant's advisers were awaiting an authoritative decision on the right to bring such proceedings before bringing their application. In the circumstances I think that the delay was not unreasonable, and I would not refuse leave on the ground that the application was not brought earlier."

In the circumstances, I do not believe that the chronology of events reveals any delay that would put the defendants outside of the limits of s. 27 of the 1961 Act. The application for leave to issue third party proceedings was made only nine days after delivery of the defendants' defence and before the plaintiff had replied to their notice for particulars of the statement of claim. The statement of claim was delivered on the 2nd July, 2009 and the defence was delivered on the 15th March, 2010. The time between the delivery of the statement of claim and the defence is by no means unusual, particularly in a professional negligence action. In the context of a claim for contribution, the seeking of leave to issue a third party notice in conjunction with the delivery of a defence, indicates that there was no undue delay on the part of the defendants. The third party notice was issued promptly after the motion for leave came on for hearing and the order sought was granted.

Further, the Court is mindful of the existence of an "informal cease fire" in relation to proceedings concerning the development at Dolmen Mews, which was observed while attempts were made to regularise the planning status of the development. The Court may, in certain circumstances, accept some extent of delay where such is justified. In *McElwaine v. Hughes*, (Unreported, High Court, Barron J., 30th April, 1997), the Court held at p.6:-

"Clearly the words 'as soon as reasonably possible' denotes that there should be as little delay as possible, nevertheless, the use of the word 'reasonable' indicates that circumstances may exist which justify some delay in the bringing of the proceedings."

Any delay in issuing the third party proceedings, which I have held regardless to be within the permissible range provided by s. 27 of the 1961 Act, must be viewed through the prism of this "cease fire". If the efforts to regularise the planning permission had been successful, there may have been no need to issue the third party proceedings at all.

CONCLUSION

The relevant limitation period for claims for contribution is that provided in s. 31 of the 1961 Act, which allows *inter alia* for an action to be brought within two years of the liability of the claimant being ascertained or the injured person's damages being paid, whichever is the greater. The relevant date for the purposes of this application is the 24th January, 2012, when the action between the plaintiff and the defendants was settled. It follows that the third party proceedings were issued within two years of this date and so the relief sought in paragraph (a) of the motion is refused.

Section 27(1)(b) of the 1961 Act provides *inter alia* that third party proceedings must be issued "as soon as is reasonably possible". It is clear that in all the circumstances, including the "informal cease fire" which was being observed while attempts were made to regularise the planning permission, that the defendants are not guilty of any delay that would justify the dismissal or setting aside of the third party proceedings. Accordingly, I would refuse the relief sought at paragraph (b) of the motion.

It is not necessary to defer the issues raised by these paragraphs as a preliminary issue and the relief sought at paragraph (c) is also refused.