

## THE HIGH COURT

2016 No. 2671 P

Between:

GRAINNE McGEOWN

Plaintiff

– AND –

TOPAZ ENERGY GROUP LIMITED

Defendant

– AND –

GUARDWELL LOCK AND SAFE COMPANY LIMITED

Third Party

**JUDGMENT of Mr Justice Max Barrett delivered on 3rd May, 2019.**

1. This is a personal injuries claim arising from an alleged injury suffered in the closing of a petrol station safe by a store manager. That the action is brought by the store manager means that the petrol station employee who would normally advise the defendant's head office as to personal injury proceedings commenced against the defendant was here the person bringing the action, a factor claimed to have presented the defendant with some logistical difficulty.

2. The third party now seeks an order pursuant to O.16, r.8(3) RSC setting aside the third party proceedings. It relies on the fact that the defendant (a) did not serve the third-party notice within the time period specified under O.16, r.1(3) RSC, and (b) failed to serve the third party notice "*as soon as is reasonably possible*" within the meaning of s.27 of the Civil Liability Act 1961. The following chronology pertains:

03.03.2014 In or about this date, the third party carries out work on the safe.

03.04.2014 In or about this date the plaintiff alleges that she hurt herself.

24.03.2016 Proceedings issue.

01.04.2016 Proceedings served.

11.04.2016 Appearance entered by defendant.

31.05.2016 Plaintiff swears affidavit of verification of PI summons.

13.09.2016 Combined request for further information and particulars.

23.02.2017 Plaintiff replies to particulars.

27.04.2017 Plaintiff issues motion seeking judgment in default of defence.

24.05.2017 Defence delivered.

Sept 2017 Plaintiff's solicitor receives documents following electronic and  
paper search by defendant.

20.10.2017 Defendant issues motion to join third party.

12.02.2018 High Court grants liberty to issue and serve third party notice.

06.03.2018 Third party notice served.

20.06.2018 Third party issues motion to set aside third party notice.

3. Order 16, rule 1(3) RSC provides that application for leave to issue a 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.*" The third party accepts that it would only be in rare circumstances that a failure to comply with the time limit in O.16, r.8(3) would of itself result in a third party notice being set aside. However, the third party contends that the said time limit is the relevant starting-point in this regard. This is accepted by the court. Thus the key issue presenting in this application is whether the third party notice was served "*as soon as is reasonably possible*". The difficulty that presents for the defendant is that, even taking its case at its height, the third party notice here was not so served.

4. The defendant observes that replies for particulars were not delivered until 23.02.2017 and submits that the appropriate date for the delivery of a defence was 8 weeks later (on 20.04.2017) and that the 28-day period referred to in O.16, r.1(3) ought to be calculated from that date. In fact the defence was delivered on 24.05.2017 and the motion to join a third party issued on 20.10.2017. Taking the defendant's case at its height, an issue clearly presents as to the five-month delay between 18.05.2017 and 20.10.2017. And here the defendant's case flounders. It turns out that: (1) the solicitors for the defendant knew on 24.05.2017 that there had been servicing done on the safe and that it was done by the third party; (2) the solicitors for the defendant sought the relevant records from the defendant's head office; (3) those records, which were at all times in the possession of the defendant, were not provided until September 2017 (somewhere in the region of four months later), with (4) the motion to join the third party issuing on 20.10.2017. No matter how liberal an approach one takes to interpreting the phrase "*as soon as is reasonably possible*" it cannot be read to embrace a defendant holding documents until asked for them by its lawyers and then taking somewhere in the region of four months to provide them to its lawyers, with the motion to join a third party issuing a month later (service of the notice taking place

thereafter).

5. The court has been referred, inter alia, to the binding judgment of Ryan P. in *Kenny v. Howard and anor* [2016] IECA 243 (another “as soon as is reasonably possible” case). Some observations might be made by reference to the judgment of Ryan P. in *Kenny*. Thus he observes, inter alia, that:

**(1) “the purpose of s.27(1)(b)...is to ensure as far as possible that all legal issues arising out of an incident are disposed of within the same set of proceedings” (para.17).** Noted.

**(2) any quest for certainty or verification by a defendant falls to be balanced against the statutory obligation under s.27(1)(b) to “serve a third-party notice...as soon as is reasonably possible” (para.19).** Here, as stated, the court does not see that the quoted phrase embraces a defendant holding onto documents until asked for them by its lawyers and then taking somewhere in the region of four months to provide them to its lawyers, with the motion to join a third party issuing a month later (service of the notice taking place thereafter).

**(3) in considering whether a third party notice is served “as soon as is reasonably possible”...the court will consider the whole circumstances of the case and its general progress (para.20).** The court has gone even further than it needs to in this regard by taking the defendant’s case at its height (something it is not required to do), and still the defendant fails to meet the test of “as soon as is reasonably possible”.

**(4) compliance with s.27 “is not achieved by the party or his solicitor deposing to how the delay arose” (para.26).** It seems to the court, with all respect, that the solicitors for the defendant, doubtless with the best interests of their client at heart (the court makes no criticism), have done precisely as Ryan P. cautioned against, pointing to the delay on the part of their client in providing the documentation sought in May 2017 but doing nothing to explain that delay.

6. Finally, although the court has taken the defendant’s case at its height and shown that even, at its best, the defendant did not act “as soon as is reasonably possible”, the court cannot but note that (1) as the proceedings were served on the defendant on 21.03.2016, the time limit applicable under O.16, r.1(3) RSC expired on 28.07.2016 (applying the O.1A, r.8 time period), (2) by 20.10.2017, the date of issue of the application seeking to join the third party, the better part of a further 15 months had elapsed since 28.07.2016, and (3) the service of the third party notice (which is what s.27(1)(b) is concerned with when it imposes the “as soon as is reasonably possible” requirement) did not take place until 06.03.2018. So in truth, when one has regard to the actual state of affairs presenting, and not taking the defendant’s case at its height, matters look very much bleaker for the defendant in terms of compliance with s.27(1)(b) of the Act of 1961; in fact (as with the defendant’s case taken at its best) there is non-compliance.

7. For the reasons stated, the court will grant an order pursuant to O.16, r.8(3) RSC setting aside the third party proceedings.