Neutral Citation Number: [2012] IEHC 219

THE HIGH COURT

[2008 No. 3373P]

BETWEEN/

GUNTHER FREISBERG

PLAINTIFF

AND

FARNHAM RESORT LIMITED AND BUNZL OUTSOURCING SERVICES (IRELAND) LIMITED

DEFENDANTS

AND

ANGELO PO GRANDI CUCCINE SPA

THIRD PARTY

JUDGMENT of Mr. Justice Hogan delivered on 24th May, 2012

1. This is an application brought by the third party ("Angelo Po") pursuant to Ord. 16 RSC to set aside a third party notice issued pursuant to the leave granted by this Court (Quirke J.) on 13th February, 2012. The third party notice arises out of an incident which is said to have occurred on 10th October 2006. The plaintiff ("Mr. Freisberg") in these personal injuries proceedings is a chef who works at the Farnham Radisson Hotel in Co. Cavan. Angela Po are an Italian company who supplied a soup kettle to the second named defendant ("Bunzl") in April, 2006. Bunzl in turn supplied the equipment to the first named defendant ("Farnham"). Farnham are the operators of the hotel and employers of the plaintiff.

2. On 10th October, 2006, Mr. Freisberg contends that he was working in the hotel when there was a sudden and unexpected electrical flash on the panel of the soup kettle which led him to believe that he was being thrown by a small electric flash. Angelo Po were then contacted by Bunzl in relation to this incident. Angelo Po immediately dispatched a technician to inspect the kettle and he apparently concluded that the kettle was undamaged save for a light fixture which had exploded. In December 2006 Angelo Po sent replacement lamps for this appliance to Bunzl. There the matter rested so far as Angelo Po was concerned and nothing further so far as they were concerned was to happen until some four years later.

3. But before explaining how this development came about, it is necessary first to retrace the narrative so far as the plaintiff is concerned. He claimed that he suffered personal injuries as a result of the incident and, pursuant to an authorisation granted by the Personal Injuries Assessment Board, he commenced proceedings against Farnham and Bunzl only on 28th April, 2008. These proceedings were then served on Bunzl's solicitors in early May 2008.

4. One measure of the rather unhurried approach taken by Bunzl to these proceedings was that it took it almost six months to enter an appearance and then only after a motion for judgment in default of defence. Following an exchange of particulars, a further motion had to be issued by the plaintiff to compel the delivery of a defence. This motion issued on 25th May, 2009, but a defence was not filed until some nine months later on 16th March, 2010. In other words it took almost two years for a routine defence to be filed.

5. Bunzl were ordered by the Master of the High Court on 18th June, 2010, to make discovery in relation to "the testing, inspection and repair of the soup kettle" within six weeks of that date, but the affidavit of discovery was sworn only on 9th May, 2011.

6. In the meantime Bunzl had written to Angelo Po on 14th March, 2011, claiming an indemnity and contribution. One can fairly describe this letter as being in the nature of a bolt from the blue so far as the third party was concerned. Nothing had happened in the interval since the delivery of replacement lamps which suggested that any of the other parties involved in this incident might seek to fix Anglo Po with liability of any kind. One might have expected that, having a written a letter of this kind, Bunzl would immediately make good their threat to issue third party proceedings seeking to join Angelo Po to the litigation "within 14 days from the date of this letter". Yet again nothing further happened until 7th December, 2011 -some nine months later- when a motion seeking leave to join a third party was issued out of the Central Office. That motion was made returnable for 13th February, 2012, some four days before the main action was originally scheduled for hearing.

7. I accept that Bunzl's solicitors obtained the first available return date for this motion. Even then, it may be suggested, Bunzl could (and should) have applied to a judge of this Court for liberty to abridge time in view of the immediate urgency of the matter, not least the necessity to issue and serve the proceedings on an Italian company based in Modena. It appears that no judge was available to hear the full action on 17th February, 2012. While the action was re-listed for hearing on 20th April 2012, it presently stands adjourned for hearing until some time next month at the earliest. This timetable may be affected by the outcome of this motion.

8. In the meantime Anglo Po moved with commendable speed to have the third party notice set aside. Although the third party notice was served on them on 6th March, 2012, a letter requested the setting aside of the notice issued on 20th March. In fairness, Bunzl's solicitors responded immediately rejecting this. The present motion seeking to have the third party notice set aside then issued on 26th March, 2012.

9. Briefly summarised, counsel for Anglo Po, Mr. White, contends that it would be unconscionable to allow the third party notice to stand, as this would otherwise infringe his client's constitutional rights to trial within a reasonable period. He maintains that the ensuing delay has prejudiced his client's interests and circumvents its rights to plead the two year limitation prescribed by the Statute of Limitations. On the other hand, Mr. Ó Scanaill S.C. counsel for Bunzl, contends that his client was entitled to proceed with caution before electing to sue the third party, not least giving the difficulties in identifying the cause of the (apparent) explosion and the associated difficulties in establishing causation.

Section 27(1)(b) of the Civil Liability Act 1961
10. The third party jurisdiction is governed by s. 27(1)(b) of the Civil Liability Act 1961 ("the Act of 1961") which provides:-

> "A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part-(2)(b) shall, if the said person is not already a party to the action, serve a third party notice upon such person as soon 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 the contribution is claimed."

11. The objects of this sub-section are so well established and so well known they do not require any detailed consideration. Its main purpose is to avoid a multiplicity of actions arising out of the same dispute, so that, as I put it in *EBS Building Society v. Leahy* [2010] IEHC 456, "where possible all issues involving plaintiffs, defendants and third parties are heard together or in a sequenced trial".

12. In this context, it must be recalled that the concept of what is "as soon as reasonably possible" within the meaning of the sub-section is a relative one and depends on the circumstances of the case: see, *e.g., Connolly v. Casey* [2000] 1 I.R. 345, *Mulloy v. Dublin Corporation* [2001] 41.R. 52, *Robins v. Coleman* [2009] IEHC 486, [2010] 21.R. 180 and Leahy.

13. Of course, the judicial discretion conferred by this sub-section must be exercised in accordance with fundamental constitutional principles: see, *e.g., East Donegal Co-Operatives Ltd. v. Attorney General* [1970] I.R. 317, 341 per Walsh J. This not only means that the discretion must be exercised in a fashion which respects basic fairness of procedures (*cf* here the comments of Henchy J. in *Ó Domhnaill v. Merrick* [1984] I.R. 151,159), but the court must be conscious of its obligation to uphold and apply the constitutional norms envisaged by Article 34.1 (administration of justice) and Article 40.3.1 (protection of personal rights): see, *e.g., Doyle v. Gibney* [2011] IEHC 10. As I noted in *Doyle*:-

> "Quite apart from any considerations of the personal rights contained in Article 40, the speedy and efficient dispatch of civil litigation is of necessity an inherent feature of the court's jurisdiction under Article 34.1. As I ventured to suggest in my own judgment in *O'Connor v. Neurendale Ltd*. [2010] IEHC 387, this constitutional imperative means that the courts have a jurisdiction (and, in an appropriate cases, a duty) to exercise their powers in a way which will best ensure that a litigant's right to a hearing within a reasonable time is best vouchsafed. In any event, and for good measure, the same right is guaranteed by Article 6 ECHR: see *Gilroy v. Flynn* [2005] 1 ILRM 290 and *McFarlane v. Ireland* [2010] ECHR 1272."

14. By assigning the administration of justice to the judicial branch, Article 34.1 presupposes that justice will be administered in an efficient and procedurally fair manner which respects the rights of litigants. One of those rights (which is a dimension of the right to fair procedures and is, in any event, reflected in Article 6(1) ECHR) is the right to a hearing within a reasonable time.

15. What amounts to a reasonable time will, of course, be measured by the specific context. Particular allowances may have to be made, for example, for those disadvantaged members of the community who by reason of indigency, lack of education and other similar factors may not have been in a position in the past to assert or protect their rights (see, *e.g., Guerin v. Guerin* [1992] 2 I.R. 287,293 per Costello J. and *Hayes v. McDonnell* [2011] IEHC 530 per Hanna J.). But the present case is about as far away from this as it is possible to imagine. The dispute - insofar as it concerns the third party proceedings - involves two commercial undertakings, each of whom have access to legal advisers of the highest quality and ability. While this may not be commercial litigation in the strict sense of the term, one may nonetheless adapt to this context the comments of Fennelly J. in *Dekra Eireann Teo. v. Minister for Environment* [2003] IESC 25, [2003] 2 I.R. 270 at 304 to the effect that in litigation of this nature involving disputes between well resourced corporate undertakings, "there should be very little excuse for delay."

16. Next, the subject matter of the proceedings should be considered. While the factual context of this claim for personal injuries is admittedly unusual and the issue of causation is not straightforward, it is at the same time difficult to understand why, well over five years later, a claim of this kind still remains to be determined. It was certainly reasonable for Bunzl to investigate the cause of the explosion of the soup kettle before joining the manufacturer to the proceedings. In that context, the words of s. 27(1)(b) which require the concurrent wrongdoer to serve the third party "as soon as is reasonably possible" are not concerned, as Murphy J. put it in *Mulloy* ([2001] 4 I.R. 52 at 56) with "physical possibilities, but legal and perhaps commercial judgments".

17. Therefore, as I suggested in *Leahy*, the question in cases of this kind thus becomes:-

> "whether, having regard to all the circumstances, it was reasonable for a defendant to wait for the period in question before applying to join a third party, although any such permissible delay will generally be measured in weeks and months and not years."

18. In the replying affidavits filed on behalf of Bunzl, great stress is laid on the fact that the expert reports prepared prior to December, 2011 had not definitively expressed a view on causation. In this regard, Bunzl's consulting engineer, Mr. James Molloy, had carried out an inspection on 16th December, 2011, and supplied a report on 28th December, 2011. In that report, Mr. Molloy concluded that the "indicator light failed at the time when the plaintiff was cleaning the pot surface" and he went to suggest that the incident might well have been caused by moisture in the area where the cables entered the bulb, thus facilitating a short circuit "by tracking across insulating material to live terminals". In the affidavits filed Bunzl accordingly suggested that it was not:-

> "until the relatively recent exchange of expert reports pursuant to S.I. 391 of 1998 that the issues and, in particular, the issues in terms of causation crystallised to a sufficient extent so as to enable this defendant's legal representatives to advise as to the suitability or otherwise of commencing third party proceedings..."

19. That may possibly be so, but the underlying issue of causation has been present from the start. After all, Bunzl were fully aware that the Angelo Po had agreed to supply replacement lamps as far back as December 2006. The question of causation may well have been problematic, but the parties surely must have known that this was likely to be a major issue. After all, the particulars pleaded as against Bunzl which were contained in the plaintiffs general indorsement of claim contended that it qua producer had supplied "a soup kettle which was dangerous and defective." This pleading immediately brought the question of causation as between supplier and manufacturer directly into focus.

20. Viewed objectively, it is very hard to see how Bunzl was entitled to wait a further three and a half years from that date before bringing a third party motion of this kind. After all, it has never been explained why Bunzl waited for so long to commission a report from a consulting engineer or, for that matter, why it delayed so long in complying with relatively basic obligations with regard to the filing of an appearance and defence. Besides, the delay was immensely prejudicial to Angelo Po. Not only was the Italian company effectively deprived of its right to plead the Statute of Limitations as against the plaintiff by being joined as a third party in this

fashion, it was unreal and unreasonable to expect that they should be joined within days of the scheduled start of the plaintiffs main action, even if that case did not proceed on that date for other reasons.

21. This is underscored by the Supreme Court's conclusions in *Mulloy*. In that case the third party notice was issued some thirteen months after the defence had been filed. The Supreme Court held that it was possible for the defendant "on the information available to it to make a prudent and responsible decision several months before the application was brought": see [2001] 4 I.R. 52 at 59, per Murphy J. This is true *a fortiori* in the present case. Taking the most benevolent view possible of the delays to date, the issue of third party joinder squarely arose following the delivery of the plaintiffs pleadings in May, 2008. This was then the time at which the report of the consulting engineer ought to have been commissioned. Very different considerations would have obtained had, for example, the application to join Angelo Po been made within the 2008 calendar year.

22. In these circumstances, I am coerced to the conclusion that the third party notice must be set aside for want of non-compliance with the requirements of s. 27(1)(b) of the 1961 Act. This is not simply a case where the non-compliance amounted to some harmless and technical breach of the statutory requirement. The non-compliance infringed the third party's constitutional rights to basic fairness of procedures and its right to have proceedings determined within a reasonable time period. Measured against a two year limitation period contained in the Statute of Limitations (even if that period is itself perforce extended by reason of the operation of the Personal Injuries Assessment Board Act 2003), a delay of over five years in making a formal application to have a third party manufacturer joined to a (relatively) routine personal injuries action involving a defective product represents a manifest infringement of these rights.

23. It must also be acknowledged that a delay of this kind tends to subvert the legislative policy which underlies the Statute of Limitations, namely, that a defendant is entitled to organise his or her affairs on the basis that the limitation period has long expired. For good measure, one might also add that the delay was manifestly prejudicial, in that the effect of the third party notice was to catapult Angelo Po into the middle of a personal injuries trial which was due to start within a matters of days.

Conclusions

24. For all of these reasons mentioned above, I would accordingly set aside the third party notice on the ground that the delay in question amounted to a non-compliance with the requirements of s. 27(1)(b) of the Act of 1961 and a clear infringement of the third party's constitutional rights to fair procedures and to a hearing within a reasonable time.