Neutral Citation: [2015] IEHC 150

THE HIGH COURT

[2012 No. 9273P]

BETWEEN

MICHAEL HENNESSY

PLAINTIFF

AND
MICHAEL GRIFFIN AND SEAN McELDUFF

DEFENDANTS

AND
WOJCIECH SASIADEK

THIRD PARTY

JUDGMENT of Kearns P. delivered on the 13th day of March, 2015

This is an application brought pursuant to Order 16(8)(3) of the Rules of the Superior Courts to set aside third party proceedings brought by each of the defendants pursuant to orders of the court dated the 18th March, 2014.

The plaintiff's claim arose out of medical negligence proceedings brought against the defendants, both general practitioners, which were compromised as between the plaintiff and the defendants on the 19th March, 2014, the day following the joinder of the third party who is an oncologist. The third party contends that the proceedings against him should be set aside because there has been a manifest failure to proceed with any due diligence in relation to the issuance of the third party notice against him. It was contended on his behalf that a defendant seeking to join a third party to proceedings is obliged to do so by application to court to be made as soon as reasonably possible under s.27(1)(b) of the Civil Liability Act 1961. Order 16, rule 1(3) of the Rules of the Superior Courts further requires that the application for leave to issue such a notice be made within 28 days from the date limited for the delivery of a defence.

BACKGROUND

The plaintiff is a retired farmer from Co. Waterford who was born on the 12th December, 1928.

He commenced proceedings against the defendants by plenary summons dated the 14th September, 2012. The indorsement of claim records that the plaintiff attended the defendants for a number of years with a medical complaint of a lesion on his left wrist, which the defendants and each of them purported to diagnose and to treat regularly as a recurrent sore. This treatment continued until the defendants referred the plaintiff to a specialist dermatologist in December 2009. He saw the plaintiff in 2010 and diagnosed the complaint to be a squamous cell carcinoma of the left wrist. This specialist immediately referred the plaintiff to one oncologist and then to the third party who confirmed the diagnosis and found that the cancer was so advanced as to not be amenable to any conservative treatment or to localised surgical excision, but was then so advanced that the plaintiff required amputation of the left forearm as the only means of curing the cancer at that time. In those circumstances, the plaintiff underwent amputation of the left forearm which was undertaken in November 2010.

The relevant timeline for the issues under consideration in this application may be set out as follows:-

Pre December 2009	The plaintiff attended the defendants for a number of years with a medical complaint of a lesion on his left wrist
December 2009	The plaintiff was referred by the defendants for specialist assessment
April 2010	Plaintiff was assessed by Dr. Colin Buckley, Consultant Dermatologist, who diagnosed a squamous cell carcinoma
June 2010	The plaintiff was referred to Mr. Dale Hacking, Consultant Radiological Oncologist, at the Whitfield Clinic for Radiotherapy
8 June 2010	The plaintiff was seen by the third party, who is a Consultant Radiological Oncologist, at the Whitfield Clinic
25 June-13 August 2010	The plaintiff underwent a course of radiotherapy
14 September 2012	A personal injury summons issued naming the two general practitioners as the defendants
19 November 2013	First defendant delivered his defence
31 January 2014	Second named defendant delivered his defence (16 months after the issue of the summons)
12 March 2014	First defendant's motion to join third party issued (4 days before trial date). The second named defendant's motion to join the third party issued at around the same time
18 March 2014	Liberty to issue and serve the third party notice on the third party granted to both defendants
19 March 2014	Case listed for hearing and compromised as between the plaintiff and the defendants on terms unknown to the third party
2 April 2014	Second named defendant served third party notice on third party
14 April 2014	First defendant served third party notice on third party
30 April 2014	Appearance entered on behalf of third party

It should be noted that in making the order joining the third party, Irvine J. did so expressly without prejudice to the right of the third party to seek to set aside the order and this direction was expressly recorded on the face of the order. By letter dated the 30th April, 2014 the third party's solicitor advised the solicitors for the first defendant that the third party intended to bring such a motion.

The same was duly brought by notice of motion dated the 12th June, 2014.

The third party now submits that there are three net issues for consideration in this application, namely:-

> (a) Were the third party notices served "as soon as is reasonably possible"?
>
> (b) Is the prejudice to the third party on the particular facts of this case such that the third party notices should be set aside in any event?
>
> (c) Should the third party notices be set aside for failure to obtain appropriate expert evidence prior to the issue of same?

Having regard to the fact that the applications of both defendants to join the third party were made more or less contemporaneously, and further having regard to the fact that the factual template common to both applications is virtually identical, the Court proposes to deal with the present application as one application only.

RELEVANT LEGAL PRINCIPLES
It is settled law that the purpose of third party procedures is to avoid a multiplicity of actions arising out of the same set of facts. In that regard Delaney & McGrath Civil Procedure in the Superior Courts (Third ed.) at para. 9.09 states:-

> "In *Gilmore v. Windle* [1967] I.R. 323 O'Keeffe J. stated that s.27 is clearly intended to ensure that, as far as possible, all questions relating to the liability of concurrent wrongdoers, or persons who may be concurrent wrongdoers, should be tried in a single proceeding. Thus, its purpose is to prevent a multiplicity of actions because, as Denham J. stated in *Connolly v. Casey* [2000] 1 I.R. 345, 'a multiplicity of actions is detrimental to the administration of justice, to the third party and to the issue of costs'. As Murphy J. explained in *Molloy v. Dublin Corporation* [2001] 4 I.R. 52, instead of defendants against whom awards had been made instituting further proceedings against other parties liable to them in respect of the same set of facts, the Oireachtas has sought to ensure that the rights and liabilities of all parties arising out of a particular set of circumstances would be disposed of in the same proceedings."

The time limits applicable to the service of a third party notice have been considered in a large number of cases, all of which have to be considered on their own particular facts. However the legislation and rules of court envisage service of a third party notice within a "relatively short time frame" in order to "put the contributor in as good a position as is possible in relation to knowledge of the claim and opportunity of investigating it".

Service within the time permitted by Order 16
Invariably in these types of applications there will have been a failure to comply with the requirement to serve a third party notice within 28 days of the date limited for the delivery of a defence as required by Order 16(1)(3). While the courts have held that a requirement of strict adherence to this time period would, absence manifest prejudice, represent a draconian step, the time period referred to is an "indicative starting point in any assessment of what was reasonably possible in the circumstances" and provides a "benchmark that has to be taken into account in assessing whether there has been a failure to serve a third party notice as soon as is reasonably possible".

The importance of the 28 day period provided for in the rules was highlighted by Clarke J. in *Greene v. Triangle Developments* [2008] IEHC 52 where, applying the principles set out in Stephens v. Paul Flynn Ltd. [2008] IESC 4 he held as follows:-

> *"The starting point is to consider the time within which the application concerned should, in accordance with the rules, have been made. While it would be inappropriate to take the draconian step of dismissing proceedings (or, as in this case, setting aside a third-party notices) on the basis of a failure per se to comply with the time limit specified, nonetheless that time limit has to be the starting point by reference to which any delay can be assessed. In addition it is clear that the complexity of the issues which need to be considered before the procedural step, which has not been taken in time, could properly be carried out, is an important factor."*

In this case the Court finds that the relevant date is 7th December, 2012 (28 days after the 8 weeks following service of a personal injuries summons permitted for the delivery of a defence in a medical negligence action). The motion for liberty to issue and serve a third party notice in fact issued on the 12th March, 2014 and was heard on the 18th March, 2014, a delay of over 15 months.

Service within a 'reasonable time' as required by section 27(1)(b) of the 1961 Act
As a preliminary issue it is settled law that the onus is on the defendant to serve the third party notice within a reasonable period of time and the onus of proof of showing that the delay in so doing is not unreasonable lies with the defendant.

In considering whether a third party notice has been served as soon as reasonably possible the whole circumstances of the case have to be considered and the reference to "as soon as reasonably possible" is a relative concept and one which has to take into account the particular facts and complexities of any particular set of facts. It is accepted that in professional negligence claims (such as this) there is a need for an additional element of caution in that appropriate expert opinion is required prior to alleging negligence on the part of any professional.

In *Greene v. Triangle & Anor*. [2008] IEHC 52 Clarke J., while noting that in considering any period which elapsed between the time when the third party application should have been brought and when it was actually brought, the court should principally have regard to any steps, such as the assembly of materials and the taking of advice, which were reasonably necessary to reach a conclusion as to whether it was appropriate to seek to join a third party, before stating that:-

> *"In assessing the pace at which such actions were conducted, it seems to me that it is appropriate for the court to have regard firstly to the urgency with which the legislation, the rules and the case law suggest that the application should be brought, so that there is no license for a leisurely approach to assembling the necessary materials or taking the relevant advice. In addition the pace needs also to be considered in the light of the fact that many recent authorities emphasise that delays which may have been considered appropriate in the past will no longer be tolerated."*

In considering what amounts to a "reasonable time" Hogan J. in *Freisburg v. Farham Resort Ltd. and Ors* [2012] IEHC 219 held as follows:-

> "What amounts to a reasonable time will, of course, be measured by the specific context. Particular allowances may 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 … But the present case is about as far away from this as it is possible to imagine. The dispute – in so far 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 terms, one may nonetheless adapt to this context the comments of Fenelly J. in *Dekra Eireann Teo v. Minister for Environment* [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'."

In *Buchanan v. BHK Credit Union Ltd and Others* [2013] IECH 439, Hogan J. in considering reasonableness noted that "any such permissible delay will generally be measured in weeks and months and not years".

In relation to the issue of prejudice, the following dictum of Laffoy J. in *Murnagham v. Markland Holdings Ltd* [2007] IEHC 255 is pertinent:-

> "Section 27(1)(b) makes the service of a third party notice 'as soon as is reasonably possible' mandatory. In my view, the absence or presence of special prejudice affecting the proposed third party is not something the court is required to have regard to in determining whether the third party proceedings are valid."

In a later case, *Robins v. Coleman* [2010] 2 I.R. 180, McMahon J., in accepting that dictum, went on to say:-

> "I have no difficulty accepting this dictum of Laffoy J. but I do not interpret it as suggesting that prejudice to the third party can never be a consideration which the court can take into account in assessing the reasonableness of the defendant's conduct in determining when to issue and serve a third party notice. As I have already indicated above, if the recurrent wrongdoer realises that the third party will be seriously prejudiced by delay, he may have to act promptly. On the other hand, if there is no danger that the third party will be prejudiced, some delay may be tolerated. The circumstances of each case must be considered."

Similarly, in *Buchanan v. BHK Credit Union Ltd. & Ors*. [2013] IEHC 439, Hogan stated:-

> "It follows, accordingly, from a straightforward application of East Donegal principles (*East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317) that the courts would not exercise their discretionary jurisdiction to join a third party where it was plain that a third party's constitutional right to a fair hearing or to a hearing within a reasonable time would be jeopardised, even if the party seeking to effect the joinder had itself applied with the requirements of s.27(1)(b) of the Civil Liability Act 1961.

In *Woori Bank v. KDB Ireland Ltd* [2006] IEHC 156, the High Court, (Clarke J.) stressed that the court should be alive to both substantive and "logistical prejudice" in the sense of something being done "at a very late stage and (which) could have the effect of significantly disrupting the intended proceedings".

Finally, on the institution of proceedings in the absence of an appropriate expert report, it was accepted in this case by the defendants that in order to claim that a professional is a concurrent wrongdoer, there must be evidence of wrongdoing from a person suitably qualified to give such evidence.

SUBMISSIONS OF THE PARTIES

The third party submits that the defendants in this case failed to obtain expert opinion in a sufficiently timely manner. Since the delivery of the personal injury summons and receipt of the medical records, the defendants were aware of all the details of the claim relevant to the joinder issue. They were also aware that the claim involved an elderly man born in 1928 whose injury had been sustained two years prior to the institution of proceedings and who had just issued same within the relevant limitation period. These facts alone should have informed the pace of investigations.

It was further submitted that the case as pleaded in the personal injury summons clearly complained of a delayed referral by the defendant G.P.s to a dermatologist who, it is pleaded, diagnosed cancer and immediately referred the plaintiff to an oncologist. The fact that the amputation occurred following a course of treatment by a dermatologist and the third party was clearly and unambiguously set out in the personal injury summons and was not an issue which required clarification in order to better understand the plea made.

Any issue as to causation was brought to the fore at the outset and ought to have been directly in focus by the defendants. However, the first report sought by the first defendant was not sought until April 2013, some seven months after service of the personal injury summons and a report in relation to causation was not sought until late December 2013/early January 2014, some fifteen/sixteen months after service of the personal injury summons. No report was sought by the second defendant in relation to negligence or causation until the 2nd October, 2013, over a year after the service of the personal injury summons. A further five months was then allowed to pass until the expert report on causation was received on the 11th March, 2014, some eight days prior to the trial date.

No explanation has been provided by the defendants to explain this delay, or as to why the defendants waited so long to commission a report from any expert on the issue of liability. Even after the case was specially fixed for hearing on the 12th December, 2013, it appears there was no real urgency devoted to the issue of causation said to have ultimately given rise to the need to bring third party proceedings. Insofar as the first defendant is concerned, while they appear to have received a report from Mr. Marsden in late January 2014, he advised that a report from a consultant surgeon was required. It appears that the surgeon of choice was unavailable until March, 2014 but what remains unclear is why the first defendant awaited his return rather than appointing an alternative expert to advise. Insofar as the second named defendant is concerned they waited until mid February 2014 prior to seeking the report which ultimately formed the basis for the application against the third party, a period of time which, it was submitted, was unreasonable because its effect was to effectively disentitle the third party from any meaningful involvement in the proceedings.

It was submitted there could be no doubt but that the delay in seeking to join the third party was totally unreasonable. It was far too late to commence investigations a few short weeks prior to a specially fixed date for hearing.

The third party in consequence suffered substantive and logistical prejudice. The treatment sought to be impugned by the defendants in alleging negligence on the part of the third party occurred in June 2010, nearly five years ago. The defendants own treatment of the plaintiff the subject matter of the substantive proceedings, took place several years prior to that date. Insofar as witness

testimony is concerned, the lengthy passage of time must be seen as having an adverse effect on the ability of witnesses to accurately reflect what did occur. Moreover, in joining him so late, the third party was given no proper opportunity of investigating the claim or partaking in the proceedings prior to their being disposed of by way of settlement on the hearing date.

In the present case, the facts were quite extraordinary. Far from blaming the third party, the plaintiff had listed him as one of his witnesses. In the instant case, the application to join the third party was made the day before the trial date, far too late by any reasonable yardstick.

It was also unreasonable and unfair that the third party should now be required to defend a claim where there was a very real risk that the ill health and age of the plaintiff is such that he might well not be able to participate in the third party proceedings.

Further, there was no report before the court indicating that the third party acted as no other doctor in his speciality would have acted if he had been exercising the care ordinarily expected of such a doctor. No report has been sought from a consultant oncologist. Nowhere in the reports that have been provided by either Mr. Marsden, Dr. Lawlor or Prof. Irvine is there a reference to their being of the opinion that the third party acted in a substandard manner or that his acts or omissions amounted to substandard care.

In all the circumstances, it was submitted there was insufficient evidence to justify a plea that the third party is a concurrent wrongdoer or that negligence on his part entitles the defendant to a contribution or indemnity and, for all those reasons, the third party notice ought to be set aside.

In meeting this application counsel on behalf of the second named defendant confined his submissions to the following proposition. Third party claims against professional persons fall within a "special category" and such claims require particular caution before proceedings should commence. The term "as soon as is reasonably possible" is a relative concept, such that in construing it the court should have regard to all the circumstances of the case. A similar position was taken by the first named defendant who simply adopted the submissions made on behalf of the second defendant.

It was submitted on behalf of the second named defendant that, on entering an appearance in November 2012, the solicitor for the second named plaintiff acted expeditiously. In October 2013 an expert consultant oncologist was instructed to provide a report on causation. Later that month, the second named defendant's solicitors agreed with the plaintiff's suggestion that the case be admitted to case management, and that duly commenced on the 11th December, 2013.

Repeated telephone calls were made to the consultant oncologist from late 2013 and in early 2014 to expedite the delivery of his expert report. It was accepted that the same was not received until the 11th March, 2014. It was submitted that in these circumstances both defendants had acted reasonably and the court itself took the view that it was imperative that the trial date be not disturbed by any issues which might arise including the issue of the third party.

DECISION
The Court is satisfied that no proper explanation has been provided by the defendants for the delay in issuing and serving the third party notice upon the third party herein in circumstances where the proceedings concerning an injury arising in October 2010 were issued in September 2012 and were case managed with the specially fixed trial date of the 19th March 2014 being provided in December 2013.

The first defendant at no stage sought the advices of a consultant oncologist, or if he did, the advices obtained must not have been supportive of a plea of substandard care on the part of the third party.

The replying affidavit of James Staines, solicitor for the third party, sworn on the 17th December, 2014, makes clear that the report of the second named defendant's consultant oncologist was only shown to him on the morning of the trial itself.

The Court is satisfied that all these investigations should have been completed well in advance of that time and that adequate information was available from the pleadings to enable appropriate steps to be taken.

The Court is quite satisfied that the third party notices were not served as soon as was reasonably possible. On the contrary, the procedure to join the third party was taken at the last possible moment; a fact adverted to by Irvine J. in the form of order which she made in permitting the joinder. She expressly reserved the right of the third party to set aside the third party notice.

The Court is satisfied that that ground alone is sufficient to dispose of any resistance that the third party claim herein; but for the sake of completeness, the Court should clarify that it also accepts the contentions that the third party has inevitably suffered prejudice in this case having regard to the length of time which has elapsed since the plaintiff's medical problems were diagnosed and treated. Indeed, the involvement of the third party in the plaintiff's treatment came at the very end of the various stages of medical treatment prior to the amputation. It hardly needs saying, but having regard to the plaintiff's advanced age, it is difficult to see what role he might be expected to play in any third party proceedings were they allowed to continue. The Court accordingly would find for the third party on this ground also.

Finally, the third party notice should, in the opinion of the Court, be set aside for the failure on the part of the first named defendant to obtain appropriate expert evidence prior to the issue of the third party notice, and, in the case of the second named defendant, leaving it until the very last moment to obtain such evidence and to make same available to the third party.

It is hardly surprising that in those circumstances the third party elected not to participate in the discussions which led to the settlement of the case against the two defendants on the date fixed for the trial. It is difficult to see what other informed strategy could have been adopted by the third party in these particular circumstances. In the circumstances the Court would accede to the third party application to strike out the third proceedings herein insofar as both defendants are concerned.