THE HIGH COURT

[2016 No. 350 P]

BETWEEN

CATHERINE CAFFREY

PLAINTIFF

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

AND

DENIS O'BRIEN

DEFENDANTS

AND

OTIS LIMITED

THIRD PARTY

EX TEMPORE JUDGMENT of Ms. Justice Baker delivered on the 17th day of May, 2018

1. This judgment is directed to the application of the third party, Otis Limited ("Otis"), pursuant to O. 16, r. 8(3) of Rules of the Superior Courts ("RSC") and/or pursuant to s. 27(1)(b) of the Civil Liability Act 1961 ("the 1961 Act") to set aside the third party notice served on it by the second defendant.

2. The motion of the second defendant to join the third party issued on 11 April 2017. Liberty to issue and serve the third party notice was granted by Cross J. on 22 May 2017. The third party notice was served on 9 June 2017.

3. The proceedings arise out of an incident said to have occurred on 18 June 2013, when the plaintiff was entering a lift at the offices of Bank of Ireland at Grand Canal Place, Dublin, of which the second defendant is owner. Otis had installed the lift in question and had maintained it pursuant to an ongoing lift maintenance contract between it and the second defendant.

4. The primary basis on which the third party asserts that the third party notice ought to be set aside is that it was not served as soon as was "reasonable possible", as is required under s. 27(1)(b) of the 1961 Act.

5. The application to set aside the third party notice is brought under O. 16, r. 8(3) RSC, which provides that the Court may set aside third party proceedings at any time.

6. Order 16, r. 1(3) RSC provides as follows:

> "Application for leave to issue the third-party notice shall, unless otherwise ordered by the Court, be made within twenty-eight days from the time limited for delivering the defence".

The chronology

7. The alleged incident occurred on 18 June 2013. The second defendant notified Otis of the incident on 12 November 2013, identified the lift in which it was alleged to have occurred and, in broad terms, made the allegation that the injuries said to have been suffered by the plaintiff arose "as a result of the lift doors closing on her". Otis was advised to contact its own insurers as a "precautionary measure".

8. Correspondence occurred for a short period thereafter. ESIS Global, loss adjusters for Otis, replied to the email of 12 November 2013 and sent a further reminder email on 10 March 2014 inquiring as to whether there had been any developments in the matter. That email dealt, to some extent, with the broad allegation that Otis might have liability in respect of the incident by asserting that it was "not really possible" for the doors of the lift to make contact with persons entering or leaving the lift due to "sensors fitted in the doors" of modern lifts. It was said, in that email, that it was "therefore likely that any liability on the part of Otis lifts would be defended".

9. A reply to that email was sent immediately, in which Otis was asked to keep its file open for the present. The final email in this chain was from the loss adjusters, which asked for an update and indicated that they may close the file by the end of that calendar year if nothing further was heard.

10. The next steps of consequence were the issue of authorisation by the Personal Injuries Board on 19 August 2015, the issue of personal injury summons on 14 January 2016, and an appearance for the second defendant very shortly thereafter. The second defendant delivered its defence on 24 August 2016 and delayed until 11 April 2017 in serving the motion for liberty to issue the third party notice.

The arguments of the third party

11. The third party argues that the delay between August 2016 and April 2017 suggests that the second defendant did not make the application as soon as was reasonably possible, but also that time commenced to run for the purposes of testing the expedition with which the second defendant acted at the date the personal injury summons issued, because at that date the second defendant knew that an action in respect of the lift, deriving from responsibilities that might be imposed upon an owner and not merely an occupier, of a building had been commenced.

12. Otis argues that the identity of the proposed third party was known to the second defendant at all material times and that this is apparent from the correspondence had in November 2013, three and a half years before the motion for leave was brought, and that there could have been no doubt in the mind of the second defendant that obligations in respect of the maintenance of the lift were, contractually, those of Otis.

13. It is asserted, in those circumstances, that the second defendant had sufficient knowledge to take such steps as were required, to issue the third party notice well within the 28 day time limit set out in O. 16, r. 1(3) RSC. It is further argued that no cogent reason is given by the second defendant for failing to serve a defence for seven months after the personal injury summons was served on 14 January 2016, and that the personal injury summons and the defence are in standard form and a reading of those documents does not suggest any great difficulty that might have given rise to a delay in the preparation and delivery of a defence.

14. Otis also argues that the nature of the plaintiff's case was perfectly clear from the personal injury summons where, at para. 6 thereof, the description of the accident was short but admitted of no ambiguity. It is also argued that the particulars of breach of duty and negligence included a specific plea relevant to any alleged involvement of Otis, namely that:

> "The Defendants, or either one of them, their servants and/or agents, were negligent and/or were in breach of duty and/or were in breach of statutory duty and/or created a nuisance in that they:
>
> (a) – (e) […]
>
> (f) failed to monitor, inspect and service the lifts and in particular the lift which caused injury to the Plaintiff."

15. There are further pleas, including that under letter "(g)", which alleged a failure to ensure that the doors in the lift worked properly, and that under letter "(h)", which alleged that the lift was unfit for use, which must have also called to mind the fact that negligence alleged against the defendants related to the suitability of the lift, whether arising from a want of repair, maintenance, or otherwise.

The arguments of the second defendant

16. The primary argument of the second defendant in resisting the motion is that it was not in a position to make a reasoned judgement regarding any liability of Otis until a multi-party inspection had occurred on 1 November 2016 and its engineer furnished an expert report on 29 November 2016.

17. The second defendant argues that, in the circumstances, it did act as soon as was reasonably possible after its solicitor received the expert engineer's report on 29 November 2016 and that, after receiving advice of counsel regarding the possible liability of Otis he had issued the motion immediately.

18. The evidence of Seamus White, solicitor for the second defendant, is that it was not until the multi-party inspection of 1 November 2016 that the "precise circumstances" of the alleged incident were explained, and that this was notwithstanding the second defendant had raised a request for particulars of the plaintiff regarding the precise details of the alleged incident and received what was described as unsatisfactory replies thereto. Mr. White explains in some detail the plaintiff's description of the incident and how her left arm and shoulder were struck by the lift. Having regard to that "precise description by the plaintiff", the engineer advising the second defendant formed the opinion that, if the incident had occurred in the way the plaintiff described and that she was already in the lift but had her left arm and shoulder in the line of the door, the door was not working properly.

19. Mr. White avers that, upon receipt of the engineer's report and having taken instructions from his principals, he forwarded papers to counsel for "further advices" and, having obtained instructions again from his principals, instructed counsel to draft a motion and grounding affidavit which had then to be sworn by the appropriate representative of the second defendant.

20. In essence, the second defendant argues that it would have been "inappropriate and premature" to issue a notice of motion seeking leave to issue a third party notice prior to the receipt of a professional opinion and advice of counsel.

21. Counsel for the third party replies to this argument that the evidence does not support a proposition that the decision had to await an engineering inspection, a report from the expert engineer, and the advice of counsel. It is argued that nothing new was added to the description of the accident or to the factors giving rise to the claim against the third party, as the contractual basis of the claim was clear since 2013, and that contractual nexus has never been doubt or denied and, at least for present purposes, is not complex.

Discussion

22. A number of factual matters ought to be observed. The second defendant did not serve its defence for a number of months following the service of the personal injury summons, and having regard to the fact that it did know, by then, that an indemnity might be sought against Otis, it could not be said that the second defendant acted as soon as was reasonably possible after the service of a defence.

23. The relevant time is closer to approximately fifteen months rather than eight months, as it is quite clear from the correspondence that the second defendant knew the identity of the body responsible for the maintenance and repair of the lift, and no delay can be blamed on the need for the second defendant to further investigate the circumstances to ascertain the identity of the person who might be sought to be joined as a third party.

24. The approach of the Court of Appeal in *Greene v. Triangle Developments* Ltd. [2015] IECA 249 was to regard the relevant period as that between the service of the statement of claim and the service of the third party notice. Further, Barron J. in *McElwaine v. Hughes* (Unreported, High Court, 30 April 1997) made it clear that a defendant ought not to be able to rely on delay in the delivery of a defence to justify delay in the institution of third party proceedings.

25. It must also be observed that the description of the incident in the personal injury summons is sparse, but it does clearly implicate the lift or the door or the maintenance repair or suitability of the lift.

26. Further a pre-litigation letter was served by the plaintiff's solicitor in May 2015 and the solicitors for the second defendant did not then notify Otis that action was likely. This is of some consequence, albeit Otis is not in a position to argue that it has suffered any prejudice from delay.

27. In essence, the argument made by Otis is that the second defendant had sufficient information to make a decision to seek to join Otis as third party once it received the personal injury summons, and nothing of any factual or legal consequences arises as a result of the joint inspection or from the replies to particulars raised by the second defendant. It is this absence of any new information which is the key to the argument of Otis that the delay in the present case was far outside what could be regarded as "reasonably possible" for the purposes of s. 27(1) of the 1961 Act.

28. Counsel for the second defendant argues that it would have been premature or inappropriate to seek leave to issue a third party notice without taking expert opinion and advice from counsel and that, having regard to the state of knowledge of the second defendant before the engineering inspection, it was prudent and appropriate to await the further advices.

29. While I consider that the argument of the third party that no new information was elicited from the joint inspection would appear at first reading to be correct and that, therefore, the knowledge on foot of which the application to issue the third party notice was available to the second defendant as early 2013, the test regarding the level or state of knowledge of the second defendant may not be so readily answered by that approach. I do accept that the description of the accident in the statement of claim, while sparse, is clear, and that the state of repair or suitability of the lift was put in issue. But having regard to contemporary jurisprudence regarding litigation efficiency it could have been foolhardy, not consistent with a proper approach to litigation efficiency, and premature, for the second defendant to bring the motion unless and until steps had been taken to assess liability arising from the expert evidence. Putting it in its most general, it seems to me that a court would not condone an approach to the issue of a third party notice unless the applicant for leave was in a position to show that proper investigations and proper considerations regarding liability, both on the facts and on the law, had been considered, and formed the basis on which the application was made.

30. An alternative approach might mean that the application for leave to issue a third party notice would be made on very general grounds, and that the third party notice could contain very general pleadings not sufficiently directed to the issue in hand. The fact that a third party notice is issued and served with leave of the court would suggest that the court must and does engage a degree of scrutiny of the application, and this involves the court engaging with the facts in a focused manner, and not acceding to an application which is overly general or formulaic.

31. Therefore, I consider that it would be wrong for me to take a firm view that no additional or further information was elicited following the joint engineering inspection, and further advice of counsel, that led to the decision on the part of the second defendant to make the application for leave to issue the third party notice. The affidavit of Mr. White, solicitor for the second defendant, makes an averment that his principals needed to be consulted twice following the engineering inspection, once to consider the contents of the expert report, and then to consider the advices of counsel.

32. Thus, it is clear to me that the decision to seek to issue a third party notice was not one that was made lightly and without consideration of the precise circumstances and legal basis of such application, and was one Mr. White regarded was not to be made as a matter of course, but following scrutiny by the professional persons involved and by his principals.

33. I consider that the time which elapsed after the receipt of the expert engineer's report on 30 November 2016 was well within a reasonable time, and the steps taken by the solicitor for the second defendant were taken with reasonable expedition, and having regard to the number of careful steps needed to be taken, and the fact that, on two occasions, he took instructions from his principals

34. However, the matter is not resolved merely by reference to the question of whether any material information was obtained as a result of the engineer's report delivered at the end of November 2016, which altered the knowledge of the defendant. This much is apparent from the decision of the Supreme Court in *Connolly v. Casey* [2000] 1 IR 345, where Denham J., having considered the reason given for the delay in seeking leave to issue a third party notice, considered that the court had to scrutinize that decision by engaging a consideration of whether it was reasonable to have awaited further information or advices. At p. 351, Denham J. was clear that "the whole circumstances of the case and its general progress must be considered" and that the absence of an explanation for some of the delay was not a sufficient ground to set aside the third party notice.

35. The judgment of Finlay Geoghegan J. in *Greene v. Triangle Developments* is instructive. The course of the jurisprudence and the leading judgments of the Supreme Court were considered, from which Finlay Geoghegan J. derived the general proposition that the onus is on the defendant to explain and justify a delay in serving a third party notice, but at para. 21 she held that a "further important qualification to that approach" was identified in the Supreme Court decision in Connolly v. Casey. Finlay Geoghegan J. noted that Denham J. had determined that a test which focused on whether a defendant had provided a satisfactory explanation for the delay in question was, quoting Denham J. at para. 23, the "wrong test", as was any question of "[w]hether the replies to particulars did or did not materially alter the defendant's state of knowledge". At para. 25, Finlay Geoghegan J. said the following:

> "In my view, following the approach of the Supreme Court in *Connolly v. Casey*, it is incumbent on a trial judge, when faced with an application such as the present before the High Court, to look not only at the explanations which were 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 or was not served as soon as is reasonably possible."

36. That approach, which mandates a consideration not merely of the reasons given for delay, but also an objective assessment of the circumstances of the case, and its general progress, requires that, on an application to set aside a third party notice, the court should look objectively at the circumstances and consider whether notice had been served as soon as was "reasonably practicable". That involves considerations of reasonableness, and the test of reasonableness is not the same as the test of whether a defendant had offered a full and proper explanation for any delay. The circumstances of the case, the general progress of the case, the length of time that had elapsed, and the nature of the claim are all relevant factors.

37. Another factor which is relevant in the mix is the factor identified by Denham J. in *Connolly v. Casey* regarding the purpose of the third party procedures. As she said at p. 351:

> "The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see *Gilmore v. Windle* [1967] I.R. 323. It is appropriate that third-party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice, to the third party and to the issue of costs. To enable a third party to participate in the proceedings is to maximise his rights - he is not deprived of the benefit of participating in the main action."

38. That factor, namely whether the issues in the case may properly be dealt with as once action, whether the rights of the third party may be protected by a hearing in which the third party participates, and whether the interests of justice and litigation efficiency and the proper use of court resources, are best to be protected by the conduct of a unitary trial albeit subject to such directions as the trial judge may make.

39. Counsel for the third party makes the not unreasonable argument that *Connolly v. Casey* and *Greene v. Triangle Developments* were both cases of alleged professional negligence, and having regard to the overriding principle in such actions that a party ought

not to commence proceedings seeking damages arising from an alleged negligence of a professional person that delay by a defendant seeking liberty to issue a third party notice can be more readily justified in such cases.

40. I accept that proposition as broadly speaking correct, but the evidence in the present application is that Mr. White considered that engineering advice and thereafter legal advice from counsel were required to justify making application for leave to issue a third party notice. Therefore, while this is not an action in professional negligence, it is an action which, on the evidence before me, did and will require engineering expert evidence having regard to the nature of the accident. While the test for the commencement of an action for damages for professional negligence is different and implies a much higher burden, having regard to the view I expressed above and also having regard to the fact that the third party issue will involve engineering evidence, I do not consider that there was an unreasonable delay in bringing this application, albeit I do accept that the matter could have moved with more expedition.. I do also accept the argument made by counsel for the second defendant that the interests of justice and the interests of litigation efficiency suggest that the third party issue should be tried at the same time or immediately after the main issue, and that the engineering evidence is likely to be central.

41. That a third party has suffered prejudice is not a key consideration in that, absent such prejudice, a court may still take the view that a third party notice is to be set aside. The existence of prejudice would make it more difficult for a defendant to meet the onus on that defendant to explain any delay and argue that the purpose of the legislation is met by the issue of the third party notice. In the present case, no argument is made that Otis is prejudiced by the delay, and any argument deriving from such does not fall to be considered.

42. In the circumstances, therefore, I propose making an order refusing the relief sought on the notice of motion to set aside the third party notice. I will, however, make some directions as to the further prosecution of the claim as the parties may propose.