Neutral Citation Number: [2008] IEHC 52

THE HIGH COURT

[2005 No. 1055 P]

BETWEEN

THOMAS GREENE AND KATHERINE GREENE

PLAINTIFFS

AND

TRIANGLE DEVELOPMENTS LIMITED AND GEORGE WADDING

DEFENDANTS

Judgment of Mr. Justice Clarke delivered on the 4th day of March, 2008

1. Introduction

1.1 In the substantive proceedings the plaintiffs ("the Greenes") seek various reliefs arising out of damage which is alleged to have been caused to their building at No. 5 Thomas Street, Waterford. The damage is alleged to have been caused in the course of the re-development of an adjoining site. It is said that the damage was caused in March or April of 2004. The action was commenced by plenary summons issued on the 22nd of March, 2005. On the 5th of May of that year, the statement of claim was delivered. The defence of both defendants (whom I will, for ease of reference describe as "Triangle") was delivered on the 20th of January, 2006. No material difference exists between the interests of the separate defendants so far as this application is concerned.

1.2 Some two and a half weeks after the delivery of the defence, Triangle applied for an order giving liberty to issue and serve a third party notice on Frank Fox & Associates ("Fox & Associates"), which application was issued on the 6th February, 2006 and was successful. On that basis an order was made by this Court (McKechnie J.), on the 20th of February, 2006, giving the defendants liberty to issue and serve such a third party notice within three weeks. While the third party notice was not, in fact, issued at that time, a copy of the proposed third party notice purporting to have been issued was, in fact, served on Fox & Associates on the 8th of March, 2006, which was within the timescale specified for service in the order of McKechnie J.. When Fox & Associates consulted their solicitors it was ascertained, ultimately, that the third party notice had not been issued. This fact was brought to the attention of Triangle's solicitors by a letter of the 7th of July, 2006. A reminder was sent on the 10th of January, 2007, which noted that the position had not been regularised and warned that if a third party notice was then issued and served, application would be made to have it set aside.

1.3 In the meantime it would appear that Triangle had applied to this Court (Peart J.) on the 8th of December, 2006 and obtained an order extending the time for the issue and service of the third party notice concerned, up to and including the 10th of January, 2007. The third party notice was, in fact, issued on the 3rd of January, 2007 but does not appear to have been formally served until the 29th of March, 2007. The substance of the document had, of course, been communicated to Fox & Associates in March of the previous year.

1.4 Thereafter, on the 16th of July, 2007, Fox & Associates brought this application seeking an order setting aside the third party proceedings. The application was originally returnable for the 30th of July, 2007. By virtue of matters outside the control of any party, the application only came to be heard in the early part of this year with the final part of the hearing completing on Monday of last week (25th of February, 2008).

1.5 The basis of the case made on behalf of Fox & Associates to have the third party notice set aside is delay. The principal delay relied on is that which occurred between the service of the statement of claim on the defendants' in May 2005, until the application for an order giving liberty to issue and serve a third party notice in February 2006 (a period of nine months). Some further reliance is also placed on the very considerable delay with occurred as a result of the failure on the part of Triangle to properly comply with the original order of McKechnie J. concerning the issuing and service of the third party notice within three weeks of the making of the order giving leave in that regard.

1.6 It is appropriate, therefore, to turn firstly to the legal principles applicable to an application such as this.

2. The Law

2.1 In *A & P (Ireland) Ltd v. Golden Vale Products Ltd* (Unreported, High Court, McMahon J., 7th November, 1978 at p. 7) McMahon J. noted that the rational behind requiring the service of a third party notice within a short time frame was "to put the contributor in as good a position as is possible in relation to knowledge of the claim and opportunity of investigating it". Order 16 rule 1(3) of the Rules of the Superior Courts specifies that, unless otherwise ordered by the court, an application for leave to issue a third party notice must be made within twenty eight days from the time limited for delivering the defence. Furthermore s. 27(1)(b) of the Civil Liability Act, 1961, requires that the third party notice be served "as soon as is reasonably possible". It should be noted that the provisions of O.16 r. 1(3), to which I have referred, specify the time limit by reference to when the defence should be served rather than the time when the defence is actually served. Noting that fact, in *S.F.L. Engineering v. Smyth Cladding Systems Ltd* (Unreported, High Court, Kelly J., 9th May, 1997), Kelly J. pointed out that the Rules of Court contemplate "an application for the joinder of a third party being made at quite an early stage of the proceedings". It is also true to state that Kelly J., did accept, in *Connolly v. Casey* (Unreported, High Court, Kelly J., 12th June, 1998), that it was only in a tiny percentage of cases that applications to join third parties are made within the time frame specified in the rules.

2.2 In that context it is appropriate to refer to the recent decision of the Supreme Court in *Stephens v. Flynn* (Unreported, Supreme Court, Kearns J., 25th February, 2008). That case was concerned with the analogous area of an application to dismiss proceedings for want of prosecution. Apart from affirming recent developments which indicate a more vigilant approach on the part of the courts to delay, Kearns J. (speaking for the Supreme Court) noted that one of the important considerations in assessing delay is to start with the time limits specified in the rules for the carrying out of the step concerned. In that context Kearns J. stated, at p. 16, that:-

> "In the ordinary course of events no court would rigidly apply a twenty one day period for delivering a statement of claim or see non delivery within that time as a failure which would justify dismissal of proceedings, even in the simplest of cases. Equally, even the most complex of cases must be prosecuted with due expedition and an appropriate sense of urgency. However, the period of twenty months is totally outside any period of time that might be considered appropriate or reasonable and is clearly, and was so found by Clarke J., to be inordinate. The challenge to that finding is unsustainable."

2.3 While the decision in *Stephens* was directed towards the requirement of the rules that a statement of claim be filed within twenty one days of the service of an appearance, it seems to me that the principle noted by Kearns J., is equally applicable to cases in which

the court is being invited to consider delay in bringing third party proceedings. 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 notice) 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.

2.4 It is, of course, the case, as was pointed out by Denham J. in *Connelly v. Casey* [2000] 1 I.R. 345 at 351 that:-

> "In analysing the delay – in considering whether the third party notice was served as soon as reasonably possible – the whole circumstances of the case and its general progress must be considered."

2.5 In *Molloy v. Dublin Corporation* [2001] 4 I.R. 52, Murphy J. stated the following general principle:-

> "The terms in which the time limit was expressed do appear severe. The use of the word "possible" rather than the words "practicable" as is invoked elsewhere, suggest a brief and inflexible time limit. It might suggest that if it is physically possible to serve the appropriate notice within an identified period that any further delay would be impermissible. However, such a draconian approach would be inconsistent with the nature of the problems to be confronted by a defendant and of the decisions to be made by him or his advisors. The Statute is not concerned with physical possibilities but legal and perhaps commercial judgments. Proceedings cannot and should not be instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon. It is in that context that the word "possible" must be understood. Furthermore the qualification of the word "possible" by the word "reasonable" gives a further measure of flexibility."

2.6 It is also clear from the judgment of Denham J. in *Connelly* that it is important in cases of professional negligence to act reasonably and to ensure that proceedings have an appropriate basis.

2.7 On the basis of the authorities it seems to me clear, therefore, that the court should adopt a strict approach to the time within which a third party application is brought. While parties will not be fixed with a requirement that, in substance, a third party notice must be served within a matter of seven weeks from the date of service of the statement of claim (or face the setting aside of the third party proceedings), that period does, nonetheless, have to be taken into account in assessing the extent to which there was, in fact, a delay which renders the period not "as soon as was reasonably possible". 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. 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 not longer be tolerated.

2.8 Against that background it will be necessary to turn to the application of those legal principles to the facts of this case. However, before doing so, it is also necessary to consider the question of the relevance, if any, of the period which elapsed after leave was given to issue and serve the third party proceedings and, perhaps, after the original ineffective attempt was made to serve the third party proceedings. I turn, therefore, firstly to that issue.

3. Delay Post Leave

3.1 There has been some difference of judicial opinion as to whether the relevant date by reference to which an assessment as to whether third party proceedings have been commenced "as soon as is reasonably possible", is the date of service of the third party notice, or the date of the application to the court for leave to issue such a notice. *In Dillon v. MacGabhann* (Unreported, High Court, Morris J., 24th of July, 1995), Morris J. stated that the date on which the third party notice was served was the correct reference date, but went on to note that in determining whether the service had been as soon as reasonably possible, the court would have to consider all the elements which contributed to any possible delay in effecting such service. In the case under consideration an error had been made whereby the motion seeking leave to issue the third party notice had been missed, due to inadvertence, in the court list and had been struck out.

3.2 In *McElwaine v. Hughes* (Unreported, High Court, Barron J., 30th of April, 1997), Barron J. suggested that:-

> "Although the wording of the section refers to the service of the notice, nevertheless, it seems to me that unless there are circumstances arising between the issue of the application to issue and serve a third party notice and its ultimate service following an order to that effect, that the time to be considered should end at the date of issue of the application to the court."

3.3 In *Connolly v. Casey* in this Court, Kelly J. stated that insofar as there was a conflict between the two views to which I have referred, he preferred that of Morris J. in *Dillon* since, in the view of Kelly J. that view accorded precisely with the wording of the section.

3.4 I respectfully agree with the view expressed by Kelly J. In addition to conforming with the wording of the section, as noted by Kelly J., it also seems to me that the date of service more properly conforms, at least in most cases, with the purpose of the section as identified by McMahon J. in *A & P Ireland Ltd*, that is giving the possible third party the earliest opportunity of being put on notice of the claim against him and the opportunity to investigate that claim. It is, of course, the case that an intended third party is not ordinarily notified of the application to issue and serve a third party notice. Therefore, in the ordinary way, the intended third party does not necessarily know of the existence of an intention to issue and serve a third party notice (or, indeed, the making of an order to that effect) until such time as the third party notice has, in fact, been served. While it may, of course, be the case that the intended third party will, in fact, know either directly from the defendant, or otherwise, of the application to issue and serve the third party notice concerned, this will not necessarily be the case until the third party notice is served.

3.5 In any event I am not sure that there is any great difference between the views expressed by Morris J. and Barron J. in the cases to which I have referred. It seems to me that Barron J. was merely noting that part of the natural process for the issuing and service of a third party notice is that there must be first be an application to the court for leave at which the court will, ordinarily, direct that the third party notice be issued and served within a period normally fixed at three weeks. It will also, inevitably, take some time for

the motion seeking leave to be listed for hearing and, furthermore it may be that the motion will not be capable of being dealt with on the first occasion on which it is listed (though such an eventuality will or should be unusual). However, the natural process to which I have referred will normally mean that a period of some six to eight weeks may well elapse between the time when a defendant initiates an application to issue and serve a third party notice, and the time when the third party notice is in fact served on the third party concerned subsequent to the court giving leave. That period of time needs also to be taken into account as part of the natural timescale within which an entirely compliant defendant would ultimately serve a third party notice.

3.6 The facts of this case are, of course, quite unusual. The application for leave was followed by a protracted series of failures on the part of Triangle to comply with the order of McKechnie J., leading to a situation where the third party notice was, in fact, formally served as late as the 29th of March, 2007, which was almost exactly twenty two months after the time provided for the service of a defence and thus after the time when the third party application should have been initiated. Even allowing for the additional time necessary to meet the procedural requirements concerning the issue and service of a third party notice, the delay was, undoubtedly, in excess of twenty months.

3.7 However, against that, it needs to be noted that for more than half of that period (approximately the latter twelve months thereof) Fox & Associates were aware that the court had given leave to issue a third party notice, and had been served with a copy of a document which was, in substance, in the appropriate form to represent a third party notice but was deficient only in that it had not been issued out of the Central Office.

3.8 In those circumstances it seems to me that it is appropriate to have regard to the entire period of delay (which, for the reasons which I have noted is of the order of twenty months) but also to have appropriate regard to the fact that during the latter twelve month period of the twenty months concerned, Fox & Associates were aware of the existence of the third party proceedings and knew the substance of the claim to be made. Strictly speaking service of the third party notice did not occur until March, 2007, for the purported earlier service during 2006 was of a document which had not been issued out of the Central Office and cannot, therefore, be regarded, strictly speaking, as service. However, having regard to the purpose behind the statutory requirement that there be an early application to issue and serve a third party notice, it seems to me that that the latter twelve months of that period, while part of the period which, strictly speaking, needs to be considered to determine whether the notice has been issued and served as soon as reasonably possible, must, nonetheless, be viewed less rigorously by virtue of the fact that Fox & Associates were, during that period, aware of the existence of the third party proceedings. Against that background it is necessary to turn to the reasons put forward on behalf of Triangle for its failure to initiate the third party proceedings and to arrange for the service of same in a more timely fashion.

4. The Position of Triangle

4.1 When this application was first moved before me it appeared that very little detail had been placed on affidavit on behalf of Triangle as to what had transpired in the period between Triangle receiving a statement of claim setting out the Greenes' case, and the initiation of the application to join a third party. In the light of certain comments made by counsel on behalf of Triangle, speaking from his instructions, it seemed to me that it would be appropriate to adjourn the matter further to enable an additional affidavit to be filed. This was done. As a result the following facts are clear.

4.2 Triangle are represented by O'Rourke Reid Solicitors. The instructing principal is ORR Risk Management which appears to be connected with O'Rourke Reid in some way. It would seem that O'Rourke Reid solicitors first received instructions in August, 2004, long before the proceedings had been initiated. Correspondence had taken place with the Greenes' solicitors in advance of the initiation of proceedings. As set out in the replying affidavit of Gordon Murphy of O'Rourke Reid, it was clear from an early stage to that firm that the possibility of third party proceedings needed to be explored, but that, prior to a final decision being made in relation to seeking to issue and serve third party proceedings, it would be necessary to obtain an appropriate expert report to enable an assessment be made as to whether a case could be mounted against Fox & Associates.

4.3 It is, of course, the case that no party should issue proceedings (or join a third party to existing proceedings) without having a credible basis for so doing. That situation applies with particular force in cases where it may be considered appropriate to maintain a claim for professional negligence. It would be most inappropriate for any party to issue proceedings alleging professional negligence or join a third party against whom professional negligence was to be alleged, without having a sufficient expert opinion available that would allow an assessment to be made to the effect that there was a stateable case for the professional negligence intended to be asserted. In some types of litigation it may well be possible for solicitors or counsel to form a judgment as to the existence of a stateable case on the basis of evidence without the benefit of expert reports. However, it seems unlikely, at least in most cases, that any such judgment could responsibly be formed in relation to a claim in professional negligence without having an appropriate expert report which addressed the alleged failings on the part of the professional person concerned.

4.4 There was not, therefore, in principle, anything in the least inappropriate in a decision being made by Triangle's solicitors to await receipt of an appropriate expert report before deciding on the precise defence to be put in and, if appropriate, on whether to bring an application for leave to issue and serve a third party notice alleging professional negligence against Fox & Associates. However, it does appear that significant delay was encountered in obtaining the relevant expert report.

4.5 It seems that an initial query was sent by O'Rourke Reid solicitors to ORR on the 13th of May, 2005, enquiring whether an engineers report from Messrs. Douglas Baxter & Associates had been received. I infer that such a report had been sought or at least discussed at an earlier date. A reply of the 17th of May, informed Triangle's solicitors that, despite reminder letters having been sent to Douglas Baxter & Associates, the relevant report was still awaited. The matter was raised again on the 21st of June, 20th of July, 30th of August and 9th of September in correspondence from O'Rourke Reid to ORR. Despite a further reminder of the 10th of October, 2005 (and an intervening application for judgment in default of defence brought on behalf of the plaintiffs), it would appear that the relevant report from Messrs. Douglas Baxter & Associates did not arrive with O'Rourke Reid until the 9th of December, 2005. The papers were sent to Junior Counsel who drafted the necessary motion and affidavit, which led to the relevant motion being issued on the 6th of February, 2006 and the order made on the 20th of February.

4.6 Having regard to the fact that Christmas intervened it does not seem to me that any culpable delay occurred between the receipt of the engineers report in mid December, and the bringing of the application before the court.

4.7 However, it clearly is very regrettable indeed that, notwithstanding the fact that an engineers report had been identified (quite properly) as being necessary as far back as May, that report did not become available until December some seven months later. There is no doubt but that a number of reminders were sent by O'Rourke Reid solicitors to ORR. Precisely what ORR did in pressing the engineers concerned for a report or indeed considering whether it might not be more appropriate to obtain a report from an alternative firm of engineers if those originally instructed seemed unable to produce a report within a reasonable time scale, is not disclosed in the affidavit evidence. It will be necessary to have regard to this fact also in assessing the overall position.

4.8 While dealing with the sequence of events it is also appropriate to note what occurred after the original order of McKechnie J. was made. It would seem on the affidavit evidence that O'Rourke Reid were unaware that they had made an error in failing to issue the third party notice until this fact was brought to their attention by a letter from the solicitors acting for Fox & Associates on the 7th of July, 2006. Notwithstanding this, an application to extend time so as to regularise the issuance and, thus, the service of the third party notice, was not moved until the 18th of December, 2006. Other than the intervention of the long vacation no real explanation is given for that delay.

5. Application to the Facts of this Case

5.1 For the reasons which I have set out earlier in the course of this judgment, it is clear that the entire period up to the formal service of the third party notice must be considered. However, given that Fox & Associates were aware of the existence of the third party proceedings from March 2006, it seems to me that a significantly lesser weight needs to be attached to the delay after that time. In truth the delay up to the bringing of the application to issue and serve a third party notice comes down to an assessment of how long it took to get the engineers report. Most of the relevant period was spent waiting for that report.

5.2 It must be acknowledged that the real issue of assessment in relation to an application such as this has to be to consider the actions of the party itself. It seems clear on the evidence that the management of this litigation on behalf of Triangle was being conducted by ORR. While a party can be blamed for any delay on the part of its professional advisors, any such blame needs to be considered in a somewhat different way from delay which is directly attributable to the party itself. I am, however, satisfied that a party is not entitled simply to sit back and allow its professional advisers to conduct litigation at whatever pace those professional advisers consider appropriate. If a party does that, then it must at least take some of the blame which might legitimately attach for delay on the part of those professional advisers.

5.3 On the other hand it must be acknowledged that the position of a party who is faced with delay on the part of its professional advisers (whether that be delay on the part of its own lawyers or delay, as here, on the part of an expert whose report is necessary to enable the next procedural step to be taken) depends on the extent to which it could be regarded as reasonable for the party to have had it within its capability an ability to do something about the delay concerned and the extent to which it may be reasonable to attribute delay on the part of those professionals involved to their client What may be reasonable depends on the circumstances of the case. Any lawyer representing a party in litigation must be taken to be fully aware of the need to act with reasonable expedition in progressing the proceedings. Such lawyers do not need to be reminded by their client of their obligations. If those lawyers are guilty of such delay as puts the proceedings at risk then, it may well be that the consequences of that delay should not be visited on the innocent other side, but rather may have to result in the proceedings, or an appropriate aspect of them, being struck out for delay, with the party aggrieved having their remedy against the lawyers whose delay has led to that unfortunate situation.

5.4 However, the position is not quite the same where any delay may be attributed to potential expert witnesses. In a case where, as I am satisfied is the case here, it is appropriate that a particular procedural step not be taken without having available a suitable expert report, then the party charged with taking that procedural step has, of course, to take reasonable efforts to ensure that the expert report concerned is available in a timely fashion. That can mean that, in an appropriate case, where it becomes difficult to obtain the expert report concerned, consideration may have to be given, if it be possible, to instructing a different expert.

5.5 On the facts of this case, it is by no means clear to me on the evidence as to what steps were taken by ORR to either secure the expert report from the consulting engineers concerned in a more timely fashion, to impress upon those experts the need to produce the report in a more timely fashion, to consider instructing alternative experts or the like. It is clear that both Triangle and O'Rourke Reid left this important matter to ORR. While Triangle was entitled to leave the matter to ORR there is no evidence that it pressed ORR or had, in effect, any involvement. Triangle must, therefore, at least to a material extent, answer for the efforts of ORR or the lack of them. In those circumstances I cannot be satisfied that Triangle acted with reasonable expedition in securing the expert report concerned. There is no evidence from which I could conclude that it would have needed seven months or anything remotely like it to produce the report concerned. There is no evidence that the urgency of the situation was impressed upon the experts concerned, and in all the circumstances I am not satisfied that an adequate explanation has been given for what is, by any stretch, a significant delay in securing the report concerned.

5.6 It follows that I am not satisfied that the application to issue and serve the third party notice was brought as soon as was reasonably possible. This fact was compounded by the inexplicable delay in regularising the failure to comply with the order of McKechnie J., to issue and serve the third party notice within three weeks from the date of his order. While that later fact would not, of itself, afford a reason for striking out the third party notice, it is an additional fact which, when added to the unexplained delay in bringing the application to issue and serve the third party notice in the first place, leads me to the conclusion that the third party notice in this case should be struck out.