Neutral Citation [2012] IEHC 438

THE HIGH COURT

[2005 No. 4353 P]

BETWEEN

MARY BERNADETTE MURPHY

PLAINTIFF

v.

PATRICK BROCK AND SONS LIMITED AND BUCHAN KANE AND FOLEY

DEFENDANTS

AND

EWBANK PREECE O'HEOCHA LIMITED

THIRD PARTY

JUDGMENT of Mr Justice Ryan delivered the 2nd November 2012

This is an old case. It concerns responsibility for the cost of repairs to a school sports hall that was built in 1999. The plaintiff is the representative of the religious community that owns and operates the school. The school complains that the hall is not weather-proof: it is letting in water and needs remedial work which may be extensive and costly. The problem has been present for many years. The builder is the first defendant, Patrick Brock and Sons Ltd. The architects are the second defendant, Buchan Kane and Foley, who brought the structural engineers on the project into the action as third party.

The application to join the third party was granted on the 25th July, 2011 by Gilligan J on the application of the second defendant. This motion is now brought by the third party, the structural engineers, to set aside the third party notice on the ground that the application to join them was not made "as soon as is reasonably possible" which are the terms of s. 27(1)(b) of the Civil Liability Act, 1961. The third party argues that the time requirement is mandatory and that the second defendant is in breach by reason of the following periods of delay, namely,

> (a) from the second defendant's appearance filed on the 4th February 2008 to the date of service of the statement of claim on the 2nd June 2010;
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> (b) 2nd June 2010 to the date of the second defendant's defence on the 15th February, 2011;
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> (c) 2nd June 2010 and/or 15th February, 2011 to date of application to join the third party, 25th July, 2011,

The Certificate of Practical Completion of the building was issued on the 24th November, 1999. The problem of water ingress became apparent soon after the school went into occupation, according to the plaintiff's statement of claim which specifies incidents from December, 1999. A meeting of relevant parties including all of the above-named litigants took place on the 15th April, 2005. They had a report from consulting engineers on the most recent episode of flooding and the meeting discussed the findings and recommendations. Water problems were now present in three areas, the problem was chronic and remedial steps needed to be taken. However, there does not appear to have been agreement on what was to be done or on who was to do the work or pay for it. That failure and the approaching sixth anniversary of the first leaks may have prompted the school to issue a plenary summons later in that year on the 14th December, 2005.

The proceedings moved at a leisurely pace, without protest from the second defendant. The plenary summons was renewed on the 9th July, 2007 and the second defendant entered an appearance on the 4th February, 2008. More than two years later, the plaintiff served notice of intention to proceed on the 1st June, 2010 preparatory to serving the statement of claim on the following day. In July, 2010 the architects' professional indemnity insurers instructed new solicitors, who sought particulars of the claim from the plaintiff by notice of the 3rd September, which elicited a reply on the 13th January, 2011. The second defendant's defence is dated the 15th February, 2011. On the 28th April, 2011 a consulting engineer, Mr Fahy, who had been engaged by the insurers in September, 2010 submitted his report, in which he implicated the third party. The motion to join the third party was issued on the 8th July, 2011 and it came on for hearing and was granted on the 25th July, 2011. Following service in turn of the notice and a third party statement of claim this motion to set aside these contribution proceedings was brought on the 10th November, 2011.

Mr Barniville, SC for the third party pointed to four relevant circumstances in the case. The architects were involved from the beginning of the project in the appointment of the consulting engineers on the building project. As building professionals, they were fully aware of the role of structural engineers and thus in a quite different position to a lay person who might not be expected to be familiar with the separate functions of experts in a construction undertaking. They had solicitors advising them who had access to the contract documents. Mr Fahy, their consultant, was engaged in late September, 2010 and there was a delay before he reported in April, 2011 and further lapse of time thereafter before the motion was brought.

Counsel dismissed the explanations put forward by the architects. The change of solicitor was irrelevant. Seeking further particulars of the plaintiffs claim was not necessary for the decision to join the structural engineers and very little relevant information was actually sought. The architects were responsible for the time it took to get Mr Fahy's report and they delayed further when they received it. There was no basis for suggesting that there was acquiescence on the part of the third party such as might be a ground of refusing this application.

Mr Nolan, SC for the architects emphasised the important qualification that s.27 does not demand service of the notice as soon as possible but what is reasonably possible. The purpose of the provision is to avoid multiplicity of proceedings. The second defendant architects did not have the specialist knowledge of structural engineering that was required. The third party was aware right from the beginning of the potential for litigation.

Counsel said that it was reasonable for the second defendant to hold back until they had made proper investigations. It was unreasonable to criticise them for not applying to the court on receipt of the plaintiff's statement of claim. It was legitimate to seek further and better particulars and to pursue the investigation through Mr Fahy. He had a lot to do, as is evident from his report. Then they considered it. All that took time. The courts require care to be taken by litigants before instituting proceedings for professional negligence to ensure that there is an evidential basis for the claim. In all the circumstances, the delays were explained and they were not unreasonable. Although there was indeed long delay by the plaintiff in prosecuting the action, none of the cases cited establishes a principle whereby the defendant can be held responsible because it did not move to have the plaintiff's case dismissed for want of prosecution. The third party by requesting a statement of claim engaged in the litigation and should not now be released from it.

> S. 27(1) (b) of the Civil Liability Act is the critical provision.
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> 27.-(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part-
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> (a) shall not, if the person from whom he proposes to claim contribution is already a party to the action, be entitled to claim contribution except by a claim made in the said action, whether before or after judgment in the action; and
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> (b) shall, if the said person is not already a party to the action, serve a third party notice upon such person as soon as 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 contribution is claimed.

I should also refer to s. 31 which is as follows:-

> An action may be brought for contribution within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater.

My understanding was that the meaning of these provisions was not in doubt. If the proposed contributor (the intended third party) was not already in the case as a party, which was the situation here, there were two methods of proceeding against him. The first was under s. 27(1)(b) and the other was a separate, independent action under section 31. S. 31 was generous in its time limit but the court had a discretion to refuse to order contribution if the claim was made under s. 31 as opposed to s. 27(1)(b) and one reason, if not the principal one, would be delay in bringing the action.

When considering my judgment and reviewing the authorities, I noted a point that arose in the Supreme Court case of *Connolly v. Casey and Murphy* [2000] 1 I.R. 345 but which was not decided by the court because it was unnecessary to do so. The argument was made by Mr Paul Gallagher S.C., who appeared for the defendant, that even if the third party notice was not served "as soon as is reasonably possible" that was not the end of the matter. The consequence if that provision was not complied with was not to jettison the third party proceedings but rather to give the court a discretion to "refuse to make an order for contribution against the person from whom contribution is claimed".

I did not know anything more about this unresolved issue in *Connolly v. Casey and Murphy* beyond what is said in the report, which is as follows, per Denham J speaking for the Court:

> Counsel for the defendants had a second argument. He raised a query as to the effect, so far as the third-party proceedings are concerned, of a failure to serve the third-party proceedings "as soon as is reasonably possible". This matter was not raised or argued in, nor did it form part of the judgment of, the High Court. Nor was it raised explicitly on the notice of appeal. Counsel for the defendants submitted that a proper reading of s. 27(1)(b) of the Act of 1961 does not require the court in the event of delay to set aside the third-party notice. Rather, the court has a discretion, he submitted, to refuse to make an order for contribution. It was argued that it was clear from the wording used that this discretion exists not only where the claim for indemnity/contribution is brought by way of separate proceedings but also where it is brought by way of third-party notice. He referred to the last sentence of s. 27(1)(b) of the Act of 1961 which begins:- "If such third-party notice is not served as aforesaid ..."
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> Counsel submitted that what is "said before" is that the third party notice should be served "as soon as is reasonably possible". He submitted that the interpretation contended for is not only consistent with the wording of the subsection but is also consistent with the statutory purpose of avoiding a multiplicity of actions. It is not necessary to determine this second ground submitted by the defendants in light of the decision on the first ground. Nor is it necessary, therefore, to analyse this argument in relation to *Board of Governors of St. Laurence's Hospital v. Staunton* [1990] 2 I.R. 31.

The different interpretations are possible because of the ambiguous wording of s.27: it admits of the possibility of not complying "as aforesaid" in two ways. The section as it applies in this case provides that the second defendant shall serve a third party notice [having previously obtained liberty to do so from the court] upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. If the notice is not served ***as aforesaid***, the court may in its discretion refuse to order contribution. Disentitlement to claim except by third party procedure is predicated on having served a third party notice. The sub-section, in referring to a notice that is not served ***as aforesaid***, may apply where a claimant (a) has not served a notice or (b) has not done so as soon as is reasonably possible.

This point was not debated at the hearing of the motion before me. There was a good reason for that but I did not know it. The Supreme Court in a subsequent case rejected the point that it left undecided in *Connolly v. Casey and Murphy*. I thought that I had encountered a new point that the parties should address and I gave a short note alerting them to the question. The parties put in written submissions which I have found very helpful.

The third party, the structural engineers, confined their argument to the meaning of s.27 (1). They explored the origin and application of the accepted interpretation that represented the consensus among lawyers. They contended first that the alternative interpretation of the section is wrong; secondly, that it was not concordant with the cases decided before *Connolly v Casey and Murphy* and, specifically, with the leading authority, the Supreme Court judgment in Board of *Governors of St Laurence's Hospital v Staunton* [1990] 2 IR 31; and thirdly, that there was a Supreme Court decision expressly rejecting the point.

The first two points cover familiar territory. The argument rebuts the proposed reading by reference to the previous cases but these submissions, whatever their cogency, do not deliver the coup de grace to the alternative interpretation. The third contention is

another matter.

The submissions state simply that the question was considered and decided by the Supreme Court on the 20th March, 2002 in *Greer v John Sisk and Sons Ltd* [2002] 3 JIC 2002. It had been argued that if the notice was not served as soon as was reasonably possible, the court did not have to set it aside and leave the claimant to its separate action but could in the s.27 (1) proceeding exercise its discretion at the hearing stage to refuse contribution. This was clearly the same argument. Keane CJ spoke for the court in an *ex parte* judgment which represents a decisive rejection of the submission and an express affirmation of the accepted understanding. The judge said:

> Mr. Counihan SC has drawn attention to and based a submission on the last sentence of s.s. 27(1)(b) namely that "if such third party is not served as aforesaid, the court may, in its discretion, refuse to make an order for contribution against the person from whom contribution is claimed." He submits, and it is quite an attractive argument, certainly as put forward at first impression by Mr. Counihan, that "as aforesaid", at least covers the situation where it is not served as soon as is reasonably possible. He argues from that that you can then have a situation in which the court may in its discretion, refuse to make an order for contribution against the person from whom contribution is claimed and that that, he submits, is the appropriate time at which the court should hold, if it considers it appropriate so to hold, that the third party notice has not been served as soon as is reasonably possible. It is at that stage, he says that the court has a discretion as to whether to make an order for contribution against the person from whom the contribution is claimed.
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> I am satisfied that, in the context of these proceedings, it is not necessary to consider all the implications of that last sentence. It is sufficient to say that in using the expression, "if such third party is not served as aforesaid", it is clearly envisaging a case in which the defendant has simply not made use of the third party procedure and then still seeks to get contribution against the person whom he claims is responsible, in whole or part, for the accident which has led to the proceedings. That is the clear and obvious meaning of the section, as one reads it at first, that it is making it absolutely clear that if a defendant fails to do what the section requires him to do, that is fails to serve a third party notice, then that may mean that if he ultimately seeks contribution in some other form, he may not be given it. That is what the section says. If it meant what Mr. Counihan has argued it could mean, then a person could simply delay quite unjustifiably, quite inexcusably, without any reason and could then say to the court, "I know that I didn't issue my third party proceedings within a reasonable time, but I will await the ultimate hearing of this action and then at that stage, I accept that the court may find against me in this matter, may find that I have failed to move within a reasonable time and then I accept that I may fail to get a contribution."
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> In my opinion, that would not only be in the teeth of the previous decisions of this court, to which I have referred, but it would be seriously at odds with the requirement that the third party notice must be served as soon as is reasonably possible, because as I said at the outset, the whole object of this section is to ensure a saving of both time and expense in the hearing of proceedings where more than one concurrent wrongdoer is involved.

The second defendant, the architects, do not address this case in their submissions. They do, however, adopt the argument that was made in that case but their position in this regard is untenable. Since the decision is directly in point, it is binding on this court. *Cadit quaestio*.

This defendant does proceed to address the substantive issue of delay in further submissions.

> (a) They say that almost all of the delay is the responsibility of the plaintiff. By this they mean that the plaintiff was the cause of the delays and therefore bears the responsibility.
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> (b) The architects could not have known the plaintiffs claim until the statement of claim was delivered on the 2nd June, 2010.
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> (c) After the 2nd June, they had to take steps that took time and which they accomplished within a reasonable period of three months, bringing them to September, 2010.
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> (d) It was reasonable and proper to seek further and better particulars by notice on the 3rd September, 2010; the plaintiffs replies came on the 13th January, 2011 and this party cannot be blamed for that time lapse. The queries raised included references to the structural engineers.
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> (e) This party received the report of its consulting engineer on the 28th April, 2011. The third party motion was issued on the 8th July, 2011.

It is necessary to look at some of the many cases on delay in reference to s.27 (1). I propose to look at the authorities that were cited in argument by reference to the following questions:

> 1. what is the purpose of s.27 (1)?
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> 2. what are the relevant events or facts to be taken into account in a case of professional negligence?

I will then examine how the answers apply to this application.

The Purpose

> "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." ***Connolly v Casey & anor [2000] 1 IR 345 Supreme Court per Denham J***
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> "... the primary purpose of s. 27(1)(b) of the Act of 1961 is to ensure that all connected claims arising out of the same circumstances should be determined at the same time so as to avoid a multiplicity of actions." ***Robins v Coleman [2010] 2 IR 180-McMahon J***
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> "Section 27(1)(b), in specifying a time limit for service of third party proceedings, is necessary to prevent such claims,

ancillary to the main action, delaying or prolonging unduly the principal litigation to the detriment of other litigants, especially the plaintiff."-McMahon J

The Test-- what are the relevant events or facts to be taken into account in a case of professional negligence?

Connolly v Casey & anor

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

In that case the High Court decided that the delay while the defendant waited for further and better particulars to be furnished was not justified or satisfactorily explained because the information that was given was in the result unnecessary for the decision as to whether to join the third party. The Supreme Court disagreed and held

"The test is whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendants' state of knowledge is not the test. The queries raised in the notice for particulars were relevant to the claim against the third party and thus it was reasonable to await the replies."

"It is important in professional negligence cases to act reasonably. Proceedings must have an appropriate basis. Counsel have a duty of care."

"Even though there were pleas in the defence relevant to the third party, there is a difference between a general plea in a defence and swearing an affidavit setting out the basis on which it is alleged Counsel was negligent. A statement from Mr, Murphy was relevant to this. It was not unreasonable to have sought a statement from Mr. Murphy and awaited its arrival, it was a prudent action."

Molloy v Dublin Corp [2001] 4 IR 52 Supreme Court per Murphy J

"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."

But "the quest for certainty or verification must be balanced against the statutory obligation to make the appropriate application 'as soon as reasonably possible'".

Robins v Coleman [2010] 2 IR 180

McMahon J said that "concurrent wrongdoers are entitled to time to allow them to give serious consideration before making a claim that a person has been guilty of professional negligence. Such an allegation or claim should only be made responsibly and when there is sufficient evidence to justify the claim.

Greene v Triangle & anor [2008] IEHC 52

Clarke J-- "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."

But "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."

Were the delays reasonable or not unreasonable?

Every case is decided on its own facts so the question is what was reasonable in these particular circumstances. While it may in theory be an option, it would be extremely unusual, to say the least, for a defendant to apply to join a third party before the plaintiff's statement of claim was delivered. It follows that failing to do so is not unreasonable. The defendant may be able to anticipate the general nature of the claim but it is reasonable to wait and see the specific presentation. The relevant period to be considered, therefore, is from the delivery of the statement of claim on the 2nd June, 2010 to the 25th July, 2011 when the third party application was made. During the relevant period, there was a change of solicitors at the behest of the second defendant's indemnifiers, the new solicitors sought further and better particulars and they sought and obtained a report from a consulting engineer. The courts have expressly endorsed such steps and indeed mandate them in some cases. It was reasonable to do those things. Was there unreasonable delay on the part of this defendant in achieving them? It is of course true to say that any step can be taken more speedily than it was but that is not the yardstick. One has to be realistic.

The further particulars came in January, 2011 and the consultant's report in late April. The expert's report describes the meetings and investigations he undertook, which go a long way to explaining why the work required substantial time to complete. The engineer's report was received on the 28th April, 2011. The second defendant brought the third party motion on the 8th July. During May and June, the report had to be considered, a decision made about the third party and the papers prepared for the application. None of

that was unreasonable.

In applying the principles approved by the courts, it seems to me that it would be unjust to strike out third-party notice. The essential features are that the case has progressed extremely slowly, which is largely the responsibility of the plaintiff; the default of the plaintiff should not militate against the rights of the second defendant; it was proper for the defendant to take care before joining the third party; it seems clear from the affidavits and from the report of the consulting engineer Mr Fahy that the analysis of the issues took a considerable time and involved a number of meetings; it was in the result reasonable for the second defendant to wait for that report and then to take some time to consider it before proceeding with the application to court.

The second defendant has provided explanations for each material period of delay. Although some of the periods could have been lessened, they were not unreasonable when considered in light of "the whole circumstances of the case and its general progress".

It is convenient, just and in accord with the policy of the section that all issues in this case should be heard and determined at the same time. It is unquestionably more convenient to have all the issues arising out of the leaking building heard and determined in one phase with all the relevant parties in attendance and participating. Justice and expediency will both be served by doing so.

In the result, the application to set aside the third party notice is refused.