THE HIGH COURT

[2015 No. 1241 P]

BETWEEN

VICKIE MOREY

PLAINTIFF

AND

MARYMOUNT UNIVERSITY HOSPITAL AND HOSPICE LIMITED AND BAM CONSTRUCTION LIMITED

DEFENDANTS

AND

BAM BUILDING LIMITED

FIRST NAMED THIRD PARTY

AND

SUIR ENGINEERING LIMITED

SECOND NAMED THIRD PARTY

JUDGMENT of Ms. Justice Baker delivered on the 4th day of May, 2017.

1. This judgment is given in the application by the first named third party, BAM Building Ltd ("BAM") for an order pursuant to O. 16, r. 8(3) of the Rules of the Superior Courts to set aside a third-party notice issued and served on BAM on 19th April, 2016.

2. Briefly, the chronology of the proceedings is as follows:

(i) 13th February, 2015 personal injuries summons served;

(ii) 19th August 2015 defence served;

(iii) 14th March, 2016 motion to join third party issued, after warning letter sent on 29th February, 2016;

(iv) 11th April, 2016 order of the High Court;

(v) 19th April, 2016 third-party notice served;

(vi) 9th November, 2016 motion to strike out issued.

3. BAM is a limited liability company with registered offices in the State. In or around the year 2009, BAM entered into a contract with the first defendant for the construction of a hospital. The personal injuries summons incorrectly named an associated company, BAM Construction Ltd, as second named defendant although this company never had any involvement in the construction of the hospital, and had been dissolved on 22nd February, 2008.

4. The accident the subject matter of the proceedings is alleged to have occurred on or about 12th October, 2012. The plaintiff in the course of her employment with the first defendant was present at its hospital at Marymount, Curraheen in the County of Cork, when it is alleged that a wall-mounted television unit detached from the wall and struck the plaintiff on the head and face. The plaintiff alleges that the accident was caused by reason of the negligence, breach of contract and breach of duty of the defendants, in regard to the installation and fitting of the television unit.

5. The application to set aside the third-party notice is grounded on the argument that the first named defendant delayed unduly in bringing a motion to join BAM as third party. A period of thirteen months elapsed between the commencement of the proceedings in February, 2015 and the issue of the motion on the on 14th March, 2016. BAM argues that it ought to have been clear and obvious to the first defendant that the plaintiff had wrongly named the dissolved company as second defendant, in particular because the first defendant had access to all documentation relating to the contract for the construction of the hospital, it being one of two parties to the contract, and the contract being for a significant monetary consideration, and that even a preliminary or superficial investigation would have identified the error, as the named second defendant company was dissolved before the contract to build had been entered into.

6. The first defendant through its solicitors and insurance company had written to the named second defendant, by then dissolved, at its registered office at Kill, County Kildare by letters of 29th April, 2014, and 23rd March, 2015. BAM argues that it is clear from these letters that the first defendant was well aware that there were different corporate entities within the BAM group of companies, that investigation and correspondence had occurred as long ago as April, 2014, a year prior to the personal injury summons, and two years before the motion to join the third party. It is argued in those circumstances that the application to join the third party was not made as soon as was reasonably possible, as is required by the statutory provisions, and that the delay of thirteen months in taking steps to join BAM is unexplained and wholly excessive.

7. The first defendant relies on a number of arguments in opposing this application. It points to the multiplicity of BAM entities, and names six of these by way of illustration. It points to the fact that the error made by the plaintiff was to name the wrong entity within the group, and that the motion to join a third party arose because the plaintiff chose to discontinue against the dissolved company and proceed solely against the first defendant. It argues that BAM allowed a period of seven months to elapse since it was joined as third party before bringing this motion, and that the principles found in the case law suggest that the requirement of expedition must be applied to all relevant parties in the application. The first defendant also argues that the third party has failed to disclose any prejudice to it in its defence of the third-party proceedings, and that as a matter of fact BAM was notified of the incident and carried out an inspection in the days immediately following the incident, and itself then carried out the necessary repair works on the premises. In those circumstances BAM was aware of the claim, and this is not denied. Further, the named third party is

an appropriate party to the proceedings.

8. A particular emphasis is placed by the defendant on the fact that by letter of 4th August, 2016, BAM's solicitors requested a third-party statement of claim and thereby engaged in the proceedings. It is argued that it is thereby estopped from seeking to set aside the notice. The solicitor for the third party points to a letter written some five weeks later, on 13th September, 2016, in which he advised that having considered the matter further, a motion to set aside the third-party notice on the grounds of delay was to be issued, and that a third-party statement of claim was no longer required.

9. No steps have been taken in the proceedings by either party since that date, albeit the first defendant delivered the third-party statement of claim on 30th September, 2016, after the letter by which the motion to set aside the third-party notice had been threatened.

10. The defendant has not identified precisely when it became aware of the error in the plaintiff's proceedings in regard to the correct BAM entity.

The law

11. Section 27(1)(b) of the Civil Liability Act 1961, provides for the service of a third-party notice by which a defendant may make a claim for contribution against a person who is not already party to a suit. The statutory provisions expressly require that such notice be served "as soon as is reasonably possible". The Act does not prescribe any period within which application is to be made, but O. 16, r. 1(3) of the Rules of the Superior Courts provides a period of 28 days for the making of application for leave to issue a third-party notice. The time provided in the Rules must be seen in the context of the statutory imperative that application be made as soon as is reasonably possible, and the delay in bringing any application will be measured in the light of the 28-day period provided by the Rules. As Hogan J. said in *Buchanan v. B.H.K Credit Union Limited & Ors.*[2013] IEHC 439:

> "… any such permissible delay will generally be measured in weeks and months and not years." (para. 23)

12. Kelly J. quoted that comment with approval in the recent decision of the Court of Appeal in *Mulcahy v. A.S.L. Sports Park Ltd & Ors.* [2015] IECA 353.

13. Finlay Geoghegan J. in *Greene v. Triangle Developments Limited & Ors.* [2015] IECA 429 said that the court hearing an application to set aside a notice should:

> "… 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." (para. 25)

14. As Kelly J. said in *Mulcahy v. A.S.L. Sports Park Ltd & Ors.*, "The statutory provision itself mandates an element of urgency". In that case he considered that the delay was not explained, and noted that the defendant was aware of the involvement of the third party some five years before the application to join was made. Kelly J. allowed an appeal from a decision of the High Court, which had refused to set aside the third-party notice, for delay. He did so, *inter alia*, by reference to the progress of the pleadings and the manner in which they were pleaded.

15. In *Molloy v. Dublin Corporation & Anor.* [2001] 4 I.R. 52, Murphy J. identified the purpose for which Oireachtas imposed the requirement of reasonable expedition as follows:

> "There can be little doubt as to what that scheme and purpose was. The legislature was understandably desirous of avoiding a multiplicity of actions. 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 – and indeed those defendants in turn perhaps instituting even more proceedings against others – the Oireachtas sought to establish a situation in which the rights and liabilities of all parties arising out of a particular set of circumstances would be disposed of in the same proceedings." (pp. 55/56)

16. This dicta was quoted with approval by Finlay Geoghegan J. in *Greene v. Triangle Developments Limited & Ors*. It is clear also from other judgments therein identified by Finlay Geoghegan J. that the obligation is on the defendant to serve the notice within a reasonable time, and that has the effect that the onus of showing that delay was not unreasonable is on that defendant.

17. In *Connolly v. Casey* [2000 1 I.R. 345], the Supreme Court seems to have preferred a more flexible or broad approach requiring an analysis of the whole circumstances of the case and its general progress, as well as the general purpose of the subsection:

> "A multiplicity of actions is detrimental to the administration of justice, to the third party into the issue of costs. To enable a third party to participate in the proceedings is to maximise his right - he is not deprived of the benefit of participating in the main action." (p. 351)

18. Finlay Geoghegan J. explained in *Greene v. Triangle Developments Limited & Ors*. that this required an "objective assessment" of the whole circumstances of the case and its general progress. The mere fact that defendant did not give a full explanation for delay was not the end of the assessment, and the test is whether, taking all of the circumstances in into account, it was reasonable to delay. As she said, the 28-day period provided under the Rules of Court is not one that parties normally observe, or can be expected to observe in many cases. In *Greene v. Triangle Developments Limited & Ors.*, Peart J. added a gloss to the test, that to strike out the third-party notice in that case would be disproportionate.

19. In *Boland v. Dublin City Council* [2002] 4 I.R. 409, the Supreme Court added a further factor to the test, that the statutory requirement to move with reasonable expedition applies also to the bringing of an application to set aside such notice. That approach is consistent with the general requirement identified in *Connolly v. Casey*, that the court would look objectively at all of the circumstances, the overall requirement of the legislation, the value of expedition in the prosecution of claims, and an avoidance of a multiplicity of actions.

Application to the facts of the present case

20. The third party argues that the legislative purpose of avoiding a multiplicity of actions is not a factor of great significance in the present case as there is another third party, Suir Engineering Ltd., against whom the defendant may seek contribution. While that argument may in due course emerge as correct, it seems to me that the objective assessment required to be carried out by the court must not be done on the basis of an assumption as to whether an existing party is likely to be found liable in the action. It is not the

function of the court in the present application to consider the merits of the action, or the likely success of the third-party proceedings, or even the degree or percentage of contribution that might be awarded.

21. Following the decision of the Supreme Court in *Connolly v. Casey* the fact that the first defendant has not provided a satisfactory explanation for a delay is not the end of the matter, and the general progress of the case and its general circumstances also fall for consideration. This is because the primary purpose of the statutory provision mandating reasonable expedition is to balance the desirability of avoiding a multiplicity of actions on the one hand with the objective with the objective that the primary proceedings not be unduly delayed by the progress of the third party issue.

22. The defence was served in the present case in August, 2015, and allowing for the Long Vacation, the 28-day period for the service of a notice of motion to seek to join a third party expired in October, 2015. Time is tested at the date of issue of the motion: *McElwaine v. Hughes* [1997] IEHC 74. The motion was issued in March, 2016, five months later. The motion to set aside was brought in November, 2016, eight months thereafter. The plaintiff discontinued against the then second defendant in February, 2016, and the motion to join the third party was issued twelve days thereafter. Thirteen months elapsed between the date when the personal injuries summons issued and the service of the motion.

23. The relevant statutory period, taken in conjunction with the period provided in the rules of the Superior Courts for the service of a notice to join a third party, is the date of the service of the defence, and not the plenary summons. Time must be assessed in that context, although the general consideration of the case will often involve a consideration of whether reasonableness is to be tested against the overall delay in the proceedings generally, and the date on which the proceedings were instituted will often in those circumstances be a factor, especially if a defendant had then all information necessary to consider whether to seek indemnity from a third party: *Board of Governors of St.Laurence's Hospital v. Staunton*: [1990] 2 I.R. 31.

24. The first defendant must have been aware, at the very latest in February, 2015, that the plaintiff had sued the wrong entity in the BAM group of companies. Indeed it must have been aware earlier than this, as the claim of the plaintiff had been processed through PIAB. The PIAB authorisation issued on 30th October, 2014, and the personal injury summons issued on 13th February, 2015. It is undoubtedly the case that the first defendant had access to all relevant documentation at the very latest when the personal injury summons was served in February, 2015, and that had it investigated the matter then, it would have seen the error, and realised it could not seek contribution or indemnity against the named second defendant. It was at that point in time that the first defendant ought to have considered whether it was appropriate or desirable to seek to join the third party to the proceedings as the first defendant made a specific plea of negligence against the second defendant when it delivered its defence on 19th August, 2015, and it must have done so without carrying out a search to ascertain whether the second defendant was correctly named.

25. The somewhat bland explanation for the delay given by the first defendant is that the plaintiff made an error in naming the second defendant, but by letter of 29th April, 2014 to "BAM Contractors", in which the insurance company identified that misnamed BAM entity as being the "main contractor" for the facility, and invited it to indemnify. A letter of 23rd March, 2015, was also addressed to the same entity also misspelt, although in the body of the document the generic "BAM" was used. It is clear from the correspondence that no search in the CRO was engaged by the first defendant until much later in the process, although it knew that some BAM entity had involvement.

26. It could be said that it was unreasonable of the first defendant not to carry out a search in the CRO before writing the letter in which indemnity was sought from a BAM company. Had the first defendant engaged even a cursory search in the CRO it would have become aware of the error made by the plaintiff, and indeed had the first defendant thought to check its own records it would have immediately known the correct name of the contracting company. It was the discontinuance by the plaintiff of her action against the dissolved entity that triggered consideration by the first defendant of the identity of the party from which it should seek indemnity.

27. Thus the material information that might have guided a decision to seek to join BAM as third party was never explored. The first defendant had all the information available to it to join BAM as a third party when the proceedings were instituted or when it served its defence. Its delay therefore was culpable and as Denham J. identified in *Connolly v. Casey* the question is whether a defendant was culpable, and not its solicitors or other advisers.

28. However, the matter does not end there, and as explained by the Supreme Court in *Connolly v. Casey*, the whole circumstances of the case and its general progress must be considered. The question is whether it was reasonable to wait four months after the service of the defence before carrying out the necessary searches to ascertain whether the plaintiff had joined the correct party as second defendant. I consider that the relevant time for the purposes of an examination of the overall progress of this litigation is that on 2nd March, 2016 the plaintiff discontinued against the named second defendant, and the motion to join the correct BAM entity was brought exactly twelve days later. It was at that time that the first defendant knew it was at risk that the named second defendant was not available as a contributor should the plaintiff succeed in the action. While there was a multiplicity of error and fault in not moving to check the precise identity of the second defendant, it was only when the plaintiff discontinued against that dissolved entity that the first defendant was genuinely at risk, or knew itself to be genuinely at risk, to the extent that it required to join a different BAM entity as third party to seek indemnity from a different corporate entity.

29. Reasonableness must also be assessed in the present case, somewhat unusually, in regard to the fact that the third party is one of one of the many companies in a group of construction companies of which the named second defendant was once a part. The first defendant had communicated with a BAM entity, at the registered office of most if not all of the entities in the group, and the third party knew that seeking contribution from a BAM company was under consideration by first defendant. There is a genuine dispute between the first defendant and the named BAM entity and it seems from the evidence that a claim for breach of contract against that entity might not be statute barred, or at least was not statute barred when the third-party notice issued, as the works of construction are said to have commenced on 22nd April, 2009, and concluded on 8th April, 2011. The third-party notice issued in April, 2016, and it is safe to assume that the fixing of a television unit would not have happened in the early stages of the works, but at the time when the final fit was done.

30. In those circumstances I do not consider that the third-party application was made too late, and therefore I refuse to make the relief sought in the notice of motion. I do not propose considering whether prejudice plays a part in the present case, and no evidence has been adduced by the third party that it suffers actual prejudice by virtue of the delay.