

## THE HIGH COURT

2001 15320 P

BETWEEN

GROVE TURKEYS LIMITED

PLAINTIFF

AND

P. CLARKE AND SONS LIMITED

DEFENDANT

**Judgment delivered by Ms. Justice Dunne on the 29th day of October, 2008**

1. The background to this matter can be stated quite simply. Thomas Tierney was an employee of a company within the Kerry Group plc of companies, namely, Grove Farm Limited. In proceedings commenced by him on the 21st February, 1997, he claimed to have suffered an injury at work on the 24th February, 1994, when in the course of his employment he was caused to fall into an excavation or hole in the floorway of the premises in which he was working and suffered a number of injuries as a result.

2. A letter was written to the defendant herein on the 26th May, 1997, by the solicitor for the Kerry Group. Having referred to the nature of the claim and stated that the hole into which the plaintiff fell was dug by the defendant or its sub-contractors the letter went on as follows:-

"We will be requiring indemnity from you in relation to this claim and you might confirm indemnity and arrange to take over the handling of this claim."

3. Correspondence passed between the parties namely the Kerry Group and P. Clarke & Sons Limited over a period of time, but it is not necessary to go into any detail about that correspondence until a letter dated the 19th January, 1999. That letter from Kerry Group Plc to Loss Adjusters on behalf of the defendant herein stated as follows:-

"Proceedings have been served on behalf of the claimant in the above matter. Please nominate solicitors to accept service of third party proceedings on behalf of your insured within the jurisdiction of Ireland. Failing this we will have no option but to apply for service of such proceedings out of the jurisdiction with the resultant additional costs.

I await hearing."

4. It does not appear that there was a response.

5. A letter was subsequently written on the 12th October, 2001, by Daniel Gormley & Co., Solicitors, on behalf of Grove Turkeys Limited to P. Clarke & Sons Ltd. That letter noted that P. Clarke & Sons Ltd. had already been called upon to provide an indemnity in relation to the claim of Thomas Tierney. It was further noted that the matter was now proceeding to trial at the High Court and that to date no indemnity had been provided nor had any solicitor been nominated to deal with the matter. The letter went on to point out that as P. Clarke & Son Ltd. was not a party to the proceedings, they would not be in a position to take any part in the proceedings or to participate in any settlement negotiations. It went on to note that:-

"If you agree to provide the indemnity to which you are contractually obliged to do, you may take over carriage of the proceedings and if you do not wish to do so, you will have a limited opportunity of participating in the proceedings if you consent to being joined as a third party."

6. The response to this letter was a request by Paul W. Tracey, Solicitors, on behalf of P. Clarke & Sons Ltd. for copies of pleadings, correspondence and medical reports for the purpose of taking instructions. It appears that a letter of the 22nd November was sent to Paul W. Tracey, solicitors, by Gormley & Co., solicitors, on the 22nd November, 2001. By letter dated the 23rd November, 2001, Paul W. Tracey, solicitors, confirmed that they had authority to accept service of proceedings.

7. The plenary summons herein was issued on the 16th October, 2001, and an appearance was entered on the 3rd December, 2001, by Paul W. Tracey on behalf of the defendant. In the plenary summons the plaintiff claims the following relief against the defendant:-

"(a) Damages for breach of contract pursuant to which the defendant agreed to indemnify the plaintiff against any liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or disease contracted by any person whomsoever arising out of or in the course of or caused by the execution of works carried out by the defendant at the plaintiff's factory premises at Smithboro in County of Monaghan.

(b) Damages for negligence and breach of duty, including statutory duty.

(c) Further and in the alternative, for a contribution up to and including a full indemnity against the claim of Thomas Tierney in an action entitled The High Court, 1997, No. 2018 P, Between / Thomas Tierney, Plaintiff and Kerry Group Plc, Grove Farm Limited and Grove Turkeys Limited, Defendants."

8. Pleadings were exchanged between the parties and in an amended defence delivered herein in December, 2004 the defendant pleaded as follows:-

"The defendant pleads that the plaintiff's claim in the within proceedings is statute barred by virtue of the provisions of the 1961 Civil Liability Act and in particular s. 31 thereof."

9. A notice of motion was then issued seeking the following reliefs:-

"1. An order determining the issue of the plea contained at para. 1 of the amended defence herein namely, the defendants claim that the plaintiff's claim in the within proceedings is statute barred by the virtue of the provisions of the 1961 civil Liability Act and in particular s. 31 thereof, as a preliminary issue, pursuant to the provisions of O. 25, r. 1, alternatively pursuant to the provisions of O. 36, r. 7 of the Rules of the Superior Courts.

2. An order striking out/dismissing the within proceedings on the grounds that the plaintiff's claim in the within proceedings is statute barred by virtue of the provisions of the Civil Liability Act 1961."

10. The motion was grounded on an affidavit of Paul Tracey, solicitor, sworn herein on the 17th November, 2005. Having set out the background to this matter he stated as follows:-

"4. It appears that while the Tierney claim was current, the solicitors for the plaintiff herein considered that they had a right to join the defendant herein as third party in the Tierney claim, as appears from a letter from the solicitors for the plaintiff herein dated 12/10/01 to the secretary of the defendant herein. Upon a copy of the said letter, marked with the letter 'A', I have signed my name prior to the swearing hereof. In spite of this, the plaintiff herein appears to have taken no steps in the Tierney claim to join the defendant herein as third party. It appears to be a reasonable inference that the plaintiff herein has instituted these proceedings by reason of the fact that the plaintiff considered that to joint the plaintiff herein as third party in the Tierney claim would have been unsuccessful because of the delay on the part of the plaintiff herein in doing so.

5. I say and believe that the Tierney claim was settled on the 25/11/02. In the circumstances I say that the plaintiff in the within proceedings has been guilty of unreasonable and/or unexplained delay in and about its initiation of its claim for a contribution against the defendant herein."

11. At this stage it would be of assistance to refer to two provisions of the Civil Liability Act 1961. Section 27 provides as follows:-

"(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part -

(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

(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. . . .

12. Section 31 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."

13. The final point to note is that the proceedings between Mr. Tierney and the plaintiff herein were settled on the 25th November, 2002, that is to say, after the commencement of the instant proceedings. Notwithstanding the fact that these proceedings were issued and served before the Tierney proceedings were settled, it appears that the defendant herein had no hand, act or part in the settlement of the Tierney proceedings and there was no attempt to link or consolidate these proceedings with the Tierney proceedings.

#### **Defendants Submissions**

14. It was emphasised by counsel on behalf of the defendant that the plaintiff's claim in these proceedings was no more nor less than a claim for indemnity or contribution within the meaning of s. 27(1) of the Civil Liability Act 1961. The fact that there is also a claim for damages for breach of contract and negligence does not alter this. The only loss claimed is "the amount of any judgment and/or interest awarded to Thomas Tierney together with any order for costs in favour of Mr. Tierney together with costs incurred by the plaintiff in defending the said proceedings."

15. Counsel then proceeded to open the law in relation to s. 27(1) and the effect of delay in relation to an application to join someone as a third party to proceedings. Reference was made to a number of authorities in this regard such as *Neville v. Margan Limited* [1988] I.R. 734, *McElwaine v. Hughes* (Unreported, High Court, 30th April, 1997), *Gilmore v. Windle* [1967] I.R. 323.

16. Many of the cases referred to arose in the context of an application to set aside a third party notice.

17. Particular reliance was placed on the provisions of s. 31 of the Civil Liability Act 1961, which I have set out above. It is of note that the section is described in the margin of the Act as follows:-

"Limitation of actions for contribution."

18. The section, as is clear, provides a limitation period for the commencement of proceedings to recover a contribution.

19. Reference was also made to cases such as *The Board of Governors of St. Laurence's Hospital v. Staunton* [1990] 2 I.R. 31, in which it was held, *inter alia*,

"That although the defendants were prevented from proceeding by way of third-party notice, this did not bar them from instituting original proceedings for a claim for contribution against the consultant neurologist as concurrent wrongdoer, in which the adjudicating court in its discretion might or might not make an order for contribution in accordance with the final sentence of s. 27, subs. 1(b) of the Act of 1961."

20. In essence the thrust of the submissions made on behalf of the defendant was that the plaintiff not having issued and served a third party notice "as soon as is reasonably possible" within the meaning of s. 27(1)(b) was not entitled to issue and serve separate proceedings and it was contended that the combined effect of s. 27(1)(b) and s. 31 was such that these proceedings are, in effect, statute barred.

#### **Plaintiff's Submissions**

21. Counsel for the plaintiff simply contended that these proceedings are not statute barred within the meaning of s. 31 of the Act. It was pointed out that these proceedings were commenced prior to the settlement of the Tierney proceedings. Reliance was placed on the case of *Gilmore v. Windle* [1967] I.R. 323. In particular, reliance was placed on the fact that s. 27 of the 1961 Act, was not the sole basis for claims for indemnity and contribution. O'Keefe J. noted at pp. 334 - 335 of his judgment as follows:-

"While s. 27 of the Act of 1961 deals only with claims for contribution under the Act (i.e. by one of two concurrent wrongdoers against another), O. 16, r. 1, of the Rules of the Superior Courts, which came into force on the 1st January, 1963, permits of third-party proceedings in a much wider class of cases. On the facts alleged by the defendant in the

present case, she may possibly be able to establish a right to damages against the third party for breach of contract, and such damages might be such as to amount to an indemnity. Under the former Rules of Court, a claim for damages of that nature (even though amounting to an indemnity) was held not to be suitable to be brought by third-party proceedings . . . ; but paragraphs (b) and (c) of O. 16, r. 1, are now wide enough to cover a claim of this nature. The Court can, therefore, grant leave to issue and serve a third-party notice, either in respect of the claim for contribution under s. 27 of the Act of 1961, or in respect of the claim for damages for breach of contract, or in respect of both such claims."

22. Counsel added that there was no evidence before the court to indicate or show that these proceedings are statute barred.

### Decision

23. I am of the view that the application before me is misconceived notwithstanding the clever and imaginative argument put forward on behalf of the defendant. It is undoubtedly the case that the defendant herein maybe entitled to seek to have these proceedings dismissed on the basis of the court's discretion as was noted by Finlay C.J. in the case of *the Board of Governors of St. Laurence's Hospital v. Staunton*, referred to above. In the course of his judgment in that case at pp. 36 – 37 he stated:-

"As I have already indicated, however, I would add that it is clear that the defendants are entitled on my interpretation of s. 27, subs. 1 to institute proceedings for the bringing of a substantive claim for contribution against the person who is presently a proposed third party. If they do so, then, having regard to the terms of the sub-section which I have quoted, that claim becomes subject to the proviso that the defendants having failed to serve a third-party notice in the action, there is vested in the court a new and separate discretion by this subsection to refuse to make an order for contribution in their favour, even if it were satisfied that they could establish a right to contribution on the facts presented to it. It would seem clear that this discretion is part of the general policy of the provisions of the Act of 1961 seeking to have all claims determined at the same time and is also a potential protection to a person against whom a claim for contribution is made by unfair or prejudicial procedure. The issue as to whether or not this third party was, by a claim for contribution now made, seriously prejudiced was not fully argued before this Court on this appeal and I express no view as to what the decision of the High Court should be were the defendant now to institute an action for contribution."

24. In that case the third party appealed against his joinder as a party and was successful before the Supreme Court on the basis that the claim for contribution by way of third party notice had not been made as soon as was reasonably possible. It was nonetheless acknowledged by Finlay C.J. that the defendant could issue separate proceedings for contribution and that the discretion of the court to refuse to make an order for contribution could be considered in those proceedings.

25. It is clear that such an argument could be made in the context of these proceedings. However, I do not think that it would be appropriate to deal with such an argument on the application before me. The preliminary issue before me raised the question as to whether or not these proceedings are statute barred. Having regard to the notice of motion and the grounding affidavit, I think any consideration of the notice of motion and grounding affidavit would lead to the conclusion that what was sought to be put at issue was whether or not these proceedings fell within the limitation period fixed by s. 31. That is the issue that the plaintiff came to court to have determined. In my view an entirely different case was put forward on behalf of the defendant namely the case that was contemplated by Finlay C.J. in the *Board of Governors of St. Laurence's Hospital v. Staunton*. In other words, the defendant has sought to persuade this Court to dismiss these proceedings pursuant to the exercise of the court's discretion as provided for by the provisions of s. 27(1)(b) and in particular the last sentence thereof, namely:-

"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."

26. On an appropriate application, the issue of prejudice to a defendant by reason of non-joinder as a third party in the original proceedings or for any other relevant reason could be properly considered by the court.

27. Written submissions were exchanged between the parties prior to the hearing of this application. Clearly, the plaintiff would have been alerted to the change of approach by the defendant as between the notice of motion and grounding affidavit and the written submissions. However, those submissions were exchanged at the last possible opportunity prior to the hearing of the issue before me. It would be unfair to expect the plaintiff to deal with the issue raised by the defendant at the hearing. It would also be inappropriate to deal with the matter at the hearing of the preliminary issue when the preliminary issue before the court was the straightforward issue as to whether or not the action for contribution was statute barred or not. In the circumstances I must refuse the application for relief herein as it is manifestly clear that the action for contribution is clearly within the limitation period prescribed by s. 31 of the Civil Liability Act 1961.

28. In reaching that conclusion, I am not precluding the defendant from making an appropriate application to have these proceedings dismissed by reason of the manner in which the plaintiff has conducted the litigation and, in particular, by reason of its failure to join the defendant as a third party in the Tierney proceedings "as soon as is reasonably possible".