**THE COURT OF APPEAL**

Neutral Citation Number: [2015] IECA 249

**Ryan P.**
**Finlay Geoghegan J.**
**Peart J.**

**Appeal No. 2014/115**

**[Article 64 Transfer]**

**BETWEEN:**

**THOMAS GREENE AND KATHERINE GREENE**

**PLAINTIFFS**

**AND**

**TRIANGLE DEVELOPMENTS LIMITED AND GEORGE WADDING**

**DEFENDANTS/APPELLANTS**

**AND**

**FRANK FOX AND ASSOCIATES (A FIRM)**

**THIRD PARTY/RESPONDENT**

**JUDGMENT of Ms. Justice Finlay Geoghegan (Ex Tempore) delivered on the 30th day of July 2015.**

1. This is an appeal from the decision and judgment of Mr. Justice Clarke in the High Court which was delivered on 4th March 2008, in which he, on the application of the third party in these proceedings reached a conclusion that the third party notice which had been served should be struck out. The defendants then appealed against that judgment and order to the Supreme Court and, by direction of the Chief Justice, with the concurrence of the other members of the Supreme Court, on 29th October 2014 the appeal was transferred to this court.

2. The proceedings were brought by plaintiffs against the defendants arising out of the subsidence of a building. The detail of the proceedings are not important, but it is important to note that it was a relatively complex claim being brought against the defendants, who had been the builders or developers involved in the construction site and the proposed third party was a firm of professional engineers.

3. The factual background which is relevant to the consideration of the issues which we have had to consider is that an initial letter of claim was made against the defendants on 30th April, 2004 and the defendants then appear to have made contact with what have been described as their loss adjusters, Orr, and they in turn instructed both a firm of engineers and the solicitors now on record for the defendants in August 2004, on 5th and 10th August, 2004 I think respectively.

4. The plenary summons was issued on 22nd March, 2005 and then on 5th May, 2005 the statement of claim was delivered. Thereafter, particulars were raised and replied to. The next steps taken by the defendants in the proceedings were the delivery of a defence on 20th January, 2006. It should be noted that that was in response in part to a motion which had been brought returnable for 5th December in which they had been given a further four weeks to deliver a defence. On 6th February 2006, a notice of motion was issued seeking liberty to issue and serve a third party notice. An order was made giving them liberty to do so on 20th February, 2006 and on 8th March, 2006 a letter was issued by the solicitors for the defendants purporting to serve on the third party a third party notice. Now, that third party notice had not been issued, as is required by, and it is accepted, by Order 16 of the Rules of the Superior Courts out of the Central Office. However, it is not in dispute that the third party, I think on 9th March 2006, received the third party notice in the form in which liberty was given to issue and serve same.

5. Thereafter, a third party statement of claim was served on 19th April 2006. There were regrettable errors and oversights made by the solicitors for the defendants in relation to the actual issue out of the central office of the third party notice; they were forced to apply *ex parte* to the High Court to extend time, and they did so on 18th December, 2006 and were granted additional time. They then issued it out of the central office on 3rd January, 2007, but did not serve it within the 21 days. They served it on 29th March 2007. The third party subsequently brought a notice of motion on 16th July, 2007 and, by reason of difficulties, then in the High Court it was not heard and determined by Mr. Justice Clarke until 4th March, 2008.

6. Of all those dates, the most relevant to the issue on this appeal are the service of the statement of claim on 5th May, 2005 and the service of the third party notice on 9th March, 2006. It is the period between those two events, which is the relevant period which was considered in the High Court by Mr. Justice Clarke to be the most significant relevant period and having considered the relevant law, I take the view that this was a correct approach and I will explain why in one moment.

7. Counsel for the appellants, that is to say the defendants, focused, correctly in my view, on the reasoning of Mr. Justice Clarke as set out at paragraph 5.5 of his judgment. As I have indicated, it was Orr, the loss adjusters, who were considered to be the principals and were giving instructions to the solicitors in relation to the defence of the proceedings and the potential bringing in of a third party. In that paragraph, Mr. Justice Clarke stated in his judgment:

> "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."

8. When indicating the important relevant dates, I should have indicated, albeit it was not a step in the proceedings, that the solicitors for the defendants received the expert report referred to in that part of the judgment on 9th December 2005.

9. In this court, counsel for the appellants submitted that Mr. Justice Clarke was in error in his approach as indicated in the paragraph that I have just read out and that what he has looked at is whether an appropriate explanation was given to him for the delay in procuring the expert report, rather than assessing, as it is submitted he ought to have done, whether or not objectively the third party notice was served as soon as is reasonably possible.

10. I should add that obviously counsel for the third party made the opposite submission and submitted that, in accordance with the authorities, the approach of Mr. Justice Clarke was correct and that there was no evidence before him explaining why the report was not obtained earlier. It is not really in dispute that there was not an adequate explanation of the delay in procuring the report. There was, as Mr. Justice Clarke pointed out, no evidence directly from Orr, who were the people who were giving instructions and procuring the report, there was simply evidence of letters from the solicitors to Orr seeking the report.

11. The starting point of any consideration of the proper approach to determining an application such as was before the High Court to set aside a third party notice is section 27(1)(b) of the Civil Liability Act 1961. Insofar as relevant, it provides:

"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 –

(a) ...

(b) shall, if the person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible..."

12. It is to be noted that the Act itself does not require either such a person to obtain the leave of the High Court to do so, nor does it require the third party notice expressly to be issued out of the central office. However, Order 16 of the Rules of the Superior Courts does so require and it is through this regulatory framework that Section 27 has been implemented. Order 16, Rule 1 requires an application to the High Court for liberty to issue and does seem to require that the third party notice is issued out of the central office.

13. However, by reason of the fact that the section requires the notice - and as I have indicated, a notice, albeit not issued out of the office, was served on 9th March, 2006 and the third party was on notice subsequent to that time - it appears for the purposes of the section on the facts of this case that it is appropriate to look at the period up to and including 9th March, 2006.

14. In considering the proper approach to determining whether or not the third party notice, on the facts of this case, was served as soon as is reasonably possible, it appears that there are three judgments of the Supreme Court which must be considered in order to ascertain whether the approach contended for on behalf of the defendants or the third party is correct.

15. The starting point is the decision of the Supreme Court in *The Board of Governors of St. Laurence's Hospital v. Staunton* [1990] 2 I.R. 31 and the oft quoted passage from the then Chief Justice Finlay at page 36, where he said of Section 27(1)(b):

"I am quite satisfied upon the true construction of that subsection that the only service of a third party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third party notice claiming contribution against a person who is not already a party to the action, is a right to serve a third party notice as soon as is reasonably possible."

16. In accordance with that identified approach, the net question which has to be decided in a case such as the present, is whether the service of the third party notice in the instant case was effected as soon as was reasonably possible.

17. The next judgment of the Supreme Court to which I wish to refer is the judgment delivered by Mr. Justice Murphy in *Molloy v. Dublin Corporation* [2001] 4 I.R. 52 and that was the single judgment with whom the other members of the court agreed. There is a lengthy passage from Mr. Justice Murphy which sets out, if I may say so, so well the purpose of the section which reads as follows at p. 55:-

"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. It is for that reason that a defendant was given the right, with the approval of the court, to serve a third-party notice on a potential defendant so that any claim against him could be disposed of at the same time as that of the claim against the actual defendant. This procedure had attractions for all of the parties and was desirable in the public interest. Nevertheless, the legislature did not preclude an unsuccessful defendant in the original proceedings from instituting a substantive action against some other party who the actual defendant contended was liable to him either in tort or in contract. What the Act of 1961 did provide, was that where the actual defendant in the original proceedings failed to avail of the third-party procedure by serving the third-party notice 'as soon as is reasonably possible' and resorted to his original cause of action, the relief which he might have claimed therein was subject to the statutory discretion of the court to refuse to make an order for contribution in his favour."

18. I also wish to draw attention to, so as to explain my reasoning, what Murphy J. later said in relation to the onus in respect of an application for leave. At page 57 he stated:

> "The onus is on the person seeking leave to serve the third party notice to prove the application is brought within the statutory time limit."

19. He then referred to the view expressed by Mr. Justice Barron in the High Court in *McElwaine v. Hughes* (Unreported, High Court (Barron J.) 30th April, 1997) and quoted him as saying, at page 6:

> "Since the obligation is on the defendant to serve the notice within a reasonable time, it seems to me that the onus of proof of showing that the delay, if delay there is, was not unreasonable is on the defendant."

20. Then Mr. Justice Murphy, in Molloy, went on to deal with what he perceived to be the explanation the second named defendant had put forward to justify the delay in that particular case. And I think in all subsequent decisions there is no departure from the position that where there does appear to be a delay, the onus is on the defendant to explain and justify the delay.

21. However, it appears to me that the Supreme Court made a further important qualification to that approach in the case of *Connolly -v- Casey* [2000] 1 IR 345. This was an appeal from Mr. Justice Kelly in the High Court where he had set aside a third party notice, essentially because he was not satisfied by the explanations given to him of the delays which had taken place in that case.

22. The single judgment of the Supreme Court, with whom the other judges agreed, in Connolly v. Casey was delivered by Mrs. Justice Denham, as she then was, and she considered the explanations given by the trial judge and quoted from them at page 350 of the judgment.

> "Two explanations were given:-
>
> > (1) that the defendants had to await the delivery of replies to particulars before they could move to join the third party; and
> >
> > (2) the necessity to obtain a statement from Mr. Murphy prior to the bringing of an application to join the third party.
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> In relation to the first explanation the learned trial judge stated, having analysed the replies to particulars:-
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> > 'I find it difficult to ascertain the information contained in this reply which added to the defendants' state of knowledge so as to make possible what had previously not been possible, namely, the preparation of the application to join the third party. I do not see that these replies materially altered the defendants' state of knowledge from what it had been before in respect of any matter of relevance concerning the joinder of a third party. Accordingly, on this aspect of the matter I do not consider that the defendants have provided a satisfactory explanation for the delay in question.'"

23. Having quoted from the trial judge, Denham J. then said:

> "This was the wrong test. The test was whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendant's state of knowledge is not the test."

24. She went on to deal with the particular facts of that case. Later in the judgment, at page 351, she stated:

> "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. The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see *Gilmore v. Windle* [1967] IR 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."

Denham J. having considered the facts of that case, allowed the appeal.

25. In my view, following the approach of the Supreme Court in *Connolly -v- Casey*, it is incumbent on a trial judge, when faced with an application such as the present before the High Court, to look not only at the explanations which were given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third party notice was or was not served as soon as is reasonably possible.

26. I would respectfully say that it appears to me that the trial judge in this case fell into error by not making that objective assessment. It appears to me he was justified on the evidence before him in saying that there had not been a full or proper explanation, particularly by reason of the lack of any evidence from Orr as to why the expert's report was not obtained before 9th December, 2005, but in accordance with the Supreme Court judgment in *Connolly v. Casey*, that should not have been the end of the assessment. He was required to consider objectively whether, in the whole circumstances of the case and its general progress, the period of time up to the date of service of the third party notice and in the special circumstance case, 9th March, 2006 meant that it was served as soon as was reasonably possible.

27. Approaching the relevant dates and the entire circumstances in that case, I have formed the following views. Firstly, this was an action where the third party claim was a claim in professional negligence. And it is accepted by both parties, in accordance with indeed what was stated, *inter alia*, by the Supreme Court in Connolly -v- Casey, that it was appropriate that an expert's report be obtained before any third party notice was served. Therefore, following the approach of Mrs. Justice Denham, objectively it was reasonable to wait until the expert's report was obtained.

28. There was undoubtedly a gap and some delay between the service of the statement of claim, which is the latest date by which certainly the expert's report should have been commenced to be procured on behalf of the defendants and the date by which it was obtained, namely 9th December. However, looking at the overall circumstances of this case, I have formed the view that the court can be satisfied that the periods were such that objectively the third party notice was served as soon as was reasonably possible.

29. The principal reasons for which I have formed that view are the following. Firstly, whilst the Rules of Court require the application to issue the third party notice to be brought within 28 days of the date for service of the defence, which would have been in this

case the end of June of 2005, as has been pointed out on more than one occasion, those are not dates with which, in actions such as this, the parties will normally or even be expected to comply.

30. In this instance, the defence was delivered on 20th January, 2006 and, albeit that it was in response to a motion, it was in response to a first defence motion which was really a mechanism for ensuring that the defence was delivered, and the motion for liberty to issue was served on 6th February, therefore something a little more than two weeks after the defence itself was filed. It is also, I think, appropriate that, in looking at the period of time to take into account the regulatory requirement, that you must issue and serve a notice of application for liberty to issue and that the standard order giving liberty to issue and serve a third party notice normally gives another 21 days. The requirement for that application to be made–and the need to allow reasonable time to prepare the papers in my view, incorporates probably another eight to ten weeks into the period of time as a matter of reasonable practice of solicitors.

31. In all those circumstances, it appears to me that in this case the defendants did discharge an onus of objectively satisfying the court that the third party notice was served as soon as was reasonably practical. Accordingly, I would allow the appeal and set aside the order of the High Court.

**Mr. Justice Peart**: I also agree that the appeal should be allowed and I would simply add that, in my view, to decide otherwise would be to take an overly draconian and harsh approach to both the delay and the reasons for it and that to dismiss, or to strike out the third party notice would be a disproportionate thing to do in all the circumstances.