Neutral Citation [2016] IEHC 625

THE HIGH COURT

[2013 No. 12700P]

BETWEEN

ISTVAN ACS

PLAINTIFF

– AND –

KCT FREIGHT LIMITED

DEFENDANT

– AND –

INTERLINK IRELAND LIMITED

THIRD PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Overview.

1. Mr Acs is a truck-driver who alleges that on 12th November, 2011, he was caused, while acting in the course of his employment with KCT Freight Limited, to fall from his trailer to the ground. On 14th December, 2015, by order of the court, Interlink Ireland Limited was joined to the proceedings as a third party on the grounds that it was allegedly responsible for packing the trailer that was being transported by Mr Acs. Interlink now seeks to have the third-party proceedings set aside on the basis that KCT failed to issue a third-party notice within the time prescribed by the Rules of the Superior Courts or "*as soon as is reasonably possible*" within the meaning of s.27(1) of the Civil Liability Act 1961.

II. Order 16, rule 1(3).

2. Order 16, rule 1(3) of the Rules of the Superior Courts 1986, as amended, provides that application for leave to issue a third-party notice shall, "*unless otherwise ordered by the court, be made within 28 days from the time limited for delivering the defence*". In the present case, the period for the delivery of a defence expired on 17th December, 2014; the notice of motion seeking to join issued on 24th November, 2015. If one looks to the majority judgment of Ryan P. in the recent decision of the Court of Appeal in *Kenny v. Howard* [2016] IECA 243, para.12, these are two critical dates to which the court must have regard in the within application.

3. Interlink accepts that a failure strictly to adhere to the 28-day time limit referred to in O.16, r.1(3) will not, in and of itself, ordinarily provide a basis for the striking-out of third party proceedings. As Kelly J. noted in *Connolly v. Casey* [1998] IEHC 90, "*very exceptional circumstances"* would be required before a court would accede to an application such as that now presenting "*if the only complaint related to a failure to observe strict compliance with the provisions of this rule*". (This decision was reversed on appeal but the foregoing appears to remain a good statement of applicable law). However, Interlink considers that the degree of non-compliance in this instance is significant in itself. It also seeks to pray in aid the exceedance of the standard 28-day time limit when deciding whether KCT has served its third-party notice "*as soon as is reasonably possible*" within the meaning of s.27(1) of the Civil Liability Act 1961. So far as relevant to the within application, this last-mentioned provision states 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…*
>
> *(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 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."*[Emphasis added].

III. 17 December, 2014 – 24 November, 2015.

4. In the present case, as mentioned, the period for the delivery of a defence expired on 17th December, 2014, and the notice of motion seeking to join the third party issued on 24th November, 2015. What was happening between these two dates? A summary chronology follows:

> 17.12.14 Period for delivery of defence expires.
>
> 26.01.15 KCT seeks further particulars.
>
> 18.02.15 KCT seeks further particulars.
>
> 12.03.15 KCT issues a motion to compel replies.
>
> 23.04.15 Mr Acs delivers further replies.
>
> 18.05.15 KCT writes to Interlink alleging third-party liability.
>
> 20.07.15 Interlink replies to KCT denying liability.
>
> 24.11.15 KCT issues motion to join Interlink.

14.12.15 Motion heard and leave granted.

5. It is helpful to add the following detail to the foregoing chronology:

- from 17th December, 2014, through to 23rd April, 2015, it is clear that KCT's solicitors were assiduously seeking further particulars from Mr Acs. The summons that had issued in the proceedings was vague and the solicitors needed to get the replies to particulars that were eventually given in order to gauge properly their client's legal position. On 23rd April, 2015, these replies were finally forthcoming, though only after a motion to compel replies was served.

- on 18th May, 2015, just over three weeks after the further replies were received, KCT's solicitors wrote the required warning letter to Interlink. Over two months later, on 20th July, 2015, Interlink wrote back and denied liability. This was in the last few days of the Trinity Term and it would have been possible to issue the motion to join Interlink later in the Summer Vacation. In fact, the motion issued the following November during the Michaelmas Term. It might have issued sooner in the Michaelmas Term but for the fact that KCT is a two-person (husband and wife) company and it appears that their attentions were briefly focused at this time on a hospitalised child.

IV. Some Applicable Law and Principle.

6. There is a rich abundance of case-law concerning applications such as that now presenting. So rich that this Court sought, in its dissenting judgment in *Kenny*, to reduce the abundance of case-law in this area to a series of key principles. The difference between the majority and minority judgments in *Kenny* was on the application of principle, not on the principles applicable, save perhaps in one respect (considered below) and it is to those principles that the court turns now in its consideration of applicable law. The court quotes para. 50 of its judgment in *Kenny* below and, in the square-bracketed text that follows each principle, seeks to apply the relevant principles, as derived from case-law, to the within application:

"50. Is it possible to arrive at a synthesis of the key principles identified in the course of the above-considered case-law as being of relevance when it is sought to set aside third-party proceedings by reference to s.27(1)(b) of the Act of 1961? The following key principles can perhaps be identified:

I: General Approach of Courts.

[1] The general approach of the courts has been to focus on the question of whether it was possible to join a third party earlier. Even lengthy delays have been excused where they have been explained and the third party has been unable to establish prejudice.

[Application of Principle to Within Proceedings. A motion to join could have issued in the Summer Vacation. Instead it issued in November. Some allowance has to be made for the slow-down in commerce that occurs as opposing practitioners take their respective summer holidays. But for the entire Summer Vacation to pass and for nothing to be done must be fatal to a claim that the defendant acted "*as soon as is reasonably possible*" within the meaning of s.27(1) of the Act of 1961. Not a great deal of consequence flows from the delay, it is true. The motion eventually issued in November and was heard in December whereas otherwise it would have been heard in October, but the statutory standard is "*as soon as is reasonably possible" and the defendant could reasonably have moved sooner.]*

[2] The net issue in s.27(1)(b) applications is whether, in all the circumstances, it is reasonable for a defendant to wait for the period in question before applying to join the third party. Any such permissible delay will generally be measured in weeks and months, not years.

[Application of Principle to Within Proceedings. See response to [1]].

II: Purpose of Section 27(1)(b).

[3] The clear purpose of s.27(1)(b) is to ensure that a multiplicity of actions is avoided and that, where possible, all issues involving plaintiffs, defendants and third parties are heard together or in a sequenced trial.

[Application of Principle to Within Proceedings. Notwithstanding that this is a purpose of the Act of 1961, the general thrust or purpose of the Act does not suffice to override the clear wording of a statutory provision unless the resultant reading was to be an absurdity. Statute, in the form of s.27 of the Act of 1961, clearly requires that the defendant act "*as soon as is reasonably possible*" and this it did not do.]

[4] A multiplicity of actions is detrimental to the administration of justice, to the third party and the issue of costs. To enable a third party to participate is to maximise his rights and see that he is not deprived of the benefit of participating in the main action.

[Application of Principle to Within Proceedings. See response to [3]].

[5] Another purpose of requiring a notice to be served "as soon as is reasonably possible" is to put the contributor in as good a position as is possible in relation to knowledge of the claim and opportunity of investigating it.

[Application of Principle to Within Proceedings. See response to [3]].

[6] In s.27(1)(b), the Oireachtas did not seek to fix a set time period, but rather imported a concept of relative urgency designed to compel the defendant to seek to issue a third party notice with all deliberate speed having regard to all relevant circumstances.

[Application of Principle to Within Proceedings. Noted.]

III: Totality of Circumstances Relevant.

[7] 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.

[Application of Principle to Within Proceedings. Noted, though consistent with the majority judgment in *Kenny*, the court has focused its attentions on the period between when the period for delivery of the defence expired (17th December, 2014) and the issuance of the notice of motion to join on 24th November, 2015)].

[8] While a court may take all the circumstances into account, there needs to be evidence as to the reasons for, and excuses for, a delay.

[Application of Principle to Within Proceedings. See response to [1]].

[9] What might appear a long period when stated in the abstract may, when all the circumstances are taken into account, attract the protection of s.27(1)(b).

[Application of Principle to Within Proceedings. See response to [1]].

[10] Because each case must be approached with reference to its own facts, precedents are of limited value and must be looked at for guidance rather than in expectation of finding an answer to the case before the court.

[Application of Principle to Within Proceedings. Noted. See response to [1]].

[11] Particular allowances may have to be made, for example, for those disadvantaged members of the community who by reason of indigence, lack of education and other similar factors may not have been in a position in the past to assert or protect their rights. (Unfamiliarity with the legal system would seem to be another factor of relevance).

[Application of Principle to Within Proceedings. Not relevant here.]

IV: Meaning of 'reasonably possible'.

[12] The use of the word "possible" in s.27(1)(b), rather than the word 'practicable', may suggest a brief and inflexible time limit. In truth, however, the statute is not concerned with physical possibilities but legal and perhaps commercial judgments.

[Application of Principle to Within Proceedings. Here, legal judgment arose in the fact that KCT's solicitors elected assiduously to seek further particulars from Mr Acs, rather than rush to issue a notice to join any conceivable third party. The summons that had issued in the proceedings was vague and the solicitors needed to get the replies to particulars that were eventually given in order to gauge properly their client's legal position. On 23rd April, 2015, these replies were finally forthcoming, though only after a motion to compel replies was served. The court does not see any avoidable delay in the foregoing; a party is not required to race to join every conceivable third-party defendant at the earliest opportunity, and some time must be allowed to a party to gauge whom (if anyone) it is proper so to join. Just over three weeks after receipt of the replies, so on 18th May, 2015, KCT's solicitors wrote the required warning letter to Interlink. Notably, it took Interlink two months plus before its solicitors wrote back on 20th July, 2015, denying liability, a delay which apparently arose because Interlink's solicitors (not unlike their counterparts when pursuing Mr Acs for particulars) took due care to assess their client's position before rushing to the next step. But then came the delay throughout the Summer Vacation, as to which see the court's response to [1]].

[13] 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 this context that the word "possible" must be understood.

[Application of Principle to Within Proceedings. See response to [12]].

[14] The qualification of the word "possible" by the word "reasonably" in s.27(1)(b) gives a further measure of flexibility, indicating that circumstances may exist which justify some delay in the bringing of the proceedings.

[Application of Principle to Within Proceedings. See response to [1]].

[15] The reasonableness at issue in s.27(1)(b) is that of the defendant or concurrent wrongdoer.

[Application of Principle to Within Proceedings. Noted.]

V: Subjective and Objective Test Arising.

[16] It is incumbent on a trial judge, when faced with a set-aside application to look not only at the explanations 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 served as soon as is reasonably possible.

[Application of Principle to Within Proceedings. This the court has done.]

VI: Failings of Professional Advisors.

[It has not been sought to place any blame on the failings of professional advisors in this case.]

….VII: Delay When Alleging Professional Negligence.

[Professional negligence is not alleged in this case.]

….VIII: Prejudice.

[25] Prejudice to a relevant party has to be a relevant factor in deciding whether or not a defendant has proceeded "as soon as is reasonably possible".

[Application of Principle to Within Proceedings. Can it be said that a party, though s/he has delayed, has failed to act "*as soon as is reasonably possible*" in circumstances where no prejudice has been caused to a proposed third-party? This Court must admit to some reluctance so to say. This is because (1) in-built into the notion of 'reasonable possibility' seems to be an acknowledgement that there may be some level of delay before one crosses from reasonableness into unreasonableness, and (2) it seems an entirely valid reading of the phrase "*as soon as is reasonably possible*" to construe the notion of reasonableness by reference not just to the behaviour of the party seeking the joinder but also by reference to whether there has been any prejudice occasioned to the party whom it is sought to join. That said, the court must acknowledge that there is authority that inclines against such a reading. See, for example, *SFL Engineering Ltd v. Smyth Cladding Systems Limited* [1997] IEHC 81, and *Murnaghan v. Markland Holdings Ltd* [2007] IEHC 255. In *Kenn*y, Ryan P., at para.25, takes a non-committal view, stating that he "*find*[s] *it difficult to understand how a defendant who is in default of the clear requirement of the subsection can escape the consequences by proposing that the third party has not suffered any specific prejudice…".* However, Ryan P.'s observation in this regard is clearly obiter as he immediately acknowledges that in the case before him the issue of prejudice to the proposed third-party was irrelevant. It may be that the answer to the quandary to which Ryan P. refers lies in how matters are approached: he clearly sees prejudice as a 'get out of jail' card for someone who is otherwise in breach of s.27; but is it not more correct to see the absence of prejudice as an ingredient of reasonableness and thus an aspect of matters that prevents one from ever crossing the line into a breach of s.27? Either way, not a great deal may hang on the point in this case. This is because the mere fact of joinder appears to this Court to be likely to suffice as a species of prejudice: after all, if a party is not joined it may never be pursued separately for a contribution, and if it is not joined as anticipated by s.27(1) an order as to contribution can be refused. In the within application, it is prejudice in this direction that the court would see to present if the third-party proceedings were not now to be set aside.]

[26] The judicial discretion conferred by s.27(1)(b) must be exercised in accordance with fundamental constitutional principles. This not only means that the discretion must be exercised in a fashion which respects basic fairness of procedures but the court must be conscious of its obligation to uphold and apply the constitutional norms envisaged by Article 34.1 of the Constitution (as to the administration of justice), and Article 40.3.1º (regarding the protection of personal rights).

[Application of Principle to Within Proceedings. The court has so approached the within application.]

IX: Onus of proof.

[27] The onus is on the person seeking leave to serve a third-party notice to prove an application for leave has been brought within the statutory time limit.

[Application of Principle to Within Proceedings.Noted.]

V. Conclusion

7. Having regard to the above-mentioned principles, and to all of the various factors considered in this judgment, the court will accede to the application toset aside the third-party proceedings.