

THE HIGH COURT

2017 No. 9228 P

Between:

JOHN MCAULIFFE

Plaintiff

– and –

GREENSTAR HOLDINGS LIMITED (IN RECEIVERSHIP) TRADING AS GREENSTAR, STARRUS ECO HOLDINGS LIMITED TRADING AS GREENSTAR, WALKER VEHICLE RENTALS LIMITED AND PAULIS SAMOULIS

Defendants

– and –

IRISH RAIL DAC

Third Party

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2019.

1. Irish Rail seeks an order setting aside a third party notice served on it in these proceedings on the basis that there has been failure to comply with O.16, r.1(3) of the Rules of the Superior Courts and s.27(1)(b) of the Civil Liability Act 1961. It is useful to begin with a summary chronology:

22.04.2016 Date of Plaintiff's alleged accident.

24.08.2017 PIAB authorisation issues.

13.10.2017 Plaintiff's proceedings issue (not clear when served).

30.11.2017 Appearances entered for 1st, 2nd and 4th defendants.

28.11.2017 Notice for Particulars raised.

12.12.2017 Replies to Particulars served.

04.01.2018 Engineering inspection (indicated potential liability of third party).

13.02.2018 Expert Report delivered (presumably likewise indicated)

09.03.2018 Appearance entered on behalf of 3rd defendant.

18.06.2018 Defendants' full defence delivered (names Irish Rail as potential tortfeasor).

21.08.2018 Motion to join third party issues.

19.11.2018 Order allowing joinder issues.

29.11.2018 Third Party Notice served.

2. Assuming that the proceedings were served on 29.11.2017 (a generous assumption as it would mean the appearances were entered the very next day), the time for serving the defence would have ended eight weeks later on 24.01.2018. Under O.16, r.1(3) RSC "*Application for leave to issue the third-party notice shall, unless otherwise ordered by the Court, be made within twenty-eight days from the time limited for delivering the defence...*", i.e. not from the actual date of delivery but the time limited for same. So application should, ideally, have been made 28 days after 24.01.2018, i.e. by 21.02.2018. In reality, circumstances can present in which strict compliance with this timeline just is not possible; however, the timeline has some meaning, yielding a starting point from which to gauge any delay that ensues.

3. Under s.27 of the Civil Liability Act 1961, a third-party notice must be served "*as soon as is reasonably possible*". The court accepts the defendants' contention that delays in getting to the point of service that arise as a result of the timing for the hearing of a motion to join and the issuance of such order as ensues cannot be attributed to the defendants; that would be nonsensical. However, they can be faulted for such delay as they themselves manifest in getting to the point of service. Allowing the defendants to the point when they received their expert report and giving them just over a week to digest its contents, so to 21.02.2018 (which just happens to coincide with the date by which application should have been made under O.16, r.1(3) RSC) there is a full six-month delay before the motion to join the third party issues on 21.08.2018.

4. Unfortunately for the defendants, it follows from the majority decision in *Kenny v. Howard* [2016] IECA 243 that the issue of prejudice is irrelevant in determining whether or not the conduct of the defendant has been unreasonable. One looks to the delay and assesses whether it is necessary and justifiable, an analysis that in practice will typically reduce to whether it was possible to seek to issue the third party motion sooner than it issued. No matter how liberal an interpretation one gives to the phrase "*as soon as is reasonably possible*", here it was eminently possible to issue the motion sooner than the six months it took it to issue (with the defendants having no responsibility for the three months it took before the motion was heard, and the ten days it took to get from receiving the order to serving it being unobjectionable), i.e. the delay from 21.02.2018 to 21.08.2018 leads inexorably to the conclusion that the third party motion did not issue "*as soon as is reasonably possible*". (And that is to ignore the fact that the affidavit evidence indicates that the engineering inspection itself suggested to the defendants that the third party was liable; that inspection took place on 04.01.2018, some 7½ months before the motion to join issued). It is not as if the accident that is at issue in these proceedings (where the plaintiff was hit on his head by a bin that was being brought down on a lorry) was of such complexity as to necessitate such a delay.

5. That the decision to seek to join Irish Rail as a third party may have followed on the delivery of the Defence is of no avail to the defendants; their own affidavit evidence indicates that their enquiries in respect of the alleged liability of Irish Rail were completed in January/February 2018; it is at that point that the "*as soon as is reasonably possible*" clock started ticking, with the court again being as generous as it can be in taking 21.02.2018 to be the date when, to borrow from the judgment of Herbert J. in *Basinview Management Ltd v. Borg Developments and ors* [2012] IEHC 380, 22, "*the defendant, exercising reasonable care and prudence, [was] first in a position to know that it was possible to pursue a claim for contribution against the proposed third party*".

6. Having regard to all of the foregoing, the court will grant the set-aside order sought.

7. In passing, reference was made by Irish Rail in argument to the fact that a five-month delay yielded a set-aside order in *McGeown v. Topaz Energy Ltd & anor* [2019] IEHC 288, it stood to reason that such an order would issue where, as here, there has been an (at least) six month delay. This is not how the within and like applications proceed. As Ryan P. indicates in *Kenny*, para.26, "*A delay in one case may be reasonable whereas the same time lapse in another may be fatal to the defendant's wish to join the alleged contributor*", i.e. these are fact-specific applications, the decisions in any one of which will depend on the particular circumstances that present in such application, though some degree of speed is invariably required.