Neutral Citation [2015] IEHC 685

THE HIGH COURT

[2011 No. 9760P]

BETWEEN

MARGARET LYONS

PLAINTIFF

AND

JOHN DELANEY, ANTHONY LOCKE, PATRICK THORPE AND DELANEY, LOCKE AND THORPE (A FIRM)

DEFENDANTS/RESPONDENTS

AND

(BY ORDER)

CATHAL O'SULLIVAN AND PARAIC O'KENNEDY PRACTICING UNDER THE STYLE AND TITLE O'SULLIVAN AND ASSOCIATES

THIRD PARTIES

JUDGMENT of Mr. Justice Binchy delivered on the 3rd day of November, 2015

1. This is an application by way of notice of motion brought on behalf of the second named third party herein, Paraic O'Kennedy ("the applicant"), for an order pursuant to Order 16, rule 8(3) of the Rules of the Superior Courts or, in the alternative, pursuant to the inherent jurisdiction of the Court setting aside the third party notice served herein on the applicant. The applicant makes this application on the grounds:

> 1. That the plaintiff's claim is statute barred and/or;
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> 2. That the second named third party was not a partner in the firm of O'Sullivan and Associates, Solicitors ("OSA") at the time the plaintiffs' cause of action accrued and/or;
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> 3. That the defendants ("the respondents") did not act as soon as reasonably possible in bringing forward an application to join the third parties as third parties to the proceedings. The applicant claims to have been prejudiced by reason of an alleged delay on the part of the respondents in bringing forward the application to join him as a third party, in particular by reason of the fact that the insurers of the firm O'Sullivan and Associates have declined to indemnify the third parties in relation to the claim on grounds of delay in notification of the same.

Background

2. The plaintiff issued proceedings against the defendants claiming damages for breach of contract and negligence, by plenary summons dated the 28th October, 2011. An amended plenary summons issued on 15th November, 2011. While the Court was not informed as to the date of service of the summons, an appearance was entered on behalf of the respondents on 8th November, 2012 by Messrs. Dillon Eustace, solicitors. The statement of claim was delivered by the solicitors acting on behalf of the plaintiff on 1st February, 2013.

3. The substance of the claim being made by the plaintiff against the defendants is that the defendants, who had been the plaintiff's financial and taxation advisers as far back as the 1980s, invited the plaintiff on 25th August, 2003 to make an investment in a consortium known as the Ritz Hotel Carlow Consortium, which was undertaking a development known as the Ritz Centre in Carlow. The plaintiff claims that while she was advised that the investment might produce a profit, she was assured that in any event she would obtain the return of her original investment and that the principal focus of the investment was to secure tax free allowances available to investors in the development. On the strength of this advice, the plaintiff claims that, she made an investment in the amount of €108,500.00 on 2nd September, 2003 and subsequently obtained the benefits of the capital allowances.

4. The plaintiff claims that on the 26th August, 2003 the first named defendant entered into a transaction on the plaintiff's behalf, but without her authority, whereby he executed in the name of the plaintiff a commercial mortgage offer facility with Irish Nationwide Building Society ("INBS"), a mortgage deed over the property upon which the Ritz Hotel was constructed and a co-ownership agreement in respect of the same property. The plaintiff claims that she knew nothing of these arrangements and, most importantly, was completely unaware that there was any borrowing associated with the development, less still any borrowing for which she would have any liability. The plaintiff further claims that in subsequent years, and sometime between 2006 and 2008, she executed at the request of the defendants, a power of attorney in relation to the transaction, without having been advised by the defendants as to the true nature of the transaction or the effect of the power of attorney.

5. In short, it may be said that the plaintiff's claim as against the defendants is that they failed to advise her that they were entering into a transaction on her behalf which involved borrowing of which she was unaware and which she did not authorise. As a result, the plaintiff, together with others in the consortium, is now facing a claim brought by NAMA (as successor to Irish Nationwide Building Society) in an amount in excess of €4 million.

6. Although the Court was not fully appraised of the difficulties encountered in repayment of the loan to INBS, it appears that that society must have been making demands of consortium members for repayment of the loan, and that it did so on the basis that it had full recourse for repayment of the loan against all consortium members, and that its recourse was not limited to the development known as the Ritz Centre. On 22nd January, 2010, the third named defendant, writing in his capacity as a member of the consortium and on behalf of his wife Sandra Thorpe, (also a consortium member), sent a letter to Mr. Cathal O'Sullivan of OSA claiming that it

was always his understanding that the transaction was a non-recourse transaction and that INBS could have no recourse to consortium members. The letter also expressed a number of concerns about other potential headings of loss, and without saying so in exact terms, the thrust of the letter was that in the event that Mr. and Mrs. Thorpe should suffer any losses as a result of the failure by OSA to advise properly in relation to the transaction, or to implement the same properly, it was his intention to recoup any such losses through the professional indemnity insurances of OSA.

7. On 14th November, 2011, Eversheds Solicitors, acting on behalf of the first, second and fourth named defendants, wrote to OSA informing them of the intention of their clients' to recover any losses incurred by their clients arising out of any claims that might be made against the first, second and fourth defendant, by INBS, other members of the consortium and other parties by reason, inter alia, of the loan advanced by INBS to the consortium being found to be fully repayable without limitation of recourse. The letter concluded by advising the firm to notify its professional indemnity insurers. The applicant claims by this time he was no longer a partner in the firm of OSA.

The Third Party Proceedings

8. By notice of motion dated 21st November, 2013, the defendants sought an order pursuant to Order 16, rule 1 of the Rules of the Superior Court, giving the defendants leave to issue and serve a third party notice on Cathal O'Sullivan and Paraic O'Kennedy practising under the style and title of OSA. While Order 16, rule 1(3) requires such an application to be made within twenty-eight days from the time limited for delivering a defence (in this case that period would have expired on 29th March, 2013), the Courts have acknowledged that only a tiny percentage of such applications are made within the prescribed time. Accordingly, in the words of Kelly J. in *Connolly v. Casey* [1998] IEHC 90, it would "require very exceptional circumstances for the Court to accede to an application of this sort [to set aside a third party notice] if the only complaint related to a failure to observe strict compliance with the provisions of this rule". Apart from the Rules of the Superior Courts, section 27(b) of the Civil Liability Act 1961 requires third party proceedings to be brought as soon as reasonably possible, in matters involving concurrent wrongdoers.

9. Since both the defendants and Mr. O'Kennedy in support of their own positions have each set out a chronology of events it is appropriate at this juncture to set out a table that reflects the position of both parties.

22nd January, 2010	Letter from Mr. Patrick Thorpe to Mr. Cathal O'Sullivan advising of his intention to hold O'Sullivan and Associates responsible for losses.
10th June, 2011	Letter from second defendant, John Locke, to Eversheds (then solicitors for first, second and fourth defendants) expressing an intention to pursue O'Sullivan and Associates for any damages that may be sustained by the fourth defendant as a result of claims from investors.
28th October, 2011	Plenary summons issued.
14th November, 2011	Letter from Eversheds to O'Sullivan and Associates on behalf of first, second and fourth defendants advising of their intention to recover any losses from O'Sullivan and Associates.
15th November, 2011	Amended plenary summons issued.
17th October, 2012	Notice of change of solicitors issued on behalf of the defendants.
8th November, 2012	Appearance entered on behalf of the defendants.
1st February, 2013	Statement of claim delivered.
March, 2013	Meeting between defendants and their solicitor.
3rd July, 2013	Defendants' files received by their solicitors, Dillion Eustace.
8th July, 2013	Defendants send a letter seeking further and better particulars to solicitors for plaintiff.
21st August, 2013	Defendants' solicitors send a reminder Re: replies to letter of particulars.
2nd September, 2013	Defendants' solicitors receive specialist legal advice as to negligence of third parties.
30th September, 2013	Defendants' solicitors send further reminder letter Re: replies to particulars.
14th November, 2013	Defendants' solicitors issue a motion compelling replies to letter for particulars.
21st November, 2013	Defendants' solicitors issue third party motion.
12th December, 2013	Plaintiff's solicitors deliver replies to notice of particulars of defendants' solicitors.
13th January, 2014	Order of Mr. Justice White giving liberty to join third parties.
3rd February, 2014	Third party notice served by registered post on O'Sullivan and Associates (but not on second named third party).
15th May, 2014	Defendants' solicitors telephone OSA regarding failure to enter an appearance.
3rd July, 2014	Defendants' solicitors issue motion against third party in default of appearance.
18th July, 2014	Defendants' solicitors make ex parte application seeking an order to extend time within which to issue and serve third party notice.
21st July, 2014	Hedigan J. extends time to serve third party notice within fourteen days from date of perfection of order so extending
23rd July, 2014	Order of Hedigan J. perfected.

24th July, 2014	First named defendant served personally with third party order and notice and informs defendants' solicitors that second named third party is no longer a partner.
6th August, 2014	Date of expiration of extended period of time within which to serve third party notice.
8th August, 2014	Second named third party served personally with third party notice.
13th August, 2014	Second named third party served personally with additional documents.
14th August, 2014	OSA indicate to solicitors for defendants that the matter has been passed to their insurers.
13th October, 2014	Second named third party enters an unconditional appearance.
October, 2014	Defendants' solicitors call on first named third party on two occasions to enter an appearance.
7th November, 2014	Defendants' solicitors issue motion for judgment in default of appearance against first named third party.
21st November, 2014	First named third party enters an appearance.
12th December, 2014	Second named third party calls on solicitors of defendants to deliver affidavit grounding application to join third parties.
8th January, 2015	Affidavit grounding application to join third parties delivered to solicitors for second named third party.
12th January, 2015	Date on which second named third party claimed to have received affidavit ground application to join third party
20th February, 2015	Issue of motion by second named third party to set aside third party notice against him.

Submissions of Counsel

Submissions of Counsel for the Applicant

10. The first ground upon which the applicant relies is that he was not a partner in OSA at any material time. The applicant states that he was a partner in the firm of OSA between 5th April, 2004 and 1st September, 2010 and submits evidence that this is so by way of letter from the Regulation Department of the Law Society of Ireland. Counsel for the applicant submits that since the facility letter pursuant to which funds were advanced to the consortium (of which the plaintiff was a member), was signed on behalf of the plaintiff by the first named defendant, Mr. Delaney, on 26th August, 2003, and since the plaintiff made her investment in the consortium in the sum of €108,300.00 on 2nd September, 2003, and further since the drawdown of the facility took place in or about September or October of 2003, that any liability which the plaintiff incurred as a result of the transaction had crystallised as of October, 2003 at latest and at which time the second named third party was not a partner in OSA. On this basis, it is argued that since the applicant was not a partner as of that date claims he cannot have any liability to the defendants in respect of any losses claimed by the plaintiff.

11. The second argument advanced on behalf of the applicant is that the plaintiff's claim is statute barred. This arises from the same facts that the applicant relies upon to support the proposition that he was not a partner at any material time *i.e.* that the gravamen of the plaintiff's complaint is concerned with events that concluded no later than October, 2003. Counsel for the applicant relies upon the decision of the Supreme Court in the case of *Gallagher v. ACC Bank Plc.* [2012] 2 I.R. 620 in which O'Donnell J. stated:

> "It is for me a striking feature of this case that the accepted starting point for the analysis is that the plaintiff's claim in contract is statute-barred because the alleged breach (which is also the foundation of the claim in tort) occurred more than six years prior to the commencement of this claim. Not only is there a similarity between the claim in contract and tort made here, they are in fact identical".

12. Later in the same judgment O'Donnell J. stated:

> "The entire thrust of the plaintiff's claim is that the investment ought never to have been made. The plaintiff claims to have suffered a loss in the shape of a liability to interest payments which accrued immediately and was immediately quantifiable. I have little doubt that proceedings could have been commenced earlier, and if so, that damage could have been assessed both in contract and tort. If such a claim had been initiated and succeeded, it would I think have been relatively easy to assess damages which in my view would have posed less difficulty than the assessment of damages for future pain and suffering, and future loss of earnings in a personal injuries action. Looked at in one way the loss itself was certain and quantifiable (it was the liability to interest payments during the term) and the only uncertainty was as to the credit which might be allowed to the defendant in respect of the possible gain in value of the investment at the end of the term. That is the type of uncertainty which would not pose significant difficulty for either the parties or the court to devise an appropriate solution. On the facts of this case, therefore, I conclude that the plaintiff's pleaded cause of action in tort accrued when the investment was made, and accordingly is barred by the provisions of the Statute of Limitations 1957."

13. Counsel for the applicant also relied on the decision of the Supreme Court in the case of *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519 in which the Court held that it would not permit a person to be made a defendant in an existing action, at a time when that person could rely on the statute of limitations to bar the plaintiff from bringing a fresh action against him.

14. The third ground relied upon by the applicant is that the third party notice should be set aside (as against the applicant) on grounds that the defendant delayed in bringing forward the application to join the third parties to the proceedings. Order 16, rule 1(3) of the Rules of the Superior Courts requires such an application to be brought forward within twenty-eight days from the time limited for delivering the defence, which in this case would be 8 weeks from 1st February, 2013 *i.e.* 29th March, 2013. The notice of motion to join third parties did not issue until 21st November, 2013. Moreover, the applicant submits that in this particular case it is the date

of service of the third party notice that should be considered in assessing the duration of the alleged delay, and not the earlier date on which the application (to join third parties) was made to Court. In this regard the applicant relies upon the decisions of *Dillon v. MacGabhann* (unreported, High court, 24 July, 1995) the decision of Kelly J. in the case of *Connolly v. Casey* [1998] IEHC 90 and the decision of Clarke J. in the case of *Greene v. Triangle Developments Ltd.* [2008] IEHC 52.

15. Counsel for the applicant acknowledges that applications to set aside a third party notice are rarely moved within the period required by Order 16, rule 1(3), but submits that this provides a benchmark deadline to be taken into account in assessing whether or not there has been a failure to serve a third party notice "as soon as is reasonably possible", as required by section 27 of the Civil Liability Act, 1961. In this regard, it is submitted on behalf of the applicant that the totality of the period during which the defendants knew that the plaintiff might bring a claim for damages should be taken into account. The applicant refers to the letter from the third named defendant, Patrick Thorpe, dated 22nd January, 2010 to Mr. Cathal O'Sullivan (referred to above) as well as the letter of 14th November, 2011, (also referred to above) written by Eversheds, then solicitors for the defendants, to OSA also stating an intention to pursue OSA for any damages that the defendants might suffer as a consequence of any claims being brought by investors in the consortium. It is submitted on behalf of the applicant that the latter letter was almost co-terminous with the issue of the proceedings by the plaintiff and that any analysis of the subsequent failure on the part of the defendants to move promptly to join third parties must necessarily be informed by their knowledge and intentions as far back as 2011. Because of this earlier correspondence, it is submitted, the defendants would have had sufficient information to make a prudent and reasonable decision to apply to join OSA once it received the statement of claim. The applicant relies on the fact that he was not personally served with the Court order until 8th August, 2014, more than six months after the order of Mr. Justice White, giving liberty to join the third parties, was perfected. The applicant submits that there was a protracted series of failures on the part of the defendants to comply with the order granting them liberty to issue and serve the third party notice, of a kind that led to the setting aside of the third party notice in the case of *Greene v. Triangle Developments Ltd. (supra).*

16. Finally, it is submitted on behalf of the applicant that he has suffered prejudice by reason of the delay on the part of the defendants. The applicant maintains that he has been denied professional indemnity insurance by reason of the delay, and that while prejudice may not be a requirement in the context of applications such as this, it is a factor to be taken into account. The applicant relies upon the decision of MacMahon J. in the case of *Robins v. Coleman* [2008] IEHC 486 in which he stated:

> "In truth, prejudice to the third party (or absence of it) is only one factor which goes in to the mix."

17. While, the above are the arguments relied upon by the applicant in support of this application, counsel for the applicant was also required to make submissions in response to submissions made on behalf of the respondents that the applicant had failed to comply with Order 14, rule 7 of the Rules of the Superior Court. This states:

> "(1) Any person served as a partner under rule 3, but who denies that he was a partner or liable as such at any material time may enter an appearance stating therein that he does so as "a person served as a partner in the defendant firm but who denies that he was a partner at any material time." Such appearance, so long as it stands, shall be treated as an appearance for the firm. (2) If an appearance is so entered —
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> (a) the plaintiff may apply to set it aside on the ground that the person entering it was a partner or liable as such, or may leave that question to be determined at a later stage of the proceedings; or
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> (b) the person entering the appearance may apply to set aside the service on him on the ground that he was not a partner or liable as such, or he may, at the proper time, deliver a defence denying either or both his liability as a partner and the liability of the defendant firm in respect of the plaintiff's claim."

18. Counsel for the respondents submits that the applicant had failed to comply with this rule and that by entering an unconditional appearance the applicant is deemed to admit his partnership status. I will address the arguments made on behalf of the respondents in this regard below, but in reply to this argument, counsel for the applicant made the following arguments:

> 1. That Order 14, rule 6 had no application in this case because that rule applies in circumstances where a summons has been served under Order 14, rule 3 in the name of the firm, and that in this case the defendants had issued the third party proceedings in the names of the individuals alleged to be partners, each of whom entered separate appearances.
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> 2. Counsel for the applicant further submits that the purpose of entering an appearance is merely to indicate an intention to defend; and that there is no further requirement to set out the grounds of defence. It was further submitted on behalf of the applicant that if the rule does apply, and had the applicant complied with the same, he would have been entitled to bring forward an application to set aside the third party notice on the grounds that he was not a partner in accordance with Order 14, rule 7(b) and that there is therefore is no prejudice suffered by the respondents in this application.
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> 3. It is further submitted on behalf of the applicant that the Court has an inherent jurisdiction, not provided for in the Rules of the Superior Courts, to rectify any procedural error and that the Court may therefore discharge the appearance entered in error, if the Court is of the view that such it be. Counsel relied upon the case of *Taher Meats (Ireland) Ltd. v. State Company for FoodStuff trading and Rafidiam Bank* [1991] 1 I.R. 443.
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> 4. Furthermore, counsel for the applicant submits that when entering an appearance on behalf of the applicant on 13th October, 2014, the solicitors for the applicant stated at that time that he was no longer a partner in the practice of OSA and so therefore the respondents were on notice of the issue from the time that the appearance was entered. Counsel for the applicant referred to the case of *SFL Engineering Ltd. v. Smyth Cladding Systems Ltd. and Korrugal Ltd.* [1997] IEHC 81 in which reliance was placed upon a letter issued by an intended third party to the effect that it would not indemnify the defendant in relation to the plaintiff's claim, and that the Court in that case attached some significance to that letter in deciding to set aside the third party notice.

Submissions of Counsel for the Respondents

19. The first point made by the respondents in their submissions relates to the non-compliance by the applicant with Order 14, rule 7 of the Rules of the Superior Court. Counsel submits that by entering an unconditional appearance, the applicant is deemed to admit both the jurisdiction and partnership status. Counsel for the respondents relies on the decision of *Davies and Co. v. André and Co.* [1890] 24 Q.B.D. 598. It was by reason of this case that the Rules of the Superior Courts at the time were amended to provide a rule in almost identical terms to Order 14, rule 7. In that case the Court held:-

> "Any person, therefore, who appears unconditionally to a writ addressed to a firm admits either that he is "sued as a partner" or that "he is carrying on business in the name" of the firm sued. Where, as in the present case, he is not told by the plaintiff that he is sued as a partner, to appear as a person sued as a partner is to confess that he is a partner and therefore under Rule 15 in circumstances like the present, and under Rule 16 in any case, no man can appear at all, if he appear unconditionally, without admitting that he is a partner."

20. Insofar as counsel for the applicant relies on the decision of *Taher Meats (Ireland) Ltd. v. State Company for FoodStuff trading and Rafidiam Bank*, counsel for the respondent submits that the nature of the mistake required before a Court will exercise its inherent jurisdiction to rectify an error and discharge the appearance is limited to cases where the solicitor enters an appearance under a misapprehension of fact, but not where it arises through an incorrect apprehension of the law or where the step has been taken ill-advisably. While there are no Irish authorities on this latter point, counsel refers to Delaney and McGrath, *Civil Procedure in the Superior Courts* (Roundhall, Dublin 2012) at paragraph 4 - 08 in which reference is made to English and Northern Irish authorities in this regard. Counsel for the respondents submits that there has been no mistake of fact on the part of the applicant in this case and for that reason therefore the applicant is not now entitled to withdraw his appearance.

21. In relation to the argument made by the applicant that he was not a partner in the firm of OSA at any material time, counsel relies upon replies to particulars delivered by the plaintiff in which she alleges that the negligence, breach of duty and/or breach of contract occurred not at a singular point in time, but across a period of eight years between 25th August, 2003 right up until 2011. In particular, the plaintiff states that the defendants failed to advise the plaintiff from 2003 to 2011 as to "the true nature of the transaction". The respondents submit that identifying and advising upon the correct legal interpretation of the loan facility documentation was a matter which fell wholly within the duties of the third parties as solicitors. Moreover, it is submitted on behalf of the respondent that OSA performed work on the file during the period when the applicant admits to being a partner *i.e.* 5th April, 2004 to 1st September, 2010.

22. The respondents further submit that the plaintiff specifically alleges negligence against the defendants "in failing to advise the plaintiff as to the true nature of the transaction when she was requested to sign the power of attorney between 2006 and 2008." It is the contention of the respondents that this power of attorney was prepared and/or advised upon by OSA at a time when the applicant was a partner.

23. As regards the argument that the plaintiff's claim is statute barred the respondents point to the reliance by the plaintiff upon sections 71 and 72 of the Statute of Limitations Act, 1957 in the event that the statute of limitations is pleaded, and the respondents say that they will do likewise as against OSA.

24. Section 71 of the Statute of Limitations Act, 1957 provides:-

> "71.— (1) Where, in the case of an action for which a period of limitation is fixed by this Act, either—
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> (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
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> (b) the right of action is concealed by the fraud of any such person,
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> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

25. Section 72 of the Statute of Limitations Act, 1957 provides:

> "72.— (1) Where, in the case of any action for which a period of limitation is fixed by this Act, the action is for relief from the consequences of mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it.
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> (2) Nothing in subsection (1) of this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake was made."

26. As regards the application of Section 71 of the Statute of Limitations Act, 1957, counsel for the respondents relies upon the decision of Hedigan J. in the case of *Patrick O'Sullivan v. Vincent Rogan and Maire Moran, both practicing under the style and title of Rogan and Moran Solicitors* [2009] IEHC 456 in which, he referred with approval to the dictum of Denning MR. in the case of *Keane v. Victor Parsons and Co.* [1973] 1 W.L.R. 29 were he said (at pages 33-34):-

> "In order to show that he concealed the right of action by fraud, it is not necessary to show that he took active steps to conceal his wrongdoing or breach of contract. It is sufficient that he knowingly committed and did not tell the owner anything about it. He did the wrong or committed the wrong secretly. By saying nothing he kept secret. He conceals the right of action. He conceals it by fraud as those words have been interpreted in the cases. To this word "knowingly" there must be added "recklessly"."

27. In further response to the claim that the plaintiff's claim is statute barred, counsel for the respondent also refers to relies the allegations of the plaintiff as regards the dates on which she alleges the defendants acted in breach of duty *i.e.* between 25th August 2003 up until 2011, and since the proceedings issued on 15th November, 2001 it cannot be certain at this remove that the plaintiff's case is statute barred.

28. Finally, as regards the alleged delay in the issuing and/or service of the third party notice, counsel for the respondents firstly argue that the applicant has brought this application on an individual basis grounded on affidavits sworn on his own behalf. On the other hand, the respondents submit that OSA has not raised any issue in respect of delay. Accordingly, it is submitted, the applicant does not have the necessary standing to make an application based upon an alleged delay in issuing and/or serving the third party notice.

29. Secondly, the respondents argue, that the time between the delivery of the statement of claim on 1st February, 2013 and the issuing of the notice of motion to join the third parties on 21st November, 2013 *i.e.* approximately nine and half months was a

reasonable period of time to undertake the work involved. This included:

- review of a large volume of documentation comprising three bankers boxes;
- preparation of written advises by solicitor and counsel;
- consultations;
- obtaining specialist legal advise as to the negligence of OSA;
- drafting and swearing service of motion papers to join OSA;
- issue of a notice for particulars and preparation of motion papers to compel replies to particulars.

30. Counsel relies upon the decision of the Supreme Court in the case of *Connolly v. Casey* [2000] 1 I.R. 345 in which it is stated at page 351:

> "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 this subsection is to ensure that the multiplicity of actions is avoided; *Gilmore v. Windle* [1967] I.R. 323. It was 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."

31. Furthermore, it is submitted, that assessment of delay and what is regarded as reasonable differs in cases of professional negligence where a number of cases have recognised the need for additional caution before seeking to join a third party. Counsel referred to the dictum of McMahon J. in *Robins v. Coleman* [2009] IEHC 486 where he said at page 196:

> "Concurrent wrongdoers are entitled to time to allow them to give serious consideration before making a claim that a person has been guilty of professional negligence. Such an allegation or claim should only be made responsibly and when there is sufficient evidence to justify the claim."

32. Counsel submitted that in this case it was necessary to assemble and examine the relevant evidence and obtain appropriate advice from solicitor and counsel together with specialist legal advice in order to make a prudent and responsible decision in what are complex proceedings, to sue a firm of solicitors for professional negligence. Furthermore, it is submitted, the substantive proceedings are themselves technical and are overlaid with challenging issues relating to the statute of limitations.

Decision

33. Order 16, rule 1 of the Rules of the Superior Courts provides that:

> "1. (1) Where in any action a defendant claims as against any person not already a party to the action (in this Order called "the third-party") -
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> (a) that he is entitled to contribution or indemnity, or
>
> (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or
>
> (c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third-party or between any or either of them.
>
> The Court may give leave to the defendant to issue and serve a third-party notice and may, at the same time, if it shall appear desirable to do so, give the third party liberty to appear at the trial and take such part therein as may be just, and generally give such directions as to the Court shall appear proper for having any question or the rights or liabilities of the parties most conveniently determined and enforced and as to the mode and extent in or to which the third-party shall be bound or made liable by the decision or judgement in the action."

34. Section 27(b) of the Civil Liability Act 1961 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 –
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> … (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."

Allegation that Applicant was not a Partner in OSA at any Material Time

35. This allegation is based upon the proposition that since the facility letter was signed on 26th August, 2003, the plaintiff subscribed for an investment in the consortium on 2nd September, 2003 and the drawdown of the facility took place no later than the end of October 2003, that there is nothing else that could have occurred to affect the plaintiff's liability to the lenders to the consortium after October 2003, at which time the applicant was not a partner in OSA. However, there is extensive reference in the statement of claim to the power of attorney that was completed by the plaintiff subsequent to the execution of the facility letter and the drawdown of funds, the purpose of which, it appears, was to authorise, even if only retrospectively, the first named defendant to complete documentation in connection with the transaction on behalf of the plaintiff. It is specifically pleaded in the particulars of negligence in the statement of claim that the defendants and/or their solicitors drafted a power of attorney which was suitable for non-recourse borrowing, but "which is now deemed by the lender to be security for full recourse borrowing."

36. Additionally, the solicitors for the respondents raised with the solicitors for the plaintiff a notice for particulars on 8th July, 2013.

Included in the particulars sought was a request for the date on which the plaintiff alleged that any negligence, breach of contract and/or breach of duty on the part of the defendants occurred. In replies to this notice for particulars dated 11th December, 2013, the solicitors for the plaintiff responded *inter alia* with the assertion that the occurrences of the negligence alleged by the plaintiff against the defendants occurred between 25th August, 2003 and 2011. These included:

> i. failing to advise the plaintiff in relation to the transaction and in particular that it involved borrowing of any description, either non-recourse or full recourse;
>
> ii. Failing to understand that the borrowing concerned was full recourse and that the bank's recovery was not limited to realising its security;
>
> iii. Failing to advise the defendant as to the true nature of the transaction and in particular when the plaintiff was requested to sign a power of attorney between 2006 and 2008. This power of attorney was furnished by OSA when the applicant was a partner;
>
> iv. Failing to establish whether the plaintiff could afford to repay such borrowings that were involved and the risks associated with the same, including the nature of the joint and several liability for the borrowings and;
>
> v. Failing to inform the plaintiff that there were ongoing issues with the tenants in the Ritz Centre which could have serious adverse consequences for the plaintiff's investment.

37. While therefore there may be a strong argument to be made that all or any losses sustained by the plaintiff were sustained between August – October 2003 when she was committed to the investment and funds were drawn down from INBS, it is clear that her allegations as against the defendants span a much longer period right up to 2011. If the plaintiff succeeds with her action, it is not possible to say at this remove that she will not succeed under one or more of the headings of negligence alleged as against the defendants in relation to an event that occurred or advice that was given while the applicant was a partner in OSA. For these reasons therefore I do not believe that the applicant can succeed in setting aside the third party notice on the grounds that he was not a partner in OSA at any material time.

Argument that Plaintiff's Claim is Statute Barred

38. Similar considerations arise in relation to the claim of the applicant that the plaintiff's claim is statute barred. Until discovery is made and evidence has been given, it is difficult to say with sufficient certainty (to merit the application succeeding on this ground) that the plaintiff's claim is statute barred.

39. While the applicant has relied upon the case of *Gallagher v. ACC Bank Plc.* [2012] 2 I.R. 620 the facts of that case were very much different to this case. In *Gallagher*, the plaintiff invested in a financial product provided by the defendant, with borrowings also provided by the defendant. The core of the plaintiff's claim was that the product was not a suitable product to borrow money to invest in and it was most unlikely that it would deliver any return sufficient to offset the cost of the loan transaction. The plaintiff invested in the bond in 2003. The issue of proceedings against the defendant claiming damages for negligence, breach of contract and breach of duty occurred in 2010. Fennelly J. held:

> "There are three possible approaches to the accrual of the cause of action: firstly, it could accrue when the plaintiff entered the transaction by borrowing the money and purchasing the bond; secondly, it might accrue at some intermediate date when the plaintiff could prove that he was at a loss in terms of a calculation of his liability for interest against movements in the value of the shares; thirdly, it could accrue at the end of the period of the investment.
>
> It is to my mind inescapable that the plaintiff's claim as pleaded is that he suffered damage by the very fact of entering the transaction and purchasing the bond. The cause of action then accrued. That was also the date when he entered into a contractual relationship with the defendant."

He continued:

> "This case, therefore, is, on its own particular pleaded facts, a clear one. The cause of action accrued when the plaintiff purchased the bond. Since that was more than six years before he commenced the proceedings, his claim is statute barred."

40. It is clear that the decision of the Supreme Court in *Gallagher* is particular to the facts of the case. Moreover, there was no dispute in *Gallagher* as to the nature of the transaction entered into between the plaintiff and the defendant. Although the respondents have yet to deliver a defence, the plaintiff is quite clearly claiming that she entered into the transaction with a very different understanding as to what it entailed than subsequently transpired to be the case, and in a most fundamental way *i.e.* she understood she was investing a fixed sum of money, but claims that she was completely unaware that by entering into the transaction on her behalf, the respondents were involving her in the borrowing of a very substantial sum of money (disregarding altogether the nature of any recourse that the lending bank would have in the event of default of repayment of the loan). Furthermore, and presumably in that context, the plaintiff has reserved her right to plead sections 71 and 72 of the Statute of Limitations, in the event that the statute is pleaded by the respondents in their defence to the proceedings.

41. For these reasons, in my view it is far from clear that the plaintiff's claim is statute barred and accordingly the third party notice cannot be set aside on this basis either.

Alleged Delay of Respondents in Serving Third Party Notice

42. Before addressing the extent of the alleged delay, I will first address the question of prejudice alleged to have been suffered to the applicant on account of delay. The applicant claims that as a result of the delay, and through no fault of his own, he has been declined insurance indemnity in relation to these proceedings. However, his affidavit does not exhibit any evidence of this declinature or the reasons therefore. Assuming that this is indeed the case however, I do not believe that this is a matter that may be taken into account in dealing with this application. I say this for two reasons: firstly, if it is the case that insurance indemnifiers have declined indemnity on the basis of a delay in notification, that delay is not caused by the defendants but by the policyholder himself. It is obviously not open to an insurer to decline indemnity on the grounds that a plaintiff (or in this case the defendants) has not advanced a claim in a timely manner. The relevant date from the point of view of insurance indemnity is the date upon which the claim should have been notified by the insured. While the applicant may be encountering difficulties by reason of a failure (if there be one) of Mr. O'Sullivan of OSA to notify the claim in a timely manner to insurers, this is not a difficulty that is of the defendants' making. Alternatively, if insurers are unreasonably withholding indemnity from the applicant because they say he should have notified

the claim sooner than it was possible for him to do, then his redress in this regard is within the dispute resolution clause of the relevant insurance policy.

43. Secondly, the authorities on this subject tend to suggest that the absence or presence of special prejudice affecting the proposed third party is not something which the Court should have regard to in considering applications of this kind. So in the case of *S.F.L. Engineering Limited v. Smyth Cladding Systems Limited* [1997] IEHC 81 at para 12 Kelly J. stated that:

> "in considering applications of this sort, the Court is not concerned with any question of prejudice arising as a result of the delay in applying for liberty to join the third party".

In the case of *Murnaghan v. Markland Holdings Ltd.* [2007] IEHC 255, Laffoy J. stated:

> "the absence or presence of special prejudice affecting the proposed third party is not something the Court is required to have regarded to in determining whether the third party proceedings are valid".

That said, in the case of *Ward v. Callaghan* [1998] IEHC 16, Morris P. stated that:

> "save in exceptional circumstances, it is desirable that all issues as to indemnity or contribution as between third parties and defendants should be disposed of at the same time as the issues relating to the defendant's liability towards the plaintiff. Such a view, in my view, should only be departed from where serious prejudice will arise as a result of following this course."

44. And in the case of *Robins v. Coleman* [2008] IEHC 486, McMahon J., in considering the dictum of Laffoy J. in *Murnaghan v. Markland Holdings Ltd*. referred to above, leaves open the possibility that prejudice may be taken into account in certain circumstances in stating:

> "I have no difficulty in accepting the dictum of Laffoy J., but I do not interpret it as suggesting that prejudice to the third party can never be a consideration which the Court should take into account in assessing the reasonableness of the defendant's conduct in determining when to issue and serve a third party notice. As I have already indicated above, if the concurrent wrongdoer realises that the third party will be seriously prejudiced by delay, he may have to act promptly; on the other hand, if there is no danger that the third party will be prejudiced, some delay may be tolerated. The circumstances of each case must be considered."

45. For the reason given above, in the circumstances of this case, I do not believe there are special circumstances that would merit consideration of the prejudice alleged to have been occurred to the applicant.

46. I turn now to the actual delay alleged by the applicant as regard to the making of the application to join him as a third party and the subsequent progression of that application. While it is suggested by the applicant in his second affidavit that it was not necessary for the defendants to await delivery of a statement of claim before bringing forward a third party application, I do not agree with this submission. The applicant states in paragraph 9(g) of his affidavit of 15th May, 2015 that "the third party notice is in generalised terms only and does not "plead out" the defendants' case against the third parties". However, in my opinion there is no doubt at all that it was indeed necessary for the defendants to await delivery of a statement of claim before bringing forward the third party application. Apart from any other consideration, it was necessary in this case (which involves allegations of negligence alleged against a professional person) for the defendants to obtain specialist expert opinion on the possible liability of OSA before advancing a third party application and that could only be obtained upon receipt of a statement of claim. The fact that the third party notice may subsequently be drafted in generalised terms does not alter this in any way.

47. There is however a very glaring delay on the part of the defendants following the delivery of the statement of claim, that is that the defendants did not deliver their files to their solicitors until 3rd July, 2013. No effort at all was made to explain this quite extraordinary delay. It is a delay of five months which occurred against a background when the defendants were aware for some time of the possibility of such proceedings and different defendants had at different times written to OSA (on 22nd January, 2010 and 14th November, 2011) either on their own behalf or through their solicitors indicating an intention to seek indemnity from OSA in the event of their sustaining losses as a result of the alleged negligence on the part of OSA. While the Court was not informed as to the date of service of the plenary summons, an appearance was entered on behalf of the defendants on 8th November, 2012. It is not be unreasonable against that background to consider that the defendants should have had their file available for delivery as soon as the statement of claim was served.

48. It is well established by the authorities that proceedings alleging professional negligence should not be rushed and should only be issued after due consideration of all documents, materials and facts. Ordinarily, as in this case, such proceedings are usually not issued without the benefit of advice from an appropriate expert. While, the legal representatives of the defendants appear to have moved very quickly upon receipt of the files from the defendants, it is inescapable that their consideration of the third party issue was delayed by the defendants themselves for no apparent reason by five months. In *Molloy v. Dublin Corporation* [2001] 4 I.R. 52 Murphy J. states that the statute is not concerned with physical possibilities but legal and perhaps commercial judgments. It seems unlikely, however, that he envisaged any delay at all in the giving of instructions and the delivery of a file, which is indeed a "physical possibility."

49. In his decision in the matter of *Greene v. Triangle Developments Ltd. and Wadding* [2008] IEHC 52, Clarke J. stated:

> "In considering any period which elapsed between the time when the third party application should have been brought and when it was actually brought, the court should principally have regard to any steps, such as the assembly of materials and the taking of advice, which were reasonably necessary to reach a conclusion as to whether it was appropriate to seek to join a third party. In assessing the pace at which such actions were conducted, it seems to me that it is appropriate for the court to have regard firstly to the urgency with which the legislation, the rules and the case law suggest that the application should be brought, so that there is no license for a leisurely approach to assembling the necessary materials or taking the relevant advice. In addition the pace needs also to be considered in the light of the fact that many recent authorities emphasize that delays which may have been considered appropriate in the past will not longer be tolerated."

50. It seems to me that taking five months to deliver a file to a firm of solicitors could not be considered anything other then leisurely. Viewed by itself, a delay of five months may not seem that long in the context of applications of this kind, but such applications are rarely, if ever, concerned with such an elementary step. It is self evident that the result of this is that the third party notice in this

case was not served as soon as was reasonably possible. I think this view is consistent with the Supreme Court in *Connolly v. Casey* which requires that, in applications of this kind, consideration be given to the whole circumstance of the case and its general progress. In this case, the sequence of events giving rise to these proceedings commenced in August, 2003. The fact that it took the plaintiff so long to issue her proceedings does not in my view afford the defendants the luxury of taking their time about the issue of the third party proceedings; the opposite is in fact the case. The very fact that the plaintiff's proceedings issued as late as they did should have spurred the defendants on to move with urgency, particularly when they knew for some considerable time prior to the issue of proceedings that they would seek indemnity from OSA.

51. Counsel for the defendants argued that the applicant does not have *locus standi* to make the arguments that he did as regards delay in the bringing of the third party application, as OSA has not done so. I cannot accept this argument. The defendants applied to joint the applicant as a partner in OSA and it seems to me that if he is deemed a partner for this purpose he is as entitled to raise the issue as Mr. O'Sullivan, although he has done so in his own name and for his own benefit only.

52. For these reasons I believe the applicant is entitled to an order setting aside the third party notice served upon him. In light of this finding it is not necessary to consider the other arguments advanced on behalf of the applicant that there was a further delay in serving the third party notice upon him after the order of White J. on 13th January, 2014.

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