[2019] IEHC 875

THE HIGH COURT

[2011 No. 8085 P]

BETWEEN

ABBIAMO LIMITED & PREFERO LIMITED (TRADING TOGETHER IN JOINT VENTURE AS GALLICO DEVELOPMENTS) & CHARLEEN LIMITED

PLAINTIFFS

AND

R.N. MURPHY & ASSOCIATES LIMITED

DEFENDANT

AND

MERCURY ENGINEERING LIMITED

THIRD PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 31st day of October, 2019

Background

1. These proceedings relate to a claim arising out of a large mixed use development in Athlone, Co. Westmeath. This development includes the Athlone Town Centre, the Sheraton Hotel and residential apartments. The first named plaintiff and the second named plaintiff are a joint venture trading as Gallico Developments, and were formed for the development. The third named plaintiff is the owner of the Sheraton hotel, by virtue of a lease entered into with the first and second named plaintiffs.

2. The defendant is a limited liability company and was, at all material times, a firm of consulting engineers who provided, *inter alia*, mechanical and engineering services in relation to the development.

3. The third party was a nominated sub-contractor in respect of mechanical, electrical and ICT technology services.

Claim

4. Each of the plaintiffs claim that there were numerous serious defects in the manner in which the development was carried out, resulting in consequent loss and damage, which it is alleged the defendant is liable for. Particulars in respect of the claim have been sought and replied to. A full defence has been delivered.

Third Party

5. In the proceedings the first and second named plaintiffs and the third named plaintiff are separately represented, this has resulted in the delivery of two Statements of Claim. There is much in common between these Statements of Claim. In particular, both make a number of references to the third party. Both Statements of Claim name the third party as being a nominated sub-contractor in respect of the services already referred to. The particulars of breach of contract, negligence and/or breach of duty make allegations concerning alleged deficiencies in the services provided. Given the identification of the involvement of the third party, and the various allegations made, it was almost inevitable that Mercury Engineering Limited would be joined as a third party.

6. The third party has applied to the court to set aside the third party notice on the grounds that it was not served as soon as was reasonably possible, as is required by statute.

Statutory Provisions

7. The relevant statutory provision is s.27(1)(b) of the Civil Liability Act 1961 (the Act of 1961), which states: -

> "(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 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."

8. Order 16, r. 3 of the Rules of the Superior Courts (RSC) states: -

> "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 or, where the application is made by the defendant to a counter claim, the reply."

It is clear that this provision in the RSC contemplates the joinder of a third party being made at an early stage in the proceedings (see Kelly J. in *SFL Engineering Limited v. Smyth Cladding Systems Limited and Korrugal Limited* [1997] IEHC 81.)

Course of the Proceedings

9. The events complained of allegedly took place in the period of 2006-2009, now some ten years ago. The plenary summons was issued in September, 2011 (at that stage, it appears that there was one firm of Solicitors on record for all the plaintiffs). The summons does not appear to have been served on the defendant until 13 August 2012.

10. There have been numerous long delays in prosecuting these proceedings. In January, 2014 the defendant was struck off the Register of Companies. The matter was listed for hearing in July, 2017 when, apparently, the status of the defendant was unknown. In July, 2018 the defendant was restored to the Register.

11. As mentioned earlier, there are separate Statements of Claim. Firstly, a Statement of Claim on behalf of the first and second named plaintiffs and, secondly, a Statement of Claim on behalf of the third named plaintiff. This is somewhat unusual and is a matter that will have to be taken into account in determining the issue before the court.

Consideration of Application

12. It seems to me that the first issue that has to be addressed is to identify the relevant time period involved and, then, to decide whether the third party notice was served as soon as was reasonably possible within that period.

13. The starting point of the time period has to be the date upon which the Statement of Claim was delivered. Though there must have been some pre-litigation correspondence,

from which the nature and extent of the claim could be identified, it was not until the service of the Statement of Claim that the defendant actually knew the claim that had to be met. Normally there would be no difficulty in identifying what the date is. However, in this case there are two Statements of Claim. The Statement of Claim from the third named plaintiff was delivered on 13 February 2014, a further year passed and on 3 March 2015 the first and second named plaintiffs delivered their Statement of Claim. As referred to earlier, both Statements of Claim identify the possible involvement of the third party. The first date upon which this occurred was 13 February 2014.

14. Although there was considerable overlap between both Statements of Claim, it seems to me that it was not until the delivery of the first and second named plaintiffs Statement of Claim on 3 March 2015 that the defendant was on notice of the entirety of the claim that it had to meet. I do not see how it could be considered as anything other than reasonable for a defendant to be fully aware of the claim that has to be met before deciding whether or not to join a third party. Thus, in my view, the relevant period commenced on 3 March 2015.

15. In my view, the relevant period of time ended on 22 December 2015 when a motion issued to join the third party, even though the third party notice was not served until 18 February 2016. When the motion is issued a date for its listing and hearing is outside the control of the defendant, who thus has no responsibility for it. I refer to the following passage from Ryan J. (as he then was) in *Murphy v. Brock and Others* [2012] IEHC 438, he states: -

> "Every case is decided on its own facts so the question is what was reasonable in these particular circumstances. While it may in theory be an option, it would be extremely unusual, to say the least, for a defendant to apply to join a third party before the plaintiff's statement of claim was delivered. It follows that failing to do so is not unreasonable. The defendant may be able to anticipate the general nature of the claim but it is reasonable to wait and see the specific presentation. The relevant period to be considered, therefore, is from the delivery of the statement of claim on the 2nd June, 2010 to the 25th July, 2011 when the third party application was made…"

16. Therefore, in this action the relevant period is 3 March 2015 to 22 December 2015, some 9-10 months. Could the joinder of the third party within that period be considered to be "*as soon as is reasonably possible"?*

17. Following the delivery of the second Statement of Claim, on 20 April 2015 the defendant sought particulars from the first and second named plaintiffs. Included in this Notice was a specific reference to the third party: -

> "4. Please furnish copies of the recommendations of payment to Mercury Engineering, referred to at paragraph 26 of the statement of claim."

This was responded to on 15 June 2015 as follows: -

> "This is a matter of evidence, and is within the knowledge of the defendant. Without prejudice to the foregoing, the recommendations of payment to Mercury Engineering are contained in Appendix 6."

In considering whether to join the third party, in my view the defendant was justified in waiting for the replies to particulars which were specifically directed towards the potential involvement of the third party. It should also be noted that the time within which the particulars were sought, and indeed, responded to, was reasonable. This reduces the relevant period to 15 June 2015 to 22 December 2015, a period of a little over six months. This period encompasses the time of the year when many take their annual holidays.

18. A further factor that has to be considered is that the defendant's claim for an indemnity, or contribution from the third party, amounts to a claim of professional negligence. It is well established that before bringing such a claim there must be a clear basis for it. Thus, a report from a suitably qualified expert is required. As was stated by Finlay Geoghegan J. in *Greene v. Triangle Development Limited* [2015] IECA 249 at para. 27: -

> "… 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. …".

19. Though the defendant does not go so far as to say it was waiting on an expert report, the defendant was entitled to a period of time within which to consider and be satisfied as to the merits of its claim against the third party. The time within which the defendant would be satisfied to the merits of the claim would be after it had received the replies to particulars on 22 June 2015.

20. Order 16, rule 1 of the Rules of the Superior Courts provides: -

> "(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") -
>
> (a) that he is entitled to contribution or indemnity, or
> (b) …
> (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 …"

21. It follows from the above rule that the service of a third party notice does not always involve the making of a claim for a contribution or indemnity. With the leave of the court, a third party notice can be served where there is a question or issue between the plaintiff

and the defendant, which is substantially the same as that between the defendant and the proposed third party. In these circumstances, a report from an expert would not be required as the defendant is not making a claim against the third party, but rather ensuring that all the relevant questions or issues are heard by a court at the same time.

22. The issue of prejudice was referred to in the course of the submissions. Section 27(1)(b) of the Act of 1961 refers to time limits. The court has to consider whether the time between the defendant acquiring the necessary knowledge and when the application to join the third party was made was reasonable. If in that time prejudice arises for a third party e.g. death of a witness or destruction of records, then such can be the subject of an application to dismiss the proceedings on the grounds that a fair trial is no longer possible. I refer to *Kenny v. Howard* [2016] IECA 243, where Ryan P. stated: -

> "24. The other issue raised and which was relied on by the judge in the High Court is that there is no evidence of any specific prejudice on the part of the HSE. However, even if it is difficult to see how prejudice, express or implied, could arise in the case, that is not the issue; if it is clear that the third party notice was not served as soon as reasonably possible, that is a failure of compliance with the specific mandatory requirement of s. 27(1)(b). The section does not require proof of prejudice in order to rely on its terms. It is true that in *Robbins v. Coleman* [2010] 2 I.R. 180, McMahon J. held that the question of the presence or absence of prejudice was not to be out-ruled a priori.
>
> 25. It seems to me that a third party applying to set aside a notice served by a defendant could argue that he had suffered prejudice and that a shorter period than might otherwise be allowed ought to be imposed in determining what was as soon as reasonably possible. I find 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. The authorities cited do not go as far as suggesting that the section's impact may be defeated by demonstrating the absence of prejudice. In the present case, it seems to me that it is irrelevant whether or not the HSE has suffered prejudice by reason of the delay."

23. In any event, in the instant case the third party was put on notice of its possible involvement following the service of the Statement of Claim by the third named plaintiff in February, 2014. On 26 February 2014 the defendant wrote to the third party referring to the proceedings and attaching a copy of the said Statement of Claim. Thus, at an early stage, the third party was on notice of its possible involvement and, presumably, took the necessary steps to investigate the matter.

24. In the course of the hearing a number of authorities were referred to the court where periods of time ranging from months to years were held to be reasonable for the purposes of s. 27(1)(b) of the Act of 1961. However, there is no independent time scale. Every case, such as the instant case, depends upon its own particular circumstances. A

particular time period which may be reasonable in one case could be considered to be entirely unreasonable in another.

Conclusion

25. In this case, the Statement of Claim from two of the three plaintiffs was delivered in March, 2015, particulars were raised by the defendant in April, 2015, replied to in June, 2015, the defence was delivered on 21 December 2015 and the motion to join the third party was issued the following day, 22 December 2015. This time period has to be viewed in the context of what is undoubtedly a complex claim involving professional negligence. Taking these factors into account, I conclude that the third party notice was served as soon as was reasonable possible. Therefore, I dismiss the application of the third party.