

APPROVED



**AN ARD-CHÚIRT
THE HIGH COURT**

[2024] IEHC 622

Record No. 2019/937P

BETWEEN/

TREVOR GREHAN AND ANGELA GREHAN

PLAINTIFFS

-AND-

DUBLIN CITY COUNCIL

DEFENDANT

-AND-

IRISH WATER

NOTICE PARTY

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 15th day of October 2024

INTRODUCTION

1. This is Irish Water's application pursuant to Order 16, rule 8(3) of the Rules of the Superior Courts 1986 (as amended) ("RSC 1986") seeking to set aside a Third-Party Notice served on it by the Defendant, Dublin City Council ("the City Council") in or around 23rd June 2023.
2. Peter Bland SC and Brendan Savage BL appeared for Irish Water; Colm P. Condon SC together with John P. Kehoe BL and Joan Williams BL appeared for the City Council. There was no appearance by or on behalf of the Plaintiffs.

BACKGROUND & CHRONOLOGY

3. The Plaintiffs alleged that they suffered loss and damage by reason of the actions of the City Council relating to a water leak that allegedly occurred at their home at 25 Rathgar Road, Dublin 6 in the period between May and November 2015.
4. Proceedings were commenced by Plenary Summons dated 5th February 2019 and the Plaintiff's Statement of Claim was dated 7th February 2019.
5. The City Council entered an Appearance to the proceedings on 5th March 2019 (and this was apparently filed on 12th March 2019).
6. By Notice of Motion dated 24th May 2019, and returnable to 15th July 2019, the Plaintiffs sought judgment in default of Defence as against the City Council.

7. On 12th July 2019, the City Council delivered its Defence.
8. On 2nd August 2019, the City Council served a Notice for Particulars on the Plaintiffs and the Plaintiffs delivered Replies to Particulars dated 21st November 2019.
9. On 9th February 2023, the Plaintiff served a Notice of Trial on the City Council.
10. By Notice of Motion issued on 9th May 2023, the City Council sought liberty to issue and serve Third-Party Proceedings on Irish Water. That Motion came on for hearing before this Court (Heslin J.) on 12th June 2023, and by Order of that date (which was perfected on 22nd June 2023) the City Council was granted liberty to issue and serve a Third-Party Notice on Irish Water.
11. On 23rd June 2023, the City Council caused the Third-Party Notice to issue out of the High Court Central Office; on that date Third-Party Notice together with a copy of the High Court Order of 12th June 2023, Plenary Summons, Statement of Claim and Defence of the City Council were all served on Irish Water.
12. On 28th September 2023, Irish Water received from the City Council a copy of its Appearance dated 5th March 2019, Notice for Particulars of 2nd August 2019, Replies to Particulars dated 21st November 2019 and a copy of the Notice of Trial dated 9th February 2023.

13. By letter dated 3rd October 2023, the Solicitor for Irish Water advised, *inter alia*, that he had been instructed to enter an Appearance on behalf of Irish Water and also requested to be furnished with a copy of the Affidavit grounding the application to join the third party dated 12th June 2023.
14. By letter dated 5th October 2023, Irish Water's Solicitor was furnished with a copy of the Affidavit of Ms. Fiona Healy Senior Executive Solicitor on behalf of the Council sworn on 8th May 2023, which had grounded the initial Third-Party application.
15. Irish Water entered an Appearance on 6th October 2023.
16. Irish Water issued the within application seeking to set aside the Third-Party Notice on 7th December 2023. The matter came on for hearing before me on Friday 27th September 2023.

APPLICATION TO SET ASIDE THE THIRD PARTY ORDER

O. 16, r. 8(3) RSC 1986

17. The Third-Party procedure under the RSC 1986 is set out in Order 16.
18. O. 16, r. 1(3) RSC 1986 provides that an 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 counterclaim, the reply.

19. O. 16, r. 8(3) RSC 1986 provides that the Third-Party proceedings may at any time be set aside by the Court.

The Civil Liability Act 1961 (as amended)

20. The procedure for claiming contribution is set out under section 27 of the Civil Liability Act 1961, as amended, (“the 1961 Act”), with section 27(1) of the 1961 Act providing as follows:

“(27)(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part—

(a) shall not, if the person from whom he proposes to claim contribution is already a party to the action, be entitled to claim contribution except by a claim made in the said action, whether before or after judgment in the action; and

(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.^[1] 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.”

¹ Emphasis added.

21. By Notice of Motion dated 6th December 2023, Irish Water sought an Order pursuant to O. 16, r. 8(3) RSC 1986 setting aside the Third-Party Notice served on Irish Water by the Council, on the grounds that the Notice was not served “*as soon as was reasonably possible*”, as that term is understood in section 27(1)(b) of the 1961 Act and associated caselaw. This judgment addresses that application.

DISCUSSION & DECISION

22. It is common case between the parties that the City Council failed to serve the Third-Party Notice within the time limit laid down by O. 16, r. 1(3) RSC 1986, *i.e.*, within 28 days from the time limited for delivering the Defence.

23. In the first Affidavit of Michael Corrigan, Solicitor, Corrigan & Corrigan Solicitors, for Irish Water, sworn on 6th December 2023, Mr. Corrigan (at paragraph 23) points out that the Statement of Claim was delivered on 7th February 2019 and assumes therefore that the Plenary Summons was also served on that date, if not before, and that the City Council was required under O. 16, r. 1(3) RSC 1986, to make the application for leave to issue and serve the Third-Party Proceedings on or before 10th May 2019.

24. In this case, the application for leave to issue and serve the Third-Party Notice was not made until 12th June 2023, which is a period of over 4 years after the application ought to have been brought.

25. Both parties agree that non-compliance with RSC 1986 (in this instance O. 16, r. 1(3) RSC 1986, *i.e.*, the 28 day period just referred to) is not dispositive of the question to be determined in this application.

26. Rather, the parties agree, having regard to the applicable jurisprudence, that the matter which I have to determine is whether or not the City Council have met the threshold that the Third-Party Notice was served “*as soon as is reasonably possible*” pursuant to the provisions of section 27(1) of the 1961 Act.

27. In this regard, in *Susquehanna International Group Limited & Others v Execuzen Limited & Others* [2022] IECA 209, the Court of Appeal (Barniville P., Noonan and Allen JJ.) in the judgment of Allen J. delivered on 12th September 2022, set out, at paragraphs 113-115, the essential features of the process for setting aside a Third-Party Notice, as follows:

“(113)... The third party procedure is a matter of right. The defendants are entitled to avail of the third party procedure provided they do so as soon as reasonably possible. The corollary to that is that the third parties are obliged to answer a claim made by the third party procedure if, but only if, the notice is served as soon as reasonably possible. In other words, the third parties have a right not to be impleaded by the third party procedure if it has not been invoked as soon as reasonably possible. In deciding a dispute as to whether a third party notice was or was not served as soon as reasonably possible the court is not concerned with punishment or reward but with the rights of the parties.

(114) If the practical consequence of setting aside a third party notice is that the moving party draws on himself a separate action for contribution, that, it seems to me, is a matter for the moving party. I accept the submission ... that it would be inconsistent with the statutory scheme that a determination as to whether a third party notice was served as soon as reasonably possible should be coloured by an assessment as to the likely availability to the defendant of contribution by the separate statutory procedure of a separate action.

(115) In my view the issue to be determined on an application to set aside a third party notice is solely whether the notice was served as soon as reasonably possible. If it was not, the third party is entitled to an order setting it aside.”

28. I am of the view, for the following reasons, that Irish Water is entitled to have the Third-Party proceedings set aside, because the application brought on behalf of the City Council was not brought as soon as reasonably possible as that term is understood within the meaning of section 27 of the 1961 Act.

29. Looking at the case as a whole, the delay in this case was a period of 4 years from approximately mid-April 2019 to 9th May 2023, when the City Council issued the Notice of Motion seeking liberty to issue and serve the Third-Party proceedings.

30. The Council’s initial Third-Party application was grounded on the (first) Affidavit of Fiona Healy Senior Executive Solicitor of the City Council, sworn on 8th May 2023

31. Irish Water's subsequent application to set aside the Third-Party Notice was grounded on the (first) Affidavit of Michael Corrigan Solicitor, sworn on 6th December 2023, which was then responded to by the second Affidavit of Ms. Healy sworn on 20th February 2024. That Affidavit was, in turn, replied to in the Supplemental Affidavit of Michael Corrigan Solicitor, sworn on 26th February 2024.
32. However, the evidence adduced on behalf of the City Council, in both the initial third-party application and in the response to the application to set aside the Third-Party Notice amounts to no more than a general timeline with reference to correspondence between the parties to the action in the period between 2016 and 2022.
33. Insofar as the City Council seeks to explain why it took a period of 4 years before the application for leave to issue and serve the Third-Party Notice that was made on 12th June 2023, it is clear from the correspondence which occurred before and during the proceedings that the City Council adopted a position, and took the view that: (i) the Plaintiffs ought to have sued Irish Water as the appropriate defendant in these proceedings and not the City Council; and (ii) under a Service Level Agreement ("SLA") dated 23rd December 2013 between the City Council and Irish Water, the Council maintained a view throughout that it was entitled to be fully indemnified by Irish Water in relation to the alleged claims in these proceedings.
34. Whilst it is perhaps understandable, at a general level, having regard to the changes in the legal landscape which occurred in or 2013 and the developments which occurred the following year concerning the transfer of responsibility to Irish Water

from Sanitary (Local) Authorities for the provision and maintenance of public water and waste water services, that there may be an initial uncertainty as between these entities insofar as their respective obligations and responsibilities are concerned, I am not persuaded that the position adopted by the City Council, in this case, meets the requirements in the case law for explaining the delay such as, for example, the carrying out of additional investigations or the complexity of the situation.

35. The City Council, for example, was a signatory to the SLA dated 23rd December 2013 made between Irish Water and the City Council, paragraph 38 of which provides for various indemnities by the respective parties.

36. For example, paragraph 38.1 provides for indemnities by Irish Water. Paragraph 38.1.1 provides that Irish Water agrees to indemnify and keep indemnified the Local Authority (*i.e.*, in this case the City Council) and its related persons from and against any and all losses that arise out of or result from:

“38.1.1.1 Injuries or death to persons, damage to or loss of any property arising after the Effective Date that are caused by the Local Authority or its Related Persons in providing the services excluding:- (a) where it is on account of the negligence, neglect or deliberate act or omission by the Local Authority or its Related Persons; or (b) Losses for which the Local Authority is obliged to maintain the Local Authority Required Insurances and in each case up to the limit of indemnity set out in Schedule 1, part 1:-

38.1.1.2 Injuries or death to persons, damage to or loss of any property in any way arising out of or occasioned by, caused by or on account of the

negligence, neglect or deliberate act or omission by Irish Water or its Related Persons”.

37. By way of further example, paragraph 38.2 of the SLA provides for the indemnity by the Local Authority as follows:

“38.2.1 The Local Authority agrees to indemnify and keep indemnified Irish Water and its Related Persons from and against any and all losses that arise out of or result from:

38.2.1.1 Injuries or death to persons or damage to or loss of any property (not deemed to include loss of or damage to the property of Irish Water or such property which is in the course of transfer to Irish Water and is insured under Irish Water’s property damage policy), in any way arising out of or occasioned by, caused by or on account of the negligence, neglect, or deliberate act or omission by the Local Authority or the Local Authority Personnel in providing the Services;

38.2.1.2 any Losses (excluding liabilities expressly transferred by a ministerial order pursuant to Section 13 (Transfer of rights and certain liabilities, and continuation of leases, licences and permissions granted by water services authorities) and/or Section 14 (Transfer of other liabilities) and/or section 15 (Liability for loss occurring before the relevant day) of the Water Services (No.2) Act 2013) arising out of the performance or otherwise of the Local Authority of its functions as a water services authority prior to the Effective Date.”

38. As mentioned, the City Council formed a view at the very outset (and prior to the issuing of proceedings), that Irish Water was the party responsible for the alleged wrong-doing asserted by the Plaintiffs. It is noted, for example, in pre-action

correspondence dated 9th May 2016 and 10th May 2018, the City Council called on Irish Water to provide an indemnity.

39. Separately, in objectively assessing whether the notice was served *as soon as reasonably possible*, the City Council offers no explanation or justification for not doing so, when it had formed the view at various points *after proceedings had issued*, that Irish Water was the appropriate defendant:

- (i) approximately eight weeks after the commencement of the proceedings the City Council called on Irish Water to provide an indemnity and to come on record as per its letter dated 23rd April 2019;
- (ii) by letter dated 24th May 2019 the City Council called on the Plaintiffs to join Irish Water as a co-defendant to the proceedings;
- (iii) in its Defence delivered on 12th July 2019 the City Council raised the following plea, on a without prejudice basis, by way of preliminary point: *“That the Defendant is the appropriate party to these proceedings in circumstances where its servants or agents acted at all material times under a service level agreement with a third party namely Irish Water.”*;
- (iv) by correspondence dated 13th July 2020 which details the SLA, the Plaintiffs’ proceedings and other correspondence, the City Council called on Irish Water to provide an indemnity within a period of seven days;
- (v) in Ms. Healy’s first grounding Affidavit sworn on 8th May 2023 whilst referring to the SLA, no explanation is offered or reasons provided for

the delay in bringing the application to serve a Third-Party Application between July 2019 and May 2020; whilst correspondence is exhibited in this Affidavit in relation to the City Council's request to the Plaintiffs' solicitors that the matter not be set down until the issue of the indemnity and the SLA was clarified, no explanation is offered, or reasons provided, for the delay between June 2020 and October 2022, in bringing the application to serve a Third-Party Application; no explanation is offered or reasons provided for the further delay from 12th October 2022 to May 2023 when the Notice of Motion seeking the Third-Party Notice issued.

40. Further, there was no requirement in this case to seek out additional materials and information or further particulars of pleading or expert advice. No such situation arose in this case and the request for an indemnity and correspondence with both the Plaintiffs and Irish Water do not provide any basis for justifying the City Council's decision to wait until May 2023 to bring the application.

41. In addition, the City Council's reference to Irish Water advising it by email dated 6th January 2022 that it had appointed IPB Insurance to investigate the matter as their insurers would suggest that by 12th October 2022 the City Council had resolved to bring an application for leave to issue and serve third-party proceedings on Irish Water but that application was not made for a further 6 months between 12th October 2022 and 9th May 2023.

42. The authorities eschew the adoption of an approach – which was the position of the City Council in this case – of essentially providing a general timeline. In this regard, the Court of Appeal (Ryan P.; Peart and Barrett JJ.) in the judgment of Ryan P. delivered on 29th July 2016) in *Kenny v Howard* [2016] IECA 243, observed as follows, at paragraph 26:

“It is not sufficient simply to describe or explain the delay. In other words, compliance is not achieved by the party or his solicitor deposing to how the delay arose. And neither, it would seem, is it enough to seek to excuse the delay by reference to exigencies that can occur or tribulations that may befall a person in the ordinary course of life. In this latter category would be mistakes, misfiling of documents and errors and omissions generally. Obviously, the court cannot take too high and mighty a view about human frailty as to rule out of consideration every human error. However, the point is as I see it that for the party to describe how the delay happened is not enough; neither is it sufficient for compliance with the section to say that it happened because of a series of unfortunate events. A particular thing might have afflicted the process of management of the case; that would be understandable”.

43. Further, in paragraph 19 of Ms. Healy’s Affidavit, sworn on 8th May 2023, prejudice is relied upon, as follows:

“I say that despite the best efforts of the Defendant to the proceedings herein, and where it is the position of this Deponent that as per the Service Level Agreement between Dublin City Council and Irish

Water that at all material times, works germane to the monitoring of the water leak at the Plaintiffs' premises were under the control, at the directions, instructions and remit of Irish Water. I say as is evidenced from the correspondence as exhibited in the body of this Affidavit that Irish Water have been on notice of these proceedings since their inception and thereafter have suffered no prejudice”.

44. This, however, does not meet the requirement in the authorities which provide that a Third-Party is not required to demonstrate prejudice in an application to set aside the Third-Party Notice. Accordingly, the City Council cannot seek to justify delay by contending that Irish Water in this case has not been prejudiced. Adopting and paraphrasing the observations of the Court of Appeal (Allen J.) in *Susquehanna International Group Limited & Others v Execuzen Limited & Others* [2022] IECA 209 at paragraph 61, if the underlying policy is to put the third party in as good a position as possible in relation to knowledge of the claim and the opportunity of investigating it, there is no authority for the proposition that a third party moving to set aside a Third Party Notice must establish prejudice; the focus must be on whether the delay was unreasonable.

45. Further, at no time did Irish Water confirm or suggest to the Council that an indemnity *would be* provided. The assertion on behalf of the City Council that Irish Water, despite appointing their insurers to investigate matters, had deliberately evaded the issue of an indemnity over a long period of time and that the within application sought to utilise the Rules of the Superior Courts to argue delay when it is asserted that it had been culpable itself in contributing to the delays, is rejected

firmly in paragraph 4 of Mr. Corrigan's Supplemental Affidavit sworn on 26th February 2024. On behalf of Irish Water, it was suggested that *if* this contention was brought to its logical conclusion, it would amount to a suggestion that by not committing to a position on the question of an indemnity, Irish Water contributed to the delay and would be, as a corollary, prevented from seeking to invoke its right to set aside the proceedings.

46. In fact, at the hearing before me, no reliance was placed on this assertion by the City Council.

47. In any event, as a proposition it seems to me to be incorrect; at no time did Irish Water suggest to the City Council that the indemnity requested *would be* provided; therefore the objective assessment which I have to make is not whether Irish Water should have provided a positive or negative answer to the question of an indemnity from the City Council, but rather whether the City Council moved to bring the application to issue to a Third-Party Notice as soon as reasonably possible, mindful of the balancing exercise in the City Council's quest for certainty and the statutory obligation to make the application as soon reasonably possible. I am not satisfied that it did so.

48. In the circumstances, there is force, I believe, in the submission on behalf of Irish Water that the point at which the application to serve a Third-Party Notice in this case should have been brought by the City Council in the early life of the proceedings in or around mid-2019, irrespective of the City Council's engagement with Irish Water in relation to its quest for an indemnity or its correspondence with

the Plaintiffs in which it was suggested that Irish Water was the more appropriate defendant.

CONCLUSION

49. I am not satisfied, therefore, that the Third-Party Notice was served “*as soon as is reasonably possible*” by the City Council on Irish Water, as required pursuant to section 27(1) of the 1961 Act.

50. In the circumstances, therefore, I shall set aside the Third Party Proceedings dated 12th June 2023 which were issued from the Central Office of the High Court on 23rd June 2023 and served on Irish Water by the City Council on the same date.

PROPOSED ORDER

51. I shall make an order pursuant to O. 16, r. 8(3) RSC 1986 setting aside the Third Party Proceedings dated 12th June 2023 which were issued from the Central Office of the High Court on 23rd June 2023 and served on Irish Water by Dublin City Council on the same date.

52. My provisional view is that as Irish Water has been entirely successful in their application to set aside the Third Party Proceedings, it is entitled to the costs of this motion and application, including reserved costs (if any), as against Dublin City Council, with such costs to be adjudicated upon in default of agreement by the

Office of the Legal Costs Adjudicator pursuant to the provisions of the Legal Services Regulation Act 2015.

53. As this judgment is being delivered electronically, I shall put the matter in for mention on Friday 1st November 2024 at 10:30 in order to hear from the parties on the question of costs and any ancillary or consequential matters which arise.

CONLETH BRADLEY

15th October 2024.