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Ireland Update

Delay and the joining of professionals as hird parties to Irish litigation

Section 27(1)(b) of the Civil Liability Act 1961 requires the joinder of relevant third parties to existing Irish Court proceedings *"as soon as is reasonably possible"*. Given the frequency with which professionals, whether solicitors, accountants, insurance brokers or otherwise, are joined to proceedings via Third Party Notices, judicial interpretation of the meaning of s27 is of considerable importance to both the professional in question and his/her professional indemnity insurer.

Applications are regularly brought before the Courts by professionals seeking to strike out Third Party Notices on grounds of delay contrary to s27. One of the most recent is the decision in *Buchanan v BHK Credit Union Limited et al* [2013] IEHC 439, which is considered below.

In short, however, the overriding guidance from recent judgments is that:

(i) *"as soon as is reasonably possible"* is a relative concept, such that in construing it the Court will have regard to all the circumstances of the case

(ii) Where delay is alleged regarding the joiner of a third party professional, the Courts are cognisant of the general need for parties to take particular care before issuing proceedings against professionals as a class. Given that an expert report supporting such a claim is a prerequisite to the issuing of proceedings against a professional (*Cooke v Cronin* [1999] IESC 54), professionals necessarily face a more difficult task than would ordinarily be the case when seeking to strike out orders joining them as Third Parties on grounds of claimant delay

We set out three recent cases on the issue, below.

Ronald Robins v Terrence Coleman, Anita Coleman, Agulhas Resources Inc, Pierse Construction, Charlie Donnelly and Mark Turpin trading as Donnelly Turpin Architects and O'Connor Sutton Cronin & Associates Limited [2009] IEHC 486

The plaintiff and the first and second defendants owned adjoining terraced properties. The plaintiff sued for damage caused to his home as a result of works carried out by the said defendants on their adjoining property. The two defendants joined Pierce Construction (the Builder) and Donnelly Turpin Architects (the Architect) as third parties in December 2006, with the plaintiff subsequently also joining them as fourth, fifth and sixth defendants in June 2007.

The Builder and Architect subsequently sought to join the structural engineer, O'Connor Sutton Cronin & Associates (the Engineer), as a third party on the basis that the Engineer was negligent in advising on the structural integrity of the terrace of houses. The Engineer brought a motion to set aside February and May 2009 Orders (in favour of the Builder and Architect respectively) joining the Engineer as a Third Party. The

Engineer's motion was on grounds that the applications had not been brought *"as soon as is reasonably possible"* under s27 given that:

(i) The works on the property commenced in 2001

(ii) Proceedings were initially issued by the plaintiff in January 2005

(iii) The Builder and Architect had been named as co-defendants in the proceedings in June 2007, almost two years previously

Despite the ostensibly significant delay of 18 months/ two years between the Builder and Architect becoming co-defendants in the proceedings and their respective applications to join the Engineer, the High Court refused to strike out the Third Party Orders. The Court stated by way of general principle that:

(i) Insofar as s27(1)(b) speaks of an obligation on a defendant to serve a Third Party Notice within a period of time, the word *"reasonably"* must, in the first instance, refer to the defendant's conduct and point of view. In construing the word "reasonably", the Court is not primarily concerned with the Third Party's viewpoint

(ii) The Court is entitled to review the delay and examine whether the defendant's explanation is one which entitles accommodation within the statutory concept of *"as soon as is reasonably possible"*

(iii) What might appear as a long period when stated in the abstract might nevertheless, when all the circumstances are taken into account, attract the protection of the *"reasonably possible"* criterion

(iv) If the party seeking joinder knew that the situation was one where the Third Party was ignorant of the claim, evidence was vanishing and witnesses were going to be difficult to locate with the passage of time, "as soon as is reasonably possible" might demand a more rapid assessment and decision on the part of the concurrent wrongdoer than in other cases where these factors were not in play. Where there is no prejudice, this fact may support the defendant's contention that the notice was served "as soon as is reasonably possible"

The Court stated that:

"… This case is characterised by two peculiar features: first, the nature of the plaintiff's claim continued to change over the years from 2005 to 2008 as the full extent of the alleged structural damage to the property became apparent. This was only finally flagged clearly in the amended Statement of Claim issued by the plaintiffs in April 2008 ….

Secondly, when the fourth, fifth and sixth named defendants [the builder and architect] *became aware of this new formulation and began to consider the issue of serving a third party notice* [on the engineer], *it was appropriate that such a course of action, involving as it did a claim of professional negligence, should not be embarked on lightly".*

In deciding not to dismiss the Third Party Orders on grounds of delay, the Court referenced the fact that:

(i) The main litigation was complex, involved several defendants and presented particular difficulties in establishing the nature of the damage/causation thereof

(ii) The protracted prosecution of the main action was, primarily, not due to the fault of the Builder and Architect parties who now sought to join the Engineer

(iii) (importantly) the claim involved an allegation of professional negligence which necessarily required caution pre-joinder of the relevant professional defendant

(iv) The third party Engineer was not in any way prejudiced by the delay in terms of knowledge of the potential claim and/or relevant proofs

The Court held that *"as soon as is reasonably possible"* under s27 should be given a more "indulgent" interpretation in light of the above factors, in particular the professional factor.

***O'Halloran v Ken Fetherston, Bernadette Fetherston, Blackrock Inns Limited, Ellen Construction Limited, Paul C O'Dwyer and Associates, WYG Ireland Limited and McKelan Construction Limited [2012]* IEHC 349**

In this matter the fifth defendant, Paul C O'Dwyer and Associates (the Architect), sought to join McKelan Construction Limited (the Subcontractor) to existing proceedings. While not strictly a professional negligence case, the Court's comments on the factors to be taken into account when considering allegations of delay in joining the Subcontractor are informative.

The plaintiff's proceedings against a number of parties, including the Architect, had issued in November 2009. A Statement of Claim was delivered to the Architect in March 2010. The Architect served its Defence on 1 November 2010, which defence referred to the Subcontractor's responsibilities/alleged very shortly that the Subcontractor had been negligent: however, the defence contained no specific allegations against the Subcontractor.

In July 2011 - eight months after filing the defence - the Architect carried out an inspection of the Plaintiff's apartment at the centre of the dispute and obtained an October 2011 expert report confirming that there was potential negligence by the Subcontractor. The application to join the Subcontractor as a third party was not made by the Architect until February 2012. Despite:

(i) The 23 month delay between service of the plaintiff's Statement of Claim (in March 2010) and the Architect's application to join the Subcontractor (in February 2012)

(ii) The 14 month delay between service of the Architect's Defence (in November 2010, which made short reference to the Subcontractor's responsibilities/potential negligence) and the application to join the Subcontractor (in February 2012)

The Subcontractor failed in its application to set aside the Third Party Notice on grounds of s27-related delay. The following factors influenced the Court:

(i) There was a significant difference between making a general precautionary statement in a defence and swearing an affidavit (when making an application for a Third Party Order) particularising an allegation of negligence against a relevant third party

(ii) Although *"the particular caution with which the law requires parties to approach suing in professional negligence does not pertain in this case … the decision to … serve a Third Party Notice is a significant one and it would be unwise to proceed without what is perceived to be reliable evidence of the fault of an intended defendant"*

(iii) When considering whether a Third Party Notice has been served *"as soon as is reasonably possible", the Court "may have regard to the effect any delay has on the achievement of joined or sequential trials"* i.e. the function of s27(1) is to ensure that related cases are heard together as far as possible. The Court stated that *"it is noteworthy in this case that the application to issue and serve a third party notice was served on the Plaintiffs and that no complaint has been identified … from the Plaintiffs as to any delay the Third Party proceedings will cause to the action"* (emphasis added)

(iv) The Court accepted that the Architect had *"prudently sought to inspect physically the plaintiffs' apartment before suing the third party* [Subcontractor]. *No complaint was addressed to me that undue delay attended this process though it took 8 months. … The 14- month delay* [between service of the Architect's defence and applying to join the Subcontractor] *is in the danger zone in relation to the sort of delay under discussion (though an even longer delay could well fall within an acceptable period if properly justified), but I find that the fifth named defendant* [the Architect] *has discharged its burden of persuading the Court that it acted as soon as was reasonably possible in obtaining additional information which permitted it to engage in a decision making process as to whether to sue the sub-contactor. While this process of gathering information, compiling a report and deciding to sue was not conducted quickly neither could it be said that it was unreasonably slow. A fixed period for joining third parties has not been set by the Oireachtas in section 27 of the 1961 Act. Instead, it has given the Court a discretion to determine what period is appropriate and in my view when the Court is considering a period of a little over a year, the court should strive to achieve the main purpose of section 27 i.e. joined or immediately sequential trials for all parties to avoid duplication of hearings and possibly conflicting results."* (emphasis added)

(v) There was no real prejudice to the Subcontractor caused by the delay

What is clear from this case (as underlined above) is that where a professional is seeking to claim that the delay in applying for, and serving, a Third Party Notice on him/her is in breach of s27, the professional would be well-advised:

(i) To require of the Court that the joining party fully explains the delay, and the reasonableness of the reasons for same

(ii) To emphasise to the Court why and how the Third Party proceedings might delay the pre-existing proceedings

Otherwise, and particularly in the absence of extended delay and/or notable prejudice, the *"particular caution"* (and ensuing excusable delay) which the Courts allow to a party who is deciding whether to join a professional to ongoing litigation will be a powerful factor in allowing the Third Party proceedings to continue.

***Desmond and Linda Buchanan v BHK Credit Union Limited, John Clarke & Sons v Brendan Cashell Architects and Duffy Chartered Engineering [2013]* IEHC 439**

The circumstances of this recent case are similar to those in *Robins v Coleman* above. The plaintiffs served a Statement of Claim in November 2010 seeking damages from the Defendant Credit Union (BHK) for property damage caused to their adjoining public house during the demolition and refurbishment of the Credit Union. BHK's builders (Clarke) were also named as a co-defendant by the plaintiffs.

BHK raised particulars on the Statement of Claim, which replies were received from the plaintiffs on 5 May 2011. BHK filed its defence on 5 July 2011, but only received the defence of Clarke on 4 April 2012. That defence alleged that Clarke had no responsibility for the design of the demolition or construction works, such that any lack of support now being experienced by the plaintiffs' adjoining premises was caused by BHK and/or BHK's engineer (Mr Cashell). In light of this, BHK served a motion seeking to join Mr Cashell on 18 May 2012, which order was granted on 23 July 2012. This was served on Mr Cashell on 9 August 2012, who sought to strike out the Third Party Notice on two grounds:

(i) The notice did not comply with the requirements of Order 16 Rule 1(3) of the Rules of the Superior Courts, in that BHK's application for leave to issue the notice on Mr Cashell was not made within 28 days after delivery of BHK's Defence; and/or

(ii) (separately) the application by BHK had not been brought *"as soon as is reasonably possible"* under s27(1)(b) of the Civil Liability Act 1961

With regard to (i) above, the Court held that the reference to 28 days in Order 16 Rule 1 (3) was: *"at the very most an indicative starting point in any assessment of what was reasonably possible in the circumstances"*, and could not be dispositive of the separate question as to whether the *"as soon as is reasonably possible"* requirements of s27 had been complied with.

Regarding the s27 allegation in (ii) above, the Court approved the statement in *Tuohy v North Tipperary County Council* [2008] IEHC 11 that the s27 imperative to join a third party *"as soon as is reasonably possible"*:

"… must be seen as applying from the time when the defendant was first in a position to know that the claim against the proposed third party was possible to pursue".

The Court in *Buchanan* further acknowledged that the time began to run from the point when it was possible for a *"prudent and responsible decision"* to be made as regards joining a relevant third party. The Court additionally approved the observation of the Court in *Robins* that Third Party Notices which seek contribution from professionals fall into a *"special category"*: an element of caution (and thus delay) is required in determining the factual position before an allegation of professional negligence can be made via a Third Party Notice.

The Court stated that BHK's delay from November 2010 (service of plaintiffs' Statement of Claim on BHK) to 5 May 2011 (BHK's receipt of the plaintiffs' replies to particulars) was justifiable: the replies were properly awaited by BHK before it decided whether or not a case might need to be pursued against the Engineer.

As regards the further period of BHK delay from 5 May 2011 to 23 July 2012 (when the Third Party Order regarding joinder of Mr Cashell was made), the Court noted that BHK must have been at least contemplating the joinder of Mr Cashell as early as 20 May 2011, when a request was made to Mr Cashell by BHK's solicitors for his file. However, he was only joined some 14 months later.

The Court concluded, however, that there were significant mitigating factors such that the Third Party Notice would not be struck out for s27-related delay:

(i) *"given that the Third Party Notice involved a claim of professional negligence, it was necessary for BHK to act with caution"*

(ii) *"… while it was always possible for BHK to have pursued a third party claim as against Mr Cashell at some earlier stage, the practical reasons and potential justifications for taking this step only really came into focus once BHK had been supplied with a copy of the John Clarke defence* [on 4 April 2012, which defence disclaimed any design responsibility and put all blame on BHK and/or BHK's engineer, Mr Cashell]. *In this case, at least, it was from that particular point in April 2012 that the temporal imperative [under s27] came into play."*

In light of this conclusion it is clear that the Courts will examine the factual background closely in any particular case in order to establish from what point in time - for s27 purposes - there was sufficient information (adequately pursued) pursuant to which a prudent and responsible decision could be made to join the relevant Third Party. As previously, this results in a degree of indulgence being given to the party seeking joinder, particularly where the *"special category"* of professionals-as-Third-Parties is involved.

As a final point, the Court noted that it did still have jurisdiction, as a matter of principle, to strike out a Third Party Notice where the "as soon as is reasonably possible" time requirements of s27 were complied with, but the delay still occasioned prejudice to the Third Party. On the facts, however, that was not the case here: while there may have been some dimming of recall by Mr Cashell in the 7 years since the relevant events occurred, this was largely due to the plaintiffs having only commenced proceedings more than four years after the said events, with any delay attributable to BHK being just over a year at most.

Conclusions

It is clear from the above case law, most recently in *Buchanan*, that third party claims against professionals fall within a *"special category"* i.e. such claims require particular caution before proceedings should issue. For this reason the Irish Courts have demonstrated a general reluctance to strike out Third Party Notices joining professionals on grounds of s27-related delay, provided the delay is not exorbitant, there are at least some reasonable mitigating circumstances and no appreciable prejudice has been suffered by the Third Party in question.

Further information

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