Getting a Contribution – Recent Developments under the Civil Liability Act, 1961

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I. The Applicable Legislation

Civil Liability Act, 1961 (CLA)

Section 11(1): For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.

(2) Without prejudice to the generality of subsection (1) of this section—

(a) persons may become concurrent wrongdoers as a result of vicarious liability of one for another, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage;

(b) the wrong on the part of one or both may be a tort, breach of contract or breach of trust, or any combination of them;

(c) it is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive.

Section 17 (1)The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.

(2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest.

Section 21(2) In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault, and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any contributor shall amount to a complete indemnity.

Section 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. 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.

RSC Order 16

Rule 1 (3): 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.

Rule 8 (3): The third-party proceedings may at any time be set aside by the Court.

Note also the District Court Rules which have a slightly different procedure and tighter time limits

Order 42A r.3 DCR provides that in order to join a third party to the action, a respondent may, within 10 days of the service upon him or her of the claim notice or notice of application (exclusive of the date of such service), issue and serve a copy of the third party notice on the claimant or the claimant's solicitor.

There is no requirement for leave from the Court under the DCR.

II. The Time Limits

Note: The following is an analysis of the caselaw relating to cases to which S.27 CLA applies. For S.27 to apply, the third party must be a concurrent wrongdoer within the meaning of CLA. The notes will consider the cases to which S.27 does not apply (and only RSC applies) further below.

Cases involving S.27 CLA

A claim for contribution is regarded as an independent cause of action pursuant to s. 27(1) of the Act of 1961. So, as Kearns P stated in *Kennedy v O'Sullivan*, the relevant limitation period is that set out in s. 31 of the Act of 1961 and it is deemed to have run from the date on which the liability of the defendants to the plaintiff was established.

S.31 provides:

> An action may be brought for contribution within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater.

This is described as "curious" by Canny[1] who notes that that they comprise both a limitation period and a requirement that a third party notice (where applicable) be served on the third party as soon as is reasonably possible,

The Courts in recent years have taken a Court takes restrictive view as to the extent of the window of opportunity afforded by the phrase " as soon as is reasonably possible". The focus of the

[1] Canny, Limitation of Actions, 2nd Ed., 2016

caselaw has been on the time limits as set out in the CLA as it is effectively accepted that parties will not comply with the 28 day limit as set out in the RSC.

The Court in Connolly v. Casey[2] said it would only be in "Very exceptional circumstances" that a third party notice would be set aside for failure to comply with 28 day rule

In Greene v. Triangle Developments Ltd[3], the Court of Appeal noted that the time-limit under Order 16 is not one with which the parties will normally comply or even be expected to comply.

In O'Connor v. Coras Pipeline Services Ltd[4], Barrett J. described as "regrettable" the fact that the rules establish time constraints which are so rigorous that they are more often honoured in the breach than the observance, with the courts expected to tolerate what appears to be a general divergence in practice from the timescale that Order 16, rule 1(3) ordains.

This does not mean that the 28 day limit should be ignored – a red flag was signaled in Clúid Housing Association v. O'Brien & Ors[5] where Murphy J. took a strict approach and had serious regard for the 28 day limit. The respondent to the application to set aside, the third named defendant, argued that the substance of the plaintiff's claim was only capable of expert review when particulars were delivered. However, Murphy J. was not satisfied that this was so, stating as follows at para 37:-

> "37. In the Court's view the statement of claim contained sufficient particulars to permit this respondent to decide whether to join the subcontractor as a third party having regard to;
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> a) its particular knowledge arising from its involvement in the project and the problems which arose;
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> b) its expertise as consulting engineers;
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> c) the detailed particulars pleaded in the statement of claim.
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> 38. In the circumstances of this case the Court is not persuaded that the respondent needed anything more than the statement of claim to decide on the appropriateness of joining the third party. Indeed, the Court goes so far as to suggest that this may be one of the few cases in which a requirement to comply with the twenty-eight-day time limit set out in O. 16 r. 1(3) might be warranted".

More particularly, the Court noted:

> 39. While the respondent has asserted that it required sight of the replies to particulars in order to brief independent experts to advise it in relation to the third party's liability, it has adduced no evidence to support that assertion. The Court has not been directed to any replies which were crucial or even material to the respondent's decision to issue third party proceedings. The experts retained by it have not been identified nor has the nature or scope of their examination been disclosed. In this regard the Court also notes that the particulars of negligence pleaded against the third party both in the third party notice and the third party statement of claim do not differ materially from those pleaded by the plaintiff in the underlying proceedings, all of which suggests that the respondent was never

[2] [1998] IEHC 90
[3] [2015] IECA 249
[4] [2021] IECA 68
[5] [2015] IEHC 398

> in fact dependent on the assessment of an independent expert to inform its decision to join the third party/applicant.

She set the third party notice aside, stating it had not been served as soon as reasonably possible. It is notable that in this case, reasonableness appears to have measured against the 28 day period.

Notwithstanding the reluctant acceptance by the Courts that RSC time limits are unlikely to be met, the 28 day limit serves as the starting point[6] for the consideration of whether or not the Defendant made the application "as soon as reasonably possible".

What is the end point of the timeline? It could be the date the motion issues, is granted by the Court or is served on the Third Party. There is some uncertainty on this point.

In Greene v. Triangle Developments Ltd[7], the Court approached the issue on the basis of the date upon which the third- party notice is served. Whereas in McElwaine v. Hughes[8] and Morey v. Marymount University Hospital and Hospice Ltd[9], the Court measured the timeline to the earlier date upon which the motion seeking to join the third- party was issued.

Simons J. recently set out his view on the issue in Susquehanna International Group Limited v Execuzen Limited & Ors[10]:

> I tend to the view that time should be taken as running from the date upon which the third- party notice is actually served. This appears to be more in keeping with the statutory language, i.e. "serve a third- party notice upon such person as soon as is reasonably possible". It is also more consistent with the objective of the temporal requirement which, as discussed under the next heading, is to avoid unnecessary delay to the plaintiff's action. It is only once the third- party notice has actually been served that applications can be made for directions.
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> (Emphasis added)

In many cases, the difference will not have an impact. However, it is a point to be alert to and obviously, depending on whether a party is a third party seeking to set aside the notice, or a defendant resisting an application to set aside, the difference of a few months might tip the scales.

It would also follow that there should be no delay whatsoever in serving the third party notice as the proverbial clock may still be ticking fi the Court takes service of the notice as the end point.

The respondent to the application will need to set out in detail the reasons for any delay. However, the Courts have confirmed that the respondent is not required to account for the entirety of the period in question:

> "The whole circumstances of the case and its general progress must be considered and that the absence of an explanation for some of the delay was not a sufficient ground to set aside the third party notice" – per Denham J. in Connolly v. Casey[11]

The assessment by the Court is both subjective and objective:

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[6] With the exception of the Cluid case.
[7] [2008] IEHC 52
[8] [1997] IEHC 74
[9] [2017] IEHC 285
[10] [2021] IEHC 551
[11] [2000] 1 IR 345 (emphasis added)

It is incumbent on the court to look not only at the explanations which have been given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third- party notice was served as soon as is reasonably possible - Greene v. Triangle Developments Ltd.[12]

There is an abundance of case law on applications to set-aside a third party notice.

The Courts always emphasise that each case will turn on its own particular circumstances, meaning there are no definitive rules on how long is acceptable i.e. 5 months in one case may be fatal whereas 18 months in another case may be excused.

As Ryan P. indicates in Kenny at para.26:

> "A delay in one case may be reasonable whereas the same time lapse in another may be fatal to the defendant's wish to join the alleged contributor ".

Therefore, these are fact-specific applications, the decisions in any one of which will depend on the particular circumstances that present in such application, though some degree of speed is invariably required.

Barrett J. set out the following principles in Majella Kenny v Noel Howard.[13] The checklist serves as a useful guide to whether there is a stateable case (or defence) to an application to set aside.

The Kenny Principles:

I: General Approach of Courts.

[1] The general approach of the courts has been to focus on the question of whether it was possible to join a third party earlier. Even lengthy delays have been excused where they have been explained and the third party has been unable to establish prejudice.

[2] The net issue in s.27(1)(b) applications is whether, in all the circumstances, it is reasonable for a defendant to wait for the period in question before applying to join the third party. Any such permissible delay will generally be measured in weeks and months, not years.

II: Purpose of Section 27(1)(b).

[3] The clear purpose of s.27(1)(b) is to ensure that a multiplicity of actions is avoided and that, where possible, all issues involving plaintiffs, defendants and third parties are heard together or in a sequenced trial.

[4] A multiplicity of actions is detrimental to the administration of justice, to the third party and the issue of costs. To enable a third party to participate is to maximise his rights and see that he is not deprived of the benefit of participating in the main action.

[5] Another purpose of requiring a notice to be served " *as soon as is reasonably possible* " is to put the contributor in as good a position as is possible in relation to knowledge of the claim and opportunity of investigating it.

[6] In s.27(1)(b), the Oireachtas did not seek to fix a set time period, but rather imported a concept of relative urgency designed to compel the defendant to seek to issue a third party notice with all deliberate speed having regard to all relevant circumstances.

[12] [2015] IECA 249
[13] [2016] IECA 243.

III: Totality of Circumstances Relevant.

[7] 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.

[8] While a court may take all the circumstances into account, there needs to be evidence as to the reasons for, and excuses for, a delay.

[9] What might appear a long period when stated in the abstract may, when all the circumstances are taken into account, attract the protection of s.27(1)(b).

[10] Because each case must be approached with reference to its own facts, precedents are of limited value and must be looked at for guidance rather than in expectation of finding an answer to the case before the court.

[11] Particular allowances may have to be made, for example, for those disadvantaged members of the community who by reason of indigence, lack of education and other similar factors may not have been in a position in the past to assert or protect their rights. (Unfamiliarity with the legal system would seem to be another factor of relevance).

IV: Meaning of "reasonably possible".

[12] The use of the word " *possible* " in s.27(1)(b), rather than the word 'practicable', may suggest a brief and inflexible time limit. In truth, however, the statute is not concerned with physical possibilities but legal and perhaps commercial judgments.

[13] Proceedings cannot and should not be instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon. It is in this context that the word " *possible* " must be understood.

[14] The qualification of the word " *possible* " by the word " *reasonably* " in s.27(1)(b) gives a further measure of flexibility, indicating that circumstances may exist which justify some delay in the bringing of the proceedings.

[15] The reasonableness at issue in s.27(1)(b) is that of the defendant or concurrent wrongdoer.

V: Subjective and Objective Test Arising.

[16] It is incumbent on a trial judge, when faced with a set-aside application to look not only at the explanations given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third party notice was served as soon as is reasonably possible.

VI: Failings of Professional Advisors.

[17] While a party can be blamed for any delay on the part of its professional advisors, such blame needs to be considered in a somewhat different way from delay directly attributable to the party itself.

[18] A party is not entitled to sit back and allow its professional advisers to conduct litigation at whatever pace those professional advisers consider appropriate. If a party does that, then it must often take some of the blame which might legitimately attach to that party for delay on the part of those professional advisers.

[19] On the other hand, the position of a party who is faced with delay on the part of its professional advisers depends on (a) the extent to which it could be regarded as reasonable for the party to have had it within its capability an ability to do something about the delay concerned, and

(b) the extent to which it may be reasonable, on the circumstances of the case, to attribute delay on the part of those professionals involved to their client. What may be reasonable depends on the circumstances of the case.

[20] Any lawyer representing a party in litigation must be taken to be fully aware of the need to act with reasonable expedition in progressing the proceedings. Such lawyers do not need to be reminded by their client of their obligations. If those lawyers are guilty of such delay as puts the proceedings at risk then, it may well be that the consequences of that delay should not be visited on the innocent other side, but rather may have to result in the proceedings, or an appropriate aspect of them, being struck out for delay, with the party aggrieved having its remedy against the lawyers whose delay has led to that unfortunate situation.

[21] Clients are not lightly to be faulted if they deferentially assume that once their lawyers have been tasked with dealing with a matter they will do so in a competent and timely manner.

[22] No lawyer could reasonably expect that any ill-consequences of delay on his part in giving advices in the context of unfolding litigation should necessarily and in all instances fall to his client. Neither should any opponent lightly assume that such delay will necessarily and in all instances be used to confound the progress of proceedings, especially in circumstances where no prejudice appears from the facts to arise for that opponent as regards its constitutional rights to basic fairness of procedures, and to have proceedings determined within a reasonable period.

[23] The court is entitled to have regard to the experience of daily practice as a solicitor.

VII: Delay When Alleging Professional Negligence.

[24] An element of caution is required before a third-party notice is served, especially where an allegation of professional negligence is involved.

VIII: Prejudice.

[25] Prejudice to a relevant party has to be a relevant factor in deciding whether or not a defendant has proceeded " *as soon as is reasonably possible* ".

[26] The judicial discretion conferred by s.27(1)(b) must be exercised in accordance with fundamental constitutional principles. This not only means that the discretion must be exercised in a fashion which respects basic fairness of procedures but the court must be conscious of its obligation to uphold and apply the constitutional norms envisaged by Article 34.1 of the Constitution (as to the administration of justice), and Article 40.3.1° (regarding the protection of personal rights).

IX: Onus of proof.

[27] The onus is on the person seeking leave to serve a third-party notice to prove an application for leave has been brought within the statutory time limit.

One point of divergence between the majority and minority in Kenny was prejudice. The majority held that whereas prejudice to the third-party might be considered in the mix, third-party proceedings may nevertheless be set aside even in the absence of specific prejudice:

> "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 Third-Party] has suffered prejudice by reason of the delay."

However, it seems prejudice will still be considered by the Court anyway.

For example, see Haughton v. Quinns of Baltinglass Ltd.[14] where Simons J. (in light of the decisions in Kenny and Greene which had been cited to him) did not regard prejudice to the third party as a decisive factor, he, nonetheless, has regard to it in considering the whole circumstances of the case.

Third Party Application to be made with haste

It is not only the Defendant who joins the Third Party that is subject to scrutiny in terms fo their speed. The application to set aside a third party motion must also be brought quickly.

The Supreme Court in Boland v Dublin City Council[15] held that just as a defendant must act as soon as "reasonably possible " in applying to join a third party so must a third party act as soon as " reasonably possible " in seeking to set it aside

An interesting issue of estoppel was also raised in the Cluid Housing case:

> "Had the applicant filed a defence before bringing this application, different considerations would apply. In such circumstances a Court might well hold that having opted to defend the proceedings the third party could not then resile from that position by seeking to set them aside. Further the delay involved in taking such a step could also mean that the application had not been brought as soon as "reasonably possible".

Other Grounds to Set Aside (apart from delay)

A third party can apply to set aside a third party notice on other grounds. Examples include Hassett v South Eastern Health Board[16] where an application was made to set aside third party notices that had been issued and served out of the jurisdiction on the basis that the Irish courts did not have jurisdiction to hear the third party claims. The application was unsuccessful with Finnegan P holding that the Irish courts had jurisdiction under Article 6(2) of Council Regulation (EC) No. 44/2001.

In Hickey v Geary[17], an application was successfully made to set aside a third party notice on the grounds the issues were res judicata. In previous proceedings instituted by the plaintiff, the High Court had held that the proposed third party, the deceased's daughter, was entitled to the proceeds of a life insurance policy taken out by the plaintiff's deceased husband. The plaintiff then instituted proceedings against the solicitors who had advised her late husband claiming negligence and the defendants served a third party notice on his daughter asserting that she was a constructive trustee for the plaintiff in respect of the funds she had received on foot of the policy. Dunne J agreed that the issues between the plaintiff and the third party had been determined in the previous proceedings and that the question which arose as between these parties was res judicata. In the circumstances she was satisfied that the third party notice should be set aside.

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[14] [2019] IEHC 532
[15] [2002] 4 IR 409
[16] [2006] IEHC 105, [2007] 1 IR 644
[17] [2009] IEHC 118

In Kevin Glackin v Olette Doherty & Ors[18] the Court set aside the third party notice on grounds of delay and also because no legitimate purpose was served in having TP involved in the proceedings as S.35(1)(h) applied. The Court appeared to determine the TP was a concurrent wrongdoer and P would therefore be identified with any liability on the part of TP anyway

IV. Separate Claim for Indemnity against Concurrent Wrongdoer

The question of whether there is any alternative to serving a third party notice in order to claim contribution in the case of concurrent wrongdoers was addressed by Finlay CJ in Board of Governors of St Laurence's Hospital v Staunton[19]. He said that he was driven to the conclusion that the express vesting in the court of a discretion to refuse to make an order for contribution upon the failure of the claimant for such contribution to serve a third party notice "as aforesaid" made it necessary to construe the subsection as leaving open the bringing of a substantive claim for contribution.

However, as Finlay CJ made clear, having regard to the terms of the subsection, any substantive claim for contribution which the defendant may make becomes subject to the proviso that "the defendants having failed to serve a third party notice in the action, there is vested in the court a new and separate discretion by this sub-section to refuse to make an order for contribution in their favour, even if it were satisfied that they could establish a right to contribution on the facts presented to it".

Therefore, by electing to proceed by way of a "separate action" for a claim for a contribution, the wrongdoer runs the risk of the Courts discretion to refuse to make an order for a contribution in what would otherwise be a good contribution claim.

A separate application for a contribution can be brought even when a third party notice has been granted and subsequently set aside i.e. it is not one or the other, but as we will see, the Order setting aside the third party notice will play a role in the discretion in the later contribution proceedings.

When is the discretion triggered?

The discretion under S.27(1)(b) was considered by Geoghegan J in the Supreme Court decision in ECI European Chemical Industries Ltd v MC Bauchemie Mueller GmbH[20] who agreed that a claimant who did not serve a third party notice as soon as was reasonably possible was not necessarily precluded from making a claim for contribution in a separate action.

The Court held that in exercising its discretion to reject the independent action, in circumstances where the third party notice was either not served, or served but subsequently set aside, the court must consider whether there was a good reason why the statutory requirement of serving the third party notice as soon as was reasonably possible was not complied with. If there was no good reason for the failure to comply, then, in most cases, irrespective of any question of prejudice, the independent action should be rejected. The onus of proof in this regard is on the claimant. There may be exceptional cases in which, as a matter of justice, the action should not be rejected on that count alone.

[18] [2016] IEHC 622
[19] [1990] 2 IR 31
[20] [2006] IESC 16, [2007] 1 IR 156.

It is notable that this threshold applies whether the third party notice procedure was not availed of, or was availed of but subsequently set aside.

In considering whether a third party notice was served as soon as was reasonably possible, the surrounding circumstances may be taken into account. It further held that while the issue of reasonableness may, as here, be res judicata as it relates to the delay in serving the third party notice, the court may, in assessing whether there was a good reason for failing to comply with the statute, address the issue of reasonableness in relation to other non-temporal issues.

Therefore, a separate action for a contribution brought after an order setting aside a third party notice faces a significant challenge to avoid a refusal based on the Court's discretion.

More recently, in Ballymore Residential Ltd v. Roadstone Ltd[21], Collins J. has queried whether the approach adopted by the Supreme Court in the ECI case might be thought to be an unduly narrow one. He suggested, obiter dicta, that if the defendant to the claim for contribution has not been materially prejudiced by a failure to utilise the third-party procedure, then it might appear difficult to understand why the court's discretion should be exercised against permitting a claim for contribution to be pursued.

> 58. The approach taken to the section 27(1)(b) discretion in ECI European Chemical Industries Limited v MC Bauchemie Muller GmbH might be thought to be an unduly narrow one that arguably involves reading into the sub-section restrictive language which the Oireachtas did not choose to employ. The discretion conferred by section 27(1)(b)) is expressed in the very broad terms ("… the court may in its discretion refuse to make an order for contribution …").Section 27(1)(b) clearly contemplates that a claim for contribution may be made by action where there has been a failure to comply with third party procedure. That is the hypothesis on which the Oireachtas legislated to permit such actions to be brought. If the failure to serve a third party notice as required by section 27(1)(b) is, of itself, regarded as sufficient reason to exercise the court's discretion against making an order for contribution – at least in the absence of some exceptional circumstance – that would appear to involve a significant limitation of the court's discretion. Geoghegan J's suggestion that prejudice may not be relevant to the exercise of that discretion also appears somewhat surprising and, as he acknowledged, the (obiter) comments made by Finlay CJ in Board of Governors of St Laurence Hospital v Staunton seem to be to the contrary effect. If the defendant to the claim for contribution has not been materially prejudiced by a failure to utilise the third party procedure it might appear difficult to understand why the court's discretion should be exercised against permitting a claim for contribution to be pursued.

If followed, this would certainly temper the sting of the discretion that is inherent in S.27(1)(b) and the gauntlet that must be run in any claim for a contribution made in separate proceedings.

Therefore, as it currently stands, on the current state of the authorities, the setting aside of a third-party notice on the grounds of delay may have the consequence that the defendant is precluded thereafter from seeking any contribution from that party.[22]

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[21] [2021] IECA 167

[22] AS per Simons J. in Susquehanna International Group Limited v Execuzen Limited & Ors at para. 34.

V. "Non S.27 CLA" Cases

As noted above, there is an important distinction to be made in cases to which S.27 CLA is applicable. Applications to set aside are determined by reference to the "as soon as reasonably possible" criteria.

In a case where the proposed third party is not a concurrent wrongdoer, the CLA does not apply and the application to join the third party is made under the RSC only.

These cases often involve the joiner of an insurance company by the Defendant. In these cases, the insurance company is clearly not a concurrent wrongdoer – it is well-established that no right of action exists between an injured party and the insurer of the tortfeasor. Therefore, the joinder of the insurance company is usually on the basis that the Defendant alleges that it is entitled to an indemnity under the contract of insurance.

Another example might arise where a person (the Plaintiff) is injured when struck by a door that opens outwards onto a busy hallway in a premises instead of inwards. The Plaintiff sues the occupier of the premises under the OL 1995 alleging a dangerous premises. The Defendant might allege that in fact, the premises was designed negligently and joins the architect as a third party. The Plaintiff does not need to join the architect as the architect's duty of care does not extend to visitors to premises that the architect designed. Here, the architect and the occupier are not concurrent wrongdoers and so the third party proceeds are determined under the RSC only. In this example, the Defendant can seek an indemnity from the architect and can also seek damages, equivalent to the costs of reinstating the door to open safely inwards.

A recent case has introduced a new test for these cases and has borrowed from the well-established "Primor" principles.

Nigel Morrow v Fields of Life Trust Limited and Trevor Stevenson Trading as Fields of Life Trust (Defendants) and J. Hatty & Company (Third-Party)[23]

The Plaintiff was working overseas with the Defendant charity and in the course of carrying out building works, suffered personal injuries. The PIS was served and verified by affidavit in March 2015. The defendant had 8 weeks to deliver a defence and 28 days thereafter to issue the TP notice, which would have been 3rd June, 2015. The defence was delivered in May 2016. The TP motion was issued in 8th December, 2016 – 18 months after the RSC time limit expired.

The proposed TP was the insurance broker who was retained by the defendant to advise in relation to the insurance required for its overseas charity work.

Of interest in this case is that McDonald J. applied the Primor principles on delay:

> [T]here is now a sophisticated body of case law in place addressing the circumstances in which the court will dismiss proceedings on the grounds of inordinate and inexcusable delay. It would be surprising if similar principles were not available to be invoked by a third-party in cases of significant delay in serving a third-party notice. The relevant principles require the court to consider the following:
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> (a) whether there has been inordinate delay in taking a relevant step;
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> (b) whether that delay is excusable or inexcusable;
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> (c) if the delay is inexcusable, where does the balance of justice lie.

[23] [2020] IEHC 390

> 91. It seems to me that a similar approach should be taken in the case of delay in serving a third-party notice in cases to which Part III of the 1961 Act does not apply. In taking that approach, I do not believe that I am acting inconsistently with the earlier case law such as Golden Vale or Ward v. O'Callaghan. In the first place, the case law on inordinate and inexcusable delay (such as Primor plc v. Stokes Kennedy Crowley [1996] 2 I.R. 459) does not appear to have been cited to McCracken J. or to Morris J. Secondly, in both Golden Vale and Ward v. O'Callaghan, the court concluded that there was no operative prejudice suffered by the third-party as a consequence of the delay. As discussed further below, subject to the potential effect of Gilroy v. Flynn and Article 6 (1) ECHR, prejudice to the affected party is one of the factors that would be taken into account, in any event, in assessing the balance of justice in accordance with the Primor principles. In seeking to apply those principles here, I am simply updating the approach previously taken by McCracken J. and Morris J. In these circumstances, I do not believe that any issue arises by reference to the principles discussed by Clarke J. (as he then was) in Worldport Ireland Ltd. [2005] IEHC 187.
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> 92. Accordingly, I propose in this case to apply the Primor principles by analogy.

This would appear to be a new development in this area and it is interesting to note once again, the issue of prejudice is to the fore in a consideration of whether an order for contribution should be made.

A short summary of the Primor principles is that it is a test that involves an examination by the court of whether or not there has been inordinate and inexcusable delay on the part of the plaintiff. If both such elements are established, and the onus is on the defendant in this regard, the Court then moves on to consider whether the balance of justice nonetheless rests in favour or against the dismissal of the proceedings. This three strand test was first described in some detail by Finlay P. in Rainsford v. Limerick Corporation [1995] 2 I.L.R.M. 561 and later considered in greater depth by Hamilton C.J. in Primor plc v. Stokes Kennedy Crowley [1996] 2 I.R. 459.

It was most recently examined by the Court of Appeal in Maria Cassidy v The Provincialate[24].

VI. Sections 34 and 35 CLA

Section 34 CLA is the provision pleaded in almost all personal injuries cases – contributory negligence. The assessment is between the Plaintiff and Defendant.

Section 35 provides for deemed contributory negligence and provides a means of "identifying" the Plaintiff with the liability of another concurrent wrongdoer.

Section 35 was quite rarely relied upon but in the last number of years has become a nuclear option that is regularly deployed.

S.35(1):

> For the purpose of determining contributory negligence—
>
> (*i*) where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any

[24] [2015] IECA 74

> other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer

It is a procedural defence which must be pleaded. This issue arose in Kehoe v RTE[25] where the Defendant successfully raised a S.35(1)(i) defence in defamation proceedings. The Plaintiff sued the broadcaster of the allegedly defamatory statement (RTE) but not the who had actually made the statement. The Defendant had pleaded it would rely on S.35(1) without identifying the specific subsection. The High Court held this was sufficient and noted particulars had not been raised. The case also confirmed that the provisions of S.35 apply to all torts, including defamation.

S.35(1)(i) issues also arose in Hickey v. McGowan and Anor[26]. Here, the Plaintiff had been a student at a Marist National School from 1969 to 1972 and alleged that he was sexually abused there by a teacher. As the Plaintiff had not sued the manager of the school, who was the employer of the teacher who had carried out the sexual abuse, S.35(1)(i) applied. O'Donnell J. considered the section and noted:

> It seems to me that this section can be understood more readily and more naturally as merely a deeming provision which deems the liability of the statute barred defendant a form of contributory negligence which can then be pleaded against the plaintiff in reduction of the plaintiff's award. The purpose of a deeming provision is to give a meaning to something for a particular purpose which it would not otherwise have more generally. Breach of contract or an intentional tort is not normally contributory negligence if committed by the plaintiff, but when committed by a concurrent wrongdoer not sued and now protected by the Statute of Limitations, it is deemed to be so for the limited purposes of the identification provisions of the Civil Liability Act

Another point that arose in this case – but was not determined – related to the fact that the Plaintiff only sued one member of the Marist Order, Brother McGowan (the person who carried out the sexual abuse). As the Marist Order is made up of a number of members and only one was sued, there was a potential further S.35 point.

> It follows from the foregoing that in theory all members of the Marist Order, at least those who are members at the time of the alleged abuse, are vicariously liable, but only Brother McGowan has been sued. There was some discussion therefore as to whether s.35(1)(i) applied in this context as well. I do not necessarily accept that it would be appropriate to permit a party such as the first named defendant in this case, to rely on the failure of the plaintiff to sue other members of a religious order when knowledge as to the identity of such members was something much more clearly within the power and control of the first named defendant rather than the plaintiff. However, in any event as is apparent, this issue was not raised by the pleadings, and accordingly it is neither necessary, nor appropriate, to address the question of the potential liability of other members of the Marist Order for the purposes of s.35(1)(i).

This has developed further recently in Kenneth Grace v Paul Hendrick and Edmund Garvey[27] where Hyland J. made an Order pursuant to the inherent jurisdiction of the High Court directing the disclosure of the names and addresses of all of the members of the Christian Brothers at the

[25] [2018] IEHC 340
[26] [2017] IESC 6 [2017] I.R. 196
[27] [2021] IEHC 320

time of the wrongful acts of the First Named Defendant. The Court identified that the Plaintiff was potentially prejudiced if a S.35 defence was raised.

> 85. As identified in Hickey, the reason for this section is to incentivise plaintiffs to sue all potential concurrent wrongdoers as otherwise, a plaintiff may simply throw all the loss upon one defendant. O'Donnell J. observes that the section has the capacity to operate harshly in certain circumstances, including where there are a large number of defendants who may be concurrent wrongdoers on the grounds of vicarious liability but whom it may be very difficult to identify and whom the plaintiff may not have the capacity to identify. In such a situation he notes it may be unfair to reduce the plaintiff's award for failure to join all potential parties (paragraph 67). O'Donnell J. notes that s.35(1)(i) might benefit from further detailed scrutiny and observes that it might be inappropriate to permit a defendant to rely on the failure of the plaintiff to sue other members of the religious order when knowledge as to the identity of such members was more clearly within the power and control of the defendant. However, that issue was not raised in Hickey and therefore not decided.
>
> 86. That discussion serves to show that any reliance upon s. 35(1)(i) by the second named defendant to reduce any award the plaintiff might obtain could be problematic. But the position would not necessarily be the same if the first named defendant sought to rely on s. 35(1)(i) given that no request has been made to him for the requisite information. Moreover, it is not possible to be sure as to how any such argument would ultimately be resolved. The plaintiff is in my view potentially at a significant disadvantage in knowing that there are (on his case) concurrent wrongdoers whom he would like to sue but cannot because of the refusal of the second named defendant to provide the names of same.

An interesting issue arose in the UCC v ESB litigation when it reached the Supreme Court. In the High Court (in 2014), the Judge had found that the Plaintiff was guilty of contributory negligence as it had hired designers who had negligently designed and located the buildings on a flood plain. The Judge found that the advisors were agents of the Plaintiff and were 40% responsible.

The Court of Appeal overturned that finding. On appeal, the Supreme Court reinstated the finding of contributory negligence (but the actual percentage finding has been remitted for hearing).

By the time the case reached the Supreme Court in 2020, the claim against the designers was statute barred. ESB sought to raise a new issue and submitted that the advisors were concurrent wrongdoers who had not been sued and therefore, S.35(1)(i) applied. As this was a new issue raised in an appeal, Lough Swilly considerations applied. Of note is the issue of "contingent pleading".

> 5.2 Counsel for the ESB was asked to indicate why the issue now sought to be relied on was not raised at the trial. It would appear that the answer is that it was unlikely that the claims in question would have been held to have been statute-barred at the time of the trial so that, it is said, the case now sought to be advanced could not have been then made. That explanation seems to me to give rise to another fundamental difficulty. What the ESB now seeks to do is to rely on a legal position which it would appear would not have been available to it at the trial but which has only arisen since then. I do not rule out the possibility that there may be cases where the justice of the situation is such that a court may be required to entertain an argument which would not have been available at a

> trial but which has become available in the interval between trial and appeal. … In that context, it is important to note the argument put forward by counsel for UCC suggesting that it would have been possible to plead, on a contingent basis, reliance on s.35(1)(i) so as to put UCC on notice of the possibility that such an issue might arise either at the trial, if the timing of the trial were ultimately such that the statute issue might have arisen by that time, or on any appeal which might subsequently be taken. Counsel for the ESB did not accept that such a pleading would be appropriate.
>
> 5.3 Without deciding the merits of the pleading question concerning the possibility of what might be described as a contingent pleading, it does seem to me that it is appropriate to have regard to the fact that the ESB did not put UCC on any form of notice that it might, in the future, rely on s.35(1)(i) should the situation arise that a potential claim against any of the relevant professional advisers became statute barred. While not necessarily decisive, it seems to that the absence of any notice in that regard is a material factor to be taken into account in assessing the justice of allowing a new argument to be made.[28]

The contingent pleading issue seems to be a new issue (and there is no other case that has mentioned it before or since) that all practitioners and insurers should be alert to. It would seem that where a S.35(1)(i) defence is triggered at the expiration of a claim against a concurrent wrongdoer who has not been joined, it will be necessary to have pleaded it in order to rely on it – while that should come as no surprise given that S.35 is a procedural defence that must be pleaded, it is interesting to see the Courts approach to the matter when it arises at the appeal stage.

A potential difficulty arises where a contingent plea requires to be made in relation to another professional. This is effectively alleging that this party is a concurrent wrongdoer and is guilty of negligence. Can the plea be made in the absence of same? There is no case on the point but it is well established that proceedings alleging negligence against a professional should not be issued without a supportive liability report so it is certainly arguable that it equally applies to a contingent plea.

Defender v HSBC – S.35(1)(h)

The proceedings involve a claim made by Defender for damages for professional negligence and breach of contract against HSBC in the sum of US$141m. Pursuant to the terms of a custodian agreement between Defender and HSBC, Defender invested US$540m in an investment management business operated by Bernard L Madoff Investment Securities LLC (BLMIS) between May 2007 and December 2008.

It transpired that the investment management business conducted by BLMIS was a Ponzi scheme, which collapsed after Madoff disclosed its true nature to the FBI in December 2008. Following the collapse of the Ponzi scheme, the liquidation of BLMIS was commenced before the United States Bankruptcy Court. HSBC lodged a claim on behalf of Defender in the bankruptcy arising from its lost investment and the Trustee commenced proceedings against Defender for the return of US$93m, which it had redeemed. On March 23, 2015, the Trustee and Defender entered into a settlement whereby Defender agreed to abandon all claims in tort or breach of contract against the Trustee and BLMIS in consideration of its claim being allowed in the sum of US$441m plus 88% of the US$93m sought by the Trustee (the settlement).

[28] [2021] IESC 21

Defender anticipated that it would recover 75% of its loss through the bankruptcy. In November 2013 Defender commenced these proceedings against HSBC to recover the remaining 25% of its loss. HSBC relied on the provisions of the CLA, in particular s 17(2), to argue that it had a complete defence to the damages claim. It asserted that, if HSBC was found to be a concurrent wrongdoer with BLMIS, the settlement meant that Defender could not pursue HSBC by operation of s 17 (2) of the CLA.

Mr Justice Twomey in the High Court found inter alia that as BLMIS was guilty of fraud i.e. criminal conduct, HSBC would have been entitled to a 100% contribution from it. He identified a qualitative distinction between criminal wrongdoing and civil wrongdoing and found that S.17(2) offered a full defence to HSBC. Importantly, this decision was found at a preliminary hearing i.e. prior to evidence being heard.

The Supreme Court[29] considered the section and identified the potential unfairness it could cause:

> "…it is quite clear that the CLA in s 17 explicitly and deliberately contemplates the possibility of a plaintiff recovering less than full damages, even though there is a solvent defendant who has been determined to be a wrongdoer and, moreover, responsible for the damage who does not have to make good the deficiency. The section does not distinguish between the case where the deficiency results from a failure of the plaintiff to properly value the claim and the liability of [the settling wrongdoer] and those cases where the plaintiff accepts the settlement as the best that is possible in difficult circumstances".

The Supreme Court held that Twomey J. was correct in his interpretation of the legislation and the interplay between Ss.17 and 35. However, the Court overturned his findings in relation to the proceedings themselves and concluded that the proposition that fraud almost always obliterated negligence in terms of fault could not safely be adopted to dismiss a claim at a preliminary hearing. The matter was remitted for hearing to the High Court.

> 112…But I do not think it can be said that once it is concluded that a party is guilty of the tort of deceit that that will always absolve a concurrent wrongdoer from an obligation to contribute to a loss where that wrongdoer has been negligent, and particularly if the negligence consisted in failing to perform the task assigned to him or her of detecting or preventing the self same fraud.
>
> 113. The dilemma is neatly illustrated by the difference of opinion in the Australian High Court. The majority focussed on the apparent injustice that a fraudster could retain some of the benefits of the fraud, whereas Kirby J. was clearly influenced by the apparent injustice that a person found guilty of serious wrongdoing should be insulated from all responsibility for it because of the existence of another solvent wrongdoer.

This was the first comprehensive analysis of S.17(2) and S.35(1)(h) by the Supreme Court and it has confirmed that the consequences can be quite stark and would appear to run contrary to the intention of the Act.

In the High Court, the injured person – Defender – was not entitled to recover the entirety of its loss despite the fact that two concurrent wrongdoers were deemed responsible for the same damage. While the finding was overturned, it must be recalled that it was overturned because the fraud/negligence distinction should not have been made as preliminary finding.

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[29] [2020] IESC 37

The decision of the Supreme Court confirms as correct the interpretation of the High Court and the consequences that may be said to flow therefrom for injured persons who have settled with one concurrent wrongdoer; namely, that injured persons who enter into settlement with one concurrent wrongdoer may not be entitled to full damages by operation of s 17 (2) of the CLA, even when wrongdoing has been proved.

It sends a very clear warning that any party settling with one concurrent wrongdoer must do so with great care and carry out a hypothetical exercise. If a settlement is reached with D1, it may lead to D2 raising a defence under S.17(2) and lead to the Court carrying out a calculation of degrees of relative blameworthiness between D1 and D2 and thereafter, identifying (and thus reducing) any damages that would be payable to the Plaintiff from D2.

A Plaintiff will now be required to make an assessment of the inter Defendant contribution claim, despite not being a party to that theoretical claim.

VII. Conclusions

Applications to Join a Third Party

a) The Court takes restrictive view as to the extent of the window of opportunity afforded by the phrase "as soon as is reasonably possible".
b) It will look objectively and subjectively at reasons for delay.
c) Proceedings involving allegations of professional negligence will lead to a greater allowable time period.
d) Detailed pleadings from the Plaintiff will give less scope to Defendant to allege it needed to investigate claim. Equally, if the Defendant is an expert in the area e.g. engineer, less scope allowed to investigate.
e) Lawyers will not be excused for delay.
f) Prejudice to a third party will be considered but not determinative.
g) Separate S.27(1)(b) cases are subject to the Court's discretion to refuse to order contribution.
h) In the Ballymore case, Collins J. opens the door to revisiting the S.27(1)(b) discretion as set out in ECI in claims for indemnity.
i) Different considerations apply when third party is not a concurrent wrongdoer. In those cases, the test set out in Morrow per McDonald J. applies. This is the Primor test.

Sections 34/35 CLA

j) Ss.34/35 continue to be relied upon more frequently in all areas.
k) Contingent pleading appears to be acceptable to the Supreme Court, although the issue was not definitively determined. A contingent plea alleging a professional is a concurrent wrongdoer may require a liability report.
l) In Hickey v McGowan, O'Donnell J. appears to have raised the possibility of a refusal to identify a Plaintiff with the liability of a wrongdoer if that wrongdoer is unknown but that person/entity is within the Defendant's power or knowledge.
m) Grace v Hendrick is a new development allowing a Plaintiff seek an Order against existing concurrent wrongdoer Defendants disclosing details of other unknown concurrent wrongdoers.
n) Defender v HSBC confirms that S.17(2) CLA can potentially have severe consequences for a Plaintiff who settles with one concurrent wrongdoer.

o) A Plaintiff will be required to assess the potential contribution claim between concurrent wrongdoer Defendants and consider whether the settlement reached with one of those wrongdoers, could lead to complete defence to the non-settling wrongdoer.

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