“GETTING A CONTRIBUTION” RECENT DEVELOPMENTS UNDER THE CIVIL LIABILITY ACT, 1961

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The Issues

1. The Rules and Procedures for Contribution
2. Recent Case Law on Time Limits
3. Recent developments in S.34/S.35
4. Defender v HSBC

Procedures for Contribution

O.16 RSC	Leave to issue TP Notice
or	
S.27(1)(a)	Co-Defendants claim contribution – serve notice seeking indemnity/contribution
or	
S.27(1)(b)	Third Party Notice Procedure (concurrent wrongdoers)
or	
S.27(1)(b)	Issue separate plenary proceedings against that other party (concurrent wrongdoers)

Concurrent Wrongdoer: Two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.

Procedures for Contribution

The time limits which govern a claim for contribution under the CLA are curious

Limitation period (s.31) v a requirement that a third party notice (where applicable) be served on the third party as soon as is reasonably possible.

“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 .”

Third Party or Separate Proceedings?

Order 16, r. 1 is permissive - confers a discretion on the court to grant liberty to issue and serve a third party notice.

Order 16, r.1 not limited in its scope to claims for contribution or indemnity - extends to claims for contractual indemnity or damages in contract or tort.

Once TP Notice served, the Defendant is entitled to determination of the TP liability as of right and not subject to the possible discretionary refusal in separate contribution proceedings

RSC O16R(1)(3) allows 28 days for application to be made from the time allowed for delivery of defence

S.27(1)(b) CLA – “as soon as reasonably possible”

S.27 not always applicable…

It is important to remember that S.27 CLA governs third parties who are concurrent wrongdoers

Therefore, an assessment must always be made – is the third party a concurrent wrongdoer within the meaning of the CLA? See S.11 CLA

If so, RSC and S.27 applies

If not, only RSC applies – therefore S.27 caselaw not applicable

We will consider the S.27 caselaw first

Third Party – Time Limits – Starting Point

“Very exceptional circumstances” to set aside for failure to comply with 28 day rule - Connolly v. Casey [1998] IEHC 90

The time-limit under Order 16 is not one with which the parties will normally comply or even be expected to comply - Greene v. Triangle Developments Ltd [2015] IECA 249

Barrett J. described as “regrettable” the fact that the rules 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 - O'Connor v. Coras Pipeline Services Ltd [2021] IECA 68

BUT Court still considers the timeline from expiration of the period for delivery of defence

Third Party – Time Limits – Starting Point

However, notice should be taken of Clúid Housing Association v. O'Brien & Ors.[2015] IEHC 398

SoC delivered November 2012 – defence January 2014 – motion re: TP issued March 2014

In terms of the Defendant, the Court noted:

a) its particular knowledge arising from its involvement in the project and the problems which arose;

b) its expertise as consulting engineers;

c) the detailed particulars pleaded in the statement of claim.

"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".

Reasonableness appears to have been measured against the 28 day period.

Third Party – Time Limits – End Point

Some uncertainty in the case law as to whether delay should be measured by reference to:

(i)the date upon which the third-party notice is served (Greene v. Triangle Developments Ltd[2008] IEHC 52), or

(ii) the earlier date upon which the motion seeking to join the third-party is issued (McElwaine v. Hughes[1997] IEHC 74; Morey v. Marymount University Hospital and Hospice Ltd[2017] IEHC 285)

In some cases it will not make much difference – usually Court will direct service within a certain period

Recently, Simons J. proceeded on the basis it was the service of the motion - Susquehanna International Group Limited [2021] IEHC 551

Therefore…serve immediately!

Third Party – Time Limits

"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" - Connolly v. Casey [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[2015] IECA 249

Therefore, objective and subjective scrutiny by the Court

Third Party – Time Limits

Majella Kenny v Noel Howard [2016] IECA 243/1

PIS – 14th March 2013

7th April 2014 – Defence delivered

1st May, 2014 – papers sent to SC to consider joining HSE as TP

9 month delay

30 January 2015 - SC advises specialist expert input required

20 April, 2015 – Letter of engagement to expert

Expert suffers ill health

27th June, 2015 – Expert recommends another expert

26th August 2015 – Motion issues

19th November 2015 – TP notice served

Application for third party notice on the HSE issued on 27th October 2015 and the notice was issued on 17th November 2015 and served on 19th November 2015.

Third Party – Time Limits

CoA set aside TP notice

“Fundamentally, it seems to me that the section requires that the time taken should be related to the necessities of the case so that the notice that is served can properly be described as being “as soon as reasonably possible.” This is the key to understanding the provision. It is not a matter of criticising the conduct of the concurrent wrongdoer applicant; neither is it a matter of excusing error or default. It is a judgment about what is reasonably necessary in the circumstances of the case.

I find it impossible to accept that the delay of two years could, on any view of the circumstances of this case, be considered to be as soon as reasonably possible.”

Third Party – Time Limits

The Courts always emphasise that each case will turn on its own particular circumstances.

As Ryan P. indicates in Kenny, 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.

[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

[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.

[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.

Per Barrett J.

Kenny v Howard [2016] IECA 243

See CPD notes for full list of "Kenny principles"

[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.

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

[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 ".

Per Barrett J.

Kenny v Howard [2016] IECA 243

See CPD notes for full list of "Kenny principles"

Prejudice?

The issue of whether prejudice to the TP was relevant divided the Court in Kenny:

Ryan P. for the majority:

"it is difficult to see how prejudice … could arise in this case, that is not the issue; if it is clear that the third-party notice was not served as soon as reasonably possible, that is a failure of compliance with the specific mandatory requirement of s. 27 (1) (b). The section does not require proof of prejudice in order to rely on its terms."

Barrett J. in the minority, held that it was of relevance and included it in his list of principles.

Prejudice?

It seems prejudice will still be considered by the Court anyway.

For example, see Haughton v. Quinns of Baltinglass Ltd. [2019] IEHC 532 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.

The Application of the Principles

A motion to join could have issued in the Summer Vacation. Instead it issued in November. Some allowance has to be made for the slow-down in commerce that occurs as opposing practitioners take their respective summer holidays. But for the entire Summer Vacation to pass and for nothing to be done must be fatal to a claim that the defendant acted " *as soon as is reasonably possible* " within the meaning of s.27(1) of the Act of 1961.

Istvan ACS v KCT Freight Limited [2016] IEHC 625

The Application of the Principles

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

Clúid Housing Association v O'Brien & Ors [2015] IEHC 398

Third Party Procedure in the District Court

Important to note that the TP procedure in the District Court is different.

Very tight 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.

No requirement for leave from the Court.

Unlike the Circuit Court (Ord.7 r.2 CCR), there is no provision made in relation to the plaintiff joining a third party as a co-defendant.

Order 43 r.6 DCR allows the court, either on or without the application of any party, to add as a respondent (or claimant) any party who ought to have been joined as a party.

Extend time – DCR O39 R(3)(5)

What about the TP?

The TP must also act quickly to apply to have the TP Notice set aside

The SC in Boland v Dublin City Council [2002] 4 IR 409 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

Note also, that care must be taken to ensure that the TP is not estopped from applying to set aside the TP notice

"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 " (Cluid Housing)

TP Notice Set Aside on other grounds?

Most cases relate to delay – one example of a non-delay application to set aside:

Hassett v South Eastern Health Board [2006] IEHC 105 – application to set aside on grounds of Regs 44/2001 (refused)

Separate Proceedings for Contribution

A party can issue separate proceedings under S.27(1)(b)

To elect for separate proceedings risks the claim for contribution being refused under the Court's discretion

Fewer reported cases on this issue

ECI European Chemical Industries Ltd v. McBauchemie Muller GmbH [2006] IESC 15 is the leading case re: discretion

ECI European Chemical Industries Ltd v. McBauchemie Muller GmbH

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.

In considering whether a third party notice was served as soon as was reasonably possible, the surrounding circumstances may be taken into account.

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.

Discretion under S.27(1)(b)

There are very few reported decisions but most cases since ECI will still consider prejudice anyway:

“Nonetheless I think it is appropriate to note that the defendants herein are prejudiced by the delay ipso facto in involving them in this dispute by reason of the ten years that has elapsed to date.” - Andrews Construction Limited v Lowry Piling Limited [2010] IEHC 276

Separate Proceedings for Contribution

More difficult to avoid discretion where TP Notice set aside for delay:

In those cases where a third-party notice had actually issued, only to be set aside subsequently, any matter already decided on the application to set aside the third-party notice must be treated as res judicata. Where the third-party notice had been set aside because it had not been served as soon as reasonably possible, then this finding will inform the exercise of the court's discretion to allow a claim for contribution in separate proceedings. The Supreme Court suggested that in most such cases, irrespective of any question of prejudice, the separate proceedings claiming contribution should be rejected.

On this analysis, it is only in those cases where the third-party notice had been set aside for reasons other than delay that there is a likelihood of being allowed to pursue a claim for contribution thereafter in separate proceedings.

-Simons J. in Ashford Castle Limited & Ors v E.J. Deacy Contractors & Industrial Maintenance Limited & Ors [2021] IEHC 549

Revisiting ECI?

However, the Court of Appeal in Ballymore Residential Ltd v. Roadstone Ltd [2021] IECA 167 has queried whether the approach adopted by the Supreme Court might be thought to be an unduly narrow one.

Collins J. 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.

As it 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.

Ballymore v Roadstone

An example of when separate proceedings are justified:

Ballymore built 145 houses with stone supplied by Roadstone

Pyrite contained in the stone

A number of homeowner claims v Ballymore are pending

Shortly after service of plenary summons in the homeowner claims, Ballymore issued plenary proceedings against Roadstone seeking indemnity and damages

Ballymore subsequently joined Roadstone as TP in homeowner claims

Roadstone applied to s/o indemnity proceedings as Ballymore were estopped having served the TP notices

Ballymore v Roadstone

HC and CoA both refused strike out application

"As regards the three actions in which third party notices have been served by Ballymore, those notices were served long after the Indemnity Proceedings were commenced and it is not clear whether and how section 27(1)(b) applies in such circumstances. More generally, it is not at all clear to me that section 27(1)(b) is to be construed as dictating that the service of a third party notice is to be regarded as an irrevocable step which has the effect of imposing an absolute and unavoidable requirement on the party serving such notice to claim contribution by way of the third party procedure … Roadstone's argument requires the Court to construe section 27(1)(b) as operating as an absolute constraint on the jurisdiction of the High Court to manage proceedings before it. Absent clear language to that effect – and I see no such language in section 27(1)(b) – I am unwilling to adopt such a construction of section 27(1)(b) and I am certainly not prepared to do so in the context of a strike-out application"

The question therefore remains open – although Collins J. expressed very strong reservations about the estoppel point

What if TP is not a concurrent wrongdoer?

It is important to note that the S.27 jurisprudence relates to cases where the TP is a concurrent wrongdoer – separate jurisprudence for non-concurrent wrongdoer third party – very few cases on this issue

See recent decision of McDonald J. in Morrow v Fields of Trust Limited [2020] IEHC 390:

Court applied the Primor principles and considers:

(a) whether there has been inordinate delay in taking a relevant step;

(b) whether that delay is excusable or inexcusable;

(c) if the delay is inexcusable, where does the balance of justice lie.

Morrow v Fields of Trust Limited

Inordinate delay? Yes, O16 contemplates a TP application made within a short time frame. 24 months is inordinate.

Excusable? First period of 12 months to make contact with expert for a liability report is inexcusable. Other periods are excused – final period of naming incorrect entity not excused – 1 year 8 months not excused

Balance of Justice? No prejudice identified, some of inexcusable delay was bona fide mistake.

Application to set aside refused.

“In an appropriate case, delay on its own would be sufficient to persuade a court to set aside a third-party notice”

Conclusions on TP v Plenary

The TP limits are strict – Court will look at the entirety of the circumstances – delay by lawyers will not be tolerated

Solicitors must ensure that file is reviewed immediately and application made with haste – active file management necessary

Issuing separate proceedings for an indemnity runs the risk of a refusal under the Court's discretion

Collins J. in Ballymore suggests SC applied "unduly narrow" approach in ECI case

In most personal injuries cases, it is likely that the TP is the more straightforward route and may be harder to justify bringing a separate indemnity claim o/s of the Plaintiff's proceedings

Conversely, there will be cases where an issue is better decided in separate plenary hearing – cases involving multiple claims (such as in Ballymore) – likely to save Court time and costs to determine the issues separately

Ballymore litigation will eventually answer the estoppel point

Different test to set aside for "non-concurrent wrongdoer" TPs

Ss. 34 & 35 CLA

S.12 – 1% Rule

S.21(2) – Measure of Contribution between wrongdoers – “just and equitable having regard to the degree of that contributor’s fault” – Comparative blameworthiness not causal potency – see Patterson v Murphy [1978] I.L.R.M. 85

S.34 Contributory Negligence – Assessment between P and D

S.35 – Deemed or Statutory Contributory Negligence: Allows for “identification” to reduce D’s liability to P

Most often seen under S.35(1)(h) and (i)

This has seen a significant resurgence in the last 5 years since Hickey v McGowan in all types of litigation

S.35 CLA – General Points

S.35 applies to all torts, not just negligence - Hickey v McGowan

S.35 is a "deeming provision" – "shall" – Hickey v McGowan – once triggered, no discretion

It is a procedural defence and must be pleaded – Kehoe v RTE

It applies to all torts, including defamation – Kehoe v RTE

There can be concurrent wrongdoers arising out of different causes of action (i.e. assault and negligence) – McCarthy v Kavanagh

It is only necessary to issue the proceedings to avoid S.35(1)(i)

If the limitation period is still open at the trial of the action and no proceedings were issued, S.35(1)(i) cannot be relied upon - McCarthy v Kavanagh

S.35(1)(i) CLA

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.

- O'Donnell J. in Hickey v McGowan

Disclosure Orders and S.35(1)(i)

A recent decision of Hyland J. has shown that a Disclosure Order can be sought to identify parties who are concurrent wrongdoers

Not a Norwich Pharmacal type Order as not an application for sole discovery i.e. existing Defendant is also a wrongdoer

Hyland J. specifically noted the comments of O'Donnell J. and the unresolved issue of whether S.35(1) could be relied upon where the Defendant(s) had the knowledge of the other wrongdoers.

She ordered 2nd Defendant to disclose the names and address of all of the Brothers during 1979-1984 and current members

See Kenneth Grace v Paul Hendrick and Edmund Garvey [2021] IEHC 320

Contingent Pleading

Arose in UCC v ESB – ESB raised a S.35(1)(i) defence at the appeal

ESB alleged that the advisers engaged by UCC were negligent in designing the building etc. The HC had found UCC guilty of CN (i.e. S.35(1)(a)) as the advisers were deemed to be its agent – CoA overturned – SC reinstated.

S.35(1)(a) "a plaintiff shall be responsible for the acts of a person for whom he is, in the particular circumstances, vicariously liable"

The claim against the professional advisers was not statute barred at the time of the trial in 2014 but the 6 year limit subsequently expired

"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 advisors 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."

Pleading and Contingent Pleading

But … a contingent plea opens the door to that other wrongdoer being joined as a co-defendant and a potential claim for an indemnity – increased costs

In PI proceedings, P may have benefit of the 1991 Act and date of knowledge provisions

P will usually join that party – S.78 Courts of Justice Act 1936 generally protects the P in this situation

A contingent plea should not be made alleging professional negligence in the absence of a liability report

Identification – S.35(1)(h)

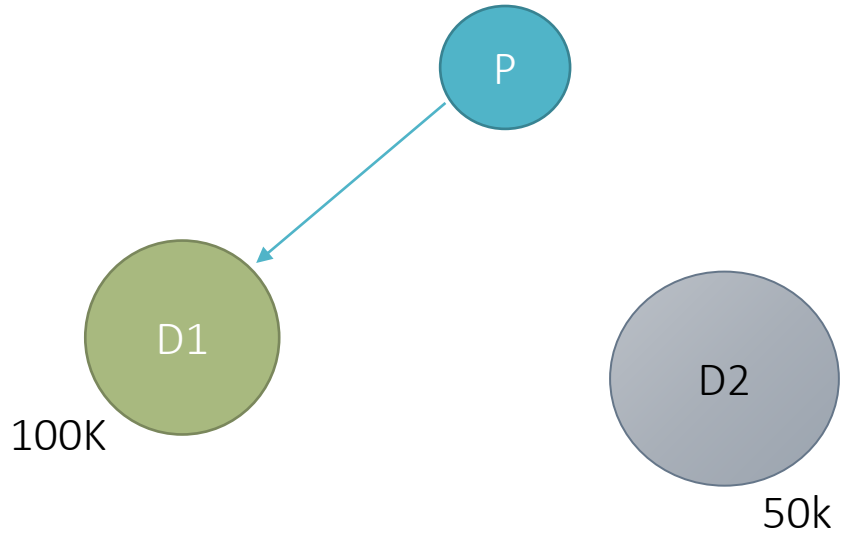
S.17(2) – Claim shall be reduced by the greatest of the following:

(a) The amount of the settlement, or;

(b) Any amount by which the release or accord provides that the total claim shall be reduced, or;

(c) 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.

Hickey as an example

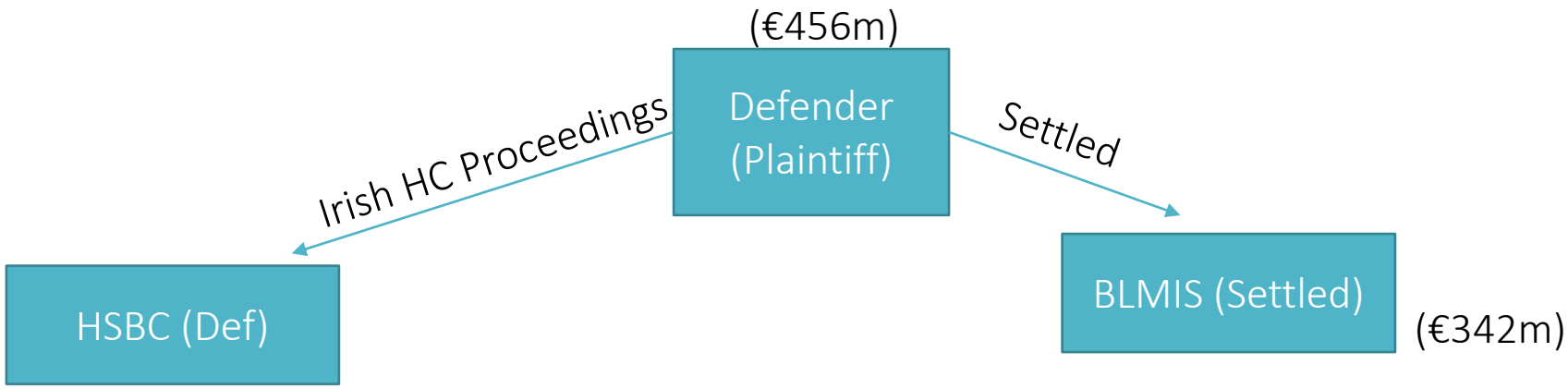


50k settlement with D2 – prudent settlement where claim against store owner less certain
P is at risk on a S.21 assessment if misjudgement in value
Remember – S.17(2) Identification:

(a) The amount of the settlement, or;
(b) Any amount by which the release or accord provides that the total claim shall be reduced, or;
(c) 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.

The Defender Case

SC confirms that S.17 of the CLA may provide a complete defence to one concurrent wrongdoer, despite their responsibility for damage, in the wake of settlement with another wrongdoer



The Defender Case

In any settlement with a concurrent wrongdoer, P will have to ensure that a hypothetical evaluation of the inter Defendant contribution claim is also carried out

Must assess:

Total value of P's claim

Likelihood of success against D1

Contribution claim D1:D2 – assess what a Court would find to be "just and equitable having regard to the degree of that contributor's fault"

Conclusions

Court takes restrictive view as to the extent of the window of opportunity afforded by the phrase “as soon as is reasonably possible”

Court will look objectively and subjectively at reasons for delay

Professional negligence proceedings will lead to a greater allowable time period

Detailed pleadings from the Plaintiff will give less scope to Defendant to allege it needed to investigate claim (Cluid case)

If Defendant is an expert in the area e.g. engineer, less scope allowed to investigate

Lawyers will not be excused for delay! (Kenny case)

Prejudice to TP will be considered but not determinative

Conclusions

Collins J. opens door to revisiting S.27(1)(b) discretion in claims for indemnity

Different considerations apply when TP is not a concurrent wrongdoer

See test in Morrow per McDonald J. – Primor principles apply

Ss.34/35 continue to be relied upon more frequently in all areas

New development in disclosure for S.35(1)(i) claims – Grace v Hendrick

Contingent pleading may be required if litigation is likely to be long running and subject to appeal – contingent plea may require liability report

Defender confirms that S.17(2) can provide complete defence in certain cases where a full contribution would have been ordered