Service outside the jurisdiction, compliance with the Hague Convention and Third Party Procedure

1. Service of Proceedings outside the Jurisdiction & Compliance with the Hague Convention.

1.1. Order 11A:

1.1.1. In proceedings which fall within the scope of the Brussels I Regulation (recast) which is applicable to EU Members or proceedings which fall within the scope of the Lugano Convention which is applicable to EU Members and European Free Trade Association Members, Order 11A permits service out of the jurisdiction without leave of the court.

1.1.2. Order 11A provides that the claim must be one which the court has power to hear and determine in accordance with the Brussels I Regulation (recast)/ Lugano Convention, and no proceedings between the parties concerning the same cause of action are pending in another member state.

1.1.3. The EU Service Regulation sets out the procedure for service. This was recast with effect from 1 July 2022 by way of Regulation (EU) 2020/1784, with the aim of improving the efficiency and speed of transmitting and serving judicial and extra-judicial documents in cross-border civil and commercial cases.

1.2. Order 11:

1.2.1. Service out of the jurisdiction on a defendant who is not domiciled in a member state of the EU or a contracting state of the Lugano Convention, is governed by Order 11.

1.2.2. It is necessary in such proceedings to make an application for leave to serve the proceedings out of the jurisdiction **before** the proceedings are issued.

1.2.3. *Analog Devices BV v Zurich Insurance Company*[1] is the seminal decision in which the required proofs and the tests are enunciated to successfully apply for an Order for service outside the jurisdiction pursuant to Order 11.

[1] [2002] IESC 1, [2002] 1 IR 272 and Vodafone GmbH v IV International Licensing and Intellectual Ventures II LLC [2017] IEHC 160

1.2.4. The application is made on an *ex-parte* basis, before proceedings have issued, grounded on an affidavit containing averments setting out how the requirements of Order 11 are satisfied. The ex-parte docket must state the category or categories of Order 11 Rule 1 under which service out is being sought.

1.2.5. The proceedings must fall within one of the specific categories set out by Order 11 Rule 1 as to the underlying nature of the action. For example, Order 11, rule 1 (f) provides that service may be allowed where the action is founded on a tort committed within the jurisdiction.

1.2.6. The obligations upon a party who wishes to issue and serve intended proceedings outside of the jurisdiction (and outside the European Union) have been stated as follows, in the form of an exhortation to practitioners, by the Court of Appeal in O'*Flynn v. Carbon Finance Ltd* [2015] IECA 93 (at paragraph 97):

> "An Exhortation
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> Before addressing the arguments on this aspect of the appeal, the Court wishes to emphasise to practitioners generally the importance of ensuring that on an *ex parte* application under Order 11(1) RSC (a) the appropriate paragraph(s) of Order 11(1) RSC is/are stated correctly in the *ex parte* docket filed; (b) that the correct said paragraph(s) are referred to in the affidavit grounding the application; and (c) that the order as perfected and taken up contains a recital of the paragraph(s) of Order 11(1) under which the order has been made.
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> The reason why these matters are important is that once served with the proceedings and a copy of the order, the defendant who is served outside the jurisdiction must know under what paragraph of Order 11(1) RSC the order has been made, because he/she is entitled under the Order 12(26)RSC to bring an application to the Court on notice to the plaintiff for an order discharging the *ex parte* order made which authorised service upon him/her outside the jurisdiction.
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> In order to bring such an application, the defendant must know the basis on which the order was made, so that he can be properly advised in relation to any such possible application. Equally any Court hearing the application to discharge the order must know under what paragraph of Order 11(1) RSC the order was made."

1.2.7. The applicant must establish that they have a good arguable case against the prospective defendant. In the *Analog Devices* decision, the Supreme Court stated that:

"When the court grants leave for the service out of the jurisdiction of proceedings, it requires a person, not otherwise within the jurisdiction of our courts, to appear here and to answer the claim of a person made in what is for him a foreign court rather than leaving the plaintiff to pursue his remedy against that person in that other jurisdiction. The international comity of the courts have long required, therefore, that our courts examine such applications with care and circumspection.

The applicant must furnish an affidavit verifying the facts upon which he bases his cause of action. It is not sufficient that he assert that he has a cause of action. The court judges the strength of the cause of action on a test of a 'good arguable case'".

"… though disputes of facts cannot always be satisfactorily be resolved on affidavit, the court must look at the matter carefully. It is not a case where the applicant's allegations must be presumed to be true. The foreign party's affidavit evidence must also be considered."

1.2.8. The applicant must satisfy the Court that Ireland is *forum conveniens* – that is, the convenient or 'suitable' venue in which to hear and determine the matter.

Order 11, rule 2 requires that the Court should evaluate this issue by reference to, *inter alia*, the value of the claim, the ease of securing the attendance of any witnesses and the comparative cost and convenience of hearing the proceedings in the State rather than in the place where the intended defendant resides. The approach of the courts is to evaluate this last question with regard to the interests of all parties, not just the plaintiff.

1.2.9. Where a defendant is not, or is not known or believed to be, a citizen of Ireland, notice of summons, and not the summons itself, should be served on the defendant, and such notice in lieu of summons is required to be given in the same manner in which summonses are served. The summons rather than notice of the summons is incorrectly served, the service will be ineffective.

1.2.10. Once leave is granted to issue and serve outside the jurisdiction an Original Summons and a Concurrent Summons, can be issued. Concurrent Summonses are used where there are multiple defendants, some of whom are within the jurisdiction and some of whom are outside. The Concurrent Summons is served on the defendant resident within the jurisdiction. The Original Summons is directed to the defendant outside the jurisdiction. This is because the time limited for the entry of an appearance will be different for the two categories of defendant.

1.3. Service in a Contracting State to the Hague Convention:

1.3.1. The Hague Service Convention, which provides a framework for the service of documents between contracting states to the convention, provides a broadly similar process to the use of Transmitting Agencies under the EU Service Regulation.

1.3.2. The Hague Service Convention makes provision for the use of Central Authority involvement in the process of service thereby avoiding the need to appoint private agents to achieve the same.

1.3.3. Service of proceedings in countries that are not member states of the EU but are contracting states to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters is governed by the provisions of that Convention, to which effect is given by **Order 11E**.

1.4. Service of proceedings on UK based Defendant or Third Party post Brexit:

1.4.1. As of the 1 January 2021, when the UK ceased to be a member of the EU, service of proceedings on a UK based defendant fell outside the scope of the EU Service Regulation and the Lugano Convention. Therefore, Order 11A is no longer applicable.

1.4.2. Order 5 rule 14 of the RSC provides that no summons or other originating document for service out of the jurisdiction or of which notice is to be given out of the jurisdiction, shall be issued without leave of the Court. An application for leave to serve out of the jurisdiction must be made pursuant to Order 11.

1.4.3. Order 11 rule 6 provides that every application for leave to serve a summons or notice of a summons on a defendant out of the jurisdiction shall be made before the issue of the summons.

1.4.4. Accordingly, leave of the Court must be sought before issuing proceedings against a defendant based in the UK.

1.4.5. The UK has been a contracting party to the Hague convention in its own right since 1967 and remains so. Once an Order has been granted to serve proceedings on a party in the UK, service must be effected in compliance with Order 11E.

1.5. Service of Foreign Proceedings in Ireland

1.5.1. Order 121A gives effect to the Service Regulation and Order 121B regulates the service of foreign proceedings pursuant to the Hague Convention.

2. Third Party Procedure

2.1. Applicable Superior Court Rule and Statutory Provision:

2.1.1. Order 16, rule 1 (3) of the Rules of the Superior Courts provides: -

> "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 …"

2.1.2. Section 27 (1)(b) of the Civil Liability Act, 1961 provides: -

> "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—
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> …
>
> (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. …"

2.2. Authorities:

2.2.1. A statutory provision that refers to taking a step "*as soon as is reasonably possible"* can only be interpreted in the context of the facts of the case in issue. What may be reasonable in one case might not be reasonable in another.

2.2.2. In *Thomas Greene v. Triangle Developments Ltd*[2] Finlay Geoghegan J. reviewed the case law in this area. Referring to the judgment of Denham J. (as she then was) in Connolly v. Casey [2000] 1 I.R. 345, Finlay Geoghegan J. stated: -

"24. [Denham J.] went on to deal with the particular facts of that case. Later in the judgment, at page 351, she stated:

'In analysing the delay – 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. The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see Gilmore v. Windle [1967] IR 323. It is appropriate that third party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice, to the third party and to the issue of costs. To enable a third party to participate in the proceedings is to maximise his rights; he is not deprived of the benefit of participating in the main action.'

2.2.3. The issue was also considered in Kenny v. Howard[3] [2016] IECA 243. In that case Ryan P. firstly considered what was "*the relevant time period*". He stated: -

"12. It is agreed between the parties that the relevant time with which we are concerned is between 22nd August 2013 and 26th August 2015. The first of those dates is when the third party notice should have been issued if the time limits in the rules had been observed. The second date is the date when the notice of motion was issued. …"

Ryan P. further stated: -

"21. The reference to all the circumstances in Connolly v. Casey and the import of the other citations is that it is proper in an appropriate case to allow time for a party to get expert advice or to wait for further and better particulars of something arising in the pleadings. It is impossible to catalogue all the exigencies

[2] [2015] IECA 249 Finlay Geoghegan J.
[3] [2016] IECA 243

that may arise in a case that take time to be satisfactorily addressed. Reasonably possible means what it says."

2.2.4. In the course of his judgment Ryan P. also considered the issue as to whether "*prejudice*" is a factor to be taken into account in an application such as this. He stated: -

"24. … if it is clear that the third party notice was not served as soon as reasonably possible, that is a failure of compliance with the specific mandatory requirement of s. 27(1)(b). The section does not require proof of prejudice in order to rely on its terms. It is true that in Robbins v. Coleman[4]*[2010], McMahon J. held that the question of the presence or absence of prejudice was not to be out-ruled a priori.*

25. It seems to me that a third party applying to set aside a notice served by a defendant could argue that he had suffered prejudice and that a shorter period than might otherwise be allowed ought to be imposed in determining what was as soon as reasonably possible. I find it difficult to understand how a defendant who is in default of the clear requirement of the subsection can escape the consequences by proposing that the third party has not suffered any specific prejudice. The authorities cited do not go as far as suggesting that the section's impact may be defeated by demonstrating the absence of prejudice. In the present case, it seems to me that it is irrelevant whether or not the HSE has suffered prejudice by reason of the delay."

Padraic Hogan, BL

29 June 2023

[4] [2010] 2 I.R. 180