

THE HIGH COURT

[2023] IEHC 348

[Record No. 2018 6475 P]

BETWEEN

TAMMY HARTE

PLAINTIFF

AND

**VOLKSWAGEN GROUP IRELAND LIMITED, VOLKSWAGEN IRELAND, VOLKSWAGEN
AG AND CURRID MOTORS LIMITED**

DEFENDANTS

AND

C. CURRID MOTORS LIMITED

THIRD PARTY

JUDGMENT of Ms Justice Bolger delivered on the 22nd day of June 2023

1. The third party has brought two separate motions seeking to set aside the third party notice obtained by the defendants. For the reasons set out below I am granting the applications and am setting aside the third party notice.

Background

2. On 18 July 2018, the plaintiff issued a personal injuries summons against four defendants seeking damages for an injury she says she sustained in an accident. The first three defendants are involved in the importation, sale and/or production of the Volkswagen Passat range of motor vehicles and the fourth defendant was a motor dealer from whom the plaintiff said she purchased her Volkswagen Passat in November 2013. She claims that on 22 February 2016, she parked her Volkswagen Passat, engaged the electronic brake and, as she was walking in proximity to the vehicle, it rolled back and collided with her as a result of which she sustained personal injuries.

3. On 28 September 2020, the plaintiff filed a notice of discontinuance against the fourth defendant. The fourth defendant's solicitor subsequently confirmed in an affidavit sworn in these applications that this was on the basis of the fourth defendant's agreement to bear their own costs.

4. On 29 April 2021, the first, second and third named defendants (the respondents in these two applications and hereinafter referred to as "*the defendants*") informed the previous fourth named defendant (the applicant in these applications hereinafter referred to as "*the third party*") of their intention to issue a third party motion to join them as a third party. That motion was granted in July 2021. Between the notice of discontinuance and notification of the defendants' intention to bring the third party motion, Level 5 COVID-19 lockdown was imposed between October and December 2021.

5. In September 2021, the third party brought a motion to set aside the third party notice on grounds of delay pursuant to O. 16, r. 8(3). Subsequently, in January 2022, they brought a separate motion to set aside the third party motion pursuant to the inherent jurisdiction of the courts on the grounds that the third party proceedings were frivolous, vexatious and/or bound to fail which they based on the notice of discontinuance constituting an accord and release. The parties agreed that both motions should be heard together.

6. The chronology of relevant events prepared by the third party is attached hereto.
- | | |
|------------|--|
| 22/2/2016 | Accident Occurs |
| 18/7/2018 | Personal Injuries Summons issued |
| 25/7/2018 | Appearance entered on behalf of the Respondents |
| 31/1/2019 | Appearance entered on behalf of Applicant (when named as a Defendant) |
| 4/11/2019 | Respondents deliver Personal Injuries Defence |
| March 2020 | First Covid-19 lockdown introduced by Government |
| 28/9/2020 | Notice of Discontinuance filed and served |
| 21/10/2020 | Government reintroduces level 5 Covid-19 lockdowns |
| 29/4/2021 | Respondents' Solicitors inform Applicant and its Solicitors by letter of intention to issue Third party proceedings |
| 29/4/2021 | Affidavit grounding Motion seeking leave to issue Third Party proceedings sworn |
| 4/5/2021 | Applicant's Solicitors write to Respondents Solicitors raising issue of delay |
| 5/5/2021 | Third Party Motion issued |
| 19/7/2021 | Order granting leave to issue Third Party Notice granted |
| 26/7/2021 | Third Party Notice filed |
| 10/8/2021 | Appearance entered on behalf of Applicant (when named as a Third Party) |
| 9/9/2021 | Applicant issues Motion to set aside Third Party Notice on the basis of delay (First Motion) grounded on Affidavit of Applicant's Solicitor sworn on 7 September 2021 |
| 14/1/2022 | Letter sent by Applicant's Solicitors to Respondents' Solicitors advising of the effect of the release and accord and invites consent to grant the first Motion as worded or to strike out the proceedings |
| 14/1/2022 | Affidavit sworn by Solicitor for Respondents filed on 11 th February 2022 in response to first Motion |
| 17/1/2022 | Return date of the first Motion to set aside on the basis of delay |
| 21/1/2022 | Applicant issue Motion to set aside Third Party Notice on the basis of release and accord (second Motion) grounded in Affidavit of Applicant's Solicitor sworn on 19 th January 2020 |

27/4/2022	Affidavit sworn and filed by Solicitor for Respondents in reply to second Motion
25/5/2022	Supplemental Affidavit of Applicant's Solicitor filed on 27 th May 2022

Delay: First motion to set aside the third party procedure

7. The third party asserts that the seven months (being six months more than the 28 days allowed by O. 8, r. 1(3)) it took the defendants to bring their third party notice was not as soon as was reasonably possible, as required by s. 27(1)(b) of the Civil Liability Act. The grounds for bringing their motion were contained in the personal injuries summons and the defendants' defence and, therefore, known to them for some time even before the notice of discontinuance was served. The defendants cited the lockdowns that had been imposed during that seven months, which the defendants' solicitor averred:-

"significantly and adversely impacted on the normal conduct and progress of business nationwide including the progress of litigation. In particular, during the seven months period under consideration, the country was in lockdown between 15 September 2020 and 30 November 2020, with a further lockdown occurring between 30 December 2020 and continuing through various stages of lockdown for the following months. During these periods and in compliance with public health mandates, work which continued to be conducted was from home was significantly reduced, with the result that the normal efficiency of attending on the progress of proceedings was not possible. In the defendants' solicitors' case, the solicitors were obliged to work on a hybrid basis both from home and the office."

8. The defendants assert that the rationale underpinning s. 27(1)(b) is breached where a significant amount of time was allowed to elapse between the commencement of the plaintiff's proceedings and the defendants' obligation to join a potential third party who was not previously a party to the proceedings and perhaps may have had no prior notice or knowledge of the proceedings until notified by the defendants. They say the position is otherwise where the third party was previously a party to the proceedings to which it was re-joined as a third party by a defendant. They suggest that the defendants in this case can have no genuine complaint and cannot use s. 27(1)(b) to prevent them from pursuing an indemnity and contribution against the third party, which those defendants would have pursued by means of a notice of indemnity and contribution had the third party remained as the fourth named defendant in the proceedings. They seek to rely on the fact that the third party here, which had already been a party to the proceedings as a defendant for a period of two years and two months, was intimately familiar with the issues in dispute in the proceedings.

Decision

9. Section 27(1)(b) provides as follows:-

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

(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.

10. O. 8, r. 1(3) of the Rules of the Superior Courts allows 28 days to issue the third party notice. Time runs from when that 28 days has passed, up to the date that the third party motion is issued, as was accepted by Ryan P. in *Kenny v. Howard* [2016] IECA 243. The notice of discontinuance here was filed and served on 28 September 2020 and so time began to run from 28 days onwards, i.e. 26 October 2020 and stopped on the date on which the defendants issued their motion on 5 May 2021, a period of over seven months from the filing and serving of the notice of discontinuance.

11. The whole circumstances of the case must be considered in analysing the delay, as found by Ryan P. in *Kenny v. Howard* in which he cited the following dicta of Finlay Geoghegan J. in *Green and Green v. Triangle Developments and Wadding and Frank Fox and Associates, Third Party* [2015] IECA 249:-

"[A] court, when looking at an application to set aside a third party notice should not only look at the explanations given by the defendant for the 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 or was not served as soon as is reasonably possible'.

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 that may arise in a case that take time to be satisfactorily addressed. Reasonably possible means what it says." (at para. 20-21)

12. The whole circumstances of this case include the periods of lockdown during the six to seven month period of delay. The court takes judicial notice both of the challenges caused to solicitors' firms during lockdown and of the fact that hybrid working had become the norm by October 2021. The defendants' solicitor does not identify any particular difficulty their office experienced as a result lockdown at that time, and in fact confirms that the firm was working on a hybrid basis from home and the office. The defendants' solicitor does not explain how or why lockdown caused the delay of six to seven months in issuing the third party notice or how or why the "*normal efficiencies of attending on progress of proceedings was not possible*".

13. The defendants also rely heavily on the fact that the third party had been a defendant in the proceedings and assert that the third party can have no genuine complaint as they were simply re-joined to the proceedings. That proposition seeks to include a qualification to the requirement to serve a third party notice as soon as is reasonably possible, where the third party was previously a defendant, that does not exist in s. 27(1)(b). The statutory requirement is to serve the proposed third party as soon as is reasonably possible, i.e. the emphasis being on how long it might reasonably take to serve that person. Assessing the reasonableness of a delay could be informed by a need to secure more information such as an expert report or replies to particulars or to resolve other issues that may arise. They are all matters going to the time it may take to address whatever is required to be addressed in order to be able to serve the third party notice and not the genuineness or otherwise of the third party's complaint about how long it took the defendants to serve them. Clear support for that can be seen in the decision of Ryan P. in *Kenny v. Howard* where he approved of the reference to the impossibility of cataloguing all the "*exigencies*" that may arise in a case that take time to be satisfactorily addressed and concluded with the statement "*Reasonably possible means what it says*". That *dicta* offers no support to the defendants' attempts to justify the time it took for them to serve the third party notice by reference to the third party's status as a previous defendant in the same proceedings. That argument does not seek to explain the delay but, rather, to neutralise any prejudice that a delay might have caused to a third party. That is not part of the test that the legislature introduced in s. 27(1)(b).

14. In *Susquehanna International Group Lt v. Citadel LLC and Needham* [2022] IECA 209, Allen J. in the Court of Appeal was critical of the High Court's approach in considering the possibility that a defendant who failed to serve a third party notice as soon as possible might later be refused contribution as a factor to be taken into account in deciding whether the notice should be set aside. He concluded (at para. 111):-

"I do not see in the legislation or the authorities any warrant for the exercise of a discretion or the application of a test of proportionality in deciding whether to set aside a notice which has not been served as soon as reasonably possible."

He described the third party procedure as "a matter of right" (at para. 113) and concluded (at para. 115):-

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

15. This decision was relied on by Simons J. in *Mia Bowen v. H&M Hennes & Mauritz (Ireland) and Otis Elevator Ireland Ltd, Third Party* [2022] IEHC 658, where he stated at para. 10:-

"A defendant cannot seek to justify a delay by seeking to establish that the third-party has not been prejudiced. A third-party who seeks to set aside a third-party notice is not required to go beyond establishing that the notice was not served as 'soon as reasonably possible' and is not required to show that he has been prejudiced."

He went on to say, at para. 12:-

"The onus is on the defendant, who has joined a third-party, to explain and justify any delay."

At para. 13, he said:-

"[D]elay in the service of a third-party notice may not be disregarded merely because it has not had the consequence that the progress of the main action has been delayed. The application of the statutory requirement to serve a third-party notice as soon as is reasonably possible cannot properly vary on a case-by-case basis by reference to the enthusiasm or lethargy of the particular plaintiff."

He determined that three months would have provided ample time to analyse and deliver its defence having considered the replies to particulars and then prepared the motion papers for the application to serve a third party notice, a far shorter time than the 20 months after the replies to particulars had been furnished. Simons J. had little difficulty in finding that that delay was not justified, including by the intervention of COVID-19 restrictions.

16. The three months identified by Simons J. included a period of time for the defendants to finalise and deliver its defence having considered the content of the replies to particulars. No such need arose here as all the information the defendants required, and indeed relied on in their affidavit grounding their application to join the third party, was available to them from the personal injuries summons, the defences and the notice of discontinuance. The defendants have not identified any issue that they had to address in order to prepare their application to join the third party, which took them seven months. The only justification they proffered for their delay was the fact of lockdown, but offered no explanation as to how lockdown actually caused the delay other than a vague and unsubstantiated claim that "the normal efficiencies of attending on the progress of proceedings was not possible". I do not find the defendants' attempts to justify their delay because of lockdown to be convincing, particularly where they confirm that their solicitors were working on a hybrid basis at that

time. This was at a time when business had adapted to hybrid work and the reality of lockdown since it first became a part of the world of work in March 2020.

17. That leaves the defendants' only justification for the delay as the fact that the third party had previously been a defendant and, therefore, had full knowledge of the proceedings well before they were served with the third party notice. For the reasons I have set out above, this argument has no legal basis and seeks to expand the statutory third party procedure in a way that is not provided for in s. 27(1)(b).

18. I am satisfied that, in the whole and relevant circumstances of this case, the defendants' delay of six to seven months in serving the third party notice did not satisfy the statutory requirement of s. 27(1)(b) to serve the third party notice "*as soon as is reasonably possible*". I, therefore, set aside the third party notice on the grounds that it was not sought as soon as was reasonably possible as required by s. 27(1)(b).

Accord and satisfaction: The second motion to strike out the third party proceedings

19. In the event that I am wrong in relation to delay, I proceed to consider the third party's second motion in which they seek an order pursuant to the inherent jurisdiction of the court to strike out the third party proceedings on the basis that they are frivolous, vexatious or bound to fail.

20. The third party claims that the plaintiff's notice of discontinuance against it amounted to a release by the plaintiff of one concurrent wrongdoer as envisaged by ss. 17 and 35(1)(h) of the Civil Liability Act. The effect of the notice of discontinuance means that, at the trial of the action, any liability on the part of the third party by operation of ss. 17(2) and 35(1)(h) of the Civil Liability Act will be deemed in law to be the plaintiff's responsibility by way of contributory negligence. They rely on the decision of the Supreme Court in *Defender Ltd v. HSBC France, Defendant and Reliance Management BVI Ltd, Third Parties* [2020] IESC 37, [2021] 1 I.R. 516 and on the decision of the Court of Appeal in *Comcast International Holdings Incorporated & ors v. Minister for Public Enterprise & ors* [2021] IECA 325, which they say leaves this Court with no discretion but to apply the provisions of ss. 35(1)(h) and 35(4) of the Civil Liability Act and to strike out the third party notice.

21. The defendants dispute the notice of discontinuance was a release and rely on Order 26 of the Rules of the Superior Courts which provide "*such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action*". A release requires full evidence of its terms. They assert that a consent order, such as at issue in *Comcast*, is a release, but the notice of discontinuance that was served here is not. They also highlight the difficulties they say they will encounter in recovering costs if the plaintiff is unable to discharge any costs order made against her, whereas the third party notice will enable them to recover costs against the third party, if the court finds them to be culpable. There is nothing in ss. 27 or 31 that affects their right to pursue an indemnity against the third party as a concurrent wrongdoer. Section 34 concerns the issue of contributory negligence and not the issue of an indemnity or contribution between concurrent wrongdoers.

The Civil Liability Act 1961

22. The Civil Liability Act 1961 states as follows:-

S. 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.

- S. 34. (1) *Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant: provided that—*

(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;

(b) this subsection shall not operate to defeat any defence arising under a contract or the defence that the plaintiff before the act complained of agreed to waive his legal rights in respect of it, whether or not for value; but, subject as aforesaid, the provisions of this subsection shall apply notwithstanding that the defendant might, apart from this subsection, have the defence of voluntary assumption of risk;

(c) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages awarded to the plaintiff by virtue of this subsection shall not exceed the maximum limit so applicable.

- S. 35. (1) *For the purpose of determining contributory negligence—*

(h) where the plaintiff's damage was caused by concurrent wrongdoers and after the occurrence of the damage the liability of one of such wrongdoers is discharged by release or accord made with him by the plaintiff, while the liability of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer whose liability is so discharged;

(4) Where a plaintiff is held to be responsible for the acts of another under this section and his damages are accordingly reduced under subsection (1) of section 34, the defendant shall not be entitled to contribution under section 21 from the person for whose acts the plaintiff is responsible.

Decision

23. It is not unusual for the settlement of proceedings to be recorded by a notice of discontinuance rather than written terms of settlement. The third party's solicitor has gone further than the defendants in *Comcast* where the terms of settlement were not disclosed, in confirming on affidavit that the notice of discontinuance was served on the agreement of the third party to bear their own costs. That confirms an agreement between the plaintiff and the third party reached with the benefit of legal advice whereby, in consideration of third party's agreement to bear their own costs, the plaintiff agreed to discontinue her proceedings against them. I see no basis on which to distinguish the decision of Hedigan J. in *Arnold v. Duffy Mitchell O'Donoghue (A Firm)* [2012] IEHC 368, where he noted at para. 6.18 that the compromise of proceedings will be a valid accord "*it is well settled that an agreement and compromise of an action constitutes a valid accord*".

24. Whilst the consent order in *Comcast* was also found to be a release (in spite of the State defendants arguing that it was not), I do not accept that it had additional elements such that renders a bare notice of discontinuance not to be to be a release. I note in *Comcast* that Haughton J did not require the settlement agreement to be before the court "*in circumstances where the order of Gilligan J. evidences an accord and release*" (at para. 92). Having determined the consent order was an accord and release, Haughton J. concluded at para. 95 that, "*pursuant to s.35(1)(h) the plaintiffs are 'deemed to be responsible for the acts of the wrongdoer whose liability is so discharged', and the State parties are entitled to have the damages claims against it reduced accordingly*". He found further support for that conclusion in s. 35(4) and stated, at para. 97 of his decision that:-

"The State parties' argument also fails to engage with s.35(4) under which, where the Plaintiffs are held to be responsible for any wrongdoing on the part of BTCIL, and the damages claim against the State parties is reduced accordingly, the State parties are no longer entitled to contribution from BTCIL. This, fundamentally, is the reason why the NICs should be struck out."

25. I do not consider any other conclusions to be available to this Court in the light of the Supreme Court's decision in *Defender Ltd v. HSBC France* [2020] IESC 37, [2021] 1 I.R. 516, where O'Donnell J. explained the mechanism of identification in the Civil Liability Act, at para. 43 of his decision, as follows:-

"It is possible to understand the manner in which the identification principle was intended to work by reference to the example of the triangle given above at paras 14 ff. The effect of the settlement between D1 and P is to extinguish the line between P and D1. A claim between P and D2 still remains, but D2 cannot now seek contribution against D1. Instead, this is converted into a claim against P and treated as contributory negligence reducing P's claim. The content of that claim is the claim, or line, linking P to D1 which D2 can now assert not against D1, but rather as contributory negligence against P."

There, D1 was the release defendant and D2 was the defendant left in place.

26. The provisions of ss. 35(1)(h) and 35(4) of the Civil Liability Act and the decisions in *Defender* and *Comcast* leaves this Court with no discretion but to strike out the third party notice. I am not persuaded that O. 26 of the Rules of the Superior Courts allow me to do otherwise. If there is any conflict between O. 26 and the statutory provisions of the Civil Liability Act, the statutory provisions must prevail as found by Simon J. in *Bowen*, at para. 17, where he held that O. 7, r. 3 of the Circuit Court Rules:-

"envisages that an application to join a third-party may be made at any time prior to the trial of the action. Were this rule to be read in isolation, without reference to the Civil Liability Act 1961, it might be understood as suggesting that there is no time constraint on the joinder of a third-party. It would, however, be inappropriate to interpret the rule in such a narrow way. Such an interpretation would create conflict between the Circuit Court Rules and Section 27 of the Civil Liability Act 1961. The Circuit Court Rules are a form of secondary or delegated legislation and, as such, cannot prevail over primary legislation such as the Civil Liability Act 1961." (at para. 17)

He went on at paragraph 18 to hold that any potential conflict could be avoided by seeking, if possible, to give the order and interpretation consistent with the statutory requirements rather than interpretation which would render the rule *ultra vires*.

27. Neither do I find that the defendants' constitutional rights have been breached as they claim. The provisions of the Civil Liability Act enjoy a presumption of constitutionality. The defendants did not seek to challenge the constitutionality of the statutory provisions.

28. Finally, the defendants contended that there is inherent unfairness in denying them the opportunity to secure their costs from third party if the trial judge was to find liability rested with them, in circumstances where the defendants have expressed concern about being able to enforce a costs order against the plaintiff but there is nothing on affidavit to demonstrate how the plaintiff may not be a mark for those costs. The defendants' speculative concerns cannot override the statutory provisions of the Civil Liability Act.

29. I, therefore, allow the third party's application to strike out the third party notice.

Indicative view on costs

30. In accordance with s. 169 of the Legal Services Regulation Act 2015, my indicative view on costs is that, as the third party has succeeded in its application to strike out to third party notice, they are entitled to their costs, but I am also of the view that those costs should be limited to the costs of one motion rather than two motions as the issues raised in the second motion could have been addressed in the first and the defendants should not be put to the additional cost of having to deal with two separate motions. I will hear any submissions for any different costs orders that the parties wish to contend for and/or how my indicative view, as set out above, should be reflected in the final orders to be made. I will put the matter in for mention before me on 12 July 2023 and any written submissions which either party wishes to furnish should be lodged with the court at least 48 hours in advance of when the matter is back in before me.

Counsel for the first, second and third defendants; Andrew Walker SC, Eamon Marray BL

Counsel for the third party; Tomás Keys BL