[1999–00 Gib LR 400]

GILBERT v. ATTORNEY-GENERAL, S.O.S. 24 LIMITED, and ASSICURAZIONI GENERALI S.P.A.

SUPREME COURT (Pizzarello, A.J.): February 16th, 2000

Civil Procedure—joinder of parties—third parties—leave required under Rules of Supreme Court, O.16, r.1(2) to issue third party notice once defence served—granted if O.16, r.1(1) prima facie applicable—discretion to strike out summons for directions if third party successfully opposes joinder

Civil Procedure—joinder of parties—third parties—directions not refused in industrial injury claim on assumption that witnesses biased in favour of employer—weight accorded to factual evidence is matter for court

Civil Procedure—joinder of parties—third parties—directions not normally refused for prejudice to third party from defendant's delay in seeking leave to issue third party notice if within limitation period—exception, e.g. if delayed after ascertained that third party worth suing and third party in fact impecunious and probably uninsured

The plaintiff brought an action for damages for personal injuries sustained on the defendant's premises in the course of his employment with a third party.

The plaintiff issued proceedings against the defendant in respect of injuries sustained two years previously at work. The defendant entered a defence but did not seek a contribution from the third party in respect of potential liability, believing that it had no assets. After the statutory limitation period for proceedings by the plaintiff against that party had expired, the defendant learned that the third party was entitled to certain funds by reason of a claim against the Government. He obtained leave under O.16, r.1(2) of the Rules of the Supreme Court to issue a summons for third party directions. The third party only then informed its insurer of the claim, and the insurer disclaimed liability on the ground that the time-limit for notification of the claim had not been complied with.

The Supreme Court ruled (1999–00 Gib LR 392) that the summons was not barred by limitation, but the plaintiff, the third party and its insurer opposed the summons on the ground that there were nevertheless special circumstances why the directions should not be given.

The plaintiff submitted that the delay resulting from the third party proceedings and the consequent expense to the legal assistance fund

would exceed that envisaged when the leave had been given, and would outweigh the convenience of having the proceedings tried together with the main action, since (a) five months had already passed since the main proceedings had been adjourned for that purpose; (b) no trial date had yet been set; (c) the third party would want to have the plaintiff further examined and tested; and (d) there would be a hearing as to the extent of the third party's role in the proceedings, followed, possibly, by the exchange of pleadings, discovery and witness statements.

The insurer submitted that the defendant had commenced proceedings too late, since (a) he ought to have known whether the third party, as a Government contractor, had insurance cover and was worth suing; (b) he could have issued third party proceedings without leave before serving his defence; (c) he had issued proceedings only several months after discovering that the third party was in funds and some time after the adjournment obtained for the purpose; (d) the limitation period had been circumvented, as the plaintiff would have been statute-barred from suing had it waited as long as the defendant had to take action; (e) the third party would be prejudiced, *inter alia*, by the fact that the witnesses would not be fresh and, having already given evidence to the defendant, their evidence might be tainted against the third party, their former employer, in favour of the defendant, their present employer; and (f) if the third party proceedings were conducted separately after the trial of the main action the procedural advantages would be lost.

The third party submitted that (a) the defendant should not be permitted to argue that he had now become aware of funds held by the third party, and at the same time dispute the third party's claim against the Government, in which case the third party was impecunious; and (b) if the insurer disclaimed liability, it would not be worth pursuing, and in any event it would be prejudiced by being left out of the conduct of its case.

The defendant submitted in reply that (a) any prejudice to other parties caused by delay was largely the plaintiff's fault, having himself sought two of the three adjournments of the main proceedings, and no date had been set for trial anyway; (b) any perceived prejudice caused by the operation of the law on limitation was irrelevant, since the defendant had no control over whom the plaintiff had chosen to sue and when; (c) more delay would be caused by the inherent weakness of the plaintiff's case than by the commencement of third party proceedings; (d) the defendant could not have been expected to be aware from the outset of the third party's claim against the Government, since it concerned a different Government department; (e) the third party would be in no worse position than the defendant had been regarding evidence, since the plaintiff had waited two years to sue him, and the same witnesses were still available; it could not be presumed that their evidence would be tainted; and (f) the third party should have been aware of the potential claim against it and ascertained its insurance position.

Held, dismissing the summons:

(1) The leave required by the defendant under O.16, r.1(2) of the Rules of the Supreme Court because he had already served his defence had been granted on the basis that a *prima facie* case under r.1(1) was made out, namely that the defendant sought a contribution from the third party. However, the third party now had an opportunity to show reason why directions should not be given (para. 5; para. 26).

(2) The court would not strike out the summons for directions on the basis that the witnesses could not be relied upon to be impartial, since the credibility of witnesses was a matter to be assessed by the court with the benefit of cross-examination by the defendant's counsel. Nor could a third party normally claim to have been prejudiced by mere delay on the part of the defendant if the proceedings were still within the limitation period (para. 26).

(3) However, in this case there had been considerable delay between the defendant's discovering that the third party might be in receipt of funds and his applying for leave to issue a third party notice, and there was likely to be further delay occasioned by the third party proceedings. Moreover, the third party's insurers appeared to be entitled to disclaim liability under the terms of the policy due to the third party's failure to notify it of the existence of a potential claim. And since the Government denied liability to the third party in respect of the claim on which that party relied for its ability to meet the present action, it seemed probable that the third party was not worth pursuing. Together, these constituted special circumstances justifying the dismissal of the summons (paras. 27–30).

Cases cited:

(1) *Bower* v. *Hartley* (1876), 1 Q.B.D. 652; 46 L.J.Q.B. 126.
(2) *Courtenay-Evans* v. *Stuart Passey & Assocs.*, [1986] 1 All E.R. 932; (1985), 7 Con. L.R. 86.

Legislation construed:

Rules of the Supreme Court, O.16, r.1(1):

"Where in any action a defendant who has given notice of intention to defend—

(a) claims against a person not already a party to the action any contribution or indemnity . . .

then, subject to paragraph (2), the defendant may issue a notice . . ."

r.1(2): "A defendant may not issue a third party notice without the leave of the Court unless the action was begun by writ and he issues the notice before serving his defence on the plaintiff."

P. Peralta for the plaintiff;
C. Pitto, *Crown Counsel*, for the defendant;
S.R. Bossino for the third party;
S.P. Triay for the intervenor.

1 **PIZZARELLO, A.J.:** I am dealing with a summons for third party directions issued on November 19th, 1999. I am satisfied that the claim herein falls within the parameters of O.16, r.1(1). I have ruled that the claim is not barred by limitation and therefore it is for the plaintiff or the third party or the intervenor to show some special circumstance why the directions should not be given.

2 Mr. Peralta, for the plaintiff, submits that the plaintiff will be embarrassed, or put to additional expense, delay and difficulty if the third party proceedings are allowed in the instant matter. He notes that the matter was originally set down for trial on November 10th, 1998 and subsequently adjourned three times, *i.e.* on February 12th, 1999, May 6th, 1999 and, finally, on October 27th, 1999. He accepts that of the first three adjournments, two were at the plaintiff's request and the first with his consent, but the last was the result of the defendant's intent to issue third party proceedings. He understands that the matter of delay has already been advanced by the plaintiff on the occasion when leave was applied for, and that notwithstanding the submissions advanced on that occasion, the court nevertheless issued the third party notice, yet cognizance must now be taken that the delay envisaged at that application was a short one. Further delays, understandable as they might be, are not of the plaintiff's making and to date the delay has been five months in what had been termed "a short delay."

3 What is clear at this juncture, says Mr. Peralta, is that (a) there is no trial date; (b) the plaintiff has suffered serious injuries and should be compensated as soon as possible and not have the worry of the trial hanging over his head; and (c) if the court gives directions under the third party summons for directions, there will be substantial delays, since the parties have indicated that they would want to have the plaintiff further medically examined and tested and these have the potential to further increase delays if, as a result, the plaintiff needs to challenge that evidence.

4 Furthermore, and I quote from his skeleton arguments:

> "It is impossible at this stage for the court even to think of trial dates, as, if the third party notice is allowed to stand, there will be a further hearing as to the extent of the role which the third party will be allowed to take in the trial itself. If the third party is allowed a full role there will be a requirement for pleadings to be exchanged (third party defence, *etc.*), discovery and witness statements. In effect, there lies a real risk that the action will almost be put back to the inception stage rather than progressed to the trial stage."

He submits that the prejudice is obvious and he refers me to *Bower* v. *Hartley* (1) (1 Q.B.D. at 656) to provide authority for the proposition that

there is a balance to be struck by the court between the convenience of having questions determined once and for all in one action, and the prejudice to the plaintiff which may well result from the introduction of the third parties. The introduction of third parties will increase the expenses and even though the plaintiff is legally assisted that is a consideration. And, as the plaintiff has already been requested to provide copies of correspondence by the third party, and the medical evidence necessary in this case is not available locally, so the plaintiff will have to travel abroad at considerable delay and expense. Lastly, he submits that there is no need for the defendant's proceedings to be tried together with the plaintiff's action.

5 Mr. Triay, for the intervenor, notes that since the third party notice was issued after the defence was entered, the third party is subject to the discretion of the court, and the court has granted leave following the practice that if a *prima facie* case is made out which brings the matter within O.16, r.1(1) leave is granted, and the matters of objection are raised on the application for directions, so now is the proper time. He accepts that the third party must show why the third party directions should not be given. The court has ruled on the limitation point and, accepting that decision for the purposes of the argument, it is the third party's submission that nevertheless the defendant has commenced his proceedings too late.

6 The reason advanced for that delay was that the defendant was not aware until very late that the third party might have some assets. But that, says Mr. Triay, is a lame excuse because the defendant *qua* Government always knew, and must be taken to have known, that S.O.S. 24 claimed moneys from it. The officers of the Attorney-General's Chambers were not to know what the exact position was but that is neither here nor there. Those instructing the Attorney-General cannot be said not to have known. And, furthermore, while S.O.S. 24 appears, from the Registrar of Companies' records, to be a private company, the question that arises is: To what extent is it controlled by the Government? The more control by Government, the less is its excuse for delaying proceedings against S.O.S. 24.

7 Whichever way it is looked at, he says, the Government knew or should have known from the very beginning precisely what counsel for the defendant found out some months before October 1999. And even then, when counsel did find out, the defendant was at fault because (a) it took several months after counsel had acquired the knowledge to issue third party proceedings; and (b) the October date having been vacated for that reason, third party proceedings were not commenced immediately. So the court is entitled to look, in its discretion, at the delays in the main action and the delay in bringing the third party proceedings and this is a

matter that should be taken into consideration by the court in its balancing exercise to determine whether the third party proceeding should continue.

8 The delay, says Mr. Triay, is prejudicial to the third party. It is years too late to investigate the scene of the accident as it is alleged. Furthermore, the effect of the delay is that if the third party had been sued by the plaintiff at the time of the issue of the third party notice, there would have been a defence on limitation. If the court's ruling on this is right, that consideration is taken away from the third party and the intervenor. If the ruling is wrong then the third party notice does not stand and so there is prejudice to the third party.

9 Then, the relationship between the defendant and the third party is unknown and one which the intervenor would wish to air. It will be an issue because it is necessary to find out who assumed the responsibility of an employer. This issue may be difficult to determine. There has to be, one would assume, a contractual relationship between the defendant and the third party to provide for its services and one might suspect that such a contract would have provided for insurance cover. If so, that provides yet another reason why the delay is unconscionable because (a) there is no excuse for the defendant to have believed that S.O.S. 24 was not worth suing; and (b) the defendant could have issued third party proceedings without leave before serving its defence.

10 Furthermore, he submits, the evidence of the witnesses will not be fresh. It may also be tainted as against the third party, since these witnesses have given evidence to the defendant. They were employees of S.O.S. 24, possibly a Government-controlled company. They are now in the employ of Gibraltar Community Care Ltd., a Government-owned company, and they will look to please their employer and that gives rise to prejudice because a fair trial will be difficult.

11 There will be further delays in the main action, as the intervenor will assuredly wish to have the plaintiff medically examined by its own expert. If the court were to rule, as it may, that the action between the plaintiff and the defendant should proceed and thereafter hear the third party-intervenor matter separately, the advantage of third party proceedings would disappear because, in effect, there would be two separate actions and the third party proceeding would proceed as if under a writ, and thus the limitation period is circumvented. Mr. Triay refers to *Courtenay-Evans* v. *Stuart Passey & Assocs.* (2) to support his submission that the defendant's delays may amount to special circumstances to defeat the defendant's application (see 1 *The Supreme Court Practice 1999*, para. 16/4/8, at 283).

12 Mr. Bossino, for the third party, asked me to consider the procedural unfairness which results in embarrassment and prejudice to the third party

and the plaintiff. Since October, 1999 both parties have been ready to proceed without any input from the third party. There is prejudice to the plaintiff if the third party proceedings are continued, because of delays, *etc.*, and to the third party, because it is bereft of the limitation point.

13 There is also, he says, a fundamental flaw in the defendant's approach and that relates to the Government's view as to S.O.S. 24's financial position. The defendant alleged, in its application for leave to issue the third party notice, that S.O.S. 24 had funds coming to it. Apart from the point made by Mr. Triay—that the Government must have known about that from the very beginning and therefore the reason advanced by Mr. Pitto for leave, *i.e.* that the Government only knew about it at a late stage, is not valid—the defendant, through counsel, is now saying that it disputes the right of S.O.S. 24 to the moneys it claims.

14 Well, submits Mr. Bossino, the Government cannot have it both ways. If it disputes the claim, S.O.S. 24 has no right to it and if S.O.S. 24 has no entitlement to the funds then the Government cannot now say (when it did not at first—the Attorney-General's chambers being unaware of the moneys alleged to be due to S.O.S. 24) that it is justifiable to sue S.O.S. 24, the reason for this being that S.O.S. 24 is actually impecunious.

15 The defendant appears to be in the position that he does not know whether or not S.O.S. 24 carries insurance. If it was part of the contractual obligation it really is too late in the day to seek to have S.O.S. 24's liability covered by its insurance, since the defendant ought to know what the third party position was in regard to insurance cover. If there was no such contractual obligation, then S.O.S. 24's financial state is questionable. If there was and the insurers disclaim, S.O.S. 24 is not worth pursuing. There is prejudice to the third party in that the conduct of the case will be in the hands of an intervenor who disclaims and the third party is, as a result, left out of the conduct of its case.

16 Mr. Pitto, in reply, submits that the argument presented by the plaintiff in respect of delay is the same as that presented when leave was granted, so the court was aware of them. In so far as delays were occasioned by any adjournments, these were mainly as the result of the plaintiff's needs and, in terms of delay, the plaintiff contributed to a fair share of the blame.

17 As to prejudice due to limitation, he says that that is not a special circumstance. If the defendant is within the statutory time-limits any prejudice occasioned by this is not relevant. The defendant has no control over the plaintiff's actions.

18 Regarding prejudice as a whole, the strength of the plaintiff's case should, he submits, be a factor to be taken into account. In his application for interim payment, the plaintiff's case was shown to be questionable

and the matters thrown up will be a matter for investigation and this will mean more delay, in fairness to the plaintiff. But the matters do not arise through any default of the defendant. They are due rather to the inherent weakness of the plaintiff's case. Such delays will compensate for any delays caused by the introduction of third party proceedings.

19 As to delay occasioned by the defendant's lack of knowledge of S.O.S. 24's claim, he submits that it is not right to expect the defendant to be aware of the claim by S.O.S. 24 right from the start, since different autonomous departments of Government are involved. That aspect came to light after the Attorney-General had investigated. Until that was ascertained nobody thought S.O.S. 24 was worth suing.

20 In respect of the submission regarding an examination of the state of the scene of the accident, Mr. Pitto says the situation is different to that in the case of *Courtenay-Evans* (2), where repairs had already been executed. There were no remedial repairs necessary here. The plaintiff had taken his time to sue the defendant (in 1998) and the third party is now in no worse position than that of the defendant when sued. The evidence, such as it was then, is still available in the form of witnesses. That is all the defendant can rely on and that is all the third party may have and it is not prejudiced by delay. What evidence there was in 1998 is now in exactly the same form. And as for Mr. Triay's point about the witnesses being tainted, Mr. Pitto disagrees. A witness is put forward as a witness of truth and is not presumed to be partisan.

21 Then there is the fact that the third party was aware that a potential claim was in the offing and it should have informed its insurer, who would then have undertaken whatever enquiries were necessary. Any delay occasioned by that is not the defendant's fault and does not give rise to special circumstances. As to the relationship between the third party and the defendant, that will be a matter for the trial in due course and there is no prejudice because of delay, because the evidence on this is not affected by time. S.O.S. 24 is a private company at arm's length from the Government.

22 Another significant difference, he says, between the instant case and *Courtenay-Evans* is that in that case there was a date set for trial and here there is no date set for trial and that is important in relation to the conduct of the action as a whole. No one is prejudiced, and in the balancing exercise the court should recall that the proceedings against the third party arise from the same set of facts and circumstances as the main action between the plaintiff and the defendant. There is a separate issue between the third party and the intervenor, namely, whether the intervenor can resile from the insurance cover, and that is a matter which is independent of the action which covers the plaintiff/defendant/third party. He distinguished *Hartley's case* (1) from the instant case.

23 In reply, Mr. Peralta submits that the importance of *Hartley's case* is the principle expounded and not the detail. He points out that Mr. Pitto brushed over the that delay point when his point was that a short delay has meant five months and that that delay lies at the door of the defendant. He submits that it is equitable, this being the exercise of the court's discretion, that if the plaintiff is barred from proceeding against the third party, the defendant should be placed in the same position as against the third party. Special circumstances in this case arise from the position of the third party-intervenor matter, which will cause further delay to obtain records and obtain a further medical examination of the plaintiff. It was not envisaged at the time leave was granted that the delay would be so great.

24 Mr. Triay reiterated his stance. There has been ample latitude given to the defendant. The reason for the delay was that S.O.S. 24 was not worth suing. That is the position today. Further, there was a contractual obligation between S.O.S. 24 and the Government, and it is a reasonable assumption that the parties would have done the prudent thing and have provided in that arrangement for insurance cover for employer's liability if this were truly a company at arm's length from the Government. Irrespective of all that, if the defendant did not know of the situation regarding insurance, the enquiries about S.O.S. 24's ability to meet a claim never extended to a simple request of S.O.S. 24 to ascertain whether or not it was insured.

25 In Mr. Triay's submission, there should be only one trial because the issues are not distinct between the plaintiff/defendant/third party. That being so, the introduction of a necessary intervenor will raise issues which will delay that action and, having regard to the facts of this case as far as they can at present be ascertained, they amount to special circumstances.

26 My view is this: (a) Mr. Triay's submission as to the witnesses is wrong, since a witness gives evidence of fact and his credibility is a matter of appreciation following on his/her cross-examination; and (b) there can normally be no prejudice on grounds of delay if a party is within the limitation period. However, as to (b), there is a discretion in the court given that the defendant applied late to issue third party proceedings and required the leave of the court. When Mr. Triay raises the point that there was considerable delay between the time the defendant found out that S.O.S. 24 might have some funds coming to it and his taking action, I think he is right.

27 I have looked at the bundle of documents placed before me and there is a letter from Mr. Pitto to Mr. Marc Ellul, the plaintiff's former solicitor, dated February 5th, 1999 which states: "It is very likely, if we do go to court, that I will be serving a third party notice on S.O.S. 24 Ltd., as I am informed that they do have funds and would clearly have a duty as

employers towards Mr. Gilbert." That is, in my view, an enormous gap in any case, but more so having regard to the fact that the action was adjourned on February 12th, 1999 (and thereafter on May 6th, 1999) without third party proceedings being issued. It is a factor I take into account, remembering at the same time that I cannot and should not, by this means, admit the operation of a limitation period by the back door, so to speak.

28 The next important matter is that it appears to me that S.O.S. 24 is not worth suing. True, this means making an assessment (at a stage when the matter has not been fully heard) of the third party's chances of obtaining insurance cover from the intervenor, and I think these are practically nil. The insurance policy requires certain time-limits which have not been kept to, *i.e.*:

> "The insured shall give notice to the insurer as soon as reasonably possible and shall within 30 days after such damage . . . or such further time as the insurer may in writing allow at the expense of the insured deliver to the insurer a claim in writing . . ."

Since the third party never made a claim on the insurer until December 3rd, 1999 and it was aware of the accident as a result of the claim by the plaintiff in late 1997 or early 1998 (see the letter from Charles A. Gomez & Co. exhibited by the affidavit of Mr. Triay dated December 21st, 1999), it seems to me that the insurer has every likelihood of succeeding in its disclaimer.

29 Furthermore, from the information given by Mr. Pitto in the course of the hearing, it appears that the Government resolutely denies the claim. The point made by Mr. Bossino seems to me to be very pertinent. When I gave leave to issue I made the caveat "if S.O.S. is good for damages." In my opinion, it is not, although I grant the existence of an outside possibility that it might eventually end up with some funds. I think special circumstances are proved, given also the delay that will be caused to the plaintiff by the third party proceedings, and I refuse to give the third party directions sought by the defendant.

30 I dismiss the summons.

Application dismissed.