[2020] IEHC 390

THE HIGH COURT

[2015 No. 1844 P.]

BETWEEN

NIGEL MORROW

PLAINTIFF

AND

FIELDS OF LIFE TRUST LIMITED AND TREVOR STEVENSON TRADING AS FIELDS OF LIFE TRUST

DEFENDANTS

AND

J. HATTY & COMPANY

THIRD-PARTY

JUDGMENT of Mr. Justice Denis McDonald delivered on 30th July, 2020

1. The above named third-party *("the third-party")* has brought an application pursuant to O.16 r.8 (3) seeking to set aside the third-party notice served upon it by the first named defendant pursuant to an order made by Barrett J. on 5th February, 2018. As originally framed, the application was brought on the basis that the first named defendant unduly delayed in pursuing the joinder of the third-party. However, in the course of the hearing (and in written submissions delivered on behalf of the third-party subsequent to the hearing) an argument has also been made that the third-party claim does not fall within the ambit of O.16 r.1 of the Rules of the Superior Courts.

2. For reasons which are explained in more detail below, the principal issue which arises on this application relates to the principles which should be applied in relation to the joinder of a third-party where the relevant claim against the third-party is not governed by the provisions of Part III of the Civil Liability Act, 1961 ("*the 1961 Act*"). Part III of the 1961 Act will only apply where the third-party concerned and the defendant who has sought to join that party to the proceedings are both "*concurrent wrongdoers*" within the meaning of s. 11 of the 1961 Act. In the affidavit of Ms. Nuala McAnally grounding the present motion, it was contended that the third-party notice was not served either in accordance with the time limits set out in O.16 or as soon as reasonably possible as required by s. 27(1) of the 1961 Act. However, for the reasons set out below, counsel for the third-party has accepted, in making this application, that the first named defendant and the third-party cannot be said to be concurrent wrongdoers within the meaning of s. 11. This is because there is no basis, in the present case, to suggest that both the defendants and third-party are each responsible to the plaintiff for the injuries alleged to have been sustained by him. Accordingly, counsel accepted that s. 27 (1) of the 1961 Act cannot be relied upon in support of the application to set aside the third-party notice. In such circumstances, the significant body of case law that exists addressing the principles applicable to s. 27 (1) is of limited assistance in assessing the present application.

3. There are a number of authorities on the joinder of third-parties in cases which are not governed by the 1961 Act. These include the decision of McCracken J. in *Golden Vale Plc v. Food Industries Plc* [1996] 2 I.R. 221 and the decision of Morris J. (as he then was) in *Ward v. O'Callaghan* (High Court, unreported, 2nd February, 1998). In both of those authorities, the court took the view that a third-party seeking relief of this kind must be in

a position to demonstrate some prejudice as a consequence of the delay in joining it as a third-party.

4. In the present case, however, counsel for the third-party has argued that these decisions of McCracken and Morris J.J. predate the decision of the Supreme Court in *Gilroy v. Flynn* [2004] IESC 98 [2005] 1 ILRM 290 and similar decisions in which the courts have placed significant emphasis on the European Convention on Human Rights ("*ECHR*"). In such circumstances, counsel argues that the approach taken in *Golden Vale* and in *Ward v. O'Callaghan* now needs to be recalibrated to take account of the subsequent jurisprudence on the impact of the ECHR. That said, counsel for the defendants, in his written submissions, has drawn attention to the recent decision of Simons J. in *Haughton v. Quinns of Baltinglass Ltd* [2019] IEHC 872 where the court, in taking the whole circumstances of the case into account, considered whether the third-party had been prejudiced by the delay in serving the third-party notice. There is nothing in the judgment of Simons J. in that case which suggests that *Gilroy v. Flynn* principles might be said to apply. However, that is unsurprising in circumstances where, in contrast to the present case, the delay in *Haughton* was of no more than five months.

5. Before attempting to address the legal issues which arise, it is necessary, in the first place, to set out the relevant facts. As will be seen, there have been some twists and turns in the events to date.

Relevant facts

6. The plaintiff issued a Personal Injury Summons on 6th March, 2015. In that summons, the plaintiff made the following claims:-

   (a) In the first place, the status of the first named defendant as a registered charity was highlighted along with its role in facilitating the provision of building services in Uganda through the use of volunteer builders from Ireland. Unusually, para. 1 (b) of the endorsement of claim states that the first named defendant "*is insured with ACE Europe to cover injuries sustained by volunteers*";

   (b) The plaintiff says that, in 2011, he volunteered with the defendants to travel to Hoima, Uganda to assist in the construction of a school building project. In 2012, he volunteered for a second time to assist in the construction of a school at Bugiri, Uganda. He travelled to Bugiri in October, 2012 and started work on the site. However, in the course of his work, he suffered an injury to his back when, under the instruction of the on-site manager of the project, he attempted to lift a wheelbarrow.

   (c) The plaintiff claims that, over the course of the evening after the accident, his condition worsened. He complains that the first defendant's representatives delayed in obtaining medical treatment for him and would not assist in organising transport to a hospital in Kampala. In the meantime, his pain worsened. Ultimately, an ambulance was arranged to take him to hospital in Kampala. From there he was moved to hospital in Johannesburg from where he was discharged

after receiving an epidural. On his return to Ireland at the beginning of November 2012, he was admitted, first to Sligo Regional Hospital and subsequently to the Mater Hospital in Dublin where an operation was performed to ameliorate damage done to two discs in his spine.

(d) A substantial claim is made in relation to loss of earnings, travel expenses and medical expenses.

7. On 11th March, 2015, an affidavit of verification was sworn by the plaintiff verifying the claim made in the Personal Injuries Summons. Thereafter, according to O. 1A, r. 8, the defendants had a period of eight weeks in which to deliver their defence. That time period expired on 6th May, 2015. Under O. 16 r.1 (3), the defendants had a period of 28 days after the expiry of the time for delivery of the defence in which to bring an application to bring an application to join the third-party. That time period expired on 3rd June, 2015.

8. Almost a year passed before the defence was delivered in May 2016. In addition to relying on a waiver of liability executed by the plaintiff and in addition to denying negligence, the defence contains a preliminary objection to the effect that the plaintiff's claim is governed by the laws of Uganda. It is alleged in the defence that it is for the plaintiff to prove (a) that the proceedings are not barred by any provision of the laws of Uganda and (b) that the plaintiff would be entitled to maintain his claim against the defendants under that law. The defence also contends that the quantum of any damages to which the plaintiff might be entitled is to be measured by reference to the applicable principles of the laws of Uganda.

9. It was not until 8th December, 2016 that the first named defendant brought a motion seeking to join the third-party to the proceedings. That is 18 months after the expiry of the period prescribed by O. 16, r. 1 (3). The application was grounded on the affidavit of Richard Spratt, the chief executive of the first named defendant in which he said that J. Hatty & Company, the proposed third-party, operated as insurance brokers from premises of 34 Hamilton Road, Bangor, County Down. Mr. Spratt stated that, in January, 2011, the first named defendant retained the third-party to advise on the insurance to be put in place in relation to its charitable activities and operations including overseas volunteer work. He confirmed that a policy of insurance was put in place with Hiscox Insurance for that purpose but Mr. Spratt explained that, as it transpired, the policy did not, in fact, extend to cover the claim made by the plaintiff in these proceedings. Mr. Spratt exhibited a draft third-party notice (which was in quite detailed terms) in which it was alleged that the third-party failed to arrange appropriate insurance notwithstanding that the third-party *"knew or ought to have known the insurance requirements of the charity" and that it failed "to exercise its duty to match, as precisely as possible, the risk exposures with the insurance cover provided*".

10. As required by the rules, that application was served on the plaintiff's solicitors. Subsequent to the service of the motion on the plaintiff, the plaintiff's solicitors wrote to

the solicitors acting on behalf of the first named defendant on 16th December, 2016 in which they stated:-

> *"We note that the affidavit of Mr. Spratt does not exhibit the basis on which he is asserting that J. Hatty & Company are the appropriate broker in this matter.*
>
> *Having carried out a search in the Registration Office for Northern Ireland, we cannot find reference to an existing company in the name of J. Hatty & Company, but note that a firm in the name of Hatty Ltd at the same address as specified in your motion exists under company no. NI058903 and in the circumstances, you may wish to amend your Notice of Motion".*

11. Following receipt of this letter, the solicitors acting for the first named defendant amended the notice of motion. Under the amended notice of motion, the party which the defendant sought to join to the proceedings was named as "*Hatty Ltd*" rather than *"J. Hatty & Company*". Thereafter, on 16th January, 2017, an order was made by Barr J. giving the first named defendant liberty to issue a third-party notice for service outside the jurisdiction on Hatty Ltd. The third-party notice was served on Hatty Ltd on 30th January, 2017.

12. In April 2017, Hatty Ltd responded to service of the third-party notice with an application to set it aside. Hatty Ltd. claimed that it had been improperly joined as a third-party to the proceedings. Without prejudice to that contention, Hatty Ltd also made the case that the third-party notice was not served in accordance with the time limit prescribed by O. 16 r. 1 (3) and s. 27 (1) of the 1961 Act.

13. In the affidavit of Ms. Michelle Kilroy, solicitor, sworn on 10 April, 2017 in support of the motion to set aside the third-party notice, Ms. Kilroy stated that the first named defendant was aware at all times that its broker was the partnership known as J. Hatty & Company and not the limited company, Hatty Ltd. She exhibited a letter from Mr. Spratt on behalf of the first named defendant to J. Hatty & Company of 20th January, 2011 in which the first named defendant stated:-

> *"We wish to appoint J. Hatty & Company to act as our insurance broker in respect of both of these policies with immediate effect".*

14. As of that date in January, 2011 the relevant policies of insurance that were in place comprised a "*Director and Officers Insurance Policy*" placed with ACE Europe and a charity insurance policy placed with Ecclesiastical Insurance Office plc. According to Ms. Kilroy, J. Hatty & Company made inquiries of other insurers seeking alternative insurance for the first named defendant and ultimately a policy was put in place with Hiscox Insurance Company ("*Hiscox*") in which the broker was named as J. Hatty & Company. On 22nd February, 2011, J. Hatty & Company wrote to Mr. Spratt enclosing a copy of the relevant insurance document. That letter was sent on the notepaper of J. Hatty & Company

15. For completeness, it should be noted that, in the same affidavit, Ms. Kilroy also drew attention to the alleged delay on the part of the first named defendant in joining the third-party to the proceedings but stated that:-

> *"…any issue regarding prejudice occasion (sic) to Hatty Ltd by reason of the delay is very much secondary and without prejudice to the primary contention that the First Named Defendant has simply joined the wrong party to these proceedings and the Third-party Notice should be set aside on that basis".*

16. In response to Ms. Kilroy's affidavit, an affidavit was sworn by Ms. Sarah Galligan who is a member of the firm of solicitors acting on behalf of the defendant. In that affidavit, Ms. Galligan explained that, on receipt of the letter from the plaintiff's solicitor of 16th December, 2016, and having carried out a search herself, the application to join J. Hatty & Company as a third-party was amended to identify Hatty Ltd as the proposed third-party. Ms. Galligan very properly accepted that, on the basis of Ms. Kilroy's affidavit, the correct identity of the relevant insurance broker is, in fact, J. Hatty & Company but she suggested that the joinder of Hatty Ltd arose as a consequence of a *bona fide* mistake and she submitted that the misidentification of the third-party should not "*be a bar to the Defendants bringing before the Court the real matters at issue between the parties … which are the issues between … the Defendants and their Insurance Broker* … ".

17. In her affidavit, Ms. Galligan also dealt with the allegation of delay. She said that, having regard to the decision of the Supreme Court in *Cooke v. Cronin* [1999] IESC 54, it was necessary, prior to bringing any application to join a professional person or firm as a party to the proceedings, to obtain an opinion from an independent insurance broker. In para. 10 of her affidavit she said:-

> *"I say that I made contact with an Insurance Broker expert on behalf of the Defendants in June 2016 but was advised by that expert that he was due to retire. That expert reverted to me with a referral of an alternative insurance broker expert whom I briefed on ... 7th July, 2016. I say that I received a draft report on the 22nd … July, 2016 from that expert with a number of queries that had to be clarified by the First Named Defendant. Those issues were clarified in early September, 2016 and the draft expert report was finalised shortly thereafter. I say that the grounding affidavit … was sworn … on the 2nd … December, 2016. Given the nature of the work undertaken by the First Named Defendant the [deponent] spends a lot of time in Uganda and this was the reason the grounding affidavit … was not sworn until the 2nd … December, 2016".*

18. In advance of the hearing of the application to set aside the third-party notice, the defendants, in May, 2017, brought a motion seeking to amend the title of the third-party from "*Hatty Ltd" to "J. Hatty & Company*". This application was brought on behalf of both defendants notwithstanding that the original application to join a third-party had been made on behalf of the first named defendant only. The application was resisted by Hatty Ltd. On their behalf, Ms. Kilroy swore a further affidavit in which she said that the true purpose of the defendants' application was to substitute J. Hatty & Company, a

partnership, in place of Hatty Ltd as the third-party in the proceedings. Ms. Kilroy suggested in her affidavit that a "*wholly new party*" cannot be added to proceedings or substituted in place of an existing party, simply by amending the title of the proceedings. At the hearing before Barrett J. (described below), it was subsequently submitted on behalf of Hatty Ltd. that, having regard to the decision of the Supreme Court in *Sandy Lane Hotel Ltd v. Times Newspapers Ltd* [2011] 3 I.R. 334, the only appropriate way in which to address the matter was by virtue of an application under O.15 r.13 (under which the court, *inter alia*, may make an order substituting the name of any new party in place of any other party who has been "*improperly joined*").

19. Both motions came on for hearing before Barrett J. on 25th January, 2018. Ten days later, on 5th February, 2018, Barrett J. delivered a reserved judgment ([2018] IEHC 70) in which he recorded that it was common case that Hatty Ltd had nothing to do with the proceedings. In those circumstances, Barrett J. held that the third-party notice would have to be set aside.

20. In the same judgment, Barrett J. addressed the application made on behalf of the defendants to amend the title of the third-party from "*Hatty Limited" to "J. Hatty & Company"*. Applying the principles set out in the judgment of the Supreme Court in *Sandy Lane*, Barrett J. came to the conclusion that the error which occurred in naming Hatty Ltd as the proposed third-party could not be said to be a mere clerical error and that the only way in which the issue could be addressed was pursuant to O.15 r.13. At paras. 6-7 of his judgment, Barrett J. said:-

> *"6. Mooted at the hearing … was the possibility that the defendants may wish to make application under O.15 … seeking to join individual partners of J. Hatty & Company to the … proceedings in place of the now-departed Hatty Limited. The court is conscious that such an application may present future difficulties for the defendants, not least given the provision in O.15 r.13 that:*
>
> > *'Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the court, and the proceedings as against such party shall be deemed to have begun only on the making of the order adding such party',*
>
> *which last phrase may yet yield a motion in the within proceedings in which the question of delay in serving the third-party proceedings will come sharply into focus.*
>
> *7. It did not seem to the court, at hearing, that the defendants had decided fully how they wished to proceed in the event that the court was to conclude … that their application to amend the title of the third-party could not succeed. That being so, the court will give the defendants time to consider this judgment and decide what further motion they may wish to bring in light of this judgment".*

21. It is clear from paras. 6-7 of his judgment that Barrett J. envisaged, at that time, that a further motion would be brought by the defendants pursuant to O.15 r.13 to substitute the individual partners in J. Hatty & Company for Hatty Ltd as third-parties in the proceedings. However, it appears from the terms of the order, as perfected, that, subsequent to the delivery of judgment by Barrett J., and without the filing and service of a new notice of motion, an application was made to the court by counsel for the defendants seeking the necessary order under O.15 r.13. The application made appears to have been to substitute J. Hatty & Company rather than the individual partners. For completeness, it should be noted that this element of the order does not appear to have been included in the first version of the order drafted by the registrar. The relevant paragraphs dealing with the substitution of J. Hatty & Company for Hatty Ltd appear to have been added to the order under the slip rule by consent of all parties on 15th February, 2018.

22. In the course of the hearing before me, counsel for the defendants argued that the present application by the third-party is misconceived in circumstances where the third-party was not joined to the proceedings by means of the third-party procedure under O.16. Instead, it was joined as a consequence of an order made under O.15 r.13. Counsel also argued that, in the course of the hearing before Barrett J., comprehensive submissions had been made by both defendants and the third-party in relation to the issue of delay and that accordingly it was no longer open to the third-party to seek to rely on the alleged delay in this case as a basis for setting aside the third-party notice.

23. I cannot, however, accept either of those contentions. In the first place, it is important to bear in mind that the order made by Barrett J. was to substitute J. Hatty & Company for Hatty Ltd. as third-party. J. Hatty & Company was not a party to the hearing before Barrett J. To my mind, J. Hatty & Company have the same rights, in those circumstances, as Hatty Ltd previously had to bring an application to set aside service of the third-party notice. While the issue of delay was raised by Hatty Ltd in its application to set aside service of the third-party notice, it is clear that this was very much a subsidiary issue which was raised without prejudice to the main basis for the application – namely that the wrong entity had been named as a third-party. Moreover, it is clear from the judgment of Barrett J. that he did not reach any conclusion in relation to the issue of delay. His judgment makes very clear that he envisaged that the question of delay might well arise in the future following the substitution of J. Hatty & Company in place of Hatty Ltd. Counsel for the defendants has argued that the observations of Barrett J. (to the effect that delay might have to be considered in the future) were made solely in relation to a scenario where the individual partners of J. Hatty & Company were named as third-parties. He drew attention, in this context, to the language used by Barrett J. in para. 6 of his judgment (quoted in para. 20 above). I do not believe that a distinction of that kind can plausibly be said to arise. Under O. 14 r. 1, a partnership may be sued in the name of the partnership. It is unnecessary to name the individual partners. The effect of O.14 r.1 is that proceedings against a named partnership is equivalent to proceedings against the individual partners making up that partnership. In such circumstances, I believe that counsel for the defendants is mistaken in seeking to place reliance on the

reference by Barrett J., in para. 6 of his judgment, to the "*individual partners*". By joining J. Hatty & Company as third-party to the proceedings in substitution for Hatty Ltd, Barrett J. was, in substance, joining the individual partners. That is the effect of O. 14 r. 1.

24. As noted in para. 23 above, at the time Barrett J. delivered his judgment on 5th February, 2018 and thereafter made the order under O.15 r.13, the correct third-party - namely the partnership known as J. Hatty & Company - was not before the court. Insofar as J. Hatty & Company was concerned, the application to join it as a party to the proceedings was made on an *ex parte* basis as against it. In accordance with the rules and the usual practice, it was not served with the application under O.15, r. 13 in advance. There was therefore no scope for any conclusive finding to be reached by the court as to whether there was any basis for the third-party notice to be set aside on the grounds of delay.

25. There is accordingly no basis to suggest that J. Hatty & Company is in any way bound by the order of Barrett J. Like any other party against whom relief is sought on an *ex parte* basis, J. Hatty & Company is free to make whatever application the partnership may be advised with a view to setting aside any order made in the proceedings which is believed to be adverse to its interests. This was made clear by McCracken J. in *Voluntary Purchasing Groups Inc. v. Insurco International Ltd* [1995] 2 ILRM 145 at p. 147 where he confirmed that:-

> *"There is an inherent jurisdiction in the Courts in the absence of an express statutory provision to the contrary, to set aside an Order made ex parte on the application of any party affected by that Order. An ex parte Order is made by a judge who has only heard one party to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that is not suggested in the present case. However, in the interests of justice, it is essential that an ex parte Order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the Court. It would be quite unjust that an Order could be made against a party in its absence and without notice to it which could not be reviewed on the application of the party affected."*

26. In my view, J. Hatty & Company therefore has the right, subsequent to its substitution as third-party in lieu of Hatty Ltd., to make an application to the court to set aside service of the third-party notice in the usual way. The fact that such an application was previously made by a separate legal entity – namely Hatty Ltd – does not affect that conclusion. J. Hatty & Company must therefore be free, in this application, to make any relevant argument in relation to delay or, subject to what I say in para. 42 below, in relation to any other issue that may arise in relation to the validity of the third-party notice to which J. Hatty & Company has only become a party after the hearing before Barrett J. had concluded.

The present application by J. Hatty & Company

27. As noted above, the present application is made pursuant to O.16 r.8 (3). That sub rule provides that third-party proceedings may, at any time, be set aside by the court. The

application was brought in July 2018 and was grounded on an affidavit of Ms. Nuala McAnally who is a member of the firm of solicitors acting on behalf of J. Hatty & Company. These are the same solicitors who previously acted on behalf of Hatty Ltd. According to para. 5 of Ms. McAnally's affidavit, the application is brought on the basis that the third-party notice was not served in accordance with the time limits set out in O.16 or as soon as was reasonably possible as required by s. 27 (1) of the 1961 Act. However, as noted above, in the course of the hearing before me, counsel for the third-party acknowledged that s. 27 (1) of the 1961 Act has no application here as the third-party and the defendants could not be said to constitute "*concurrent wrongdoers*" for the purposes of Part III of the 1961 Act (which deals with contribution between concurrent wrongdoers). In his oral and written submissions on behalf of his clients, counsel for the defendants also accepted that the 1961 Act does not apply.

28. Ms. McAnally drew attention, in her affidavit, to the fact that the policy of insurance put in place by J. Hatty & Company on behalf of the first named defendant was incepted in January 2011. She also suggested that, at all relevant times, the defendants were aware of the identity of the insurance broker. She described the previous application brought by Hatty Ltd to set aside service of the third-party notice and she then set out what she contended was the relevant period of delay for the purposes of the court's consideration of the application to set aside the third-party notice. In particular, she drew attention to the fact that the third-party notice was not served on J. Hatty & Company until 27th February, 2018 which was almost three years after the time prescribed by O.16 r.1 (3) had expired. She contended that the relevant period of delay should be assessed as from that time rather than from the time at which it became apparent that the first named defendant had named the wrong entity as third-party in its application to Barr J. in 2017.

29. With regard to prejudice, this was addressed by Ms. McAnally in para. 37 of her affidavit as follows:-

> *"37. Finally, I say and believe that J. Hatty has been prejudiced by the … delay. The events, the subject matter of these proceedings, took place over seven years ago when the policy of insurance … was first arranged. The Plaintiff suffered his injuries five and a half years ago. I say and believe that there may have been other policies of insurance in place which ought to have responded to the loss allegedly suffered by the Plaintiff. It appears therefore that any application to make a claim against another responsive policy of insurance has now been lost due to the delay on the part of the First Named Defendant in joining J. Hatty [& Company] to these proceedings as a Third-party".*

30. Mr. Ronan O'Brien (a member of the firm of solicitors acting on behalf of the defendants) swore an affidavit in response to Ms. McAnally. In that affidavit, Mr. O'Brien said that while his firm admit to making a *bona fide* mistake, there were "*some grounds for the confusion which brought about this mistake*". In para. 4 of his affidavit, Mr. O'Brien noted that the address of both Hatty Ltd and J. Hatty & Company is 34 Hamilton Road in Bangor and he suggested that two directors of Hatty Ltd are partners in J. Hatty & Company

namely Paul Hatty and Julie Hatty. He also made the point that, in circumstances where both Hatty Ltd and J. Hatty & Company are closely connected, share an office, and have retained the same solicitors and counsel, J. Hatty & Company cannot claim to have been unaware of the potential claims against them and he further suggested that, accordingly, no prejudice had arisen.

31. Insofar as delay is concerned, Mr. O'Brien referred to the averments previously made by Ms. Galligan in her affidavit sworn in May 2017 with regard to the need to obtain an expert report to support a claim of professional negligence against the insurance broker before any attempt could properly be made to join the broker as a third-party. Mr. O'Brien also sought to suggest that the question of delay had already been heard and determined by Barrett J. However, for the reasons previously outlined by me at paras. 23 to 25 above, I do not believe that Barrett J. made any such determination. His judgment makes very clear that he envisaged that the question of delay would be dealt with at some stage in the future, following the substitution of J. Hatty & Company for Hatty Ltd.

32. Although a further affidavit was sworn by Ms. Kilroy on behalf of the third-party, no further evidence of prejudice was identified in the affidavit over and above the prejudice described in Ms. McAnally's affidavit.

33. Having considered the evidence before the court, it is next necessary to consider the provisions of O.16 and the relevant case law. In circumstances where the 1961 Act does not apply, the present application is governed solely by the provisions of O.16 and the principles which emerge from the case law relating to O. 16.

Order 16

34. Having regard to the case made by counsel for the third-party that the claim against J. Hatty & Company does not fall within the ambit of O. 16 r. 1, it is necessary to consider the ambit of that rule in some detail. As noted further below, it has sometimes been suggested that the current form of O. 16 was prompted by the enactment of Part III of the 1961 Act, the underlying policy of which is to ensure that all claims relating to the same subject matter should, insofar as possible, be determined at the same time. However, as outlined in more detail below, I believe it is clear that the form of O. 16 r. 1 predates the enactment of the 1961 Act albeit that it is inspired by a similar underlying principle. In its current form, O. 16 r. 1 provides as follows:

"1.(1) Where in any action a defendant claims as against any person not already a party to the action (in this Order called 'the third-party')-

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between

the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third-party or between any or either of them,

the Court may give leave to the defendant to issue and serve a third-party notice and may, at the same time, if it shall appear desirable to do so, give the third-party liberty to appear at the trial and take such part therein as may be just, and generally give such directions as to the Court shall appear proper for having any question or the rights or liabilities of the parties most conveniently determined and enforced and as to the mode and extent in or to which the third-party shall be bound or made liable by the decision or judgment in the action.

(2) The application for such leave shall be made by motion on notice to the plaintiff. Unless the plaintiff wishes to add the third-party as a defendant, his attendance at the hearing of the motion shall not be necessary. If he does attend, he shall not be entitled to costs except by special direction of the Court.

(3) Application for leave to issue the third-party notice shall, unless otherwise ordered by the Court, be made within twenty-eight days from the time limited for delivering the defence or, where the application is made by the defendant to a counterclaim, the reply."

35. In its current form, O. 16 r. 1 was introduced by the Rules of the Superior Courts 1986 (S.I. No. 15 of 1986). However, it is important to note that, with the exception of sub-rules 2 and 3, O. 16 r. 1 substantially replicates the form of O. 16 r. 1 which was found in the Rules of the Superior Courts 1962 (S.I. No. 72 of 1962) ("*the 1962 rules*"). Order 16, r. 1 of the 1962 Rules represented a significant broadening of the court's power to join third-parties. The previous version of the rule found in O. 16 r. 48 of the Rules of the Supreme Court (Ireland) 1905 ("*the 1905 rules*") did not contain provisions equivalent to O. 16, r. 1 (b) or (c). Insofar as relevant, it provided as follows:

"48. Where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action, he may, by leave of the Court …, issue a notice (hereinafter called the third-party notice) to that effect …".

36. *Wylie on the Judicature Acts*, 1906, at p. 334 notes that the 1905 rule limited third-party claims expressly to "*claims by a defendant to contribution or indemnity*". The 1905 rule nonetheless represented an expansion on the very narrow approach that had been taken under the immediately preceding rules. In that context, *Wylie* explains that, although s. 27 (3) of the Judicature Act (Ireland) 1877 appeared, by its express terms, to give extensive powers to the court to permit a defendant to claim relief against a third-party, it had been held in England, by reference to an identical provision in the Judicature Act 1873 and by reference to the relevant rules then in force, that the only object of the pre 1905 provisions was to bind the third-party conclusively by the judgment given as between the plaintiff and the original defendant and that the defendant could not obtain relief against the third-party without a fresh action being brought. At p. 335, *Wylie*

explains that O. 16 r. 48 of the 1905 rules "*now expressly provides for the decision, as between the defendant and the third-party … of all questions arising upon such claims for contribution or indemnity*…". However, *Wylie* also explains that, in order to bring a case within O. 16 r. 48 of the 1905 rules, it was not enough that a defendant would have a claim for damages against the third-party. At p. 335, *Wylie* said:

> *"but [the] defendant must have a direct right to indemnity as such, which must generally, if not always, arise from contracts express or implied… and it must be an indemnity against the liability of [the] defendant to [the] plaintiff.*

37. The narrow ambit of O.16 r.48 suggested by *Wylie* in 1906 has been upheld in subsequent case law. In Butterly v. United Dominions Trust (1961) 95 ILTR 66, the Supreme Court held that the provisions of O. 16 r. 48 of the 1905 rules have always been strictly construed and that the rule was limited to cases in which the defendant has a direct right of indemnity against the proposed third-party, generally, if not always, arising from contract express or implied. In that case, the plaintiff purchased a motor vehicle by way of a hire purchase agreement from the defendant (a hire purchase company). The plaintiff alleged that the vehicle was defective and commenced proceedings against the defendant seeking rescission of the hire purchase agreement and for return of monies already paid by him pursuant to that agreement. The defendant obtained an order pursuant to O. 16 r. 48 of the 1905 rules for the joinder of the supplier of the motor vehicle as third-party. The defendant claimed that the third-party sold the vehicle to it "*on terms whereby the venders warranted that the said motor car was of merchantable quality and was fit for purposes as aforesaid and undertook either expressly or impliedly to indemnify the defendants against any claim made against the defendants by reason of same not being of merchantable quality*". The order joining the third-party was appealed to the Supreme Court which overturned the order. It did so on the basis that, as Maguire J. explained, the defendants had failed to establish any contract of indemnity with the third-party. Maguire J. said:

> *"The defendants must have a direct right to indemnity. It is not enough that, if the plaintiff succeeds, the defendants may have a claim for damages, or other relief or remedy over against the third-party.*
>
> *The defendants have failed to establish any contract of indemnity with the third-party…If an express contract of indemnity existed it would be a simple matter to establish it by evidence…. No ground has been laid on which a contract of indemnity can be implied…".*

38. Order 16, r. 1 of the 1962 Rules, represent a significant broadening of the circumstances in which a third-party could be joined. By its terms, two new categories of third-party claim were included. As mentioned in para. 34, it is often suggested that O. 16 r. 1 was introduced in the 1962 rules in order to give effect to the significant changes brought about by Part III of the 1961 Act. However, it is important to recall that the 1962 rules (which replaced the 1905 rules) contained a significant number of changes to the 1905 rules and were largely prompted by the same concern which motivated, for example, the

enactment of the Courts (Supplemental Provisions) Act, 1961 and the Courts (Establishment and Constitution) Act, 1961. In particular, there was a concern to ensure that Article 34.1 of the Constitution was fully observed. Article 34.1 expressly provides that justice "*shall be administered in courts established by law*…" (emphasis added). There was a concern that, notwithstanding the enactment of the Constitution in 1937, no laws had yet been put in place providing for the establishment of the courts envisaged by Article 34.1.

39. Moreover, it is clear that, in enacting O. 16 r. 1 in the form contained in the 1962 rules, the Rules Committee largely adopted the language of an English rule which long pre-dated the 1961 Act. The Rules Committee appears to have based O. 16, r. 1 as it appeared in the 1962 Rules on O. 16A of the Rules of the Supreme Court 1883 (England & Wales) as amended in 1929 following the enactment of s. 39 of the Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.). The text of O. 16A is set out in the judgment of Neill L.J. in *C.E. Heath Plc v. Ceram Holding Co. [*1988] 1 W.L.R. 1219 at p. 1226 as follows:

> *"(1) Where in any action a defendant claims as against any other person not already a party to the action (in this Order called the third-party) (a) that he is entitled to contribution or indemnity, or (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or (c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third-party or between any or either of them, the court … may give leave to the defendant to issue and serve a 'third-party notice'".*

40. It will be noted that this is identical language to O. 16 r. 1 (of both the 1962 and 1986 rules in Ireland) save that O. 16 r. 1 also contains the following additional language which continues immediately after the passage quoted in para. 39 above namely:

> *"…and may, at the same time, if it shall appear desirable to do so, give the third-party liberty to appear at the trial and take such part therein as may be just, and generally give such directions as to the Court shall appear proper for having any question or the rights or liabilities of the parties most conveniently determined and enforced and as to the mode and extent in or to which the third-party shall be bound or made liable by the decision or judgment in the action".*

41. The additional language contained in O. 16 r. 1 (quoted in para. 40 above) is principally concerned with the conduct of the trial. It does not address the circumstances in which the court may join a third-party under the rule. In cases which are not governed by the 1961 Act, the court's jurisdiction to join a third-party is limited to the three categories of case specified in O.16 r.1 namely:

(a) Cases where the defendant claims to be entitled to contribution or indemnity as against the proposed third-party;

(b) Cases where the defendant claims an entitlement to any relief or remedy "*relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff*"; and

(c) Cases where a question or issue relating to or connected with the original subject matter of the action between the plaintiff and the defendant is "*substantially the same as some question or issue arising between the plaintiff and the defendant*" which should properly be determined not only as between those parties but "*as between the plaintiff and defendant and the third-party or between any or either of them*".

42. *In the present case, counsel for the third-party, in his oral submissions at the hearing of the application (and in his written submissions including those subsequently made available to the court on 25th May, 2020) argues that a claim made by the defendants against J. Hatty & Company does not fall within any of the categories of claim enumerated in O. 16 r.1. While I think it is open to question whether the third-party is entitled to raise this issue (having not pursued it in the affidavits grounding the motion to set aside service of the third-party) I nonetheless propose to address the issue in circumstances where the matter was fully argued in the course of the oral hearing and in the written submissions subsequently delivered on behalf of the parties. I address each of the three categories of third-party claim, in turn, below.*

Claims for contribution or indemnity

43. It is clear from the decision of the Supreme Court in *Butterly v. United Dominions Trust* (discussed above) that, under the predecessor provision to O. 16 r. 1, namely O. 16 r.48 of the 1905 rules, a very narrow view was taken as to the ambit of what is now para. (a) of r. 16 (1). As outlined above, the Supreme Court, in that case, took the view that a claim for damages against a third-party would not come within the ambit of the rule. I believe that it is open to question whether such a narrow view should now be taken. This is particularly so in circumstances where the rule in its current form was enacted subsequent to the passing of the 1961 Act. While it appears to be clear that the form of O. 16 r. 1 is derived from equivalent English provisions which predate the enactment of the 1961 Act, it seems reasonable to assume that, in enacting the 1962 rules, the Rules Committee must also, to some extent, have had the 1961 Act in mind. Under s. 21 of the 1961 Act, there is a wide scope for claims to contribution to be brought (albeit in the context of claims between concurrent wrongdoers *inter se*). It is therefore difficult to accept the submission made by counsel for the third-party in these proceedings that "*contribution*" in the context of O. 16 r.1 (a) should be read as confined to claims for the equitable remedy of contribution as described, for example, in *Halsbury's Laws of England,* 5th ed., 2014, para. 58 where the authors say:

> *"Although its extent may be modified by contract, contribution is not based on contract law, but on principles of natural justice. Payment by one person liable*

releases the others from the principal demand, and they are required to contribute as a return for this benefit; but the principle does not apply unless all the parties are liable to a common demand, and such liability, therefore, is a condition of contribution" (emphasis added by counsel for the third-party).

44. The 1999 edition of the White Book (which was the last edition published prior to the introduction of the Civil Procedure Rules in England & Wales in April 1999) suggests (at Vol. 1 p. 276), in similar terms to Barrett J. in *Haughton v. Quinns of Baltinglass* [2018] IEHC 532, at p. 5, that a wider view should be taken of the concept of contribution in the context of the equivalent English rule (which was admittedly in somewhat different terms). The authors suggest that, in effect, a claim to contribution is a claim to a partial indemnity and they also say that it covers the form of contribution available under the UK equivalent to Part III of the 1961 Act namely the Civil Liability (Contribution) Act 1978. This tends to support the conclusion that the reference in O. 16, r. 1 (a) to claims for contribution should be similarly construed. That said, I am concerned that the decision of the Supreme Court in *Butterly v. United Dominions Trust* is binding on me and was regarded by the Supreme Court in *Gilmore v. Windle* [1967] I.R. 323 (at p. 335) as a continuing authority on the ambit and effect of O. 16, r. 1 (a) notwithstanding the intervening enactment of the 1961 Act. In those circumstances, I do not believe that it would be appropriate for me, as a judge of the High Court, to depart from the approach taken in *Butterly v. United Dominions Trust*.

45. I must also bear in mind that, under s. 27 (1) (b) of the 1961 Act, there is an express statutory right (in the case of a concurrent wrongdoer seeking contribution from another concurrent wrongdoer, not already a party to an existing action) to pursue a claim for contribution by means of a third-party notice and, accordingly, the Rules Committee, in 1962, may have thought that it was not necessary to expand the ambit of contribution claims described in O.16 r.1 (a).

46. I am also conscious that, in *Gilmore v. Windle*, the Supreme Court did not regard the third-party claim there as falling within 0. 16, r. 1 (a). In that case, the plaintiff was struck by the defendant's motor car and injured. He claimed damages from the defendant on the basis that his injuries were caused by the latter's negligent driving. However, the defendant claimed that the accident had been caused by the sudden and total failure of the breaks of her motor car which had been sold to her by the third-party only two days before the accident. She contended (*inter alia*) that the vendor had represented to her that the car was in a sound mechanical condition. While the facts of the case are very different to the facts of the present case, there is a clear parallel between the two in that the defendant's contribution claim against the third-party was essentially a claim for damages for breach of the third-party's obligations to her and was so characterised by O'Keeffe J. at p. 335 who said: "*On the facts alleged by the defendants …, she may possibly be able to establish a right to damages against the third-party for breach of contract, and such damages might be such as to amount to an indemnity*."

47. Similarly, in the present case, the claim made in the third-party notice is framed as a claim for damages which, if successful, may amount to an indemnity (either in whole or in part) in respect of the plaintiff's claim against the first named defendant. It is clear from the judgment of O'Keeffe J. in *Gilmore v. Windle* at p. 335 that, although the court was of the view that the claim fell within either O. 16, r. 1 (b) or (c), the Supreme Court considered that such a claim did not fall within para. (a) of O. 16 r. 1. Citing the decision in *Butterly*, O'Keeffe J. expressly stated that: "*Under the former Rules of Court a claim of damages of that nature (even though amounting to an indemnity) was held not to be suitable to be brought by third party proceedings …but paragraphs (b) and (c) of Order 16, r. 1 are now wide enough to cover a claim of that nature*". In those circumstances, I do not believe that I can take the view that there is any scope to find that the claim made by the defendants against J. Hatty & Company can be said to fall within the ambit of O. 16 r. 1 (a).

48. Before going further, I should, at this point, for completeness, draw attention to an argument made on behalf of the third-party by reference to the judgment of Cregan J. in *Irish Bank Resolution Corporation v. Purcell* [2016] 2 I.R. 83 that claims for damages against a third-party cannot be pursued in third-party proceedings. In that case, the plaintiff, as successor in title to the Irish Nationwide Building Society ("*INBS*") sought to make some of the INBS directors personally liable for the extensive losses suffered by INBS. One of the defendants joined the Central Bank as a third-party and sought damages against the Central Bank for breach of duties alleged to have been owed to him. At p.p. 153 -154, Cregan J. accepted an argument of counsel for the Central Bank that it was wrong, as a matter of law, to plead in a third-party notice, a separate claim for damages for breach of duty owed by the third-party to one of the defendants. Crucially, that issue was decided in that case solely by reference to the 1961 Act. There is nothing in the judgment to suggest that any argument was addressed to the court in relation to O. 16 and the decision in *Gilmore v. Windle* was not cited to the court. I therefore do not believe that *Purcell* is relevant for present purposes.

Order 16 rule 1 (b)

49. Order 16 rule 1 (b) will apply where a defendant claims an entitlement to a relief or remedy "*relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff*".

50. It is clear from the language of O.16 r.1 (b) that it will apply where two conditions are met namely:

    (a) Where a defendant claims against a third-party any relief or remedy relating to or connected with the original subject-matter of the action as between plaintiff and defendant; and

    (b) Where the relief or remedy claimed by the defendant against the third-party is substantially the same as some relief or remedy claimed by the plaintiff against the defendant.

51. It is therefore necessary to consider both limbs of O. 16, r. 1 (b). Insofar as the first limb is concerned, in my view, the words "*relating to or connected with*" are very broad. Thus, for example, in *Eccles Hall Ltd v. Bank of Nova Scotia*, (High Court, unreported, 3rd February, 1995) Murphy J., at p. 16 of his judgment expressed the view that the words "*in connection with*" in s. 60 (1) of the Companies Act, 1963 were of "*wide import*".

52. Similarly, the words *"relating to*" are also capable of having a very wide ambit. The meaning of the very similar phrase "*in relation to*" was considered by Toohey J. in *Smith v. Federal Commissioner of Taxation* (1987) 164 CLR 513 at p. 533. Toohey J. suggested that the words "in relation to" are: "*wide words which do no more, at least without reference to context, than signify the need for there to be some relationship or connection between two subject matters*".

53. I appreciate that, in considering the meaning of the words "*relating to*" or "*connected with*", the degree of relationship or connection required may vary, depending on the context. In the present context, it seems to me that the underlying purpose of O. 16 r. 1 should be borne in mind. As Lavery J. observed in *Gilmore v. Windle* at p. 329:

> *"It is necessary to consider the relevant provisions of the Civil Liability Act, 1961, and the Rules of the Superior Courts. The procedure allowing a party to an action to bring in a third-party is not new, though it has been greatly extended. The object of the old procedure, and of its extension, is to avoid multiplicity of actions and to enable, so far as can be done with just regard to the interests of the several parties involved, all issues arising out of a particular incident or transaction to be determined by the one court at one time; thus avoiding repetition of evidence and argument before different tribunals. …"..*

54. In the same case, O'Keeffe J., at p. 335, highlighted that O. 16 r. 1 of the 1962 Rules permits third-party proceedings in a much wider class of cases than the 1961 Act. Similarly, in *Chatsworth Investments Ltd. v. Amoco* (UK) Ltd. [1968] 1 Ch. 665 at p. 692, Widgery L.J. (as he then was) said of a similar provision in the English rules that: "*Now that the scope of third-party proceedings has been extended it would, I think, be unfortunate if the terms of Ord. 16, r. 1, were given a restrictive interpretation. The court's discretion to disallow third-party proceedings in appropriate cases is an adequate safeguard against abuse*".

55. These observations clearly suggest that the use of the words *"relating to or connected with*" should be given a broad rather than a narrow meaning so as to permit full effect to be given to the underlying purpose of O. 16 r. 1 in its current form. That is the approach which was taken by a majority of the Supreme Court in *Gilmore v. Windle*. At p. 335, O'Keeffe J., speaking for the majority, said:

> *"In the present case, [the defendant] may possibly be able to establish a right to damages against the third-party for breach of contract, and such damages might be such as to amount to an indemnity. Under the former Rules of Court, a claim for damages of that nature (even though amounting to an indemnity) was held not to*

be suitable to be brought by third-party proceedings— Bolger v. Brennan and Harding …, and Butterly v. United Dominions Trust (Commercial) Ltd. …; but paragraphs (b) and (c) of Order 16, r. 1, are now wide enough to cover a claim of this nature. The Court can, therefore, grant leave to issue and serve a third-party notice, either in respect of the claim for contribution under s. 27 …, or in respect of the claim for damages for breach of contract, or in respect of both such claims". (emphasis added).

56. While the court in that case was able to take the view that the claim against the proposed third-party there either came under the 1961 Act or under O. 16, the fact that the court considered that the defendant's claim for damages against the third-party fell within either para. (b) or para. (c) of O. 16 r. 1 is significant for present purposes. It will be recalled that, in that case, the plaintiff's action against the defendant was based on an allegation of negligent driving of a motor vehicle. In turn, the claim against the proposed third-party related to a warranty allegedly given by it to the defendant that the car which had been sold to the defendant two days before the accident was in sound mechanical condition. As noted in para. 47 above, the claim of the defendant against the proposed third-party in that case was characterised by O'Keeffe J. as a claim for damages against the third-party for breach of warranty. In my view, there is a parallel between the circumstances which arose in *Gilmore v. Windle* and the present proceedings where the plaintiff is claiming damages against the defendants by reason of the wrong alleged to have been done by them to him in failing to have a safe system of work in place for him in Uganda. As in *Gilmore v. Windle*, that claim may appear to be at some remove from the claim against the third-party. However, in my view, there is the same level of connection between the main action and the claim against the third-party here as there was between the main action and the third-party claim in *Gilmore v. Windle* in so far as the breach of warranty claim in the latter case is concerned. In both cases, the third-party claim was based on the existence of a prior relationship between the defendant and third-party that did not involve the plaintiff. In both cases, the third-party claim was based on the alleged existence of circumstances which, if established by the defendant, would permit the defendant to pursue a claim for damages against the third-party aimed at indemnifying it in whole or in part in respect of the plaintiff's damages claim. For example, in the present case, if the defendants are correct in their contention that J. Hatty & Company failed to arrange appropriate insurance in respect of that claim, the defendants (or at least the first-named defendant who was responsible for the joinder of J. Hatty & Company) will be entitled (in the same way as the defendants in *Gilmore v. Windle*) to pursue a claim for damages against J. Hatty & Company in respect of the loss to which they are exposed as a consequence of the alleged failure to have an appropriate policy of insurance in place to cover the injuries suffered by the plaintiff. In both *Gilmore v. Windle* and in the present case, the case made by the defendant is that the alleged underlying failing or default on the part of the third-party has led to the defendant being on the hook for the plaintiff's injuries.

57. It is also significant that a similar third-party claim against an insurance broker (for alleged failings in placing insurance) was pursued in *Ward v. O'Callaghan* [1998] IEHC 16

(discussed further below). While there is no discussion in the judgment about the ambit and effect of O. 16, r. 1 (b), it is noteworthy that no point was taken in that case that the claim did not fall within the sub-rule. This is especially so given the extensive trial experience of Morris J. (as he then was) as both counsel and judge.

58. It seems to me that the claim against J. Hatty & Company does relate to or is connected with the original subject matter of the plaintiff's claim in that, if the defendants are correct in their contention, there would be insurance in place to cover the plaintiff's claim. Having regard to the wide breadth of the words "*relating to or connected with*" and the approach taken in *Gilmore v. Windle*, it seems to me that the relevant connection exists between the plaintiff's claim against the defendant, on the one hand, and the defendant's claim against the third-party, on the other.

59. Insofar as the second limb of O.16 r.1 (b) is concerned, it was suggested by Cross J. (as he then was) in *Chatsworth Investments Ltd v. Amoco* (U.K.) Ltd [1968] 1 Ch. 665, that it was not enough to satisfy the second limb of O. 16 r. 1 (b) that the relief or remedy sought was merely of the same (or substantially the same) type as the relief or remedy sought by the plaintiff against the defendant. Cross J. suggested that there must be more. In particular, he suggested that there must be a factual overlap. In this context, he cited the judgment of Pennycuick J.in *Standard Securities Ltd v. Hubbard* [1967] 1 Ch. 1056 where the plaintiff sought specific performance of a contract for the sale of land as between itself and the defendant and, in turn, the defendant sought specific performance of a contract relating to the same parcel of land as against the third-party. Cross J. emphasised the factual overlap in that case namely that the relief claimed in the main action and in the third-party issue related to the same property. However, the view of Cross J. was not accepted on appeal. At p. 688 Russell L.J. said:

> *"Cross J. considered that it was not enough under the second requirement of paragraph (b) that the relief or remedy sought was merely of the same (or substantially the same) type – for example, specific performance of a contract. There must be more: for example, in the Standard Securities case the relief claimed was one involving conveyance of the same property in each claim. I do not think it necessary to decide whether, as was contended for by the defendants, it is sufficient for the second requirement of para. (b) merely that the relief or remedy is of the same type – for example, specific performance. It may be so. If it is not so, if there must be some connection between the subject-matter of the reliefs sought, it would seem to make the first requirement of the paragraph otiose".*

60. I respectfully agree with Russell L.J. that, if it was necessary to demonstrate a factual overlap of the kind suggested by Cross J., it would make the second limb of O.16 r.1 (b) otiose. While no authority has been cited to me which throws any light on the object of the second limb of O. 16 r.1 (b), it strikes me that the requirement may well have been prompted by a concern on the part of the original draftsmen of Order 16A to ensure that the third-party claim could be addressed in the same division of the court as the plaintiff's claim against the defendant. For example, if the plaintiff's claim against the defendant

was a common law claim for damages, it might have been considered unwise that a defendant could, in the same proceedings, bring an equitable claim for specific performance or some other remedy that would ordinarily be tried in the chancery division. Again, it must be borne in mind that the origin of the rule is to be found in O. 16A of the English rules and that, notwithstanding the passing of the Judicature Act 1873, the English High Court has, for many generations, been quite rigidly divided into different divisions including the Queen's Bench division (dealing with common law matters) and the Chancery division (dealing with traditional chancery cases).

61. Here, the third-party argues that the claim made in the third-party notice cannot be said to be the same as the claim made by the plaintiff in the proceedings. Counsel for the third-party argued that the only "*relief or remedy*" claimed in the notice is "*an indemnity and/or a contribution*" and that such relief was plainly not substantially the same as the claim for damages made by the plaintiff in the proceedings. I do not accept this submission. Although damages are not expressly claimed by the first named defendant in the third-party notice, the claim made is that the third-party was guilty of negligence, breach of duty and breach of contract. The remedy available in respect of these torts is, classically, an award of damages. In the circumstances, I do not believe that there is any doubt but that the claim for contribution or indemnity that is made would, if ultimately successful, be remedied by an appropriate award of damages. Thus, for example, if the court ultimately came to the conclusion in relation to the third-party issue that, but for the alleged failings on the part of the third-party, there would have been an insurance policy in place sufficient to cover the entire of the plaintiff's claim, the damages recoverable against the third-party would, in all likelihood, equate to the award of damages which the plaintiff may recover against the defendants (assuming the plaintiff succeeds in his action).

62. Counsel for the third-party also makes a number of arguments that there is insufficient commonality between the legal and factual issues arising in the action as between the plaintiff and the defendants, on the one hand, and the third-party issue, on the other. Counsel submitted that, if both claims were to proceed, there would be no cross-over of witnesses or issues. However, it seems to me that these are issues which are more properly considered in the context of the overriding discretion of the court (discussed further below). This is the approach that was taken by the English Court of Appeal in the *Chatsworth Investments* case and I will therefore address this element of counsel's submissions in that context.

63. For the reasons discussed in paras. 49 to 61 above, I have come to the conclusion that the case falls within O. 16 r. 1. (b). As the case law demonstrates, that is not the end of the enquiry. It is still necessary, however, to consider the issue of the court's discretion. I will address that issue once I have considered whether the claim against the third-party falls also within the ambit of O.16 r.1 (c).

Order 16 rule 1 (c)

64. Order 16 r.1 (c) will apply where two criteria are met:

(a) In the first place, there must be some "*question or issue*" in the third-party claim "*relating to or connected*" with the subject matter of the main action as between plaintiff and defendant which is "*substantially the same as some question or issue*" arising between the plaintiff and the defendant; and

(b) Secondly, that question or issue should "properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third-party or between any or either of them". As I read that requirement, it must be shown that it is appropriate that an issue which will require to be determined in the main action between the plaintiff and the defendant should also be determined as between the plaintiff and the third-party or as between the defendant and the third-party. That seems to me to follow from the words "*between any or either of them*".

65. Counsel for the third-party has acknowledged that he has been unable to find any authority which considers O.16 r.1 (c). Counsel for the defendants has suggested that the sub-rule was considered by the Supreme Court in *Gilmore v. Windle*, by Morris J. (as he then was) in *Ward v. O'Callaghan* [1998] IEHC 16, by Barrett J. in *Haughton v. Quinns of Baltinglass* [2018] IEHC 532 and by Simons J. in *Haughton v. Quinns of Baltinglass* [2019] IEHC 872. However, while it is addressed briefly by Barrett J. in *Haughton v. Quinns of Baltinglass* and is suggested by O'Keeffe J. in *Gilmore v. Windle* to be applicable in that case, there is no detailed consideration of the rule in either of those judgments. Insofar as I can see, O.16 r.1 (c) is not addressed by Simons J. in *Haughton v. Quinns of Baltinglass* or by Morris J. in *Ward v. O'Callaghan*. As noted above, Simons J. came to the conclusion that the third-party claim in issue in the *Quinns of Baltinglass* case fell within the ambit of O.16 r.1 (a). Simons J., therefore, did not have to address his mind to r. 1 (c).

66. In the absence of authority, I must consider this issue by reference to the plain words used in O. 16 r. 1 (c). As outlined in para. 64 above, there are two limbs to O. 16 r. 1 (c). My task is therefore to consider whether those limbs are satisfied in the present case.

67. Insofar as the first limb is concerned, it seems to me that there is a question or issue in the third-party claim relating to or connected with the subject matter of the main action between the plaintiff and the defendants and which is substantially the same as some question or issue arising between the plaintiff and the defendant in the main action. In this context, it is important to bear in mind that, in the third-party claim, the first named defendant, if successful, will only be able to pursue the third-party in respect of any liability it may be found to have to the plaintiff. That was the basis on which its application under O. 16 was made. The extent of the injury (if any) suffered by the plaintiff and the circumstances in which that injury arose will all be matters that the first named defendant will have to address and prove in the pursuit of the third-party claim. In this regard, it is important to bear in mind that no indication has been given by the third-party that it will not put in issue that the plaintiff suffered the injuries described in the

Personal Injuries Summons or that the injuries arose in the circumstances alleged in the indorsement of claim on that summons. I must therefore proceed on the basis that these will be live issues in the third-party claim. Accordingly, the issues relating to whether or not the plaintiff sustained the injury claimed and the circumstances in which he allegedly sustained that injury are all matters that will have to be resolved in both the action as between the plaintiff and the defendants and also in the context of the third-party claim against J. Hatty & Company. Thus, it seems to me that the first limb of sub-rule 1 (c) is satisfied in this case. I note, in this context, that a similar view was taken by Goff J. (as he then was) in *Myers v. N. & J. Sherick Ltd*. [1974] I WLR 31 at p. 36 where he said: " *In their claim for breach of duty, the defendant must prove their loss and the [third party], if not brought into the main action as third parties will not be bound by the judgment in it, but will be free to dispute the extent of the defendant's true liability*." That observation seems to me to be equally valid here.

68. For similar reasons, in so far as the second limb is concerned, it also seems to me to be "*proper*" that those issues should be determined not only as between the plaintiff and the defendant but also as between the first named defendant and the third-party. If the claim as between the plaintiff and the defendants were to be tried in separate proceedings to the claim as between the first named defendant and the third-party, the third-party would not be bound in any way by the findings made by the court in the plaintiff's action. That would be undesirable and would give rise to the mischief that different conclusions could be reached at different hearings in relation to the same issues. In these circumstances, it seems to me that it is appropriate that the issues as to the injuries sustained by the plaintiff and the issues that arise in relation to the circumstances in which the plaintiff was injured should be determined in one forum.

69. Accordingly, I have reached the conclusion that the third-party claim here falls not only within the ambit of O.16 r.1 (b) but also O.16 r. 1 (c).

The discretion of the court

70. It is clear from the decision of the Supreme Court in *Gilmore v. Windle* that the court has an overriding discretion as to whether a third-party should be joined. In that case, O'Keeffe J. said at p. 335:

> *"The court has a general discretion in all cases whether or not to allow the notice to be served, seeing that leave is required in all cases."*

71. The existence of the discretion of the court under O. 16, r. 1, was also discussed by the Supreme Court in *Quirke (a minor) v. O'Shea* [1992} I.L.R.M. 286 albeit in the context of a third-party claim covered by Part III of the 1961 Act. In that case, Finlay C.J. emphasised at p. 290 that the discretion of the court is a wide one and is not confined to the question as to whether it is appropriate that the defendant's claim against the third-party should be tried in the same proceedings as the main action or independently in separate proceedings. In that case, the Supreme Court concluded that it was not in the interests of justice that the mother and next friend of the minor plaintiff should be joined

as a third-party to proceedings in which the minor sought damages against the defendant for injuries sustained outside his home caused by an oil tanker driven by the defendant.

72. That said, considerations of the kind addressed by the Supreme Court in that case do not often arise. In most applications to join third-parties, the issues relevant to the exercise of the court's discretion usually relate to whether it is convenient that the third-party claim should be joined to the main action rather than be separately pursued. That was the focus of the submissions made on behalf of the third-party here. It was contended that there is no commonality of issues and no cross-over of witnesses. In circumstances where the third-party had no opportunity to canvass these issues at the time of its joinder, it seems to me that the third-party must be entitled to ask the court, on an application to set aside the third-party notice, to revisit the exercise of the court's discretion under O. 16, r. 1.

73. It was submitted on behalf of the third-party that the judgment of Russell L.J. in *Chatsworth Investments Ltd v. Amoco* (U.K.) Ltd. is instructive in the context of the court's discretion. In that case, the Court of Appeal of England & Wales came to the conclusion that, although the requirements of O. 16 r. 1 (b) (which was the operative sub-rule in issue in that case) had been satisfied, the court, in the exercise of its discretion, should nonetheless set aside the joinder of a third-party. This was on the basis that the third-party there had "*no concern with the issue between plaintiffs and defendants*". Counsel for the third-party suggested that a similar consideration arises here.

74. In my view, the decision in *Chatsworth* does not assist the third-party. The facts of that case put the observations of the court in context. In the main action, the plaintiffs sought to enforce as against the defendant a contract to take out a lease of a multi-storey car park. The sole defence to the claim was that the agreement was defective in that it did not provide (either expressly or impliedly) a date for commencement of the term of the lease. The defendants claim against the third-party was that it had agreed to take a sub-lease of the car park. The court took the view that the plaintiff's case against the defendant and the defendant's case against the third-party would each depend upon the respective dealings between those parties and there was no cross-over between them. Russell L.J. said at p. 689:

> *"… [I]n the present case it is in my view plain that the third-party is in no way concerned with the argument between plaintiff and defendant in the action. If the third-parties have a defence to the defendant's claim against them, it matters not that the defendants may lose the action. If the third parties have no defence against the defendants, it matters not to the third-parties in law whether the defendants lose to the plaintiff or surrender to the plaintiffs: provided that the defendants for any reason acquire the legal estate necessary to enable them to grant the sublease, they can enforce the contract against the parties (if the third-parties be without defence). This is in summary to say that the third-parties have in law no concern with the issue between plaintiffs and defendants … ".*

75. On that basis, the court, unsurprisingly, came to the conclusion that there was no point to be decided in the main action between the plaintiff and the defendant that required to be resolved in order to determine the issues between the defendant and the third-party.

76. In the present case, for the reasons discussed in para. 67 above, the position is different. There are questions which are common to the main action as between the plaintiff and the defendants and the third-party claim and as between the first named defendant and the third-party relating to the injuries suffered by the plaintiff and the circumstances in which the injuries were suffered. In the absence of concessions by the third-party, those issues will have to be resolved in the claim made by the first named defendant against the third party before the defendant can recover any damages from the third party. It will also be necessary to explore the relevant facts relating to the occurrence of the injuries in order to consider whether those circumstances would be amenable to cover under any policy of insurance that might have been available at the relevant time.

77. That being so, it appears to me that there are good policy reasons why the discretion of the court should be exercised in favour of the joinder of the third-party. In this context, the Supreme Court in *Gilmore v. Windle* identified that the policy underlying O. 16 is very similar to the policy underlying the provisions of Part III of the 1961 Act. I have already quoted from the judgment of Lavery J. in *Gilmore v. Windle* in which he highlighted that the object of third-party procedure is to avoid multiplicity of actions. Similar observations were made by Finlay C.J. in *International Commercial Bank Plc v. Insurance Corporation of Ireland Plc* [1989] I.R. 453 at p. 468 where he said:

> "*The modern development of procedures against third parties in respect of claims for contribution or indemnity, in my view, indicates a clear recognition by the courts of the requirement of justice which so frequently involves the necessity as far as possible to ensure that a party against whom a claim has been made and who has legal rights against some other party which may relieve him from some or even all of the consequences of that claim should be entitled to have the issue of his liability and of his consequential rights determined in a single set of proceedings and as far as possible at the same time.*"

78. On the same page of the report, Finlay C.J. described these considerations as being of "*fundamental importance*". Similar considerations were also expressed by Morris J. in *Ward v. O'Callaghan* discussed below.

79. In the specific context of O. 16, Scrutton L.J. in *Barclays Bank v. Tom* [1923] 1 K.B. 221 at p. 224, explained that the object of third-party procedure is:

> *"… in the first place to get the third-party bound by the decision between the plaintiff and the defendant. In the next place it is directed to getting the question between the defendant and the third-party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third-party while all the time the plaintiff is enforcing his*

judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions."

80. In my view, each of the three considerations identified by Scrutton L.J. arise here. In the first place, it is undoubtedly desirable that the third-party should be bound by the decision of the court in the main action between the plaintiff and the defendant as to whether the plaintiff was injured and as to the circumstances in which he suffered that injury. Secondly, it will enable the issue as to the third-party's potential liability to the first named defendant to be resolved at the same time as the issues as between plaintiff and the defendant. Thirdly, it will save the additional cost and court time that would be involved in two separate hearings of independent actions.

81. I fully accept that, as submitted by counsel for the third-party, there may be elements of the evidence in the action between the plaintiff and the defendant in which the third-party may have no interest. However, should that transpire to be the case, I have no doubt that arrangements can be made for the conduct of the trial which will ensure that the third-party's legal team will only require to be present during those aspects of the plaintiff's case against the defendant which are relevant to the issues in dispute between the defendant and the third-party. Likewise, it may not be necessary for the plaintiff's legal team to be present during those parts of the trial which relate solely to the evidence as between the defendant and the third-party. In this context, the attitude of the plaintiff is of some importance. It is significant that the plaintiff has not objected to the joinder of the third-party. On the contrary, as outlined in para. 10 above, the solicitors acting on behalf of the plaintiff sought to assist the first named defendant in identifying the name of the proposed third-party. Regrettably, that led to the error in joining Hatty Ltd as a third-party to the proceedings. In this regard, I note that in *Gilmore v. Windle*, O'Keeffe J., in considering how the discretion of the court should be exercised, had regard to the position adopted by the plaintiff in that case. At p. 335, O'Keeffe J. said that the third-party procedure *"will not be allowed where the result will be to embarrass or delay the plaintiff* …". At p. 337, he expressly took into account, in the exercise of the court's discretion, that the plaintiff had raised no objection to the joinder of the third-party.

82. In all of these circumstances, I have come to the conclusion that, in so far as the requirements of O. 16, r. 1 are concerned, the joinder of the third-party is justified. Of itself, that does not resolve the issues that arise on the present application. It is still necessary to consider the question of delay.

Delay

83. Most of the authorities on the issue of delay in the context of third-party proceedings are concerned with the effect of the specific statutory requirement contained in s.27 (1) (b) of the 1961 Act that third-party proceedings should be served "*as soon as is reasonably possible*". That statutory provision is not applicable here. As noted previously, the relevant time obligation applicable in this case is O. 16 r. 1 (3) which provides that, unless otherwise ordered by the court, the application for leave to issue a third-party notice must be made within 28 days from the time limited for delivery of the defendant's defence.

84. The principles applicable to cases which are not governed by the 1961 Act were considered by Morris J. (as he then was) in *Ward v. O'Callaghan* [1998] IEHC 16. In that case, the plaintiff sought damages against the defendants arising out of the negligent driving of a motor car by the first named defendant (who had been denied cover by Zurich Insurance Company on the grounds that he had failed to provide them with an engineer's report which they had required in order to reinstate the policy). In those circumstances, the first named defendant joined his insurance broker, Mike Murphy Insurance Brokers Limited as third-party to the proceedings on the basis that (so he alleged) they had failed to advise him of the necessity to obtain an engineer's report and they had represented to him that his insurance policy had been reinstated. The application to join the broker in that case was not made until one year and four months after the time prescribed by O.16 r.1 (3) had expired. The broker subsequently made an application under O. 16 r. 8 (3) to set aside the third-party proceedings on the grounds that there had been, firstly, unnecessary and unreasonable delay in serving the third-party notice and, secondly, that the broker had suffered prejudice as a result of the delay. This application was rejected by Morris J. who said at pp. 3-4:

> *"In my view, while clearly the First Named Defendant has failed to comply with the time limit provided for in the Rules, this delay would not, standing alone, be of such significance as to constitute a ground for setting aside the Third-party procedure. In my view, to constitute such a ground it would be necessary for the delay of this length to be coupled with circumstances which amounted to a prejudice suffered by the Third-party based on this delay".*

85. Morris J. then considered the issue of prejudice. He noted that, in the grounding affidavit sworn on behalf of the broker, the deponent stated that an extensive search had taken place at the broker's offices and that it had been impossible to locate the documents and files relating to the first named defendant. The deponent said that, in those circumstances, the broker would have to rely on the memory of personnel regarding events which had transpired six years previously. However, it transpired that the records in question had been destroyed even prior to the time when the third-party notice ought to have been served under O. 16 r. 1 (3). In those circumstances, Morris J. took the view that any prejudice which arose could not be attributed to delay on the part of the first named defendant in serving the third-party notice. He concluded that, if the third-party notice was to be set aside, the third-party would have to show that the delay in joining the third-party had caused serious prejudice. He said:

> *"Apart from all of the considerations, it has been the view of the Courts that, save in exceptional circumstances, it is desirable that all issues as to indemnity or contribution as between third-parties and defendants should be disposed of at the same time as the issues relating to the defendant's liability towards the plaintiff. Such a view, … should only be departed from where serious prejudice would arise as a result of following this course. I am of the view that no such prejudice arises in this case and I accordingly refuse the relief sought".*

86. The earlier decision of McCracken J. in *Golden Vale Plc v. Food Industries Plc* [1996] 2 I.R. 221 does not appear to have been brought to the attention of Morris J. In that case, McCracken J. had taken a similar approach. In *Golden Vale*, the plaintiff commenced proceedings against the defendant claiming damages for breach of contract arising out of the purchase of a dairy business in 1990. That business had previously been sold by Goodman International Ltd ("*Goodman*") to the defendant. Various warranties and indemnities were given by Goodman to the defendant under the 1988 agreement. The defendant joined Goodman (and a related company) as third parties to the proceedings. There was significant delay on the part of the defendants in doing so. The proceedings were commenced on 14th February, 1992. However, a defence was not delivered until 25 July, 1995. In the meantime, on 15th November, 1993, the defendant was granted an order giving liberty to issue and serve the third-party notice. The order was not served at that time. Although the third parties were made aware of the order, the order was not served on them until August 1995 (following an application to extend time for that purpose). The third parties applied to the court to set aside service of the third-party notice on the grounds that they had not been served as soon as reasonably possible as required by s. 27 (1) (b) of the 1961 Act. The defendants argued that the 1961 Act had no application because the defendants and Goodman were not concurrent wrongdoers within the meaning of that Act. This argument was upheld by McCracken J. In circumstances where the 1961 Act did not apply, McCracken J. dealt with the application solely by reference to O. 16. At pp. 227-228, he held that, in the absence of prejudice, the third-party notice should not be set aside. He said:

> *"… I must have regard to the general principle which is quite clear from both the Rules … and the Civil Liability Act, that disputes involving a third-party should, as far as possible, be determined at the same time as, or immediately after, the dispute between the plaintiff and the defendant. There may, of course, be circumstances in which a plaintiff would be seriously prejudiced by delay if this were to happen, or there might be cases in which the claim over against the third-party was vexatious or was bound to fail. In such circumstances, the court quite clearly would be entitled to set aside the third-party proceedings. In the present case, it is not claimed by any party that there would be prejudice due to the delay in serving the third-party notice, and there is clearly a stateable cause of action by the defendant against the third parties, and I can see no reason why, in those circumstances, I should strike out the third-party proceedings".*

87. The approach taken by McCracken J. is therefore consistent with the approach subsequently taken by Morris J. More recently, a similar issue arose for consideration in *Haughton v. Quinns of Baltinglass Ltd.* [2019] IEHC 532. It appears from the judgment of Simons J. that neither *Golden Vale* nor *Ward v. O'Callaghan* were cited to the court. Simons J. was referred to two decisions of the Court of Appeal namely *Greene v. Triangle Developments Ltd*. [2015] IECA 249 and *Kenny v. Howard* [2016] IECA 243. In both of those cases, it was held, in the context of s. 27 (1) (b) of the 1961 Act, that prejudice to the third-party was not a relevant consideration. Those decisions were concerned with the specific statutory requirement that a third-party notice must be served as soon as

reasonably possible. As Ryan P. observed in *Kenny*, at p.11, "*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."* (emphasis added).

88. In *Haughton*, Simons J., while noting that both Greene and *Kenny* were concerned with s. 27 (1) (b), found the approach taken by the Court of Appeal in those cases to be of assistance in so far as the court emphasised the need to consider the whole circumstances of the case. He therefore carefully considered all of the circumstances and concluded that the third-party notice should not be set aside. In that case, there had been a delay of five months in serving the third-party notice and Simons J. concluded that there was no prejudice to Zurich Insurance. While 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.

89. As noted in para. 4 above, counsel for the third-party submitted that the approach previously taken in *Golden Vale* and in *Ward v. O'Callaghan* now needs to be recalibrated to take account of decisions such as *Gilroy v. Flynn*. He therefore argued that, in cases of significant delay, there should not be any requirement for the third-party to demonstrate prejudice; the delay of the defendant should be sufficient, in itself, to justify the setting aside of the third-party notice.

90. In my view, there is some merit in the argument made by counsel for the third-party at least to the extent that it may now be necessary to update or supplement the approach previously taken in *Golden Vale* and in *Ward v. O'Callaghan*. While the extent to which *Gilroy v. Flynn* has changed the criteria for assessing the effect of delay in High Court proceedings is still the subject of debate, there is now a sophisticated body of case law in place addressing the circumstances in which the court will dismiss proceedings on the grounds of inordinate and inexcusable delay. It would be surprising if similar principles were not available to be invoked by a third-party in cases of significant delay in serving a third-party notice. The relevant principles require the court to consider the following:

    (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.

91. It seems to me that a similar approach should be taken in the case of delay in serving a third-party notice in cases to which Part III of the 1961 Act does not apply. In taking that approach, I do not believe that I am acting inconsistently with the earlier case law such as *Golden Vale* or *Ward v. O'Callaghan*. In the first place, the case law on inordinate and inexcusable delay (such as *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459) does not appear to have been cited to McCracken J. or to Morris J. Secondly, in both *Golden*

Vale and *Ward v. O'Callaghan*, the court concluded that there was no operative prejudice suffered by the third-party as a consequence of the delay. As discussed further below, subject to the potential effect of *Gilroy v. Flynn* and Article 6 (1) ECHR, prejudice to the affected party is one of the factors that would be taken into account, in any event, in assessing the balance of justice in accordance with the *Primor* principles. In seeking to apply those principles here, I am simply updating the approach previously taken by McCracken J. and Morris J. In these circumstances, I do not believe that any issue arises by reference to the principles discussed by Clarke J. (as he then was) in *Worldport Ireland Ltd*. [2005] IEHC 187.

92. Accordingly, I propose in this case to apply the *Primor* principles by analogy. The first issue which I must address is whether there has been inordinate delay in joining the third-party. I believe that it is clear that there has been inordinate delay. Order 16, r. 1 (3) clearly contemplates that applications to join a third-party should be brought within a relatively short time frame. Moreover, the underlying policy of O. 16, r. 1 is to ensure, in so far as feasible, that all claims as between the plaintiff and the defendant and as between the defendant and third-party should be heard together. It would potentially undermine that policy if third-parties were not joined promptly to proceedings. If the joinder does not take place promptly, there is a real danger that the third-party issue would lag far behind the main action making it difficult to ensure that a unitary hearing could be accommodated.

93. Here, the first application to join a third-party was not filed until 8th December, 2016 which was 18 months after the time limited by O. 16, r. 1 (3). The order substituting J. Hatty & Company for Hatty Ltd. was not made until 15 February, 2018 which was 14 months later. Whether one takes a period of 18 or 32 months, it seems to me that the delay must be regarded as inordinate. This is especially so in circumstances where the plaintiff's claim relates to an incident which occurred in October 2012 and the placing of insurance through J. Hatty & Company was effected in 2011. These facts made it particularly important that any application to join a third-party should be made in a timely way.

94. The next issue which arises is whether the delay can be said to be excusable or inexcusable. In so far as the first period of 18 months is concerned, the solicitor for the first-named defendant has explained that it was necessary to obtain a report from an expert before taking the step of applying to join a professional firm as a party to the proceedings. She stated that she first made contact with an expert in June 2016. She also explained that, once the report of the expert was finalised in September 2016, there was a further delay in having the grounding affidavit sworn by Mr. Spratt of the first named defendant because he spends a lot of his time in Uganda. Having regard to the decision of the Supreme Court in *Cooke v. Cronin* [1999] IESC 54, it was, of course, entirely proper for the solicitor for the first named defendant to defer any application to join a third-party until an expert report had been obtained. However, it seems to me to be unacceptable for the first named defendant's solicitor to wait for such a long period to first seek an expert's report. By the time she did so in June 2016, one year had already passed since the time

limited by O. 16, r. 1 (3) had expired. No explanation has been given for that period of delay. In the absence of a satisfactory explanation, I do not believe that this period of delay can be excused.

95. In contrast, I accept that the period between June and September 2016 (while the report was commissioned and finalised) can be excused. I also accept that, given Mr. Spratt's charitable commitments in Uganda, there were difficulties in having the grounding affidavit sworn. While delay which is not referable to the conduct of proceedings is generally not considered relevant in this context, I note that absence from the jurisdiction was one of the factors unconnected with the conduct of proceedings that was acknowledged to be relevant by Fennelly J in the Supreme Court in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510 at p. 518. I am therefore inclined to the view that the period between June and December 2016 can be excused. However, thereafter, as described in paras. 10 to 11 above, the wrong entity was named as third-party in January 2017. It was not until February 2018 that the error was rectified. While that error was entirely *bona fide*, the fact remains that, as described in paras. 13 to 15 above, there was ample material available to demonstrate that the correct entity to be named as third-party was J. Hatty & Company rather than Hatty Ltd. In those circumstances, I do not believe that the error can excuse the additional delay which occurred subsequent to January 2017. Nonetheless, I do not believe that the entire of the period between January 2017 and February 2018 can be said to be attributable to delay on the part of the first-named defendant. The motion to set aside the third-party notice was not filed on behalf of Hatty Ltd. until April 2017 and the period between then and February 2018 is at least partly attributable to the difficulty in obtaining a hearing date for a motion that was not capable of being heard in the Monday list. While it is impossible to approach this in a precise way, I am inclined to the view that the period between January and April 2017 can be excused since that period of delay was out of the hands of the first named defendant and of its solicitors. I am also inclined to the view that a further period of three months can be attributed to the court listing system. That means that, of the total period of 14 months in this second period of delay, 6 months can be excused. It follows that, when the one-year period described in para. 93 is taken into account, there is, in aggregate, a period of one year 8 months of delay that has not been excused.

96. However, subject to *Gilroy v. Flynn*, that is not the end of the enquiry. In accordance with *Primor* principles, the balance of justice still has to be considered. In considering the balance of justice, the extent to which a party has suffered prejudice as a consequence of delay is usually a significant factor. This is evident from the judgment of Hamilton C.J. in *Primor* at p. 497 and was confirmed, more recently, by Clarke J. (as he then was) in *Comcast International Holdings Inc. v. Min. for Public Enterprise* [2012] IESC 50 at para. 6.2. While the courts have moved away from suggesting that serious prejudice must always be demonstrated (as the decision of the Supreme Court in *Stephens v. Paul Flynn Ltd.* [2008] 4 I.R. 31 shows), some element of prejudice must normally arise if the balance of justice is to favour dismissal on the grounds of delay. Everything will depend on the individual facts of the case and, consistent with the approach taken by Simons J. in *Haughton*, the whole circumstances will have to be weighed in the balance. As Fennelly J.

observed in *Anglo Irish Beef Processors* at p. 518: "… *the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all parties to the litigation*."

97. Taking that approach in the present case, I must have regard, in the first instance, to the fact that there has been a period of inordinate and inexcusable delay on the part of the first named defendant in joining the third party. One year 8 months is a significant period. As against that, it is noteworthy that the only prejudice asserted by the third-party is that described in para. 37 of Ms. McAnally's affidavit (quoted in para. 29 above). While Ms. McAnally has drawn attention to the length of time which has elapsed since the policy of insurance was arranged, the only specific prejudice mentioned by her is that there may have been other policies of insurance in place that ought to have responded to the loss allegedly suffered by the plaintiff. Crucially, Ms. McAnally does not suggest that there is any difficulty with the availability or recollection of witnesses or records. The issue about the potential availability of other policies of insurance seems to me to be a matter that goes to the question of causation rather than prejudice. If there was some other policy of insurance that would have covered the loss in question, then the third-party can say, in defence of the claim against it, that the loss claimed against it does not arise as a consequence of any default on its part but as a consequence of the failure of the first named defendant to make a claim under the correct policy. Thus, on the evidence before the court, I do not believe that the issue of prejudice to the third-party carries much weight in deciding where the balance of justice lies. This explains why counsel for the third-party has sought to place so much reliance on *Gilroy v. Flynn* in which observations were made by Hardiman J. in the Supreme Court suggesting that, independently of the position of the parties, the court has an obligation to ensure that proceedings are heard and determined within a reasonable time. Since the judgment in that case, several judges have suggested that the *Primor* principles may need to be recalibrated but I have not been referred to any decision in which a comprehensive recalibration has yet been carried out. In these circumstances, I do not believe that it would be appropriate for me, as a judge of the High Court to do so. Unless and until *Primor* is revisited by the Supreme Court, I remain bound by it. For that reason, I must assess the issue by reference to where the balance of justice lies.

98. The policy underlying O. 16, r. 1 seems to me to be factor which is relevant to the balance of justice. By maintaining the third-party claim in these proceedings, this will allow all issues to be determined as between each of the parties. I bear in mind, in this context, the observation of Fennelly J. in *Anglo Irish Beef Processors* (quoted in para. 95 above) that the interests of all parties to the litigation should be taken into account. It is also relevant, in this regard, that the plaintiff has never objected to the joinder of the third-party and that there is nothing to suggest that the third-party issue cannot catch up with the main action notwithstanding the period of inexcusable delay which has occurred.

99. It is also relevant that, although the third-party was not joined until February 2018, it clearly had notice through service on Hatty Ltd. of the third-party claim since service of the third-party notice was effected on Hatty Ltd. in January 2017. In this regard, it is

noteworthy that the suggestion made by Mr. O'Brien, in para. 7 of his affidavit (summarised in para. 30 above), that J. Hatty & Company could not claim to be unaware of the potential claim against it, has never been denied by the third-party.

100. I also believe that it is of some relevance that a significant part of the period of inexcusable or culpable delay on the part of the first named defendant arose as a consequence of a *bona fide* mistake on the part of the solicitor for the first named defendant. While I do not believe that any substantial weight can be given to this factor, it is, nevertheless, a point of difference between this case and many others where there is nothing present other than inertia or inactivity on the part of the party in default. To that extent, the delay in this case subsequent to January 2017 is less deserving of censure than might otherwise be the case.

101. When the lack of any identified prejudice to the third-party is taken into account together with the factors outlined in paras. 97 to 99 above, I have come to the conclusion that, in the particular circumstances of this case, the balance of justice lies in favour of allowing the third-party claim to proceed. Nothing has been identified in this case which would render it unjust to permit the third-party claim to proceed. On the contrary, if the third-party notice is set aside, this would prevent all issues being decided in these proceedings which would undermine the rationale underlying O. 16 and give rise to a real risk of injustice.

102. I should make clear that I do not rule out the possibility that, in an appropriate case, delay on its own would be sufficient to persuade a court to set aside a third-party notice. The concerns expressed in *Gilroy v. Flynn* and, more recently, in *Comcast International Holdings Inc. v. Min. for Public Enterprise* suggest that delay of itself may, depending on the circumstances, be sufficient, without more, to warrant the court bringing proceedings to an end. Article 6 (1) ECHR plainly envisages that proceedings should be concluded within a reasonable time. However, as noted above, it seems to me that any recalibration of the applicable *Primor* principles is a matter for the Supreme Court. It also has to be said that counsel for the third-party has not identified in any detailed way how he suggests that the applicable principles should properly be recalibrated in light of *Gilroy v. Flynn* and Article 6 (1) ECHR.

Conclusion

103. For all the reasons outlined above, I have come to the conclusion that the third-party's application to set aside the third-party notice should be refused.

104. I invite the parties to confer with each other in relation to the issue of costs and to notify the registrar by email of any agreement they reach in relation to the issue. In the event that the parties are not in a position to agree on that issue, each party should set out their position in writing by email to the registrar not later than 7 September, 2020 following which I will rule on the matter.