

THE HIGH COURT

[2023] IEHC 518

[Record No.] 2019/ 6075 P

Between

**RIVERVIEW ADMINISTRATION OWNERS MANAGEMENT COMPANY
LTD BY GUARANTEE**

Plaintiff

-v-

**WATERFORD CITY AND COUNTY COUNCIL, THE OFFICE OF PUBLIC
WORKS (OPW) and NIALL BARRY & COMPANY LTD**

Defendants

-and-

(BY ORDER) TRENCH CONTROL LIMITED

Third Party

Judgment of Mr. Justice Dignam delivered on the 6th day of September 2023.

Introduction

1. This matter comes before me by way of an application to set aside third-party proceedings pursuant to *Order 16, rule (8)* of the *Rules of the Superior Courts* or on the grounds of delay and/or failure to serve same upon the third party as soon as reasonably possible.

2. The following is the relevant chronology:

| | |
|--------------------------------|---|
| 2013 – 2014/2015 | Alleged period of works; |
| 31 st July 2019 | Plenary Summons issued; |
| 31 st July 2020 | Statement of Claim delivered by the plaintiff; |
| 17 th August 2020 | Appearance entered on behalf of the third-named defendant; |
| 11 th December 2020 | Notice of Motion issued by the third-named defendant seeking leave to issue and serve a Third-Party Notice; |
| 22 nd March 2021 | Order of Mr. Justice Twomey granting the third-named defendant liberty to issue and serve a Third-Party Notice; |
| 26 th March 2021 | Third-Party Notice sent to Central Office for issuing; |
| 19 th April 2021 | Third-Party Notice issued; |
| 23 rd April 2021 | Third-Party Notice served by registered DX on the Third-Party; |
| 26 th April 2021 | Third-Party Notice signed for by servant/agent of the Third Party; |
| 7 th March 2022 | Notice of Motion issued by third named defendant to have service of the Third-Party Notice deemed good; |
| 25 th April 2022 | Return date for third-named defendant's motion seeking to have service of the Third-Party Notice deemed good; |
| 11 th May 2022 | Appearance entered on behalf of the third-party; |

2nd August 2022

Notice of Motion issued by the third party to have the leave to issue and serve the Third-Party Notice set aside.

Background

3. Nothing in this background should be taken as a finding on any matter of fact which may be disputed in the substantive proceedings.

4. The plaintiff is the owner of a block of 24 apartments known as De Bruin Court, Poleberry, Waterford.

5. In 2013 the second-named defendant commenced works known as the Waterford Flood Relief Scheme. The first-named defendant was the second-named defendant's agent for this Scheme and the third-named defendant was the contractor for the Scheme.

6. It is alleged by the plaintiff that in the course of the Scheme, the defendants took a portion of the plaintiffs lands for a walkway and "*drove sheet metal piles from the edge of the ... walkway down into the river. Thereafter the Third Defendant raised the ground level across the [walkway] to the edge where the piles had been driven and concreted over the new walkway.*" The plaintiff describes this as "*the Work*". It then pleads at paragraph 11 of the Statement of Claim that:

"The Plaintiff further avers that the Work caused subsidence to the Property causing collapses of sewers and drains, settlement and cracking. The Plaintiff says that the said subsidence constituted a nuisance to the Property and was caused by negligence on the part of the Third Defendant who used a heavy pile driving hammer to drive steel sheet piles. In this regard the Plaintiff will seek discovery of the piling design, specification and records..."

7. The Statement of Claim, containing the above allegations, was delivered on the 31st July 2020 on the same day as the Plenary Summons. Events took the course set out in the chronology above. An Appearance was entered on behalf of the third-named defendant on the 17th August 2020 and then the application for liberty to serve a Third-Party Notice on the third-party was issued on the 18th December 2020 and was

determined on the return date, the 22nd March 2021, and the Third-Party Notice was served on the 23rd April 2021. It is alleged that the third-party carried out the “*piling*” works.

8. This application to set aside the Third-Party Notice was issued on the 2nd August 2022.

Legal Principles

9. Section 27(1) of the Civil Liability Act 1961 provides, inter alia:

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

(a) shall not, if the person from whom he proposes to claim contribution is already a party to the action, be entitled to claim contribution except by a claim made in the said action, whether before or after judgment in the action; and

(b) shall, if said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible...”

10. Order 16 Rule 1 of the Rules of the Superior Courts provides, inter alia:

“(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.”

11. Order 16 Rule 8 provides, inter alia:

“(3) The third-party proceedings may at any time be set aside by the Court.”

12. Order 16 Rule 1(3) sets a specific time limit of twenty-eight days from the time limited for the delivery of a Defence for the making of an application to issue a Third-Party Notice. However, no such specific limit is provided for in the Act itself, other than the obligation to serve a Third-Party Notice as “*as soon as reasonably possible*” is provided for in the Act itself. It has long been accepted that the twenty-eight day time limit is, at most a benchmark against which the statutory requirement to “*move as soon*

as reasonably possible" might be measured and that the time limit under Order 16 is not one with which the parties will normally comply or even be expected to comply. The third-party in this case did not rely on the third-named defendant's failure to move within that twenty-eight day period from the time limited for delivering the defence but rather its failure to move as soon as reasonably possible.

13. I was referred to a number of authorities: *Board of Governors of St. Laurence's Hospital v Staunton* [1990] 2 IR 31, *Molloy v. Dublin Corporation & Ors* [2001] 4 IR 52, *Boland v Dublin City Council* [2002] 4 IR 409, *Ashford Castle Ltd v E.J. Deacy Contractors & Industrial Maintenance Ltd* [2021] IEHC 549, *William Purcell v Córas Iompair Éireann (Cié)* [2022] IEHC 4, *Susquehanna International Group Ltd v Execuzen Ltd* [2022] IECA 209, *McGuinness v Sharif, Hermitage Medical Centre Trading as Hermitage Clinic Limited* [2022] IEHC 438, *Bowen v H & M Hennes & Mauritz [Ireland] Limited* [2022] IEHC 658, *Connolly v Casey* [2000] 1 IR 345, *Thomas Greene and Another v Triangle Developments Ltd and Others* [2015] IECA 249, *Lawless v Beacon Hospital* [2019] IECA 256 and *Desmond Buchanan and Another v B.H.K. Credit Union Ltd and Others* [2013] IEHC 439. It is not necessary to set out all of these authorities in detail, many of which are well-known. Simons J provides a useful summary of many of the applicable principles in paragraphs 17 – 28 of his judgment in *Ashford Castle Limited & anor v E.J. Deacy Contractors & Industrial Maintenance Limited* [2021] IEHC 549:

"17. The principal objective of the third-party procedure is to simplify litigation and to avoid a multiplicity of actions by allowing the main proceedings and the third-party proceedings to be heard together by the same judge (Connolly v. Casey [1999] IESC 76; [2000] 1 I.R. 345, citing Gilmore v. Windle [1967] I.R. 323). That does not necessarily mean that all the issues have to be dealt with simultaneously; that may depend on appropriate orders as to the time and mode of trial of the various issues (Kenny v. Howard [2016] IECA 243).

18. Section 27 of the Civil Liability Act 1961 provides that a defendant, who wishes to make a claim for contribution, must serve a third-party notice as soon as is reasonably possible. This temporal obligation is intended to ensure that the general progress of the main proceedings is not unnecessarily delayed by the third-party claim (Kenny v. Howard [2016] IECA 243).

19. The imposition of the statutory obligation to serve a third-party notice as soon as is reasonably possible has the practical consequence that a defendant who wishes to pursue a third-party claim is under far greater time constraints

than a putative plaintiff. A putative plaintiff is allowed the full reach of the relevant limitation period within which to institute proceedings against a defendant. Thereafter, a failure by the plaintiff to comply with the time-limits prescribed under the Rules of the Superior Courts for the delivery of pleadings will not normally result in the plaintiff's claim being struck out, unless there has been inordinate and inexcusable delay. By contrast, a defendant to existing proceedings who wishes to make a claim for contribution is expected to issue the third-party proceedings within a much tighter timeframe. There are examples of third-party proceedings having been set aside where the delay is measured in months rather than years. This is so notwithstanding the generous limitation period allowed for under section 31 of the Civil Liability Act 1961.

*20. The onus is on the defendant, who has joined a third-party, to explain and justify any delay. In assessing delay, the court will have regard to the fact that third-party proceedings should not be instituted without first assembling and examining the relevant evidence and obtaining appropriate advice thereon. However, the quest for certainty or verification must be balanced against the statutory obligation to make the appropriate application as soon as reasonably possible (*Molloy v. Dublin Corporation* [2002] 2 I.L.R.M. 22).*

*21. It is incumbent on the court to look not only at the explanations which have been given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third-party notice was served as soon as is reasonably possible (*Greene v. Triangle Developments Ltd* [2015] IECA 249).*

22. The most obvious example of a disruptive effect caused by the joinder of a third-party is where the third-party notice has been issued after the pleadings in the main proceedings have closed and the case has been set down for trial. The introduction of a third-party claim at such a late stage is likely to result in a delayed hearing. It is apparent from the case law, however, that it is not only such eleventh hour joinders that are liable to be set aside.

*23. The statutory requirement to move for liberty to issue a third-party notice as soon as is reasonably possible should be regarded as also applying to the bringing of an application to set aside such a notice (*Boland v. Dublin City Council* [2002] IESC 69; [2002] 4 I.R. 409). No point has been taken in this regard in the present case.*

24. *The provisions of section 27 of the Civil Liability Act 1961 are supplemented by Order 16 of the Rules of the Superior Courts. This order introduces a requirement to obtain the leave of the court to issue a third-party notice out of the Central Office of the High Court. It also introduces a specific time-limit. An 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. This time-limit under Order 16 has to be seen in the context of time-limits prescribed for the delivery of other pleadings, e.g. twenty-one days is allowed for the delivery of a statement of claim and twenty-eight days for the delivery of a defence. The Rules of the Superior Courts thus envisage a timetable whereby a defendant will have delivered their defence within twenty-eight days, and then have applied to join a third-party within a further twenty eight days. The timetable reflects the objective that the third-party proceedings should not unnecessarily delay the progress of the main proceedings.*

25. *In practice, none of these time-limits are complied with in the majority of cases. There is almost always some slippage in the delivery of the various pleadings and in the making of applications to join third-parties. The Court of Appeal, in *Greene v. Triangle Developments Ltd* [2015] IECA 249, observed that the time-limit under Order 16 is not one with which the parties will normally comply or even be expected to comply. More recently, the Court of Appeal in *O'Connor v. Coras Pipeline Services Ltd* [2021] IECA 68 (per Barrett J.) described as "regrettable" the fact that the rules establish time constraints which are so rigorous that they are more often honoured in the breach than the observance, with the courts expected to tolerate what appears to be a general divergence in practice from the timescale that Order 16, rule 1(3) ordains.*

26. *The twenty-eight day time-limit thus represents, at most, a benchmark against which the statutory requirement to move "as soon as is reasonably possible" might be measured.*

27. *There is some disagreement on the authorities as to whether delay should be measured by reference to (i) the date upon which the third-party notice is served (*Greene v. Triangle Developments Ltd* [2008] IEHC 52), or (ii) the earlier date upon which the motion seeking to join the third-party is issued (*McElwaine v. Hughes* [1997] IEHC 74; *Morey v. Marymount University Hospital and Hospice**

Ltd [2017] IEHC 285). For the purpose of this judgment, this distinction is unimportant: the period of five weeks between the two dates is not material in the context of an overall delay of some twenty one months.

28. Finally, it should be noted that the consequences for a defendant of a third-party notice being set aside are potentially severe. The defendant's claim for contribution may only be pursued thereafter in separate proceedings and is subject to the court's discretion under section 27(1)(b) of the Civil Liability Act 1961. The court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed."

14. Allen J said on behalf of the Court of Appeal in *Susquehanna International Group Limited & Ors v Execuzen Ltd [2022] IECA 209* (at paragraph 57):

"57. In his summary, at paras. 36 to 39, of the "Obligation to serve 'as soon as reasonably possible'", the judge correctly identified the statutory requirement that a defendant who wishes to make a claim for contribution in third party proceedings must serve a third party notice as soon as is reasonably possible. A defendant is not required to serve a third party notice until such time as he is aware of any potential claim for contribution which he may have against the third party: Board of Governors of St. Lawrence's Hospital v. Staunton [1990] 2 I.R. 31. In the event of any delay, the onus is on the defendant to explain and justify the delay. In assessing delay, the court will have regard to the fact that third party proceedings should not be instituted without first assembling and examining the relevant evidence and obtaining appropriate advice. However, the quest for certainty or verification must be balanced against the statutory obligation to make the application as soon as reasonably possible: Molloy v. Dublin Corporation [2001] 4 I.R. 52. It is incumbent on the court to look not only at the explanations which have been given by the defendant for any apparent delay but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third party notice was served as soon as was reasonably possible: Greene v. Triangle Developments Ltd. [2015] IECA 249. I am quite satisfied that this was a correct summary of the law."

15. Allen J went on to say at paragraph 61 that it is not necessary for a third-party to establish prejudice. He said:

"61. As the judgment of the High Court shows, the defendants' essential submission was that the purpose of the requirement is that the general progress of the action between the plaintiff and the defendant is not unnecessarily delayed. Greene is authority for the proposition that in assessing any delay, regard may be had – and should be had – to the whole circumstances of the case and its general progress. However, it is not authority for the proposition that delay in the service of a third party notice may be disregarded if it has not had the consequence that the progress of the action has been delayed. By the same token, if the underlying policy is to put the third party in as good a position as possible in relation to knowledge of the claim and the opportunity of investigating it, I know of no authority for the proposition that a third party moving to set aside a third party notice must establish prejudice. It is true that many third parties applying to set aside third party proceedings – as in this case – will assert that they have been prejudiced by the delay and that many defendants – as in this case – will assert that there has been no prejudice. In every case, however, the focus must be on whether the delay was unreasonable."

16. He emphasised this point at paragraph 132 where he said:

"A third party who applied for an order setting aside the third procedure is not obliged to show that he has been prejudiced by the delay. Nor is it an answer to such application for the defendant to show that the third party was not prejudiced, or that the progress of the action was not impeded by the delay. Nor is it an answer to seek to show that the delay has not affected the progress of the action generally."

17. At paragraph 17 of his judgment in *Purcell v C oras Iompair  ireann & Ors [2022] IEHC 4* Simons J repeated a point he had made in his judgment in *Ashford Castle* (quoted above) that:

"There is some disagreement on the authorities as to whether delay should be calculated by reference to (i) the date upon which the third-party notice is served (Greene v Triangle Developments Ltd [2008] IEHC 52), or (ii) the earlier date upon which the motion seeking to join the third party is issued (McElwaine v Hughes [1997] IEHC 74; Morey v Marymount University Hospital and Hospice Ltd [2017] IEHC 285). I tend to the view that time should be taken as running from the date upon which the third-party notice is actually served. This appears

to be more in keeping with the statutory language, i.e. "serve a third party notice upon such person as soon as is reasonably possible." It is only once the notice has been served that the third party will be on formal notice of the third-party proceedings, and that the timetable prescribed under the Rules of the Superior Courts for the exchange of pleadings within the third-party proceedings will be triggered."

18. Finally, the principle identified at paragraph 23 of Simons J's judgment in *Ashford Castle*, i.e. that the statutory requirement to move as soon as reasonably possible also applies to the third-party who seeks to have the Third-Party Notice set aside, was front and centre in the third-named defendant's arguments. Hardiman J said in *Boland v Dublin City Council [2002] 4 IR 409* at page 413-414:

"In relation to a motion to set aside a third party notice, in Carroll v Fulflex International Co Ltd (Unreported, High Court, Morris J, 18th October, 1995) Morris J said:-

"A motion to set aside a third party notice should only be brought before that defendant has taken an active part in the third party proceedings and I believe that an application of this nature must itself be brought within the time-scale identified in s.27(1) of the Civil Liability Act 1961, that is to say, 'as soon as is reasonably possible'. While that limitation is not spelt out in the Act, I believe that a fair interpretation of the Act must envisage that a person seeking relief under s.27 would himself move with reasonable speed and certainly before significant costs and expenses have been occurred in the third party procedures."

In Tierney v Sweeney Ltd (Unreported, High Court, Morris J, 18th October. 1995) Morris J said at p.4:-

"I am of the view that where it is intended to make the case that a defendant has failed to move the court to set aside an order giving a defendant liberty to serve a third party notice, such an application should be brought with reasonable expedition and in accordance with the time scale reflected in s.27(1)(b) of the Civil Liability Act, 1961, that is 'as soon as reasonably possible' and save in exceptional circumstances should not extend beyond the point where a defence is delivered to the third party statement of claim."

I respectfully agree that the statutory requirement to move for liberty to issue a third party notice, "as soon as is reasonably possible", should be regarded as

applying, also, to the bringing of an application to set aside such a notice. While it is difficult to imagine circumstances in which a delay by a third party until after he has himself delivered a defence to the third party statement of claim could be justified, it by no means follows that the mere fact that he has not yet delivered a defence means that the application to set aside has been brought as soon as reasonably possible.

... Just as the onus of justifying any delay in seeking liberty to issue the third party notice devolves on the defendant, the onus of justifying delay in bringing the motion to set such notice aside devolves on the third party. Since the first third party is the moving party here, its delay falls to be considered first."

Since the first third party has failed to demonstrate that its motion has been brought as soon as reasonably possible, the present application must fail. I would accordingly, set aside the order of the High Court and decline the relief sought by the first third party."

Position of the Parties

19. The third-party submits that the third-named defendant did not serve the Third-Party notice as soon as is reasonably possible. It was submitted (and accepted by the third-named defendant) that the relevant period is to be calculated by reference to when the Third-Party Notice was served rather than when the motion for leave to issue and serve the Third-Party Notice was issued though it was also submitted that even if the period is calculated from the date of issue of the motion the third-named defendant did not act as soon as reasonably possible. I have, therefore, considered both periods.

20. The third-party submitted that the Statement of Claim which was delivered on the 31st July 2020 included the plea that the damage was caused by the piling and that this was a specific rather than generic plea and that it was not a complex plea; that the third-named defendant was naturally aware that it had directed the third-party to carry out the piling works; and therefore "*the third named defendant was possessed of all material knowledge or was aware since in or about the 31st July 2020 of the specific allegations made by the plaintiff with regard to the piling carried out in the context of the Works over which it was the main contractor.*" The third-party also emphasised that the sole ground relied upon in the application for leave to serve the Third-Party Notice was that the third-party was "*sub-contracted by the third named defendant to complete the sheet piling works at the locus of the Waterford Flood Relief Scheme.*" The third-party

emphasised that this fact was known to the third-named defendant and therefore there was no reason for any delay in making the application once the Statement of Claim containing the aforementioned pleas was delivered.

21. It was also submitted that the third-party did not fail to make the application to set aside the Third-Party Notice as soon as reasonably possible.

22. In the replying affidavit filed on behalf of the third-named defendant, the point is made that the Statement of Claim makes general allegations without specific particulars of how it is alleged the piling works caused or contributed to the alleged damage and specifically pleads that the plaintiff will require discovery to make the case that the works caused the damage and it is averred that the mere fact that allegations are made is not a sufficient basis for the third-named defendant to bring an application to join a third-party. It is deposed that on receipt of the Statement of Claim the third-named defendant's insurers instructed Loss Adjusters and Claims Specialists to investigate the claim and provide a report and those Loss Adjusters thereafter dealt directly with the third-named defendant. The steps taken in that investigation are set out in general terms in the affidavit and it is deposed that "*[T]he preliminary investigation report dated the 20th September 2020 confirmed an exposure for the Third Party and recommended the retention of a consultant engineer to undertake an inspection of the works on the Plaintiff's buildings and a review of both the pre and post-construction condition stage 4 surveys of the Plaintiff's building and the cracking that was identified as part of the investigation. Instructions to join the Third Party were obtained from my principals and papers were furnished to counsel to draft the necessary pleadings and motion papers.*" This was further expanded upon in a supplemental affidavit in which it was deposed that instructions to draft the relevant motion papers were forwarded to Counsel on the 22nd October 2020.

23. These points were reflected in the submissions made on behalf of the third-named defendant. It was submitted that the third-named defendant was entitled to investigate the matter upon receipt of the Statement of Claim as it is not appropriate to proceed to join a third-party on the allegations of a plaintiff alone and simply on the strength of a Statement of Claim alone.

24. It was further submitted that the third-party did not bring the application to set aside the Third-Party Notice as soon as reasonably possible. In particular it was submitted that the third-party received the Third-Party Notice on the 26th April 2021 (or accepts that any issues about service were cured by the entry of an appearance on behalf of the Third Party) and that representatives of the third-party attended a joint

inspection on the 25th November 2021, yet the third party did not enter an appearance until the 11th May 2022 and did not issue this motion to set aside the Third-Party Notice until the 2nd August 2022, a delay of 16 months from receipt of the Third-Party Notice. It was submitted that this delay is in itself fatal to the third-party's application. Particular emphasis was placed on this by the third-named defendant.

Discussion and Conclusion

25. That a third-party who seeks to set aside a Third-Party Notice must make that application as soon as reasonably possible is clear from Hardiman J's judgment in *Boland v Dublin City Council* and Simons J's judgment in *Ashford Castle*, both of which are quoted above.

26. No real explanation is given by the third-party for the delay of sixteen months in moving this application. It was initially suggested that the time it took for the third-party to move its application to set aside the Third-Party Notice should be calculated by reference to when the appearance was entered on behalf of the third-party. It was also submitted that the third-named defendant did not take any steps in the proceedings during this period (other than the motion to have service deemed good) and in particular took no steps to compel the entry of an appearance by the third-party. I was referred in this regard to paragraph 37 of Simons J's judgment in *Ashford Castle* where Simons J had regard to the failure of party to chase a matter up with diligence. If time was calculated from the entry of the appearance the relevant period would be a little under three months (between entry of the appearance and the issue of the third-party's motion to set aside the Third-Party Notice. Ultimately, correctly in my view, this was not pushed vigorously and Senior Counsel for the third-party accepted that time did not only start to run when the appearance was entered but submitted that I must have regard to the fact that no steps were taken by the third-named defendant to chase up the third-party's appearance. I do not accept that time can only be calculated from the time of entry of the third-party's appearance. The logic of this would be to allow a third-party to not enter an appearance and then to benefit from its own omission. It seems to me that in assessing whether third-party has acted as soon as reasonably possible to have a Third-Party Notice set aside regard must be had to the whole period from service of the Third-Party Notice. I accept that as part of this consideration I can have regard to the absence of any steps by a third-named defendant to chase up the third-party's appearance but this must be of limited weight because the obligation to enter an appearance is that of the third-party.

27. There is a suggestion that the reason the application to set aside the Third-Party Notice was not made sooner was because the motion and grounding affidavit seeking leave to join the Third-Party Notice had not been served on the third-party. However, it is clearly stated in the affidavits filed on behalf of the third-party that Counsel was only instructed to prepare the application to set aside the Third-Party Notice after the appearance was entered on behalf of the third-party. That was already more than a year after service of the Third-Party Notice. No explanation for this period is given on behalf of the third-party. It is also clear from the affidavit evidence that the fact that the motion and grounding affidavit had not been served was only noticed when Counsel was instructed to draft the current application, i.e. after the appearance was entered. Thus, the failure by the third-named defendant to serve the motion and grounding affidavit was not a reason for the delay in making the application to set aside the third-party proceedings in the period between service of the Third-Party Notice and the entry of the appearance. In any event, the application was made before the motion and grounding affidavit were provided and in those circumstances could not be a reason for the application not having been made sooner.

28. As Hardiman J makes clear, the onus of justifying any delay in bringing the application to set aside a Third-Party Notice devolves on the third-party. In the absence of an explanation for the delay in doing this I could not be satisfied that the third-party moved as soon as reasonably possible. This in itself would be sufficient to refuse the application.

29. In any event, even if there was not a delay on the part of the third-party, I am satisfied that the application for leave to serve the Third-Party Notice was made and that the Third-Party Notice was served as soon as reasonably possible.

30. The burden of proving that the statutory requirement is satisfied is on the third-named defendant. The explanation offered is that an investigation was carried out by the Loss Adjusters engaged by the third-named defendant's insurer. They provided a Report on the 20th September 2020; Counsel was instructed on the 22nd October 2022 and the motion was issued on the 11th December 2020.

31. The meaning of "*as soon as reasonably possible*" was considered in *Molloy v Dublin Corporation* [2001] 4 IR 53 where Murphy J said at pages 56-57:

"The terms in which the time limit was expressed do appear severe. The use of the word "possible" rather than the word "practicable", as is invoked elsewhere, suggests a brief and inflexible time limit. It might suggest that if it is physically possible to serve the appropriate notice within an identified period, that any

*further delay would be impermissible. However, such a draconian approach would be inconsistent with the nature of the problems to be confronted by a defendant and of the decision to be made by him or his advisors. The statute is not concerned with physical possibilities but legal and perhaps commercial judgments. Proceedings cannot and should not be instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon. It is in that context that the word "possible" must be understood. Furthermore, the qualifications of the word "possible" by the word "reasonable" gives a further measure of flexibility. As Barron J pointed out in *McElwaine v Hughes* (Unreported, High Court, Barron J, 30th April, 1997) at p.6 of the unreported judgment:-*

"Clearly the words 'as soon as reasonably possible' denotes that there should be as little delay as possible, nevertheless, the use of the word 'reasonable' indicates that circumstances may exist which justify some delay in the bringing of the proceedings."

32. In *Ashford Castle* and *Susquehanna Simons J* and *Allen J* respectively said:

*"In assessing delay, the court will have regard to the fact that third-party proceedings should not be instituted without first assembling and examining the relevant evidence and obtaining appropriate advice thereon. However, the quest for certainty or verification must be balanced against the statutory obligation to make the appropriate application as soon as reasonably possible (*Molloy v Dublin Corporation* [2002] 2 ILRM 22)."*

33. It is a matter for the Court to make an objective assessment as to whether the Third-Party Notice was served as soon as is reasonably possible, rather than simply accepting the explanations offered by the defendant.

34. I am satisfied on the basis of these authorities that the third-named defendant was entitled to take some time to conduct an investigation and obtain advice before applying to join a third-party. Indeed, it would seem to me to be contrary to the proper administration of justice and to the imperative that parties approach litigation with proper regard to the question of limited judicial resources and the question of costs if a defendant were obliged to join a party into proceedings before ascertaining whether there was a proper basis for doing so.

35. There is a limit to this in light of the statutory imperative that a defendant must move as soon as reasonably possible. A defendant can not sit back or rely on the need to carry out an investigation if that investigation is going to take too long. That is reflected in the qualification that the quest for certainty or verification must be balanced against the statutory obligation to move as soon as reasonably possible.

36. I am satisfied that the investigation in this case did not take too long and that the entitlement to await the outcome of the investigation did not cause an unreasonable delay. The investigation was sufficiently advanced within approximately seven weeks of delivery of the Statement of Claim for a decision to be made to make the application to join the third party. It was correctly brought to my attention by Senior Counsel for the third-party that there was no evidence of when the third-named defendant told its insurer of the claim. In some circumstances that will be an important, and perhaps determining, factor but where I have concluded that the period within which the report was prepared after service of the Statement of Claim was not too long it seems to me that this is not such a case.

37. The point was also made on behalf of the third-party that the investigation could not really have turned up anything important in circumstances where the plea in the Statement of Claim was specific rather than generic, where no one has said that anyone other than the third-party was responsible for the piling works, and where the basis of the application to join the Third Party (and the plea in the third-named defendant's Defence) was essentially that the third-party was responsible for the piling works. It is clear that even if the investigation does not turn up something novel, a party is still entitled to carry out the investigation to assemble the information or evidence to allow them to make an informed decision as to their approach to the proceedings. Denham J in *Connolly v Casey (Unreported, Supreme Court, 17th November 1999)* had to consider an explanation given by the relevant defendant that they waited for replies to particulars before bringing their application to join the third party. The High Court had held that it did not "see that these replies materially altered the Defendants' state of knowledge from what it had been before in respect of any matter of relevance concerning the joinder of a Third Party. Accordingly, on this aspect of the matter I do not consider that the Defendants have provided a satisfactory explanation for the delay in question." Denham J held:

"This was the wrong test. The test is whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendants' state of knowledge is not the test. The queries raised in the notice

for particulars were relevant to the claim against the third party and thus it was reasonable to await the replies.”

38. A number of weeks did elapse between completion of the preliminary report and instructions being given to Counsel and then the motion being issued. However, I do not believe that even when these periods are taken together they amount to a failure to move as soon as reasonably possible. Finlay Geoghegan J said in *Greene v Triangle Developments Limited & anor* [2015] IECA 249 at paragraph 30 that:

*“...It is also, I think appropriate that in looking at the period of time to take into account the regulatory requirement, that you must issue and serve a notice of application for liberty to issue and that the standard order giving liberty to issue and serve a third party notice normally gives another 21 days. **The requirement for that application to be made – and the need to allow reasonable time to prepare the papers in my view, incorporates probably another eight to ten weeks into the period of time as a matter of reasonable practice of solicitors.**”* [emphasis added]

39. Taking all of this into account I am satisfied that the third-named defendant moved as soon as was reasonably possible in issuing the application for leave to issue and serve the Third-Party Notice.

40. I must also consider matters by reference to the date of service of the Third-Party Notice. While, as noted above there is some disagreement in the authorities as to whether delay should be calculated by reference to when the application for leave is made or when the Third-Party Notice is served, the parties agree that this is the appropriate period. Simons J also stated (*Purcell v CIE & Ors* at paragraph 17 and *Ashford Castle* at paragraph 27), that he tends towards the view that the relevant date is the date of service. This makes sense given the language of section 27 and the possibility that a defendant could move as soon as reasonably possible to obtain leave to issue and serve the Third-Party Notice but may then delay in serving the notice.

41. I am also satisfied that the third-named defendant served the Third-Party Notice as soon as reasonably possible. There was no additional delay on the part of the third-named defendant in serving the Third-Party Notice. The motion for leave to issue and serve the Third-Party Notice was issued, was given a return date by the Central Office,

and was moved by the third-named defendant on that first return date. Twomey J made an Order on that date granting the third-named defendant leave to issue and service the Third-Party Notice on that date. The Order was perfected on the 23rd March 2021. Solicitors acting for the third-named defendant sent the Third-Party Notice to the Central Office to be issued within three days of perfection of the Order (on the 26th March 2021). It was issued on the 19th April 2021 and returned to the solicitors for the third-named defendant on the 21st April 2021 and was served by DX on the 23rd April 2021 and signed for by a representative of the third-party on the 26th April 2021. It is to be noted that an application to have the service deemed good was made on behalf of the third-named defendant on the 7th March 2022. This seems to have come about because at the time of serving the Third-Party Notice the time for doing so under Twomey J's Order had expired. It expired on the day it was returned to the third-named defendant's solicitors. In any event, the Order deeming service good and the entry of the appearance on behalf of the third-party cured any defects which might have arisen in respect of service I must assess the period of time on the basis that the Third-Party Notice was served on the 23rd April 2021. Thus, it seems to me that at all stages the third-named defendant acted promptly and any slight delays in the matter after the motion was issued were outside the control of the third-named defendant.

42. I will therefore refuse the relief sought.