Neutral Citation Number: [2009] IEHC 486

THE HIGH COURT

2005 72 P

BETWEEN

RONALD ROBINS

PLAINTIFF

AND

TERENCE COLEMAN, ANITA COLEMAN, AND (BY ORDER) AGULHAS RESOURCES INC., PIERSE BUILDING SERVICES LIMITED, AND CHARLIE DONNELLY AND MARK TURPIN TRADING AS DONNELLY TURPIN ARCHITECTS

DEFENDANTS

AND

O'CONNOR SUTTON CRONIN & ASSOCIATES LIMITED

THIRD PARTY

JUDGMENT of Mr. Justice McMahon delivered on the 6th day of November, 2009

1. Background

1.1 The plaintiff in these proceedings sues the defendants for damage to his home at No. 2 Sorrento Terrace, Dalkey, as a result of works carried out by the defendants on No. 1 Sorrento Terrace which adjoins and is connected to the plaintiff's property. The first two defendants are the occupiers of No. 1 Sorrento Terrace and the third defendant is the owner of that property. The builder who carried out the work is the fourth defendant and the architects are the fifth and sixth defendants. The fourth, fifth and sixth named defendants have issued and served a third party notice on the present third party. They claim that the third party should be joined because it was negligent in the provision of professional advice as the structural engineers engaged by the first three named defendants in the project.

1.2 The third party now brings two motions before this Court seeking an order to set aside the third party notices on the grounds that they did not comply with O. 16, r. 1(3) of the Rules of the Superior Courts and that the same were not brought "as soon as is reasonably possible" as required by s. 27 of the Civil Liability Act 1961.

1.3 The history of the proceedings involving the fourth named defendant (the builders) is set out hereunder for convenience:-

13 Jan. 2005 Plenary Summons issued against the first and second named Defendants.

20 July 2005 An Order was made joining the third named Defendant to the proceedings.

22 Aug. 2005 An amended Plenary Summons was issued.

23 Aug. 2005 An amended Statement of Claim was issued.

18 Dec 2006 The first to third named Defendants obtained an Order giving liberty to issue and serve a Third Party Notice upon the now fourth named Defendant.

16 Jan. 2007 An Appearance under protest was entered by the now fourth named Defendant to the Third Party Notice.

19 June 2007 The fourth, fifth and sixth named Defendants were joined as co-defendants to the proceedings.

23 July 2007 The fourth named Defendant entered an Appearance to the amended Plenary Summons.

9 Oct. 2007 The plaintiff wrote to the fourth named defendant requesting that it refrain from issuing Notice for Further Particulars pending an amended statement of claim.

14 Nov. 2007 A Notice for Particulars was raised by the fourth named Defendant.

7 Mar. 2008 An amended Statement of Claim was delivered on all six Defendants.

25 Aug. 2008 A revised Notice for Particulars was served by the fourth named Defendant.

11 Nov. 2008 The Plaintiff replied to the fourth named Defendant's Notice for Particulars.

4 Feb. 2009 A Notice of Motion issued seeking liberty to issue and serve a Third Party Notice upon O'Connor Sutton Cronin the present Third Party.

23 Feb. 2009 An Order was made giving liberty for the issue and service of a Third Party Notice upon the now Third Party.

1.4 The history of the proceedings, insofar as the fifth and sixth named defendants are concerned is set out again for convenience:-

(a) 13 January 2005: the proceedings were commenced by Plenary Summons, naming only the first and second named Defendants.

(b) 19 & 20 December 2006: Third Party Notices were served on the fourth and fifth and sixth named defendants.

(c) 22 December 2006: the fifth and sixth named defendants (Architects) entered an Appearance (as Third Parties);

(d) 19 June 2007: on application of the Plaintiff, an Order was made joining the fifth and sixth named defendants (theretofore Third Parties) as Co-Defendants in the action.

(e) 2 July 2007: an Amended Plenary Summons issued.

(f) 6 September 2007; an Appearance to the Amended Plenary Summons was entered by the fifth and sixth defendants *qua* Defendants.

(g) 11 April 2008: the Amended Statement of Claim was delivered by the Plaintiff to *inter alia* the fifth and sixth named defendants (the Architects).

(h) 8 July, 2008: a Defence and a Notice for Particulars was delivered by the fifth and sixth named defendants.

(i) 11 November 2008: Replies to Particulars were delivered by the Plaintiff to the fifth and sixth named defendants.

(j) 1 December 2008: a Motion issued by the first to third defendants seeking case management of the within proceedings.

(k) 30 March 2009: a Notice of Motion issued on behalf of the fifth and sixth named defendants seeking liberty to issue and serve a Third Party Notice on the Engineers.

(l) 18 May 2009: an Order was made granting liberty to the fifth and sixth named defendants to issue and serve a Third Party Notice.

(m) 26 May 2009: the Third Party Notice was served.

(n) The present application seeking an Order setting aside the Third Party Notice issued on behalf of the Engineers.

1.5 Before referring to the legal issues arising in this case, it is appropriate to outline the context of the dispute between the plaintiff and the defendants herein. The works to No. 1 Sorrento Terrace were commenced in or around 2001 and from the beginning the plaintiff expressed some concern and made some objections in respect of those works, especially in relation in dust, vibrations and noise. It was not until January, 2005, however, that a plenary summons was issued. The statement of claim which followed was amended on two separate occasions increasing the number of defendants from two to three and later to six and expanding the nature of the complaint and the reliefs sought. From the affidavits and the submissions made to the court, it is clear that, as the years went by, the plaintiff gradually came to the conclusion that the damage to his property was more serious than was first appreciated. In the early days it appeared that the complaint by the plaintiff primarily related to the enjoyment of his property, but as time went by he became more concerned with possible structural problems which began to manifest themselves as cracks in the walls. The first amended statement of claim, contained a claim in the particulars: (i) that there was a cracking of the party wall where the ceiling and the party wall joined on the landing; (ii) there was a crack over the interior head of the window closest to the defendants' property on the south face; and (iii) there was a vertical and horizontal crack on the party wall. The reliefs indicate, however, that the plaintiff's concerns at the time, in seeking injunctions in relation to specific work carried out and damages for nuisance, were primarily with trespass and wrongful interference with the plaintiff's enjoyment of his property.

1.6 By April 2008, however, the plaintiff in a further amended statement of claim was seeking damages additionally for negligence and for wrongful interference with the easement of support to which the plaintiff's property is entitled from No. 1 Sorrento Terrace. In the particulars of the statement of claim, the plaintiff was then alleging that:-

"Ongoing cracking is continuing and there will be an ongoing maintenance problem

with repeated cosmetic repairs and frequent redecoration being necessary."

1.7 At that stage, it was clear that the plaintiff was becoming concerned with the ongoing nature of the cracking and cosmetic repairs to the earlier cracks were not providing a permanent solution.

1.8 The fourth named defendant, the builder, together with the plaintiff and a representative on behalf of the first, second and third named defendants (now the third party) carried out a joint inspection of the plaintiff's property in February, 2008. Carroll and Browne, the expert consulting engineer retained by the fourth named defendant, furnished a report on 7th March, 2008, but indicated that it was unable to draw conclusions as to the cause of the past and ongoing cracking to No. 2 Sorrento Terrace. Following further information gathered by Carroll and Browne and after the plaintiff's replies to particulars raised by the fourth named defendant furnished on 11th November, 2008, Carroll and Browne prepared "an addendum report" on 11th December, 2008, in which they finally gave a definitive engineering opinion to the effect that the cracking in No. 2 Sorrento Terrace, the plaintiff's house, was caused by structural design flaws in No. 1 Sorrento Terrace for which the third party, according to the fourth named defendant, was responsible. Up to that time

the fourth named defendant did not have sufficient information to confidently involve the third party.

1.9 It would appear that the plaintiff himself could not establish the cause for the ongoing problems in spite of several inspections by experts on his behalf. The underlying problem in this situation was a complex one and defied explanation up to that time. This, in my view, is an important factor to bear in mind in considering the motion before the court and in considering, in particular, the time from which a prudent defendant might issue and serve a third party notice.

1.10 Apart from its own facts, this case is characterised by two peculiar features: first, the nature of the plaintiff's claim continued to change over the years from 2005 to 2008 as the full extent of the alleged structural damage to the property became apparent. This was only finally flagged clearly in the amended statement of claim issued by the plaintiffs in April 2008. In this amendment, the plaintiff joined not only the contracting builders (the fourth named defendant), and the architects (the fifth and sixth named defendants) as defendants, but also included a claim for wrongful interference with his easement of support. Secondly, when the fourth, fifth and sixth named defendants became aware of this new formulation and began to consider the issue of serving a third party notice, it was appropriate that such a course of action involving, as it did, a claim of professional negligence should not be embarked on lightly.

2. The law

2.1 The relevant provision of the Civil Liability Act 1961, s. 27(1) reads as follows:-

> "A concurrent wrongdoer who is sued for damages or for contribution and who
>
> wishes to make a claim for contribution under this Part –
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> …
>
> > (b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. If such third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed."

2.2 From the case law dealing with the interpretation and application of s. 27(1)(b) of the Civil Liability Act 1961, some rules are clear:-

(i) The purpose of the Act is to ensure as far as possible that a multiplicity of actions is avoided and that all questions of liability in the same dispute should be dealt with in the same litigation, if possible. (See *Connolly v. Casey* [2003] 1 I.R. 345 (Supreme Court); *Gilmore v. Windle* [1967] I.R. 323 and *Board of Governors of St. Laurence's Hospital v. Staunton* [1990] 2 I.R. 31).

(ii) The onus lies on the concurrent wrongdoer/defendant to prove that it acted "as soon as is reasonably possible". (See *McElwaine v. Hughes* (Unreported, High Court, Barron J., 30th April, 1997) and *Dillon v. MacGabhan* (Unreported, High Court, 24th July, 1995).

(iii) In determining what the phrase means, "as soon as is reasonably possible", all the facts of the case have to be taken into account. (See *Connolly v. Casey (supra)* and *Molloy v. Dublin Corporation* [2001] 4 I.R. 52.)

(iv) An element of caution is required before a third party notice is served especially where an allegation of professional negligence is involved. (See *Connolly v. Casey (supra)* and *Greene v. Triangle Developments Ltd. [*2008] IEHC 52.)

(v) If a concurrent wrongdoer/defendant does not serve a third party notice "as soon as is reasonably possible" (or at all), he may still maintain an independent action at a later date after the determination in the substantive claim, but in that event the court reserves a discretion to refuse a contribution if it thinks it is appropriate to do. (See s. 27(1)(b) and *Board of Governors of St. Laurence's Hospital v. Staunton (supra).)*

2.3 It is now appropriate to look more closely at s. 27(1)(b) of the Civil Liability Act 1961.

2.4 The subsection states that a concurrent wrongdoer must serve a third party notice "as soon as is reasonably possible". The subsection specifies the period within which the concurrent wrongdoer must perform a particular act. The legislation, by avoiding a specified time limit such as 90 days, for example, and by introducing the qualifying word "reasonably" into the phrase, clearly intended to modify the urgency implied by an unqualified "as soon as possible", recognising that a degree of flexibility should be allowed in expressing the time limit. Insofar as s. 27(1)(b) speaks of an obligation on the defendant to serve the notice within a period of time, the word "reasonably" must, in the first instance, refer to his conduct and his point of view. In construing the word "reasonably", we are not primarily concerned with the third party's viewpoint.

2.5 The court, however, is entitled to review the delay, and examine whether the defendant's explanation is one which entitles him/her to accommodation within the statutory phrase as being "as soon as is reasonably possible".

2.6 It must also be appreciated that "as soon as is reasonably possible" is a relative concept and, in construing it, one must have regard to all the relevant circumstances. The case law continuously emphasises this. What might appear as a long period when stated in the abstract, might nevertheless, when all the circumstances are taken into account, attract the protection of the phrase.

2.7 A further word should be said concerning prejudice to the third party. It has been said that prejudice of the third party is not relevant in construing the phrase used in Section 27(1)(b). In many cases where the length of delay is very long, a court may be justified in ignoring the prejudice to the third party in deciding that the concurrent wrongdoer is out of time. Similarly, in cases where the delay is on its face brief, as in the case of the fourth named defendant here, I also suggest that the question of prejudice may not arise. Where, however, as here, the third party is intimately involved in the case from beginning to end, and no general prejudice could be claimed, and the special claims of prejudice are not

well founded as I have determined later in this judgment, consideration of this fact could have a bearing on the concurrent wrongdoer's sense of reasonableness in assessing when to serve a third party notice. If, for example, the concurrent wrongdoer knew that the situation was one where the third party was ignorant of the claim, evidence was vanishing and witnesses were going to be difficult to locate with the passage of time or the change of circumstance, "as soon as is reasonably possible" might demand a more rapid assessment and decision on the part of the concurrent wrongdoer than in other cases where these factors were not in play. Where there is no prejudice, as here, this fact may also support the defendants' contention that the notice was served "as soon as is reasonably possible".

2.8 Laffoy J. in *Murnaghan v. Markland Holdings Limited & Ors* [2007] IEHC 255, addressed the question of the necessity for the applicant to establish prejudice in cases such as this and comments as follows:-

> "As the commentary in Delany & McGrath on Civil Procedure in the Superior Courts, 2nd Edition, at paras. 9-18 and 9-19 indicates, there is something of a divergence of opinion on the authorities as to the relevance of prejudice, in that in *Ward v. O'Callaghan* (Unreported, High Court, Morris P., 2nd February, 1998) Morris P. appeared to countenance consideration of prejudice, whereas Kelly J. in *S.F.L. Engineering Limited v. Smyth Cladding Systems Limited* [1997] IEHC 81 (9th May, 1997) stated at para. 12:
>
> > 'In considering applications of this sort, the court is not concerned with any question of prejudice arising as a result of the delay in applying for liberty to join the third party. This was accepted by counsel appearing on behalf of the defendants in the present case and it seems to follow from the interpretation given to the relevant provision by Finlay C.J. in the *St. Laurence's Hospital case*.'
>
> Section 27(1)(b) makes the service of a third-party notice "as soon as is reasonably possible" mandatory. In my view, the absence or presence of special prejudice affecting the proposed third party is not something the court is required to have regard to in determining whether the third-party proceedings are valid." (Emphasis added)

2.9 I have no difficulty accepting this dictum of Laffoy J., but I do not interpret it as suggesting that prejudice to the third party can never be a consideration which the court should take into account in assessing the reasonableness of the defendants' conduct in determining when to issue and serve a third party notice. As I have already indicated above, if the concurrent wrongdoer realises that the third party will be seriously prejudiced by delay, he may have to act promptly; on the other hand, if there is no danger that the third party will be prejudiced, some delay may be tolerated. The circumstances of each case must be considered.

2.10 In truth, prejudice to the third party (or absence of it) is only one factor which goes into the mix. What justification can be advanced for isolating it as a consideration that must never be taken into account? In my view, whether it is relevant in a particular case, and if so what weight it is accorded in assessing reasonableness, depends on the facts of each case and it is not to be excluded a priori. Although prejudice was not claimed by the third party in *Tuohy v. North Tipperary County Council & Cleary (Third Party)* (Unreported, High Court, 10th March, 2008), Peart J. seemed to imply that, had there been prejudice to the third party, it might have affected his decision in holding that the notice was served "as soon as is reasonably possible". This approach would also seem to be in keeping with the view expressed by McMahon J. in *A & P (Ireland) Ltd. v. Golden Vale Products (supra)* where he emphasised that one of the purposes of s. 27 is to give the third party the earliest opportunity of learning of the claim against him and an opportunity to investigate the claim. (See also *Neville v. Margan Ltd* [1988] I.R. 734.) In *Cedardale Property Co. Ltd. & Ors v. Deansgrange Development Ltd & Ors* (Unreported, High Court, 13th November, 2008), Irvine J. stated:-

> "It is important to note that the applicants (the third party) are adamant that the main proceedings relate to matters of which they had no awareness at any material time."

2.11 In considering the phrase, therefore, one must bear in mind that the policy behind this part of the Act is to ensure that all disputes relating to the same matter are before the court at the same time and, secondly, that there is no unreasonable delay in serving the third party notice such as might slow down unduly the progress of the case.

2.12 Where each case must be approached with reference to its own peculiar facts, precedents are of limited value and must be looked at for guidance rather than in expectation of finding an answer to the case before the court. In *Tuohy v. North Tipperary County Council*, Peart J. said:-

> "I accept, and respectfully agree, as Kelly J. concluded in *SFL Engineering Ltd v. Smyth Cladding Systems Ltd [supra]*, that the subsection contains 'a temporal imperative', but that imperative in the present case must be seen as applying from the time when the defendant was first in a position to know that the claim against the proposed third party was possible to pursue."

2.13 As examples of the kind of delay allowed and disallowed by the courts in previous cases, counsel for the fifth and sixth named defendants cited the following:-

> "Delays of 38 months (*Neville v. Margan (supra)),* 48 months (*Governors of St. Laurence Hospital v. Staunton (supra))*, 36 months (*Molloy v. Dublin Corporation (supra))* and 21 months (*SFL Engineering Limited v. Smyth Cladding Systems Ltd (supra))* were held to be outside the period allowed, whereas delays of 15 months (*Connolly v. Casey (supra)),* 18 months (*McElwaine v. Hughes (supra))* and 16 months (*Tuohy v. North Tipperary County Council (supra))* were not set aside."

2.14 Bearing in mind what I have already said, however, these are of limited assistance to the court and are useful only to give an idea of the range of delays addressed by the courts in the case law. The overarching rule in all these cases and which is evident from these time variations is that each case must be considered on its own facts.

2.15 That the reasonableness at issue in construing the phrase "as soon as is reasonably possible" is that of the defendant or concurrent wrongdoer is also clear from the Supreme Court decision in *Connolly v. Casey (supra)* In that case the defendant had argued that it had waited for replies to the particulars raised before addressing the issue of the third party notice. Kelly J. held that this delay was inexcusable because the replies did not add to the defendants' state of knowledge so as to excuse the delay. In the Supreme Court, Denham J. for that court, in overruling the trial judge, stated (at p. 350):-

> "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."

2.16 The Supreme Court also held that, where the third party was a barrister who had advised in the case, the defendants were justified in waiting for a statement from Mr. Murphy, the instructing Solicitor. The Court stated that "[it] was not unreasonable to have sought a statement from Mr. Murphy and awaited its arrival, it was a prudent action."

Later in the same judgment, Denham J. has this to say (at p. 351):-

> "In analysing the delay - in considering whether the third-party notice was served as soon as is reasonably possible - the whole circumstances of the case and its general progress must be considered. The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see *Gilmore v. Windle* [1967] I.R. 323. It is appropriate that third-party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice, to the third party and to the issue of costs. To enable a third party to participate in the proceedings is to maximise his rights - he is not deprived of the benefit of participating in the main action."

2.17 The question then arises as to when each of the defendants in the present proceedings had sufficient information to confidently identify the third party as being potentially liable for the damage caused to the plaintiff's property and whether they acted "as soon as is reasonably possible".

3. Third Party order made in favour of the fourth named defendant

3.1 The fourth named defendant was entitled to take time to consider its position when it was served with the amended statement of claim in April 2008. A measure of the uncertainty (springing from lack of expert evidence) that surrounded the formulation by the plaintiff of his claim can be seen from a letter sent by the plaintiff's solicitors on the 9th October, 2007, to the fourth named defendant indicating that an amended statement of claim was being prepared and requesting the fourth named defendant to refrain from raising further particulars until these matters were cleared up. In an affidavit sworn by Adrian Burke, Managing Director of Pierse Building Services Limited (the fourth named defendant) dated 10th August, 2009 he reproduces the letters from the plaintiff's solicitors to this effect. The relevant paragraph reads as follows:-

> "Apart from anything else, because of the way in which these proceedings have progressed, we think it sensible to seek to ensure that unnecessary further pleadings and/or particulars (whether due to incompleteness of available information or otherwise) not come into being."

3.2 In spite of this request, the fourth named defendant nevertheless and in absence of further developments from the plaintiff, raised further particulars on 14th November, 2007. The plaintiff's solicitors replied that this was inappropriate in the absence of an amended statement of claim. In these circumstances, the fourth named defendant had little choice but to wait for the amended statement of claim before considering any action against third parties.

3.3 As already referred to, the amended statement of claim served in April, 2008 introduced new and expanded claims. Earlier, on 26th February, 2008, the fourth named defendant had participated in a joint inspection of No. 1 Sorrento Terrace with the plaintiff and the third party herein, who was the structural engineer representing the first to third named defendants. The fourth named defendant served an amended notice of particulars on the plaintiff on 25th August, 2008 (the first notice of particulars having being served on 14th November, 2007). It received replies on 11th November, 2008. The expert consulting engineer retained by the fourth named defendant reported on 7th March, 2008, but indicated that he could not draw firm conclusions as to the cause of the past and ongoing cracking to No. 2 Sorrento Terrace. It was only at this stage that the cracking to the walls of the plaintiff's house was becoming a major issue as can be seen from correspondence from the plaintiff's solicitor to the other parties which maintained that the plaintiff's property had further deteriorated. It was not until the 11th December, 2008, that the experts engaged by the fourth named defendant concluded, for the first time, that the third party was professionally negligent for the standard design for the project carried out in No. 1 Sorrento Terrace. According to the submissions of the fourth named defendant, the cracking referred to in the statement of claim " [and] the interference with the support of one property to the other is caused by the failure of the third party to take into account the fact that Sorrento Terrace, as a whole, was a flexible construction and that the works which were carried out made No. 1 Sorrento Terrace a rigid structure relative to the remainder of the Terrace thereby causing permanent relative movement between the two properties".

3.4 The third party argues that the fourth named defendant was in a position to commence third party proceedings against it from December, 2006 when the fourth named defendant was joined as a third party, or in June, 2007 when it was joined as a co-defendant. At that time, it is argued, it was in a position to make a proper assessment of the situation and who else should be joined. It should not have waited until 11th March 2009 to serve the third party notice.

3.5 I cannot agree. The changing nature of the plaintiff's claim, in a complex building situation and the difficulties in getting permission to inspect No. 1 Sorrento Terrace, allied to the difficulty in establishing for certain the extent and the causes of the damage to the plaintiff's property, were sufficient, in my opinion, to justify caution on the part of the fourth named defendant in issuing any third party notice before 4th February, 2009.

3.6 I find that it was not unreasonable for the fourth named defendant to wait until it received the replies to its particulars on 11th November, 2008 before considering third party proceedings in this case. Bearing in mind that consideration had to be given to these replies and presumably counsel's advice had to be sought as well as instructions from the client, I find that issuing a third party motion seeking to join the third party on 4th February, 2009 following an earlier letter of claim sent on 22nd January, 2009, was promptly done. The order having been made on 23rd February, 2009, the third party notice was served on 11th March, 2009, and, in my view, was done "as soon as is reasonably possible" within the meaning of s. 27 of the Civil Liability Act 1961.

4. The third party order made in favour of the fifth and sixth named defendants

4.1 With regard to the fifth and sixth named defendants, they delivered their defence to the plaintiff on 5th July, 2008. Counsel for the third named defendant in its submission points out that, in their defence, the fifth and sixth named defendants indicated a positive intention to claim an indemnity from "such third parties as may be advised". Furthermore, on the same day, the fifth and sixth named defendants served a notice of indemnity and contribution on the first four named defendants. Paragraphs 2, 3 and 4 thereof referred specifically to the duties owed by the structural engineers (i.e. the third party) engaged by the first four defendants asserting a liability on the part of those defendants for the acts of the third party. Accordingly, as counsel for the third party points out, it is evident that, as of 5th July, 2008, the fifth and sixth named defendants considered:-

(i) That there was a breach on the part of the third party; and

(ii) That it was appropriate for them to seek to join a third party in order to make a claim.

4.2 Nevertheless, it was not until 25th March, 2009, almost nine months after the delivery of the defence, that they issued a motion to join the third party. An order was made on 18th May, 2009, and the third party notice was served on 2nd June, 2009.

4.3 In this context, it should be pointed out that there is a big difference between making a general precautionary statement by way of general pleading in litigation, and swearing an affidavit particularising an allegation of professional negligence. In my view, it would be unsafe to conclude from such a general pleading that the pleader had sufficient knowledge to justify allegations of professional negligence against a third party or to abandon the prudent caution of restraint that such a course of action requires. This point is well made by Denham J. in *Connolly v. Casey (supra)*, where she says (at p. 350):-

> "Even though there were pleas in the defence relevant to the third party, there is a difference between a general plea in a defence and swearing an affidavit setting out the basis on which it is alleged counsel [i.e. the proposed third party] was negligent. A statement from Mr. Murphy was relevant to this. It was not unreasonable to have sought a statement from Mr. Murphy and awaited its arrival, it was a prudent action."

4.4 Counsel for the fifth and sixth named defendants unapologetically linked the response of his clients to the affidavit sworn on behalf of the contractor (the fourth named defendant) dated 4th February, 2009. That was the prudent date for the fifth and sixth named defendants to contemplate issuing the third party notice. On that timeframe, it could not be said that they had not acted "as soon as is reasonably possible". In litigation of this sort, where many parties are potentially involved, it would not be uncommon for concurrent wrongdoers (or their insurers) to be in touch with each other on matters of mutual interest. In the present case joining the third party would certainly be something of material interest and one on which I would infer some exchange of information. In these circumstances, it would not be imprudent of the fifth and sixth named defendants to wait for the fourth named defendant's affidavit since presumably they were also aware of the slow progress of the fourth named defendant's case and even though the fourth named defendant was actively investigating the matter it had no definitive report on the liability of the third party until December, 2008. It is not unreasonable for the fifth and sixth named defendants to take their pace from the knowledge and actions of the fourth named defendant.

4.5 At this juncture, I would like to say something about the specific prejudice alleged by the third party in this case. Counsel for the third party submitted (citing Laffoy J. in *Murnaghan (supra) and Kelly J. in S.F.L. Engineering Ltd. (supra)*) that, as a matter of law, he does not have to show prejudice to succeed. Nevertheless, in the legal submissions to the court, it is stated that in addition to general prejudice consequent upon the lapse of time, the third party's position is likely to be prejudiced by the non-availability of a significant potential witness, James Keane, who carried out a Photographic Condition Survey in 2001 and who has since left the employment of the third party and whose current whereabouts are unknown. I have already made my views clear on the issue of prejudice generally when one is considering Section 27(1)(b). On specific prejudice, I do not believe that the third party has in fact been prejudiced in the sense it has put forward, especially since counsel for the fifth and sixth named defendants has indicated his clients' willingness to admit the relevant photographs into evidence without proof of their origin. Furthermore, it was averred by Adrian Burke for the fourth named defendant at para. 16 of his affidavit of 10th August, 2009 that Mr. Tegart, Technical Director of the third party, was involved in the project on behalf of the first, second and third named defendants from the outset of these works and attended an inspection of No. 2 (the plaintiff's house) as late as 26th February, 2008. There was evidence before the court that there had been no changes since that date to either property. In these circumstances, I find that the third party has not suffered any prejudice as a result of delay in this case.

4.6 However, as I have already indicated, counsel for the third party argues that this does not in any way weaken his case in respect the relief he seeks under the provisions of s. 27(1)(b) of the Civil Liability Act 1961.

4.7 The general comments I have made already relating to the fourth named defendant must be repeated here: the plaintiff spent a long time finally settling his pleadings in view of the difficulties he had in identifying the nature of the damage to his property and the causes of that damage. In that sense, the case was a complex one involving many potential defendants. Its progress was slow. Denham J., again in *Connolly v. Casey (supra*, at p. 351) emphasised that "in analysing the delay…the whole circumstances of the case and its general progress must be considered". Second, concurrent wrongdoers are entitled to time to give serious consideration before making a claim that a person has been guilty of professional negligence. Such an allegation or claim should only be made responsibly and when there is sufficient evidence to justify the claim. Further, it should be noted, as counsel for the fifth and sixth named defendants does in his submissions, that the primary purpose of s. 27(1)(b) is to ensure that all connected claims arising out of the same circumstances should be determined at the same time so as to avoid multiplicity of actions. Section 27(1)(b), in specifying a time limit for service of third party proceedings, is necessary to prevent such claims, ancillary to the main action, delaying or prolonging unduly the principal litigation to the detriment of other litigants, especially the plaintiff. Moreover, there has been a motion before the Court since December, 2008 seeking case management of the proceedings. The slow progress of the case cannot in any way be attributed to the conduct of the fifth and sixth named defendants.

4.8 In my view, it is also relevant to note that the third party concerned in this case was involved with the first, second and third named defendants since the works commenced in 2001 and attended a site meeting together with the plaintiff and the fourth named defendant's representatives as late as 26th February, 2008. The affidavits before the court, averred that there has been no change in the property since that date. To grant the third party's application would mean that the fifth and sixth named defendants would have to issue separate legal proceedings. They are not out of time to do so. It is also relevant to point out that, since I have refused the third party's application to set aside the notice issued by the fourth named defendant, the third party is already involved in the main litigation anyway.

4.9 A refusal in this case, therefore, almost certainly will spawn another independent action and will not promote the principal objective of the section. Of course, this is what is contemplated by the Act itself when the service is not made "as soon as is reasonably possible", but it does emphasise, in my view, that the court should approach the interpretation of the phrase with some flexibility in the particular circumstances of this case.

4.10 Given this situation and bearing in mind the following factors:-

 the third party is not in anyway prejudiced in terms of knowledge and proofs;

the main litigation was complex and involved several defendants and presented the plaintiff with particular difficulties in establishing the nature of the damage as well as difficult causation issues;

 the protracted prosecution of the main action was not due primarily to the fault of the fourth, fifth and sixth named defendant;

 the claim involved an allegation of professional negligence; and

 the objective to avoid multiplicity of actions, I have come to the conclusion that "as soon as is reasonably possible", in all the circumstances, should be given a more indulgent interpretation than might normally be expected in a situation where such peculiar features are not present. In my view, the interpretation I am adopting is best designed to advance the object of the section.

4.11 Finally, with regard to O. 16, r. 8(3) of the Superior Court Rules, I am satisfied to adopt the reasoning of McCracken J. in *Golden Vale plc v. Food Industries plc* [1996] 2 I.R. 221 where a third party order later challenged was made well outside the 28 day period allowed by the Rules. There, the learned judge held (at p. 227) that the court had by implication extended the time, but indicated that, if it were necessary to do so, he too would be prepared to extend the time in that case. That reflects my attitude to the case before the Court (see also Peart J. in *Tuohy v. North Tipperary County Council and Casey (supra)).*

4.12 I refuse the application by the third party to set aside the third party orders made in favour of the fourth named defendant and the fifth and sixth named defendants.