Neutral Citation [2015] IEHC 398

THE HIGH COURT

Record No: 2012/9497 P

BETWEEN:

CLÚID HOUSING ASSOCIATION

Plaintiff:

-and-

BRIAN O'BRIEN AND MICHAEL HASLAM PRACTICING UNDER THE STYLE AND TITLE OF SOLEARTH ECOLOGICAL ARCHITECTURE

-and-

REMCO LIMITED TRADING AS MALONE O'REGAN CONSULTING ENGINEERS

-and-

P. ELLIOT & COMPANY LIMITED (IN RECEIVERSHIP AND LIQUIDATION)

Defendants:

-and-

DTE MANUFACTURING LIMITED TRADING AS DEMPSEY TIMBER ENGINEERING

Judgment of Ms. Justice Murphy delivered the 30th day of June, 2015

1. This is an application by a third party, namely DTE Manufacturing Limited trading as Dempsey Timber Engineering, to set aside notice of third party proceedings brought against it by the respondents, Remco Limited trading as Malone O'Regan Consulting Engineers. The third party notice was served on 23rd April, 2014 following an application issued by the third named defendant on 13th March, 2014. The application to set aside the proceedings is based on the applicant's contention that neither the application for leave to issue a third party notice nor service of the actual notice was done in a timely manner as required by Order 16, Rule 1(3) of the Rules of the Superior Courts and s. 27(1)(b) of the Civil Liability Act, 1961, respectively. Order 16 Rule 1(3) provides that an application for leave to issue a third party notice shall, unless otherwise ordered by the Court, be made within twenty eight days from the time limited for delivering the defence. Section 27(1)(b) of the Civil Liability Act 1961 provides that a third party notice be served as soon as reasonably possible.

2. Background

The underlying proceedings commenced in September 2012. Those proceedings involve various allegations of professional negligence and contractual breach against the architects, consulting engineers and main contractors of a social housing development known as the Emerald Project at Sillogue Road, Ballymun, hereinafter referred to as "the Project". This Project consisted of the construction of a number of apartments and houses over two, three and four storeys in four separately constructed blocks.

3. The plaintiff in the underlying proceedings is a company limited by guarantee without share capital engaged in the business of developing and managing social housing. The first and second named defendants were appointed as the architects to the project pursuant to a contract dated 31st October, 2008. On the same date, a contract was entered into with the third named defendant, appointing it as engineer. On 23rd September, 2009, the fourth named defendant was retained as the building contractor for the Project, on the recommendation of the first, second and third named defendants. The applicant in the current proceedings, DTE Manufacturing Limited trading as Dempsey Timber Engineering, is a specialist manufacturer, supplier and installer of timber frame buildings. It was subcontracted by the fourth named defendant to design, manufacture and install the timber structure of the project with the exception of what are known as Brettstapel slabs, in respect of which it had responsibility for installation only. The respondent in the current application, Remco Limited trading as Malone O'Regan Consulting Engineers, is the third named defendant in the underlying proceedings.

4. The plaintiff's claim concerns defects which arose in Block A of the Project. It is alleged that those defects arise from the use of a timber construction method used in the project known as Brettstapel – a method that originated in Southern Germany/Austria. Brettstapel slabs were used in the structural frame of Block A. The plaintiff contends that the inclusion of these slabs was specified in the design produced by the first, second and third named defendants. The plaintiff, in its statement of claim, says that Brettstapel is very rarely used in Ireland because, amongst other reasons, it is unsuited to the high level of atmospheric and environmental moisture experienced in this country. This contention is disputed by the third named defendant, the respondent in the within application.

5. In March 2010, Brettstapel slabs were transported to the Project site, having been ordered from a manufacturer in Germany. These slabs were installed by the fourth named defendant and the applicant/third party, between 22nd March, 2010 and 3rd May, 2010.

6. On 8th June, 2010, the block work wall at the gable end of Block A was found to be off plumb. According to the respondent, the fourth named defendant determined that this was due to the workmanship of the applicant. The fourth named defendant demolished and reconstructed the wall and realigned the timber frame. However on 15th July 2010, the wall was found to be off plumb again. The first, second, third and fourth named defendants investigated this issue and found that the Brettstapel slab had expanded in the horizontal plane, damaging the floor, the timber frame, the windows and the external cladding to Block A. Following an inspection, the first, second and third named defendants formed the view that the expansion was due to moisture absorption by the timber and consequent swelling. Subsequent testing and specialist surveys confirmed this to have been the case. The source of the moisture was considered to be atmospheric humidity and/or rain ingress, although this is the subject of some dispute in the underlying proceedings.

7. The first, second, third and fourth named defendants subsequently took steps to remedy the difficulties that had arisen. The affidavit of Brendan Flanagan, CEO of the applicant, points to the statement of claim in the underlying proceedings which states that, on 14 September, 2010, the first and second defendants, the architects, instructed the fourth named defendant to remove and re-execute the Brettstapel flooring. The fourth named defendant refused to comply with this direction, contending that it was not necessary, and a dispute subsequently arose.

8. In January, 2011, the fourth named defendant suspended its works on the Project. According to the affidavit of Brendan Flanagan, the plaintiff, supported by the first and second named defendants, the architects, and the third named defendant/respondent, the engineer, as its professional advisers engaged in a dispute resolution process with the fourth named defendant, as envisaged by the building contract of 23rd December, 2009. The applicant/third party states that it was not invited to participate in this process. The dispute resolution process was ultimately unsuccessful and on 3rd May, 2011, the fourth named defendant wrote to the plaintiff signaling its withdrawal from the conciliation process. On 8th May, 2011, the plaintiff terminated the fourth named defendant's obligation to complete works on the Project, in accordance with the terms of the building contract. On 19th May, 2011, the first of a series of receivers was appointed to the fourth named defendant. On 4th July 2011, pursuant to an order of the High Court, the fourth named defendant was placed in liquidation. It appears to be undisputed that following the termination of the fourth named defendant's obligation to complete the works the plaintiff made a call on the performance bond provided to it under the building contract and recouped a sum of €850,000 from the bond provider.

9. According to its statement of claim, the plaintiff, in June 2011, received specialist technical advice to the effect that the damage to block A could not be corrected and, even if catered for structurally and concealed cosmetically, the block would represent a long term maintenance problem. In light of this advice, and the reduced amount of funding available to it, the plaintiff decided to demolish block A (excluding the two two-storey houses) and to proceed only with blocks B, C and D.

10. On 21st September, 2012, the underlying proceedings were commenced by plenary summons. A statement of claim was delivered on 22nd November, 2012. The statement of claim is an extensive pleading which runs to twenty pages and sets out in great detail the plaintiffs claim against each of the defendants. The plaintiff's claim against the defendants is that the inclusion of the Brettstapel slabs in the timber frames of Block A caused swelling in the structure and led it to be off plumb. It is alleged that this occurred because the timber frame, including the Brettstapel slabs, absorbed the moisture from the atmosphere and was caused to swell as a result. The plaintiff claims that each of the defendants breached the express or implied terms, conditions or warranties of their respective contracts with the plaintiff and/or that each of the defendants have been negligent and breached its duties, including statutory duties, to the plaintiff. On 14th January, 2013, Birmingham J. granted the plaintiffs judgment in default of appearance as against the fourth named defendant. On 17th May, 2013, the plaintiffs amended their statement of claim to provide for an amended claim of damages reduced from €3,460,351.26 to €3,202,154.16. Otherwise, the statement of claim appears unchanged.

11. On 5th June, 2013, the respondent in these proceedings, in their capacity as third named defendant in the underlying proceedings, issued a notice for particulars. Replies were furnished on 28th June, 2013. The particulars sought mainly related to the architect's contract, the building contract and the engineering contract as well as the services provided by the third named defendant before the execution of the engineering contract, correspondence between the parties after problems arose in July 2010, the specialist technical advice obtained by the plaintiff, details of the bond provided to the plaintiff by the fourth named defendant and information on the contention that the fourth named defendant had not adequately weathered the works. The respondents, as third named defendants, subsequently made arrangements to brief experts in the matter and an inspection of the site was arranged for 6th August, 2013. The identity and specializations of the experts have not been disclosed to the Court.

12. On the 11th and 22nd November, 2013, the respondent received two expert independent reports in relation to the issues of liability and causation in respect of the Brettstapel flooring. These reports, the Court is told, were compiled on the basis of investigations which included the site visit of 6th August, 2013. Although the respondents claim privilege over the contents of these reports, the Court has been informed that the reports attribute responsibility for moisture ingress in the Brettstapel flooring at least in part, to the applicant, having regard to what the respondent claims are clear deficiencies in the installation and measures taken to protect the flooring. The applicant/third party on the other hand claims that the difficulties which arose resulted from the fact that Brettstapel slabs were wholly unsuitable for use in the Project, due to humidity levels occurring in Dublin. The respondent also claims that the delay between the August inspection and the provision of the November reports was due to the extensive nature of the documents furnished in response to its notice for particulars and the advent of the holiday period.

13. On 29th January, 2014, the respondent in these proceedings, in its capacity as third named defendant in the underlying proceedings, delivered its defence, as well as a counterclaim against the plaintiff for €52,000 in unpaid fees. On 18th February, 2014 the respondent's solicitors wrote a letter before action to the applicant seeking that the applicant *"take over the handling of these proceedings on behalf of our client giving it a full indemnity and discharging its costs incurred to date"* and informing the applicant of the respondents intention to join them to the underlying proceedings if such indemnity was not forthcoming. On 13th March, 2014, the respondents issued a notice of motion supported by a grounding affidavit of Eugene Kelly pursuant to which it was granted leave by Gilligan J., on 31st March, 2014, to issue and serve a third party notice on the applicant. Such notice was served on 23rd April and an appearance was entered on behalf of the applicant on 20th June, 2014 at which time a third party statement of claim was requested by the applicants. This statement of claim was delivered to the applicants on 8th August, 2014. The respondents claim, without prejudice to the contention that it is not liable in the underlying proceedings, that any loss or damage sustained by the plaintiff, if any, was caused wholly or contributed to by the negligence, breach of duty and/or breach of contract by the applicant. On 24th September, 2014, the applicant issued its motion to set aside such third party notice.

Submissions

14. The parties are largely in agreement as to the relevant legal principles to be applied in this case, namely, O.16, r.1(3) of the Rules of the Superior Courts and s. 27 of the Civil Liability Act, 1961. The applicant/third party states that the two provisions "*while separate*" are:

> *"to a certain extent related in that it has been held that when determining whether a defendant has moved to serve a putative third party notice as soon as is reasonably possible, the court should first identify by what date the application should have been brought in accordance with Order 16, Rule 1(3) RSC and then ask whether the explanation which has been offered for not meeting that deadline is reasonable".*

15. The applicants cite both *S. Doyle & Sons Roscommon Limited v. Flemco Supermarket Limited & Ors* [2009] IEHC 581 and Greene v. Triangle Developments Limited [2008] IEHC 52, as authority for the above proposition. In both cases, the Court held that the starting point, by reference to which any delay can be assessed, is the time within which the application should have been made in accordance with O.16 r.1(3), while the cut-off point is when the notice is actually served following the granting of leave. The respondent contends that there is some disagreement as to whether the measure of any delay should stop from the date of the issue

of a motion for leave to issue a third party notice as was the case in *McElwaine v. Hughes* [1997] IEHC 74 or only from the date of service of the third party notice itself, as held in *Greene v. Triangle Developments Limited*. In any event, Clarke J., at p. 59 of his decision in Greene noted that the interval between the issue of the motion and the perfection of the order, due to court process delay, *"needs to be taken into account as part of the natural timescale within which an entirely compliant defendant would ultimately serve a third party notice"*. Furthermore, the delay in this case between the issuing of a motion and the service of third party notice, was little over a month.

16. The applicant first notes that the filing of the application for leave to issue third party notice on 13th March, 2014, does not comply with O.16, r.1(3) of the Rules of the Superior Courts which provides that:

> *"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 or, where the application is made by the defendant to a counter-claim, the reply."*

It contends therefore, that the application ought to have been issued by the 17th January, 2013 since the statement of claim was delivered on 22 November, 2012. The respondent contends that the twenty eight day period specified in O.16 r.1(3) is far more honoured in the breach than the observance and points to the remarks of Kelly J. in *Connolly v. Casey* [1998] IEHC 90, wherein he states *"it would, in my view, require very exceptional circumstances for the Court to accede to an application of this sort if the only complaint related to a failure to observe strict compliance with the provisions of this rule"*. While the applicant accepts that it would not be reasonable to strike out the notice simply because the respondent failed to issue its motion by 17th January, 2013, it argues that it is up to the respondent to explain why the motion was not issued until over a year after that date and further to demonstrate that it was reasonable to wait until 23rd April, 2014 before serving third party notice, a motion having been issued in this respect on 13th March, 2014.

17. Thus, it is at this point that s. 27(1) of the Civil Liability Act 1961 becomes relevant for the purpose of the application to set aside the third party notice at issue in this case. Section 27(1) provides:

> *"A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part—*
>
> *(a) …*
>
> *(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."*

18. In this respect, the applicant firstly argues that at the time of issuing of the third party notice the respondent had been aware for more than a year and a half of the detailed nature of the plaintiff's claim as set out in the statement of claim filed on the 22nd November 2012. Further, the respondent as consultant engineer to the project had conducted investigations into the nature and cause of the problem when they arose in 2010, almost four years before the issuing of the third party notice. Therefore, the applicant contends that the respondent has not brought proceedings to join the applicant to the underlying proceedings "as soon as reasonably possible" within the meaning of s. 27(1) of the 1961 Act.

19. The respondent in this regard cites the observation of Delany and McGrath, *Civil Procedure in the Superior Courts*, 3rd Ed., (Dublin, 2012) that the *"general approach of the courts has been to focus on the question of whether a defendant had acted reasonably rather than on the question of whether it was possible to join a third party earlier"*. The respondent further points out that in the Supreme Court decision of *Connolly v. Casey* [2001] 1 IR 345, the Court placed the emphasis of the analysis squarely on the reasonableness of a defendant in allowing time to lapse before joinder of a third party. In this case Denham J., in delivering the judgment of the Court held that *"the test is whether it was reasonable to await the replies to particulars"* and that in considering whether the third party notice was served as soon as reasonably possible *"the whole circumstances of the case and its general progress must be considered"*. Therefore, the respondent claims that it acted reasonably and responsibly, by waiting to receive replies to particulars which were delivered on 28th June, 2013, conducting an inspection and investigations in August, 2013, and awaiting expert reports in November 2013, before seeking to join the applicant to the proceedings in March, 2014. The respondent points out that the time period for delivery of defence would have expired in June, since the amended statement of claim was delivered in May, and further points out that the near universal practice in relation to complex construction disputes is for a defence not to be filed until replies to particulars have been received.

20. The applicant on the other hand argues that in considering the meaning of the phrase *"as soon as is reasonably possible"* the courts have repeatedly laid emphasis on the obligation which rests on the party claiming contribution to move with proper speed. Both parties refer to the Supreme Court decision in *Molloy v. Dublin Corporation* [2001] 4 IR 52 in which Murphy J. stated at p. 57:

> *"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 qualification of the word 'possible' by the word 'reasonable' gives a further measure of flexibility."*

In *Molloy,* Murphy J. stated that the concept of what was "*reasonable*" would be considered in accordance with what steps it had been necessary to take in order to assemble the relevant materials for commencing the third party action and how quickly those steps had been taken. In this regard, the respondent points to the decision of *Robins v. Coleman* [2010] 2 IR 180 in which MacMahon J. stated at 188-189:

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

The applicant however, points to the decision of Clarke J. in *Greene v. Triangle Developments Limited* [2008] IEHC 52, at para 2.7, in which he stated that *"on the basis of the authorities it seems to me clear…that the court should adopt a strict approach to the time within which a third party application is brought*". It further points to *EBS Building Society v. Leahy & Ors* [2010] IEHC 456, in

which Hogan J. held, at para 11, that while *"the question thus becomes whether, having regard to all the circumstances, it was reasonable for a defendant to wait for the period in question before applying to join the third party…any such permissible delay will generally be measured in weeks and months and not years"*. However the respondent contends that in more complex litigation, greater time is typically tolerated and in *Connolly v. Casey* [2001] 1 IR 345; *O'Halloran v. Fetherston* [2012] IEHC 349 and *Murphy v. Patrick Brock & Sons* [2012] IEHC 438, the courts declined to set aside third party notices where the decision was taken to defer joinder until receipt of particulars or expert reports. In the case of construction disputes the courts have regularly refused applications to set aside third party notices with comparable or greater periods of delay. For example in *O'Halloran* there was a delay of two years following delivery of the statement of claim, fourteen months following delivery of defence and of five to six months following the receipt of an expert report. In *Murphy v. Brock* the delay was three years after the plenary summons and fourteen months after the statement of claim. The respondent argues that the present facts are concerned with a complex construction dispute and it acted reasonably and with appropriate prudence before taking the decision to join the third party.

21. The applicant on the other hand contends that the respondent has been aware of the subject matter of the action for over four years. It was involved when the complaints of damage first arose in June, 2010, it investigated them and in September, 2010 it reached a conclusion as to how the damage was caused. The respondent has been aware of the detail of the wrongdoing alleged against it since 22nd November, 2012 and yet did not seek to join the applicant to the proceedings until 13th March, 2014 and did not serve third party notice until 23rd April, 2014, over a year after the respondent was required to act by the provisions of O.16 r.1(3). In this regard the applicant contends that the respondent's explanations for the delay are wholly insubstantial.

22. In his affidavit of 4th November, 2014, Eugene Kelly, a director of the respondent, states that it was necessary to await the plaintiff's replies to particulars dated 28th June, 2013 because *"the substance of the plaintiff's claim was only capable of expert review when particulars were delivered and it was this that the third named defendant focused on next".* However, the applicant argues that there are two difficulties with this statement.

23. The first difficulty is that Mr. Kelly's statement suggests that the detail of the plaintiff's claim was not made clear until 28th June, 2013, when replies to particulars were delivered. However the applicant contends that Mr. Kelly does not make it clear in his affidavit that the plaintiff's statement of claim was delivered on 22nd November, 2012 and the third named defendant did not serve a notice for particulars until over six months later on 5th June, 2013. The plaintiff argues that no explanation has been offered for this delay. In addition, Mr. Kelly refers to the amended statement of claim of 17th May, 2013 without referring to the fact that this amended version in no way alters the substantive detail of the commissions of wrongdoing made against the third named defendant in the original statement of claim of 22nd November, 2012 and concerns only changes to the figures claimed for special damages. The applicant further argues that the respondent has been aware of the events which form the subject matter of this action for over four years because it was involved in them and conducted an investigation into their cause. It should be noted in this regard that the notice for particulars did not raise queries concerning the plaintiff's core allegations. The applicant contends that the reason for this is that the respondent was already aware of the detail of the plaintiff's claim.

24. The second issue raised by the applicant in respect of the statement of Mr. Kelly is that such statement suggests that on receipt of the plaintiff's replies to particulars the respondent moved with all reasonable speed to join the applicant as a third party. In this regard, the applicant points to the fact that third party notice was not filed until 23rd April, 2014, almost a year after replies to particulars were furnished to the respondents on 28th June, 2013.

25. In response to the respondent's contention that the extent of the applicant's responsibility only became apparent following the inspection of August, 2013 and the reports of November, 2013 which followed and that it was in reliance on such reports that the application was made to seek leave to issue third party notice in the first instance, the applicant argues that the respondent was under an obligation to progress its investigations with speed, in light of the fact that the case was by that time a year old. The applicant states that the respondent could hardly be said to have discharged such obligation in circumstances where it allowed experts over three months to prepare and deliver their reports without any apparent objection or attempt to intervene. The respondent claims that the delay between the August inspection and the provision of the November reports was due to the extensive nature of the documents furnished in response to its notice for particulars and the advent of the holiday period.

26. The applicant further claims that, pursuant to the decision of Clarke J. in *Greene v. Triangle Developments Limited,* the Court should consider how quickly the respondent moved to apply to join the third party to the proceedings following receipt of an expert's report. In *Greene* a period of seven months elapsed between the request for the expert's report and its receipt but the motion to join issued within eight weeks of that receipt. The applicant claims that this should be contrasted with the present case wherein the respondent delayed for a period of four months before issuing the application.

27. Both parties agree that it is by now well-established that the question of whether the defendant's delay in serving third party notice has caused prejudice to the third party concerned is not a relevant consideration in considering whether the defendant complied with the obligation to serve notice as soon as reasonably possible, as outlined by the Court in the decisions of *S.F.L. Engineering Limited v. Smyth Cladding Systems Limited* [1997] IEHC 81 and *Murnaghan v. Markland Holdings Limited* [2007] IEHC 255.

28. Finally, the respondent points to the decision of the Supreme Court in *Boland v. Dublin City Council* [2002] 4 IR 409 in which Hardiman J., delivering the judgment of the Court, affirmed that the requirement under s. 27(1) of the 1961 Act to move for liberty to issue a third party notice "*as soon as reasonably possible*" also applied to the bringing of an application to set aside such notice. The respondent argues therefore that the Court should have regard to the fact that the applicant first entered an appearance in the proceedings on 20th June, 2014 and expressly solicited a third party statement of claim, which was not a requirement of the order of 24th April, 2014, and thereby put the respondent to cost and expense and reasonably caused it to understand that no challenge would be made to the third party notice. The applicant did not issue its motion to set aside the third party notice until almost two months following delivery of the statement of claim. In those circumstances, the respondent argues that the applicant has failed to seek to set aside the third party notice as soon as reasonably possible.

Decision of the Court

29. On the authorities the law is clear. A third party notice must be served as soon as is "*reasonably possible*". What is "*reasonably possible* is to be assessed in the context of the facts of each particular case. As the respondent has pointed out a lapse of years before service of a third party notice may be excusable depending on the circumstances of a particular case. The more complex the case the more forgiving a Court may be in determining when it was "*reasonably possible* to issue a third party notice.

30. The respondent asserts that this is a complex construction dispute involving allegations of professional negligence in which it was proper and appropriate to await the plaintiff's replies to particulars and receipt of expert reports allocating blame to the third party prior to seeking indemnity and contribution against it. The respondent contends that there was no undue delay on their part and that they moved promptly from receipt of expert reports in mid-November 2013. On the particular facts of this case, the Court does not

agree.

31. The Brettstapel slabs at the core of the underlying proceedings were installed between 22nd March and the 3rd. May 2010. Within weeks problems manifested when a gable wall in the relevant housing unit was found to be off plumb. This was, according to the statement of claim as averred to in the affidavit of Brendan Flanagan, first noted on the 8th June 2010. Initially it was considered that the applicant who had designed and installed the timber frames of the building was at fault. The relevant wall was demolished and reconstructed but within weeks the same wall was again off plumb. There followed a major investigation by the four defendants including the respondent. According to the evidence it was found that the Brettstapel slabs had expanded in the horizontal plane, damaging the floor, the timber frame, the windows and the external cladding of Block A. At that time the respondent and the first and second defendants formed the view that the expansion was due to moisture absorption by the Brettstapel slabs with consequent swelling. According to the statement of claim this was subsequently confirmed by testing and specialist surveys. The source of the moisture was identified as atmospheric humidity and/or rain ingress. It is inconceivable to the Court that the role of the third party as installer of the Brettstapel slabs was not fully considered at the time of this investigation which took place in the summer of 2010.

32. There followed a protracted dispute with the fourth defendant building contractor as to the appropriate resolution of the problem which had arisen. The respondent was centrally involved in that process as engineering consultants to the project. Again the role of the third party as subcontractor to the builder must have been considered even though the third party was not a participant in that dispute resolution process.

33. In the course of 2011, the fourth defendant's building contract was terminated and the company was put into liquidation pursuant to a High Court Order on 4th July 2011. Again as consulting engineers to the project the Court is satisfied to draw the inference that the respondent was aware of this development and that it had the opportunity to consider any consequences which might flow from that event.

34. By reason of the foregoing events, when the plaintiff issued proceedings by way of plenary summons against the architects, the respondent engineers and the construction company (in liquidation) on the 21st September 2012, the respondent was in the Court's view, well placed to assess its situation so as to decide whether or not it was appropriate to seek to join the applicant/third party to the proceedings. The Court cannot overlook the fact that the respondent holds itself out as an expert in engineering and therefore itself possesses the expertise to assess the issue of responsibility for the problems which arose from the use of Brettstapel slabs in the construction of block A of the project. This respondent is not in the same position as a defendant who may be dependent on obtaining independent expert advice before taking a decision to issue third party proceedings.

35. The plaintiff's statement of claim was delivered on the 22nd November, 2012. As already noted it is an extensive pleading running to twenty pages in which every aspect of its claim against each defendant is specifically pleaded. There are twenty one particulars of negligence and breach of duty including statutory duty and breach of contract alleged against the respondent in the statement of claim. They include the following particulars of relevance to this application:

> *(g) Did not sufficiently advise the Employer or the Architect of the need to employ a specialist subcontractor to design and/or install the Brettstapel flooring;*
>
> *(h) Did not check and superintend the engineering design and workmanship of all parties providing engineering design;*
>
> *(j) Failed adequately to specify the means of protecting the wood from moisture ingress, both before the slabs are incorporated into the works and afterwards, until the building is sealed and heated;*
>
> *(k) Failed adequately to cater in the design for the Project for the effects of the expansion that could be expected to occur in the event of the Brettstapel slabs absorbing environmental and atmospheric moisture, thereby causing the slabs to damage the structure when they expanded;*
>
> *(i) Failed to produce a dedicated specification for the installation and/or protection of the Brettstapel slabs, and instead produced general specifications for internal timber and the timber frame, without indicating which category applied to the Brettstapel flooring, and in partial conflict with the specification produced by other professionals;*
>
> *(m) Specified that internal timber should be erected with a moisture content of not less that 21%, without specifying a moisture content for the timber frame;*
>
> *(n) Specified an unsuitable moisture content for internal timber flooring;*
>
> *(o) Failed to specify that the slabs should be maintained, post-installation, at the moisture content at which they were installed;*
>
> *(p) Specified how timber frame units were to be protected from the weather, but failed to specify how to protect internal timber generally or the Brettstapel flooring specifically;*
>
> *(q) Did not carry out site inspections, in particular inspections of the Contractor's work on and protection of the Brettstapel flooring, as often as was necessary.*

36. If the issue of the subcontractor's potential liability to the respondent was not sufficiently clear from these particulars the respondent also had sight at this point of the particulars of negligence and breach of duty and breach of contract pleaded against the Contractor. They are eight in number and include:

> *(a) Did not ensure that the Brettstapel timber was properly protected from atmospheric and environmental moisture during it's travel to the Project site, after arrival on the site, during installation, or after installation;*
>
> *(b) Did not execute and complete the installation of the Brettstapel flooring in accordance with the requirements in and to be reasonably inferred from the Building Contract;*
>
> *(c) Did not execute and complete the installation of the Brettstapel flooring in a proper and workmanlike manner and using good practice;*
>
> *(d) Did not recognize sufficiently quickly, and take any or sufficient measures to stop the expansion of the Brettstapel*

flooring.

37. In the Court's view the statement of claim contained sufficient particulars to permit this respondent to decide whether to join the subcontractor as a third party having regard to;

a) its particular knowledge arising from its involvement in the project and the problems which arose;

b) its expertise as consulting engineers;

c) the detailed particulars pleaded in the statement of claim.

38. In the circumstances of this case the Court is not persuaded that the respondent needed anything more than the statement of claim to decide on the appropriateness of joining the third party. Indeed the Court goes so far as to suggest that this may be one of the few cases in which a requirement to comply with the twenty eight day time limit set out in O. 16 r. 1(3) might be warranted.

39. While the respondent has asserted that it required sight of the replies to particulars in order to brief independent experts to advise it in relation to the third party's liability, it has adduced no evidence to support that assertion. The Court has not been directed to any replies which were crucial or even material to the respondent's decision to issue third party proceedings. The experts retained by it have not been identified nor has the nature or scope of their examination been disclosed. In this regard the Court also notes that the particulars of negligence pleaded against the third party both in the third party notice and the third party statement of claim do not differ materially from those pleaded by the plaintiff in the underlying proceedings, all of which suggests that the respondent was never in fact dependent on the assessment of an independent expert to inform its decision to join the third party/applicant. In these circumstances, the Court is satisfied that the third party notice in this particular case was not issued as soon as reasonably possible within the meaning of s27(1)(b) of the Civil Liability Act 1961.

40. Finally the respondent submitted that the applicant has itself been guilty of delay in bringing its application to set aside the respondent's third party notice and for that reason the court should not set it aside. It is clear from the decision of the Supreme Court in *Boland v Dublin City Council* [2002] 4 IR that just as a defendant must act as soon as "*reasonably possible*" in applying to join a third party so must a third party act as soon as "*reasonably possible*" in seeking to set it aside. Again in the context of the facts of this particular case the court is satisfied that the third party/applicant acted reasonably. An appearance to the third party notice was entered on the 20th June, 2014 and a third party statement of claim was requested. The Court considers that it was reasonable for the third party to seek a statement of claim in circumstances where the claim related to events which had occurred four years previously and where the third party, unlike the respondent, had not been a participant in the dispute resolution process which had taken place over a number of months in early 2011.

41. The mere request for a statement of claim is not such a step in the proceedings as would estop the third party from challenging the issuing of the third party proceedings. It seems to the Court that a party is entitled to know the claim against it before deciding on the approach it adopts to those proceedings. Had the applicant filed a defence before bringing this application, different considerations would apply. In such circumstances a Court might well hold that having opted to defend the proceedings the third party could not then resile from that position by seeking to set them aside. Further the delay involved in taking such a step could also mean that the application had not been brought as soon as "*reasonably possible*"

42. The third party statement of claim was delivered on the 8th August 2014 and following a change of solicitor, the notice of motion seeking an order setting aside the third party proceedings was issued six and a half weeks later on the 24th September 2014. In the Court's view, having regard to the information which required to be digested and the inquiries which required to be made, this was not an unreasonable period for the completion of such work, particularly as the entire period fell within the long vacation. The Court is therefore satisfied that the applicant brought its application as soon as reasonably possible.

43. For the foregoing reasons the Court will set aside the third party proceedings brought by the third named defendant/respondent on the grounds that in the circumstances of this case those proceedings were not brought as soon as reasonably possible as required by s. 27(1)(b) of the Civil Liability Act 1961.