THE HIGH COURT

[2023] IEHC 79

RECORD No 2018/8787p

BETWEEN

CARLA COLEMAN

PLAINTIFF

AND

ANTHONY M JOYCE

PRACTICING UNDER THE STYLE AND TITLE OF

ANTHONY JOYCE & COMPANY SOLICITORS

DEFENDANT

AND

CLEMENT HERRON

THIRD PARTY

JUDGMENT of Mr. Justice Mark Heslin delivered on the 16th day of February, 2023

Introduction

1. On 25 January 2021 a motion was issued pursuant to O. 16, r. 8 (3) of the Rules of the Superior Courts ("RSC") seeking to set aside a Third Party Notice and Order of 30 June 2020. The motion was grounded an affidavit sworn by the Third Party's solicitor, Mr James McElwee on 21 January 2021. A replying affidavit was sworn by Ms. Pauline Taaffe, solicitor for the Defendant, on 21 April 2021, to which Mr McElwee swore a replying affidavit.

Civil Liability Act 1961, s.27

2. Section 27(1) of the Civil Liability Act, 1961 (the "1961 Act") states:

> *"27.—(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 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."*

Order 16

3. The 1961 Act does not prescribe any specific period within which an application to join a Third Party must be made. However, O. 16 of the Rules of the Superior Courts ("RSC") which relate to "Third-Party Procedure" states the following:

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

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

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

(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the Plaintiff and the Defendant and should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff and the Defendant and the third-party or between any or either of them,

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

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

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

Legal Principles

4. In the recent judgment of this court in *Avoncore Ltd. & Ors. v. Leeson Motors Ltd & Ors* [2022] IEHC 415, Quinn J. set out certain relevant principles with respect to an application to join a Third Party, as follows:

"(1) The purpose of Section 27 is to avoid a multiplicity of legal proceedings arising from the same event or set of events.

(2) The obligation to move as soon as possible is imposed to avoid unnecessary delay to the progression of the Plaintiff's action (see Ryan P in Kenny v. Howard [2016] IECA 243). This principle is essentially about protecting the Plaintiff's position while at the same time ensuring that all appropriate parties are before the court.

(3) The court needs to examine the date at which it can be said that the Defendant had sufficient information to enable it to make an informed decision, based on appropriately researched advice as to whether a case for contribution can be made out.

(4) It is not appropriate to join any Third Party a Defendant considers "might" have such a liability. A Defendant must have been in possession of sufficient information to make the informed and advised judgment that such a cause of action is credible.

(5) Where the contribution claim arises from an allegation of professional negligence a factor to be taken into account is the long-established requirement that such an allegation is made and proceedings commenced only after first ascertaining that there are reasonable grounds for doing so. It is an abuse of process to commence professional negligence proceedings without having followed this course of action and, with certain exceptions, having first obtained an appropriate expert report to inform such a decision. (See Doyle v. Flemco, Mangan v. Dockery [2020] IESC 67, Ashford Castle Limited v. EJ Deacy Contractors and Maintenance Limited [2021] IEHC 549 and Connolly v. Casey (op cit).

(6) The court will be required to balance the statutory imperative in s.27(1) to move as soon as is reasonably possible against the duty of a party and its advisors to first obtain the necessary information and advice, including expert reports.

(7) It is not essential that perfection be achieved in terms of the analysis of a potential claim against a Third Party and account must be taken of the balance referred to in the preceding paragraph.

(8) An expert consulted for the purpose of this analysis is himself under a duty to have equipped himself with all information and facts required to make an informed report.

(9) The court will take into account what steps have been taken by the relevant parties to obtain the necessary information and to brief an appropriate expert. This will engage a consideration of whether the expert was instructed and briefed on a timely basis.

(10) Since the purpose of the section is to avoid a multiplicity of legal proceedings and at the same time to avoid imposing delay on the Plaintiff in pursuing its remedy, the question of prejudice to the Third Party is of limited weight. In certain cases, it can be said that a Third Party may even benefit by participating in the trial.

(11) If a Third Party can demonstrate prejudice this is a factor which can be taken into account. However, a relevant consideration will be whether that prejudice has been caused

by the Defendant seeking to join him. (see Buchanan v. BHK Credit Union Limited & Ors. [2013] IEHC 439 and Kenny v. Howard [2016] IECA 243)

(12) The court will have regard to the question of the utility of setting aside the notice in the context of the overall progress of the case and the objective of the section (see Doyle v. Flemco)."

It is fair to say that there was no suggestion that these principles, so helpfully summarised in *Avoncore Ltd. & Ors*, are not relevant to this court's decision on the present motion. To the foregoing list, I would respectfully add certain additional principles which appear to me to be of relevance, given the circumstances of the particular case before this court:

(13) With respect to the 28-day period found in the RSC Finlay Geoghegan J stated at para. 29 in Greene v. Triangle Developments Limited & Ors [2015] IECA 429 that: "…as has been pointed out on more than one occasion, those are not dates with which, in actions such as this, the parties will normally or even be expected to comply" (note: the learned judge was referring to an action brought against builders, arising out of subsidence, in which the Third Party was a firm of engineers, which proceedings were described as "relatively complex". See also the decision of Baker J, in Morey v. Marymount University Hospital [2017] IEHC 285, at para. 18. In addition, see O'Connor v. Coras Pipeline Services Ltd. [2021] IECA 68, wherein, at para. 6, Barrett J stated that: "…in practice the strict timeframe for joinder under the rules is more observed in the breach than the observance…").

(14) 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" (see Denham J. in Connelly v. Casey [2000] 1 I.R. 345, at 351);

(15) The court should not only look "…at the explanations which were given by a Defendant for any purported delay, but also… make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the Third Party notice was or was not served as soon as is reasonably possible" (See Finlay Geoghegan J in Greene v. Triangle Developments Limited & Ors [2015] IECA 429, para. 25)

(16) The complexity of the issues which need to be considered before the procedural step, which has not been taken in time, could properly be carried out, is an important factor. (See Clarke J (as he then was) in Greene v Triangle Developments [2008] IEHC 52, para.2.3)

(17) The statutory requirement to move with reasonable expedition also applies to the bringing of an application by a Third Party to set aside a Notice (see the Supreme Court's decision in Boland v. Dublin City Council [2002] 4 I.R. 409. See also Clúid Housing Association v.O'Brien & Ors [2015] IEHC 398, wherein Murphy J stated, (at para. 40): "It is clear from the decision of the Supreme Court in Boland v Dublin 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 aside.")

(18) "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" (see Denham J in Connolly v Casey & Anor. [2000] 1 IR 345)

(19) The time taken to issue an application to join a Third Party must be looked at relative to "the necessities of the case" or "what is reasonably necessary in the circumstances of the case" (see the judgment of Ryan P. in Kenny v Howard [2016] IECA 243)
(20) "The delay in bringing any application will be measured in the light of the 28-day period provided by the Rules" (see Baker J in Morey v. Marymount University Hospital & Ors [2017] IEHC 285, at para.11);
(21) "…any such permissible delay will generally be measured in weeks and months and not years." (See Hogan J. in Buchanan v. B.H.K Credit Union Limited & Ors. [2013] IEHC 439, at para. 23)"

What is expected of a Defendant

5. What is expected of a Defendant is that they act as soon as reasonably possible in applying to join a Third Party. Thus, this court must decide whether the Defendant in this case made the application for liberty to issue and serve the Third Party notice as soon as "*reasonably possible*" in the sense in which that phrase has been interpreted in the jurisprudence.

6. The obligation to act as soon as reasonably possible does not require a Defendant to have issued an application to join a Third Party at the soonest ever point in time when such an application was a physical, or technical, possibility.

As soon as reasonably possible

7. On the contrary, the nature of the obligation resting on the Defendant was explained by the Supreme Court (Murphy J) in *Molloy v. Dublin Corporation* [2001] 4 IR 52 as follows:

"*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 decisions 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 qualification of the word "possible" by the word "reasonable" gives a further measure of flexibility. As Barron J pointed out in McElwaine v. Paul Vincent Hughes (unreported delivered 3rd April, 1997)*:- *'Clearly as soon as reasonably possible to note that there should be as little delay as possible, never the less use of the word reasonable indicates that circumstances may exist which justify some delay in the bringing of the proceedings'."* (Emphasis added).

The obligation on the Third Party

8. My reading of the authorities is that a Third Party is under an equivalent obligation to act with "*reasonable expedition"* (see *Morey* para. 19) insofar as bringing an application to set aside a Third Party notice, namely, to act as soon as "*reasonably possible"* (see *Clúid Housing Association* para. 40) in seeking to set aside a Third Party notice. In other words, it seems to me that what is expected of a Third Party is that they act as soon as reasonably possible in applying to set aside a Third Party notice, i.e. the Third Party is under no greater or lesser obligation than rests on the Defendant.

9. Given that the most recent application is the one made by the Third Party (to set aside the notice) and having regard to the equivalent obligation resting on both to act as soon as reasonably possible, I asked at the commencement of the hearing whether the parties considered that the proper approach by this court was to, first, see if the Third Party had discharged its obligation and, if so satisfied, to then look at the position of the Defendant. Rather than this 'two-stage' approach, both counsel suggested that all matters should be considered together, with both sides acknowledging that, if the court were to find that the Third Party had not moved with reasonable expedition, such a finding could provide a basis for refusing the third-party's application although the gravamen of the submissions, particularly from the third-party, is that it would not automatically deny the third party the relief being sought.

Submissions

10. I want to express my thanks to Mr Niland BL for the Third Party and to Mr Dowling SC for the Defendant. Both made oral submissions with clarity and skill, which supplemented detailed written submissions. I have carefully considered all submissions made but, regardless of the force and commitment with which something is urged on the court, the outcome of this application is determined by established legal principles applied to the very particular facts and circumstance of this case. It is to the latter I now turn.

Circumstances and general progress of the case

11. Armed with the legal principles set out in this judgment, and based on a careful consideration of the affidavits, the exhibits thereto, and the pleadings in this case, the following chronology emerges in relation the circumstances and general progress of the case.

25 July 2018

12. Having received allegations made by, or on behalf of Ms Carla Coleman, Mr Anthony Joyce sent an email to the Auctioneer on 25 July 2018, which stated, *inter alia* the following:

> *"I am still trying to establish details about the Carla Coleman transaction in order to fully respond to allegations. Could you provide a statement of monies received/paid by you (with dates)…"*

A copy of this email comprises part of exhibit "PT1" to the affidavit sworn by Ms Pauline Taaffe, solicitor, of Beale & Company, solicitors for the Defendant.

25 July 2018

13. The Auctioneer replied by email on 25 July stating inter-alia the following:

> *"From memory, Carla flew from the UK to search for properties. She viewed several properties with me in early 2011.*
>
> *She called some time after her visit and wanted to buy the showhouse in Ballacollig, Mountmellick, Co. Laois. We have just sold the property to another party for €97,000…*
>
> *She insisted that she wanted that exact house. We did not have it in stock. She persisted and enquired if we could recreate that house for her. We agreed to deliver 38 Ard Erin as a "turn key" house for her for the same money as the one she missed out on. The contract was for the "bare bones" shell and the balance was for all the materials and labour to deliver a turn key home. She liaised with this office by email and text with regard to the exact furniture and finishes and delivery date. Extensive work was carried out over a 2–3 month period by MBC contractors and Marie Haslam from this office. When she arrived to take up possession everything was delivered to her exact specification. She was delighted with her purchase and lived there for a good few years.*
>
> *We sold the house for about 2 years ago for €112,000.*
>
> *I too have received a letter from Tom O'Grady's accusing this office of all sorts. I have not responded to his letter. His client must have amnesia.*
>
> ***Hi (sic) client has suffered no loss whatsoever.***
>
> *She bought the house, lived in it, (rented it out through this office also) and sold it through this office.*
>
> *We moved office last year and I didn't keep the old files here. I'll have a look in my shed at home this evening where I have some files archived.*
>
> *We shredded 22 boxes of old files with Thorntons the time we moved. I hope it's not one of them!!"* (Emphasis in original).

14. It is fair to say the foregoing response did *not* address the question asked, which was to provide a statement of monies received/paid by Mr Herron, together with dates. The only sums referred to in Mr Herron's email are (i) "€97,000", being the price of property sold to a different party (with a suggestion, but not confirmation, that Ms Coleman paid the same sum, nor confirmation as to whom any sum was paid) and (ii) "€112,000" said to be the sale price for Ms Coleman's property. A copy of this email also comprises part of exhibit "PT1" to the affidavit sworn by Ms Pauline Taaffe, solicitor, of Beale & Company, solicitors for the Defendant on 24 April 2021.

9 August 2018

15. In circumstances where the payment details sought had not been provided, by email of 9 August 2018, Mr Joyce wrote again to Mr Herron in the following terms:

"It is not helpful that your file may be destroyed. However, I'm sure you have accounting records. Please can you therefore advise the following:

1. *How much did she pay you for 38 Ard Erin? €97,000?*
2. *When did she make the payment?*
3. *Was it direct to your client a/c?*
4. *Can you confirm that the purchase price for the property was €40,000 paid as follows?*
   a. *€3,000 -booking deposit confirmed by Ken Burke in writing;*
   b. *€4,000 – 27.7.2012 transfer to AJ Solrs client a/c 2.8.2012 – contracts sent with AJ Solrs client a/c cheque*
   c. *€33,000 – 22.11.2012 bank draft furnished by Clement Herron sent on 26th November 2012.*
5. *Can you confirm that the total cost (including our fees were included in the amount paid to you)?*
6. *Please provide a detailed statement of monies received and paid by you.*
7. *Can you remember whether you brought any other clients to us in a similar scenario?*

I look forward to hearing from you?"

Again, a copy of this email also comprises part of exhibit "PT1" to the affidavit sworn by Ms Pauline Taaffe, solicitor, of Beale & Company, solicitors for the Defendant on 24 April 2021.

16. It seems to me that the foregoing request was for relevant information which might reasonably be expected to be in Mr Herron's possession. It also seems to me that it was not only relevant to the allegations which, shortly thereafter, gave rise to legal proceedings against Mr Joyce's firm, but also relevant to the question of whether it might be appropriate for Mr Herron to be joined as a co-Defendant or Third Party.

17. Regardless of these observations, it is a matter of fact that Mr Herron did not respond to this 9 August 2018 request for information, at any point. An uncontroverted averment to that effect, namely, "*Mr Herron never responded to these queries*", is made at para 12. of Ms Taaffe's affidavit. As will presently be seen, the failure of Mr Herron to provide this information, and the fact that answers to these queries were not contained in either the Plaintiff's plenary summons (8 October 2018) or in her statement of claim (24 April 2019), resulted in the necessity for the Defendant to raise a notice for particulars (19 July 2019) to which the Plaintiff replied (on 7 October 2019). In other words, the failure by Mr Herron to provide information in August 2018 made it necessary for the Defendant to seek it from the Plaintiff, as a result of which it took over a year before the Defendant was given certain fundamentally relevant information concerning, *inter alia,* what monies were allegedly paid to Mr Herron; what that payment allegedly related to. Later in this judgment I will refer to the Notice for Particulars, item 1 (a) to (d) of which

sought similar information to the queries raised by Mr Joyce in August 2018, but which were never answered by Mr Herron.

8 October 2018

18. The Plaintiff caused a plenary summons to be issued on 18 October 2018 the general endorsement of claim pleads the following: *"The Plaintiff's claim is for damages for breach of retainer, negligence and breach of duty including breach of statutory duty."* Obviously, a plenary summons articulates a claim in legal terms, often under a range of headings but, other than the foregoing, there is no detail of the basis for the claim made. Given the ongoing failure of Mr Herron to reply to the queries put to him by Mr Joyce in August, there could be no criticism whatsoever of the Defendant for not making an application, at that point, for liberty to join Mr Herron as a Third Party, particularly in circumstances where the nature of the Plaintiff's claim against the Defendant was unknown.

24 April 2019

19. Some seven months later, the Plaintiff delivered a Statement of Claim dated 24 April 2019. After identifying the Plaintiff (para. 1) and Defendant (para. 2) the statement of claim begins with the following pleas:

"3. The Plaintiff decided in May 2011 to buy a dwelling house in Ireland and after several contacts with an auctioneer, Clement Herron Real Estate… Portlaoise, Co. Laois [hereinafter the "Auctioneer"] she decided to buy 38 Ard Erin, Mountrath, Co. Laois upon a bid accepted by the vendor for €90,000 together with sundries.

4. The Plaintiff moved into the dwelling house on about 5th July 2011. The Auctioneer arranged to meet her that day and provide her with keys to the Property.

5. From in or about March 2012, the same auctioneer offered to put her in touch with a solicitor who would complete the sale for her.

6. In or around Wednesday the 21st March 2012, Gartland Furey solicitors… [hereinafter "solicitors for the vendor"] sent a letter to the Defendant at its offices at…Dublin 8, entitled "Subject to Contract/ Contract Denied" enclosing Contracts for Sale, Booklet of Title and Copy Scheme Map. That letter stated "We act for the Receiver in this matter and we understand that your client [having earlier identified the Plaintiff by name] has agreed to purchase the Property for a sum of €60,000" the letter goes on to request that if the Plaintiff is proceeding the Defendant should return the said Contract for Sale duly executed together with balance deposit payable.

7. In or around Wednesday the 28th March 2012, the Defendant set up a client's account for the Plaintiff with regard to the purchase of the Property and listed the fee earner as Mr. Kenneth Burke.

8. *In or about a weekday morning in late March 2012 while she was shopping in Aldi the Plaintiff received a call on her mobile phone, number…. from a source unknown. The caller identified himself as Mr. Kenneth Burke, a law clerk employed by the Defendant and he asked her if she intended to purchase the Property. The Plaintiff immediately informed him that she already owned the Property as she had purchased it the previous year in June 2011 and that she had been living in the Property since July 2011.*

9. *Mr. Burke then asked her upon this information supplied by her if she had paid "€60,000 for the property" to which the Plaintiff immediately and emphatically corrected him stating that she had paid "€90,000" for it. Thereafter Mr. Burke went no further into price specifics and the conversation ended quickly thereafter….*"

20. This is followed by a narrative with respect to various steps leading up to the completion of the purchase of, and the registration of title to, the relevant property. It is entirely fair to say, however, that a number of questions arise from the pleas contained in the statement of claim, the answers to which are highly relevant to (a) understanding the claim made by the Plaintiff and (b) assessing the appropriateness (or otherwise) of an application to join Mr Herron into the proceedings. For example:

(i) to whom the Plaintiff allegedly paid €90,000 is not at all clear;

(ii) whether this €90,000 was played to Mr Herron, is not specified;

(iii) given that the vendor is not named, whether Mr Herron was the vendor is unclear;

(iv) precisely what the €90,000 is said to relate to is unclear;

(v) the words "… upon a bid accepted by the vendors for €90,000…" might suggest that the entire amount related to the sale price;

(vi) however, the additional words "…together with sundries" might indicate a different possibility, i.e. that the €90,000 may have included other things, e.g. the cost of works to the house;

(vii) no information is pleaded as to where the €90,000 went, in whole or in part;

(viii) there is a lack of clarity about what, in fact, Mr Herron is said to have done insofar as the Plaintiff's claim is concerned;

(ix) there is a lack of clarity with respect to Mr Herron's status, in law, be that as agent of the Plaintiff and/or another, with respect to the Plaintiff's claim;

(x) when the monies (be that €90,000 or otherwise) are said by the Plaintiff to have been paid over is unclear, insofar as it appears to be the Plaintiff's claim that, prior to the

Defendant being instructed (March 2012), the vendor accepted her offer (May 2011) and she moved into the property (July 2011).

21. Given the foregoing, I cannot accept that it was other than entirely reasonable, indeed necessary, for the Defendant to raise a notice for particulars in order to better understand the nature of the claim against it, and to try and obtain further information which was required in order that the Defendant could consider, *inter alia,* the appropriateness, or not, of taking the significant step of seeking to join Mr Herron into the proceedings. This is because the Defendant lacked basic information of relevance to a decision on the appropriateness of making an application to join Mr Herron as a Third Party, despite having requested same from Mr Herron. In short it could not be said that raising a Notice for Particulars (as opposed to delivering a Defence and applying for liberty to join Mr Herron as a Third Party) was other than reasonably necessary in the circumstances of this particular case.

22. Thus, it would be entirely unreasonable for this court to suggest that 'time' started to 'run' against the Defendant, as of 24 April 2019, for the purposes of assessing alleged delay with respect to the bringing of an application to join the Third Party. Given the range of unanswered questions which arose from the statement of claim (and the ongoing failure of Mr Herron to reply to relevant queries put in the clearest of terms on 18 August 2018) it was simply not possible to serve a meaningful Defence, or to make any decision with respect to issuing a Third Party notice until, at the earliest, the Defendant's Notice for Particulars had been replied to by the Plaintiff. The lack of clarity which I have referred to can also be seen with reference to the following pleas in the statement of claim:

> "*17. On Thursday 26 July 2012, Mr. Burke sent an email to the Solicitors for the Vendor stating that the Defendant was instructed by the Plaintiff in respect of her proposed purchase of the Property, that they had received an amended sales advice note from the Auctioneer revising the sale price to €40,000 and that the Defendant was in a position to return executed contracts together with the deposit. The Defendant sought the vendor's permission to amend the price in the original contracts and permission to amend was granted by return email."*
> …
>
> *32. In or around 21st day of April 2016 the Plaintiff attempted to sell the Property, using the services of the same Auctioneer and a new local solicitor, more conveniently placed. The Auctioneer had negotiated a sale for €112,000.00, but the sale fell through due to planning compliance problems. As a result the Plaintiff's own purchase of a property in Co. Mayo also fell through"*
> …
>
> *36. In around 22nd June 2016, the Auctioneer again negotiated with a new purchaser, the sale of the Property for a lesser amount of € 107,000 but matters relating to services and architect opinion were still unresolved."*
> …
>
> *41. On 19th of May 2017 after the Local Authority had taken the services in charge the Plaintiff succeeded in selling the property for €107,000"*
> …

49. The Defendant is liable to the Plaintiff for breach of retainer, negligence, breach of duty including breach of statutory duty and the Plaintiff has thereby suffered loss, damage, financial hardship, distress and expense."

23. Particulars are pleaded in respect of the foregoing (para.49 (1) to (24)) and this is followed by particulars of special damage, which are pleaded as follows:

"1. Difference in purchase price	*€ 50,000.00*
2. Unaccounted deposit	*€3,000.00*
3. Unaccounted legal fees, stamp duty and registration fees	*€1,465.00*
4. Loss due to aborted house sale	*€ 5,000.00*
5. Architects opinion	*€ 553.50*
6. Solicitors fees wasted on the attempted sale of property	*€ 738.00*
7. Solicitors fees wasted on the fall through Plaintiff's own house purchase	*€ 615.00*
Total	*€ 61,371.50"*

24. It seems entirely fair to say that a range of questions arise from the foregoing pleas including, but not limited to:

(i) Whereas the Defendant is pleaded to have put in writing that Mr Herron (i.e. "the Auctioneer") furnished an amended sales advice note "revising the sale price to €40,000", where is the difference between that sum and the €90,000 (referred to in para. 3) said to have gone?

(ii) Does the Plaintiff claim that the difference (€50,000) went to:

a. Mr Herron?

b. Mr Herron's principal, insofar as it is claimed that Mr Herron was an agent?

c. If so, is it claimed that €50,000 went to the relevant Bank, or to its Receiver?

(iii) What sum(s) if any does the Plaintiff say the Defendant received/retained?

(iv) If the Plaintiff claims that the Defendant facilitated a sale for €40,000 and is not making the case that the Defendant received any monies/any monies in excess of €40,000, on what basis is the Defendant being pursued for the difference between €40,000 and €90,000?

(v) Whereas the Plaintiff pleads that she sold the property for €107,000 (see Statement of Claim ("SOC") para. 36) which is in excess of (a) €40,000 (SOC para. 17); (b) €90,000 (SOC para. 3); and (c) €97,000 (see Mr Herron's email dated 25 July 2018), on what basis does the Plaintiff allege loss and to what extent is that loss alleged to be as a consequence of actions/omissions by the Auctioneer, as opposed to the Defendant?

19 July 2019

25. The Defendant raised a lengthy Notice for Particulars, dated 19 July 2019. Taking numbered as well as sub-paragraphs into account, a total of 46 queries were raised. It seems appropriate to note that this was not a 'boiler plate' document (of the type perhaps seen in personal injuries

litigation where standard queries are commonly raised in respect of pleas commonly made). Just as the claim pleaded is unique one, albeit one in which the Plaintiff's claim is not easy to understand, the notice for particulars could fairly be called a 'bespoke' document.

26. In light of the foregoing, the fact that it was served less than three months following the date which appears on the Statement of Claim does not, in my view, amount to unreasonable delay with respect to seeking necessary clarity, particularly given that the relevant backdrop included the ongoing failure on the part of Mr Herron to provide basic but vital information (sought on 18 August 2018). Nor could it be suggested that it was in any way unreasonable to seek further particulars in order to better understand the claim which was being made. To illustrate this, one need go no further than item 1 of the Notice for Particulars wherein the Defendant sought fundamentally relevant details (with respect to para. 3 of the statement of claim) which were not at all clear from the Plaintiff's pleaded claim:-

> "*a) Please provide detailed particulars of the instructions and criteria given to Clement Herron by the Plaintiff;*
>
> *b) Please provide all documentation, including invoices and receipts, provided by Clement Herron to the Plaintiff and please treat this as a request pursuant to order 31, rule 15 of the rules of the Superior Courts;*
>
> *c) Please provide particulars of what the Plaintiff believed was being acquired for €90,000;*
>
> *d) Please confirm whether the Plaintiff instructed Clement Herron to carry out works to the property at 38 Ard Erin and, if so, please provide full particulars of those instructions*"

27. The foregoing queries relate to the same information sought from Mr Herron, by Mr. Joyce, in the latter's 18 August 2018 email which remained (and remains) unanswered. These queries speak directly to the questions such as the quantum of monies Mr Herron is said to have received, and the purpose for which those monies were paid, on the Plaintiff's case. These are plainly of fundamental relevance bearing in mind that the vast majority of the special damages which the Plaintiff is seeking from the Defendant (€50,000 of €61,371.50) is said by the Plaintiff to be the "*Difference in purchase price*".

28. It is also fair to say that, had Mr Herron replied to the queries put to him in August of the previous year, the Defendant would (i) have had certain information which the Defendant did not have, but which was both relevant and necessary to a consideration of the appropriateness of seeking to join Mr Herron in the proceedings; and (ii) would not have been forced to seek the same information from the Plaintiff.

7 October 2019

29. A little shy of three months later, on 7 October 2019, the Plaintiff furnished Replies. Before proceeding further, it is important to state that, regardless of what might or might not have been stated in the Plaintiff's Replies, such was the relevance (to the Auctioneer's position) of the

questions raised in the Defendant's Notice for Particulars that the Defendant was, in my view fully entitled to await the Replies. Thus, (i) 'time' did not start to 'run' against the Defendant, for the purposes of delivering a Defence, until 7 October; (ii) the Defence was due 28 days after 7 October, i.e. 4 November; and consequently (iii) time began to run against the Defendant on 4 November with regard to a joinder application and (iv) expired 28 days later on 2 December 2019. Turning to the Replies, in relation to item 1 (and for ease of reference I have put the queries in bold ahead of each reply) the Plaintiff stated:

> ***"a) Please provide detailed particulars of the instructions and criteria given to Clement Herron by the Plaintiff;***
>
> *a) The Plaintiff told Clement Herron that she wished to purchase a property as a family home for herself and her young son;*
>
> ***b) Please provide all documentation, including invoices and receipts, provided by Clement Herron to the Plaintiff and please treat this as a request pursuant to order 31, rule 15 of the rules of the Superior Courts;***
>
> *b) The Plaintiff is not in possession of such documentation;*
>
> ***c) Please provide particulars of what the Plaintiff believed was being acquired for €90,000;***
>
> *c) The property, 38 Ard Erin, to include fixtures and fittings;*
>
> ***d) Please confirm whether the Plaintiff instructed Clement Herron to carry out works to the property at 38 Ard Erin and, if so, please provide full particulars of those instructions***
>
> *d) The Plaintiff instructed Clement Herron to carry out internal freshening-up works consisting of cleaning, painting and the purchase of some items of furniture and soft furnishings at an additional cost of €5,000."*

30. In contending that the Defendant has failed to bring an application for liberty to issue and serve a third-party notice as soon as was reasonably possible, the Third Party submits that time began to 'run' against the Defendant from the date of delivery of the Statement of Claim (see para. 13 of the affidavit sworn on 21 January 2021 by Mr James McElwee, solicitor for the Third Party). I feel bound to reject that submission. In view of the lack of clarity on a range of matters, relevant both to the claim made by the Plaintiff against the Defendant and the role of Mr Herron, according to the case made by the Plaintiff, I take the view that it was reasonable and necessary for the Defendant to raise a notice for particulars and that 'time' did not start to 'run' against the Defendant with respect to the latter's obligation to deliver a defence until receipt of the

Plaintiff's Replies to the Defendant's notice for particulars. I am fortified in this view by the details which were, in fact, provided by the Plaintiff in her Replies to Particulars, including the replies at item 1 (a) to (d) above.

31. For example, the Plaintiff's response at 1(c) would appear to constitute confirmation that she paid €90,000 and understood this to be the purchase price of the property. Furthermore, the reply at 1(d) appears to indicate that, on the case made by the Plaintiff, works *to* the house, as opposed to the purchase price *of* same came to "*an additional cost of €5,000".* In view of the pleas in the statement of claim with respect to a revised purchase price of €40,000, this would appear to leave the sum of €50,000 unaccounted for.

Time for delivery of a Defence

32. At this juncture it is important to keep in mind the relevant 'timeline'. Order 21 has since been revised and in its current form states the following:

"*Order 21. Defence and Counterclaim*

(S.I. 490 of 2021) [Effective from 13th November 2021]

1. *Where a Defendant enters an appearance to a plenary summons he shall, subject to the terms of any order of the Court made in the proceedings, including any order made in accordance with Order 122, rule 7, deliver his defence and counterclaim (if any):*
    - *(a) in case he does not by notice require a statement of claim, within **eight weeks** from the entry of appearance or;*
    - *(b) in any other case within **eight weeks** from the date of delivery of the statement of claim or from the time limited for appearance, whichever shall be later*" (emphasis added).

33. A calculation of the time permissible for the delivery of a Defence, strictly in accordance with the *current* Rules, means that the Defendant would have had a period commencing on 7 October 2019 and ending 8 weeks later, on 2 December 2019. Thereafter, 28 days for a Third Party joinder application would expire on 31 December 2019.

34. Order 21, *formerly* (and as of 2019) provided the following:

"*Order 21. Defence and Counterclaim*

- *Where a Defendant enters an appearance to a plenary summons he shall deliver his defence and counterclaim (if any)—*

(a) in case he does not by notice require a statement of claim, within twenty eight days from the entry of appearance; or

*(b) in any other case within **twenty eight days** from the date of delivery of the statement of claim or from the time limited for appearance, whichever shall be later*." (emphasis added)

35. Satisfied that the claim articulated in the Plaintiff's statement of claim was not sufficiently clear and that the Defendant was required to raise a notice for particulars and consider the Replies to same, if one were to calculate the time permissible for the delivery of a defence *strictly* in accordance with the *then* Rules, that time period commenced with delivery by the Plaintiff of Replies to particulars (7 October 2019) and ended 28 days / 4 weeks later (4 November 2019). Thus, the Defendant had a further 28 days under the Rules to issue a Third Party joinder application (i.e. expiring on 4 December 2019).

Relatively complex

36. Against that backdrop, it is appropriate to see what action the Defendant took, from 4 December 2019 onwards, given that the application for liberty to join the Third Party did not issue until 24 February 2020.

12 - week 'delay period'

37. Given that the Defendant's period of delay is 'book-ended' by 4 December (the last day to bring a Third Party joinder application strictly in accordance with the then Rules) and 24 February 2020 (when the application was in fact issued) it comprises a total of some 12 weeks (the "delay period").

38. Before going further, it seems to me appropriate to observe that the proceedings in this case are not at all to straightforward in nature. In my view they deserve to be called at least "*relatively complex"* (the phrase used by Finlay Geoghegan J in *Greene v. Triangle Developments Limited & Ors*) when indicating that the 28-day period provided for bringing an application to join a Third Party is not one the parties, in such cases, normally observe or can be expected to observe in many cases. For the reasons set out in this judgment, this is a case where the Defendant could *not* reasonably be expected to have brought the joinder application within 28 days. The facts and circumstances are such that it was reasonable and in my view necessary to pursue the lines of enquiry which the Defendant prudently decided to investigate by way of information gathering before deciding to seek liberty to join Mr Herron as a Third Party.

4 December 2019

39. It was plainly necessary for the Defendant to consider the contents of the Replies to particulars, as furnished by the Plaintiff. Self-evidently, that took some time, not least given the number of queries raised/replied to and the volume of documentation which accompanied the Replies themselves. It is also clear that, following receipt of the Replies, the Defendant began work on drafting a Defence. I say this because the first paragraph of the letter from the Defendant's solicitors, dated 4 December 2019, begins with the explicit statement that "*We are in the process of finalising the defence and expect to serve same very shortly"*. I take the view that it reasonable, given the particular facts and circumstances, for the Defendant not to (i) immediately file the Defence and (ii) immediately apply to join Mr Herron, as opposed to taking the active steps which the Defendant, in fact, took at that point. These comprised efforts on two different 'fronts' as can be seen from the correspondence sent on 4 December in which the

Defendant pursued, simultaneously, two 'lines of enquiry' i.e. one with Mr Herron and the other with the Plaintiff.

Letter to Plaintiff's solicitors 4/12/2019

40. Looking first at the 4 December sent by the Defendant's solicitors to the Plaintiff's solicitors, it stated inter alia the following:

> "*Based on the information our client has provided to us, the statement of claim served and Replies to Particulars provided,* ***it is clear to us that your client ought to have made a claim against Clement Herron*** *of Clement Herron Real Estate, the estate agent who acted for your client in relation to the purchase of the property in question. It is clear that your client provided funds to Mr Herron in relation to the purchase of the property and had moved into the property, long before our client was instructed. It appears there are numerous issues for Mr Herron in relation to how this matter was dealt with, which we do not propose to go into now, but at this point we wish to note that* ***we consider your client ought to have sued Mr Herron in the first instance.***
>
> *We will be pleading section 35 (1) (i) of the Civil Liability Act 1961 in our client's defence in relation to Mr Herron. This means that we shall be indicating to the court that in the event that Mr Herron is liable to your client and a claim against him is statute barred, then your client adopts any such liability and is contributory negligent in this regard. In such circumstances, without commenting on the issue of the statute of limitations,* ***we consider your client should move quickly to join Mr Herron as a co-Defendant to the proceedings.***
>
> *We would appreciate if you could* ***revert to us to confirm if you intend to join Mr Herron as a Defendant to the proceedings within 14 days*** *of the date of this letter as time is of the essence…*" (emphasis added).

41. This letter is referred to at paragraph 11 of Mr. Joyce's 20 February 2020 affidavit (which was sworn to ground an application for liberty to issue and serve a Third Party notice). A copy comprises exhibit "AJ1" to same. In my view, it was certainly not unreasonable for the Defendant to write a letter in the foregoing terms. Nor could it be said to be unreasonable to await a response. Indeed, a positive reply could obviate the need for any application to seek to join Mr Herron as a Third Party. That being so, I cannot take the view, that the foregoing action comprises evidence of a failure to apply for the issue of a Third Party notice as soon was reasonably possible.

Letter to Mr Herron 4.12.19

42. I am fortified in the foregoing views by the fact that, on the very same date, the Defendant's solicitors also wrote directly to Mr Herron. That letter comprised a detailed setting out of the Defendant's concerns and why, in their view, there were grounds for believing that the Auctioneer had a liability. The letter went on to seek confirmation that he would indemnify the

Defendant. A copy of that letter comprises exhibit "AJ5" to Mr Joyce's 20 February 2020 Affidavit and stated the following:

"*Dear Mr. Herron,*

We act for Anthony Joyce practising under the style and title of Anthony Joyce & Co Solicitors in relation to the above mentioned High Court proceedings issued by Carla Coleman against that firm.

We understand that the Plaintiff Carla Coleman wished to purchase property in Co Laois and contacted you in 2011 in relation to doing so. We understand that Ms Coleman agreed to purchase No 38 Ard Erin, Mountrath Co Laois number 38 which you were selling at the time. We understand that you were instructed to arrange for the fit out decoration of this property for Ms Coleman. It is indicated in the statement of claim served in these proceedings that €90,000 was accepted by you/your client/the vendor for the purchase of number 38 and that the funds were paid directly to you. It is also pleaded that the Plaintiff moved into the property on 5 July 2011. For some reason, which we do not understand, Plaintiff appears to have taken possession of number 38 prior to becoming the legal owner.

We understand that after the Plaintiff took up occupation of number 38, you contacted our client in March 2012, some 9 months later, in order to complete the purchase of the property. We note that initially the vendors solicitors wrote to our client enclosing contract for sale and the booklet of title documents, noting the purchase price was €60,000 but later you sent an amended sales advice notice to our client indicating that the purchase price was €40,000.

We are strongly of the view that our client does not have a liability in this matter where our client completed the purchase of the property on behalf of Ms Coleman, on your instructions, for €40,000. It is entirely unclear where the balance of €50,000 Euro went. We have no information on the agreement between you and the Plaintiff and how it operated; however, it appears to us that there is exposure to liability for you in relation to the claim the Plaintiff is now making.

Please confirm that you will indemnify our client in relation to this claim to avoid formal proceedings being issued against you.

We would ask that you pass this letter to your professional indemnity insurers or any other insurers relevant in respect of this matter and revert to us promptly within 14 days to confirm if that indemnity shall be provided.

We await hearing from you…"

43. I do not accept that the Defendant could fairly be criticised for not writing a letter of this type at an *earlier* point, especially given the fact that as far back as August 2018, the Defendant had

asked a range of questions, the replies to which would have given clarity which the Plaintiff's Replies to Particulars only partially provided. Nor could the Defendant be criticised for putting the auctioneer squarely on notice of the fact that the Defendant considered them to have a *liability* in respect of the Plaintiff's claim, notwithstanding the ongoing 'silence' in response to the queries put. That the Defendant explicitly sought an *indemnity* is also something for which they could not be criticised. Two further comments seem appropriate. First, if this letter produced a positive response to the request for an indemnity, it would obviate the need for any application to seek to join the auctioneer into proceedings. Second, it seems to me that the recipient of this letter could be in no doubt that they were at risk of being joined into legal proceedings if they did not agree to provide the indemnity sought.

44. Taken together, both letters of 4 December 2019 evidence active steps, of a material kind, taken on 2 fronts, which seem to me to have been both reasonable and necessary. They amounted to the seeking of information which, if provided, might well avoid the need for any application to seek to join the auctioneer as a Third Party. That being so, it seems to me self-evident that the sender of these letters was entitled to consider such reply as might be furnished or to press for a reply in order to 'bottom out' the issues raised in both letters *before* taking the significant step of making a formal application for liberty to issue and serve a third-party notice. I now proceed with the analysis of events in chronological order.

12 December 2019

45. By letter dated 12 December 2019, the Plaintiff's solicitor replied in the following terms (a copy of this letter comprises exhibit "AJ2" to Mr Joyce's affidavit of 20 February 2020):

> *"In reply to your enquiry of the 4th December we do not intend to join Mr Clement Herron as a Co-Defendant; having at all times declined to do so and which we again still so decline.*
>
> *In the events which happened* ***Clement Herron was*** *engaged or retained first as the first* ***agent of*** *and his first and prior in time principal was* ***Ulster Bank Ltd and David Carson receiver****. In such circumstances* ***suing him was pointless*** *as any difference exacted in price was prima facie and ever the property of Ulster Bank Ltd, his prior in time principal, and David Carson.*
>
> *We note that you are in the process of finalising the Defence and we look forward to service of same."* (Emphasis added).

46. It does not seem controversial to say that the bases for the statements made in this letter from the Plaintiff's solicitors are not entirely apparent from its contents. Obvious questions would appear to arise including: (i) Is the Plaintiff making the case that the Auctioneer acted only as agent of a Bank/Receiver and not as her agent? (ii) Who does the Plaintiff regard as having "exacted" a difference in price from her? (iii) Why does the Plaintiff regard suing the Auctioneer as pointless? In these circumstances, the Defendant's solicitors replied seeking further clarification and will presently look at the contents of their 2 January 2020 response. Before

doing so, however, it is appropriate to note that, far from 'sitting on their hands' the Plaintiff delivered a formal Defence on 18 December 2019 and I now turn to its contents.

18 December 2019

47. In the Defence, dated 18 December 2018 (and consistent with the approach signalled in its 4 December 2018 letter to the Plaintiff's solicitors) the Defendant pleads by way of preliminary objection that the Plaintiff's claim is 'statute barred'. Reliance is placed on section 11 of the Statute of Limitations Act 1957 (as amended), and on sections 34 and 35 (1) (i) of the Civil Liability Act 1961.

48. Each of the particulars of breach of retainer, negligence and breach of duty including statutory duty pleaded at paragraph 49 of the statement of claim are denied in full. It is also denied that the Plaintiff has suffered loss and damage as alleged or at all and the special damages pleaded in the statement of claim are denied. It is appropriate to quote *verbatim* paragraphs 32 to 34, inclusive, of the Defence, wherein the Defendant makes the following pleas:

"*32. Without prejudice to the foregoing, it is pleaded that the Defendant entered an agreement with Clement Herron whereby he would arrange for the purchase of the property at 38 Ard Erin on her behalf, and would carry out works to the property to render it in 'turn key' condition. The Plaintiff agreed to pay Clement Herron €90,000, to include the purchase price of the property and the works to be carried out on it. The property was purchased and the works carried out to the satisfaction of the Plaintiff, and she lived in it for a number of years before selling it for a higher sum. The Plaintiff also rented out, and subsequently sold, the property through Clement Herron's office. In the premises, the Plaintiff has not suffered the loss pleaded in the statement of claim, or any loss.*

33. Without prejudice to the foregoing, if the Plaintiff did suffer any loss, damage, inconvenience, stress or upset in the manner as alleged or at all, which is denied, same was caused and/or occasioned to the Plaintiff by reason of the Plaintiff's own negligence and/or contributory negligence as follows:

i) Failed to obtain legal advice before agreeing to purchase the property at 38 Ard Erin;

ii) Failed to appoint a solicitor in a timely fashion to transact the purchase of the property at 38 Ard Erin;

iii) Signed documents without taking any or adequate legal advice;

iv) Paid the sum of €90,000 to Clement Heron;

v) Failed refused or neglected to recover €50,000 from Clement Herron;

vi) Failed to have any or adequate regard for her own financial well-being.

The Defendant reserves the right to furnish further and better particulars of contributing actions in due course when same are to hand.

34. Without prejudice to the foregoing, if the Plaintiff did suffer any loss, damage, inconvenience, stress or upset in the manner as alleged or at all, which is denied, same was caused and/or occasioned to the Plaintiff by reason of the acts and/or omissions of a Third Party, Clement Herron in that he:

i) Arranged the purchase of the property at 38 Ard Erin on the Plaintiff's behalf;

ii) Allowed the Plaintiff to purchase the property at 38 Ard Erin without having obtained independent legal advice;

iii) Allowed the Plaintiff to pay for the purchase of the property at 38 Ard Erin before the sale had been fully executed;

iv) Allowed the Plaintiff to pay for the purchase of the property at 38 ordered Erin while there were outstanding planning permission issues pertaining to the property;

v) Allowed the Plaintiff to pay to the vendors a sum significantly in excess of the value of the property;

vi) Failed to communicate the amended sale price to the Plaintiff;

vii) Failed to account to the Plaintiff in respect of the €90,000 paid by the Plaintiff for the purchase of the property;

viii) Failed to adequately or appropriately advise the Plaintiff in relation to the sale of the property;

ix) Failed to discharge his obligations to Plaintiff with due skill care and attention.

In this regard the Defendant expressly pleads that Mr Herron was a concurrent wrongdoer and will rely on section 35 1(i) of the Civil Liability Act 1961 to identify the Plaintiff with the wrongdoing of Mr Herron."

49. In light of the foregoing, the *status quo* as of the end of December 2019 was that (i) the Defendant had served a formal Defence to the proceedings; but (ii) the Defendant's call for the Auctioneer to agree to provide an indemnity had not yet been replied to; and (iii) the Defendant's

call for the Plaintiff to join the Auctioneer as a co-Defendant had produced an assertion that doing so was "*pointless*", based on an alleged 'agency' relationship.

"Pointless"

50. In circumstances where the Plaintiff asserted that it was *pointless* pursuing the proposed Third Party, I cannot take the view that it was other than prudent and responsible for the Defendant to seek further information in relation to this recent and highly material assertion (as opposed to ignoring the assertion and pressing ahead with application to join the auctioneer, notwithstanding). This is because the assertion that it *pointless* to sue the Auctioneer spoke directly to whether there was a *credible* basis for joining him into the proceedings at all. The authorities make clear that "*no party should issue proceedings (or join a Third Party ot existing proceedings) without having a credible basis for doing so*" per Clarke J (as he then was) in *Greene v. Triangle Developments* at para. 4.3). Thus, it was necessary for the Defendant to pursue this line of enquiry further with the Defendant before issuing any application to join the Auctioneer. He did just that in the following manner.

2 January 2020

51. The Defendant's solicitors wrote to the Plaintiff's solicitors on 2 January 2020 (see exhibit "AJ3"to Mr Joyce's affidavit of 20 February 2020) making the following request:

> *"… please provide further details in relation* [to] *the agency relationship as briefly described as this does not clearly explain why joining Clement Herron to proceedings is "pointless".*

The foregoing request for information could hardly be said to be an unreasonable approach for the Defendant to take. On the contrary, the details sought by the Defendant concerned the appropriateness, or not, of an application to join the Auctioneer as a Third Party (i.e. if it was "pointless", as the Plaintiff contended, that he be joined as a co-Defendant, it was equally pointless that he be joined as a Third Party). Thus it was necessary for the Defendant to ask for further details in relation to the alleged agency relationship, bearing in mind that (i) it was not until the letter from the Plaintiff's solicitors, dated 12 December 2019, that such an agency relationship, and the contention that it rendered Mr Herron immune from suit, was asserted for the *first* time; and (ii) no such plea is made in the Statement of Claim or in the Plaintiff's Replies to Particulars.

52. Thus, the decision by the Defendant solicitor's to investigate this issue did not constitute a failure to apply for a Third Party notice as soon as was reasonably possible. Indeed, without receiving and considering such answer as the Plaintiff's solicitor might provide in relation to the request for further details of the 'agency' issue, it could fairly be said that it would have been imprudent, irresponsible and precipitous to seek liberty to issue a Third Party notice (i.e. against someone against whom legal action was "*pointless*", according to the Plaintiff).

30 January 2020

53. The reply by the Plaintiff's solicitor is dated 30 January 2020 and a copy comprises exhibit 'AJ4' to Mr Joyce's affidavit. It states inter alia the following:

"***Clement Herron was retained as agent and fiduciary for Ulster bank and for any Receiver appointed*** *including David Carson, to sell the dwellinghouse, 38 Ard Erin, and remained so long before he met the Plaintiff who ultimately agreed to buy the dwellinghouse at the price nominated by Clement Herron. The* ***difference in actual concluded sale price less the price he misrepresented ("€40,000") to Ulster bank*** *or to its privies or receivers was the property of Ulster bank, whether he was additionally or secondarily purported to act as agent of the purchaser/Plaintiff or not.*

Nor is it actionable fraud against the purchaser ***for a seller, Clement Herron to obtain an advantageous bargain for his principal, Ulster Bank, while stating he is not prepared to take less than € 90,000.*** *In the events which happened the purchaser/Plaintiff could show no legal damage in that,* ***although she indeed lost a better bargain, she lost nothing to which she had any legal right***." (Emphasis added).

54. The contents of this response fortify me in the view that it was entirely reasonable for the Defendant to have pressed for further information. It also seems to me that this response disclosed new or additional information, of direct relevance to both the case made by the Plaintiff against the Defendant and the question of the Auctioneer having a potential liability to indemnify the Defendant. I say this in circumstances where nowhere in the Statement of Claim or in the Replies to Particulars does the Plaintiff plead that (i) the Auctioneer "*misrepresented*" the sale price; (ii) obtained an "*advantageous bargain for his principal*"; and (iii) that the Plaintiff "*lost a better bargain*". Again, keeping the chronology in mind, by the time this 30 January 2020 letter was sent to the Defendant's solicitors, the latter still had received no response to their 4 December 2019 call for the Auctioneer to agree to provide an indemnity.

6 February 2020

55. Mr Joyce has averred (see para. 16 of his 20 February 2020 affidavit) that no response was received from the Auctioneer to the 4 December 2019 letter from the Defendants' solicitors. In those circumstances and less than 7 days after receiving the letter from the Plaintiff's solicitors which made, for the first time, direct accusations against the Auctioneer, the Defendant's solicitor wrote again, to the Auctioneer, by letter dated 6 February 2020, stating *inter-alia* the following:

"We refer to your letter dated 4 December 2019, in which we sought, inter alia, confirmation from you that you will indemnify our client in relation to the above referenced High Court proceedings. We note we have not received a response to the said letter

It is our position that you are liable to the Plaintiff for the damages claimed in the Statement of Claim (copy enclosed) and that you are a concurrent wrongdoer within the meaning of the Civil Liability Act 1961.

Please confirm that you will indemnify our client in relation to this claim. In default of a satisfactory response from you within 7 days, we are instructed to immediately apply to the

High Court for liberty to join Clement Herron trading as Clement Herron real estate as a Third Party to these proceedings.

We would ask that you pass this letter to your professional indemnity insurers or any other insurers relevant to this matter.

We await hearing from you…"

56. Given the very direct accusations made by the Plaintiff against the Auctioneer, as of 30 January 2020, sending the foregoing letter seems to me to have been reasonable and necessary as a precursor to any formal joinder at application. Although I take the view that, by virtue of the 4 December 2019 letter, the auctioneer was already on notice that an application to join him into proceedings was a possibility, it will be recalled that the request for an indemnity had produced no reply. Against that backdrop, the Defendant wrote for a second time (i) repeating the request for an indemnity; (ii) giving a final deadline of 7 days for a positive response; and (iii) stating explicitly that failure to do the foregoing would mean a formal application to seek his joinder as a Third Party.

57. In light of the foregoing analysis, I take the view that for the Defendant to have pursued the two 'lines of enquiry' referred to above *before* issuing a joinder application did not amount to a failure to do so as soon as reasonably possible. It also needs to be kept in mind that, as of 6 February 2020, the Defendant's solicitors had still received no response of any kind from the Auctioneer. Thus, there remained a possibility of a positive response, and however remote that possibility might have been, it seems to me entirely reasonable that the Defendant solicitor would attempt to ascertain the Auctioneer's position *before* incurring the costs of what might otherwise be an unnecessary court application.

10 February 2020

58. I am fortified in the foregoing views by the fact that the second letter to the Auctioneer *did,* in fact, produce a response, by way of a letter dated 10 February 2020, in which he stated, *inter alia*:

"Ms Carla Coleman was not my client during this transaction.

Our team here including builders went over and above normal practice to facilitate a seamless move for this lady from the UK. We delivered a fully spec'd house with all services connected…for her on arrival from the UK.

This was full 'open book' transaction. Carla was at no loss whatsoever and to suggest any wrong doing or dishonesty on our part is ludicrous.

No PI Insurance was held by us at that time. We have given a full account of the matter to your client on numerous occasions.

This transaction is 9 years old. However, we will offer to meet you/your client/the alleged injured party for mediation if you wish to clarify a few point.

Yours faithfully"

59. Without commenting in any way on the merits of the positions maintained by the Plaintiff, Defendant or Third Party (purely a matter for a future trial), it seem fair to say that two key points are made in the Auctioneer's letter i.e. (i) the Plaintiff was *not* his client in relation the transaction which is the subject of the Plaintiff's claim; and (ii) the Plaintiff has suffered *no* loss.

13 February 2020

60. According to the evidence before the court in the present motion, this appears to be the first time the auctioneer has set out his position in writing. I cannot accept that it was unreasonable for the Defendant to have pressed him to articulate his position before issuing a joinder application, given the particular circumstances of this case. Nor do I regard it as unreasonable for the Defendant's solicitors to have sent a response to this letter before issuing a formal joinder application. The reply, which was sent just 5 days later, on 13 February 2020, stated *inter alia*:

"Your letter does not address, in any meaningful way, the issues raised in our correspondence dated 4 December 2019 or 4 February 2020.

We note that you state that no PI insurance was held by you at the time the transaction took place however this issue is a matter which ought to be reported to your current insurers. We note that Section 45 of the Property Services Regulation Act 2011 obliges you to have in force a policy of Professional Indemnity Insurance which adequately covers you in the provision of property services. Please make your current insurer aware of all correspondence received by you in respect of this matter.

We note your willingness to meet to discuss the circumstances which have given rise to this matter and may avail of that in due course. However, in the meantime we reserve our position in respect of applying to the High Court to seek leave to join you as a Third Party to these proceedings…"

24 February 2020

61. Despite making clear in the foregoing letter, that the Auctioneer's response had not, in the view of the Defendant's solicitors, addressed in any meaningful way, the contents of theirs, no reply was received from the Auctioneer or anyone representing him (see averments made by Mr Joyce at para. 16 of his 20 February 2020 affidavit). Eleven days after the aforesaid letter, the Defendant's solicitors issued an application, pursuant to Order 16 r. 1 of the RSC, seeking liberty to issue and serve Third Party notice on "*Clement Herron, trading as Clement Herron Real Estate".*

62. It is a statement of the obvious that to prepare such an application took some time. Bearing in mind that Mr. Herron's response was not sent until 10 February 2020, I cannot regard a period of 14 days from then until the issuing of the application as other than efficient. Indeed, insofar as the Third Party seeks to rely on delay, it seems entirely fair to say that, had he promptly replied to the 4 December letter from the Defendant's solicitor (instead or responding for the first time on 13 February 2020), over two months could have been 'saved'. In other words, I cannot accept that a Third Party can point to a period of what it contends to be a Defendant's delay, and argue that this period should 'count against' a Defendant, where the Third Party can fairly be said to be responsible for that very period of what it calls delay.

63. The application brought by the Defendant was grounded on an affidavit sworn by Mr Anthony M. Joyce, solicitor who made the following averments at paras. 4 and 5;

"4. Whereas it is difficult to discern from the Plaintiff's Statement of Claim precisely what allegation of wrongdoing is made against the Defendant, it is pleaded in broad terms that the Defendant breached its retainer and acted negligently and in breach of duty including statutory duty in the course of the transaction. Similarly, it is difficult to identify how the wrongdoing alleged against the Defendant can be causally linked to the losses allegedly suffered by the Plaintiff. That being so, I have endeavoured to set out the case made by the Plaintiff below as best I can, based on matters pleaded to date.

5. In essence, the Plaintiff appears to claim that whereas she paid the sum of €90,000 to Mr Herron in respect of the purchase of the property, the final sale price paid to the owner of the property (a receiver appointed over the property by Ulster bank was only €40,000). Thus, the vast majority of the damages claimed by the Plaintiff (which total €61,371.50 is made up of the difference of €50,000 between a) what was paid to Mr. Herron and b) the final sale price. The Defendant understands that the original purchase price of the property was to be €60,000 , and the remaining €30,000 given to Mr Heron was to be spent on a fit out of that property, but that the final purchase price was in fact €40,000 ; however, the Defendant is a stranger to the precise terms of the agreement between the Plaintiff and Mr Herron. It is important to observe that the Plaintiff paid the €90,000 - to which the vast majority of her alleged losses relate - to Mr Herron before ever instructing the Defendant in relation to the purchase of the property…"

64. Mr Joyce went on to aver, *inter alia*, that the Plaintiff's allegations of wrongdoing are denied by the Defendant, and he referred to certain pleas in the defence, including at paragraph 34. The consideration given by the Defendant's solicitors to the 'agency relationship' argument (raised by the Plaintiff's solicitors in their 12 December 2019 letter, and elaborated upon in their 30 January 2020 letter) is evident from the averments made by Mr Joyce, at para. 15 of his 20 February affidavit, wherein he states *inter-alia*:

"*For the avoidance of doubt, the Defendant does not accept that Mr Herron was not acting as agent of the Plaintiff. The Defendant's case will be that a relationship in tort and/or contract, or a principal-agent relationship, existed between the Plaintiff and Mr Herron at all*

material times, and that Mr Herron is liable to the Plaintiff for the damages claimed in the statement of claim…"

3 March 2020

65. On 3 March 2020, the Defendant's solicitors wrote again to the auctioneer seeking a response to Mr Joyce's email, dated 9 August 2018. This is averred by Ms Pauline Taaffe at para. 30 of her 21 April 2021 Affidavit. She goes on to aver that no response was or has ever been provided by Mr Herron.

30 June 2020

66. The motion was originally returnable for 16 March 2020 but, due to restrictions as a consequence of the Covid 19 pandemic, it was not heard until 30 June 2020. Plainly there can be no question of delay *after* the relevant application was issued. But order made on 30 June 2020 (Cross J) the Defendant was given liberty to issue and serve the Third Party notice. Although Order 16 specifies 28 days for the bringing of an application to join a Third Party, the 30 June 2020 order specified a lesser period of 3 weeks. The steps which were taken after the making of the 30 June 2020 order comprise the following an averments made by Ms Taaffe, solicitor for the Defendant, at para. 24 of her 21 April 2021 affidavit:

"*This firm then send the third-party notice to the High Court Central office by post, together with a bundle of other documents for filing/issuing. At that stage, owing to Covid 19 pandemic, attendance at the Central Office was permitted for urgent matters only. I cannot be sure of the date it was sent to the central office (as the colleague who dealt with this is no longer with the firm). However, I understand that it was reviewed by the Central office on 22 July 2020, and it was returned to this office by post because the stamp duty and a copy of the order was unfortunately missing from the papers filed. In this regard I beg to refer to a true copy of the docket received from the High Court Central office*…"

67. The foregoing is uncontroverted evidence of the fact that the then restrictions caused by Covid 19 resulted in delay, specifically, delay caused by the necessity to submit papers to the Central office by post, and to receive queries by post, as opposed to 'in person' attendance. The docket which Ms Taaffe exhibits ("PT4") identifies the member of staff who processed the matter; details the queries raised; and then states: *"Please address these corrections/omissions and resubmit to the address below"* (namely the Central Office).

27 July 2020

68. The following comprise uncontroverted averments as to what the Defendant did in response to the Central Office's communication:

"Upon receipt of this docket on 27 July 2020, a colleague arranged for an urgent attendance at the Central office on that same day. The central office accepted the papers, and issued the Third Party notice, and we served the papers (including a booking of pleadings) on Mr Herron by post on the same day" (para. 25 of Ms Taaffe's affidavit).

69. Thus, service of the Third Party notice took place 27 days after the Court's 30 June 2020 Order but 6 days outside the time specified in same. It is fair to say that in both the affidavits sworn by Mr McElwee, solicitor for the 3rd party, and in the Third Party's legal submissions, particular emphasis is laid on this period of 6 days. For example, at para. 17 of Mr McElwee's replying affidavit, he makes inter alia the following averments:

> *"I say that the Defendant's delay of 6 days was in excess of the period prescribed by this Honourable Court and that the failure to comply with the order of the court cannot be trivialised compared with the general actions and/or delays of parties in the litigation process"*

70. Despite the foregoing, a materially different and, in my view entirely appropriate, approach was taken to the 6 – day period by the Third Party's counsel during the hearing. Among Mr Niland's submissions was to indicate that, whilst it was appropriate for the Third Party to point out this 6-day delay, he was going no further than to say that it was a matter for the Court to determine its significance. This was not to make any concession but to take a very sensible approach given the facts.

71. I say this because the facts which emerge from a consideration of uncontroverted averments as to what occurred from 30 June 2020 onwards, entitles this court to hold that the necessary public health response to the Covid 19 pandemic was a material factor in the delay, which totalled 6 days. As well as being, in objective terms, a very short period of delay, this court is entitled to hold that it comprises delay which would not have arisen at all, but for the fact that Covid 19 restrictions prevented 'in person' attendance to issue the application (and to deal, in person, without the need for correspondence, with such queries as arose concerning that application).

72. In short, nothing whatsoever turns on this 6 day period and the appropriate response to it, in the circumstances, is for this court to extend time for the issue/service of the Third Party notice to 27 June 2020, and to deem service good. I now propose to continue looking at events in chronological order, bearing in mind that service of the third-party notice was effected on 27 July 2020.

25 January 2021

73. It will be recalled that the Defendant's delay comprises, in total, a period of *12 weeks* (i.e. from 4 December 2019 to 24 February 2020). By contrast, the Third Party delayed some *6 months* before issuing the present application. Furthermore, although the Defendant has explained his delay with reference to the necessities of these particular proceedings, the Third Party has done no such thing. The Third Party's attitude to his delay is put in the following terms by Mr McElwee at paras. 15 and 16 of the latter's Replying Affidavit:

> *"15….the Third Party acknowledged that he was slow to engage legal professionals as his understanding prior to same was that he has no responsibility or liability in this matter and*

that once your deponent was instructed in or around 19 October, 2020 it was necessary to obtain files and review the case being put before the Third Party and also to instruct counsel.

16 I say that the Defendant has not demonstrated any prejudice suffered by them due to what is characterised as the Third Party's slow manner of engagement in the proceedings and/or issuing the within motion. I say believe and am advised that any perceived delays on the part of the Third Party, as set out by the Defendant are of no consequence to the Defendant's defence and ability to have issued the Third Party notice and therefore have no bearing before this Honourable Court in determining the Third Party's motion to set aside the Third-Party notice."

74. Several comments seem appropriate with respect to the above. First, the foregoing would appear to comprise an averment that the Third Party, in effect, did nothing whatsoever for almost 3 months after being served with the Third Party notice (i.e. he did not even instruct solicitors until 19 October 2020). Second, a belief that he had no responsibility or liability, does not in my view explain or excuse a delay of 6 months, with regard to the bringing of the present application by the Third Party. Third, whilst reference is made to obtaining files, reviewing the case, and instructing counsel, it is fair to say that no specifics are given and nothing is said to account for any specific period of the delay. Fourth, the assertion that the Defendant has not been prejudiced does not seem to me to be of any relevance, i.e. whether prejudice did or did not arise for the Defendant neither explains nor excuses the Third Party's delay in bringing an application which he was under an obligation to bring as soon as reasonably possible. Fifth, in light of the principles laid down by the Supreme Court in *Boland v. Dublin City Council* [2002] 4 I.R. 409, and emphasised by this Court's decision in *Clúid Housing Association v. O'Brien & Ors* [2015] IEHC 398, I regard myself as bound to reject the Third Party's assertion that his delay in bringing the present motion is of *"no consequence"* to and/or has *"no bearing"* on the proper determination of this application. On the contrary, the Third Party was under an obligation to act as soon as "*reasonably possible"* in seeking to set aside the Third Party notice and, having carefully considered all the evidence, I am entirely satisfied that the Third Party has *not* discharged that onus.

Discussion and decision

75. It will be recalled that, when calculated strictly in accordance with Ord. 21 as it then was, a Defence was due by 4 November 2019 (i.e. 28 days after the Plaintiff's replies to Particulars). Thus, the Defendant had a further 28 days to bring an application to join the Auctioneer (i.e. ending on 2 December 2019). Although the Defendant did not issue an application seeking to join the auctioneer until some 12 weeks later, on 24 February 2020, it is very clear that, between 2 December 2019 and 24 February 2020, the Defendant, through his solicitors, took other steps which seem to me to fall squarely within what the Court of Appeal in *Kenny* referred to as "*the necessities of the case*" (see Ryan P. at para. 28).

76. In the manner examined, these steps included (i) efforts to obtain factual information of relevance to the question of the Defendant's claim against the proposed Third Party, in order that the Defendant had adequate information to make a prudent and responsible decision as regards a joinder application; as well as (ii) efforts to try and avoid the necessity to bring an application to join the auctioneer. With respect to (i), it was not until 30 January 2020, and in response to queries by the Defendant's solicitors, that the Plaintiff's solicitors suggested for the first time that the Auctioneer had "*misrepresented*" the sale price (something not pleaded in the Statement of Claim and not clear from the Plaintiff's replies). As to (ii) the Defendant's solicitors pressed the Plaintiff's solicitors to join the auctioneer as a co-Defendant and pressed the latter to provide an indemnity as an alternative to joining him as Third Party.

77. It will be recalled that 4 December coincided with the expiry of the period allowed for the bringing of a Third Party joinder application strictly in accordance the Rules. From the receipt by the Auctioneer of the letter dated 4 December, the latter was aware of the possibility that he would be joined into proceedings. An objective reading of that letter makes that clear, in circumstances where it contains inter alia the following:

> *"We are strongly of the view that our client does not have a liability in this matter where our client completed the purchase of the property on behalf of Ms Coleman, on your instructions, for €40,000. It is entirely unclear where the balance of €50,000 Euro went. We have no information on the agreement between you and the Plaintiff and how it operated; however, it appears to us that there is exposure to liability for you in relation to the claim the Plaintiff is now making.*
>
> *Please confirm that you will indemnify our client in relation to this claim to avoid formal proceedings being issued against you."*

78. Therefore, whilst the delay period runs from 4 December 2019 to 24 February 2020, it seems to me that this delay can be looked at "*less rigorously*" (to borrow a phrase used by Clarke J (as he then was) in *Greene v. Triangle Developments* [2008] IEHC 52 (at para. 3.8)) due to the fact that the Auctioneer was aware, throughout this entire period, that he was at risk of being joined into legal proceedings, should he decline to provide the indemnity sought by the Defendant.

79. If I am wrong in this view, i.e. if an objective reading of the above does *not* allow for a finding that the addressee was put on notice of the possibility that he might be joined into proceedings (if he did not to provide the indemnity sought), that was put beyond doubt by the 6 February 2020 letter from the Defendant's solicitor (which was sent in circumstances where the Auctioneer had not respondent to the 4 December letter) and which stated *inter alia:*

> *"It is our position that you are liable to the Plaintiff for the damages claimed in the statement of claim (copy enclosed) and that you are a concurrent wrongdoer within the meaning of the Civil Liability Act 1961.*
>
> *Please confirm that you will indemnify our client in relation to this claim. In default of a satisfactory response from you within 7 days, we are instructed to immediately apply to the*

High Court for liberty to join Clement Herron trading as Clement Herron Real Estate as Third Party to these proceedings."

80. Even if this Court does *not* attach any lesser weight to either (i) the period of delay after the first letter, dated 4 December 2019, to the proposed Third Party (which, of course, comprises the *entire* 12-week period of delay in this case), or (ii) the period after the second letter, dated 6 February, the outcome of this application is the same. For the reasons set out in this judgment, I am entirely satisfied that the Defendant has discharged the onus of showing that his delay in issuing the joinder application was not unreasonable.

81. This is not a situation where the Defendant 'sat on his hands' during the 12–week delay period. On the contrary, throughout the entire period of delay, the Defendant was responding to the necessities of the case, by taking the steps which have been examined in this judgment. Furthermore, the delay is, in objective terms, not a long period, in the context of progressing relatively complex legal proceedings.

82. Counsel for the Third Party submitted that the joinder application could and should have been brought sooner having regard to the contents of certain documents which, it was submitted, were in the possession of the Defendant. Particular emphasis was laid on two documents. The first is a 26 July 2012 email from Mr Ken Burke who was then an employee of Anthony Joyce & Co to a Ms Orla Higgins of Messrs. Gartlan Furey solicitors which stated the following:

"Subject: No. 38 Ard Erin…

SUBJECT TO CONTRACT/CONTRACT DENIED

Dear Ms Higgins

I am instructed by Carla Coleman in respect of her proposed purchase of the aforementioned property.

I received an amended sales advice note from Clement Herron Real Estate revising the sale price to €40,000.00.

I am in a position to return executed contracts together with a deposit.

[I a]m seeking your permission to amend the price in the contracts that you originally forwarded to this firm on the … March 2012.

You might confirm whether I may do so by return. Alternatively if you wish to issue fresh contracts then that will be fine.

Kind regards…"

83. This document would appear to have been one of those which accompanied the Replies to Particulars, dated 7 October 2019, furnished by the Plaintiff and the following comments seem appropriate; (1) it seems to me that the contents of this email go no further than indicate the Auctioneer's involvement in a transaction as opposed to demonstrating liability; (2) even if this court assumes that the Defendant had a copy of this email to hand at all material times from 2012 onwards, its contents do not answer *any* of the range of queries which the Defendant put to the Auctioneer in August 2018 (and which the Third Party has never answered); (3) nor do the contents of the above email contain answers to the queries which the Defendant was required to raise by way of the 19 July 2019 Notice for Particulars. Similar comments apply, if not more so, to the second document upon which Counsel for the Third Party laid emphasis during the hearing. This was a document dated 16 October 2012 which stated the following:

"To: Ken Burke
16th Oct 2012
Property: 38 Ard Erin, Mountrath, Co. Laois
Dear Sir
Below all outlays to date for this property.

MCB Builders total bill	*€44,832.50*
KWS Interiors etc	*€5,612.88*
Legal and Stamp	*€2,175.00*
Rent	*€9,600.00*
Sub-total	*€62,220.38*

If you have any queries, please contact me at 086….
Yours sincerely
Clement Herron
Auctioneer and Valuer"

84. Several observations seem relevant; (1) this document comprises an exhibit to the replying affidavit sworn on 31 May 2021 by the Third Party's solicitor, Mr McElwee; (2) neither the Third Party nor his solicitor makes any averments with respect to when or if this document was sent to the Defendant and there is no evidence before the court upon which to base a finding that it was in the Defendant's possession; (3) leaving that issue aside, it does not make clear that the Plaintiff paid the sums referred to or to whom; (4) quite apart from the foregoing, a central element of the Plaintiff's claim appears to be that, whereas the purchase price was €40,000 she paid €90,000 (not €62,220.38, being the total in the above document); (5) even if it were to be assumed that the Defendant had a copy of this document at all material times, it is not at all clear to me that it provides the Defendant with knowledge that it was appropriate to take the significant step of joining the Auctioneer into legal proceedings; (6) this document was not furnished in response to the Defendant's list of queries which he put to the Auctioneer by email on 9 August 2018 (no response was ever provided); (7) the contents of this document did not

make it any less appropriate and necessary for the Defendant to raise a Notice for Particulars, dated 19 July 2019; (8) it was only at that point as of the delivery by the Plaintiff of Replies, dated 7 October 2019, that the Defendant was made aware of what the Plaintiff says she paid for works to the property i.e. the response to query 1 (d) referred to "*internal freshening-up works consisting of cleaning, painting and the purchase of some items of furniture and soft furnishings at an additional cost of €5,000";* (9) I have taken 7 October 2019 as the date when the 'clock' started to 'run' against the Defendant with respect to the delivery of a Defence and, thereafter, the bringing of a Third Party joinder application and this produces a 12–week delay period (4 December 2019 to 24 February 2020) which has been examined in this judgment.

85. The crux of the matter is that the delay period has been explained with reference to steps which, in this particular case, were reasonable and necessary. For this court to hold otherwise would, in my view, be to ignore the *dicta* of Murphy J. in *Molloy v Dublin Corporation* [2001] 4 I.R. 52, wherein the learned judge stated: "***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*" (emphasis added). The application to join the Third Party was, in effect, postponed until relevant lines of enquiry had been pursued and legal and commercial judgments made, as the correspondence which was issued by the Defendant's solicitor (dated the 4th, 4th ,12th, and 18th December 2019, and 2nd January, 6th and 13th February 2020) illustrates. Thus, the postponement of a formal application to join the Third party, to 24 February 2020 was reasonable and legitimate, given the particular facts of the case.

86. In deciding whether the Third Party Notice was served as soon as was reasonably possible, I have considered, in objective terms, the whole circumstances and the general progress of the case and am entirely satisfied that the joinder of the Third Party was effected as soon as reasonably possible. This is, without doubt, a situation where the rights and liabilities of the Plaintiff, Defendant, and Third Party, respectively, should be determined in a single set of legal proceedings, given that it is a single set of circumstances, and the roles played by each of these parties in a specific transaction which is at issue. In other words, this seems to me to be a very clear example of what the Oireachtas envisaged that s.27 would address (to avoid multiple different claims) and in my view there is no legitimate basis upon which this Court could deprive the Third Party of the opportunity to participate in the main proceedings.

87. Finally, even if I am entirely wrong in my view that the Defendant acted as soon as reasonably possible, I am entirely satisfied that the Third Party has *not* discharged the onus of demonstrating that he acted with the required expedition. The Third Party failed to bring this application as soon as reasonably possible and, for that reason, he is not entitled to relief and this application must be dismissed.

88. On 24 March 2020, the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made*

or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

89. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs, which should be made. My preliminary view on the costs question is that there are no facts or circumstances which would merit a departure from the 'normal' rule that 'costs' should 'follow the event'. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days.