

THE HIGH COURT

[RECORD NUMBER 2012 9932 P]

BETWEEN

RORY POWER

PLAINTIFF

V.

KING OF THE CASTLE LTD., MANOR PARK HOME BUILDERS LTD., LIFFEY DEVELOPMENTS (DUBLIN) LTD., IRISH ASPHALT LTD.,
LAGAN HOLDINGS LTD., LAGAN CONSTRUCTION LTD., LAGAN CEMENT GROUP LTD. (FORMER LAGAN HOLDINGS LTD.),
LINSTOCK LTD., ROADSTONE DUBLIN LTD., AND CRH PLC.

DEFENDANTS

AND

TRACEY ENTERPRISES DUNDRUM LTD.

THIRD PARTY

[RECORD NUMBER 2015 416 P]

MARGARET ROONEY

PLAINTIFF

V.

LIFFEY DEVELOPMENTS (DUBLIN) LTD., LERNER PARK HOME BUILDERS LTD. (IN RECEIVERSHIP) (IN LIQUIDATION) IRISH
ASPHALT LTD., LAGAN HOLDINGS LTD., LAGAN CONSTRUCTION LTD., LAGAN CEMENT GROUP LTD. (FORMER LAGAN HOLDINGS
LTD.), LINSTOCK LTD., ROADSTONE DUBLIN LTD., AND CRH PLC.

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Judgment of Mr. Justice Robert Eagar delivered on the 29th day of July 2019

1. This is a judgment of this Court on motions seeking an order pursuant to O. 16 r. 8 (3) of the Rules of the Superior Courts setting aside the third party notices served by Liffey Developments (Dublin) Ltd. where the plaintiff is Rory Power, and the third parties are *Keegan Quarries Ltd. and Tracey Enterprises (Dundrum) Ltd.*

2. Further, an order setting aside the third party notice served by Liffey Developments (Dublin) Ltd., (hereinafter *Liffey*) where the plaintiff is Margaret Rooney, and the third party is Tracey Enterprises (Dundrum) Ltd. (hereinafter *TEDL*).

3. Whilst there are certain differences between the reliefs claimed, the differences are of such a limited nature that the court proposes to award one single judgment in relation to the application of *TEDL* and *Keegan Quarries Ltd.* (hereinafter *Keegan*). The court would like to thank the parties involved in this matter for their preparation for this case. Furthermore, the Court notes that submissions were prepared and the matter was heard over three days in the High Court in April and May 2019.

4. The proceedings in relation to Rory Power commenced by concurrent plenary summons issued on the 5th October 2012 in which the third named defendant is *Liffey*. This record number is 9932 P of 2012. The third named defendant sought an order from this court managing the proceedings, for liberty to issue a third party notice and serve same on *Keegan* and on *TEDL*. The third party notice was subsequently served on both the third-parties dated the 14th August 2018. There was some exchange of pleadings, and by way of notice of motion dated the 12th November 2018, *TEDL* issued a motion returnable for the 17th December 2018 for an order setting aside the third-party notice. Equally, on the 17th December 2018, *Keegan* sought a similar order in respect of the Power proceedings setting aside the third-party notice dated the 14th August 2018. The proceedings in which Margaret Rooney is the plaintiff was commenced by a concurrent plenary summons issued on the 21st January 2015 and the 23rd August 2018. The defendant (*Liffey*) obtained liberty to issue a third party notice on *Keegan* and *TEDL*.

5. The court notes that Mr. Michael Howard SC with David Dunne BL instructed by Deirdre Boylan of A&L Goodbody Solicitors appeared for *TEDL*. Mr. Barry Mansfield BL instructed by Lisa Moloney of Byrne Wallace Solicitors acted for *Keegan* and Ms. Sasha Gayer SC with Mr. James Phillips BL instructed by Harrison O'Dowd Solicitors appeared for *Liffey*.

6. Both properties were developed in the Ongar estate.

Submissions by *TEDL*

7. Counsel on behalf of *TEDL* made the following submissions. The plaintiff in the Power proceedings claims against the defendants including *Liffey* for loss and damage caused to his residential property known as 1, Williams Lane, South Ongar, Dublin 15, *inter alia* by reason of the use of aggregate infill in the construction of the property which is alleged to have contained pyrite and elevated levels of sulphate. The same claims were made in the Rooney proceedings concerning a residence at 1, Park House, Ongar, Dublin 15. The first appearance entered on behalf of *Liffey* in relation to the pyrite related proceedings was filed with the High Court on the 11th September 2012.

8. Counsel referred to the affidavit of Anne Cooper sworn on the 9th July 2018 in support of its application to join *TEDL*. Ms. Cooper claims that *Liffey* sourced quantities of infill and aggregate from *TEDL* for use in the construction of a residential development at Ongar, Dublin 15 in which both properties are situated. Furthermore, she claims that it purchased quantities of infill and aggregate from *TEDL* costing in excess of €200,000. Counsel submitted that *Liffey* claims against *TEDL* to be indemnified against the plaintiff's claim and the cost of the action or contribution amounting to a full indemnity in respect of the plaintiffs' claim on the grounds that any loss and damage sustained by the plaintiff was caused solely or in the alternative, contributed to, by the negligence or breach of duty, including statutory duty and/or breach of contract in or about the production supply and sale of aggregate and infill for use by *TEDL* in the development. It was submitted that the claim is an old one, having been articulated as early as the 3rd November 2011. He said that *Liffey* however failed to issue a third party notice in the Power and Rooney proceedings until August 2018.

9. He referred to s. 27 (1) of the Civil Liability Act 1961 entitled "*Procedure for claiming contribution*". which provides:-

"A concurrent wrongdoer who is sued for damages or 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 the contribution is claimed.

He referred to the Board of Governors of *St. Laurence's Hospital v. Staunton* [1990] 2 IR 31 [hereinafter *Staunton*], per Finlay C.J.: -

"I am quite satisfied that upon the true construction of that sub-section that the only service of a third-party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third party notice claiming contribution against a person who is not already a party to the action, is a right to serve a third-party notice as soon as is reasonably possible".

10. He also quoted from *SFL Engineering v. Smyth Cladding Systems Ltd.* [1997] IEHC 81, (hereinafter *Smyth*) where Kelly J. (as he then was) stated: -

"A defendant who wishes to join a person as a third party to proceedings must serve a Third Party Notice upon such person as soon as is reasonably possible.

The temporal obligation to which I have just referred is to be found both in the relevant statutory provisions, the Rules of the Superior Courts and the jurisprudence which has developed on this topic".

11. Kelly J. referred to O. 16 of the Rules of the Superior Courts which governs third party procedures, and quoted from O. 16 (1) (iii) which provides: -

"Application for leave to issue the third party notice shall, unless otherwise ordered by the Court, be made within 28 days from the time limited for delivering the defence or, where the application is made by the defendant to a counterclaim, the reply".

12. Kelly J. stated at para. 6 of his judgement in *Smyth*: -

"This provision of the Rules of the Superior Courts gives expression in a concrete form to the temporal imperative contained in Section 27(1)(b) of the 1961 Act. It is to be noted that the Rules of Court require the application to be made not within 28 days from the delivery of the defence in the proceedings but within 28 days from the time limited

for delivering the defence. That time is fixed by Order 21 of the Rules of the Superior Courts”.

13. Kelly J. then reviewed the jurisprudence. He quoted from *Staunton* and stated: -

“The view expressed by Finlay C.J. in this case is clearly authority for the proposition that the obligation to serve a third party notice as soon as is reasonably possible is mandatory in nature and a failure to comply with that temporal obligation may lead to the application for liberty to issue and serve the third party notice being refused or, if granted, being set aside on the application of the newly joined third party”.

14. Counsel on behalf of *TEDL* also quoted from Delaney & McGrath on Civil Procedure, 4th Ed., 2018 at para. 9-27 when considering s. 27 (1) (b): -

“Given the increasing reluctance on the part of the courts to condone delays in procedural matters, a less lenient approach may be adopted in the future”.

He also quoted from Article 6 of the European Convention of Human Rights which imposes an obligation on the State to avoid delay in civil (and criminal) trials. He said it was not open to a defendant to disregard the provisions of s. 27 (1) of the Civil Liability Act 1961 which was enacted by the Oireachtas. The provision is to be enforced by the court and given effect to. He made the following points in regard to the relationship between *Liffey* and *TEDL*: -

(i) *Liffey* has been dealing with *TEDL* for a number of years commencing in or about 1983.

(ii) *Liffey* is in possession of invoices and dockets dated from the 28th June 2002 onwards which are clearly marked “Tracey Enterprise Developments (Dundrum) Ltd” evidencing deliveries to the development and other matters.

(iii) On the 3rd August 2011, Eugene F. Collins solicitors on behalf of the underwriters of the Premier Guarantee Scheme which provided assurance to homeowners in the development informed *Liffey* of major damage in houses constructed by *Liffey* in the development caused by defective material leading to pyrite heave and provided an opportunity to *Liffey*’s legal insurers to inspect.

(iv) Most notably, on the 3rd November 2011, *Liffey* wrote to *TEDL* furnishing the letter of 3rd August 2011 and related correspondence. *Liffey* put *TEDL* on notice of a potential legal claim and requested an immediate indemnity from *TEDL*.

(v) The Power proceedings were issued by Eugene F. Collins by way of concurrent plenary summons on the 5th October 2012, almost one month after Paul Keogh & Co. solicitors entered an appearance for *Liffey* in proceedings entitled *Finn & Ors v. The King of the Castle Ltd & Ors* 2012 3632 P.

(vi) On or prior to December 2013, *Liffey* was on notice that significant investigation work was carried out to identify the extent/cause of the damage to houses in the development. *Liffey* was also informed that experts examined the materials used in its construction and expert views were canvassed as to the practice in quarries at the relevant time and the extent to which quarry operators knew or ought to have known of the risks involved in supplying material containing pyrite for use in the construction of housing.

(vii) On the 17th December 2013, the plaintiff issued a motion seeking an order to stay the sixteen sets of related proceedings listed in the motion relating to the development and for the related proceedings to abide by the outcome of the Power proceedings. *Liffey* was served with the notice of motion returnable for the 17th January 2014.

(viii) On the 18th January 2014, Harrison O’Dowd, solicitors for *Liffey*, wrote to Eugene F. Collins solicitors for the plaintiff and stated that the infill material was supplied to the development by *TEDL* (and a number of others including *Irish Asphalt Ltd.*, *Roadstone Dublin Ltd.*, and *Keegan Quarries Ltd.*) On the 17th January 2014, the solicitors for *Liffey* filed an appearance for *Liffey*. The plaintiffs’ motion was adjourned to the 21st March 2014.

(ix) On the 21st January 2014, the Supreme Court appeal in the Elliot Construction proceedings (*Elliot Construction v. Irish Asphalt Ltd.*, 2011 284) concluded and judgment was reserved.

(x) On the 18th February 2014, the plaintiff delivered a statement of claim to the defendants including *Liffey*.

(xi) On the 20th March 2014, *Liffey*’s solicitors inquired of the solicitors for the plaintiff if *Keegan* or *TEDL* had been named as defendants in the Power proceedings or any of the proceedings related to the development. On the 21st March 2014, the application before the court was adjourned to the 20th June 2014. On the 23rd April 2014, the plaintiff furnished *Liffey* with the detailed spreadsheet of particulars arising from the plaintiffs’ statement of claim and on the 20th June 2014, the plaintiffs’ application was adjourned to the 25th July 2014 for mention.

(xii) In July 2014 an engineer was appointed by the plaintiff in the Rooney proceedings to inspect cracks in the walls of the property both internally and externally.

(xiii) On the 14th July 2014, the solicitors for the plaintiff confirmed to *Liffey*’s solicitors that it was the case that the underwriter continued to receive applications for cover in respect of additional properties and that further proceedings may be issued in respect of those houses. Eugene F. Collins said they would notify the relevant defendants promptly in the event that further proceedings had commenced, provide particulars in the format contained in the spreadsheets and apply to include such cases in the case management process.

(xiv) On the 15th July 2014, the solicitors for the plaintiff confirmed to *Liffey* that neither *TEDL* nor *Keegan* had been named as defendants in the proceedings. (The court notes that this is a very significant date as at that stage *Liffey* were aware that neither *TEDL* nor *Keegan* had been named as defendants).

(xv) On the 2nd December 2014 the Supreme Court handed down decision in the Elliot Construction proceedings.

(xvi) On the 19th December 2014, the Supreme Court referred a number of questions to the CJEU in *James Elliot Construction v. Irish Asphalt* (C-613/14).

(xvii) On the 21st January 2015 the Rooney proceedings (also relating to the Ongar estate) were issued by Eugene F. Collins by way of concurrent plenary summons.

(xviii) On the 22nd December 2014, Maples solicitors for Irish Asphalt issued a motion seeking an order directing that no further steps should be taken in the Power proceedings by reason of the *James Elliot Construction v. Irish Asphalt* (C-613/14).

(xix) The order of Kearns P. dated the 15th January 2015, in the case of Rory Power (9932 P of 2012), directed that no further steps be taken in these proceedings (save for the joinder of parties) pending the determination of the reference made by the Supreme Court on the 19th December 2014 to the Court of Justice of the European Union, for preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU) in the proceedings bearing record numbers 2008/4767 P between *James Elliot Construction Ltd. v. Irish Asphalt Ltd.* On the 21st January 2015, the Rooney proceedings were issued by Eugene F. Collins by way of concurrent preliminary summons.

(xx) On the 27th October 2016 the CJEU delivered its judgment in *James Elliot Construction v. Irish Asphalt* (C-613/14).

(xxi) On the 10th November 2017 the plaintiff issued a statement of claim to the defendants including *Liffey*, in the Rooney proceedings.

(xxii) On the 20th November 2017, the plaintiff delivered an amended statement of claim in the Power proceedings.

(xxiii) On the 22nd December 2017, *Liffey* raised notices for particulars and the amended statement of claim in the Power proceedings and the statement of claim in the Rooney proceedings.

15. On the 16th December 2018, the plaintiffs in both the Power and Rooney proceedings replied to *Liffey's* notice for particulars.

16. On the 26th April 2018 *Liffey* delivered defences in the Power and Rooney proceedings.

17. On the 11th May 2018 the plaintiffs delivered a defence in reply to both the Power and Rooney proceedings.

18. On the 22nd June 2018 *Liffey* obtained directions from this Court to issue any motion to join a third party to any relevant legal cases which included the Power and Rooney proceedings returnable for the 16th July 2018.

19. On the 9th July 2018, *Liffey's* solicitors filed an appearance for *Liffey* in the Rooney proceedings.

20. On the 9th July 2018, *Liffey* issued notices of motion seeking orders in the Power and Rooney proceedings granting leave to issue and serve third party notices. On the 9th July 2018, *Liffey* issued notices of motion seeking orders in the Power and Rooney proceedings granting leave to issue and serve third party notices upon *Keegan*.

21. On the 23rd July 2018, *Liffey* secured orders in the Power and Rooney proceedings granting liberty to serve third party notices on *TEDL* and *Keegan*.

22. On the 14th August 2018, *Liffey* issued the third party notices relating to *TEDL*.

23. Counsel on behalf of *TEDL* asked the court to reject the submission that *Liffey* had complied with reasonable dispatch to join as third party. Counsel also asked the court to consider the following: -

(i) *Liffey* was notified of the damage in the development caused by pyrite heave on the 3rd August 2011. *Liffey* sought an immediate indemnity from *TEDL* on the 3rd November 2011.

(ii) A concurrent plenary summons in the Power proceedings issued on the 5th October 2012.

(iii) *Liffey* was served with the Power proceedings on or before the 4th October 2013.

(iv) From the 16th January onwards *Liffey* sought to have *TEDL* joined as a defendant by the plaintiff which the plaintiff made clear it was not going to do.

(v) In July 2014, *Liffey* was made aware of other possible proceedings with identical core complaints and causes of action.

(vi) By order of the President of the High Court dated the 5th January 2013, they then consented expressly stated there was no stay in the joinder party.

(vii) The concurrent plenary summons in the Rooney proceedings issued on the 21st January 2018.

(viii) *Liffey* did not issue any motion to join *TEDL* as a third party until the 9th July.

(ix) *Liffey* did not issue the third party notice until the 14th August 2018.

24. He argued that *Liffey's* default is all the worse because at the stage these proceedings commenced, *Liffey* had already been involved in the pyrite litigation for a number of years. He said that on the 21st January 2015, the proceedings in Rooney were issued by Eugene F. Collins by way of concurrent plenary summons but it took *Liffey* until the 14th August 2018 to issue the third party notice. Bearing in mind the obligation of *Liffey* to join *TEDL* as soon as reasonably possible under s. 27 (1) of the 1961 Act, the foregoing were in clear breach of that mandatory requirement.

25. Counsel on behalf of *TEDL* suggested that a number of observations arise from the case law: -

(i) The onus of proving that any delay is not unreasonable is borne by *Liffey*, not *TEDL* and he cited *Molloy v. Dublin Corporation* [2001] 4 IR 52. Murphy J. in that case stated: -

"In any event the question whether a defendant has discharged the onus imposed upon him of proving that the

application for leave is brought 'as soon as reasonably possible' will depend upon the examination of the facts of each particular case as was pointed out in Connolly v. Casey".

(ii) Any assessment of circumstances pointed to by a defendant to excuse or explain delay must be grounded on evidence, that need for evidence was emphasised by Denham C.J. in *O'Byrne v. Michael Stein Travel Ltd.* [2012] 1 ILRM 297: -

"There needs to be evidence as to the reasons for, and excuses for, a delay".

(iii) An objective assessment of the explanations and excuses is required, the question is whether, objectively speaking, the third party notices were served as soon as reasonably possible or not, in light of the full circumstances.

26. Counsel argued that the need for an objective assessment was stressed by Finlay Geoghegan J. in the Court of Appeal in *Thomas Greene & Anor v. Triangle Developments Ltd. & Ors* [2015] IECA 249, following a review of the Supreme Court authorities. She stated at para. 25 & 26: -

"In my view, following the approach of the Supreme Court in Connolly -v- Casey, it is incumbent on a trial judge, when faced with an application such as the present before the High Court, to look not only at the explanations which were given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third party notice was or was not served as soon as is reasonably possible.

I would respectfully say that it appears to me that the trial judge in this case fell into error by not making that objective assessment. It appears to me he was justified on the evidence before him in saying that there had not been a full or proper explanation, particularly by reason of the lack of any evidence from Orr as to why the expert's report was not obtained before 9th December, 2005, but in accordance with the Supreme Court judgment in Connolly v. Casey, that should not have been the end of the assessment. He was required to consider objectively whether, in the whole circumstances of the case and its general progress, the period of time up to the date of service of the third party notice and in the special circumstance case, 9th March, 2006 meant that it was served as soon as was reasonably possible".

27. He then addressed the issue of the defendant's knowledge, and he said that when a defendant first knew that an indemnity might be sought against a third party is a critical part of the "circumstances" and he quoted Delaney & McGrath on Civil Procedure, 4th Ed., 2018 at para. 9.34: -

"Clearly, in order to assess whether the defendant acted 'as soon as reasonably possible', it will be necessary for the court to establish at what point the defendant possessed sufficient knowledge to appreciate that a third party might bear responsibility in relation to the plaintiff's claim".

28. He quoted from the Supreme Court in *Staunton* as follows: -

"It is clear that from the facts which I have outlined that probably from the month of July, 1984, when particulars were filed, the defendants were aware of the nature of the claim which has been brought against them by the plaintiff. They may have been unaware as to whether that claim would succeed or not, but they were aware of what the nature of the claim was, and it must follow, it seems to me, that they were also aware at that time of any potential claim for contribution they might have against this third party".

He said that as early as the 3rd November 2011, *Liffey* sought an indemnity in *TEDL*. In the correspondence, *Liffey* put *TEDL* on notice of a potential legal claim that may arise "as a direct result of material supplied by your company to this project". The letter continued by requesting "an immediate indemnity from your company in the event that legal proceedings are issued against *Liffey Developments (Dublin) Ltd*".

29. On the 24th July 2014, *Liffey* through its solicitors specifically raised the issue of joining *TEDL* and the other third party joined (*Keegan*) by *Liffey* on the 23rd July 2018 in a letter to the plaintiffs' solicitors claiming *Liffey's* solicitors called on the plaintiff's solicitors to confirm whether or not they intended to join *TEDL* and *Keegan* to the proceedings. In the affidavit of Peter Dineen the following allegations against *TEDL* were made: -

"Infill to the development was to my clients' knowledge, supplied by . . . Tracey Enterprises and the omission from the proceedings has complications where any claim for indemnity and contribution which my client may have against these entities notwithstanding the actual knowledge of Liffey as early as 2011 and the allegation contained in Peter Dineen's affidavit of the 24th September 2014, no step was taken at any stage prior to June 2018 to apply for liberty to serve third party notices on TEDL or any other third party".

30. Delay in obtaining expert evidence can be relevant in a claim for professional negligence where it is reasonable for a defendant to await an expert report; no such issue arises here as the claim is not one of professional negligence.

31. At all material times, he argued, that *Liffey* was in possession of the evidence which is now relied.

32. Counsel also referred to the invoices in the affidavit of Ms. Anne Cooper, in relation to the affidavit sworn on the 6th February 2019 and the exhibits thereto, which according to *Liffey* form the basis of the claim for indemnity against *TEDL*. Each of these invoiced and delivery dockets are titled "Tracey Enterprises (Dundrum) Ltd". The details on the dockets include the date of delivery, quarry location, delivery site reference, the product description, the quantity supplied, delivery vehicle registration numbers and the driver's name. These invoices and documents summarised were in the possession of *Liffey* since 2002.

33. He then dealt with the explanations for delay provided by *Liffey*. In effect, these are the reasons: -

(i) It was appropriate to await the appeal in the Elliot Construction proceedings and reference to the CJEU.

(ii) Allowance must be made from litigation that may be complex, expensive and involve a multiplicity of parties.

(iii) In 2017, it was necessary to see what defendants were going to be active in these proceedings.

(iv) *Liffey* required the benefit of expert advice and

(v) By mid – 2018 it was apparent that the proceedings in which the case management applied were still entirely based on the assertion that the infill used in the properties contained pyrite.

(vi) He noted that despite being called upon to do so the plaintiff in each of the Power and the Rooney proceedings had refused to join *TEDL* to these proceedings. This is despite the claim that *TEDL* supplied the infill since 1983. He pointed out that once the plaintiff had declined to join *TEDL* as a “defendant” it was left to *Liffey* Developments to do so.

(vii) When an application for a stay was moved on the 15th January 2015 the order secured expressly excluded any application for a joinder party. Prior to that, *Liffey* was the only defendant promoting the joinder of other parties. After this, no steps were taken to join any third party, the primary explanation that was put forward to justify the delay is as a result of the appeal in the Elliot Construction proceedings and references to the CJEU, the decision was taken not to seek to join *TEDL*. *Liffey* claims that a prudent and reasonable thing to do was not to seek leave to issue third party proceedings in the light of the Elliot reference.

(viii) There is no suggestion in this explanation that any inadvertence arose rather than what is suggested by Ms. Anne Cooper on oath is an explanation based on the decision not to join *TEDL* because of the Elliot reference. Counsel said however there was no contemporaneous evidence such as the receipt of legal advice to support the claims under this heading.

34. He also said that the Elliot reference had a direct bearing upon the litigation, but he said that did not mean that it had any bearing on the joinder of a third party by *TEDL* and a review of the third party’s statement of claim dated the 17th October 2018 revealed that there are no pleas concerning the “*Harmonised Standard, the Technical Standards Directive, the Construction Products Directive, or the use of CE marks which were the issues engaged in the Elliot reference*”, and he submitted that the answer of the CJEU had no bearing on the facts relied upon by *Liffey* to claim an indemnity from any of the third parties. He pointed to the affidavit of Anne Cooper which suggested that allowance must be made for the fact that the litigation may be complex, expensive and involves a multiplicity of parties however an examination of the third party’s statements of claim reveal no complexity arising on *Liffey*’s pleaded claim for an indemnity. He said that *Liffey* identified no change of circumstances involving any new fact or evidence emerging in 2018. At para. 4 of her affidavit, Ms. Cooper is in a position to set out details concerning the dates during which material was allegedly delivered by *TEDL*. The point that was not addressed directly by Ms. Cooper is that on her own evidence, *Liffey* was in possession of the material since 2002. He said that Ms. Cooper says by way of excuse that *Liffey* is the only “*active defendant in the proceedings which has a builder/subcontractor*” and he said that she could not possibly suggest that *Liffey* only appreciated in 2018. In other words the only builder/subcontractor to be sued as a defendant in these proceedings.

35. He also said it was obvious to *Liffey* that none of the other parties would be joining *Keegan*, Murphy Concrete Manufacturing Ltd. or *TEDL* into the proceedings and the plaintiff made that abundantly clear in 2014.

36. Another aspect was addressed by counsel and that was the failure to brief an expert. He said it was surprising that *Liffey* only briefed an expert in November 2017. He said that any failure to brief an expert did not prevent *Liffey* seeking an indemnity from *TEDL* on the 3rd November 2011, and he quoted from Clarke J. in *Greene & Anor v. Triangle Developments Ltd., & Ors* (op. cit.); -

“On the other hand it must be acknowledged that the position of a party who is faced with delay on the part of its professional advisers (whether that be delay on the part of its own lawyers or delay, as here, on the part of an expert whose report is necessary to enable the next procedural step to be taken) depends on the extent to which it could be regarded as reasonable for the party to have had it within its capability an ability to do something about the delay concerned and the extent to which it may be reasonable to attribute delay on the part of those professionals involved to their client What may be reasonable depends on the circumstances of the case”.

37. Counsel for *TEDL* said that logically speaking the existence of prejudice (or not) has no bearing on whether a defendant acted as soon as reasonably possible (or not) in line with s. 27(1) (b) of the 1961 Act and he quoted Finlay J. in *Staunton*: -

“In considering an obligation of this sort the court is not concerned with any question of prejudice arising as a result of the delay in the time for the liberty to join the third party proceedings”.

He quoted from Kelly J. (as he then was) in *Smyth* which implied the same. He said that the third party notices were served in contravention of s. 27(1)(b) of the 1961 Act and are invalid and should be set aside.

Keegan Quarries Ltd.

38. The court will now consider the submissions made on behalf of *Keegan*.

39. Mr. Rafferty BL said that in the within proceedings the plaintiff had claimed against the defendants including *Liffey* for loss and damage caused by a residential property located at 1, Park House, Ongar Dublin 15 by the use of aggregate infill in the construction of the property which is alleged to have contained pyrite and elevated levels of sulphur. *Liffey* claimed that it sourced infill and aggregate from *Keegan* for use in the construction of a residential property in which the plaintiff is situated and he said that *Liffey* now seeks an indemnity against *Keegan* in respect of the plaintiff’s claim on the grounds that any loss and damage sustained by the plaintiff was caused or contributed to by *Keegan*’s actions and supposedly supplying the infill used at the development. He set out what he believed to be the timeline. The infill was supposedly supplied to *Liffey* by *Keegan* during the period July 2000 to May 2002. The prior proceedings were commenced on the 5th October 2018.

40. Counsel on behalf of *Keegan* said that the full chronology of the proceedings had been set out by *TEDL* in respect of its identical application. *Keegan* will rely upon this chronology as applies equally as it does to *TEDL*, but he pointed out dates most pertinent to his client were as follows: -

(i) The infill was supposedly supplied to *Liffey* by *Keegan* during the period from June 2000 to May 2002.

(ii) The Power proceedings were commenced on the 5th October 2012.

(iii) The Power proceedings were stayed by order of this honourable Court (Kearns P.) on the 15th January 2015 subject to the caveat that the appeal did not apply to “the rejoinder of parties”.

(iv) The within proceedings were commenced by the plaintiff on the 21st January 2015. *Liffey's* defence was delivered on the 28th April 2018. *Liffey's* amended defence was delivered on the 24th July 2018. The third party notice issued on the 14th August 2018.

(v) The third party statement of claim was delivered on the 27th October 2018.

41. He said that the application was grounded on the affidavit of James *Keegan* sworn on the 12th December 2018 and a supplementary affidavit of James *Keegan* sworn on the 22nd February 2019. He advised that the following grounds were advanced by *Keegan* to set aside the third party notice:

(a) That *Liffey* did not serve the third party notice as soon as was reasonably possible.

Third party procedure before this Court is governed by O. 16 of the RSC in particular O. 16, r. 8 (3) provides that third party proceedings may be set aside at any time. He said the most frequent reason for setting aside third party notice is that it was not served in a timely fashion. He quoted from Delany and McGrath on Civil Procedure, 4th Edition, 2018, that "*the rationale behind requiring the service of a third party notice within a relatively short timeframe was explained . . . as being 'to put the contributor in as good a position as possible in relation to the knowledge of the claim and opportunity of existing it'. He also quoted from Kelly J. as he then was in SF Engineering v. Smyth's Cladding Systems Ltd. previously cited as a 'temporal imperative' to serve the third party notice 'as soon as is reasonably possible'.*"

42. He said that the jurisprudence interpreting the temporal requirements of s. 27 (1) of the 1961 Act is set out in some detail in *TEDL's* outlined legal submissions and *Keegan* believes there is no need to repeat the applicable legal principles in full but he wanted to place some emphasis on the jurisprudence as follows: -

(i) The onus of proof lies on the defendant who served the third party notice to justify any delay in serving it and he quotes *McElwaine v. Hughes* [1997] IEHC 74.

(ii) When analysing a delay the entire circumstances of the case and its general progress must be considered – *Connolly v. Carey* [2001] 1 IR 345.

(iii) It is necessary to establish that when a defendant has sufficient knowledge to appreciate that a third party might bear responsibility in order to assess whether leave is sought in a timely fashion, and he quoted from *Staunton*.

(iv) Delay is measured in weeks rather than months or years and he quotes from *Buchanan v. BHK Credit Union Ltd.* [2013] IEHC 439. In this case, Hogan J. stated that: -

"There is accordingly here an implicit legislative recognition that given the almost infinite variety of circumstances that are necessary for a third party to arise, the question of what amounted to "as soon as is reasonably possible" for the purpose of s. 27 (1) (b) of the 1961 Act, have to be determined in the overall circumstances of any given particular case and not by reference to some ex ant formula."

He went on to say: -

"While the reference to 28 days in O. 16, r. 1(3) is, therefore, as Laffoy J. hinted in S. Doyle, at the very most an indicative starting point in any assessment of what was reasonably possible in the circumstances, it cannot take from the task of the Court to arrive at an independent determination of whether the requirements of s. 27(1)(b) have been complied with in any particular case."

He continued: - *"While we have already noted that any tolerable delay will usually be measured in weeks and months, in general the delay inherent in all reasonable steps taken by a prudent and responsible litigant will be not be considered excessive for the purposes of section 27(1)(b), absent perhaps specific and identifiable prejudice to the third party which has been occasioned as a result of this delay. This, in my judgment, is what occurred in the present case. The solicitors acted with all deliberate speed in the matter and it is for these reasons that I dismissed this application to have the third party notice set aside"*.

(v) The prejudice occasioned to a third party by a defendants' claim may be relevant but not a decisive factor and he quoted *Robbins v. Coleman* [2010] 2 IR 180.

43. Counsel on behalf of *Keegan* stated that the litigation is just one of a number of related matters and on the 24th July 2014. *Liffey* through its solicitors specifically raised the issue of joining *Keegan* and *TEDL* in a letter to the plaintiffs' solicitors wherein *Liffey's* solicitors called on the plaintiffs' solicitors to confirm whether or not they intended to join *Keegan* and *TEDL* to the Power proceedings.

44. The plaintiffs' legal advisors responded in October 2014 and confirmed the plaintiffs had no intention to join *Keegan* and *TEDL* as co – defendants at that time. However, the plaintiffs' legal advisers specifically stated that "*though it remains open to Liffey Developments to seek to join them as a third party for the purpose of claiming an indemnity*". He said that it was properly conceded by *Liffey* at para. 10 of Ms. Coopers' affidavit whether he was aware of *Keegan's* supposed involvement at the development since at least July 2014 and this admission meant that *Liffey* was aware that *Keegan* could be joined as a third party from the time these proceedings were commenced. He then dealt with the primary explanation advanced by *Liffey* to purportedly justify its delay in serving the third party notice is that the proceedings were stayed pending the outcome of a reference to the Court of Justice of the European Union (CJEU) in litigation entitled *James Elliot Construction Ltd. v. Irish Asphalt Ltd* (C-613/41). The James Elliot Construction litigation was referred to the CJEU by the Supreme Court on the 2nd December 2014 and the CJEU delivered judgment on the 27th October 2016. However, *Liffey* provides no explanation as to why it did not join *Keegan* as a third party in the within proceedings during the period between October 2016 and August 2018. He also argued that the justification offered by *Liffey* had even less credibility as the stay granted over the within proceedings expressly provided that it did not apply to the joinder of additional parties. He also stated that an alternative explanation offered by *Liffey* for its delay in issuing the third party notice against *Keegan* which included the supposed complexity of the litigation and the fact that it remains the only active defendant. He argued that *Keegan* submits that *Liffey* has failed to discharge the onus of proving that it issued and served the third party notice as soon as was reasonably possible in accordance with s. 27 (1) of the 1961 Act. Mr. Mansfield also argued that *Liffey* had failed to demonstrate *prima facie* evidence that it is a reasonable course of action against *Keegan* and argued that the court could consider striking out the proceedings pursuant to its inherent jurisdiction if they are bound to fail.

Submissions on behalf of Liffey

45. In response, Ms. Gayer SC set out that the proceedings were lead cases as defined in the order of this Court dated the 22nd June 2018. The Rooney proceedings relate to the construction of a residential development in Ongar, Dublin 15 which is one of a number of residential homes in the development. It is alleged in the proceedings that the property, together with a number of other properties in the development suffered damage as a result of the presence of pyrite in the infill material used during the course of construction. Liffey constructed roads, common areas and foundations for some of the houses in the Ongar development. During the course of construction Liffey was supplied with quantities of infill and aggregate for use in the works performed by it from a number of its suppliers, including the third party herein (Keegan). The Rooney proceedings were issued on the 21st January 2015, a statement of claim was delivered on the 10th November 2017. Liffey delivered its defence on the 26th April 2018. Liffey obtained leave to join third parties on the 23rd July 2018, and third party notices were issued on the 14th August 2018. Liffey delivered an amended defence on the 24th July 2018 and quoted from s. 27 of the Act noting that the section provides that there was no specific time limits prescribed and she referred to O. 16. r 1 (3) and said that the 28 – day period in that rule was more honoured in its breach than its observance. She quoted from *Thomas Greene & Anor v. Triangle Developments Ltd. & Ors* [2008] IEHC 52 where Clarke J. said: -

"While it would be inappropriate to take the draconian step of dismissing proceedings (or, as in this case, setting aside a third party notice) on the basis of a failure per se to comply with the time limit specified in that rule, nonetheless that time limit has to be the starting point by reference to which any delay can be assessed." (this Court's emphasis)

46. She also quoted from MacEochaidh J. in *O'Halloran v. Fetherston* [2012] IEHC 349, the rationale behind the service by enacting s. 27 of the 1961 Act, not only did the Oireachtas intend to achieve efficiency in litigation by linking cases arising from the same facts, it may also be said that the Oireachtas intended to avoid the problem of conflicting judgments which might arise if cases arising from the same nexus are tried at different times by different courts. In her opinion, the requirement in s. 27 that a third party notice be served as soon as is reasonably possible is intended to ensure that the risk between the parties and all procedural steps be completed in the manner that permits the various actions to be tried either together or sequentially and by the same court. Thus, when one is considering whether third party notice has been served "as soon as is reasonably possible" when they have regard to the effect that any delay has on the achievement of joined or sequential trials.

47. She also argued that the pace at which the litigation proceeds was also relevant and quoted from *Kynes Moycullen Ltd & Ors v Whiskey Refrigeration Co Ltd & Ors* [2014] IEHC 348, 11th July 2014 where Bermingham J. stated: -

"It also seems to me significant that this litigation has moved quite slowly. The plenary summons issued over four years after the fire, and because of the pace at which the litigation has proceeded, there is no question of the litigation and other parties being held up by the third named third parties desire to join a fourth party".

48. She also referred to *Molloy v. Dublin Corporation* [2001] 4 IR where Murphy J. stated: -

"The legislature was understandably desirous of avoiding a multiplicity of actions. Instead of defendants against whom awards had been made instituting further proceedings against other parties liable to them in respect of the same set of facts — and indeed those defendants in turn perhaps instituting even more proceedings against others — the Oireachtas sought to establish a situation in which the rights and liabilities of all parties arising out of a particular set of circumstances would be disposed of in the same proceedings. It is for that reason that a defendant was given the right, with the approval of the Court, to serve a third party notice on a potential defendant so that any claim against him could be disposed of at the same time as that of the claim against the actual defendant. . . . Nevertheless, the Legislature did not preclude an unsuccessful defendant in the original proceedings from instituting a substantive action against some other party who, the actual defendant contended, was liable to him either in tort or in contract. What the 1961 Act did provide was that where the actual defendant in the original proceedings failed to avail of the third party procedure by serving the third party notice "as soon as is reasonably possible" and resorted to his original cause of action the relief which he might have claimed therein was subject to the statutory discretion of the Court to refuse to make an order for contribution in his favour".

49. She also referred to Delaney & McGrath on Civil Procedure, 4th. Ed., 2018 where she said:

"A review of the authorities indicates that the general approach of the courts has been to focus on the question of whether a defendant had acted reasonably rather than the question of whether it was possible to join a third party earlier. Thus, even lengthy delays have been excused where they have been explained and the third party has been unable to establish prejudice".

She set out a timeline from the issue of the Power proceedings as follows: -

- (i) Power proceedings issued on the 5th October 2012.
- (ii) Power proceedings served on Liffey, October 2013.
- (iii) Appearance on behalf of Liffey dated 17th January 2014.
- (iv) Statement of claim delivered the 18th February 2014.
- (v) Copy of the European Court of Justice dated the 27th December 2016 in James Elliot Construction case.
- (vi) Amended statement of claim delivered the 20th November 2017.
- (vii) Particulars raised the 22nd September 2017.
- (viii) Particulars raised 22nd December 2017.
- (ix) Replies to particulars 16th February 2018.
- (x) Liffey's defence delivered on the 26th April 2018.
- (xi) Reply dated the 11th May 2018.

- (xii) Third party notice and notice of motion issued on 9th July 2018.
- (xiii) Leave to issue and serve obtained 23rd July 2018.
- (xiv) Amended defence 24th July 2018.
- (xv) Third party notice issued 14th August 2018.
- (xvi) Third party appearance entered 12th October 2018.
- (xvii) Third party statement of claim delivered 17th October 2018.

She then made the point that when drafting the Civil Liability Act, the legislature did not impose a time limit for the purpose of an application pursuant to s. 27 (1) (b) reflecting an implicit legislative recognition that given the almost infinite variety of circumstances in which the necessity to join third parties might arise. The question of what amounts to "*as soon as is reasonably possible*" for the purpose of this section has to be determined in the overall circumstances of any given particular case and that allowance must be made for the fact that the litigation may be complex, extensive and involve a multiplicity of parties. The whole circumstances of the litigation and its general progress is a factor to be taken into consideration.

50. Ms. Gayer said that it is apparent from that chronology that steps were taken to join third parties without delay as soon as it became evident that the proceedings were being advanced, and statements of claim delivered. She said that while complaint is made about some delay which occurred prior to the delivery of the statements of claim having regard to the whole circumstances of the litigation and its general progress, objectively the third party notice was served as soon as was reasonably possible. She submitted that the decision of the Supreme Court in *James Elliot Construction Ltd. v. Irish Asphalt Ltd.* [2011] 384 2nd December 2014, was clearly relevant to this litigation, so its referral to the European Court concerning its interpretation of an EU standard for construction products together with a number of questions for determination by the CJEU. She submitted that the above referral was relevant to these proceedings. In particular, the applicability of the merchantable quality provisions of the Sale of Goods legislation alongside the provisions of the Construction Products Directive. Pending the determination of the CJEU, herein proceedings were stayed in circumstances that the outcome of the reference would be and whether the litigation would be renewed thereafter. It was appropriate to await the outcome and clarification of the issues raised. She quoted from Denham J. in *Connolly v. Casey* (op. cit.): -

"The test is whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendants' state of knowledge is not the test. The queries raised in the notice for particulars were relevant to the claim against the third party and thus it was reasonable to await the replies".

She said it was reasonable for *Liffey* to await the outcome of the referral to the CJEU by analogy. She also submitted that while a complaint had been made by the notice parties, that the stay on the proceedings did not apply to any application to join third parties. This cannot be taken to mean in her view that joinder should have occurred irrespective of the Supreme Court's referral and/or other relevant circumstances.

51. She said of the proceedings appropriate steps were taken by *Liffey* upon reactivation of the proceedings to investigate the claims and retain expert construction engineers to advise on the technical construction issues arising except for the geological issues. Considerable difficulty was experienced in sourcing an expert within the jurisdiction who was not already acting, or who had previously acted for one of the other parties in the litigation. Consulting engineers that were prepared to act were found in November 2017 and asked to consider and advise upon the issues arising in the litigation. She said it is way beyond dispute that litigation involving a multiplicity of parties, is complex, and involves multiple causation issues. Given the magnitude of this litigation, the general progress of the main litigation has been relatively slow when compared to other litigation, despite the fact that it is presently case managed by the court in such a manner that ensures the progress of this litigation to proceed as expeditiously as possible. The case of the progress of the main litigation is not due to any fault on the part of *Liffey* but instead is as a result of the multiplicity of parties and the complexity of the issues involved in same. He submitted that allowance must be made for the complex factors when considering whether the third party is joined "*as soon as is reasonably possible*". She quoted from McMahon J. in *Robins v. Coleman & Ors* [2010] 2 IR 188 where McMahon J. observed the phrase "*as soon as reasonably possible*": -

"is a relative concept and, in construing it, one must have regard to all the relevant circumstances".

She said that Anne Cooper's affidavit explained the circumstances which pertained when the commencement of the main litigation in the period during which a stay was placed on same and the renewal of that litigation and those are all matters which the court should have regard to. She also said that it was not appropriate for any legal advice which was provided to *Liffey* in respect of the potential joinder of the third parties to the litigation would be unprecedented to place before this Court legal advice in respect of this litigation which is of course privileged. She submitted that what might appear as a long period of time when stated in the abstract might nevertheless when all the circumstances are taken into account, attract the protection of the phrase "*as soon as is reasonably possible*".

Prejudice

52. She submitted that the third parties had not identified any real ground of prejudice or evidence to justify any such contention. She said that *TEDL* may not have sufficient records or orders of deliveries but these have been supplied by *Liffey*. She said there was no suggestion that any or all of the relevant witnesses were unavailable. She said the biggest delay in the litigation had been caused by the fact that the proceedings were only commenced by the plaintiffs some years after the houses were constructed. *Liffey* bears no responsibility for this. The third party was put on notice of a claim in November 2011. In truth therefore, the subsequent service of the third party notice could not be characterised as a complete surprise and she said that in all the circumstances, the third party notices were served as was reasonably practicable in compliance with s. 27 (1) (b).

53. Mr. Howard indicated that prejudice was utterly irrelevant in these applications and he quoted from the Chief Justice in *Staunton* where he said: -

"In considering an application of this sort the court is not concerned with any question of prejudice".

He also enclosed the correspondence that *Liffey* had received. He said that the problem in this case for the defendant was that they deliberately waited for three years not to get a report from an engineer. Therefore, this is not a case where they only became aware of delivery of a pleading to them, but that there was a potential issue that could involve an engineer and then exercise reasonable endeavours to secure the services of that engineer. He also referred to the judgment of Denham J. in *Connolly v. Casey*: -

"The test is whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendants' state of knowledge is not the test. The queries raised in the notice for particulars were relevant to the claim against the third party and thus it was reasonable to await the replies".

Mr. Howard said the problem was that the defendant cannot in this case rely on any notice for particulars they serve, which they didn't serve until very late because they did not raise any particulars that could be relevant to whether or not *TEDL* had been a supplier of pyrite or aggregate with pyrite, because they knew that anyway, and they knew it from the materials that the plaintiff had given them in the spreadsheets that constituted the particulars in May of 2014. He said the important issue is when were *Liffey* aware of the nature of the claim being made against it? They knew that even before they were served with the claim, but having been served with the claim, they knew it at the latest when they got the statement of claim in 2014. The court also notes that a letter from *Liffey* were also sent to *Keegan* in the same terms.

The Power proceedings

54. The court must now examine the issues which have been argued before this Court. It is certainly clear that: -

(i) The onus of proving that any delay is not unreasonable is borne by the defendant and not by the third parties.

(ii) Any assessment of circumstances pointed to by a defendant to excuse or explain delay must be grounded on evidence.

(iii) An objective assessment of the explanations and excuses is required, the question is whether objectively speaking, the third party notices were served "as soon as is reasonably possible" or not, in light of the full circumstances.

55. The court notes the timeline in relation to the case of *Rory Power*. He owned a house in the residential development at *Ongar, Clonee, Co. Meath*. The court notes the letters from *Liffey Developments (Dublin) Ltd.* to the company secretary at *TEDL* dated the 3rd November 2011. In that correspondence, Mr. Jameson of *Liffey* indicates: -

"We hereby wish to put you on notice for a potential legal claim that may arise as a direct result of materials supplied by your company to this project. We therefore request an immediate indemnity from your company in the event that legal proceedings are issued against Liffey Developments (Dublin) Ltd."

56. *Liffey* had first been notified of the damage in the development caused by the pyrite on the 3rd August 2011. A plenary summons in the Power proceedings issued on the 5th October 2012, and *Liffey* was served with the Power proceedings on or before the 4th October 2013.

57. The court has determined that the correspondence between *Liffey*, *TEDL* and *Keegan* prior to the issue of proceedings is what the court would describe as the first date on which the issue of the joinder of *TEDL* and *Keegan* as third parties had been raised.

58. The court notes that these proceedings together with the related proceedings entitled *Margaret Rooney v. Liffey Developments (Dublin) Ltd. & Ors.* 2015 416 P., are the lead cases in the proceedings. The plaintiff claims against *Liffey* for loss and damage caused to Mr. Powers' residential property known as 1, Williams Lane South, *Ongar Dublin 15*.

59. *Liffey* claims that it sourced infill and aggregate from *Keegan* and from *TEDL* for use in the construction of the residential development at *Ongar*. *Liffey* was named as defendant in the Power proceedings and subsequently in the Rooney proceedings.

60. The court notes that on the 24th July 2014, *Liffey* through its solicitors specifically raised the issue of joining *Keegan* and *TEDL* in a letter to the plaintiffs' solicitors wherein *Liffey's* solicitors called on the plaintiffs' solicitors to confirm that they intended to join *Keegan* and *TEDL* to the proceedings.

61. The court notes the very clear response of Eugene F. Collins that it was not intended to join *Keegan* and *TEDL* as co - defendants at the time. He continued: -

"Though it remains open to Liffey Developments to seek to join them as third parties for the purpose of claiming an indemnity".

62. The court has identified this date. The proceedings having been issued and *Liffey* having ascertained that the plaintiffs' solicitors were not proposing to join at that stage *Keegan* and *TEDL* together with the invitation of the solicitors for *Liffey* to join them as third parties. The court notes that the issue of adding *Keegan* and *TEDL* as third parties was an opportunity to move and it is a most important date for the court to make a decision as to whether or not the third party notice is served in accordance with s. 27 (1) (b) of the 1961 Act in terms of "as soon as is reasonably possible". The court notes that the application for a third party notice was not made until July 2018, about four years later.

63. The court notes that on the 2nd December 2014, the Supreme Court decision in *James Elliot Construction v. Irish Asphalt* was handed down and on the 22nd December 2014, Maples Solicitors for *Irish Asphalt* issued a motion seeking an order directing that no further steps should be taken in the Power proceedings by reason of the *James Elliot Construction v. Irish Asphalt* case being referred to the CJEU.

64. That motion was heard by the then - President, Kearns P., and it is commonplace that counsel for *Liffey* were in attendance and consented to the order in the proceedings that "no further steps shall be taken in the within proceedings (save for the joinder of parties)". *Liffey* again did not issue its notice for leave to join *TEDL* in the proceedings until July 2018. The court believes that this was the most important failure on the part of *Liffey* to serve third party notice in circumstances where the President had indicated that nothing further save for the joinder of the parties.

65. The failure to seek liberty to serve third party notice notwithstanding the actual knowledge of *Liffey* despite the order of the President. This order of the President was taken 30 months prior to the issue by *Liffey* joining *Keegan* and *TEDL*. The court notes in particular the judgment of Kelly J. (as he then was) in *Smyth* quoting from *Staunton* said: -

"The view expressed by Finlay C.J. in this case is clearly authority for the proposition that the obligation to serve a third party notice as soon as is reasonably possible is mandatory in nature and a failure to comply with that temporal obligation may lead to the application for liberty to issue and serve the third party notice being refused or, if granted, being set aside on the application of the newly joined third party".

66. The court is of the view that the litigation is reasonably straightforward. Pyrite occurred in these houses. It was a question of where the pyrite was sourced from and on the basis that in 2012, *Liffey* were able to write to the two third parties indicating that they may seek an indemnity was clear that at that stage it was open to *Liffey* to issue a third party to seek to join the two third parties as third parties to the proceedings. The complicating factor of the litigation related to the large number of developments and the large number of parties being sued by the plaintiffs.

67. The court notes the affidavit of Anne Cooper on behalf of *Liffey* sworn on the 6th February 2019. In that, she states that *Liffey* constructed roads, common areas and the foundations of some of the houses in the Ongar development from 2002 to 2003, during the course of construction, *Liffey* were supplied with quantities of infill and aggregate for use in the works performed by it from a number of suppliers, Irish Asphalt, Roadstone, Tracey Enterprises Dundrum Ltd., Murphy Concrete Manufacturing Ltd. and *Keegan Quarries Ltd.* The damage of each of the properties in the Ongar development was the subject of an investigation undertaken by the premier guarantee scheme under which each property was insured.

68. *Liffey* sought to utilise the third party procedure because they claim that *Liffey* were entitled to a contribution or indemnity from *Keegan* and *TEDL*.

69. Delaney and McGrath on Civil Procedure 4th Ed., 2018 states that: -

"the rationale behind requiring the service of a third party notice within a relatively short time frame was explained by Mahon J. in A&P (Ireland) Ltd. v. Golden Vale Produce Ltd. as being 'to put the contributor in as good a position as is possible in relation to the knowledge of the claim and the opportunity of investigating it'. It is certainly desirable that a proposed third party should be given notice of a claim as expeditiously as possible so that he may have an adequate opportunity to investigate and defend any claim against him". (this Court's emphasis)

70. In relation to time limits under s. 27 of the Civil Liability Act, Delaney and McGrath state the following: -

"A review of the authorities indicates that the general approach of the courts has been to focus on the question of whether a defendant has acted reasonably rather than a question of whether it was possible to join a third party earlier. Thus even lengthy delays have been excused where they have been explained and the third party has been unable to establish prejudice. However, given the increasing reluctance on the part of the court to condone delays in procedural matters, a less lenient approach may be adopted in the future".

The court is aware already of the tide of change in relation to delays in litigation and in particular in this case in the failure of *Liffey* to issue the third party proceedings prior to July 2018.

71. The next step for the court is to review what is said on behalf of *Liffey* in relation to the undoubted delay and finally Delaney and McGrath quote from Ryan P. in *Kenny v. Howard* [2016] IECA 243 in which Ryan P. said that there was no evidence of prejudice being severed by the proposed third party as a result of the delay. Ryan P., in finding that the third party notice should be set aside, said the presence or absence of prejudice was not the issue and he found it difficult to understand how a defendant who was otherwise in default due to delay could escape the consequences of this by asserting that the third party had not suffered the specific prejudice.

72. The court will now look at the reasons for delay on the part of *Liffey*. This will require considering the affidavits filed in relation to this notice of motion. The affidavit of Sarah Jane Tracey sworn on the 12th November 2018 grounded the application to set aside the third party proceedings in respect of *TEDL*. She states that the plaintiff claims against the defendants (including *Liffey*) for loss and damage caused to his residential property at 1, Williams Lane South, Ongar, by reason of the use of aggregate in fill in the construction of the property which is alleged to have contained pyrite and elevated levels of sulphur.

73. *Liffey*, in the affidavit of Anne Cooper sworn on the 9th July 2018 in support of its application to join *TEDL*, claims that it sourced infill and aggregate from *TEDL* for use in the construction of a residential development at Ongar, Dublin 15, and claims that it purchased quantities of infill and aggregate costing in excess of €200,000. Ms. Tracey set out the history which the court has set out in its judgment. She states then that *Liffey* is named as a defendant in 147 sets of High Court proceedings of which 136 sets of proceedings appear to relate to pyrite. *Liffey* faces claims in respect of at least two separate developments including those at Ongar, as well as those at Chapel Farm.

74. The first appearance entered on behalf of *Liffey* in relation to the pyrite related proceedings was filed with the High Court on the 11th September 2012 (Finn & Ors, record number 2012 3632P).

75. Harrison O'Dowd solicitors entered appearances in respect of at least seven of the proceedings and they first came on record for *Liffey* on the 30th April 2013. She says that notwithstanding that appearances had only been entered on behalf of *Liffey* in a small number of proceedings, affidavits filed in those proceedings make it clear that *Liffey* was aware of these and the related proceedings since at least the 24th July 2014. She sets out a chronology of the proceedings which the court has noted. Despite the actual knowledge of *Liffey*, no step was taken at any time prior to June 2018 for liberty to serve a third party notice on *TEDL*, and she said that the alleged factual basis of *Liffey's* claim remains the same: -

"That it sourced quantities of infill and aggregate from the proposed third party for use in the construction of the development and purchased from the proposed third party quantities of aggregate and infill costing in excess of €200,000".

76. She stated that *Liffey* did not know where the infill was used and there is no evidence from Anne Cooper that any infill alleged to have been supplied by *TEDL* was used in the property.

Affidavit of Anne Cooper, Director and Secretary of Liffey

77. Ms. Cooper avers that in circumstances where the plaintiffs declined to join Tracey Enterprises as a co – defendant, it was necessary for *Liffey* to do so. She refers to the Supreme Court decision in *Elliot Construction v. Irish Asphalt* (op. cit) and the reference to the Court of Justice of the European Union. She said that in July 2014, there were a number of factors to be taken into consideration. She raised the issues of the questions being asked of the CJEU and further states that she was advised that when drafting the Civil Liability Act of 1961, the legislature did not impose a time limit for the purpose of an application pursuant to s. 27 (1) (b) and she said there is an implicit legislative recognition that giving the almost infinite variety of circumstances in which it is a necessity to join third parties might arise, the question of what amounts to be "as soon as is reasonably possible" for the purposes of the section has to be determined in the overall circumstances of any particular case.

78. The court accepts this statement as a requirement of the court. The court is satisfied that the decision to seek to join the third parties in 2018 was in a gross excess of time since *Liffey* first became aware of the claim against them. The court is not satisfied that the issues raised in the Elliot Construction case had a direct bearing upon the litigation.

79. She also says that *Liffey's* solicitors had tried from July 2017 to engage a firm of engineers with the appropriate expertise. It was difficult to find such an expert within this jurisdiction who has not acted or who had previously acted for one of the other parties in the litigation and that it was in November 2017 consulting engineers were engaged. Unfortunately, it was still another eight months since the application to join *TEDL* and *Keegan* was made.

80. Ms. Cooper said that *Liffey* had been dealing with *TEDL* for a number of years, commencing in 1983 and since that time has purchased a significant amount of aggregate from it. She said that difficulties were experienced by *Liffey* to trace documentary records relating to the infill supplied by *TEDL* for use in the Ongar development. She said in October 2018 a number of boxes containing old records were searched as part of an ongoing exercise to trace relevant documentation and that in addition to this there were a number of documents related to the supply by the third party for use in the Ongar development.

81. It is clear that this documentation was possessed by *Liffey* and that a search for these old records was only made in October 2018.

82. She said that *Liffey* had moved to its current location in February 2003 and subsequently shredded a significant amount of old records and documentation around 2005. It was purely by accident a small number of boxes which contained relevant records were not sent for shredding. The court notes that what is being said by *Liffey* is that they did not believe that they had records. Nevertheless these records are available and were clearly available in 2012.

The replying affidavit of Sarah Jane Tracey

83. Ms. Tracey says the following with regard to "reasonable dispatch": *TEDL* has not yet been provided with all of the affidavits or correspondence in the proceedings and reserved *TEDL's* position in that regard. The material that has come to light further evidences *Liffey's* delay.

(i) *Liffey* had been dealing with *TEDL* for a number of years commencing in or about 1983.

(ii) *Liffey* is in possession of invoice documents dated from the 28th June 2002 and clearly marked "Tracey Enterprises Dundrum Ltd." to Ongar.

(iii) On the 16th October 2003 the plaintiff entered into a building agreement with Tracey for the construction and purchase of the property.

(iv) On the 3rd August 2011 Eugene F. Collins on behalf of the underwriters of the premier guarantee scheme which provided insurance to homeowners in the development informed *Liffey* of major damage in the houses constructed by *Liffey*. *Liffey* wrote to *TEDL*, putting them on notice of a potential legal claim and requested an immediate indemnity. She then deals with the history of the proceedings and noted that the statement of claim in the Rory Power case was delivered by the solicitors for the plaintiff on the 10th February 2014.

The court notes that on the 12th September 2014, (this Court's emphasis) *Liffey's* solicitors sought a list of experts retained by the solicitors for the plaintiff and she also says that Ms. Cooper in her affidavit ignored that *Liffey* were notified of the damage in the development caused by pyrite heave on the 3rd August 2011.

84. She also deals with the justification for the delay and refers to the Elliot reference and notes that she made no reference to the President's order of the 18th January 2015. She also says that a review of the third party statement of claim dated the 17th October 2018 reveals that there is no plea concerning the Harmonised Standards which was the issue raised in the reference to the CJEU. She also points out prejudice that *TEDL* ceased trading in 2004 and will have for example great difficulty in identifying relevant witnesses to the allegations made. The court is satisfied from a consideration of the history of the proceedings and also the attempt to explain the delay that the court is not satisfied that there was any particular complexity of the issues which needed to be considered before the procedural step to issue the third party proceedings.

85. The court in those circumstances in relation to the Rory Power case against *TEDL* and *Keegan* under these circumstances the court accedes to the application of the third parties to set aside the third party notices of both *TEDL* and *Keegan* dated the 14th August 2018.

Margaret Rooney proceedings

86. The proceedings taken on behalf of Margaret Rooney taken against inter alia, *Liffey* were issued on the 21st January 2015. No real submissions were made to seek to distinguish the Margaret Rooney proceedings from the Rory Power proceedings, and that was appropriate in the circumstances that on the 15th January 2015 in the case of Rory Power the President of the High Court directed that no further steps be taken in these proceedings (save for the joinder of parties).

87. The proceedings in relation to Margaret Rooney related to pyrite in her home at 1, Park House, Ongar Dublin 15, the Ongar development.

88. It was clear to *Liffey* from correspondence from Eugene F. Collins solicitors, on behalf of the underwriters of the premier guarantee scheme which provided assurance to homeowners in the development informed *Liffey* of major damage in the houses constructed by *Liffey* in the development caused by the defective material leading to pyritic heave and providing an opportunity to *Liffey's* legal insurance to inspect.

89. *Liffey* was in possession of invoices and dockets dated from the 28th June 2002 onwards and clearly marked "Tracey Developments Dundrum Ltd." On the 3rd November 2011, *Liffey* wrote to *TEDL* furnishing the letter of the 3rd August 2011 and related correspondence and *Liffey* put *TEDL* on notice of a potential legal claim and requested an immediate indemnity from *TEDL*. It is clear to this Court that when the Rooney proceedings was issued, *Liffey* were well aware of the potential to add *TEDL* by way of third party. It was clear to *Liffey* that by way of letter dated the 15th July 2014, the solicitors for the plaintiff confirmed to *Liffey* that neither *TEDL* nor *Keegan* had been named as defendants in the proceedings. This is a significant date even in the Rooney proceedings.

90. The position was that pursuant to s. 27 (1) (b) of the Civil Liability Act 1961, the third party notice had to be served as soon as

reasonably possible.

91. The affidavit of Anne Cooper sworn on the 9th July 2018 in support of its application to join *TEDL* claims that it sourced infill and aggregate from *TEDL* for use in the construction of a residential development at Ongar, Dublin 15, and claimed that it purchased quantities of infill and aggregate costing in excess of €200,000. Notwithstanding that *Liffey* were aware of the order in the Power proceedings and the decision taken by the solicitors for the various plaintiffs (that it was not intended to join *TEDL* and/or *Keegan Quarries Ltd.* as co – defendants *Liffey* did not issue this motion for leave to join *TEDL* in the within proceedings until the 9th July 2018).

92. The affidavit of Sarah Jane Tracey, director of *TEDL*, states that she has been instructed that *Liffey* is the only party to the proceedings who sought to join any other party. She also stated that the third party statement of claim was to be delivered by the 30th September 2018 but that *Liffey* failed to comply with that order and *TEDL* was not served with the third party statement of claim until the 17th October 2018.

93. Ms. Tracey said that *Liffey* was furnished with a detailed spreadsheet of particulars arising from the statement of claim delivered in the Power proceedings on the 23rd May 2014, and in July 2014 an engineer was appointed by the plaintiff to inspect cracks in the walls of the property. On or before the 20th January 2016, the Rooney proceedings were served on *Liffey* and on the 10th November 2017, the plaintiff delivered a statement of claim to the defendants including *Liffey* and on the 22nd December 2017, *Liffey* raised a notice for particulars. It was only on the 9th July 2018 that Messrs. Harrison O'Dowd entered an appearance on behalf of *Liffey*. It seems extraordinary to this Court that a memorandum of appearance was only served in these proceedings on the 12th October 2018 after the application to this Court for leave to serve third party notices to *TEDL* and *Keegan* had been heard by this Court.

94. The affidavit of Anne Cooper sworn on the 6th February 2019 in response to the notice of motion stated in response to the affidavit of Ms. Tracey stated that a statement of claim was not delivered until the 10th November 2017 and after raising a receipt of particulars *Liffey* delivered its defence on the 28th April 2018. She said that s. 27 (1) (b) of the Civil Liability Act had been complied with. She also raised the issue of whether or not the reference by the Supreme Court to the CJEU in the *James Elliot Construction Ltd. v. Irish Asphalt Ltd.* (C-614/14) were relevant to the within proceedings.

95. The court is satisfied that the jurisprudence in relation to compliance with s. 27 (1) (b) of the Civil Liability Act has changed over the past number of years. The court would point to the decision of Kelly J. (as he then was) in *Smyth* where Kelly J. (as he then was), quoted from *Staunton*: -

"The view expressed by Finlay C.J. in this case is clearly authority for the proposition that the obligation to serve a third party notice as soon as is reasonably possible is mandatory in nature and a failure to comply with that temporal obligation may lead to the application for liberty to issue and serve the third party notice being refused or, if granted, being set aside on the application of the newly joined third party".

96. The court also notes the decision of Hogan J. in *Desmond Buchanan v. BHK Credit Union Ltd. & Ors* [2013] IEHC 439.

97. What Hogan J. states is a clear change of the jurisprudence in that: -

"any tolerable delay will usually be measured in weeks and months"

The delay in this case was three and a half years.

98. This change of jurisprudence has been forewarned by Delaney & McGrath on Civil Procedure, 4th Ed., 2018 in which they say: -

"Thus, even lengthy delays have been excused where they have been explained and the third party has been unable to establish prejudice. However, given the increasing reluctance on the part of the courts to condone delays in procedural matters, a less lenient approach may be adopted in the future".

99. The burden is on the defendant to serve the third party notice within a reasonable time and the onus of proof of showing that any delay is not unreasonable lies on *Liffey*. With regards to the previous proceedings both in the Power case and in the general nature of the litigation, the court is satisfied that *Liffey* have failed to establish that the third party procedure in the Rooney case was served as soon as was reasonably possible.

Decision of the court

100. The court is satisfied that *Liffey* have failed to discharge the onus of proof showing that the application to join *TEDL* and *Keegan* was not served as soon as was reasonably possible. In those circumstances, the court will set aside the third party notice against Tracey Enterprises (Dundrum) Ltd. The Court will strike out the third party proceedings in relation to *Keegan Quarries Ltd.* with no Order in the circumstances that the proceedings in *Keegan Quarries Ltd.*, have become compromised.