Neutral Citation Number: [2012] IEHC 380

THE HIGH COURT

[2007 No. 5569 P.]

BETWEEN

BASINVIEW MANAGEMENT LIMITED, JUSTIN LENNON, ANNE DUNNE, MARGARET COSTIGAN, GERARD REAL AND ATTRACTA REAL, RICHARD BANNISTER AND JOHN BURKE, PETER DUFFY, SARAH CORCORAN, JOAN CORCORAN, G.J. BYRNE, B. BYRNE, DAVID BOBBETT, TOM SHANAHAN, DENISE O'BRIEN, EILEEN O'SULLIVAN, JOSEPHINE DOLAN, JOHN NOLAN AND NEIL O'REILLY, ANTHONY HOURIHAN, RICHARD NOLAN, PHILOMENA NOLAN, LISA SHAUGHNESSY, JOHN MCKIERNAN, FRANK FEELY

PLAINTIFFS

AND

BORG DEVELOPMENTS AND WATERDROP (AN UNLIMITED COMPANY IN LIQUIDATION FORMERLY KNOWN AS COSGRAVE HOMES)

DEFENDANTS

AND

BERNARD MURPHY

THIRD-PARTY

JUDGMENT of Mr. Justice Herbert delivered the 12th day of June 2012

The basis alleged for the litigation in this case appears to be, - from the pleadings and affidavits, - that in July or August 2006, various apartment holders in the "Berkeley Block" and, in the "Landsdowne Block" of the apartment complex known as "Pembroke Square", Barrow Street, Dublin, became aware of spreading dampness and of the ingress of foul water in various parts of their apartments. By an Equity Civil Bill issued on the 21st February, 2007, the owners of Apartment No. 9, Landsdowne Block, sued Basinview Management Limited and Borg Developments for damages for breach of covenant, negligence, misrepresentations and other reliefs. In its defence delivered on the 12th June, 2007, Borg Developments Limited (the Lessor), pleaded inter alia, that any such ingress of water was caused or contributed to by negligence and/or breach of duty and/or breach of contract and/or nuisance on the part of Bernard Murphy, the owner of Apartment No. 34 in the same Block. By Order of the County Registrar made on the 4th October, 2007, Bernard Murphy was joined as a third-party in those proceedings. In a third-party defence delivered on the 29th April, 2009, Bernard Murphy denied that in or about July 2006, dishwater or similar effluent leaked from his apartment into that of the plaintiffs in those proceedings. He asserted that if the plaintiffs had suffered loss, damage, expense or inconvenience, (which he denied), this was caused by negligence and/or breach of contract and/or nuisance on the part of Basinview Management Limited, (the Management Company) or in the alternative on the part of Cosgrave Property Developments Limited in the design, construction, and maintenance of the "Landsdowne Block".

In the present action a plenary summons was issued on the 24th July, 2007, by Basinview Management Limited, (the Management Company of the entire apartment complex known as "Pembroke Square") and 25 other individual plaintiffs who are owners of individual apartments in the "Berkeley Block" and, the "Lansdowne Block" of that complex against Borg Developments and Cosgrave Homes. The plaintiffs claim:-

> "Damages for negligence in and about the construction and maintenance of those blocks and, in particular the common areas of those blocks and additionally or alternatively the utilities passing in, under or over those common areas.
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> Damages for nuisance and under the doctrine of Rylands and Fletcher.
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> An injunction directing the defendants to put their apartments, the common areas and/or utilities into a satisfactory state of repair and, to maintain them in that condition pending the transfer of the common areas to the plaintiffs."

After the service of this plenary summons a process of mediation and conciliation was entered into between the parties. This unfortunately concluded on the 2nd June, 2009, without any agreement being concluded between them.

By a letter dated the 5th June, 2009, the solicitors for the named defendants notified the solicitors for the plaintiffs that unless a statement of claim was delivered within the following 21 days an application would be made to this Court to dismiss the plaintiffs' claim for want of prosecution.

By a letter dated the 12th June, 2009, in reply, the solicitors for the plaintiffs advised the solicitors for the named defendants that following a joint inspection by the civil engineers for the plaintiffs and the defendants on the 29th May, 2009, they were awaiting a report from the engineers for the plaintiffs to enable counsel to complete a statement of claim. They stated that this would require a further eight weeks at least. They also pointed out that it would be necessary for them to seek to amend the title of the action. This was necessary, they stated, because the several building agreements appeared to have been signed by Mr. Joseph Cosgrave and Mr. Michael Cosgrave, trading as Cosgrave Homes, which, in turn, appeared to be a trading name of Cosgrave Property Developments Company Limited. They asked the solicitors for the defendants to identify the correct title of the second defendant and to agree to the title of the action being amended without the need for a formal application to this Court.

In reply, by a letter dated the 23rd June, 2009, the solicitors for the named defendants stated that it was a matter for the plaintiffs to correctly identify the defendants and, that they were surprised that this amendment was being sought nearly two years after the plenary summons had been issued. They went on to state that the site owner was Borg Developments and that it had engaged Cosgrave Homes to carry out the construction of the apartment complex. Both were unlimited companies and had their respective registered offices at 15 Hogan Place, Dublin 2.

On the 24th July, 2009, the plaintiffs served a motion on notice, returnable for the 30th July, 2009, on the solicitors for the named defendants seeking liberty to join Cosgrave Property Developments Limited as a co-defendant in the action. This motion was struck out by consent after a letter dated the 28th July, 2009, had been received from the solicitors for the named defendants stating that Cosgrave Property Developments Limited had been incorporated on the 7th October, 2003, after the apartment complex had been built. By a further letter dated the 14th October, 2009, the defendants gave the plaintiffs a further period of 21 days from that date within which to deliver a statement of claim.

By a letter dated the 11th November, 2009, the solicitors for the plaintiffs asked the solicitors for the named defendants to consent to the amendment of the title of the action by substituting Waterdrop (an unlimited company in liquidation) for Cosgrave Homes, as the second defendant. It appears that Cosgrave Homes registered this change of name on the 5th February, 2003. A search in the Companies Office had shown that a liquidator had been appointed over the assets of Waterdrop (Company No. 267823), and therefore the solicitors for the plaintiffs further wished to consider whether an application pursuant to the provisions of s. 222 of the Companies Act, 1963, seeking liberty to proceed in the action might be necessary. By this letter the solicitors for the plaintiffs further sought the release of all original title documents and counterpart leases relating to the Pembroke Square Development to them as solicitors for Basinview Management Limited, the first plaintiff.

Between the 1st December, 2009, and the 15th April, 2010, extensive and increasingly acrimonious correspondence was exchanged between the solicitors for the plaintiffs and the solicitors for the named defendants, principally in relation to this request for documents, which was refused and, in respect of which the plaintiffs reserved the right to seek discovery, but also in respect of other matters such as, ongoing investigations by engineers, documents required to facilitate the obtaining of tenders for repairs and, the exchange of engineers reports and other matters. By Order of the Master of the High Court made on the 3rd February, 2010, the plaintiffs were given leave to amend the title of the action by substituting, "Waterdrop (an unlimited company in liquidation formerly known as Cosgrave Homes)" for, "Cosgrave Homes".

By a letter dated the 9th April, 2010, the solicitors for the defendants agreed to extend the time for the delivery of a statement of claim by a further four weeks, noting that the plenary summons had been issued on the 24th July, 2007. The statement of claim was in fact delivered on the 17th May, 2010, two years and nine and a half months after the plenary summons had been issued and almost four years after the ingress of water and dampness had been noticed. The defendants delivered a defence on the 27th January, 2011. While denying that they had any responsibility for the alleged dampness, leakage or other damage caused to the relevant apartments, they plead in this defence that any such damage, (if any), was due to the failure of each of the apartment owners to properly maintain and repair their individual apartments or, the failure of the first plaintiff or, O'Dwyer Property Management Limited, a management company services provider engaged by the first plaintiff, to repair, maintain and keep in proper order the development in general and the common areas of the development in particular or, to negligence, and/or breach of duty, and/or breach of contract, and/or nuisance on the part of Bernard Murphy the owner and occupier of Apartment 34 in causing water to emanate from that apartment causing damage to certain other properties and, in causing damage to a soil stack passing through certain apartments causing damage to those apartments. A notice for particulars arising out of the statement of claim and also dated the 27th January, 2011, was served on the solicitors for the plaintiffs.

By a motion on notice to the plaintiffs dated the 30th March, 2011, grounded upon an affidavit of Conor B. Cahill, Solicitor, the defendants sought an order of this Court joining Mr. Bernard Murphy as a third-party in the action. By order of this Court made on the 16th May, 2011, the defendants were granted liberty to issue and serve a third-party notice on Mr. Bernard Murphy. By Order of this Court made ex-parte on the 11th July, 2011, the time within which to issue and serve this third-party notice on Mr. Bernard Murphy was extended for a further period of 28 days from that date, - to the 8th August, 2011. On the 24th August, 2011, an appearance was entered for Mr. Bernard Murphy for the sole purpose of applying to set aside this third-party notice. By motion on notice dated the 25th August, 2011, grounded on his own affidavit sworn on the 21st August, 2011, Mr. Bernard Murphy moved, pursuant to the provisions of s. 27(1) of the Civil Liability Act 1961, and O. 16, r. 1(3) and r. 3 of the Rules of the Superior Courts to set aside the Order joining him as a third-party in this action.

Section 27(1)(b) of the Civil Liability Act 1961 provides as follows:-

> "A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part shall, if the person from whom he proposes to claim contribution 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, r. 1(3) of the Rules of the Superior Courts provides that:-

> "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."

Order 21, r. 1(b) of the Rules of the Superior Courts provides that where a defendant enters an appearance to a plenary summons he shall deliver his defence and counterclaim (if any) within 28 days from the date of delivery of the statement of claim or from the time limited for appearance, whichever shall be later.

The statement of claim was delivered on the 17th May, 2010. The time limited by O. 21, r. 1(b) of the Rules of the Superior Courts for the delivery of a defence therefore expired on the 14th June, 2010. The defence was not in fact delivered until the 27th January, 2011. However, Order 16, rule 1(3) of the Rules of the Superior Courts limits the time for the making of an application for leave to issue and serve a third-party notice, not by reference to the date of the actual delivery of the defence but, to, "the time limited for delivery of the defence", that is, within 28 days from the delivery of the statement of claim unless otherwise ordered by the Court. Therefore, the 28 days limited for making an application to join Mr. Bernard Murphy as a third-party in this action ran from the 14th June, 2010, and, reckoned exclusively of that date, (Order 122, rule 10), expired on the 12th July, 2010, - that day included. Since the application is not made *ex-parte*, but by way of motion on notice to the plaintiff (Order 16, rule 2), the date of service of the notice of motion on the plaintiff is the date of "making" of the application, (*K.S.K. Enterprises Limited v. An Bord Pleanála* [1994] 2 I.L.R.M. 1, per. Finlay C.J. at p. 6).

The notice of motion seeking leave to issue and serve the third-party notice is dated the 30th March, 2011. Therefore there has been a delay of at least eight and a half months in making the application. The Order of this Court granting liberty to issue and serve the third-party notice on Mr. Bernard Murphy was made on the 16th May, 2011. By Order 16, rule 2(2) of the Rules of the Superior Courts

this notice must be issued and served within 28 days from the making of that Order. This was not done. By an Order of this Court made *ex-parte* on the 11th July, 2011, time was extended by a further 28 days to enable the third-party notice to be issued and served. Mr. Bernard Murphy on the service of the third-party notice on him, (Order 16, rule 3), became a party to this action almost thirteen months after the delivery of a defence in which it was clearly pleaded, at para. 10, thereof, that any, (if any) dampness, leakage and damage was due to Mr. Bernard Murphy causing water to emanate from his property and to damage caused by him to a soil stack which passed through other apartments causing damage to those apartments.

The plaintiffs raised no objection to Mr. Bernard Murphy being joined as a third-party in the proceedings. Since no issue was raised in that regard at the hearing of this application I infer that the appearance entered on behalf of Mr. Bernard Murphy on the 24th August, 2011, was entered within the time specified in Order 16, rule 4 of the Rules of the Superior Courts.

In *Gilmore v. Windle* [1967] I.R. 323 at 337 and *in The Board of Governors of St. Laurence's Hospital v. Staunton* [1990] 2 I.R. 31 at 36, the Supreme Court held that where a defendant is seeking contribution from a third-party the application for leave to issue and serve a third-party notice must be made "as soon as is reasonably possible" as required by the provisions of s. 27(1)(b) of the Civil Liability Act 1961.

In the former case the statement of claim was delivered on the 1st October, 1962. The application for leave to issue and serve a third-party notice was not brought until the 26th February, 1964. The Supreme Court accepted the explanation offered for this delay that the defendant's legal advisors were awaiting an authoritative decision on the right to bring such applications which had been argued in other proceedings before proceeding with the application. The court held that in such circumstances the delay was reasonable. However, as was pointed in *Molloy v. Dublin Corporation and Others* [2001] 4 I.R. 52 at 58, that case must be distinguished on the basis that the outstanding proceedings related to the interpretation and application of the relevant provisions of the Civil Liability Act 1961, which was then still a comparatively novel piece of legislation which had caused considerable difficulties for practitioners unfamiliar with its operation. Though the facts in the latter case were clearly different from those in the instant case, the Supreme Court laid stress on the fact that the applicants for leave to issue and serve a third-party notice were aware from July 1984 that they had a potential claim for contribution against the proposed third-party while the application to issue and serve the third-party notice had not been made until September 1987 and after the conclusion of the action by the plaintiff against the defendant. Finlay C.J., for the Supreme Court at p. 36 held as follows:-

> "I am quite satisfied 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. A defendant in an action seeking to claim contribution against a person who is not a party to the proceedings cannot serve any third-party notice at any other time, other than as soon as is reasonably possible."

In Molloy v. The Right Honourable Lord Mayor, Aldermen and Burgesses of Dublin, Clonmel Enterprises Limited and Bestobell v. Valves Limited [2001] 4 I.R. 52, the Supreme Court held that if there was delay in seeking to issue and serve a third-party notice the onus of showing that the delay was not unreasonable lay on the party in delay, - in the present case the defendant. Murphy J. for the Supreme Court at p. 56 and 56 held 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. Hughes* (Unreported, High Court, Barron J., 30th April, 1997) at p. 6 of the unreported judgment:-
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> > 'Clearly the words 'as soon as reasonably possible' denotes that there should be as little delay as possible, nevertheless, the use of the word 'reasonable' indicates that circumstances may exist which justify some delay in the bringing of the proceedings.'
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> The onus is on the person seeking leave to serve the third-party notice to prove the application is brought within the statutory time limit. Again, it was Barron J. who pointed out in *McElwaine v. Hughes* also at p. 6 that:-
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> > 'Since the obligation is on the defendant to serve the notice within a reasonable time, it seems to me that the onus of proof of showing that the delay, if delay there is, was not unreasonable is on the defendant.'"

In that case the statement of claim was delivered on the 7th April, 1997. A defence was delivered on behalf of the second named defendant on the 4th June, 1998. By a notice of motion dated the 20th May, 1999, the second defendant sought leave to issue and serve a third-party notice. He was granted leave on the 28th June, 1999, and the third-party notice was served on the 9th July, 1999. The second defendant sought to explain and justify the delay by referring to criminal proceedings which had been taken against them and the third-party pursuant to the provisions of the Safety Health and Welfare at Work Act 1989. While accepting the affidavit evidence that the proceedings in the District Court "enhanced the second defendant's state of knowledge" the Supreme Court held that it was possible for the second defendant on the information available to it to have made a prudent and reasonable decision to join the third-party in the action several months before the application for liberty to issue and serve the third-party notice was brought. The Supreme Court therefore concluded that the application was not brought, "as soon as reasonably possible".

In *Greer v. John Sisk and Sons Limited* [2002] W.J.S.C.-S.C. 2933, Keane C.J. for the Supreme Court at p. 2938 stated:-

> "I am satisfied that one should apply the same principles as applied by this court in *Molly v. Dublin Corporation* and the earlier case referred to therein of *St. Laurence's Hospital v. Staunton*, the High Court decision in *McElwaine v. Hughes and Another* [and the] decision in this court in *Connolly v. Casey*, in all of which the issue was, was there an explanation which made it, at least, not unreasonable for the defendant to delay in serving the third-party proceedings to the extent that he did."

In that case the statement of claim was issued on the 21st January, 1999. Replies to particulars arising out of that statement of

claim were delivered on the 25th March, 1999. The Supreme Court found that it was clear from these replies to particulars that the case made by the plaintiff clearly involved G. and L. Heating and Plumbing Services Limited. The defendant delivered a defence on the 14th June, 1999, which raised a plea under the Statute of Limitations. On the 25th January, 2001, the High Court held that the Statute had not been properly pleaded. The motion on notice seeking liberty to issue and serve a third-party notice was brought on the 12th February, 2001. While there was some delay following the bringing of the motion, it was not an issue in that application. Keane C.J. held that the matter of real concern was the unquestionable delay which ensued following the delivery of the statement of claim and the replies to particulars. The Supreme Court held that the application for leave to issue and serve the third-party notice had not been made as soon as reasonably possible. The court held that there was simply no explanation for the delay of eighteen months. Keane C.J. held that the Rules of the Superior Courts provided a procedure, which had been availed of in that case of applying to the High Court to have such an application for leave to issue and serve a third-party notice dismissed or struck out if they had not been served as soon as was reasonably possible.

At a point later in the same judgment, Keane C.J. (at p. 2941) stated that in his view, what s. 27(1)(b) intended to achieve, given its plain wording, was that the application for leave to issue and serve a third-party notice was to be made as soon as was reasonably possible. He continued:-

> "It must be borne in mind that, at the stage when a party moves to set aside a third-party notice on the ground that it has not been served as soon as is reasonably possible, a court is in a position to ascertain whether that has happened or not. It was either served as soon as reasonably possible, or it was not."

In *Murnaghan v. Markland Holdings Limited, Cantier Construction Limited (In Voluntary Liquidation) and McElroy (Third-party)*, [2007] I.E.H.C. 255, Laffoy J. at 264 cited Denham J. in *Cook v. Cronin* (Unreported, Supreme Court, 14th July, 1999), where she held:-

> "In analysing the delay – in considering whether the third-party notice was served as soon as is reasonably possible – the whole circumstances of the case and its general progress must be considered."

As regards possible prejudice to the third-party arising from delay in seeking liberty to issue and serve the third-party notice, in *A. and P. (Ireland) Limited v. Golden Vale Products Limited* (Unreported, High Court, 7th December, 1978) and in *Neville v. Margran Limited* (Unreported, High Court, 1st December, 1988), McMahon J. in the former case and Blayney J. in the latter, considered that the purpose for the statutory requirement that any application for leave to issue and serve a third-party notice be made, "as soon as is reasonably possible", is to put the third-party in as good a position as possible in relation to knowledge of the claim and opportunity of investigating it. This may be so, but in considering an application of this nature to strike out or dismiss a third-party notice, I am satisfied that an applicant does not have to plead or establish prejudice flowing from the delay in making the application to issue and serve the third-party notice in order to succeed in the application. I adopt what was stated by Laffoy J. in *Murnaghan v. Markland Holdings Limited and Others*, (above cited) at p. 266:-

> "Section 27(1)(b) makes the service of a third-party notice 'as soon as is reasonably possible' mandatory. In my view, the absence or presence of special prejudice affecting the proposed third-party is not something the court is required to have regard to in determining whether the third-party proceedings are valid."

A similar opinion was expressed by Kelly J. in S.*F.L. Engineering Limited v. Smyth Cladding Systems Limited* [1997] I.E.H.C. 81. Of course actual material prejudice if demonstrated could well become a decisive factor depending on the facts of a particular case.

In *Robins v. Coleman and Others* [2010] 2 I.R. 180, McMahon J. at p. 191, para. 25, held:-

> "That the reasonableness at issue in construing the phrase 'as soon as is reasonably possible' is that of the defendant or concurrent wrongdoer is also clear from the Supreme Court decision in *Connolly v. Casey* [2000] 1 I.R. 345."

In that case the Supreme Court held that it was reasonable for the defendant to have waited for replies to particulars before addressing the issue of serving a third-party notice. The test was not whether the replies did or did not materially alter the defendant's state of knowledge but, whether it was reasonable for the defendant to have waited for those replies. The questions raised in the notice for particulars were relevant to a claim against the third-party, so that it was reasonable to await the replies.

The first motion on notice by the defendants seeking leave to issue and serve a third-party notice on Mr. Bernard Murphy was dated the 27th January, 2011. There was therefore a delay of four and half months from the 12th July, 2010, when the time limited by the Rules of the Superior Courts for making such an application expired. No explanation or excuse for this delay has been offered by the defendants. In a replying affidavit of Mr. Joseph Cosgrave, sworn on the 12th October, 2011, he states that he is a director to both defendants and was authorised to make that affidavit on their behalf, which he states he did from facts within his own knowledge and belief. At para. 24 of that affidavit he avers that when this first motion seeking leave to issue and serve a third-party notice on Mr. Bernard Murphy, appeared in the Common Law Motion List on the 20th February, 2010:-

> "Because of an error by both the Solicitor and Counsel instructed in the case, neither attended the hearing of the application and the motion was struck out for non appearance."

He goes on to say that, "as soon as this came to light" a new motion on notice, dated the 30th March, 2011, was issued which came on for hearing on the 16th May, 2011. No explanation is offered as to when or how the oversight came to light or why a further month was permitted to elapse before the new motion was issued.

Order 16, rule 2(2) of the Rules of the Superior Courts provides that unless otherwise ordered by the Court, the third-party notice must be served within 28 days from the making of the order. At para. 26 of his said affidavit, Mr. Joseph Cosgrave states that because the order made on the 16th May, 2011, was not passed and perfected until the 23rd June, 2011, - 37 days, - it was necessary to apply ex parte in The Common Law Ex-Parte List on the 11th July, 2011, for an extension of time within which to serve the third-party notice. This extension was granted and the third-party notice was issued on the 14th July, 2011, and was served on the solicitors for the third-party on the 19th July, 2011.

A procedural order giving liberty to issue and serve a third-party notice bears the date and takes effect from the day the order is pronounced unless the court otherwise directs, (Order 115, rule 1). The inference to be drawn from this paragraph of the affidavit of Mr. Joseph Cosgrave is that the solicitors for the defendants did not apply in the Central Office of the High Court within 28 days from the 16th May, 2011, to have the third-party notice sealed and issued so that it might be served on or before the 13th June, 2011. It was only after the 30th June, 2011, when the solicitors for the defendants received a copy of the order of this Court, dated the 16th May, 2011, as passed and perfected that they sought to issue the third-party notice and the application was refused as not having

been made within time. For this reason they found it necessary to obtain a further order of this Court extending for an additional period of 28 days the time within which to issue and serve the third-party notice. The overall period of delay in serving the third-party notice in this case is therefore eleven months and ten days, commencing on the 9th August, 2010, the date of expiry of the period of 28 days from the time limited for delivery of a defence, (12th July, 2010), and, ending on the 19th July, 2011, the date of service of the third-party notice on Mr. Bernard Murphy. No explanation or excuse is offered for the delay of four months and eighteen days between the 9th August, 2010, the date limited by the provisions of Order 16, rule 1(3) of the Rules of the Superior Courts and the 27th January, 2011, the date of the first notice of motion seeking liberty to issue and serve a third-party notice on Mr. Bernard Murphy.

The delay between the 27th January, 2011, and the 20th February, 2011, was due to an error on the part of solicitors and counsel for the defendants in overlooking the motion in the Common Law Motion List so that it was struck for non-appearance. At para. 24 of his affidavit sworn on the 12th October, 2011, Mr. Joseph Cosgrave states that, "as soon as this came to light a further motion was issued". It is not stated when this unfortunate oversight came to light: the further motion is dated the 30th March, 2011, a lapse of one month and ten days from the striking out of the initial motion. Between the 30th March, 2011, and the actual service of the third-party notice on Mr. Bernard Murphy, on the 19th July, 2011, out of the total intervening period of three months and nineteen days just over one month is attributable to a further unfortunate legal misadventure in the issuing of the third-party notice.

I am satisfied that the third-party has established that there has been delay and, a very substantial delay on the part of the defendants in serving the third-party notice on him. In such circumstances the onus lies on the defendants to satisfy this Court that the delay was not unreasonable having regard to the whole course and conduct of the proceedings up to the 19th July, 2011, the date of service of the third-party notice on Mr. Bernard Murphy. As no explanation or excuse is offered by Mr. Joseph Cosgrave in either of his affidavits made on behalf of the defendants for the initial delay of four months and eighteen days in issuing the first notice of motion on the 27th January, 2011, seeking leave to issue and serve a third-party notice on Mr. Bernard Murphy, I think it reasonable to infer that this delay was attributable to his professional advisors and was not directly attributable to the defendants themselves.

This being so, I find that the overall delay in serving the third-party notice in this case was not directly due to any act or omission on the part of the defendants. I find that this delay was due in lesser part to tardiness on the part of the defendants' legal advisors in delivering a defence and in seeking leave to issue and serve a third-party notice on Mr. Bernard Murphy, but was principally due to legal misadventures for which those legal advisors must be considered responsible and, over which the defendants had no control. By far the greater part of the delay on the part of the defendants in serving the third-party notice on Mr. Bernard Murphy consisted, not in inaction or procrastination, but in errors made in the course of actually endeavouring to implement the third-party procedure.

I adopt the reasoning of Clarke J. in *Thomas Greene and Katherine Greene v. Triangle Developments Limited and George Wadding* [2008] I.E.H.C. 52 at p. 66, where he held as follows:-

> "While a party can be blamed for any delay on the part of its professional advisors, any such blame needs to be considered in a somewhat different way from delay which is directly attributed to the party itself. I am, however, satisfied that a party is not entitled simply to sit back and allow its professional advisers to conduct litigation at whatever pace those professional advisers consider appropriate. If a party does that, then it must at least take some of the blame which might legitimately attach for delay on the part of those professional advisers.
>
> 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 advisors (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 reasonable to attribute delay on the part of those professionals involved to their clients. What may be reasonable depends on the circumstances of the case. Any lawyer representing a party in litigation must be taken to be fully aware of the need to act with reasonable expedition in progressing the proceedings. Such lawyers do not need to be reminded by their clients of their obligation. If those lawyers are guilty of such delay as puts the proceedings at risk then, it may well be that the consequences of that delay should not be visited on the innocent other side, but rather may have to result in the proceedings, or an appropriate aspect of them, being struck out for delay, with the party aggrieved having the remedy against the lawyers whose delay had led to that unfortunate situation".

In the instant case the initial unexplained delay of four months and eighteen days after the expiry of the period allowed by the provisions of Order 16, rule 1(3) of the Rules of the Superior Courts for obtaining leave to issue and serve a third-party notice if it stood alone, though far from trivial, nonetheless in my judgment could not in the circumstances of the progress and conduct of this case to that date be considered unreasonable. The statutory requirement is for the third-party notice to be served, "as soon as is reasonably possible" and not within the more peremptory, "as soon as possible". This is acknowledged by the statutory instrument which confers on this Court a discretion to extend the time specified in Order 16, rule 1(3).

This Court must take notice of the established practice, but without condoning it any way, whereby large numbers of these applications are constantly made outside the time limited by Order 16, rule 1(3), generally without any difficulty. In such circumstances to demand a more rigid observance of the time limit specified in the rule in the present case would be unreasonable, at least without a prior practice direction signalling a change of policy and, insisting on a more strict adherence to the letter of the rule, with extensions of time being granted only in exceptional circumstances. I do not think that the defendants can reasonably be blamed for the delay in serving the third-party notice on Mr. Bernard Murphy resulting firstly, from the striking out of the first motion dated the 27th January, 2011, and secondly, by the failure to serve the third-party notice within 28 days from the making of the order in the second motion on the 16th May, 2011. In my judgment it would be inappropriate in this case, especially as there was no evidence of any actual and material prejudice to the third party arising from the delay, to take the draconian step of setting aside the third-party notice in this case because of this additional, but entirely accidental delay, arising from these unfortunate errors on the part of the defendants' legal advisors in taking steps to issue and serve the third-party notice.

The time limited by Order 16 rule 1(3) of the Rules of the Superior Courts for making application for leave to issue and serve a third-party notice is, (unless otherwise ordered by this Court), 28 days from the time limited for delivery of a defence. Order 21, rule 1 provides that where a defendant enters an appearance to the plenary summons he shall deliver a defence within 28 days from the delivery of the statement of claim or, from the time limited for appearance, whichever shall be later, (subject to extension by consent in writing between the parties or by order of this Court, - Order 122, rule 8). Counsel for Mr. Bernard Murphy submitted that the statutory requirement that a defendant who wishes to make claim for contribution should serve a third-party notice, "as soon as is reasonably possible" necessarily imposes an obligation on the part of such defendant to ensure that there is no delay on the part of

the plaintiff in delivering a statement of claim.

In determining whether a third-party notice has been served as soon as is reasonably possible, the whole circumstances of the case and, its general progress is taken into account by this Court. As was pointed out by McMahon J. in *Robins v. Coleman and Others* (above cited) at p. 189:-

> "What might appear to be a long period when stated in the abstract, might nevertheless, when all the circumstances are taken into account, attract the protection of the phrase."

This includes a consideration whether there is evidence of unreasonable delay on the part of the plaintiff in delivering a statement of claim and, if so, whether the defendant acquiesced in that delay by inaction or, by unreasonably delaying in moving to dismiss the plaintiff's claim for want of prosecution. While an application for leave to issue and serve a third-party notice may be brought at any time after the defendant has entered an appearance, the key issue with which this Court is concerned is when was the defendant, exercising reasonable care and prudence, first in a position to know that it was possible to pursue a claim for contribution against the proposed third party.

In cases where contribution or indemnity is claimed this is seldom possible before the precise nature of the claim being pleaded by the plaintiff has been ascertained. This will generally occur on the delivery of the statement of claim. However, for a variety of reasons, quite frequently this does not occur until after proper replies have been received to a notice for particulars arising out of the statement of claim. There may be cases where the court could conclude, from the particular facts, that from a much earlier stage the alleged wrongdoer should have moved to join a third party in the action for purpose of claiming contribution or indemnity: even without waiting to deliver a defence. I do not accept that a defendant in proceedings must at all times assume that it will become necessary to join a third party in the action and progress the action accordingly, ever mindful of the provisions of s. 27(1)(b) of the Civil Liability Act 1961.

The time lapse in the present case between the issuing of the plenary summons on the 24th July, 2007, and the delivery of the statement of claim on the 17th May, 2010, is in my judgment divisible into four successive periods:-

> 24th July, 2007, to 5th June, 2009, - mediation period, - one year and ten and a half months approximately.
>
> 12th June, 2009, to 11th November, 2009, - difficulties regarding the identity and proper title of the second defendant, - five months.
>
> 1st December, 2009, to 15th April, 2010, - disputes regarding documents, - four and a half months.
>
> 15th April, 2010, to 17th May, 2010, - no identified reason, - one month.

In the proceedings in the Circuit Court, which commenced with the issuing of an Equity Civil Bill on the 21st February, 2007, the owners of Apartment No. 9, Landsdowne Block, sued Basinview Management Limited, the management company and, Borg Developments, the lessor in that case, for damages for breach of covenant, negligence, misrepresentation and/or nuisance by reason of the fact that dishwater or some similar effluent coming from a leak in the above apartment and discharged from a pipe in the common area had caused damage to their apartment. In its defence delivered on the 12th June, 2007, Borg Developments denied liability and, pleaded that any such damage, (which was denied) was due to the failure of Basinview Management Limited to keep and maintain the estate, the common areas and the utilities and, in particular the pipes running between Apartment No. 9 and the car park, in good and substantial repair and condition. It also pleaded, "without prejudice to the foregoing", that the leak was caused or contributed to, by negligence and/or breach of duty, and/or breach of covenant, and/or nuisance on the part of Mr. Bernard Murphy, the owner of apartment No. 34, a third party. On this ground Borg Developments obtained an order from the County Registrar on the 4th October, 2007, granting leave to issue and serve a third-party notice on Mr. Bernard Murphy. In a third-party defence delivered on the 29th April, 2009, Mr. Bernard Murphy pleaded, *inter alia*, that alternatively, the damage arising from the leak was caused by Cosgrave Property Developments Limited in and about the design and construction of the Landsdowne Block.

In the plenary summons issued in the present action on the 24th July, 2007, Basinview Management Limited, the management company, and 25 individual owners of a number of different apartments in the Landsdowne Block and in the Berkeley Block claimed against Borg Developments, the lessor and, Waterdrop (an unlimited company in liquidation) formerly known as Cosgrave Homes), the building company, or one or other of them, an injunction directing them to carry out such works as might be required to ensure that the common areas and, in particular, the sewers and water mains, were put and thereafter maintained in a satisfactory state of repair. They further claimed damages for breach of a management company agreement, breach of covenant, negligence, nuisance and, under the doctrine in *Rylands v. Fletcher*. An appearance was entered for both defendants by the same firm of Solicitors on the 20th June, 2008.

In the statement of claim delivered on the 17th May, 2010, it is pleaded that:-

> "In or about the months of July and August, 2006, the (25 owners), first noticed serious water leaks and dampness in the bathrooms, kitchens, ceilings and walls of their said apartments. The source of those leaks have been traced by expert engineers to multiple failures of the joints in the vertical soil stacks, as a result of a lack of appropriate support brackets for the vertical pipes."

A joint defence was delivered by the defendants on the 27th January, 2011. In that defence they plead, inter alia, that any dampness, leakage or other damage to the relevant properties was caused by the failure of each of the plaintiffs to properly maintain and repair their individual apartments, and/or a failure of the first plaintiff and O'Dwyer Property Management Limited, a management company services provider, to discharge their obligation to repair, maintain and, keep the development and in particular the common areas in proper order. Additionally or alternatively they plead that, "certain items" of dampness and damage caused to, "certain apartments", was due to negligence, and/or breach of duty, and/or breach of covenant, and/or nuisance on the part of Mr. Bernard Murphy, the owner and occupier of Apartment No. 34 Landsdowne Block, in causing water to emanate from that apartment and damage, "certain other properties". It is pleaded that Mr. Bernard Murphy, "furthermore", either by himself or through his agents caused damage to, "a soil stack passing through certain apartments" which in turn caused the damage complained of. By a notice for particulars, also dated the 27th January, 2011, the defendants sought particulars of the pleading in the statement of claim. It was not clear at the hearing of this application whether or not replies were received by the defendants to this notice for particulars.

It appears from this defence that two distinct items of wrongdoing are alleged against Mr. Bernard Murphy. The first item, - causing water to emanate from Apartment No. 34 Landsdowne Block causing damage to, "certain other properties, - appears very similar to

the claim made by the plaintiffs in the action in the Circuit Court against Basinview Management Limited and Borg Developments. The latter in those proceedings pleaded that this was caused or contributed to by Mr. Bernard Murphy and, on foot of this he was joined by them as a third party in those proceedings. However, on the affidavit evidence in the instant case I could not be satisfied that these claims are so similar that from the moment they entered an appearance in the present action, the defendants, acting reasonably and prudently, ought to have realised that they had a bona fide claim for contribution against Mr. Bernard Murphy. As to the second item of wrongdoing, on the affidavit evidence I cannot establish when the defendants first became aware or, were apprised of facts or, were furnished with an expert opinion which led them to consider that Mr. Bernard Murphy, by himself or through his agents, had caused damage to a soil stack passing through "certain apartments", that in turn caused the damage the subject matter of the proceedings. Despite the absence of direct evidence with respect to these two matters, I consider that it is reasonable and proper for me to infer that both these possible heads of claim against Mr. Bernard Murphy must have become clearly apparent to the defendants during the period of mediation, that is, between the 24th July, 2007, and the 5th June, 2009. It is clear from the pleadings and the correspondence exhibited in affidavit that during this time engineering experts were retained by both sides and, that the claims were extensively investigated which included a partial opening-up of the works.

I do not accept the submission by Counsel for Mr. Bernard Murphy, that regardless of the mediation process between them and the plaintiffs, the defendants should have sought leave to issue and serve a third-party notice on Mr. Bernard Murphy, during this period having regard to the mandatory requirement of s. 27(1)(b) of the Act of 1961, that a third-party notice be served as soon as is reasonably possible. As has been repeatedly pointed out by the Supreme Court and by this Court the principal object sought to be achieved by the enactment of s. 27(1)(b) of the Act of 1961, was the elimination and prevention of multiple proceedings. Had the mediation process been successful it is reasonable to infer that there would have been no further proceedings in the present action: a result not only to be encouraged as a matter of public policy but entirely in keeping with the legislative purpose of the section. Having regard to the legal and factual issues raised by the plaintiffs' claims and, the involvement of engineering experts on both sides, I am satisfied that the period of one year and ten and a half months devoted to the mediation process could not be said to have been unreasonable. For these reasons I am satisfied that there was no infringement of the provisions of s. 27(1)(b) of the Act of 1961, during this period.

Thereafter, a further period of ten and a half months elapsed before the delivery of the statement of claim. The first five months approximately of this period were mostly spent in identifying the correct name and status of the second defendant. It may clearly be seen from the *inter partes* correspondence and other acts in the cause to which I have already adverted, that is, the letters dated the 12th June, 2009, 23rd June, 2009, the motion on notice dated the 24th July, 2009, returnable for the 30th July, 2009, and, the letters dated the 28th July, 2009, and 11th November, 2009, that this was a matter which caused no little difficulty for the plaintiffs. Nonetheless, by letters dated the 5th June, 2009, and the 14th October, 2009, the defendants pressed for the delivery of a statement of claim. The order of the Master of the High Court granting leave to amend the title of the action was not made until the 3rd February, 2010. I find that there was no unreasonable delay on the part of the plaintiffs in progressing the action during this period, nor do I find that the defendants acquiesced in such delay as arose from this necessity of ensuring that the proper parties were before the Court.

As I have already indicated the remaining period of five and a half months, - apart from the final month from the 15th April, 2010, to the 17th May, 2010, - was taken up by the plaintiffs' making requests for various documents which their legal advisors considered necessary in order to progress the action and, to deliver a statement of claim and, these requests being refused or challenged by the legal advisors of the defendants. I do not consider that either the plaintiffs or the defendants acted unreasonably in this regard and failed to progress the action with proper diligence and dispatch. I am satisfied that the decision of the legal advisors of the defendants not to make an application up to this time seeking to dismiss the plaintiffs' case for want of prosecution was reasonable and justifiable for the reason stated at para. 8 of the second affidavit of Joseph Cosgrave sworn on the 20th January, 2012, that in the context of the foregoing it would be most unlikely to succeed. By a letter dated the 9th April, 2010, the solicitors for the defendants agreed to extend the time for the delivery of a statement of claim by a further four weeks drawing, at the same time, attention to the fact that the plenary summons had been issued on the 24th July, 2007. The statement of claim was delivered on the 17th May, 2010.

In the circumstances of this case I find that it was reasonable and proper for the defendants to have waited until the exact nature of the case being pleaded against them by the plaintiffs became crystallised by the delivery of this statement of claim. In my judgment due compliance with the provisions of s. 27(1)(b) of the Act of 1961, does not require a defendant to attempt to foresee or to deduce the nature of the claim likely to be pleaded by a plaintiff. Even if, following the unsuccessful conclusion of the mediation process on the 2nd June, 2009, the defendants and/or their legal advisors could surmise the possible or even probable nature of a claim likely to be made against them by some or all of the plaintiffs, in my judgment it still could not reasonably be claimed that at this time the defendants had sufficient relevant evidence upon which to make a rational and prudent judgment to join Mr. Bernard Murphy as a third party in the proceedings. I am satisfied that though the proceedings in this case have not progressed with any particularly commendable alacrity there has been no failure on the part of the defendants to serve the third-party notice on Mr. Bernard Murphy as soon as was reasonably possible.

It was submitted by Counsel for Mr. Bernard Murphy that the third-party notice should be set aside as irregular for failing to disclose on its face, as required by the provisions of the Rules of the Superior Courts, the grounds of the claim for contribution being made against Mr. Bernard Murphy. As was pointed out by Counsel for the defendants in reply, these grounds were stated fully in the grounding affidavit of Conor B. Cahill, Solicitor for the defendants. He stated that a copy of this affidavit was served on Mr. Bernard Murphy with the third-party notice so that Mr. Bernard Murphy was thereby made fully aware of the grounds upon which a claim for contribution was being made against him. The fact of this service was not disputed on behalf of Mr. Bernard Murphy.

Undoubtedly, the form of third-party notice provided at Appendix C Form 1 of the Rules of the Superior Courts contains the following express direction:-

> "State concisely the grounds of the claim against the third party."

By O. 125, r. 2 it is provided that this appendix shall be deemed to form part of those rules. Order 125, r. 3 provides that:-

> "The respective forms in the said Appendices shall, where applicable or appropriate, be used with such variations or modifications as circumstances may require."

This rule goes on to provide that where other or more prolix forms are employed the costs occasioned are to be disallowed to or, borne by the party using those forms, unless otherwise directed by this Court.

It is provided by O. 124, r. 1 of the Rules of the Superior Courts that:-

> "Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

I am satisfied that no detriment was shown to have been caused to Mr. Bernard Murphy by the omission from the third-party notice itself of the grounds of claim. While taking notice of the fact that for many years past, this has become a not uncommon feature of these third-party notices, I cannot accept that this would justify the Court in disregarding the failure in the instant case to comply with the express requirements of the Rules of the Superior Courts. However, I consider that it would be quite unjust and altogether disproportionate to set aside the third-party notice in this case for this reason only. I am satisfied that justice will be served in this case by disallowing to the defendants the costs of preparing, issuing and serving the third-party notice regardless of the outcome of this action and of the third party issue, and to this extent and, to this extent only, the order of this Court as to costs made on the 16th May, 2011, shall stand varied.

The application to set aide or dismiss the Order granting leave to issue and serve a third-party notice on Mr. Bernard Murphy is refused.