THE HIGH COURT

[2008 No. 7476 P.]

BETWEEN

JOHN O'SULLIVAN AND BRENDA O'KEEFFE

PLAINTIFFS

AND

MOUNT JULIET PROPERTIES LIMITED, CAMPBELL CONROY HICKEY PARTNERSHIP ARCHITECTS AND McCARRICK WOODS TRADING AS McCARRICK WOODS CONSULTING ENGINEERS

DEFENDANTS

AND

MELCARNE DEVELOPMENTS LIMITED TRADING AS WALSH BROTHERS

FIRST NAMED THIRD PARTY AND

HENDRICK RYAN AND ASSOCIATES LIMITED

SECOND NAMED THIRD PARTY

THE HIGH COURT

[2009 No. 2444 P.]

BETWEEN

JOHN ENRIGHT AND MARY ENRIGHT

PLAINTIFFS

AND

MOUNT JULIET PROPERTIES LIMITED,

DEFENDANT

AND

MELCARNE DEVELOPMENTS LIMITED TRADING AS WALSH BROTHERS

FIRST NAMED THIRD PARTY

AND

CAMPBELL CONROY HICKEY PARTNERSHIP ARCHITECTS

SECOND NAMED THIRD PARTY

AND

McCARRICK WOODS TRADING AS McCARRICK WOODS CONSULTING ENGINEERS

THIRD NAMED THIRD PARTY AND

HENDRICK RYAN AND ASSOCIATES LIMITED

FOURTH NAMED THIRD PARTY

JUDGMENT of Mr. Justice Roderick Murphy dated the 3rd day of July 2012

1. Motions

These related motions, brought by the second named third party (HRA) to strike out the third party notice, were heard together in relation to No. 9 and No.2 The Walled Garden, Mount Juliet, Co. Kilkenny.

The first motion in the O'Sullivan and O'Keeffe proceedings (2008 No. 7476 P.) was dated the 6th October, 2011, while the Enrights' (2009 No. 2444 P.) motion was dated the 28th November, 2011, (Enrights).

Both motions were grounded on the affidavit of Fiona Kearns, solicitors with Beale and Co. Solicitors, for HRA. and the exhibits thereto sworn on the 30th September, 2011.

Hendrick Ryan Associates Limited (HRA), is a firm of civil and structural engineers. It was involved with a development at Mount Juliet called The Walled Gardens.

2. Pleadings

Three sets of proceedings related to claims of allegedly defective construction. HRA was involved at an initial planning stage of the development in July 2004. HRA subsequently produced works documents in the period from June to September 2006. In November 2007, following the completion of structural works on site, HRA issued an opinion of compliance.

The first and second sets of proceedings issued in 2008 and 2009 as referred to above.

The third, High Court Record Number 2010/11587P, Mount Juliet Properties Limited v. Melcarne Developments trading as Walsh Brothers, Campbell Conroy Hickey Partnership Architects and McCarrick Woods Limited trading as McCarrick Woods Consulting Engineers and Hendrick Ryan and Associates Limited, issued on the 17th December, 2010, relates to premises in the Walled Garden from other members of No. 9 and No. 2.

HRA is, accordingly, a defendant in the third proceedings.

The plenary summonses originally issued as against Mount Juliet Properties Limited (Mount Juliet), seeks, *inter alia*, specific performance of work and damages in lieu or in addition to such specific performance.

On the 29th March, 2011, the solicitors for Mount Juliet issued a motion for leave to issue and serve a third party notice on HRA. That motion was returnable on the 9th May, 2011. It was pleaded, *inter alia*, that HRA had a liability as "the consulting civil and structural engineers appointed by the first named defendant to design, monitor, supervise and inspect the civil and structural installation in respect of the property ..."

It was averred that no detail was given in respect of any particular allegations against HRA. There is a reference to Mount Juliet having "appointed" HRA and there is a separate reference to an "agreement".

3. Grounding Affidavit for Third Party Notice
In an affidavit sworn Eoin Cotter, director of Mount Juliet stated that Mount Juliet's ongoing endeavours to address the complaints of the plaintiffs and other owners involved considerable opening up of the structure of many of the premises in The Walled Garden lodges. Mount Juliet had obtained the advices of Punch Consulting Engineers (Punch) in relation to the alleged complaints and, in particular, in relation to complaints regarding civil and structural engineering matters.

It was averred that at the time of construction, Mount Juliet had retained the services of civil structural engineers, HRA, to provide civil and structural engineering services in connection with the property and other premises in The Walled Garden lodges. The deponent had been advised by Punch that Mount Juliet would be entitled to claim indemnity or contribution from HRA and that Mount Juliet had not been so advised at the time of the earlier application to join the other third parties.

On the basis of the opening up investigations carried out by Punch. Eoin Cotter believed and was advised that Mount Juliet was entitled to seek indemnity and/or contribution from HRA.

The High Court (Gilligan J.) granted liberty to Mount Juliet to issue and serve a third party notice on HRA on the 23rd May, 2011.

4. Second Proceedings
Similar applications were made in relation to HRA in the second set of proceedings. This Court granted liberty to Mount Juliet to issue and serve third party notice on HRA ion the 14th February, 2011.

5. Grounding Affidavit sworn on the 30th September, 2011 in Strike out Proceedings
The grounding affidavit in relation to the O'Sullivan proceedings is more extensive than that of even date in the Enright proceedings. The latter refers to the former. Consequently the court will refer to the former. In her affidavit, Fiona Kearns said that she believed that there had been manifest and quite considerable delay on the part of Mount Juliet in seeking to join HRA as a third party to each of the proceedings. The application ought to have been brought in late November 2008, rather than in February and June 2011, involving a significant period of unexplained delay. HRA had been identified in or about July 2009 when they were named in the first amended defence. Mr. Eoin Cotter deposed in September 2009, that Mount Juliet had the benefit of expert advice in his affidavit to join the first set of third parties and referred to the potential responsibilities of all parties concerned therefore.

Mr. Cotter, for Mount Juliet, in his affidavit of the 28th March, 2011 grounding the application to join HRA, referred to advices it had received more recently which was presumably a reference to the advices received from Punch. Mount Juliet had sent a letter before the action to HRA on the 2nd December, 2008, but nothing further occurred thereafter. The letter of the 23rd September, 2010, specifically stated that (Mount Juliet) "had now completed its investigations and ascertained the extent of the defects to the properties".

In that context White Young Greene, Consulting Engineers and Environment Consultants, (WYG) had been engaged by Mount Juliet in April 2009, and subsequently were replaced by Punch.

It was averred that Mount Juliet had resolved the claims of the plaintiff in the first set of proceedings and that HRA was only formally joined to those proceedings after that settlement.

The joinder of HRA as the third party had caused very real prejudice, not least of all because Mount Juliet appeared to have reached a compromise with the plaintiffs without any reference to HRA. The decision to apply to join HRA as the third party had all the indicia of after-thought, unsupported by any substantive merit. Even if merited, which was strongly denied, they were of an entirely negligible and inconsequential nature.

6. Replying Affidavit
Mr. Cotter in his affidavit sworn the 28th November, 2011, referred to experts retained by Mount Juliet to advise them of the extent and defects of the development and the remedial works necessary to rectify properties. Each of those experts produced reports in or around spring of 2009, and none of the reports identified "any structural and (*sic*) civil engineering problems".

The letter before action to HRA on the 22nd December 2008, referred to above, was a notice that, in respect of claims being made against Mount Juliet by the owners of the houses, Mount Juliet would seek indemnity from HRA to the extent of HRA's liability for such defects. The letter did not purport or claim that there were, in fact, any such defects for which HRA was liable or that Mount Juliet was making a formal claim against HRA.

Mr. Cotter said that WYG, who were Mount Juliet's then new consultant civil and structural engineers, did not express any opinion on the basis of which Mount Juliet would have been justified in seeking to join HRA in either the Enright or the O'Sullivan proceedings. He referred to the report on structural issues in Hayes Higgins report of the December 2009.

Subsequently in early June 2010, the potential structural engineering issue was raised for the first time with Mount Juliet by WYG who

advised that, at the interface between balcony *in situ* concrete and internal pre-cast units, the support angle called up on the HRA drawings were not of sufficient depth to allow for satisfactory edge distance between the fixing bolts and the underside of the concrete. This gave rise to a possible element of defective design by HRA. Mount Juliet solicitors communicated with WYG asking for clarification on this issue and seeking their detailed view as to why HRA were negligent. Before furnishing an answer to that request, on the 28th June, 2010, WYG advised Mount Juliet that they did not have the resources to provide the services required for the project and offered to resign. Punch were appointed to replace WYG and required some lead in time to acquaint themselves with the very extensive project and documentation.

> On the 1st September, 2010, Punch advised Mount Juliet as follows:
>
> "Therefore on the basis that further information in the form of memos of phone conversations, faxes, emails, letters etc, generated by Hendrick Ryan to the contractor recording defects in site construction (which we are not in possession of), our opinion will remain that Hendrick Ryan & Associates were negligent in their duties as per the Conditions of Engagement and should therefore be joined into the legal proceedings."

Mr. Cotter said this was the first time that Mount Juliet had consultant's advice on the basis of which it could reasonably contemplate involving HRA. They had acted in a wholly responsible manner with all due haste.

Counsel advised that, in the light of the extent of both the Enright and the O'Sullivan claims, it would be preferable to join HRA as a third party to each of their proceedings. Counsel had queried precisely what Punch was saying and that they clarified their advice on the 3rd December, 2010, to read as amended in bold as follows:-

> "Therefore on the basis that further information in the form of memos of phone conversations, faxes, emails, letters, etc. generated by Hendrick Ryan to the contractor recording defects in site construction (which we are not in possession of), ***does not exist*** our opinion will remain that Hendrick Ryan and Associates were negligent of their duties as per the Conditions of Engagement and should therefore be joined into the legal proceedings."

He was of the view that the claims being made against HRA were not "of an entirely negligible and inconsequential nature". He was advised that the potential costs of remedying defects might have a liability which would run to several hundred thousand Euros.

Due to the circumstances outlined by Ms. Kearns in the chronology of the Enright proceedings, the third party notice was not served on HRA until the 7th July, 2011.

The circumstance referred to, include seeking assistance of HRA in relation to discovery to plaintiff of documents relevant to No. 2 (Enright claim), discovery order of the 28th April, 2011, a letter from HRA's solicitors dated the 13th May, 2011, stating that HRA were not a party to the proceedings nor were in a position of agent for (Mount Juliet). It was only on the 13th June, 2011, that the plaintiffs solicitors wrote saying that an order had been made joining HRA as a third party and that further opening up works were to be commenced. HRA was put on notice in case it wished to have an expert in attendance.

On the 27th June, 2011, Peart J. granted an order for extension of time to serve the third party notice on HRA.

On the 4th July, HRA's solicitors took up the offer to inspect of No. 2.

On the 5th July, the third party notice was issued and was served on the 7th July, 2011.

However, notwithstanding all the foregoing difficulties in relation to service of the third party notice on HRA, not only were HRA on notice of their potential involvement in relation to defects, but were given every opportunity to participate in the investigation of defects in No.2 and No.9.

7. Further Affidavit of Fiona Kearns
By affidavit filed on the 9th December, 2011, Ms. Kearns said that a striking feature of Mr. Cotter's affidavit was that, far from providing any explanation or justification for the delay, it raised very significant questions as to what precisely was occurring at various points in time over the course of the proceedings and, indeed, as to the "bona fides" of Mount Juliet in seeking to make such a claim against HRA. It did not provide justification for the dilatory manner in which Mount Juliet pursued the claims it then wished to make for contribution or indemnity against HRA.

Ms. Kearns said that the reports of spring 2009 were not exhibited. Mr. Cotter was exceedingly vague as to what the experts advised. If Mount Juliet were indeed unaware of any case against HRA at that time the responsibility for this delay should lie with their experts and by extension with Mount Juliet in respect of their instructions given to the experts.

Having notified HRA that Mount Juliet would seek indemnity on the 2nd December, 2008, Mount Juliet should not have done so if it was not making a formal claim against HRA. It did not have evidence to justify HRA's joinder to the actions. It was incumbent upon Mount Juliet to move with all appropriate dispatch at that time to investigate thoroughly to pursue any third party action it might wish to take as against HRA.

The deponent said that Mount Juliet must bear responsibility for the delay caused in the cessation of WYG on the 28th June, 2010.

There was a very significant period of unexplained and unjustifiable delay to the point when the third party proceedings were actually served in July 2011, ten months after the letter of September 2010.

The deponent referred to the No.9 (O'Sullivan) proceedings having been settled after the issue of the third party proceedings, but not before they had been served and HRA had been prejudiced due to that settlement without prior reference to it.

8. Second Affidavit of Eoin Cotter
Mr. Cotter, by affidavit filed on the 13th January, 2012, stated that Mount Juliet's position was that it moved to join HRA as quickly as it reasonably could once it had the relevant advice of its experts. It should not and could not have moved earlier. He referred to the WYG report on structural issues dated the 15th February, 2010, previously exhibited, in which WYG did not express any opinion on the basis of which it has justification in joining HRA in either the Enright or O'Sullivan proceedings.

In June 2010, it was clear that WYG was not in a position to continue to devote sufficient resources to the assignment at hand and, therefore, would have to be replaced. Mount Juliet, acting as responsibly and quickly as it could, appointed Punch. Mr. Cotter said

that he had made no assertion that HRA, if successful, would still be obliged to defend the claim in the Mount Juliet proceedings (the third set of proceedings) which related to all the other properties at Walled Garden lodges.

He confirmed other matters in his original affidavit and asked the court to refuse the reliefs sought in HRA's notice of motion.

9. Relevant Authorities
The Civil Liability Act 1961, s. 27(1)(b) provides that a concurrent wrongdoer who is sued for damages or for contribution and wishes to make a claim for contribution shall serve the third party notice upon such person as soon as is reasonably possible. Having served such notice he should not be entitled to claim contribution except under the third party procedure. If the 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.

The meaning of the phrase "as soon as is reasonably possible" has been subject to a comprehensive analysis in Delaney and McGrath in *Civil Procedure in the Superior Courts*, 3rd Ed. (para. 9.26) It is clear that the whole circumstances of the case and its general progress must be considered. The phrase is a relative concept and what might appear to be a long period of time in the abstract might, when all the circumstances of the case are taken into account, attract the protection of the phrase.

The meaning of the phrase was examined in some detail by the Supreme Court (Murphy J.) in *Molloy v. Dublin Corporation* [2001] 4 I.R. 52. The word "possible" is used rather than "practicable" suggesting a brief and inflexible time limit which would be inconsistent with the nature of the problems confronted by a defendant and of the decisions to made by him or his advisers. The Supreme Court continued:-

> "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". (at 56-57, 26 -27).
>
> It is clear that the phrase is not as soon as possible nor forthwith.

Clarke J. in *Greene v. Triangle Developments Limited* [2008] I.E.H.C. 52 considered that the period which elapsed should have regard to any steps, such as the assembly of materials and the taking of advice, which were reasonably necessary to reach a conclusion as to whether it was appropriate to seek to join a third party. Delaney and McGrath emphasise (para. 9.29) that Clarke J. added that, in assessing the pace at which such actions were concluded, it was appropriate for the court to have regard to the urgency with which the legislation, the rules and the case law suggest that the application should be brought and the fact that many recent authorities emphasised that delays which might have been considered acceptable in the past will no longer be tolerated.

Finlay C.J. in *Board of Governors of St Lawrence Hospital v. Staunton* [1990] 2 I.R. 31, had regard to the fact that the defendants were aware of the nature of the plaintiffs claim from the time that the particulars were filed and were aware at that time of any potential claim for contribution which they might have against the third party was relevant. The real question hinged, according to Barron J. in *McElwaine v. Hughes* [1997] I.E.H.C. 71, on the behaviour of the defendant or rather his legal advisers.

It is clear from *Greene v. Triangle Developments Limited* that no party should issue proceedings to seek or join a third party without have a credible basis for doing so. A party is not entitled simply to sit back and allow professional advisers to conduct litigation at whatever pace those professional advisers consider appropriate. On the other hand the position of the party who is faced with delay on the part of its professional advisers depends on the extent to which it could be regarded as reasonable and had within its capability an ability to do something about the delay concerned.

The further proviso is that the intended third party suffers prejudice by reason of delay. In *S.F.L. Engineering v. Smyth Cladding Systems Limited* [1997] I.E.H.C. 81 at (6) - (9). Kelly J. stated that:-

> "In considering applications of this sort, the Court is not concerned with any question of prejudice arising as a result of the delay in applying for liberty to join the third party."

This view was repeated in *Connolly v. Casey* [1998] I.E.H.C. 90 at para. 13.

A similar view was expressed by Laffoy J. in *Murnaghan v. Markland Holdings Limited* [2007] I.E.H.C. 255, where it was stated that the absence or presence of special prejudice affecting the proposed third party was not something the court was required to have regard to in determining whether the third party proceedings were valid.

Previously in *Ward v. O'Callaghan* [1998] I.E.H.C. 16, Morris P. stated that to constitute a ground for setting aside third party proceedings, it would be necessary for delay (in that case of one year and five months since the delivery of the statement of claim) to be coupled with circumstances which amounted to a prejudice suffered by the third party based on this delay. It was desirable that all issues about indemnity or contributions as between third parties and defendants should be disposed of at the same time as the issues relating to the defendants liability towards the plaintiff. That view should only be departed from where serious prejudice would arise as a result of following that course.

McMahon J. in *Robins v. Coleman* [2010] 2 I.R. 180, concluded that prejudice to the third party (or absence of it) is only one factor which went into the mix.

In *Connolly v. Casey and Murphy* at para. 42, Kelly J. stated in relation to the explanations of delay in the light of delivery of replies to particulars and of obtaining a statement prior to bringing an application to join the third party that he found it difficult to ascertain the information contained in the reply which added to the defendants state of knowledge so as to make possible what had previously not been possible, namely, the preparation of an application to join the third party. He did not see that the replies materially altered the defendant's state of knowledge and did not consider that the defendants had provided a satisfactory explanation for the delay in question.

This has a certain resonance to the present case. However, Denham J., (in the Supreme Court [2000] I.R. 345) for the Supreme Court said that this was the wrong test. The test was whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendant's state of knowledge was 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 their replies.

In the present case the material delay complained of was as much prior to the Punch report but, rather, the further delay in serving the third party notice.

The delay in forming legal and commercial judgments referred to by Murphy J. in *Molloy v. Dublin Corporation* at 56, have to be considered in the light of proceedings not being instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon.

Greene v. Triangle Developments Limited and George Wadding having referred to *Stephens v. Flynn* (Unreported, Supreme Court, Kearns J. 25th February, 2008), stated that even the most complex of cases must be prosecuted with due expedition and an appropriate sense of urgency. A period of 20 months was totally outside the period of time that might be considered appropriate or reasonable, and was so found by Clarke J. in *Stephens v. Flynn* to be inordinate. In the Supreme Court Kearns J. held that in the challenge to that finding is unsustainable.

Clarke J. at 2.7, having reviewed the case law stated:-

> "On the basis of the authorities it seems to me clear, therefore, that the court should adopt a strict approach to the time within which a third party application is brought. While parties will not be fixed with a requirement that, in substance, a third party notice must be served within a matter of seven weeks from the date of service of the statement of claim (or face the setting aside of the third party proceedings), that period does, nonetheless, have to be taken into account in assessing the extent to which there was, in fact, a delay which renders the period not 'as soon as was reasonably possible'. In which renders the period not 'as soon as was reasonably possible'. In considering any period which elapsed between the time when the third party application should have been brought and when it was actually brought, the court should principally have regard to any steps, such as the assembly of materials and the taking of advice, which were reasonably necessary to reach a conclusion as to whether it was appropriate to seek to join a third party. In assessing the pace at which such actions were conducted, it seems to me that it is appropriate for the court to have regard firstly to the urgency with which the legislation, the rules and the case law suggest that the application should be brought, so that there is no license for a leisurely approach to assembling the necessary materials or taking the relevant advice. In addition the pace needs also to be considered in the light of the fact that many recent authorities emphasise that delays which may have been considered appropriate in the past will not longer be tolerated."

Clarke J. agreed with the view expressed by Kelly J. in *Connolly v. Casey* regarding the preference of Morris J.'s decision in *Dillon v. MacGabhann* (Unreported, High Court, Morris J. 24th July, 1995), at para. 3.4 Clarke J. states that:

> "... the date of service more properly conforms, at least in most cases, with the purpose of the section as identified by McMahon J. in *A & P Ireland Ltd*, that is giving the possible third party the earliest opportunity of being put on notice of the claim against him and the opportunity to investigate that claim.
>
> It is, of course, the case that an intended third party is not ordinarily notified of the application to issue and serve a third party notice. Therefore, in the ordinary way, the intended third party does not necessarily know of the existence of an intention to issue and serve a third party notice (or, indeed, the making of an order to that effect) until such time as the third party notice has, in fact, been served. While it may, of course, be the case that the intended third party will, in fact, know either directly from the defendant, or otherwise, of the application to issue and serve the third party notice concerned, this will not necessarily be the case until the third party notice is served."

The facts in *Greene*, were that the order granting leave was formally served almost exactly 22 months after the time provided for the service of defence and thus after the time when the third party application should have been initiated.

While HRA had been notified by letter on the 23rd September, 2010 and the 5th October, 2010, there is no evidence to suggest that they were on notice that Mount Juliet intended to apply for leave of the court to serve them with third party proceedings which they did on the 17th December, 2010. In the O'Sullivan case, as already referred to, there was a delay of 42 days and in the Enright case, a delay of 140 days in serving the applicant albeit after an extension of time had been granted.

In the *Greene* case, the intended third party was during the period of delay aware of the existence of the proceedings.

McMahon J. in *Robins v. Coleman* [2010] 2 I.R. 180 at 191, Para. (23) gave examples of the kind of delay allowed and disallowed by the courts in previous cases which though of limited assistance were regarded as useful to give an idea of the range of delays addressed by the courts in the case law. Delays of 38, 48, 36, 21 months were held to outside the period allowed whereas delays of 15 months, 18 months and 16 months were not set aside.

On this basis the delay of six weeks and five or seven months appeared to be reasonable in the context of those decisions.

McMahon J. at 193(32) and (33) did not agree with the argument of the third party, that the fourth defendant was in a position to commence third party proceedings against it from December 2006, when the fourth defendant was joined as a third party, or in June 2007, when it was joined as a co-defendant. At that time, it was argued, it was in a position to make a proper assessment of the situation and who else should be joined. It should not have waited until the 11th March, 2009, to serve the third party notice. The fourth defendant gave as the reason for the changing nature of the plaintiffs claim in a complex building situation and the difficulties in getting permission to inspect. In that case the fourth defendant was awaiting replies to particulars before considering third party proceedings.

McMahon J. also held at 197(44) that the third party was not prejudiced in terms of knowledge and proofs in what was complex litigation. He came to the conclusion that "as soon as is reasonably possible", in all the circumstances should be given a more indulgent interpretation that there might normally be expected in the situation where such peculiar features are not present. In his view the interpretation he was adopting was best designed to advance the object of the section.

In that the court was of the view that where a court had granted liberty to issue a third party notice in circumstances where the application to issue the notice was made outside the 28 day time period stipulated in O. 16, r. 1(3), the court had, by implication, extended the time period within which to apply to issue the third party notice.

He accordingly refused the application by the third party to set aside the third party notices of the fourth, fifth and sixth defendants.

Laffoy J. in *Doyle and Sons Roscommon Limited v. Flemco Supermarket Limited and JJ Rhatigan and Company Limited, and Fortlyster*

Limited, third party [2009] I.E.H.C. 581 referred to the period of delay of being one month short of two years and if this were a "stand alone" application, despite the obvious necessity for the first named defendant to obtain expert advice, in her view it could not be said that the third party notice was served as soon as reasonably possible. However, the application was not a "stand alone" application as the third party proceedings by the defendant against the third party remain and would be litigated with the plaintiffs' claim. If the third party proceedings were set aside it would still open for the defendant to institute proceedings against the third party. In the circumstances having regard to the overriding purpose of s. 27(1)(b), which is to avoid a multiplicity of actions, it seemed that, in the unusual circumstances of case, the proper course was to refuse the application to set aside the defendants third party proceedings as the issues which arose on the proceedings were similar to the issues which would have to be dealt with in the second named defendant's third party proceedings against the third party. Laffoy J. noted that, on the evidence before the court, there was no prejudice to the third party having to defend the third party proceedings at that juncture.

10. Procedure: 0. 16
Order 16 of the Rules of the Superior Court provide at r. 1(3) that an application for leave to issue a third party notice should be made within 28 days in the time limited for delivery of the defence. Pursuant to r. 2(3) the order should be served within 28 days of its issue.

The court notes that the 28 day period envisaged by O. 16, covers both the application for leave and the service of the intended third party under r. 1(3) which provides:-

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

11. Findings of the Court
The evidence in all material aspects is similar in the O'Sullivan case to the Enright case save in respect of the timing of significant events. The following table indicates the respective dates of pleadings including issue and service of notices:

TABLE OF PLEADINGS including issue and service of notices

Event O'Sullivan Enright

Summons 11-9-08 13-3-09

Statement of Claim 21-10-08 22-5-09

Defence 22-12-08 17-08-09

Amended Claim 24-07-09

Amended Defence 24-7-09

Third Party Notices 1-3 9-9-09 23-2-10

Service 12-3-10

Amended Claim 17-12-09

Amended Defence 29-01-10

Punch Advice 1-09-10

M.J. Letter to HRA 23-09-10

M.J. Letter Investigations Complete 23-09-10

M.J. Letter to HRA 5-10-10

Clarification by Punch 3-12-10

M.J. Summons HRA (Re. other houses) 17-12-10

Leave to serve HRA in Enright 14-2-11

Extension of time 27-06-11

Leave to serve HRA in O'Sullivan 23-5-11

Service 5-7-11 5-7-11

The elapsed time between the summons and application for the first three third party notices was about a year. However, the time between summons and order for the HRA third party notice was two years and eight months (O'Sullivan) and two years (Enright).

Services of such notices was two years and ten months after summons or six weeks after the order (O'Sullivan) and two years and four months or under five months from order, but one week after extension of order.

Also of significance is the time from the advice of Punch on the 18th September, 2010 (clarified on the 3rd December, 2010 to service on the 5th July, 2011, which was eight or six months in both cases).

The notice of the advice may be more significant for the trial if the court were to decide to refuse the applications. However, it is of some significance in relation to these motions insofar as the Mount Juliet alleged delay is concerned.

Punch had reported that they were not in possession of the further information "generated by Hendrick Ryan to the contractor recording defects in site construction". Their opinion would notwithstanding, remain that Hendrick Ryan and Associates were negligent of their duties as per the Conditions of Engagement and should therefore be joined "into the legal proceedings".

This is a curious paragraph. The amendment of the words "does not exist" whether referring to the basis of their opinion or to the non recording of defect, is not entirely clear. There is no comment on the insufficient depth to allow for satisfactory edge distance between the fixing bolts and the underside of the concrete. There was no opinion other than this gave rise to the possible element to the defect designed by HRA.

Their report is summarised in two paragraphs above the opinion ending with the words ... "it is reasonable to expect that the majority of structural elements would be available for inspection over the course of the fortnightly visits" and the following paragraph:-

> "In our opinion therefore 30 weeks of construction would be sufficient time to review the quality of work that the builders carrying out and to highlight any concerns as to the quality and the necessity for intervention if quality is substandard.
>
> Substandard items discovered in the properties following inspection by Punch are not identified and recorded in the site minutes. Typically there are only a small number of issues raised under the structural section although issues with regard to key tests and roof strapping details are mentioned."

It is acknowledged that no substandard quality elements are identified or recorded in the site minutes.

Counsel had asked for clarification of the report of the 1st September, which resulted in the letter of the 3rd December, 2011.

The references to "our opinion will remain" may indicate previous verbal or, perhaps, written opinion which is, however, not exhibited.

If such a previous opinion existed and, if such an opinion were that HRA should be joined to the legal proceedings then this would have been at an earlier date and would further highlight the delays in joining HRA in the proceedings.

On the other hand Mount Juliet advisors might have been justified to await written advice and clarification.

12. Decision of the Court
The court has considered the chronology both in the O'Sullivan case and in the Enright case. In O'Sullivan the statement of claim was filed on the 21st October, 2008, and the defence on the 22nd December, 2008. However, an amended statement of claim and defence issued nine months later.

Third party notices in respect of the first second and third named parties were served on the 9th September, 2009. A further amended statement of claim in defence issued on the 17th December, 2009, and the 29th January, 2010.

Following advice of Punch who was Mount Juliet's second consulting engineering firm, solicitor's letters were sent to the applicant, HRA on the 23rd September, 2010 and the 5th October, 2010. On the former date the defendant had said that it had "now completed investigation" and clarified that on the 3rd December, 2010.

On the 17th December, 2010, Mount Juliet issued a summons against HRA in respect of other houses in the Walled Garden development.

Six months later the High Court gave leave to Mount Juliet to serve HRA on the 23rd May, 2011. The following day Mount Juliet settled with the plaintiffs in the O'Sullivan case.

The HRA avers that it is prejudiced by that settlement which came the day after the court had given leave to Mount Juliet to serve HRA with a third party notice.

The HRA submits that the service of that third party notice on the 5th July, 2011, was a full six weeks after leave was given in O'Sullivan.

The reasons given for this delay, as outlined in Fiona Kearns' affidavit and referred to by Eoin Cotter, are summarised in para. 5 above. The reasons do not appear to be relevant to the delay.

There was an even longer delay in relation to the service of the third party notice on the Enright parties. Leave had been given on the 14th February, 2011, with service delayed until the 51h July, 2011, which is approximately 140 days after leave.

However, by order of Peart J. on the 27th June, 2011, leave to extend the time for the service of the third party notice was granted. The notice was then served on the 5th July, 2011.

While that delay, before leave was given, would appear inordinate even in relation to the amended statement of claim the court is of the view that the delay resulted from the need to have a clear expert report from the consulting engineers. The court notes, however, that no such report indicating that HRA was liable was made by WYG. Mr. Cotter stated at para. 18 of his affidavit filed the 28th November, 2011, that, on the basis of the opening up works that had been carried out and WYG's inspection thereof at No.2 and No.6 and No.8 (but not at No.9 of The Walled Garden lodges) that WYG did not express any opinion on the basis of which Mount Juliet would have been justified in seeking to join HRA in either the Enright proceedings or the O'Sullivan proceedings. Mr. Cotter referred to the report on the structural issues in Hayes Higgins report of December 2009, prepared by WYG and dated the 5th February, 2010.

The court notes that Mount Juliet had stated that they had completed investigations on the 23rd September 2010.

Mr. Cotter said that in June 2010, the potential structural engineering issue was raised for the first time with Mount Juliet by WYG (as well as issues of lack of supervision). They advised Mount Juliet that, the interface between balcony *in situ* and concrete internal precast units, the support angle called upon the HRA drawings was not of sufficient depth to allow for satisfactory edge distance between the fixing bolts on the underside of the concrete. That gave rise to a possible element of defective design by HRA. It was in those circumstances that Gore Grimes solicitors for Mount Juliet communicated with WYG asking for clarification in this issue. In fact that clarification would appear to have been given by Punch on the 3rd December, 2010, after Mount Juliet had said that it had completed the investigations.

In the meantime Mr. Cotter referred to WYG advising Mount Juliet that it did not have the resources to provide the services required for the project and said that very shortly afterwards the firm was disbanded. This was denied by Fiona Kearns whose uncontradicted evidence was that WYG continued in existence.

Punch took over the project on the 7th July, 2010, and advised Mount Juliet of their views on the 1st September, 2010. That view was that their opinion "will remain" that HRA were negligent in their duties as per the conditions of engagement and should therefore be joined into the legal proceedings.

As is clear from para. 30 of Mr. Cotter's affidavit, queries were relayed to Punch who wrote to the solicitors on behalf of Mount Juliet on the 3rd December, 2010, with the addition of three words: "does not exist" as set out above at paragraph 6.

Mr. Cotter says that accordingly, in the light of the foregoing, the Mount Juliet proceedings were formally commenced against the parties including HRA by the plenary summons on the 17th December, 2010, in respect of premises other than those the subject matter of these proceedings.

There was, of course, a period of three months from the Punch letter of the 1st September, 2010, to the clarification on the 3rd December, 2010. That was a further delay and, while the clarification remains somewhat unclear, Mount Juliet were entitled to ask for it.

The court is of the view that the further delay either from the 1st September, 2010, when the advice was first given on the 3rd December, when clarification was made to the application and leave to serve HRA on the 23rd May, 2010 (eight months or, taking the latter date of the 3rd December, six months) may not be entirely explained. The court has to balance the objective of third party procedure in having all matters dealt with under the originating proceedings whereby the defendant may seek to join in a third party (in the case the first, second and third) on the 9th September, 2009, and later the applicant, a fourth third party on the 5th July, 2011, with the right of a third party to apply, pursuant to r. 8(3) to have the third party proceedings set aside by the court at any time.

The court is satisfied, on balance, that the applicant's issuing of a motion to strike out the third party notice made on the 6th October, 2011, was not unduly delayed having regard to the long vacation.

While there were overall delays which exceed the starting point laid down by the rules contained in O. 16, in relation both to the application for and the service of the orders granted, the court has to have regard to the obligation of an applicant seeking a third party order to have appropriate advice. Moreover, as held by McMahon J. in *Robins v. Coleman*, where a court has granted liberty to issue a third party notice outside the 28 day period stipulated in the Rules, the court has, by implication extended the time period within which to apply to issue the third party notice.

The same reasoning applies to the granting of an order extending the time for service of such order as was done by Peart J. on the 27th June, 2011, in both proceedings. The notice issued on the 5th July, and served on the 7th July, within the 28 days.

The court must, accordingly, refuse both applications.