

**THE HIGH COURT****[2010 No. 2061 P.]****BETWEEN**

**KYNES MOYCULLEN LIMITED, JONAH INVESTMENT HOLDINGS LIMITED, AND AN FUARÁN MANAGEMENT COMPANY LIMITED**  
**PLAINTIFFS**

**AND**

**WHIRISKEY REFRIGERATION COMPANY LIMITED, PELETON DEVELOPMENTS LIMITED, TINGLE AND ASSOCIATES AND RAY  
 STAUNTON ELECTRICAL LIMITED**

**DEFENDANTS****AND**

**COPELAND LIMITED, MITSUBISHI ELECTRIC EUROPE BV AND REFRIGERATION DISTRIBUTORS LIMITED**

**THIRD PARTIES**

**AND EMERSON CLIMATE TECHNOLOGIES LIMITED**

**FOURTH PARTY****JUDGMENT of Mr. Justice Birmingham delivered the 11<sup>th</sup> day of July 2014**

1. In this case Emerson Climate Technologies Limited (Emerson) , which I will refer to as the fourth party, is seeking an order pursuant to O. 16, r. 8(3) of the Rules of the Superior Courts setting aside a third party notice issued by the third named third party, Refrigeration Distributors Limited (RDL) on the 12th December, 2013. The background to the current application is that a fire occurred on the 24th December, 2005, at the Supervalu supermarket at Moycullen, Co. Galway. On the 1st March, 2010, a plenary summons was issued and on the 7th November, 2011, a statement of claim was delivered. The statement of claim describes the first named defendant as carrying on the business of supplying and installing refrigeration and air conditioning equipment, the second named defendant as carrying on the business of construction project management, the third named defendant as carrying on the business of inspecting and commissioning refrigeration and air conditioning equipment, and the fourth named defendant as carrying on the business of an electrical contractor.

2. By a motion dated the 15th February, 2012, the first named defendant sought leave to issue and serve third party notices on the three third parties. Leave was granted by order of Feeney J. of the 23rd April, 2012. As appears from the third party notice served on Refrigeration Distributors Limited, the first named defendant claimed to be entitled to an indemnity or contribution by reason of the negligence, misrepresentation and breach of contract of RDL in and about the supply or manufacture by it of five condensing units. The particulars refer to the supply of five Copeland Easy Cool Outdoor Condensing Units Models OLQ13(x2), OLQ11(x2) and OLTQ36(x1).

3. The third party notice pleads that the first named defendant joined the third named third party and served a third party notice on the third named third party. In the third party notice, the first named defendant pleads that in or about November 2004, the third named third party agreed to supply five Copeland Easy Cool Outdoor Condensing Units Models OLQ13(x2), OLQ11(x2) and OLTQ36(x1) in consideration of the payment of the sum of €15,904.24 by the first named defendant to the third named third party. The first named defendant contends that in breach of agreement the condensing units were not fit for the purpose for which they were intended. The notice goes on to plead that if the units were not free from defects, that the third named third party is not liable for same and that responsibility rests with Emerson, that Emerson supplied the units to the third named third party and that the third named third party did not interfere with the units in any way, but simply took possession of them and forwarded them on to the first named defendant.

4. A conditional appearance was entered on behalf of RDL and subsequently a notice of motion was issued on the 11th August, 2012, seeking an order setting aside the third party notice that had been issued by Whiriskey Refrigeration Limited, the first named defendant. That motion came on for hearing before O'Neill J. on the 3rd December, 2012, who declined to set aside the third party notice.

5. On the 23rd October, 2013, RDL issued an application seeking leave to issue a third party notice on Emerson Climate Technologies Limited. On the 2nd December, 2013, O'Malley J. acceded to the application. The third party notice was served on Emerson over the Christmas/New Year period.

6. The motion now before the court issued on the 28th February, 2014, returnable for the 24th March, 2014. For ease of reference I will set out certain dates that are significant in the context of this application.

- 24th December, 2005, fire occurs at plaintiff's supermarket.
- 1st March, 2010, plenary summons issued.
- 7th November, 2011, statement of claim delivered.
- 23rd April, 2012, order by Feeney J. joining three third parties.
- 22nd May, 2012, service of third party notices.
- 11th August, 2012, motion brought by RDL to set aside third party notice.

- 3rd December, 2012, application to set aside third party notice refused by O'Neill J.
- 23rd October, 2013, motion brought by RDL to issue and serve third party notice on Emerson Climate Technologies Limited.
- 2nd December, 2013, O'Malley J. grants leave to issue and serve third party notice on Emerson.
- Christmas 2013/New Year 2014, (the precise date is unknown) third party notice served on Emerson.
- 28th February, 2014, motion brought by Emerson, the fourth party, to set aside the third party notice served on it.

7. As the fourth party attaches significance to this, I should refer to the fact that on the 11th November, 2009, the first named defendant's insurer wrote to Refrigeration Distributors Limited in the following terms:-

"We wish to advise that we are currently investigating the above incident. On the incident date a fire broke out in the roof of the premises whereby refrigeration units supplied by you to our insured were mounted. These units were Copeland Easy Cool Outdoor Condensing Units models OLQ13, OLQ11 and OLTQ36. As you supplied these units to our insured, we are holding you liable for this incident. Please confirm by return that you will accept liability for this incident."

8. The fourth party and moving party has focused attention on three dates, the 11th November, 2009, when the insurers for the first named defendant wrote to RDL informing it that it was being held liable for the Moycullen Supermarket fire incident, the 22nd May, 2012, when a third party notice was served on RDL and the 3rd December, 2012, when an application by RDL to set aside the third party notice served on it failed before O'Neill J.

9. In my view, the two earliest dates are of limited significance. The November 2009 correspondence does mean that when at a much later stage RDL was joined to the proceedings that this cannot have come as a bolt from the blue, but that is really the extent of its significance. Neither do I attach particular significance to the fact that the third party notice was served on the 22nd May, 2012. Ordinarily, this would be a date of great significance but in a situation where RDL embarked on a strategy designed to have the third party notice served on it set aside, its significance is much diminished. It seems to me rather that the dates with which we are particularly concerned, are the 3rd December, 2012, when O'Neill J. refused the application to set aside forcing a rethink of the strategy that had been pursued and the 23rd October, 2013, when the motion seeking leave to issue and serve a third party notice on Emerson issued. It seems to me that in assessing the delay in question, a period of ten and a half months, one has to have regard to the fact that in these very proceedings, RDL had itself brought a similar motion thus showing that it was very aware of the obligation to avoid delay.

10. From the replying affidavit that has been sworn by Ms. Aileen Dolan, solicitor of Dawson Solicitors, the solicitors for RDL, it seems that when it was decided that the decision of O'Neill J. should not be appealed that the issue of liability was then addressed. The fourth party would argue that this ought to have been happening in parallel with the setting aside strategy, so that the third named third party would have been in a position to act immediately if the motion to set aside failed. That might be seen as a counsel for perfection.

11. The affidavit makes the point that there appears to be some confusion in relation to the identities and involvement of various parties, pointing out that the solicitor for the fourth party and moving party in the application now before the court, has filed a defence on behalf of Copeland Limited, the first named third party in the proceedings. She goes on to observe that Copeland Limited and Emerson Climate Technologies Limited are related companies in that they are both subsidiaries, within the American owned Emerson Electric Company through the UK registered Emerson Holdings Limited. She refers to the fact that an invoice dated the 5th October, 2004, has been furnished to the third named third party in respect of the units in question. The invoice in question in the top left corner bears the words "Emerson Climate Technologies" with a diamond shaped logo and the top right hand corner bears the word Copeland in bold and immediately to the left the word Copeland GMBH with a Berlin address, telephone number and bank details. At the foot of the page in English and German there appears the words Copeland GMBH, Head Office Berlin, registered at the District Court Berlin-Charlottenburg, No. 92 HR 8877, President Tarst-Kells, Carnap. Ms. Dolan goes on to comment that there was no company that could be located in existence as of the 5th October, 2004, the date of the invoice in the name of Emerson Climate Technologies Limited. However, upon further inquiry, a currently registered company called Emerson Climate Technology Limited was revealed. This company on the 31st December, 2007, changed its name from Copeland Corporation Limited to Emerson Climate Technology Limited. She goes on to comment that while it is not entirely clear from any documentation furnished, that it seems Copeland Corporation Limited previously traded under the business name of Emerson Climate Technologies. She then observes that while it has proved difficult to piece together the jigsaw of Emerson and Copeland Companies that she believes the information has been obtained as expeditiously as possible in all the circumstances. The point about the difficulty in piecing together the jigsaw, seems to me a point well made, indeed I wonder whether all of the pieces of the jigsaw are now in place.

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

13. All in all I have concluded that the third named third party has in the particular circumstances of the case moved as soon as was reasonably possible to involve the fourth named party. In those circumstances, s. 27(1) of the Civil Liability Act 1961, does not provide a basis for setting aside the third party notice. Moreover, having regard to the factual background to which I have referred, I cannot see how the interests of justice would be served by setting aside the notice. On the contrary, the interests of justice will be served by having all the parties having a role in relation to this controversy before the court at the same time. In these circumstances, I decline the set aside the third party notice.