Neutral Citation [2013] IEHC 439

THE HIGH COURT

[2010 No. 5552 P]

BETWEEN

DESMOND BUCHANAN AND LINDA BUCHANAN

PLAINTIFFS

AND

B.H.K. CREDIT UNION LIMITED, JOHN CLARKE AND SON (ARDEE) LIMITED

DEFENDANTS

AND

BRENDAN G. CASHELL AND DUFFY CHARTERED ENGINEERS

THIRD PARTIES

JUDGMENT of Mr. Justice Hogan delivered the 24th September 2013.

1. This is an application, pursuant to O.16, r. 8(3) RSC, to set aside an order of this Court joining Brendan G. Cashell as a third party to these proceedings. That order was made in this Court (Cross J.) on the 23rd July, 2012. This third party notice claiming indemnity and contribution was served on 9th August 2012 by the first named defendant, BHK Credit Union Ltd. ("BHK"). Mr. Cashell, who is an architect, maintains that the third party notice was not served "as soon as reasonably possible" in the manner required by s. 27(1)(b) of the Civil Liability Act 1961 ("the 1961 Act"). It is also contended that the notice did not comply with the requirement of O. 16, r. 1(3) in that the application for leave to issue the notice was not made within twenty eight days from the date limited for the delivery of the defence. The issue arises in the following way.

2. In the second part of 2005 BHK sought to proceed with plans to demolish and to re-develop its existing premises at Blackrock, Co. Louth and it retained the second defendant, John Clarke & Son (Ardee) Ltd. ("John Clarke") as the main contractor for this purpose. The plaintiffs in this action are a married couple who are the owners of a public house immediately adjacent to BHK's premises. Mr. Cashell was the nominated architect for the project.

3. According to their statement of claim filed on 30th July 2010, the plaintiffs contend that in March 2006 their public house premises was damaged in the course of the demolition and refurbishment work on the BHK property. The plaintiffs further contend their premises has deteriorated gradually as a result of these building works, with new cracking visible and any existing cracks deteriorating further. It is further pleaded that the premises will have to close for six weeks to enable repair extensive repair works to be carried out. It is perhaps appropriate to record that the plaintiffs have taken no part in the hearing of this application regarding the set aside of the third party notice.

4. Any judgment on the merits of these claims (or, for that matter, the defence of the various defendants and prospective third parties) will naturally have to await the outcome of the main proceedings, but is sufficient for present purposes to refer to these claims since they form the backdrop to the present application. Before proceeding to consider the substance of the set aside application, it is, however, first necessary to fill in further details regarding the rather complex chronology of the proceedings.

The defence of BHK

5. The proceedings were commenced on 10th June 2010 and the proceedings were served on 11th October 2010. An appearance was entered by BHK on 1st November 2010. While there is a dispute as to when exactly the statement of claim was served on BHK, it is accepted that the service of the statement of claim on this particular defendant was certainly no later than 12th November 2010. At that point BHK then served a detailed notice for particulars (running to some 28 paragraphs) shortly thereafter. These requests were not immediately replied to and a motion was then issued on 23rd February 2011. The motion was made returnable for the 9th May 2011 and the replies were furnished on the 5th May 2011.

6. While BHK filed a defence on 5th July 2011, it seems evident that their legal advisers must have been at least contemplating prior to that point whether Mr.Cashell should be joined as a third party. On the 20th May 2011 BHK's solicitors requested that Mr. Cashell supply them with a copy of his files. Mr. Cashell replied on 30th May 2011 confirming receipt of the request. He indicated that he had a vast volume of paperwork and that while he was prepared to hand over the relevant documentation, he sought assurances regarding the time-frame for doing so and the costs which were thereby involved.

7. BHK also separately sought voluntary discovery from John Clarke a few weeks later on 26th July 2011. With this request for discovery, BHK sought material relating, *inter alia*, to Mr.Cashell's involvement in the building project, including the instructions which he had given in relation to the demolition and building works. In the absence of agreement, BHK then sought an order for discovery, which order was subsequently made on 21st November 2011.

The defence of John Clarke

8. Although John Clarke delivered a defence on 11th November 2011 a copy of this was only supplied to BHK's solicitors by the plaintiff's solicitors on 4th April 2012. The terms of that defence appear to have come as a surprise to BHK, because John Clarke pleaded that it had no role in the design, planning or structural assessments which were involved in the demolition and construction of the site. John Clarke thus contended that if the plaintiffs had suffered any loss by reason of the interference with the right of support enjoyed by their building, this was the responsibility of BHK and its professional advisers.

9. It was at that juncture that a decision was made by BHK to seek to have Mr. Cashell joined to the proceedings. The appropriate motion was issued on the 18th May 2012 and it was made returnable for the 23rd July 2012. On that day the order was duly made by this Court (Cross J.) and the third party notice was then served on Mr.Cashell on the 9th August 2012. It is against this background that two questions immediately arise.

10. First, is it relevant that the third party notice was not served within the twenty-eight day period specified by O. 16, r. 1(3)? Second, irrespective of the answer to the first question, was the third party notice served "as soon as reasonably possible" within the meaning of s. 27(1)(b) of the Civil Liability Act 1961? We can now proceed to consider each of these questions in turn.

The failure to comply with the requirements of O. 16, r. 1(3)

11. Order 16, r. 1(3) of the Rules of the Superior Courts 1986 provides:

> "An 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 counter-claim, the reply."

12. It is accepted that the application for leave to issue the notice was considerably out of time for the purposes of O. 16, r. 1(3). Even if one further accepts that the statement of claim was served on BHK on 12th November 2010, it follows that the application to serve the third party notice ought to have been made by December 10th, 2010, at least so far as the requirements of the sub-rule is concerned.

13. While it must also be accepted that the order of Cross J. dated July 23rd, 2012 does not in terms purport to extend time for the purposes of r. 1(3), the judge must nonetheless be taken to have implicitly sanctioned an extension of time – if only on an *ex parte* basis – for this purpose: see *Golden Vale plc v. Food Industries plc* [1996] 2 I.R. 221, 227 *per* McCracken J. and *Robbins v. Coleman* [2010] 2 I.R. 180, 197, *per* McMahon J.

14. Counsel for Mr. Cashell, Mr.McGinn, has nonetheless argued forcefully that the subsequent delay on the part of BHK in applying for the third party notice ought to be measured from this date (*i.e.*, December 2010) for the purposes of both O. 16, r. 1(3) and, for that matter, the time allowed by s. 27(1)(b) of the 1961 Act. It is not, I think, contended, that the third party notice ought to be set aside *merely* for want of compliance with the time limit since this would, absent manifest prejudice to the potential third party, represent what Laffoy J. described in *S. Doyle and Sons (Roscommon) Ltd. v. Flemco Supermarket Ltd.* [2009] IEHC 581 as a "draconian step."

15. But the argument advanced on behalf of Mr.Cashell also raises a broader issue of principle which, rather surprisingly, does not seem to have been heretofore directly addressed in the extensive jurisprudence on this point. The novel issue is this: could the drafters of r. 1(3) implicitly cut down the discretion of this Court to determine what period of time was "reasonably possible" for the purposes of s. 27(1)(b) by prescribing a 28 day time period of this kind when no time period of this kind was actually specified by the Oireachtas itself when enacting that very sub-section?

16. In my view, this question must be answered in the negative. It may first be recalled that the Rules of Court are simply statutory instruments which have been made and promulgated by the Superior Court Rules Committee (with the consent of the Minister for Justice and Defence) under the provisions of s. 36 of the Courts of Justice Act 1924 in order to regulate aspects of court procedure. As I had occasion to point out in *Gokul v. Aer Lingus plc* [2013] IEHC 432, these Rules do not, of course, have the same normative status in our legal system as legislation enacted by the Oireachtas. Specifically, given that Article 15.2.1 of the Constitution vests the exclusive law-making function in the Oireachtas, it is axiomatic that the Superior Court Rules Committee could not have been given the power to amend the law (whether directly or indirectly) by the making of a statutory instrument of this kind: see*, e.g., Cooke v. Walsh* [1984] I.R. 710, 728-720, *per* O'Higgins C.J. Nor could the Superior Court Rules Committee themselves have expanded (or, for that matter, limited) the meaning to be ascribed to a particular statutory provision by the making of Rules of Court of this kind, since the terms of any such procedural regulation prescribed by statutory instrument must be ignored "in determining the scope of the [parent] Act": see *Frescati Estates Ltd. v. Walker* [1975] I.R. 177, 187 *per* Henchy J.

17. Second, it is striking that the Oireachtas itself did not see fit to prescribe a time limit for the purposes of s. 27(1)(b). There is accordingly here an implicit legislative recognition that, given the almost infinite variety of circumstances in which the necessity for a third party notice might arise, the question of what amounted to "as soon as is reasonably possible" for the purposes of s. 27(1)(b) had to be determined in the overall circumstances of any given particular case and not by reference to some ex ante formula.

18. It follows, therefore, that the Rules Committee could not in any way seek to abridge or otherwise trammel the appropriate exercise of discretion by the Court under s. 27(1)(b) of the 1961 Act by rules of court since this would have amounted to the indirect amendment of the law. This would be plainly contrary to Article 15.2.1. While the reference to 28 days in O. 16, r. 1(3) is, therefore, as Laffoy J. hinted in *S. Doyle*, at the very most an indicative starting point in any assessment of what was reasonably possible in the circumstances, it cannot take from the task of the Court to arrive at an independent determination of whether the requirements of s. 27(1)(b) have been complied with in any particular case. It follows, therefore, that BHK's admitted non-compliance with the requirements of O. 16, r. 1(3) at least so far as the 28 day requirement is concerned is not – and could not validly be – dispositive of the separate question of whether the requirements of s. 27(1)(b) have been complied with.

The interpretation of s. 27(1)(b) of the Civil Liability Act 1961

19. Before immediately turning to the more important question of whether the requirements of s. 27(1)(b) have been complied with by BHK, it is necessary first to re-visit some of the contemporary case-law on the meaning of this sub-section. This sub-section provides:

> "A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part-(2)(b) shall, if the said person is not already a party to the action, serve a third party notice upon such person as soon is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third party procedure. If such third party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom the contribution is claimed."

20. One of the objects of the procedural reforms effected by the 1961 Act was to avoid a multiplicity of actions arising out of the same dispute, so that where possible all issues involving plaintiffs, defendants and third parties are heard either together or in a sequenced trial: see, *e.g., Governor of St. Laurence's Hospital v. Staunton* [1990] 2 I.R. 31, *Connolly v. Casey* [2003] 1 I.R. 345 and *Robins v. Coleman* [2009] IEHC 486, [2010] 2 I.R. 180. The language of s. 27(1)(b) must be understood against that background.

21. It is perhaps precisely for this very reason that the concept of what is "as soon is reasonably possible" within the meaning of s. 27(1)(b) is a relative one and depends on the circumstances of the case: see, *e.g., Connolly v. Casey* [2000] 1 I.R. 345, *Mulloy v. Dublin Corporation* [2001] 4 I.R. 52 and *Robins v. Coleman*. As we have already observed, the Oireachtas did not seek to fix a set time period, but rather imported a concept of relative urgency which is designed to compel the defendant to seek to issue a third party notice with all deliberate speed having regard to all the relevant circumstances.

22. As Murphy J. explained in *Mulloy* ([2001] 4 I.R. 52 at 56-57):

> "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:- '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.'"

23. As I put the matter in *EBS Building Society v. Leahy* [2010] IEHC 456:

> "…..the question thus becomes whether, having regard to all the circumstances, it was reasonable for a defendant to wait for the period in question before applying to join the third party, although any such permissible delay will generally be measured in weeks and months and not years."

24. This principle is illustrated by the facts of *Mulloy* where the third party notice was issued some thirteen months after the defence had been filed and where the Supreme Court held that it was "possible for the second defendant, on the information available to it, to make a prudent and responsible decision several months before the application was brought": [2001] 4 I.R. 52, 59 *per* Murphy J.

25. Another example of a similar approach is to be found in *Connolly v. Casey*, a case involving an action for professional negligence. Here the plaintiff sued her former solicitors for negligence regarding advice given in respect of the institution of proceedings against a health board. The proceedings were commenced in February 1995 and a statement of claim was served in the following month. A year passed and a notice for particulars was served in April 1996. A defence was finally delivered in April 1996 and the particulars replied to on 14th January 1997. The affidavit to join the third party was sown in April 1997 and the grounding motion seeking liberty to issue and serve the third party notice was issued in July 1997. The order granting such liberty was made *ex parte* by this Court on 20th October 1997. The third party in question was a barrister had who been retained by the defendant solicitors to give advice in relation to the earlier set of proceedings.

26. On the third party's application to have the notice set aside, this Court (Kelly J.) held that the defendant solicitors had waited unduly, but the Supreme Court disagreed. In her judgment Denham J. noted that the defendant solicitors had pondered the question of whether the counsel who had given advices should be joined in the action and that two reasons had been given for this delay. One reason was the necessity to obtain a statement from the instructing solicitor setting out the basis on which it was alleged that counsel was negligent. The other reason is perhaps one which is particularly germane to the present case, namely, whether it was reasonable to await the delivery of particulars.

27. Kelly J. had rejected this latter argument, noting that on the facts the replies to particulars added little to the defendant's state of knowledge regarding the involvement of counsel, but Denham J. disagreed, saying that this was the "wrong test". She added ([2000] 1 I.R. 345, 350):

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

28. A similar approach was also taken by me in *Leahy*. In that a case a firm of solicitors had given certificates of title to a building society in respect of three parcels of land as security for various loans. It was later alleged that one of these parcels of land were owned by A rather than B, as had been previously thought. In addition, in separate High Court proceedings the building society obtained orders for possession in respect of the two other parcels of land.

29. The building society later commenced separate proceedings claiming damages for professional negligence against the solicitors in February 2009. A defence was filed by the solicitors in June 2009, but a notice for particulars was then filed at the same time. The notices to particulars were replied to in September 2009. A motion to join A and B as third parties then issued in November 2009. I rejected the argument advanced by the third parties that the defendants had delayed unduly in seeking to join them:

> "…it may be noted that whereas the solicitors filed their defence in the present proceedings in June 2009, it seems clear from the affidavit of Seamus Tunney of 9th April, 2010, that it was still necessary for their purposes to ascertain a number of vital matters arising from the statement of claim. Thus, they needed to know exactly what had transpired in the earlier High Court proceedings. In addition, they also needed to know the basis on which the EBS calculated its loss and damage. It should be recalled that the property contained in Folio 3949 was just one of the three items of property offered as collateral. If, for example, the other two properties repossessed by the EBS pursuant to the order of McGovern J. were sufficient to meet the debt, then the EBS would have suffered no loss (or, at least, no appreciable loss) in respect of any defects to the title to Folio 3949. These were matters which the solicitors were fully entitled to explore with the EBS prior to making any decision with regard to the involvement with third parties. As we have seen, a notice for particulars was served on 22nd June, 2009, and the replies to those particulars were dated 3rd September, 2009. As a result, the solicitors learnt that the proceedings with regard to Folio 3949 had been adjourned generally with liberty to re-enter and that the loss claimed by the EBS with regard to those lands was €350,000. The advice of counsel was then sought and it culminated in a decision to seek to join the [A and B] as third parties. Following a short hiatus during which some further issues were raised with counsel, the appropriate motion accordingly issued on 23rd November, 2009. For my part, having regard to the circumstances of this case, I cannot agree with the submission that the solicitors did not comply with the requirements of section 27(1)(b). Given that the solicitors were themselves being sued for professional negligence, they were entitled to reflect on the potential ramifications of the joinder of the third parties, especially once the extent of the claim made by the EBS had been clarified in September, 2009 with the replies to notice for particulars. Recalling again the words of Murphy J. in *Mulloy*, s. 27(1)(b) is concerned with an important decision which a litigant must make with regard to the potential involvement of a third party and the length of the delay must be measured against that context and not by reference to purely physical possibilities.
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> While the solicitors could, of course, have immediately issued the motion within days of the replies to the notice for particulars - and, arguably, even earlier again - that it not what s. 27(1)(b) actually contemplates should happen and still less does it require it. Instead, what is required that a defendant proceed with all deliberate speed prior to making any decision with regard to the issue of a third party notice. While we have already noted that any tolerable delay will usually

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

30. Two further considerations relevant to the present application may also be mentioned at this point. The first is the fact that the authorities are in complete agreement that third party notices which (as here) seek contribution and indemnity on the basis of allegations of professional negligence fall into a special category. This point was not only stressed by Denham J. in *Coleman* and by Laffoy J. in *S. Doyle*, but in *Robbins* McMahon J. added ([2010] 2 I.R. 180, 188) that "an element of caution is required before a third party notice is served especially where an allegation of professional negligence is involved."

31. The other consideration is that allowance must be made for the fact that the litigation is complex and that it involves a multiplicity of parties. This may mean that a "more indulgent interpretation" should be given to the meaning of the words " as soon as is reasonably possible" than might otherwise have been the case: see *Robbins v. Coleman* [2010] 2 I.R. 180, 197, *per* McMahon J.

Application of these principles to the facts of the present case
32. It is against this background that the question of compliance with the requirements of s. 27(1)(b) falls to be measured. The first item of delay relates to the period from November 2010 (when the statement of claim was served) to early May 2011 (when the BHK's notice for particulars was replied to). In my view, this period of delay was not unreasonable given that as earlier authorities such as *Connolly* make clear, a defendant in this position is normally at least entitled to clarify the scope of the case against him by means of raising a notice for particulars and to await the replies before finally deciding on a strategy.

33. The second period of delay is the period from May 2011 to July 2012. It is true that BHK took a further two months following the delivery of replies to particulars to file a defence, but this cannot be adjudged to be unreasonable in itself. The real complication – and reason for the ensuing further delay - arises from the fact that a copy of John Clarke's defence was made available to BHK only in April 2012, even though it had been previously furnished to the plaintiffs almost six months previously in November 2011.

34. It must be regarded as unfortunate that BHK were not furnished with a copy of that particular defence at the same time as it was supplied to the plaintiffs, but BHK can hardly be faulted for this. As we have already noted, the terms of that defence must have caused BHK some surprise, since – probably for the first time – another defendant was now unequivocally pointing the finger of blame in the direction of BHK and its professional advisers. While, as we have also already observed, the option of joining Mr.Cashell as a third party must have been under consideration for some time, the terms of John Clarke's defence now served to concentrate BHK's mind, as – looking at the matter from its perspective - there was now no realistic option then open other than to apply to have a key professional adviser joined as a third party.

35. The appropriate motion was then issued without any appreciable further delay on the 18th May 2012. As we have seen, the order joining the third party was duly made by Cross J. on 23rd July 2012 and service was then effected on Mr.Cashell on 9th August 2012.

36. While the delays were unfortunate and the lapse of time between November 2010 and August 2012 was not inconsiderable, there were nonetheless significant mitigating factors to excuse and justify the delay. Given that the third party notice involved a claim of professional negligence, it was necessary for BHK to act with caution. It was certainly entitled to await the replies to its notice to particulars and then to file its defence. It was equally entitled to respond to developments in the litigation, such as when it became clear from the tenor of John Clarke's defence that that defendant denied any responsibility for the design, planning or structural assessments involved in the construction work. In this respect the present case is not altogether unlike *Robbins* – itself another construction case where the plaintiff occupier contended that structural damage was done to his property and which involved a multiplicity of defendants – where McMahon J. held ([2010] 2 I.R. 180, 193) that one of the defendants was entitled to await an amended statement of claim before "considering any action against third parties."

37. While it is true that s. 27(1)(b) provides - in the graphic phrase used by Kelly J. in *SFL Engineering Ltd. v. Smyth Cladding Systems Ltd.*, High Court, 9th May 1997 – for a "temporal imperative", yet as Peart J. put it in *Tuohy v. North Tipperary County Council* [2008] IEHC 11, "that imperative in the present case must be seen as applying from the time when the defendant was first in a position to know that the claim against the proposed third party was possible to pursue." I would qualify those words slightly so far as the present case is concerned, because while it was always possible for BHK to have pursued a third party claim as against Mr.Cashell at some earlier stage, the practical reasons and potential justifications for taking this step only really came into focus once BHK had been supplied with a copy of the John Clarke defence. In this case, at least, it was from that particular point in April 2012 that the temporal imperative came into play.

38. Having regard, therefore, to all of these considerations, it cannot be said that BHK did not act as soon as was reasonably possible for the purposes of s. 27(1)(b).

The position of Mr. Cashell
39. It is next necessary to consider the position of Mr.Cashell. In the affidavit sworn to ground the motion seeking to have the third party notice set aside, his solicitor has averred that his client's defence of the proceedings would be compromised by the intervening delay of some seven years since the building was first constructed and that the memory of Mr.Cashell "and of any other potential witness will be compromised by such delay."

40. It should first be said that the authorities are not, perhaps, in precise agreement on the question of prejudice in this general context. Certainly, if the party seeking to join the third party does not comply with the requirements of s. 27(1)(b), the balance of authorities suggests that the third party notice should nonetheless be set aside irrespective of whether possible prejudice on the part of that third party can be established: see, *e.g., Murnaghan v. Markland Holdings Ltd.* [2007] IEHC 255, per Laffoy J. and *Greene v. Triangle Developments Ltd.* [2008] IEHC 52, per Clarke J. Given, however, that I have already found that BHK did in fact comply with the requirements of s. 27(1)(b), this issue does not now strictly arise.

41. The issue which I now have to consider is rather the inverse of that proposition: should the court strike out a third party notice where the delay prejudicially affects the capacity of the third party to defend the proceedings, even though the temporal requirements of s. 27(1)(b) were otherwise satisfied? Here again I suggest that, at least at the level of general principle, the answer to this question is most obviously in the affirmative. The obligation placed on the judicial branch by Article 34.1 of the Constitution to administer justice presupposes that the courts will ensure that justice is administered in a fair, efficient and timely fashion: see, *e.g., Doyle v. Gibney* [2011] IEHC 10. It follows, accordingly, from a straightforward application of *East Donegal* principles (*East Donegal Co-operative Ltd. v. Attorney General* [1970] I.R. 317) that the courts would not exercise this discretionary jurisdiction to join a third

party where it was plain that a third party's constitutional right to a fair hearing or to a hearing within a reasonable time would otherwise be jeopardised, even if the party seeking to effect the joinder had itself complied with the requirements of s. 27(1)(b).

42. Nevertheless, while this may represent the general principle, I am not convinced that it arises for application in the present case. It is true that it has been contended on behalf of Mr.Cashell that his memory and that of other potential witnesses will have dimmed over the years, although no specific particulars have been given of this rather generalised complaint. Nor has it been suggested that the intervening delay of some seven years has been necessarily advantageous to the proper administration of justice.

43. Yet all of this must be put in some perspective. The biggest delay has been caused by the fact that the proceedings were only commenced by the plaintiffs some four years after the event and, of course, BHK can bear no responsibility for this. It must also be recalled that it is accepted that the third party strands possessed of a great deal of documentation in relation to the project and this will doubtless assist him and other potential witnesses to refresh their memories in relation to decisions regarding the design, planning and structural assessments which were made in the course of the demolition and construction. One might also observe that it must have been evident from the letter of request for documents in relation to the project sent on May 20th, 2011 to Mr.Cashell by BHK's solicitors that his role might yet come under scrutiny. In truth, therefore, the subsequent service of the third party notice in August 2012 can scarcely have come as a surprise.

44. In these circumstances I find myself yielding to the conclusion that the delays here were not in themselves egregious. Nor can it be said that on these facts that the delays were also inherently prejudicial to the ability of the third party to defend himself on the merits. In these circumstances I will refuse to set aside the third party notice on the grounds of prejudicial delay affecting the constitutional rights of Mr. Cashell.

Conclusions
45. In conclusion, therefore, I would summarise my principal findings as follows:

46. First, given that the Superior Court Rules Committee could not validly abridge or trammel the duty of this Court to determine whether the requirements of s. 27(1)(b) have been complied with in any given case, it follows that the reference to 28 days in O. 16, r. 1(3) is at the very most an indicative starting point in any assessment of what was reasonably possible in the circumstances. Accordingly, BHK's admitted non-compliance with the requirements of O. 16, r. 1(3) at least so far as the 28 day requirement is concerned is not – and could not validly be – dispositive of the separate question of whether the requirements of s. 27(1)(b) have been complied with.

47. Second, BHK were entitled to await the clarification of the scope of the case made against it by means of raising a notice for particulars and to await replies before finally deciding on a strategy. The real complication – and the ensuing further delay - arises from the fact that a copy of John Clarke's defence was only made available to BHK in April 2012, even though it had been previously furnished to the plaintiffs almost six months previously in November 2011. It must be regarded as unfortunate that BHK were not furnished with a copy of that particular defence at the same time as it was supplied to the plaintiffs, but BHK can hardly be faulted for this. The terms of that defence must have caused BHK some surprise, since – probably for the first time – another defendant was now unequivocally pointing the finger of blame in the direction of BHK and its professional advisers. While the option of joining Mr.Cashell as a third party must have been under consideration for some time, the terms of John Clarke's defence now served to concentrate BHK's mind, as there was now no realistic option then open other than to apply to have a key professional adviser joined as a third party. The appropriate motion was then issued without any appreciable further delay.

48. While the delays were unfortunate and the lapse of time between November 2010 and August 2012 was not inconsiderable, there were nonetheless significant mitigating factors to excuse and justify the delay. Given that the third party notice involved a claim of professional negligence, it was necessary for BHK to act with caution. It was certainly entitled to await the replies to its notice to particulars and then to file its defence. It was equally entitled to respond to developments in the litigation, such as when it became clear from the tenor of John Clarke's defence that that defendant denied any responsibility for the design, planning or structural assessments involved in the construction work. For these reasons, I consider that the requirements of s. 27(1)(b) have been complied with in the present case.

49. Third, it cannot be said that these delays have appreciably compromised the ability of the third party to defend himself on the merits.

50. In these circumstances I will also refuse to set aside the third party notice on the grounds of prejudicial delay affecting the constitutional rights of Mr. Cashell.