Neutral Citation [2016] IECA 243

**AN CHÚIRT ACHOMHAIRC**
**COURT OF APPEAL**

**Appeal No. 2016/60**
**High Court Record**
**No. 2013/2696P**

**BETWEEN**

**MAJELLA KENNY**

**Plaintiff**

**AND**
**NOEL HOWARD**

**Defendant/Respondent**

**AND**
**HEALTH SERVICE EXECUTIVE**

**Third Party/Appellant**

**JUDGMENT of Mr Justice Max Barrett delivered on 29th July, 2016.**

**Part 1: Overview.**

1. If Senior Counsel delays for almost nine months in responding with legal advice concerning the intended joinder by a defendant of a third party to proceedings, are any (if any) ill-consequences of that delay to be visited on the defendant? If an expert advisor consulted by that defendant has to decline to assist because of ill-health, ought the time lost because of that mischance to count as delay by the defendant? Did the Oireachtas, when it required in legislation that a defendant seeking to join a third party proceed "*as soon as is reasonably possible*", intend that inaction by his Senior Counsel and mischance in the choice of expert advisor would be precisely the type of factors to which the courts would be most attentive when deciding, on the particular facts of a case, whether a defendant, for his part, has acted "*as soon as is reasonably possible*" in the light of all that has occurred? Is it credible that the Oireachtas, a body comprised of worldly-wise men and women, intended that the inaction of professional advisors was invariably to be discounted when calculating whether a blameless defendant has acted "*as soon as is reasonably possible*"? Is that an interpretation which properly reflects the Legislature's intent? What is the relevance in all of this that, other than the occurrence of delay, no prejudice arises for the potentially liable third party as regards its constitutional rights (a) to basic fairness of procedures and (b) to have proceedings determined within a reasonable period? And what level of regard requires to be had to the recognised intent of the Legislature in applicable legislation to avoid the needless multiplicity of court proceedings?

**Part 2: Background.**

2. Ms Kenny has brought personal injuries proceedings against Mr Howard. Mr Howard's lawyers, acting on Mr Howard's behalf, have joined the HSE to these proceedings. In the High Court, the HSE sought to set aside the third-party notice served on it for procedural reasons that have nothing to do with the substantive dispute at hand. This application was refused by Barr J. last February. The HSE now appeals against that refusal.

3. Ms Kenny's personal injuries summons issued on 14th March, 2013. However, for the purposes of this appeal, it suffices to take up matters from May, 2014, with the key events from that time identified in the below chronology:

> 01.05.2014. Papers sent by Mr Howard's solicitors to Senior Counsel, inter alia, to consider whether third-party proceedings should issue.
>
> *Papers sit with Senior Counsel for almost 9 months*
>
> 30.01.2015. Senior Counsel advises that the issue of liability between Mr Howard and the HSE is a difficult one requiring specialised expert input.
>
> 13.03.2015. Mr Howard instructs his solicitors to engage the services of a United Kingdom-based expert, Professor Gournay.
>
> 26.03.2015. Letter issued by Mr Howard's solicitors to the HSE indicating the intention to make an application to join the HSE as a third party.
>
> 20.04.2015. Mr Howard's solicitors issue letter to Professor Gournay.
>
> *Lost time because of Professor Gournay's ill-health*
>
> 27.06.2015. Letter from Professor Gournay indicating that he cannot take on case due to personal ill-health. He recommends that Professor Sines be engaged.
>
> 30.06.2015. Initial correspondence from Mr Howard's solicitors to Professor Sines.
>
> 10.08.2015. Formal instructions from Mr Howard's solicitors to Professor Sines to prepare an expert report.
>
> 26.08.2015. Mr Howard's solicitors issue motion seeking leave to join the HSE as a third party.
>
> 12.09.2015. Report of Professor Sines delivered to Mr Howard's solicitors.
>
> 27.10.2015. The High Court grants leave to issue and serve the third-party notice.
>
> 19.11.2015. Third-party notice served on the HSE's solicitors.
>
> 02.12.2015. The HSE serves a motion seeking set-aside of the third-party notice.
>
> 11.01.2016. The High Court (Barr J.) refuses to set aside the third-party notice.

4. As can be seen from the above chronology, there are only two periods of delay arising in the period under consideration and neither

has anything to do with Mr Howard himself. There is the delay on the part of Senior Counsel and the delay occasioned by Professor Gournay dropping out of the picture because of ill-health (and the consequent need to engage Professor Sines arising).

**Part 3: Reliefs Now Sought.**
5. The HSE, in this appeal, seeks the following reliefs: (1) an order setting aside the order of Barr J. dated 1st February, 2016; (2) an order pursuant to O.16, r.8(3) of the Rules of the Superior Courts 1986, as amended, setting aside the third party proceedings on the procedural ground that the third party notice was not served "*as soon as is reasonably possible*" within the meaning of s.27(1)(b) of the Civil Liability Act, 1961; (3) an order for the costs of the High Court motion and for the costs of the proceedings; and (4) an order for the costs of the appeal.

**Part 4: What is the Relevant Period of Focus?**
6. Order 16 of the Rules of the Superior Courts makes provision in respect of third-party procedure. Order 16, rule 1(3) provides as follows:

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

7. Order 1A of the Rules of the Superior Courts governs the procedure applicable in relation to personal injuries summons. Order 1A, rule 8 provides, *inter alia*, as follows:

> *"A defence shall be delivered by each defendant…within eight weeks of the service on such defendant of the plaintiff's personal injuries summons."*

8. In this case, O.1A, r.8 was overtaken by events. This is because the High Court (O'Malley J.), acting pursuant to O.122, r.7 of the Rules of the Superior Courts, ordered on 24th March, 2014, that Mr Howard deliver his defence by 14th April, 2014. (So far as relevant to the within proceedings, O.122, r.7 provides that "…[T]*he court shall have power to enlarge or abridge the time appointed by these Rules*…"). Notably, O'Malley J.'s order of 24th March, 2014, followed application to the High Court, and consequent deliberation by the High Court, before it issued. It was not a court order that was made simply for the asking; no court order is. It was an order that was undoubtedly made because O'Malley J. considered that there was good reason to make it in all the circumstances presenting before her. Hence there can be no incentive provided by these proceedings for parties in other proceedings to delay without reason. For they have no guarantee that any application made pursuant to O.122, r.7 will be successful, and that they will not be left in the potentially invidious position which s.27(1)(b) apprehends.

9. Under O.16, r.1(3) of the Rules of the Superior Courts, and consistent, *inter alia*, with the observations of the High Court in *SFL Engineering Ltd v. Smyth Cladding Systems Ltd* (Unreported, High Court, 9th May, 1997 (Kelly J.)), O'Malley J.'s considered order had the effect that, as a matter of law, Mr Howard had 28 days, so until 12th May, 2014, to make application for leave to issue the third-party notice. (Kelly J. observes in SFL, at 3, that one has 28 days from "*the time limited for delivering the defence*", so here 28 days from 14th April, 2014, being the date settled upon by O'Malley J. after application to, and deliberation by, her). As it happens, application for leave to issue the third-party notice was made on 26th August, 2015. So the focus of this appeal is properly on the 15½ month period between 12th May, 2014, and 26th August, 2015. And if the rules of court allow (and they do allow) any period of delay to be calculated from the time limited for delivering the defence, then that is a benefit of which the party seeking joinder is properly entitled to seek to avail. Notably, notwithstanding such delay as arises in this case, no prejudice appears to present for the HSE as regards its constitutional rights to basic fairness of procedures and to have proceedings determined within a reasonable period.

10. It was clear from the oral submissions of Mr Howard's counsel, who emphasised in his closing remarks before this court that continuing reliance was being placed on his written submissions, that he (and his client) continue to contend that the above-mentioned 15½ month timeframe is the correct period on which the court should focus its attentions. If that contention was not accepted by the court, then there was agreement between the parties as to what longer period ought to be focused upon. But, for the reasons stated, I accept the 15½ month period to be the correct period of focus.

**Part 5: The Civil Liability Act 1961**
11. The rules relating to the procedure for claiming contribution seek to ensure, so far as is possible, that claims for contribution will be made and determined in the action of the person claiming injury, here Ms Kenny, and not in separate proceedings. Section 27 of the Civil Liability Act 1961, provides, *inter alia*, as follows:

> *"(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part…*
>
> *(b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person* ***as soon as is reasonably possible*** *and, having served such notice, he shall not be entitled to claim contribution except under 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." [Emphasis added].*

12. What is the general purport of s.27(1)(b) and, more particularly, what is meant by the phrase "*as soon as is reasonably possible*"? The court has been referred to a number of cases in this regard and turns to consider certain key authorities later below. First, it is necessary to consider what Barr J. decided in the High Court application that led to the present appeal.

**Part 6: The High Court's Decision**
13. In the High Court, Barr J., delivering an *ex tempore* judgment, recited the chronology of events, noted that the HSE will not be prejudiced by virtue of the delay that occurred before it was joined, and found in effect that the while the delay was long it was "*excusable*", the only basis on which it could be "*excusable*" being that, to paraphrase s.27 of the Act of 1961, the third-party notice had been served 'as soon as was reasonably possible'. An approved transcript of Barr J.'s *ex tempore* judgment was furnished to this court on appeal. The critical part of his judgment reads as follows:

"[T]*here was some delay caused, first, by the misplacement of the papers in the offices of the Senior Counsel who had been retained in the matter and, thereafter, some further delay caused due to the fact that there was some delay perhaps on the part of Professor Gournay in finally communicating with the defendant's solicitor and indicating that he was not in a position to furnish an opinion in the matter….*[Mr Howard's] *solicitor then set about reasonably quickly obtaining an alternative opinion from the expert recommended by Professor Gournay and to that end made contact with Professor Sines….*

*I think in this case, given the nature of the liability that may attach to the HSE, that it was reasonable for…*[Mr Howard's] *solicitor to obtain the advices of a suitably qualified expert prior to proceeding to join the HSE as a third party to the proceedings….It seems to me that…the HSE will not be prejudiced by the delay that has occurred in joining them as a third party to the proceedings because at the trial of the action or the trial of the issue between* [Mr Howard and the HSE]*…the court will be required to look in some depth at the medical records pertaining to the service user at the time that the decision was made to house her in this particular residential establishment. And it seems to me that the evidence in that regard will be contained in her* [Ms Kenny's] *personnel file or her medical file and that the third party will have access to that file and will be able to make a case in their defence at the trial of the issue to the effect that…it was reasonable of them to make the decision to direct that she should be admitted to the particular establishment where she was at the time that the assault was perpetrated on* [Ms Kenny*]….So it seems to me that there will not be any prejudice to* [the HSE]*…caused by the delay in having* [the HSE]*…joined to the proceedings, but in any event, as I have said, I find that while the delay is somewhat long it was excusable in the particular circumstances of this case. So, I will refuse the application on the part of the third party to have the third-party notice struck down in this case."*

14. The HSE's case is essentially that Barr J. should have set aside the third party notice on the basis that the third-party proceedings were not brought "as soon as is reasonably possible" within the meaning of s.27(1)(b) of the Act of 1961. What guidance does key case-law and learned commentary offer in this regard?

**Part 7: Some Case-Law**

A. Decisions of the Supreme Court.

i. Board of Governors of St. Laurence's Hospital v. Staunton

[1990] 2 I.R. 31

15. In July, 1981, the plaintiff in this case fell out of a hospital window. In September 1983, personal injuries proceedings were commenced. The plaintiff succeeded in the court of trial; on appeal an order was sought of, and issued by, the High Court granting liberty to serve a third-party notice on the consultant under whose care the plaintiff had been admitted to hospital. Rejecting the claim for contribution on foot of the third-party notice, Finlay C.J., for the Supreme Court, noted, at 36, that, upon the delivery of the replies to particulars in July 1984, the defendants were aware of the nature of the claim being brought against them, and were also aware of any potential claim that they might have for contribution against the third party (the consultant). "*In these circumstances, serving a third party notice on the third party after the conclusion of the plaintiff's claim is not serving it as soon as is reasonably possible."*

16. In the present case, Mr Howard's legal team did not receive Professor Sines' report until 12th September, 2015. However, they clearly had a good sense of what that report would contain as they issued their motion seeking to join the HSE on 26th August, 2015, and had sent a precautionary letter indicating this as a prospective course of events on 26th March, 2015. So this is not a case like that which confronted the Supreme Court in *St Laurence's Hospital*, in which the necessary steps were not taken until long after the relevant events were known. Quite the contrary. Moreover, shining through the facts of the within appeal is the fact that no prejudice appears, from the facts presenting, to arise for the HSE as regards its constitutional rights to basic fairness of procedures, or to have proceedings determined within a reasonable period. This must surely be a factor in deciding whether a defendant has acted "*as soon as is reasonably possible*". For an essential element of what is 'reasonable' in this context has to be whether a defendant has acted at a pace and within a timeframe that has done no true harm to the other side. Once one crosses the boundary into real prejudice to a third-party, then it would undoubtedly be difficult for a defendant to establish that he had proceeded "*as soon as is reasonably possible*". But up to that point, he must, at worst, have a better than fighting-chance of so doing, not least because, as Finlay C.J. notes in *St Laurence's Hospital*, at 37, "[T]*he general policy of the provisions of the Act of 1961* [is]*…to have all claims determined at the same time*". In the present case, it would seem to accord with this policy objective that the issues arising between Mr Howard and the HSE should be tried as part of the proceedings brought by Ms Kenny against Mr Howard.

ii. Connolly v. Casey

[2000] 1 1.R. 345

17. The plaintiff in this case commenced a professional negligence action in 1995. In April of the following year, the defendant solicitors delivered their defence. In July, 1997, they were granted leave to issue and serve a third-party notice. In the High Court, the third party successfully sought to set aside the third party notice; on appeal to the Supreme Court this was reversed. In her judgment for the Supreme Court, Denham J. made reference, at 350, to the duty of care on counsel to satisfy themselves that there is an appropriate basis for professional negligence proceedings, and made the following observation, at 351, regarding the "*service of notice as soon as is reasonably possible*":

> "[I]*n 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. The clear purpose of* [s.27(1)(b)]*…is to ensure that a multiplicity of actions is avoided….It is appropriate that third-party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice, to the third party and to the issue of costs. To enable a third party to participate in the proceedings is to maximise his rights – he is not deprived of the benefit of participating in the main action."*

18. This might, respectfully, be described as the 'tough medicine' approach to s.17(1)(b). It recognises that although being joined as a third party may be unpleasant, it can in fact bring real benefits for the third party. And there is a systemic benefit too, so far as the efficient and timely administration of justice is concerned. In the present case, there is a real advantage to the HSE, though it may not perceive matters so, as well as a systemic advantage, that the issues contended by Mr Howard to arise between him and the HSE should be tried as part of the proceedings commenced by Ms Kenny against Mr Howard. Moreover, those advantages fall to be assessed in a context where no prejudice appears from the facts to arise for the HSE as regards its constitutional rights to basic fairness of procedures and to have proceedings determined within a reasonable period – a relevant factor in deciding whether a defendant has acted "*as soon as is reasonably possible*" because, for the reasons offered above, an essential element of what is 'reasonable' in this context surely has to be whether a defendant has acted at a pace and in a timeframe that has done no true harm to the other side.

19. In passing, it is worth noting that Mr Howard's counsel see their client's action against the HSE as one rooted in professional

negligence. Mr Howard's counsel may be right or wrong in approaching matters so – counsel for the HSE contends that Mr Howard's counsel are wrong – but it is the honestly founded professional opinion of Mr Howard's counsel that the nature of their client's claim against the HSE lies in professional negligence. Thus they are not to be flawed for having proceeded conscious of that duty of care on counsel (to which Denham J. refers in *Connolly*, at 350) to satisfy themselves that there is an appropriate basis for bringing professional negligence proceedings.

iii. Molloy v. Dublin Corporation

[2001] 4 I.R. 52

20. This was an unsuccessful appeal against a decision of the High Court (Butler J.) to strike out a third-party notice. Giving judgment for the court, Murphy J. made various helpful observations concerning the meaning and application of s.27(1)(b) of the Act of 1961, observing, at 56 *et seq*:

> *"The terms in which time limit was expressed do appear severe. The use of the word 'possible' rather than the word 'practicable…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 this 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…".* [Emphasis added].

21. It is difficult not to see in these words a strong sense at Supreme Court level that, in approaching, interpreting and applying s.27(1)(b), undue rigour or unyielding absolutism is to be avoided, and all due flexibility is to be shown. And this makes sense when one recalls the emphasis placed by the Supreme Court in, *inter alia*, *St Laurence's Hospital* and *Connolly*, on the fact that the "*general policy*" of the Act of 1961, and the "*clear purpose*" of s.27(1)(b), is to avoid a multiplicity of proceedings.

22. Murphy J. continues:

> *'Clearly the words 'as soon as reasonably possible'; denote 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.'*
>
> *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."*

23. Especially notable in the context of these proceedings, particularly so when one has regard to the fact that Mr Howard's legal team perceive their client's case against the HSE to be rooted in professional negligence, is Murphy J.'s observation that "*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."* This is what Mr Howard's legal team maintain they were doing at all times. Whether there was a case against the HSE was in fact a matter which Mr Howard's Senior Counsel was instructed to consider in May 2014, albeit that he, for his own reasons, took his time in doing so. Following the advice from Senior Counsel as to the need for specialist input, Professor Gournay was contacted and, when the mischance of Professor Gournay's ill-health meant that he could not assist, Professor Sines was then engaged. All of this, Mr Howard's legal team maintains, involved the assembling and examining of relevant evidence and the obtaining of appropriate advice. There was delay in the process, but it was not culpable delay on the part of Mr Howard, and it does not appear that there are any adverse consequences so far as the HSE's rights to basic fairness of procedures and to have proceedings determined within a reasonable period are concerned. Again, this absence of prejudice surely has to be a relevant factor in deciding whether a defendant has acted "*as soon as is reasonably possible*". After all, in the context of explained delay for which a defendant is not himself culpable, and where matters have proceeded at a pace where no true harm has been done to the other side, can it not properly be said that a person has acted within the timeframe encompassed by the phrase "*as soon as is reasonably possible*", perhaps at one reach of that timeframe but nonetheless within it? And can it credibly be asserted that, in such circumstances, the Oireachtas, a body comprised of serious-minded men and women, has sought, via the Act of 1961, to achieve an end-situation in which (a) the inaction of professional advisors would invariably be discounted when calculating whether a defendant had acted "*as soon as reasonably possible*", and (b) the consequences of such inaction would unfailingly be visited instead on an otherwise blameless defendant? Such an assertion just does not ring true.

iv. O'Byrne v. Michael Stein Travel Ltd and ors

[2013] 1 I.L.R.M. 297

24. This was an appeal against a refusal by the High Court (O'Neill J.) to set aside a third-party notice. O'Neill J. had found that although there had been delay on the part of the defendant in progressing his claim against the third parties, there was no prejudice suffered by the third parties. On appeal, the decision of the High Court was reversed. In the context of the within proceedings, the observations of Denham C.J. as to what circumstances a court could take into account, what reasons and excuses were offered as to the delay and on whom the onus lay, are of interest. Per Denham C.J., at paras. 23-25:

> *"23. There is no doubt but that a court can take all the circumstances into account in considering a delay….*
>
> *24. …[W]hile a court may take all the circumstances into account…there needs to be evidence as to the reasons for, and excuses for, a delay. This was absent in the case. The onus lay on the respondent, but no explanation for the delay was given….*
>
> *25. In the absence of any, or any adequate explanation for the delay by the respondent, I would allow the appeal."*

25. Mr Howard has satisfied the onus that Denham C.J., through the above-quoted remarks, has placed upon him. Here, there were two periods of delay. The first was the near nine-month delay of Senior Counsel. There was also the delay occasioned by the change of expert advisors, thanks to the mischance of Professor Gournay's ill-health, itself hardly a delay ever to be visited lightly on any

party. Moreover, the reason for going to Professor Gournay, and Professor Sines, was grounded in the need to take expert advice on whether a case could be founded against the HSE in the circumstances presenting. As mentioned in the context of the consideration of *St Laurence's Hospital* above, Mr Howard's solicitors advised the HSE of the prospects of a joinder, and even issued the motion seeking leave to join the HSE, before (in the case of the letter advising of the prospects of joinder, long before) the solicitors knew formally that Professor Sines considered there was a basis for liability on the part of the HSE. And, as now repeatedly touched upon, it does not appear from the facts arising that there are any adverse consequences for the HSE so far as its rights to basic fairness of procedures and to have proceedings determined within a reasonable period are concerned. Again, in this regard, it does not seem plausible that the Oireachtas, a body comprised of practically-minded men and women, intended through the Act of 1961 to arrive at a position in which the inaction of professional advisors would invariably be discounted when calculating whether a defendant had acted "*as soon as reasonably possible*", with the consequences of such inaction unfailingly to be visited on an otherwise blameless defendant.

B. Decisions of the Court of Appeal.

v. Greene v. Triangle Developments Limited and anor.

[2015] I.E.C.A. 249

26. This was a successful appeal against a decision of the High Court (Clarke J.) delivered a remarkable seven years previously in *Greene v. Triangle Developments Limited and anor* [2008] IEHC 52, in which Clarke J. had struck out a third-party notice. The judgment of Clarke J. had in the interim period come to be recognised as a notable decision on whether, and what, adverse consequences should follow for a defendant whose professional advisors are guilty of delay. Subject to the respectful gloss offered in the consideration (later below) of the High Court decision in *Greene*, and notwithstanding the reversal of Clarke J.'s ultimate decision in *Greene* by the Court of Appeal, his statement of the law as regards delay by professional advisors appears correct, and it is notable that Finlay Geoghegan J. does not state anything to the contrary in her *ex tempore* judgment for the Court of Appeal last July. Finlay Geoghegan J. makes two observations of especial relevance in the context of the within proceedings, the first at para. 25:

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

followed by the below observation, at para. 27:

> "[T]*his was an action where the third party claim was a claim in professional negligence. And it is accepted by both parties, in accordance with…Connolly v. Casey, that it was appropriate that an expert's report be obtained before any third party notice was served. Therefore, following the approach of Mrs Justice Denham, objectively it was reasonable to wait until the expert's report was obtained".*

27. Looked at objectively, neither the delay of Senior Counsel nor the glitch concerning Professor Gournay, is a period of delay for which Mr Howard is in any way culpable. And, as mentioned in the context of *Connolly* above, counsel for Mr Howard see their client's action against the HSE as one rooted in professional negligence and so have proceeded conscious of that duty of care on counsel, to which Denham J. refers in *Connolly* and which Finlay Geoghegan J. touches upon in *Greene*, to satisfy themselves that there is an appropriate basis for professional negligence proceedings. Notably too, whether one looks at matters subjectively or objectively, no prejudice appears from the facts to arise for the HSE as regards its constitutional rights to basic fairness of procedures and to have proceedings determined within a reasonable period. And looking at matters objectively, can it be that the Oireachtas intended, via the Act of 1961, that a defendant would be found to have acted other than "*as soon as is reasonably possible*", when he had done what he could to advance his cause, when any delay arising was due to his professional advisors, when no true harm had been done to the party whom it was sought to join and when the "*general policy*" of the Act of 1961 (*St Laurence's Hospital, op. cit.*) and "*clear purpose*" of s.27 (*Connolly, op. cit.*) is to avoid a multiplicity of proceedings? Surely in the assessment of reasonableness, the absence of any harm must be strong pointer to finding that a defendant has acted within the wide spectrum embraced by the versatile phrase "*as soon as is reasonably possible*"; and surely in reaching that finding, comfort is to be taken in the compatibility of that finding with the just-mentioned policy and purpose.

vi. Mulcahy v. ASL Sports Park Limited & Ors

[2015] I.E.C.A. 353

28. Not mentioned in the submissions to the court but a judgment of which the court is naturally aware is the *ex tempore* judgment of Kelly J. for this court in *Mulcahy*. That case was not quite like this case in that (a) professional negligence appears not to have been alleged against the proposed third party, and (b) there was not the consequent heightened need (as recognised, *inter alia*, by Denham J. in *Connolly*) to proceed with due care before such an allegation is levelled. Even so, the case is of interest because of the following observations of Kelly J., at paras. 7–8:

> *"7. The first thing that I would like to say before considering the facts of this case is that of course the obligation to move as soon as is reasonably possible is an obligation upon the party to the suit, the defendant in other words, who wishes to join a third party. It is not an obligation on that defendant's insurer or that defendant's solicitor or indeed anybody else. It is the defendant's own obligation to ensure that the statutory provision is complied with.*
>
> *8. The statutory provision itself mandates…[an] element of urgency. A statutory requirement to act as soon as is reasonably possible means what it says. It would be difficult to excuse a failure to comply with the statutory provision by reference to the general speed at which litigation is proceeding."*

29. There are a number of points to be made about these observations. First, although para. 7 of *Mulcahy* is correct in and of itself, it does not purport to encapsulate in three sentences the entirety of the applicable law arising. So, for example, Kelly J. does not suggest that when it comes to the considered application of s.27(1)(b), statute and case-law between them require that no matter how vulnerable and uninformed a defendant is, any inadequacies on the part of that defendant's professional advisors are necessarily and always to be visited on that defendant. And if he is so suggesting, which again does not seem to be so, I would respectfully prefer in this regard the nuanced reasoning offered by Clarke J. in his original decision in *Greene* (considered below). Second, as regards para. 8 of the court's judgment in *Mulcahy*, s.27(1)(b) clearly "*mandates*…[an] *element of urgency*". However, the Act of

1961 is not just about urgency, and Kelly J. does not suggest that it is. As the Superior Courts, including the Supreme Court in and since its relatively long-ago decision in *St Laurence's Hospital*, have now repeatedly held, the Act of 1961 has, as an objective, the avoidance of an unnecessary multiplicity of proceedings. In construing and applying s.27(1)(b), it is always necessary to have regard to that statutory objective also.

30. A court in approaching a case such as that now presenting has to undertake a fairly complex 'juggling' task which involves (a) a subjective assessment of the facts presenting, and (b) an objective assessment of the facts presenting, all the time weighing in mind (c) the need for urgency, (d) the need to avoid multiple proceedings, and (e) the fact that the Oireachtas by using the flexible wording "*as soon as is reasonably possible*" clearly wanted to avoid absolute rules and the individual injustices that would almost certainly follow from an application of same. Given the complexity of this task, it is perhaps unsurprising that different judges might reasonably arrive at different overall conclusions in any one case. However, where I would respectfully depart from the decision in *Mulcahy*, is in the *obiter* comment, at para. 8 of the judgment for the court, that "*It would be difficult to excuse a failure to comply with the statutory provision by reference to the general speed at which litigation is proceeding."* Notably, this observation recognises that it would be "*difficult*", but not impossible. Even so, it appears, with respect, to emphasise (b) and (c) (as identified above) to the detriment of (a), (d) and (e) (again as identified above), and thus to afford a prioritisation to particular dimensions of the applicable test which is neither required by, nor properly discernible in, the Act of 1961.

31. Turning again to the facts of the appeal at hand, it does not seem credible that in the universe of circumstances presenting here, where Mr Howard did what he could to advance his cause, when any delay arising was due to his professional advisors, when no true harm had been done to the party whom it was sought to join and when the "*general policy*" of the Act of 1961 (*St Laurence's Hospital, op. cit*.) and "*clear purpose*" of s.27 (*Connolly, op. cit.*) is to avoid a multiplicity of proceedings, that the Oireachtas intended, via the Act of 1961, that a defendant would be found to have acted other than "*as soon as is reasonably possible*" in all of the circumstances presenting.

C. Decisions of the High Court.

vii. Neville v. Margan Limited

[1988] I.R. 734

32. In this case Mr Neville was injured in an explosion on 14th October, 1977. He instituted personal injuries proceedings on 29th June, 1978. On 5th May, 1981, Margan Limited agreed to settle Mr Neville's claim. In the meantime, on 23rd February, 1981, Margan Limited had obtained liberty to issue and serve a third-party notice. The time for service was extended on a number of occasions and the third-party notice was eventually served on 22nd July, 1983. The third party claimed that Margan Limited had not served the third party notice "*as soon as is reasonably possible*" within the meaning of s.27(1)(b). In the High Court, Blayney J. held for the third party, observing as follows, at 737:

> "*The purpose of requiring a notice to be served 'as soon as is reasonably possible' was stated by McMahon J. in* A and P (Ireland) Limited v. Golden Vale Products Ltd. t/a Golden Vale *(Unreported, High Court, 7th December, 1978) to be 'to put the contributor in as good a position as is possible in relation to knowledge of the claim and opportunity of investigating it.' The delays that occurred here clearly frustrated this purpose. Almost six years had elapsed from the date of the plaintiff's sustaining his injuries by the time the third-party notice was served, and obviously at that stage the third party was at a great disadvantage in investigating what happened. In his judgment in* Gilmore v. Windle *[1967] I.R. 323 O'Keeffe J. said at p.336:-*
>
> *'…a defendant, seeking contribution under the Act, is compelled by s.1(b) of s.27 to serve a third-party notice, and, if he does not do so, the court may in its discretion refuse to make an order for contribution. The purpose of the provision would seem to be to encourage the bringing of claims for contribution to third-party proceedings, rather than by independent actions, and so to have all questions arising for determination disposed of in a single proceeding.'*
>
> *What has happened here has likewise defeated this purpose. Since the third party notice was not served until after the plaintiff's claim against the defendant had been settled, the present claim for contribution is no different from what it would have been if it had been made in a separate action."*

33. In the present case what presents is a 15½ month period of delay, so nothing like the six-year period of delay that confronted Blayney J. in *Neville*. Moreover, in this case, it does not appear that the HSE is in any way frustrated in terms of its knowledge of the claim and its opportunity of investigating it, a point of no little relevance adverted to repeatedly above. Indeed, Barr J. has effectively found as a matter of fact that this was not so. And as to the policy objective referred to in *Gilmore*, and to which reference is made by Blayney J. in the above-quoted text, it would seem to accord with this objective that the issues that Mr Howard contends to arise between himself and the HSE should be tried as part of the proceedings commenced by Ms Kenny against Mr Howard.

viii. Greene v. Triangle Developments Limited and anor

[2008] I.E.H.C. 52

34. This was an application for the setting aside of third party proceedings. As it happens, Clarke J.'s decision in this case to set aside the relevant third-party notice was reversed last year by this court (see above). Even so, Clarke J.'s consideration of the law as regards delay by professional advisors appears, subject to the gloss referred to later below, to be correct. It is notable in this regard that Finlay Geoghegan J. does not state anything to the contrary in her *ex tempore* judgment in *Greene* (on appeal); nor does Kelly J. in his *ex tempore* judgment in *Mulcahy*; and both judges seem likely to have flagged expressly if they were abandoning altogether the logic of Clarke J. regarding the issue of delay by professional advisors, and indeed to have offered some comprehensive alternative logic in its stead, not least as the High Court decision in *Greene* had, by the time it was appealed to this court, come to be seen as a leading authority on the issue of delay by professional advisors in the context now presenting. When it comes to that issue, Clarke J. made the following observations, at 14-15:

> "***5.2*** *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 attributable 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.*

> ***5.3*** *On the other hand it must be acknowledged that the position of a party who is faced with delay on the part of its professional advisers…depends on the extent to which it could be regarded as reasonable for the party to have had it within its capability an ability to do something about the delay concerned and the extent to which it may be reasonable to attribute delay on the part of those professionals involved to their client. What may be reasonable depends on the circumstances of the case. 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 client of their obligations. 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 their remedy against the lawyers whose delay has led to that unfortunate situation."*

35. The following gloss might respectfully be added. Practising lawyers are paid good money to get things right legally, and they should get things right legally; that is their job. Practising lawyers are also typically shown no little deference by so-called 'ordinary' clients in acknowledgement of their learning and professional standing. So those clients are not lightly to be faulted if (a) they deferentially assume that once their lawyers have been tasked to deal with a matter, that they will do so in a competent and timely manner, and (b) consistent with that deference, do not take to contacting their lawyers constantly to see that matters are proceeding in a timely manner. As Clarke J. observes, *'Any lawyer representing a party in litigation must be taken to be fully aware of the need to act with reasonable expedition'.* No practising lawyer can reasonably expect that any ill-consequences of delay on his part in giving advices in the context of unfolding litigation should necessarily and in all instances fall to his client; and neither should any opponent lightly assume that such delay will necessarily and always be used to upset the progress of court proceedings, especially in circumstances where no prejudice appears from the facts to arise for that opponent as regards its constitutional rights to basic fairness of procedures and to have proceedings determined within a reasonable period. Why so? Because, again, it does not ring true that in enacting the Act of 1961, the Oireachtas, a body comprised of sober-minded men and women, intended to bring about a situation in which the inaction of professional advisors would invariably be discounted when calculating whether a defendant had acted "*as soon as is reasonably possible*" for the purposes of that Act, with the consequences of such inaction being visited unfailingly on an otherwise blameless defendant. Nor does it seem any answer, let alone the answer intended to be brought about by the Oireachtas through the Act of 1961, an Act which, as touched upon above, has been recognised repeatedly by the Supreme Court as seeking to avoid a multiplicity of proceedings, that a defendant who wishes to join a third-party to still-continuing proceedings and who has himself proceeded correctly, would necessarily and always be deprived from doing so in circumstances for which he bears no proper responsibility and which have occasioned no true prejudice to the intended third-party, leaving that defendant instead to seek recourse by way of separate action, in a manner that sits askance with that efficiency in proceedings which the Act of 1961 seeks generally to achieve and which the courts seek generally to ensure.

ix. Tuohy v. North Tipperary County Council

[2008] I.E.H.C. 63

36. This is another case concerning the effect of s.27(1)(b) of the Act of 1961. The court's attention has been drawn to it in the context of the present proceedings because of Peart J.'s astute observation, at 11, that "*The Court is entitled to have regard to the experience of daily practice as a solicitor*" or, to put matters otherwise, that one is entitled to have regard to certain practical realities. One such practical reality is that when it comes to suing the HSE, Mr Howard, be he a 'David' or not, is confronted with a 'Goliath' in the sense of facing an entity that is comparatively well-resourced, that is, to borrow an Americanism, 'lawyered up', and which is perfectly capable of defending itself in proceedings which do not appear to place any constitutional rights to fair procedures or the like in jeopardy, and where (not least per Barr J.) it will not be disadvantaged in terms of presenting its defence at this time. Another practical reality, now repeatedly touched upon, is that although an almost nine-month delay is striking, delay on the part of legal advisors is not unknown, it is not a delay for which Mr Howard is culpable and, again, this is not a case that presents difficulties for the HSE in terms of fairness of procedures or the timely administration of justice. These truths must surely be a factor in deciding whether a defendant has acted "*as soon as is reasonably possible*". For an essential element of what is 'reasonable' in this context has to be whether a defendant has acted at a pace and in a timeframe that has done no true harm to the other side. All this in mind, the timely administration of justice and the avoidance of a multiplicity of proceedings – itself a "*general policy*" of the Act of 1961 (*St Laurence's Hospital*) and a "*clear purpose*" of s.27(1)(b) (*Connolly*) appears better served by refusing the present appeal.

x. EBS Building Society v. Leahy

[2010] I.E.H.C. 456

37. This was still another application to have a third-party notice set aside on the basis that the notice was not served "*as soon as is reasonably possible*" within the meaning of s.27(1)(b) of the Act of 1961. In the course of his judgment, Hogan J. made various observations as to the objectives of the Act, what is encompassed by the phrase "*as soon as reasonably possible*", and the net issue that arises for consideration in such proceedings. Per Hogan J., at 4-5:

> *"The objectives of* [s.27(1)(b)]*…are by now so well established in the voluminous case-law on the topic that it is scarcely necessary to set them out at length here. Briefly, the 1961 Act seeks 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 together or in a sequenced trial….*
>
> *Second, the concept of what is 'as soon as is reasonably possible' within the meaning of s.27(1)(b) is a relative one and depends on the circumstances of the case….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….*
>
> [The net issue arising is] *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."*

38. If the issues arising between Mr Howard and the HSE are tried as part of the original proceedings, this will avoid a multiplicity of proceedings. As regards what is "*as soon as is reasonably possible*" in the context of the present appeal, Mr Howard's legal team did not formally know that they had grounds for bringing a case against the HSE until they received Professor Sines' report on 12th September, 2015. Yet, as mentioned above, they had formally acted in advance of that date, issuing their motion to join the HSE on the previous 26th August. And they had taken the care to let the HSE know long in advance of that date, on the previous 26th March, that this was what they intended to do. Such delay as arose (Senior Counsel's delay and the mischance that required a

change of expert advisors) is not delay that appears to impact adversely on the HSE's rights to basic fairness of procedures and to have proceedings determined within a reasonable period. Indeed, Barr J. effectively finds as a matter of fact that the HSE's ability to defend the third-party proceedings have not been impacted adversely. Again, this must be a factor in deciding whether a defendant has acted "*as soon as is reasonably possible*"; for an essential element of what is 'reasonable' has to be whether a defendant has acted at a pace and in a timeframe that has done no true harm to the other side. And an essential objective factual matrix within which matters fall to be considered must surely be that it does not ring true that the Oireachtas, a body comprised of practically-minded men and women, intended, via the Act of 1961, to attain the end-result that the inaction of professional advisors would invariably be discounted when calculating whether a defendant had acted "*as soon as reasonably possible*" and the consequences of such inaction visited unfailingly on an otherwise blameless defendant.

xi. Robins v. Coleman

[2010] 2 I.R. 180

39. This was a case involving two motions to set aside separate third-party motions for want of compliance with s.27(1)(b) of the Act of 1961. In his assessment of the law, McMahon J. made a number of helpful observations. First (at 187), that the purpose of the Act of 1961 is to ensure so far as possible that a multiplicity of actions is avoided and that all questions of liability should be dealt with in the same litigation, if possible. Second (at 188), that the onus lies on the concurrent wrongdoer/defendant to prove that it acted "*as soon as is reasonably possible*". Third (at 188), that in determining what the phrase "*as soon as is reasonably possible*" means, all the facts of the case have to be taken into account. Fourth (at 188), that an element of caution is required before a third-party notice is served, especially where an allegation of professional negligence is involved. Fifth (at 188), that if a concurrent wrongdoer/defendant does not serve a third-party notice "*as soon as is reasonably possible*" (or at all), he may still maintain an independent action at a later date after the determination of the substantive claim, but in that event the court (under s.27(1)(b)) has a discretion to refuse a contribution if it thinks that appropriate. Sixth (at 188), that "[t]*he legislation, by avoiding a specified time limit…and by introducing the qualifying word 'reasonably' into the phrase, clearly intended to modify the urgency implied by an unqualified 'as soon as possible', recognising that a degree of flexibility should be allowed in expressing the time limit."* Seventh (at 188), that the court is entitled to review any delay and examine whether a defendant's explanation for same is one entitling that defendant to accommodation within the statutory phrase "*as soon as is reasonably possible*". Eighth (at 188), that the phrase "*as soon as is reasonably possible*" is a relative concept and, in construing it, one must have regard to all the relevant circumstances. "*What might appear as a long period when stated in the abstract might nevertheless, when all the circumstances are taken into account, attract the protection of the phrase."* Ninth (at 188-89), that prejudice to a relevant party can be a relevant factor in deciding whether or not a defendant has proceeded "*as soon as is reasonably possible*". Tenth (at 191), that because each case must be approached with reference to its own facts, precedents are of limited value and must be looked at for guidance rather than in expectation of finding an answer to the case before the court. Eleventh (at 191), that the reasonableness at issue in s.27(1)(b) is that of the defendant or concurrent wrongdoer.

40. Applying these various principles in the context of the present appeal, perhaps three observations might be made. First, if the appeal is refused it appears that a multiplicity of actions will be avoided. Second, given that these proceedings involve what Mr Howard's legal team perceives to be a case of professional negligence, the team were required to proceed carefully. Third, although 15½ months may seem long in the abstract (and, in the grand scheme of things, it is not so very long), the professional negligence dimension, the fact that Mr Howard has not himself acted culpably, and the fact too that there is no breach of the HSE's rights to basic fairness of procedures or to have proceedings determined within a reasonable period presenting (Barr J. found as a matter of fact that the HSE's ability to defend itself has not been impacted), it is difficult to see that this is a case that does not come within the protection afforded by s.27(1)(b). As McMahon J. observes (at 188), the Act of 1961 recognises that "*a degree of flexibility should be allowed*" as regards bringing oneself within s.27(1)(b). And in the absence of true prejudice to the affected third-party, one surely finds basis for flexibility a-plenty.

xii. Freisberg v. Farnham Resort Limited

[2012] I.E.H.C. 216

41. *Freisberg* is another set-aside application in which s.27(1)(b) is invoked. What sets it quite apart from other cases in this area of case-law is that Hogan J. sets the examination by the court of whether a defendant has proceeded "*as soon as is reasonably possible*" in its constitutional law context, specifically as regards a third party's constitutional rights to basic fairness of procedures and its right to have proceedings determined within a reasonable period – an aspect of matters to which this author has paid especial regard and which, given its constitutional provenance, is of especial significance. Notably, in his focus on the constitutional dimension of matters, Hogan J. appears to have resolved via constitutional law the issue as to whether, and what, prejudice to a third party is relevant in the context of s.27(1)(b). The answer to this sometime conundrum appears to be that such prejudice is a relevant factor, and thus its absence must also be a feature of some note.

42. Having noted, at para. 11, that "[Section 27(1)(b)'s] *main purpose is to avoid a multiplicity of actions*" and, at para. 12, that "[T]*he concept of what is 'as soon as reasonably possible' within the meaning of* [s.27(1)(b)]…*is a relative one and depends on the circumstances of the case"*, Hogan J. continues, at para. 13 et seq:

> "***13****. Of course, the judicial discretion conferred by [s.27(1)(b)]…must be exercised in accordance with fundamental constitutional principles….This not only means that the discretion must be exercised in a fashion which respects basic fairness of procedures…but the court must be conscious of its obligation to uphold and apply the constitutional norms envisaged by Article 34.1 (administration of justice) and Article 40.3.1 (protection of personal rights)….*
>
> ***14****. By assigning the administration of justice to the judicial branch, Article 34.1 presupposes that justice will be administered in an efficient and procedurally fair manner which respects the rights of litigants. One of these rights (which is a dimension of the right to fair procedures and is, in any event, reflected in Article 6(1) ECHR) is the right to a hearing within a reasonable time.*
>
> ***15****. What amounts to a reasonable time will, of course, be measured by the specific context. Particular allowances may have to be made, for example, for those disadvantaged members of the community who by reason of indigency, lack of education and other similar factors may not have been in a position in the past to assert or protect their rights….But the present case is about as far away from this as possible….*
>
> ***16.*** *Next, the subject matter of the proceedings should be considered. While the factual context of this claim for*

*personal injuries is admittedly unusual and the issue of causation is not straightforward, it is at the same time difficult to understand why, well over five years later, a claim of this kind still remains to be determined*……[T]*he words of s.27(1)(b) which require the concurrent wrongdoer to serve the third party* 'as soon as is reasonably possible' are *not concerned, as Murphy J. put it in* Mulloy…*with 'physical possibilities, but legal and perhaps commercial judgments'.*

***17.*** *Therefore, as I suggested in Leahy, the question in cases of this kind 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 a third party, although any such permissible delay will generally be measured in weeks and months and not years.'"

43. Transplanting this logic into the context of the within appeal, perhaps three points might be made. First, there appear to be no issues presenting for the HSE as regards the administration of justice and the protection of its rights should the third party action now proceed. As stated, *inter alia*, in the context of the consideration of *Connolly* above, it seems better for the HSE that matters between it and Mr Howard are addressed in the proceedings brought by Ms Kenny against Mr Howard. And, as Barr J. effectively concluded in the High Court, the HSE is well-positioned to defend itself fully at this time. Second, although Mr Howard is neither indigent nor uneducated, it is easy for those of us who work in the law to forget just how alien the legal environment is to so many people, even people who might otherwise be considered to be, to borrow a colloquialism, experienced 'men and women of the world'. Consistent with the comments made in the consideration of this court's decision in *Mulcahy* and the High Court decision in *Greene*, due allowance would appear ever to be required of the courts to the fact that to persons not closely or regularly concerned with the legal world, (a) the need for expedition in litigation may not be appreciated, (b) a delay such as that manifested by Senior Counsel in this case may not appear other than normal, and (c) the need to lift the phone to solicitors, never mind counsel, in whom that client has reposed complete trust, simply and honestly may not occur to him. Third, the delay in this case is 15½ months; this includes over ten months of delay for which Mr Howard is not culpable; and this is not a case in which there appear to be any issues presenting for the HSE as regards the administration of justice and the protection of its rights should Mr Howard's action against it now proceed.

xiii. O'Halloran v. Fetherston and ors

[2012] I.E.H.C. 349

44. In *O'Halloran*, another application to set aside a third-party notice for want of compliance with s.27(1)(b) of the Act of 1961, MacEochaidh J. appears to place especial emphasis on the desirability of avoiding a multiplicity of actions, almost if not quite to the point of excluding other considerations as at best secondary, observing, at para. 16:

*"By enacting section 27 of the 1961 Act, not only did the Oireachtas intend to achieve efficiency in litigation by linking cases arising from the same facts, it may also be said that the Oireachtas intended to avoid the problem of conflicting judgments which might arise if cases arising from the same nexus are tried at different times by different courts. In my opinion, the requirement in s.27 that a third party notice must be served as soon as is reasonably possible is intended to ensure that the writs between the parties and all procedural steps be completed in a manner that permits the various actions to be tried either together or sequentially, and by the same court."*

45. That is certainly one objective of the Act, and, so far as avoiding a multiplicity of actions is concerned, this would point to a refusal of the within appeal being appropriate, all else being equal.

xiv. Buchanan v. B.H.K. Credit Union Limited

[2013] I.E.H.C. 439

46. This is another judgment of Hogan J. that is concerned with the setting aside of a third-party notice. The judgment is most notable for Hogan J.'s finding, at 5-7, that the discretion of the court to determine what period of time is "*reasonably possible*" for the purposes of s.27(1)(b) is not in any way abridged or trammelled by the Rules of the Superior Courts. (Hogan J. specifically refers to O.16, r.1(3) in this regard but his reasoning is of wider application). So far as relevant to the within proceedings, the judgment is also of interest insofar as: (1) (at 8) Hogan J. confirms what has now repeatedly been confirmed in case-law, viz. that the Act of 1961 seeks to avoid a multiplicity of actions; (2) (at 8) Hogan J. refers to the subjective nature of the assessment that must be done in each case ("*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*") – albeit that this must now be seen as qualified by the additional objective assessment to which Finlay Geoghegan J. makes reference in the Court of Appeal's decision last year in *Greene*; and (3) like Denham J. in *Connolly*, Hogan J. touches on the special duty of care that arises for counsel in professional negligence cases (which is what counsel for Mr Howard honestly contend their client's case against the HSE to be, albeit that a court of trial may or may not ultimately accept this contention).

xv. Hennessy v. Griffin and ors

[2015] I.E.H.C. 50

47. As with the present proceedings, *Hennessy* was an application seeking the set-aside of third-party proceedings on grounds of want of compliance with s.27(1)(b). In his judgment, Kearns P. largely affirms/follows existing precedent. What is particularly notable about Kearns P.'s judgment is his willingness (see 9, 10, 16) to consider prejudice to a third party as a factor in determining whether the party seeking joinder has served a third party notice "*as soon as is reasonably possible*".

**Part 8: Learned Commentary.**

48. Summarising the abundant case-law relevant to the set-aside of third-party notices by reference to s.27(1)(b), Delaney and McGrath in *Civil Procedure in the Superior Courts* (3rd ed., 2012), observe as follows, at para. 9-22:

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

49. Even if the courts, in the pursuit of a particular vision of justice, are now generally less willing than before to condone delays in procedural matters, the delay in issue in this case extends to 15½ months, it covers vacation periods, it includes a two-month period of delay due to an expert advisor becoming unwell, it involves no culpable behaviour on the part of Mr Howard, it is largely

attributable to the slowness of Senior Counsel in responding to queries raised, and it all arises in a context where there appear to be no issues presenting for the HSE as regards the administration of justice and the protection of its rights should Mr Howard's action against it proceed. Did the Oireachtas, when it required in legislation that a defendant seeking to join a third party proceed "*as soon as reasonably possible*", intend that such inaction by Senior Counsel and such mischance in the choice of expert advisor would be precisely the type of subjective factor to which the courts would have assiduous regard when deciding, on the particular facts of a case, whether a defendant, for his part, had acted "*as soon as reasonably possible*"? My answer to this, in the circumstances arising and for the reasons touched upon previously above, is 'yes'. Did the Oireachtas, a body comprised of practically-minded men and women of the world, intend that the inaction of professional advisors should invariably be discounted when calculating whether a defendant had acted "*as soon as reasonably possible*", with the result that the consequences of such inaction would unfailingly be visited on an otherwise blameless defendant? My answer to this, for the reasons touched upon previously above, is 'no'. And neither should such consequences be visited in the circumstances now presenting. This does not therefore appear to be a case in which this court should now depart from the "*general approach*" identified by Delaney and McGrath in the above-quoted text.

**Part 9: An Attempted Synthesis of Principle.**

50. Is it possible to arrive at a synthesis of the key principles identified in the course of the above-considered case-law as being of relevance when it is sought to set aside third-party proceedings by reference to s.27(1)(b) of the Act of 1961? The following key principles can perhaps be identified:

I: General Approach of Courts.

[1] The general approach of the courts has been to focus on the question of whether it was possible to join a third party earlier. Even lengthy delays have been excused where they have been explained and the third party has been unable to establish prejudice.

[2] The net issue in s.27(1)(b) applications is whether, in all the circumstances, it is reasonable for a defendant to wait for the period in question before applying to join the third party. Any such permissible delay will generally be measured in weeks and months, not years.

II: Purpose of Section 27(1)(b).

[3] The clear purpose of s.27(1)(b) is to ensure that a multiplicity of actions is avoided and that, where possible, all issues involving plaintiffs, defendants and third parties are heard together or in a sequenced trial.

[4] A multiplicity of actions is detrimental to the administration of justice, to the third party and the issue of costs. To enable a third party to participate is to maximise his rights and see that he is not deprived of the benefit of participating in the main action.

[5] Another purpose of requiring a notice to be served "*as soon as is reasonably possible*" is to put the contributor in as good a position as is possible in relation to knowledge of the claim and opportunity of investigating it.

[6] In s.27(1)(b), the Oireachtas did not seek to fix a set time period, but rather imported a concept of relative urgency designed to compel the defendant to seek to issue a third party notice with all deliberate speed having regard to all relevant circumstances.

III: Totality of Circumstances Relevant.

[7] 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.

[8] While a court may take all the circumstances into account, there needs to be evidence as to the reasons for, and excuses for, a delay.

[9] What might appear a long period when stated in the abstract may, when all the circumstances are taken into account, attract the protection of s.27(1)(b).

[10] Because each case must be approached with reference to its own facts, precedents are of limited value and must be looked at for guidance rather than in expectation of finding an answer to the case before the court.

[11] Particular allowances may have to be made, for example, for those disadvantaged members of the community who by reason of indigence, lack of education and other similar factors may not have been in a position in the past to assert or protect their rights. (Unfamiliarity with the legal system would seem to be another factor of relevance).

IV: Meaning of "reasonably possible".

[12] The use of the word "*possible*" in s.27(1)(b), rather than the word 'practicable', may suggest a brief and inflexible time limit. In truth, however, the statute is not concerned with physical possibilities but legal and perhaps commercial judgments.

[13] 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 this context that the word "*possible*" must be understood.

[14] The qualification of the word "*possible*" by the word "*reasonably*" in s.27(1)(b) gives a further measure of flexibility,

indicating that circumstances may exist which justify some delay in the bringing of the proceedings.

[15] The reasonableness at issue in s.27(1)(b) is that of the defendant or concurrent wrongdoer.

V: Subjective and Objective Test Arising.

[16] It is incumbent on a trial judge, when faced with a set-aside application to look not only at the explanations given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third party notice was served as soon as is reasonably possible.

VI: Failings of Professional Advisors.

[17] While a party can be blamed for any delay on the part of its professional advisors, such blame needs to be considered in a somewhat different way from delay directly attributable to the party itself.

[18] A party is not entitled 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 often take some of the blame which might legitimately attach to that party for delay on the part of those professional advisers.

[19] On the other hand, the position of a party who is faced with delay on the part of its professional advisers depends on (a) 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 (b) the extent to which it may be reasonable, on the circumstances of the case, to attribute delay on the part of those professionals involved to their client. What may be reasonable depends on the circumstances of the case.

[20] 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 client of their obligations. 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 its remedy against the lawyers whose delay has led to that unfortunate situation.

[21] Clients are not lightly to be faulted if they deferentially assume that once their lawyers have been tasked with dealing with a matter they will do so in a competent and timely manner.

[22] No lawyer could reasonably expect that any ill-consequences of delay on his part in giving advices in the context of unfolding litigation should necessarily and in all instances fall to his client. Neither should any opponent lightly assume that such delay will necessarily and in all instances be used to confound the progress of proceedings, especially in circumstances where no prejudice appears from the facts to arise for that opponent as regards its constitutional rights to basic fairness of procedures, and to have proceedings determined within a reasonable period.

[23] The court is entitled to have regard to the experience of daily practice as a solicitor.

VII: Delay When Alleging Professional Negligence.

[24] An element of caution is required before a third-party notice is served, especially where an allegation of professional negligence is involved.

VIII: Prejudice.

[25] Prejudice to a relevant party has to be a relevant factor in deciding whether or not a defendant has proceeded "*as soon as is reasonably possible*".

[26] The judicial discretion conferred by s.27(1)(b) must be exercised in accordance with fundamental constitutional principles. This not only means that the discretion must be exercised in a fashion which respects basic fairness of procedures but the court must be conscious of its obligation to uphold and apply the constitutional norms envisaged by Article 34.1 of the Constitution (as to the administration of justice), and Article 40.3.1º (regarding the protection of personal rights).

IX: Onus of proof.

[27] The onus is on the person seeking leave to serve a third-party notice to prove an application for leave has been brought within the statutory time limit.

**Part 10: Conclusion**

51. Having regard to the above-mentioned principles, and to all of the various factors considered in this judgment, I would refuse this appeal.