COURT OF APPEAL

UNAPPROVED

NO REDACTION NEEDED

Court of Appeal Record No. 2018/461

High Court Record No. 2016/9653 P

Woulfe J.

Donnelly J.

Barrett J.

BETWEEN

ANDRÉ O'CONNOR

PLAINTIFF

– AND –

CORAS PIPELINE SERVICES LIMITED

DEFENDANT/APPELLANT

– AND –

NORTHSTONE (N.I.) LIMITED

THIRD PARTY/RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 11th day of March 2021.

I

Introduction

1. This is an application to set aside a judgment of the High Court whereby, pursuant to O.16, r.8(3) of the Rules of the Superior Courts, as amended, (a) the defendant's proceedings against the third party in the above-entitled proceedings were set aside, (b) the defendant was ordered to pay the costs of the set-aside application before the High Court, (c) a stay was placed on the costs order pending the determination of the proceedings.

II

Background Facts

2. The facts of the underlying personal injuries dispute that forms the crux of the within proceedings are as follows. Mr O'Connor, a construction worker employed by Coras Pipeline Services Ltd. claims to have been involved in an accident at a site in Knocklane, Dublin on 7th January 2015. The alleged accident came about in circumstances where the services of Coras had been retained by Northstone (NI) Limited, which company had itself been retained by Irish Water to install water meters nationwide. It is a matter of public knowledge that the nationwide installation of such meters occasioned a degree of public disquiet. As a result, Mr O'Connor claims, the area where the installation works were being carried out at Knocklane had been carefully cordoned off by the erection of barriers for the protection of pedestrians and also, in all the circumstances presenting, for the protection of workers.

3. Mr O'Connor maintains that on the day of the alleged accident the prevailing weather conditions were very windy and that, as a result, a number of the pedestrian barriers around the area where crew members were working were blown over. He claims that the Northstone site engineer had directed that the barriers were required at all times to be in place and that, as a consequence, a number of Coras workers, including Mr O'Connor, had been directed to re-

erect the fallen barriers and secure them with sandbags. It was while Mr O'Connor was engaged in this last activity that the alleged accident occurred which has given rise to the within proceedings. Thus, he claims that while he was in the process of re-erecting the barriers a strong gust of wind forced the barriers to move, causing Mr O'Connor to twist his thumb.

4. Following this alleged incident, Mr O'Connor instituted personal injuries proceedings against Coras. Coras, in turn, considers that Northstone was in control of the relevant site and failed to exercise reasonable care regarding the directions/instructions given to Mr O'Connor as regards engaging in the task of re-erecting the barriers. It was in this context that on 15th January 2018, an application was made by Coras to join Northstone as a third party. On 26th November 2018, Northstone in turn made application to have the third-party notice set aside; that application was acceded to by the High Court and the within appeal against the decision to accede has ensued.

III

Chronology of Joinder and Set-Aside Applications

5. The following summary chronology is useful in understanding the sequencing and timing of events as regards the joinder and related set-aside applications:

20.04.2015 **Loss adjusters for Coras write to Farrans.** (Farrans is a wholly owned subsidiary of Northstone). The letter states, *inter alia*, as follows:

> "*Our investigations to date suggest that as your engineer directed the employees of* [Coras]*…to re-erect the barriers, but did not use a safe system of work…that you are liable for the accident…*".

[Note: In an affidavit sworn in the set-aside proceedings, a Northstone insurance manager averred, *inter alia*, as follows:

> "*I say and believe that the…letter* [of 20.04.2015] *constitutes incontrovertible evidence that the Defendant had all the information that it needed to make a determination in relation to liability issue between the Defendant and the Third Party and had in fact made a determination that the Third Party was liable for the accident the subject matter of the proceedings before the proceedings had even been served on them.*"

In truth, on closer examination, the just-quoted analysis, when one has regard to the express text of the letter, does not hold good for at least three reasons. First, the letter is not addressed to Northstone. Rather, the loss adjusters appear to consider that the addressee, a separate, subsidiary company (Farrans), is liable for the accident. Second, the letter does not purport to represent the final and concluded opinion of the loss adjusters as to liability; rather it refers simply to "*Our investigations to date…*". It is therefore clear that the perceived position could change, and in point of fact it did change, with Northstone being the party that was eventually joined, not Farrans. Third, the references in the letter are to Farrans' engineer, not Northstone's engineer, so again the loss adjusters were clearly focused on the perceived liability of a different third party (Farrans) at the time of the letter and thus had not "*made a determination that the Third Party was liable for the accident the subject matter of the proceedings before the proceedings had even been served on them*".]

28.10.2016. **Personal injuries summons issues.**

08.11.2016. **Summons served. Appearance filed by Coras.**

21.11.2016. **Notice for Particulars raised by Coras.**

[Note: Following a reminder letter of 20th February 2017, the replies to particulars issued on 16th March 2017.]

31.01.2017 A *strict* application of the Rules of the Superior Courts yields the conclusion that the application to join Northstone ought to have been made by this date. This is because of the combined operation of: (i) O.16, r.1(3) RSC, which requires an application to be made, in the circumstances here presenting, "*within twenty-eight days from the time limited for delivering the defence*"; and (ii) O.1A, r.8 RSC, which provides that "*A defence shall be delivered by each defendant…within eight weeks of the service on such defendant of the plaintiff's personal injuries summons*". Here, given that the personal injuries summons was served on 8th November 2016, that eight-week period would bring one to 3rd January 2017, and the 28-day period would then bring one to 31st January 2017. However, both parties are agreed that in practice the timeframe for joinder, as prescribed by the Rules, is more honoured in the breach than the observance.

16.03.2017. **Replies to Particulars received.**

[Note: Considerable information was revealed in the replies as to certain prior injuries of the plaintiff and the nature of his claim.]

April 2017 **Copy of contract documentation sourced.**

[Note: Counsel for Coras, when he was originally sent the papers in November 2016, advised as to the proposed joinder of Northstone but requested sight of the contract entered into between Coras and Northstone to see if there were any indemnity arrangements in that contract that would negate the need for joinder. In the written submissions for Coras it is stated that "*It took a little time for the contractual documentation to be traced, and the same was received in April of 2017 by* [Coras']*...solicitors*", presumably from Coras. This is a lengthy period of delay in a context where counsel had expressly advised that joinder of Northstone might be necessary and hence where the s.27(1)(b) "*as soon as is reasonably possible*" obligation would apply. As I noted in a similar context in my own judgment in *McGeown v. Topaz Energy Group* [2019] IEHC 288, at para. 4, to which the Court was referred by counsel for Northstone, that earlier case being concerned with circumstances where there had been a circa. four-month delay in a client furnishing documents to its advisors (here the delay was circa. 5 months):

> "*No matter how liberal an approach one takes to interpreting the phrase* 'as soon as is reasonably possible' *it cannot be read to embrace a defendant holding documents until asked for them by its*

lawyers and then taking somewhere in the region of four months to provide them to its lawyers",

at least, it might be added, where no good excuse has been offered for such a period of delay, and here no good excuse has been provided.]

18.05.2017. Defence filed by Coras.

[Note: Sometime around this time Coras' managing director appears to have raised a query with the company's legal advisors concerning the substance of the contract with Northstone and the indemnity arrangements under same. It is not entirely clear how this is relevant to the issue of whether Coras acted "*as soon as is reasonably possible*" for the purposes of s.27(1)(b) of the Civil Liability Act 1961, as amended. It may be that the indemnity issue raised was perceived as potentially negating any need to bring a joinder application. However, if it was merely a query regarding the excess on the policy that query affords little or no justification for delay. In any event a meeting was scheduled with counsel for 25th July 2017 but that meeting was subsequently cancelled.]

13.11.2017. Motion to join Northstone issues.

[Note: In response to a query at the hearing as to why, following the cancellation of the meeting in July it took until November for the joinder motion to issue, the response was that the managing director of Coras had to swear up his affidavit evidence and that thereafter the documentation was filed within days. If

one assumes from this answer that the documentation was filed in early-November, that means that in a best-case scenario from Coras' perspective, it took its managing director from July 2017 to November 2017 to swear up affidavit evidence, it seems for no other reason than that is the time it took.]

15.01.2018. **The last-mentioned motion succeeds.**

15.02.2018. **Defendant files Third Party Notice and serves Northstone.**

04.04.2018. **Appearance to Third Party Notice entered.**

7.09.2018. **Set-aside application issues.**

[Note: In its written submissions, Northstone acknowledges that a level of delay presents in the bringing of the set-aside application, counsel submitting, *inter alia*, as follows in this regard:

> "*7.1 The Respondent does not take issue with* [Coras']*...submissions that the Respondent had a corresponding legal obligation to issue the Motion to strike out the Third-Party Notice as soon as was reasonably possible.*
> *7.2 The Respondent is indemnified under a policy of insurance with Zurich. There was a relatively short period of delay between the time that the Third-Party Notice was served on the 15th February 2018 to*

when the Respondents' solicitors on the instructions of Zurich entered an Appearance on the 4th April 2018.

7.3. The Respondents' solicitors briefed counsel in early-July 2018 for the purpose of providing an Opinion. Counsel provided an Opinion to the Respondents' solicitors on the 11th July 2018 that there were grounds to bring an application to set the Third-Party Notice aside due to delay. Counsel also provided the Respondent's solicitors with a draft notice of motion and grounding affidavit for an application to strike out the Third-Party Notice on the 11th July 2018.

7.4 It was necessary for the Respondent's solicitors to take instructions from Zurich in relation to whether it wished to bring the Motion.

7.5 It then took a period of time to obtain the sworn affidavit from a director of the Respondent. It is respectfully submitted that the Court should take into consideration that the period in question includes the month of August.

7.6 While the Respondent accepts that there was some delay in issuing

> *the Motion to strike out the Third-Party Notice it is respectfully submitted that the period of delay was relatively short and was not unreasonable in all the circumstances.*"

[Note: It is notable that the period complained of by Northstone when it comes to Coras (the seven-month period from April 2017 to November 2017) is roughly similar to the period complained of by Coras when it comes to Northstone (the seven-month period from February 2018 to September 2018). Each side maintains that despite the ostensible delay there was some activity during the relevant period. There is a remarkable delay on the part of Northstone of almost five months from service of the third-party notice on 15th February 2018 to "*early July*" (whatever exactly that means) to enquire of counsel whether a set-aside application ought to be filed. The submissions are vague as to how long it took to apprise, and get instructions from, Zurich. That there was a delay in getting a director to sign is delay of a type that Northstone seeks to have counted against Coras which likewise delayed in getting a director signature, albeit of different durations. Moreover, while I accept that there can be a *degree* of slow-down in August, solicitors' firms do not completely close down at that time and people generally remain contactable electronically and via courier.]

26.11.2018. **Third-Party Notice set aside by High Court**

6. Allowing for the fact that in practice the *strict* timeframe for joinder under the rules is more observed in the breach than the observance, it seems to me from the above-described chronology that the latest date by which the joinder application should have been brought was sometime around April 2017. At that time Coras' lawyers were in possession of the contractual documentation, could assess whether or not an indemnity issue presented, and had the standing advice since the previous November from counsel as to the ostensible need to join Northstone to the proceedings. No good reason has been offered by Coras as to why it delayed from this point onwards. Nor can it be concluded that in proceeding as it did Coras acted "*as soon as is reasonably possible*". Even if one takes Coras' case at its absolute height and thus takes July 2017 as the date from which Coras could have acted – and that is to be perhaps unduly generous to Coras – it *still* delayed until mid-November before commencing its joinder application. Even allowing for some delay over the Summer vacation period, Coras again cannot be said, even within this narrower timeframe to have acted "*as soon as is reasonably possible*".

IV

Ex tempore judgment of the High Court

7. The learned trial judge delivered an *ex tempore* judgment. He recited the facts. He treated with certain of the notable cases in this area. He did not treat with the judgment of the Supreme Court in *Boland v. Dublin City Council* [2002] 4 I.R. 409, though I do not know whether that case was opened to the learned judge.

8. Notably, the learned trial judge does refer to delay by Northstone, (i) (at p.2 of his judgment, lines 16-19) where he notes the seven-month period between the service of the third-party notice and the subsequent issuance of the set-aside motion, and (ii) (at p.2, lines 27-28) where his observation that "*I am not particularly persuaded by the effects of the delay in issuing this motion by the third party*" (which appears to involve a finding that the learned trial judge did not consider the delay on the part of Northstone in issuing the set-aside motion to be legally objectionable – and given the overall result of his judgment it seems implicit in any event that he must have made some such finding). As will be seen, having due regard to the requirements of s.27(1)(b) of the Act of 1961 and, more particularly, the judgment of the Supreme Court in *Boland*, I respectfully depart from the judgment of the learned trial court judge insofar as regards the non-objectionability, from a legal perspective, of Northstone's delay in bringing its

set-aside application. Specifically, it does not seem to me, when one has regard to the above summary chronology and the observations that I make in the course of recounting same, that Northstone can properly be said to have acted "*as soon as is reasonably possible*", for the purposes of s.27(1)(b) of the Act of 1961, as amended, when it came to issuing its set-aside motion in September 2018, following upon the service upon it of the third-party notice in February of that year.

9. By way of conclusion to his judgment, the learned trial judge made the orders indicated in the opening paragraph above.

V

Grounds of Appeal

10. By notice of expedited appeal received on 6th December 2018, Coras has advanced the following grounds of appeal, *viz*. that the learned trial judge erred in fact and in law:

> "*(1)* *…in setting aside the Third-Party Notice.*
>
> *(2)* *…in concluding that the Third-Party Notice had not been served as soon as is reasonably possible.*
>
> *(3)* *…in ignoring the reasons set forth for the delay in serving the Third-Party Notice as soon as reasonably possible, and which delay was not in any way excessive and conformed to normal litigation practice.*
>
> *(4)* *…by placing undue reliance on correspondence emanating from the Defendant's loss adjusters to the Third Party's loss adjusters, prior to the issuing of proceedings herein.*
>
> *(5)* *…in relying upon the decision in* Clúid Housing Association v. O'Brien *[2015] IEHC 398 and in considering that the factual situation herein required the*

Defendant to issue the Third Party Notice within the time as envisaged in Order 16, Rule 1(3) and/or that there were any circumstances which required the Defendant to move with undue haste.

(6) *…in enquiring and considering whether the Defendant would seek to issue separate contribution proceedings against the Third Party herein, in the event that the Third-Party Notice was set aside.*

(7) *…in contemplating that separate 'contribution' proceedings could be issued as against the Third Party, thereby resulting in a multiplicity of actions as opposed to having all actions heard within the one set of proceedings.*

(8) *…in failing to give any consideration to the delay on the part of the Third Party in bringing the application herein to set aside the Third-Party Notice, in circumstances when it itself was served with the Third-Party Notice on the 15th of February, 2018, and did not issue the Motion to set aside the Third Party Notice until the 7th of September, 2018.*"

11. In his written submissions to this Court, counsel for Coras distils the grounds of appeal into three key points, *viz*:

"*(i)* *The learned trial judge erred in fact and in law in concluding that the Third-Party Notice had not been served as soon as reasonably possible.*

(ii) *The learned trial judge erred in fact and in law in considering whether* [Coras]*…if the Court set aside the Third-Party Notice, would bring an application for separate contribution proceedings. This is a matter which*

should not have been a consideration in the decision to set aside the Third-Party Notice.

(iii) *The learned trial judge did not consider that* [Northstone]*…itself had delayed in bringing the motion to set aside the Third-Party Notice*".

VI

Principal Law Applicable

i. General.

12. The key legal provisions raised at the hearing of the within appeal are ss.27 and 31 of the Act of 1961, as amended, and O.16, r.1(3) RSC.

ii. Sections 27 and 31.

13. Sections 27(1) and 31 of the Act of 1961, both of which sit in Chapter II of the Act of 1961 ("*Contribution between concurrent wrongdoers*") provide as follows:

"***Procedure for claiming contribution.***

27. *(1)* *A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part—*

(a) *shall not, if the person from whom he proposes to claim contribution is already a party to the action, be entitled to claim contribution except by a claim made in the said action, whether before or*

after judgment in the action; and

(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 the third-party procedure. If such third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed.*

…

Limitation of actions for contribution.

31. *An action may be brought for contribution within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater.*"

[Emphasis added].

14. The contention was made for Coras at the hearing of the within proceedings that, in effect, the two-year period referred to in s.31 ought to be seen as an outlier against which the obligation in s.27(1)(b) to "*serve a third-party notice…as soon as is reasonably possible*". Two problems, it seems to me, arise with this contended-for interpretation:

– first, there is nothing in the express text of the Act which suggests that the Oireachtas saw the two-year period in s.31 as being in any way connected with the obligation in s.27(1)(b) to "*serve a third-party notice…as soon as is reasonably possible*".

– second, it seems to me that the two periods referred to in ss. 27 and 31 are concerned with altogether different matters. The two-year period in s.31 relates to the maximum time permitted for the *commencement* of proceedings. The "*as soon as is reasonably possible*" period in s.27(1)(b) concerns the pace at which steps are to be taken in proceedings *post-commencement*. I do not see that the assessment of what is a "*reasonably possible*" timeframe within which to serve a third-party notice falls ever to be done by reference to a limitation period which, in effect, becomes redundant once proceedings are commenced within the outside limit of same.

iii. Order 16, rule 1(3).

15. Order 16, rule 1(3) of the Rules of the Superior Courts, so far as relevant to the within proceedings, provides as follows:

> "*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 limit for delivering the defence…*".

16. If O.16, r.1(3) RSC were not so rigorous in its terms that it falls in practice to be honoured more in the breach than the observance, then a court could reasonably factor into its conclusions that a failure to comply with O.16, r.1(3) pointed to a failure to serve "*as soon as is reasonably possible*". However, given that O.16, r.1(3) is so rigorous in terms of timing that the parties are agreed that it is honoured more in the breach than the observance (which suggests that it is not adhered to very much at all), this sequential reasoning, whereby a breach of O.16, r.1(3) points to a breach of s.17(1)(b), becomes impossible. Hence, not because of any primacy of statute over the rules of court but rather because of the dissatisfying position which presents that O.16, r.1(3) is so rigorous that it is, in practice, honoured more in breach than observance, I am, at this time, and because of the aforesaid practice, essentially driven (a) to confine my attentions in the within appeal to the following question: 'Was service of the third-party notice effected "*as soon as is reasonably possible*"?' and (b) to leave aside the question whether there was compliance with the rules, which compliance, all else being equal, would, in a situation where general practice did not so sharply deviate from what the rules require, likely be of assistance in determining whether there had been compliance with s.27(1)(b).

17. Were it not for existing case-law in this area, one *might* perhaps approach the question at point (a) above on the basis that (i) one cannot serve a third-party notice until one has leave to serve it, (ii) here that leave was obtained on 15th January 2018 and service was effected one month later, and (iii) a court would be justified on the facts presenting that such service was effected 'as soon as was reasonably possible'. However, the courts have for many years brought a different construction to bear. So, for example in a very early case, *The Board of Governors of St Laurence's Hospital v. Staunton* [1990] 2 I.R. 31 (SC), Finlay C.J. elides any distinction that might be made, in the context of s.27(1), between the process of making application for leave to serve a third-party notice and the service of such notice once obtained, observing, for example, at p. 36, as follows:

> "*I am quite satisfied upon the true construction of that sub-section that the only service of a third-party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third-party notice claiming contribution against a person who is now already a party to the action, is a right to serve a third-party notice as soon as is reasonably possible. A defendant in an action seeking to claim contribution against a person who is not a*

> *party to the proceedings cannot serve any third-party notice at any other time, other than as soon as is reasonably possible.*
> *In my view, the application brought after the conclusion of the action by the plaintiff against the defendants for liberty to serve a third-party notice could not, under any circumstances, be construed as an application to serve a third-party notice as soon as was reasonably possible….*
> *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.*"

18. In truth, the foregoing establishes something of a moving target for litigants seeking to claim a third-party contribution: unless they act with what, at the moment of action, is an unknown degree of haste, they cannot be certain that a court coming to matters at some future time with the benefit of hindsight will not find that it failed to act "*as soon as is reasonably possible*" for the purposes and within the meaning of s.27(1)(b). That being so, it seems to me that the difficulty which presents in this regard for a litigant hoping to seek a third-party contribution (trying to anticipate what a future court will consider reasonable when it looks to the past) ought properly to be offset by a certain generosity of spirit on the part of the courts when it comes to determining whether or not there has been compliance with s.27(1)(b).

VII

Case-Law

i. General.

19. There was little, if any, divergence between the parties as to the law as iterated in a number of prominent cases over the years. Where the parties differed was as to the end-result at which the Court should arrive following an application of relevant legal principle. I proceed now to consider various cases that were opened to the Court at the appeal-hearing.

ii. *Connolly v. Casey*

(Unreported, High Court, Kelly J., 12 June 1998)

20. This was a strike-out application, treated by the High Court as an application made under O.16 RSC. It was brought in the context of professional negligence proceedings issued against solicitors who had in turn sought to join a barrister to those proceedings. The basis upon which the third party sought a set-aside order was the alleged failure on the part of the defendants to comply with the "*as soon as is reasonably possible*" requirement in s.27(1)(b) of the Act of 1961, as amended. Although the High Court in *Connolly* held, in a later-reversed judgment, that the third-party notice in issue had not been served "*as soon as is reasonably possible*", it notably observed, *inter alia*, as follows:

> "*The Third-Party places reliance upon the Defendants' failure to comply with the provisions of Order 16 Rule 1(3). He is of course entitled to do so. However, experience indicates that only a tiny percentage of applications to join a Third Party are made within the time prescribed by this rule. It would, in my view, require very exceptional circumstances for the Court to accede to an application of this sort if the only complaint related to a failure to observe strict compliance with the provisions of this rule.*"

21. It is regrettable that almost a quarter of a century after the High Court expressly adverted in *Connolly* to general non-compliance with O.16, r.1(3), this Court should continue to be presented with submissions in which all the parties are agreed that the time-limit in O.16, r.1(3), a rule of court established by secondary legislation, continues to be honoured more in the breach than the observance. It does little for respect for the rule of law or for the rules of court if those rules establish time constraints which are so rigorous that they are more honoured in the breach than the observance, with the courts expected to tolerate what appears to be a general divergence in practice from the timescale that O.16, r.1(3) ordains.

22. In the course of the hearing of the within proceedings Coras asserted, and Northstone denied, that what was in issue in these proceedings was a failure to observe 'strict' compliance with the provisions of O.16, r.1(3). Given that, by common agreement, O.16, r.1(3) is more honoured in the breach than the observance, I do not see how 'strict' non-compliance with O.16, r.1(3), a rule established by secondary law, could ever, given the general professional

practice that continues to present, be counted against a party, including in a determination as to whether there has been compliance with s.27(1)(b).

iii. *Connolly v. Casey*
[2000] 1 I.R. 345 (SC)

23. This was a successful appeal against the above-considered decision of the High Court. The case is notable, *inter alia*, for the following observations of Denham J., as she then was. at p. 351:

> "[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 the subsection 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.*"

24. A number of points arise from the above.

25. First, as was anticipated by the decision of the Supreme Court in *St Laurence's*, Denham J. makes clear that in assessing whether there has been compliance with the "*as soon as is reasonably possible*" requirement in s.27(1)(b) of the Act of 1961, as amended, "*the whole circumstances of the case and its general progress must be considered*".

26. Second, as Denham J. states, "[t]*he clear purpose of* [s.27(1)(b)]*…is to ensure that a multiplicity of actions is avoided*". Additionally, if a court considers that there has been a breach of the "*as soon as is reasonably possible*" obligation in s.27(1)(b) then, per the same subsection, "*the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed*". Given that this possibility is open to a court and given the "*clear purpose*" of s.27(1)(b), as indicated by Denham J., it would seem that a

certain premium should attach to avoiding a multiplicity of proceedings. This is because in avoiding a multiplicity of proceedings, *i.e.* by allowing an action for contribution to continue, a court which so allows does not thereby obviate the possibility that the court which hears the substantive proceedings may elect to invoke the discretion to refuse to make an order for contribution against the person from whom contribution is claimed.

27. Third, Denham J. points to the fact that "*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.*" However, I do not understand Denham J. to be asserting in this regard that a court should place a greater premium on a third party's rights than s/he or it places on same. So where, as here, a third party (Northstone) expressly indicates that it does not wish to participate in the main action, it does not seem to me that, absent *e.g.*, shareholder or directorial impropriety (none of which is even alleged here) it is for the court to second-guess Northstone as to where its own best interests lie.

(vii) *Boland v. Dublin City Council*
[2002] 4 I.R. 409 (SC)

28. This was a successful appeal against a decision of the High Court that had set aside a third-party notice. In the course of his judgment for the court, Hardiman J. observed, *inter alia*, as follows, at pp.413-14:

> "*O.16 of the Rules of the Superior Courts provides at r. 1(3):-*
>
> > *'Application for leave to issue the third-party notice shall, unless otherwise ordered by the Court, be made within twenty-eight days from the time limited for delivering the defence or, where the application is made by the defendant to a counterclaim, the reply.'*
>
> *I agree with the remarks of Kelly J. in* SFL Engineering Ltd v. Smyth Cladding Systems Ltd. *(Unreported, High Court, Kelly J., 9th May, 1997) as follows:-*

> *'This provision of the Rules of the Superior Courts gives expression in a concrete form to the temporal imperative contained in s. 27(1)(b) of the Act of 1961. It is to be noted that the Rules of the Superior Courts require the application to be made not within 28 days from the delivery of the defence in the proceedings but within 28 days from the time limited for delivering the defence.'*

It is also to be noted that under O. 16, r. 8(3) third party proceedings may at any time be set aside by the court. This is the jurisdiction which is invoked on the present application.

In Board of Governors of St Laurence's Hospital v. Staunton *[1990] 2 I.R. 31 the Supreme Court considered s. 27 of the Act of 1961. Referring specifically to s. 27(1)(b) Finlay C.J. said at p. 36:-*

> *'I am quite satisfied upon the true construction of that sub-section that the only service of a third-party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third-party notice claiming contribution against a person who is not already a party to the action, is a right to serve a third party notice as soon as is reasonably possible. A defendant in an action seeking to claim contribution against a person who is not a party to the proceedings cannot serve any third-party notice at any other time, other than as soon as is reasonably possible.'*

This view has been followed, and its application to various specific circumstances considered, in a number of decisions of the High Court….

In relation to a motion to set aside a third-party notice, in Carroll v. *Fulflex International Co. Ltd. (Unreported, High Court, Morris J., 18th October 1995), Morris J. said:-*

> *'A motion to set aside a third party notice should only be brought before that defendant has taken an active part in the third party proceedings and I believe that an application of this nature must itself be brought within the time-scale identified in s. 27(1) of the Civil Liability Act, 1961, that is to say, 'as soon as is reasonably possible'. While that limitation is not spelt out in the Act, I believe that a fair interpretation of the Act must envisage that a person seeking relief under s. 27 would himself move with reasonable speed and certainly before significant costs and expenses have been occurred in the third-party procedures.'*

In Tierney v. Sweeney Ltd. *(Unreported, High Court, Morris J, 18th October, 1995) Morris J. said at p. 4:-*

> *'I am of the view that where it is intended to make the case that a defendant has failed to move the court to set aside an order giving a defendant liberty to serve a third party notice, such an application should be brought with reasonable expedition and in accordance with the time scale reflected in s. 27(1)(b) of the Civil Liability Act, 1961, that is "as soon as reasonably possible" and save in exceptional circumstances should not extend beyond the point where a defence is delivered to the third party statement of claim.'*

I respectfully agree that the statutory requirement to move for liberty to issue a third-party notice, 'as soon as is reasonably possible', should be regarded as applying, also, to the bringing of an application to set

aside such a notice. While it is difficult to imagine circumstances in which a delay by a third party until after he has himself delivered a defence to the third party statement of claim could be justified, it by no means follows that the mere fact that he has not yet delivered a defence means that the application to set aside has been brought as soon as reasonably possible.

…

Just as the onus of justifying any delay in seeking liberty to issue the third-party notice devolves on the defendant, the onus of justifying delay in bringing the motion to set such notice aside devolves on the third party. Since the first third party is the moving party here, its delay falls to be considered first."

(iv) *Greene v. Triangle Developments Ltd.*
[2015] IECA 249

29. This appears to be the first significant decision of this Court in what was a successful appeal against a decision in the High Court by Clarke J., as he then was, to strike out a third-party notice. In the course of her judgment, Finlay Geoghegan J. observed, *inter alia*, as follows:

"*11. The starting point of any consideration of the proper approach to determining an application such as was before the High Court to set aside a third party notice is section 27(1)(b) of the Civil Liability Act 1961….*

12. It is to be noted that the Act itself does not require either such a person to obtain the leave of the High Court to do so, nor does it require the third-party notice expressly to be issued out of the central office. However, Order 16 of the Rules of the Superior Courts does so require and it is through this regulatory framework that Section 27 has been

implemented. Order 16, Rule 1 requires an application to the High Court for liberty to issue and does seem to require that the third-party notice is issued out of the central office.

...

14. *In considering the proper approach to determining whether or not the third party notice, on the facts of this case, was served as soon as is reasonably possible, it appears that there are three judgments of the Supreme Court which must be considered in order to ascertain whether the approach contended for on behalf of the defendants or the third party is correct.*

15. *The starting point is the decision of the Supreme Court in* The Board of Governors of St. Laurence's Hospital v. Staunton *[1990] 2 I.R. 31 and the oft quoted passage from the then Chief Justice Finlay at page 36, where he said of Section 27(1)(b):*

> *'I am quite satisfied upon the true construction of that subsection that the only service of a third party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third party notice claiming contribution against a person who is not already a party to the action, is a right to serve a third party notice as soon as is reasonably possible.'*

16. *In accordance with that identified approach, the net question which has to be decided in a case such as the present, is whether the service of the third-party notice in*

the instant case was effected as soon as was reasonably possible.

17. *The next judgment of the Supreme Court to which I wish to refer is the judgment delivered by Mr. Justice Murphy in* Molloy v. Dublin Corporation *[2001] 4 I.R. 52 and that was the single judgment with whom the other members of the court agreed. There is a lengthy passage from Mr. Justice Murphy which sets out, if I may say so, so well the purpose of the section which reads as follows at p. 55:-*

> *'There can be little doubt as to what that scheme and purpose was. The legislature was understandably desirous of avoiding a multiplicity of actions. Instead of defendants against whom awards had been made instituting further proceedings against other parties liable to them in respect of the same set of facts - and indeed those defendants in turn perhaps instituting even more proceedings against others - the Oireachtas sought to establish a situation in which the rights and liabilities of all parties arising out of a particular set of circumstances would be disposed of in the same proceedings. It is for that reason that a defendant was given the right, with the approval of the court, to serve a third-party notice on a potential defendant so that any claim against him could be disposed of at the same time as that of the claim against the actual defendant. This procedure had attractions for all of the parties and was desirable in the public interest. Nevertheless, the legislature did not preclude an unsuccessful*

> *defendant in the original proceedings from instituting a substantive action against some other party who the actual defendant contended was liable to him either in tort or in contract. What the Act of 1961 did provide, was that where the actual defendant in the original proceedings failed to avail of the third-party procedure by serving the third-party notice 'as soon as is reasonably possible' and resorted to his original cause of action, the relief which he might have claimed therein was subject to the statutory discretion of the court to refuse to make an order for contribution in his favour.'*

18. *I also wish to draw attention to, so as to explain my reasoning, what Murphy J. later said in relation to the onus in respect of an application for leave. At page 57 he stated:*

> *'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.'*

19. *He then referred to the view expressed by Mr. Justice Barron in the High Court in* McElwaine v. Hughes *(Unreported, High Court (Barron J.) 30th April, 1997) and quoted him as saying, at page 6:*

> *'Since the obligation is on the defendant to serve the notice within a reasonable time, it seems to me that the onus of proof of showing that the delay, if delay there is, was not unreasonable is on the defendant.'*

20. *Then Mr. Justice Murphy, in* Molloy*, went on to deal with what he perceived to be the explanation the second named defendant had put forward to justify the delay in that particular case. And I think in all subsequent decisions there is no departure from the position that where there does appear to be a delay, the onus is on the defendant to explain and justify the delay.*

21. *However, it appears to me that the Supreme Court made a further important qualification to that approach in the case of* Connolly -v- Casey *[2000] 1 IR 345. This was an appeal from Mr. Justice Kelly in the High Court where he had set aside a third-party notice, essentially because he was not satisfied by the explanations given to him of the delays which had taken place in that case.*

22. *The single judgment of the Supreme Court, with whom the other judges agreed, in* Connolly v. Casey *was delivered by Mrs. Justice Denham, as she then was, and she considered the explanations given by the trial judge and quoted from them at page 350 of the judgment.*

> *'Two explanations were given:-*
>
> *(1) that the defendants had to await the delivery of replies to particulars before they could move to join the third party; and*
> *(2) the necessity to obtain a statement from Mr. Murphy prior to the bringing of an application to join the third party.*
> *In relation to the first explanation the learned trial judge stated, having analysed the replies to particulars:-*

> *'I find it difficult to ascertain the information contained in this reply which added to the defendants' state of knowledge so as to make possible what had previously not been possible, namely, the preparation of the application to join the third party. I do not see that these replies materially altered the defendants' state of knowledge from what it had been before in respect of any matter of relevance concerning the joinder of a third party. Accordingly, on this aspect of the matter I do not consider that the defendants have provided a satisfactory explanation for the delay in question.''*

23. *Having quoted from the trial judge, Denham J. then said:*

> *'This was the wrong test. The test was whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendant's state of knowledge is not the test.'*

24. *She went on to deal with the particular facts of that case. Later in the judgment, at page 351, she stated:*

> *'In analysing the delay - in considering whether the third-party notice was served as soon as is reasonably possible - the whole circumstances of the case and its general progress must be considered. The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see* Gilmore v. Windle *[1967] IR 323. 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.'

Denham J. having considered the facts of that case, allowed the appeal.

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.*"

(vi) *Clúid Housing Association v. O'Brien and Ors.*
[2015] IEHC 398

30. This was a successful set-aside application which was opened to the Court, in which the trial judge (Murphy J.) observed, *inter alia*, as follows:

"*29.* *On the authorities the law is clear. A third-party notice must be served as soon as is* 'reasonably possible*'. What is "* reasonably possible *is to be assessed in the context of the facts of each particular case. As the respondent has pointed out a lapse of years before service of a third-party notice may be excusable depending on the circumstances of a particular case. The more complex the case the more*

forgiving a Court may be in determining when it was 'reasonably possible' *to issue a third-party notice.*

...

37. *In the Court's view the statement of claim contained sufficient particulars to permit this respondent to decide whether to join the subcontractor as a third-party….*

38. *In the circumstances of this case the Court is not persuaded that the respondent needed anything more than the statement of claim to decide on the appropriateness of joining the third party. Indeed the Court goes so far as to suggest that this may be one of the few cases in which a requirement to comply with the twenty-eight day time limit set out in O. 16r. 1(3) might be warranted.*

...

40. *Finally the respondent submitted that the applicant has itself been guilty of delay in bringing its application to set aside the respondent's third-party notice and for that reason the court should not set it aside. It is clear from the decision of the Supreme Court in* Boland v. Dublin City Council *[2002] 4 IR that just as a defendant must act as soon as* 'reasonably possible' *in applying to join a third party so must a third party act as soon as* 'reasonably possible' *in seeking to set it aside.*"

(v) *Kenny v. Howard & Anor.*
[2016] IECA 243

31. This was a successful appeal to this Court against a refusal by the court below to set aside a third-party notice upon application being made that the defendant had failed to serve the third-

party notice as soon as was reasonably possible. In a majority judgment for the Court, Ryan P. observed, *inter alia*, as follows:

> "*17.* *The purpose of s. 27(1)(b) of the Act is to ensure as far as possible that all legal issues arising out of an incident are disposed of within the same set of proceedings. That does not mean that all the issues have to be dealt with simultaneously; that may depend on appropriate orders as to the time and mode of trial of the various issues. At the same time as ensuring that all the issues are comprised in the one set of proceedings, the other goal of the provision is to avoid unnecessary delay of the plaintiff's action. It seems to me that this is the essential logic of the requirement that the proceedings be joined in the same action and of the specification as to time.*
>
> *18.* *In* Connolly v. Casey & Anor. *[2000] 1 I.R. 345, the Supreme Court per Denham J. (as she then was) said:*
>
> > *'The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see* Gilmore v. Windle *[1967] I.R. 323. 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.'*
>
> *To this, I would add the other object of the provision insofar as it restricts the time to what is reasonably possible which is to protect the plaintiff's position at the same time as*

ensuring that all the appropriate other parties are before the court in the same set of proceedings.

19. *In* Molloy v. Dublin Corporation *[2001] 4 I.R. 52, the Supreme Court per Murphy J. said:*

> ‘*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.’*

But the court said that:

> *‘… the quest for certainty or verification must be balanced against the statutory obligation to make the appropriate application ‘‘as soon as reasonably possible’’.’*

20. *The court, in* Connolly v. Casey, *emphasised that ‘*in analysing the delay – in considering whether the third-party notice was served as is soon as is reasonably possible – the whole circumstances of the case and its general progress must be considered*’ (Denham J.) That statement was understood by Finlay Geoghegan J. in* Green & Green *v.* Triangle Developments & Wadding and Frank Fox & Associates third party *[2015] IECA 249 as meaning that a court, when looking at an application to set aside a third*

party notice should not only look at the explanations given by the defendant for the 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*'*.

21. *The reference to all the circumstances in* Connolly v. Casey *and the import of the other citations is that it is proper in an appropriate case to allow time for a party to get expert advice or to wait for further and better particulars of something arising in the pleadings. It is impossible to catalogue all the exigencies that may arise in a case that take time to be satisfactorily addressed. Reasonably possible means what it says.*"

VIII

Statement of Key Legal Principles

32. Given the abundance of case-law that now exists in this area, it may assist if I set out a statement of key legal principles identifiable in the above-considered case-law. Such a statement follows, with the principles listed in order of the court that identified them:

Supreme Court

[1] "[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.*" (*Connolly,* at p. 351).

[2] "*The clear purpose of the subsection 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." (*Connolly*, at p. 351).

[Note: Additionally, if a court considers that there has been a breach of the "*as soon as is reasonably required*" obligation in s.27(1)(b) then, per the same subsection, "*the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed*". Given that this possibility is open to a court and given the "*clear purpose*" of s.27(1)(b), as indicated by Denham J., it would seem, for the reason stated in para.26 above, that a certain premium should attach to avoiding a multiplicity of proceedings.]

[3] "*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.*" (*Connolly*, at p. 351).

[Note: I do not understand Denham J. to be asserting in this regard that absent *e.g.*, an allegation that some form of impropriety or something untoward presents, a court should place a greater premium on a third party's rights than s/he or it places on same.]

[4] Order 16, rule 1(3) RSC "*gives expression in a concrete form to the temporal imperative contained in s. 27(1)(b) of the 1961 Act.*" (*Boland*, at p. 413, relying on *SFL Engineering Ltd v. Smith Cladding Systems Ltd* (Unreported, High Court, Kelly J., 9th May 1997).

[5] "*It is to be noted that the Rules of Court require the application to be made not within 28 days from the delivery of the defence in the proceedings but within 28 days from*

the time limited for delivering the defence" (*Boland*, at p. 413, relying on *SFL*).

[6] "*Under Order 16, rule 8(3) third party proceedings may at any time be set aside by the court.*" (*Boland*, at p. 413).

[7] "[U]*pon the true construction of that subsection that the only service of a third party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third party notice claiming contribution against a person who is not already a party to the action, is a right to serve a third party notice as soon as is reasonably possible. A defendant in an action seeking to claim contribution against a person who is not a party to the proceedings cannot serve any third-party notice at any other time, other than as soon as is reasonably possible.*" (*Boland*, at p. 413, relying on *St Laurence's*).

[8] "*A motion to set aside the third party notice should only be brought before that defendant has taken an active part in the third party proceedings*" (*Boland*, at p. 413, referring with approval to the judgment of Morris J. in *Carroll v. Fulflex International Co. Ltd.* (Unreported, High Court, Morris J., 18th October, 1995).

[9] A set-aside application "*must itself be brought within the time scale identified in s.27(1)…that is to say 'as soon as is reasonably possible'. While that limitation is not spelt out in the Act, I believe that a fair interpretation of the Act must envisage that a person seeking relief under s.27 would himself move with reasonable speed and certainly before significant costs and expenses have been incurred in the third-party procedures.*" (*Boland*, at pp. 413-414, referring with approval to the judgment of Morris J. in *Carroll v.*

Fulflex (Unreported, High Court, Morris J., 18th October 1995).

[10] "[A set-aside] *application 'should be brought with reasonable expedition and in accordance with the time scale reflected in s.27(1)(b)…that is as soon as reasonably possible and save in exceptional circumstances should not extend beyond the point where a defence is delivered to the third party statement of claim.*" (*Boland*, p.414, referring with approval to the judgment of Morris J. in *Tierney v. Sweeney Ltd.* (Unreported, High Court, Morris J., 18th October 1995)).

[11] "*I respectfully agree that the statutory requirement to move for liberty to issue a third-party notice, 'as soon as reasonably possible', should be regarded as applying, also, to the bringing of an application to set aside such a notice. While it is difficult to imagine circumstances in which delay by a third party until after he has himself delivered a defence to the third party statement of claim could be justified, it by no means follows that the mere fact that he has not yet delivered a defence means that the application to set aside has been brought as soon as reasonably possible.*" (*Boland*, p.414).

[12] "*Just as the onus of justifying any delay in seeking liberty to issue the third-party notice devolves on the defendant, the onus of justifying delay in bringing the motion to set such notice aside devolves on the third party….*[Where the] *third party is the moving party…its delay falls to be considered first.*" (*Boland*, p.414).

Court of Appeal

[13] "*The starting point of any consideration of the proper approach to determining an application such as was before the High Court to set aside a third party notice is section 27(1)(b) of the Civil Liability Act 1961*." (*Greene,* at para.11)

[14] "[T]*he Act* [of 1961] i*tself does not require either such a person to obtain the leave of the High Court to do so, nor does it require the third-party notice expressly to be issued out of the central office. However, Order 16 of the Rules of the Superior Courts does so require and it is through this regulatory framework that Section 27 has been implemented.*" (*Greene,* at para.12).

[15] Following on the decision of the Supreme Court in *St. Laurence's*, "*the net question which has to be decided in a case such as the present, is whether the service of the third-party notice in the instant case was effected as soon as was reasonably possible.*" (*Greene,* at paras.15-16).

[16] "T*he onus is on the person seeking leave to serve the third-party notice to prove the application is brought within the statutory time limit.*" (*Greene,* at para.18, quoting from the judgment of Murphy J. in *Molloy v. Dublin Corporation* [2001] 4 I.R. 52, at p. 57).

[17] Where there does appear to be a delay, the onus is on the defendant to explain and justify the delay. (*Greene,* at para. 20).

[18] "*In analysing the delay - in considering whether the third-party notice was served as soon as is reasonably possible - the whole circumstances of the case and its general progress must be considered. The clear purpose of the*

subsection 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." (*Greene*, at para. 24, relying on the judgment of Denham J. in *Connolly v. Casey*, at p. 351)

[19] "[I]*t is incumbent on a trial judge, when faced with an application such as the present…to look not only* [a] *at the explanations which were given by a defendant for any purported delay, but* [b] *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.*" (*Greene*, at para. 25).

[20] "*The purpose of s. 27(1)(b)…is to ensure as far as possible that all legal issues arising out of an incident are disposed of within the same set of proceedings. That does not mean that all the issues have to be dealt with simultaneously*" (*Kenny*, at para. 17)

[21] "*At the same time as ensuring that all the issues are comprised in the one set of proceedings, the other goal of the provision is to avoid unnecessary delay of the plaintiff's action.*" (*Kenny*, at para. 17).

[22] To Denham J.'s observation in *Connolly v. Casey* that the clear purpose of s.27(1)(b) is to ensure that a multiplicity of actions is avoided, Ryan P. added that "[T]*he other object of the provision insofar as it restricts the time to what is*

reasonably possible which is to protect the plaintiff's position at the same time as ensuring that all the appropriate other parties are before the court in the same set of proceedings." (*Kenny*, at para. 18).

[23] "*The* [Act of 1961]*...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.*" (*Kenny*, at para. 19, quoting from Murphy J. in *Molloy v. Dublin Corporation*).

[24] *However*, "*the quest for certainty or verification must be balanced against the statutory obligation to make the appropriate application 'as soon as reasonably possible'.*" (*Kenny*, at para. 19, quoting from Murphy J. in *Molloy v. Dublin Corporation*).

[25] "[A] *court, when looking at an application to set aside a third party notice should not only look at the explanations given by the defendant for the 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*." (*Kenny*, at para. 20, relying on *Connolly* and *Greene*).

[26] "*The reference to all the circumstances in Connolly v. Casey and the import of the other citations is that it is*

proper in an appropriate case to allow time for a party to get expert advice or to wait for further and better particulars of something arising in the pleadings. It is impossible to catalogue all the exigencies that may arise in a case that take time to be satisfactorily addressed." (*Kenny*, at para. 21).

[27] "*Reasonably possible means what it says*", *i.e.* each case depends on its own facts. (*Kenny*, at para. 21).

High Court

[28] "[A] *lapse of years before service of a third-party notice may be excusable depending on the circumstances of a particular case.*" (*Clúid* at para. 29).

IX

Application of Principle to Appeal at Hand

33. I turn now to apply the above-identified principles to the within appeal.

34. Principle [1]: "[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.*" (*Connolly*, at p. 351).

35. The learned trial judge proceeded in accordance with this principle.

36. Principle [2]: "*The clear purpose of the subsection 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.*" (Connolly, at p. 351).

37. The learned trial judge expressly identified this objective and had due regard to same.

38. Principle [3]: "*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.*" (Connolly, at p. 351).

39. Again, I do not understand Denham J. to be asserting in this regard that absent *e.g.,* an allegation that some form of impropriety or something untoward presents, a court should place a greater premium on a third party's rights than s/he or it places on same. Here, Northstone clearly considers that it is in its own best interests not to participate in the main action. It is not alleged that anything untoward or improper presents in its taking that view of its own best interests, and the view taken is one that it is legitimately open to Northstone to take.

40. Principles [4]-[7] are noted; no further elaboration seems merited.

41. Principle [8]: "*A motion to set aside the third party notice should only be brought before that defendant has taken an active part in the third party proceedings*" (*Boland,* at p. 413, referring with approval to the judgment of Morris J. in *Carroll v. Fulflex* (Unreported, High Court, Morris J., 18th October 1995)).

42. Northstone has so proceeded.

43. Principle [9]: A set-aside application "*must itself be brought within the time scale identified in s.27(1)…that is to say 'as soon as is reasonably possible'. While that limitation is not spelt out in the Act, I believe that a fair interpretation of the Act must envisage that a person seeking relief under s.27 would himself move with reasonable speed and certainly before significant costs and expenses have been incurred in the third-party procedures.*" (*Boland,* at p. 413, referring with approval

to the judgment of Morris J. in *Carroll v. Fulflex* (Unreported, High Court, Morris J., 18th October 1995).

44. I note the use of the imperative form ("*must*") in the above-quoted text and that Hardiman J., for the Supreme Court, moves on to observe at *Boland*, at p. 414, that "*I respectfully agree that the statutory requirement to move for liberty to issue a third-party notice, 'as soon as reasonably possible'* [an obligation which is also expressed in the imperative], *should be regarded as applying, also, to the bringing of an application to set aside such a notice.*" Thus Hardiman J. gives the imprimatur of the Supreme Court to the observations of Morris J. in the High Court, transforming them into observations that are binding on this Court and/or applies the mandatory requirement of s.27(1)(b) to the party bringing a set-aside motion. In this regard, as mentioned previously above, it is notable that the period complained of by Northstone when it comes to Coras (the seven-month period from April 2017 to November 2017) is roughly similar to the period complained of by Coras when it comes to Northstone (the seven-month period from February 2018 to November 2018). Each side maintains that despite the ostensible delay there was some activity during the relevant period. There is a remarkable and unexplained delay on the part of Northstone as to why it took almost five months for Northstone (from service of the third-party notice on 15th February 2018 to "*early July*" (whatever exactly that means) to enquire of counsel whether a set-aside application ought to be filed. (Impressively, it took him only days to give his advice). The submissions are notably vague as to how long it took to apprise and get instructions from Zurich. That there was a delay in getting a director to sign is delay of a type that Northstone seeks to have counted against Coras which likewise delayed in getting a director signature, albeit of different durations. And while I accept that there can be a degree of slow-down in the commercial world during August, law firms do not completely close down at that time and people generally remain contactable electronically and by courier. I note that this delay

on the part of Northstone was raised before the learned High Court judge; his treatment of this issue is addressed at para. 8 above.

45. Principles [10]-[11] are noted; no further elaboration seems merited.

46. Principle [12]: "*Just as the onus of justifying any delay in seeking liberty to issue the third-party notice devolves on the defendant, the onus of justifying delay in bringing the motion to set such notice aside devolves on the third party….*[Where the] *third party is the moving party…its delay falls to be considered first.*" (*Boland*, p.414).

47. Consistent with the above-quoted observations of Hardiman J. in *Boland*, since Northstone was the moving party in the set-aside application, its delay falls to be considered first. (I treat elsewhere with the perceived delay on the part of Northstone).

48. Principles [13]-[14] are noted; no further elaboration seems merited.

49. Principle [15]: Following on the decision of the Supreme Court in *St. Laurence's*, "*the net question which has to be decided in a case such as the present, is whether the service of the third-party notice in the instant case was effected as soon as was reasonably possible.*" (*Greene*, at paras.15-16).

50. Having regard to the facts in play before him, I see no reason to interfere with the finding of the learned High Court judge that service of the third-party notice was not effected as soon as was reasonably possible. (I treat elsewhere with the perceived delay on the part of Northstone).

51. Principle [16] is noted; no further elaboration seems merited.

52. Principle [17]: Where there does appear to be a delay, the onus is on the defendant to explain and justify the delay. (*Greene*, at para.20).

53. Here there are elements of the delay presenting on the part of Coras that either have not been explained or not adequately explained. (I treat elsewhere with the perceived delay on the part of Northstone).

54. Principle [18] is noted. It reiterates elements of *Connolly* which has been considered above.

55. Principle [19]: "[I]*t is incumbent on a trial judge, when faced with an application such as the present…to look not only* [a] *at the explanations which were given by a defendant for any purported delay, but* [b] *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.*" (*Greene,* at para.25).

56. The learned trial judge did this.

57. Principles [20]-[24] are noted; no further elaboration seems merited.

58. Principle [25]: "[A] *court, when looking at an application to set aside a third party notice should not only look at the explanations given by the defendant for the 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.*" (*Kenny*, at para. 20, relying on *Connolly* and *Greene*).

59. The learned trial judge did so.

60. Principle [26]: "*The reference to all the circumstances in* Connolly *v.* Casey *and the import of the other citations is that it is proper in an appropriate case to allow time for a party to get expert advice or to wait for further and better particulars of something arising in the*

pleadings. It is impossible to catalogue all the exigencies that may arise in a case that take time to be satisfactorily addressed." (*Kenny*, at para.21).

61. I do not see that the learned trial judge erred in this regard.

62. Principles [27] and [28] are noted; no further elaboration seems merited.

X

The Three Issues Presenting

63. As noted previously above, counsel for Coras, in his written submissions to this Court, has distilled the various grounds of appeal in the notice of appeal into three key issues. These are reiterated hereafter and my views indicated.

64. "*(i) The learned trial judge erred in fact and in law in concluding that the Third-Party Notice had not been served as soon as reasonably possible.*"

65. I respectfully do not accept this contention to be correct. It seems to me that the learned trial judge was correct on the facts to conclude that the third-party notice was not served "*as soon is reasonably possible*" and erred neither in fact nor in law in this regard.

66. "*(ii) The learned trial judge erred in fact and in law in considering whether* [Coras]*…if the Court set aside the Third-Party Notice, would bring an application for separate contribution proceedings. This is a matter which should not have been a consideration in the decision to set aside the Third-Party Notice.*"

67. I accept that this is a matter which should not be a consideration in the decision to set-aside a third-party notice. However, I consider that the learned trial judge's remarks in this regard are but *obiter* observations, being but the type of considerate comment that any trial court judge is likely to make when telling a party that it has lost in a particular application before that judge.

68. **"*(iii) The learned trial judge did not consider that* [Northstone]*…itself had delayed in bringing the motion to set aside the Third-Party Notice*".**

69. I would reiterate in this regard the observations that I make at para. 8 above.

XI

Conclusion

70. For the reasons set out above, I would respectfully allow the appeal against the judgment of the learned trial court judge .

71. With regard to costs, as the appellant has been entirely successful in this appeal, my provisional view is that: the appellant is entitled to its costs of the appeal; the same result would follow if the Court were to apply the traditional approach whereby 'costs follow the event'; and no circumstances present that would justify making any alternative order as to costs. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within 14 days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the just-proposed terms, the requesting party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the just-proposed terms will be made.

72. As this judgment is being delivered electronically, I note that each of Woulfe and Donnelly JJ. have indicated agreement with it.