APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2021/262

Barniville P.
Noonan J.
Allen J.

Neutral Citation Number [2022] IECA 209

BETWEEN

SUSQUEHANNA INTERNATIONAL GROUP LIMITED

PLAINTIFF

AND

EXECUZEN LIMITED, DANIEL WHITFIELD, ELENA SUEPPEL

AND

NATALIE MELNICK

DEFENDANTS

AND

CITADEL LLC

AND

DANIEL NEEDHAM

THIRD PARTIES

JUDGMENT of Mr. Justice Allen delivered on the 12th day of September, 2022

Introduction

1. These are appeals by the third parties, Citadel LLC *("Citadel")* and Daniel Needham *"Mr. Needham")* against an order made by the High Court (Simons J.) refusing their motions to set aside third party notices on the grounds that they did not comply with the requirements of s. 27(1)(b) of the Civil Liability Act, 1961 and O. 16, r. 1(3) of the Rules of the Superior Courts.

2. The application for leave to issue the third party notices was issued three years after the time limited by the Rules of the Superior Courts for the delivery of the defendants' defence and about two and a half years after the defence was delivered. The third party notices were issued and served about six months later. The High Court judge found that while, subjectively, there had been unreasonable delay on the part of the defendants, objectively, and seen in the context of the progress of the action, the delay was not unreasonable and that in all the circumstances it would be disproportionate to set aside the third party notices.

3. The core issue on the appeal is whether, and if so the extent to which, account can be taken of the policy of the Civil Liability Act, 1961 that all issues arising out of an event are disposed of in the same set of proceedings in deciding whether the defendants have met the statutory requirement that the third party notices should have been served as soon as was reasonably possible.

The action

4. The plaintiff, Susquehanna International Group Limited *("SIG")*, is a private company limited by shares incorporated under the laws of Ireland which carries on the

business of a global investment and trading firm. Part of its business is trading in financial instruments known as exchange traded funds.

5. The first defendant *("Execuzen")* is a company incorporated under the laws of England and Wales and carries on the business of a consultancy firm. The second, third and fourth defendants are the principals of Execuzen. There is a sharp conflict between the parties to the proceedings as to the nature of Execuzen's business. The defendants are adamant that it is a *bona fide* recruitment consultant. SIG's case is that it is engaged in industrial espionage.

6. The first third party *("Citadel")* is a company incorporated under the laws of England and Wales and is also in the business of investment and trading.

7. The second third party *("Mr. Needham")* is a trader who was employed by SIG for about ten years until 2016 when he left to take up employment with Citadel. He has since left Citadel's employment.

8. By this action, which was commenced by plenary summons issued on 19th November, 2015, SIG claimed against Execuzen an order compelling the delivery of all documents which contain or refer to any confidential information relating to SIG, its counterparties and/or customers in the possession or control of Execuzen; an order restraining Execuzen from soliciting any person employed by SIG and who, by means of such employment, is or is likely to be in possession of confidential information belonging or relating to SIG; and an order restraining Execuzen from disclosing any information obtained by it from SIG's employees concerning its counterparties, customers or business operations. As against each of the defendants, SIG claimed damages for inducement of breach of contract, intentional interference with its economic interests and breach of confidence. As against Execuzen, SIG also claimed an account of all profits made from the use of SIG's confidential information.

9. On 23rd December, 2015 an appearance was entered by on behalf of the defendants for the purpose of contesting jurisdiction but in the event, there was no challenge to jurisdiction.

10. On 29th July, 2016 SIG delivered its statement of claim. The essence of the claim, as the trial judge put it, is that the defendants interviewed employees of SIG, on the pretext of seeking to recruit – or place – them, but in truth in order to elicit confidential and proprietary information. SIG's claim is that the defendants induced the employees to disclose information in relation to its business, reporting structures, and proprietary software, which it later disclosed to Citadel. It is claimed that the defendants and Citadel were aware that the information was confidential and could not lawfully be disclosed by the employees.

11. SIG claims that Citadel determined to establish a business in Dublin, staffed by SIG's employees, carrying on the same business using SIG's confidential and proprietary information and practices, and later did so. It is claimed that the defendants, acting on behalf of Citadel, unlawfully coordinated a *"group leave"* whereby SIG's key employees on its exchange traded funds desk left on the same day or very close together, thereby causing maximum damage to SIG's business.

12. SIG claims that one of the services offered by Execuzen is to assist clients who wish to target the businesses of competitors and that it gathers information on the competitor by interviewing employees of the target and eliciting information – including proprietary and confidential information – about the personnel, business, and structures of the target; and, in the event that its client wishes to exploit the information and recruit employees of the target, coordinates the hiring process, including by inducing employees to assist with the recruitment in breach of their contracts of employment.

13. Having rather tentatively pleaded what is alleged to be Execuzen's business model, the statement of claim goes on to claim that on a date unknown but prior to September, 2015

Citadel or one of its affiliates retained Execuzen to provide such services in relation to the business of SIG and that in or about August and September, 2015 the defendants contacted employees of SIG and induced them to disclose information which, in turn, formed the basis of a report to Citadel. Particulars were given of the names of five employees and the information allegedly sought from them.

14. The statement of claim goes on to allege that Citadel, on foot of the alleged unlawful conduct of the defendants, and well knowing that SIG's employees were prohibited from disclosing confidential information or from assisting in the recruitment of other SIG employees, determined to establish a business in Dublin and, by Execuzen, unlawfully coordinated a *"group leave"* by key employees, and continues:-

> *"By reason of the matters aforesaid, the defendants and any of them have obtained or sought to obtain confidential information from SIGL's employees and have caused SIGL loss and damage. But for the wrongful conduct of Execuzen and the Execuzen Agents [that is, the other defendants] Citadel would not have been able to recruit a number of key SIGL employees to establish a competing business in Dublin."*

15. The relief claimed by the statement of claim is the same as was set out in the general indorsement of claim.

16. The trial judge, at para. 10 of his judgment, suggested that the reliefs sought in the statement of claim were, in the main, directed to the use or disclosure of the confidential information said to have been wrongfully obtained. By reference to the reliefs claimed in the prayer to the statement of claim, that was undoubtedly correct. But reading the statement of claim as a whole, the plaintiff's case by the time the statement of claim was delivered was that what had been apprehended at the time the plenary summons was issued had come to pass. The claim by then was that the information had been gathered, a report made to

Citadel, a decision made by Citadel to establish itself in Dublin in competition with SIG, and an exodus of key personnel organised. If the claims were to be made out, it is difficult to see what effective remedy might be ordered other than damages.

17. By letter dated 17th October, 2016 – following a change of solicitors for the defendants in the meantime – a number of particulars were sought of the claim pleaded in the statement of claim. SIG's replies to particulars dated 22nd November, 2016 were in some respects, perhaps, rather vague but reference was made to an announcement by Citadel that it would open an office in Dublin in the first quarter of 2017 and a list of nine names was given of those who were alleged to have been part of the *"group leave"*. These staff were said to have given their notice on specified dates between the end of March, 2016 and the beginning of June, 2016. Three of the staff were said to have given as their reason for leaving that they were leaving to take up another (unspecified) opportunity, and six that they were going to Citadel.

18. In reply – or at least in response – to a request for particulars of the loss and damage alleged to have been suffered by SIG it was said that:-

> *"Information passed by the defendant to Citadel relating to SIGL's operations, structure, trading processes and proprietary software and the specific resources required in order to attain similar profit and presence as the plaintiff in markets in which it operates ultimately resulted in Citadel's decision to enter a competing business and target and hire key SIGL staff. The deprivation of these staff in which SIGL was heavily invested negatively impacted SIGL's opportunity to make money it could otherwise have made. Further particulars will be provided as they arise."*

19. If the defendants were dissatisfied with – I will not say the particulars of loss and damage – what had been said as to the loss and damage allegedly suffered, they did not take

issue with the response or apply for an order requiring SIG to put a figure or figures on the loss claimed.

20. The defendants delivered their defence on 15th February, 2017. They objected that in circumstances in which Execuzen's business almost exclusively involved recruiting employed financial services executives to leave one position to take up another with a client, the purported causes of action were inappropriate, misconceived, unstateable, unsustainable, bound to fail, frivolous and/or vexatious and/or constituted an abuse of process.

21. The defendants pleaded that the crux of the action was that a number of SIG's employees had decided to leave and take up positions with a competitor and objected that the claims of inducement of breach of contract and so forth had not been adequately particularised. The defendants admitted to having met a number of SIG's employees but denied having done so on a pretext or having elicited confidential information and denied having induced them to breach their contracts.

22. As to loss and damage, the defendants denied that SIG had suffered any loss or damage and pleaded that the court would be invited to draw all appropriate inferences from the failure or refusal to provide any particulars. Without prejudice to that plea, the defendants pleaded that any loss, if any, arose from SIG's failure to retain key staff. Further and in the alternative, the defendants pleaded that if SIG had suffered any loss by reason of any breach of contracts of employment or the unlawful use of confidential information by any new employer, SIG ought to have joined such employees and employer but had chosen not to do so.

23. At para. 54 of the defence it was pleaded that:-

> *"The defendants for their part plead that they have no evidence of wrongdoing on the part of any other person or firm and therefore is not in a position to join any person or firm as a party hereto."*

24. And at para. 59 it was pleaded that:-

> *"The defendants further plead that all information obtained from employees of the plaintiff in the recruitment process which the defendants plead was neither sensitive or confidential was in any event information obtained by the defendants as agents only on behalf of the defendants' known principal, in which circumstances no cause of action lies against these defendants."*

25. By notice of motion issued on 23rd February, 2018 the defendants applied for an order requiring SIG to make discovery of three categories of documents, including all documents in relation to all losses alleged to have been incurred by SIG as a result of the *"group leave"* and/or exploitation of confidential information, including the trading results and/or profits for each business unit in which any *"group leaver"* had worked for the period of three years prior to, and eighteen months subsequent to, March, 2016, and all estimates and calculations of losses which SIG claimed arose from the use by others of its alleged proprietary systems and processes.

26. The affidavit of the defendants' solicitor grounding the motion showed that the three categories of documents the subject of the motion were three of six that had been requested, agreement having been reached on the others. As to the category in relation to the losses claimed, reference was made to a reply by SIG's solicitors to the request for voluntary discovery, which took the position that the category as drafted was a request for particulars and indicated that a report was awaited from an expert and that *"updated particulars of loss"* would be furnished when the report was finalised, in the coming weeks. Thereafter, it was said, the issue of discovery could be addressed as it might be relevant to the claim and the plaintiff would make discovery as appropriate. In his affidavit grounding the motion, the defendants' solicitor suggested that if documentation had been assembled to be sent to SIG's expert, the defendants were entitled to see it.

27. The order of the High Court made on 16th July, 2018 on the defendants' discovery motion shows that there was no order made in relation to the losses category but the defendants were given leave to bring a further motion seeking such relief. On the hearing of the motion the court was informed that the expert report which had been commissioned by SIG was expected to be available imminently and would be made available to the defendants within two weeks. The expectation was that the defendants would formulate a revised request for discovery of documents in relation to the losses claimed by reference to the formulation of that claim in the expert report. In the event – as I will come to – the expert report was not made available to the defendants until 18th January, 2019.

The third party motion

28. By notice of motion issued on 19th September, 2019 and originally returnable for 2nd December, 2019 the defendants applied for liberty to issue and serve third party notices against Citadel and Mr. Needham. The motion was grounded on quite a long affidavit of Mr. Adrian Ezra, Chief Executive Officer of Execuzen.

29. Mr. Ezra very briefly summarised SIG's claim. He said that on the facts known to the defendants there was no substance to the claim and that this was reinforced by SIG's refusal or inability to provide any sensible information in relation to loss. Mr. Ezra noted that Citadel had not been joined as a defendant and that Mr. Needham, who was not one of the employees named in the statement of claim, had first been identified in the replies to particulars in November, 2016.

30. Mr. Ezra deposed that at the time the defendants' motion for discovery was listed for hearing on 16th July, 2018 it had been agreed that SIG's expert report would be furnished within two weeks and that ultimately, on 18th January, 2019, SIG's solicitors had made

available an *"initial report"* from Grant Thornton dated 18th July, 2018. This report was said to show that apart from this action there was another action by SIG against Mr. Needham, which had been commenced in 2016. Mr. Ezra deposed that SIG's solicitors had been asked to provide a copy of the proceedings which had been taken against Mr. Needham but that they had not done so. The Grant Thornton report was said to show that the case made by SIG against Mr. Needham was that he had been approached by Citadel in January, 2016 and that Citadel's objective and intention was to acquire a ready-made business by persuading a group of employees to leave SIG and to bring with them confidential information, know-how and trading strategies.

31. The Grant Thornton report was said to show that Mr. Paul Jacobs of that firm had been asked to address the loss and damage by reference to the allegations both against Mr. Needham as well as the defendants, without differentiating between the two. While, Mr. Ezra said, the allegations against Mr. Needham and Citadel could clearly not be laid at the door of the defendants, the plaintiff now sought to advance a claim for US$53 million, or, at the exchange rates then prevailing, €47 million. Because, it was said, the plaintiff was intent on assuming loss and causation without distinguishing between Mr. Needham and the defendants, it was necessary to join Citadel as a third party. The affidavit did not spell out why the defendants wanted to join Mr. Needham.

32. Mr. Ezra deposed that the defendants' solicitors had written to Citadel and Mr. Needham on 27th June, 2019 seeking an indemnity, to which responses had been received on 9th and 11th July, 2019 which were said to have displayed a reluctance to be joined and offering reasons why they should not be joined.

33. The third party motion was, as I have said, initially returnable for 2nd December, 2019. When the motion first came before the court it was adjourned by consent to 9th March, 2020 to allow SIG to consider – or, perhaps, to reconsider – whether it wished to join Citadel

as a co-defendant. By then, as I will come to, the separate action by SIG against Mr. Needham had already been compromised and he had been released and this was formally confirmed by SIG's solicitors by letter dated 3rd December, 2019.

34. When the third party motion came back into the list on 13th March, 2020 an order was made giving liberty to the defendants to issue third party notices against Citadel and Mr. Needham, and for service out of the jurisdiction on Citadel. On 11th March, 2020 a short supplemental affidavit had been sworn on behalf of the defendants by their solicitor, Mr. John G. Walsh, which exhibited SIG's solicitors' letter of 3rd December, 2019 and averred that:-

> *" ... [T]he catalyst for the bringing of this application was a report from Grant Thornton intended to identify the loss claimed in these proceedings but which advanced the claim for loss by reference to the then separate proceedings brought by the plaintiff against Mr. Needham."*

The motions to set aside the third party notices

35. By notice of motion issued on 31st July, 2020 Citadel applied for an order pursuant to O. 16, r. 8(3) of the Rules of the Superior Courts and/or s. 27 of the Civil Liability Act, 1961 setting aside the third party notice against it, and on 18th August, 2020 an identical motion was issued on behalf of Mr. Needham.

36. The motion on behalf of Citadel was grounded on the affidavit of Ms. Kristina Knoll Martinez. The proceedings, she said, had been in existence since 2015. The first notice received by Citadel of any intention on the part of the defendants to join Citadel was the defendants' solicitors' letter of 27th June, 2019, and the third party notice was not served until 21st April, 2020.

37. Ms. Knoll Martinez averred that the affidavits filed in support of the defendants' motion provided no adequate explanation for the delay in seeking to join Citadel. The delay, she suggested, could not be explained by reference to the Grant Thornton report since it – it was said – contained absolutely no new information regarding Citadel. She pointed to the statement of claim, in which Citadel had been identified; the replies to particulars, in which Mr. Needham had been identified as a person who had allegedly taken and misused confidential information; and the defence, in which the defendants had identified Citadel as their principal. The Grant Thornton report, she said, did not set out any new information as to the alleged liability of the defendants or the third parties but simply set out a calculation of the losses allegedly suffered by SIG.

38. Ms. Knoll Martinez concluded by averring that Citadel had been prejudiced by the delay. As of the date of swearing of her affidavit, almost five years had elapsed since the commencement of what she called the executive search process. At least six Citadel employees who had been involved in that process, and several of those who had been recruited – including Mr. Needham – had since left the Citadel group. She expressed concern that memories would have faded and that because Citadel had not been on notice of any potential proceedings it might be impossible to retrieve relevant hard copy documents.

39. The defendants contested the assertion that there had been any delay on their part in joining the third parties. In an affidavit sworn on 14th December, 2020 Mr. Ezra suggested that the allegations against Mr. Needham were pre-eminently directed to the alleged misuse of confidential information whereas the complaint against the defendants arose from the recruitment process and was characterised as being the *"group leave"*. The fundamental difference between the two – it was said – was that the defendants were fully aware of their role in the recruitment process but not of the allegations against Mr. Needham. The statement in SIG's replies to particulars of 22nd November, 2016 that Mr. Needham was one

of a number of employees – the only one who had been identified – who misused confidential information was said to be cryptic. The Grant Thornton report, he said, disclosed information which had not been previously available and it disclosed, for the first time, that SIG was seeking to attribute the same loss to *"both cases"*. Mr. Erza deposed that he had been unaware of the proceedings against Mr. Needham until after the Grant Thornton report had been received. He rejected the suggestion that Citadel had been prejudiced by the delay.

40. Mr. Ezra was adamant that the role of Execuzen was limited to acting in the recruitment process and that despite *"the pejorative phrases used by the plaintiff"*, Execuzen was fully aware of what it had done and not done and could establish that nothing wrongful had occurred.

41. Mr. Erza's evidence that he had first become aware from the Grant Thornton report of the action against Mr. Needham was addressed in an affidavit of SIG's solicitor, Mr. Michael David Anderson. Mr. Anderson deposed that in view of the fact that Mr. Needham had been employed by Citadel following the recruitment exercise the subject of SIG's complaints, he, Mr. Anderson kept a watching brief on the proceedings. Mr. Anderson deposed that on 5th December, 2017, following a significant judgment which was delivered on 27th November, 2017 – *Susquehanna International Group Limited v. Needham* [2017] IEHC 706 – he had discussed the Needham proceedings with the defendants' solicitor, Mr. Walsh. He expressed surprise that Mr. Walsh might not have relayed their conversation to Mr. Ezra but suggested that in any event the defendants, by virtue of that conversation, were aware of the Needham proceedings. Mr. Walsh, in a replying affidavit, recalled having a conversation with Mr Anderson but suggested that it was limited to the procedural nature and effect of the order made and that there was no discussion as to the substance of the action against Mr. Needham. Mr. Walsh, in turn, expressed surprise that Mr. Anderson had not told him of what he later

learned were the very specific allegations of wrongdoing on the part of Mr. Needham and Citadel.

42. There followed an exchange of affidavits of Messrs. Anderson and Walsh in which they differed as to what was or was not, and what might and might not have been, said in the course of their telephone call and what Mr. Walsh might or might not have discovered if he had later read the judgment. It is not useful to dwell on the detail or necessary or appropriate to attempt to decide which of them is in the right. It is common case that Mr. Walsh was made aware by Mr. Anderson – if he had not been previously aware – of the separate action by SIG against Mr. Needham. The demonstrable objective fact is that the defendants knew from SIG's replies to particulars that SIG had identified Mr. Needham as having allegedly misused confidential information. If there was no discussion as to the precise claims made by SIG against Mr. Needham, Mr. Walsh did not suggest that he thought that the dispute the subject of the separate action might have been in relation to anything other than the circumstances of Mr. Needham's departure from SIG and his later engagement by Citadel.

43. Mr. Needham's motion to set aside the third party notice which had been served on him was grounded on the affidavit of his solicitor, Mr. John Dunne, the contents of which Mr. Needham verified in a separate affidavit. Mr. Dunne identified each of the allegations in respect of his client in the statement of claim, and the particulars sought and given in respect of each such allegation. The Grant Thornton report, he said, could not have created any liability on the part of Mr. Needham or altered the pleaded case between SIG and the defendants. Mr. Dunne also pointed to what he said was the delay between receipt by the defendants of the Grant Thornton report and the issuing and service of the third party notice on Mr. Needham.

44. Mr. Dunne summarised the separate proceedings which had been brought against Mr. Needham. That action had been commenced by plenary summons issued on 15th April, 2016

by which SIG claimed a variety of injunctions and damages. SIG's motion for interlocutory injunctions was resolved on 26th April, 2016 by Mr. Needham giving several undertakings to the High Court. The action was eventually settled on confidential terms shortly before 16th July, 2019 when an appeal to the Court of Appeal against an order for discovery by Mr. Needham which was made by the High Court on 19th December, 2017 was due to have been heard. In the meantime, Mr. Needham's employment with SIG had terminated on 10th January, 2019. Mr. Dunne deposed – and Mr. Needham verified – that the action by SIG against him had been the cause of great stress and anxiety, as well as mounting costs. The defendants' delay in serving the third party notice was characterised as an attempt to prolong an enduring professional and personal nightmare and thereby to have caused him great prejudice.

The judgment of the High Court

45. The substance of the third parties' case that the third party notices should be set aside was that the third party notices had not been served *"as soon as reasonably possible"* as required by s. 27 of the Civil Liability Act, 1961. The third parties pointed to the time which elapsed between the delivery of the defence on 15th February, 2017 and the date of issue of the third party notices in March, 2020 and, separately, to the intervals between 16th July, 2018 when SIG said that it would make the Grant Thornton report available and 18th January, 2019, when it did so; between 18th January, 2019 and 27th June, 2019 when the defendants' solicitors first wrote to the third parties; between then and 19th September, 2019 when the motion issued seeking to join the third parties; and between the first return date for the motion on 2nd December, 2019 and the dates on which the third party notices were eventually served.

46. The substance of the defendants' answer to the motion was that the third party notices had in fact been issued and served as soon as was reasonably possible. The foundation stone for that argument was that the Grant Thornton report fundamentally changed SIG's case against the defendants and the defendants' assessment of the necessity to join the third parties. The time that had elapsed between receipt of the Grant Thornton report and the issue third party of the motion was – it was said – no more than had been necessary to consider the information in the report and to decide what to do.

47. The two motions were dealt with together by Simons J. in a comprehensive written judgment delivered on 19th August, 2021 [2021] IEHC 551

48. The High Court judge, at para. 45 of his judgment, identified the principal area of disagreement between the parties as the objective underlying the statutory obligation to serve a third party notice as soon as is reasonably possible. Citing *Connolly v. Casey* [2000] 1 I.R. 345 and *Gilmore v. Windle* [1967] I.R. 323, he found that the overarching objective of the third party procedure is to simplify litigation and to avoid a multiplicity of actions by allowing the main proceedings and third party proceedings to be heard together.

49. Again citing *Connolly v. Casey,* the judge noted that it may be reasonable for a defendant to await particulars of the claim made against him in the main proceedings before deciding whether to join a third party. The reasonableness of the defendants' position is to be assessed at the time the particulars are sought, as opposed to when they are provided. Specifically, he said, whether the particulars did or did not alter the defendant's state of knowledge is not the test.

50. The judge found that the Grant Thornton report changed the entire complexion of the case. The claim, he said, had been reoriented from one directed to injunctive relief to one seeking an enormous sum in respect of alleged loss of profits. There was, said the judge, nothing in the statement of claim which presaged the claim for €47 million. At para. 75, the

judge observed that a defendant will normally have a sense of the extent of the claim being made and will, accordingly, be in a position to make an informed decision as to its approach to the litigation, including the need to join any third parties but at para. 78, concluded that in the exceptional circumstances of the case, the defendants, upon disclosure of the particulars of loss, were entitled to give fresh consideration to the question whether Citadel and/or Mr. Needham should be joined as third parties.

51. As to the separate action against Mr. Needham, the judge found that the Grant Thornton report forged the link between the two sets of proceedings and showed, for the first time, that SIG was seeking to characterise the defendants and Mr. Needham as being jointly responsible for the alleged loss of profits, thus bringing into play the definition of concurrent wrongdoers for the purposes of the Civil Liability Act, 1961.

52. Having considered the substance of the Grant Thornton report, the judge then looked at the delay on the part of the defendants in seeking a copy of the report and the delay thereafter in the preparation of the third party motion. He concluded that in both instances the delay was unreasonable.

53. From there, the judge moved to the judgment of the Court of Appeal in *Greene v. Triangle Developments Ltd.* [2015] IECA 249, in which it was said that it was incumbent on the court to look not only at the explanations given for any period of apparent delay but to make an objective assessment whether, in the whole circumstances of the case and its general progress, the third party notice had been served as soon as was reasonably possible. Because, he said, the delay on the part of the defendants could not be said to have adversely affected the progress of the main proceedings, in was not *"on objective assessment"* unreasonable. In all the circumstances, he said, it would be disproportionate to set aside the third party notices.

The approach taken by the High Court

54. Citadel and Mr. Needham have appealed against the judgment and order of the High Court on a number of grounds but the central argument is that the approach was wrong. The High Court judge found – and it is emphasised that there is no cross-appeal against the finding – that there was culpable, unreasonable delay on the part of the defendants from July, 2018, when the Grant Thornton report ought to have been provided, until March, 2020 when the third party notices were issued. It follows – so the argument goes – that the third party notices were not served as soon as was reasonably possible and they should have been set aside. It is submitted that the *"principal objective"* identified by the judge of the requirement to serve as soon as reasonably possible is not to be found in any of the authorities and, in any event, runs directly contrary to the plain wording of the statutory provision on which the defendants rely to make their claim for contribution.

55. In my view, there is substance to the argument that the High Court judge was distracted by his quest for the objective of s. 27(1) of the Act of 1961 from the application of the plain words of the section.

56. In his *"Overview of the legislative framework and rules of court"* at paras. 28 to 35 of the judgment, the judge correctly identified s. 21 of the Act of 1961 as providing for a statutory right of contribution between concurrent wrongdoers *inter se*, and two procedural routes by which a defendant in existing proceedings can pursue a claim for contribution against a concurrent wrongdoer who is not already a party. The first is to use the third party procedure, which requires the service of a third party notice as soon as is reasonably possible. The second is to bring a separate action for contribution. The judge touched on the complications that may arise in the event that a defendant does not utilise the third party procedure. Not overlooking the *dicta* of Collins J. in *Ballymore Residential Ltd. v. Roadstone Ltd.* [2021] IECA 167, the judge observed that on the current state of the authorities, the

setting aside of a third party notice on the grounds of delay may have the consequence for a defendant that it is precluded thereafter from seeking any contribution from that party.

57. In his summary, at paras. 36 to 39, of the *"Obligation to serve 'as soon as reasonably possible'"*, the judge correctly identified the statutory requirement that a defendant who wishes to make a claim for contribution in third party proceedings must serve a third party notice as soon as is reasonably possible. A defendant is not required to serve a third party notice until such time as he is aware of any potential claim for contribution which he may have against the third party: *Board of Governors of St. Lawrence's Hospital v. Staunton* [1990] 2 I.R. 31. In the event of any delay, the onus is on the defendant to explain and justify the delay. In assessing delay, the court will have regard to the fact that third party proceedings should not be instituted without first assembling and examining the relevant evidence and obtaining appropriate advice. However, the quest for certainty or verification must be balanced against the statutory obligation to make the application as soon as reasonably possible: *Molloy v. Dublin Corporation* [2001] 4 I.R. 52. It is incumbent on the court to look not only at the explanations which have been given by the defendant for any apparent 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 was reasonably possible: *Greene v. Triangle Developments Ltd.* [2015] IECA 249. I am quite satisfied that this was a correct summary of the law.

58. Having touched on the requirement in O. 16 of the Rules of the Superior Courts that an application for leave to issue and serve a third party notice should be issued within twenty eight days of the time limited for delivery of the defence, the judge moved to the question as to whether delay should be calculated by reference to the date on which the third party notice is served or the earlier date on which the third party motion is issued. While there is, as the judge said, some disagreement on the authorities, in practice the distinction will rarely be

decisive because in most cases the time between the issuing of the motion and the subsequent service of the order will be short enough. If and insofar as there is a significant time period between the issue of the motion and the service of the third party notice and this is caused by factors outside the control of the defendant, the delay will not be regarded as unreasonable. Again, I am satisfied that the judge correctly summarised the law in this regard.

59. This is a case in which the distinction between the date of issue of the motion and the date of service of the third party notices is of some importance. The third party motion was issued on 19th September, 2019 and was initially returnable for 2nd December, 2019. On the assumption that the motion was served reasonably promptly, SIG would have had a couple of months – on top of the four years which had elapsed since the beginning of the events complained of – to decide whether it wished to join Citadel as a co-defendant, but nonetheless the motion was further adjourned for three months. As far as Mr. Needham was concerned, SIG had settled with him and he had been released, so there could have been no question of SIG joining him as a co-defendant and so, it seems to me, no justification for adjourning the motion as far as he was concerned.

60. Where I respectfully part company with the High Court judge is in the significance which he attached to the objective of the statutory requirement that the third party notice must be issued as soon as reasonably possible. I would not disagree that in construing a statutory provision regard may be had to any clear legislative policy but in this case, I think that the danger was – and it was realised – that the analysis would drift from whether the statutory condition had been met to whether the underlying purpose of the legislation had been achieved.

61. As the judgment of the High Court shows, the defendants' essential submission was that the purpose of the requirement is that the general progress of the action between the plaintiff and the defendant is not unnecessarily delayed. *Greene* is authority for the

proposition that in assessing any delay, regard may be had – and should be had – to the whole circumstances of the case and its general progress. However, it is not authority for the proposition that delay in the service of a third party notice may be disregarded if it has not had the consequence that the progress of the action has been delayed. By the same token, if the underlying policy is to put the third party in as good a position as possible in relation to knowledge of the claim and the opportunity of investigating it, I know of no authority for the proposition that a third party moving to set aside a third party notice must establish prejudice. It is true that many third parties applying to set aside third party proceedings – as in this case – will assert that they have been prejudiced by the delay and that many defendants – as in this case – will assert that there has been no prejudice. In every case, however, the focus must be on whether the delay was unreasonable.

62. If the overarching objective of the third party procedure is to simplify litigation and to avoid a multiplicity of actions, it seems to me that the application of the statutory requirement cannot properly vary on a case by case basis by reference to the enthusiasm or lethargy of the plaintiff.

63. At paras. 60 to 62 of his judgment, the judge considered the *dicta* of Barrett J. (sitting as a judge of the Court of Appeal) in *O'Connor v. Coras Pipeline Services Ltd.* [2021] IECA 68 to the effect that a court should not place a greater premium on a third party's rights than the third party itself places on same, concluding that while a third party has a choice as to the extent to which it actively participates at the hearing, it does not get to decide whether it should be joined as a third party and bound by the outcome of the proceedings. The judgment refers to the third party being bound by the outcome of the *"third party proceedings"* but I am confident that what the judge meant was the outcome of the main proceedings. In this respect I find myself fully in agreement with the judge. I quite agree that the third party procedure, specifically the requirement that any third party notice must be

served as soon as reasonably possible, is not a form of entitlement conferred on a third party which the third party may waive at will. But the converse, it seems to me, is that a defendant cannot seek to justify a delay by seeking to establish that the third party has not been prejudiced, still less that a third party moving to set aside a third party notice must go beyond establishing that the notice was not served as soon as reasonably possible and show that he has been prejudiced.

The Grant Thornton report

64. It is clear from the affidavits filed in support of the third party motion – as well, indeed, from the affidavits filed on behalf of the defendants in response to the motion to set aside the notices – that the application to join Citadel and Mr. Needham was prompted by the Grant Thornton report. The judge found that this report changed the entire complexion of the case, reorientating it from a case directed to injunctive relief to one claiming an enormous sum for alleged loss of profits, such that it justified the defendants giving fresh consideration to the question of the joinder of third parties.

65. Citadel protests that there was no evidence before the High Court on affidavit with respect to the consideration given to joining Citadel or Mr. Needham or as to the reorientation of SIG's case, which is strictly speaking correct, but it is evident from para. 54 of the defence that consideration was given at that time to the possibility of joining third parties and that the defendants assessment then was that there was no evidence of wrongdoing on the part of any other person or firm such as would warrant the joinder of any other party. The very fact of the bringing of the third party motion shows that the defendants did reconsider their position and the affidavit of Mr. Erza sought to justify the motion by reference to the Grant Thornton report. As Mr. Walsh put it in his affidavit, the Grant Thornton report was the catalyst for the

application. In my view the judge was entitled to find that the Grant Thornton report had prompted a reconsideration of the joinder of third parties. Whether there was anything in the report which could be said to have changed the original assessment is another matter.

66. The substance of the case pleaded in the statement of claim (which was delivered on 29th July, 2016) was (1) that on a date unknown but prior to September, 2015 Citadel engaged Execuzen to gather information about the business carried on by SIG, its traders and trades, its revenues and profits, its confidential trading strategies and models, its proprietary software, and the resources committed by SIG to support its profitability; (2) that Execuzen and Citadel were aware that the information was confidential and could not be lawfully disclosed by SIG's employees; (3) that in August and September, 2015 such information was gathered from SIG employees and formed the basis of a report made to Citadel; (4) that, using the report, Citadel decided to set up a business in Dublin; (5) that, starting in January, 2016, Execuzen, on behalf of Citadel, unlawfully coordinated a *"group leave"* of SIG's key personnel; and (6) that by reason of the matters aforesaid SIG had suffered loss and damage.

67. The relief claimed in the prayer to the statement of claim was the same as had been claimed in the general indorsement of claim on the summons, but the summons had been issued on 19th November, 2015, at a time when – on SIG's case – the defendants were gathering or attempting to gather information but before they had passed it on, and certainly before the establishment of Citadel's Dublin office and the group leave. On the case pleaded in the statement of claim, all that SIG had previously apprehended had come to pass. At least as far as the defendants were concerned, there had been no application for interlocutory orders. If it was not obviously pointless for SIG to press the action for an order directing the defendants to return or destroy information which – on SIG's case – had already been passed on and acted upon, or an injunction restraining the further use of the information, it seems to me that the obvious thrust of the action was a claim for damages.

68. A letter dated 17th October, 2016 seeking a number of particulars of the claim was replied to by letter of 22nd November, 2016. SIG was able to say when and where Citadel's Dublin office would be established and to identify nine former employees who, it said, had been recruited by Execuzen and another four who intended to take up employment with Citadel. One of those was Mr. Needham.

69. At para. 10(2) of the notice for particulars SIG was asked to give further particulars of the alleged confidential information which it claimed its employees were prohibited from exploiting or using, which it did.

70. At para 10(4) SIG was asked to identify the employees alleged to have used or exploited such information, to which the reply was:-

> *"SIGL cannot say at this juncture precisely which of the employees misused its confidential information save that it is certain that Mr. Needham was guilty of this conduct. Full details of the information disseminated and the parties guilty of the dissemination will be furnished following discovery."*

71. At para. 12 of the notice for particulars the defendants sought full and detailed particulars of the loss and damage alleged to have been suffered or sustained by SIG, including but not limited to:-

(a) The alleged loss of trading gains by virtue of [SIG's] perceived wrongdoings on the part of the defendants;

(b) The alleged loss of market share in any particular market;

(c) The alleged loss of absolute advantage in any particular market by the alleged unlawful duplication of proprietary intellectual property.

72. At para. 13 the defendants again asked that SIG would specify the alleged loss and damage and asked that it would identify the SIG employees recruited by Citadel who had facilitated the establishment of a competing business in Dublin.

73. The reply to paras. 12 and 13 was a composite answer that:-

> *"Information passed by the defendant (sic.) to Citadel relating to SIGL's operations, structure, trading processes and proprietary software and the specific resources required in order to attain similar profit and presence as the plaintiff in the markets in which it operates ultimately resulted in Citadel's decision to enter a competing business and target and hire key SIGL staff. The deprivation of these staff in which SIGL heavily invested negatively impacted SIGL's opportunity to make money it could otherwise have made. Further particulars will be provided as they arise."*

74. If the response to the request for particulars was not an answer, it was clear – as it was from the statement of claim, and indeed from the particulars sought – that SIG's case was that its business had been seriously damaged, not only by reason of the loss of staff but because the defendants had allegedly gathered and passed on confidential business information.

75. The defence, which was delivered on 15th February, 2017, robustly denied all allegations of wrongdoing, specifically of any gathering of confidential information or of any involvement in the group leave. Further and alternatively, it was said, if SIG had suffered any loss by reason of breaches by its employees of their contracts of employment or by some unlawful use of confidential information by *"any new employer"*, SIG ought to have joined such employees and employers in the proceedings but had chosen not to do so.

76. To the extent that the defence is indicative of the defendants' assessment of SIG's case against them, the defendants doubted that SIG would be able to quantify, still less to prove, any claim for loss but the substance of the claim clearly was, and was clearly understood to be, a claim for damages.

77. By letter dated 18th September, 2017 the defendants' solicitors wrote to SIG's solicitors seeking voluntary discovery of six categories of documents, said to be relevant and necessary for the fair disposal of the action. The sixth category comprised all documents in

relation to all losses alleged to have been incurred by SIG, whether as a result of the group leave or the exploitation of confidential information. SIG was asked, in particular, for all documents in relation to trading results and profits for three years prior to, and eighteen months subsequent to, March, 2016 and all estimates and calculations of losses claimed to have arisen from the use by others of its alleged proprietary systems and processes. The response, as I have said earlier, was that SIG had commissioned an expert report which was expected to be available in the coming weeks, at which stage SIG would provide *"updated particulars of loss"* and engage with the issue as to what discovery might arise out of the claim.

78. I pause to make two observations. The first is that the defendants clearly anticipated a claim for loss of revenue and loss of profit. Secondly, the defendants then clearly understood that the claim against them was not limited to the group leave but extended to the alleged exploitation of confidential information.

79. The Grant Thornton report was eventually provided to the defendants' solicitors on 18th January, 2019. As I have said, it estimated the losses incurred by SIG at US$53 million, or €47 million. Predictably enough, the report looked at the figures for the years prior to and subsequent to the time of the events complained of. If the defendants were startled by the numbers, I cannot see how they could have been surprised at the methodology.

80. The Grant Thornton report referenced two actions – this action against the defendants, and a separate action commenced in 2016 against Mr. Needham – and summarised SIG's case in each.

81. The summary of the case against Mr. Needham set out various clauses of his contract of employment, including post termination restraints on soliciting SIG personnel and post termination employment in a *"competing business"* and the disclosure of confidential information. The case pleaded against Mr. Needham was that following an approach by

Citadel in January, 2016, he supplied Citadel with confidential information, including as to the identity and details of other traders, trades, revenues and profits, and details of confidential trading strategies and models and that Citadel later made coordinated offers of employment to several SIG employees and so on.

82. By the way, it was said in argument that the Grant Thornton report made no mention of Citadel, which it did. The report showed that SIG in its action against Mr. Needham alleged that Citadel contacted Mr. Needham in January, 2016 to persuade him to leave his employment with SIG; that Mr. Needham was aware of Citadel's intention – and so, necessarily, that Citadel's intention was – to acquire a ready-made business in Dublin by persuading a group of SIG's employees to leave and to bring with them confidential information, strategies and know-how. What the report said about Citadel's engagement with Mr. Needham, however, was not materially different to what was said about Citadel's intentions and engagement with the defendants in the action against them. I am satisfied that Ms. Kroll Martinez was correct in her assessment of the Grant Thornton report that it contained nothing new about Citadel.

83. It was also said in argument that Grant Thornton did not say that Citadel was a concurrent wrongdoer. That is correct, but it makes no difference. Grant Thornton were engaged to make an estimate of losses on the basis of their instructions and on the premise that the claims against the defendants and Mr. Needham could be made out. If, directly, the allegation was that Mr. Needham disclosed confidential information and poached SIG employees in breach of his contract of employment, the allegation was that he allegedly did what he allegedly did at the instance and for the benefit of Citadel. It was no part of Grant Thornton's brief to say who was or was not a concurrent wrongdoer.

84. The action which the Grant Thornton report showed had been brought by SIG against Mr. Needham perhaps went further than what he had been alleged in the replies to particulars

to have done. In the action brought against Mr. Needham, SIG's claim went beyond the alleged disclosure of confidential information to alleged unlawful assistance in the recruitment of SIG staff but I cannot see how the fact or nature of the action against Mr. Needham changed the fundamental nature or complexion of the action against the defendants.

85. The declared position of the defendants when they delivered their defence was that they did not have sufficient evidence of wrongdoing by anyone to warrant the joinder of any third party. I cannot see how that assessment could have been altered by anything in the Grant Thornton report. In the first place, what was recorded in the report was a summary of the claims which had been made against Mr. Needham and did not amount to evidence. In any event, there was not much new in the report. If the claim in the action against Mr. Needham included an allegation that he was entirely or largely responsible for the group leave, that might have been useful information in the defence of the action against the defendants in which it was claimed that they had co-ordinated the group leave, but it did not change the nature of the claim against the defendants.

86. The thrust of the action by SIG against the defendants was the defendants had acted for Citadel in the collection and use of confidential information which the defendants and Citadel knew was confidential and could not lawfully be disclosed and which Citadel later used to establish a business in competition with SIG, and that the defendants, on behalf of Citadel, unlawfully coordinated the group leave. Mr. Needham was identified in the replies to particulars as having allegedly been involved in the disclosure of confidential information. It was evident on the face of the statement of claim that Citadel was, with the defendants, a *"concurrent wrongdoer"*, in the sense that they were both alleged to have been responsible for the same damage. Similarly, it was evident from the replies to particulars that Mr. Needham, with the defendants, was alleged to have been a *"concurrent wrongdoer"*, at least to the extent of the alleged abuse of confidential information. The thrust of the defence is that

the defendants did no wrong and there was no damage. It is clear that consideration was given to the possibility of the joinder of some other *"person or firm"*, which, if it was not confined to Citadel and Mr. Needham, must have included them, and a decision was made not to apply to join them.

87. If there was nothing in the Grant Thornton report as to the claim against Mr. Needham which would have justified revisiting the decision made long ago not to join him as a third party there was nothing at all new about Citadel. The report summarised the case which had been brought against the defendants and estimated the loss and damage suffered by SIG as a result of the alleged wrongdoing of the defendants. The summary of the claim correctly incorporated the references to the defendants having been acting on behalf of Citadel and the alleged use by Citadel of the information allegedly obtained but the report contained nothing new – bar, perhaps, the number which was put on the claim or the combined claims. Counsel for Citadel submits that whatever may have been said in the Grant Thornton report about the action against Mr. Needham cannot have gone to whether the defendants should have applied to join Citadel. I agree.

88. The estimate of losses in the Grant Thornton report was, as Mr. Gardiner S.C. for Citadel put it, a *"chunky"* number. But if it was more than the defendants had previously guessed, the size of the claim was not said to have formed any part of the reconsideration of the question of the joinder of the third parties.

89. The estimate of €47 million was the estimate of the losses which were allegedly attributable to the matters complained of against both Citadel and Mr. Needham. The defendants' case is that it is clear that the allegations made in relation to the involvement of Mr. Needham and the involvement of Citadel in the engagement and other activities of Mr. Needham clearly cannot be laid at the door of the defendants. If that is so – and I do not say that it is so, but it is the defendants' case that it is so – the report did not convey to the

defendants the total amount of the claim against them. I do not disagree that the involvement of Citadel in the engagement and involvement of Mr. Needham may be of the first importance to the defendants in their defence of the claims against them, but I do not see how this goes to the joinder issue. More to the point, it seems to me that if and to the extent to which the Grant Thornton report quantified SIG's claim against Execuzen, it did not reorient it. I quite agree with the High Court judge that the action as commenced was later reoriented but, in my view, this occurred at the time of delivery of the statement of claim and not the Grant Thornton report.

90. The High Court judge, at para. 80, suggested that the Grant Thornton report forged the link between the two sets of proceedings. Again I find that I cannot agree. The judge found that the report showed for the first time that SIG sought to characterise the defendants and Mr. Needham as being jointly responsible for the alleged loss of profits. That, it was said, brought into play the definition of concurrent wrongdoers for the purposes of the Civil Liability Act, 1961. In my view the statement of claim and the replies to particulars, and, indeed, the defence, clearly characterised the defendants and Mr. Needham – and Citadel – as concurrent wrongdoers. Although not named as defendants, Citadel and Mr. Needham were identified as having been party to the alleged wrongs and the defendants protested that if SIG had a claim against anyone, it was against Citadel and Mr. Needham, and perhaps any other employees who could be identified as having had any involvement in the events complained of.

91. For these reasons, I have come to the conclusion that the High Court judge was not justified in his conclusion that the Grant Thornton report changed the complexion of the case.

Delay after the Grant Thornton report

92. While a significant part of the case made on behalf of both third parties was that the Grant Thornton report did not disclose any new evidence or information which would have justified a claim for contribution against Citadel or Mr. Needham or, as the judge found, changed the entire complexion of the case, the sharp focus of the argument was on the time that was allowed to pass between July, 2018 – when the defendants were promised that they would have the Grant Thornton report in a couple of weeks – and 26th March, 2020, in the case of Mr. Needham, and 21st April, 2020 in the case of Citadel, when the third party notices were served.

93. On the hearing of the defendants' motion for discovery on 16th July, 2018 it was agreed that SIG would provide a copy of the Grant Thornton report within two weeks. That was not done. It was not until 18th January, 2019 that the report was received by the defendants' solicitors. The High Court judge found that there was no evidence before the court as to what steps had been taken to chase up the report in the meantime and fixed the defendants with responsibility for that delay. He found that the delay was unreasonable. There is no cross-appeal against those findings.

94. After the Grant Thornton report was eventually made available on 18th January, 2019, there was a delay until 27th June, 2019 when warning letters were written to the then proposed third parties, and thereafter until 19th September, 2020 when the third party motion issued. The High Court judge found that the defendants did not move as soon as reasonably possible to apply to join the third parties and that there was no satisfactory explanation for the delay. He found that there was unreasonable delay between the receipt of the report and the writing of the letters and between the – inevitable – responses to the letters and the issuing of the third party motion. Again, there is no cross-appeal against those findings.

95. The judge also found that there was a further delay of three months by reason of the adjournment of the third party motion. I understand the judge to have found that this was

further unreasonable delay: which it was. If the object of the adjournment was to allow SIG further time within which to consider whether it would join Citadel as a co-defendant, I can see no justification for the defendants agreeing to it. As I have previously observed, SIG's parallel action against Mr. Needham having already been settled, there could have been no question of joining him as a co-defendant.

96. The unchallenged finding of the High Court is that there was unreasonable delay in the issuing and moving of the third party motion. It follows, it seems to me, that the third party notices were not issued and so could not have been served as soon as reasonably possible.

Objective and subjective delay

97. The judge made two assessments of the delay, a *"subjective assessment of delay"* and an *"objective assessment of delay"*. He found that while the delay was subjectively unreasonable, it was objectively not unreasonable. I know of no authority for such an approach.

98. In principle, it seems to me that the delay was what it was. Absent evidence of any explanation for the time which had been allowed to elapse, the judge could do no more than look at the calendar between July, 2018 and January, 2019 and thereafter make an assessment by reference to the Grant Thornton report as to how long it might reasonably have taken to assimilate its contents and make an assessment on a rule of thumb basis as to what was a reasonable time to prepare the papers for the third party motion. There was no explanation for the delay, and that was what the judge did. Without any input from the defendants, it seems to me that the assessment can only have been an objective assessment.

99. As to *"the whole circumstances of the case and its progress generally"*, Citadel and Mr. Needham submit that the decision in *Greene* is to the effect that the explanation given by the defendant for late service of a third party notice must be assessed by reference to the overall progress of the case to see whether there is any validity to the explanation. It is contended that in a case where no explanation is given, the overall progress of the case can scarcely save the position for the recalcitrant defendant. But that is precisely what happened in *Greene*. In *Greene* the Court of Appeal held that the trial judge had been entitled to find that the explanation offered for the delay was inadequate but had erred in stopping there and not moving on to consider objectively whether, in the whole circumstances of the case and its progress generally, the third party notice had or had not been served as soon as was reasonably possible.

100. The third parties are on firmer ground when they point to the judge's finding that the delay on the part of the defendants could not be said to have adversely affected the progress of the main proceedings. The issue is not whether the delay has adversely affected the progress of the main proceedings but whether the third party notice was served as soon as reasonably possible. It seems to me that it is no answer to a third party's argument that the notice was not served as soon as reasonably possible to say that the plaintiff was not progressing his action, or that the delay in serving the third party notice had not held up the progress of the action. It is evident from the defendants' defence that before it was delivered consideration was given to the joinder of third parties and a decision made not to. This is not a case in which the defendants were awaiting replies to particulars or particulars of the damage claimed. The defendants' request for particulars of loss and damage which was not properly answered was not pursued as such by the defendants. No less to the point, the case was not made that the initial decision not to apply to join the third parties was premised on any estimate or guess as to what the claims might be, or that the question was revisited and

the decision to apply to join the third parties made by reference to the quantum of the claim. The defendants' confident expectation was that SIG could not quantify or prove any losses referable to the matters complained of but their declared position was that, whatever about anyone else – specifically Citadel or any of SIG's former employees – they had done nothing wrong. If, as they did, the defendants nailed their colours to the mast of innocence, the quantum of the claim was immaterial.

101. I respectfully agree with the trial judge that SIG failed to plead its case properly and that the pursuit of the main proceedings appeared to be leisurely. SIG's claim for loss was always likely to be – as it eventually was – formulated by reference to revenues and profits in the years immediately prior and subsequent to the events complained of. On one view it could properly be said that SIG could not finally quantify its claim until it became apparent what the consequences were of the events complained of but that, it seems to me, would not have prevented a fairly early sensible projection by reference to established and provable prior earnings. It is not evident when the Grant Thornton report was commissioned but it came upwards of two years after the establishment of Citadel's Dublin office and – whatever about the defendants' obligation to chase it up – was not provided until six months after it was available to SIG's solicitors. If, for the sake of argument, the claim had been fully particularised in the statement of claim, it would have been no answer to a complaint of delay in the service of the third party notices to have said, if such was the case, that the main action was not being actively pursued.

102. Making due allowance for the time necessary for the preparation of the papers for the third party application, the decision to issue the motion appears to have been made coming up to three years after the delivery of the statement of claim.

103. Save, perhaps, as to the amount of the claim, there was nothing in the Grant Thornton report which could be said to have warranted a re-evaluation of the joinder of the third

parties. The third parties had been identified in the statement of claim and in the defence as potential concurrent wrongdoers. There was no evidence in the Grant Thornton report that the third parties were concurrent wrongdoers.

104. The fact that SIG had brought proceedings against Mr. Needham was known to the defendants long before the Grant Thornton report. If the precise nature of that action was not previously known to SIG, it was not fundamentally different to the complaint in the replies to particulars that Mr. Needham had allegedly provided Citadel with confidential information and, by his alleged actions, had damaged SIG's Irish business. Any focus which may have become apparent from the Grant Thornton report on the claim against Mr. Needham by reference to the precise terms of his contract of employment or his alleged engagement directly with Citadel was, if anything, consistent with the defendants' position that whatever about anyone else, they had done nothing wrong.

105. There was only scant evidence as to the progress of the main action. The chronology showed that an order for discovery had been made against the defendants on 24th July, 2017 but not whether or when that had been complied with. There was no evidence at all of the progress, if any, of the main action after the Grant Thornton report was provided to the defendants' solicitors on 18th January, 2019.

106. There was no explanation for the delay between 18th January, 2019 when the Grant Thornton report was made available and 19th September, 2019 when the third party motion issued. As of the latter date, the progress of the case generally was that the pleadings had been closed nearly two years previously and orders for discovery made on the application of each side against the other. It is not evident whether or when either order for discovery was complied with.

107. For these reasons, I accept the submission on behalf of Citadel and Mr. Needham that there is insufficient evidence on which the High Court judge could have properly concluded that the delay in serving the third party notices had not impeded the progress of the action.

108. However, I rest my analysis on what I respectfully say was the error on the part of the judge in focussing on whether the defendants' delay had affected the progress of the action rather than whether the third party notices had been served as soon as reasonably possible.

Proportionality

109. In his examination of the *"Legislative framework and Rules of Court"*, the High Court judge correctly identified two procedural routes by which a defendant in existing proceedings could pursue a claim for contribution against a person who is not already a party to the action. The first is by serving a third party notice as soon as reasonably possible. The alternative is by a separate action for contribution. The judge noted that s. 27(1)(b) provided that on a separate action for contribution the court in its discretion might refuse to make an order for contribution if a third party notice had not been validly served. The judge noted that on the current state of the authorities – he identified the judgment of the Supreme Court *European Chemical Industries Ltd. v. Bauchemie Muller GmbH* [2006] IESC 15, [2007] 1 I.R. 156 and the *dicta* of Collins J. in *Ballymore Residential Ltd. v. Roadstone Ltd.* [2021] IECA 167 querying the approach taken by the Supreme Court – the setting aside of a third party notice on the grounds of delay may have the consequence that the defendant is precluded thereafter from seeking contribution. At para. 95, the judge identified the possibility of a separate action for contribution as the very mischief which the Act seeks to avoid and the controversy in such an action as to whether the court should exercise its

discretion to refuse relief as a factor in his consideration that it would, in all the circumstances, be disproportionate to set aside the third party notices.

110. It is submitted on behalf of Citadel and Mr. Needham that the possibility that a defendant who has failed to serve a third party notice as soon as possible might in a later action be refused contribution is not a factor which ought to have been taken into account in deciding whether the notice should be set aside. The basis of the third party procedure is statutory. The precondition of a claim for contribution by that route is that the notice must be served as soon as reasonably possible. To hypothesise what the consequences of setting aside the third party notice might be, and to take account of those consequences, it is submitted, would be to set aside the statutory scheme.

111. In my view there is considerable force in this submission. If the general policy of the Civil Liability Act is to encourage the disposal of all claims arising out of an incident in one action, nonetheless the Act expressly contemplates separate actions for contribution. It can hardly be correct to characterise as a mischief actions for contribution which the Oireachtas has provided for. Moreover, as the judge correctly observed in his examination of the legislative framework, the Act provides for alternatives, the statutory condition of one of those alternatives being that the third party notice be served as soon as reasonably possible, and of the other that the action be brought within the longer of the period allowed for the bringing of an action by the injured person against the contributor and two years after the liability of the claimant is ascertained or the injured person's damages are paid. It seems to me that whatever the basis upon which it is to be exercised, the discretion in a later separate action cannot go to the question whether an earlier third party notice was or was not served as soon as was reasonably possible. I do not see in the legislation or the authorities any warrant for the exercise of a discretion or the application of a test of proportionality in deciding whether to set aside a notice which has not been served as soon as reasonably possible.

112. It seems to me that to take account of a risk that the court might in a later action, in the exercise of its discretion, refuse to make an order for contribution would inexorably lead to an assessment of the extent of that risk. The court would be attempting to look around a corner which has not been reached and to guess or assess what the outcome of a later action for contribution might be. That would be calculated to import into s. 27(1)(a) the discretion that is to be found only in s. 27(1)(b) and so is impermissible.

113. The High Court judge, at para. 106, suggested that the only supposed benefit of setting aside the third party notices would be to penalise the defendants for their delay. I respectfully disagree. The third party procedure is a matter of right. The defendants are entitled to avail of the third party procedure provided they do so as soon as reasonably possible. The corollary to that is that the third parties are obliged to answer a claim made by the third party procedure if, but only if, the notice is served as soon as reasonably possible. In other words, the third parties have a right not to be impleaded by the third party procedure if it has not been invoked as soon as reasonably possible. In deciding a dispute as to whether a third party notice was or was not served as soon as reasonably possible the court is not concerned with punishment or reward but with the rights of the parties.

114. If the practical consequence of setting aside a third party notice is that the moving party draws on himself a separate action for contribution, that, it seems to me, is a matter for the moving party. I accept the submission on behalf of Citadel and Mr. Needham that it would be inconsistent with the statutory scheme that a determination as to whether a third party notice was served as soon as reasonably possible should be coloured by an assessment as to the likely availability to the defendant of contribution by the separate statutory procedure of a separate action.

115. In my view the issue to be determined on an application to set aside a third party notice is solely whether the notice was served as soon as reasonably possible. If it was not, the third party is entitled to an order setting it aside.

Mr. Needham

116. The applications by Citadel and Mr. Needham were heard and dealt with together. Mr. Beirne S.C., for Mr. Needham, adopted the submissions which had been made by Mr. Gardiner, for Citadel, and added three points which were specific to Mr. Needham.

117. The first point was that Mr. Needham had settled the action which was brought against him by SIG. He did so in July, 2019 on the eve of the hearing of his appeal against the discovery order made by Baker J. It is acknowledged that before Mr. Needham settled the other case he was on notice by the defendants' solicitors' letter of 27th June, 2019 of their intention to apply to join him as a third party in this action but Mr. Needham points to the delay between then and the service on him of the third party notice on 26th March, 2020. Mr. Needham, it is said, settled the other action against him in the hope of putting a halt to the immense stress and anxiety of that litigation, as well as the mounting costs. Mr. Needham, it was said, was gravely prejudiced by being brought back in to a case which he had already settled.

118. Secondly, Mr. Needham's solicitor, Mr. Dunne, abstracted from the statement of claim and the request for and replies to particulars and set out in tabular form the information which was available to the defendants before they delivered their defence and at the time when – the defence shows – they decided not to apply to join Mr. Needham. It was, it is said, demonstrable that the defendants had the requisite information in November, 2016 to allow

them to make *"a prudent and informed decision"* whether to join him. Reference was made to the decision of the Supreme Court in *Molloy v. Dublin Corporation* [2001] 4 I.R. 52.

119. Thirdly, it was said, as far as Mr. Needham in particular was concerned, there was no warrant for adjourning the third party motion from the first return date on 2nd December, 2019. By then SIG had settled its separate action against Mr. Needham and there was no question that SIG might apply to join him as a defendant to this action. The adjournment of the third party motion, it is said, demonstrably and unreasonably delayed the service of the third party notice by three months.

120. For the reasons already given, I accept Mr. Needham's submission that the defendants demonstrably had sufficient knowledge in November, 2016 of Mr. Needham's alleged involvement in the events complained of to have allowed them to make a prudent and informed decision whether to join him as a third party.

121. I also accept his submission that the adjournment of the third party motion for three months, for no conceivable reason as far as Mr. Needham was concerned, by itself necessarily had the consequence the third party notice directed to him was not served as soon as was reasonably possible.

122. As to the argument that the effect of joining Mr. Needham as a third party to this action was to re-embroil him in a claim which he had settled, the thrust of the argument – as the judge observed at para. 100 – was that the third party proceedings should be set aside by reason of delay. I accept that Mr. Needham hoped by settling with SIG to put an end to the stress, anxiety and financial drain of the litigation against him and that his later joinder as a third party to this action meant that he found himself, to a degree at least, out of the frying pan and into the fire. However, at the time of the settlement with SIG he was aware of the risk, at least, that the defendants would apply to join him as a third party. Moreover, it seems to me that Mr. Needham's disappointment and the prejudice on which he relies is really

attributable to the settlement rather than the defendants' delay. No doubt he settled with SIG for good and sufficient reason and after careful consideration. No doubt, before he settled, Mr. Needham carefully considered the prospects that the defendants would follow through of their threat to apply to join him as a third party, and his options if they did. To that extent the defendants' delay in serving the third party notice was surely a factor in his decision to settle but I do not believe that it can be said that the settlement was caused or contributed to by the delay. That being so, I do not believe that it can be said that the settlement gave rise to any prejudice referable to the delay.

123. I add for completeness – as the High Court judge did – a word in relation to s. 17 of the Civil Liability Act, 1961. Section 17 of the Act of 1961 provides for the consequences of a release or accord with a concurrent wrongdoer. In a case in which the release or accord with one concurrent wrongdoer does not indicate an intention that the others should be discharged, the injured person is identified with the person with whom the release or accord is made. There was no argument made in the High Court as to the implications of s. 17 of the Act of 1961 as far as the joinder of the released wrongdoer as a third party, specifically as to the liability of a released wrongdoer to contribute to the injured person's claim against the others which, by reason of the release, has been reduced by the full extent of the liability of the released wrongdoer. In principle, it might be thought surprising that a concurrent wrongdoer who has paid his share and who has thereby reduced *pro tanto* the liability of the concurrent wrongdoers should find himself the subject of a claim for contribution which he has already paid. But the point was not argued and so I express no concluded view on it.

Summary

124. It is a condition of the statutory procedure in s. 27(1)(a) of the Civil Liability Act, 1961 by which a defendant may claim contribution by third party notice that the notice be served as soon as is reasonably possible.

125. In determining whether a third party notice was or was not served as soon as reasonably possible, the court should look at the whole circumstances of the case and its progress generally: *Greene v. Triangle Developments Ltd.* [2015] IECA 249.

126. In deciding whether a third party notice was served as soon as was reasonably possible, the court should not be distracted by the general policy of the Act to ensure that all claims arising out of the same incident are resolved in one set of proceedings, still less subordinate the plain statutory requirement that the notice be served as soon as is reasonably possible to the general policy of the Act.

127. If not on the affidavits filed on the third party motion or the motion to set aside the third party procedure, then on the pleadings, it is clear that the defendants considered before delivering their defence whether to join the third parties, and that they decided not to. On the defendants' case, their decision not to join the third parties was based on their assessment of the merits of the plaintiff's case against them and of the prospects of the plaintiff being in a position to formulate and prove any claim for damages, and the absence of any evidence which would have justified the joinder of the third parties.

128. The Grant Thornton report, although it somehow prompted prompted the re-evaluation of the decision not to join the third parties, did not materially add to the defendants' knowledge of the alleged role and involvement of the third parties in the events complained of. The report summarised the claims made in the plaintiff's separate action against Mr. Needham, which were substantially the same as the complaints which had been made of his alleged misconduct in the action against the defendants.

129. The Grant Thornton report did not change the complexion of the claim against the defendants. It was evident from the statement of claim that the action was in substance an action for damages, and from the particulars and discovery sought by the defendants that they correctly so understood it. While the estimate made by the Grant Thornton report of the damages claimed was large, this was not the basis on which it was said to have prompted the joinder of the third parties. Moreover, if, as was the defendants' case, the overall estimate failed to separate an element for which they could have had no conceivable responsibility, it could not have conveyed to the defendants the amount of the claim against them.

130. The defendants' delay between the time when they should have obtained the Grant Thornton report and the service of the third party notices greatly exceeded anything that might have been expected. Absent any explanation, the delay was unreasonable. It follows that the third party notices were not served as soon as reasonably possible.

131. The corollary to the statutory obligation on the defendants, if they were to avail of the third party procedure, to serve their third party notices as soon as was reasonably possible is a right, on the part of the third parties to have the third party procedure set aside if they were not so served.

132. A third party who applies for an order setting aside the third party procedure is not obliged to show that he has been prejudiced by the delay. Nor is it an answer to such application for the defendant to show that the third party was not prejudiced, or that the progress of the action was not impeded by the delay. Nor is it an answer to seek to show that the delay has not affected the progress of the action generally.

133. In determining whether a third party notice was or was not served as soon as reasonably possible, the court ought not take into consideration what the outcome might be of a later action for contribution.

134. The third parties having shown that the third party notices had not been served as soon as was reasonably possible, they were entitled to orders setting aside the third party procedure. These two appeals should, therefore, be allowed.

135. Provisionally, it seems to me that the appellants having been entirely successful on their appeals are entitled to the costs of the appeal as well as their costs in the High Court. If the defendants wish to contest the appellants' entitlement to their costs they may notify the appellants' solicitors and the Court of Appeal office within ten days of the electronic delivery of this judgment, in which case the panel will reconvene to deal with the matter of costs. If such further hearing is sought and does not result in an order different from that proposed, the defendants may additionally be liable for the costs of that hearing.

136. I am authorised by Barniville P. and Noonan J. to say that they agree with this judgment and with the orders proposed.