

**THE HIGH COURT**

[2021] IEHC 339  
[2017 No. 10917 P.]

**BETWEEN**

**JANET ACHESON**

**PLAINTIFF**

**AND**

**LOUGHSHINNY MOTORCYCLE SUPPORTERS CLUB LTD**

**AND**

**MOTORCYCLE UNION OF IRELAND (SOUTHERN CENTRE) LTD**

**DEFENDANTS**

**AND**

**BMW AUTOMOTIVE (IRELAND) LTD**

**AND**

**KEARYS OF CORK UNLIMITED COMPANY**

**AND**

**KEARYS KINSALE ROUNDABOUT UNLIMITED COMPANY**

**THIRD PARTIES**

**JUDGMENT of Ms. Justice Creedon delivered on the 16th day of April, 2021:**

**Background**

1. The first named third party in these proceedings, BMW Automotive (Ireland) Ltd. (hereinafter referred to as BMW) has made an application by way of Notice of Motion to have the third party proceedings which have been brought against BMW by the defendants set aside.
2. The first named third party is seeking an order inter alia as follows: -
  - (i) An order pursuant to O. 16, r. 8(3) of the Rules of the Superior Courts (RSC) setting aside the third party proceedings against the first named third party by the defendants by way of a third party notice issued on the 6th June 2019 on the grounds that the said third party notice has not been served within 28 days from the time limited for delivering the defence as required by O. 16, r. 1(3) RSC and/or has not been served as soon as is reasonably possible as required by s. 27(1) of the Civil Liability Act 1961.
  - (ii) To set aside the order made by the High Court on the 20th May 2019 (the order) joining a total of three third parties to the proceedings.
3. The proceedings concern a fatal accident which occurred on the 3rd July 2015 when Dr. John Hinds (the deceased) who was then the appointed mobile medical assistant for the Skerries 100 Road Race which was to commence on the 4th July 2015 suffered fatal injuries. During a practice session on the 3rd July 2015, the day before the Skerries 100 Road Race was to commence, the deceased, who was accompanying the motorcycles around the circuit, suffered fatal injuries from which he died on the 4th July 2015. The Plaintiff commenced the present proceedings by way of personal injuries summons issued on the 1st December 2017 and claims damages for personal injuries and for the wrongful death of a person within the meanings of s. 48 and s. 49 of Part IV of the Civil Liability

Act 1961 (the 1961 Act) arising from the accident. The proceedings were served on the defendants on the 5th December 2017.

4. The first third party (BMW) in its Notice of Motion seeks an order pursuant to O. 16, r. 8 (3) of the RSC setting aside the order on the grounds that the third party notice was not served within 28 days of the time limited for the personal injuries defence as required by O. 16, r. 8 (3) of the RSC and/or has not been served as soon as reasonably possible as required by s. 27 (1) of the Civil Liability Act 1961. The first named third party also seeks to set aside the order made by the High Court on the 20th of May 2019 (the order) joining a total of three third parties to these proceedings.
5. The defendants delivered a personal injuries defence on the 30th January 2019. The third party notice was served on BMW on the 6th June 2019 and an unconditional appearance was entered on behalf of the three third parties on the 4th July 2019 by Frank Nyhan and Associates Solicitors. It would appear that Frank Nyhan and Associates Solicitors only had instructions to enter an appearance on behalf of the second and third named third parties and not BMW on whose behalf a conditional appearance was entered by BLM Solicitors on the 11th July 2019. A notice of change of solicitors was subsequently served by Eugene F. Collins Solicitors on the 31st July 2019.
6. The second and third named parties have not sought to challenge the order joining them as third parties to the proceedings.
7. The motorcycle which was involved in the accident was a BMW S 1000 RR motorcycle bearing registration number 151 D 23763 (hereinafter the motorcycle). The motorcycle was in the possession of the defendants for three weeks after the accident, during which time the defendants carried out a visual inspection of the motorcycle. The motorcycle was subsequently released to BMW on or about the 24th July 2015. A second inspection of the motorcycle took place on the 10th August 2015 attended *inter alia* by Ms Sarah Roebuck on behalf of the defendants along with representatives of BMW.
8. An engineer retained by the defendants, Mr. Noel Maher, inspected the motorcycle on the defendant's behalf on the 15th June 2016 and 11th August 2016. Mr. Maher's preliminary advices were relied upon by the defendants in support of their application to join BMW to these proceedings.
9. BMW contended that there has been a clear failure by the defendants to issue the application to join BMW as a third party to these proceedings either within the time period allowed by the RSC or as soon as was reasonably possible as required by s. 27(1) of the Civil Liability Act 1961 and that the third party proceedings should accordingly be struck out.

**Applicant's arguments**

10. The applicant set out the background to the case, the chronology of events, the relevant law and the following affidavit evidence was read into the record and was sworn by the following:

- i. Ms Susan Plunkett on the 27th of March 2019
  - ii. Mr Paulo Alves on the 9th of October 2019
  - iii. Ms Susan Plunkett on the 24th of January 2020
  - iv. Mr Kevin Davidson on the 27th of February 2020
  - v. Ms Susan Plunkett on the 26th of January 2021
  - vi. Ms Sarah Roebuck on the 21st of January 2021
  - vii. Mr Paul Kester on the 10th February 2021
  - viii. Mr Conor O'Neill on the 12th of February 2021
11. The applicant submitted that the relevant time period to be considered on applications of this type was summarised by the Court of Appeal in *Kenny v. Howard & Anor* [2016] IECA 243 in which Ryan P. noted at para. 12 that it had been agreed between the parties that the relevant time period was between the following dates:-

*"The first of those dates is when the third party notice should have been issued if the time limits in the Rules had been observed. The second date is the date when the notice of motion was issued."*

12. The applicant also opened O. 16 r. 1(3) RSC which requires an application for leave to issue third party proceedings (unless otherwise ordered by the Court) to be made within 28 days from the time limited for delivering of the defence. O. 16, r. 8(3) RSC provides that third party proceedings may, at any time, be set aside by the court.
13. Section 27 (1) of the Civil Liability Act 1961 sets out the procedure for claiming contribution as follows: -

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

*(b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under 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".*

14. S. 11 of the Civil Liability Act defines persons who are concurrent wrongdoers and provides as follows as subs. 1: -

*"For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called*

*the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them”.*

15. In *Connolly v. Casey & Anor.* [2000] 1 IR 345, Denham J. stated as follows in relation to s.27(1) of the 1961 Act at p.351:-

*“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”.*

16. The Court of Appeal considered the Supreme Court decision in *Connolly v. Casey in Greene & Anor. v. Triangle Developments Ltd. & Ors.* [2015] IECA 249 in which Finlay Geoghegan J. stated as follows at para 25:-

*“ In my view, following the approach of the Supreme Court in Connolly v Casey, it is incumbent on a trial judge, when faced with an application such as 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.”*

17. In *Kenny v. Howard & Anor,* [2016] IECA 243, Ryan P. stated as follows at para 28:-

*“Fundamentally, it seems to me that the section requires that the time taken should be related to the necessities of the case so that the notice that is served can properly be described as being “as soon as reasonably possible.” This is the key to understanding the provision. It is not a matter of criticising error or default. It is a judgment about what is reasonably necessary in the circumstances of the case.”*

18. In *Clúid Housing Association v. O’Brien & Ors.* [2015] IEHC 398 the respondent to the application to set aside, the third named defendant, argued that the substance of the plaintiff’s claim was only capable of expert review when particulars were delivered. However, Murphy J. was not satisfied that this was so, stating as follows at para 37:-

*“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 having regard to;*

*a) its particular knowledge arising from its involvement in the project and the problems which arose;*

*b) its expertise as consulting engineers;*

*c) the detailed particulars pleaded in the statement of claim.*

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. 16 r. 1(3) might be warranted*”.
19. In *Molloy v Dublin Corporation* [2001] 4 IR 52, Murphy J. in the Supreme Court referred to the judgment of Barron J. in *Mc Elwaine v. Hughes* (Unreported, High Court, Barron J. 30th April, 1997) stating as follows at p. 57:-
- “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.”*
- Again, it was Barron J. who pointed out in *McElwaine v Hughes* also at p. 6 that: -
- “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 upon the defendant”*
20. Again, in *Kenny v Howard* [2016 IECA 243, Ryan P. in the Court of Appeal stated as follows from para 24:-
- “...if it is clear that the third party notice was not served as soon as reasonably possible, that is a failure of compliance with the specific mandatory requirement of s. 27(1)(b). The section does not require proof of prejudice in order to rely on its terms.”*
21. Again in *McAuliffe v. Greenstar Holdings (in receivership) T/A Greenstar* [2019] IEHC 516, Barrett J. referred to the above decision in *Kenny v. Howard*, stating as follows at para 4:-
- “Unfortunately for the defendants, it follows from the majority decision in Kenny v Howard [2016] IECA 243 that the issue of prejudice is irrelevant in determining whether or not the conduct of the defendant has been unreasonable. One looks to the delay and assesses whether it is necessary and justifiable, an analysis that in practice will typically reduce to whether it was possible to seek to issue the third party motion sooner than it issued.”*
22. The applicant asserted that the plaintiff’s affidavit of verification was sworn on the 17th of January 2018 and filed on the 29th of January 2018. Pursuant to O. 1 A r. 10 (4) RSC, where an affidavit of verification is delivered subsequent to delivery of a pleading, the time prescribed by the rules for delivery of any pleading or other document in reply runs from the date of delivery of the affidavit of verification to the defendants pursuant to O. 1 A r. 8 RSC would have expired on the 26th of March, 2018. The applicant went on to argue that if the defendant’s defence was due by the 26th of March 2018, then the time period specified in the Rules for issuing any motion to join BMW would have expired on the 23rd of April 2018.

23. The applicant highlighted the following relevant periods of delay as follows: -
- i. Eleven months and four days (23rd April 2018 to 27th March 2019) elapsed between the date when the third party notice should have been served had the RSC been adhered to and the date when the application to join BMW was in fact issued. The applicant submitted that this is the primary time period which requires to be considered for the purposes of the application.
  - ii. One year, three months and 22 days (5th December 2017 to 27th March 2019) elapsed between the service of the personal injuries summons and the issuing of the defendant's application to join BMW.
  - iii. Six months and 27 days (29th August 2018 to the 27th March 2019) elapsed between the Plaintiff's solicitor's letter refusing to provide further particulars and the issuing of the defendant's application to join BMW.
  - iv. Eight weeks (30th January 2019 to the 27th March 2019) elapsed between the date of delivery of the defendant's personal injuries defence and the date when the defendants issued a motion to join BMW.
24. In light of this chronology of events as outlined above, the applicant submitted that the third party notice in this case has clearly been delivered outside the timeframe provided for in the RSC.
25. The applicant asserted that pursuant to the terms of s. 27 (1) (b) of the Civil Liability Act 1961 and with reference to the opened case law it is clear that the burden of establishing that the delay which has occurred in the present case in issuing an application to join BMW was not unreasonable rests with the party serving that third party notice, namely the defendants. Further, in light of the case law the applicant submitted that the issue of prejudice is irrelevant in determining whether or not the conduct of the defendants has been unreasonable.
26. The applicant contended that applying the principles to the present case there has been a clear failure by the defendants to issue an application to join BWM to the proceedings as soon as was reasonably possible.
27. Further, the applicant argued that as the organisers of the event at which the accident occurred the defendants, were aware of the accident immediately after it occurred. They asserted that the defendants had the opportunity to inspect the motorcycle in July 2015 (while it was in their possession) and on the 10th August 2015. They further asserted that the defendant's engineer, Mr. Maher, inspected the motorcycle on the 15th June 2016 and the 11th August 2016.
28. The applicants argued that while the defendants contend further testing and analysis was required it is submitted that the Supreme Court made clear in the case of *Molloy v. Dublin Corporation* [2001] 4 IR 52 at p.59 that: -

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

29. The applicants submit that the defendants failed to undertake their quest for certainty or verification concerning BMW's potential liability with any despatch and in fact seem to have taken an entirely passive approach to an issue which they now seek to depict as being of critical importance to the proceedings.
30. The applicant also later went on to address the arguments made in reply by the defendants which will be set out in greater detail below.

#### **Defendant's arguments**

31. The defendant confirmed that the motorcycle was removed from the accident location by the defendants to a storage facility under the defendant's control. Referring to the affidavit of Ms. Susan Plunkett, Company Secretary, dated 24th of June 2020 at para. 6 (iii) of her affidavit, and her subsequent affidavit of the 26th of January 2021 contact was made with the defendant by Ms. Linda Brown and subsequently by Mr. Charles Godolphin from BMW who requested the defendants release the motorcycle to BMW.
32. The defendants asserted that as no detailed forensic examination of the motorcycle had been carried out at that time. Ms. Roebuck refused to release the motorcycle to Mr. Godolphin and only agreed to do so, as she has averred on affidavit, on Mr. Godolphin agreeing to have BMW carry out a detailed technical testing of and retrieval of the relevant information on the motorcycle, all of which were relevant to a proper forensic investigation into the cause and circumstance of the fatal collision.
33. The defendants went on to assert that, as averred to by Ms. Roebuck in her affidavit, had Mr. Godolphin of BMW not agreed to carry out a detailed technical examination and retrieval of information from the motorcycle and to subsequently furnish the information and findings to the defendants, the defendant would not have agreed to release the motorcycle to the third party. The defendant referred to the fact that Mr. Godolphin has not sworn an affidavit in this application to refute what Ms. Roebuck has stated in her affidavit.
34. The defendants asserted that it was clear from the affidavits sworn on behalf of BMW in this application that the principal and substantial ground upon which BMW is relying to seek an order from the courts setting aside the third party order made on the 20th May 2019 is the fact that in June and July 2016 an engineer then retained on behalf of the defendants had carried out a limited visual and physical inspection of the seriously damaged BMW motorcycle.
35. In particular, the defendants refer to para. 26 of the affidavit of Mr. Pablo Alves, Managing Director of BMW Automotive (Ireland) Limited, sworn on the 9th October, 2016 as follows: -

*"26. In the circumstances of the present case it does not appear to your deponent that the defendants with the benefit of their engineer's prior inspection of the*

*motorcycle required anything more than the personal injuries summons to decide upon the appropriateness of joining BMW to these proceedings. Accordingly, I say and believe and I am advised that having regard to the whole circumstances of the case and its general progress the defendants failed to deliver a third party notice in these proceedings as soon as was reasonably possible”.*

36. The defendants said that to similar effect Mr. Kevin Davidson, Managing Director BMW Automotive (Ireland) Limited, in his affidavit dated the 27th of February 2020, stated at para. 9 as follows: -

*“In light of the foregoing I say and believe and I am advised that, as of the date of the service of the personal injuries summons, the defendants could or should have known that it was possible to pursue a claim for contribution against BMW if they had a basis to do so. As of this date, namely the 5th December 2017, the defendants knew that the motorcycle had been imported/distributed by BMW and that any allegations which the defendants wished to make to the effect that the vehicle in question was defective could be directed towards BMW”.*

37. The defendants argued that as a third party seeking to set aside a third party order on the grounds of delay, it is not entitled to ask the Court to confine itself to a specific time or date and to treat that date as determinative thereby excluding consideration of all of the circumstances which are material to and arise in the case.
38. Referring to the affidavit of Mr. Kevin Davidson, sworn on the 27th of February 2020, which is the principal affidavit sworn on behalf of BMW in the application, the defendant pointed out that Mr. Davidson denied that there has been any failure by BMW to provide information to the defendant but that in making these averments Mr. Davidson failed to disclose that BMW had already according to Mr. Kester, customer relations manager BMW Ireland, in his subsequent affidavit sworn on the 10th February 2021 conducted a thorough investigation into the circumstances of the fatal collision.
39. In his affidavit of the 10th February 2021 at para. 16, Mr. Kester stated as follows: -

*“I say and believe that BMW does not have any diagnostic or data reports in relation to the vehicle. While the vehicle was examined by BMW technicians from Munich, namely Thomas Goetz and Stefan Krimmer on or about the 10th of August 2015, those examinations did not disclose any defect which warranted pursuing further diagnostic or data extraction from the vehicle. I say and believe that Mr. Goetz and Mr. Krimmer did not prepare a report following the said examination. This position was confirmed to the defendant’s solicitors by Mr. Oliver Vietze of BMW by letters dated the 25th April 2016 and 26th May 2016 and was further confirmed by BMW’s solicitor by letter dated the 19th of June 2020”.*

40. The defendants argued that such a thorough investigation would necessarily have involved BMW carrying out a detailed forensic examination of the motorcycle as well as analysing the significant data retrieved from the computer on the motorcycle. The



defendants said that if, as must be assumed was the case, this data finding was available to BMW, it must follow that contrary to Mr. Davidson's claim in para. 53 of his affidavit BMW did in fact fail to provide relevant and material information to the defendants and indeed to the plaintiff concerning the cause and circumstances of the fatal collision.

41. The defendants went on to argue that Mr. Conor O'Neill in his replying affidavit to Mr. Kester's affidavit highlights that notwithstanding Mr. Kester's claim that no report was in fact prepared or finalised by BMW following its thorough investigation the documents exhibited in Mr. O'Neill's affidavit clearly suggest that BMW at all times intended to and was in the process of completing a report into the investigation.
42. The defendant further highlighted that Mr. Davidson in paras. 40 – 51 of his affidavit addressed the circumstances in which "destructive testing" of the motorcycle did not proceed and that such "destructive testing" was only to take place when all the parties agreed to it. However, Mr. Davidson does not address how it was possible for BMW to carry out a thorough investigation into the circumstances of the accident to include a forensic examination of the motorcycle where the position being represented by BMW to the defendants was that no forensic and destructive testing of the motorcycle would proceed in the absence of the agreement of all the parties.
43. The defendant submitted that consideration must be given by the Court to all of the affidavit evidence and to the particular matters referred to above and to Ms. Roebuck's affidavit evidence that she entered into an agreement with Mr. Godolphin of BMW that she would release the motorcycle on condition that the relevant test findings and data retrieval from the motorcycle would be collated and furnished to the defendants, who required access to the forensic findings and data for the purpose of ascertaining the cause and circumstances of the fatal collision. It was submitted that this evidence completely undermines the principle ground upon which BMW relies in asking the Court to set aside the third party order.
44. In this regard, the defendant referred to the case already referred to above of *Greene v. Triangle Developments* [2015] IECA and the judgment of Finley – Geoghegan J. where she stated *inter alia*

"36. *That approach, which mandates a consideration not merely of the reasons given for the delay, but also an objective assessment of the circumstances of the case, and its general progress, requires that, on an application to set aside a third party notice, the court should look objectively at the circumstances and consider whether notice had been serviced as soon as was reasonably practicable. That involves considerations of reasonableness, and test of reasonableness is not the same as the test of whether the defendant had offered a full and proper explanation for any delay. The circumstances of the case, the general progress of the case, the length of time that had elapsed and the nature of the claim are all relevant factors"*

45. The defendant also opened the case of *Kenny v. Howard* [2016] IECA 243, also referred to above and the judgment of Ryan P. and in particular referred to para. 21 of that judgment where Ryan P. stated as follows: -

*"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".*

46. The defendant went on to argue that in reliance on the affidavit evidence adduced on behalf of the defendants in this application, and accepting that there was limited evidence available to the defendants in June and July 2016 it is submitted that having regard to the seriousness of the accident which involved a fatality and to the fact that the engineer's preliminary views were subject to obtaining further detailed forensic examination and retrieval of data from the motorcycle the defendants acted responsibly and reasonably in not proceeding to immediately join BMW to the proceedings following the proceedings issuing on the 1st December 2017.
47. The defendants argued further that in order for the Court to take all of the circumstances properly into account it must have regard to the fact that very significant material and relevant forensic information and data remained to be obtained. They submitted that in the particular circumstances of this case the responsibility of BMW to provide this information to the defendants arises particularly in circumstances where BMW had the necessary resources and technical equipment to complete a forensic examination of the motorcycle and to retrieve relevant data from the computer of the motorcycle.
48. The defendant asserted that as BMW had possession and custody of the motorcycle in January 2019, the defendants, faced with the position being adopted by the plaintiff, considered that the most responsible and reasonable step to take at that time pending receipt of a more detailed forensic and technical data from the motorcycle was to deliver a personal injuries defence in the proceedings and proceed with an application to join BMW to the proceedings notwithstanding that it had not by that date all of the relevant and material forensic information and data relating to the cause and circumstances of the vehicle collision.
49. In that regard, the defendants referred to the dicta of Baker J. in *Caffrey v. Governor and Company of the Bank of Ireland & Ors.* [2018] IEHC 305 at paras 31 to 34:

*"31. Therefore, I consider that it would be wrong for me to take a firm view that no additional or further information was elicited following the joint engineering inspection, and further advice of counsel, that led to the decision on the part of the second defendant to make the application for leave to issue the third party notice. The affidavit of Mr. White, solicitor for the second defendant, makes an averment that his principals needed to be consulted twice following the engineering*

*inspection, once to consider the contents of the expert report, and then to consider the advices of counsel.*

32. *Thus, it is clear to me that the decision to seek to issue a third party notice was not one that was made lightly and without consideration of the precise circumstances and legal basis of such application, and was one Mr. White regarded was not to be made as a matter of course, but following scrutiny by the professional persons involved and by his principals.*

33. *I consider that the time which elapsed after the receipt of the expert engineer's report on 30 November 2016 was well within a reasonable time, and the steps taken by the solicitor for the second defendant were taken with reasonable expedition, and having regard to the number of careful steps needed to be taken, and the fact that, on two occasions, he took instructions from his principals.*

34. *However, the matter is not resolved merely by reference to the question of whether any material information was obtained as a result of the engineer's report delivered at the end of November 2016, which altered the knowledge of the defendant. This much is apparent from the decision of the Supreme Court in Connolly v. Casey [2000] 1 IR 345, where Denham J., having considered the reason given for the delay in seeking leave to issue a third party notice, considered that the court had to scrutinize that decision by engaging a consideration of whether it was reasonable to have awaited further information or advices. At p. 351, Denham J. was clear that 'the whole circumstances of the case and its general progress must be considered' and that the absence of an explanation for some of the delay was not a sufficient ground to set aside the third party notice".*

50. The defendants also opened the same Court of Appeal decision and in particular para. 36 of the judgment of Baker J. where she stated as follows: -

*"That approach, which mandates a consideration not merely of the reasons given for delay, but also an objective assessment of the circumstances of the case, and its general progress, requires that, on an application to set aside a third party notice, the court should look objectively at the circumstances and consider whether notice had been served as soon as was 'reasonably practicable'. That involves considerations of reasonableness, and the test of reasonableness is not the same as the test of whether a defendant had offered a full and proper explanation for any delay. The circumstances of the case, the general progress of the case, the length of time that had elapsed, and the nature of the claim are all relevant factors".*

51. The defendant submitted that once consideration is given to all of the circumstances of the case in the manner required by the jurisprudence opened, any specific delay from a point in time which occurred without the Court having regard to all of the circumstances is not determinative and certainly does not justify the Court setting aside the third party order on foot of which in this case three third parties were joined in the proceedings on the 20th May 2019. Additionally, they submitted that only one of the third parties has

sought to challenge the order on the grounds that the defendants did not move as soon as reasonably possible to have BMW joined to the proceedings.

52. The defendants went on to argue that given that the jurisprudence clearly emphasises that the purposes of s. 27 (1) is to avoid a multiplicity of actions and noting that a setting aside of the third party order for delay does not necessarily preclude subsequent proceedings between the defendants and the third party (*ECI European Chemical Industry Ltd. v. MC Bauchemie Mueller GMBH* [2007] 1 IR 156), it is important to highlight the fact that even if the Court was to set aside the order joining BMW to the proceedings, it would be open to the second and third parties to apply to have BMW re-joined to the proceedings as a further third party for the purposes of obtaining an indemnity from BMW as BMW was the manufacturer, owner and supplier of the BMW motorcycle which was involved in the fatal collision and which was supplied by BMW to the second and third parties. In that regard, the defendant opened the cases of *Gilmore v. Windle* [1967] IR 2323, *International Commercial Bank plc v. Insurance Corporation of Ireland* [1989] IR 453 and *Connolly v. Casey* [2000] 1 IR 345.
53. The defendant went on to argue that as the proceedings involve personal injuries proceedings which had been issued by the plaintiff, the relevant time period for the delivery of a personal injuries defence is a period of eight weeks as provided for in O. 1 (A) of the RSC, consequently they argued the time period of 28 days provided in O. 16, r. 3 RSC does not apply.
54. The defendant went on to argue that notwithstanding that the third party order was served on BMW on the 6th June, 2019, with an appearance being entered on behalf of BMW to the proceedings on the 4th July 2019, no application was intimated or brought by BMW until the 10th October 2019 some four months after the third party order was served on BMW. The defendant argued that this is also a consideration which the Court is entitled to have regard to in determining the present application as confirmed by the Supreme Court in *Boland v. Dublin City Council* [2002] 4 IR 409. The defendants submitted that BMW's delay in issuing the application to set aside the third party order when regarded in the whole of the circumstances of the case, should also move the Court to dismiss the application now before the Court.

#### **Applicant's Response**

55. In response to the defendants' assertion of an agreement reached on the 22nd July, 2015, between Ms. Sarah Roebuck, and Mr Howard Godolphin of BMW whereby BMW agreed to carry out specialist testing and retrieval of data from the motorcycle and make it available to the defendants and the defendants' contention that they released the motorcycle to BMW on the basis of this agreement and would not otherwise have agreed to provide same to BMW, BMW denied that the release of the motorcycle to it was subject to these alleged conditions and does not accept that there was any such agreement. In this regard, the applicant made reference to para. 5 of Mr Kevin Davidson's affidavit of the 27th February 2020 and para. 17 of Mr Paul Kester's affidavit of the 10th February 2020.

56. The applicant went on to submit that the agreement contended for is inconsistent with the contemporaneous correspondence exchange between the parties and in this regard the loss adjusters acting for the defendants' insurers namely Noel's Loss Adjusters agreed the following in an email to BMW dated the 25th July 2016 sent in the context of arranging Mr. Noel Maher's August 2016 viewing of the motorcycle: -

*"I agree that for additional information and documentation and tests then all parties should be involved in the discussions preceding any such additional testing etc."*

57. The applicant argued that far from suggesting that BMW had already agreed to carry out specific specialist testing and to revert to the defendants with the results, this email plainly shows that the defendant's servants or agents agreed that if there was to be additional testing all parties should be involved in discussions preceding same.

58. The applicant went on to argue that on the 2nd August 2016 Mr Simon Smith of Noel's Loss Adjusters emailed Mr Oliver Vietze of BMW quoting the defendants' engineer Mr. Noel Maher as stating the following in relation to the proposed inspection of the motorcycle by Mr. Maher: -

*"As the inspection required will not require any testing and will be only a visual inspection I will only require the morning time to inspect the vehicle. I would suggest a suitable time of 10 a.m. to 1 p.m. on the 11th August 2016"*

59. Mr. Vietze reverted by email later that date to confirm that the viewing of the vehicle could be carried out at the requested time.

60. The applicant asserted that as appears from the foregoing, BMW facilitated the visual inspection which was requested by Noel's Loss Adjusters, and Noel's Loss Adjusters specifically agreed that any additional testing should be discussed between all parties in advance. No request for further testing or data was made by or on behalf of the defendants from August 2016 until after BMW had been joined to the proceedings with the next request made in this regard being the defendants' solicitor's letter of the 8th July 2019 to Frank Nyhan and Associates.

61. The applicant therefore contended that there is a conflict of fact on the affidavits as to whether the agreement contended for by the defendants was entered into in July 2015. The applicant submitted that it is unnecessary for the Court to seek to resolve this conflict of fact (even if it were prepared to do so on the basis of affidavit evidence alone within the somewhat limited parameters of the present application) in circumstances where even if this conflict were to be resolved in the defendants' favour it would not amount to an answer to the present application.

62. In that regard, the applicant contended that even if the Court was satisfied that BMW had agreed to carry out testing and data retrieval in July 2015 and had failed to do so, it is submitted that it would nevertheless have been wholly unreasonable for the defendants to wait years on end for this alleged agreement to be completed by BMW without sending so

much as a reminder letter to BMW calling on it to perform its alleged obligations under the said agreement.

63. Further, the applicants asserted that if the defendants did have the benefit of a 2015 agreement with BMW whereby BMW is required to undertake extensive specialised testing and data extraction which had not been complied with as of December 2017, when these proceedings commenced, the defendants clearly should have written to BMW referring to this agreement and calling upon them to comply with it. The applicant said however that the defendants have in fact been unable to identify a single request for access to the vehicle or for information about it which they directed to BMW between the date of commencement of the proceedings and March 2019 when the defendants issued their motion to join BMW to the proceedings.
64. The applicant contended that it is unreasonable for the defendant to contend that the alleged 2015 agreement with BMW entitled them to take no further steps to obtain further information or expert analysis of the motorcycle and to simply passively wait for BMW to undertake the required data extraction and analysis and revert to the defendants. They say this approach is incompatible with the defendants' statutory obligation to bring an application to join any third parties to these proceedings as soon as reasonably possible.
65. With regard to access to the vehicle, the applicants referred to the defendant's suggestion that there has been a failure by BMW to permit the defendants to further inspect and carry out tests on the motorcycle. The applicants stated however that BMW facilitated the visual inspection which was requested by the defendants in 2016. The defendants' agents KLA agreed in July 2016 that no destructive testing should be carried out to the motorcycle pending discussion between all parties. The applicants said that BMW's repeated offers of access to the vehicle are summarised in paras. 18 to 24 of Paul Kester's affidavit of the 10th February 2021.
66. With regard to the defendants' allegation that BMW failed to provide the defendant with data extracted from the motorcycle on the 10th of August 2015 as per para. 17 of the affidavit of Ms. Sarah Roebuck of the 21st of January 2021, they said that this allegation is addressed at para. 15 and 16 of Paul Kester's affidavit of the 10th of February 2021 which confirms that BMW does not have any diagnostic or data reports in relation to the motorcycle and that while the vehicle was examined by BMW Technicians from Munich on or about the 10th of August 2015, those examinations did not disclose any defect which warranted pursuing further diagnostic or data extraction from the motorcycle and no report was prepared following this examination.
67. The applicants referred to email correspondence between Mr. Steve Bellers of BMW and Ms Sarah Roebuck which took place during December 2019 and January 2020 in which Ms. Roebuck indicated that the only thing she really needed to sign off on was the telemetry readings suggesting that "It was arranged through Howard for yourselves to do that with us". The applicant said that Ms. Roebuck has indicated on affidavit that she emailed Mr. Bellers again about this issue but she has not exhibited the relevant email. They said that Ms. Roebuck also indicated that she attempted to phone Mr. Bellers but her

calls went to voicemail, as per her affidavit of the 21st January 2020, para. 25. The applicant said that BMW has indicated in correspondence that other than the emails which have been exhibited, no further emails were received by Mr. Bellers from Ms. Roebuck on the 7th January 2020 or thereafter.

68. Accordingly, the applicant said that there seems to have been a breakdown in communication in early 2020 with regard to arranging further testing or the extraction of telemetry readings. However, this email exchange occurred in January 2020, over nine months after the defendants had issued their motion to join BMW to the proceedings in March 2019 and the applicant submitted that it does not explain or excuse the delay in moving to join BMW to these proceedings which occurred between December 2017 and March, 2019.
69. With regard to the defendants' final affidavit sworn by Mr. Conor O'Neill, solicitor, on the 12th February 2021 in which he suggests that BMW did in fact prepare a report in relation to the accident and in this regard exhibits three emails sent in July 2015 the applicant said that several issues arise in relation to this assertion;
- (1) *The email of the 18th July 2015 relied on by the defendants was not sent by BMW but by Mr. Alan O'Connor of the second named third party; Keary's of Cork Unlimited Company, which is a BMW dealership and accordingly is not a statement of or representation by BMW.*
  - (2) *The said email predates the examination of the 10th August 2015 which is described above and which did not result in any report in circumstances where no defect was detected in the course of the said examination.*
  - (3) *The fact that a technical report was furnished by the second named defendant to BMW in July 2015 again underscores the extent of the defendants' familiarity with the events surrounding the accident in its immediate aftermath.*
  - (4) *Even if the defendants understood that such a report was being prepared and that BMW had agreed to provide the defendants with a copy of same (which was not borne out by the correspondence) then it would have been unreasonable for the defendants to wait passively for this report to be furnished after December 2017 onwards from which time they were subject to the statutory obligation to apply to join any third party as soon as as reasonably possible.*
70. The applicants maintain their position; the core issue arising is whether the defendants issued their application to join BMW to the proceedings as soon as was reasonably possible, having regard to all of the circumstances of the case. In that regard the applicants said that the defendants have failed to engage with this key issue to any significant extent and have largely ignored the crucial period of time between the date when the application to join BMW should have issued had the RSC been complied with, that is, the 23rd April 2018 and the date when the application in fact issued being the 27th March 2019.

71. They said that the defendants have failed to identify information of any type about either the accident or the motorcycle which they obtained subsequent to the commencement of the proceedings which might demonstrate that they acted reasonably in issuing their motion on the 27th March, 2019, rather than at some earlier point in time.
72. They said that in fact the defendants in this case appeared to argue precisely the converse, namely that because the plaintiff and BMW failed to provide them with additional information in relation to the accident and/or motorcycle they were forced to simply issue an application to join BMW in the proceedings in March, 2019, based on the information which they had at the time. The applicants submitted that this falls very short of a reasonable excuse for delay, particularly in circumstances where further information was not actually requested between December, 2017 and March, 2019.
73. In conclusion, the applicant submitted that the issue for the Court to decide is whether the defendants' application to join BMW to these proceedings eleven months and four days outside of the time permitted by the RSC was an application brought as soon as was reasonably possible and submits that even affording the most generous interpretation possible to the phrase "as soon as reasonably possible" it cannot coherently extend to cover delays of the type which have occurred in the present case.
74. The applicant submitted that the defendants have entirely failed to discharge the onus resting on them of establishing that they issued an application to join BMW to these proceedings as soon as was reasonably possible and that the Court should accordingly grant the reliefs sought by BMW in the notice of motion to set aside the third party proceedings against BMW.

#### **Decision**

75. The factual background to the incident giving rise to this case and the chronology of the pleadings have already been set out earlier in this judgment and are not in dispute and the Court does not intend to traverse this in detail again.
76. There is extensive affidavit evidence from both the applicant and the defendants, which has been referenced earlier in this judgment, and was opened in its entirety before the Court and is on the court record.
77. There is a conflict in the affidavit evidence between the parties as to what was agreed between them in respect of specialist testing and retrieval of data from the motorcycle being ridden by the deceased at the time of the accident. This issue is extensively addressed by both sides throughout the affidavit evidence.
78. It does not seem to be in dispute between the parties that the motorcycle was in the possession of the defendants for three weeks after the accident, during which time the defendants carried out a visual inspection of the motorcycle.
79. The motorcycle was subsequently released to BMW on the 24th of July 2015 but the terms under which the motorcycle was released to BMW is in dispute between the parties. Ms. Sarah Roebuck on behalf of the defendants in her affidavit of the 21st January, 2021,



avers *inter alia* that shortly after the accident she was contacted by and spoke with a Ms. Linda Browne who she understood to be from BMW who requested that the motorcycle be released to BMW. Ms. Roebuck indicated that further testing was required and at that point Ms. Browne referred her on to Mr. Howard Godolphin.

80. Ms. Roebuck went on to aver that on or about the 22 July 2015 Mr. Godolphin requested her to release the motorbike to BMW and that when she indicated that the defendants wished to retain the motorcycle for further tests and retrieval of data from the computer system on the motorbike Mr. Godolphin replied that;

*"BMW would cooperate with the defendants by way of providing metallurgic testing and also provide a qualified and competent technician with specialist software to access the telemetry information and data from the ECU computer system /electronic control units on the motorcycle, which would provide accurate and relevant information concerning the functioning and operation of the motorcycle prior to and at the time of the fatal collision"*

81. Ms. Roebuck averred that this information and data cannot be obtained by the normal diagnostic equipment that is available and requires specialist software equipment which Mr. Godolphin confirmed was available to BMW and on the basis that Mr Godolphin would carry out this testing and make it available to the defendants she agreed to release the motorbike to BMW.

82. There is no affidavit before the Court from Mr. Godolphin, but Mr Paul Kester Customer Relations Manager with BMW, in his affidavit of the 10th of February, 2021, avers that:-

*"I reiterate that BMW does not accept that there was any such agreement and it is striking that no such agreement was alleged in correspondence sent by and on behalf of the defendants since 2015, including the letters sent to Frank Nyan & Associates on 8 July 2019 and to BMW's Solicitors on the 1 November 2019"*

83. It does not appear to be in dispute that an inspection did take place on the 10th August, 2015, and in the same affidavit Mr Kester averred:-

*"I say and believe that BMW does not have any diagnostic or data reports in relation to the vehicle. While the vehicle was examined by BMW technicians from Munich namely Thomas Goetz and Stephan Krimmer on or about the 10th of August 2015 those examinations did not disclose any defect which warranted pursuing further diagnostic or data extraction from the vehicle. I say and believe that Mr. Goetz and Mr. Krimmer did not prepare a report following the examination. This position was confirmed to the defendant's solicitors by Mr. Oliver Vietze of BMW by letters dated the 25th April 2016 and 26 May 2016 and was further confirmed by BMW's Solicitors by letter dated the 19th of June 2020."*

84. An engineer retained by the defendants, Mr. Noel Maher inspected the motorcycle on behalf of the defendants on the 15th of June, 2016, and 11th of August, 2016. Mr Maher's

preliminary advices were ultimately relied upon by the defendants in support of their application to join BMW to these proceedings.

85. In her affidavit of the 24th of January 2020 Ms Susan Plunkett averred that the Personal Injury Summons issued on the 1st of December 2017 and was served on the defendants on the 5th of December 2017 who were the only named defendants and no allegations were made against any of the third parties named in the High Court order of the 20th of October, 2019.
86. Ms Plunkett averred that an Appearance was entered on behalf of the defendants on the 12th of April 2018 and the defendants raised a Notice for Particulars on the 31st of May 2018 seeking *inter alia* at para 6 & 10 (iii) further particulars in respect of the case pleaded in the Personal Injury Summons in respect of loss of control of the motor cycle.
87. Replies to particulars were received on the 2nd of August 2018 and given that the defendants considered the replies inadequate sent a further letter on the 8th of August 2018, to which a reply was received on the 29th of August, 2018, wherein the plaintiffs confirmed that no further replies would be furnished. They requested the defendant to deliver their defence on or before the 21st of September 2018.
88. It seems not to be in dispute between the parties that the motorcycle was in the possession of BMW at this time. Ms Plunkett, in her affidavit of the 24th of January 2020, averred that because of the position adopted by the plaintiff's solicitors in their replies to particulars, the defendants decided to deliver their Personal Injuries Defence and thereafter apply to join third parties. The defendant's defence was delivered on the 30th of January 2019, which pleaded negligence, nuisance, breach of duty, including statutory duty and breach of contract in respect of the parties ultimately joined as third parties.
89. By Notice of Motion dated the 27th of March, 2019, the defendants applied to join the third parties to the proceedings and the third parties were joined by order of the High Court dated the 20th of May 2019 which was served in early June 2019.
90. An appearance was entered on behalf of all third parties on the 4th of July 2019. Subsequently on the 11th of July 2019 a conditional appearance by different solicitors was entered on behalf of BMW and on the 31st of July a Notice of Change of solicitor was served in relation to BMW.
91. By letter dated the 8th of July 2019, to the Solicitors who had entered an appearance on behalf of BMW, the defendants requested joint inspection facilities and to be provided with access to or share the technical data specified in that letter and a similar letter was sent on the 1st of November 2019 after this motion issued.
92. Ms Plunkett averred that four months later and without any advance notice to the defendants, BMW issued a Motion dated the 10th of October 2019, returnable for the 16th of December 2019 seeking to set aside the Third Party Notice made by order of the High Court on the 20th of May 2019.

93. The law, including relevant caselaw, has been comprehensively set out above and the Court will not traverse it here in full again. The issue for the Court to decide is whether the defendant's application to join BMW to these proceedings outside of the time permitted by the Rules of the Superior Courts was an application brought as soon as was reasonably possible.
94. The relevant time period to be considered on applications of this type was summarised by the Court of Appeal in *Kenny v. Howard & Anor.* [2016] IECA 243 in which Ryan P. noted at para. 12 that it had been agreed between the parties that the relevant time period was between the following dates: -

*"The first of those dates is when the third party notice should have been issued of the time limits in the rules had been observed. The second date is the date when the notice of motion was issued"*

95. In the same case Ryan P. went on to say;

*"Fundamentally, it seems to me that the section requires that the time taken should be related to the necessities of the case so that the notice that is served can properly be described as being 'as soon as reasonably possible.' This is the key to understanding the provision. It is not a matter of criticising the conduct of the concurrent wrongdoer applicant; neither is it a matter of excusing error or default. It is a judgment about what is reasonably necessary in the circumstances of the case".*

And later in the same judgment dealt with the issue of prejudice as follows;

*". . . if it is clear that the third party notice was not served as soon as reasonably possible, that is a failure of compliance with the specific mandatory requirement of s. 27(1)(b). The section does not require proof of prejudice in order to rely on its terms".*

96. The Court of Appeal considered the Supreme Court decision in *Connolly v. Casey in Greene & Anor. V. Triangle Developments Ltd. & Ors.* [2015] IECA 249 in which Finley – Geoghegan J. stated as follows at para. 25: -

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

97. The Court agrees that the burden of establishing that the delay was not unreasonable rests with the defendants in this case as argued by the applicants at paragraph 25 *supra* and the fact that the other third parties have not made a similar application is not a consideration for this Court in considering the matter.

98. The applicant highlighted four specific periods of delay as set out at paragraph 23 *supra*. The primary period which requires to be considered by this Court for the purpose of this application is the first period highlighted, being;
- (i) Eleven months and four days (23rd April, 2018, to 27th March, 2019) elapsed between the date when the third party notice should have been served had the RSC been adhered to and the date when the application to join BMW was in fact issued. The applicant submitted that this is the primary time period which requires to be considered for the purposes of the application.
99. This Court will not be able to resolve the conflict of evidence in the affidavit evidence in respect of any purported agreement that was reached between the parties as to the technical examination of the motorbike within the parameters of this application and in the absence of any evidence from Mr. Goldolphin. However, the Court must, in accordance with the Supreme Court decision in *Connolly v. Casey in Greene & Anor. V. Triangle Developments Ltd. & Ors.* above seek 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".*
100. Looking to the whole circumstances of the case and its general progress to make an objective assessment as to whether the Third Party Notice was served as soon as reasonably possible the Court notes the following matters;
- a) Contact was made with the defendants by BMW soon after the accident and the motorbike was released to BMW as early as the 24th of July, 2015.
  - b) A joint technical inspection attended by two named BMW technicians who travelled from Munich took place on or about the 10th of August 2015. The defendants had carried out a visual inspection only by then but had not carried out any technical examination at that point.
  - c) BMW confirms that the examination did not disclose any defect which warranted pursuing further diagnostic or data extraction from the vehicle. No report was prepared by the two BMW technicians who carried out the inspection and no data or information arising from that inspection has ever been furnished to the defendants save for confirmation as to what has been outlined here by letters dated 25th of April, 2016, 20th May, 2016 and 19th June, 2020.
  - d) Two visual inspections only were carried out by Mr. Noel Maher, an engineer retained by the defendants on 15th June, 2016, and 11th August, 2016, in circumstances where it appears to have been accepted by both parties that any destructive testing would have to be agreed by all relevant parties in advance.
  - e) BMW maintained in their arguments that the visual inspections carried out by Mr. Maher, engineer, and the information contained in the Personal Injuries Summons

provided the defendants with sufficient information to decide on the appropriateness of joining BMW as a third party. They argued that this, together with the fact that no further testing or data retrieval was requested by the defendants from the date of Mr. Maher's inspection in August, 2016, until after the defendants issued their motion to join BMW on the 27th March, 2019, with the next request for information being the defendant's letter of the 8th July, 2019 provides a strong basis for the Court to accede to their application.

- f) The disagreement as to the parameters of what was agreed between the parties when the motorcycle was released to BMW on the 24th July, 2015, impacts this application and impacts how the period in question in this application between 23rd April, 2018, to 27th March, 2019, should be viewed.
- g) By the 23rd April, 2018, the joint technical inspection had taken place in circumstances where the defendants said that they had expected the results of that inspection to be shared with them. They had received two letters from the defendants dated 25th April, 2016, 20th May, 2016, indicating that there was no written report available but the letters do not appear to have brought finality to the issue of technical information being forthcoming to the defendants. In particular the letter of the 26th May, 2016, confirmed that *"should you have any particular technical question I am more than happy to liaise with BMW Germany in order to answer the request"*.
- h) Having served proceedings on the 1st December, 2017, the defendants argue that given the limited information available to them on foot of Mr Maher's visual inspections in June and August 2016, the seriousness of the accident and the fact that they believed that Mr Maher's preliminary views were subject to receiving further detailed forensic information, they acted reasonably in not joining BMW following the issuing of proceedings in December, 2017.
- i) The defendants raised a Notice of Particulars on the 31 May 2018 seeking, *inter alia* further particulars in respect of the plaintiffs pleaded case that the deceased had lost control of the motorbike. In circumstances where they considered the plaintiff's reply of the 2nd August inadequate, they sent a further letter on the 8th August, 2018, to which a reply was received on the 29th August, 2018, wherein the plaintiffs confirmed that no further replies would be furnished.
- j) The defendants said that in circumstances where BMW retained custody of the motorcycle in January, 2019, and considering the position being adopted by the plaintiffs and pending receipt of the more detailed forensic and technical data from the motorcycle, they decided to deliver their personal injuries defence and proceed with their application to join BMW as a third party.

101. Irrespective of the disagreement between the parties as to what precisely was agreed between them on release of the motorcycle by the defendants to BMW in July 2015 it is reasonable to assume that the two BMW technicians were best placed to carry out a

comprehensive technical examination of the motorcycle and the diagnostic equipment available to them would be superior to any equipment available to the defendants.

102. The fact that BMW contacted the defendants and that two BMW technicians travelled from Munich to carry out this inspection points to the technical complexity of the inspection and the importance of it being carried out by suitably qualified personnel to ensure that the inspection was comprehensive and accurate. It is reasonable to assume that if the outcome of the inspection by the BMW technicians had been made available to the defendants it would have provided information over and above that available from Mr. Maher.
103. In light of this background the Court considers that the defendants did not act unreasonably in not joining BMW following the issuing of proceedings in December 2017. Further, having considered events in the period following the issue of proceedings and up to the time that they received a final reply from the plaintiffs on the 29th of August 2018, it was not unreasonable for the defendants to consider that the visual inspections carried out by Mr. Maher Engineer and the information contained in the Personal Injuries summons did not provide them with sufficient information to decide on the appropriateness of joining BMW as a third party.
104. While the defendants did ultimately rely on Mr. Maher's inspections and the Personal Injury summons and further that the correspondence suggests that no further testing or data retrieval was requested by the defendants from the date of Mr. Maher's inspection in August, 2016, until after the defendants issued their motion to join BMW on the 27th March, 2019, with the next request for information being the defendant's letter of the 8th July, 2019, this has to be looked at in the context of the overall circumstances to include the specialised technical inspection conducted by BMW at its request, the conflict in the evidence as to what was agreed and understood by the parties on release of the motorcycle, the nature of the overall correspondence between the parties and the steps taken by the defendant to progress matters.
105. Looking to the caselaw and in particular the Supreme Court decision of Denham J. in *Connolly V Casey* [2000] IR 345 quoted above where Denham J., having considered the reason given for the delay in seeking leave to issue a third party notice, considered that the court had to scrutinize that decision by engaging in a consideration of whether it was reasonable to have awaited further information or advices. At p. 351, Denham J. was clear that *'the whole circumstances of the case and its general progress must be considered' and that the absence of an explanation for some of the delay was not a sufficient ground to set aside the third party notice*". In all of the circumstances the Court is satisfied that the third party notice was served as soon as was reasonably possible and will not set aside the third party proceedings against the first named third party or the order made by the High Court on the 20th of May 2019 and refuses the application.
106. The costs of this application should be reserved to the hearing of the action. This is subject to hearing any submissions on costs. The order on costs will be finalised in the event that there are no such submissions within 14 days.