

**THE HIGH COURT**

[2021] IEHC 844

**[2017 468 P]**

**BETWEEN**

**RUTH KILCOYNE (A MINOR)  
SUING BY HER UNCLE AND NEXT FRIEND DAVID KILCOYNE**

**PLAINTIFF**

**AND**

**SARAH JANE MCHALE**

**DEFENDANT**

**AND**

**KATHLEEN ROLAND**

**THIRD PARTY**

**JUDGMENT of Mr. Justice Mark Heslin delivered on the 21st day of December, 2021**

**Introduction**

1. On 16 November 2020 a motion was issued seeking to set aside the Third Party proceedings, pursuant to O. 16, r. 8 (3) of the Rules of the Superior Courts and/or in accordance with s. 27 (1) (b) of the Civil Liability Act 1961. The motion was grounded on an affidavit sworn by the Third Party on 10 November 2020. A replying affidavit was sworn by Mr. Paul Breen, solicitor for the Defendant, on 13 June 2021.

**The Plaintiff's claim**

2. The Plaintiff issued a personal injuries summons on 19 January 2017. The Plaintiff is a minor, born in 2011, who is suing by her uncle and next friend. The Defendant is pleaded to be the owner and occupier of a private dwelling house. It is pleaded that, on or about 16 May 2015, the Plaintiff was present in the house as a visitor, as defined in s. 1 of the Occupier's Liability Act, 1995 ("the 1995 Act"), to whom a duty of care was owed pursuant to s. 3 of the 1995 Act. It is alleged that, at the Defendant's dwelling house, hot oil from a deep fat fryer was caused, permitted or allowed to come into contact with the Plaintiff's body when she climbed on a chair to look at turtles, as a consequence of which she suffered scalding injuries to her skin, severe personal injuries, loss and damage.
3. A range of pleas of negligence and breach of duty are made. Particulars of personal injuries are given in respect of what are alleged to have been extensive burns to the Plaintiff's left thigh and left upper arm. It is pleaded *inter alia* that the Plaintiff was transferred by air ambulance to UCH Galway, where she came under the care of a named plastic surgeon and reference is made *inter alia* to split skin grafting to the Plaintiff's left leg under general anaesthetic on 8 June 2015 and skin grafting on 19 June 2015. Among other things, reference is made to the Plaintiff asking "why did it happen to me" causing distress to others. It is also pleaded that the Plaintiff has developed behaviourisms as a result of the accident. Reference is made to nocturnal disturbances blamed on skin itch, which may be part of a complex secondary gain behaviours pattern. The personal injuries summons also refers *inter alia* to permanent scarring on the Plaintiff's left leg; nightmares post – accident; continued complaints about itch; and the Plaintiff's enjoyment of life having been severely diminished.

**Circumstances and general progress of the case**

4. From a careful consideration of the affidavits, the exhibits thereto and the pleadings in this case, the following emerges which, in my view, are of relevance insofar as the whole circumstances of the case and its general progress are concerned. For the sake of convenience, I will refer to these in chronological order.

**16 May 2015:** - The date of the alleged incident

**16 March 2016:** - The Defendant's insurers, "RSA" sent a letter to Ms. Roland in connection with the matter. A copy of that letter has not been exhibited in circumstances where the court was given to understand that the contents of the letter are covered by privilege. Thus, the precise contents of that letter are unknown although the fact that it was sent is averred to at para. 6 of Ms. Roland's 10 November 2020 affidavit and at para. 7 of Mr. Breen's replying affidavit.

**1 April 2016:** - Having received the 16 March 2016 letter, Ms. Roland contacted her insurance company "Zurich" to see whether she might be covered for any claim, under her household insurance policy and, on 1 April 2016, Zurich wrote to her confirming that the claim had been notified to it. That letter (which comprises Exhibit "B") to Ms. Roland's affidavit referred *inter alia* to a claim form which the insured was required to complete and return to Zurich. The letter also indicated that if any correspondence was received from a Third Party, it should be sent to Zurich straight away, unanswered.

**19 January 2017:** - The personal injury summons is issued by the Plaintiff.

**28 February 2017:** - A verifying affidavit is sworn by the Plaintiff's uncle and next friend.

**8 March 2017:** - Messrs. Dillon Eustace, solicitors for the Defendant, enter an appearance.

**30 March 2017:** - Dillon Eustace, solicitors for the Defendant, write to Zurich in relation to the proceedings, referring to a telephone conversation which took place on 29 March 2017 concerning the case and "as promised" enclosing a copy personal injuries summons. I am entitled to take from the foregoing that Zurich, with whom Ms. Rowland had a home insurance policy, had requested the Defendant's solicitors to provide a copy of the personal injuries summons in the context of such investigations as Zurich were carrying out. The letter from the Defendant's solicitors goes on to state as follows: - "*We have sent papers to counsel to draft a full Defence and to join Ms. Kathleen Roland to proceedings. Strictly without prejudice, we are instructed that Ms. Kathleen Roland had switched on the deep fat fryer and left it unattended at the time of the accident. We are of the opinion that liability rests with Ms. Roland. Please confirm if you are in a position to indemnify our client and discharge all costs to be taxed in default of agreement. We look forward to hearing from you in due course*". It is plain from the foregoing that, as of 30 March 2017, the solicitors for the Defendant regarded it as appropriate to join Ms. Roland into proceedings, but it is equally clear that, in circumstances where Ms. Roland had an insurance policy and the insurer had requested a copy of the personal injuries summons,

the Defendant's legal advisers were seeking, very reasonably and prudently, to know what Zurich's attitude was to indemnifying the Defendant, prior to making any application to join Ms. Roland. Plainly, if Zurich's attitude turned out to be a willingness to indemnify the Defendant, there was a prospect of a saving of legal costs and time and such an outcome could fairly be said to be of benefit both to the Defendant and to the proposed Third Party. Zurich agreed to review the file and the stage of their investigations, as is clear from the contents of Mr. Breen's attendance note concerning his 29 March 2017 telephone call with a Ms. Carol McMahon of Zurich.

**30 March 2017:** - The Defendant's solicitors raised a Notice for particulars, in which the Plaintiff was requested to provide details concerning, *inter alia*, the Plaintiff's alleged injury; treatment in respect of same; the nature and extent of recovery; details concerning any prior injuries; whether the Plaintiff was suffering from any previous condition or injury; the manner in which it is alleged that the Defendant failed to comply with s. 3 of the 1995 Act; supporting documentation in relation to the Plaintiff's claim for medical report fees and travelling expenses. The particulars sought at items 5 and 6 were as follows: -

(5) *"Kindly confirm who switched on the deep fat fryer on the date of the accident.*

(6) *Kindly confirm the owner of the deep fat fryer".*

**1 June 2017** – The Plaintiff's solicitors replied and in response to the query as to who switched on the deep fat fryer on the date of the accident, the Plaintiff replied: - "(5) *This is a matter for evidence*". The reply to query (6) was that *"The deep fat fryer was owned by the Plaintiff's mother Maureen Roland"*. By way of observation, the question of who, in fact, switched on the deep fat fryer on the date of the accident, is plainly relevant but as can be seen from the foregoing reply, the Plaintiff did not confirm the position; rather they indicated that it was a matter for evidence.

**5 July 2017** – the Defendant's solicitors delivered a Defence. By means of the pleas at para. 2(i) – (vii), the Defendant put the Plaintiff on proof of a range of allegations as pleaded in the personal injuries summons. The Defendant also denied that she was liable for the injuries suffered by the Plaintiff and, at para. 3 of the Defence, pleaded the grounds upon which the Defendant relied in that regard. These are, (i) that the Plaintiff did not suffer personal injuries, loss and damage as a consequence of any negligence or breach of duty on the part of the Defendant, her servants or agents; (ii) there was no negligence or breach of duty on the part of the Defendant, her servants or agents and (iii) *"that the Plaintiff suffered personal injuries, loss and damage as a consequence of the negligence and breach of duty (including breach of statutory duty) on the part of Ms. Kathleen Roland . . ."*.

**5 July 2017** – Mr. Breen, solicitor for the Defendant, wrote to Ms. Mahon of Zurich to confirm that fees had been discharged to Prof. Jack Kelly, plastic surgeon; to Mr. Peter Mooney, litigation photographer, as well as €200 to the next friend for travel expenses and Mr. Breen made clear that if Zurich wanted a copy of the relevant report and

photographs, payment should be made to RSA Insurance. Mr. Breen also indicated that he would be sending relevant pleadings under separate email.

By separate email, on the same date, sent to Ms. McMahon of Zurich, the Defendant's solicitor furnished the following pleadings: -

- (1) Personal injuries summons;
- (2) Appearance as filed on 8 March 2017;
- (3) Affidavit of verification;
- (4) Letter seeking particulars;
- (5) Replies to particulars;
- (6) The defence and,
- (7) "Draft Third Party Motion affidavit and Third Party Notice".

Mr. Breen's email to Zurich concluded as follows: "*Please confirm if your investigations are completed. Are you in a position to take over this claim without the necessity of Third Party proceedings? I look forward to hearing from you*". A number of things are clear from the foregoing. An insurance company with which the proposed Third Party had a home insurance policy was continuing to investigate matters. The Defendant, via its solicitors, was keen to progress matters. They had promptly raised a Notice for particulars concerning what, on any analysis, was relevant information and in the wake of the Replies furnished by the Plaintiff, the Defendant had promptly delivered a Defence and immediately drafted an application to join Ms. Roland as a Third Party. However, in circumstances where Zurich's investigations were ongoing, the solicitors for the Defendant very reasonably furnished a copy of the draft application and specifically asked whether Zurich were in a position to take over the claim *without* the necessity for Third Party proceedings to be issued. It is uncontroversial to say that, at that point in time, whether or not Third Party proceedings would be necessary was an 'open question'. It is equally uncontroversial to say that, had Zurich promptly provided a positive response to the foregoing query (i.e. had Zurich confirmed that it would be taking over the claim) it would have offered the clear prospect of a saving of time and cost for all concerned and would, on any analysis, have been of mutual benefit to the Defendant and Third Party.

**30 May 2018** – The Defendant's solicitors issued a motion pursuant to O. 16 of the Rules of the Superior Courts seeking liberty to issue and serve a Third Party Notice on Ms. Roland, which motion was returnable for 16 July 2018 and was grounded on an affidavit sworn by Mr. Breen on 30 May 2018. In that affidavit, he averred, *inter alia*, that, on the day of the accident, the deep fat fryer was being operated by the proposed Third Party, who switched it on to cook chips and then left the utility room where the deep fat fryer was situate. He went on to aver that the minor Plaintiff and the Defendant's daughter then went into the utility room where Ms. Roland had left the deep fat fryer unattended

and that it appears the minor Plaintiff knocked the deep fat fryer and the hot oil spilled on her causing burn injuries. He averred that he believed and had been advised that it was appropriate to join Ms. Roland as a Third Party to the proceedings and he exhibited a draft Third Party Notice. Several comments seem appropriate to make in relation to the foregoing. It will be recalled that, on 5 July 2017, Mr. Breen specifically asked Zurich, with whom the proposed Third Party had an insurance policy, to confirm whether they were in a position to take over the claim without the necessity of Third Party proceedings. There is no evidence before this Court that Zurich replied in the weeks and months which followed. I am entirely satisfied, however, that it was not at all unreasonable for the Defendant to await a response to the specific query raised by their solicitor on 5 July 2017. Although nothing turns on the matter for the purposes of this application, it also seems appropriate to note that the "Long Vacation" arose relatively soon after the 5 July 2017 query raised by Mr. Breen. It is also a matter of fact that, as of 30 May 2018, when the Defendant decided to issue a motion seeking to join the Third Party, it did so not having received from Zurich any response to a highly relevant query which it had raised. Plainly, the Defendant wanted a response to this query, but it is equally clear that the Defendant was not willing to wait indefinitely for Zurich to reply. That is evidenced by the fact that the Defendant went ahead with issuing the application to join the Third Party, even though Zurich had failed to make its position clear, by that stage. To my mind, this could hardly be said to be unreasonable. Rather it seems to me to have involved the striking of a balance between, on the one hand, trying to get the proposed Third Party's insurer to confirm that it would be taking over the claim (rendering Third Party proceedings wholly unnecessary) and, on the other hand, not allowing the progress of the proceedings to be unduly delayed by the lack of clarity from the proposed Third Party's then – insurer. In my view, an appropriate balance was struck by the Defendant in this regard. To hold otherwise would be entirely unfair in my view.

**16 July 2018** – By order made by this Court (Barr J.), the Defendant was granted liberty to issue and serve the relevant Third Party Notice within four weeks.

**18 July 2018** – Just two days after the aforesaid order, the relevant Third Party Notice was filed in the Central Office.

**19 July 2018** – Dillon Eustace solicitors for the Defendant wrote to Ms. Roland by registered post enclosing the Third Party Notice, as issued, and a copy of the order made by Barr J. dated 16 July 2018 and respectfully suggested that their correspondence be passed to the Third Party's insurers.

**23 August 2018** – Patrick J. Durcan & Co. Solicitors ("PJD") wrote to Dillon Eustace in the following terms: -

*"We refer to your letter of the 19th of July 2018 addressed to Ms. Kathleen Roland . . . she has consulted us in relation thereto. We have also been passed a copy of the Third Party Notice together with a copy of the order of Judge Barr dated 16th of July 2018. However, you might wish to note that the Personal Injuries Summons referred to within the Third Party Notice was not served. It may very well be*

*therefore that the Third Party Notice as served on our client was invalid. Nevertheless, we should be grateful if you would forward us a copy of the Personal Injuries Summons to enable us to consider matters further. Please let us also have copies of all relevant pleadings to date. We have asked our client to forward the documentation received to her Insurers". Several comments can fairly be made in relation to the foregoing. PJD solicitors make very clear that the Third Party "has consulted us" and they specifically refer to the Third Party as "our client". It is perfectly reasonable to hold that, as and from 23 August 2018, PJD Solicitors was acting for the Third Party in relation to the proceedings and was advising her. It is also fair to say that, insofar as PJD Solicitors suggest that there may have been any defect in respect of the Third Party Notice as served, the sole reference is to the fact that it was not accompanied by a copy of the personal injuries summons. Nor does the letter from PJD Solicitors state or suggest that they are willing to go only so far, but no further, in terms of the advice or assistance they will provide to the Third Party, having regard to her financial circumstances. Nothing of the sort is said or suggested.*

**20 August 2018** – Having been served with the Third Party Notice and order, Ms. Roland attended Patrick J. Durcan & Co. ("PJD") Solicitors. This is averred by the Third Party at para. 8 of her affidavit sworn on 10 November 2020.

**3 September 2018** – In response to the letter from PJD Solicitors of 23 August 2018, Mr. Breen, solicitor for the Defendant, writes to PJD enclosing a copy of the personal injury summons. With regard to the foregoing, counsel for the Third Party submits that it is from 3 September 2018 that time begins to 'run' insofar as an assessment of delay on the part of the Third Party with regard to the bringing of the present application. For the reasons explained in this decision, I am satisfied that nothing turns on the difference between 19 July 2018 and 3 September 2018. It is, however, appropriate to note that, as a matter of fact, the then – solicitors representing the Third Party, namely PJD, had, as of 3 September 2018, the Third Party Notice, the relevant court order and a copy of the personal injury summons.

**17 September 2018** – PJD Solicitors for the Third Party write to Dillon Eustace, solicitors for the Defendant, referring to previous correspondence from Dillon Eustace dated 7 September 2018, received on 11 September 2018 and also referring to a conversation between Mr. Ward of PJD and Mr. Breen, solicitor, which took place on 12 September. The letter from PJD goes on to state as follows: "*As discussed with your Mr. Breen, we would ask that you bear with us in terms of filing any Appearance on behalf of Ms. Roland. On our advices, we requested that she refer the matter to her insurers and we understand her Insurers have made preliminary contact with your good selves. If it is the case that our client's insurers are in a position to deal with the matter, then no doubt they will appoint their own Solicitors for the purposes of dealing with the claim herein. If it is the case however that there is no insurance cover in respect of the incident arising the subject matter of the proceedings, then, given our client's financial circumstances, we have advised her to approach the Legal Aid Board to see if they can address matters and*

*provide representation for her. We would ask therefore that you would bear with us for the time being".* Several comments can fairly be made with regard to the foregoing letter. Once again, PJD Solicitors make clear that the Third Party is their client. They also make clear that they have provided her with advices. However, they do not state or in any way suggest that their client takes any issue with alleged delay in the bringing of an application to join her as a Third Party. It seems entirely obvious to say that if a very experienced firm of solicitors which was, in fact, providing advices to a client who had been joined as a Third Party, regarded the relevant Third Party Notice as having been applied for too late, it could, and would, have said so. Not only is there no suggestion of the foregoing, the 17 September 2018 letter plainly amounts to a request for forbearance, in particular as regards the filing of any appearance on behalf of the Third Party. It seems uncontroversial to say that by making such a request, PJD Solicitors had no way of compelling the Defendant to deliver a positive response. It is equally clear that if the Defendant was willing to show forbearance, it would be of benefit to the Third Party for the very reasons outlined in the 17 September 2018 letter. It is also fair to say that if it turned out that the Third Party's insurers would be providing cover, such a position could well be of mutual benefit to the Third Party and indeed the Defendant.

**11 September 2018** – Ms. McMahon, of Zurich Insurance plc. wrote to Mr. Breen, the Defendant's solicitor, in the following terms: *"You will be aware that we spoke on this case some time back in the initial stages. I did ring looking for you just now but unfortunately you were otherwise engaged so was advised to email you. I am off on annual leave from tonight for a week hence I wanted to speak to you. As we are both aware all persons involved in this action are related to each other and naturally all have the concerns of the child first and foremost. Our understanding was that the claimant was our insured's daughter and that the deep fat fryer was also our insured's which we now know is not the case and that another family member owned it. Our file had been closed due to an exclusion on a policy where 'a family member permanently resides with you'. Obviously this is now not the case.*

*I am only today in receipt of your correspondence addressed to Kathleen Roland. Can I ask you to please call me to discuss this case before I do anything? As things stand I have no idea how far 'down the road' the case is, her current medical condition and future prognosis etc. I am back in the office on 25th so if you can hold off until then we can talk".* Several things can fairly be said in relation to the foregoing. Plainly, the Third Party is described as Zurich's "insured". It is also clear that the possibility that Zurich would be providing cover remained a 'live' one. Not only is it clear that Zurich had been undertaking its own investigations in relation to the matter, it is clear that Zurich had been mistaken as to the relationship between the relevant parties; where they lived; and who owned the deep fat fryer - the foregoing being of relevance to the question of insurance cover. Furthermore, the Third Party's insurer was specifically asking for forbearance from the Defendant's solicitors.

**19 September 2018** – The Defendant's solicitor, Mr. Breen, wrote by email to Ms. McMahon of Zurich, referring to the 11 September 2018 email and stating *inter alia* that:

*"Defence has been served (copy attached). The Plaintiff solicitors (like ourselves) are anxious to serve notice of trial but have held off due to Third Party application. I am waiting on the Plaintiff's medical records. Most recent defence report from Professor Jack Kelly, consultant plastic surgeon, is dated 14th May 2018. I also have photographs of scarring taken by a litigation photographer. I am prepared to share all reports on usual terms on receipt of 50% payment . . . please advise if cover is confirmed for Ms. Kathleen Roland in respect of this accident. Without prejudice your insured cannot escape liability. Give me a call when you get back to discuss. I look forward to hearing from you".* It is clear from the foregoing that the question of whether Zurich would indemnify the Third Party was both highly relevant and remained 'live' as of September 2018. It will be recalled, of course, that this is a question the Defendant's solicitors raised with Zurich at an early state (30 March 2017) and had repeatedly asked thereafter. In the manner explained, and in the absence of a response to this important question, the Defendant had issued the Third Party Notice in May 2018 and had obtained the relevant order. It is equally clear that the Defendant had been simultaneously taking other highly-relevant steps in the context of progressing the case for the defence, including obtaining a medical expert's report from Prof. Kelly, consultant plastic surgeon, on 14 May 2018, shortly before issuing the application for liberty to join the Third Party. The Defendant had also obtained professional photographs of the relevant scarring. As of September 2018, these were being offered to the Third Party's insurer in an obvious attempt to progress matters efficiently and in the context of the repeated request as to whether insurance cover was confirmed for the Third Party in respect of the accident in question.

**4 April 2019** – The Defendant's solicitor, Mr. Breen, wrote by email to PJD stating *inter alia* the following: *"To date, Zurich Insurance Limited, solicitors have not yet filed and (sic) appearance for Ms. Kathleen Roland. Will I send warning letter direct to Ms. Roland or to you? I attach my email to date to Zurich Insurers Limited. I will keep you advised of all developments"*. Mr. Breen enclosed for PJD, a copy of his 04 April 2019 email to Zurich which stated *inter alia* that: *"I refer to my emails dated 11 December 2018 and 4 March 2019 in relation to this matter. Your insured has not filed an appearance to Third Party Notice and order of Mr. Justice Barr dated 16 July 2018. I am instructed to issue motion for judgment in default of appearance. I will need to issue a motion warning letter to your insured. Please give me a call when you get a chance to discuss on a without prejudice basis. I look forward to hearing from you"*. The foregoing is further evidence of the repeated efforts on behalf of the Defendant to progress matters. It will be recalled that, by 04 April 2019, over 8 months had elapsed since the Third Party Notice was served and over seven months had elapsed since PJD solicitors confirmed that the Third Party had consulted them, yet there was no question of the Third Party's solicitor issuing any application to set aside the Third Party Notice on delay grounds or even suggesting that such an application should be brought.

**6 April 2019** – Mr. James Ward of PJD solicitors responds to Mr. Breen stating, with regard to the warning letter concerning judgment in default of appearance that: -



*"It might be as well to send this to me and I will make contact with Kathleen".* The foregoing is, of course, entirely consistent with PJD solicitors representing the Third Party at the time.

**27 May 2019** – Mr. Ward of PJD solicitors wrote to Mr. Breen of Dillon Eustace, referring to their previous email exchange of 4 and 6 April and asking if there have been any developments.

**08 July 2019** – Dillon Eustace, solicitors for the Defendant, wrote to Zurich referring to a previous telephone conversation of 04 July 2019, enclosing a copy of the personal injury summons and Third Party Notice and stating *inter alia*: -*"We understand that your insured are Mr. Paul Roland and Ms. Kathleen Roland. As we have not received an appearance to the Third Party Notice, we confirm that we are serving a warning letter on Patrick J. Durcan & Co. who are the insured's own solicitors. At the expiration of the time limit set out in this correspondence, we confirm that we will be issuing motion for judgment against your insured. We look forward to hearing from you in due course"*. The foregoing represents a further attempt by the Defendant's solicitors to progress matters. It is also consistent with the fact that PJD solicitors was, at that time, acting for the Third Party. It is equally clear that the question of whether Zurich would provide cover still remained an 'open' one and no response had yet been furnished by Zurich to the repeated requests made on behalf of the Defendant, who was plainly anxious to progress the claim.

**29 July 2019** – PJD solicitors wrote to Dillon Eustace in response to the latter's 08 July correspondence and stated *inter alia*: *"We have endeavoured to get in touch with Zurich but without success. Certainly the claim reference number 716556 corresponds with the correspondence our client has shown to us with her then Insurance Company. Our client's financial circumstances are not good and accordingly we have advised her to proceed with her application to the Legal Aid Board to ensure that she has appropriate and proper representation to address the defence of this case. Accordingly, we will not be in a position to come on record herein and we trust the Legal Aid Board will be in touch in due course"*. One can readily understand the practical difficulties created by a lack of funds. That said, it is plain from this letter that PJD solicitors continued to provide advices to the Third Party. Furthermore, although specific reference is made to their *"client's financial circumstances"*, the letter certainly does not say that the Third Party takes the view, on foot of the advice provided, that the Third Party Notice was applied for too late and/or that PJD solicitors regarded it as appropriate that an application to set aside the Third Party Notice be made and/or that the only reason such an application was not being made was because of the Third Party's poor financial circumstances. The Third Party, without doubt, had access to legal advice from a most reputable firm of experienced solicitors and it seems uncontroversial to say that it would have cost little or nothing for the Third Party's solicitors to include, in one of their letters, an assertion that the Third Party Notice had been applied for too late if that was the view taken. Nothing of the sort was said.

**4 September 2019** – Dillon Eustace emailed PJD solicitors to state *inter alia* that: -

*"Zurich Insurance Limited have now instructed Nathaniel Lacy & Partners to protect the interests of your client. I am still waiting on an acknowledgment from Nathaniel Lacy & Partners. I will keep you advised of all developments".*

**12 September 2019** – Nathaniel Lacy & Partners ("NLP") wrote to Mr. Breen of the Defendant's solicitors stating: *"I refer to the above matter and your correspondence has been passed to me by my clients Zurich Insurance. I confirm that indemnity/cover is still under review in this matter and I hope to have a decision from my clients shortly and will communicate same. In the meantime, you should communicate directly with the Third Party and/or own personal solicitors"*. Mr. Breen forwarded a copy of the email from NLP to PJD solicitors and confirmed *inter alia* that: - *"No appearance has been filed by them yet"*. PJD responded on 18 September 2019 to note the position.

**4 October 2019** – NLP wrote to Mr. Breen of the Defendant's solicitors stating *inter alia*: *"Indemnity has not been confirmed. You should serve all documents directly on the Third Party or Patrick J. Durcan & Co."* On the same date, Mr. Breen sent a copy of the NLP email to Mr. James Ward of PJD solicitors stating *inter alia* that: - *"I have been instructed to start motion process"*. In response, Mr. Ward of PJD solicitors email Mr. Breen to state: - *"I will get client in and let you know what the score is. I hope to be back to you next week"*. The foregoing confirms, once again, that at all material times from 23 August 2018, when PJD solicitors first wrote on behalf of the Third Party, the latter had access to legal advice and representation, and PJD solicitors continued to act as the Third Party's solicitor, making it clear that she was their client. Again, there was no suggestion that the Third Party or her solicitors thought that an application to set aside the Third Party Notice was appropriate and should be brought (or that it would have been brought, but for the Third Party's lack of funds). Nothing of the sort was said or suggested.

**23 October 2019** – Dillon Eustace, solicitors for the Defendant, wrote to PJD solicitors for the Third Party stating as follows: *"We refer to the above and to previous correspondence. Third Party Notice was served on Kathleen Roland on 19 July 2018. To date we have received no appearance to the Third Party Notice. Please take notice that unless we receive appearance to the Third Party Notice within twenty-one days from the date of this letter, we have instructions to issue a notice of motion for judgment in default of appearance. We will use this letter to fix you with the costs of this application"*. The foregoing is plainly a formal 21 – day warning letter sent on behalf of a Defendant who was, very obviously, anxious to progress the proceedings and had never been made aware at any point in the one year and three months since the Third Party Notice had been served, that the Third Party took any issue with alleged delay in respect of the application to issue the Third Party Notice.

**5 November 2019** – PJD solicitors replied to the 23 October 2019 letter to state: *"I attach our own formal response to you in respect of the Motion. Ms. Roland is still awaiting a response from the Legal Aid Board but I don't want to have her position compromised so I am going to file an Appearance for the time being and hopefully the Legal Aid Board can come on board fairly shortly"*. That letter enclosed a formal response

to Dillon Eustace which stated: "*As previously advised, we had suggested to our client that she should retain the services of the Legal Aid Board given her impecunious circumstances. The outcome of that is still awaited on the part of our client as we understand there are significant waiting lists. That said, we understand and appreciate your anxiety to have matters progressed and we are also anxious to ensure that our client's position is protected. Accordingly, we attach herewith Memorandum of Appearance*". What neither of the foregoing letters state or suggest is that there was any 'delay' issue with regard to the Defendant's seeking of consent to issue a Third Party Notice. There is not even a hint that such an application has merit (and/or would be brought, but for the Third Party's impecunious circumstances). This is despite the explicit reference made by the Third Party's solicitors to ensuring that their client's position was "*protected*". It is a matter of fact that, as of 05 November 2019 when this correspondence was sent, the Third Party, who had access to legal advice, did *not* regard an application to set aside the issuing of the Third Party Notice on delay grounds as appropriate, or necessary, in the context of protecting her position. If it were otherwise, that could have been stated (even if it was with the proviso that the only reason such an application was not being brought was because there were no funds to bring it). It was not stated.

**06 November 2019** – NLP solicitors wrote to Dillon Eustace stating *inter alia* that: - "*we are not acting on behalf of the Third Party*". An appearance was filed on the same day by PJD solicitors for the Third Party who formally came 'on record' for her in respect of the present proceedings. Despite doing so, the Third Party's solicitors did not issue any application to set aside the Third Party proceedings. It seems entirely fair to say that lawful arrangements between a firm of solicitors and their client is a matter for those parties. It also appears uncontroversial to say that, in the context of litigation involving claims for alleged personal injuries, it is not unusual for solicitors to decide that they will represent clients who may not have the financial wherewithal to discharge their fees on an ongoing basis. The willingness of solicitors to act on a range of bases (including "no foal no fee"; or deferring payment until the resolution of a case; or, for that matter, on a "pro bono" basis) is not uncommon, and that willingness can make a positive contribution to the administration of justice by providing otherwise impecunious clients with access to legal advice. I want to emphasise that the precise nature of the fee arrangements which governed the retainer by the Third Party of PJD solicitors is entirely unknown. Nor is it relevant. What is known and, to my mind, highly relevant, is that a very professional and experienced firm of solicitors formally came on record for the Third Party in these proceedings. That being so, this Court is entitled to hold that, at least as and from 06 November 2019, the Third Party had access to professional legal advice and assistance and was in a position, through her legal representatives, to issue such application as the Third Party regarded as appropriate, having had the benefit of legal advice and assistance. As a matter of first principles it seems to me that I cannot possibly take the view that the filing in the High Court Office of a formal Appearance by a firm of solicitors in respect of a party to litigation means other than that party is in a position to bring such application(s) as are appropriate. Yet, implicit in the submissions made on behalf of the Third Party in the present proceedings is that, notwithstanding the filing of a formal Appearance on behalf of the Third Party, this Court should take the view that it did not

really mean that the Third Party was in a position to get advice as to the appropriateness of an application to strike out the Third Party proceedings, or to bring such an application. Also implicit in the Third Party's submission is that some Appearances filed on behalf of third parties will mean that they, through their solicitors, are in a position to protect and defend their position but other Appearances mean something else. I simply cannot take that view, either as a matter of principle, or having regard to the evidence. As for the evidence, what PJD solicitors stated in the voluminous correspondence which was exchanged between their office and that of the Defendant's solicitors for well over a year is a matter of record. The court has seen it in the context of this application and what PJD solicitors never stated, be that before or after formally coming on record on 05 November 2019, is that there was any 'delay' issue with regard to the Defendant's application to join the Third Party. Nor was an application of the present sort ever brought by PJD solicitors. If that firm and the Third Party (having had the benefit of their advice) regarded such an application as appropriate, I am entirely satisfied that it could have been brought or, failing that, PJD could, at the very least, have made clear that the Third Party regarded such an application as appropriate but, because of a lack of funds, no such application could be brought at that stage. Having regard to what I have said in relation to the filing of an Appearance, I do not accept that it would be appropriate for a firm to say that *we have formally come on record for a Third Party but we reserve the right not to bring applications which are appropriate to bring unless and until we are paid and, therefore, any steps we take to progress and any forbearance we ask you to give on our client's behalf is without prejudice to our client's entitlement, at a later unspecified stage, to bring an application which should have been brought now but will not be brought until such time as finance has been sorted out.* To my mind, that would be a wholly illegitimate stance to adopt, yet such a stance is the logic of the submissions made on behalf of the Third Party in the present application. I should also emphasise that it is not a stance that PJD solicitors ever took. Nor, I should emphasise, is anything I say in this decision intended to be a criticism of PJD solicitors. Let me make it clear at this juncture that the fact that PJD solicitors never brought an application to set aside the Third Party Notice and never flagged an intention so to do and never indicated that any such application was appropriate reflects the fact that *no* such application was appropriate in the present case, having regard to a careful consideration of the whole circumstances of this case and its general progress. Having made the foregoing clear, it is appropriate to continue to look at matters in terms of the relevant chronology.

**01 August 2019** – Mr. Gary Raethorne, a claims handler with Zurich, wrote to Mr. Breen, the Defendant's solicitor stating *inter alia* that "*in relation to the attached please note we have nominated Nat Lacey solicitors and they will be in touch soon.*". The foregoing demonstrates that, as of early August 2019, there clearly remained a prospect that Zurich would be indemnifying the Third Party. For the insurance Company to nominate a firm of solicitors to represent the Third Party is not to say definitively that cover will be provided, but it certainly demonstrates that the question of indemnity remained an 'open' or 'live' one at that juncture.

**04 September 2019** – The Defendant’s solicitor Mr. Breen emailed Mr. Raethorne in Zurich to state *inter alia*: “I await acknowledgment and appearance from Nathaniel Lacey & Partners. Strictly without prejudice what is your position between Defendants? I am of the opinion that there is a liability attaching to all parties. Are you in a position to consider sharing arrangement on a without prejudice basis and I will take my principal’s instructions? I look forward to hearing from you.” The foregoing represents a further attempt by the Defendant, through their solicitor, to progress matters. In circumstances where Zurich had nominated Nathaniel Lacey & Partners (“NLP”), it was hardly surprising that the Defendant’s solicitor expected NLP to enter a formal Appearance on behalf of the Third Party and said so to Zurich.

04 March 2020 - Ms. Susan Duffy, senior liability claims handler with RSA insurance wrote to Ms. McMahon of Zurich in relation to the proceedings and, having referred to the circumstances of the claim she stated *inter alia*: “A letter was issued directly to Kathleen Rowland on 16/03/16 and thereafter correspondence passed back and forth between your good selves and ourselves. We have now been advised by our Solicitors that an indemnity is not being provided to Kathleen Rowland on the basis that your policy excludes “bodily injury to a member of your **household** or any other person permanently residing with **you**. The Plaintiff is neither and we fail to understand then how an indemnity is not being provided to Kathleen Rowland. We would be grateful if you could confirm that you will be providing an indemnity to Kathleen Rowland and furthermore that you will take over the handling of this claim from RSA. We look forward to hearing from you by return.” It will, of course, be recalled that as early as 30 March 2017 the Defendant’s solicitors wrote to Zurich asking if that insurance company was in a position to indemnify Ms. Rowland. Almost two years later, the Defendant’s insurer, RSA, is still asking the same question, that question having been posed on numerous occasions in the intervening period, in particular by Mr. Breen, the Defendant’s solicitor, in an obvious attempt to try and progress matters and in circumstances where, if Zurich was willing to take over the claim, there was an obvious potential for the saving of time and costs, insofar as legal proceedings were concerned.

**06 February 2020** – The Defendant’s solicitors wrote to PJD, solicitors on record for the Third Party, consenting to the late delivery of the Third Party’s defence for a further period of 21 days and indicating that a motion would be issued if the defence was not delivered.

**10 February 2020** - PJD Solicitors responded to the Defendant’s letter of 6 February 2020 stating *inter alia* as follows: “Coincidentally, we received on the 7th February, 2020, Authority from Mrs. Rowland to transfer the file to the Law Centre in Castlebar. This we have done and we have advised them of your letter of the 6th February. In the circumstances, can we respectfully suggest that you liaise with the Law Centre in Castlebar, Co. Mayo to progress matters. Can we also respectfully request that you hold off any Motion to enable the Law Centre receive and consider the file.”. The foregoing was plainly a request for forbearance. It was by no means an assertion the Third Party Notice had been applied for too late. Nothing of the kind was stated or implied. Rather,

and in circumstances where that issue was not mentioned at all, the focus is on the very understandable anxiety on the part of the Defendant to progress the proceedings by way of a motion in respect of which, on their client's behalf, PJD Solicitors ask for forbearance, given the potential involvement of Castlebar Law Centre. In a manner which will be seen, that forbearance was, in fact, provided and the forbearance shown by the Defendant, by refraining from issuing a motion for judgment in default of Defence, plainly was of benefit to the Third Party. I say this in circumstances where it is incontrovertible that, as of 10 February 2020, almost 19 months had elapsed since the Third Party Notice was served on Ms. Rowland and, throughout that period, there had been extensive communication by the Defendant's solicitor to try and progress matters and no little forbearance shown by the Defendant's solicitors in response to specific requests for same made on behalf of the Third Party. Yet the fact remained that no Defence had been delivered even though over three months had passed since PJD solicitors, who had been advising and representing the Third Party since August, 2018, formally came on record as her solicitor in the within proceedings as of 6 November 2019. Had the Defendant issued a motion for judgment in default of Defence, it is uncontroversial to say that there would have been little that the Third Party and her legal advisors could have done by way of opposition to such a motion, with the prospect that, at best, 'time' would be extended for the delivery of the Third Party's Defence in an order requiring same (and with a real prospect of an order for costs against the Third Party). It also seems appropriate to state that, faced with that prospect, the most the Third Party's solicitor did was to look for forbearance. PJD solicitors did not state or suggest that the Third Party Notice itself had been applied for too late. Again, that is not to criticise PJD solicitors because, for the reasons detailed in this decision, it would not have been appropriate in my view to assert that the Third Party Notice in the present case was applied for too late, having regard to the facts and circumstances and progress of this specific matter.

**19 March 2020** - NLP solicitors wrote to Dillon Eustace stating *inter alia* as follows: "*As you are aware Messrs. Patrick J. Durcan & Company have entered an Appearance on behalf of Kathleen Rowland, the Third Party herein. Notwithstanding that we have been instructed by Zurich Insurance your client, Ms. Susan Duffy – RSA has saw fit to contact our client directly by way of email of the 4th March last. We note you were copied on that email. We have set out our client's position clearly herein and indeed a separate firm of solicitors are on record for Kathleen Rowland. Please instruct your client not to contact our client directly in the future.*"

**15 April 2020** - Dillon Eustace, solicitors for the Defendant, wrote again to PJD, solicitors for the Third Party consenting to the late delivery of the Third Party's defence for a further period of 21 days and indicating that a motion would issue against the Third Party if the defence was not delivered. It will be recalled that a similar letter pressing for the Third Party's defence had been sent by Dillon Eustace to PJD Solicitors on 06 February 2020 and it prompted a request for forbearance, which was evidently shown. It is perfectly clear that no Defence had been delivered in the intervening three months and that PJD Solicitors remained 'on record' for the Third Party. No defence was delivered at that juncture. Nor did PJD Solicitors state or suggest that the reason why no Defence was

being delivered was that the Third Party Notice was invalid by reason of an alleged 'delay' issue in terms of applying for same.

**16 June 2020** - NLP Solicitors emailed Mr. Breen of Dillon Eustace to point out that the claims-handler in RSA was still making direct contact with NLP's client, Zurich Insurance, notwithstanding NLP's 19 March 2020 letter. As well as requesting that all communication between the respective solicitors, NPL stated *inter alia* that "*the Third Party has appointed a solicitor which is clear from the court's website*". The foregoing was of course true in circumstances where PJD solicitors remained on record for the Third Party.

**21 July 2020** - Mr, Breen, solicitor for the Defendant, emailed PJD solicitors and stated *inter alia* the following: "*Legal Aid Board have never confirmed that they will be coming on record for Mr. (sic) Kathleen Rowland – see letter from Legal Aid Board attached. I am now instructed to proceed to issue a motion for judgment in default of defence to Third Party Notice. Has your client asked Zurich why indemnity is not being provided? Claims handler is now Mr. Gary Raethorne at Zurich (gary.raethorne@zurich.com/claim reference 716556) who have instructed Nathaniel Lacey & Partners. Our principals RSA have tried to engage Zurich unsuccessfully but only reply is response from Nathaniel Lacey & Partners. I look forward to hearing from you.*" Again, the foregoing evidences the ongoing efforts on behalf of the Defendant to try and progress the matter against the backdrop of (a) PJD Solicitors continuing to represent the Third Party; (b) the Third Party never having suggested that there was any delay on the Defendant's part in applying to issue the Third Party Notice; (c) the question of whether Zurich would indemnify the Third Party remained 'live' and unanswered, despite the Defendant's solicitors having asked that question repeatedly, both prior to and subsequent to issuing the Third Party Notice; and (d) PJD Solicitors having previously requested forbearance on behalf of their client, the Third Party, which forbearance had been shown by the Defendant, to the obvious benefit of the Third Party.

**22 July 2020** - Dillon Eustace Solicitors for the Defendant wrote to PJD Solicitors referring to their previous letters of 6 February 2020 and 15 April 2020 (consenting to the late filing by the Third Party of a Defence) and consent was given to the late delivery of the Third Party's Defence for a further period of 7 days, with an indication that a motion would issue if the Defence was not delivered.

**28 July, 2020** - PJD solicitors responded to Dillon Eustace to state *inter alia* "*I attach copy letter despatched to the Legal Aid Board today. I will go back to the client in any event to see why cover is not being provided but I suspect it is because the only Insurance that Ms. Rowland has was her own house insurance which would not have extended to the property in question.*" PJD Solicitors provided Dillon Eustace with a copy of their letter of 28 July 2020 to the Law Centre Castlebar which stated *inter alia*: "*We were somewhat surprised to receive further communication from Dillon Eustace Solicitors on behalf of the Defendant Sarah Jane McHale herein to advise that they have still not received confirmation from you that you are coming on record. We note from your letter of the 20th April 2020 that you are in the process of assessing whether legal aid was*

*being granted and in that regard you might clarify this has now been concluded. A warning letter has now been issued for the non-filing of the Defence of the Third Party herein and we are anxious that our client's position is not compromised. You might revert to us as a matter of urgency."* It is plain that PJD Solicitors furnished the Defendant's solicitors with a copy of the former's letter to the Legal Aid Board because it wished the Defendant to show further forbearance to the Third Party. It is equally clear that PJD Solicitors continued to regard the Third Party as their client and, as they stated explicitly: *"we are anxious that our client's position is not compromised"*. Despite that explicitly put anxiety to ensure the Third Party's position was not compromised, there was no question of PJD Solicitors issuing or signalling any intention to issue an application based on any alleged 'delay' on the part of the Defendant with regard to the issuing of the Third Party Notice. For the reasons explained in this decision, I am entirely satisfied that if the Third Party, with the benefit of professional legal advice from a very experienced and reputable firm of solicitors, regarded such an application as appropriate, it could have and would have been signalled and brought. It was not. I am entitled to infer that the reason it was not referred to in correspondence by the Third Party's solicitors or issued is because it was not regarded as an appropriate application to bring. In that, I fully agree, having regard to the particular facts which an analysis of the evidence before this court discloses. It is also clear that the correspondence sent by PJD Solicitors on 28 July 2020 had the desired effect in that no motion for judgment in default of defence was issued by the Defendant's solicitors as against the Third Party. Thus, yet more forbearance was shown by the Defendant for very understandable reasons.

**02 September 2020** – Dillon Eustace wrote once more to PJD Solicitors, referring to the previous "warning" letters of 06 February, 15 April and 22 July 2020 and consenting to the late delivery of the Third Party's Defence for a further period of 7 days, with reference made to a motion if the defence was not delivered.

**22 September 2020** – PJD Solicitors responded to Dillon Eustace to state *inter alia*: *"We were concerned to have received your letter and what appeared to be any absence of progress in the context of the Legal Aid Board dealing with the case. We made contact with the local law centre in Castlebar and have been advised by them that the file has now been transferred to their specialised P.I. Unit in Dublin which, we understand, has only recently begun taking Defence P.I. cases again. The P.I. Unit in question is based in Montague Court and we confirm we have forwarded on the recent correspondence received from your good selves to them with a renewed request to expedite matters. We trust you note the position accordingly."* Again, the foregoing letter from PJD Solicitors was plainly sent with a view to securing yet more forbearance. Again, it is necessary to point out that nowhere does the Third Party's solicitors state or suggest that there is any 'delay' issue affecting the Third Party Notice which had been served on Ms. Rowland just over two years and two months earlier. In circumstances where PJD Solicitors willingly came on record, formally, for the Third Party, when that firm filed an Appearance dated 06 November 2019, I simply cannot hold that there was any impediment to that firm issuing an application to set aside the Third Party Notice at any point from 06 November 2019 onwards if, that is, such an application was regarded as appropriate. The fact that



it was not regarded as appropriate is entirely fair to infer from the fact that, despite sending numerous letters on behalf of their client, PJD Solicitors did not once state or suggest that such an application was appropriate. Moreover, I simply cannot hold that the Third Party's solicitors regarded such an application as appropriate but did not issue same because they lacked the funds to do so. I cannot hold this because at no stage did PJD Solicitors ever state or suggest this. There was ample opportunity to do so, and a feature of the present application is the huge volume of correspondence. It is fair to say that this correspondence evidences consistent efforts on the part of the Defendant to progress matters, as well as admirable forbearance on the Defendant's part, against the backdrop of 'live' issues, in particular whether Zurich would or would not provide indemnity to the Third Party and would or would not take over the claim and, laterally, whether the Third Party would obtain legal aid. I cannot, however, take from the evidence that it was not possible for the Third Party, via PJD Solicitors, to make an application of the present type from at least 06 November 2019 onwards. Returning to the sequence of events, it is entirely fair to say that the 22 September 2020 letter was sent by PJD Solicitors to Dillon Eustace in the obvious hope of yet further forbearance being shown. Plainly it was shown in that the Defendant did not issue a motion for judgment in default of Defence.

**22 October 2020** – Dillon Eustace, solicitors for the Defendant, wrote again to PJD, solicitors for the Third Party and referred to their previous "warning" letters of 06 February, 15 April, 22 July and 02 September 2020. Again, consent was furnished to the late delivery of the Third Party's Defence for a further period of 7 days, with reference made to a motion.

**29 October 2020** – On receipt of the 22 October 2020 letter from Dillon Eustace, PJD Solicitors replied to state that they had forwarded same to the Legal Aid Centre in Montague Court in Dublin for their attention. Once more, a prompt reply by PJD Solicitors and the reference to the Legal Aid Centre was plainly for the purposes of trying to secure ongoing forbearance on the part of the Defendant for the benefit of the Third Party who remained, of course, the client of PJD Solicitors. That was yet again successful from the Third Party's perspective, in that no motion for judgment was issued.

**05 November 2020** – Mr. Breen of Dillon Eustace wrote once more to PJD Solicitors stating *inter alia*: "I refer to previous correspondence in relation to this matter. I confirm that we have not received any correspondence from Legal Aid Board. I am now instructed to issue a motion for judgment in terms of Third Party Notice. Have Zurich Insurance (Claim Reference: 716556/Claims Handler Gary Raethorne) ever given a reason for not providing indemnity to Ms. Kathleen Rowland? RSA have tried to engage with Zurich to avail (sic) and also receive a response from Nathaniel Lacey & Partners Solicitors. This accident did not happen in Ms. Kathleen Rowland's house and usually insurance policy would extend to circumstances of this accident. I am of the opinion your client should ask for written reasons why indemnity is being refused by Zurich. I attach Zurich policy document. I look forward to hearing from you." It is entirely fair to say that the foregoing communication from the Defendant's solicitors to the Third Party's

solicitors amounted to a *bona fide* attempt on the part of the Defendant to assist the Third Party with respect to an issue which was of obvious importance to the Third Party, namely, the provision of indemnity by her insurer. This communication is yet another example of *bona fide* efforts on the part of the Defendant to progress the proceedings in a reasonable and professional manner. It also must be said that, in ease of the Third Party, a great deal of forbearance had been shown by the Defendant, via its solicitors, such forbearance no doubt provided due to the nature of and promptness with which PJD Solicitors for the Third Party had responded. This latest communication was sent precisely one year after PJD Solicitors formally came on record for the Third Party. Throughout that entire year, there was not the barest suggestion that any 'delay' issue arose with regard to the application to issue the Third Party Notice. Nor did PJD Solicitors ever state that the Third Party was desirous of bringing an application to strike out the Third Party proceedings and/or that they regarded such an application as appropriate and the reason it was not being brought is because there was a lack of funds. Thus, I am entitled to include that there was no impediment to bringing such an application if it was merited. It was *not* brought and I am entirely satisfied that it was *not* merited. However, a careful consideration of the evidence simply does not allow me to hold that it could not have been brought, or that there was an impediment to PJD Solicitors bringing such an application. Thus, I am satisfied that, as of 05 November 2020, a full year had elapsed during which the Third Party could have but did not bring an application to set aside the Third Party proceedings. In other words, such an application was certainly *not* brought as soon as was reasonably possible.

**09 November 2020** –Against the backdrop of the Defendant's latest letter (of 22 October 2020) extending time for the delivery by the Third Party of a defence and threatening a motion, PJD Solicitors for the Third Party wrote to Mr. Dillon stating the following in an obvious attempt to secure yet more forbearance: "I have emailed the Legal Aid Board ... and asked them to move things along as they have taken over the file. Fergus O'Loughlin is the person handling the file in the Legal Aid Board (Montague Court) and his number is 01 477 6208. I tried calling him this morning but he is on leave, returning tomorrow. I will chase him up again tomorrow."

**15 April 2020** – Dillon Eustace, solicitors for the Defendant wrote to the Legal Aid Board, Castlebar stating *inter alia*: "*We understand that you have been instructed to act for Ms. Kathleen Rowland who is currently represented by Patrick J. Durkan & Company Solicitors. We have not received notice of change of solicitor for the Legal Aid Board to come on record. We enclose warning letter for a Third Party Defence that we have served on Patrick J. Durkan & Company Solicitors. We are instructed to issue Motion at the expiration of the time limits set out in the correspondence. Kindly confirm if you have also considered joining Zurich Insurance Limited who were the insurers for Ms. Kathleen Rowland to proceedings. We look forward to hearing from you.*"

**20 April 2020** – The Law Centre Castlebar replied to the Defendant's solicitors 15 April 2020 letter to state *inter alia* that "*Please note that we are not on record for Ms. Rowland and we have therefore not filed a Notice of Change of Solicitor. She has attended in*

*respect of the matter and we are in the process of assessing whether she will be granted legal aid. We would therefore request that you hold off issuing Motion until it is ascertained whether Ms. Kilcoyne will have the benefit of legal aid."* The foregoing made clear that, as of April 2020, the one and only firm of solicitors on record for the Third Party was PJD Solicitors. It was also a request for forbearance and, if the totality of the facts and circumstances are considered, it is plain that an enormous amount of forbearance was shown to the Third Party, in light of requests for same made on her behalf.

**30 November 2020** – The Legal Aid Board (Law Centre Montague Court) wrote to Dillon Eustace, solicitors for the Defendant as follows: *"We refer to the minor Plaintiff's above captioned High Court personal injury proceedings and previous correspondence herein. In circumstances where our client has now issued a motion seeking to set aside the Third Party proceedings, we would respectfully say that it is not necessary for our client to deliver a Defence and that no motion for judgment in default of defence should be brought."*

**13 December 2019** – The Third Party applied for legal aid by completing an application for legal services for Castlebar Law Centre (as averred by her at para. 11 of Ms. Rowland's 10 November 2020 affidavit).

**January 2020** – The Third Party had a consultation at Castlebar Law Centre (as averred by Ms. Rowland at para. 11 of her 10 November 2020 affidavit).

**10 February 2020** – PJD Solicitors wrote to the Legal Aid Board at the Law Centre, Castlebar in the following terms: *"We refer to the above matter and the Authority received from Mrs. Rowland on the 7th February 2020. We now enclose herewith the file as requested and authorised. You will note the position as per the letter of Dillon Eustace dated the 6th of February 2020 regarding the filing of a Defence. We had retained the services of Mr. Terence Walshe, BL in the event that Mrs. Rowland was not in a position to avail of legal aid services. He has been briefed with the Pleadings and it may therefore be helpful to retain him in the context of his familiarity with the case. However, that of course is a matter for yourselves and Mrs. Rowland. In the meantime, you will note that I have also sent a holding letter to Dillon Eustace advising them of the position in terms of the file being transferred to yourselves. You might acknowledge receipt of the within."* The foregoing evidences that, not only did PJD Solicitors represent and advise the Third Party and formally come on record for her in the within proceedings, they briefed counsel on behalf of the Third Party. This self-evidently occurred notwithstanding the Third Party's impecunious position. Indeed, PJD Solicitors made explicit that counsel had been instructed in the event that the Third Party *"was not in a position to avail of legal aid services"*. The foregoing fortifies me in the view that the evidence demonstrates that there was no impediment which prevented the Third Party's solicitors from bringing an application to set aside the Third Party Notice at any point, in particular from 06 November 2019, when PJD Solicitors formally came on record for the Third Party in the within proceedings. Yet no such application was brought as weeks and months elapsed.

**16 November 2020** – A notice of change of solicitor was filed in the High Court Central Office indicating that the Law Centre (Montague Court) had been appointed as solicitor for the Third Party.

**16 November 2020** – On the same day as filing a notice of change of solicitor and formally coming on record, the Law Centre, Montague Court, issued the present application on behalf of the Third Party seeking to set aside the Third Party proceedings. In terms of the relevant “timeline”, it will be recalled that the Third Party Notice, which was issued on 18 July 2018, was served by registered post on the Third Party on 19 July 2018. Thus, some *2 years and 4 months* elapsed before the present application was issued. The evidence demonstrates that, throughout this period, the Third Party had, in fact, access to legal advice and representation. The correspondence from PJD Solicitors, commencing with their letter dated 23 August, 2018 makes this perfectly clear. In the manner examined in this decision to date, a careful review of the evidence entitles me to hold that there was nothing which prevented the Third Party from bringing an application of the present type at a much earlier stage, had they regarded it as appropriate (having, at all material times, access to legal advice from a very experienced and most reputable firm of solicitors as the correspondence to which I have referred in this judgment, confirms). It will also be recalled that PJD Solicitors chose to formally come on record for the Third Party as of 06 November 2019. This was over a year before the present application to set aside the Third Party was issued by a subsequent firm of solicitors instructed by the Third Party. I cannot hold, based on careful consideration of the evidence, that there was anything which prevented PJD Solicitors from issuing an application of the present type at any stage from 06 November 2019 onwards. Nor did the Third Party’s then solicitors ever suggest there was any such impediment at any stage in any one of the numerous letters which PJD wrote on behalf of the Third Party from 23 August 2018 onwards and, in particular, as and from 06 October 2018.

### **Submissions**

5. Counsel for the Third Party and Defendant, respectively, made a range of submissions during the hearing, all of which I have carefully considered and for which I am very grateful. The thrust of the submissions made on behalf of the Third Party was that the Defendant delayed impermissibly with regard to serving the Third Party Notice, regardless of whether one looks at the date when the motion was issued, the date it was served or the date when a copy of the personal injury summons was furnished to the Third Party’s solicitor but, insofar as her submission was concerned, it was urged on the court that the relevant period of delay only ended on 03 September 2018 and began 28 days after the date on which a defence should have been delivered. It was argued that the Defendant did not bring the Third Party proceedings as soon as was reasonably possible. Counsel for the Third Party submitted that, the fact that the Defendant’s solicitor was waiting to see if Zurich would indemnify Ms. Rowland and take over the claim is not relevant to the question of whether it was reasonably possible for the Defendant to issue and serve Third Party proceedings. She emphasises what is submitted to be a distinction between *reasonableness* and what was *reasonably possible*. The gravamen of the submission was that it may well have been reasonable for the Defendant’s solicitor to try and ascertain

Zurich's attitude to providing an indemnity but it was simultaneously reasonably possible to serve Third Party proceedings without knowing Zurich's attitude to indemnifying the Third Party and, thus, it is argued, the Third Party proceedings should be set aside on delay grounds. Particular emphasis is laid on the Defendant's correspondence sent to Zurich on 05 July 2017 and on the Defendant's earlier communication with Zurich of 30 March 2017.

6. Counsel for the Third Party acknowledges that her client must show that the present motion was brought as soon as was reasonably possible and she submits that it was. The submission is made that it was entirely reasonable, indeed necessary for the Third Party to await Zurich's attitude to An indemnity. The submission is made that, had Zurich been willing to indemnify the Third Party, she would not have been entitled to obtain legal aid and, thus, it was appropriate for the Third Party not to apply for legal aid until after Zurich made its position known.
7. Counsel for the Third Party accepts that PJD Solicitors were engaged by Ms. Rowland and that they advised her and that they engaged in voluminous correspondence. She submits, however, that it is clear "*it was never their intention to really act for her as she didn't have the money to pay them*". Based on the foregoing submission, counsel for the Third Party argues that it was not reasonably possible for Ms. Rowland to bring the present application at any point before she in fact brought it. It is further submitted that PJD Solicitors "*were not required as a matter of law to bring an application to set aside the Third Party proceedings.*"
8. With reliance in particular, on the Court of Appeal's decision in *Kenny v Howard* [2016] IECA 243, counsel for the Third Party submits that the lack of prejudice suffered by a Third Party does not have the effect of extending the period of time within which a Defendant must bring Third Party proceedings. In short, counsel for the Third Party argues that her client brought the present application as soon as was reasonably possible, but the Defendant did not do so in respect of serving the Third Party Notice.
9. Counsel for the Defendant characterises the Defendant's solicitors as doing their best to progress matters, including for the benefit of the Third Party, and asserts that it was entirely reasonable for the Defendant to try and ascertain if Zurich was going to indemnify the Third Party. The periods of time at issue are also described as reasonable. It is pointed out that time for the delivery of a defence does not run until an affidavit of verification is delivered which, in the present case, did not happen until 28 February 2017. Reference is made to the defence which was delivered on 05 July 2017, the Defendant having raised particulars on 30 March 2017 which were replied to on 01 June 2017.
10. Counsel for the Defendant submitted that "*the facts of this case crystallise as soon as the Third Party was served with the Third Party Notice in July 2018*". According to counsel for the Defendant, it is from this point onwards that the court must assess the delay on the part of the Third Party as regards the bringing of the present application which was not issued until November 2020. It was also emphasised that, even though it was legitimate

for the Defendant to try and ascertain Zurich's attitude to indemnifying the proposed Third Party, the Defendant did *not* wait until Zurich finally decided that issue (i.e. November 2019) but moved far sooner to issue the Third Party application which resulted in an order (Barr J.) of 16 July 2018. It was submitted that it was legitimate for the Defendant to bear in mind the possibility that it would not be necessary to join the Third Party depending on the attitude of Zurich and to try and ascertain that attitude.

11. By contrast, it is submitted that the Third Party could and should have brought the present application sooner. It was stressed that, insofar as the Third Party argues that it was reasonable for her to await the outcome of Zurich's investigations and a final decision concerning indemnity by Zurich "*that must cut both ways*".
12. The Defendant submitted that it acted within the normal course of litigation practice wherein 28-day time-limits, be that for the delivery of a defence or for the bringing of an application to join a Third Party, are rarely strictly adhered to. The point is also made that the Long Vacation arose soon after the delivery of defence in July 2018. It is submitted that if one applies the 28-day time limit from the delivery of the defence and takes into account the long vacation, the 28-day time limit does not expire until October 2017, whereas the motion seeking to join a Third Party issued in May 2018, some seven months later.

#### **Analysis of the affidavits before the Court**

13. I have carefully considered the averments made by the Third Party and by Mr. Breen as well as the exhibits to their respective affidavits. It is fair to say that much of the averments made comprise a reference to the chronology of relevant events. Both sides exhibit correspondence and I have felt it necessary to examine this carefully in the foregoing manner. This was in circumstances where, although the formal pleadings as exchanged between the parties may not be extensive, they are dwarfed by the sheer scale of communication which took place in the background, arising out of attempts, in particular by the Defendant, to try and progress matters.
14. It is fair to say that, not only did the Defendant try to progress the proceedings in a formal manner, it also went to a great deal of effort 'behind the scenes' to progress issues of obvious relevance and it is plain that this was done promptly, professionally and with a view to trying to minimise wasted costs and avoid trespassing unnecessarily on the court's time. It is also fair to say that the averments made by Mr. Breen emphasise the reality that the Third Party has a very material role to play in the determination of liability, as regards the Plaintiff's claim.
15. It is no function of this court in the present application to determine issues in the underlying proceedings, but it is fair to say that, as relevant authorities emphasise, underpinning s. 27(1)(b) of the Civil Liability Act, 1961 is the legislature's desire, in the public interest, that a multiplicity of legal actions be avoided and that the rights and liabilities of all parties arising out of a particular set of circumstances might be disposed of in a single set of proceedings. The averments made by Mr. Breen as to the Third Party's involvement in the incident, the subject matter of the proceedings, speak to that

objective. To put it another way, if one puts to the side the alleged 'delay' issue, it could hardly be suggested that the Third Party has no part to play in the determination of the question of liability in respect of the incident in question. There is a very obvious 'downside' to the necessity for a second set of proceedings arising out of the *same* incident, when all questions could be more speedily and efficiently determined in a more cost-effective manner at a *single* hearing where all aspects are dealt with.

16. In circumstances where the Third Party's affidavit is almost exclusively concerned with the chronology of events it is sufficient to make the following comments as regards the grounding affidavit sworn by Ms. Rowland on 10 November 2020. Ms. Rowland avers at para. 7 that she acted as soon as was reasonably possible to obtain legal representation in connection with the matter. The foregoing certainly appears to be true, given her prompt meeting with PJD Solicitors in July 2018 as a result of which that firm began corresponding on her behalf and advising her. Ms. Rowland goes on to refer to efforts to have Zurich indemnify her; her correspondence from Zurich confirming the claim had been notified; contact between Zurich and the Defendant's solicitors; Zurich's nomination of NLP; that it became clear in November 2019 that Zurich would not be indemnifying her in respect of the Third Party proceedings; her 13 December 2019 application for legal aid; a January 2020 consultation at Castlebar Law Centre; the sending by PJD of her file to Castlebar Law Centre in February 2020; delays caused by the Covid-19 pandemic; the implementation in March 2020 by the Legal Aid Board of a Crisis Management Plan to address the operational impact of the pandemic; the Taoiseach's 12 March 2020 announcement directing school closures etc; the priority given by Castlebar Law Centre to other matters; the application on 04 August 2020 by Castlebar Law Centre to the relevant section of the Legal Aid Board for authority for Junior Counsel to provide an opinion on her eligibility for legal aid; the granting of that application on 4 September 2020; the sending on 9 September 2020 of a file from Castlebar Law Centre which was received on 14 September 2020 by the Law Centre (Montague Court) for it to instruct Junior Counsel; the preparation on 21 September 2020 of a file before being passed to the managing solicitor for review; a discussion between the managing solicitor of the Law Centre, Montague Court and counsel by telephone and a 16 October 2020 letter providing counsel with relevant papers and instructions to provide an opinion on her eligibility for aid; a telephone conversation on 23 October 2020 between solicitor and counsel and a 28 October 2020 telephone consultation between the Third Party, counsel and solicitor; the progression of the legal aid application with the legal services section of the Legal Aid Board to seek a legal aid certificate which was granted on 29 October 2020; the drafting by counsel of the papers for the present application and the emailing of same on 4 November 2020; an email of 5 November 2020 from solicitor to counsel and a reply by counsel on 09 November.
17. Having made reference to the foregoing chronology of events, Ms. Rowland avers at the end of para. 17 that "*in the circumstances, this application has been brought by me as soon as was reasonably possible.*" Nowhere, however, does Ms. Rowland aver that it was not possible for her former solicitors i.e. PJD Solicitors (who corresponded on her behalf and advised her from August 2018 and who formally came on record for her as of 06

November 2018) to issue an application of the present type. Thus, not only is it the case that nowhere in the multiple letters written on her behalf by PJD Solicitors was it ever suggested that the Third Party was desirous to issue an application to set aside the Third Party Notice on 'delay' grounds (but lacked the funds to pay for same and for this reason PJD Solicitors were not bringing such an application), nowhere does the Third Party assert that her impecuniosity or any other reason rendered it impossible, or even difficult, for an application of the present sort to be brought at any point by PJD Solicitors.

18. It is plain that efforts were gone to, in order to ascertain whether Zurich would indemnify the Third Party. Indeed, Ms Rowland refers to her own efforts in that regard. However, the evidence before this court indicates that (a) there was nobody more active in pursuing this issue than the Defendant's solicitor and (b) doing so was entirely appropriate.
19. In the manner previously looked at, Dillon Eustace solicitors pressed for an answer to the indemnity question both *prior* to and *subsequent* to formally issuing the Third Party application striking, as I have previously observed, an appropriate balance between (i) trying to get an answer to a highly relevant *question* and (ii) not permitting the progress of the underlying proceedings to be delayed by waiting unduly for an answer from Zurich.
20. Insofar as Ms. Rowland avers that she acted as soon as was reasonably possible to obtain legal representation, it cannot be lost sight of that she did, in fact, secure legal representation from PJD Solicitors. Yet, it is fair to say that Ms. Rowland, in effect, ignores the entire period where that firm of solicitors were (a) advising her, (b) corresponding on her behalf and (c) were formally on record as her legal advisors in respect of the present proceedings.
21. Instead, she focuses only on the point when she ultimately was granted Legal Aid. It is clear that the thrust of her assertions is that it was not until the end of October 2020 that a Legal Aid certificate was granted and, in circumstances where the Legal Aid Board brought the present application in November 2020 Ms Rowland avers that "*this application has been brought by me as soon as was reasonably possible*".
22. The foregoing averment is utterly undermined by the fact of her having had legal advice and legal representation from another firm of solicitors who never suggested, in any of their numerous letters (over more than 2 years) that it was not possible to bring an application of the present sort.

### **Discussion and Decision**

23. A number of authorities were opened during the hearing and it is fair to say that there was no dispute between the parties as to the relevant principles. In short, it is accepted that there is an onus to bring the relevant application *as soon as is reasonably possible*. In the context of the present application, counsel for the Third Party acknowledged that it was for her client to discharge that burden insofar as the present application to set aside the Third Party proceedings and, if the court was satisfied that that burden had been



discharged, the onus lay on the Defendant to demonstrate that the Third Party Notice was served "as soon as is reasonably possible".

24. In *Kenny v Howard*, the President's judgment set out the relevant principles, analysed the purpose behind s. 27(1)(b), and gave clear guidance as to the proper approach a court should take to the application of the principles as follows:

*"[17] The purpose of s. 27(1)(b) of the Act is to ensure as far as possible that all legal issues arising out of an accident are disposed of within the same set of proceedings. That does not mean that all the issues have to be dealt with simultaneously; that may depend on appropriate orders as to the time and mode of trial of the various issues. At the same time as ensuring that all the issues are comprised in one set of proceedings, the other goal of the provision is to avoid unnecessary delay of the Plaintiff's actions. It seems to me that this is the essential logic of the requirement that the proceedings be joined in the same action and of the specification as to time.*

*[18] In Connolly v Casey & Anor. [2000] 1 I.R. 345, the Supreme Court per Denham J. (as she then was) said:*

*'The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see Gilmore v Windle [1967] I.R. 323. It is appropriate that third-party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice, to the Third Party and to the issue of costs. To enable a Third Party to participate in the proceedings is to maximise his rights – he is not deprived of the benefit of participating in the main action.'*

*To this, I would add the other object of the provision insofar as it restricts the time to what is reasonably possible which is to protect the Plaintiff's position at the same time as ensuring that all the appropriate other parties are before the court in the same set of proceedings.*

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

*'The Statute is not concerned with physical possibilities but legal and perhaps commercial judgments. Proceedings cannot and should not be instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon. It is in that context that the word 'possible' must be understood. Furthermore, the qualification of the word 'possible' by the word 'reasonable' gives a further measure of flexibility.'*

*But the court said that:*

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

*[20] The court, in Connolly v Casey, emphasised that 'in analysing the delay – in considering whether the Third Party Notice was served as is soon as is reasonably possible – the whole circumstances of the case and its general progress must be considered' (Denham J.) That statement was understood by Finlay Geoghegan J. in Greene & Triangle Developments & Wadding and Frank Fox & Associates Third Party [2015] IECA 249 as meaning that a court, when looking at an application to set aside a Third Party Notice should not only look at the explanations given by the Defendant for the delay "but also to make an objective assessment as to whether in the whole circumstances of the case and its general progress, the Third Party Notice was or was not served as soon as is reasonably possible".*

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

#### **Legal and commercial judgments**

25. Pausing here for a moment, it seems to me that the observation by Murphy J. in Molloy that *"the Statute is not concerned with physical possibilities but legal and perhaps commercial judgments"* is particularly relevant to the present case. It is entirely true to say that it was physically, or technically, possible for the Defendant's solicitor to issue an application for liberty to serve a Third Party Notice sooner than the application was, in fact issued. That, however, is not the test.
26. It will be recalled that a defence was delivered on 05 July 2017 and on the very same date, the Defendant's solicitor wrote to Ms. Rowland's insurer, Zurich, enclosing a *draft* Third Party motion, affidavit and notice and specifically asked the insurer *"are you in a position to take over this claim without the necessity of Third Party proceedings?"*.
27. The logic of the submissions made on behalf of the Third Party is that the only legitimate approach which was open to the Defendant was to issue an application for liberty to serve a Third Party Notice at *that* stage and that it was impermissible for the Defendant, in the circumstances of this case, to make the enquiry it made and to await a response to same, notwithstanding the very obvious potential benefits, from a legal and commercial perspective, which could accrue to the Third Party as well as to the Defendant, if Zurich delivered a positive response. I simply cannot accept the submission.

#### **A chilling effect**

28. I cannot accept that, in adopting the approach which the Defendant adopted in the present circumstances of the case, there was a failure to serve a Third Party Notice as soon as is reasonably possible. To do so would, it seems to me, run contrary to the

principles summarised by the then President in the Kenny case. Moreover, it would have a chilling effect with regard to the conduct of litigation by Defendants and their legal advisors, as it would be to endorse what might be called a 'litigation by numbers' approach where, out of fear of being met with an application such as the present one, relevant issues would not be satisfactorily addressed, regardless of the potential benefits to the parties to the litigation and irrespective of the potential to save legal costs and minimise the use of scarce court resources.

**Ready, willing and able**

29. On the facts of the present case, it is self-evident that the Defendant was ready, willing and able to issue a Third Party application as of 05 July 2017 and it was physically possible for such an application to have been brought then. Physical possibility is not, as I say, the applicable test. Plainly, the Defendant, through their solicitor, was seeking to address satisfactorily, a very relevant issue *before* making a decision, the result of which would involve legal costs and a formal court application as well as the joinder of a party who, depending on Zurich's attitude, it might not be necessary to join, at all. Thus, although technically possible for an application to have been brought as of 05 July 2017, a failure to do so at that point and thereafter was not a failure to bring the application as soon as was reasonably possible.
30. There was no question of the Defendant 'sitting on their hands'- quite the reverse is true. Nor did the Defendant wait *indefinitely* for Zurich's response. According to the evidence before this court, a point clearly came where the Defendant made a 'judgement call' that the various potential advantages to the proceedings of Zurich clarifying its position (and possibly rendering a Third Party application unnecessary) were outweighed, in the context of Zurich's delay, by the appropriateness of issuing a formal application for liberty to serve a Third Party Notice, notwithstanding Zurich's failure to answer the question very legitimately asked on 05 July 2017 (and, before that, on 30 March 2017).
31. Objectively assessing the whole circumstances of the case and its general progress, I have no hesitation in saying that the Third Party Notice was served as soon as reasonably possible. Given the particular facts and circumstances of this case, it is not necessary for this court to decide whether it would come to the same view, had the Defendant waited until Zurich finally made its position known.
32. By contrast, the *Third Party* undoubtedly waited for Zurich to clarify its attitude to indemnity. The point at which this occurred can be seen from the analysis of the chronology of relevant events and it was far more than a year and a half *after* the Defendant made the application to join the Third Party.
33. Ms. Rowland avers (at para. 11 of her affidavit) that "*it only became clear in November 2019 that Zurich would not be indemnifying or covering me in respect of the third-party proceedings. On 13 December 2019, I applied for legal aid...*". Thus, it is submitted on behalf of the Third Party that it was perfectly legitimate and reasonable for her to delay the bringing of the present application until after Zurich clarified its position regarding indemnity. Yet, ignoring the old adage involving sauce, geese and ganders, Counsel for

the Third Party argues that the Defendant who brought their application a year and a half *before* Zurich clarified its position should have the Third Party Notice struck out on delay grounds. That contention by the Third Party is flawed in principle and undermined by the facts in this case.

34. I have no hesitation in saying that, carefully considering the whole circumstances and progress of this case against the backdrop of the relevant legal principles, the Third Party's application to set aside the Third Party proceedings was *not* brought as soon as reasonably possible.
35. The reasons are clear from the analysis of the chronology of events which demonstrates that for more than the previous 2 years, the Third Party had advice and assistance from an experienced firm of solicitors who formally came on record for her well over a year prior to the application being brought. The court cannot ignore this. That firm never indicated that such an application was merited. They at no time ever suggested that such an application should be brought, or would have been brought, but for a lack of funds. If the foregoing was the position, the Third Party's then solicitors could have, should have, and no doubt would have said so. They did not and, therefore, I am entitled to hold that it was *not* the position.
36. Rather, time and again, and doubtless in good faith and out of a desire to protect the Third Party's position, they sought forbearance from the Defendant in respect of a motion, to which, it seems clear, there was no answer. Nor did they at any point indicate that there was no obligation to file an Appearance or a Defence due to any allegation that the Third Party Notice was issued too late. Forbearance was sought and it was given. It was given, repeatedly, for very understandable reasons and the evidence reveals that forbearance was both sought and given on a shared understanding by the legal representatives on both sides that there was simply no 'delay' issue in respect of the Third Party Notice being canvassed.
37. Further useful guidance can be gleaned from the Court of Appeal's decision in *Kenny* and it is useful to quote further from that authority as follows:

*"[25] It seems to me that a Third Party applying to set aside a notice served by a Defendant could argue that he had suffered prejudice and that a shorter period than might otherwise be allowed ought to be imposed in determining what was as soon as reasonably possible. I find it difficult to understand how a Defendant who is in default of the clear requirement of the subsection can escape the consequences by proposing that the Third Party has not suffered any specific prejudice. The authorities cited do not go as far as suggesting that the section's impact may be defeated by demonstrating the absence of prejudice. In the present case, it seems to me that it is irrelevant whether or not the HSE has suffered prejudice by reason of the delay."*

## **Prejudice**

38. With regard to the foregoing, I want to make it clear that the issue of prejudice played no part in this court's decision. By way of observation, however, there is no evidence whatsoever that the Third Party suffered *any* prejudice arising out of any alleged delay on the part of the Defendant in serving the Third Party proceedings. A consideration of the facts and circumstances reveals that, if any party suffered prejudice, it was the Defendant.

**Efforts by the Defendant to progress the matter**

39. I say this, having regard to the consistent efforts on the part of the Defendant to progress matters, including pressing, repeatedly, for an Appearance on behalf of the Third Party and, thereafter, for the Third Party's Defence. Those efforts involved a commitment of time, effort and some cost. A consideration of the evidence entitles me to conclude that the only reason that default motions were not brought is because the solicitors representing the Third Party sought, and were afforded, forbearance. The Defendant had nothing to gain from such forbearance, (nor did the Plaintiff), but the result was ongoing delay for which neither the Defendant, nor the Plaintiff were responsible.

**Third Party delay**

40. In the manner explained, some two years and four months' delay arose from the point at which the Third Party proceedings were served in July 2018. Even if the calculation is done from 03 September 2018 over two years and two months' delay arose following the service of the Third Party proceedings, which delay can fairly be laid at the door of the Third Party, despite the *bona fide* efforts made by the Defendant's solicitors to progress matters.

41. In saying the foregoing, I do not direct any criticism at the Third Party in a personal sense. One could have nothing but sympathy, on a personal level, for someone anxious to learn if their insurance company would be indemnifying them and anxious to secure legal aid after their insurer refused cover in November 2019. That said, this court cannot ignore the fact that the Third Party has had expert legal advice and assistance from August 2018 onwards, as well as formal legal representation in the present proceedings, by those same solicitors who came on record for her in November 2019 and, despite the foregoing, the present application was only brought in November 2020.

42. Thus, while prejudice plays no part in this court's decision, I simply cannot hold, based on a careful consideration of the evidence, that the Third Party's application has been brought as soon as was reasonably possible. I am entirely satisfied, however, that the Third Party application itself was made as soon as was reasonably possible.

**No 'hard and fast' rule**

43. I also want to emphasise that this court's decision emerges from the very particular facts and circumstances in this specific case. There is no hard and fast rule and that point was emphasised by the Court of Appeal in *Kenny*, as follows:

*"[26] Section 27(1)(b) requires the third-party notice to be served as soon as reasonably possible. This provision represents a time limit, albeit not a specified universal limitation period. It depends on the particular case. A delay in one case*

*may be reasonable whereas the same time lapse in another may be fatal to the Defendant's wish to join the alleged contributor. A notice will be considered to have been served as soon as reasonably possible if it is sought promptly by motion and the normal court processes entail delay in the listing and hearing of the application for leave to issue and serve. In this case, the parties have sensibly agreed to take the date of the issue by the Defendant of his motion. ...*

*[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."*

#### **The necessities of the case**

44. The foregoing guidance fortifies me in the views I have expressed, regardless of whether, insofar as the Defendant's application to join the Third Party, one looks at 30 May 2018 (when the motion was issued by the Defendant) or 19 July 2018 (when the Third Party Notice was served) or 03 September 2018 (when a copy of the personal injury summons was sent to the Third Party's solicitors).
45. In my view, the reference at para 28 of *Kenny* to "*the necessities of the case*" is not a narrow reference to pleadings alone. It is uncontroversial to say that, in many instances, the pleadings represent the 'tip of the iceberg' which is visible. Below the 'waterline' in the present case were issues of legal and commercial relevance including, in particular, whether Zurich would be indemnifying the proposed Third Party.
46. A useful summary of relevant legal principles was also set out by Baker J., in the High Court, in her decision in *Morey v Marymount University Hospital & Ors* [2017] IEHC 285 and it is useful to quote from that judgment as follows:

#### **"The law**

Section 27(1)(b) of the Civil Liability Act 1961, provides for the service of a third-party notice by which a Defendant may make a claim for contribution against a person who is not already party to a suit. The statutory provisions expressly require that such notice be served 'as soon as is reasonably possible'. The Act does not prescribe any period within which application is to be made, but O. 16, r. 1(3) of the Rules of the Superior Courts provides a period of 28 days for the making of application for leave to issue a third-party notice. The time provided in the Rules must be seen in the context of the statutory imperative that such an application be made as soon as is reasonably possible, and the delay in bringing any application will be measured in the light of the 28-day period provided by the Rules. As Hogan J. said in *Buchanan v. B.H.K Credit Union Limited & Ors*. [2013] IEHC 439: '... any such permissible delay will generally be measured in weeks and months and not years.' (para. 23)"

#### **Measuring delay in months -v- years**

47. Pausing at this point, it is appropriate to observe that the delay of which the Third Party complains is certainly measured in months (*under 11 months* elapsed between service of the Defence and the issuing of an application to join the Third Party) whereas *2 years and 4 months* elapsed between service of the Third Party Notice and the present application to set it aside on delay grounds. The setting-out of relevant principles in *Morey* continued as follows:

"12. Kelly J. quoted that comment with approval in the recent decision of the Court of Appeal in *Mulcahy v. A.S.L. Sports Park Ltd & Ors.* [2015] IECA 353.

13. Finlay Geoghegan J. in *Greene v. Triangle Developments Limited & Ors.* [2015] IECA 429 said that the court hearing an application to set aside a notice should:

*'... 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.'* (para. 25)

14. As Kelly J. said in *Mulcahy v. A.S.L. Sports Park Ltd & Ors.*, 'The statutory provision itself mandates an element of urgency'. In that case he considered that the delay was not explained, and noted that the Defendant was aware of the involvement of the Third Party some five years before the application to join was made. Kelly J. allowed an appeal from a decision of the High Court, which had refused to set aside the third-party notice, for delay. He did so, inter alia, by reference to the progress of the pleadings and the manner in which they were pleaded.

15. In *Molloy v. Dublin Corporation & Anor.* [2001] 4 I.R. 52, Murphy J. identified the purpose for which [the] Oireachtas imposed the requirement of reasonable expedition as follows:

*'There can be little doubt as to what that scheme and purpose was. The legislature was understandably desirous of avoiding a multiplicity of actions. Instead of Defendants against whom awards had been made instituting further proceedings against other parties liable to them in respect of the same set of facts – and indeed those Defendants in turn perhaps instituting even more proceedings against others – the Oireachtas sought to establish a situation in which the rights and liabilities of all parties arising out of a particular set of circumstances would be disposed of in the same proceedings.'* (pp. 55/56)

16. This dicta was quoted with approval by Finlay Geoghegan J. in *Greene v. Triangle Developments Limited & Ors.* It is clear also from other judgments therein identified by Finlay Geoghegan J. that the obligation is on the Defendant to serve the notice within a reasonable time, and that has the effect that the onus of showing that delay was not unreasonable is on that Defendant.

17. In *Connolly v. Casey* [2000 1 I.R. 345], the Supreme Court seems to have preferred a more flexible or broad approach requiring an analysis of the whole circumstances of the case and its general progress, as well as the general purpose of the subsection:

*'A multiplicity of actions is detrimental to the administration of justice, to the Third Party into the issue of costs. To enable a Third Party to participate in the proceedings is to maximise his right - he is not deprived of the benefit of participating in the main action.'* (p. 351)

18. *Finlay Geoghegan J. explained in Greene v. Triangle Developments Limited & Ors. that this required an 'objective assessment' of the whole circumstances of the case and its general progress. The mere fact that Defendant did not give a full explanation for delay was not the end of the assessment, and the test is whether, taking all of the circumstances into account, it was reasonable to delay. As she said, the 28-day period provided under the Rules of Court is not one that parties normally observe, or can be expected to observe in many cases. In Greene v. Triangle Developments Limited & Ors., Peart J. added a gloss to the test, that to strike out the third-party notice in that case would be disproportionate.*

19. *In Boland v. Dublin City Council* [2002] 4 I.R. 409, the Supreme Court added a further factor to the test, that the statutory requirement to move with reasonable expedition applies also to the bringing of an application to set aside such notice. That approach is consistent with the general requirement identified in *Connolly v. Casey*, that the court would look objectively at all of the circumstances, the overall requirement of the legislation, the value of expedition in the prosecution of claims, and an avoidance of a multiplicity of actions."

#### **Reasonable expedition**

48. With regard to the foregoing principles, the Third Party has not moved with reasonable expedition insofar as the bringing of the present application is concerned. Again, this is in no way to criticise the Third Party in any personal sense. It is simply to recognise the incontrovertible fact that she had the benefit of legal advice and assistance from August 2018, (immediately after being served with the Third Party Notice) and that same firm of solicitors formally came on record for her in November 2018 and remained on record for her until a notice of change of solicitor was filed on 16 November 2020, the very day the present application to set aside the Third Party Notice was brought. There is simply no evidence before this court to the effect that there was any bar to the Third Party's former solicitors bringing an application to set aside the Third Party Notice. Not only did they not bring any such application, they never as much as hinted that such an application was appropriate. Nor did they ever suggest that it would have been brought, but for a lack of funds. Thus, the evidence requires me to reject the submission by made by Counsel for the Third Party in relation to PJD solicitors who formally came on record for the Third Party in November 2019 (a year before the application to set aside the Third Party Notice): "it was never their intention to really act for her as she didn't have the money to pay them". To accept such a submission is, as I have observed earlier, to accept that



some 'Appearances' mean what they say and some do not, with no means for a Defendant of knowing the difference.

### **Inimical to justice**

49. The Third Party has not discharged the burden which they face. Nor does the evidence establish that there was a failure on the part of the Defendant to serve the Third Party Notice as soon as was reasonably possible. In the present case, it would be inimical to justice to set aside the Third Party Notice. To say this is not to create an additional test. It is simply to recognise, as Murphy J. did in *Molloy*, the purpose behind s. 27(1)(b) of the 1961 Act and the reality that, not only would it be wholly improper for this court to accede to the present application having regard to the particular facts and circumstances, the effect would be to thwart the legislature's desire to avoid a multiplicity of actions.

### **'Blinkered' approach**

50. The observation by Finlay Geoghegan J. in *Greene* that the 28-day period provided for in O.16, r.1(3) is not one that parties normally observe or can be expected to observe in many cases is reflective of the fact that it would be improper for this court to adopt a 'blinkered' approach which focuses only on the counting of days from the point at which a Defence was due and deciding when it was *technically* possible that a Third Party Notice could first be served. Yet, relying *inter alia* on the Defendant's correspondence sent to Zurich on 05 July 2017, it is precisely this type of blinkered approach which the Third Party urged on the court. That is not an approach which can be taken. Rather, a 'wide-angle lens' view is appropriate, with an analysis and an objective assessment of the whole circumstances and general progress of the case being required.

51. In the Court of Appeal's recent judgment in *O'Connor v Coras Pipeline Services Ltd.* [2021] IECA 68, Barrett J. (who, at para. 6, also stated that: "... in practice the strict timeframe for joinder under the rules is more observed in the breach than the observance...") set out, at para. 32[1] – [27], the key legal principles identifiable from the Superior Court authorities (including the Supreme Court's decisions in *Connolly* and in *Boland*; the Court of Appeal's decisions in *Greene*; in *Molloy*; and in *Kenny*). The 8th of those principles was expressed in the following terms: "[8] 'A motion to set aside the Third Party Notice should only be brought before that Defendant has taken an active part in the Third Party proceedings' (*Boland*, at p. 413, referring with approval to the judgment of Morris J. in *Carroll Cahill v Fulflex International Co. Ltd. v Fulflex International Co. Ltd.* (unreported, High Court, Morris J., 18th October, 1995)."

### **No Defence delivered**

52. In the present case, counsel for the Third Party emphasised that no Defence had been delivered prior to the present application to set aside the Third Party Notice. The thrust of that submission was to assert that no active part had been played in the Third Party proceedings. That no Defence to the Third Party Notice has been furnished is technically true as a matter of fact, but it is perfectly clear from an analysis of the evidence that this is *only* because the solicitors acting for the Third Party repeatedly sought forbearance, whereas the Defendant, through its solicitors, was most anxious to progress the claim and was prepared to issue motions for judgment in default of Appearance and for judgment in

default of Defence (but only refrained from doing so as a result of what were, either in fact or in substance, entreaties made by PJD Solicitors on behalf of the Third Party that the Defendant 'stay its hand'). In other words, it is clear from the evidence that, but for the forbearance shown by the Defendant, which was only shown as a result of requests for same made by the Third Party's then solicitors, the Third Party would have been required to deliver a Defence to the Third Party Notice. Thus, on the particular facts and circumstances in the present case, it does not seem to me that the Third Party even finds itself on the right side of principal "[8]" as identified by the Court of Appeal in *O'Connor*.

### **Conclusion**

53. Without for a moment directing any criticism at the Third Party or her then solicitors, the evidence reveals that, from August 2018, there was a firm of solicitors advising the Third Party; corresponding on her behalf; which identified her as their client; which had emphasised how keen they were to protect her interests; which firm formally came on record for the Third Party as of 06 November 2018; which firm never as much as raised the possibility that an application to set aside the Third Party Notice was justified; and never brought such an application in the more than a year they were on record for the Third Party; and never stated or suggested that such an application was merited; and never as much as hinted that the only reason it was not being brought was due to a lack of funds; which firm, against that backdrop, repeatedly sought forbearance in circumstances where, at all material times, the Defendant was trying to progress the proceedings, including by means of motions for judgment; which motions were not brought as a result of forbearance requested.
54. Carefully considering all relevant facts and circumstances I am forced to the conclusion that, by not bringing an application to set aside the Third Party Notice until 16 November 2020 (two years and four months after it was served) the Third Party did not bring the present application with anything like sufficient speed and failed to bring the present motion as soon as was reasonably possible. I stress yet again that this is not a criticism of her or her then solicitors and I say this because I am entirely satisfied that no application to set aside the Third Party Notice would have been appropriate in this case, irrespective of when issued (be that August 2018, November 2018 or at any other point) even if I took the view that the Third Party had acted with the necessary speed. This is because I am entirely satisfied that, having objectively assessed all relevant facts and circumstances and the general progress of the case, the Defendant sought the Third Party Notice as soon as was reasonably possible, in accordance with how that phrase has been interpreted by the relevant authorities.
55. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to*

*resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”*

56. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of final order. As regards the question of costs, my preliminary view is that there are no facts or circumstances which would justify a departure from the 'default position', namely, that costs should 'follow the event'. Given the upcoming Christmas and New Year holiday, in the event of disagreement between the parties as to the final form of order, short written submissions should be filed in the Central Office within 28 days.