

**THE HIGH COURT
COMMERCIAL**

[2022] IEHC 415

[Record No. 2020/2194 P]

BETWEEN

**AVONCORE LIMITED AND CANMONT LIMITED, T/A
DOUGLAS VILLAGE SHOPPING CENTRE**

PLAINTIFFS

AND

**LEESON MOTORS LIMITED, ADAM OPEL GMBH, OPEL
AUTOMOBILE GMBH AND VAUXHALL MOTORS LIMITED**

DEFENDANTS

AND

NIGHAM MOHSEN

FIRST NAMED THIRD PARTY

AND

MICHAEL N. SLATTERY AND ASSOCIATES LIMITED

SECOND NAMED THIRD PARTY

AND

**MICHAEL SLATTERY, T/A MICHAEL SLATTERY
ASSOCIATES**

THIRD NAMED THIRD PARTY

JUDGMENT of Mr. Justice Quinn delivered on the 7th day of July 2022

(Section 27(1) of the Civil Liability Act 1961 and O. 16 of the Rules of the Superior

Courts)

1. On 31 August 2019, Ms. Nagham Mohsen went shopping at the Douglas Village Shopping Centre in Douglas, Cork. She drove her Opel Zafira vehicle to the centre and parked on Level 2 of the car park, situated above the shopping centre. While she was still in the vehicle, she noticed smoke emerging from the bonnet. She got out of the vehicle and telephoned her husband and asked him to come and assist her. In the meantime, she decided

to go down to the shopping centre on the lower level with a view to seeking help. As she was doing so, the vehicle burst into flames, causing a fire which quickly spread and caused damage to adjoining vehicles, to the car park itself and to the shopping centre beneath.

2. So extensive was the damage, that the centre was closed for trade for over a year to facilitate demolition and renovation works.

3. Arising from those events, the owners of the centre are suing the manufacturers and designers of the Opel Zafira. The defendants have joined the Second and Third Named Third Parties, who were the fire safety consultants retained by the owners when the centre was refurbished in 2007 – 2009 and for its reconstruction after the fire. The Third Parties deny liability. They also say that they were not joined as soon as was reasonably possible, as required by s.27 (1)(b) of the Civil Liability Act 1961 and on that ground they have applied to set aside the Third Party Notices served on them.

4. I have concluded that in all the circumstances of this case, including the overall state of its progress, the Third Party Notices were served as soon as was reasonably possible, and that the purpose and policy of the Act would not be fulfilled if the Notices were set aside. Accordingly, the application of the Second and Third Named Third Parties will be dismissed.

The parties

5. The plaintiffs are the owners and operators of the shopping centre, which I shall refer to as “the Property”. I shall refer to the plaintiffs as “the Owners”.

6. The first named defendant distributes and sells Opel motor vehicles in Ireland, which are manufactured by the second named defendant. In 2006, the first named defendant sold the car which was later purchased by Mrs. Mohsen. She purchased it in June 2014. In this judgment I refer to Mrs. Mohsen by name or as “the driver”.

7. The second named defendant is incorporated in Germany and is the manufacturer and designer of the Opel Zafira B model, manufactured between 2005 and 2014, including Mrs. Mohsen's car.

8. The third named defendant is also incorporated in Germany. It is engaged in recall campaigns and monitoring for potential risks in Opel vehicles and making decisions where necessary to mitigate risks in Opel vehicles.

9. The fourth named defendant is incorporated in the UK. It has responsibility for the conduct and management of recalls of Zafira B vehicles in the UK and provided guidance to the first defendant in relation to the recall of Zafira B vehicles in Ireland.

10. In this judgment, the first, third and fourth named defendants are referred to as the "Opel Defendants". The second defendant is referred to as "Adam Opel".

11. The Second Named Third Party is a firm providing fire safety consultancy services for the design, construction and operation of buildings. The Third Named Third Party founded the Second Named Third Party in 1988. He makes the point that he never provided any service of any kind to the owners in his personal capacity and that he does not know why he personally has been named as a party. The Opel Defendants have accepted this point and discontinued their proceedings as against him. In this judgment I shall use the abbreviation "MSA" to refer to the Second and Third Named Third Parties.

The claims

12. The plaintiffs claim that the Zafira B model sold in Ireland in 2006, including Mrs. Mohsen's car, was manufactured and designed with a defective heating and ventilation system. They claim that the defects had the result that under certain conditions components of the heating and ventilation system can fail to operate as expected and result in fires. It is said the design of the Zafira B was such that certain parts were susceptible to corrosion which created a very serious fire risk in that model.

13. It is alleged that in 2015 there was a sudden increase in fires involving the Zafira B. It is alleged that the defendants were slow in investigating these fires and that only in late 2015 did the defendants initiate a recall of the Zafira B.

14. Mrs. Mohsen was notified of the first recall and responded by attending at the first defendant's authorised dealer in Cork on 14 December 2015. Certain works were carried out.

15. Further recalls were issued by the defendants in May 2016 and in June 2019.

16. The plaintiffs allege that Mrs. Mohsen was not notified of the second or third recall and that there were flaws in the manner of communication of those recalls.

17. The plaintiffs allege that the defendants knew or ought to have known that they had not properly ascertained all the causes of fires affecting the Zafira B models. It is alleged that they therefore failed to take adequate steps to notify all owners and failed to undertake a proper public campaign.

18. The plaintiffs say that when Mrs. Mohsen went to the property on 31 August 2019, she did so unaware of these defects and of any danger.

19. The plaintiffs say that the fire which occurred on 31 August 2019 was caused by the defective manufacture of the vehicle and that the damage resulting from the fire was occasioned by the negligence and/or breach of duty of the defendants in the design and manufacture of the car and in the design and implementation of the recall campaigns.

20. The plaintiffs also allege that the defendants knowingly or recklessly exposed owners and drivers of Zafira B models and members of the public to a risk of fire and exposed the property of owners of property adjacent to the parked vehicle to a risk of fire damage. On this ground the plaintiffs seek aggravated and/or exemplary damages arising out of what they allege is the defendants' deliberate and/or reckless conduct.

21. An amended statement of claim was delivered on 23 June 2021 in which the plaintiffs add claims for indemnity and contribution pursuant to the provisions of the Civil Liability

Act 1961 in respect of any damages or costs which they may be held liable to pay to the plaintiffs in a series of other proceedings, notably the retail tenants of the centre, in the “Callistoy” proceedings referred to below.

Defences

22. Full defences have been delivered on behalf of all of the defendants.
23. A number of particular pleas are made by reference to individual defendants, but the essence of the defence may be summarised as followed.
24. It is denied that the Zafira B was manufactured and designed with a defective heating, ventilation and air conditioning system, or that its manufacture or design created a fire risk.
25. The defendants say that a joint investigation in respect of the fire has not yet concluded and that therefore the root cause of the fire has yet to be identified and that the plaintiffs’ allegations are speculative and premature. In the immediate aftermath of the fire an investigation was commenced with the participation of experts representing many interested parties. A remarkable feature of the case is that this investigation was still, at the time of hearing this application, ongoing and even such matters as a protocol for its completion remain unagreed.
26. It is also denied that the defendants failed to properly or fully investigate the cause of any fires which occurred in Opel Zafira B models.
27. The defendants say that Mrs. Mohsen attended an Opel dealership, namely Johnson and Perrott, in response to the first recall. The defendants say that Mrs. Mohsen did not respond to the second and third recall, despite follow up letters to her.
28. The defendants plead that, if the plaintiffs have suffered and continue to suffer loss such loss and damage was caused or contributed to by acts or omissions of the driver Mrs. Mohsen. In particular, it is said that she failed to respond to some or all of the recalls, and that her conduct constitutes a novus actus interveniens and/or breaks the chain of causation.

29. In December 2020, the defendants issued third party notices joining Mrs. Mohsen as the first third party.

Contributory negligence plea

30. In its defence delivered 9 September 2020 the manufacturer Adam Opel pleads contributory negligence on the part of the plaintiffs. It pleads that the plaintiffs failed to have in place an adequate system or safeguards to prevent the outbreak of fire and/or to prevent or minimise the spread of fire at the property including the car park. It pleads that the plaintiffs failed to carry out any adequate risk assessment concerning the outbreak and spread of fire at the property.

31. On any view of the case, it is not seriously suggested that either the plaintiffs or MSA could have any culpability in relation to the ignition of the fire. The contributory negligence plea, and the claims later made against MSA, relate only to the extent of the spread of the fire.

32. On 21 December 2020, Adam Opel delivered replies to a notice for particulars of the defence.

33. In the Adam Opel replies it is alleged that the maintenance and/or management and/or supervision of the car park failed to prevent the outbreak and or spread of fire or limit the effect of the fire. It is said that the plaintiffs failed to ensure that the property had adequate and properly maintained and functioning fire detection and alarm systems, failed to adequately train and instruct staff in firefighting procedures, and failed to have fire and emergency alarms and locations where they would be readily identified by the public in the event of an emergency.

34. It continues: -

“The state of knowledge in relation to fire spread in car parks in the event of a car fire has been such that the plaintiffs and/or their advisors were or ought to have been

aware that in the event of a car fire, the fire would spread to other vehicles and that such an outcome would have been prevented by inter alia the installation of sprinklers". (emphasis added)

35. The plea of contributory negligence against the plaintiffs, made by Adam Opel in its defence of 9 November 2020 was made by the Opel Defendants for the first time in an amended Defence which they delivered on 22 December 2021. In that defence, they added the plea of contributory negligence. In particular, they said that in or about 2007 the plaintiffs had redeveloped and refurbished the property and retained MSA to provide fire safety consultancy services. They allege that the design of the car park was defective and in breach of regulatory and technical requirements in particular in the context of fire safety measures. They say that as a result the stability of the car park was not maintained for a reasonable period of time during the fire and the damage suffered was more significant than would otherwise have been suffered. Particulars of this plea include allegations that the plaintiffs failed to ensure that the fire safety design of the car park was adequate or appropriate, or complied with appropriate regulatory requirements and technical guidance documents, that the plaintiffs caused or permitted the erroneous design of fire safety measures and failed to ensure that the fire safety design of the car park included an appropriate sprinkler system and other measures which would have prevented or minimised the spread of the fire.

The Callistoy proceedings

36. On 21 August 2020, proceedings were issued by five occupiers of retail units at the centre, namely Callistoy Limited, a bookseller, Amari Shoes Limited, a shoe shop, Sheehan Family Butchers Limited, a family butcher, Layered Approach Limited, a florist, and Neville Jewellers Limited, a retail jewellery. Those proceedings were issued against the Opel Defendants, Adam Opel and against the Owners, the plaintiffs in these proceedings. MSA

were not named as defendants in those proceedings as commenced, but were later added as defendants.

37. The ‘Callistoy Plaintiffs’ allege that Canmont Limited and Avoncore Limited, in their capacities as owners, occupiers and operators of the centre, owed a duty to take care that persons did not suffer injury loss, or damage by reason of the outbreak of fire and to have in place systems and safeguards to protect against the spread of fire. It is also said that they owed a duty to take care in or about the design and construction of the premises to include the car park. They pleaded, critically, at 29(d) as follows: -

“The duty to take reasonable care in or about the design and construction of the DVSC premises, to include the car park, and thereafter in or about the management or control of the DVSC premises, to include the car park in such a manner as to limit and minimise the risk of outbreak of fire, and as to limit and minimise the spread of fire”.

38. The claims made by Callistoy against the Opel Defendants and Adam Opel are similar to those made by the plaintiffs in these proceedings. As regards their claims against MSA an amended statement of claim was delivered in those proceedings on 25 January 2022 following the joinder of MSA as defendants. The amendments include allegations against MSA which can be summarised as follows: -

- (a) That they acted for the owners in relation to the fire safety aspects of the extension and alterations to the property in 2007 to 2009, including the provision of fire safety design engineering and consultancy services.
- (b) That they knew or ought to have known of the risks and issues associated with vehicle fires and fire spread in car parks, including but not limited to the risk of combustion of cars, the likelihood and/or possibility of such fires spreading to

vehicles adjacent to the vehicle where a fire starts and that a sprinkler system in a car park would prevent or inhibit such spread.

- (c) That the MSA parties were guilty of negligence, breach of duty and breach of statutory duty in failing to possess and/or exercise reasonable skill and care appropriate to a fire safety consultant.
- (d) Failing to provide appropriate advice in relation to the fire safety design and/or engineering solution for the refurbishment of the centre, and to ensure or advise that such measures were included in the fire safety design and/or engineering solution for the refurbishment works.

39. The Callistoy plaintiffs allege that the MSA parties are directly liable to them for negligence, breach of duty and breach of statutory duty.

40. Notably, the owners, who were the clients of MSA, have not issued proceedings against MSA.

41. In their defence delivered on 29 March 2022, MSA deny all claims made against them. In addition to general denials, they make the following pleas: -

- (a) That in a compliance report which accompanied the application they delivered for a fire certificate in respect of the extension and alteration works submitted to Cork County Council on 28 February 2007, they had noted that the objective of the fire safety measures set out in the drawings and design details submitted with the application was to satisfy the obligations and requirements of the Building Regulations, 1997. They say that that report expressly noted that additional measures may be necessary to protect against the risk of property and consequential loss and that such additional measures were a matter for Canmont Limited and/or its insurers.
- (b) They deny that a sprinkler system was required in the car park.

- (c) They deny that the fire necessitated the complete closure of the centre from 31 August 2019 to 12 November 2020 and they say that they had no control over the decision to close the entire centre for such period.
- (d) They say that even if Callistoy and others suffered the alleged loss or damage, such loss or damage was not foreseeable to MSA when it provided limited services to Canmont in respect of the extension and alterations carried out at the centre.

The actions will be heard together

42. On 9 February 2021, McDonald J. heard an application by the Opel Defendants to stay the Avoncore proceedings pending further directions. The court refused the application for a stay and directed that the Avoncore proceedings and the Callistoy proceedings should proceed to trial in tandem with a view to ensuring that a single trial will take place of the issues which arise in both sets of proceedings in a structured and cost efficient way.
43. In his judgment delivered on 11 March 2021, [2021] IEHC 163, McDonald J. noted: -
“Crucially, the most significant issue that arises in both sets of proceedings is the cause of the fire and the determination of that issue, common to both sets of proceedings, will be central in any determination as to liability for the damage caused by the fire”.
44. McDonald. J. considered a number of issues regarding the manner in which the cases would be conducted both at interlocutory stages and at a trial of the actions. In directing that liability should be addressed first in the trial, and that quantum hearings may not proceed together, he made the following observation: -
“It seems to me that this is an obvious case in which liability should be addressed first. Within any such liability hearing, counsel for the Avoncore plaintiffs submitted that the most obvious issue to be addressed first is the cause of the fire. While I do not

make any determination at this point that the cause of the fire should be addressed first, it does seem to be a fairly obvious issue (which is common to both sets of proceedings) to be considered first. Thereafter, the respective liabilities of the different sets of parties can be addressed.

In my view, if the further prosecution and hearing of both sets of proceedings are not addressed in this way, there is a very real risk that court time will unnecessarily be spent on separately case managing two sets of proceedings separately”.

45. Apart from a passing reference to the possibility of the joinder of additional parties (para. 28 of judgment of McDonald J.) this judgment did not focus on any question of the possibility of the joinder of additional parties to the proceedings. This arose on different occasions in directions hearings before Barniville J.

Joinder of MSA

46. On 14 December, 2021 the defendants issued notices of motion seeking leave to join MSA as third parties. The defendants were given liberty to issue and serve the third party notices by close of business on 22 December, 2021.

47. Adam Opel served its third party notice on MSA on 22 December, 2021.

48. In its points of claim delivered on 14 January, 2022 Adam Opel seek a contribution up to and including a complete indemnity to the extent of the plaintiffs’ claims and costs in these proceedings on the grounds of MSA’s liability as a concurrent wrongdoer within the meaning of the Civil Liability Act 1961 by reason of MSA’s negligence breach of duty and/or breach of contract.

49. Adam Opel pleads that at all material times MSA was the plaintiffs’ fire safety consultant and knew or ought to have known of the risks and issues associated with vehicle fires and fires spread in carparks. It asserts that MSA failed to advise the plaintiffs properly in respect of the fire safety design of the refurbishment of the property between 2007 and 2009.

It is alleged that MSA was negligent in preparing a fire safety design and certifying the construction of the carpark in accordance with that design which failed to adequately identify assess and/or respond to the risk profile of the carpark and was inadequate in numerous respects.

50. The Opel Defendants served their third party notice on 12 January, 2022 and their third party statement of claim on 14 January, 2022. Their claims against MSA are in terms broadly similar to those made by Adam Opel including complaints that MSA failed to ensure that the fire safety design of the carpark was adequate or complied with appropriate regulatory requirements and caused or contributed to the spread of the fire.

51. Obviously, it is nowhere alleged that MSA has any case to answer in relation to the ignition of the fire in the first place. All complaints as regards MSA relate to the spread of the fire alleged to flow from defects in the design of the centre when it was being refurbished.

These applications

52. On 11 February, 2022 MSA issued applications for orders pursuant to O.6, r.8(3) of the Rules of the Superior Courts setting aside the third party notices on the ground that the notices were not served within the time laid down by O.16, r.1(3) and/or as soon as was reasonably possible, as required by s.27(1)(b) of the Civil Liability Act 1961.

53. The applications are grounded on affidavits sworn by Mr. Michael Slattery on 11 February, 2022.

54. MSA submit that a reading of the pleadings shows that as early as August 2020 when Callistoy delivered its statement of claim it was clear that the matter of the design of the property in the refurbishment works was an issue. This is a reference to the plea in the Callistoy proceedings as against the owners that they were guilty of a failure to design construct maintain and manage the centre in such as manner as would limit the risk of outbreak of fire and, minimise the spread of fire.

55. MSA refer also to the defence delivered by Adam Opel on 9 November, 2020 in which it is pleaded by way of contributory negligence plea against the owners that they failed *inter alia*, to design the carpark in such a manner as would limit and minimise the spread of the fire.

56. MSA refer to the Adam Opel replies to particulars of the defence delivered on 21 December, 2020 in which specific allegations are made regarding such matters as the absence of an automatic sprinkler system which it is said would have limited the fire and the particular allegation that the plaintiffs “and/or their advisers” were or ought to have been aware that in the event of a car fire the fire would spread and that the outcome that occurred would have been prevented by *inter alia*, the installation of sprinklers.

57. MSA claim that the defendants had sufficient information from at the latest August 2020 when they received the Callistoy statement of claim, to know that a claim might lie against MSA. They say that the delays which occurred before the move in December 2021 to join them as a third party are not fully explained and that those that are explained are not justified.

58. MSA also claim that they have been prejudiced by the delay and that they were excluded from having an expert on their behalf participate in the investigation process which commenced as early as September 2019. They claim that if they had been joined on a timely basis they could have performed their own inspection and conducted their own enquiries and are prejudiced by such exclusion.

59. The defendants say that when all factors are taken into account they have moved as soon as reasonably possible. They say that the content of Callistoy statement of claim and the Adam Opel defence which relate to the construction and design of the property is an allegation made against the Owners of the centre and is not the same as the case now being made against MSA, which is a claim for professional negligence.

60. The defendants say that they could not have moved to join MSA until they possessed sufficient information to determine that there was a credible and stateable case in professional negligence against that firm. They say that such information included the advice of a competent expert which only came to hand in November 2021, and that when they moved in December 2021 they did so as soon as reasonably possible.

61. The defendants also say that MSA are not prejudiced and had ample opportunity to conduct their own inspection and inquiries. They submit that insofar as MSA were not invited to participate in joint investigations of the fire it was not a matter for the defendants to invite them to do so. They say that they were not in control or ownership of the centre and therefore were not the parties who could grant access to the centre to MSA for the purpose of conducting any inspection.

62. The defendants say that MSA were on notice from a letter written to them by the solicitors for the owners of the centre on 9 September, 2019 that they could be fixed with liability for the loss and damage suffered and that from that very early date they had every opportunity to insist on inspection and participation in any joint investigation which was being undertaken.

Civil Liability Act 1961

63. Section 27 of the Act provides as follows: -

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

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

(b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. If such third-party notice is not served as aforesaid, [i.e. as soon as is reasonably possible] the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed.”

Order 16 of the Rules of the Superior Courts – third party procedure

64. Order 16.

“(1) Where in any action a defendant claims as against any person not already a party to the action (in this Order called ‘the third-party’):

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third-party or between any or either of them,

the Court may give leave to the defendant to issue and serve a third-party notice and may, at the same time, if it shall appear desirable to do so, give the third party liberty to appear at the trial and take such part therein as may be just, and generally give such directions as to the Court shall appear proper...

(2) The application for such leave shall be made by motion on notice to the plaintiff.

(3) Application for leave to issue the third-party notice shall, unless otherwise ordered by the Court, be made within twenty-eight days from the time limited for delivering the defence or, where the application is made by the defendant to a counterclaim, the reply.

2. (2) The notice shall, unless otherwise ordered by the Court, be served within twenty-eight days from the making of the order, and with it there shall be served a copy of the originating summons and of any pleadings delivered in the action.

8. (3) The third-party proceedings may at any time be set aside by the Court.”

65. Before I leave O. 16, r. 8, it is appropriate to note that it has been recognised in numerous cases that the requirement to serve a third party notice within 28 days of the time limited for delivery of the defence, is frequently honoured in the breach (see observations of Barrett J. in *O’Connor v. CIE and Ors* [2021] IECA 68).

66. By contrast however, the requirement under s. 27 (1) (b) to move to join third parties “as soon as reasonably possible”, is a statutory imperative. If a notice is not served “as soon as is reasonably possible” it is not a notice served in accordance with the section (per Finlay C.J. in *Board of Governors of St. Lawrence’s Hospital v. Staunton* [1990] 2 IR 31).

67. In a case where a notice is set aside pursuant to the provisions of O. 16, r. 8(3), no such notice will have been validly served and a defendant seeking to fix a third party with liability as a concurrent wrongdoer must rely on the discretion conferred on a court in separate proceedings as provided for in the second sentence of s. 27 (1) (b). The effect of that sentence is that where a third party notice has not been served validly or at all it will still be open to the defendant to maintain an action against the potential third party but the court on hearing such an action has a discretion to refuse to grant any order for contribution.

Leading cases on section 27

68. In *Molloy v. Dublin Corporation & Ors.* [2001] 4 IR 52, Murphy J. for the Supreme Court, considered the objective of s. 27 in the context of the scheme of the Act: -

“There can be little doubt as to what that scheme and purpose was. The legislature was understandably desirous of avoiding a multiplicity of actions. Instead of defendants against whom awards had been made instituting further proceedings against other parties liable to them in respect of the same set of facts — and indeed those defendants in turn perhaps instituting even more proceedings against others — the Oireachtas sought to establish a situation in which the rights and liabilities of all parties arising out of a particular set of circumstances would be disposed of in the same proceedings. It is for that reason that a defendant was given the right, with the approval of the Court, to serve a third party notice on a potential defendant so that any claim against him could be disposed of at the same time as that of the claim against the actual defendant. This procedure had attractions for all of the parties and was desirable in the public interest. Nevertheless, the legislature did not preclude an unsuccessful defendant in the original proceedings from instituting a substantive action against some other party who, the actual defendant contended, was liable to him either in tort or in contract. What the 1961 Act did provide was that where the actual defendant in the original proceedings failed to avail of the third party procedure by serving the third party notice "as soon as is reasonably possible" and resorted to his original cause of action the relief which he might have claimed therein was subject to the statutory discretion of the Court to refuse to make an order for contribution in his favour.

.....

The terms in which the time limit was expressed do appear severe. The use of the word "possible" rather than the word "practicable", as is invoked elsewhere, suggests a brief and inflexible time limit. It might suggest that if it is physically possible to serve the appropriate

notice within an identified period that any further delay would be impermissible. However, such a draconian approach would be inconsistent with the nature of the problems to be confronted by a defendant and of the decisions to be made by him or his advisors. The statute is not concerned with physical possibilities but legal and perhaps commercial judgments. Proceedings cannot and should not be instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon. It is in 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.

.....

The onus is on the person seeking leave to serve the third party notice to prove the application is brought within the statutory time limit”.

69. In *Connolly v. Casey* [2000] 1 IR 345, Denham J. (for the Supreme Court) considered the manner in which the court should assess delay, namely: -

*“In analysing the delay - in considering whether the third party notice was served as soon as is reasonably possible - the whole circumstances of the case and its general progress must be considered. The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see *Gilmore v. Windle* [1967] IR 323. It is appropriate that third party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice, to the third party and to the issue of costs. To enable a third party to participate in the proceedings is to maximise his rights - he is not deprived of the benefit of participating in the main action”.* (emphasis added)

70. Denham J. also emphasised the relevance of the circumstances of each case when she stated: -

“However, this is a case with particular facts in a suit alleging professional negligence and the decision does not endorse delay - rather it seeks to encourage a modern management of litigation to avoid a multiplicity of suits”.

71. In *Greene v. Triangle Developments Ltd. & Ors.* [2015] IECA 249, Finlay Geoghegan J. reviewed the case law including “Connolly” and “Molloy”, and said the following: -

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

26. I would respectfully say that it appears to me that the trial judge in this case fell into error by not making that objective assessment. It appears to me he was justified on the evidence before him in saying that there had not been a full or proper explanation, particularly by reason of the lack of any evidence from Orr as to why the expert's report was not obtained before 9th December, 2005, but in accordance with the Supreme Court judgment in Connolly v. Casey, that should not have been the end of the assessment. He was required to consider objectively whether, in the whole circumstances of the case and its general progress, the period of time up to the date of service of the third party notice and in the special circumstance case, 9th March, 2006 meant that it was served as soon as was reasonably possible.

27. Approaching the relevant dates and the entire circumstances in that case, I have formed the following views. Firstly, this was an action where the third party claim was a claim in professional negligence. And it is accepted by both parties, in accordance with indeed what was stated, inter alia, by the Supreme Court in Connolly -v- Casey, that it was appropriate

that an expert's report be obtained before any third party notice was served. Therefore, following the approach of Mrs. Justice Denham, objectively it was reasonable to wait until the expert's report was obtained.”

72. Before leaving the discussion of these cases, it is appropriate to refer to the weight which MSA attaches to the judgment of Finlay C.J. in Board of Governors of St. Laurence’s Hospital v. Staunton [1990] 2 IR 31. A remarkable feature of that case was that the application to serve a third party notice was made after the trial of the action, albeit that an appeal on both liability and quantum was then pending. Finlay C.J. stated the following: -
“In my view, the application brought after the conclusion of the action by the plaintiff against the defendants for liberty to serve a third-party notice could not, under any circumstances, be construed as an application to serve a third-party notice as soon as was reasonably possible. It is clear from the facts which I have outlined that probably from the month of July, 1984, when particulars were filed, the defendants were aware of the nature of the claim which was being brought against them by the plaintiff. They may have been unaware as to whether that claim would succeed or not, but they were aware of what the nature of the claim was, and it must follow, it seems to me, that they were also aware at that time of any potential claim for contribution they might have against this third party”. (emphasis added)

73. The use of the phrase “aware of any claim they might have against this third party” has been cited in submissions in support of a proposition that the moment a defendant considers that there “might” be an arguable cause of action against a third party is the date when time starts to run in assessing any delay. Finlay CJ used the term “might” in describing the facts of ‘Staunton’ when he said that the defendant had been aware of the nature of the claim against him and that it must follow that he was aware of a potential claim against the third party. He did not, as he has been submitted, declare generally that the test was that a defendant “might” be aware of such a claim. As I shall discuss later, it is one thing to

conclude that a defendant “might” have a claim against a third party, but it is an entirely different matter to make an informed judgment, based, in the case of a professional negligence claim, on expert advice that a sustainable and credible cause of action rests against such a third party.

74. In *S. Doyle & Sons Roscommon Limited v. Flemco Supermarket Limited & Ors.*

[2009] IEHC 581 Laffoy J considered the application of s.27. Firstly, the court found that the application to set aside a third party notice served by the second named defendant “Rhatigan” was not brought as soon as reasonably possible, (having been brought only after delivery of a defence to the third party proceedings and after raising of particulars on the third party statement of claim), and held that in those circumstances the third party notice should not be set aside.

75. The court found that the third party notice served by the first named defendant (“Flemco”) was not served as soon as reasonably possible. However, the court decided in that case that it ought not in the circumstances be set aside. Laffoy J. explained her decision as follows: -

“If this were a ‘standalone’ application, despite the obvious necessity for Flemco to obtain expert advice, in my view, it could not be said that the third party notice was served as soon as reasonably possible.

*However the application is not a ‘standalone’ application and the fact is that, having regard to the decision I have made in the application against Rhatigan, the third party proceedings by Rhatigan against Griffin remain and will be litigated with the plaintiff’s claim. If Flemco third party proceedings are set aside it is still open to Flemco to institute separate proceedings against Griffin, subject to the discretion of the court under s.27(1)(b) of the Act of 1961. Having regard to the overriding purpose of s.27(1)(b) as outlined by Murphy J in *Molloy v. Dublin Corporation*, which is to*

avoid a multiplicity of actions, it seems to me that, in the unusual circumstances of this case the proper course is to refuse the application to set aside Flemco's third party proceedings against Griffin, as the issues which arise on those proceedings are similar to the issues which will have to be dealt with in Rhatigon's third party proceedings against Griffin."

76. In this case MSA will be a defendant in the Callistoy proceedings, being heard at the same time as these proceedings, and therefore cannot escape participating in the trial.

77. Having considered those and other judgments cited, the following principles inform the court's assessment in this case of whether the notices were served as soon as reasonably possible.

- (1) The purpose of Section 27 is to avoid a multiplicity of legal proceedings arising from the same event or set of events.
- (2) The obligation to move as soon as possible is imposed to avoid unnecessary delay to the progression of the plaintiff's action (see Ryan P in *Kenny v. Howard* [2016] IECA 243). This principle is essentially about protecting the plaintiff's position while at the same time ensuring that all appropriate parties are before the court.
- (3) The court needs to examine the date at which it can be said that the defendant had sufficient information to enable it to make an informed decision, based on appropriately researched advice as to whether a case for contribution can be made out.
- (4) It is not appropriate to join any third party a defendant considers "might" have such a liability. A defendant must have been in possession of sufficient information to make the informed and advised judgment that such a cause of action is credible.

- (5) Where the contribution claim arises from an allegation of professional negligence a factor to be taken into account is the long established requirement that such an allegation is made and proceedings commenced only after first ascertaining that there are reasonable grounds for doing so. It is an abuse of process to commence professional negligence proceedings without having followed this course of action and, with certain exceptions, having first obtained an appropriate expert report to inform such a decision. (See *Doyle v. Flemco, Mangan v. Dockery* [2020] IESC 67, *Ashford Castle Limited v. EJ Deacy Contractors and Maintenance Limited* [2021] IEHC 549 and *Connolly v. Casey (op cit)*).
- (6) The court will be required to balance the statutory imperative in s.27(1) to move as soon as is reasonably possible against the duty of a party and its advisors to first obtain the necessary information and advice, including expert reports.
- (7) It is not essential that perfection be achieved in terms of the analysis of a potential claim against a third party and account must be taken of the balance referred to in the preceding paragraph.
- (8) An expert consulted for the purpose of this analysis is himself under a duty to have equipped himself with all information and facts required to make an informed report.
- (9) The court will take into account what steps have been taken by the relevant parties to obtain the necessary information and to brief an appropriate expert. This will engage a consideration of whether the expert was instructed and briefed on a timely basis.
- (10) Since the purpose of the section is to avoid a multiplicity of legal proceedings and at the same time to avoid imposing delay on the plaintiff in pursuing its

remedy, the question of prejudice to the third party is of limited weight. In certain cases it can be said that a third party may even benefit by participating in the trial.

(11) If a third party can demonstrate prejudice this is a factor which can be taken into account. However, a relevant consideration will be whether that prejudice has been caused by the defendant seeking to join him. (see *Buchanan v. BHK Credit Union Limited & Ors.* [2013] IEHC 439 and *Kenny v. Howard* [2016] IECA 243)

(12) The court will have regard to the question of the utility of setting aside the notice in the context of the overall progress of the case and the objective of the section (see *Doyle v. Flemco*).

Chronology

78. The affidavits exchanged on this application, understandably, focus on the events which each of the parties consider to be most relevant. An attempt has been made at assisting the court with an agreed chronology, but again of necessity and understandably, the parties all focus on their “favoured” events and intervals in time. I have identified in summary form the timeline of events relevant to my decision and the significance of certain of the events.

Events before the fire

2003	MSA were retained by Canmont to provide fire safety consultancy services in relation to a proposed extension and alterations to the Douglas Village Shopping Centre.
December 2003	MSA met with Canmont and with architects and other professional advisors retained in the project. They engaged on behalf of Canmont with Cork County Council and Cork City Council (the property then straddling the boundary of both authorities).
October 2006	planning applications for amendments to the intended extension works were lodged with the relevant authorities and this included amendments to fire safety certificate applications which accompanied the planning applications.
5 November 2008	MSA made formal application to Cork County Council in respect of fire safety certificates.
2008 - 2009	The refurbishment and extension of the centre was undertaken
July 2009	fire safety certificates were issued by Cork County Council incorporating 16 conditions.

Events of 2019

31 August 2019	The fire occurred at the property in Douglas
9 September 2019	A joint investigation was commenced, coordinated by AIG, insurers to the plaintiffs and the driver, and possibly other parties. A Mr. Lee Masson was the expert retained by AIG. A remarkable feature of the joint investigation is that even at the hearing of this application on 30 and 31 March 2022, the investigation was ongoing. The court has been informed that some 20 experts representing more than sixteen insurers and other parties are engaged in the investigation. A protocol to inform the finalisation of the conclusion of experts from the investigation has not yet been agreed.
9 September 2019	<p>Messrs. J.W. O’Donovan, solicitors then acting for Canmont Limited wrote to MSA in relation to the fire. This letter is of great significance for my decision and it is important to quote it in full: -</p> <p><i>“We are instructed by Canmount Limited having its registered office at 48 Upper Drumcondra Road Dublin. As you are aware, the company is the owner of Douglas Village Shopping Centre, Douglas, Cork. The shopping centre sustained extensive damage in a fire which occurred in the multi – storey car park on 31 August 2019. The nature of this damage is such that extensive demolition and reconstruction works will be required. In consequence, the centre is likely to remain closed pending completion of these works. Forensic and engineering investigations into the cause of the fire and the extent of the resulting damage are continuing. The initial indications are that the fire originated in a car which was parked in the car park. As your firm were the fire safety consultants involved in the design and construction of the multi storey car park, we have been instructed to write to you to put you on notice that, in the event of that the design and/or construction of the car park should be found to have caused or contributed to our client’s losses, our client reserves the right to seek recovery of those losses from your firm. We therefore respectfully suggest that you immediately forward this letter to your insurers. As it is hoped to commence the necessary demolition works as a matter of urgency, should you require facilities to carry out a site inspection prior to commencement of these works, you should immediately contact our client’s loss assessor, Mr. Alan Fitzgerald, to make the necessary arrangements (contact details given). Both our client and this firm regret having to write to you in this manner.</i></p> <p><i>Yours faithfully, J.W. O’Donovan”.</i></p>
	<p>Canmount has never issued proceedings against MSA. Nonetheless, this letter is important for two reasons:</p> <ul style="list-style-type: none"> A) It put MSA on notice of a potential claim against it B) It invited MSA to make contact to conduct a site inspection.
10 September 2019	Mr. Slattery received a telephone call from Mr. Eamon Leonard on behalf of Canmont, inviting him to inspect the scene of the fire.

11 September 2019	<p>Mr. Slattery attended at the car park where he met with Mr. Leonard. In his affidavit grounding the application now before the court he states that a safety cordon had been erected some distance from the seat of the fire and he was informed by Mr. Leonard that he was not permitted to cross beyond the cordon. He took a number of photographs which he has exhibited.</p> <p>The photographs were taken between 9:12 a.m. and 9:26 a.m. that day. The photographs show several burnt out vehicles which had not by that time been removed from the car park and other aspects of the scene. MSA say that they were precluded from performing a proper inspection of the scene. Whatever about the events of 11 September 2019, it is clear that they had been invited to inspect, and never protested that they had been deprived of inspection facilities until making that point on this application.</p>
27 September 2019	<p>A remote visual inspection of Ms. Mohsen’s car was undertaken by the use of a robot. This was because the vehicle was still in its original location and general access to that location by persons was not permitted due to structural and safety concerns.</p>
2 October 2019	<p>Canmont retained MSA as its fire safety consultant in respect of the reinstatement works required to the property.</p>
11 October 2019	<p>Demolition of the property commenced.</p>
21 October 2019	<p>The vehicle was removed from the car park and placed in a locked and sealed container.</p>
19 November 2019	<p>the Chief Fire Officer of Cork City Council contacted MSA and requested it to conduct an analysis and modelling in respect of the fire.</p>
3 – 4 December 2019	<p>A physical examination of the vehicle was undertaken by the joint investigation expert group.</p>
20 December 2019	<p>MSA delivered its report to Cork County Council Fire Department. That report is not before the court on this application.</p> <p>In his second affidavit sworn in relation to this application on 4 March 2022, Mr. Slattery says (para. 13) that the task which he was conducting for Cork City Fire Department was to “model temperature exposure of steelwork to a sprinkler controlled fire in the car park”. He says that the modelling was based on recently published research data and information on car park fires and did not require any detailed investigation including forensic investigations of either the vehicle or the surrounding area of the car park in which the fire occurred. He says that it was not designed to investigate or establish whether the spread of the fire was caused by the design and or/safety of the car park, being the allegation now made against MSA.</p> <p>The instructions and the report given by Mr. Slattery to Cork City Council are not exhibited. His explanation as to the scope of that assignment and report may be correct and is not contradicted by the defendants. However, it is clear that from such an early stage he was charged by Cork City Council with making a report arising from the fire. Taking this fact together with the then very recent letter which he</p>

	had received from J.W. O'Donovan on 9 September 2019, it is difficult to understand how he could not, in the context even of an overview of the matter, have considered questions concerning the potential liability of MSA.
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Events of 2020

13 – 14 January 2020	a physical examination of the car space at the centre was performed by the all-party expert group. By this date demolition works had commenced and had progressed sufficiently to make such a visit and inspection safely possible.
19 March 2020	the plenary summons issued in these proceedings.
23 March 2020	The statement of claim was served on the Opel Defendants only.
23 March 2020	The expert group was informed by AIG's expert Mr. Masson that CT scanning of the components removed from the vehicle had been completed.
23 March 2020	The investigation was thereafter hindered by the restrictions caused by the Covid – 19 pandemic. This included such issues as the ban on travel and the requirement for social distancing. It did not cause a full cessation of the investigation but was a factor in disrupting physical meetings and inspections and appears to have contributed to the fact that the investigation is ongoing even to this date.
7 April 2020	CT scans of the components of the vehicle were circulated to the expert group.
14 – 16 April 2020	A metallurgical examination of the extracted components was undertaken.
June 2020	the Opel Defendants retained a structural engineer, Mr. Ciaran McIntyre.
25 June 2020	the statement of claim was delivered to Adam Opel.
13 July 2020	An order was made by Barniville J. entering the proceedings in the Commercial List. Initial directions were applied for and proposed in relation to exchanges of notices for particulars and the matter was adjourned to 27 July 2020. No directions were given as to the date by which a defence should be delivered.
22 July 2020	Adam Opel (by its solicitors McCann Fitzgerald) approached Dr. Denis Wood, a forensic engineer.
27 July 2020	Barniville J. made directions regarding dates for the replies to a notice for particulars and adjourned the directions hearing to 5 October 2020. Again, no direction was given as to the date by which the defence should be delivered.
21 August 2020	The Callistoy proceedings were issued.
24 August 2020	the statement of claim was delivered in the Callistoy proceedings to all defendants then being the Opel Defendants, Adam Opel, the driver Mrs. Mohsen and the owners Canmont and Avoncore.

8 September 2020	An order was made entering the Callistoy proceedings in the Commercial List.
9 September 2020	Dr. Denis Wood was retained formally by Adam Opel.
21 September 2020	Mr. McIntyre the structural engineer retained by the Opel Defendants, approached Cork City Council seeking access to files relating to the property and the incident.
4 October 2020	Matheson solicitors for the Opel Defendants contacted Kennedys, the solicitors for Canmont and Avoncore requesting letters of consent to facilitate an inspection of the files and plans of the centre by Mr. McIntyre.
5 October 2020	Barniville J. directed that the defences be delivered by 9 November 2020.
20 October 2020	Messrs. Kennedy wrote to Matheson enclosing a zip file of fire safety certificates relating to the centre. They did not provide the letter of consent for inspection of the files of Cork City Council which had been requested.
3 November 2020	Good and Murray Smith Solicitors acting for the Callistoy plaintiffs wrote to Kennedys requesting a letter of consent to the inspection of files at Cork City Council.
9 November 2020	the Opel Defendants and Adam Opel delivered their defences. The defence of Adam Opel includes the allegation of contributory negligence regarding the adequacy of the fire safety systems at the centre, including their design.
11 November 2020	McCann Fitzgerald solicitors for Adam Opel and Good and Murray Smith solicitors for Callistoy wrote to Kennedys again requesting letters of consent to inspection of files at Cork City Council.
11 November 2020	The centre reopened.
23 November 2020	Good and Murray Smith wrote again to Kennedys requesting a consent letter.
30 November 2020	By order of Barniville J., the driver, Mrs. Mohsen was joined as a third party in these proceedings. (Mrs. Mohsen was already a defendant in the Callistoy proceedings issued on 21 August 2020).
1 December 2020	McCann Fitzgerald for Adam Opel again wrote to Kennedys requesting the consent letter.
7 December 2020	Date of expiry of 28 days from the date fixed by Barniville J. for delivery of the defences.
15 December 2020	Kennedys/Canmont issue the requested letter of consent to all parties to inspect files at Cork City Council.
15 December 2020	McCann Fitzgerald contacted Cork City Council to arrange inspection of files.
16 – 18 December 2020	A “destructive examination” of certain components retrieved from the vehicle was conducted on a hybrid basis, having regard to social distance requirements still prevailing.
17 December 2020	Mr. McIntyre contacted Cork City Council to arrange inspection of files.
18 December 2020	the Opel Defendants delivered a third party statement of claim to the driver.

21 December 2020	Adam Opel delivered a third party statement of claim to the driver.
21 December 2020	Dr. Wood on behalf of Adam Opel attended at Cork City Council for an initial inspection of its files. The time allowed for this inspection was limited and he was unable to complete his inspection.
21 December 2020	<p>Adam Opel delivered its replies to the notice for particulars of the defence and in particular regarding the claims of contributory negligence. These replies reference the absence of sprinklers and of other fire resistant materials at the car park.</p> <p>In these particulars reference is made to the property being “not constructed in accordance with the Building Regulations 1997”. It is said that an automatic sprinkler system would have limited the fire to the vehicle and prevented its spread. No express reference is made in these replies to the matter of the design of the car park, although reference is made to the prevailing state of knowledge in relation to fire spread in car parks generally being such that “the plaintiffs and/or their advisors were or ought to have been aware that in the event of a car fire the fire would spread to other vehicles and that such an outcome would have been prevented by inter alia the installation of sprinklers”.</p>

Events of 2021

4 January 2021	Mr. McIntyre contacted Cork County Council again for access to files.
22 January 2021	Dr. Wood is requested by Adam Opel to recommend an expert in fire safety consultancy. In his affidavit sworn on 25 February 2022 Dr. Wood states that this would be an expert “who could address with the necessary like skill and specialisation the question of the potential liability and professional negligence of the MSA parties”.
5 February 2021	McCann Fitzgerald made contact with an independent fire safety expert on behalf of Adam Opel. The identity of this expert has not been disclosed. I shall refer to him/her hereafter as the “fire safety expert”. This is the person whose expert advice it is now said was required before a decision could be made whether to join MSA.
9 February 2021	The Opel defendants applied for a stay of these proceedings in circumstances where the issues between the parties to these proceedings are substantially the same as those that arise in the Callistoy proceedings. The Opel defendants contended that it would make sense, both in terms of costs and court time, if the issues were determined solely in the Callistoy proceedings and that in the meantime these proceedings should be stayed. This application was refused and I shall return later to the decision of McDonald J. on that application.
11 February 2021	The driver Mrs. Mohsen delivered her defence to the Opel Defendants third party statement of claim.
15 February 2021	The Adam Opel defendants formally retained the independent fire safety expert.
2 March 2021	Further CT scans were conducted on vehicle components.

March 2021	Dr. Wood (for Adam Opel) submitted to Cork City Council a request pursuant to the Freedom of Information Act for certain documents and correspondence relating to the property.
March 2021	the fire safety expert retained by Adam Opel made inquiries to Cork City Council and to Cork County Council Fire Brigade for any reports in relation to the incident.
5 March 2021	The fire safety expert indicated that he had conducted a preliminary assessment. He informed Adam Opel that he required additional information and documents including an incident report form from the local authority before advising further.
8 March 2021	Adam Opel make their request for discovery of documents to the plaintiffs.
11 March 2021	<p>McDonald J. delivered his judgment on the application of the Opel defendants for a stay. McDonald J. refused the stay and ruled as follows:</p> <ul style="list-style-type: none"> - (a) That the Avoncore and Callistoy proceedings should continue to be case managed together. (b) That both cases should proceed to trial in tandem with a view to ensuring that a single trial will take place of the issues which arise in both sets of proceedings. (c) That the cases should go forward on the basis that all issues of liability will be addressed separately from quantum. Accordingly, the joint hearing would be confined to issues of liability. Issues of quantum would have to be addressed individually in both cases at a later point. <p>McDonald J. made further directions regarding the conduct of the proceedings and any further interlocutory applications.</p>
15 March 2021	Matheson on behalf of the Opel defendants obtained certain fire safety files from Cork City Council pursuant to the Freedom of Information Act request submitted by their expert, Mr. McIntyre.
22 March 2021	The expert retained by Adam Opel obtained the fire certification files from Cork Council.
25 March 2021	Cork City Council Legal Department confirm that the Fire Services Department is compiling a fire incident report.
9 April 2021	Cork City Council provide to Dr. Woods on behalf of Adam Opel certain documents requested pursuant to the Freedom of Information Act and decline other documents.
14 – 16 April 2021	Certain components from the driver’s vehicle are subjected to a metallurgical examination. This is conducted on a socially distant basis having regard to restrictions still in place and the number of participants.
7 May 2021	Cork City Council inform McCann Fitzgerald (for Adam Opel) that they were in receipt of certain answers from firefighters and would compile information in a provisional report.

18 May 2021	the Opel defendants deliver a reply to the driver's defence to the third party statement of claim.
23 June 2021	the plaintiffs deliver an amended statement of claim. The material amendments made are to add claims against the defendants for indemnity and/or contribution in respect of any such damages or costs which the plaintiffs may be held liable to pay to the plaintiffs in the Callistoy proceedings and in other proceedings against them arising from the fire.
28 June 2021	Cork City Council announce that the incident report may not be available for several further months.
28 June 2021	McCann Fitzgerald (for Adam Opel) instruct the fire safety expert to proceed to finalise his report, notwithstanding the absence of the City Council incident report.
30 June 2021	The results of the metallurgical examination of the vehicle components which had been undertaken on 14 – 16 June 2021 are circulated to the all-party expert group.
July and August 2021	There is a dearth of information as to any events during these months.
September 2021	Information emerges through discussions between experts that the driver of the vehicle had brought her vehicle to a local independent garage in Cork on the day immediately prior to the fire and repairs to the vehicle were undertaken. This information was not previously known to any of the experts.
5 October 2021	the fire safety expert delivered a draft report to McCann Fitzgerald/ Adam Opel.
8 October 2021	Adam Opel / McCann Fitzgerald hold a consultation with the fire safety expert.
	In a supplemental affidavit of Mr. Roderick Bourke solicitor on behalf of Adam Opel, reference is made to a series of contacts between his colleague Mr. Daniel Lucy of McCann Fitzgerald and the fire safety expert between 5 February 2021 and 1 December 2021. This is said to be a reference to "calls" between Mr. Lucey and the expert and it includes references to calls on 26 July 2021 and 30 August 2021. Further calls are listed in the schedule as having taken place in each month between February and December including four calls in March, three in May, four in September, four in October and three in November. Details of the substance of these calls are not provided save that Mr. Bourke says that during this period McCann Fitzgerald remained in regular communication with the fire safety expert "with a view to obtaining a finalised report as soon as reasonably possible while bearing in mind the particular safeguards for professional negligence suits". He refers also to consultations having been held with the expert "throughout this period".

18 November 2021	McCann Fitzgerald received from the fire safety expert a “finalised draft report”.
November 2021	McCann Fitzgerald for Adam Opel inform Matheson for the Opel Defendants that the fire safety expert has advised that there is a basis for a claim in negligence against MSA. There is no evidence before the court of any engagement directly between the Opel Defendants or their solicitors Matheson and the fire safety expert retained by Adam Opel, or with any equivalent fire safety expert.
22 November 2021	McCann Fitzgerald notify Kennedys for the plaintiffs and Goode and Murray Smith for the Callistoy plaintiffs of the intention of Adam Opel to apply to join MSA as third parties. No objection is made by the plaintiff to such joinder.
23 - 26 November 2021	Twomey J. hears contested applications for discovery of documents.
3 December 2021	McCann Fitzgerald notify MSA of the intention of Adam Opel to apply to join MSA as a third party to the proceedings.
9 December 2021	The Opel defendants notify MSA of their intention to join MSA as a third party.
14 December 2021	The Opel defendants and Adam Opel issue motions to join MSA as a third party.
16 December 2021	Twomey J. makes the order joining MSA as third party and directs that the third party notice be issued and served by 22 December 2021.
16 December 2021	Twomey J. also ordered the joinder of MSA as a defendant in the Callistoy proceedings. In the course of his ruling on 16 December 2021, Twomey J. declined to make an order which was sought to the effect that there should be no further applications to join third parties to the proceedings, having regard to the fact that the joint investigation was still not completed.
22 December 2021	Adam Opel serve its third party notice on MSA.

Events of 2022

12 January 2022	the Opel defendants serve third party notice on MSA.
26 January 2022	Twomey J. delivers his judgment regarding disputed discovery categories.
14 January 2022	the Opel defendants deliver their third party claim to MSA and Adam Opel deliver its third party points of claim to MSA.
February 2022	the joint investigation is still incomplete and a draft protocol for the completion of the work of the joint investigation remains unfinalised.
25 March 2022	the order of Twomey J. for discovery in both these proceedings and the Callistoy proceedings is made, arising from the judgment of Twomey J.

	delivered on 26 January 2022. A period of nine months is allowed for the making of discovery.
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When did time start to run?

79. Applying strictly the provisions of O. 26, r. 3, the defendants would be required to deliver the third party notices within 28 days from the time limited for delivering the defence.

80. The statement of claim was delivered to the Opel defendants on 23 March 2020. Under the rules therefore their defence would have been due for delivery on 24 March 2020. Therefore, the time limit under O. 16, r. 3 would have expired on 20 April 2020.

81. The statement of claim was served on Adam Opel on 25 June 2020. The time limited for delivery of its defence therefore expired on 23 July 2020 and on that basis the time limit under O. 16, r. 3 would have expired on 20 August 2020.

82. When the proceedings were first issued, the defendants were notified that the plaintiffs intended to apply for entry into the commercial list of this Court. It is the practice that the timetable for exchange of substantive pleadings is directed by the commercial court at directions hearings. Therefore, it was known from the very outset that the timetable for delivery of a defence would be governed not simply by the Rules of Court, but by such directions as may be made by the court.

83. It was not until 5 October 2020 that directions were made as to the time for delivery of the defence when Barniville J. directed that the defences be delivered by 9 November 2020. If one takes that as the date for delivery of the defence, then the period of 28 days thereafter expired on 7 December 2020. In circumstances where it was known at the outset that the time for delivery of the defence would be subject to such directions, I treat that date as the date on which, without more complexity, any third party notices ought to have been served. It is then a matter of assessing delay thereafter.

84. In affidavits and in submissions it has been suggested by MSA that the relevant time for delivery of third party notices should be counted from dates earlier in 2020, largely in the

context of other pleadings and information available to the defendants. However, it has not seriously been pressed that the third party notices ought to have been delivered before the time directed by the court for delivery of the defence. That being the case, it seems to me that the date when time started to run, even applying O. 16, r. 3 to the court directed timetable, was 7 December 2020.

85. The application for leave to join MSA was issued on 14 December 2021. The order was made on 16 December 2021 and the third party notices were issued and served on 22 December 2021 by Adam Opel and on 12 January 2022 by the Opel defendants.

86. I do not consider that the period between the issue of the motions to join MSA and the service of the third party notices on 22 December 2021 and 12 January 2022 were unreasonable and therefore the focus of the analysis of the delay is the period 7 December 2020 to 14 December 2021.

Relevance of pleadings to the knowledge of defendants

87. The essence of the case made by Adam Opel against MSA is as follows: -

- (a) MSA was the plaintiff's fire safety consultant and acted for it in relation to the fire safety aspects of the extension and alterations to the property between 2007 and 2009.
- (b) Failure to advise the plaintiffs properly in respect of the fire safety design of the works.
- (c) That they knew or ought to have known of the risks and issues associated with vehicle fires and fire spread in car parks including the risk of combustion of cars, the likelihood of fires spreading, and that a sprinkler system would prevent or inhibit a spread.
- (d) That they were negligent in the following respects: -
 - (i) Failing to exercise reasonable care and skill.

- (ii) Exposing the plaintiffs and Adam Opel and others to a risk of injury, loss and damage of which MSA knew or ought to have known.
 - (iii) Failing to identify appropriate safety standards for the alterations and extension of the property.
- (e) Failure to apply and ensure compliance with applicable and appropriate fire safety standards.
- (f) Failure to propose adequate and appropriate measures in respect of fire safety design in the works.
- (g) Preparing and recommending a fire safety design and engineering solution for the car park and certifying the construction of the car park in accordance with that design which failed to respond to the risk profile of the car park and the potential for fire spread.

88. The allegations made by the Opel defendants against MSA are in virtually identical terms.

89. MSA say that the defendants had sufficient information to make these claims as early as 24 August 2020 when the Callistoy statement of claim was delivered.

The Callistoy statement of claim

90. The Callistoy allegations against the owners include an allegation that they failed to take reasonable care to prevent the property from being a source of danger, nuisance or damage to the plaintiffs. In particular, they claim that the owners failed to have in place any or any adequate systems or safeguards to prevent both the outbreak and the spread of fire at the centre.

91. In para. 31(d) they allege that the owners were guilty of negligence, breach of duty, and breach of statutory duty in: -

“ . . . failing to design, construct maintain, manage and/or supervise the DVSC premises, including the car park, in such manner as to limit the risk of outbreak of fire and in such a manner as to limit and minimise the spread of fire”. (emphasis added)

92. There is no aspect of the allegations concerning the outbreak of the fire which can have any relevance to MSA and no such claim is ever made as against MSA or indeed as against the owners. The focus therefore is on the spread of the fire.

93. 31(d) quoted above focuses on the failure to design and construct the centre in such a manner as would minimise the spread of fire.

94. It was known to all concerned from the earliest stage in the matter that MSA were the fire safety consultants retained by Canmont. One could therefore draw an inference, albeit speculative, that the claims against the owners regarding failure of design and construction of the premises lead inexorably to a claim against MSA.

95. It is one thing to say that the centre was designed and/or constructed inadequately and that MSA were the fire safety consultants. However, this does not mean that the defendants had available to them sufficient information to establish or to commence a proceeding alleging professional negligence on the part of MSA. Such a question would necessitate at the very least information in relation to the following: -

- (a) What instructions the owners gave to MSA;
- (b) What advice was given by MSA;
- (c) What actions were taken by the owner on foot of the advice? Was the advice followed?
- (d) Did the construction contractors have any role in relation to the matter? Nowhere in the affidavits on this application is any reference made to the role or potential culpability of such a party.
- (e) The role of any other professionals in relation to the design of the property.

96. It is not for this Court to speculate on what proofs would be required to maintain a claim in negligence against MSA. However, it is clear even at the highest level that the mere fact that complaints are made by Callistoy against their landlord in relation to the design of the centre does not mean that these defendants had sufficient information to make an informed decision that a claim in professional negligence would lie against the fire safety consultants to the owners.

The defences

97. The defence of Adam Opel delivered on 9 November 2020 includes pleas of contributory negligence against the plaintiffs. It includes at para. 35 the particular allegation that the plaintiffs failed to have in place any or any adequate system of safeguards to prevent the outbreak or spread of fire at the property including the car park. Reference is made to design and at para. 35.2 it is alleged that the plaintiffs were guilty of contributory negligence in: -

“35.2 Failing to design, construct maintain manage and/or supervise the property to include the car park in such a manner as to limit the risk of outbreak of fire and in such a manner as to limit and minimise the spread of fire.

35.3 Failing to carry out any or any adequate risk assessment concerning the outbreak and *spread* of fire at the property”.

98. These are allegations against the owners of the property, and at one level give rise to a train of enquiry as to the possibility – and I would put it no further than a possibility – of a claim against the owners’ design consultants and fire safety experts. But, as identified earlier (paragraph 96), more information would be required to make out a claim in professional negligence against those consultants. I cannot simply infer from the fact that these matters were pleaded as against the owners that sufficient information was to hand to make out the claim now made against MSA.

99. No corresponding allegation of contributory negligence is made in the defence of the Opel defendants delivered 9 November 2020.

100. The first express reference to the plaintiffs' advisors arises in the Adam Opel replies to a notice for particulars of the defence delivered on 21 December 2020 which includes the reference at para. 5 to the following: -

“The state of knowledge in relation to fire spread in car parks in the event of a car fire has been such that the plaintiffs and/or their advisors were or ought to have been aware that in the event of a car fire the fire would spread to other vehicles and that such an outcome would have been prevented by inter alia the installation of sprinklers”.

101. Again, the reference to design features and to the plaintiffs' advisors may point to a potential cause of action against MSA. However, the reliance by MSA on such a pleading is misplaced, and the possibility of a claim against MSA was no more than a possibility, particularly when one notes that the owners, being the clients of MSA, had elected not to make such a claim.

102. I do not find that the allegations made in the third party claims against MSA sufficiently correspond to the pleas of contributory negligence made in the Adam Opel defence delivered on 9 November 2020 or in the replies to particulars by Adam Opel delivered on 21 December 2020 as to warrant a finding that the defendants were in possession of sufficient information as early as the delivery of those pleadings to justify the commencement of a claim against MSA.

Expert advice and timing

103. The defendants say that it was on 18 November 2021 that they received the advice of the fire safety expert which enabled them to determine that MSA had a case to answer in professional negligence.

104. Throughout the affidavits and submissions references are made to the retention of experts at much earlier dates, but this expert was only retained by Adam Opel on 15 February 2021. This gives rise to two questions as follows. Firstly, the delay in approaching that expert in the first place and secondly the delay in obtaining his report.

105. In relation to the first of these questions, Adam Opel say that the expert was retained after its forensics engineer, Dr. Wood, retained on 9 September 2020, had undertaken his initial review of the matter. The court has not been informed as to why Dr. Wood was not retained earlier (although he was approached in July 2020) or exactly when Dr. Wood gave the results of such an initial review. The evidence is that on 22 January 2021, Dr. Wood was asked by Adam Opel to recommend a fire safety consultant to provide an expert opinion as to whether MSA had a case to answer. Mr. Bourke, solicitor on behalf of Adam Opel, says that it was the content of the Callistoy statement of claim which first put Adam Opel on a train of inquiry regarding a possible claim against MSA and led to an instruction to Dr. Wood to examine that question.

106. Nor has the court been informed of the content of Dr. Wood's conclusion or whether he or Adam Opel themselves determined to consult a fire safety expert to "match" the MSA skillset. The court is only informed that on 21 January 2021 Dr. Wood was asked to make a recommendation on such an expert.

107. MSA submit that if the defendants only realised in late 2020 or even in early 2021 that none of the advisors or experts that had been retained up to that point were competent to advise on the potential professional negligence of MSA, that is a failure or delay on their part. They say that the defendants have not explained why they did not do so earlier.

108. The defendants say that the entire focus in the early stage of the proceedings for them, as designer, manufacturer and supplier of the car, was the cause of the fire itself. They say

that they had no reason to be focused on the potential liability of the owners of the property let alone the advisors to these owners.

109. There is force in the submissions made by MSA in relation to the timing of the retention of the fire safety expert. However, when one looks at the overall timeframe of the proceedings, I do not consider that there has been unjustified delay in this regard. The proceedings commenced in March 2020. The statement of claim was served on Adam Opel three months later on 25 June 2020, and Dr. Wood was approached in July 2020 and formally retained in September 2020. Undoubtedly, it can be said that the defendants could have moved earlier in terms of their retention of a fire safety expert to examine the particular question of the role of MSA, but when one considers the focus of the case for the defendants up to that point, I do not believe that they acted unreasonably by not approaching the fire safety expert earlier.

110. In relation to the period of time which expired after the approach and retention of the expert on 15 February 2021, it is clear that a process of accessing files at Cork City Council – which had commenced in September 2020 – was ongoing. The evidence is that the expert retained himself indicated that he needed further information. He made direct contact with Cork City Council in March 2021. In April, May and June 2021, there was continuing contact with Cork City Council regarding access to statements of the firefighters with direct knowledge of the incident and it was only on 28 June 2021 that Cork City Council announced that their formal incident report may not be available for several months.

111. MSA say that an expert retained by them was in a position to obtain almost instant access at Cork City Council to certain fire certificates. However, the fire certificates alone would not have equipped any advisor to closely examine and provide an expert opinion as to the potential professional negligence of MSA.

112. Ultimately when Cork City Council made their announcement on 28 June 2021 that the incident report would not be available for an additional further number of months, Adam Opel and McCann Fitzgerald made the decision, described by Mr. Bourke as a judgment call, to instruct the expert to proceed to finalise his report. Further consultations took place between that date and the date in November when he issued his “finalised draft report”.

113. I have a measure of sympathy for the submission that this process could have been concluded by the defendants in a shorter time frame. But the commencement of professional negligence proceedings is such a serious matter that when the overall timeframe and pace of proceedings, including the still ongoing process of discovery, is taken into account together with other considerations which I discuss below, I do not find that there has been a failure on the part of the defendants to serve the third party notice as soon as reasonably possible.

Other considerations

114. Nine days after the fire, MSA were put on notice that the owner of the centre was reserving its right to seek from it recovery of losses suffered. They were invited to bring that correspondence to the attention of their insurers and were informed that demolition works would be commencing as a matter of urgency and that if they required facilities to carry out an inspection prior to commencement of those works, they should make the necessary arrangements. Undoubtedly there were restrictions in place on the access which they were given when Mr. Slattery visited the property on 11 September. But there is no evidence that they at any point protested that they were being prevented from carrying out an inspection or investigation, particularly in the light of the letter of 9 September 2019.

115. MSA are fire safety experts. They had more knowledge of the design of the centre from the fire safety perspective than any of the other parties to these proceedings, with the possible exception of the plaintiffs themselves.

116. If the access granted to them at their visit on 11 September 2019 was limited, then particularly in the context of the letter from Messrs. O'Donovan, they had every opportunity to protest and make known their desire to either (a) inspect more closely the scene, albeit that it appears that for safety reasons no party was given any closer access, and in fact the inspection of the vehicle in situ was undertaken later by a robotic device; or (b) to place on record its desire to participate in or to be given access to the workings and output of any expert or group of experts performing an inspection or examination of the scene. It has never been suggested since their joinder that they would be precluded from access to records generated in the course of the inspection.

117. There is no evidence of any refusal to permit MSA to follow up with an inspection or to participate in any further investigations which were undertaken.

118. Having been notified by the owners of a potential liability it is not open to MSA to say that it was reasonable for them to wait to see which other parties might make a similar threat or warning before they would perform their own inspection or insist on participating in an inspection and investigation.

119. The proceedings were commenced in March 2020. The statement of claim was delivered to the Opel defendants on 23 March 2020 and to Adam Opel on 25 June 2020.

120. The complaint that if MSA had been served with the Third Party Notice earlier they could have inspected the scene more closely carries limited weight in circumstances where the vehicle had been removed on 21 October 2019, demolition had commenced on 11 October 2019 and the car space inspected itself on 13 – 14 January 2020. All of those events occurred before these proceedings were commenced. Clearly there was no reason for the defendants to move against MSA in advance of the commencement of the proceedings. Therefore, I am not persuaded that MSA was deprived of inspection opportunities by reason of delay on the part of the defendants in serving the Third Party Notice.

121. The defendants were not the parties in control of the property and therefore were not the parties who had the right to invite MSA to conduct further inspections at the scene or to join in the expert group investigation.

122. To the extent that MSA were excluded from the expert joint investigation process, that exclusion was not the act of the defendants. MSA's client in the matter was the owner of the centre and notably had engaged MSA itself to advise in relation to the reconstruction of the property after the fire.

123. The report which MSA delivered to Cork County Council in response to its request in November 2019 is not before the court. It has not been suggested anywhere that the scope of that report was limited to the cause of the fire, although Mr. Slattery says that it was a theoretical modelling of such a fire. The description he gives of the request he received is that he was invited to conduct "analysis and modelling in respect of the fire" which was duly submitted to the Cork City Fire Department on 20 December 2019. Clearly, MSA considered itself competent to make such a report even at that time.

124. The court has been informed that the joint investigation is ongoing and there is nothing to preclude MSA from seeking access, whether by discovery or otherwise, to all of the records of the investigation process both to date and ongoing. For example, it is said that the debris of the vehicle is still available for inspection. To the extent that the joint investigation process is not yet completed it has not been suggested that MSA would be precluded from nominating its own expert to engage with that process.

125. As a defendant in the Callistoy proceedings MSA will in any event need to engage in relation to this investigation and to nominate its own experts to engage with experts for the other parties. They will be participating in the trial on liability matters when these cases which will be heard together as directed by McDonald J.

126. MSA submits that they are exposed to higher levels of damages if they remain in the case as a third party on the application of these defendants than if they were simply a defendant in Callistoy and other proceedings. That may be correct, but it is not a prejudice against which the s.27 proviso to act as soon as reasonably possible is intended to afford protection.

127. The entire purpose of and policy of s. 27 would be defeated if this case were to go to trial with a multiplicity of parties, which is in itself not yet a closed class (per Twomey J.) and yet MSA were to participate in the trial only as a defendant in the Callistoy action.

128. The judgment of Laffoy J. in Doyle v. Flemco is directly on point. No purpose will be served, in the context of the policy objective of s. 27 if an order was made to set aside the MSA Third Party Notice.

129. The plaintiffs have not objected to the joinder of MSA. There would be no substantive disruption to the trial of the action, particularly the circumstances where MSA will be a defendant in the Callistoy action.

130. If anything a trial of the cases together, in which MSA are a defendant only in the ‘Callistoy’ part is likely to be fraught with confusion as regards the status and liability of MSA. Even its own interests would not be served by such an unsatisfactory state of affairs. I have been informed that the order for discovery pursuant to the judgment of Twomey J. allows a period of nine months for the making of discovery. It is clear therefore that allowing these third party proceedings to continue can facilitate this complex action progressing to trial without any undue delay.

131. Without making any findings or observations which are properly for the court of trial, it is appropriate to note again that no connection is alleged to exist between the Opel Defendants and Adam Opel on the one hand and the extent of the spread of the fire. The claim against the Opel Defendants relates to the design and manufacture of the Opel Zafira B

and the recall campaign. Similarly, no suggestion has been made of any connection between the role of MSA and the cause of the fire. I make this observation because it was entirely understandable that in the initial stages of the case the focus of the defendants was on the claims made against them arising from the design and manufacture of the car and an allegedly faulty recall campaign. It was only as matters and pleadings developed that they had any cause to consider a question of joining MSA.

132. I conclude that the purpose of s. 27 would be defeated if the third party notices in this matter were set aside. I shall dismiss the applications.