



**THE COURT OF APPEAL
CIVIL**

Approved

No Redactions Needed

Court of Appeal Record No. 2022/52

High Court Record No. 2017 No. 468P

Neutral Citation No. [2023] IECA 45

**Donnelly J.
Faherty J.
Pilkington J.**

BETWEEN/

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

PLAINTIFF

- AND -

SARAH JANE McHALE

DEFENDANT/RESPONDENT

- AND -

KATHLEEN ROWLAND

THIRD PARTY/APPELLANT

JUDGMENT of Ms. Justice Pilkington delivered on the 28th day of February 2023

1. This appeal is in respect of an application to set aside a third party notice. The parties comprise the third party appellant Ms Rowland whom I shall refer to as Ms Rowland or the appellant and the defendant/respondent who I shall refer to in these terms as appropriate.

2. Pursuant to the order of Heslin J. on 21 January 2022 (perfected 3 February 2022) following his judgment delivered on 21 December 2021, the High Court refused to set aside the third party notice and made an award of costs against Ms Rowland, (with a stay upon execution pending final determination of the proceedings).

3. In an application where the joinder or setting aside of third party proceedings is at issue, the legal principles are now relatively clear and uncontroversial. Whilst the parties to this appeal seek to rely upon differing aspects of the relevant judgments, the basic propositions are clear and considered below. Equally clear is the premise that such propositions can only be properly assessed upon an examination of the specific facts and circumstances of each case.

4. The trial judge embarked upon an exhaustive examination of these facts and circumstances and it is also necessary, for the purposes of properly considering the appeal, to recite these matters in some detail.

Proceedings

5. On 19 January 2017 the plaintiff issued proceedings, through her next friend. The plenary summons seeks damages for personal injuries arising from an alleged accident where hot oil from a deep fat fryer came into contact with her whilst she was climbing onto a chair.

As appears later within the pleadings, the allegation is that the plaintiff, at the time of the alleged accident, was at the home of the defendant, under the supervision of the third party.

6. At the date of the alleged accident on 16 May 2015, the plaintiff was a very young minor.

7. All of the parties to the litigation are related; the respondent is the minor plaintiff's grandmother and the appellant, Ms Rowland, is the respondent's sister and a great aunt of the plaintiff.

8. In the normal course an appearance was entered on 8 March 2017, followed by a notice for particulars dated 30 March 2017, with replies furnished on 1 June 2017.

9. The defence was delivered on 5 July 2017. For present purposes the relevant pleading is at para. 3(iii) and is as follows:

"3. The grounds upon which the respondent claims that she is not liable for injuries suffered by the plaintiff are as follows:

...

(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 of [address given] ."

10. On 30 May 2018 the respondent issued a Notice of Motion seeking an order pursuant to RSC Order 16 for liberty to issue and serve a third party notice upon Ms Rowland.

11. On 16 July 2018 Barr J. acceded to the application and Ms Rowland was served personally on 19 July 2018 (it was sent by pre-paid registered post on that day).

12. An appearance to the third party notice was entered on 5 November 2019. No copy of the appearance was available in court and the date for its entry is stated as being either 5 or 6 November 2019. It appears to have been served under a covering letter of 5 November and it is therefore perhaps more likely to be that date but, in my view, nothing of substance turns upon this.

13. The Notice of Motion to set aside that third party notice issued on 16 November 2020, seeking orders, pursuant to RSC Order 16, rule 8(3) or in the alternative s.27(1)(b) of the Civil Liability Act 1961 ('s. 27(1)(b)') to set aside the third party proceedings. The motion states it is being brought on behalf of the plaintiff, clearly it is the third party.

14. Arising from this application, affidavits were exchanged, which in turn exhibited a significant body of documentation.

Affidavits & exhibits

15. Throughout the documentation, in dealing with the various parties, the respondent's solicitor is Dillon Eustace (Mr Paul Breen) and the respondent's insurer RSA. Ms Rowland was initially represented by Patrick J. Durcan & Company Solicitors ('PJD') and she held an insurance policy with Zurich Insurance Plc ('Zurich'). At one point and for a very short period Zurich nominated Nathaniel Lacy & Partners ('NLP') to represent its interest. Eventually and up to the present time Ms Rowland is represented by the Legal Aid Board ('LAB').

16. Two affidavits were sworn in respect of this application; the affidavit of Kathleen Rowland sworn on 10 November 2020 grounding her application and the replying affidavit from Paul Breen of Dillon Eustace sworn on 13 June 2021.

17. The specific averments are considered below. However, the particular importance of the affidavits (particularly that of Mr Breen) lies within its exhibits, consisting of the correspondence, including emails, passing between the parties. Given some of the unusual facts of this case, it is necessary to peruse these in some detail.

18. I note that all of the letters (and indeed emails) from PJD (certainly prior to the entry of an Appearance by that firm and on occasion afterwards) are marked "*without prejudice*". It was expressly confirmed that this claim has been waived and no objection has been raised to these documents forming part of the exhibits.

19. The replying affidavit of Paul Breen divides the exhibits into two categories comprising (i) the solicitors' correspondence between Dillon Eustace, PJD and lately NLP, and (ii) various e-mails between Dillon Eustace, RSA and Zurich which is described as the insurer's correspondence.

20. In my view, in order to properly determine the timeline of events it is necessary to amalgamate this documentation and also that provided within Ms Rowland's affidavit. I have done so and the timeline of events reflected within this correspondence is therefore as follows:

- (a) In her grounding affidavit Ms Rowland confirms that she was initially contacted by the respondent's insurer RSA on or about 16 March 2016. Arising from this she contacted her insurer, Zurich; she exhibits a letter from them dated 1 April 2016

confirming notification of her claim and enclosing a claim form. They also request that any correspondence sent to her be forwarded to Zurich “*straight away, unanswered*”.

- (b) A letter from Dillon Eustace to Zurich on 30 March 2017 references a telephone call of the previous day and asks if they are in a position to indemnify the respondent. The attendance note of that call on 29 March 2017, states that Zurich had confirmed the closure of their file.
- (c) In an email of 5 July 2017 from Dillon Eustace to Zurich, which in turn confirms previous conversations, Dillon Eustace set out certain disbursements which they have discharged and ask that, if Zurich require copies, they issue a cheque made payable to RSA.
- (d) On the same day, 5 July 2017, in an exchange between Dillon Eustace and Zurich, copies of all pleadings are dispatched to Zurich, including draft third party proceedings (copies of the intended motion, grounding affidavit and third party notice). In my view it is noteworthy, and this point was also made by the High Court judge, that this is the same date the Defence was delivered. There is no documentation that I can discern which shows that draft third party proceedings were furnished to any other party (PJD had not entered the picture at this time) but appears to confirm that the defence and draft third party proceedings were prepared at the same time. Again, within this correspondence, clarification is sought from Zurich as to their position. A further reminder is dispatched to Zurich on 8 July 2018.
- (e) Following service of the third party notice on 19 August 2018, Ms Rowland contacted PJD on 20 August 2018 who in turn wrote to Dillon Eustace on 23

August 2018 to seek a copy of all pleadings. The personal injury summons was furnished.

- (f) On 17 September 2018 PJD wrote asking forbearance to their filing an appearance to the third party notice. They clearly point out that they are hoping that their client's insurer (Zurich) will clarify the position and, in such circumstances, will likely nominate their own solicitor. If that is not the case and there is no insurance cover, then PJD advises that in light of "*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.*" Forbearance is granted on this and subsequent occasions.
- (g) There is further email correspondence between Dillon Eustace and Zurich seeking clarification of their position; Zurich seek information about the case in an email of 11 September 2018 and Dillon Eustace seek to clarify matters in their email reply of 19 September. Ongoing clarification is sought from Zurich in emails dated 11 December 2018 and 4 March 2019. On 4 April 2019 Dillon Eustace point out that a warning letter will shortly issue and suggest they discuss matters further on a 'without prejudice' basis. This is reiterated in a letter of 8 July 2019.
- (h) On 4 April 2019 Mr Breen wrote to PJD asking if a warning letter seeking an appearance to the third party notice should, in the circumstances, be sent directly to Ms Rowland or to PJD (they have also been keeping them apprised of events in the interim). PJD (Mr Durcan) in reply suggests that it is sent to his firm and states that he will then contact Ms Rowland himself.
- (i) On 29 July 2019 PJD wrote to Dillon Eustace and set out their unsuccessful attempts to get in touch with Zurich and again point out that, as their client's

financial circumstances are not good, the advice is that she proceed with an application to the LAB *“to address the defence of this case.”*

- (j) On 1 August 2019 in an email from Zurich to Dillon Eustace, they confirm that NLP is nominated and will contact them directly. This information is conveyed to PJD.
- (k) NLP in an email to Mr Breen on 12 September 2019 confirm that indemnity cover is still under review (by Zurich) and that Dillon Eustace should in the interim communicate directly *“with the third party and/or their own personal solicitors.”*
- (l) In September 2019 interaction between Dillon Eustace and Zurich continues, with Dillon Eustace anxious to initiate without prejudice discussions between the insurers.
- (m) In a series of emails on 3 and 4 October 2019 between Dillon Eustace and NLP, clarification is again sought on the indemnity issue. Dillon Eustace confirm their instructions to motion for judgment in default of appearance and to then seek a defence to the third party notice.
- (n) Thereafter in a letter from Dillon Eustace to PJD dated 23 October 2019 a formal 21 day warning letter is sent in respect of the entry of an appearance. On the same date a letter in identical terms is also sent to NLP. In response NLP state in a letter of 6 November 2019 that they are not acting for Ms Rowland (in a previous email they point out that indemnity is not confirmed).
- (o) PJD by letter of 5 November 2019 again seek forbearance and this is confirmed for a further period of 21 days from 6 October 2020. In a second letter of that date PJD confirm that whilst awaiting a response from the LAB *‘...I don’t want her position compromised so I’m going to file an Appearance for the time being and hopefully the Legal Aid Board will come on board shortly’.*

- (p) In a further letter from PJD to Dillon Eustace of 5 November 2019 they enclose the memorandum of appearance. As set out above it is therefore more likely that this is the date of the appearance, the documentation varies as to the date being either 5 or 6 November 2019 but I reiterate that nothing turns upon this.
- (q) On 6 November 2019 NLP write to Dillon Eustace confirming that they are not acting on behalf of the third party. It appears they never entered an appearance.
- (r) On 6 February 2020 Dillon Eustace write to PJD consenting to the late filing of the third party's defence for 21 days from the date of the letter.
- (s) On 10 February 2020 PJD write to indicate that they have received authority from Ms Rowland to transfer the file to the Law Centre in Castlebar and again seek forbearance to enable the Law Centre to deal with this matter. Dillon Eustace in a letter of 15 April 2020 consent to a late filing of the defence for a further 21 days from that date and again for a period of 7 days from 22 July 2020. Further forbearance is granted for a period of 7 days from 22 October 2020.
- (t) There is then correspondence from Dillon Eustace to PJD querying why Zurich declined to furnish an indemnity together with letters from PJD to the LAB asking them to clarify their position as a matter of urgency.
- (u) On 19 March 2020 NLP write to Dillon Eustace expressing displeasure about continuing contact between Zurich and RSA. In an email of 16 June 2020 NLP state that a claims handler in RSA is still contacting Zurich and that "*if she continues to do so I will refer this matter onwards by way of complaint*". Whilst within an e-mail from RSA of 4 March 2020 they query the stance adopted by Zurich in this matter, their correspondence with Zurich is largely seeking to identify the appropriate case-handler, the previous person having apparently left the company. RSA's enquiries are entirely appropriate throughout.

- (v) A letter from Dillon Eustace to the LAB of 15 April 2020 encloses a warning letter seeking a defence to the third party notice and enquiring if, in all the circumstances ‘.....*you have considered joining Zurich Insurance Limited to proceedings*’. The LAB in a holding letter of 20 April 2020 confirm that Ms Rowland’s entitlement to legal aid has yet to be assessed.
- (w) The final letter within the exhibits to Mr Breen’s affidavit is from the LAB to Dillon Eustace of 30 November 2000 pointing out that, as Ms Rowland has issued a motion seeking to set aside the third party proceedings (she had done so on 16 November 2020), any suggestion of a motion for judgment in default of a defence to a third party notice would appear superfluous.

21. In completing the chronology from Ms Rowland’s perspective;

- (a) within her affidavit there is a letter exhibited from PJD to the LAB on 10 February 2020 enclosing an authority from Ms Rowland to hand over her file. Within that letter they also state:

“You will note the position as per the letter of Dillon Eustace (solicitors for the respondent) dated 6 February 2020 regarding the filing of a defence.”

- (b) She then points out that, following her initial consultation at Castlebar Law Centre and the subsequent despatch of her file by PJD, the LAB was obliged to implement certain measures arising from the covid pandemic. In such circumstances Ms Rowland’s application was not afforded priority.
- (c) The application for authority to instruct junior counsel was sought by the LAB on 4 April 2020 and granted on 4 September 2020. On 9 September 2020 the file was dispatched to Dublin where the LAB specialised unit dealing with personal injury cases is located. On 29 October 2020 counsel was informed that legal aid had been

granted, papers were emailed by counsel on 4 November and the motion to set aside these third party proceedings issued on 16 November 2020.

22. Within the body of her affidavit Ms Rowland sets out why she should be permitted to set aside the third party proceedings. Paul Breen's replying affidavit focuses upon the suggestion of delay by the respondent in the issuing of third party proceedings and also focuses the steps taken by the respondent in this matter, as reflected within the chronology above. Their respective averments are considered in the context of each parties' submissions below.

High Court Judgment

23. The High Court judge dealt with all correspondence in comprehensive detail. Counsel for the appellant has correctly pointed out that on occasion within his judgment the appearance by PJD is stated to be on 6 November 2018 and not 6 (or 5) November 2019.-The latter date is correct, accepted by all, and nothing turns on the mischaracterisation.

24. In considering the documentation the trial judge had the following comments:

“(1) In respect of Ms Rowland and her solicitor, PJD, the Court states the following:

[page 17]

“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 6 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.”

Later also on page 17, the Court states:

“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.”

Later (page 25) the Court asserts:

“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.”

At para. 54 the Court concluded;

“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.”

Legal principles

Third party proceedings

25. RSC Order 16 rule 1(3) states:

“(3) Application for leave to issue a 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 respondent to a counterclaim, the reply.”

26. Twenty eight days from ‘*from the time limited for delivering the defence*’ is calculated as the time limited for its delivery, in this case 28 days from the delivery of the Personal Injuries Summons or the entry of the appearance, whichever is the later. (see RSC Order 21 (1) and RSC Order 1A(7))

27. RSC Order 16 Rule 8(3) states;

"The third-party proceedings may at any time be set aside by the Court."

28. Section 27(1)(b) of the Civil Liability Act 1961 states:

“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—

...

(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 the third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed.” (emphasis added).

29. In *Boland v Dublin City Council* [2002] 4 IR 409, Hardiman J., delivering the judgment of the Court, quoted *Tierney v Sweeney Ltd*, (Unreported High Court Morris J, 18 October 1995) at page 4 of his judgment as follows;

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

30. Hardiman J. then stated at page 414;

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

In the following paragraph he states;

“Just as the onus of justifying any delay in seeking liberty to issue the third party notice devolves on the respondent, the onus of justifying delay in bringing the motion to set such notice aside devolves on the third party.”

Authorities

31. The Supreme Court decision in *Connolly v Casey* [2000] 1 IR 345 considered an appeal against an order of the High Court setting aside a third party notice on the grounds of delay. The respondent argued, in an action for professional negligence, that where the proposed third party was a barrister, the delay had been necessary as he was awaiting replies to particulars and a statement from Mr Murphy, the solicitor who had instructed the proposed third party.

32. The Court initially considered the finding of the trial judge that it was difficult to ascertain any information within the replies to particulars which added to the respondent’s state of knowledge in this application to join the third party. Denham J. (as she was then), delivering the judgment of the Court, stated (p.350):

“This was the wrong test. The test is whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendants’ state of knowledge is not the test. The queries raised in the notice for particulars were relevant to the claim against the third party and thus it was reasonable to await the replies.”

33. Denham J. then considered whether the periods of delay and the reasons advanced by the respondent were an appropriate explanation and stated (p.351):

“In analysing the delay – in considering whether the third party notice was served as soon as is reasonably possible – the whole circumstances of the case and its general progress must be considered. ... It is appropriate that third party proceedings are dealt

with as part of the main action. A multiplicity of action is determined 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.”

34. In *O’Byrne v Michael Stein Travel Limited* [2012] IESC 62, [2013] 1 I.L.R.M. 297 the Supreme Court (with Denham C.J. delivering the judgment of the Court) considered the question of delay in the joinder of a third party and the explanation for that delay furnished by the respondent. She stated; (para. 24):

“The respondent did not set out any details as to why the delay had occurred, or any excuses for the delay. Thus, while a court may take all the circumstances into account, such as the amendment to the defence, there needs to be evidence as to the reasons for, and excuses for, a delay. This was absent in this case. The onus lay on the respondent, but no explanation for the delay was given.”

35. *Thomas Greene & anor v Triangle Developments Ltd & anor and Frank Fox & Associates* (third party) [2015] IECA 249 is an *ex tempore* decision where Finlay Geoghegan J., delivering the judgment of the Court, considered an appeal by the respondents against an order striking out a third party notice. On the facts of the case the third party notice was served some 10 months after the service of the statement of claim, in circumstances where the respondents had argued that this was occasioned by a delay in obtaining an expert report from consulting engineers. It had been accepted by both parties that it was appropriate that an expert’s report was obtained prior to the service of any third party notice. In such circumstances the Court of Appeal was satisfied that the period was such that, objectively, the third party notice was served as soon as was reasonably possible.

36. Finlay Geoghegan J., having considered the Supreme Court decisions that were the precursors of *Connolly v Casey*; *The Board of Governors of St. Lawrence's Hospital v Staunton* [1990] 2 IR 31, *Molloy v Dublin Corporation* [2001] 4 IR 52 and also *McElwaine v Hughes* (Unreported, High Court, Barron J. 30 April 1997) then turned to consider *Connolly v Casey* itself. In the view of Finlay Geoghegan J. that decision made a further important qualification to the approach in these previous cases. With regard to the quotations from *Connolly v Casey* quoted above Finlay Geoghegan J. stated (para. 25):

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

At paragraph 26 the Court continued:

"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.”

37. In *Kenny v Howard* [2016] IECA 243 Ryan P. (Peart J. concurring, Barrett J. dissenting) considered an appeal against a High Court Order refusing to set aside a third party notice.

The plaintiff was a social care worker who in her personal injuries summons claimed she was assaulted by a service user in the course of her employment at a care home. The respondent was the person nominated as representative for the chairman of the nursing home board of the care home group. Some two years after the time limit within RSC Order 16, rule 1(3) an application was made to join the HSE as a third party to the action and this was granted by order of the High Court on 27 October, 2015.

38. Ryan P. referred to two arguments made by the respondent against having the third party notice set aside on the basis of delay. First, that this was a case of *“unusual complexity akin to one of professional negligence and that it was necessary to have specialist advice.”* Ryan P. did not accept this proposition. The President noted that there were long periods when nothing happened and found that the explanations furnished by the respondent were *“really descriptions of the failure to take any steps and do not in any way establish necessity or reasonableness.”*

39. Ryan P. after pointing out, within para. 21, the impossibility of seeking to catalogue all of the contingencies that may arise in a case that takes time to be satisfactorily addressed and pointing out that *“reasonably possible means what it says”* in the context of considering s. 27(1)(b) stated at para. 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....

It is not sufficient simply to describe or explain the delay. In other words, compliance is not achieved by the party or his solicitor deposing to how the delay arose. And neither, it would seem, is it enough to seek to excuse the delay by reference to exigencies that can occur or tribulations that may befall a person in the ordinary course of life. In this latter category would be mistakes, misfiling of documents and errors and omissions generally. Obviously, the court cannot take too high and mighty a view about human frailty as to rule out of consideration every human error. However, the point is as I see it that for the party to describe how the delay happened is not enough; neither is it sufficient for compliance with the section to say that it happened because of a series of unfortunate events...” (emphasis added)

40. The Court continued (at para. 28) as follows:

“Fundamentally, it seems to me that the section requires that the time taken should be related to the necessities of the case so that the notice that is served can properly be described as being ‘as soon as reasonably possible.’ This is the key to understanding the provision. It is not a matter of criticising the conduct of the concurrent wrongdoer

applicant; neither is it a matter of excusing error or default. It is a judgment about what is reasonably necessary in the circumstances of the case.”

41. The Court of Appeal allowed the appeal, concluding that the third party notice was not served as soon as reasonably possible. The Court held that the provision should be interpreted to mean that the time taken is related to the necessities of the case. On the same set of facts Barrett J. in the minority judgment took the contrary view, he considered that on the basis of the explanation furnished, objectively the third party notice had been served as soon as was reasonably possible, a conclusion relied upon by this appellant.

42. In *Morey v Marymount University Hospital & ors* [2017] IEHC 285, the third party sought to have a third party notice set aside on the basis that the respondent delayed more than 13 months in issuing proceedings against it. Baker J. dismissed the application and in setting out the relevant principles stated (para. 11):-

*“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 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)”

43. Having regard to the relevant statutory provisions and the legal authorities, and taking account of the parties’ respective submissions (as set out below), the issues that arise for immediate consideration in the within appeal are:

- (i) Whether the High Court judge erred in fact or in law in deciding that Ms Rowland did not act as soon as was reasonably possible in applying to set aside the third party notice?; and
- (ii) In the context of (i) above, whether, in concluding as he did, the High Court judge had proper regard to “*the whole circumstances of the case and its general progress*” (as per Denham J. in *Connolly v Casey*) including Ms Rowland’s assertion that the respondent’s delay in serving the third party notice was a factor to be considered in assessing whether the application to set aside the third party notice was in fact served as soon as reasonably possible.

Submissions

44. The appellant contends that the trial judge did not properly focus upon and analyse the word “*reasonably*” within the criteria of s. 27(1)(b) “*as soon as is reasonably possible*”.

45. On the facts of this case the appellant maintains that the respondent (and indeed the High Court) cannot have been in any doubt, at all times, as to Ms Rowland’s position.

46. The appellant contends that both Dillon Eustace and PJD were pursuing Zurich to see whether Ms Rowland was covered by her household insurance policy. PJD had, from the

outset, made it clear that if, for whatever reason, it transpired that Ms Rowland was not entitled to the benefit of that policy, then she would have no option but to seek legal aid as she was not a person of means. In addition, the parties were aware that if she was entitled to the benefit of the policy, then Zurich would likely nominate a solicitor of their own choosing in any event. Zurich did nominate NLP in August 2019 to represent their interests who, some two months later, clarified that no indemnity was to be furnished. At no time did they act for Ms Rowland nor enter an appearance on her behalf.

47. The appellant further contends that the steps taken by Ms Rowland were fully in accordance with the case law – the Supreme Court in *O’Byrne v Michael Stein Travel limited* spelt out the necessity for a proper explanation for any delay to be furnished. Ms Rowland provided comprehensive explanations, both for the steps taken by the appellant and the reasons for any delay. She argues that this case was never one of inaction but rather waiting for a necessary insurer (Zurich) to clarify its position. Once the position with Zurich was clarified, Ms Rowland did what PJD had always explained she would be required to do – she sought legal aid and the position moved forward at that time.

48. The appellant faults the judgment of the trial judge in placing too much emphasis upon the entry of the appearance by PJD and his view that this was the seminal date for considering any question of delay. In the trial judge’s view, as reflected within the passages cited above, it was at this time that an application could have been made to set aside the third party notice. Whilst the appellant accepts that it was possible, as a matter of procedure, for such an application to be made at that time, her counsel argued that for reasons which had been made crystal clear throughout the correspondence, whilst possible, it was not reasonable, owing to

Ms Rowland's impecuniosity and PJD's explanation of the implications of this for her (and indeed PJD).

49. In counter argument, the respondent highlighted the number of occasions when forbearance had been afforded to Ms Rowland, so as to enable her to obtain clarification from Zurich, in order that the solicitor nominated by it, or some other solicitor, would enter an appearance to the third party notice, deliver a defence and the litigation would then proceed in the usual way. They were well aware of their entitlement to serve Ms Rowland personally prior to the entry of an appearance on her behalf but did not do so as illustrated from the exchange of correspondence above.

50. In my view whilst all parties accept that the LAB must take such steps as they may be advised and consider appropriate, nevertheless it was never envisaged by Dillon Eustace that their acts of forbearance would ultimately result in an application to set aside their client's third party notice. The correspondence is clear on this point also; forbearance was clearly sought by PJD firstly in respect of the entry of an appearance (mainly to await clarification of Zurich's position) and thereafter for the filing of a defence to the third party notice (mainly to allow time for files to pass to the LAB and for them to consider those files and take the necessary steps).

51. It is a fair reading of the documentation that Dillon Eustace's acts of forbearance and indeed their efforts to engage Zurich were all with a view to regularising the third party proceedings, in order that the case as a whole might proceed to hearing or perhaps a settlement. As Mr Breen was of course also aware, he was anxious on behalf of his client to either procure an indemnity from the third party insurer, or for the insurers to arrive at some arrangement

between them. This was particularly so, given all parties were aware of the family relationships to this litigation.

52. I accept that PJD set out their client's position fairly as they strove to be of assistance to Ms Rowland. It is clear that the correspondence between PJD, Dillon Eustace and its insurer was conducted throughout in a professional and courteous manner.

53. Zurich is not a party to these proceedings. However the position they adopted is curious. It was not until November 2019 that Zurich finally confirmed they were not providing indemnity cover for Ms Rowland. The impetus in seeking clarification from Zurich lay at all times with Dillon Eustace, RSA and PJD. Clearly Zurich were under no obligation to furnish an indemnity and having initially contacted Ms Rowland in 2016, it was entirely proper for them to take time to consider their position. However, that it took some three years for them to clarify that position, in what appears a straightforward matter for an experienced insurer, in my view served to exacerbate the difficulties that arose in this litigation.

The respondent's delay

54. As set out in paragraph 43 above, it is initially for a court to consider whether the third party acted '*as soon as is reasonably possible*' in applying to set aside the third party notice. If the finding of this court is that the trial judge was not correct in holding that Ms Rowland did not satisfy that criteria, then (and only then) is the court to go on to consider whether the third party notice itself was served by the respondent upon the third party '*as soon as is reasonably possible*'.

55. For the reasons set out below this Court proposes to uphold the judgment of the High Court in finding that the third party did not act as soon as is reasonably possible.

56. Accordingly, the issue of the respondent's delay is considered solely in the context of the appellant's arguments that the respondent's delay in serving the third party notice is to be considered as a factor in assessing whether the application to set aside the third party notice was in fact served as soon as is reasonably possible.

57. On the facts of this case I do not consider the arguable delay by the respondent in serving its third party notice assists the third party's argument. PJD and Dillon Eustace both acted upon the mutual understanding that they were awaiting clarification from Zurich prior to dealing with the third party issue. Both envisaged that, once clarified one way or another, the third party proceedings would form part of the overall litigation; in other words, both had a tacit understanding as to the purpose of what is categorised as the delay. The respondent throughout that period was not, in my view, seeking to disadvantage or prejudice Ms Rowland but rather, in its forbearance, was in part providing a potential opportunity for her to proceed with her case with the possible benefit of legal representation and possibly also an insurer. I note from the documentation in this case as set out at paragraph 20(d) above that third party proceedings were drafted at an early stage but were not served for the reasons set out within this judgment.

58. Furthermore, in some of the cases seeking to set aside a third party notice (for example *Morey v Marymount Hospital & ors* cited above) the sole or principal reason advanced for such an application to set aside a third party notice is the delay of the respondent in serving it; the facts of this case clearly demonstrate that this is not such a case, the reasons here related very

much to the position in which Ms Rowland found herself and the efforts of those advising her to seek to resolve them.

Conclusion

59. As set out above, within the appellant’s notice of motion to set aside the third party proceedings, reliefs are sought pursuant to RSC Order 16 rule 8(3) and s. 27(1)(b) seeking to set aside the third party proceedings. Order 16 rule 8(3) provides that a third party notice may at any time be set aside by the court. In the context of Order 16 rule 8(3), as Delany and McGrath point out within their text on Civil Procedure¹ (para. 9-68) “..... *by far the most common basis for such an application is that the third party notice has not been served within the time limit laid down by Order 16, 1(3) or ‘as soon as is reasonably possible’ as required by s 27(1) of the Civil Liability Act 1961*”. Clearly the time limit within Order 16 rule 1(3) has long since passed and the appellant and this Court has therefore focused upon the oft repeated phrase within s. 27(1)(b) of ‘*as soon as is reasonably possible*’.

60. At the outset, it appeared this litigation would proceed in what might be described as the usual fashion. Certainly, it appeared unlikely that those issuing a personal injury summons in January 2017 on behalf of a minor plaintiff would still not be in a position to proceed to hearing some six years later. The incident which forms the basis of this litigation occurred in May 2015 now over seven and a half years ago.

61. The trial judge pointed out that it is difficult to ignore the period of time that has elapsed from the service of the third party notice on 19 July 2018 to the date of issue of the application to set it aside on 16 November 2020, some two years and five months later. I agree with that

¹ *Delaney & McGrath on Civil Procedure* (Biehler, McGrath & McGrath), Fourth edition.

and particularly the general imperative on all courts in ensuring that, as far as possible, litigation should proceed without undue delay². This imperative is heightened, in my view, when the plaintiff is a minor.

62. Whilst one can admire the efforts of PJD in assisting Ms Rowland, it is apparent that, from the outset, the clear understanding between Dillon Eustace and PJD, on any fair reading of the affidavits, was that both parties were maintaining their respective positions on the mutual understanding that third party proceedings would proceed once matters had been properly clarified (in essence once Zurich had clarified its position).

63. At no time prior to the LAB involvement had it been envisaged, nor had any documentation admitted of the possibility, that an application would be advanced on behalf of Ms Rowland to set aside the third party notice. I fully appreciate that it was for those who advised her at the time to deal with this litigation as they deemed appropriate. But, in my view, whilst the decision was taken against the background of what were undoubtedly certain difficulties encountered by Ms Rowland which were not of her own making, by the time the LAB determined to issue a motion to set aside the third party notice, the delay was such that it could not be said that the application was made as soon as reasonably possible and thus made it unreasonable for the respondent to be required to meet such an application.

64. Clearly each case turns on its facts and a court must seek, as objectively as possible, to determine on the facts what can be construed as being as “*as soon as is reasonably possible*”. In my view, in considering this requirement it was not unfair for the trial judge to determine

² See the comments of Clarke J. (as he then was) within his Supreme Court judgment of *Comcast International Holdings Inc. & ors v Minister for Public Enterprise & ors* [2012] IESC 50, in which he quotes his judgment in *Rodenhuis & Verloop B.V. v. HDS Energy Ltd.* [2011] 1 I.R. 611, at pp.616-617, in confirming that the Courts have made it clear that there will not be an excessive indulgence of delay.

that the date of entry of a formal appearance by PJD was the operative date when it was possible for a motion to issue to set aside third party proceedings. The appellant strongly contends that whilst it may have been possible, it was wholly unreasonable to expect PJD to do so in all of the circumstances of the case and accordingly did not meet the criteria of s.27(1)(b). However, I cannot accept that to issue a motion on 16 November 2020 with a view to setting aside a third party notice issued first on 19 July 2018 could be said, on any criteria, to have been served “*as soon as is reasonably possible*”. I accept that PJD properly set out its position throughout, nevertheless the court can have regard to that time period in applying an objective criteria to it.

65. It seems to me that consideration has to be given to the fact that, as I construe the affidavits and correspondence, PJD did not intend to continue in the case but rather anticipated or hoped that Ms Rowland, in the absence of procuring insurance cover from Zurich, would obtain legal aid. The respondent understood that position but equally one has to balance that against the fact that the respondent did not anticipate that in those circumstances it would be met two years after the issuing of the third party notice with an application that it be struck out. That, I believe, is a significant difficulty in this case. The fact that PJD when coming on record anticipated that matters would take a certain course is not the end of the matter.

66. In any litigation, a solicitor on record has all possible avenues open to that individual. Counsel for the respondent suggested that it was open to PJD, upon entering an appearance, to issue a motion seeking a stay on proceedings pending adjudication by the LAB upon Ms Rowland’s entitlement to legal aid or potentially to have also sought to have the third party notice set aside and to perhaps within that context or separately make an *ex parte* application to come off record or in the circumstances seek a stay for the reasons already set out.

67. Simply entering an appearance and pointing out an intended course of conduct (in essence to hold Ms Rowland's position pending her entitlement to the benefit of an insurance policy and thereafter legal aid) does not in and of itself prevent time from running in respect of any statutory obligation. That time must also, it follows, be factored into any assessment as to whether the requisite steps had been taken "*as soon as is reasonably possible*".

68. As a general rule when new solicitors enter an appearance the possible inactivity, for whatever reason, of Ms Rowland's previous solicitors, cannot be ignored. It is the totality of the case that must be considered.

69. In one sense seeking to criticise or comment upon PJD's failure, upon entering an appearance, to immediately issue proceedings to set aside the third party proceedings is unfair as there is no suggestion within the papers that they had any intention of doing so at all. However, given that the LAB took a different view of the matter, in my view consideration of the phrase "*as soon as is reasonably possible*" must consider, as confirmed by the Supreme Court in *Connolly v Casey*, the entire circumstances of the case and its general progress must be considered. On the facts of this case, that encompasses all of the steps taken by those who sought to assist Ms Rowland throughout this litigation to date. The fact that each may have provided an explanation for their specific role within the timeline does not of itself make it objectively reasonable in the eyes of the court; it is for the court to make that '*objective assessment*', as set out by Finlay Geoghegan J. in *Thomas Greene*. It may come down to, in the words of Ryan P. in *Kenny v Howard*, that '*reasonably possible means what it says*' and his confirmation that it is ultimately what is reasonably necessary in the circumstances of a case. The court must exercise its objective assessment in applying that phrase to the facts of this case.

70. In *Darcy v AIB* [2022] IECA 230 Noonan J., delivering the judgment of the Court, in an appeal brought by a litigant in person against the dismissal of his claim on the grounds of delay, pointed out (within paragraph 23) that Mr Darcy's argument that he was unable to progress the proceedings because he was a litigant in person would, in the normal way, provide no basis for excusing his delay in doing so. The Court, within the same paragraph also pointed out that unrepresented parties are subject to the same legal obligations as those who are represented. In my view, on the facts of this case, that logic must extend to those who have legal assistance from a solicitor who had not entered an appearance, in this case due to his client's impecuniosity and for the reasons set out by Mr Durcan of PJD. It does not necessarily stop any clock from running in determining the period of time for assessing the reasonableness of Ms Rowland's application pursuant to s.27(1)(b). That it is argued that no progress could be made whilst matters of legal aid were considered may not, in and of itself, be a sufficient answer.

71. In considering the timeline for an application to set aside third party proceedings, it is an objective fact that such an application could have been made when PJD entered an appearance. It was from this time that they were in a position, as the solicitors on record for Ms Rowland, to issue such a motion. In addition, whilst I fully accept that PJD acted honourably throughout, in general terms, if a solicitor in advising a client involved in litigation, chooses for whatever reason to delay its entry of the appearance, as in this case, it does not follow that a court cannot have regard to this time period in its assessment of the criteria within s.27(1)(b). Any objective consideration of whether such an application has been made 'as soon as is reasonably possible' can in my view, on the facts of this case, have regard both to the time that elapsed after the entry of an appearance and also the fact that the entry of that appearance had itself been delayed.

72. As already stated, this Court must have regard to the fact that this plaintiff is a minor. In my view the necessity that litigation proceeds as quickly as reasonably possible assumes an even greater importance in respect of a minor plaintiff.

73. In all the circumstances of this case I cannot accept that the application to set aside this third party notice was served 'as soon as is reasonably possible'. The respondent first learned that such an application to set aside a third party notice was to be issued in or about November 2020. Up until that time it had been clearly intimated to the respondent that the third party proceedings would proceed once the outstanding issues set out above had been clarified or resolved. The reasons for the adjournments were not ultimately utilised in aid of the third party proceedings, as the conclusion by those acting for Ms Rowland was that the appropriate course was to seek that to strike out the third party notice. Whilst certain aspects of this case are certainly unusual, and one can have sympathy for the parties involved, nevertheless in objectively considering the totality of this aspect of the litigation, it cannot be said that the application to set aside the third party notice was instituted, to again quote the wording within s.27(1)(b) 'as soon as is reasonably possible' and the third party's appeal must fail.

Outcome of this Appeal

For the reasons given therefore, I would dismiss this appeal.

Costs

As the respondent has been entirely successful, my provisional view is that the respondent should be entitled to the costs of the appeal. I note the stay granted by Heslin J. and that Order is to remain in place, with this Court also granting a stay on the costs of this Appeal pending

the determination of these proceedings. If the third party wishes to contend for an alternative order, she will have liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the respondent will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made.

As this judgment is being delivered electronically, Donnelly and Faherty JJ. have indicated their agreement with it and the orders I have proposed.