

APPROVED

[2021] IEHC 551



THE HIGH COURT

2015 No. 9648 P

BETWEEN

SUSQUEHANNA INTERNATIONAL GROUP LIMITED

PLAINTIFF

AND

EXECUZEN LIMITED
DANIEL WHITFIELD
ELENA SUEPPEL
NATALIE MELNICK

DEFENDANTS

CITADEL LLC
DANIEL NEEDHAM

THIRD-PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 August 2021

INTRODUCTION

1. This judgment is delivered in respect of an application to set aside a third-party notice on the grounds of delay. The application is made pursuant to Order 16, rule 8(3) of the Rules of the Superior Courts.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. The summary which follows is based solely on the pleadings, and does not entail the making of any findings of fact by this court on the merits of the claim.
3. The Plaintiff describes itself as a “global trading and investment firm”. The proceedings relate to events leading up to the departure, in March/April 2016, of a number of employees of the Plaintiff. The employees had, seemingly, been engaged by the Plaintiff as traders in financial instruments known as “exchange traded funds”. The employees had not yet resigned as of the date the proceedings issued, but had left as of the date the statement of claim was delivered. Certain of the employees subsequently took up employment with Citadel LLC (“*Citadel*”).
4. The Plaintiff instituted two sets of legal proceedings arising out of the departure of these employees. The first set of proceedings are the present proceedings (High Court 2015 No. 9648 P). These proceedings are taken against a recruitment firm, Execuzen Ltd, and three of its principals (collectively, “*the Defendants*”). The second set of proceedings were taken against one of the departing employees, Mr. Daniel Needham (High Court 2016 No. 3300 P). The second set of proceedings have since been compromised.
5. The present proceedings were instituted by plenary summons on 19 November 2015. Notice of the proceedings was served on the Defendants, who are all resident outside the jurisdiction in London, on 24 November 2015.
6. The statement of claim was delivered on 29 July 2016. The essence of the claim is that the Defendants interviewed employees of the Plaintiff, on the pretext of seeking to recruit them, in order to elicit confidential and proprietary information. In particular, it is alleged that the Defendants induced the employees to disclose information in respect of the Plaintiff’s operations, the types of trading desks it operated, the reporting structures in

relation to those desks, and what proprietary software was being used by those desks. This information was then provided to Citadel, who had engaged the Defendants, in the form of a report. It is pleaded that the Defendants and Citadel were aware that such information was confidential and could not be lawfully disclosed by the employees.

7. It is further pleaded that Citadel determined to establish a business in Dublin staffed by employees of the Plaintiff, carrying on the same business, using the Plaintiff's confidential and proprietary information and practices (including information provided to it by the Defendants).
8. A related claim is made that the Defendants, acting on behalf of Citadel, unlawfully coordinated what is described in the statement of claim as a "group leave" by key employees. It is pleaded that the Defendants, in conjunction with the employees, coordinated the latter's resignations so that they would leave on the same date or in close proximity to each other, thereby causing maximum damage to the Plaintiff's business.
9. The Defendants are accused of having facilitated and encouraged the employees to breach their contracts of employment, and their duty of loyalty and fidelity. The Defendants are also accused of having induced, directly or indirectly, the employees to misappropriate confidential information. It is pleaded that "but for" the wrongful conduct of the Defendants, Citadel would not have been able to recruit a number of key employees or establish a competing business in Dublin.
10. The reliefs sought in the statement of claim are, in the main, directed to restraining the use or disclosure of the confidential information said to have been wrongfully obtained. It is sought to have the Defendants either furnish the confidential information to the Plaintiff or to provide satisfactory evidence of its destruction. An order is sought restraining the Defendants from soliciting any person who is or was employed or engaged by the Plaintiff.

11. An order is also sought compelling the Defendants to furnish the names, addresses and contact information of all persons to whom information in relation to the business of the Plaintiff had been provided.
12. Damages are sought against the Defendants for inducing a breach of contract; for intentional interference with the Plaintiff's economic interests; and for breach of confidence. An account of all profits made by the first named defendant arising from the use of the confidential information is also sought. No indication whatsoever is provided in the statement of claim as to the quantum of damages being sought. Certainly, there is nothing in the statement of claim which presages the claim which is now advanced for some 47 million euro.
13. The Defendants initially sought details as to the quantum of damages by serving a request for particulars dated 17 October 2016. Particulars were sought, *inter alia*, of the following.
 - “12. Please provide full and detailed particulars of the loss and damage alleged to have been suffered or sustained by the Plaintiff, including but not limited to:—
 - (a) The alleged loss of trading gains by virtue of the Plaintiff's perceived wrongdoing on the part of the Defendants.
 - (b) The alleged loss of market share in any particular market.
 - (c) The alleged loss of absolute advantage in any particular market by the alleged unlawful duplication of proprietary intellectual property.
 13. In relation to paragraph 17 of the Statement of Claim:
 - (a) Please specify the loss and damage caused to SIGL.
 - (b) Please identify the SIGL employees recruited by Citadel LLC which facilitated the establishment of a competing business in Dublin.”
14. The Plaintiff delivered its replies on 22 November 2016. In response to the requests set out above, the reply is as follows.

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

15. The Defendants delivered their defence on 15 February 2017. The defence is a comprehensive document running to some sixty paragraphs. The defence raises a number of preliminary objections to the proceedings, and, in particular, alleges that the proceedings are misconceived, unsustainable, bound to fail, frivolous and/or vexatious and/or constitute an abuse of process. It is expressly pleaded that as Citadel and the Plaintiff are competitors in certain areas of financial services, there is nothing untoward regarding former employees of the Plaintiff taking up equivalent positions with Citadel and vice versa.
16. Insofar as the claim for damages is concerned, it is pleaded that the court will be invited to draw all appropriate inferences from the Plaintiff’s failure or refusal to provide any particulars of such alleged loss or damage. It is pleaded, in the alternative, that if the Plaintiff has suffered loss by the use of confidential information by a new employer, the Plaintiff ought to have joined its former employees and any new employer in these proceedings. Importantly, it is pleaded that the Defendants have no evidence of wrongdoing on the part of any other person or firm, and therefore are not in a position to join any person or firm as a party.
17. In fact, the Plaintiff had instituted separate proceedings as against one of the leaving employees, Mr. Needham. The existence of these proceedings was not formally disclosed to the Defendants until 18 January 2019. No proceedings have been taken against the new employer, Citadel.

18. The next significant step in the proceedings seems to have been the pursuit of an application for discovery against the Defendants. An order for discovery was made on consent in July 2017.
19. Thereafter, the Defendants sought discovery as against the Plaintiff. As part of this application, the following documentation was sought in respect of the losses alleged to have been suffered by the Plaintiff. (This had been category 6 in the notice of motion of 22 February 2018).

“All losses alleged to have been incurred by the Plaintiff, as a result of the “group leave” and/or exploitation of confidential information, including:–

 - (i) documentation recording the trading results and/or profits for each business unit in which any “group leaver” worked for the period of three years prior to March, 2016;
 - (ii) documentation recording the trading results and/or profits for each business unit in which any “group leaver” worked for the 18 months since March, 2016;
 - (iii) all estimates and calculations of losses which the Plaintiff claims arose from the use by others of its alleged proprietary systems and processes etc.”
20. The court made no order with regards to this category, but instead granted liberty to the Defendants to bring a further notice of motion to seek such relief. (See order of 16 July 2018).
21. It has been explained on affidavit that the parties had reached an agreement in respect of this category of documentation. It had been agreed that the Plaintiff would furnish the Defendants with a copy of a forensic accountant’s report setting out the alleged losses. This was to have been done within two weeks of the listing of the motion for discovery on 16 July 2018.
22. It seems that the forensic accountant’s report was completed shortly thereafter (“*the Grant Thornton report*”). The report is dated 19 July 2018. In the event, however, the

report does not appear to have been furnished to the Defendants' solicitors until 18 January 2019.

23. The position adopted on behalf of the Defendants is that, prior to their having sight of the Grant Thornton report, they had been satisfied that there had been no wrongdoing on their part. It is said on affidavit that the lack of substance to the claim had been reinforced by the refusal or inability of the Plaintiff to provide any sensible information in respect of loss. Therefore, insofar as they had been acting on behalf of their client, Citadel, in recruiting the former employees, the Defendants considered that they had no basis for seeking a statutory contribution under Part III of the Civil Liability Act 1961.
24. It is said that it was only on receipt of the Grant Thornton report that the Defendants became aware, for the first time, that they were at risk of having to pay damages as a concurrent wrongdoer by reference to the *other* proceedings, i.e. the separate proceedings taken by the Plaintiff against one of their former employees, Mr. Needham. Prior to this, there had been no disclosure by the Plaintiff of the existence of other proceedings, nor any suggestion that there was any overlapping element of loss.
25. It is further said that the case made against the former employee is clearly a quite distinct claim from that made against the Defendants. The former employee is held out as playing a significant operative role in the loss asserted by the Plaintiff. The Defendants' understanding of the case pleaded against the former employee is summarised as follows (at paragraph 18 of the grounding affidavit sworn on 9 September 2019).

“Various allegations are then made that Mr. Needham supplied Citadel with confidential information for the purposes of assisting Citadel, not only with the selection and recruitment of employees, but with a budgeting and planning strategy for the new business. It was suggested that highly sensitive and confidential information had been taken by Mr. Needham in connection with his intention to commence employment with Citadel and also alleged that Citadel made offers of employment to various employees of the Plaintiff, asserting that Mr. Needham assisted in the recruitment of employees.”

26. It is said that the fact that a very large claim is now being advanced, for the first time, against the Defendants as though they were jointly and severally liable with Citadel and Mr. Needham makes it necessary to ensure that the latter are joined to the proceedings as third-parties so that any issue in relation to the causation of loss and the apportionment as between the parties can be addressed to completion.

CHRONOLOGY

27. The chronology of the proceedings is summarised in tabular form below.

19 November 2015	Plenary summons issued
24 November 2015	Notice of proceedings served (Defendants non-resident)
23 December 2015	Appearance entered by defendants
29 July 2016	Statement of claim delivered
5 September 2016	Change of solicitors for defendants
17 October 2016	Defendants' notice for particulars
22 November 2016	Plaintiff's replies to notice for particulars
15 February 2017	Defence delivered
25 April 2017	Change of solicitors for plaintiff
24 July 2017	Discovery order (against defendants)
16 July 2018	Discovery order (against plaintiff)
19 July 2018	Report on loss completed by Grant Thornton
18 January 2019	Report on loss furnished to defendants
27 June 2019	Warning letters to putative third-parties
9 & 11 July 2019	Response to warning letters
19 September 2019	Motion to join third-parties issued
2 December 2019	First return date: Motion adjourned
13 March 2020	Order made joining third-parties
19 March 2020	Third-parties served

LEGISLATIVE FRAMEWORK AND RULES OF COURT

Overview

28. Section 21 of the Civil Liability Act 1961 provides for a statutory right of compensation between concurrent wrongdoers *inter se*. This statutory right is distinct from any contractual right of indemnity which might exist (*Defender Ltd v. HSBC France* [2020] IESC 37; [2021] 1 I.L.R.M. 1).
29. The legislation envisages that there are, in principle, two procedural routes by which a defendant in existing proceedings can pursue a claim for statutory contribution against a person who is not already a party to the action. The first is to utilise the third-party procedure. This necessitates serving a third-party notice “as soon as reasonably possible”. The second is to bring a separate action for contribution. The limitation period allowed for such an action is the greater of (i) the period allowed by law to the injured person for bringing an action against the contributor, or (ii) the period of two years after the liability of the claimant is ascertained or the injured person’s damages are paid (section 31 of the Civil Liability Act 1961).
30. Matters are complicated, however, by the fact that relief in a separate action is discretionary. More specifically, section 27(1)(b) of the Civil Liability Act 1961 provides that the court may, in its discretion, refuse to make an order for contribution against the person from whom contribution is claimed if a third-party notice had not (validly) been served. Put otherwise, the failure to utilise the third-party procedure may result in relief being refused, as a matter of discretion, in a separate action for contribution taken subsequently.
31. The nature of the statutory discretion under section 27(1)(b) has been discussed in *ECI European Chemical Industries Ltd v. McBauchemie Muller GmbH* [2006] IESC 15; [2007] 1 I.R. 156. There, the Supreme Court held that the type of considerations which are relevant in deciding whether to set aside a third-party notice will also be relevant to

the exercise of the court's discretion to allow a claim for contribution in separate proceedings. The court would have to consider was there a good reason why the statutory requirement of serving a third-party notice as soon as is reasonably possible had not been complied with.

32. In those cases where a third-party notice had actually issued, only for it to be set aside subsequently, any matter already decided on the application to set aside the third-party notice must be treated as *res judicata*. Where the third-party notice had been set aside because it had not been served as soon as reasonably possible, then this finding will inform the exercise of the court's discretion to allow a claim for contribution in separate proceedings. The Supreme Court suggested that in most such cases, irrespective of any question of prejudice, the separate proceedings claiming contribution should be rejected. On this analysis, it is only in those cases where the third-party notice had been set aside for reasons *other than* delay that there is a likelihood of being allowed to pursue a claim for contribution thereafter in separate proceedings.
33. The Court of Appeal in *Ballymore Residential Ltd v. Roadstone Ltd* [2021] IECA 167 has queried whether the approach adopted by the Supreme Court might be thought to be an unduly narrow one. Collins J. suggested, *obiter dicta*, that if the defendant to the claim for contribution has not been materially prejudiced by a failure to utilise the third-party procedure, then it might appear difficult to understand why the court's discretion should be exercised against permitting a claim for contribution to be pursued.
34. In summary, on the current state of the authorities, the setting aside of a third-party notice on the grounds of delay may have the consequence that the defendant is precluded thereafter from seeking any contribution from that party.
35. Finally, it should be noted that a claim for contribution may be made notwithstanding that the person making the claim denies or does not admit that he is a wrongdoer, and the

making of the claim shall not be taken as implying any admission of liability by him (section 27(5) of the Civil Liability Act 1961).

Obligation to serve “as soon as reasonably possible”

36. Section 27 of the Civil Liability Act 1961 provides that a defendant, who wishes to make a claim for contribution in third-party proceedings, must serve a third-party notice as soon as is reasonably possible.
37. A defendant is not required to serve a third-party notice until such time as they are aware of any potential claim for contribution which they might have against the third-party. (*Board of Governors of St. Laurence’s Hospital v. Staunton* [1990] 2 I.R. 31). The onus is on the defendant, who has joined a third-party, to explain and justify any delay. In assessing delay, the court will have regard to the fact that third-party proceedings should not be instituted without first assembling and examining the relevant evidence and obtaining appropriate advice thereon. However, the quest for certainty or verification must be balanced against the statutory obligation to make the appropriate application as soon as reasonably possible (*Molloy v. Dublin Corporation* [2001] IESC 53; [2001] 4 I.R. 52; [2002] 2 I.L.R.M. 22).
38. It is incumbent on the court to look not only at the explanations which have been 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 served as soon as is reasonably possible (*Greene v. Triangle Developments Ltd* [2015] IECA 249).
39. The statutory requirement to make an application “as soon as is reasonably possible” should be regarded as also applying to the bringing of an application to *set aside* such a third-party notice (*Boland v. Dublin City Council* [2002] IESC 69; [2002] 4 I.R. 409). No point has been taken in this regard in the present case.

Order 16, Rules of the Superior Courts

40. The provisions of section 27 of the Civil Liability Act 1961 are supplemented by Order 16 of the Rules of the Superior Courts. This order introduces a requirement to obtain the leave of the court to issue a third-party notice out of the Central Office of the High Court. It also introduces a specific time-limit: An 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.
41. The Court of Appeal, in *Greene v. Triangle Developments Ltd* [2015] IECA 249, observed that the time-limit under Order 16 is not one with which the parties will normally comply or even be expected to comply. More recently, the Court of Appeal in *O'Connor v. Coras Pipeline Services Ltd* [2021] IECA 68 (per Barrett J.) described as “regrettable” the fact that the rules establish time constraints which are so rigorous that they are more often honoured in the breach than the observance, with the courts expected to tolerate what appears to be a general divergence in practice from the timescale that Order 16, rule 1(3) ordains.
42. The twenty-eight day time-limit thus represents, at most, a benchmark against which the statutory requirement to move “as soon as is reasonably possible” might be measured.

Date of service or issuance of motion

43. There is some disagreement on the authorities as to whether delay should be calculated by reference to (i) the date upon which the third-party notice is served (*Greene v. Triangle Developments Ltd* [2008] IEHC 52), or (ii) the earlier date upon which the motion seeking to join the third-party is issued (*McElwaine v. Hughes* [1997] IEHC 74; *Morey v. Marymount University Hospital and Hospice Ltd* [2017] IEHC 285). I tend to the view that time should be taken as running from the date upon which the third-party notice is actually served. This appears to be more in keeping with the statutory language,

i.e. “serve a third-party notice upon such person as soon as is reasonably possible”. It is also more consistent with the objective of the temporal requirement which, as discussed under the next heading, is to avoid unnecessary delay to the plaintiff’s action. It is only once the third-party notice has actually been served that applications can be made for directions.

44. In practice, this distinction between the two dates will rarely be decisive. This is because, in most cases, the period of time between the issuance of the motion seeking to join the third-party and the subsequent service of the third-party notice will be short, certainly relative to the overall progress of the proceedings. If and insofar as there is a significant time period between the two, and this is caused by factors outside the control of the defendant, then the delay will not be regarded as *unreasonable*.

“AS SOON AS REASONABLY POSSIBLE”: OBJECTIVE OF REQUIREMENT

Submissions of the parties

45. The principal area of disagreement between the parties centres on the objective underlying the statutory obligation to serve a third-party notice as soon as is reasonably possible. The Defendants insist that the purpose is to ensure that the general progress of the main proceedings is not unnecessarily delayed by the third-party claim. It is said that this is the benchmark against which any delay is to be assessed.
46. The Third-Parties contend, conversely, that the purpose is to put the contributor, i.e. the third-party, in as good a position as is possible in relation to knowledge of the claim and the opportunity of investigating it. Counsel submits that this principle is long since established, citing *A & P (Ireland) Ltd v. Golden Vale Products Ltd*, unreported, High Court, McMahon J, 7 December 1978. The majority judgment of the Court of Appeal in *Kenny v. Howard* [2016] IECA 243 is said to represent a recent example of the application of this principle. The analysis in the judgment of Ryan P. is directed to

possible prejudice to the third-party, and not to the impact of the delay on the progress of the main proceedings. This is so notwithstanding that the proceedings in that case had already been set down for trial by the time the third-party notice came to be served.

Findings of the court

47. The overarching objective of the third-party procedure is to simplify litigation and to avoid a multiplicity of actions, by allowing the main proceedings and the third-party proceedings to be heard together by the same judge (*Connolly v. Casey* [1999] IESC 76; [2000] 1 I.R. 345, citing *Gilmore v. Windle* [1967] I.R. 323). A multiplicity of actions is detrimental to the administration of justice; to the third-party; and to the issue of costs (*Connolly v. Casey*).
48. The statutory obligation to serve the third-party notice as soon as reasonably possible falls to be interpreted by reference to this overarching objective of avoiding a multiplicity of actions. The purpose of the obligation is to ensure that the third-party procedure does not cause unreasonable delay to the general progress of the main action. A plaintiff will not be directly concerned with the outcome of the third-party proceedings, and accordingly should not have the progress of his or her proceedings impaired by the existence of the claim between the defendant and the third-party.
49. The modern case law, commencing with *Connolly v. Casey*, has consistently adopted the approach that in considering whether a third-party notice had been served as soon as is reasonably possible, the whole circumstances of the case and its general progress must be considered.
50. The judgment in *Connolly v. Casey* has been interpreted by the Court of Appeal in *Greene v. Triangle Developments Ltd* [2015] IECA 249 as making it incumbent on the 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 served as soon as is reasonably possible.

51. On the facts of *Greene*, the Court of Appeal had regard to the fact that there had only been a short delay between (i) the delivery of the defence (in response to a motion for judgment in default) and (ii) the issuance of the motion seeking to join the third-party. Put otherwise, in making an objective assessment of the delay, the court attached some weight to the plaintiff's own delay in moving to ensure the delivery of the defence.
52. Ryan P., delivering the majority judgment of the Court of Appeal in *Kenny v. Howard* [2016] IECA 243, explained the purpose of the "as soon as reasonably possible" requirement as follows (at paragraph 17).

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

53. Having cited the judgment in *Connolly v. Casey*, Ryan P. then refers to the object of the provision, insofar as it restricts the time to what is reasonably possible, as being *to protect the plaintiff's position* while at the same time ensuring that all the appropriate other parties are before the court in the same set of proceedings.
54. Baker J. (then sitting in the High Court) gave a similar interpretation to the provision in *Morey v. Marymount University Hospital and Hospice Ltd* [2017] IEHC 285 (at paragraph 21).

"Following the decision of the Supreme Court in *Connolly v. Casey* the fact that the first defendant has not provided a satisfactory explanation for a delay is not the end of the matter, and the general progress of the case and its general circumstances also fall for consideration. This is because the primary purpose of the statutory

provision mandating reasonable expedition is to balance the desirability of avoiding a multiplicity of actions on the one hand with the objective that the primary proceedings not be unduly delayed by the progress of the third party issue.”

55. A similar rationale underlies the attempt, under Order 16 of the Rules of the Superior Courts, to align the time-limit governing the third-party procedure with the time-limits prescribed for the delivery of other pleadings. Twenty-one days is allowed for the delivery of a statement of claim and twenty-eight days for the delivery of a defence. An 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.
56. As it happens, these time-limits are not complied with in the majority of cases. There is almost always some slippage in the delivery of the various pleadings and in the making of applications to join third-parties. For present purposes, however, what is relevant is that the Rules of the Superior Courts envisage a timetable whereby a defendant will have delivered their defence within twenty-eight days, and then have applied to join a third-party within a further twenty-eight days. The timetable reflects the statutory objective, under section 27 of the Civil Liability Act 1961, that the third-party procedure should not unnecessarily delay the progress of the main proceedings.
57. The contrary interpretation advanced by the Third-Parties is based on an old decision, *A & P (Ireland) Ltd v. Golden Vale Products Ltd*, unreported, High Court, McMahon J., 7 December 1978. It is correct to say that this judgment held that the purpose of the third-party notice is to put the contributor in as good a position as is possible in relation to knowledge of the claim and opportunity of investigating it. It should be explained, however, that on the facts of the case no third-party notice had ever been served. Rather, the proceedings before the court were an action for contribution which had been taken *subsequent* to the settlement of personal injuries proceedings. The plaintiff in the second action, who had been the defendant in the personal injuries proceedings, sought a

contribution from an alleged concurrent wrongdoer. The issue before the court, therefore, concerned the court's statutory discretion to allow a claim for contribution in a separate action, where the third-party procedure had not been availed of. (The nature of this statutory discretion has been discussed at paragraphs 29 to 34 above). It had not been necessary, therefore, for the High Court in *A & P (Ireland) Ltd v. Golden Vale Products Ltd* to consider the question of delay to the progress of the main proceedings, i.e. the personal injuries proceedings. This is because those proceedings had already concluded before any claim for a contribution was made. It is only in the more recent case law that the question of delay to the main proceedings has had to be directly addressed. This court is bound by the more recent judgments of the Court of Appeal and the Supreme Court discussed above.

58. Not only is the suggestion, that the "as soon as reasonably possible" requirement is for the benefit of the third-party, inconsistent with the modern case law, it would also produce the following anomalous result. The procedural protections afforded to an alleged wrongdoer would differ according to the happenstance of whether they had been joined as a defendant to the main proceedings or as a third-party. If joined as a defendant, the wrongdoer might not have been put on notice of a claim for a number of years. This is because a putative plaintiff is allowed the full reach of the relevant limitation period within which to institute proceedings against a defendant, and a further twelve months within which to serve same. Thereafter, a failure by the plaintiff to comply with the time-limits prescribed under the Rules of the Superior Courts for the delivery of pleadings will not normally result in the plaintiff's claim being struck out, unless there has been inordinate and inexcusable delay.
59. By contrast, if the wrongdoer has not been named as a defendant, but is subsequently joined as a third-party, then a much tighter timeframe applies. The claiming party, i.e. the

defendant in the main action, is required to issue and serve the third-party notice as soon as reasonably possible. This is a much higher standard than that to which a plaintiff is held. There are many examples of third-party proceedings having been set aside where the delay is measured in months rather than years. The imposition of this tighter timeframe is justified to ensure that the third-party proceedings keep pace with the main action. The rationale for imposing the tighter timeframe is less convincing if the sole purpose is to benefit the third-party.

60. It is convenient to address, at this point of the judgment, a related submission made by Citadel as follows. My attention has been drawn to the following *dicta* in the judgment of the Court of Appeal in *O'Connor v. Coras Pipeline Services Ltd* [2021] IECA 68 (at paragraph 27). Barrett J. suggested that a court should not place a greater premium on a third-party's rights than the third-party itself places on same. The learned judge continued to say that where a third-party expressly indicates that it does not wish to participate in the main action, it is not for the court to second-guess the third-party as to where its own best interests lie. These *dicta* were premised on an interpretation of the oft-cited statement of principle in *Connolly v. Casey* [1999] IESC 76; [2000] 1 I.R. 345 to the effect that to enable a third-party to participate in the proceedings is to maximise the third-party's rights.
61. With respect, the observations in *O'Connor v. Coras Pipeline Services Ltd* are *obiter dicta* only. The appeal had been decided principally on the narrow ground that the application to set aside the third-party notice had not been brought as soon as reasonably possible, as mandated by the judgment of the Supreme Court in *Boland v. Dublin City Council* [2002] IESC 69; [2002] 4 I.R. 409. There is nothing in the conclusions section of the judgment in *O'Connor v. Coras Pipeline Services Ltd* which implies that the observations discussed above were decisive.

62. If and insofar as the observations were intended to suggest that the court must defer to the third-party on the question of whether it wishes to be joined to the proceedings, same would be inconsistent with the judgment of the Supreme Court in *Connolly v. Casey*. Whereas a third-party has a choice as to the extent to which it actively participates at the hearing, it does not get to decide whether it should be joined as a third-party and bound by the outcome of the third-party proceedings.
63. In summary, the principal objective underlying the statutory obligation to serve a third-party notice as soon as is reasonably possible is to ensure that the third-party procedure does not delay the general progress of the main proceedings. This does not mean that prejudice to the third-party is not a factor to be addressed in the consideration of the whole circumstances of the case. It does, however, mean that it is incorrect to say that delay has to be viewed solely through the prism of its impact on the third-party.
64. More broadly, the third-party procedure is intended to serve the interests of all parties by avoiding a multiplicity of actions, with the attendant costs. It is incorrect, therefore, to regard the third-party procedure as being for the benefit of the third-party alone, i.e. that it represents a form of entitlement conferred upon the third-party which the third-party may waive at will.

DISCUSSION: SUBJECTIVE ASSESSMENT OF DELAY

65. The principal issue to be determined in this judgment is whether the third-party notices were served as soon as reasonably possible. The determination of this issue requires the court, first, to identify the period of delay; and, secondly, to assess whether the delay was reasonable or not.
66. The parties are in disagreement both as to the start point and end point of any delay. The Third-Parties submit that delay should be measured from the date prescribed under

Order 16 for the making of an application to issue and serve a third-party notice, i.e. twenty-eight days from the time limited for delivering the defence. Time is said to run from then until the actual service of the third-party notice. On this analysis, the delay is just short of three and a half years. Even if time only runs to the earlier date upon which the joinder motion was issued (as opposed to the date of service), the delay is still significant, i.e. approximately three years.

67. Conversely, the Defendants submit that the obligation to serve the third-party notice “as soon as is reasonably possible” is a relative one. It is necessary to identify the occurrence of an event from which alleged delay can be measured. In the circumstances of the present case, it is said that it was only upon receipt of the Grant Thornton report on 18 January 2019 that the Defendants would have had cause to make a claim for contribution against Citadel and Mr. Needham. On this analysis, it is said that the period of any alleged delay runs from 18 January 2019 to the date of the issuance of the joinder motion on 19 September 2019.
68. It will be necessary, therefore, for this court to rule on the significance or otherwise of the Grant Thornton report. In the event that this court were to find that the application to join the Third-Parties could not reasonably have been made until receipt of the Grant Thornton report, it will still be necessary to consider whether there had been unreasonable delay prior to, and subsequent to, the receipt of the report. More specifically, it will be necessary to consider whether the Defendants should have sought the report earlier and whether the lapse of time thereafter in joining the Third-Parties was reasonable.
69. I address these various issues in sequence below.

(i). Significance of Grant Thornton report

70. The case law indicates that it may be reasonable for a defendant to await particulars of the claim made against it in the main proceedings before deciding whether to join a third-

party. Reasonableness is to be assessed at the time the particulars are sought, rather than with the benefit of hindsight once the replies are received. The test is whether it was reasonable to await the replies to particulars. Whether the replies did or did not materially alter the defendant's state of knowledge is not the test (*Connolly v. Casey* [1999] IESC 76; [2000] 1 I.R. 345).

71. The Defendants in the present case had sought particulars of the losses alleged by the Plaintiff, initially by way of a notice for particulars, and thereafter by way of an application for discovery. An agreement had been reached in July 2018 whereby the particulars would be provided by way of a forensic accountant's report, i.e. the Grant Thornton report. The content of this report is significant, and changes the entire complexion of the case. The claim has been reoriented from one directed to injunctive relief to one seeking an enormous sum in respect of an alleged loss of profits. There is simply nothing in the statement of claim which presaged the claim now advanced for some 47 million euro. To adopt the language in the case law, the content of the report materially altered the Defendants' state of knowledge of the claim against them.
72. The Third-Parties have sought to play down the significance of the Grant Thornton report, saying that the report "merely" quantifies the losses allegedly suffered by the Plaintiff. With respect, this submission is predicated on an overly narrow view of the type of considerations which are relevant to the decision to join a third-party. The case law emphasises that a contribution should not be sought from a third-party without first assembling and examining the relevant evidence and obtaining appropriate advice thereon. As explained by the Supreme Court in *Molloy v. Dublin Corporation* (cited earlier), the decision to join a third-party involves the making of legal and perhaps commercial judgments.

73. The principal consideration will, of course, be whether there is a proper basis for a claim for contribution against the putative third-party. Just as it would be inappropriate to issue proceedings against a defendant without a proper basis, so too is it inappropriate to join a third-party to existing proceedings in the absence of grounds for doing so. There may, however, be additional considerations. These would include the strength of the claim being made against a defendant and the quantum of damages being sought. A defendant might well reasonably decide that it is unnecessary to join a third-party where the claim is frivolous and vexatious or where the damages sought are nominal.
74. To say that the Grant Thornton report “merely” quantifies the losses allegedly suffered by the plaintiff is to underestimate the crucial importance for a defendant of knowing the extent of the claim with which they are faced. A defendant is always entitled to know the scale of the damages being sought against them. The courts regularly direct the delivery of further and better particulars of loss where same have not been properly pleaded.
75. In certain cases, a plaintiff may not be in a position to quantify damages with precision at the time the proceedings are issued. For example, the medium- to long- term effects of the injuries suffered by a plaintiff in personal injuries proceedings may not be known at the time proceedings are issued. However, even in those cases where a plaintiff is not in a position to articulate the quantum of damages sought with precision, they will generally be able to indicate the broad parameters of same. A defendant will normally have a sense of the extent of the claim being made and will, accordingly, be in a position to make an informed decision as to its approach to the litigation, including on the need to join third-parties.
76. The circumstances of the present case are truly exceptional. The Grant Thornton report represents the very first time that any insight whatsoever into the extent of the Plaintiff’s

claim has been provided. The sum claimed is staggering. There is some force in the observation made by the Defendants' solicitors, in their warning letters of 27 June 2021, that if loss has been incurred in the order of magnitude indicated, this does not arise because of any wrongdoing on the part of the recruiting agency alone. The Defendants insist that they had no responsibility for the decision to hire the former employees nor for their subsequent actions.

77. This is not a case where further details have been provided during the course of the proceedings, with the result that there has been an incremental increase in the damages being claimed. The disclosure for the first time that the Plaintiff is pursuing a claim for some 47 million euro is hugely significant.
78. For the reasons explained above, I am satisfied that, in the exceptional circumstances of the present case, the Defendants, upon disclosure of the particulars of loss, were entitled to give fresh consideration to the question of whether Citadel and Mr. Needham should be joined as third-parties to the proceedings.
79. As it happens, however, the Grant Thornton report discloses more than simply the scale of the claim. The report also discloses an attempt by the Plaintiff to hold the Defendants jointly liable with one of the leaving employees for the alleged loss of profits suffered by the Plaintiff. The report also represents the first time that the Plaintiff has formally disclosed to the Defendants the existence of the proceedings against the employee. It is certainly the first time that an attempt has been made to forge a direct link between the two sets of proceedings, with a global sum by way of damages being claimed in respect of both. Again, this represents a significant development in the understanding of the case being made against the Defendants. As appears from the defence delivered on 15 February 2017, the Defendants had previously attached some significance to the fact

that—on their then understanding of matters—the Plaintiff was not pursuing a claim against any of the former employees.

80. There is some debate in the affidavits as to the extent to which the solicitors acting for the Defendants may have been aware of the existence of the second set of proceedings prior to the receipt of the Grant Thornton report. It is said that a lawyer acting on behalf of Citadel had, in December 2017, drawn the attention of the Defendant’s solicitors to the reserved judgment on the discovery application in those proceedings, *Susquehanna International Group Ltd v. Needham* [2017] IEHC 706. This judgment had been published on the Courts Service website and thus would have been publicly accessible. The judgment contains a summary of the claims being made against the employee. It is suggested therefore that, as of December 2017, the Defendants were on constructive notice of the allegations being made against the employee.
81. With respect, this argument tends to miss the point. The significance of the Grant Thornton report is the link that it forges between the two sets of proceedings. This represents the first time that the Plaintiff has sought to characterise the Defendants and the employee as being jointly responsible for the alleged loss of profits. This brings into play the definition of concurrent wrongdoers for the purposes of the Civil Liability Act 1961.
82. In summary, I am satisfied that the content of the Grant Thornton report disclosed a significant change in the nature of the case being faced by the Defendants. The statement of claim refers, largely, to apprehended losses. It would not have been evident to anyone reading the statement of claim that the value of the losses being alleged would run to a figure of 47 million euro. Following upon this reorientation of the Plaintiff’s case, the Defendants were entitled to give fresh consideration to the question of whether Citadel and Mr. Needham should be joined as third-parties to the proceedings.

(ii). Delay in seeking copy of Grant Thornton report

83. The next question which arises is whether the Defendants delayed unreasonably in seeking out and obtaining the particulars of loss. As discussed earlier, an agreement had been reached between the Defendants and the Plaintiff in July 2018 whereby, rather than consenting to an order for discovery in the terms then sought by the Defendants, the Plaintiff agreed to furnish a report of a forensic accountant which would estimate the loss. This was to be done within two weeks. The report, i.e. the Grant Thornton report, was completed a number of days after this agreement. Notwithstanding this, the report was not ultimately received by the Defendants' solicitors until 18 January 2019, that is some six months later.
84. There is no evidence before the court as to what steps, if any, the Defendants took to chase up a copy of the report in that six-month period. Given that the agreement between the parties had been that the report would be furnished within two weeks, the delay in seeking out the report was unreasonable.

(iii). Delay after receipt of Grant Thornton report

85. The judgment in *Greene v. Triangle Developments Ltd* [2015] IECA 249 refers to the need to allow reasonable time to prepare the papers for an application to join a third-party, suggesting a period of eight to ten weeks as a matter of reasonable practice of solicitors.
86. In the present case, there was unreasonable delay in pursuing an application to join the two third-parties. The Grant Thornton report is not a particularly lengthy or complex document. It would have been immediately apparent to anyone reading the report that a very significant claim was being pursued against the Defendants in the two sets of

proceedings. The Defendants were obliged to move as soon as reasonably possible to apply to join the third-parties.

87. No satisfactory explanation has been provided on affidavit for the delay in so doing. Whereas it is not unreasonable to write to a potential third-party in advance, to seek an indemnity or their consent to their joinder to the proceedings, it should not have taken five months to do so. Once the replies to these letters had been received, the motion should have been issued promptly. Instead, there was a further delay of some two months in issuing the motion to join. Yet further delay ensued in that, on the return date, the motion was adjourned for three months. The third-party notice was not served until March 2020.

OBJECTIVE ASSESSMENT OF DELAY

88. For the reasons set out above, I have concluded that the Defendants are culpable of two periods of unreasonable delay. First, between July 2018 and January 2019; and, secondly, between January 2019 and March 2020. The Defendants have failed to discharge the onus upon them to explain and justify the delay.
89. This is not, of course, the end of the matter. As emphasised by the Court of Appeal in *Greene v. Triangle Developments Ltd* [2015] IECA 249, it is incumbent on the 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 served as soon as is reasonably possible.
90. On the facts of *Greene*, the Court of Appeal had regard to the fact that there had only been a short delay between (i) the delivery of the defence (in response to a motion for judgment in default), and (ii) the issuance of the motion seeking to join the third-party.

Put otherwise, in making an objective assessment of the delay, the court attached some weight to the plaintiff's own delay in moving to ensure the delivery of the defence.

91. The statutory obligation to serve a third-party notice as soon as reasonably possible seeks to reconcile (i) the objective of avoiding a multiplicity of proceedings with (ii) the risk of unreasonable delay to the main proceedings. It follows that the reasonableness of any delay is to be assessed primarily by reference to the overall circumstances and general progress of the main proceedings.
92. Applying these principles to the present proceedings, I have concluded that, *on an objective assessment*, the delay in serving the third-party notices was not unreasonable. This is because the delay on the part of the Defendants cannot be said to have adversely affected the progress of the main proceedings. Rather, the main proceedings have been held up as a consequence of the complete failure on the part of the Plaintiff to produce any particulars of loss until 18 January 2019, i.e. some two and a half years after the statement of claim had been delivered. It bears repetition that this is not a case where *additional* particulars of loss were provided subsequently, as can often happen in the course of proceedings. Here, no particulars of loss at all had been provided prior to the furnishing of the Grant Thornton report. The Grant Thornton report represents the very first time that any insight whatsoever into the extent of the Plaintiff's claim has been provided.
93. Put simply, the Plaintiff failed to plead its case properly until it belatedly produced particulars of loss. The delay to the progress of the main proceedings falls to be measured by reference to this event, i.e. the furnishing of the Grant Thornton report to the Defendants' solicitors on 18 January 2019. The delay of some fourteen months thereafter in serving the third-party notices has to be seen in the context of the leisurely progress of the main proceedings.

94. The present case is to be contrasted with those discussed in many of the authorities. In many instances, the delay is attributable to attempts by a defendant to secure information from an external source. The most common example being where the delay relates to obtaining a report from an independent and impartial expert. Here, it was the Plaintiff itself that was withholding crucial information.
95. In all the circumstances, it would be disproportionate to set aside the third-party notices. The only supposed benefit of setting aside the third-party notices would be to penalise the Defendants for their delay. This would come at the cost of the risk of a multiplicity of actions, i.e. the very mischief which the legislation seeks to avoid. The Defendants would, in principle, be entitled to issue separate proceedings against Citadel (and, possibly, against Mr. Needham subject to section 17 of the Civil Liability Act 1961) notwithstanding the setting aside of the third-party notices. There would then be a controversy as to whether the court should exercise its statutory discretion to refuse relief. (See discussion at paragraphs 29 to 34 above).
96. It is correct to say—as counsel for both the Third-Parties do—that the risk of a multiplicity of actions exists whenever a third-party notice is set aside. The distinguishing feature of the present case, however, is that there is no countervailing benefit in setting aside the third-party notices which would outweigh this risk. An order setting aside the third-party notices is not necessary to ensure the timely progress of the main proceedings. The majority of the delay is attributable to the failure of the Plaintiff to plead its case properly from the outset. The third-party proceedings can still be heard in conjunction with the main proceedings without causing unreasonable delay to the latter.
97. Nor is the setting aside of the third-party notices necessary to mitigate any prejudice to the Third-Parties. The authorities indicate that a third-party applying to set aside a notice

can argue that he had suffered prejudice and that a shorter period than might otherwise be allowed ought to be imposed in determining what was as soon as reasonably possible (*Kenny v. Howard* [2016] IECA 243).

98. Both Citadel and Mr. Needham have been aware of the existence of the main proceedings for many years. Citadel has been liaising with the Defendants' solicitors in the preparation of the defence to these proceedings, and Mr. Needham had been involved in his own proceedings. Both have been on notice that the events of 2015 and 2016 are alleged to have involved wrongdoing on their part (as per the statement of claim).
99. If and insofar as it is suggested that Citadel may be prejudiced by an inability to access certain documentation, this has to be seen in the context of their knowledge of the proceedings and their having had an opportunity to preserve the documents. The other points of prejudice asserted, i.e. the accuracy of witnesses' recollection of events, have to be measured against the type of delays inherent in any significant litigation.

SECTION 17, CIVIL LIABILITY ACT 1961

100. It has been unnecessary for the purpose of this judgment to consider the broader implications of the settlement of the proceedings between Susquehanna International and Mr. Needham. This is because the application to set aside the third-party proceedings as against Mr. Needham has been advanced solely by reference to the question of delay.
101. No argument has as yet been addressed to the court in respect of the implications of section 17 of the Civil Liability Act 1961. In brief, this section provides that an injured party shall be "identified" with any concurrent wrongdoer in respect of whom it has entered into a settlement. Any claim which such a party has against other concurrent wrongdoer's shall be reduced in the amount of the consideration paid for the release or accord.

102. No submission has been made as to whether there is any necessity to join the released wrongdoer as a third-party to proceedings, or, whether, alternatively, the other alleged concurrent wrongdoers can simply call the released wrongdoer as a witness and seek discovery against him as a non-party.

CONCLUSION AND PROPOSED FORM OF ORDER

103. The principal objective underlying the statutory obligation under section 27 of the Civil Liability Act 1961 to serve a third-party notice “as soon as is reasonably possible” is to ensure that the third-party procedure does not delay the general progress of the main proceedings. This does not mean that prejudice to a third-party is not a factor to be addressed in the consideration of the whole circumstances of the case. What might otherwise have been regarded as a reasonable time period might be foreshortened if there is prejudice caused to a third-party. It is incorrect, however, to say that delay has to be viewed exclusively, or even primarily, through the prism of its impact on the third-party.
104. A defendant is not required to serve a third-party notice until such time as they are aware of any potential claim for contribution which they might have against the third-party. In most instances, this will require consideration solely of whether there is a proper basis for saying that the third-party may be a concurrent wrongdoer. There may, however, be additional considerations. These would include the strength of the claim being made against a defendant and the quantum of damages being sought. A defendant might well reasonably decide that it is unnecessary to join a third-party where the claim is frivolous and vexatious or where the damages sought are nominal.
105. On the facts of the present case, the belated disclosure that the Plaintiff was seeking damages in the sum of 47 million euro changed the entire complexion of the case. The

claim had been reoriented from one directed to injunctive relief to one seeking an enormous sum in respect of an alleged loss of profits.

106. In all the circumstances, it would be disproportionate to set aside the third-party notices. The only supposed benefit of setting aside the third-party notices would be to penalise the Defendants for their delay. This would come at the cost of the risk of a multiplicity of actions, i.e. the very mischief which the legislation seeks to avoid. The Defendants would, in principle, be entitled to issue separate proceedings against Citadel (and, possibly, against Mr. Needham subject to section 17 of the Civil Liability Act 1961) notwithstanding the setting aside of the third-party notices. There is no countervailing benefit in setting aside the third-party notices which would outweigh this risk. An order setting aside the third-party notices is not necessary to ensure the timely progress of the main proceedings. The majority of the delay is attributable to the failure of the Plaintiff to plead its case properly from the outset. The third-party proceedings can still be heard in conjunction with the main proceedings without causing unreasonable delay to the latter.
107. The applications to set aside the third-party proceedings are, therefore, refused.
108. As to costs, my *provisional* view is that the Defendants, having been entirely successful in resisting the application to set aside the third-party notices, are entitled to the costs of the motions as against the Third-Parties in accordance with the principles prescribed under Part 11 of the Legal Services Regulation Act 2015. Such costs to be adjudicated upon by the Office of the Chief Legal Costs Adjudicator in default of agreement. The proposed costs order would be stayed in the event of an appeal. If either party wishes to contend for a different form of order, short written submissions should be filed by 1 October 2021.
109. The proceedings will be listed before me on 6 October 2021 at 10.30 a.m. for final orders.

110. If any of the parties wish to have the proceedings case managed, with a view to securing an early hearing date, they are at liberty to issue motions for directions returnable before me on 6 October 2021.

Appearances

Gavin Mooney, SC and Paul Fogarty for the defendants instructed by Miley & Miley
Paul Gardiner, SC and Caren Geoghegan for the first named third-party instructed by Lewis Silken Ireland

Niall Beirne, SC and Shelley Horan for the second named third-party instructed by McInnes Dunne

Approved
Gemma S. MINS