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Judgment: approved by the Court for handing down | *Delivered:* **8/10/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

2003 No 1195

_____

BETWEEN:

ALEXANDRA ESTHER BOYD

Plaintiff

And

DEPARTMENT FOR REGIONAL DEVELOPMENT

Defendant

_____

McCLOSKEY J

I INTRODUCTION

[1] This is an appeal by the Defendant against the order of the Deputy Master, dated 15th September 2008, refusing the Defendant's application for leave to issue Third Party proceedings. The proposed Third Parties, who were represented both at first instance and in this court, are, in order:

(a) NTL.

(b) NIE.

(c) McNicholas Construction Services ("*McNicholas*").

[2] The litigation context in which the Defendant seeks to initiate Third Party proceedings against the aforementioned entities is constituted by a claim for damages for personal injuries, loss and damage alleged to have been sustained by the Plaintiff on 31st December 2000. The Plaintiff's case is that while driving a motor vehicle on the public highway at the Antrim Road, Glengormley, County Antrim she lost control and crashed into a field adjacent to the far side of the road by reason of blocked gullies and ensuing excessive surface water. The causes of action which she invokes against the Defendant are breach of statutory duty, negligence and nuisance. The Defence traverses the Statement of Claim comprehensively and pleads, in the alternative, contributory negligence.

[3] The landmark dates and events in the history of these proceedings may be summarised thus:

(a) 31st December 2000: date of accident.

(b) 25th February 2003: issue of the Writ of Summons.

(c) 14th July 2004: service of the Statement of Claim.

(d) 25th August 2004: service of the Defence.

(e) 8th October 2004: service of Notice of Setting Down for Trial.

(f) 25th August 2006: application by the Plaintiff for an order pursuant to RSC Order 15, Rule 6 granting leave to add NTL, NIE, and McNicholas as further Defendants.

(g) 7th December 2006 and 30th April 2007: discovery orders in favour of the Plaintiff against the Defendant.

(h) 4th June 2007: Order of the Master refusing the Plaintiff's application.

(i) 13th September 2007 and 19th October 2007: interlocutory discovery orders in favour of the Plaintiff against the Defendant.

(j) 14th March 2008: service of a draft amended Statement of Claim on behalf of the Plaintiff.

(k) 7th April 2008: scheduled date of trial.

(l) 28th May 2008: Defendant's summons seeking an order granting leave to bring third party proceedings.

(m) 15th September 2008: Order of the Deputy Master, refusing the Defendant's application.

(n) 18th September 2008: Notice of Appeal.

(o) 26th September and 3rd October 2008: dates of hearing of the appeal in this court.

[4] The history of this litigation to date has certain striking features. To say that this action has proceeded at a leisurely pace would be a serious understatement. It is a matter of some concern that the period which elapsed between the issue of the Writ of Summons and service of the Statement of Claim exceeds five years. The litigation has continued for over nine years and the tenth anniversary of the Writ of Summons is looming. The application to join the proposed Third Parties as further Defendants was not brought until almost two years after the action had been set down for trial. Then, the application having been issued, a period of almost one year elapsed before it was heard. Ultimately, the Plaintiff's solicitors served a draft amended Statement of Claim just three weeks in advance of the scheduled date of trial, resulting in the trial date being vacated. This was followed by two further periods of delay. Firstly, some two months elapsed before the Defendant issued its summons seeking an order granting leave to initiate third party proceedings. The summons, however, was not heard on its allocated date and, with the long vacation intervening, a further delay of almost four months occurred.

[5] In an era where there is ever-increasing attention to, and public debate about, delays in the conduct of all forms of litigation, the conduct of this action has, regrettably, been inexplicably tardy. Unfortunately, there is nothing novel about this topic. It was specifically highlighted by William Shakespeare several centuries ago [Hamlet, Act III, Scene 1] in the celebrated pithy expression "*the law's delay*" and was the subject of a specially convened conference ("Avoidable Delay"), albeit in the context of the criminal justice system, in February this year. In his address to this conference, the Lord Chief Justice stated:

> "*I have no difficulty with the concept of judges being responsible for the efficient and speedy conduct of a case when it is before them …*
>
> *There is also a responsibility, however, on others in the system to act in a similar fashion. It is incumbent on all of us to constantly review the way we approach this task with a focus on the participants in the process. The test is to*

> *secure a fair trial within a reasonable period and to respect the rights and expectations of the victims, witnesses and Defendants*".

These sentiments can be readily applied to every field of litigation. I have little doubt that many of the individual periods of delay in the present action could have been reduced or avoided. These delays have not occurred in a vacuum. Rather, they have operated to deny the Plaintiff a trial of her action within a reasonable time. They have also served to give rise to some of the main issues which this appeal has generated and will have a material bearing on how it is determined.

[6] The central issues are, in summary:

(a) Whether the proposed Third Party proceedings fall within the ambit of RSC Order 16, Rule 1.

(b) The need for the Defendant to demonstrate that the proposed third parties have a case to answer.

(c) The Defendant's delay.

(d) Limitation.

It will be immediately apparent that these issues do not belong to hermetically sealed compartments and this will be reflected in my consideration of them below.

II RSC ORDER 16

[7] The provisions of RSC Order 16 are arranged under the rubric of "Third Party and Similar Proceedings". Rule 1 provides, in material part:

> "*(1) Where in any action a Defendant who has entered an Appearance –*
>
> > *(a) claims against a person not already a party to the action any contribution or indemnity; or*
> >
> > *(b) claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the Plaintiff; or*

> *(c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the Plaintiff and the Defendant but also as between either or both of them and a person not already a party to the action,*
>
> *then, subject to paragraph (2), the Defendant may issue a* [Third Party Notice] *containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.*
>
> *(2) A Defendant to an action may not issue a Third Party Notice without leave of the court unless the action was begun by Writ and he issues the Notice before serving his Defence on the Plaintiff.*
>
> *(3) Where a Third Party Notice is served on the person against whom it is issued, he shall as from the date of service be a party to the action (in this Order referred to as a Third Party) with the same rights in respect of his defence against any claim made against him in the Notice and otherwise as if he had been duly sued in the ordinary way by the Defendant by whom the Notice was issued*".

[8] Order 16, Rule 2 stipulates that an application for leave to issue a Third Party Notice must be supported by an affidavit with certain prescribed contents. In particular, the affidavit must specify –

> "*the nature of the claim made by the applicant or particulars of the question or issue required to be determined, as the case may be, and the facts on which the proposed Third Party Notice is based*".

[9] The supporting affidavit in the present matter is sworn by the Defendant's solicitor. It exhibits a draft Third Party Notice, which contains the following material passage:

> "*The Defendant claims against you to be indemnified against the Plaintiff's claim and the costs of this action or contribution to the extent of the whole of the Plaintiff's claim on the grounds that any such personal injuries, loss or damage as may have been sustained by the Plaintiff were caused or occasioned by reason of the negligence and breach of statutory duty by the Third Parties, their servants and agents, and each of them, in and about the organisation,*

> *management, supervision, inspection, care and control of works of installing and placing cables underground at or about the aforesaid highway whereby such works damaged and interfered with the drainage of water from the public highway thereby causing flooding, the subject matter of the Plaintiff's claim against the Defendant*".

[10] The supporting affidavit contains an averment to the effect that the Defendant has no record of any complaints of flooding at the accident locus during a period of ten years prior to the Plaintiff's accident. It further describes a trial excavation carried out by the Defendant at the locus in May 2005 and continues:

> "*This excavation revealed that an armoured cable belonging to NIE and a NTL cable had fractured the connecting pipe running from the two gullies draining surface water from the carriageway to a drainage pipe running parallel with the kerb on the footpath. This meant that water or other debris coming from the carriageway and draining into the gullies did not drain into the main drainage pipe on* [sic] *the footpath but drained into the ground and acted as a soak away. In normal road conditions this would not present a problem but in periods of excessive rainfall (as was the case at the time of the Plaintiff's accident) flooding would occur.*"

At the hearing, Mr. Millinson, counsel for the Defendant, confirmed that one should substitute "*beneath*" for "*on*" in the above quotation.

[11] The supporting affidavit exhibits certain photographs. These were apparently taken on 11th May 2005. They depict the site of the "trial excavation" and show the presence of, firstly, two orange coloured cables and a green coloured cable. The Defendant asserts that these are NTL cables. The photographs further depict, at a lower level, a dark coloured pipe which is said to be, in the language of the affidavit, "*an armoured cable belonging to NIE*". No DRD drainage pipe is visible in these photographs. In an exhibited plan, three roadside gullies are identified, together with a manhole. Three short red lines purport to connect the gullies with a longer red line. As regards two of the gullies, the plan, with reference to the short red lines, contains the legend "*gully connection damaged by NTL*". The plan also contains a longer red line, which is said to depict the drainage pipe itself.

[12] According to the supporting affidavit, the Defendant claims that in 1998/2000 NTL and NIE laid cables at the accident locus and, further, that McNicholas "*had been contracted by both utilities to undertake this work*". Exhibited to the affidavit is a formal Notice. This document is undated. The affidavit suggests that following the trial excavation it was served by the

Defendant on NTL. It identifies the location as No. 653 Antrim Road, near the Chimney Corner Inn. It categorises the relevant works as "*minor works with excavation*". On its face, this document was "*issued*" on 13th May 2005, with a proposed "*start date*" of 16th May 2005. It contains the following "Description of Works":

> "*Excavate to slew NTL ducts and repair damaged gully inspection chamber*".

Under the heading "*Contractor Details*", one finds the entry "*McNicholas Construction Services*", followed by the firm's business address and telephone number. Mr. Nason, apparently of NTL, is noted as the "*originator contact*". The dates and contents of this document support the suggestion that it was stimulated by the findings of the trial excavation. According to paragraph 5 of the grounding affidavit:

> "*As a result of the Notice McNicholas Construction attended the site and repaired the connection pipes in both gullies at the request of NTL*".

[13] Continuing, the supporting affidavit contains averments to the effect that McNicholas (a) duly carried out the works specified in the Notice and (b) "*admitted to the Defendant's statutory functions officer that it was their initial work which had caused the fractured pipes …* [and] *… that they had constructed a single trench between the two gullies in question to enable the laying of the cables on behalf of the two utilities concerned*". The deponent further avers that NTL also "*constructed an additional manhole on the footpath to enable them to gain access to their cables*".

[14] In the first of two affidavits filed on behalf of NIE, it appears to be accepted, at least tacitly, that in 1998, NIE "*… laid a cable along the road where the Plaintiff crashed*": see paragraph 2(b)(i). In the same affidavit, it is averred that on 9th August 2001, DRD issued a certificate to NIE "*in respect of the works which were carried out by the NIE on the Antrim Road*", effective from 20th November 1999 (just over one year before the Plaintiff's accident). It is averred that this constitutes, in effect, a "certificate of satisfaction" and, further, that DRD thereby "*took over responsibility*" in respect of public liability claims. This affidavit, in conjunction with a later affidavit, avers that NIE and McNicholas representatives attended the trial excavation in May 2005 and, further, that McNicholas thereupon agreed to carry out the necessary repair works. These averments are unclear, inasmuch that the "*necessary*" repair works are not particularised.

[15] The aforementioned certificate is one of the documentary exhibits. It is entitled "Acceptance of Permanent Reinstatement" and recites the following:

> "*I have to inform you that the Roads Service accepts responsibility (including responsibility for Public Liability Claims) for the roads covered by Certificate 1 and certified as complete by Certificate 2 as from the date of this certificate.*
>
> *Effective date – 20/11/99*
>
> *Completion date – 20/10/98*".

This document is dated 9th August 2001 and is signed by a Roads Service engineer. On its face, it relates to a cable laying scheme in the area described as "Mallusk S/S Roughfort".

[16] The second of the two affidavits filed on behalf of NIE also contains the following averment:

> "*… the NIE employee who monitored the relevant works at or about the accident locus (one William McCormick) died on 30th December 2006. He would have been an important witness for NIE in the defence of any claim arising out of their works at the locus because he monitored the said works and would likely have been aware of any problems encountered …* "

I shall return to the significance of this discrete issue later in this judgment.

[17] The affidavit evidence is completed by an affidavit sworn on behalf of McNicholas by one of its construction managers, Mr. Gildernew. This exhibits a substantial quantify of documents, consisting largely of diary entries in respect of the period July to November 1998. The exhibits include two letters, the subject matter whereof is "Roughfort Central (Brett Martin) Project – Contract Reference B812A/83". According to these letters, on 31st July 2000 NIE issued a Completion Certificate to McNicholas, thereby triggering a two-year period of maintenance. The Plaintiff's accident occurred precisely five months later. The affidavit accepts that McNicholas were involved in cable laying works in an area encompassing the accident locus, on behalf of NIE, between July and November 1998. The deponent avers that the diary entries do not document any damage to existing cables or other like structures. He suggests that following completion i.e. after November 1998, NTL began a project entailing the installation of cables "*which was part of a large job from Belfast to Londonderry*" and which "*would have involved re-digging some of the areas where we had already been working*". The deponent, confirming the affidavit of his company's solicitor, acknowledges that McNicholas did "*carry out some repair works at or near to the accident locus during 2005*" but suggests that these were not "*part of the original contract works*". He deposes to a vague belief that McNicholas were paid for these

works, while acknowledging his inability to exhibit documentary proof of this.

[18] The documentary evidence exhibited to the supporting affidavit also contains a document which takes the form of a synopsis. This is evidently based on a combination of DRD documentary records and related instructions. It contains the following material entry:

> "*Investigation work was carried out on 11, 12 and 13 May 2005 by RSD* [IE Roads Service Direct]. *Damage to drainage line was noted and reported via Statutory Functions Officer Seamus O'Neill to NIE and NTL …*
>
> *NTL were notified by Moleseye on 13th May 2005 …*
>
> *remedial work was carried out by NIE …*
>
> *Work was carried out by NIE and NTL from 1998 and evidence shows that NTL contractor was still in vicinity in Des. 2000.*
>
> *Investigation work carried out by RSD revealed that NIE and NTL had damaged the drainage line and therefore they should be held liable*".

This synopsis also debates "*… a theory that since a section of pipe was removed by both utilities and the missing section backfilled with stone the surface water could filter through the stone to reach the drainage line in all but the heaviest rain conditions*".

III FIRST ISSUE: RSC ORDER 16, RULE 1

[19] The first issue to be determined is whether the proposed Third Party Notice comes within the ambit of RSC Order 16, Rule 1. It was argued on behalf of the Defendant that its case falls within all three limbs of Rule 1(1). The contrary argument, on behalf of NTL, was that a Defendant seeking leave to issue Third Party proceedings must clearly and unequivocally espouse one of these three provisions and, further, that the Defendant has failed to do so. Rule 1 provides:

> "*(1) Where in any action a Defendant who has entered an Appearance –*
>
> > *(a) claims against a person not already a party to the action any contribution or indemnity; or*

> *(b) claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the Plaintiff; or*
>
> *(c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the Plaintiff and the Defendant but also as between either or both of them and a person not already a party to the action,*
>
> *then, subject to paragraph (2), the Defendant may issue a* [Third Party Notice] *containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined*".

Per Rule 1(2):

> "*A Defendant to an action may not issue a Third Party Notice without leave of the court unless the action was begun by Writ and he issues the Notice before serving his Defence on the Plaintiff*".

Finally, Rule 1(3) provides:

> "*Where a Third Party Notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (in this Order referred to as a Third Party) with the same rights in respect of his defence against any claim made against him in the Notice and otherwise as if he had been duly sued in the ordinary way by the Defendant by whom the Notice was issued*".

[20] In The Supreme Court Practice 1999, Volume 1, paragraph 16/2/5, one finds the following commentary:

> "*The court has under Rule 2 a general discretion in all cases whether or not to allow a Third Party Notice to issue. The practice is that if a prima facie case is made out which would bring the matter within any paragraph of Rule 1 (1), leave will be granted to issue the Notice … and the court will not, in granting leave, consider the merits of the claim …* ".

In this action, the Plaintiff sues the Defendant *qua* statutory road authority. The draft Third Party Notice, from which I have quoted in paragraph [9]

above, follows on from the Defence denying liability and, by its terms, expressly claims an indemnity or contribution from the proposed Third Parties. It appears to me that the effective causes of action to be invoked by the Defendant against the proposed Third Parties are negligence and nuisance. The Defendant is not pursuing any contractual indemnity. Rather, its case against the proposed Third Parties is that they are tortfeasors whose tortious conduct caused or contributed to the Plaintiff's personal injuries and other losses.

[21] I am satisfied that the case which the Defendant seeks to make against the proposed Third Parties constitutes, in the language of Order 16, Rule 1(1)(a), a claim for a "*contribution or indemnity*". The suggestion that the Defendant is somehow not doing so seems to me unarguable. While the Defendant's proposed claim *might* also be embraced by subparagraphs (b) and (c), given the elasticity of the language in which these are framed, my finding in relation to subparagraph (a) makes it unnecessary to consider this matter further.

IV SECOND ISSUE: PRIMA FACIE CASE

[22] This prompts some interesting reflections. In the vast majority of cases, a Plaintiff initiates proceedings against a Defendant without the court's permission. The Defendant is normally powerless to prevent this from occurring. Rather, the Defendant's recourse will typically be to invoke the protections contained in RSC Order 18, Rule 19 or, insofar as necessary or appropriate, the inherent jurisdiction of the court. In this way, a Defendant can invite the court to strike out the proceedings on the ground that they disclose no reasonable cause of action; or are scandalous, frivolous or vexatious; or are otherwise an abuse of the process of the court.

[23] It is clear from RSC Order 16, Rule 1(3) that the Defendant/Third Party "axis" is to be equated with that of Plaintiff/Defendant. Where a Defendant acts expeditiously, he will not require the provision of the court to issue Third Party proceedings: See Rule 1(2). However, where he fails to do so, the court has a role and I construe the language of Rule 1(2) to confer on the court a discretionary power: it may grant or refuse the application. Rule 2 prescribes no criteria to which resort should be had by the court in the exercise of its discretion. Unfettered discretions are alien to most legal contexts. Having acknowledged that, the terms of Rule 2 are suggestive of a relatively broad discretion. By virtue of Order 1, Rule 1A, the court *must* seek to give effect to the over-riding objective when exercising a power of this kind. Thus the court must, fundamentally, seek to deal with the case justly. This aspiration *includes* so far as is practicable, "*ensuring that it is dealt with expeditiously and fairly*". In every case, it is for the court to decide where the interests of justice lie, taking into account the competing claims and interests of the parties, both actual and putative.

[24] I consider that the exercise of this discretion should be informed by the provisions of Order 18, Rule 19. Clearly, it would be an inappropriate exercise of the court's discretion to permit the issue of Third Party proceedings which disclose no reasonable cause of action against the proposed Third Parties or are otherwise an abuse of the court's process. In short, there is a threshold which must be surmounted by the Defendant. If it were otherwise, the discretion vested in the court would be illusory.

[25] I further consider that in exercising its discretionary power under Order 16, Rule 1(2) the court should have regard to such evidence as is adduced about the viability of the Defendant's proposed claim against the Third Parties and any resistance mustered by the latter, in opposition. However, I would add the following cautionary observations:

(a) The evidence before the court is in the form of affidavits only.

(b) As a result, the evidence is not tested or explored in the manner which habitually occurs at a substantive trial.

(c) Frequently (as here) the affidavits do not comply with the requirements of RSC Order 41, Rule 5 (a practice to be deprecated).

(d) At the interlocutory stage, the evidence before the court is almost invariably incomplete. Moreover, it may be unavoidably, or inadvertently, selective, inaccurate or unclear.

(e) The court determines these applications at a stage when there has been no discovery of documents as between the Defendant and the proposed Third Parties.

Accordingly, as a general rule, when exercising its discretion under Order 16, Rule 2, the court should be reluctant to become unduly embroiled in matters of factual dispute sounding on the merits of the proposed action against the Third Party. Of course, the court will not turn its eye from the obvious or undeniable. However, the interlocutory stage is, by reason of the matters highlighted above, ill-suited to the determination of factual disputes and is to be contrasted with the substantive trial, in this respect. It is equally ill-suited to exercises entailing the interpretation of documents or the comprehension of documents whose contents can be satisfactorily clarified and explained only by sworn testimony.

[26] This approach is supported by the statement in The Supreme Court Practice that, at this stage, the court should not "… *consider the merits of the*

claim": see paragraph [19], *supra*. The apparently limited judicial authority on this topic is to like effect. In ***Edison –v- Holland*** [1886] 33 Ch.D 497, in an infringement of patents action the Defendant applied under the former Order 16, Rule 48 for leave to issue Third Party proceedings, claiming a contractual indemnity. Bacon VC stated (at p. 499):

> "*The policy of the law expressed in the rule is plain. If A is suing B and B denies his right to sue, but says 'even if he is entitled to sue, C has indemnified me; let him come here and fight his own battle, or help me fight mine,'* ***the object of the rule of procedure is that there should be a discussion and a decision, once for all, of the real substance of the dispute ...***
>
> *There is no doubt that the Defendants were clearly right in taking out this summons;* ***and to go into the nature of the indemnity would be a most idle and absurd thing for me to do ...***
>
> ***I simply refused to have anything whatever to say to*** [the merits] ***or to attend to the argument in that respect***".
>
> [My emphasis].

The emphasis is somewhat different in the judgment of Joyce J in ***Furness –v- Pickering*** [1908] 224. Two observations about this short judgment are apposite. The first is that the judge stated, in terms, that he was granting leave to bring Third Party proceedings *because* he was satisfied that "*… the Defendants will have a prima facie case for contribution against this third person …*" [at p. 227]. The second is the judge's apparent recognition that there would be scope at the Third Party Directions stage for ventilating issues of this kind.

[27] I consider that, as a general rule, upon the hearing of an application for leave to issue Third Party proceedings the court should pay some regard to the apparent merits of the Defendant's proposed claim against the Third Party. The court should do so taking into account the various considerations highlighted in paragraphs [23] to [25] above. It seems to me inappropriate to go any further: the extent to which the court explores the merits of the proposed claim will be a matter for the considered judgment of the individual judge having regard to the particular circumstances of the case.

[28] Upon the hearing of the present application, counsel for all parties sought to engage the court in a relatively detailed examination of the evidence assembled at this stage. I have considered all the submissions and it is unnecessary to rehearse them *in extenso*. They are illustrated by the carefully constructed submissions of Miss Simpson, on behalf of McNicholas.

To highlight one pertinent example, the submissions emphasized the contrast between the averment in the Defendant's grounding affidavit that the trial excavation in May 2005 "*… revealed that an armoured cable belonging to NIE and a NTL cable had fractured the connecting pipe …* ", whereas the Defendant's synopsis document, discussed in paragraph [18] above, speaks of "*damage to drainage line*" and, simultaneously, a "*theory*" of removal of a section of pipe by both utilities, with a resulting "*missing section*". I agree that the affidavit and the synopsis are not readily reconciled *inter se*. However, I consider that this is precisely the kind of disputed factual issue which the court is not equipped to confidently determine at this stage. The court's experience is that cases of this kind involving accidents on the public highway and the conduct and operations of public utilities typically give rise to disputed factual issues of this kind, which can be satisfactorily probed and determined only by extensive questioning of witnesses which will touch on, *inter alia*, the clarification and interpretation of documents.

[29] I consider that the present case exemplifies the desirability of the cautious and circumspect approach which I have advocated above. The evidence presently before the court is plainly incomplete. It is contained in or exhibited to affidavits some of which are non-compliant with RSC Order 41, Rule 5. The affidavits sworn by the parties' respective solicitors and by the McNicholas Construction manager are no substitute for sworn *viva voce* evidence from appropriate witnesses, duly tested by cross-examination and suitable questioning by the court. The evidence currently assembled, in certain respects, raises more questions than it answers. It has lured some of the parties' counsel into the trap of purporting to give evidence themselves, to some extent. This is a symptom and consequence of the incomplete and unclear evidential picture before the court. In the present case, it would be quite wrong for the court to attempt to resolve any of the factual disputes which have emerged and I unhesitatingly decline to do so.

[30] Insofar as there is a threshold to be overcome by the Defendant in establishing some foundation for its claim against the proposed Third Parties, giving rise to some prima facie case or some case to answer, I am satisfied that the Defendant has done so in the present instance. Put somewhat differently, the case which the Defendant wishes to make against the proposed Third Parties cannot be condemned, at this stage, as unarguable or fanciful or unsustainable. Any further observation by the court on its merits would, for the reasons explained above, be inappropriate. The extent to which the Defendant truly enjoys a sustainable claim against the Third Parties will be a matter for the trial judge, rather than me.

V THIRD ISSUE: DELAY

[31] I accept that delay on the part of the Defendant is a factor which the court can legitimately take into account in exercising its discretion under

Order 16, Rule 2. This view is fortified by the terms in which the over-riding objective is framed: see paragraph [24] above. In this context, I refer also to the judgment of Coghlin J in ***Gransha Hospital Staff Social Club –v- Canning and Others*** [2005] NIQB 44, at paragraphs [11] – [12] especially, together with that of Carswell LCJ in ***Dingles Builders Limited –v- Brooks and Others*** [2002] NICA 38 and in particular paragraph [20], which refers to the judgment at first instance:

> "*His* [i.e. the judge's] *reasons were not expressed at any length, but it is clearly enough apparent that he founded his conclusion on the lateness of the stage at which the application was made.* ***This was a valid ground on which to base the exercise of his discretion*** *and we should be slow to reverse his decision*."
>
> [Emphasis added].

Interestingly, the Lord Chief Justice added that the loss by the Plaintiff of his solicitors which would flow from an order granting leave to bring Third Party proceedings against them, "*a not insignificant deprivation in itself*", was a further ground warranting the exercise of the court's discretion against granting the application. This illustrates the breadth of the discretion under consideration.

[32] While the circumstances in which the court might properly exercise its discretion to refuse the relief sought on the ground of delay alone are far from clear, it would be wrong to attempt to prescribe any exhaustive rules or guidelines. A particular factor which may merit consideration is that in our legal system, issues of delay are regulated by the legal rules belonging to the law of limitations. While they may not belong exclusively to that realm, the limitation code nonetheless contains a series of constraints and safeguards. In some cases, issues of delay may more properly be considered, and determined, under the banner of the law of limitations. The stage at which the court should properly address limitation issues in Third Party proceedings is addressed more fully below.

[33] By virtue of Order 1, Rule 1A the court is explicitly required, in the exercise of its obligation to deal with every case justly, *to ensure, so far as practicable, that it is dealt with expeditiously and fairly*. As I have already observed in paragraph [5] above, this litigation has been characterised by substantial periods of apparently unjustifiable and inexplicable delay. In the circumstances prevailing at present, I consider the most significant factor to be the trial date which, I am informed, is 24th November 2008. On behalf of the proposed Third Parties, I was effectively invited to allocate blame for the delays which have occurred to date. I decline to do so, essentially because the evidence bearing on this discrete issue seems to me incomplete and unclear.

In my view, the most important consideration is that the trial date of 24th November 2008 should not be jeopardised, absent some compelling justification for doing so. I shall return to this issue below.

VI FINAL ISSUE: LIMITATION

[34] The final issue canvassed in argument was that of limitation. This is, by some distance, the most complicated issue before the court. On behalf of NTL in particular, it was argued that the Defendant's cause of action against the Third Parties is governed by Article 7 of the Limitation (Northern Ireland) Order 1989 ("*the 1989 Order*"), which provides:

> **" *Time limit: actions for personal injuries***
> *7. - (1) This Article applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.*
> *(1A) This Article does not apply to any action brought for damages under Article 5 of the Protection from Harassment (Northern Ireland) Order 1997.*
> *(2) Articles 4 and 6 do not apply to an action to which this Article applies.*
> *(3) Subject to Article 50, an action to which this Article applies may not be brought after the expiration of the period specified in paragraphs (4) and (5).*
> *(4) Except where paragraph (5) applies, that period is three years from-*
> *(a) the date on which the cause of action accrued, or*
> *(b) the date of knowledge (if later) of the person injured.*
> *(5) If the person injured dies before the expiration of the period in paragraph (4), the period as respects the cause of action surviving for the benefit of the estate of the deceased by virtue of section 14 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 is three years from-*
> *(a) the date of death; or*
> *(b) the date of the personal representative's knowledge, whichever is the later.*
> *(6) Subject to paragraph (7), in this Article and in Article 9, references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts-*

(a) that the injury in question was significant; and

(b) that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

(c) the identity of the defendant; and

(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(7) In Article 8 and in Article 9 so far as that Article applies to an action by virtue of Article 9(1) of the Consumer Protection (Northern Ireland) Order 1987 (death caused by defective product) references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts-

(a) such facts about the damage caused by the defect as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; and

(b) that the damage was wholly or partly attributable to the facts and circumstances alleged to constitute the defect; and

(c) the identity of the defendant;

but, in determining the date on which a person first had such knowledge there is to be disregarded both the extent (if any) of that person's knowledge on any date of whether particular facts or circumstances would or would not, as a matter of law, constitute a defect and, in a case relating to loss of or damage to property, any knowledge which that person had on a date on which he had no right of action by virtue of Part II of that Order in respect of the loss or damage.

(8) For the purposes of paragraph (6) an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(9) For the purposes of paragraph (6) a person's knowledge includes knowledge which he might reasonably have been expected to acquire-

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek,
but a person is not to be fixed under this paragraph with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

(10) For the purposes of this Article and Article 8-
(a) "personal representative" includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate); and
(b) regard is to be had to any knowledge acquired by any such person while a personal representative or previously.
(11) If there is more than one personal representative and their dates of knowledge are different, paragraph (5)(b) is to be read as referring to the earliest of those dates."

[35] This argument entailed the following specific submissions:

(a) The Defendant's cause of action against the Third Parties accrued on the date of the Plaintiff's accident viz. 31st December 2000, with the result that the limitation period of three years expired almost five years ago.

(b) Alternatively, the Defendant's cause of action accrued in May 2005, this being " *the date of knowledge (if later) of the person injured*" and the three year period has, therefore, expired.

(c) Accordingly, the court can grant leave to issue Third Party proceedings only if, in accordance with Article 50 of the 1989 Order, it appears to the court that it would be equitable to do so.

[36] Alternatively, it was argued that the Defendant's cause of action against the proposed Third Parties falls within Article 6 of the 1989 Order, which provides:

"*(1) Subject to paragraph (2) and to Articles 7 and 9 and 11-13, an action founded on tort may not be brought after the expiration of six years from the date on which the cause of action accrued.*

(2) Subject to Article 51, an action for damages for –

(a) libel or slander, or

(b) slander of title, slander of goods or other malicious falsehood,

may not be brought after the expiration of one year from the date on which the cause of action accrued."

In the present case, the evidence adduced before the court provides some basis for the Defendant invoking the causes of action of negligence and nuisance in the proposed Third Party proceedings. The Defendant alleges that the Third Parties were guilty of negligence and/or nuisance causing or contributing to the Plaintiff's injuries and other losses. I consider that, *prima facie,* this constitutes "*an action founded on tort*" within the meaning of Article 6(1). This engages a limitation period of six years, running from "*the date on which the cause of action accrued*". Equally, I recognise the scope for debate about whether a Third Party action can properly be fitted within the framework of Article 7 of the 1989 Order. However, the anterior question to be addressed is whether I should properly determine <u>any</u> limitation issue at this stage.

[37] It seems to me that, in the context of the present appeal, the most germane of the provisions of the 1989 Order is Article 73. This provides:

"*(1) For the purposes of this Order, any new claim made in the course of any action is to be treated as a separate action and as having been commenced –*

(a) if it is a new claim made in or by way of Third Party proceedings, on the date on which those proceedings were already commenced; and

(b) in relation to any other new claim, on the same date as the original action.

(2) Except as provided by Article 50, by Rules of Court, or by County Court Rules, neither the High Court nor any County Court may allow a new claim within paragraph (1)(b), other than an original set off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Order which would affect a new action to enforce that claim".

I consider that, in the present context, the proposed Third Party proceedings fall within the ambit of Article 73(1)(a). I shall dilate on the significance of this below.

[38] The English equivalent of Article 73 is Section 35 of the Limitation Act 1980 which is, according to one commentator, "*one of the most convoluted provisions in the entire law of limitations*": ***Limitation Periods*** [McGee, 2nd Edition, p. 384: a condemnation not repeated in the current (5th) edition of the same work; cf. pp. 464-467]. It is clear from a combination of Article 73(1)(a) and the definition of "*third Party proceedings*" in Article 73(8) that Third Party proceedings constitute "*a new claim*" for the purposes and within the meaning of Article 73. Notably, Article 73(1) distinguishes between (a) a new claim made in or by way of Third Party proceedings and (b) any other new claim. This distinction is also reflected in the relevant Rules of Court, which belong to the Order 15 regime, rather than its Order 16 relation. This distinction is of some significance, since Article 73(2) makes reference to Article 73(1)(b) only – and does not mention Article 73(1)(a). The significance of this is that the general rule enshrined in Article 73(2) does not, in consequence, apply to a new claim made by way of Third Party proceedings. That general rule is to the effect that the High Court and the County Court should disallow any new claim made in the course of any action after the expiry of any relevant limitation period. By virtue of Article 73(3), any new claim to which Article 73(2) applies may be allowed only if (a) the conditions specified in Article 73(4) are satisfied and (b) there are corresponding enabling rules of court. In short, the regime established by Article 73(3), (4) and (5) is of a highly restrictive nature, where it applies, but it excludes third party proceedings.

[39] The separate treatment accorded to third party proceedings in the Article 73 regime is acknowledged in the textbook cited above:

> "*Section 35(3) imposes restrictions on the bringing of new claims. Subject to Section 33 (which deals with the court's discretion to over-ride the three-year time limit in the case of personal injury claims) and any provisions in the Rules of the Supreme Court, neither the High Court nor the County Court shall allow a new claim (**other than one made by way of Third Party proceedings**) other than an original set off or counterclaim to be made after the expiry of any time limit which would affect a new action to enforce that claim*".
>
> [My emphasis].

Notably, the text continues:

> "*It is important to understand that Third Party proceedings are treated quite differently from other forms of new claim under Section 35. There is no backdating, Third Party proceedings are treated as commencing on the date on which they do actually begin and it is therefore necessary to comply with the basic time limits in the 1980*

> *Act, subject of course to any extensions of time permitted under Part II of that Act. This rule makes it necessary to determine when Third Party proceedings are in fact commenced …*
>
> *The rule that there is no backdating in Third Party proceedings makes it unnecessary for Section 35 to impose any restrictions on the addition of new claims by way of Third Party proceedings – the ordinary Limitation Act rules ensure that no claim can be added once time has expired, though conversely another effect of this is that any number of Third Party claims can be added within the limitation period*".
>
> [Op. cit. pp. 393-394].

While there might be a degree of ambiguity in the penultimate proposition in this passage, to similar effect is the following passage in ***Limitation of Actions*** (Oughton, Lowry and Merkin), p. 85:

> "*Third Party proceedings arise whenever, in the course of any action, a claim is brought by the Plaintiff or Defendant against a new party (including fourth and subsequent parties), not previously a party to the action …*
>
> *The claim is treated as a separate action, but one which is deemed to have been commenced on the date when the Third Party proceedings commenced, i.e. such claims do not have retrospective effect …*
>
> *Accordingly, although a Third Party Notice can be issued outside the relevant limitation period it can be defeated by a limitation plea in the normal way*".

[40] Accordingly, within the array of provisions arranged in Article 73 of the 1989 Order, there is a striking contrast between the rules governing a new claim brought as between Plaintiff and Defendant, or vice versa, in an extant action (on the one hand) and the initiation of Third Party proceedings, in such an action (on the other). As regards Third Party proceedings, Article 73 confines itself to establishing, in unequivocal terms, the date on which Third Party proceedings are treated as coming into existence: this occurs on the date on which such proceedings are "*commenced*", per Article 73(1)(a). In the present case, it is unnecessary to resolve the conflicting views concerning whether Third Party proceedings are "*commenced*" on the date when permission is granted – pursuant to an application under RSC Order 16, Rule 2 – or the (normally later) date when the Third Party Notice is issued. I would observe (doubtless *obiter*) that the latter date is probably the operative

date for this purpose and I note that this is the view offered by Oughton (op. cit.).

[41] In short, I consider that in the specific context of an application to the court for leave to issue Third Party proceedings, where limitation issues are concerned Article 73 of the 1989 Order represents the *lex specialis*. In the present case, it is argued that the causes of action which the Defendant wishes to pursue against the Third Parties are statute barred, with the result that the proper exercise of the court's discretion is to refuse the application. I reject this argument. I find nothing in Article 73 – or any other provision of the Limitation Order – to the effect that when seised of an application for leave to bring Third Party proceedings, the court should consider, investigate and determine limitation issues as between the Defendant and the proposed Third Party or Parties. Nor do I find anything in the Rules of the Supreme Court supporting the contention that the court is thus empowered.

[42] My conclusion on this issue is reinforced by the concept of Third Party proceedings having an essentially independent existence, in the sense that they are *not* begun, or deemed to have begun, on the date of the Writ of Summons and in the further sense that the Defendant/Third Party "axis" equates with that of Plaintiff/Defendant, per Order 16, Rule 1(2). Furthermore, a draft Third Party Notice is the equivalent of a draft Writ of Summons. Neither is a substitute for a fully and properly pleaded case. While the supporting affidavit must contain the information required by Order 16, Rule 2, any pleading which may follow must comply with the rigorous requirements of Order 18, Rules 7 and 12 in particular. In contrast, where the bringing of a new claim in an extant action involves the Plaintiff and Defendant only, the court will normally have the benefit of a considerably fuller picture and can apply the relevant rules and principles by reference to the immutable, cornerstone date of the Writ of Summons.

[43] Moreover, at this juncture, no limitation issue as between the Defendant and the proposed Third Parties has crystallised. There is no privity of litigation as between the Defendant and the proposed Third Parties. There are no proceedings between them. Such proceedings will not come into existence unless and until the Defendant issues a Third Party Notice. It will only be upon service of the Third Party Statement of Claim that the Third Parties will be in a position to assess whether there is any limitation issue of substance and, if so advised, to plead same with appropriate particularity. Limitation is a defence which must be pleaded specifically, per Order 18, Rule 8(1). Limitation operates as a shield. Where a Defendant or a Third Party pleads limitation, the role of the court depends on how the Defendant or Third Party chooses to proceed thereafter. Those choices include an application for an Order under Order 18, Rule 19 striking out the relevant claim or pleading; an application to have the limitation question tried as a preliminary issue; and simply reserving the limitation defence to the full trial.

[44] I am further reinforced in the views and conclusions which I have expressed above by the commentary in The Supreme Court Practice 1999, Volume 2, paragraph 14-42/4:

> "***Third Party Proceedings*** *– the issue and conduct of such proceedings is governed by Order 16. Although that Order is not itself specifically concerned with limitation, the question of leave or otherwise to issue Third Party proceedings may, by reason of the provisions of* [Section 35(3) of the Limitation Act 1980] *be affected where a question of limitation … thus in* ***Ronex Properties –v- John Laing Construction*** [1983] 1 QB 398, *it was held that in a very clear case founded on limitation a Third Party in the position of a Defendant may seek to strike out Third Party proceedings on the ground that they are frivolous, vexatious and an abuse of the process of the court*".

Notably, there is nothing in the commentary on Order 16 in Volume 1 of the same work to suggest that in the context of determining an application under Order 16, Rule 2 the court should entertain and resolve limitation issues raised by resisting proposed Third Parties.

[45] I am of the opinion that, at this stage of the present proceedings, the court is not properly seised of any limitation issue. If I am wrong in this conclusion, I consider, in the alternative, that it would be inappropriate for the court to make any concluded findings or determinations in respect of limitation issues. The considerations which I have highlighted in paragraph [25] above apply with equal force to this matter. At this juncture, the most that can be said on behalf of the proposed Third Parties is that the Defendant's cause of action against them, if it materialises, *might* be statute barred. I consider that the factual matrix bearing on the limitation issues raised is unclear, uncertain and incomplete. If it were open to the court to refuse the Defendant's application on this ground, I consider that it would be inappropriate to do so in the present case.

[46] In view of this conclusion, it is unnecessary for me to resolve the question of whether the Defendant's third party action, if it crystallises, *will be* statute barred by virtue of either Article 6 or Article 7 of the 1989 Order. The submissions advanced to the court on this discrete issue demonstrated that it is one of no little complexity. It is a pure question of law which will fall to be determined at a later stage, only if (a) leave to bring Third Party proceedings is granted and (b) the Third Parties plead limitation.

VII <u>OTHER OBJECTIONS</u>

[47] I have taken into account the various factors urged on me by the proposed Third Parties in resisting the Defendant's application. These include, in particular, the demise of a key witness, a former employee of NIE, on 30th December 2006 and the facility available to the Defendant to bring separate proceedings under the Civil Liability (Contribution) Act 1978. As regards the first of these issues, there is no suggestion in the relevant affidavit that the substance of the evidence concerned cannot be given by other witnesses, in particular those directly involved in carrying out the works and those with responsibility for any subsequent certification. Moreover, there is no suggestion that this witness was involved in the important events of May 2005. Finally, it is not claimed that material facts cannot be established by reference to documentary records.

[48] As regards the second of these issues, it is correct that the 1978 Act makes provision for fresh, further proceedings in certain circumstances. The position adopted by all parties before the court was that this option is available to the Defendant. If this is correct, the limitation period is one of two years and the cause of action will not accrue unless and until the Plaintiff secures judgment against the Defendant *or* the action is compromised by the Defendant: see Article 13 of the 1989 Order. The question whether, as a matter of law, the Defendant would enjoy a viable cause of action following settlement or judgment in the present action does not fall to be determined at this stage and I expressly decline to do so. I merely observe that there might conceivably be issues concerning, for example, Section 6(1), as in ***Dingles Builders***. I say nothing more about such matters at present.

VIII CONCLUSION

[49] I consider that, overall, it would be more convenient and less expensive for all parties concerned to have all issues canvassed and determined in the current proceedings. Moreover, this would be compatible with the over-riding objective, as well as being harmonious with common sense. Where achievable and practicable, one trial is clearly preferable to two trials. If there is any tangible prejudice to the proposed Third Parties on account of delay, such prejudice is likely to be augmented by further delays. Where such further delays can be minimised or avoided, it is appropriate for the court to act to do so. Moreover, in circumstances where it is possible that the truly culpable tortfeasor is one of the Third Parties, I consider that it would not be in the interests of justice to insulate the Third Parties from a possible finding of liability, in whatever proportions, on the ground of the Defendant's delay alone, in the particular circumstances of this case.

[50] In the exercise of my discretion, I conclude that it is appropriate to accede to the Defendant's application and I allow the appeal accordingly. I

reach this decision on the basis and in the expectation that, with rigorous case management, the trial date of 24th November 2008 will not be vacated. To this end, I refer to the directions appended to this judgment.

[51] The draft Third Party Notice appears to require the following amendments:

(a) To include the customary paragraph pleading that the Defendant denies liability on the grounds appearing in its Defence.

(b) To plead nuisance against the Third Parties, in addition to negligence.

(c) To delete the claim for breach of statutory duty against the Third Parties, which I consider demonstrably misconceived.

[52] With regard to limitation issues, I am satisfied that the Third Parties will, when joined, enjoy all the rights available to any Defendant.

[53] While I am provisionally minded to reserve the costs of the hearing at first instance and on appeal or, alternatively, to direct that such costs be in the cause, the parties will be at liberty to address further argument to me on this issue.