THE HIGH COURT

COMMERCIAL

[2023] IEHC 612

[2022 No. 6117P]

BETWEEN

COÖPERATIVE RAOBANK U.A. trading as RABOBANK DUBLIN

PLAINTIFF

AND

AM ALPHA LUX INVEST 130 S.A.R.L

DEFENDANT

AND

BENNETT (CONSTRUCTION) LIMITED

ETHOS ENGINEERING LIMITED

WALSH MECHANICAL ENGINEERING LIMITED

RKD ARCHITECTS LIMITED

TRENMOR UNLIMITED COMPANY trading as LINESIGHT

THIRD PARTIES

JUDGMENT of Ms. Justice Eileen Roberts delivered on 10 November 2023

Introduction

1. This judgment relates to the plaintiff's application for an order pursuant to O. 63A, r. 5 of the Rules of the Superior Courts, 1986 (as amended) ("**RSC**") directing that the trial of the issues in dispute between the plaintiff and the defendant in these

proceedings be heard in advance of and distinct from the trial of the issues in dispute between the defendant and the third parties. An alternative order is sought pursuant to O. 36, r. 9 RSC directing that the issues in dispute in these proceedings be conducted in particular stages and/or on a modularised basis such that the issues in dispute between the plaintiff and the defendant are heard in advance of and distinct from the issues in dispute between the defendant and the third parties.

2. In essence, the plaintiff wants its action against the defendant to be allowed to proceed independently from the defendant's action against the third parties. The defendant and most of the third parties resist this motion although the fourth named third party supports it.

3. An identical application was also brought by other plaintiffs in another set of proceedings against the same defendant and to which the same third parties have been joined. These proceedings bear record number 2022/6116P / 2022 No.121 COM (the "**Zurich Proceedings**"). The plaintiffs in those proceedings are Zurich Insurance plc, Zurich Treasury Services Limited and Zurich Financial Services EUB Holdings Limited (together "**Zurich**"). For reasons which will become clear in this judgment, both sets of proceedings have been prosecuted together since being instituted and they were admitted to the commercial list together. The plaintiffs in both proceedings are represented by the same solicitors and counsel and, save as set out hereunder, the circumstances of both proceedings are the same.

4. Accordingly, this judgment relates to both these proceedings (which I also refer to as the "**Rabobank Proceedings**") and to the Zurich Proceedings.

The parties and the background to this dispute

5. The plaintiff ("**Rabobank**") is the tenant of three floors of the multi-story office block building at 76 Sir John Rogerson's Quay Dublin 2 (the "**Building**") which it occupies

under three separate commercial leases it entered into with the defendant's predecessor in title. The relevant leases date from 24 November 2020 and each have a 10 year term with a five year rent review. Excluding service charges, the total rent reserved by the relevant leases is €1,347,512,50 per annum. Rabobank's title as tenant also comprises other landlord and tenant documentation including deeds of renunciation, side letters and deeds of variation (all such documents together comprising the "**Rabobank Leases**").

6. Rabobank went into occupation of the sixth, seventh and eighth floors of the Building (collectively "the **Premises"**) in or around June 2021. Rabobank occupies the Premises for the purposes of its business, and it employs approximately 247 people who work there.

7. Prior to taking up occupation of the Premises, Rabobank undertook tenant fitout works in the Premises pursuant to a license for works.

8. The defendant is a private limited company incorporated in Luxembourg. The defendant is the current owner of the Building, having acquired the Building from its previous owners, Tio South Docks Fund II Limited ("**TIO**"), in or about 23 March 2021. At that time the Building was at its final stages of construction as a new "*magnificent Grade A HQ office building extending to 100,000 sq. ft.*"[1].

9. In or about 2018, TIO had commissioned the construction of the Building and contracted with the third parties as follows:

(1) The first named third-party ("**Bennett**") - an Irish registered company which provides construction services - was appointed as the main building contractor for the Building pursuant to a building contract dated 20 June 2018.

[1] As described in the relevant sales brochure exhibited at Tab 13 to the affidavit of Colin Fuller sworn 19 July 2023

(2) The second named third-party ("**Ethos**") - an Irish registered company which provides mechanical and electrical engineering services- was appointed as mechanical and electrical engineer pursuant to an agreement dated 20 November 2018.

(3) The third named third-party ("**Walsh Mechanical**") - an Irish registered company which provides mechanical engineering services- was engaged as subcontractor to provide professional services in relation to the supply, installation and commissioning of the mechanical services package for the Building pursuant to the subcontract to the building contract dated 21 June 2018.

(4) The fourth named third-party ("**RKD**") -an Irish registered company which provides architectural services- was appointed to provide architectural services including certain certification services by agreement dated 3 December 2018.

(5) The fifth named third-party ("**Linesight**") -an Irish registered company which provides project management services- was appointed to provide project management services for the construction of the Building pursuant to agreement dated 20 November 2018.

10. Contemporaneous with the acquisition of the Building by the defendant in March 2021, the respective third parties, identified above, entered into collateral warranties with the defendant. The defendant therefore obtained the benefit of those warranties which had originally been secured by TIO from those third parties, regarding their respective roles in the construction of the Building (although there are some issues pleaded by Linesight in that regard).

11. The defendant, on acquiring the Building, was also assigned the Rabobank Leases (and entered into its own further landlord documentation with the plaintiff) such that the defendant is now Rabobank's landlord.

12. Rabobank alleges that since it went into occupation of the Premises it has consistently experienced (a) problems with the air conditioning, which renders some parts of the Premises and the Building very warm and other parts very cold; (b) poor to non-existent air circulation; (c) leaks and (d) noxious odours lingering in the Premises and the Building. There also appears to be an allegation regarding water quality in the Building.

13. Rabobank pleads that such issues breach several covenants in the Rabobank Leases including what Rabobank describes as the quiet enjoyment covenant, the repairs covenant, the common parts covenant, the heating covenant, and the air conditioning covenant.[2]

14. Rabobank alleges that these ongoing issues have rendered the Premises "*an undesirable, unattractive, unpleasant and at times unusable place to work and constitutes a series of ongoing serious breaches of covenant by the defendant, its servants and/or agents*".[3] It is alleged that despite having put the defendant on notice of these issues in July 2021, the defendant has failed, neglected and/or refused to remedy these issues in any meaningful way. The Rabobank Proceedings issued on 5 December 2022.

15. Rabobank seeks orders compelling the defendant to comply with its obligations under the Rabobank Leases; orders to remedy or repair the identified defects; a declaration that the failure by the defendant to perform its landlord covenants constitutes a derogation from grant by the defendant; a declaration that Rabobank can at its election rescind or disclaim or treat the Rabobank Leases as repudiated; a declaration that the defendant should indemnify Rabobank for all loss caused by or associated

[2] See para 19 Statement of Claim dated 24 April 2023
[3] Para 23 Statement of Claim dated 24 April 2023

with remedial works to address the defects in the Building and damages for breach of covenant, breach of contract, nuisance and/or negligent misrepresentation.

16. Zurich seeks virtually identical reliefs against the defendant in the Zurich Proceedings arising from the same complaints regarding the Building and the premises demised to it. Insofar as there are material differences between the circumstances of Zurich and Rabobank they can be summarised as follows:

(a) Zurich entered into two separate lease arrangements directly with the defendant in respect of specified parts of the Building. The first lease which is dated 3 June 2022 relates to the fourth floor of the Building and in respect of which three separate side letters, a deed of renunciation and a proposed form of licence for works were also executed. The second lease (also supplemented by three side letters, a deed of renunciation and a form of licence for works) was entered into on 22 July 2022 in respect of the ground floor of the Building (both leases and ancillary documents together being described in this judgment as the "**Zurich Leases**"). The Zurich Leases are for a 10 year term with a rent review in year 5. Excluding service charges, the initial rent reserved by the Zurich Leases is €751,356 per annum. For all material purposes the Zurich Leases contain the same landlord covenants as those set out in the Rabobank Leases.

(b) Zurich has not taken up occupation in the Building. Due to the defects of which complaint is made in the Zurich Proceedings, Zurich remains in the office building which it was intended it would vacate in March 2023 as part of a planned move to the Building. Zurich has managed to negotiate a temporary extension to its existing tenancy arrangements but is incurring ongoing expense in doing so.

(c) Zurich has not carried out any tenant fit out works in the Building.

(d) The Zurich Proceedings include an additional plea against the defendant which is not advanced in the Rabobank Proceedings.[4] This plea relates to a pre-lease misrepresentation which is alleged by Zurich to have contractual status under clause 7.4 of the Zurich Leases. It is alleged that the defendant represented to Zurich that it was not aware of any "*structural or other defects in the property*" or "*defective drainage, pipes, wires or services*" at a time when Rabobank had already made complaints to the defendant about such issues concerning the Building.

The relevant pleadings

17. On 7 June 2023 the defendant issued motions seeking liberty to join the five named third parties to both the Rabobank Proceedings and the Zurich Proceedings. By orders dated 12 June 2023 liberty was given to the defendant to so join the third parties. By Order dated 10 July 2023, directions for the exchange of third-party pleadings were made. However, the relevant court orders include no directions on how the third-party action in each case is to be advanced by reference to the action as between the plaintiff and the defendant. This is a matter to which I will return.

18. The third parties were served with third-party notices on 20 June 2023. An exchange of pleadings took place between the third parties and the defendant in each case. Defences were served by each third-party shortly prior to the hearing of this motion on 25 October.

19. On 10 July 2023, Rabobank and Zurich were granted leave to bring the present motions.

20. On 24 July 2023, the defendant obtained leave to deliver an amended defence in the Rabobank Proceedings to include a plea relating to the tenant fit-out works. There was no similar amendment made in the Zurich Proceedings as Zurich has not carried out

[4] Paras 19-24 of Zurich Statement of Claim dated 24 April 2023.

any tenant fit-out works. An amended defence was delivered in the Rabobank Proceedings on 9 August 2023 (the "**Amended Rabobank Defence**"). I will set out this amendment in full given the importance that is attached to it by the defendant and most of the third parties in their argument that the plaintiff actions should be heard in a unitary trial with the third-party proceedings in each case and not separately, as the plaintiffs contend.

21. The relevant amendment set out in the Amended Rabobank Defence is paragraph 63 which is in the following terms:

"*Further, if the alleged issues and/or malfunctioning of the heating system, the cooling system, the ventilation and/or the water quality of the Building are well-founded (which is denied) said issues have been contributed to or partly caused by the negligence or want of care on the part of the Plaintiff its servant or agents in the carrying out of cat A and cat B fit-out works and in effecting interventions to the Building systems including the heating system, the cooling system, the ventilation and/or the water quality of the building. The Defendant is not privy at this time to the full detail of the works actually carried out and the interventions made with respect to the chilled water and heating pipe work systems however the water quality issues/ water contamination complained of by the Plaintiff is consistent with localised interventions and the isolation of floors. Floor specific air systems interventions are also liable to impact upon flow rates. Typical tenant interventions in relation to cat A and cat B fit-out include inter alia: - the introduction of additional fan coil units and associated interventions to chilled water and heating pipe work systems; - defective commissioning of the water systems and air systems referable to the demised areas; - adjustments to the BMS systems. The Defendant pleads that these or similar interventions are liable to contribute to the water quality and ventilation flow rate*

issues alleged by the Plaintiff and reserves the right to plead further particulars of contributory negligence subsequent to discovery."

22. It is instructive to consider at this point how the tenant fit out works are pleaded in the respective third-party defences delivered in the Rabobank Proceedings.

23. In the Bennett defence dated 16 October 2023 at para 9.3 it is pleaded that "… *the Plaintiff and numerous other tenants completed fit out works to their respective demised premises. At all times, the Defendant was responsible to ensure the tenant's works were properly incorporated into the overall building systems without detriment to the landlord areas or other tenant areas. Furthermore, it was incumbent on the tenants to ensure their own systems worked correctly and were properly maintained so as not to affect landlord areas or other tenant areas*". A similar plea is contained at para 10.4 and para 12.3.

24. Para 47 of the Bennett defence pleads that "*The water quality issue, which prevented the re-commissioning, arose through the actions of the Plaintiff in fitting out its premises and/or the Defendant in failing to properly maintain the system post practical completion and/or the Defendant failing to properly manage the Plaintiff in carrying out its fit out works*." A similar plea is made at paras 10.7, 58 and 63 and in general terms at para 78 of the Bennett defence.

25. The Ethos defence dated 13 October 2023 also refers to tenant fit out works. It pleads at para 20 that: "*If (which is denied) the alleged defects and/or deficiencies and/or problems were caused to occur post practical completion, then same were caused and/or contributed to by the negligence of the Defendant and/or their servants and agents and/or the Defendant's tenants including the Plaintiff in or about post practical completion stage commissioning, fit-out and/or maintenance issues*…". Similar claims are pleaded at paras 30 and 32.

26. It is pleaded at paragraph 31.6 of the Walsh Mechanical defence dated 13 October 2023 that "*Walsh Mechanical reserves the entitlement to contend that any defects in the Building (which are not admitted) were caused or contributed to by the acts or omissions of others (including others not yet party to these proceedings) subsequent to the practical completion and handover of the Building to the Defendant, including the acts or omissions of tenant fit out contractors*." A similar plea is made in para 37 reserving the right, inter alia, to pursue fit out contractors (whether on behalf of the defendant or tenants). It is also pleaded that the defendant was negligent in failing to regulate properly, or at all, the tenant fit out works carried out to the Building (paragraph 34.3).

27. RKD are supportive of the plaintiffs' motions. It's defence does not specifically reference the Rabobank fit out works.

28. Linesight delivered its third-party defence on 16 October 2023. On the question of the plaintiff's fit out, para 36 provides as follows: – "… *the Fifth Named Third-party will rely on the matters pleaded by the Defendant in its Amended Defence as against the Plaintiff, in particular the matters pleaded at paragraph 63 thereof*". By way of a plea of contributory negligence against the defendant, para 38 (iv) alleges that the defendant caused, allowed, or permitted category B fit out works to be undertaken by or on behalf of tenants which caused and/or contributed to the defects now complained of. A similar plea is contained in para 38(v). It is pleaded at para 42 that Linesight will rely upon the defence of *novus actus interveniens* in light of the failure to maintain and/or the category B fit out works.

29. In comparison, the third-party defences in the Zurich Proceedings refer to "*numerous tenants*" completing fit out works to their respective demised premises in the Building and do not specifically reference Zurich fit out works as no such works have been

undertaken by Zurich. However, the Bennett defence refers to the actions of "the plaintiff" (being Zurich) in "*failing to maintain its demised premises*" as part of the reason for any water quality issues[5] and more generally in relation to the "*alleged defects on which the Plaintiff's claim against the Defendant is based*" by reason of the pleaded failure of Zurich to "*properly maintain the systems within its demised premises*". [6] The Ethos defence contains a general plea (without further detail) that Zurich contributed to the matters of which complaint is made, failed to mitigate their loss, and "*are the authors of their own misfortune*".[7] Linesight repeats the plea it made in the Rabobank Proceedings regarding para 63 of the Amended Rabobank Defence although, of course, no such amended defence arises as against Zurich.[8]

The positions adopted by the Parties

30. The parties have adopted differing positions in relation to this application. As one would expect, parties have primarily adopted positions consistent with what they perceive to be in their own best interests and tactically most advantageous to them. I make no criticism of the parties in that regard. It is the function of this court however to balance those competing interests and views in a manner which best serves the administration of justice and overall fairness.

31. While I will address the detailed submissions made by each party, a brief summary of their respective positions is as follows:

Rabobank and Zurich	Seeks to have the proceedings in both cases advanced against the defendant separately and

[5] See paras 10.7,46,62 and 69 of the Bennett defence dated 16 October 2023
[6] Para 77 of the Bennett defence dated 16 October 2023
[7] Para 32 of the Ethos defence dated 13 October 2023.
[8] Para 37 of Linesight defence dated 16 October 2023.

	distinct from the issues between the defendant and third parties.
Defendant	Seeks a single unitary hearing but is not opposed to phasing of evidence and submissions.
Bennett	Prefers a unitary but modular hearing-module (1) for terms and effects of agreements, whether breached and consequences; module (2) for which party is responsible for the defects.
Ethos	Favours a unitary but modular hearing-(1) technical module concerning presence cause and remediation of defects and (2) a landlord and tenant module.
Walsh Mechanical	Favours a unitary hearing with a pause of proceedings to allow remediation works to be completed and to ascertain the root cause of the identified defects.
RKD	Favours a separate hearing of the main and third-party proceedings
Linesight	Favours a unitary but modular hearing-(1) technical module concerning presence, cause and remediation of defects, and (2) a landlord and tenant module.

32. Therefore, there is agreement between the plaintiff and RKD on separate hearings of the main and third-party proceedings. The defendant wants all issues heard together but concedes that there may be a benefit in phasing the issues and evidence. There is agreement between Ethos and Linesight on a single modular hearing and what those modules should cover. While Bennetts also argue for a single modular hearing they suggest different modules and that the landlord and tenant issues should be heard before, rather than after, the technical module. Finally, Walsh Mechanical wish to have a unitary hearing but with a pause to allow remediation works to complete and root causes of problems to be identified. It is worth noting that where the parties in this case refer to a modular hearing it was clear that they do not mean a hearing in which judgment would be given on distinct modules in advance of other modules. Rather they really mean a phased hearing of evidence with a single judgment to be delivered at the end of all hearings. This is an important distinction to which I will return.

The submissions made by the Parties to support their positions

Rabobank

33. Counsel for Rabobank says that Rabobank (and equally Zurich) are concerned about the risk of the trial being delayed if it were to proceed as one unitary trial. The plaintiff actions are significantly more advanced than the third-party actions. Discovery is due to be completed in early December in the plaintiff actions while this process has not yet started as between the defendant and the third parties. Counsel argues that the urgency of securing a trial affects both Rabobank and Zurich, although in different ways. The evidence provided by Rabobank is that the lived experience of their employees who work in the Building is intolerable.[9] While Zurich has not yet

[9] as per affidavit of Colin Fuller sworn 19 July 2023

taken up occupation in the Building, it is required at significant financial cost to negotiate short-term extensions of existing landlord and tenant arrangements. Zurich believes it has a robust basis for recission of the Zurich Leases in light of the misrepresentations it alleges were made to it by the defendant. Zurich is therefore in a situation of limbo pending a determination of its claim against the defendant. Neither Rabobank nor Zurich believe that these defects will be properly remediated unless and until the defendant is directed to do so by way of court order.

34. Counsel for Rabobank argues that the delay is not merely a matter of the third-party proceedings being less advanced than the main proceedings. He says that the issues between the defendant and the third parties amount to building disputes arising from a significant building project. Claims of this nature are lengthy and complex and expensive to litigate. He says that neither Zurich nor Rabobank wish to become embroiled in lengthy and complex third-party actions in which comprehensive defences have been filed by all parties. He says that the plaintiffs have no interest in the third-party proceedings and they make no claim against any of the third parties. Furthermore, the third parties have raised the possibility of yet further parties being joined to these proceedings, thus creating an even greater potential for delay. [10]

35. Counsel for Rabobank disputes the suggestion that the proposed remediation plan recently suggested by the defendant takes away the urgency from the perspective of either Rabobank or Zurich. He also points out that this remediation plan does not address issues such as the right to rescind.

36. Counsel for Rabobank also argues that the idea of a modular hearing was not one that the court should direct in this case. He said that both Ethos and Linesight were

[10] See for example para 43 of Ms Ryan's affidavit on behalf of Bennett and para 30.2 of Affidavit of Ms Noctor on behalf of Walsh Mechanical.

suggesting that a technical module would proceed in advance of the landlord and tenant issues, which counsel described as putting the cart before the horse. He points out that the third parties are not a party to the plaintiff's dispute. He rejects the argument that there is a fundamental interconnectedness between the plaintiff action and the third-party action. He argues that if the plaintiff cannot have its landlord and tenant issues resolved until after there is a full and complete hearing of the complex issues which arise as between the defendant and the third parties and indeed between the third parties *inter se*, this creates enormous prejudice for both Rabobank and Zurich who will be put to significant additional legal costs dealing with matters in which they have no direct interest. He does not agree that more overall court time would be required in a split trial scenario, as is contended by the defendant.

37. Counsel described the Amended Rabobank Defence as non-specific and drafted in speculative terms. He says that no such plea arises at all against Zurich who carried out no fit out works. He argues that such an "insubstantial" plea cannot justify linking or rolling up the plaintiff actions with the third-party actions into a modular trial, with the plaintiffs and third parties participating across multiple modules. He argues that the defendant, as landlord, must meet its obligations to its tenants and that it cannot postpone doing so until it resolves separate complex and lengthy claims against third parties on foot of collateral warranties. Counsel argues that this plea in the Rabobank Proceedings is a relatively minor part of the overall claim and not something which justifies in effect sucking the plaintiff into the third-party proceedings with the consequence that the plaintiff actions will be significantly delayed and elongated.

38. Counsel for Rabobank argued that the landlord and tenant dispute between the plaintiff and the defendant is focused on the question as to whether lease covenants have been complied with by the defendant. He says at its most basic level the focus of

the plaintiff's claim will be on whether the Building meets objective standards to which the tenant was entitled and, if not, what remedies flow from that. He argues that *why* those standards are not met is simply not an issue as between the plaintiff and the defendant, still less who on the initial build team might be responsible for that. While the plaintiff does want the defendant to ascertain the root causes of the issues with the Building so that it may be able to properly remedy matters, this, Counsel argues, is not a matter that arises on the plaintiff's proceedings against the defendant. Counsel notes that there is no plea by the defendant of impossibility around the remediation sought by the plaintiff. Indeed, he says the defendant's approach has been to seek time to remediate (albeit formally maintaining the position in its defence that there are no issues with the Building).

39. Rabobank also argues that there is no material prejudice to the third parties if the plaintiff action proceeds separately with the defendant. Counsel says there is no dispute between the third parties and the plaintiff. Furthermore, the third parties, he says, will not be bound by the outcome of the dispute as between the plaintiff and the defendant. He argues that if there are issues which the third parties say were not fully ventilated in the main proceedings it would be open to the third parties to raise these matters in the third-party proceedings. Counsel argues that if the defendant succeeds in its contributory negligence plea as against Rabobank for the tenant fit out works then the third parties get the benefit of that finding as the defendant has less to pursue them for in the third-party proceedings. He says that even if the defendant does not succeed in its contributory negligence plea against Rabobank, the third parties can, regardless, articulate the issues they have raised in their defence and evidence can be heard in relation to that in the third-party proceedings. The court in those third-party proceedings having assessed more detailed evidence, could come to a different

conclusion if that was warranted. Counsel says that section 35 (1)(j) of the Civil Liability Act 1961 specifically contemplates a scenario where, if the Defendant doesn't obtain a contribution from Rabobank, that doesn't preclude the third parties from agitating those same issues when they come to consider the third-party action.

40. Counsel for Rabobank rejected the argument that there was an overlap, or at least any significant overlap, in technical evidence between the main proceedings and the third-party proceedings. While he acknowledged that the plaintiff would produce technical evidence at trial, he said this technical evidence would concern establishing the unsatisfactory nature of the Building. The plaintiff's statement of claim already sets out particulars of expert surveys carried out by the plaintiff's experts on the performance of the heating ventilation and air-conditioning system (HVAC) in the Building, relative to the original specification that system had at the time of commissioning. A similar exercise was carried out in relation to the building management system (BMS). He says the only other technical evidence will be whether and, if so, to what extent, the plaintiff's fit-out works caused or contributed to the current identified defects in the Building.

41. The plaintiff points out that the defendant has never said it is impossible to fix the Building. The plaintiff says in those circumstances there would be no issue in the context of specific performance requiring the defects to be remedied. Precisely how such remediation is achieved is a matter for the defendant, possibly in discussion with those third parties who it claims are responsible. The plaintiff says it is largely agnostic as to how the Building is fixed, provided that it is fixed.

42. Counsel acknowledged that the split trial may conceivably expose the defendant to increased costs as the common party in two separate sets of proceedings but he says

that it was the defendant who elected to join the third parties for its own purposes and to take on the costs risk associated with that step.

The defendant

43. Counsel for the defendant argues that there are compelling reasons in this case for a trial in which the plaintiff, defendant and third parties should all be heard alongside one another. He says that the unitary trial will likely diminish the scope for strategic scheduling advantages within the litigation and will concentrate minds on efficient conduct of the case. Counsel for the defendant argued strongly that the "default position" was a unitary trial and that the onus was on the plaintiff to persuade the court that it should depart from this default position. The defendant argues that in this case the third-party proceedings are intrinsically linked with the main proceedings.

44. The defendant argues that because it has now commenced implementation of what it describes as a comprehensive remediation strategy, this dissipates the urgency of the plaintiff's claim. The defendant says this process is expected to be completed by the end of January 2024.

45. The defendant says that having consulted with its experts, they are satisfied their evidence "*will likely overlap significant (sic) with evidence they would adduce in the Third-party Actions.*" [11] Reference was made by the defendant's counsel to the statement of claim where detailed particulars of findings of the inspection by the plaintiff's engineering experts are set out at paragraphs 32 to 68. He says this outlines the detailed tests carried out by the plaintiff's experts on which the plaintiff has acknowledged there will have to be technical evidence adduced at trial. Counsel says that the issue of the fit out works undertaken by Rabobank "*is a very significant issue*

[1111] Para 35 of Gerald Burns affidavit sworn 29 September 2023

in both the main proceedings and the third-party proceedings"[12]. He says that this court could, within the context of a unitary trial, phase the presentation of evidence to improve efficiency and he urged this court to put this matter back to late January to direct the parties to agree a proposal for a phased hearing of a unitary trial.

46. Counsel for the defendant says this dispute with the plaintiff is not a standard landlord and tenant dispute, although this may be how the plaintiff seeks to present it. Instead, he characterised it as "*an extremely technical, complex, specialised claim being made by the plaintiff in the statement of claim, that as they have openly recognised will require expert evidence*"[13]

47. Counsel for the defendant stressed that the defendant was not involved in the commissioning of the Building or the third-party contracts. This fact, he says, will make it extremely difficult and challenging for the defendant to cross-examine the plaintiff on the degree to which its fit out damaged the pre-existing works. He says the defendant would have to call the third parties as witnesses in the main action as the people who did the work in question. He says it would make a nonsense of splitting the trials where the same parties are involved in each trial. He says that if the plaintiff succeeds in the main action against the defendant alone, it is likely the third parties will contend that the defendant did not adequately challenge the plaintiff about the fit out works that had been done and that this may involve reviewing again the transcript of the main action as well as hearing the same technical evidence twice over. The defendant submits that a unitary trial will be faster, more efficient, and accordingly less expensive in terms of resolving all issues. Counsel says a split trial creates the

[12] P101 lines 9 and 10 Transcript 25 October 2023
[13] P92 lines 17-20 Transcript dated 25 October 2023

risk that any party can appeal a judgment given - thus increasing the overall time to resolve the entire dispute.

48. The defendant says that there is a particular prejudice to it if the matter does not proceed as a single action. The affidavit of Gerald Byrne on behalf of the defendant exhibits at Tab 4, a letter from Stephen Tierney of Peter Fitzpatrick, legal costs accountants, which provides an opinion on the potential costs of proceeding by way of one singular trial versus a trial on a split basis. While acknowledging there would be a saving of costs for the plaintiff in a split trial, Mr Tierney estimates that the extra costs to the defendant of a split trial could be in the region of €209,000.

49. The defendant says there is a particular prejudice to it in having to meet the plaintiff's claim but then wait much longer for the third-party proceedings to come on for hearing. This latter argument however is somewhat inconsistent with the defendant's stated belief that the third-party proceedings "*have the capacity to catch up fully with the plaintiff's actio*n"[14].

50. Counsel for the defendant also argued that with a split trial there was unquestionably a risk of conflicting factual findings or deprivation of relevant evidence. He said the main proceedings will need the involvement of the third parties as the people who did the works. So, they would either be called as witnesses or alternatively they don't have their say.

RKD

51. RKD support the plaintiff's applications for separate trials. RKD says that the main proceedings concern matters of landlord and tenant law pursuant to leases between the plaintiffs and the defendant, to which RKD is not a party and in which it had no involvement. RKD's position is that the plaintiff's complaints relate to mechanical

[14] As per para 43 of the affidavit of Gerald Byrne sworn 29 September 2023.

and electrical matters that are outside the scope of RKD's responsibility and retainer in the construction of the Building. They argue that it would be "*highly prejudicial* "for RKD "….*to have to take part in proceedings, much of which concern matters that have nothing to do with the allegations made against it and in respect of which it maintains a full defence".* [15]

52. Counsel for RKD argued strongly that RKD had been "wrongly joined" and that they were not a concurrent wrongdoer. Those matters were not before me for determination but will be a matter for the trial judge. They do illustrate however the extent of the issues which arise in the third-party proceedings.

53. Counsel for RKD did not accept that there would be a significant overlap of technical evidence between the main proceedings and the third-party proceedings. He argued that the technical evidence in the plaintiff's claim is whether the Building is functioning. He says this technical evidence is different than the much more complex evidence that will arise between the defendant and the third parties, working out the underlying causes to determine who is responsible and the degree of their responsibility. He argues that the third parties are not at all prejudiced by the resolution of the dispute between the plaintiff and the defendant, even if it does engage what he described as a "*hazy and unsubstantiated claim that the fit out was at fault*".[16] He says that section 29 of the Civil Liability Act 1961 protects the third parties who remain free to adduce whatever evidence they wish to dispute their liability in the third-party proceedings.

[15] Mr David Petherbridge affidavit sworn 11 October 2023 at paragraph 8 thereof
[16] P135 lines 4-5 transcript dated 25 October 2023

54. RKD also argue that if the proceedings are to be heard together, an unreasonable burden will be imposed on the third parties, whose proceedings will be required to keep pace with, and ultimately catch up with, the main proceedings.[17]

The remaining third parties

55. A sensible consensus was reached by the remaining third parties that counsel would make amalgamated submissions to the court on behalf of all of them (each third-party having filed their separate written submissions). While there are differing views amongst the remaining third parties as to how the trial might be phased or modularised, their common position was that there should be a unitary hearing.

56. Counsel argued that it would not be possible to determine what was wrong with the Building or what was the appropriate remedy without also understanding what is the *cause* of the defects. He argued that the plaintiff had already pleaded a number of technical matters and that these are denied by the defendant and re-pleaded against the third parties. He says that the plaintiffs have not merely confined themselves to the evidence of the lived experience in the Building but have chosen to plead what they say are technical defects in the Building. In doing so, he says that the plaintiffs have strayed into pleas which seek to identify the cause of the technical problems. This, counsel says, has ramifications for the third parties if that issue is going to be determined in their absence.

57. Counsel argues that if the plaintiff's action proceeds as a single hearing the judge hearing it will have to decide matters including technical evidence as to the cause of the alleged defects. The same or another judge will then later have to consider the same issues in the third-party proceedings on the basis of hearing different evidence from different experts advocating, undoubtedly, different positions and hearing

[17] Para 47 of RKD's written submissions.

different submissions. He says different conclusions may be arrived at in both trials as a result. He says while this is possible, it is highly undesirable.

58. Counsel stressed that the policy underpinning the Civil Liability Act was to reduce a multiplicity of actions by ensuring that claims for contributions were heard together with main actions where possible. He argued that neither section 35 (1) (j) nor section 29 of the Civil Liability Act 1961 are relevant in the present circumstances. Counsel conceded that a third-party is not bound by the findings in a main action, but he argued that separate trials was not a good use of court resources and could lead to inconsistent findings. He says that the fact that the Civil Liability Act 1961 has catered for separate trials does not make this the best use of the limited resources of either the court or the parties.

Analysis of the Law by reference to the facts

59. All parties were in agreement that this court can, pursuant to its inherent jurisdiction, determine how proceedings before it should be conducted. Furthermore, O 63A r. 5 of the RSC gives the Commercial Court a broad jurisdiction to give directions and make orders for the determination of proceedings in a manner which is just, expeditious, and likely to minimise costs. Order 36, rule 9 of the Rules of the Superior Courts, 1986 in effect allows for a sequencing of aspects of trials and modular trials.

60. The defendant and those third parties who object to this application say that the principles which apply to modular trials equally govern this application. The plaintiff does not agree and says the position is more nuanced. The plaintiff argues that in the present case the court is not simply looking at how to sequence the trial between two parties who are in dispute with each other. Rather, the court has to consider how to deal with two separate trials in which there is a common denominator, being the

defendant, but in which the plaintiff is seeking relief against the defendant but not against the third parties and vice versa.

61. This distinction is, in my view, a critical one. In an application for a modular trial the parties are all parties to the same action. A module determines an issue once and for all and binds those parties. A third-party action is a separate claim to the main action and does not involve identical parties. Neither will a third-party be bound by a determination in the main action in which he has not participated. Counsel for the defendant argued strongly that the starting position for the court's consideration should be that the default position is a unitary trial. In that regard he relied on the line of authority regarding applications for a modular trial between the same parties. While many legal authorities were put before this court there was no legal authority directly on point with the circumstances of this case. The authorities relied upon either concerned applications for a modular trial as between a plaintiff and defendant or applications to set aside third-party notices on the grounds of delay.

62. There is a well-established framework for the manner in which a court should approach the request for a modular trial. The principles have recently been set out comprehensively by Quinn J in *Biomass Heating Solutions Limited v Geurts International BV* [2023] IEHC 66 at paras 82 to 87 where the court confirmed:

"82. Firstly, the default position is that the court should conduct a unitary trial.

83. Secondly, orders 36 and 63A confer on the court a discretion to direct a modular trial.

84. Thirdly, the onus is on the moving party to satisfy the court that the interests of the administration of justice are served by directing a modular trial.

85. Fourthly, if the matter is capable of being disposed of by separate modules, and if a module can be identified which is capable of being determined independently of the

balance of the trial, the court must consider whether directing such a module to be heard separately will or may generate efficiencies and benefits in terms of the saving of court time and expense and other benefits such as the facility for the parties and the court to focus on discrete issues in each module.

86. Fifthly, if such benefits are discernible the court needs to consider whether they are of sufficient weight as to justify departure from the default position of a unitary trial. This is a balancing exercise.

87. Sixthly, in exercising the court's discretion, it should take account of such factors as:

(a) This history of the case, including the pace at which it has moved this far.

(b) Delay in bringing the application or any other delay considerations in the context of the proceedings as a whole;

(c) Prejudice to a party pressing for a unitary trial;

(d) Whether the application has truly been brought in the interests of saving court time and cost and expense or for some other purpose such as the strategic interests of the applicant;"

65. While many of the considerations set out in *Biomass* are directly relevant to the balancing exercise this court has to do in the present application, I do not believe that an identical starting point or default position necessarily applies to a consideration of whether a plaintiff action should be allowed to proceed as a stand-alone action. In that regard I prefer the plaintiff's argument that the question is not why should there not be a unitary trial but rather why should the third parties, against whom the plaintiffs have no complaint and seek no relief, be permitted to intervene in a dispute which is largely contractual between the plaintiff tenants and their landlord.

66. Counsel for the defendant argues that the third-party procedure contained in the Civil Liability Act 1961 provides the legal rationale for cutting- down on the multiplicity of actions and ensuring that there is an efficiency in respect of court hearings. He referred to the decision of the Supreme Court in *Connelly v Casey[1999] IESC 76* /[2000] IR 345- allowing an appeal against the High Court's decision to set aside a third-party notice on the basis that the third-party had not been joined as soon as was reasonably possible- and in particular, the following comments of Denham J (as she then was) at p 351:

"*The clear purpose of [*section 27 (1) of the Civil Liability Act 1961*] is to ensure that a multiplicity of actions is avoided; see Gilmore v. Windle [1967] I.R. 323. It is appropriate that third-party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice, to the third-party and to the issue of costs. To enable a third-party to participate in the proceedings is to maximise his rights-he is not deprived of the benefit of participating in the main action.*"

67. Counsel for the plaintiff says that the Supreme Court's comments in *Connolly* have to be understood in the context in which they were made, which was that if the third-party notice had been set aside for delay, the defendant in order to prosecute his claim for contribution would have had to bring a separate set of proceedings. Counsel argued that what the court was essentially saying in *Connolly* was that there was no prejudice to the third-party arising from the third-party procedure being utilised, rather than separate actions being brought, because the third-party has a right to defend its position. He says it is in that context that the reference to a multiplicity of actions must be understood – avoiding a succession of cases with separate record numbers and entirely separate proceedings being issued. He says the case is not

authority for a proposition that it necessarily or inevitably follows that once a third-party is brought into proceedings, he immediately has the right to intervene in the main action as though he were a party, because he is not.

68. In that regard reliance was placed by the plaintiff on the decision of Carswell LJ in the case of *Gillespie v Anglo Irish Beef Processors Ltd* [1994] NI 65. While acknowledging that this case related to a different scenario to the present facts, it nevertheless is relevant as it addressed the question of the entitlement of a third-party to intervene in proceedings between a plaintiff and defendant. *Gillespie* concerned the entitlement of a third-party to obtain particulars of a claim from a plaintiff. Carswell LJ held at page 68 that *"a plaintiff ought to be able to confine himself to dealing with those whom he has chosen to join as defendants and decline to concern himself with third parties joined by the defendant*s". He went on to hold at page 71 of his judgment that:

*"I do not consider that the convenience which would be afforded to third parties if they were able to require [*particulars/discovery/interrogatories*].. directly from the plaintiff outweighs the desirability of leaving the plaintiff free to deal solely with the parties whom he has joined as defendants and no one else. If the third-party requires particulars, discovery or interrogatories, he can go to the defendant-on whom lies the main responsibility of opposing the plaintiff's claim-to obtain what he requires. If he is unable to obtain it in this manner, he can then seek further directions under Ord 16 or even apply to be joined as a defendant.… In principle, I consider that the plaintiff is entitled to stand aside from the third-party proceedings and confine his dealings to those which he has with the defendant.*"

69. The court in *Giillespie* noted that in practice a third-party will generally be able to obtain what he needs from a defendant if the defendant's advisers are taking sensible

steps to protect the defendant's ability to defend the action. The court did not wish to deter parties from following such convenient practices in a spirit of goodwill but, as a matter of entitlement in principle, the court determined that the third parties were not entitled to require the plaintiff to furnish particulars directly to them.

70. Similar to the comments made by Carswell LJ in *Gillespi*e, I believe that, with the alignment of interests, the defendant will likely obtain cooperation from the third parties insofar as this is necessary to enable the defendant to advance its claim for contributory negligence against the plaintiff. As a matter of principle however the third parties are not parties to the main action.

71. The nature of a contribution claim was explained by O'Donnell J (as he then was) in *Defender Limited v HSBC France (formerly HSBC Institutional Trust Services (Ireland) Limited)* [2020] IESC 37 where, at para 13, he said:

"*The nature of what I think can be usefully described as a CLA contribution claim is important. It is a separate cause of action which, while intended to be capable of normally being conducted within the original pleadings by simple pleadings which may themselves extend no further than the delivery of a third-party notice, or a notice of indemnity in contribution, is nevertheless capable of being conducted as separate proceedings with fully developed pleadings*."

72. While ordinarily, and for very good reasons, third-party proceedings are heard together with the main proceedings, this does not necessarily mean that all the issues have to be dealt with simultaneously (as confirmed in *Kenny v Howard* [2016] IECA 243.). The authors note in *Delaney and McGrath On Civil Procedure (fourth ed.)* at para 9-84 that the order joining a third-party usually provides that the third-party proceedings are to be tried at or after the trial of the plaintiff's proceedings and "*Thus, the default position is that the third-party proceedings will be tried at the same time*

or immediately after the main proceedings". However, in that same para the authors confirm that:

"*…it is not uncommon for the third-party proceedings to be tried separately from the main proceedings where to do otherwise would be to delay or cause difficulty in the trial of the main proceedings*".

73. I believe that there is a nuance between the interpretation of a "default position of a unitary trial" for proceedings involving the same parties and for those involving a third-party. In applications for a modular trial in proceedings involving the same parties, a unitary trial is certainly the default position on the basis that all issues between the same parties in the same proceedings should, in the absence of a good reason otherwise, be heard together. However, in third-party proceedings, there are in fact two separate actions in place between different parties. The default position is that as a matter of practicality and efficiency and recognising the overlap in evidence, those two separate actions should generally be tried at the same time - there are procedures in place both in the Civil Liability Act 1961 and in O16 RSC to facilitate this. However, directions for a simultaneous hearing of both actions have to be applied for in third-party proceedings and justified and so the "default position" of a unitary trial is not the same for third-party proceedings as it is for proceedings between a plaintiff and a defendant.

74. Even the third parties in this case do not suggest to the court that all issues should be tried simultaneously. Rather they suggest varying versions of a type of "modular" hearing, with evidence being phased. The only party who has an interest in all phases is the defendant. The plaintiff has no interest in the third-party proceedings and the third parties do not wish to become involved in the landlord and tenant disputes between the plaintiff and the defendant (albeit that some of them say they have an

interest in the technical evidence that may be advanced in the landlord and tenant dispute). The third parties also say that they do not wish to be rushed to deal with matters to accommodate the more advanced stage of the main proceedings.

75. Even though there is a difference between the Rabobank Proceedings and the Zurich Proceedings in that Zurich did not carry out any tenant fit out works, no one is suggesting splitting the Rabobank Proceedings from the Zurich Proceedings which have moved together to date in the interests of efficiency. Although I accept that Zurich may be even more prejudiced in that it did not carry out fit out works, I have to consider the overall plaintiff claims in the round. I accept however that there is an additional level of prejudice to Zurich in a unitary trial given that Zurich performed no fit out works which could possibly be pleaded against them as a contributory negligence factor.

76. It is also relevant to consider the provisions of O. 16 of the RSC which deals with the third-party procedure provided for under those rules. Order 16, rule 1(c) of the Rules of the Superior Courts, 1986 confirms that "…*the court may give leave to the defendant to issue and serve a third-party notice and may, at the same time, if it shall appear desirable to do so, give the third-party liberty to appear at the trial and take such part therein as may be just, and generally give such directions as to the court shall appear proper for having any question or the rights or liabilities of the parties most conveniently determined and enforced and as to the mode and extent in or to which the third-party shall be bound or made liable by the decision or judgement in the actio*n".

77. It is therefore open to a defendant seeking to join a third-party to seek directions requiring that the third-party issue and the main proceedings be heard together. No such directions were sought or made in this case when the court made orders

permitting the joinder of the third parties. Order 16, rule 7 of the Rules of the Superior Courts, 1986 permits any third-party to apply to vary any directions previously given by the court under O.16 r. 1 RSC. Order 16, rule 8(1) of the Rules of the applies where a third-party has delivered his defence. This provision entitles the defendant, on notice, to apply to the court for directions and in such case the court may under subsection (b): "*if satisfied that there is a question or issue proper to be tried as between the plaintiff and the defendant and the third-party or between any or either of them as to the liability of the defendant to the plaintiff or as to the liability of the third-party to make any contribution or indemnity claimed in whole or in part, or as to any other relief or remedy claimed in the notice by the defendant, or that a question or issue stated in the notice should be determined not only as between the plaintiff and the defendant but as between the plaintiff, the defendant and the third-party or any or either of them, thereupon try such question or issue or order it to be tried in such manner as the court may direct*…"

78. Order 16, rule 8(1)(c) of the Rules of the Superior Courts, 1986 confirms that the court can give the third-party liberty to defend the action, either alone or jointly with the original defendant upon such terms as may be just if it appears desirable to the court to make such an order. Order 16, rule 8(2) of the Rules of the Superior Courts, 1986 confirms that any direction given by the court may be given either before or after any judgment has been obtained by the plaintiff against the defendant.

79. It is clear that O.16 RSC gives the court broad powers to make directions regarding the manner in which third-party proceedings can be heard but these directions do not arise automatically. Rather such directions must be applied for and the court must be satisfied in all the circumstances to make such directions. The provisions explicitly recognise the possibility that directions may not be given or that an action may be

tried as between the plaintiff and defendant and further directions may then be given after that point.

80. Without determining any issues, I believe it is nevertheless safe to assume that the plaintiff's action against the defendant is likely to be less complex (and accordingly shorter) than the third-party action. The present case is not a straightforward third-party action where a defendant is simply seeking to pass through any liability he has to another party. This third-party action involves five separate third parties, all of whom appear to be seeking to pass responsibility one to the other in addition to defending their own positions against the defendant. The third-party disputes will concern, inter alia, the scope of each party's original mandate, the work undertaken by each third-party, the cause of and responsibility for any defects arising and the terms of any collateral warranties which might deal with that responsibility and the remedies flowing to the defendant in reliance on them. This evidence in my view is different and considerably more extensive than the evidence that will arise in the main landlord and tenant proceedings between the plaintiff and the defendant. An important point for me to consider is the extent to which two separate hearings would or could elongate the overall trial period relative to a unitary trial (whether on a phased basis or not). Key to this consideration in this case, it seems to me, is the extent to which expert technical evidence would likely need to be adduced twice if there were separate hearings. If that were the case, it would be a very strong factor in persuading me that a unitary trial should be ordered.

81. However, I am not convinced that there will be a significant overlap in technical evidence between the main action and the third-party proceedings, although I accept there will likely be some overlap. In reality, given the nature of the landlord and tenant arrangement between the plaintiff and the defendant, the plaintiff will have to

adduce expert evidence as to the existence of the defects it pleads, and those defects will then be assessed against the landlord covenants and relevant representations. If the defects are established, Rabobank (but not Zurich) will also have to adduce expert evidence to establish that the fit out works it carried out did not cause or contribute to those problems with the Building - although the burden of proof in that regard will rest with the defendant who has pleaded it by way of contributory negligence. The precise causes of the defects and the allocation of responsibility for them between third parties will not, in my view, be necessary proofs to be met in the main proceedings but this technical evidence will be central to the third-party proceedings. I am not persuaded on the pleadings, that the plaintiffs have to any material degree pleaded the technical causes of the defects identified – as opposed to simply establishing the defects by reference to contracted standards and how the defects manifest themselves in the Premises and the Building.

82. The question is whether this degree of overlap justifies delaying the plaintiff's claim (perhaps significantly where there exists the real possibility of yet further parties being joined to these proceedings whether that be additional third parties or indeed fourth parties). The evidence is that a number of tenants in the Building undertook fit out works. Every tenant who did so would likely have engaged professional advisers who may face the prospect of being joined to these proceedings, depending on the evidence. All of this serves to convince me that there is no realistic prospect that the third-party proceedings will catch up with the main proceedings and I do not believe the differential time limit of three months relied on by counsel for the third parties is realistic. Even if no further parties are joined, I expect that the discovery process as between the third parties and the defendant is likely to be larger and more complex than the discovery as between the plaintiff and defendant. Further time will therefore

be lost. In reality, there will be a significant additional delay to the plaintiff in having its claim dealt with if it is to be tied to a simultaneous determination of the third-party proceedings in which the plaintiff has no interest.

83. While the defendant has formally denied that there are any issues with the Building (and it is of course entitled to take that position in its defence) the defendant, at the same time, accepts on affidavit that there are issues and says that it is engaged in a remediation program which it claims will resolve all of the defects identified by the plaintiff and other tenants. I am not persuaded by the defendant's argument that it would be prejudiced in having to prove the contributory negligence it pleaded against the plaintiff in the absence of being able to rely on evidence adduced in the third-party proceedings. It is the defendant who amended its defence against Rabobank to specifically include a plea of contributory negligence regarding the tenant fit out works. In those circumstances it is entirely reasonable to expect that the defendant must bear the burden of proof to establish that contention at trial. The defendant can do so either by instructing independent experts or by involving the third parties as witnesses (whose interests would be aligned with the defendant in that regard). Even if the third parties agreed to give evidence in the main proceedings regarding the Rabobank fit out, I do not believe this evidence would substantially overlap with the totality of the technical evidence that will arise in the third-party proceedings.

84. There appears to me to be no logic to the suggestion that the third-party action should be heard in advance of the plaintiff's action, even on a phased basis. The main proceedings anchor any liability which arises in the third-party proceedings. The plaintiff has issued proceedings against the defendant alone, being the only party it holds responsible for the Building. The plaintiff has taken the trouble and expense to enter its proceedings into the commercial list in the expectation that these proceedings

will benefit from the efficiencies that parties before the commercial court expect. If the plaintiff has to wait for what will undoubtedly be lengthy and complicated third-party issues to be determined before it can secure any relief from its own landlord, this appears to me to very significantly dilute the value of the contractual covenants it holds as a tenant. While a landlord is of course entitled to itself pursue all necessary third parties on the basis of collateral warranties or otherwise, this entitlement does not absolve a landlord from dealing with the leasehold covenants it has with its own tenant.

85. Balancing that prejudice to the plaintiff, I have to consider the prejudice to the defendant and to the third parties in permitting the plaintiff actions to proceed independently.

86. The strongest argument articulated by the third parties in my view is the risk that they will be prejudiced in relation to the technical evidence adduced in the main proceedings if they are not heard at the same time as those proceedings. Because I do not believe there will be a significant overlap of technical evidence between the main proceedings and the third-party proceedings and because the third parties could also assist the defendant in the main proceedings and indeed appear as witnesses if requested by the defendant, I do not believe there would be significant prejudice to the third parties if the main proceedings were heard independently of the third-party claim. Furthermore, even to the extent that there is overlap of technical evidence, the third parties would not be bound by a finding in the main proceedings. The third parties would be free to adduce whatever evidence they wish in the third-party proceedings.

87. I believe that that defendant is the party most likely to benefit from a unitary trial – primarily because it may find it easier to establish the contributory negligence it

pleads against Rabobank if the third parties provide their technical evidence at the same time and also because a unitary trial would allow the defendant to postpone having to deal with the plaintiff before the defendant could itself seek to recover from the third parties. However, those factors do not in my view override the prejudice to the other parties and I am not persuaded that a unitary trial would, overall, be a more efficient use of the court's time or resources nor indeed the time and resources of the parties other than the defendant who is the only party interested in both actions. I have considered carefully the opinion provided by Mr Tierney regarding the costs exposure of a singular trial versus a split trial in his letter dated 28 September 2023. Mr Tierney himself describes this task as "*.. unusual such that it falls to be described as a rarified instruction*".[18] Mr Tierney's advices are predicated on his instructions that the defendant believes a split trial could result in eight additional days of court time to determine issues. It is unsurprising in those circumstances that Mr Tierney concludes that a split trial will result in additional costs to the defendant which he calculates in the region of €209,000. I take no issue with Mr Tierney's calculation. However, the real question is whether in fact there will be eight days of additional hearing necessitated by permitting the plaintiff's action to proceed separately. I am not satisfied on the evidence before me that eight additional days of evidence would be necessary if the matter was not heard by way of a unitary hearing. If I was so satisfied, it would of course make sense to direct a unitary trial in the interests of ensuring an efficient process where duplication of costs would be avoided. I am not persuaded that there will be a significant overlap of evidence between both actions. Accordingly I believe that a split trial will not result in significant duplication of time

[18] Page 2 of Mr Tierney's report dated 28 September 2023 exhibited at Tab 4 to the affidavit of Gerald Byrne sworn on behalf of the defendant on 29 September 2023

or costs. The assumptions underlying Mr Tierney's estimate therefore are not, in my view, likely to arise in fact.

88. This court is unclear as to precisely what stage of implementation the defendant's remediation plan is at. Certainly, there has been a draft plan produced although it does not appear that any works have actually started on foot of it. It also appears that although the third parties were provided with a copy of the plan, they were not afforded an opportunity to input into the plan. The plaintiff has expressed its concern regarding the adequacy of the plan. I have no information as to the attitude of the third parties to the remediation plan as currently drafted. It does however appear to me that any remediation plan should be one that has maximum buy- in before remediation works start. This is to avoid the obvious difficulty which will arise if works are carried out and other parties allege, for example, that such works were inadequate, that they prevented proper investigation or concealed the true nature and cause of the defects or that they may in fact have disimproved matters. This has the potential to create an entirely new round of dispute, particularly between the defendant and third parties. For that reason, I believe there is much to be said for the sensible suggestion advanced by Walsh Mechanical in its written submissions and by counsel for the third parties that all experts would engage with a view to agreeing what works are required for the purposes of remediating the issues identified by the plaintiff.

89. I am of the view that all parties should engage on the remediation plan with a view to enabling it to be implemented so that by the end of January (on the defendant's evidence) it will the clear whether that plan has been effective and, if not, whether it has at least narrowed the issues between the parties. I do not believe that it is necessary to order a unitary trial to achieve that sensible engagement. There is nothing to stop the third parties and the defendant immediately investigating the alleged

defects and indeed engaging in any remediation works regardless of how the trial is scheduled.

Decision and next steps

90. For all the reasons outlined in this judgment, I grant the plaintiff the relief sought in its motion seeking that the trial of these proceedings (and the related Zurich Proceedings) be permitted to proceed in advance of and distinct from the trial of the issues in dispute between the defendant and the third parties. I make this direction under O. 63A, r. 5 of the Rules of the Superior Courts, 1986.

91. I am on the view that it is in the interests of all parties that their respective experts formally engage as soon as possible. This is for the purpose of achieving agreement on or at least knowledge of the proposed remediation works to be undertaken at the Building. The third parties may themselves propose to take on their own expert roles for the purposes of assessing those remediation works in advance of commencement. The parties should therefore arrange for this engagement to take place as soon as possible. In the event that this cannot be arranged on a voluntary basis, I will make formal directions in that regard.

92. I propose to list this matter for mention before me at 10.15am on Tuesday 21 November to deal with costs and any further directions that arise out of this judgment in advance of these proceedings returning before the commercial list for further directions in the normal course.