Neutral Citation Number: [2007] IEHC 255

THE HIGH COURT

RECORD NO. 2003/6781 P

BETWEEN

DENIS MURNAGHAN

PLAINTIFF

AND
MARKLAND HOLDINGS LIMITED

FIRST NAMED DEFENDANT
CLAIMANT

AND
CANTIER CONSTRUCTION LIMITED
(IN VOLUNTARY LIQIDATION)

SECOND NAMED DEFENDANT
FIRST NAMED RESPONDENT

AND
N. McELROY ASSOCIATES LIMITED
TRADING AS McELROY ASSOCIATES CONSULTING ENGINGEERS

THIRD PARTY
SECOND RESPONDENT

Judgment of Miss Justice Laffoy delivered on 10th August, 2007.

The application

1. By order of this Court made on 31st March, 2006 it was ordered that the third party (McElroy) be joined as a third party in these proceedings on the basis that it would be joined with the second named defendant (Cantier) as co-defendant in the claim for contribution and indemnity of the first defendant (Markland) in these proceedings. On this application McElroy seeks to set aside the third-party proceedings.

Factual and procedural background

2. In these proceedings, which were initiated by plenary summons which issued on 5th June, 2003, the plaintiff sought damages for loss he had incurred as a result of damage to his residence at 5 Pembroke Place, Dublin 2, caused by the construction of a building on an adjoining site at No. 70 Leeson Close, Dublin 2. Markland was the owner and developer of the site at No. 70. Cantier was the building contractor retained by Markland to construct the building. McElroy was retained by Markland as structural engineers to advise on the construction of the building.

3. On the day on which the plenary summons was issued, the plaintiff applied for and obtained an interim injunction restraining the defendants from carrying out any further works on No. 70. The subsequent application for an interlocutory injunction in the same terms was vigorously defended by Markland. Eventually, agreement was reached on 25th July, 2003 between the plaintiff and Markland, which resulted in the plaintiff's motion for an interlocutory injunction being struck out. An important element of that agreement was that Markland agreed to facilitate a joint inspection by the engineers of the plaintiff and Markland of the foundations of both buildings. The parties also agreed a timetable for the procedural aspects of the proceedings with a view to securing an early trial, in accordance with which Markland's defence was delivered on 9th September, 2003.

4. The inspection of the foundations took place between 11th and 15th September, 2003. The reports of McElroy put before the court by it on this application disclose that it informed Markland on 18th September, 2003 that it was common case between Markland's advisers, including McElroy, and the plaintiff's engineer and architect that they were unable to observe a point where the foundations of No. 70 separated from the foundations of No. 5. In a fuller report of November, 2003 McElroy advised Markland, as a result of a further inspection from the No. 5 side, that there was contact between No. 5 and No. 70 at foundation level which was contrary to what was originally intended and that there was no evidence of a compressible board (Korpak) between the two foundations, as McElroy had detailed.

5. In the substantive proceedings the plaintiff claimed damages against Markland for breach of an agreement between the respective architects of Markland and the plaintiff on their principals' behalf to maintain a gap of between 100 mm and 150 mm between No. 5 and the building on No. 70, and for negligence and breach of duty, and for trespass and nuisance. The claim against Cantier was for damages for loss occasioned by its negligence, breach of duty, trespass and nuisance.

6. The voluntary winding up of Cantier commenced on 3rd July, 2003. Thereafter, until May, 2004, Cantier did not participate in the proceedings. On 15th December, 2004 the plaintiff obtained judgment in default of defence against Cantier and the damages to which the plaintiff was entitled were directed to be assessed. Subsequently, on 6th May, 2004 Cantier, on disclosure to the court that it was defending through an indemnifier, was given liberty to deliver a defence. In its defence, which was delivered on 10th May, 2004, the second defendant denied that the plaintiff had suffered any loss and pleaded contributory negligence on his part in failing to minimise his loss.

7. The trial of the plaintiff's action commenced on 19th October, 2004. As regards the position of the defendants inter se, on 28th August, 2003 Markland had served notice claiming indemnity or contribution on Cantier and on 12th May, 2004 Cantier had served notice claiming indemnity or contribution on Markland. At the hearing of the action the court was told that it had been agreed by the parties that the issues between the defendants should be left in abeyance until the issues between the plaintiff and the defendants were determined. Judgment was delivered on the plaintiff's claim on 1st December, 2004. Because of the judgment in default of defence, the liability of Cantier was not at issue. In relation to liability on the part of Markland, it was held that Markland had failed to observe good building practice in installing the foundation of No. 70 and thereby breached the duty of care it owed to the plaintiff as the adjoining property owner. It was also held that the agreement between the architects as to the maintenance of a gap between the two buildings had not been implemented. Having addressed the issue as to damage caused to No. 5 by those breaches, the court awarded the plaintiff damages in the sum of €238,909.90.

8. At the hearing of the action one witness only was called on behalf of Markland on the issue of liability, John Moylan of Moylan Consulting Engineers and Project Managers, who was retained in February, 2004 in connection with the proceedings, if not earlier. According to the evidence now put before the court by Markland, Markland continued to rely on the advices of McElroy in relation to the merits of its case generally and McElroy personnel remained witnesses in the case, which I assume means potential witnesses given that no member of the firm was called, and attended consultations, provided reports and generally assisted in addressing the

factual and technical issues which arose in the case.

9. The award of damages to the plaintiff has not been appealed by Markland. However, a subsequent judgment of the court, which was delivered on 20th December, 2004, awarding costs to the plaintiff, which was the subject of a perfected order of 15th March, 2005, has been appealed.

10. Following the judgments of the court on the plaintiff's claim, on 19th January, 2005 the solicitors for Markland wrote to McElroy putting them on notice of certain facts, including that, should the insurers of Cantier fail to admit liability in full, members of McElroy who would have been involved in the case would be essential witnesses to make the case that Cantier was entirely responsible for the damage which occurred and to rebut whatever allegations of default on the part of Markland's professional advisers might be made by Cantier. It was stated that Markland was "an innocent party" in the whole affair and that it was Markland's belief that no finding of liability could be made against it unless the court made a finding that there was default on the part of Markland's professional advisers, which contributed to the damage to No. 5. McElroy was notified that, in the event of the High Court determining that there had been any default or failure on the part of Markland's professional advisers which created a liability on the part of Markland, Markland would require the relevant professional advisers or their insurers to bear the costs of discharging such liability in full, including all the costs of Markland and all other parties involved in the proceedings to the extent that they might not be discharged by Cantier. It was suggested that, if McElroy had not already done so, it should notify its insurers of the letter. The response of McElroy in a letter dated 26th January, 2005 was a statement of firm belief that McElroy had no liability in the case arising from its services on the project.

11. The proceedings on the reciprocal claims for contribution or indemnity proceeded on the basis that Markland was the claimant and Cantier the respondent. Points of claim were delivered by Markland on 17th February, 2005. Points of defence and counterclaim were delivered by Cantier on 28th April, 2005. Notice seeking particulars arising from the points of defence and counterclaim were delivered by Markland to Cantier on 10th May, 2005. Replies were not furnished until 23rd March, 2006.

12. In the interim, on 25th January, 2006 Markland issued a notice of motion on foot of which the order of 31st March, 2006 joining McElroy as a third party was made. The motion was on notice to Cantier. On 30th January, 2006 Markland's solicitors advised McElroy that the application was pending.

13. Following the making of the order of 31st March, 2006 a third-party notice dated 27th April, 2006 was filed. On 28th April, 2006 Markland delivered amended points of claim against Cantier as first respondent and McElroy as second respondent. The claim for indemnity or contribution against McElroy as pleaded is based on allegations of negligence and breach of duty and breach of contract on the part of McElroy, in broad terms, in failing to give adequate instructions to Cantier in relation to ensuring separation of No. 5 and No. 70 at foundation level, failing to supervise the works adequately and failing to take steps to separate the buildings subsequently.

14. A factual matter to which counsel for McElroy ascribed significance was information which Markland's solicitors had in early July, 2003 following queries channelled through Niall Sheehan, the project manager of Markland, to Ian Guinness, the contracts manager for Cantier. The information would appear to have been sought in connection with the defence of the plaintiff's application for an interlocutory injunction. It is not denied that Markland's solicitors had information that Mr. Guinness's view at the time was that the foundations of No. 70 did touch the foundations of No. 5 for the full length of the foundation and that this was "as per the construction detail issued by Jack O'Regan [of McElroy]" and that Mr. Guinness could say this because he saw the excavated foundation on 18th December, 2002. Mr. Guinness had answered a question whether he could confirm that the new building was built in accordance with the engineers' designs by stating "in principle, yes", but he would need to see a copy of the drawings as issued for construction to swear to that fact.

The law

15. There was really no dispute between counsel for McElroy and counsel for Markland as to the legal principles by reference to which an application to set aside third-party proceedings should be determined where, as here, the basis of the application is that the third-party notice was not served in time.

16. Order 16, r. 1(3) of the Rules of the Superior Courts, 1986 provides that application for leave to issue a third-party notice shall, unless otherwise ordered by the court, be made within 28 days from the time limited for delivering the defence or, where the application is made by the defendant to a counterclaim, the reply. It was held by the Supreme Court in *Board of Governors of St. Laurence's Hospital v. Staunton* [1990] 2 I.R. 31 that that provision and the discretion vested in the court by it must be exercised subject to the statutory provisions which give rise to the jurisdiction, namely, s. 27(1)(b) of the Civil Liability Act, 1961. Sub-section (1) of s. 27 provides:

> "A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part –
>
> (a) …
>
> (b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. If such third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom the contribution is claimed."

17. As to the construction of that provision, Finlay C.J. stated as follows (at p. 36):

> "I am satisfied upon the true construction of that sub-section that the only service of a third-party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third-party notice claiming contribution against a person who is not already a party to the action, is a right to serve a third-party notice as soon as is reasonably possible. A defendant in an action seeking to claim contribution against a person who is not a party to the proceedings cannot serve any third-party notice at any other time, other than as soon as is reasonably possible."

18. The rationale of the provision was considered by the Supreme Court in *Molloy v. Dublin Corporation* [2001] 4 I.R. 52. Murphy J., with whom the other judges agreed, stated as follows (at p. 55):

> "There can be little doubt as to what that scheme and purpose was. The legislature was understandably desirous of avoiding a multiplicity of actions. Instead of defendants against whom awards had been made instituting further

> proceedings against other parties liable to them in respect of the same set of facts – and indeed those defendants in turn perhaps instituting even more proceedings against others – the Oireachtas sought to establish a situation in which the rights and liabilities of all parties arising out of a particular set of circumstances would be disposed of in the same proceedings. … Nevertheless, the legislature did not preclude an unsuccessful defendant in the original proceedings from instituting a substantive action against some other party who the actual defendant contended was liable to him either in tort or in contract. What the Act of 1961 did provide was that where the actual defendant in the original proceedings failed to avail of the third-party procedure by serving the third-party notice 'as soon as is reasonably possible' and resorted to his original cause of action, the relief which he might have claimed therein was subject to the statutory discretion of the court to refuse to make an order for contribution in his favour."

19. The discretion referred to is the discretion conferred in the last sentence of para. (b) of s. 27(1).

20. As to the meaning of "as soon as is reasonably possible", having quoted the passage from the judgment of Finlay C.J. quoted earlier, Murphy J. continued (at p. 56):

> "The terms in which the time was expressed do appear severe. The use of the word 'possible' rather than the word 'practicable', as is invoked elsewhere, suggests a brief and inflexible time limit. It might suggest that if it is physically possible to serve the appropriate notice within the identified period, that any further delay would be impermissible. However, such a draconian approach would be inconsistent with the nature of the problems to be confronted by a defendant and of the decisions to be made by him or his advisers. The statute is not concerned with physical possibilities but legal and perhaps commercial judgments. Proceedings cannot and should not be instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon. It is in that context that the word 'possible' must be understood. Furthermore, the qualification of the word 'possible' by the word 'reasonable' gives a further measure of flexibility. As Barron J. pointed out in *McElwaine v. Hughes* (Unreported, High Court, Barron J., 30th April, 1997) at p. 6 of the unreported judgment:-
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> > 'Clearly the words "as soon as reasonably possible" denote that there should be as little delay as possible, nevertheless, the use of the word "reasonable" indicates that circumstances may exist which justify some delay in the bringing of the proceedings.'"

21. Suggesting that the claim against McElroy is akin to a claim for professional negligence, counsel for Markland place particular reliance on the judgment of the Supreme Court in *Connolly v. Casey* [2000] 1 I.R. 345. In that case the defendants, being solicitors against whom the plaintiff was seeking damages for professional negligence, although having delivered a defence on 22nd April, 1996 in which they had pleaded negligence and breach of duty on the part of the third party, a barrister, in respect of advice he had given, awaited the delivery of replies to particulars sought and advanced that as one of the explanations for not having obtained leave to issue and serve a third-party notice until 20th October, 1997 on foot of a motion issued on 25th July, 1997. The Supreme Court reversed the decision of the High Court to set aside the third-party proceedings. In her judgment, with which the other judges agreed, Denham J. stated that the wrong test had been applied at first instance and continued (at p. 350):

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

22. Denham J. also held that it was not unreasonable for the solicitors conducting the defence, presumably on behalf of an indemnifier, to have sought a statement from the solicitor who had briefed the third-party barrister and to have awaited its arrival. In this connection, Denham J. observed (at p. 350):

> "It is important in professional negligence cases to act reasonably. Proceedings must have an appropriate basis. Counsel have a duty of care. Reference has already been made to the need to develop modern case management in cases relating to professional negligence: *Cook v. Cronin* (Unreported, Supreme Court, 14th July, 1999)."

23. Later in her judgment, Denham J. set out the approach which should be adopted to analysing delay in the context of s. 27(1)(b) and stated as follows:

> "In analysing the delay – in considering whether the third-party notice was served as soon as is reasonably possible – the whole circumstances of the case and its general progress must be considered. The clear purpose of the sub-section 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."

24. Counsel for McElroy submitted that Denham J. emphasised that the decision was specific to the facts before the court, and was not to be seen as diluting the requirements of s. 27(1)(b), in the following passage at 352:

> "In conclusion, I would allow the appeal of the defendants on the grounds that the delay of the defendants was not unreasonable and that in the circumstances of the case the third-party notice was served 'as soon as is reasonably possible'. However, this is a case with particular facts in a suit alleging professional negligence and the decision does not endorse delay – rather it seeks to encourage a modern management of litigation to avoid a multiplicity of suits."

25. It is well settled that on an application to set aside third-party proceedings, the onus of proof of showing that the delay at issue was not unreasonable is on the defendant.

26. While arguing that it is not necessary for the applicant to establish prejudice, it was submitted on behalf of McElroy that, where it is present, the court should be all the more willing to strike out the third-party proceedings. As the commentary in Delany & McGrath on Civil Procedure in the Superior Courts, 2nd Edition, at paras. 9-18 and 9-19 indicates, there is something of a divergence of opinion on the authorities as to the relevance of prejudice, in that in *Ward v. O'Callaghan* (Unreported, High Court, Morris P., 2nd February, 1998) Morris P. appeared to countenance consideration of prejudice, whereas Kelly J. in *S.F.L. Engineering Limited v. Smyth Cladding Systems Limited* [1997] IEHC 81 (9th May, 1997) stated at para. 12:

> "In considering applications of this sort, the court is not concerned with any question of prejudice arising as a result of the delay in applying for liberty to join the third party. This was accepted by counsel appearing on behalf of the

defendants in the present case and it seems to follow from the interpretation given to the relevant provision by Finlay C.J. in the St. Laurence's Hospital case."

27. Section 27(1)(b) makes the service of a third-party notice "as soon as is reasonably possible" mandatory. In my view, the absence or presence of special prejudice affecting the proposed third party is not something the court is required to have regard to in determining whether the third-party proceedings are valid. Apart from that, in my view, it would be inherently dangerous for a court on an application to set aside third-party proceedings to examine, and express a view on, the type of issues which it is asserted constitute special prejudice affecting McElroy in this case, where the entitlement of the unsuccessful defendant, in this case, Markland, to institute a substantive action against the third party remains, even if the third party proceedings are set aside.

Application of the law to the facts - submissions

28. McElroy argued that the third-party notice was not served as soon as was reasonably possible on two alternative bases. The first was that McElroy should have been brought in as a third-party before the trial of the action between the plaintiff and the defendants so that it could have participated in that trial. The alternative argument was that, even if Markland was entitled to await the outcome of the trial of the plaintiff's claim against the defendants, there was unreasonable and unexplained delay between the service of Cantier's points of defence and counterclaim on 28th April, 2005 and the service of the third-party notice twelve months later and, even the issue of the third-party application some nine months later.

29. Counsel for McElroy submitted that support for the proposition that Markland should have brought in McElroy as a third party when it became aware of the claim being made against it by the plaintiff is to be found in the decision of the Supreme Court in the *St. Laurence's Hospital* case. The facts in that case were that the plaintiff had been admitted to St. Laurence's Hospital under the care of Mr. Staunton, a consultant neurologist. In July, 1981 he fell from a window in the hospital and sustained serious injuries. In September, 1983 he issued a plenary summons in the High Court against the defendant hospital. The statement of claim was filed in November, 1983 and replies to the defendant's notice for particulars of negligence were delivered in July, 1984. A full defence was filed and the action was set down for trial in 1985. It was heard in July, 1987, during which Mr. Staunton was called as a witness for the defendant. At the conclusion of the trial the jury awarded the plaintiff £90,000. The defendant appealed on liability and quantum and the appeal was ultimately dismissed. However, while the appeal was pending, the defendant obtained an order for liberty to serve a third-party notice on Mr. Staunton. On those facts, Finlay C.J. concluded that the serving of a third-party notice on the third party after the conclusion of the plaintiff's claim was not serving it as soon as reasonably possible. He stated (at p. 36):

> "In my view, the application brought after the conclusion of the action by the plaintiff against the defendants for liberty to serve a third-party notice could not, under any circumstances, be construed as an application to serve a third-party notice as soon as was reasonably possible. It is clear from the facts which I have outlined that probably from the month of July, 1984, when particulars were filed, the defendants were aware of the nature of the claim which was being brought against them by the plaintiff. They may have been unaware as to whether that claim would succeed or not, but they were aware of what the nature of the claim was, and it must follow, it seems to me, that they were also aware at the time of any potential claim for contribution they might have against the third party."

30. In this case, McElroy contends, Markland was in a position to consider and decide whether a claim for contribution arose against it at the latest towards the end of 2003. By September, 2003 it was common knowledge that there was no separation joint between No. 70 and No. 5 at foundation level. That, of itself, was sufficient to put Markland on notice of a potential claim, which clearly warranted immediate investigation and inquiry, it was submitted. McElroy went further and submitted that the existence of the e-mail suggests that Markland was aware that the position Cantier would adopt was that the foundations as constructed were in accordance with the construction details issued by McElroy. It was submitted that Markland's strategy, as is to be gleaned from the letter of 19th January, 2005 from its solicitors, was that Markland was prepared to allow the plaintiff's claim to proceed to a hearing on the basis that, if it was found by the court that the absence of a separation joint did cause structural damage to No. 5, it could pursue a claim against one or more of its professional advisers, including McElroy, after the court determination. It was submitted that that was an inappropriate approach, in that it prevented McElroy from deciding whether to participate in the trial of the plaintiff's action or to elect to have the claim for indemnity or contribution against it held over. Joinder of McElroy as a third party would have avoided a multiplicity of proceedings.

31. On the alternative argument, it was submitted on behalf of McElroy that Markland could have taken steps to compel Cantier to reply to the notice for particulars dated 10th May, 2005. It was further submitted that, in any event, the particulars ultimately furnished on 23rd March, 2006 had no relevance because they post-dated the decision to seek to join McElroy as a third party.

32. Markland's explanation for not seeking to join McElroy as a third party prior to the determination of the action between the plaintiff and the defendants was that there was no allegation against McElroy by Cantier until after the determination of that action. Its explanation for not having moved more expeditiously after receipt of Cantier's defence and counterclaim was that, because of the lack of clarity in Cantier's pleading, it was necessary for Markland to seek particulars from Cantier and to engage in its own process of investigation to ascertain whether it has a claim against McElroy. If it had not adopted that approach, it was submitted, the consequence might have been the joinder of a multiplicity of parties because the allegations made by Cantier implicated not merely McElroy but also Markland itself and its architects. On the authorities (*Connolly v. Casey* and *Cook v. Cronin*) Markland was obliged to identify the existence of a clear cause of action before initiating proceedings against its professional advisers for professional negligence, it was submitted.

33. Markland also sought to attach some significance to Cantier's limited participation in the plaintiff's action because it was in liquidation at the time of the discovery, in September, 2003, of the absence of a separation joint at foundation level between No. 70 and No. 5 and to the fact that, when its participation was permitted in May, 2004, it did not deny liability. Of course, it could not have denied liability because of the existence of the judgment. As I understand Markland's argument, it is that, given those circumstances, Markland could not reasonably be expected to have concluded that some fault was then, or could be, attributed to McElroy by Cantier.

34. Counsel for McElroy countered this last point on the basis that it was *nihil ad rem*. The proposition that it is necessary for some other party to make a specific allegation of wrongdoing against a prospective third party before an obligation exists to move speedily and without delay to institute third-party proceedings, it was submitted, is not supported by authority.

Conclusions

35. The issue which the court has to determine is whether Markland served the third-party notice dated 27th April, 2006 on McElroy as soon as reasonably possible.

36. As was recognised in the affidavit of Aidan Scully sworn on 25th January, 2006, which grounded Markland's application for leave

to serve the third-party notice on McElroy, the principal issue as between the plaintiff and the defendants was the failure to achieve separation between No. 70 and No. 5. The absence of a separation joint at foundation level between the two properties was common knowledge from September, 2003. The plaintiff's contention was that that factor had caused, and probably would in the future cause, structural damage to No. 5. While Markland put in issue the existence of damage and causation, it must have been obvious to it that, if the court were to find that structural damage existed and that it was caused by the absence of the separation joint, to adopt the terminology adopted by Finlay C.J. in the *St. Laurence's Hospital* case, there was a potential claim for contribution against McElroy, on the basis that the absence of the separation joint must have been attributable either to Cantier not having followed McElroy's instruction or McElroy having given no instructions to ensure separation of the two buildings at foundation level. It was at that stage that Markland should have conducted an investigation of the role of McElroy, which was the retained professional responsible for the structural aspects of the building operations on the site of No. 70, with a view to assessing whether it was appropriate to seek leave to join McElroy. The evidence indicates that it would have been reasonably possible to make the necessary professional judgment by the end of 2003.

37. The fact that Cantier's participation in the plaintiff's action was dormant between July, 2003 and May, 2004 and the fact that its defence of the plaintiff's claim was circumscribed by the existence of the judgment in default of defence, are not matters which justify Markland's failure to pursue a claim for contribution against McElroy until after the conclusion of the plaintiff's claim. Nor does the fact that Cantier did not articulate that the construction of No. 70 at foundation level without a separation joint was carried out on the express instructions of Markland, its servants or agents, including, McElroy until 28th April, 2005 justify that failure. It was the plaintiff's claim against Markland and Cantier for damages which triggered the obligation under s. 27(1)(b) of each of the defendants to serve a third-party notice if either wished to claim a contribution against a non-party, not the formal pleading of the defendants' claims for indemnity and contribution *inter se*.

38. The approach adopted by Markland in this case with the concurrence of Cantier has given rise to, not obviated, a multiplicity of actions. The trial of the plaintiff's claim against both defendants took place over twelve days in 2004. The fact that the issues between the defendants were left over means that there will be a second trial to determine those issues. Even if the court were to reject McElroy's application to set aside the third-party proceedings, a beneficial outcome to the system of administration of justice and to the third party of the type envisaged by Denham J. in *Connolly v. Casey* cannot be achieved here.

39. For the foregoing reasons, I consider that the third-party notice was not served as soon as reasonably possible and, therefore, the third-party proceedings must be set aside. I am not oblivious to the fact that this decision may result in a third trial: the trial of a substantive action by Markland against McElroy. Whether, in that event, the court should exercise its discretion to refuse to make an order for contribution, as provided for in the last sentence of para. (b) of s. 27(1), is a matter for another day.

Order

40. There will be an order setting aside the third-party proceedings.