THE HIGH COURT

[2017 No. 827 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

DANIEL O'REILLY

AND

TERESA O'REILLY

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 6th day of March, 2019.

Introduction

1. This is my judgment on an application by the Defendants to join a third party to the proceedings. The Defendants' application is made in summary proceedings in which the plaintiff, Allied Irish Banks PLC (the "Bank"), is seeking judgment against the Defendants as guarantors for the alleged liabilities of their son, John O'Reilly (the "Borrower"), to the Bank.

2. The Defendants' application to join the Borrower as a third party was opposed by the Bank on a number of grounds. I have concluded that, notwithstanding the Bank's opposition, it is appropriate for me to grant the Defendants' application and to join the Borrower as a third party to the proceedings on certain terms which I will explain in greater detail in my judgment.

Structure of Judgment

3. At the outset, I will describe the proceedings brought by the Bank against the Defendants and refer to the defences which the Defendants have sought to raise in response to the Bank's claim. I will then refer to the application brought by the Defendants to join the Borrower as a third party. I will discuss the basis on which the Defendants seek the joinder of the Borrower and the grounds on which the Bank objects to that joinder. I will then identify the issues which require to be resolved on this application in the context of the applicable legal principles. Finally, I will set out my conclusions on the Defendants' application.

The Proceedings

4. The Bank commenced the proceedings against the Defendants by a summary summons which was issued on 11th May, 2017. As appears from the special indorsement of claim on the summary summons, the Bank's claim against the Defendants is for the sum of €400,000.00 together with continuing interest which is allegedly due and owing by the Defendants under separate guarantees in writing dated 21st October, 2009, given by each of the Defendants in respect of loan facilities extended by the Bank to the Borrower. It is pleaded that the Borrower has outstanding debts due to the Bank in respect of those loan facilities which are in excess of €400,000.00 with interest and that despite demand the Borrower has not discharged his liabilities to the Bank. The Bank claims that it has demanded payment of €400,000.00 plus interest from each of the Defendants and that they failed to pay the sum demanded. Therefore, the Bank seeks summary judgment against the Defendants in the sum of €400,000.00 together with interest.

5. Following the entry of an appearance on behalf of the Defendants, the Bank issued a motion seeking liberty to enter final judgment against the Defendants in the amount of €400,000.00 (as at 15th September, 2016) on 26th July, 2017. The motion was returnable before the Master on 26th October, 2017. It was grounded on an affidavit sworn by Richard Stafford, an official of the Bank, on 21st July, 2017. Mr. Stafford's affidavit referred to the loan facilities advanced by the Bank to the Borrower on foot of a facility letter dated 19th October, 2009, which was accepted by the Borrower on 21st October, 2009. The facility letter described the purpose of the facility as "working capital" and stated that it was in substitution for existing liabilities on the Borrower's account with the Bank. The security required to be provided for the facility advanced to the Borrower was a letter of guarantee from each of the Defendants for the sum of €400,000.00. Mr. Stafford exhibited letters of guarantee from the Defendants dated 21st October, 2009. He averred that the Borrower's loan account with the Bank went into arrears and that the Bank demanded payment of the amount outstanding from the Borrower in September, 2016. Mr. Stafford averred that the Borrower failed to repay the sum demanded and that, as of September, 2016, a sum of in excess of €400,000.00 was due and owing by him to the Bank (the statement of the Borrower's loan account showed a sum allegedly due and owing by the Borrower as of that date of €408,587.92). Mr. Stafford then referred to letters of demand sent to both Defendants on 15th September, 2016, demanding payment of the sum of €400,000.00 from the Defendants together with interest. He then referred to further letters of demand sent to the Defendants by the Bank's solicitors on 27th September, 2016.

6. Mr. Stafford explained (at para. 13 of his affidavit) that, in light of a medical report in relation to the Borrower, the Borrower has been classified by the Bank as a "*vulnerable customer*" for the purposes of the Consumer Protection Code. No proceedings have been brought by the Bank against the Borrower. Mr. Stafford asserted that the Borrower's current condition and his status as a "*vulnerable customer*" have no bearing on the guarantees given by the Defendants and the Bank's alleged right to enforce those guarantees. Mr. Stafford contended that the appearance entered on behalf of the Defendants was entered solely for the purposes of delay and that the Defendants have no credible or *bona fide* defence to the Bank's claim on foot of the guarantees.

7. The first Defendant, Mr. O'Reilly, swore a replying affidavit on his own behalf and on behalf of the second Defendant. In his affidavit, the first Defendant referred to the Bank's treatment of the Borrower as a "*vulnerable customer*". He stated that the Borrower had suffered from depression for many years and may have been symptomatic at the time he entered into the loan agreement with the Bank. He stated, that the Defendants were not aware that the Borrower was symptomatic and would not have entered into the guarantees had they known. The first Defendant stated that if the Borrower was suffering from depression at the time of the loan agreement, the Bank could have become aware of that, had it taken reasonable steps, and that its failure to do so, and its extension of a €400,000.00 loan to the Borrower, in circumstances where the Borrower may have been under a "*serious disadvantage due to his mental health*" meant that the transaction was an improvident one and gave rise to an obligation on the part of the Bank to ensure that the Borrower obtained independent legal advice prior to entering into the loan agreement. The first Defendant asserted that the Bank did not do so and that, as a consequence, the loan agreement between the Bank and the Borrower "*may be void*". The first Defendant further asserted that if the Borrower lacked capacity at the time he entered into the loan agreement with the Bank or if he was under a "*sufficiently serious disadvantage to have the loan voided as improvident*", the court

would be bound to find that the guarantees provided by the Defendants were similarly void and of no effect. He contended that the facts set out in his affidavit amounted to a *bona fide* defence to the Bank's application for summary judgment. In the same affidavit, the first Defendant referred to the Defendants' then pending application to join the Borrower as a third party to the proceedings "*in order to ascertain the state of his health at the time of agreeing the loan and for the purpose of seeking an indemnity or contribution from him if he is found to have had capacity*" (para. 5 of the first Defendant's affidavit of 26th January, 2018).

8. I was informed at the hearing of the Defendants' application to join the Borrower as a third party that the Bank's application for liberty to enter final judgment against the Defendants was adjourned on a number of occasions by the Master and that it was next to appear in the Master's list in late January, 2019. I was further informed that it had been hoped that the Defendants' application to join the Borrower as a third party could be heard by the High Court at the same time as it heard the Bank's application for summary judgment against the Defendants. However, due to the numerous adjournments of the Bank's application, the Defendants' application to join the Borrower as a third party came on for hearing first. Rather than seeking to adjourn that application, the parties agreed that it could be heard separately from and in advance of the Master, and ultimately the court as it is a contested application, dealing with the Bank's summary judgment application.

Defendants' Application to join Third Party

9. The Defendants issued a motion to join the Borrower as a third party on 8th December, 2017. The application was made pursuant to O. 16 r. 1 RSC, and was grounded on an affidavit sworn by the first Defendant on 25th October, 2017. While noting that the Bank was being put on proof of each and every aspect of its claim, the first Defendant stated that the Defendants had been advised that it would be prudent to seek an indemnity or contribution from the Borrower as a "*concurrent wrongdoer*" within the meaning of that term in the Civil Liability Act, 1961 (as amended) (the "1961 Act") either by means of a third party notice or by separate proceedings (para. 4 of his affidavit). The first Defendant further asserted that it would be expedient, and would aid the administration of justice, to have the Borrower joined as a third party rather than having to "*undergo the costlier and more time consuming mechanism of initiating separate proceedings*" (again, para. 4 of his affidavit). The first Defendant exhibited a copy of the facility letter and of the guarantees that were issued by the Bank. He further exhibited a draft third party notice. He contended that it would be appropriate, desirable and in the interests of justice that the Borrower be joined as a third party to the proceedings for the purpose of enabling the Defendants to obtain an indemnity or contribution from him.

10. The Bank did not swear any replying affidavit to the first Defendant's affidavit grounding the Defendants' application to join the Borrower as third party. The Bank opposed the application on legal and practical grounds which I summarise and discuss below.

Basis for Application and Bank's Response

11. The Defendants rely on O. 16 RSC. They contend that O. 16 r. 1(1) RSC provides for the joinder of a third party "*in any action*" where a defendant seeks a contribution or indemnity or other relief against a person who is not already a party to the action. They argue that the use of the term "*in any action*" in O. 16 r. 1(1), makes clear that a third party can be joined in proceedings brought by summary summons. The Defendants contend that the provisions of O. 16 r. 1(1) should be interpreted broadly so as to permit the joinder of a third party in proceedings brought by summary summons. They contend that this broad interpretation is supported by other provisions in O. 16, such as O. 16 r. 2(2). The Defendants further contend that they and the Borrower are "*concurrent wrongdoers*" for the purposes of s. 27 of the 1961 Act and that the appropriate method for seeking contribution from a person who is not already a party to the action is by serving a third party notice on such person (which notice must be served "*as soon as is reasonably possible*"). The Defendants argue that the Borrower and the Defendants (as guarantors) are "*concurrent wrongdoers*" within the meaning of that term in the 1961 Act and that, therefore, by virtue of O. 16 r. 1(1)(a) RSC, and s. 27 (1)(b) of the 1961 Act, the appropriate means of seeking a contribution or indemnity order from the Borrower is by joining him as a third party. Alternatively, the Defendants argue that if it is found that they and the Borrower are not "*concurrent wrongdoers*", the court should still grant liberty to issue and serve the third party notice on the Borrower under O. 16 r. 1(1)(b) and (c) RSC. In anticipation of the Bank's reliance on *Wicklow County Council v. Fenton* [2002] 2 IR 583 ("*Fenton*"), the Defendants submit that that case is not authority for the proposition that a third party cannot be joined in proceedings commenced by summary summons and that it should be viewed as applying to the particular form of statutory relief which was at issue in that case under the Waste Management Act, 1996, and the particular reliefs which were being sought. Finally, the Defendants submit that the courts have made clear that so far as possible, all issues between plaintiffs, defendants and third parties should be heard together and that a multiplicity of actions should be avoided.

12. In opposing the application, the Bank first argues that O. 16 cannot easily be interpreted so as to permit the joinder of a third party in proceedings commenced by summary summons. This is particularly so, the Bank contends, where a plaintiff who commences proceedings by summary summons is entitled under O. 37 to seek summary judgment and that to permit the joinder of a third party in advance of a plaintiff's application for summary judgment would be to frustrate that right and entitlement on the part of the plaintiff as O. 16 confers a range of procedural entitlements on a person who is joined as a third party to proceedings (such as the entitlement to a third party statement of claim and so on). The existence of these rights under O. 16, the Bank contends, is not consistent with the existence of an entitlement to join a third party in summary proceedings (at least before the plaintiff's motion for summary judgment is heard and determined). Alternatively, the Bank submits that the court has a discretion under O. 16 not to permit the joinder of a third party if it would frustrate the plaintiff's entitlement to seek summary judgment. Second, the Bank argues that the Defendants are not entitled to seek to join the Borrower as a third party having regard to the provisions of Clause 8 of the guarantees signed by the Defendants. Third, the Bank relies on *Fenton* in support of its contention that summary proceedings do not envisage the joinder of third parties. Fourth, the Bank contends that s. 27 of the 1961 Act has no application to the present situation as the Defendants (as guarantors) and the Borrower are not "*concurrent wrongdoers*" within the meaning of that term in the 1961 Act. It contends that the Defendants and the Borrower are not responsible to the Bank for the "*same damage*" (which would be necessary if they were to be "*concurrent wrongdoers*"). The Bank relies on the decision of Clarke J. in the High Court in *Moloney v. Liddy* [2010] IEHC 218; [2010] 4 IR 653 ("*Moloney*"). Finally, the Bank contends that the court should adopt the same approach as was taken in *Fenton* as regards the potential application of O. 16 r. 1(b) and (c) as a basis for joining the Borrower as a third party to these proceedings. The Bank submits that those provisions should be strictly construed having regard to the nature of the summary proceedings brought by the Bank against the Defendants.

The Issues

13. In determining the Defendants' application to join the Borrower as a third party, it is necessary for me to consider the submissions advanced by the parties, as summarised above. From those submissions, the following issues must be addressed:-

> (1) Whether it is open in principle to seek the joinder of a third party under O. 16 in proceedings commenced by summary summons.
>
> (2) If it is, whether the provisions of part III of the 1961 Act (including s. 27) apply and, in particular, whether a borrower and a guarantor are "*concurrent wrongdoers*" under the 1961 Act.

(3) Whether the terms of the guarantees themselves (and, in particular, Clause 8) preclude the Defendants from joining the Borrower as a third party.

(4) Whether, in the event that it is open to the Defendants to seek to join the Borrower as a third party in these summary proceedings, there is any reason why the court should exercise its discretion not to do so or whether the joinder should be subject to any conditions.

14. I will deal with each of these issues in turn.

(1)Whether joinder of third party possible in summary summons proceedings.
15. The Defendants submit that O. 16 is wide enough to permit a defendant to proceedings brought by summary summons to seek the joinder of a third party. The Bank contends that it is not as many of the provisions in O. 16, such as the procedural entitlements of a person joined as a third party, would not be consistent with the procedure for the hearing of proceedings commenced by summary summons.

16. Order 16 applies to the "*third-party procedure*". Order 16 r.1(1) provides as follows:-

> *"Where in any action a defendant claims as against any person not already a party to the action (in this Order called 'the third-party') –*
>
> *(a) that he is entitled to contribution or indemnity, or*
>
> *(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or*
>
> *(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third-party or between any or either of them, the Court may give leave to the defendant to issue and serve a third-party notice…".*

17. The express terms of O. 16 r. 1(1) provide that the entitlement to seek the joinder of a third party, in the particular circumstances referred to at subparas (a) to (c), applies "*in any action*". It is not limited to proceedings commenced by plenary summons or by any other form of originating document. On its express terms, therefore, it is open to utilise the procedure under O. 16, r.1(1) in proceedings commenced by a summary summons. However, it is necessary to consider the Bank's argument that the other provisions of O. 16 are inconsistent with or should in some way limit the scope of the express terms of O.16 r.1 (1).

18. The first relevant provision to consider is O. 16 r. 1(3). Under that provision, an application for leave to issue the third party notice must, "*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 a defendant to a counter claim, within that period of time from the time limited for the delivery of the reply. It does not seem to me that that provision can be read as meaning that in any case in which the RSC do not limit the time for the delivery of a defence, it is not possible to join a third party. In the case of proceedings commenced by summary summons, where an appearance has been entered, it is necessary for the plaintiff to bring a motion for liberty to enter a final judgment before the Master under O. 37. Where the matter is contested, the Master is required to transfer the case, when it is in order for hearing before the High Court, to the High Court list for hearing (O. 37 r. 6 RSC). The court will then hear the motion. There is a wide range of possible orders the court can make on the hearing of the motion. If the court is satisfied that the defendant has a *bona fide* defence (in accordance with the well-established test for determining whether such a *bona fide* defence exists), the court will adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons with such directions as to pleadings or discovery or otherwise as may be appropriate (O. 37 r. 7). Until the court gets to that stage, it cannot be said that there is any "*time limited for delivering the defence*" by the defendant. However, O. 16 r. 1(3) makes it clear that the time for the application for leave to issue the third party notice must be made within the stated time period "*unless otherwise ordered by the court*". It is clear, therefore, that the court has a discretion to order that the application to join the third party can be made within some other period or at some other stage. There is nothing, in my view, in this provision which limits or restricts the wide scope of application of the third party procedure provided for under O.16 r. 1(1) which arises from the express terms of O. 16 r. 1(1). Support for the wide scope of application of the O. 16 procedure can also be found in O. 16 r. 2(2) where, once leave is obtained from the court to issue and serve a third party notice, the notice must be served within a particular time period (28 days from the making of the order, unless otherwise ordered by the court). It is also necessary to serve with it a copy of the "*originating summons and of any pleadings delivered in the action".* The reference to "*originating summons*" is plainly wide enough to encompass a summary summons. As is the reference to "*any pleadings delivered in the action"*. This provision is, in my view, consistent with the broad scope of application of the third party procedure provided for in O.16 RSC.

19. It is suggested that the provisions of O. 16 r. 4 are not consistent with the application of the O. 16 procedure to proceedings commenced by summary summons and, in particular, to a situation where the plaintiff's motion for summary judgment (or liberty to enter final judgment before the Master) has not yet been determined. Under O. 16 r. 4 a third party who has been served with a third party notice must enter an appearance, if the third party wishes to contest the claim against it. Where the third party has entered an appearance and has requested a statement of claim, the defendant is required to deliver a statement of claim (O. 16 r. 4(2)). Where the third party has entered an appearance and has requested the delivery of a statement of claim, the third party is required to deliver its defence within a 28 day period from date of delivery of the statement of claim. It is submitted by the Bank that the provision for the delivery of pleadings as between the defendant and the third party is inconsistent with, and would frustrate, the plaintiff's entitlement to seek summary judgment on foot of a summary summons and that the provision for such pleadings is, therefore, inconsistent with a broad interpretation being given to the scope of application of O. 16 r. 1(1). I do not agree. I do not see anything in the provisions relied upon by the Bank which cut across or limit in any way the broad scope of application of O. 16 r. 1(1) or require the court to interpret the term "*in any action*" in a way which would mean "*in any action other than an action commenced by summary summons"*. In my view, having regard to the wide discretion which the court has in deciding whether or not to give leave to a defendant to issue and serve a third party notice, (which I discuss in greater detail later in this judgment), it is open to the court to apply the provisions of O. 16 r. 1(1) in a manner which does not undermine or restrict a plaintiff's entitlement to proceed with its application for summary judgment under O. 37, RSC.

20. While the parties were not in a position to point to any case in which leave to issue and serve a third party notice was given in the context of summary proceedings while the motion for summary judgment was pending, I have come across three potentially relevant cases in preparing this judgment. The first is the decision of the High Court (McGovern J.) in *Vesta Mortgage Investments*

Limited v. Paul Devine and Mary Devine [2014] IEHC 109 ("*Vesta*"). *Vesta* was an application brought by the plaintiff against the defendants for summary judgment. Prior to that application being heard, the High Court had ordered that if the defendants wished to bring a motion for the joinder of a third party, such motion had to be issued and made returnable for a date prior to the date for the hearing of the summary judgment application. McGovern J. found it to be:-

> *"… of some significance that although the defendants sought and were granted liberty to issue a motion to join EBS as a third party in these proceedings they did not do so".* (para. 12, p. 6).

21. While clearly not determinative of the existence of a jurisdiction under O. 16 to join a third party in summary proceedings where the motion for summary judgment was pending, it does appear that neither Kelly J. (who gave the initial directions) nor McGovern J. (who heard the application for summary judgment) saw any obvious difficulty in a motion to join a third party being brought while the motion for summary judgment was pending.

22. The second potentially relevant case is the decision of the High Court (Barrett J.) in *Fexco Asset Finance v. Kieran Martin* [2018] IEHC 240 ("*Fexco*"). This was another application for summary judgment. One of the grounds advanced by the defendant in support of the existence of a *bona fide* defence was that he had experienced difficulties with another person who was not a party to the proceedings. In the course of his judgment, Barrett J. stated that it was *"open to [the defendant] to seek to join a third party to these proceedings. He has not done so"* (para. 6, p. 4). Again, Barrett J. did not see any obvious difficulty in a defendant who was facing a motion for summary judgment seeking to join a third party.

23. The final potentially relevant case is the decision of the High Court (Birmingham J.) in *Irish Bank Resolution Corporation Ltd. v. Tommy Kelly & Anor*. [2014] IEHC 160 ("*Kelly*"). This was another application for summary judgment. In defending the summary judgment application, the defendant relied on alleged representations made by another entity, Jaguar Capital Limited ("Jaguar"). The court decided to adjourn the case for plenary hearing and, at the same time, made an order joining Jaguar as a third party. I accept that this case is slightly different to *Vesta* and *Fexco*, in that the application to join the third party was heard at the same time as the application for summary judgment. However, the first two cases are of obvious relevance.

24. While I base my decision on this issue on the express and, in my view, clear terms of O.16 r. 1(1), the fact that neither McGovern J. nor Barrett J. saw any difficulty with an application to join a third party being dealt with in advance of an application for summary judgment, does provide some comfort to me that the interpretation I have given to O.16 r. 1(1) RSC is the correct one.

25. Before turning to the next issue, it is appropriate for me to consider the decision of the High Court (O'Sullivan J.) in *Fenton*. The Bank contends that *Fenton* supports its case that it is either not open in principle to a defendant facing a summary judgment application to join a third party or that it would not be appropriate in this case having regard to the Bank's entitlement to pursue its application for summary judgment to join a third party at this stage. In *Fenton*, Wicklow County Council (the "Council") brought proceedings against the respondents under the provisions of ss. 57 and 58, of the Waste Management Act, 1996 (the "1996 Act"). Those provisions provided for summary procedures. The proceedings were commenced by an originating motion on notice. The Council claimed reliefs against a number of the respondents pursuant to s. 58 of the 1996 Act, requiring them to take such steps as may be directed by the court to mitigate or remedy the pollution effects of alleged unlawful dumping of waste material and to put in place ongoing monitoring, examination and inspection systems following such remedy. The Council also sought to recover its costs and expenses in the management of the relevant lands. Those respondents applied for and obtained leave to issue and serve third party notices on a number of third parties. The third parties sought to have the order joining them set aside. Among the arguments they made were that the procedure under s. 58 of the 1996 Act did not allow for the joinder of a third party, in circumstances where a third party would be entitled to full pleadings and counter pleadings, something not contemplated by s. 58. The third parties further argued that the basis on which they were joined was O. 16 r. 1(1)(a) and the claim against them was, therefore, a claim for contribution or indemnity. However, they argued that they were not "*concurrent wrongdoers*" with the respondents under the 1961 Act. Further, the third parties argued that since s. 58 provided for an "*urgent remedy*", the procedure should be kept *"as simple and uncomplicated as possible*" and should not be *"intertwined with third party proceedings*". It was submitted that to permit the joinder of a third party with the concomitant right of the third party to full pleadings or counterpleadings and, if necessary, discovery, would *"run counter to the very purpose of s. 58, a self-styled summary procedure"*. In granting the third parties' application to set aside the third party notices, O'Sullivan J. held that s. 58 of the 1996 Act, contemplates a "*speedy and relatively simple statutory relief*" which is required to be sought in a summary manner. He held that the court was entitled to have regard to the disruption to the Council's application by the proposed joinder of the third parties and stated that he was entitled to take this into account in light of what Finlay C.J. had said in *Quirke (a minor) v. O'Shea* [1992] ILRM 286 ("*Quirke*"). O'Sullivan J. took account of the asserted complexity of the factual and legal issues which would arise in the proposed third party proceedings. The court stated that it may be "*possible to assert, on this basis alone*", that the third party procedure could never be appropriate in the context of s. 58 (or s. 57) proceedings. He concluded on this point by stating *"[s]uffice to say that in the present circumstances, in my view, they are wholly inappropriate for the reason I have just specified*" (per Sullivan J. at p.590). This was primarily because of the disruption to the proceedings by the joinder of the third parties. In that context, O'Sullivan J. stressed the *"public interest in seeing the applicant's case speedily resolved*" (at p. 590).

26. O'Sullivan J. considered that there were other reasons why the third party notices should be set aside. The first was that the primary relief sought against the relevant respondents was an injunction and that their liability in that regard could not be transferred or diluted by reference to third parties. Further, O'Sullivan J. held that the relevant respondents had relied on O. 16 r. 1(a) on the basis that those respondents and the third parties were "*concurrent wrongdoers*" under the 1961 Act. He held that they were not "*concurrent wrongdoers*" as the relevant activities covered by s. 58 of the 1996 Act might well be committed in such a way as to cause environmental pollution without constituting a "*wrong*" within the meaning of that term in the 1961 Act.

27. Both parties have relied on *Fenton*. In my view, there is nothing in *Fenton* which supports the proposition that a defendant in proceedings brought by summary summons who is facing an application for summary judgment may not apply under O. 16 r. 1(1) for leave to issue and serve a third party notice on a person who is not already a party to the proceedings. *Fenton* was concerned with a particular statutory procedure which was required to be brought in a summary manner (albeit not by summary summons). It was because of the very specific type of relief being sought in that case (namely an injunction directing the respondents to mitigate and remedy the alleged environmental pollution) as well as the public interest in the speedy determination of the Council's application and the disruption to the proceedings in the event that the third parties were joined (having regard to the likely postponement of the imminent hearing of the injunction application) that O'Sullivan J. was persuaded that the third party procedure was not appropriate, at least in the circumstances of that case. He also concluded that the relevant respondents and the third parties were not "*concurrent wrongdoers*" (for a reason that is not relevant to the present case). However, it seems to me that none of the factors considered relevant by O'Sullivan J. are present in this case. This is not an application for an injunction involving a significant public interest in the speedy resolution or determination of the case. It is not one in which there will be the same degree of disruption in the proceedings, if the proposed third party is joined. Nor is it a case involving the type of relief which was at issue in *Fenton*, namely,

injunctive relief requiring the mitigation or remedying of alleged environmental pollution. This case involves a straightforward application for judgment for a sum of money allegedly due by the Defendants as guarantors.

28. In my view, there is nothing in *Fenton* which would require me to conclude that O. 16 r. 1(1) RSC does not entitle a Defendant in proceedings brought by summary summons, and who is facing a motion for summary judgment, to apply for leave to issue and serve a third party notice on a person who is not already a party to the proceedings.

29. While Delaney and McGrath in *Civil Procedure in the Superior Courts* (4th ed., Round Hall, 2018) refer (at para. 9 – 06) to *Fenton* and note that "*it has been held that third party procedure is inappropriate and may be unavailable in the case of proceedings that are intended to be dealt with in a summary manner*", the authors were not, in my view, suggesting that the third party procedure would not be available in a case such as the present case. Their comments were expressly directed to the *Fenton* case rather than to the ordinary type of case brought by summary summons.

30. In conclusion, in my view, therefore, O. 16 r. 1(1) does apply to proceedings brought by summary summons. Whether or not the court will exercise its discretion to join a third party under that procedure will depend on whether the defendant satisfies the court that the requirements in one or more of subparas. (a), (b) and (c) are met and whether the court is satisfied to exercise its discretion to join the third party. I consider the question of the exercise of the court's discretion as the final issue in this judgment.

(2) Are Defendants and Borrowers "*Concurrent Wrongdoers*"? Sections 11, 21 and 27 of 1961 Act

31. In seeking the joinder of the Borrower as a third party to the proceedings, the Defendants place primary reliance on O. 16 r. 1(1)(a) RSC, in asserting that they are entitled to a contribution or indemnity from the Borrower. It is expressly asserted (at paras. 4 and 7 of the first Defendant's affidavit of 25th October, 2017) that the purpose of seeking the joinder of the Borrower as a third party is to seek an indemnity or contribution from him. The draft third party notice which is exhibited to the first Defendant's affidavit and which the Defendants seek leave to issue and serve on the Borrower expressly seeks an indemnity or contribution from the Borrower. The basis on which such indemnity or contribution is sought in the draft third party notice is that the Borrower is a "*concurrent wrongdoer*" with the Defendants within the meaning of that term in s. 11 of the 1961 Act. The Defendants, therefore, seek an indemnity or contribution from the Borrower as an alleged "*concurrent wrongdoer*" with them pursuant to s. 21 of the 1961 Act in accordance with the procedure provided for in s. 27 of that Act. All of this is predicated upon the Defendants and the Borrower being "*concurrent wrongdoers*" within the meaning of that term in s. 11 of the 1961 Act. The Bank contends that they are not "*concurrent wrongdoers*". It does so primarily on the basis that the Defendants and the Borrower are not responsible to the Bank for the "*same damage*" which they would have to be in order for them to constitute "*concurrent wrongdoers*" under s. 11 of the 1961 Act and in order to avail of the right to recover contribution under s. 21 of that Act. It is not otherwise suggested by the Bank that the 1961 Act does not apply. The crucial issue, therefore, to determine is whether the Defendants and the Borrowers are "*concurrent wrongdoers*" for the purposes of the 1961 Act.

32. Before considering the relevant provisions of the 1961 Act and examining that issue, it should be said that if the Defendants are correct in their contention, the complicated legal issues which can arise in considering the entitlement of a guarantor to an indemnity or contribution from the principal debtor, and the timing of that entitlement, will not arise in this case. If the Defendants are correct, the entitlement to such indemnity or contribution will arise under the provisions of the 1961 Act. Fortunately, therefore, it will be unnecessary for this judgment to explore the complicated legal issues which arise in such circumstances, in the event that the provisions of the 1961 Act or the provisions of O. 16 r 1(1) apply.

33. Are the Defendants and the Borrower "*concurrent wrongdoers*"? The starting point in addressing this issue is s. 21, of the 1961 Act. Section 21 provides as follows:

> "*21 (1) Subject to the provisions of this Part, a* concurrent wrongdoer *(for this purpose called the claimant) may recover contribution from any other wrongdoer who is, or would if sued at the time of the wrong have been, liable in respect of the same damage (for this purpose called the contributor), so, however, that no person shall be entitled to recover contribution under this Part from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.*
>
> *(2) In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault, and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any contributor shall amount to a complete indemnity".*

34. The procedure by which a "*concurrent wrongdoer*" must claim contribution from another "*concurrent wrongdoer*" who is not already a party to the action is set out in s. 27(1)(b) of the 1961 Act. Under that provision, it is necessary for the claimant to serve a third party notice upon such person and such notice must be served "*as soon as is reasonably possible*". Therefore, it is necessary to seek contribution from a "*concurrent wrongdoer*" under the third party procedure. Section 27(1)(b) provides that if the third party notice is not served as required, the court has a discretion to refuse to make any order for contribution against a "*concurrent wrongdoer*". The Supreme Court held in *ECI European Chemical Industries Limited v. MC Bauchemie Muller GmbH* [2007] 1 IR 156, that a claimant who did not serve a third party notice as soon as was reasonably possible (as required under s. 27(1)(b)) was not necessarily precluded from seeking contribution by way of separate proceedings. However, the court held that in the exercise of its discretion in such cases, the court would have to consider whether there was a good reason why the requirement to serve the third party notice as soon as was reasonably possible had not been complied with. The Defendants in the present case are understandably concerned that if the contribution procedure provided for in the 1961 Act as between "*concurrent wrongdoers*" applies they wish to ensure that they have complied with the statutory obligation to serve the third party notice "*as soon as is reasonably possible*". I am not dealing with that issue in this judgment. That issue, if it arises, will be a matter for determination at a later stage in the proceedings.

35. In order for the statutory entitlement to contribution in s. 21 of the 1961 Act and the procedure for seeking such contribution in s. 27 of that Act to apply, the Defendants and the Borrower must be "*concurrent wrongdoers*". A definition of persons who are "*concurrent wrongdoers*" is contained in s. 11 of the 1961 Act. Sections 11(1) and (2) provide as follows:-

> "*11 (1) For the purpose of this Part, two or more persons are* concurrent wrongdoers *when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.*
>
> *(2) Without prejudice to the generality of subs. (1) of this section –*
> *(a) persons may become* concurrent wrongdoers *as a result of vicarious liability of one for another,*

breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage;

(b) the wrong on the part of one or both may be a tort, breach of contract or breach of trust, or any combination of them;

(c) it is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive."

36. Proceeding, as I must, on the basis that the Borrower has failed to repay the loan and that the Defendants are liable under the guarantees, both are "*wrongdoers*" within the meaning of that term in ss. 11(1) and (2), of the 1961 Act (a "*wrong*" includes a breach of contract – s. 11(2)(b)). The Defendants and the Borrower would be "*responsible to a third person*" for some "*damage*" (as the Bank has not recovered the monies lent to the Borrower and guaranteed by the Defendants). However, the critical question is whether the Defendants and the Borrower are responsible to the Bank for the "*same damage*". If they are, they are "*concurrent wrongdoers*". If they are not, they are not.

37. In considering whether the Defendants and the Borrower are responsible to the Bank for the "*same damage*", it must be observed at the outset that as has been consistently pointed out in this jurisdiction and in other common law jurisdictions dealing with somewhat similar legislation which use the phrase "*same damage*", the term "*damage*" does not mean "*damages*". That point was made by Roch L.J. in *Birse Construction Limited v. Haiste Limited* [1996] 1 WLR 675 (at p. 682), and by Lord Bingham in the United Kingdom Supreme Court in Royal *Brompton Hospital NHS Trust v. Hammond* [2003] 2 AC 366 ("Royal Brompton Hospital") (at para. 6). Clarke J. in the High Court made the same point (citing *Royal Brompton Hospital and Birse* with approval) in *Moloney* and in the later case of *ACC Bank PLC v. Johnston* [2011] IEHC 108.

38. In the case of a lender who has lent money to a principal debtor whose obligation to repay the lender is guaranteed by a guarantor, the damage suffered by the lender is the non-recovery or non-repayment of the loan advanced. In my view, the "*damage*" allegedly suffered by the Bank in the present case as a result of the failure by the Borrower to repay the loan is precisely the "*same*" as the damage the Bank has allegedly suffered as a result of the Defendants failing to pay the sum demanded under the guarantees. In each case it is the non-recovery by or non-repayment to the Bank of the loan. While the amount for which it is alleged the Defendants are liable as guarantors may be lower than that allegedly due by the Borrower, having regard to the limit on the guarantees, it does not seem to me that this affects the nature of the damage allegedly suffered by the Bank, which is the principal focus of the definition of "*concurrent wrongdoers*" in s. 11(1) and s. 21(1) of the 1961 Act. The "*damage*" allegedly suffered by the Bank is, in my view, the "*same*" in the case of the Borrower's failure to repay the loan and in the case of the Defendants' failure to pay on foot of the guarantees.

39. The Bank relied on the decision of Clarke J. in the High Court in *Moloney* in support of its contention that the Defendants and the Borrower are not "*concurrent wrongdoers*" as they are not both responsible to the Bank for the "*same damage*". However, *Moloney* dealt with an entirely different situation. In *Moloney*, the plaintiff brought proceedings against a firm of solicitors for allowing their claim against a firm of architects they had engaged to build a house for them to become statute barred. The solicitors joined the architects as third parties claiming that they were "*concurrent wrongdoers*" responsible to the plaintiffs for the "*same damage*", pursuant to s. 21 of the 1961 Act. The architects applied to have the third party proceedings set aside. One of the grounds on which they made that application was that, on a proper construction of the relevant provisions of the 1961 Act, the architects and the solicitors were not "*concurrent wrongdoers*" liable to the plaintiffs in respect of the "*same damage*" in the sense in which that term is used in s. 21 of the 1961 Act. The principal area of disagreement between the parties concerned the issue as to whether the solicitors and the architects were responsible to the plaintiffs for the "*same damage*". In considering that issue, Clarke J. found two cases to be relevant and "*highly persuasive*", notwithstanding that there were differences between the 1961 Act and the legislation at issue in those cases. The two cases were *Royal Brompton Hospital and Wallace v. Litwiniuk* [2001] 1 ACBA 118 ("*Wallace*"), a decision of the Court of Appeal of Alberta.

40. Having made the point, referred to above, that the term "*damage*" does not mean "*damages*", a point also made in *Wallace*, Clarke J. went on to consider that case, in which it was held by the Court of Appeal of Alberta that the claim for damages by a plaintiff against her lawyers who had failed to bring proceedings against a defendant in a timely manner was not brought in respect of the "*same damage*" as would arise in that plaintiff's claim against that defendant. The Court of Appeal of Alberta held that while in both cases the plaintiff sought "*damages*", she did not bring such claim in respect of the "*same damage*". The Alberta Court held that the "*damage*" was different. Clarke J. found Wallace to be a "*highly persuasive authority*". He continued:-

"[25]… As pointed out the claim is not to the same damage. The claim by a disappointed litigant against a solicitor who allows the statute to run is a claim for the loss of opportunity to bring effective proceedings and achieve either a settlement of same, or a determination by the court on the merits. The original claim, which has been lost by virtue of the expiry of the statute, was, of course, of a different character being, in the circumstances of Wallace v. Litwiniuk, a negligence claim for personal injury, and in the circumstances of this case, a negligence and allied claim against a firm of architects.

[26] As pointed out in Wallace..., the fact that the calculation of damages in both cases may be analogous (in the sense that the calculation of the amount of damages to which a successful plaintiff may be entitled may be based on the same general considerations) is not the point…

[27] All of the authorities on the award of damages against lawyers for depriving their client of an opportunity to bring proceedings by allowing limitation periods to expire make it clear that, in assessing the damages to be awarded the court must have regard to the prospects of success which the client might have had in the event that the proceedings were able to be considered on their merits. It is true that the court may well award what appears to be the full value of the lost claim, or something approximating to it, in circumstances where it is felt that the client was deprived of bringing an action which had a significant chance of success. But it is also true that in very weak cases nominal or very small damages will be awarded and in cases where a significant risk attached to the bringing of the client's case, an appropriate deduction will be made to reflect the risk of losing…

[28] It is clear, therefore, that in the event that the plaintiffs establish liability for negligence against the Defendants, the court, in assessing damages, will be required to have regard to the likely extent of the full value of the plaintiffs' claim lost by the Defendants' negligence, but also will be required to have proper regard to any significant risks that the plaintiffs might have faced in maintaining that litigation. The court will not decide the case against the architects and give the plaintiffs the damages that they would have obtained. Rather, the court will assess the value of the loss of

opportunity by reference to the full value of the claim coupled with any significant risk on liability.

[29] It must be noted that that exercise is an entirely different exercise to the one which would have been conducted had the plaintiffs' proceedings against the architects been commenced and proceeded with in a timely fashion so that no limitation barrier arose. In those circumstances, the court would consider all issues of liability and quantum and come to whatever decision might be considered appropriate on the law and the facts." (per Clarke J. at paras. [25]-[29], pp. 662 – 663).

41. Clarke J. then gave an illustration of the difference in substance and practice between the two methods of approaching the calculation of damages in those two scenarios by reference to a hypothetical case. He concluded that:-

"[34]…the fact that there may be some broad analogy between the considerations which a court may properly have regard to in considering such an original claim and a claim against lawyers for delay such has caused the original claim to be statute barred, does not in any way suggest that, even as a matter of the calculation of damages, the claim can properly be said to be in respect of "the same damage". In addition, for the reasons identified in Wallace…, I was satisfied that there is a real, substantial and significant difference between the nature of the damages as and between the two types of cases…" (per Clarke J. at para. [34], p. 664).

42. Clarke J. concluded that the differences in the "*damage'* were "real and substantial, both as to their nature and as to the proper approach to their quantification" (para. [35]) and that they could not, therefore, be said to be the "*same damage*" in the sense in which that term is used in s. 21 of the 1961 Act. He concluded, therefore, that the solicitors and the architects were not "*concurrent wrongdoers*" and that since a claim for contribution was maintainable, if at all, only if it came within s. 21 of the 1961 Act, and since in order to come within that provision the liability of the alleged "*concurrent wrongdoers*" had to be for the "*same damage*", and since this was not the case, the solicitors had no entitlement to seek contribution from the architects by way of the third party proceedings. Since the only basis on which the solicitors could seek such contribution was pursuant to s. 21 of the 1961 Act, and since there was no other basis on which such a claim could properly be maintained, Clarke J. concluded that the claim was bound to fail.

43. It will be immediately obvious that the features of the respective claims against the solicitors and against the architects and the differences between those claims which were considered by Clarke J. in *Moloney* are not present in this case. There is no question of the Bank's claim against the Defendants or the Borrower as being in respect of any alleged loss of opportunity, which led to the claim in *Moloney* being found not to be in respect of the "*same damage*". In this case, the Bank's claims against the Defendants and any claim against the Borrower would be, for the reasons outlined by me earlier, in respect of the "*same damage*".

44. I am reinforced in my view by the very recent decision of the High Court (Twomey J.) in *Defender Ltd. v. HSBC Institutional Trust Services (Ireland) Ltd*. [2018] IEHC 706 ("*Defender*"). That case concerned a claim by the plaintiffs against HSBC arising from the loss of the plaintiffs' monies which were invested in a Madoff Ponzi scheme. Twomey J. noted that the essence of the plaintiffs' claim against HSBC and against Madoff was for the loss of the monies which the plaintiffs had invested in the scheme operated by Madoff. The damage sustained by the plaintiffs was alleged to have been caused by Madoff's fraud and by the negligence of HSBC in failing to put in place safeguards to minimise the risk of Madoff's scheme. Twomey J. concluded that Madoff and HSBC were "*concurrent wrongdoers*" who had engaged in "*independent acts*" which led to the "*same damage*" (at paras. 43 – 48). At para. 48 of his judgment, Twomey J. stated that:-

"On any reading of the pleadings in this case, the essence of the claim against HSBC and against Madoff is for the loss of the money Defender invested in a Ponzi scheme operated by Madoff. In this Court's view therefore, Defender's claim is that HSBC and Madoff are responsible for the same loss. It is clear from s. 11(2)(a) of the [1961 Act], that persons can be concurrent wrongdoers where 'independent acts' caused the same damage. In this case, fraud by Madoff and negligence by HSBC are alleged by Defender to have lead to the same damage. Thus, for the purposes of this preliminary hearing only, this Court finds Madoff and HSBC to be 'concurrent wrongdoers'" (per Twomey J. at para. 48).

45. That case is much closer to the present case than *Moloney*. It reinforces the view which I have formed that the Defendants and the Borrower are "*concurrent wrongdoers*" in that they are responsible to the Bank for the "*same damage*". Therefore, the Defendants are entitled to seek contribution from the Borrower under s. 21 of the1961 Act in accordance with the procedure provided for in s. 27 of that Act, which is the third party procedure which the Defendants have invoked on this application. While s. 27 of the 1961 Act does not require a Defendant who wishes to claim contribution from a "*concurrent wrongdoer*" to obtain the leave of the court to serve the third party notice, O. 16 RSC does so require. This was noted by Finlay Geoghegan J. in the Court of Appeal in *Thomas Greene & Anor v. Triangle Developments Ltd & Ors* [2015] IECA 249, where at para. 12, she stated:-

"It is to be noted that the Act itself does not require either such a person to obtain the leave of the High Court to do so, nor does it require the third party notice expressly to be issued out of the central office. However, Order 16 of the Rules of the Superior Courts does so require and it is through this regulatory framework that Section 27 has been implemented. Order 16, Rule 1 requires an application to the High Court for liberty to issue and does seem to require that the third party notice is issued out of the central office."

46. Therefore, a "*concurrent wrongdoer*" who wishes to make a claim for contribution under s. 21 of the 1961 Act in accordance with the procedure provided for in s. 27 of that Act, must apply to the High Court pursuant to O. 16 r. 1 for leave to issue and serve the third party notice.

47. In light of the conclusion I have reached in relation to the Defendants' entitlement to seek a contribution or indemnity from the Borrower pursuant to the provisions of the 1961 Act, which claim falls under O. 16 r. 1(1)(a), it is unnecessary to express any concluded view on whether the Defendants' intended claim against the Borrower could fall within either of the other subparagraphs of O. 16 r. 1(1). For completeness, however, in my view, the Defendants would also be entitled to rely on O. 16 r. 1(1)(b) and (c), as a basis to seek the joinder of the Borrower as a third party to the proceedings. The Defendants' claim for a contribution or indemnity from the Borrower is one *"relating to or connected with"* the subject matter of the Bank's action against the Defendants and is *"substantially the same as some relief or remedy claimed by the [Bank]"* (O. 16 r. 1(1)(b)). In addition, questions or issues "*relating to or connected with*" the subject of the Bank's action against the Defendants are:-

"substantially the same as some question or issue arising between the [Bank] and the [Defendants] and should properly be determined not only as between the [Bank] and the [Defendants] but as between the [Bank] and the [Defendants] and the [Borrower] or between any or either of them…" (O. 16, r.1(1)(c)).

48. I have reached that view based on the nature of the claim made, and the reliefs sought, by the Bank in its proceedings against the Defendants and the nature of the claim and the reliefs intended to be sought by the Defendants against the Borrower in the third party proceedings.

49. Finally in this context, I draw attention to the following passage from one of the leading textbooks on the law of guarantees, J.C. Phillips, The *Modern Contract of Guarantee* (2nd English Ed., 2010) where, at para. 10-203, p. 643, the authors state:-

> *"If the principal appears to be solvent, it is common for the creditor to sue both the principal and the guarantor in the one action. In these proceedings, the guarantor may claim an indemnity from the principal. If the creditor sues only the guarantor, the guarantor may claim an indemnity from the principal in third party proceedings."*

That is precisely what the Defendants wish to do in their third party proceedings against the Borrower. In my view, the 1961 Act and O. 16 RSC permit them to do so.

(3) Whether the Joinder of the Third Party is Precluded by the Guarantees

50. The Bank has contended that the terms of the guarantees given by the Defendants preclude the joinder of the Borrower as a third party to the proceedings. The Bank relies, in particular, on Clause 8 of the guarantees. It relies, on the following part of Clause 8, which states:-

> *"…nor shall the Guarantor take any step to enforce any right or claim against the Borrower in respect of any moneys paid by the Guarantor to the Bank hereunder nor shall the Guarantor exercise any rights as surety in competition with the Bank unless and until the whole of the principal moneys and interest shall have first been completely discharged and settled…"*

51. It seems to me that for various reasons, the Bank is not correct in its submission that this part of Clause 8 of the guarantees precludes the Defendants from joining the Borrower as a third party to the proceedings. First, the Bank's objection in reliance on this provision is premature. If the Bank is correct in its contention that Clause 8, as properly construed, precludes the Defendants from recovering from the Borrower in the third party proceedings, the court when hearing and determining those proceedings will agree with it and refuse to grant the contribution or indemnity sought. However, that decision will fall to be made in the determination of the third party proceedings. It is not a reason for refusing to join the Borrower as a third party at this stage. Second, while it would not be appropriate for me to express any concluded view on the interpretation of the relevant provisions of Clause 8 relied upon by the Bank at this stage in the proceedings, it does seem to me that there is a good argument that the first part of the provision relied on does not have any application in the circumstances of this case as the Defendants have not, in fact, paid any monies to the Bank under the guarantees. That appears to be an important precondition for the application of that part of the provision relied upon by the Bank. Third, again while not expressing any concluded view on the point, it seems to me that there is also a good argument that the second part of the provision relied upon may have no application in that the Defendants are not seeking to exercise any rights as sureties "*in competition with the Bank*" in maintaining their third party proceedings against the Borrower. There is, in my view, much force to the submission made by the Defendants that the joinder of the Borrower, as a third party, does not put the Defendants "*in competition*" with the Bank since if the Defendants are indemnified by the Borrower, it would not be putting the Defendants "in competition" with the Bank but would be in the Bank's interest. Again, while I do not have to express any concluded view on these points (and I have deliberately refrained from doing so), there are good arguments open to the Defendants in response to the Bank's reliance on these provisions in Clause 8 of the guarantees. However, the appropriate time to determine this issue is at the hearing of the third party proceedings and not at this stage of the proceedings.

(4) Court's Discretion under Order 16, Rule 1, RSC

52. The final issue to be determined on this application is whether, in light of my conclusion that the Defendants' application to join the Borrower as a third party falls under O. 16 r. 1 RSC, there is any reason why the court should exercise its discretion not to give leave to the Defendants to issue and serve the third party notice on the Borrower.

53. The question of the discretion of the Court under O.16 was considered by the Supreme Court in *Quirke*. Before considering how the issue was addressed by the Supreme Court in that case, I draw attention to the fact that O. 16 r. 1(1) provides that where the requirements of the sub-rule are complied with, the court "may" give leave to issue and serve a third party notice. The court, therefore, clearly has a discretion as to whether to give such leave.

54. The Supreme Court in *Quirke*, considered the extent of that discretion. In that case, the plaintiff brought personal injury proceedings against the defendant, suing through his mother as next friend. The defendant applied to join the plaintiff's mother and next friend as a third party. The High Court refused the application on two grounds. The first was that the defendants had not made out a *prima facie* case for contribution against the mother and next friend as a "*concurrent wrongdoer*". The second was that the court refused the order, in the exercise of its discretion, on the ground that the proposed third party was the plaintiff's mother and next friend. On appeal to the Supreme Court, the court accepted that the defendant's affidavit evidence disclosed a *prima facie* case for contribution from the proposed third party as a "*concurrent wrongdoer*". However, the court went on to consider the circumstances where, notwithstanding the disclosure of a *prima facie* case, the court could nonetheless, exercise its discretion the refuse to join a third party under O. 16 RSC. In that regard, Finlay C.J. stated:-

> *"It is, in my view, of very considerable importance to emphasise that the question arising upon an application under O. 16, r. 1, is not a question of whether a defendant shall be at liberty in general to claim from a* concurrent wrongdoer *contribution or an indemnity, but rather the procedural question as to whether it is appropriate that he should be entitled to claim in the action rather than by independent proceedings. I say this because I am quite satisfied, having regard to the provisions of s. 27(1)(b) which I have quoted, that if a defendant applies to the court to add an alleged* concurrent wrongdoer *as a third party to proceedings, and if that application is refused, then the failure to serve a third party notice arising from such refusal could not constitute a valid ground for the exercise by a court of its discretion to refuse, by reason of such failure, to make an order for contribution in separately instituted independent proceedings.*
>
> *Having regard to this conclusion, I am satisfied that the discretion to be exercised by the court is not confined, as is submitted, to the question as to whether the issues arising between the plaintiff and the defendant on the one hand, and the defendant and the third party on the other hand, are similar or appropriately tried together but is a wider discretion.*
>
> *In the case of a claim by an infant plaintiff suing by a parent and next friend, where an application is made to add that next friend as a third party, in my view the court is entitled to balance the disruption to the existing proceedings which could arise from such joinder against the convenience of trying all the issues in the one action."* (per Finlay C.J. at 290 –

291)

55. The decision of the Supreme Court in *Quirke* demonstrates that the court does have a wide discretion in permitting the joinder of a third party under O. 16 r. 1. Where the purpose of seeking the joinder of a third party was not *bona fide* or constituted an abuse of process, the Supreme Court made clear that the court could and should exercise its discretion to refuse to join the proposed third party under O. 16. Further, the court would also be entitled to consider whether the joinder of the third party would disrupt the existing proceedings and to balance that disruption against the convenience of having all issues tried together in the one set of proceedings (and of achieving the desirable goal of avoiding a multiplicity of actions arising out of the same dispute).

56. The Bank does not contend that the Defendants' application to join the Borrower as a third party is not *bona fide* or that it constitutes an abuse of process. The Bank does, however, as a fall-back position, contend that the court should refuse to join the Borrower as a third party in circumstances where such joinder is likely adversely to affect the Bank's application for summary judgment against the Defendants. I have concluded that while there is some force to the Bank's contention on this issue, it is not sufficient to persuade me to exercise my discretion to refuse to join the Borrower as a third party.

57. However, the Bank is entitled to pursue its application for summary judgment (and for liberty to enter final judgment before the Master) in accordance with the required procedures provided for in O. 37 RSC. The Bank is entitled to have its application for such summary judgment heard and determined without any interruption or disruption by reason of the joinder of the Borrower as a third party. Having regard to the wide discretion which the court has under O. 16 r. 1 as outlined by the Supreme Court in Quirke, it is open to me to exercise my discretion to give leave to the Defendants to issue and serve a third party notice on the Borrower but to attach certain conditions to that leave.

58. I am satisfied that it is appropriate to grant the Defendants leave to issue and serve the third party notice on the Borrower. However, in order to enable the Bank to continue with its application for summary judgment in the High Court (presuming that as this is a contested case, the Master either has already transferred or will transfer the case for hearing by the High Court) without disruption or interruption by the joinder of the third party. In order to achieve that balance, in the exercise of my discretion, having given leave to issue and serve the third party notice on the Borrower, I will direct that the Defendants serve the Borrower with a copy of the summary summons, the Bank's motion for liberty to enter final judgment against the Defendants and all affidavits sworn for the purposes of that application together with the third party notice itself (in the form of the draft exhibited to the first Defendant's affidavit of 25th October, 2017), within 28 days from the date of the order made on foot of this judgment (in accordance with O. 16 r. 2(2)). I will then place a stay on the conduct of the third party proceedings by the Defendants against the Borrower to enable the Bank's application for summary judgment to be heard and determined by the High Court. In the event that summary judgment is granted by the court in favour of the Bank, the stay will lapse and the Defendants will be at liberty to pursue their third party proceedings against the Borrower. In the event that the Bank does not obtain summary judgment against the Defendants and the case is adjourned for plenary hearing, the stay will similarly lapse and the Defendants can proceed with the third party proceedings against the Borrower. In that situation, the Borrower shall have liberty to appear at the trial and to take such part at the trial as the trial judge may direct and be bound by the result of the trial. The question of the liability of the Borrower to make contribution to or to indemnify the Defendants can be tried at or after the trial of the Bank's action against the Defendants, as the trial judge shall direct.

Summary of Conclusions

59. In summary, I have concluded that for the reasons outlined in this judgment:-

(i) It is open to a defendant to seek to join a third party to proceedings brought by summary summons by way of an application for leave to issue and serve a third party notice under O. 16 r. 1 RSC.

(ii) The Defendants and the Borrower are "*concurrent wrongdoers*" within the meaning of that term in the 1961 Act and it is open to the Defendants to seek a contribution or indemnity from the Borrower pursuant to s. 21 of the 1961 Act in accordance with the third party procedure provided for in s. 27(1) of that Act by way of an application to the court pursuant to O. 16 r. 1(1) RSC.

(iii) The provisions of Clause 8 of the guarantees do not preclude the Defendants from seeking the joinder of the Borrower as a third party to the proceedings. Whether those provisions preclude the granting of a contribution or indemnity in favour of the Defendants as against the Borrower will be a matter for the trial judge dealing with the third party proceedings. There are good arguments in favour of the Defendants to the effect that the provisions of Clause 8 of the guarantees relied upon by the Bank do not preclude the granting of a contribution or indemnity in favour of the Defendants as against the Borrower. However, I express no concluded view on those arguments. That will be a matter for the trial judge.

(iv) The court has a discretion under O. 16 r. 1(1) RSC as to whether to grant leave to the Defendants to issue and serve a third party notice on the Borrower. I am satisfied that it would be appropriate to exercise that discretion to grant such leave to the Defendants, subject to certain conditions. Those conditions are designed to enable the Bank to proceed with its application for summary judgment without disruption or interruption by reason of the joinder of the third party. In those circumstances, I have indicated the directions which should be made. I have also concluded that a stay should be imposed on the conduct of the third party proceedings which will lapse in certain circumstances outlined in the judgment.

60. I will hear counsel as to the precise terms of the order which shall be made to give effect to this judgment.