**THE HIGH COURT**

**2009 1784 P**

**BETWEEN**

**EBS BUILDING SOCIETY**

**PLAINTIFF**

**AND**

**WILLIAM E. LEAHY & OTHERS (PRACTISING UNDER**

**THE STYLE AND TITLE OF LEAHY AND PARTNERS)**

**DEFENDANTS**

**AND**

**PATRICK McMAHON JUNIOR, PATRICK McMAHON SENIOR**

**AND KEVIN McMAHON**

**THIRD PARTIES**

**JUDGMENT of Mr. Justice Hogan delivered on the 6th day of December, 2010**

1. This is an application by the third parties to have a third party notice dated 23rd December, 2009 - in which the defendants (who are a firm of solicitors)("the solicitors") seek an indemnity in respect of the claims brought against them by the plaintiff building society ("EBS") - set aside for non-compliance with the requirements of s. 27(1)(b) of the Civil Liability Act 1961. In essence, the contention of the third parties is that the notice was not served "as soon as is reasonably possible" within the meaning of this statutory provision.

2. The present proceedings arise in this way. The EBS claims that in January, 2007 it offered loan facilities in the sum of €1.45m to Patrick McMahon Junior, one of the third parties. The object of this loan was to allow Mr. McMahon Junior to purchase a 3.36 acre site at Sixmilebridge, Co. Clare and to re-finance a loan held with Bank of Scotland Ireland. While the security offered included a first legal charge over property situate at Mungret, Co. Limerick comprised in Folio 3949 for County Limerick, it also comprised a first legal charge over the 3.36 acre site at Six Mile Bridge, Co. Clare and a first legal charge over properly at Monaleen Road, Castletroy, Limerick. One of the loan conditions was that Mr. McMahon's then solicitors, Messrs. Leahy and Partners, should certify title to these lands.

3. The EBS further claims that the defendant solicitors duly furnished a certificate of title on 29th January, 2007, and that on foot of this it duly advanced the loan facilities. As it happens, Mr. Patrick McMahon Junior defaulted on this loan and an order for possession in respect of the Six Mile Bridge and Monaleen Road properties was duly made in favour of the plaintiff building society by this Court (McGovern J.)

on 24th November, 2008. 4. The plaintiff contends that it then emerged that the lands in question were in fact owned by Patrick McMahon Senior, the father of Patrick McMahon Junior. If this is correct, then, of course, one of the parcels of land held by the EBS as collateral for the loan is worthless for this purpose and it has thereby been deprived of one of its items of security.

5. The EBS commenced these present proceedings on 24th February, 2009, and a statement of claim was delivered on 31st March, 2009. It claims damages as against the defendant solicitors for negligence, misrepresentation and negligent misstatement. As it happens, the solicitors had already issued separate proceedings on 27th January, 2009 (bearing record number 2009 No. 714 P) by which they claimed damages as the third parties in the present proceedings. In those proceedings the solicitors (as plaintiffs) seek damages for deceit, conspiracy, negligence and misrepresentation as against the McMahons as defendants.

6. Returning to the present proceedings, the solicitors filed a defence on 22nd June, 2009. The EBS replied to a notice for particulars on 3rd September, 2009. On 23rd November, 2009 the solicitors issued a motion seeking to join the McMahons as third parties. On 21st December, 2009 this Court (Quirke J.) made an order granting the solicitors liberty to issue and serve a third party notice on the McMahons. That order was served on 23rd December, 2009.

7. Patrick McMahon Junior has now brought a motion pursuant to O. 12, r. 26 RSC seeking to have the third party notice set aside. Patrick McMahon Senior and Kevin McMahon supported this position at the hearing before me.

8. Section 27(1)(b) of the Civil Liability Act 1961 provides:

> “A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part-(2)(b) shall, if the said person is not already a party to the action, serve a third party notice upon such person as soon 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.”

9. The objectives of this sub-section are by now so well established in the voluminous case-law on the topic that it is scarcely necessary to set them out at length here. Briefly, the 1961 Act seeks to avoid a multiplicity of actions arising out of the same dispute, so that where possible all issues involving plaintiffs, defendants and third parties are heard either together or in a sequenced trial: see, e.g., *Governor of St. Laurence’s Hospital v. Staunton* [1990] 2 I.R. 31, *Connolly v. Casey* [2003] 1 I.R . 345 and *Robins v. Coleman* [2009] IEHC 486.

10. Second, the concept of what is “as soon is reasonably possible” within the meaning of s. 27(1)(b) is a relative one and depends on the circumstances of the case: see, e.g., *Connolly v. Casey, Mulloy v. Dublin Corporation* [2001] 4 I.R. 52 and *Robins v. Coleman*. The Oireachtas did not seek to fix a set time period, but rather imported a concept of relative urgency which is designed to compel the defendant to seek to issue a third party notice with all deliberate speed having regard to all the

relevant circumstances. As Murphy J. explained in *Mulloy* ([2001] 4 I.R. 52 at 56-57):

> "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' denotes 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.'"

11. In that regard, the question thus becomes whether, having regard to all the circumstances, it was reasonable for a defendant to wait for the period in question before applying to join the third party, although any such permissible delay will generally be measured in weeks and months and not years. Indeed, this is illustrated by the facts of *Mulloy* where the third party notice was issued some thirteen months after the defence had been filed and where the Supreme Court held that it was "possible for the second defendant, on the information available to it, to make a prudent and responsible decision several months before the application was brought": see [2001] 4 I.R. 52 at 59, per Murphy J.

12. What, then, was the position in the present case? It may first be noted that the McMahons had themselves been sued in respect of this matter by the solicitors in separate proceedings which were issued in January, 2009. The McMahons thus knew at a relatively early stage that the solicitors thereby contended that they were guilty of negligence, misrepresentation and deceit. This factor is of some relevance because there may be other types of cases where a third party could be appreciably prejudiced by a late joinder in respect of a claim of which they had no prior knowledge. The present proceedings could hardly involve such a case, since McMahons were fully aware by this stage of the position of the solicitors, albeit by reason of the existence of separate proceedings in which the solicitors were plaintiffs and the McMahons were defendants.

13. Next, it may be noted that whereas the solicitors filed their defence in the present proceedings in June 2009, it seems clear from the affidavit of Seamus Tunney of 9th April, 2010, that it was still necessary for their purposes to ascertain a number of vital matters arising from the statement of claim. Thus, they needed to know exactly what had transpired in the earlier High Court proceedings. In addition, they also needed to know the basis on which the EBS calculated its loss and damage. It should be recalled that the property contained in Folio 3949 was just one of the three items of property offered as collateral. If, for example, the other two properties repossessed by the EBS pursuant to the order of McGovern J. were sufficient to meet the debt, then the EBS would have suffered no loss (or, at least, no appreciable loss) in respect of any defects to the title to Folio 3949.

14. These were matters which the solicitors were fully entitled to explore with the EBS prior to making any decision with regard to the involvement with third parties. As we have seen, a notice for particulars was served on 22nd June, 2009, and the replies to those particulars were dated 3rd September, 2009. As a result, the solicitors learnt that the proceedings with regard to Folio 3949 had been adjourned generally with liberty to re-enter and that the loss claimed by the EBS with regard to those lands was €350,000.

15. The advice of counsel was then sought and it culminated in a decision to seek to join the McMahons as third parties. Following a short hiatus during which some further issues were raised with counsel, the appropriate motion accordingly issued on 23rd November, 2009.

16. For my part, having regard to the circumstances of this case, I cannot agree with the submission that the solicitors did not comply with the requirements of section 27(1)(b). Given that the solicitors were themselves being sued for professional negligence, they were entitled to reflect on the potential ramifications of the joinder of the third parties, especially once the extent of the claim made by the EBS had been clarified in September, 2009 with the replies to notice for particulars. Recalling again the words of Murphy J. in *Mulloy*, s. 27(1)(b) is concerned with an important decision which a litigant must make with regard to the potential involvement of a third party and the length of the delay must be measured against that context and not by reference to purely physical possibilities.

17. While the solicitors could, of course, have immediately issued the motion within days of the replies to the notice for particulars - and, arguably, even earlier again - that it not what s. 27(1)(b) actually contemplates should happen and still less does it require it. Instead, what is required that a defendant proceed with all deliberate speed prior to making any decision with regard to the issue of a third party notice. While we have already noted that any tolerable delay will usually be measured in weeks and months, in general the delay inherent in all reasonable steps taken by a prudent and responsible litigant will be not be considered excessive for the purposes of section 27(1)(b), absent perhaps specific and identifiable prejudice to the third party which has been occasioned as a result of this delay.

18. This, in my judgment, is what occurred in the present case. The solicitors acted with all deliberate speed in the matter and it is for these reasons that I dismissed this application to have the third party notice set aside.