UNAPROVED
THE COURT OF APPEAL

Neutral Citation No. [2021] IECA 167

Appeal Number: 2018/318

Faherty J.
Collins J.
Binchy J.

BETWEEN/

BALLYMORE RESIDENTIAL LIMITED AND CROSSWINDS COTTAGE LIMITED

PLAINTIFFS / RESPONDENTS

- AND -

ROADSTONE LIMITED, CRH PUBLIC LIMITED COMPANY, MURPHY CONCRETE (MANUFACTURING) LIMITED AND WILLIAM MILEY LIMITED

DEFENDANTS/ APPELLANTS

Judgment of Ms. Justice Faherty delivered on the 4th day of June 2021

1. This is an appeal by the first and second named defendants (hereinafter "Roadstone") from the refusal of the High Court (Murphy J.) to strike out and/or alternatively stay these proceedings (hereinafter "the Plenary Proceedings"). Roadstone's strike out application was initiated in the wake of the plaintiffs (hereinafter "Ballymore") having obtained leave to issue and serve third party notices on Roadstone in three sets of proceedings which form part of a series of actions referred to hereinafter as the "Homeowner Proceedings". Essentially, what arises for determination in this appeal is

whether it was reasonable for the High Court judge, in the exercise of her case management functions, to take the provisional view that the contribution/indemnity issues that arise as between the parties should be determined first and in the Plenary Proceedings, and whether she was precluded from taking that approach by s.27 of the Civil Liability Act 1961, as amended ("the 1961 Act").

Background

2. Between November 2001 and April 2005, Ballymore built some 145 houses at Drumnigh Wood, Portmarnock, County Dublin ("the Drumnigh Estate"). They did so with stone supplied by Roadstone, and the third and fourth named defendants (hereinafter "Murphy Concrete" and "William Miley"). Ballymore contend that some 80% of the stone infill used in the construction of the Drumnigh Estate was supplied by Roadstone, Murphy Concrete or William Miley. Between April 2002 to in or about June 2007, Roadstone delivered some 39,000 tonnes of stone to Ballymore. The houses were constructed by Ballymore in three phases. Phase one commenced 15 November 2001, phase 2 on 29 August 2003 and phase 3 in April 2005.

3. Following construction, a number of the houses in the Drumnigh Estate began to show cracking, which was alleged to be caused by the presence of fromboidal pyrite in the stone infill used in the construction of the houses and related infrastructure.

4. All of the houses built by Ballymore had the benefit of a structural guarantee provided by Liberty Corporate Capital Limited ("Liberty") as the underwriters of defects insurance policies arranged by Ballymore for the benefit of the homeowners through the Premier Guarantee Scheme for Ireland. Between 2012 and 2014, subrogated proceedings (in total some 365 sets of proceedings), initiated at the direction of Liberty, were issued in the names of various homeowners against Ballymore, Roadstone and Murphy Concrete (the "Subrogated Proceedings"). The Subrogated Proceedings against Ballymore were

compromised in 2019 following mediation and notices of discontinuance were served by the homeowners in October 2019. Roadstone did not make any contribution to that settlement.

5. On 12 August 2015, Coleman Legal Partners ("CLP"), the solicitors for homeowners who were not compensated by the Premier Guarantee Scheme and thus not the subject of the Subrogated Proceedings wrote to Ballymore alleging, *inter alia,* that due to the presence of pyrite in material used as infill during the construction beneath the houses "major structure defects are present in same". CLP alleged that the defects, including emerging defects and future damage, arose from Ballymore's negligence and/or breach of contract in relation to the construction of the properties and/or from material used during construction. Ballymore were requested to admit liability within seven days failing which proceedings would issue. In October 2015 and since then, various proceedings by the purchasers of houses have issued, these being the Homeowner Proceedings.

6. In November 2015, Eversheds, Ballymore's then solicitors, notified Roadstone, Murphy Concrete and William Miley that the Homeowner Proceedings had recently been served on Ballymore and that the homeowners were claiming damage for alleged breach of contract and negligence, together with interest and costs incidental to the proceedings. Roadstone, Murphy Concrete, William Miley and Liberty were notified that Ballymore were denying they had any liability to the homeowners but without prejudice to that denial, Ballymore reserved the right to make application in due course for, *inter alia,* orders joining Roadstone, Murphy Concrete and William Miley to the Homeowner Proceedings.

7. Some three weeks later, on 3 December 2015, Ballymore issued the Plenary Proceedings. These proceedings are in effect a hybrid claim for indemnity and contribution under s.31 of the 1961 Act and damages at common law. The claim for indemnity and contribution against the defendant quarry owners (including Roadstone) is in respect of the

series of claims brought (and anticipated) in the Homeowner Proceedings. Ballymore is seeking an indemnity in respect of all costs, expenses, losses, liabilities and claims arising from the supply and/or use of stone infill in connection with the construction of residential units, related infrastructure and external areas within the Drumnigh Estate.

8. In December 2015, Roadstone were requested to confirm that they would facilitate access by Ballymore, and its geological experts, to their quarries for the purpose of inspecting and retrieving samples so as to enable Ballymore to identify the source of the infill used in the houses the subject of the Homeowner Proceedings. Similar letters were sent to Murphy Concrete and William Miley.

9. There followed a protracted exchange of correspondence between Ballymore and Roadstone, Murphy Concrete and William Miley on the issue of inspection.

The progress of the Plenary Proceedings

10. The Plenary Proceedings were served in May 2016 following which Roadstone and Murphy Concrete entered appearances on 27 May and 30 May 2016 respectively. William Miley entered an appearance in December 2016.

11. On 3 June 2016, Ballymore issued a motion seeking, *inter alia,* an order directing the provision of an inspection and sampling facilities by Roadstone, Murphy Concrete and William Miley. It is common case that both Roadstone and Murphy Concrete opposed the inspections when the motions came on for hearing the following year. William Miley, however, intimated at an early stage their agreement to their quarries being inspected, which duly took place in August 2016.

12. Ballymore delivered a statement of claim in the Plenary Proceedings on 24 November 2016. On 5 January 2017, Byrne Wallace (Ballymore's now solicitors) wrote to Roadstone and Murphy Concrete requiring that their respective defences be filed.

13. On 24 January 2017, Roadstone and Murphy Concrete served a detailed notice for particulars on Ballymore.

14. On 27 January 2017, Ballymore issued a second inspection motion, this time seeking the provision of inspection and sampling facilities by Murphy Environmental Hollywood Limited ("MEHL") at a quarry formerly owned by Murphy Concrete (the "Hollywood Quarry").

15. Replies to particulars were delivered by Ballymore on 21 April 2017. On 2 May 2017, Ballymore advised Roadstone and Murphy Concrete that if their defences were not received within 21 days, a motion for judgment in default would issue.

16. On 15 May 2017, Roadstone served a notice for further and better particulars on Ballymore to which replies were delivered on 26 May 2017. Murphy Concrete did likewise on 25 May 2017 and Ballymore's replies were delivered on 15 June 2017.

17. On 29 May 2017, two motions seeking judgment in default of defence were issued by Ballymore.

18. The inspection motions came on for hearing before the High Court (Murphy J.) on 30 May, 31 May and 1 June 2017. Some thirty affidavits were exchanged prior to the hearing of that motion. There were myriad documents exhibited, including those pertaining to the expertise of the various parties' experts on infill, pyrite expansion and the damage to the houses, all with a view to determining whether there should be an inspection of the quarries from which the infill came.

19. On 3 June 2017, Murphy J. directed that Ballymore were entitled to inspection and sampling facilities at the Hollywood Quarry, outlining her reasons in a written judgment delivered on 28 July 2017. As appears from her judgment, in the knowledge that William Miley had consented to inspection, Murphy J. refrained from making any inspection order in respect of Roadstone at that point, operating on the premise that if Ballymore's experts

could establish "the source of the rock in the subfloor of each of the houses by a process analogous to DNA testing, it followed logically that where there are only three sources of rock, the establishment of the source of two of them *ipso facto* identifies the source of the third."

20. The inspection of the Hollywood Quarry took place on 19 October 2017.

21. On 18 October 2017, Ballymore delivered supplemental replies to the notices for further and better particulars which Roadstone and Murphy Concrete had issued, followed by second supplemental replies delivered on 18 January 2018. In the interim (19 June 2017) Roadstone had issued a motion seeking an order compelling Ballymore to deliver replies to certain of the requests which had been made in their notice for further and better particulars. Murphy Concrete had issued a similar motion on 30 June 2017.

Events in the Homeowner Proceedings

22. In October 2017, notices of intention to proceed were served on behalf of the plaintiffs in a number of the Homeowner Proceedings. Statements of Claim were delivered in three sets of proceedings, namely 2015/8217P, 2015/8216P and 2015/8214P on or about 11 December 2017. Ballymore duly issued a motion on 6 February 2018 in the Homeowner Proceedings, seeking leave to issue and serve third party notices on the entities identified in the third party notices, namely Roadstone, Murphy Concrete, William Miley and Liberty.

The motions for further and better particulars and for judgment in default of defence in the Plenary Proceedings

23. On 23 and 24 January 2018, Murphy J. heard Roadstone's and Murphy Concrete's motions seeking replies to their requests for further and better particulars. Ballymore's motions for judgment in default of defence also came on for hearing on that date. During

the hearing of the said motions, Ballymore indicated their intention to join Roadstone as third parties to the Homeowner Proceedings.

24. On 28 January 2018, Murphy J. delivered an *ex tempore* judgment refusing the applications of Roadstone and Murphy Concrete for further and better particulars and directing Roadstone and Murphy Concrete to deliver defences within 21 days. At that stage, Murphy J. announced that she was going to case manage the Plenary Proceedings to trial. For all intents and purposes, the proceedings had been under case management since May 2017 when Murphy J. heard the first of the inspection motions over a three-day period.

25. Roadstone delivered its defence on 19 February 2018 and Murphy Concrete did so on 28 February 2018.

26. Following directions given by Murphy J. on 8 March 2018, notices for particulars arising from the defences were delivered by Ballymore on 13 March 2018. Murphy Concrete replied thereto on 20 April 2018. Roadstone's replies were delivered on 17 May 2018.

The lead up to the motion to strike out the Plenary Proceedings

27. On 1 March 2018, Roadstone wrote to Ballymore asserting that they were not entitled to further prosecute the Plenary Proceedings while also claiming contribution from Roadstone in the third party proceedings. Ballymore were requested to confirm within seven days that they were discontinuing the Plenary Proceedings in default of which application would be brought by Roadstone to strike out the proceedings. The High Court was apprised of Roadstone's letter during the case management hearing on 8 March 2018 in the course of which Ballymore confirmed that they would not be agreeing to discontinue the Plenary Proceedings.

28. On 9 March 2018, Ballymore replied to Roadstone's request that they discontinue the Plenary Proceedings, expressing their surprise at Roadstone's letter in particular the contention that Ballymore were not entitled to seek an order for indemnity other than by way of third party order in each of the Homeowner Proceedings. The letter advised as follows:

> "As you know, motions to join your clients as third parties to the three homeowner proceedings in which Statements of Claim have been delivered are returnable before the High Court on 12 March 2018. In the event that the Court accedes to the applications to join your clients as third parties to those proceedings, (which are being made out of an abundance of caution and without prejudice to the claims of our clients the subject of the Plenary Proceedings), please note that, in principle, our clients are willing to refrain from prosecuting such third party actions in circumstances where each of the issues which arise therein can be disposed of in the Plenary Proceedings which were issued in 2015 and which, as you know, are now the subject of intensive case –management with a view to achieving an early trial.
>
> It is plainly in the interests of all the parties, including as regards avoiding unnecessary costs, to ensure that the issues in dispute are litigated and determined in the most efficient, expeditious and cost-effective manner possible. The obvious way to do so is in the Plenary Proceedings and, with respect, it makes no sense whatsoever to jettison all of the work done to date in the Plenary Proceedings and effectively to start afresh in multiple sets of third party proceedings. Such a course of action would merely serve to increase very substantially and unnecessarily the costs relating to the determination of the issues in dispute and to delay very considerably the determination of those issues.

Moreover, while you have focussed exclusively in your letter on the Declaration sought at paragraph 1 of the prayer for relief in the Statement of Claim in the Plenary Proceedings, that is only one of the twelve reliefs sought by our clients in those proceedings.

Accordingly, we respectfully invite your clients to reconsider their position and confirm that they are agreeable to all of the issues in dispute being determined in the Plenary Proceedings, in the light of which the third party actions against your clients can be stayed pending the determination of the Plenary Proceedings and ultimately disposed of following such determination.

For the avoidance of doubt, our clients will not be discontinuing the Plenary Proceedings and all of the rights of our clients are fully reserved."

The third party Order in the Homeowner Proceedings

29. By Order dated 12 March 2018, the High Court (O'Connor J.) granted liberty to Ballymore to issue and serve the third party notices in the Homeowner Proceedings in which statements of claim had been delivered. The third party notices were duly served on Roadstone on 27 March 2018. On 14 May 2018, O'Connor J. made a third party order joining Liberty as a third party to the Homeowner Proceedings.

Roadstone's motion to strike out/stay the Plenary Proceedings

30. On 24 April 2018, Roadstone issued the motion the subject of the within appeal in which they seek:

- An order pursuant to s. 27(1)(b) of the 1961 Act and/or Order 16 RSC and/or the inherent jurisdiction of the court striking out the Plenary Proceedings or alternatively staying them pending the determination of the third party procedure in the Homeowner Proceedings.

- In the alternative, an order pursuant to Order 19, r.28 RSC and/or the inherent jurisdiction of the court striking out the proceedings as bound to fail or failing to disclose a reasonable cause of action.

31. In his affidavit sworn 24 April 2018 grounding the application, Roadstone's solicitor, Mr. Andrew Lenny of Arthur Cox, avers, *inter alia*, that the course Ballymore have taken in joining Roadstone as a third party to the Homeowner Proceedings means that Ballymore are not entitled to maintain the Plenary Proceedings and that in those circumstances their statement of claim discloses no reasonable cause of action and that the proceedings are bound to fail. On 17 May 2018, Ms. Helen Gibbons of Byrne Wallace swore a replying affidavit, outlining Ballymore's opposition to the relief sought in the notice of motion.

Events post the issuing of the strike out motion

32. On 9 May 2018, Ballymore delivered its reply to Murphy Concrete's defence.

33. Further case management directions were made by the trial judge on 10 May 2018. She listed Roadstone's strike out motion for hearing on 30 May, 31 May and 1 June 2018 and made various directions in connection with the delivery by Roadstone of replies to a notice for particulars, the exchange of affidavits and the exchange of submissions. On 17 May 2018, she admitted the Homeowner Proceedings to case-management and granted liberty to apply to the parties thereto (including the third parties).

The High Court judgment in the strike out motion

34. Roadstone's motion to strike out and/or alternatively stay the Plenary Proceedings came on for hearing over on 30 May, 31 May and 1 June 2018. In tandem with this motion, Murphy J. also had before her the resumption of Ballymore's inspection application against Roadstone. The inspection application did not in fact resume on 30 May, having been overtaken by the motion to strike out.

35. On 26 June 2018, Murphy J. delivered her judgment on the motion to strike out/stay the Plenary Proceedings. At the outset she referred to the written judgment she had delivered on 28 July 2017 in respect of the inspection motions wherein she had noted as follows:

> "Finally, the Court observes that there are now before the courts in excess of 80 claims arising from this development at Drumnigh Wood, 50 being subrogated claims of Liberty Insurance and the balance being claims against these parties to this application. While in the normal course applications for contribution or indemnity follow the determination of the main action, in this case, it may well be in the interests of the efficient administration of justice and the significant minimising of costs for all the parties, were the issue between the plaintiffs and the defendants in this case determined first. In the Court's view, this would allow for the more efficient conduct of the 80 plus outstanding claims because the party ultimately found liable could take control of all claims and defend them or settle them as it considered appropriate."

36. She noted that she had been asked on 24 November 2018 to engage in case-management of the Plenary Proceedings and Roadstone had agreed to that course "without demur". She had indicated on 28 January 2018 that she would manage the proceedings to trial.

37. The trial judge next addressed the arguments canvassed by Roadstone in aid of its application to have the Plenary Proceedings struck out or stayed. She stated:

> "It is Roadstone's claim that Section 27 of the Civil Liability Act 1961… expressly provides that a party having served a third party notice on a person against whom a claim for contribution is made is not entitled to claim contribution except under the third party procedure. They contend that in circumstances where [Ballymore] have

joined [Roadstone] …as third parties to three of the homeowner proceedings and have indicated their intention to join [Roadstone] to the remainder of the homeowner proceedings [Ballymore] are not entitled to claim contribution except in the third party proceedings in the homeowner proceedings."

38. She noted Roadstone's contention that litigating Ballymore's claim for indemnity and contribution in the Plenary Proceedings rather than in the third party proceedings had caused Roadstone significant procedural prejudice. She observed that on 10 May 2018 she had acceded to an application by Ballymore to take the Homeowner Proceedings into case-management.

39. Murphy J. went on to state:

"Having considered the detailed written and oral submissions of the parties the Court has come to the conclusion that Roadstone's application is without merit.

The core of Roadstone's application is that the service of a third party notice in the Homeowner Proceedings pursuant to Section 27(1) of the Civil Liability Act… by operation of law renders these proceedings moot. Everyone is agreed that the policy underlying Section 27(1)…is to discourage multiple proceedings arising from the same set of facts. There is clearly an irony in the fact that Roadstone seeks to use a statutory provision designed to avoid multiplicity of actions to in fact insist upon a multiplicity of actions, perhaps as many as 35, to resolve the issue of liability for pyritic heave in 30 to 35 houses in the Drumnigh Estate.

The statute is in fact silent as to the effect of the service of a third party notice on proceedings for contribution or indemnity which are already in existence and which preceded in time the third party notice."

40. She noted that the Plenary Proceedings have been ongoing for more than two years and that Roadstone had fully engaged in them until 24 April 2018 "without demur knowing

that [Ballymore's] claim was for contribution and indemnity in respect of the claims of third parties".

41. Murphy J. disagreed with Roadstone's contention that they did not have *locus standi* to maintain the application to strike out the Plenary Proceedings until a third party notice was in fact served on them, in circumstances where the Plenary Proceedings "were clearly proceedings for contribution or indemnity".

42. She referred to the view she had expressed in the inspection motion judgment of the desirability of determining liability for pyritic heave in one action fought between the parties who had the resources and expertise to mount such an action, thereby establishing which of the parties is liable to the homeowners whose houses have been damaged by pyritic heave. She stated:

> "Roadstone did not demur, nor did Roadstone at any stage indicate its current position that the proper forum in which the litigate the third party issues is in the individual homeowner proceedings."

43. Murphy J. noted that in those circumstances the court had two options, to continue the Plenary Proceedings in which Ballymore would have the burden of proving that each house in the Homeowner Proceedings is affected by pyritic heave and that Roadstone, Murphy Concrete and William Miley or one or other of them was liable for that damage. Alternatively, she could stay the Plenary Proceedings and oblige each of the affected homeowners to bring an individual case to establish the fact of pyritic heave and the loss and damage arising therefrom. She noted that "in that scenario Ballymore would issue and serve third party proceedings on each of these Defendants and when the pleadings were closed the Court would then have a discretion under [Order16 RSC] to determine first of all liability between Ballymore and these Defendants". She opined:

> "It seems to the Court to be an extremely wasteful of resources to undertake such a convoluted and expensive process when the very issue that requires to be determined can be determined in the existing plenary proceedings. Furthermore the Court observes that the affected homeowners are blameless in this circumstance and deserve to have the damage to their homes remediated and should not be forced unnecessarily into the stress, anxiety and expense of maintaining individual proceedings against the Plaintiff in this action and/or the Defendants in this action."

44. Murphy J. addressed Roadstone's submission that they were procedurally disadvantaged in the Plenary Proceedings because of their claim that they did not have a right to exercise inspection of the damaged homes as they would have in third party proceedings, by noting that having taken the Homeowner Proceedings into case-management, "the Court will ensure that Roadstone gets all appropriate access to allow them to contest Ballymore's claim against them." She addressed the claim that by allowing Ballymore to proceed with the Plenary Proceedings and at the same time maintain third party proceedings in the Homeowner Proceedings was to give Ballymore "two bites of the cherry", by stating that that the Plenary Proceedings "will determine all issues between Ballymore and Roadstone. There will be no third party hearing in the homeowners' cases because liability and the level of contribution will already have been determined in these proceedings." She went on to state:

> "[T]he Court considers that Ballymore cannot maintain in these plenary proceedings a claim for contribution or indemnity in respect of all of the 35 houses and then also maintain a third party action. It seems to the Court that the procedural difficulty that may arise could be resolved by the homeowners simply joining the Defendants in the plenary proceedings as co-defendants in the homeowner proceedings. The Court proposes to hear from the lawyers for the

homeowners before deciding finally what should happen to their claims while this action is proceeding. The Court can readily appreciate that they will be anxious to have their proceedings ready to go once the issue of liability is determined between Ballymore and Roadstone."

45. Murphy J. concluded as follows:

"To summarise therefore these proceedings predate the third party notices in the Homeowner Proceedings and as such they are not in the Court's view on a proper interpretation of the statute caught by the issuing of third party proceedings. Secondly, the Court accepts the submission of Ballymore that Roadstone by their conduct are estopped from challenging these proceedings. However, the Court also holds that Roadstone is correct in its assertion that Ballymore cannot maintain these proceedings and also maintain third party proceedings. Ballymore set out in these proceedings to seek the statutory remedy of contribution on the basis that the quarry owners are concurrent wrongdoers and also to seek an indemnity arising from the alleged negligence, breach of contract and breach of statutory duty of the quarry owners. Having done so they cannot then seek the same relief of the individual homeowners' claims. Their rights such as they may be will be established in these proceedings and those rights will be binding as between Ballymore and Roadstone and the other quarry operators in respect of the individual homeowner proceedings. Therefore, it appears to the Court that it is neither necessary nor appropriate for Ballymore to issue and serve further third party notices in those proceedings."

46. Notwithstanding the ruling that no further third party proceedings be advanced, on 26 July 2018 Ballymore sought leave to issue and serve third party notices in respect of other

statements of claims which had by then been delivered in the homeowners' cases. This was refused by Murphy J.

The resumed motion for inspection

47. The previously deferred inspection motion duly resumed on 19 and 20 July, 20 September and 24 October 2018. Judgment was delivered on 21 February 2019. Murphy J. ordered inspection of Roadstone's quarries. While not taking issue with the Order for inspection *per* se, Roadstone have appealed the requirement on them to identify the parts of their quarries from which it is said material might have been supplied to Ballymore. That appeal is not the subject of this judgment.

Leave to appeal to the Supreme Court denied to Roadstone in respect of Murphy J.'s refusal to strike out the Plenary Proceedings

48. On 27 July 2018, Roadstone filed their appeal of Murphy J.'s judgment and Order in the application to strike out to this Court. On the same day, they filed an application for a leap frog appeal to the Supreme Court, arguing that the interpretation of s.27(1) of the 1961 Act involved a matter of general public importance and that there were exceptional grounds justifying the appeal. It was asserted that the issue would be the same even after an appeal to this Court.

49. On 28 October 2018, the Supreme Court refused leave to appeal. In its Determination it noted that the Plenary Proceedings have been case-managed since at least November 2017, following the High Court having earlier heard and determined the first of the inspection motions over a three-day period. It also noted that the issue in respect of which leave to appeal was sought arose because statements of claim in three homeowner cases had been delivered in December 2017 and February 2018, following which Ballymore had issued the motion in the Homeowner Proceedings seeking to serve third party notices on Roadstone, Murphy Concrete and William Miley in those proceedings.

50. The Supreme Court opined there was no doubt that the question of the interpretation of s.27 of the 1961 Act is itself an issue of law and that in as much as that section is regularly invoked, might be said to be of general importance at least as a general proposition. It observed, however, that it was doubtful that the issue that arose was one which was likely to occur stating:

> "The facts of this case are highly unusual. Furthermore, it is inconceivable that the end point of these proceedings or the homeowner proceedings, however structured, would not be the trial of an issue between the plaintiffs and defendants hereto as to indemnity. It is not clear what practical or even tactical disadvantage will be suffered by the defendants in this case as a result of the ruling of the trial judge. This is a decision made not only in an interlocutory matter but effectively in the course of case management. The trial judge has also indicated that steps will be taken to avoid any potential prejudice to the position of the defendants by reason of the manner in which the case proceeds."

51. In response to Roadstone's appeal to this Court, Ballymore have cross-appealed the holding of the High Court that they cannot maintain both the Plenary Proceedings and the third party proceedings and the holding that no further third party notices should be issued and served. They further appeal the reservation of the costs to the trial of the action in the Plenary Proceedings, asserting that they should have been awarded the costs of the strike out motion.

Roadstone's appeal

52. Arising from the parties' submissions, the issues to be decided in this appeal are:

- Whether the question of the construction of s.27(1)(b) of the 1961 Act is properly a matter to be determined in an application to strike out or stay the Plenary Proceedings;

- Whether the trial judge erred in finding that, by reason of their conduct in the Plenary Proceedings, Roadstone were estopped from maintaining that the issue of contribution and indemnity should not be determined in those proceedings.

Discussion

Roadstone's reliance on s.27(1)(b) of the 1961 Act as precluding the maintenance of the Plenary Proceedings

53. To put the issues which are in contention between the parties into context, it is instructive to set out the statutory basis for Ballymore's indemnity or contribution claim against Roadstone and the third and fourth defendants, as made in the within proceedings.

54. This is found in Part III of the 1961 Act. As identified by McMahon and Binchy, Law of Torts (4th Ed.) at para. 4.03, three principles underlie Part III of the 1961 Act:

(i) Subject to the rule that the plaintiff cannot recover more than the total amount of the damages he has suffered, the injured plaintiff must be allowed full opportunity to recover the full compensation for his injuries from as many sources as possible;

(ii) Concurrent wrongdoers should be entitled to recover fair contributions from each other in respect of damages paid to the plaintiff; and,

(iii) All matters relating to the plaintiff's injuries should as far as possible be litigated in one action.

55. A "wrong" for the purposes of the 1961 Act includes a tort, a breach of contract or breach of trust, whether intentional or not.

56. The entitlement to contribution is provided for in s.21:

> "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."

The amount of the contribution recoverable:

> "…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." (s.21(2))

57. Section 27 of the 1961 Act provides, in relevant part:

> "27 (1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part—
>
> (a) shall not, if the person from whom he proposes to claim contribution is already a party to the action, be entitled to claim contribution except by a claim made in the said action, whether before or after judgment in the action; and
>
> (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 contribution is claimed."

As noted by Kerr, Civil Liability Acts (5th Ed.), s.27 is designed to ensure that, where practicable, claims for contribution will be made and determined in the injured person's action.

58. Section 31 provides for the time limits for an action for contribution, that is "within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater."

59. The objects of the 1961 Act were explained by Walsh J. in *Gilmore v. Windle* [1967] I.R. 323:

> *"In my view the object of the Act of 1961 was to simplify litigation and to avoid multiplicity of actions. That the issue of a third-party notice may result in some complexity in a particular action is something which can always arise with that procedure… In the present case it is particularly desirable to follow the statutory policy of having, so far as is possible, the same tribunal to deal with all the issues so as to avoid the danger of different findings on the facts in issue, such as the nature of the defect, the date from which it existed, the knowledge of the defendant and of the third-party, and whether a warranty was given."* (at pp. 332-333)

60. In the same case, O'Keeffe J. opined that s.27 of the 1961 Act *"is clearly intended to ensure that, as far as possible, all questions relating to the liability of concurrent wrongdoers (and here I include persons who may be concurrent wrongdoers) should be tried in a single proceeding…"* (at p. 334)

61. He further opined, at pp.336-337:

> *"At the same time a defendant, seeking contribution under the Act, is compelled by sub-s. 1 (b) of s. 27 to serve a third-party notice, and, if he does not do so, the court may in its discretion refuse to make an order for contribution. The purpose of the provision would seem to be to encourage the bringing of claims for contribution by third-party proceedings, rather than by independent actions, and so to have all questions arising for determination disposed of in a single proceeding. Paragraph (b) of sub-s. 1 of s. 27 provides that a defendant, having served a third-party notice, shall not be entitled to claim contribution except under the third-party procedure."*

62. The desirability of avoiding a multiplicity of actions was also noted by Murphy J. in *Molloy v. Dublin Corporation* [2001] 4 I.R. 52. It was more recently commented on in *Kenny v. Howard and HSE* [2016] IECA 243, where Ryan P. explained the purpose of s.27(1)(b) as follows:

> *"… the clear purpose of s.27(1)(b) is to ensure as far as possible that all legal issues arising out of an incident are disposed of within the same set of proceedings".* (at para.17)

In this regard, he was echoing the *dictum* of Denham J. in *Connolly v. Casey* [2000] 1 I.R. 345 who in turn had looked back to *Gilmore v. Windle.* Ryan P. went on to note that the other object of s.27(1)(b) *"was to protect the plaintiff's position at the same time as ensuring that all the appropriate other parties are before the court in the same set of proceedings."* (at para. 18)

63. As was made clear in *Buckley v. Lynch* [1978] I.R. by Finlay P. (at p. 10), and by the Supreme Court in *Board of Governors of St. Laurence Hospital v. Staunton* [1990] 2 I.R. 31, s.27(1)(b) does not preclude a defendant from bringing a claim for contribution by separate action. If, therefore, a defendant does not serve a third party notice, they may bring a separate claim for contribution or indemnity. In that event, however, the court

reserves a discretion to refuse contribution if it thinks it appropriate to do so. As explained by Murphy J. in *Molloy v. Dublin Corporation* [2001] 4 I.R. 52:

> *"...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 1961 Act 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."* (at p.56)

64. Similarly, in *ECI v. McBauchemie* [2007] 1 I.R. 156, Geoghegan J. determined that the second sentence of para.(b) of s.27(1) must necessarily lead to a conclusion that a claimant who did not serve a third party notice as soon as was reasonably possible was not necessarily precluded from making an indemnity or contribution claim by separate action but such claim could be refused as matter of discretion.

65. What Roadstone urges on the Court in this appeal is that the trial judge erred (based on her conclusions as to the meaning of s.27(1)(b) of the 1961 Act) in deciding not to strike out the Plenary Proceedings and thereafter allow the indemnity and contribution issues as between Ballymore and Roadstone to be decided in the third party proceedings.

66. Roadstone argue that the correct construction of s.27(1)(b) means that the Plenary Proceedings are bound to fail and that, accordingly, Ballymore must go down the path of the third party procedure they have latterly invoked (where they can make not only their claim for contribution under the 1961 Act but all their other claims for damages based on contract and negligence). This, Roadstone say, is the only legal path (as well as the

preferred path) given the circumstances of this case. It is submitted that Ballymore being entitled to pick and choose, namely by opting out of the third party proceedings and reverting to their indemnity proceedings, is contrary to the policy underlying both the 1961 Act and Order 16 RSC.

67. Consideration of Roadstone's arguments argument requires, firstly, looking at what is at issue in the Plenary Proceedings. They have been commenced on the premise that if Ballymore is found to have to pay damages to the homeowners in the Homeowner Proceedings, they are entitled to collect those damages from Roadstone (and/or Murphy Concrete and William Miley), if the latter are found to be liable, either under the 1961 Act contribution claim and/or by way of common law claim for indemnity/ breach of contract. The proceedings also seek damages for negligence, damages for misrepresentation, damages for breach of duty and damages for unlawful interference with economic interest. All of the claims (save for the claim for contribution under the 1961 Act) are common law claims which are available to Ballymore to pursue and which have been pursued.

68. Turning next to the Homeowner Proceedings, the statutory and procedural framework for an application to join a third party to proceedings for the purpose of claiming indemnity and contribution is provided for in s.27(1)(b) and Order 16, r. 1 RSC, respectively. Order 16, r. 1 RSC is permissive in its terms and confers a discretion on the court to grant liberty to issue and serve a third party notice. Undoubtedly, Ballymore have invoked the third party procedure in the Homeowner Proceedings. Order16, r.1 RSC is not limited in its scope to claims for contribution or indemnity under the 1961 Act. It extends to claims for contractual indemnity or damages in contract or tort, as is clear from the decision in *Staunton v. Toyota (Ireland) Limited* (Unreported, High Court, 15 April 1988). In *Gilmore v. Windle*, O'Keeffe J. had likewise opined that that "*paragraphs (b) and (c) of Order 16, r. 1, are now wide enough to cover a claim of this nature"*.

69. As is clear, Ballymore's common law claims are not just made in the Plenary Proceedings but also in the third party notices which they have served on Roadstone in the Homeowner Proceedings in which they seek "a contribution in the amount of a complete indemnity…" and damages (including exemplary and/or punitive damages) for breach of contract, negligence, misrepresentation, unlawful interference with their economic interests and damages for "breach of the rights of [Ballymore] which are protected by the Constitution…", together with compensation consequent on the unjust enrichment of the third parties.

70. The principal proposition being advanced on behalf of Roadstone is that once Ballymore identified and invoked s.27(1) of the 1961 Act to issue and serve third party notices in the Homeowner Proceedings, on the proper construction of s.27(1)(b), Ballymore are statutorily prohibited from maintaining the Plenary Proceedings. Roadstone's further position is that even if no statutory claim for contribution had been made in the Plenary Proceedings, once such a claim has been made in the third party proceedings, s.27(1)(b) would still give a basis for striking out the Plenary Proceedings.

71. Roadstone contend that the effect of allowing the Plenary Proceedings continue while third party proceedings are in being is essentially to bypass the provisions of s.27(1)(b) of the 1961 Act and thus thwart the primary objective of s.27 which is the avoidance of multiplicity of actions and the costs associated therewith.

72. It is submitted that the trial judge erred in finding that Roadstone's application to strike out had no merit and in stating that the 1961 Act was silent as to the effect of a third party notice on proceedings for indemnity and contribution already in existence. Roadstone say that it was wrong of Murphy J. to conclude that as the Plenary Proceedings predate the third party notices they are not caught by the issue of the third party notices. Counsel argues that the 1961 Act is clear, once a third party notice is served, a claimant is not then

entitled to proceed by way of indemnity proceedings. Accordingly, he says that the trial judge erred in failing to have regard to the provisions of s.27(1)(b) of the 1961 Act and in failing to strike out, or at least stay, the Plenary Proceedings once third party notices were issued and served by Ballymore on Roadstone in the Homeowner Proceedings. Roadstone also argue that the trial judge's conclusion that allowing the third party procedure to progress instead of the Plenary Proceedings would be "convoluted" and "expensive" is misconceived in circumstances where a distinct and separate issue for each house is required to be determined.

73. Roadstone also contend that it cannot be the case that the 1961 Act can be circumvented simply by issuing proceedings claiming indemnity or contribution before the homeowner plaintiffs institute proceedings. They assert that Ballymore's approach is inconsistent with the decisions of the Supreme Court in *Staunton* and *ECI.* It is also posited that an order striking out or staying the Plenary Proceedings would visit no prejudice on Ballymore, in light of Roadstone's willingness to have Ballymore transpose the particulars in the Plenary Proceedings, as well as the fruits of the inspections that have taken place, to the third party proceedings.

74. It is a procedural fact that, pursuant to Order 16 RSC, Ballymore made their claim for indemnity or contribution in the Homeowner Proceedings as soon as statements of claim were delivered. Roadstone argue that the actions of Ballymore in obtaining leave in the Homeowner Proceedings to serve third party notices is consistent with their plea, at para. 66 of their defence, that if Ballymore is claiming indemnity or contribution, it should be done by way of third party proceedings. They also argue that it is not an answer to the application to strike out or stay the Plenary Proceedings for Ballymore to assert that Roadstone's objection to the Plenary Proceedings can only relate to the three homeowner cases in which statements of claim had been delivered by March 2018, in circumstances

where post the judgment of the High Court, statements of claim have been delivered in the other 29 homeowners' cases. This, I should observe, in passing, has been at the instigation of Roadstone. Roadstone assert that it was always Ballymore's intention to serve third party notices in the Homeowner Proceedings once statements of claim were delivered, an intention that is presently hindered only by the ruling of Murphy J., against which Ballymore has cross-appealed.

75. It is worth noting that in their defence (delivered on 19 February 2018), Roadstone raise three preliminary objections, none of which objects to the Plenary Proceedings on the basis that they are misconceived or bound to fail. What is set out at para. 66 is a denial that Ballymore were entitled to relief under the 1961 Act or a bare order for indemnity in respect of the third party claims "except by way of third party order for indemnity in the relevant proceedings." It was not there pleaded that Ballymore were precluded by s.27(1)(b) of the 1961 Act from pursing the Plenary Proceedings. It is now in fact conceded by Roadstone that Ballymore are entitled to pursue a bare order for indemnity in separate proceedings. There can, therefore, be no argument but that the Plenary Proceedings were properly brought in December 2015 or that a claim for contribution under the 1961 Act may be brought in such proceedings.

76. In their amended defence, delivered on 19 July 2019, post the judgment under appeal here, Roadstone have pleaded, by way of preliminary objection, that, pursuant to s.27(1)(b) of the 1961 Act, the service by Ballymore of third party notices in the Homeowner Proceedings precludes the maintenance of the Plenary Proceedings.

77. In his oral argument before this Court, counsel for Ballymore describes what is now pleaded by Roadstone in the amended defence as a legal issue more properly for the trial of the action, where it can be argued whether Ballymore's claim for statutory contribution can

be maintained in the Plenary Proceedings or is required to be litigated by way of third party action consequent on their having issued and served third party notices on Roadstone. He contends that it is not appropriate for this Court to rule as to the meaning of s.27(1)(b) in the context of Roadstone's strike out motion in circumstances where the meaning of the proviso is not completely clear, and which requires, therefore, detailed legal argument more appropriate to the trial of the action. Ballymore also assert that the trial judge's conclusion as to the scope of s.27(1)(b) are *obiter.* This is disputed by Roadstone.

78. Whether *obiter* or not, the trial judge concluded that on a true construction of s.27(1)(b), it did not reach back to claims already in existence prior to the issuing and service of the third party proceedings, effectively concluding that s.27(1)(b) was not applicable to the circumstances of the case by reason of the fact that the Plenary Proceedings had commenced before the issuance of the third party notices. For reasons that will become apparent below, I do not deem it either necessary or appropriate to express any view on whether such a conclusion was correct.

79. The salient issue here is whether it was open to Roadstone to make their argument as to the true construction of s.27(1)(b) in the course of a motion to strike out the Plenary Proceedings. To my mind, notwithstanding that Ballymore did not, either in the High Court, or in their written submissions before this Court, oppose Roadstone's interpretation of s.27(1)(b) on the basis that any such argument fell to be determined at the trial of the action, the construction which Roadstone seek to put on s.27(1)(b) is not a matter for determination in a motion to strike out, in the absence of Roadstone being in a position to point to established legal authority for the proposition they advance. They have not done so, in my view.

80. It is noteworthy that s.27(1)(b) of the 1961 Act itself does not provide any procedural mechanism for proceedings to be struck out. To my mind, this is significant in light of the reliefs sought at para.1 of Roadstone's notice of motion. Furthermore, Order 16 RSC (invoked by Ballymore in the Homeowner Proceedings for the purpose of instituting the third party proceedings) has no application in the Plenary Proceedings. While Roadstone may invoke Order 16 *qua* third party in the Homeowner Proceedings, they cannot rely on that procedural rule to further their cause in respect of how s.27(1)(b) of the 1961 Act is to be interpreted *vis a vis* the Plenary Proceedings.

81. By way of alternative to the reliance placed on s.27(1)(b) as the basis to strike out or stay the proceedings, Roadstone rely on Order 19, r.28 RSC, which provides that "[t]he court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action […] and in any such case or in case of the action[…] being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed […] as may be just." Given, as effectively conceded by Roadstone, Ballymore are entitled to maintain a separate action to claim indemnity or contribution (as opposed to only invoking third party proceedings), and where no argument is canvassed that the Plenary Proceedings are not properly pleaded, Roadstone could hardly have expected to have any success in relying on Order 19, r.28 since *"an application under the rules is based on a contention that the case as pleaded does not disclose a cause of action"* (emphasis added), (per Clarke J. in *Moylist Construction Limited v. Doheny & Ors* [2016] IESC 9).

82. We are left then with the further alternative relief claimed by Roadstone, namely the invoking of the inherent jurisdiction of the court to strike out the action on the basis that it discloses no reasonable cause of action or is bound to fail. Here, the notice of motion seeks

to have the Plenary Proceedings struck out on such a basis. For the reasons just outlined, Roadstone cannot establish that *as pleaded* the Plenary Proceedings are bound to fail. That leaves the potential for this Court to strike out the proceedings on the basis that there is no prospect of the plaintiff succeeding.

83. The jurisdiction invoked by Roadstone is one which the court must exercise with caution. In *Barry v. Buckley* [1981] I.R. 306, the High Court (Costello J.) observed that *"this jurisdiction should be exercised sparingly and only in clear cases"*. In order to succeed, Roadstone (on whom the onus lies) have to establish that the claims made by Ballymore in the Plenary Proceedings are effectively unsustainable i.e. bound to fail. As said by Clarke J. (as he then was) in *Keohane v. Hynes* [2014] IESC 66:

> *"6.5 It is important, for the avoidance of any doubt, that the overall principle be clearly stated. As pointed out in many of the authorities, not least in the judgment of Murray J. in Jodifern, the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However, as again noted by Murray J. in Jodifern, whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail <u>is not a means for inviting the court to resolve issues on a summary basis</u>"* (emphasis added).

84. In *Jeffrey v. Minister for Justice* [2019] IESC 27, [2020] 1 I.L.R.M. 67, Clarke C.J. considered the appropriateness of determining an issue of law in an application to strike out. He stated:

> *"7.4 It is now well settled that, in the context of a summary judgment motion in which a plaintiff seeks judgment in summary proceedings, a court can resolve straightforward issues of law or the interpretation of documents, where there is no real risk that attempting to resolve those issues within the limited confines of a summary judgment motion might lead to an injustice. By analogy, I would not rule out the possibility, without so deciding, that it may be possible to resolve a simple and straightforward issue of law within the confines of a Barry v. Buckley application. However, even if that should be possible, it could only be appropriate where the issue was very straightforward and where there was no risk of injustice by adopting that course of action...*
>
> *[A] Barry v. Buckley application cannot be used to dismiss a case simply because it might be said that there is a strong defence. Rather, such applications can only be used in cases where it is clear that the claim is bound to fail…"*

85. In my view, manifestly, nothing canvassed by Roadstone comes within the bound to fail threshold as enunciated in *Barry v. Buckley* or *Keohane v. Hynes*, or meets the *"straightforward issue of law"* criterion referred to by Clarke C.J. in *Jeffrey*. Crucially, Roadstone cannot point to any definitive legal authority for the proposition that once a third party notice is served, s.27(1)(b) precludes the maintenance of proceedings which in fact *precede* the issuing and service of the third party notice. As said by counsel for Ballymore, in effect, what Roadstone want is for the judgment of this Court to be the authority for the proposition they advance. I agree with counsel that it is entirely inappropriate that such question would be determined in a motion to strike out proceedings.

86. Thus, I would observe, at this juncture, that insofar as the trial judge refused the application to strike out the Plenary Proceedings on the basis of the construction she put on s.27(1)(b), her view as to the applicability of s.27(1)(b) to the present case should more properly have awaited the trial of the action, where the question of the true meaning of s.27(1)(b) may be considered, should Roadstone continue to be minded to pursue the issue.

87. I should also add however that my overall impression from the judgment of the learned trial judge is that there were more prevailing factors than her construction of s.27(1)(b) which informed her decision to refuse strike out the proceedings, namely Roadstone's conduct over the course of the litigation to the date of the issuing of the strike out motion, and the avowed intention of the trial judge to continue to case manage both the Plenary Proceedings and the Homeowner Proceedings, which she had committed to some months earlier. These themes are at the heart of the trial judge's judgment and are addressed later in this judgment.

88. Apart altogether from the inappropriateness of determining a novel and difficult issue of law in an application to strike out, there is another substantial reason as to why Roadstone's application to strike out is without merit. It is important to recall that what is being alleged against Roadstone in the Plenary Proceedings in the context of the claim for contribution under Part III of the 1961 Act is that Roadstone was negligent *vis a vis* the *homeowners* in the Homeowner Proceedings. Ballymore's claim for contribution under Part III of the 1961 Act arises where Ballymore has appropriated to themselves the claim that the homeowners would have against Roadstone, i.e. a claim for negligence. This concept is explained in *Defender Limited v. HSBC France* [2020] IESC 37, [2021] 1 I.L.R.M. 1.

89. The issue in the contribution action at play in *Defender* was not the respective legal rights and duties of the range of players in that case, rather it related solely to the issues that follow once it was accepted that the claim made by Defender was that HSBC Institutional Trust Services (Ireland) Limited ("HSBCTIS") were negligent in failing to advise Defender of the risk of fraud by Bernard L Madoff Investment Securities LLC ("BLMIS")-a Bernie Madoff owned company. As held by O'Donnell J., *vis a vis* Defender, HSBCTIS and BLMIS were concurrent wrongdoers in respect at least of the damage alleged to flow from the alleged fraud. It was that right of Defender to make the claim that gave rise to the possibility of a claim by the concurrent wrongdoers for contribution under the 1961 Act. As articulated by O'Donnell J:

> *"The nature of what I think can be usefully described as a CLA contribution claim is important. It is a separate cause of action which, while intended to be capable of normally being conducted within the original proceedings by simple pleadings which may themselves extend no further than the delivery of a third party notice, or a notice of indemnity in contribution, is nevertheless capable of being conducted as separate proceedings with fully developed pleadings. The cause of action is not, however, related to anything that either concurrent wrongdoer is alleged to have done to the other. It relates instead to what one concurrent wrongdoer claims the other concurrent wrongdoer did to the plaintiff."* (at para. 13)

At para. 18, O'Donnell J. explained that in more complex cases there will often be other claims arising from the pre-existing relationship of the parties. He stated:

> *"…it is conceivable that other claims will arise between the defendants which would be sought to be tried alongside the plaintiff's claim against the defendants, some of which may give rise to claims for indemnity or contribution. In the simplest*

case, this will arise where one defendant claims a right to a contractual indemnity from the other in respect of the claim brought against the first defendant. Such claims are not, however, controlled by the CLA…A CLA contribution claim arises once the claim made by the plaintiff gives rise to the possibility that there are concurrent wrongdoers (whether sued by the plaintiff or not) and allows the defendant sued… to, at least provisionally, conscript the plaintiff's claim against [the second defendant], whether made by the plaintiff or not, to attempt to obtain contribution from [the second defendant]. The complex mechanism of the CLA, insomuch as it deals with concurrent wrongdoers, is designed to manage the possibility of such claims. While the Act, on occasion, takes account of the existence of the possibility of other claims…the focus of the Act is on the manner in which a CLA claim arises, may be made, and may be resolved."

90. At para. 123, O'Donnell J. made clear that what s.27(1) covers is a contribution under Part III of the 1961 Act:

"… it is important to remember that Part III is intended to regulate the position of CLA claims for contribution and indemnity: that is, claims that arise only by virtue of the fact that the parties are concurrent wrongdoers."

91. In reliance on the *dictum* of O'Donnell J. in *Defender,* Ballymore submit that the only claim (assuming Roadstone's interpretation of s.27(1)(b) to be correct) that could conceivably be precluded from being prosecuted in the Plenary Proceedings once a third party notice has been issued and served is the statutory claim for contribution. On the other hand, counsel for Roadstone argues that that proposition is far from clear. In support of his argument, he points to the fact that while s.27(1) of the 1961 Act refers to "a claim for

contribution under this Part…", noticeably, the phrase "this Part" is absent from subs. (a) and (b) of s.27(1).

92. I am not persuaded, however, that Roadstone's latter argument is sufficient for the Court to attribute any wider scope to Part III of the 1961 Act than that described by O'Donnell J. in *Defender*. Based on what O'Donnell J. says is the remit of Part III of the 1961 Act, I am of the view that the provisions of s.27(1)(b) cannot preclude Ballymore's claim for indemnity under the head of damages for breach of contract, negligence or misrepresentation, as s.27(1)(b) does not purport to govern these common law actions. In other words, the common law claims are claims over which the 1961 Act has no reach. Thus, even if Roadstone are minded to pursue the construction of s.27(1)(b) at trial, and if their argument as to how s.27(1)(b) should be construed were to prevail, it could only result in the statutory claim for contribution being struck out, leaving the balance of the claims in the Plenary Proceedings intact.

93. Irrespective of Ballymore's reliance on *Defender,* counsel for Roadstone argues that once a claim for contribution under the 1961 Act is made, then the policy underlying the 1961 Act must prevail. He posits that whatever the legal basis on which it is asserted Roadstone should contribute, it should all be determined in one action, not split between two actions.

94. While I accept that the policy objective of the 1961 Act is to avoid multiplicity of actions, *Defender* clearly identifies that the scope of Part III of the 1961 Act relates to a contribution claim under the 1961 Act, and that Part III of the Act does not apply save to such a contribution claim. In my view, that principle, coupled with the fact that Ballymore are entitled to maintain a claim for indemnity in respect of a claim for damages for breach of contract (a claim which is not touched upon by the provisions of the 1961 Act), means

that the Plenary Proceedings cannot be considered as being bound to fail in the sense contemplated by *Barry v. Buckley* and the subsequent jurisprudence. Even if I am incorrect in so deciding, it remains the case that the manner in which the trial judge directed how the issues of indemnity and contribution as between Ballymore and Roadstone (and the liability of Ballymore to the homeowners) are to be determined, effectively echoes the objective of Part III of the 1961 Act, something that should afford Roadstone comfort, a topic to which I will return in due course.

95. At best, therefore, even if this Court had deemed it appropriate to rule on the scope of s.27(1)(b) in the context of an appeal of a motion to strike out proceedings (which it has not) and Roadstone had been found to be correct in their interpretation of s.27(1)(b), the most they could have expected to achieve is that Ballymore's claim under the 1961 Act would be struck out. That, however, is not the relief being sought by Roadstone– they contend that the Plenary Proceedings *per se* are not maintainable. Insofar as it is Roadstone's proposition that s.27(1)(b) precludes all of Ballymore's claims and not just the issue of a statutory entitlement to indemnity or contribution, that proposition, for the reasons I have already outlined, is entirely misconceived.

96. Furthermore, assuming Roadstone's s.27(1)(b) argument was ultimately to prevail at trial and the statutory contribution claim were to be surgically removed from the Plenary Proceedings, thereby leaving Ballymore's common law claims to be pursued in those proceedings, that, undoubtedly, in my view, would in fact result in the very duplication which the High Court judge was at pains to ensure would not occur. This is a further reason as to why this Court should not interfere with the manner in which the trial judge has exercised her discretion in regulating how the litigation in issue here should proceed, a

matter which was entirely appropriate to the trial judge's case management function. This is discussed later in the judgment.

97. Of course, the case law is replete with warnings that a defendant who chooses not to institute third party proceedings and instead claims indemnity and contribution post the determination of the main proceedings is subject to the discretion of the court as to whether an order for contribution will be made in any proceedings the defendant might institute. However, as is by now well-rehearsed, Ballymore commenced the Plenary Proceedings prior to any proceedings having been instituted in the Homeowner Proceedings. Moreover, they progressed those proceedings over a period of more than two years prior to Roadstone's motion to strike out, the motion itself clearly precipitated by Ballymore having issued and served third party notices in the Homeowner Proceedings.

98. In the course of the appeal hearing, counsel for Roadstone surmised that Ballymore's objective in issuing and serving the third party notices and maintaining an entitlement to serve further third party notices, was to preserve their position in case a finding would be made in the Plenary Proceedings that they should have pursued their claim for contribution *via* the third party procedure. That may well have been Ballymore's strategy. Their letter of 9 March 2018 refers to their issuing and serving third party notices "out of an abundance of caution". It is of note that, as acknowledged by counsel for Roadstone at the appeal hearing, if Ballymore had not served any third party notices at all, and simply relied on the Plenary Proceedings as a vehicle through which to claim indemnity or contribution under the 1961 Act, Roadstone would not have been able to make the objection they now make to the maintenance of the Plenary Proceedings. It is also noteworthy that counsel for Roadstone accepted that if the decision of Murphy J. had been made solely in the exercise of her case management powers, Roadstone would have

no basis to impugn the trial judge's decision. In my view, these concessions are significant in the overall consideration of the issues in this appeal, again, something to which I will return in due course. Suffice it to say, at this juncture, that for the reasons outlined above, Roadstone have not established that the Plenary Proceedings fail to disclose a reasonable cause of action, or are bound to fail, either by reference to Order 19, r.28 RSC or pursuant to the inherent jurisdiction of the Court.

Did the trial judge err in concluding that Roadstone were estopped from seeking the reliefs claimed in the notice of motion?

99. Apart altogether from her rejection of Roadstone's s.27(1)(b) argument, the trial judge separately found that Roadstone were estopped from challenging the maintenance of the Plenary Proceedings by reason of their conduct in the litigation up to the time of the issuing of the motion to strike out the proceedings. Roadstone assert that the trial judge erred in so concluding. It is to this issue I now turn.

100. The first observation I would make is that Roadstone's motion to strike out or stay the Plenary Proceedings was brought more than two years after that litigation commenced.

101. Secondly, once served with the Plenary Proceedings, Roadstone did not immediately respond with the claim that issues of indemnity and contribution should await third party proceedings in the Homeowner Proceedings. This is surprising given that from as early as 4 November 2015, they were on notice that Ballymore reserved their right to bring third party claims against Roadstone. It is clear from Roadstone's own affidavit evidence that, from the outset, they were aware that "the principal relief" (as described by Mr. Lenny)

being sought by Ballymore was the indemnity claimed in para. 1 of the prayer for relief in the (now amended) statement of claim. A declaration in the same terms is sought at para. 1 of the general endorsement of claim in the plenary summons which was served on Roadstone on 25 May 2016. Accordingly, when the original statement of claim was delivered on 24 November 2016, Roadstone were more than aware that Ballymore had "fully reserved" "the right …to make applications in due course for, *inter alia,* Orders joining each of the Defendants to the Homeowner Proceedings".

102. What transpired between May 2016 and April 2018 in terms of Roadstone's engagement with the Plenary Proceedings is already recorded earlier in this judgment. Certain aspects of that engagement, however, merit consideration, in particular, the various procedural devices employed by Roadstone from January 2017 to March/April 2018 and their active opposition to Ballymore's application for inspection of their quarries.

103. By letter dated 5 January 2017, Roadstone was informed by Ballymore that a motion for judgment in default would issue if their defence did not issue within 21 days. Roadstone's response was not to file their defence with preliminary objection that Ballymore's proceedings were misconceived by reason of their avowed intention to join Roadstone as a third party to the Homeowner Proceedings. Rather, on 24 January 2017, Roadstone served a detailed notice for particulars on Ballymore.

104. Following replies to same by Ballymore on 21 April 2017 and a further threat of a motion for judgment in default of defence, Roadstone's response again was to serve a detailed notice for further and better particulars. This, to my mind, is evidence of a party clearly and fully engaging with the substantive claims being made in the Plenary Proceedings.

105. Reference has already been made to the three days in May/June 2017 which were devoted to the hearing of Ballymore's inspection motion which had issued a year earlier in June 2016. As recorded in Murphy J.'s judgment of 28 July 2017 in the inspection motion, Roadstone's principal argument was that the inspection sought by Ballymore was premature in the absence of pleadings in the Homeowner Proceedings. As I understand it, there was no mention or hint by Roadstone at the hearing of that motion that the Plenary Proceedings were misconceived. This is despite Roadstone's awareness of Ballymore's by then well-professed intention to join Roadstone as a third party to the Homeowner Proceedings. As already referred to, some thirty affidavits were exchanged prior to the hearing of the inspection motion. Nowhere in the affidavits sworn on behalf of Roadstone was it suggested that the Plenary Proceedings were misconceived or otherwise infirm such that they should be struck out or stayed.

106. Some two weeks or so before the hearing of the inspection motion in May/June 2017, Roadstone issued a motion compelling replies from Ballymore to their notice for further and better particulars. Moreover, they continued to fully engage in their pursuit of further and better replies when that motion came on for hearing on 28 and 29 January 2018, notwithstanding that replies had been delivered by Ballymore in June 2017, followed by supplemental replies in October 2017 and second supplemental replies on 18 January 2018.

107. All this, to my mind, points to a party fully engaged with the substance of the claims being made in the Plenary Proceedings and who were willing to engage every available procedural device, and court time, to defend their position.

108. It will be recalled that Murphy J. also heard Ballymore's motion for judgment in default of defence on 28 and 29 January 2018. Roadstone fully contested that motion, arguing that the delivery of their defence was premature given that replies to their notice

for further and better particulars remained outstanding. As is now abundantly clear, that argument did not prevail before Murphy J. Specifically, in January 2018 Roadstone did not advance the argument that the Plenary Proceedings should be struck out. They duly delivered their defence on 19 February 2018.

109. I have already observed that none of the preliminary objections raised in the defence delivered on 19 February 2018 alluded to the Plenary Proceedings being misconceived or bound to fail or disclosing no reasonable cause of action. The first pleading of s.27(1)(b) as a statutory bar to the maintenance of the Plenary Proceedings was made in Roadstone's amended defence, delivered on 19 July 2019, some sixteen months post the judgment and Order of Murphy J. the subject of this appeal, albeit I accept that Roadstone evinced their reliance on s.27(1)(b) as a basis to strike out the proceedings in their letter of 1 March 2018, followed by their motion which issued on 24 April 2018.

110. By the time the motion to strike out issued, to put it colloquially, a great deal of water had flowed under the bridge, namely the two years of intensive litigation I have endeavoured to describe in this judgment. More importantly, as far as this appeal is concerned, a common thread in the progress of the litigation is the involvement of Murphy J. as the presiding judge (at least from May 2017) in the myriad motions that have issued in the Plenary Proceedings and taken up the time and resources of the High Court. In January 2018, Murphy J. formally took the Plenary Proceedings into case management, declaring that she was going to case manage them to trial. This was put into effect by the various case management hearings she scheduled from March 2018 until she delivered the judgment the subject of this appeal on 26 June 2018. Furthermore, she admitted the Homeowner Proceedings to case management on 17 May 2018. I note, in passing, that since the date of delivery of judgment until the appeal hearing, there were a further eleven case-management hearings conducted by Murphy J.

111. As observed by the trial judge in the course of her judgment, on 24 November 2017 she was requested to engage in case management and hear Roadstone's motion for replies to their notice for further and better particulars as well as Ballymore's motions for judgment in default of defence, a course Roadstone had agreed to "without demur". Similarly, Roadstone "did not demur" when in her judgment of 27 July 2017 in the Hollywood Quarry inspection motion, Murphy J. made reference "to the desirability of determining liability for pyritic heave in one action fought between the parties who have the resources and expertise to mount such an action…".

112. By the time Roadstone's motion to strike out issued, the Plenary Proceedings had been before the High Court on numerous occasions, many of which involved the procedural motions I have already referred to, whose objective was to progress the Plenary Proceedings and distil the substantive claims in issue between the parties. Roadstone fully participated in these processes without the objections or the reservations they now advance.

113. Furthermore, it cannot be denied that when the trial judge came to determine Roadstone's application to strike out or stay the Plenary Proceedings, she had extensive knowledge of all of the prior history in the case. Indeed, this history was incorporated by Roadstone's own solicitor in the affidavit sworn by him grounding the application to strike out the Plenary Proceedings. All of the knowledge which the trial judge had (both from the pleadings and her active case management of the proceedings) was relevant for the purposes of her consideration of Roadstone's application and informed her view that Roadstone "are estopped from challenging [the Plenary Proceedings]".

114. Citing *Grogan v. Ferrum Trading Company Limited* [1996] 2 ILRM 216, Ballymore submit that Roadstone, by their participation in the Plenary Proceedings, have forfeited their right to make the application to strike out and that any contrary conclusion

would be, in the words of Henchy J. in *Corrigan v. The Irish Land Commission* [1977] IR 317, *"obviously inconsistent with the due administration of justice"* and at variance with public policy.

115. Roadstone argue that Ballymore's reliance on this jurisprudence is misconceived in circumstances where the opportunity for Roadstone to apply to strike out the Plenary Proceedings only arose when third party notices were served by Ballymore. It is asserted that in those circumstances, and where Roadstone issued the motion to strike out/stay the Plenary Proceedings as soon as it could thereafter, no estoppel can be said to arise.

116. Firstly, I cannot accept the proposition that Roadstone somehow lacked *locus standi* to bring their application earlier than they did. As I have already observed, they were formally on notice of the indemnity claim since at least May 2016 (and informally from November 2015). They had another opportunity when the inspection motions were heard in May 2017, particularly when one of their arguments was that inspection of their quarries was premature and should more properly await their being joined as a third party in the Homeowner Proceedings when, according to Roadstone, they would have more details about the alleged damage to the individual houses. Yet, despite this, Roadstone took no steps to bring the arguments they now canvas to the attention of the High Court until the April 2018 motion. Moreover, they did not make the argument to Ballymore until they wrote on 1 March 2018.

117. In my view, Roadstone did not require to await any procedural step that Ballymore might take in the Homeowner Proceedings to bring their complaint to the High Court: they were well aware that the Plenary Proceedings were, in the words of Murphy J. "clearly proceedings for contribution and indemnity" and, accordingly, if they wanted to make the case that issues of indemnity and contribution were more properly for third party

proceedings, then that case should have been made well before the two years or more that were spent litigating the Plenary Proceedings, when they had ample opportunity to do so. Moreover, Roadstone must be assumed to have received all the appropriate advices, including that a case could have been made at an early stage to the High Court that that the issues on indemnity and contribution should be decided in the Homeowner Proceedings.

118. Secondly, even if the construction they put on s.27(1) (b) of the 1961 Act is correct, there is ample jurisprudence for the proposition that having participated in the Plenary Proceedings to the extent they did, including delivering a defence without reserving their position, Roadstone cannot now equitably resile from that position by the invocation of the procedural rule set down in s.27(1)(b). This is all the more so given that the rule upon which Roadstone rely can only be invoked in respect of the contribution claim made by Ballymore. Essentially, to paraphrase Henchy J. in *Corrigan v. The Irish Land Commission,* Roadstone *"cannot blow hot and blow cold"*: they *"cannot approbate and then reprobate…[or] have it both ways."*

119. In *Grogan v. Ferrum Trading Co. Ltd.*, what was in issue was estoppel by reason of the active participation by a third party in third party proceedings hence, the opposite to here. That notwithstanding, I consider the approach of Morris J. in that case instructive as far as the present case is concerned. In *Grogan*, the third parties had sought to have the order granting liberty to the second named defendant to issue and serve third party notices set aside. The application was opposed on the basis that the third parties were estopped by their conduct from seeking the relief. This was in circumstances where they had entered an appearance to the third party notice, called upon the defendant to deliver a third party statement of claim and duly entered a third party defence once the third party claim was delivered. In refusing relief, Morris J. opined that by their participation the third parties

had *"forfeited their rights to make application to the Court to have the procedure set aside".* He went on to state:

> *"The delivery of the Defence is, in my view, an election by the Third Party which precludes him thereafter from moving the Court to set aside the Notice."*

120. The words of Morris J. resonate here. Having participated in the Plenary Proceedings to the extent they did until they issued their motion in April 2018, Roadstone cannot now be permitted to engage in a *volte face*. Whether one categorises Roadstone's active participation in the Plenary Proceedings over a two-year period as a basis for the operation of an estoppel or (perhaps more properly) acquiescence on their part to the maintenance of the proceedings, to borrow, in part, the words of Morris J. in *Carroll v. Fultlex International Company Limited* (High Court, 18 October 1995), it would be *"entirely inappropriate"* that Roadstone *"should come to Court seeking to set aside [the Plenary Proceedings] in which they have taken an active part and effectively urge the Court to set at nought the costs and expenses incurred in this procedure"* and then require that issues of indemnity and contribution (which have been the subject of intensive interlocutory orders and case management in the Plenary Proceedings) now be determined in third party proceedings.

121. Thus, in my judgment, for all the reasons set out above, it was open to the High Court judge to determine as she did, namely that Roadstone left it too late to advance their argument, more than two years into the Plenary Proceedings and which included some six days of hearings, between the inspection motion in May/June 2017 involving more than 30 affidavits, and the motion in respect of replies to particulars and judgment in default of defence in January 2018, not to mention the myriad other matters overseen by Murphy J.

up to the time the strike out motion issued and not forgetting the four days debating the strike out motion itself.

New evidence said by Roadstone to be relevant to the appeal

122. In advancing their arguments in the appeal, Roadstone sought to rely on particulars which Ballymore furnished on 12 December 2019 and January/ February 2020 in the Plenary Proceedings. The backdrop to these particulars is as follows. In the first statement of claim, delivered on 24 November 2016, Ballymore pleaded, *inter alia*, that due to the presence of pyritic heave, in order to remediate the houses, it would be necessary to remove and replace the stone infill beneath the ground floor slabs of the houses. Specifically, para. 38 pleads:

> "In order to remediate the houses and related garages, that sustained damage and/or have the potential to sustain damage as a result of being constructed using the stone infill…the stone infill beneath the floor slabs must be removed and replaced." (emphasis added)

123. The amended statement of claim, delivered on 18 April 2019 (some ten months or so post the High Court judgment) pleads, *inter alia*, that the infill under the ground floor slabs of the houses "may" have to be removed and replaced. On 12 November 2019, Ballymore's solicitors disclosed in correspondence that only four houses require remediation by replacement of the subfloor infill. On 12 December 2019, letters were sent by Ballymore's solicitors to the solicitors for the homeowners in the Homeowner Proceedings which identified the alleged appropriate categorisation for each house in accordance with the by then revised NSAI Standard-I.S. 398-1:2017. The revision of the NSAI Standard resulted in the houses in the homeowner cases having to be re-assessed. The reassessment begot the correspondence and updated particulars sent by Ballymore to Roadstone as referred to above. Each letter indicated whether remediation was required.

The letters confirmed that only four houses (listed under Category C) required remediation by replacement of the subfloor hardcore, that 18 of the houses have been categorised "A" and do not require remediation, and that the remaining houses are "Category B" and that it is not envisaged that the sub floor hardcore material in these houses will need to be replaced. Of the four houses listed in Category C, Roadstone is implicated in only one as the supplier of the stone infill.

124. Roadstone contend that it is clear from her judgment that Murphy J. proceeded on the assumption that all 35 houses then the subject of the Homeowner Proceedings required remediation by the removal and replacement of stone infill. It is submitted that in light of the new information provided by Ballymore, Ballymore's case as pleaded is incorrect and that the new evidence demonstrates the correctness of Roadstone's argument as to why Ballymore's claim for indemnity and contribution ought to be determined in the third party proceedings. It is asserted that the trial judge would have acceded to Roadstone's application to strike out the Plenary Proceedings had she been aware that only four houses require remediation by way of replacement of the hardcore subfloor.

125. Ballymore reject both the assertion that the trial judge proceeded to determine Roadstone's application on the basis that 35 houses required remediation by way of subfloor removal and replacement and that the trial judge would not have concluded as she did had she been aware of the actual number of houses requiring such remediation. They contend that by relying on the information furnished in December 2019 and January 2020, Roadstone are effectively asking this Court to substitute its view for that of the trial judge and to, effectively, reverse the order in which the trial judge determined things are to happen by staying the Plenary Proceedings and requiring Ballymore to pursue their claim against Roadstone in the third party proceedings. Albeit acknowledging that, by reason of the revision, Roadstone (if found liable) will have to pay less to Ballymore than originally

anticipated, Ballymore submit that the fact that this has transpired does not make the Plenary Proceedings unstateable or render it expedient to strike them out.

126. In my judgment, Roadstone cannot rely on a factual scenario that has come to light some ten months or so post the judgment of the trial judge in order to impugn her findings, or have this Court substitute its view for that of the trial judge. If Roadstone wish to revisit the matter, it is open to them to apply to the trial judge, for her to vary the course she has directed. Furthermore, and in any event, it is not the case that Roadstone's potential exposure is limited to the one house in Category C since it is acknowledged by all that the damage being claimed by the homeowners is not restricted to the removal and replacement of subfloor infill. As is clear from the replies to particulars, Ballymore continue to maintain their allegation that "damage has occurred in each of the houses the subject of the Homeowner Proceedings which is connected with damage caused by the heaving of the ground floor slabs due to the pyrite expansion of the hardcore Stone Infill beneath the ground floor slabs of the houses" and that "remedial works are required in respect of each house". In any event, as I have said, it is a matter for the trial judge and not this Court.

Alleged prejudice

127. Roadstone argue that the effect of the Order of Murphy J. is to deprive them of their rights, *qua* third party in the Homeowner proceedings. Order 16, r.3 RSC provides:

> "The third-party shall, as from the time of the service upon him of the notice, be a party to the action with the same rights in respect of defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant."

128. It is submitted that in the three homeowner cases where third party notices have been served, the rights provided for pursuant to Order 16, r.3 have been lost to Roadstone because of the Order of the High Court, and indeed lost in the other homeowner cases in

respect of which Ballymore had intimated they were going to join Roadstone as a third party once statements of claim issued. Roadstone say that they have been deprived of the right to interrogate the homeowners' cases as to whether or not remediation is needed and whether the sub floors require to be replaced. Counsel submits that this deprivation arises in the context in which the courts have said that Order 16 RSC is *the* regulating framework through which Part III of the 1961 Act is implemented.

129. It is the case that the trial judge has directed the sequencing by which Roadstone's liability (if any) to Ballymore is to be determined, namely that the Plenary Proceedings will "determine all issues between Roadstone and Ballymore" and that there would be no third party hearing in the Homeowner Proceedings "because liability and the level of contribution will already have been determined [in the Plenary Proceedings]." This determination means that issues of liability *vis a vis* Ballymore and Roadstone will not have to be revisited in the thirty two homeowner cases that remain live. In her judgment, the trial suggests that it would make sense from a case-management point of view to have the issue of indemnity sorted out between the defendants so that the homeowners' cases could then be defended by the person whose pocket is at risk.

130. Insofar as Roadstone contend that they are at a procedural disadvantage by reason of the format of the Plenary Proceedings, I note that the trial judge observed at pp. 12-13 of her judgment that the procedural difficulties raised by Roadstone could be avoided if the homeowner plaintiffs joined Roadstone as a co-defendant in the Homeowner Proceedings. As I read this passage from the judgment, it seems to me that the trial judge was considering this procedure as a way to ensure that Roadstone's *procedural* rights would be copperfastened. As she makes clear later, it was not her intention that the third party proceedings would be progressed. It must also be recalled that Murphy J. has taken the

Homeowner Proceedings into case management. Accordingly, the Plenary Proceedings can be case managed alongside the homeowner cases, which is what is happening presently.

131. Roadstone argue that it is difficult to see what the advantages are of allowing the indemnity proceedings to continue since in most cases a claim for indemnity or damages for indemnity cannot proceed until the liability of Ballymore to the homeowners has been ascertained. I do not accept the latter contention. While I am conscious that in *BS v. Director of Public Prosecutions* [2017] IESC 134 the Supreme Court has warned that *"it will not…save in the rarest of circumstances be appropriate to rely on a leave refusal as having precedential value to the substantive issues in the context of a different case where leave is granted"*, I believe that the observation made by the Supreme Court in its Determination in the present case is worth recalling. The Supreme Court found it inconceivable that the end point of the Plenary Proceedings or the Homeowner Proceedings, however structured, would not be the trial of an issue between Ballymore and Roadstone (and the third and fourth defendants) as to indemnity. I have no hesitation in concurring with the view expressed in the Determination. There is no statutory or procedural bar to the indemnity and contribution issues being determined in the Plenary Proceedings in advance of the issues that arise as between Ballymore and the homeowners. It is not an insignificant factor that, even if she had determined that the third party proceedings were to prevail over the Plenary Proceedings, the trial judge would have equally been at liberty to direct that issues of indemnity and contribution would be determined *before* embarking on a consideration of the individual homeowner's cases. This is provided for in Order 16.

132. Roadstone also contend that the issue of indemnity must be sorted out on a house-by house basis because of the infill in each house, the construction defects in each house and damage done to each house, are going to be different. They say that this is best achieved in

the third party proceedings. On the other hand, Ballymore rely on the decision of the English High Court in *Shepherd Homes Limited v. Encia Remediation Limited* [2007] EWHC 1710, not only as persuasive authority for continuing the Plenary Proceedings (i.e. as an example of a claim for damages for breach of contract) but also in aid of their submission that the mode of action and case management employed in *Shepherd Homes* led to a speedy resolution of the issues both between the homeowners and Shepherd Homes and Shepherd Homes and Encia, with no prejudice having been suffered by any party.

133. In brief, what was in issue in *Shepherd Homes* was as follows: Shepherd Homes were the developer of a housing project and Encia were the builder of the houses. Shepherd Homes employed Encia to install the piling. Subsidence duly occurred in some 95 houses. Shepherd Homes bought back five of the more seriously damaged properties in order to carry out investigative and remedial works. The remediation involved the installing of new piling. Negotiations between Shepherd Homes and Encia as to who was responsible for the subsidence and the necessary remedial works were unsuccessful. Instead of waiting for the homeowner to sue them, Shepherd Homes brought a claim against Encia for breach of contract. They claimed damages for the costs of the investigation, the costs of the remedial work carried out on various houses and the amount of their liability to certain house owners. There was also a claim on the basis that some homeowners would in due course recover damages against Shepherd Homes for diminution in value. In turn, Encia brought third party proceedings against a company, Green Piling.

134. Following a case management conference in October 2006, it was directed that the the third party issue between Encia and Green Piling be tried as a preliminary issue. (This was duly tried on 26 November 2006, with Green Piling's defence to the third party proceedings upheld.) With regard to the remainder of the action, it was directed that the

trial (as between Shepherd Homes and Encia) was to take place on 4 June 2007 "in relation to all issues in the claim…as to liability, causation of damage (including competing remedial schemes) save in respect of quantification of loss". In this regard, the burden of proof was on Sheppard Homes. Thereafter, there were many case management conferences in respect of the scope of the trial. Experts on both sides duly met and agreed certain matters. Part of this exercise involved attaching colour codes to the properties to match the degree of damage to the properties.

135. Ultimately, the UK High Court dealt with the liability for the subsidence in respect of the houses over the course of a five-week trial. Shepherd Homes succeeded on liability, being found to be entitled to nominal damages in respect of 40 of the properties and to substantial damages and indemnities in respect of 54 houses. They were also granted a declaration of indemnity in respect of liability for diminution in value to some 49 of the houses.

136. Roadstone assert that there is no equivalent Irish authority to *Shepherd Homes*. Their position, therefore, is that they wish to reserve the right to argue in the High Court that *Shepherd Homes* should not be followed, particularly given that in *Shepherd Homes* there was only one defendant, unlike the position here.

137. I perceive no basis upon which it is necessary, for the purpose of this appeal, to comment on the approach adopted by the UK High Court in *Shepherd Homes.* Both Ballymore and Roadstone are free to advance their respective arguments in the course of case management in the Plenary Proceedings and Homeowner Proceedings (and at trial in the Plenary Proceedings) as to whether the formula adopted in *Shepherd Homes* is an appropriate model here.

138. That being said, I note that, in oral submissions, counsel for Roadstone did not rule out the possibility that, in the Plenary Proceedings, the necessary individual assessment of

each homeowner claim could be done in the manner set out in *Shepherd Homes.* Nevertheless, he emphasised that Roadstone are being sued for an indemnity where no liability of Ballymore to the homeowners has been ascertained. He also opined that the facts as between the homeowners and Ballymore might be completely different to facts that are being put forward by Ballymore in the Plenary Proceedings.

139. While that may be the case, it is clear from the judgment of the trial judge that every available procedural tool will be available to Roadstone in the Plenary Proceedings so as to put them in possession of all relevant facts. While there may have to be individualised assessments of the houses in the homeowners' cases for the purposes of determining any liability on the part of Roadstone, there are ways of achieving the necessary assessment: *Shepherd Homes* is testament to that. While this Court has left it to the trial judge to determine whether the formula employed in *Shepherd Homes* is the appropriate one, even if the *Shepherd Homes* approach is found not to be the appropriate approach, no doubt the case management function in the High Court will devise an appropriate means of conducting the requisite assessment, without any prejudice accruing to Roadstone.

140. I also consider that there is another important factor at issue here, in the context of the prejudice that is being alleged. It will be recalled that one if the objects of s.27(1) of the 1961 Act is that third parties against whom a claim for contribution or indemnity is made learn of that claim at an early stage. That has occurred here in the Plenary Proceedings, in my view. Roadstone learnt of the claim at the earliest stage possible when they were called upon in December 2015 by Ballymore to admit liability and allow inspection of their quarries, and when they were served with the proceedings in May 2016. Moreover, they had the benefit of the inspection motion papers from June 2016 and no doubt gleaned from those papers the nature of the claims being asserted by Ballymore. The statement of claim was delivered in November 2016. Through those processes they were well apprised of the

nature and scope of Ballymore's claims and, therefore, cannot reasonably assert the prejudice of which they now complain. All of this was well *in advance* of the third party notices served on them in March 2018 by Ballymore following the re-activation of the Homeowner Proceedings.

141. In all the circumstances, notwithstanding Roadstone's submissions that the place to try the issue between them and Ballymore is in the third party proceedings, in my view, they have advanced no persuasive argument as to alleged prejudice such that it would be inequitable or unjust for the issue indemnity and contribution to decided in the Plenary Proceedings.

142. Furthermore, contrary to Roadstone's contention, it is most definitely not the case, that Ballymore will have it both ways, namely maintaining the third party procedure and maintaining the Plenary Proceedings, less still that Roadstone face any risk of double recovery against them. The ruling of the trial judge has ensured that will not happen.

143. Clearly, the trial judge refused Roadstone's motion to strike out in the context of Plenary Proceedings already in being for over two years and in which there has been both proactive and reactive participation by Roadstone, and active case-management on the part of the trial judge. She had to decide the best way of getting to trial the issue between Roadstone and Ballymore on the quality of the stone infill used in the construction of the Drumnigh Estate and which houses have defective infill. If Ballymore prevails in the Plenary Proceedings, Roadstone will have to pay the homeowners if Ballymore is found to be liable to them.

144. What has been determined by Murphy J. is (as indeed noted by the Supreme Court in its Determination) essentially a question of case-management, as well as being an interlocutory matter. In *Kalix Fund Ltd. v. HSBC Institutional Trust Services (Ire) Ltd.*

[2010] 2 I.R. 581, Clarke J. explained the basis and rationale for a trial judge's powers regarding case management:

> *"[T]he court has an inherent jurisdiction to manage the conduct of a series of cases which are connected by reason of having significant factual or legal overlap for the purposes, in the words of Kelly J. in Re. Norton Healthcare Limited [2005] IEHC 441, [2006] 3 I.R. 321, of bringing about 'a just and expeditious trial whilst seeking to minimise costs' (at p.331). Applied to a number of cases, the obligation is to ensure that each party to each of the cases nonetheless will achieve, as best as can be done, a just and expeditious trial, but also that, across the range of cases, costs be minimised and scarce court resources not be wasted."* (at para. 48)

145. The *dictum* of Clarke J. in *Kalix* is entirely apt to the litigation in issue here, given the connected nature of the claims made in the Plenary Proceedings and the Homeowners Proceedings. It is also worth recalling that while the litigation is that of the parties, in the words of O'Donnell J. in *Defender*,*"the trial courts are not passive observers of litigation, and have to manage litigation effectively…Experienced trial judges can insist on realism where it is lacking, require efficiency, and encourage practicality."* In my view, in the present case, the very experienced trial judge has given directions as to how the issues of contribution and indemnity as between Ballymore and Roadstone are to proceed, without prejudicing the rights of either party, and equally with an eye to the blamelessness of the plaintiffs in the Homeowner Proceedings and the unnecessary "stress, anxiety and expense" to which the homeowner plaintiffs would be subjected in maintaining individual proceedings against Roadstone and/or the other defendants named in the Plenary Proceedings if the issue of liability as between Ballymore and Roadstone (and the other defendants) had to be debated in each of the individual homeowner cases.

146. In my view, therefore, this Court should be very slow interfere with the trial judge's exercise of her discretion in case management. As put by Clarke J. in *Dowling v. Minister for Finance & Ors.* [2012] IESC 32 for such interference to be warranted:

> *"…it would be necessary for this Court to be satisfied that the relevant measures under appeal created a substantial risk of significant procedural unfairness coupled with the likelihood that no remedial action could be put in place either by the trial judge or this Court on appeal which would have the effect of significantly remedying any alleged unfairness which might be demonstrated to have occurred."* (at para. 3.2)

Clarke J. found support for the judicial restraint he urged in the fact that procedural directions are rarely written *"in stone"* (at para. 3.3) and that *"it always remains open to the trial judge to put in place any measures which the trial judge is persuaded is necessary to ensure overall fairness and, thus, redress any actual prejudice that a party may be able to show as flowing from case management directions put in place".* (at para. 3.4) It is the trial judge who will be *"in a much better position to be able to determine with some precision as to whether real prejudice has occurred".* (at para. 3.4)

Against that background, Clarke J found:

> *"[T]his Court should only intervene if there is demonstrated a degree of irremediable prejudice created by the relevant case management directions such as could not reasonably be expected be remedied by the trial judge (or at least where the chances of that happening were small) and where therefore, unusually, the safer course of action would be for this Court to intervene immediately to alter the case management directions."* (at para. 3.5)

147. For the reasons set out above, Roadstone have not persuaded this Court that they will be disadvantaged or prejudiced by the procedure which has been adopted in the High

Court. Furthermore, going forward, I perceive no prejudice in this case arising from the refusal of the trial judge to grant Roadstone the relief they claim in their notice of motion. To echo the Determination of the Supreme Court, I struggle to find *"what practical or even tactical disadvantage will be suffered by [Roadstone] in this case as a result of the ruling of the trial judge"*. Moreover, recalling the words of Clarke J. in *Dowling*, the directions given by a trial judge in the course of case management cannot be said to be set in stone and, thus, should it in fact transpire in the future that Roadstone are put in peril of suffering prejudice in the context of determining the liability issues as between them and Ballymore, the case management powers vested in the trial judge can be called upon to level the playing field. As is clear from her pronouncements in her judgment, the trial judge will not be slow to do so.

The cross-appeal

148. While the trial judge agreed with Ballymore's contention that the issues of indemnity and contribution as between Ballymore and Roadstone were best determined in the Plenary Proceedings, she also found that having pursued Roadstone in the Plenary Proceedings based on the 1961 Act and on the basis of breach of contract, negligence and breach of duty, Ballymore could not continue to seek the same relief in the Homeowner Proceedings. She considered that the duplication of proceedings was, at a minimum, undesirable and thus directed that no further third party proceedings should be commenced, holding that it was neither necessary nor appropriate for Ballymore to bring any further third party claims in the Homeowner Proceedings.

149. At Part III (10)(b) of their Respondent Notice, Ballymore cross-appealed the order preventing them from issuing and serving any further third party notices. They maintained

that the trial judge erred in law and/or in fact in holding that they cannot maintain the Plenary Proceedings and also the third party proceedings and in holding that no further third party notices should be issued and served. They asserted that insofar as any issue of duplication arises in connection with the maintenance of the Plenary Proceedings and the third party proceedings, it was capable of being addressed by Ballymore's open offer on 9 March 2018 to refrain from prosecuting third party proceedings and/or by way of a stay on the further prosecution of all third party proceedings pending the determination of the Plenary Proceedings.

150. In their written submissions, Ballymore assert that if this court dismisses Roadstone's appeal, their cross-appeal as set out at Part III (10)(b) will not arise. As I propose to dismiss Roadstone's appeal, it thus follows that Ballymore's appeal against the holding of the High Court that they cannot maintain both the Plenary Proceedings and the third party proceedings and prohibiting them from issuing and serving any further third party notices will also be dismissed.

The High Court costs Order

151. The trial judge reserved the costs of the motion to strike out. Ballymore have appealed against this order. In their written submissions, they merely repeat what they stated in their appeal notice, namely that as Roadstone were unsuccessful in their application, Ballymore should get their costs.

152. I find no basis, however, upon which to trespass on the trial judge's discretion in respect of costs. As is clear from her judgment, while she declined to grant Roadstone any relief, she likewise declined to allow Ballymore to maintain both the Plenary Proceedings and the third party proceedings. It was in that context that she reserved the issue of costs-a decision entirely within her discretion, particularly given her extensive knowledge of the

litigation to that point in time. On that basis, I propose dismissing Ballymore's appeal of the costs Order.

Summary

153. For the reasons set out above, I would dismiss Roadstone's appeal and Ballymore's cross-appeal.

154. Roadstone have not been successful in their appeal and Ballymore have not been successful in their cross-appeal. As the cross-appeal took up little time in this Court, I perceive no injustice if the Court were to make no order as to costs in respect of the cross-appeal. I take the view, however, that as Ballymore is the successful party in respect of Roadstone's appeal, they are entitled to their costs.

155. If, however, the parties wish to seek different costs orders to those proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled. If no indication is received within the twenty-one-day period, the orders of the Court, including the proposed costs orders, will be drawn and perfected.

156. As this judgment is being delivered electronically, Collins J. and Binchy J. have indicated their agreement therewith and the orders I have proposed.