APPROVED **[2021] IEHC 549**

THE HIGH COURT

2018 No. 792 P

BETWEEN

ASHFORD CASTLE LIMITED
RED CARNATION HOTELS (UK) LIMITED

PLAINTIFFS

AND

E.J. DEACY CONTRACTORS & INDUSTRIAL MAINTENANCE LIMITED
CONSARC DESIGN GROUP LIMITED
JUSTIN MCCARTHY & ASSOCIATES

DEFENDANTS

CONSERVATION AND RESTORATION (IRELAND) LIMITED

THIRD-PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 August 2021

INTRODUCTION

1. This judgment is delivered in respect of an application to set aside a third-party notice on the grounds of delay. The application is made pursuant to Order 16, rule 8(3) of the Rules of the Superior Courts.

PROCEDURAL HISTORY

2. The underlying claim in the main proceedings concerns the carrying out of restoration works at a hotel known as "Ashford Castle". The summary which follows is based solely on the pleadings, and does not entail the making of any findings of fact by this court on the merits of the claim.

3. The restoration works involved, *inter alia*, the installation of what are described as "cavity trays" in the exterior walls of the building. The plaintiffs allege that the cavity trays installed by the defendants, their servants or agents, were installed in a negligent manner, and not in accordance with the manufacturer's instructions and specifications. It is pleaded that this resulted in a number of rooms at Ashford Castle experiencing an ingress of water in the vicinity of their windows. The plaintiffs claim damages for, *inter alia*, building repairs and business interruption.

4. The first named defendant had been the main contractor in respect of the restoration works ("***the main contractor***"). The second named defendant had been the architect engaged in respect of the works ("***the architect***"). The third named defendant had been appointed as project manager ("***the project manager***").

5. The main contractor has pleaded in its defence that the allegedly defective works were conducted by a nominated subcontractor, namely, Conservation and Restoration (Ireland) Ltd. This is the company which has since been joined as the third-party ("***the subcontractor***"). It is further pleaded that the subcontractor had been appointed by the second and/or third named defendants as a nominated subcontractor; and was not a domestic subcontractor whose works would have been under the control of the main contractor.

6. The defence continues as follows (at paragraph 7(iii)).

> "(iii) The First Named Defendant had no hand, act and/or part in the appointment of Conservation & Restoration (Ireland) Limited and

> furthermore had no hand, act and/or part in relation to the scope of works and/or the manner in which the said scope of works were conducted by Conservation & Restoration (Ireland) Limited save for and with the exception of the First Named Defendant was responsible for and in control of (a) basic health and safety issues while on Conservation & Restoration (Ireland) Limited were on site, (b) the scaffolding by which Conservation & Restoration (Ireland) Limited gained access to and egress from the area they conducted their work and (c) the processing of stage payments to Conservation & Restoration (Ireland) Limited which processing was requested by the First and/or Second Named Plaintiffs. Furthermore, no payments were processed by the First Named Plaintiff (*sic*) for Conservation & Restoration (Ireland) Limited unless and until the works for which payment was sought were certified by the Second and/or Third Named Defendants."

7. The main contractor's defence was delivered to the plaintiff on 6 March 2019. On the same date, the main contractor sought voluntary discovery from the architect. The categories of documentation sought included documentation in relation to the nomination and appointment of the subcontractor, and all architect's certificates of approval of the works.

8. In circumstances where the architect did not, seemingly, receive a copy of the main contractor's defence until 27 January 2020, the content of this request for voluntary discovery is relevant to the question of the state of knowledge of the architect. It is necessary, therefore, to set out the relevant part of the request for voluntary discovery as follows.

> "It is the First Named Defendant's defence that the Second and/or Third Named Defendants nominated and/or appointed Conservation and Restoration (Ireland) Limited as a nominated subcontractor to carry out works. The First Named Defendant denies that Conservation and Restoration (Ireland) Limited was a domestic subcontractor and as such requires the above documentation so as to prove that Conservation and Restoration (Ireland) Limited were a nominated rather than a domestic subcontractor.
>
> In addition to the above reasons why the documents at category (c) are both necessary and relevant is the fact that the First Named Defendant alleges that all payments processed by the First Named Defendant for works done by Conservation and Restoration (Ireland)

> Limited were done so on the certification of the works by the Second and/or Third Named Defendant."

9. As appears, the architect was on notice, as of 6 March 2019, that the main contractor would be defending the proceedings on the basis (i) that the allegedly defective works had been carried out by a subcontractor for which the main contractor had no responsibility, and (ii) that the architect had certified the works.

10. The principal explanation offered on affidavit for the delay in joining the third-party is that it would have been "entirely inappropriate" for the architect to seek to join a third-party against whom "professional negligence was to be alleged without having a sufficient expert opinion available that would allow an assessment to be made that there was a stateable case for such a claim". The point is made that the motion to join the subcontractor as a third-party issued some fifteen days after receipt of an *addendum report* dated 2 February 2020 from an expert. The initial report has not been exhibited in the proceedings, but it is common case that same is dated 3 March 2019. The only explanation proffered for the delay of some eleven months in obtaining the addendum report is that the proceedings entail a "highly technical" construction case encompassing numerous defects and three different defendants.

11. The addendum report, in relevant part, reads as follows.

> "From examining the report on the trays at Ashford Castle it would appear to me that the defects relate to bad workmanship and a failure to install the trays in accordance with manufacturer's instructions rather than any inherent defect in the product, specifically:
>
> - Failing to adequately bond (seal) the trays to each other.
> - Failing to adequately install the trays.
> - Failing to prevent excessive mortar build-up.
> - Failing to provide weepholes in the correct position.
>
> This work was undertaken by Conservation and Restoration Ltd.
>
> It is my conclusion that Conservation and Restoration Ltd are responsible for this work which was clearly defective, not undertaken

> in a proper workmanlike manner and not in accordance with the exemplar agreed with the architect.
>
> As Conservation and Restoration were domestic sub-contractors on this project I make no comment as to whom they are legally responsible with regard to the defective works."

12. The reference to "the report on the trays at Ashford Castle" is to an earlier report dated 14 December 2015 prepared by the architect. This would have been shortly after the water infiltration complained of in the main proceedings is alleged to have occurred. It appears, therefore, that the expert's addendum report of 2 February 2020 is based on a review of a much earlier report by the architect, and did not involve a site inspection by the expert himself.

13. The affidavit filed on behalf of the subcontractor explains that their insurers have refused to provide an indemnity in relation to the claims. It is not explained whether this refusal is because of a delay in notifying the claim.

14. The subcontractors issued a motion to set aside the third-party notice on 6 November 2020. The motion ultimately came on for hearing before me on 21 June 2021.

CHRONOLOGY

15. The chronology of the proceedings is summarised in tabular form below.

30 January 2018	Plenary summons issued
29 May 2018	Statement of Claim delivered
22 January 2019	Notice for Particulars served by architect
3 March 2019	Expert report prepared for architect
6 March 2019	Main contractor delivers defence
6 March 2019	Main contractor seeks discovery from architect to establish that third-party was a nominated subcontractor
28 November 2019	Architect seeks copy of main contractor's defence
27 January 2020	Copy of defence provided to architect
2 February 2020	Addendum to expert report for architect
13 February 2020	Motion to compel replies to particulars issued

17 February 2020	Motion to join third-party issued
9 March 2020	Order joining third-party
24 March 2020	Third-party notice served
23 June 2020	Replies to particulars delivered
4 November 2020	Defence delivered by architect
6 November 2020	Motion to set aside third-party notice issued
21 June 2021	Hearing of set aside application

LEGAL PRINCIPLES GOVERNING SET ASIDE APPLICATION

16. Save for a disagreement as to whether the third-party proceedings here represent a claim for *professional negligence*, with implications for the assessment of the reasonableness of the delay, the parties in the present proceedings are in broad agreement as to the principles governing an application to set aside a third-party notice.

17. The principal objective of the third-party procedure is to simplify litigation and to avoid a multiplicity of actions by allowing the main proceedings and the third-party proceedings to be heard together by the same judge (*Connolly v. Casey* [1999] IESC 76; [2000] 1 I.R. 345, citing *Gilmore v. Windle* [1967] I.R. 323). That does not necessarily mean that all the issues have to be dealt with simultaneously; that may depend on appropriate orders as to the time and mode of trial of the various issues (*Kenny v. Howard* [2016] IECA 243).

18. Section 27 of the Civil Liability Act 1961 provides that a defendant, who wishes to make a claim for contribution, must serve a third-party notice as soon as is reasonably possible. This temporal obligation is intended to ensure that the general progress of the main proceedings is not unnecessarily delayed by the third-party claim (*Kenny v. Howard* [2016] IECA 243).

19. The imposition of the statutory obligation to serve a third-party notice as soon as is reasonably possible has the practical consequence that a defendant who wishes to pursue

a third-party claim is under far greater time constraints than a putative plaintiff. A putative plaintiff is allowed the full reach of the relevant limitation period within which to institute proceedings against a defendant. Thereafter, a failure by the plaintiff to comply with the time-limits prescribed under the Rules of the Superior Courts for the delivery of pleadings will not normally result in the plaintiff's claim being struck out, unless there has been inordinate and inexcusable delay. By contrast, a defendant to existing proceedings who wishes to make a claim for contribution is expected to issue the third-party proceedings within a much tighter timeframe. There are examples of third-party proceedings having been set aside where the delay is measured in months rather than years. This is so notwithstanding the generous limitation period allowed for under section 31 of the Civil Liability Act 1961.

20. The onus is on the defendant, who has joined a third-party, to explain and justify any delay. In assessing delay, the court will have regard to the fact that third-party proceedings should not be instituted without first assembling and examining the relevant evidence and obtaining appropriate advice thereon. However, the quest for certainty or verification must be balanced against the statutory obligation to make the appropriate application as soon as reasonably possible (*Molloy v. Dublin Corporation* [2002] 2 I.L.R.M. 22).

21. It is incumbent on the court to look not only at the explanations which have been given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third-party notice was served as soon as is reasonably possible (*Greene v. Triangle Developments Ltd* [2015] IECA 249).

22. The most obvious example of a disruptive effect caused by the joinder of a third-party is where the third-party notice has been issued after the pleadings in the main proceedings

have closed and the case has been set down for trial. The introduction of a third-party claim at such a late stage is likely to result in a delayed hearing. It is apparent from the case law, however, that it is not only such eleventh hour joinders that are liable to be set aside.

23. The statutory requirement to move for liberty to issue a third-party notice as soon as is reasonably possible should be regarded as also applying to the bringing of an application to *set aside* such a notice (*Boland v. Dublin City Council* [2002] IESC 69; [2002] 4 I.R. 409). No point has been taken in this regard in the present case.

24. The provisions of section 27 of the Civil Liability Act 1961 are supplemented by Order 16 of the Rules of the Superior Courts. This order introduces a requirement to obtain the leave of the court to issue a third-party notice out of the Central Office of the High Court. It also introduces a specific time-limit. An application for leave to issue the third-party notice shall, unless otherwise ordered by the court, be made within twenty-eight days from the time limited for delivering the defence. This time-limit under Order 16 has to be seen in the context of time-limits prescribed for the delivery of other pleadings, e.g. twenty-one days is allowed for the delivery of a statement of claim and twenty-eight days for the delivery of a defence. The Rules of the Superior Courts thus envisage a timetable whereby a defendant will have delivered their defence within twenty-eight days, and then have applied to join a third-party within a further twenty-eight days. The timetable reflects the objective that the third-party proceedings should not unnecessarily delay the progress of the main proceedings.

25. In practice, none of these time-limits are complied with in the majority of cases. There is almost always some slippage in the delivery of the various pleadings and in the making of applications to join third-parties. The Court of Appeal, in *Greene v. Triangle Developments Ltd* [2015] IECA 249, observed that the time-limit under Order 16 is not

one with which the parties will normally comply or even be expected to comply. More recently, the Court of Appeal in *O'Connor v. Coras Pipeline Services Ltd* [2021] IECA 68 (per Barrett J.) described as "regrettable" the fact that the rules establish time constraints which are so rigorous that they are more often honoured in the breach than the observance, with the courts expected to tolerate what appears to be a general divergence in practice from the timescale that Order 16, rule 1(3) ordains.

26. The twenty-eight day time-limit thus represents, at most, a benchmark against which the statutory requirement to move "as soon as is reasonably possible" might be measured.

27. There is some disagreement on the authorities as to whether delay should be measured by reference to (i) the date upon which the third-party notice is served (*Greene v. Triangle Developments Ltd* [2008] IEHC 52), or (ii) the earlier date upon which the motion seeking to join the third-party is issued (*McElwaine v. Hughes* [1997] IEHC 74; *Morey v. Marymount University Hospital and Hospice Ltd* [2017] IEHC 285). For the purpose of this judgment, this distinction is unimportant: the period of five weeks between the two dates is not material in the context of an overall delay of some twenty-one months.

28. Finally, it should be noted that the consequences for a defendant of a third-party notice being set aside are potentially severe. The defendant's claim for contribution may only be pursued thereafter in separate proceedings and is subject to the court's discretion under section 27(1)(b) of the Civil Liability Act 1961. The court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed.

29. The nature of this statutory discretion has been discussed in *ECI European Chemical Industries Ltd v. McBauchemie Muller GmbH* [2006] IESC 15; [2007] 1 I.R. 156. There, the Supreme Court held that the type of considerations which are relevant in deciding whether to set aside a third-party notice will also be relevant to the exercise of the court's

discretion to allow a claim for contribution in separate proceedings. The court would have to consider was there a good reason why the statutory requirement of serving a third-party notice as soon as is reasonably possible had not been complied with.

30. In those cases where a third-party notice had actually issued, only to be set aside subsequently, any matter already decided on the application to set aside the third-party notice must be treated as *res judicata*. Where the third-party notice had been set aside because it had not been served as soon as reasonably possible, then this finding will inform the exercise of the court's discretion to allow a claim for contribution in separate proceedings. The Supreme Court suggested that in most such cases, irrespective of any question of prejudice, the separate proceedings claiming contribution should be rejected. On this analysis, it is only in those cases where the third-party notice had been set aside for reasons *other than* delay that there is a likelihood of being allowed to pursue a claim for contribution thereafter in separate proceedings.

31. The Court of Appeal in *Ballymore Residential Ltd v. Roadstone Ltd* [2021] IECA 167 has queried whether the approach adopted by the Supreme Court might be thought to be an unduly narrow one. Collins J. suggested, *obiter dicta*, that if the defendant to the claim for contribution has not been materially prejudiced by a failure to utilise the third-party procedure, then it might appear difficult to understand why the court's discretion should be exercised against permitting a claim for contribution to be pursued.

32. In summary, on the current state of the authorities, the setting aside of a third-party notice on the grounds of delay may have the consequence that the defendant in the main proceedings is precluded thereafter from seeking any contribution from that party.

DISCUSSION AND DECISION

33. The time period between the delivery of the statement of claim and the filing of the motion to join the subcontractor as third-party is almost twenty-one months. The third-party notice was served some five weeks later. Two explanations are offered on behalf of the architect for this delay as follows.

34. First, it is said that the claim against the subcontractor involves an allegation of professional negligence in circumstances where the subcontractor was acting, in an advisory capacity, as a specialist in restoration. There is a requirement to ensure that professional negligence proceedings have an appropriate basis, and, in particular, must be based upon the views and findings of an independent and impartial expert and not the parties themselves. Accordingly, it was reasonable to await receipt of the addendum report.

35. Secondly, it is said that it was reasonable to await sight of the main contractor's defence before deciding whether to pursue a claim for contribution. Notwithstanding that the main contractor's defence had been delivered to the plaintiff on 6 March 2019, a copy of same was not, seemingly, received by the architect's solicitors until 27 January 2020.

36. This second explanation can be disposed of shortly. As described at paragraphs 7 and 9 above, the gist of the main contractor's defence to the proceedings had been spelt out in the letter seeking voluntary discovery. The architect was thus on notice, as of 6 March 2019, that the main contractor would be defending the proceedings on the basis (i) that the allegedly defective works had been carried out by a subcontractor for which the main contractor had no responsibility, and (ii) that the architect had certified the works. It should have been obvious to the architect and its legal advisors at that stage that consideration would have to be given to joining the subcontractor as a third-party to the

proceedings. Yet an application to issue a third-party notice was not moved until twelve months later (9 March 2020).

37. Moreover, it is not open to the architect to rely on the delay in receiving a copy of the main contractor's defence in circumstances where the architect's legal advisors did not chase up a copy with diligence. It appears that a copy was only sought for the first time in November 2019, that is some eight months after the defence had been delivered to the plaintiff and the request for voluntary discovery made of the architect.

38. The first explanation offered for the delay merits more elaborate examination. The courts have long since recognised the particular difficulties which a claim for professional negligence presents for a defendant. Even if the claim is groundless, the publicity engendered by the proceedings can be damaging to the defendant's professional reputation and practice. The defendant may be under duress to settle the proceedings by making a payment to the plaintiff notwithstanding that the claim lacks any merit, i.e. to dispose of the "nuisance value" of the claim. To guard against these dangers, the courts have said that it is irresponsible and an abuse of the process of the court to commence professional negligence proceedings without first ascertaining that there are reasonable grounds for so doing (*Cooke v. Cronin* [1999] IESC 54).

39. This general principle has been applied in the specific context of a claim against a third-party by the Supreme Court in *Connolly v. Casey* [1999] IESC 76; [2000] 1 I.R. 345. The Supreme Court, per Denham J., held that it had been reasonable to await a statement from the instructing solicitor before joining a barrister as a third-party to professional negligence proceedings.

40. The parties in the present proceedings are in disagreement as to whether the claim against the subcontractor can properly be categorised as alleging professional negligence, such as to trigger the principle in *Connolly v. Casey*. Perhaps tellingly, a director of the

subcontractor has stated on affidavit his belief that the claim is not one of professional negligence in circumstances where the company did not have any design responsibility in relation to the works carried out to Ashford Castle.

41. It is not, strictly speaking, necessary to rule on this question of the correct characterisation of the claim for the purpose of disposing of the present proceedings. This is because, even allowing that a claim for professional negligence is involved, the delay was unreasonable. First, it is apparent that, even prior to the receipt of the addendum report, the architect already had sufficient information to meet the threshold for pursuing a claim for contribution against the subcontractor. The allegations which are now made against the subcontractor in the third-party notice were all clearly pleaded in detail in the statement of claim. More specifically, the statement of claim expressly alleges that the cavity trays were not installed correctly and not installed in compliance with the manufacturer's instructions and specifications.

42. The architect had been aware of the nature of the defects from its own inspection of the works in 2015. The architect is quoted, in the expert's addendum report, as saying "[I]t was seen that some at least some of the cavity trays inserted over some of the windows have failed due to either failure of the bonding strip between lap joints or excessive waste mortar build up blocking weak poles (*recte*, weepholes) or a combination of both due to incorrect installation".

43. Secondly, no proper explanation has been provided for the delay of some eleven months in obtaining an addendum report from the expert. No reason is proffered as to why the original report required to be supplemented. It is apparent from the text of the addendum report that it is based on a review of a much earlier report by the architect, and did not involve a site inspection by the expert himself. No reason is advanced as to why this desktop exercise could not have been carried out much earlier. This is especially so

where the particulars alleged against the subcontractor in the addendum report are almost identical to the particulars which had been pleaded in the plaintiff's statement of claim as long ago as May 2018.

44. Thirdly, the purpose of the principle identified in *Connolly v. Casey* is to protect a professional from abusive claims. This principle should not be applied in such a way as to defeat the complementary principle that a putative third-party should be notified of any claim for contribution against them in a timely manner. Yet the logic of the architect's argument is that it was entitled to sit back for some twenty-one months before alerting the subcontractor to the existence of the claim. The benefit, if any, to the third-party of the defendant adopting the overly cautious approach of awaiting the addendum report before instituting the third-party proceedings is disproportionate to the disbenefit of the delayed notification of the claim against them.

45. For the reasons set out above, I have concluded that the architect has failed to discharge the onus upon it to explain and justify the delay of twenty-one months. That is not, however, the end of the matter. As emphasised by the Court of Appeal in *Greene v. Triangle Developments Ltd* [2015] IECA 249, it is incumbent on the court to look not only at the explanations which were given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third-party notice was served as soon as is reasonably possible.

46. On the facts of *Greene*, the Court of Appeal held that it had been objectively reasonable for the defendant to await an expert's report before making a claim involving professional negligence against the third-party. The Court of Appeal had regard to the fact that there had only been a short delay between (i) the delivery of the defence (in response to a motion for judgment in default) and (ii) the issuance of the motion seeking to join the

third-party. Put otherwise, in making an objective assessment of the delay, the court attached some weight to the plaintiff's own delay in moving to ensure the delivery of the defence.

47. The judgment in *Greene* also refers to the need to allow reasonable time to prepare the papers for an application to join a third-party, suggesting a period of eight to ten weeks as a matter of reasonable practice of solicitors.

48. Applying these principles to the present proceedings, I have concluded that the delay of some twenty-one months is not objectively reasonable. As appears from the chronology, the delay on behalf of the architect has been significant relative to the overall progress of the proceedings. Whereas the other defendants had not complied with the twenty-eight day time-limit prescribed under the Rules of the Superior Courts for the delivery of defences, the main contractor had delivered its defence within nine months of the statement of claim and had begun to pursue the discovery of documents. The architect's delay of twenty-one months is out of all proportion to this and inhibited the overall progress of the proceedings.

CONCLUSION AND FORM OF ORDER

49. The delay of some twenty-one months in applying to join the subcontractor as a third-party is unreasonable and does not comply with the requirements of section 27(1)(b) of the Civil Liability Act 1961. This is so on both a subjective and an objective analysis. On a subjective analysis, the second named defendant has failed to discharge the onus upon it to explain and justify the delay. In particular, no proper explanation has been provided for the delay following the receipt of the expert's report on 3 March 2019. At the very latest, the architect had sufficient information from this date to meet the threshold for pursuing a claim for contribution against the subcontractor. On an objective

analysis, the delay of twenty-one months between the delivery of the statement of claim and the issuance of the motion to join the third-party is unreasonable and out of all proportion to the progress of the main proceedings.

50. An order will be made, pursuant to Order 16, rule 8(3), setting aside the third-party proceedings. As to costs, my *provisional* view is that the third-party, having been entirely successful in its application to set aside, is entitled to its costs against the second named defendant in accordance with the principles prescribed under Part 11 of the Legal Services Regulation Act 2015. Such costs to be adjudicated upon by the Office of the Chief Legal Costs Adjudicator in default of agreement. The costs order is to be stayed in the event of an appeal. If either party wishes to contend for a different form of order, short written submissions should be filed by 4 October 2021. In the event that no submissions are received by that date, the order will be drawn up the next day.

Appearances

Patricia Hill for the third-party instructed by Eugene F Collins
Jennifer M. Good for the second named defendant instructed by Kennedys Solicitors

Approved