Approved
No redactions required

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 Mr Justice Maurice Collins delivered on 4 June 2021

PRELIMINARY AND SUMMARY

1. I have read the judgment of Faherty J and I agree with it. In light of the importance of some of the issues raised by the appeal, I wish to separately explain my reasons for dismissing the appeal and affirming the judgment and order of the High Court. For that purpose I gratefully adopt my colleague's detailed account of the procedural history of these proceedings, the background to this appeal (including the judgment of Murphy J given on 26 June 2018) and the positions taken by the parties in argument.

2. I will start by setting out briefly the principal conclusions I have reached:

- The Appellants ("*Roadstone*") are precluded from challenging the entitlement of the Respondents ("*Ballymore*") to pursue its claim for indemnity and contribution in these proceedings (to which, for convenience, I shall refer to as "*the Indemnity Proceedings*"). Roadstone participated actively in the Indemnity Proceedings without objection or complaint between May 2016 (when the proceedings were served on them) and April 2018 (when Roadstone's application to set aside the Indemnity Proceedings as bound to fail issued). In these circumstances, it is "*entirely inappropriate... that [Roadstone] should come to Court seeking to set aside a procedure 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".*

- In this context, Roadstone's argument that it could not move until third party

notices were issued and served in the Homeowner Proceedings is wholly unconvincing. At any point after the Indemnity Proceedings were served on it, it was open to Roadstone to apply to have the proceedings stayed on the basis that the claims for indemnity and contribution made in these proceedings (including, but not limited to, Ballymore's claim for contribution pursuant to Part III of the Civil Liability Act 1961 ("*the 1961 Act*")) ought properly to be pursued by way of the third party procedure in the Homeowner Proceedings. Its failure to do so, or otherwise to take any step challenging the prosecution of the Indemnity Proceedings, over a period of almost two years, during which the proceedings were before the High Court on multiple occasions, deprives Roadstone of any entitlement to raise any procedural objection to the maintenance of the Indemnity Proceedings at this stage.

- These findings are sufficient to dispose conclusively of Roadstone's appeal but I shall in any event consider the merits, such as they are, of Roadstone's application.

- The application is to have the Indemnity Proceedings struck out *in limine* pursuant to Order 19, Rule 28 or, on the alternative, pursuant to the inherent jurisdiction (to which I shall refer as the "*Barry v Buckley jurisdiction*", after *Barry v Buckley* [1981] IR 306). It is clear from the authorities that Order 19, Rule 28 has no application in the circumstances here, given that Roadstone does not suggest that Ballymore's pleaded claim (now set out in the Amended Statement of Claim delivered on 18 April 2019) fails on its face to disclose a

reasonable cause of action or is frivolous or vexatious on its face.

- As regards the *Barry v Buckley* jurisdiction, it is clear from the authorities that the threshold for granting relief is a high one. As Costello J emphasised in *Barry v Buckley* itself, the jurisdiction is to be "*exercised sparingly and only in clear cases."* The jurisdiction is not suitable for the resolution of disputed issues of law unless they are "*simple and straightforward"* and can properly be determined, without risk of injustice, within the confines of a strike-out application: *Jeffrey v Minister for Defence* [2019] IESC 27, [2020] 1 ILRM 67.

- Roadstone's core argument – that the further prosecution of the Indemnity Proceedings is so clearly inconsistent with the mandatory requirements of section 27(1)(b) of the 1961 Act that the Court can, with sufficient confidence, conclude that the proceedings are bound to fail – has multiple frailties:

    - Roadstone's analysis critically depends on the fact that third party notices were served by Ballymore in the Homeowner Proceedings. According to Roadstone, it was the service of such notices that triggered an absolute requirement on the part of Ballymore to pursue its claim for indemnity and contribution by way of the third party procedure in the Homeowner Proceedings. Yet, of the 32 surviving actions within the Homeowner Proceedings, third party notices have been served in three actions only. The claims made in the Indemnity Proceedings are not limited to those three actions. No credible argument has been articulated

by Roadstone as to how service of third party notices in three actions should have the consequence of barring the maintenance of the much broader claims made in the Indemnity Proceedings.

- A claim for contribution under Part III of the 1961 Act is made in the Indemnity Proceedings but the proceedings also include other claims, including claims for damages for breach of contract, negligence and breach of duty. Roadstone's strike-out application depends critically on its contention that *all* of the claims made by Ballymore in the Indemnity Proceedings –not simply the Part III contribution claim – come within the scope of section 27(1)(b). If that contention is not correct, then Roadstone's application inevitably fails. The scope of section 27(1)(b) is not a *"simple and straightforward*" issue and for that reason I shall refrain from expressing a definitive view on the issue in this judgement. However, it certainly cannot be said that Roadstone has demonstrated that section 27(1)(b) clearly applies to the range of claims made in the Indemnity Proceedings. On the contrary, Ballymore appears to have the better side of the argument, by reference to the language of section 27, the structure of Part III and the authorities.

- As regards the claim for Part III contribution, even if one assumes (in favour of Roadstone) that the *Barry v Buckley* jurisdiction allows a court to strike-out part only of a plaintiff's claim, this is not an appropriate case in which to exercise any such jurisdiction in circumstances where,

far from resulting in the saving of court time and costs, such an order would (in the words of the Judge) result in " *a convoluted and expensive process"* that would be *"extremely wasteful of resources".*

- In any event, it cannot be said that Roadstone has demonstrated that section 27(1)(b) of the 1961 Act clearly has the effect of precluding Ballymore from maintaining its claim for Part III contribution in the Indemnity Proceedings. Again, the issue is not *"simple and straightforward*" and for that reason it would not be appropriate to seek to resolve it definitively in an application such as this.

- What may be said, however, is that section 27(1)(b) "*does not prescribe that the claim for contribution may only be brought by way of third party proceedings and not by a separate action*": *ECI European Chemical Industries Limited v MC Bauchemie Muller GmbH* [2006] IESC 15, [2007] 1 IR 156. True it is that, where a contribution claim is made by action rather than by way of the third party procedure, section 27(1)(b) provides that the court has a discretion to refuse to make an order for contribution. However, the authorities suggest that where there *is "good reason"* for not pursuing the third party procedure, that discretion falls to be exercised so as to allow the action for contribution to proceed, at least in the absence of any prejudice to the defendant. There can be no doubt that there is such "*good reason*" here. The Judge (who has long been case-managing both the Indemnity Proceedings and the

Homeowner Proceedings) has *directed* that the claims for indemnity and contribution made by Ballymore (including the claim for Part III contribution) should be determined in the Indemnity Proceedings. In her view, the alternative of having those claims determined on a "*house-by-house*" basis by way of the third party procedure (the alternative favoured by Roadstone) would be *"extremely wasteful of resources"* and would not be consistent with the effective management of the overall litigation, in the interests of *all* of the parties (including the plaintiffs in the Homeowner Proceedings). The High Court has thus determined that there is *"good reason*" why Ballymore's claim for Part III contribution (and its broader claim for indemnity and contribution) ought not to be pursued by the third party procedure in the Homeowner Proceedings and ought instead to be pursued by action.

- As to the question of prejudice, Roadstone's assertion that the determination of Ballymore's claims for indemnity and contribution in the Indemnity Proceedings would cause prejudice to it is without substance. The Judge has made it clear that she will exercise her case management powers in a manner that appropriately protects the legitimate rights and interests of Roadstone in its defence of Ballymore's claim against it.

- As regards the three actions in which third party notices have been served by Ballymore, those notices were served long after the Indemnity

> Proceedings were commenced and it is not clear whether and how section 27(1)(b) applies in such circumstances. More generally, it is not at all clear that section 27(1)(b) is to be construed as dictating that the service of a third party notice is to be regarded as an irrevocable step which has the effect of imposing an absolute and unavoidable requirement on the party serving such notice to claim contribution by way of the third party procedure, even where (as is the case here) the notice is served solely for the purpose of protecting the procedural position of the party serving it and where the High Court takes the view that the third party procedure is not best suited to achieve the efficient and effective management of complex litigation. Roadstone's argument requires the Court to construe section 27(1)(b) as operating as an absolute constraint on the jurisdiction of the High Court to manage proceedings before it. Absent clear language to that effect – and I see no such language in section 27(1)(b) – I am unwilling to adopt such a construction of section 27(1)(b) and I am certainly not prepared to do so in the context of a strike-out application.

- In these circumstances, Roadstone's application to strike out the Indemnity Proceedings *in limine* cannot succeed.

3. I reach this conclusion without regret. The Indemnity and Homeowner Proceedings are being case-managed by the High Court. Having heard detailed submissions from all parties, the Judge has ruled on how she considers the issues in those proceedings are

best brought to resolution in the interests of the parties and in the interests of justice. Roadstone accepts that, section 27(1)(b) aside, the Judge's decision was within her discretion. Part III of the 1961 Act, including section 27, has the objective of *facilitating* rather than *impeding* the effective management and resolution of multi-party litigation involving claims for contribution and indemnity. However, if Roadstone is correct about the effect of section 27(1)(b), it would follow that, in the circumstances here, the Judge is precluded from adopting the approach to managing the proceedings that she considers appropriate and that she would instead be compelled to adopt an approach that would be, in her words, *"extremely wasteful of resources."* I would be very reluctant to construe section 27(1)(b) as having such an unfortunate (and unintended) effect. For the purposes of this appeal, Roadstone had to demonstrate that its construction of section 27(1)(b) – the construction having that effect – is clearly correct. Despite the skilful advocacy of counsel on its behalf, Roadstone has not come close to discharging that burden in my view.

CASE MANAGEMENT

4. For some time, these proceedings and the Homeowner Proceedings have been case-managed by Murphy J. A formal direction for case management of the Indemnity Proceedings was made in November 2017. However, the Judge's first involvement with the proceedings dates back to May 2017. Since then, she has, over many hearing days, conducted numerous case-management/directions hearings, as well as hearing and adjudicating on a number of significant motions, including but by no means limited to the current motion. The Homeowner Proceedings were brought into case-management in May 2018 and the proceedings have been managed together since then. It is clear that the Judge has a detailed familiarity with the issues arising in both the Indemnity and Homeowner Proceedings that, notwithstanding the vast volume of documentary material pressed on us in this appeal, this Court simply does not have.

5. The law reports are replete with statements by appellate courts as to the need for and value of case management of complex proceedings by the High Court. It is not necessary in this regard to look beyond the decision of the Supreme Court in *Talbot v Hermitage Golf Club* [2014] IESC 57 and in particular the judgment of Denham CJ, at paras 13-14 where she stated that:

> *"13. The use of judicial case management is crucial to the effective conduct of litigation .... This approach helps to define the key issues and to clarify the responsibilities between the parties. It enables managed use of limited court*

resources. It can assist by making the case more understandable for all those concerned, and may facilitate an early settlement between the parties.

14. Further, case management assists a court in determining a case within a reasonable timeframe. This is important for all parties in an action."

As Charleton J observed in his concurring judgment in *Defender Limited v HSBC France (formerly HSBC Institutional Trust Services (Ireland) Limited* [2020] IESC 37, [2021] 1 ILRM 1, *"[c]omplex cases, without case management, waste resources both for the system of justice and for those seeking justice."* (at page 60).

6. Appellate courts have also recognised that case management is likely to be an entirely hollow exercise unless appropriate judicial restraint is exercised on appeals from case-management decisions made by the High Court. As it was put by Clarke J in *Dowling v Minister for Finance* [2012] IESC 32, an appellate 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)

7. As this Court noted in its recent decision in *Wallace v HSE* [2021] IECA 141 (referring to *Dowling* and to *PJ Carroll v Minister for Health and Children* [2005] 1 IR 294), certain case management directions may have such far-reaching effect on one party or

the other that immediate appellate intervention is warranted. In *Wallace*, the orders made by High Court were effectively final orders which had potentially significant – and irreversible – implications for the running of the appellants' defence. The position presented in *Wallace* is, however, likely to be the exception rather the rule, not least because, of their nature, case management directions are normally not made for once and for all. Rather, they can, as appropriate, be revisited and revised as litigation proceeds. That is an essential element of the rationale for appellate restraint (see *Dowling* at para 3.4). The case management directions made by the Judge are, in my view, clearly in that category and do not fall within the exception identified in *Wallace*.

8. The application now before this Court by way of appeal may give the appearance of raising a hard-edged issue of law, rather than any issue of case-management. However, it is evident that Roadstone's underlying complaint concerns the Judge's management of the Indemnity and Homeowner Proceedings and, in particular, her view (expressed clearly and consistently over a lengthy period of time) that it would be preferable to have all issues of indemnity and contribution between Ballymore and Roadstone (and the issues arising between Ballymore and the other Defendants) determined in the Indemnity Proceedings, rather than within the confines of individual third party claims made in the Homeowner Proceedings. Roadstone also appears to be unhappy with the Judge's provisional view (and it seems to be no more than that) that such issues of indemnity or contribution should be determined first, in advance of the High Court adjudicating on the claims of the Homeowners.

9. The identification and sequencing of issues for determination in large-scale and

complex litigation, involving multiple claims and parties, is of course the basic stuff of case management and the Judge's decision-making must be accorded very significant weight in this appeal.

10. Roadstone came to this Court asserting that it has suffered "*significant prejudice*", "*obvious and significant prejudice*" and "*ongoing procedural prejudice*".[1] It is, I believe, fair to say that these complaints of prejudice receded greatly – if they did not evaporate entirely – in the course of the hearing, and rightly so. It could not be clearer from the Judge's Ruling of 26 June 2018 that she has been and continues to be astute to respect and protect the procedural rights and interests of Roadstone. The Judge has said, in unequivocal terms, that she will ensure that Roadstone *"gets all appropriate access [to inspect the damaged homes] to allow them to contest Ballymore's claim against them."* [2] In response to Roadstone's apparent concern that Ballymore might be allowed "*two bites of cherry"* against them – involving, so Roadstone apprehended, a claim for indemnity in the Indemnity Proceedings followed by a similar claim in the Homeowner Proceedings – the Judge has again been absolutely clear: "*that will not happen*". The fact that the Indemnity and Homeowners Proceedings are being managed together by the Judge gives her ample power to make good on these assurances.

11. In the course of the hearing of the appeal, counsel accepted that Roadstone might not be subject to a *"double decree"* but, he said, it would certainly be subjected to double

[1] Roadstone's written submissions to this Court at paras 59-62.

[2] Ruling, at page 12.

costs and a lot of additional steps that ought to be avoided. However, that complaint rested on the premise that Ballymore intended to (and would be permitted to) pursue third party proceedings against Roadstone in parallel to the Indemnity Proceedings. That is a significant – and surprising – misapprehension of the true position. It is clear beyond argument from the material before the Court that Ballymore has at all times consistently maintained the position that its claim for indemnity and contribution against Roadstone ought to be determined in, and only in, the Indemnity Proceedings. While Ballymore served notices seeking indemnity and contribution in three of the Homeowner Proceedings where statements of claim had been delivered, and sought permission from the Judge to serve such notices in the remaining cases on service of a statement of claim, it did so not because it wished to pursue indemnity and contribution from Roadstone by way of the third party procedure but simply to protect its position (as was made clear in by its solicitors in contemporaneous correspondence). In particular, Ballymore wished to protect itself against any subsequent argument by Roadstone that the failure to serve third party notices in the Homeowners Proceedings barred any entitlement to pursue a claim for indemnity or contribution from it. No doubt, Ballymore was concerned – not without cause, it seems – that a section 27 trap was being laid for it. If Ballymore did not serve third party notices, Roadstone would argue that the High Court could and should exercise its discretion under section 27(1)(b) to refuse to make an order for contribution against it. On the other hand, if Ballymore proceeded to serve third party notices, Roadstone would argue (as of course it argues now) that, having done so, section 27(1)(b) barred the further prosecution of the Indemnity Proceedings. It is clear that the Judge had little sympathy for such tactical manoeuvring. However, it is also clear that the Judge has made it abundantly clear in

any event that there is no question of Ballymore being permitted to ride two horses in pursuit of indemnity from Roadstone. That is a phantom menace.

12. Roadstone makes other, more general, complaints to the effect that its right of participation in the Homeowner Proceedings has been adversely affected and that it has less information about the Homeowner claims than would be the case if issues of indemnity and contribution were being pursued by way of the third party procedure contemplated by Section 27 of the 1961 Act and Order 16 RSC. In my view, there is no substance in any of these complaints.

13. First, while the joinder of Roadstone as a third party in the actions within the Homeowner Proceedings would make it a party to those actions, it is not the case (as counsel for Roadstone appeared to suggest in argument) that this would entitle it "*to interrogate the plaintiff's case.*" As is evident from Order 16, Rule 3, joinder as a third party gives that third party the same rights by way of defence as if sued in the ordinary way *by the defendant*. The third party does not become a defendant to the plaintiff's claim (unless the plaintiff elects to have the proposed third party joined as a co-defendant). The claims as between plaintiff and defendant, and defendant and third party, remain separate claims, which (as the High Court may direct) may be heard together or separately. As counsel for Ballymore observed in argument, there would be no impediment in such circumstances to his client settling the Homeowner Proceedings and then pursuing its contribution claim against Roadstone. Third party claims are frequently heard *after* the main proceedings. Equally – as counsel for Roadstone expressly accepted – the discretion of the High Court under Order 16 extends to

directing that issues of indemnity and contribution arising in third party proceedings should be determined *in advance of* the determination of the issues as between plaintiff and defendant. No doubt, as counsel said, such a sequence would be unusual but the facts here are unusual. In any event, it is clear that, even if Ballymore's claim for contribution was pursued by way of third party proceedings within the Homeowner Proceedings, Roadstone would have no *entitlement* to participate in the determination of liability between the plaintiffs and Ballymore in the manner contended by it.

14. Second, and in any event, the case-management powers of the High Court are more than adequate to enable the High Court to achieve by way of case-management direction what it might otherwise have done by way of directions given under Order 16. Case management of the Indemnity and Homeowner Proceedings can secure all of the objectives of Order 16 (and of Part III of the 1961 Act) in terms of the fair and efficient disposal of the claims made by the Homeowners and the claims for indemnity and contribution made by Roadstone. By way of illustration, we were told that the High Court had, *on the application of Roadstone*, directed those plaintiffs in the Homeowner Proceedings who had not already done so to deliver statements of claim. The arguments to the contrary advanced by Roadstone were long on general assertions but entirely lacking in specifics.

15. Third, it is clear from the material put before this Court that Roadstone has already been provided with a vast amount of information regarding the Homeowner claims and in particular the alleged defects in the Homeowners' houses. The Court has been provided with the pleadings, which run to more than 1300 pages, comprising largely of

particulars and further particulars of Ballymore's claims. Indeed, Roadstone relies on some of this material (provided subsequent to the High Court hearing) as a basis for asking this Court to set aside the High Court Order here. It is difficult to conceive how any greater level of information could be available to Roadstone *qua* third party to the Homeowner Proceedings.

16. Fourth, Roadstone cannot be heard to complain that it was not notified of Ballymore's claim for indemnity and contribution in a timely way. That is, of course, one of the purposes of third party procedure: *Kenny v Howard* [2016] IECA 243. Here, the Indemnity Proceedings were commenced shortly after the commencement of the Homeowner Proceedings and were served on Roadstone long before the Homeowner Proceedings reached the stage where any requirement to serve third party notices would have been triggered under Order 16 RSC and almost two years before third party notices were issued and served in three of the Homeowner Proceedings.[3]

[3] The Indemnity Proceedings issued in December 2015 and, following correspondence about inspection, were served in May 2016. Statements of claim were served in three of the actions within the Homeowner Proceedings in December 2017. Motions for leave to issue and serve third party notices in those three actions issued in February 2018, orders were made in March 2018 and the third party notices were served later that month. It does not appear to have been suggested by Roadstone that the third party notices were not served "*as soon as possible.*" By the time of their service, however, voluminous particulars had been delivered by Ballymore in the Indemnity Proceedings, the inspection and sampling motion brought by Ballymore had been heard by the High Court (over 3 hearing days) and had been determined by it *and* Roadstone had delivered its Defence (the High Court having rejected its arguments that still further replies to particulars should be first be directed to be delivered by Ballymore).

17. There remains Roadstone's complaint that the approach adopted by the High Court involves the procedural evil that Section 27 and Order 16 undoubtedly seek to prevent, namely a *"multiplicity of actions*". The authorities make it clear that it was the object of the 1961 Act generally, and of section 27 specifically, *"to simplify litigation and to avoid a multiplicity of actions"* and, as far as possible to have *"the same tribunal to deal with all the issues so as to avoid the danger of different findings on the facts in issue*" (*Gilmore v Windle* [1967] IR 323, at per Walsh J 332) and to ensure "*as far as possible that all legal issues arising out of an incident are disposed of within the same set of proceedings"*(*Kenny v Howard* [2016] IECA 243, per Ryan P at para 17). However, Roadstone's stated concerns in this context have to be taken with a generous pinch of salt, given that it also insists that *"given the issues which arise in this case, this is a matter which will have to be determined on a house by house basis".*[4] As the Judge observed in her ruling:

> *"There is clearly an irony in the fact that Roadstone seeks to use a statutory provision designed to avoid a multiplicity of actions to in fact insist on a multiplicity of actions, perhaps as many as 35, to resolve the issue of liability for pyritic heave in 30 – 35 houses in the Drimnigh Estate."* [5]

18. Later in her Ruling, the Judge expressed the view that it seemed *"extremely wasteful of*

[4] Written submissions, at para 72.

[5] Ruling, at page 9.

resources to undertake such a convoluted and expensive process [that of determining issues of indemnity/contribution by way of the third party procedure within the Homeowner Proceedings] *when the very issue that requires to be determined can be determined in the existing [Indemnity Proceedings]."* Such an assessment appears to come well within the proper jurisdiction of the Judge in the exercise of her case-management functions and the procedure contemplated by the Judge appears to be entirely consistent with the objectives of Part III identified in the authorities.

19. Ultimately, counsel for Roadstone acknowledged that the Judge had decided that, from a case management perspective, the better way to adjudicate on the indemnity/contribution issue was in the Indemnity Proceedings rather than by way of third party proceedings *and* he also quite properly accepted that – subject only to the effect of section 27(1)(b) – such a decision was within the proper parameters of the Judge's case management discretion. But for the section 27(1)(b) argument, counsel fairly acknowledged that Roadstone "*would not have an appeal."*

SECTION 27(1)(b)

20. It is necessary therefore to consider whether Roadstone's argument as to the effect of section 27(1)(b) is capable of sustaining its appeal. I will address this issue first. While the issue of estoppel/acquiescence might logically appear to be the prior issue, I prefer to address it at the conclusion of this judgment.

The Nature of the Application before the Court

21. It is important to appreciate the nature of the application made to the High Court, now before this Court on appeal. It does *not* involve the determination of any preliminary issue regarding the interpretation of section 27(1)(b). Clearly, Roadstone could have sought to have such an issue or issues determined. It did not do so. Rather, the application effectively seeks the dismissal of the Indemnity Proceedings *in limine*.

22. The precise reliefs sought by Roadstone in its Notice of Motion are as follows:

> *"1. An Order pursuant to section 27(l)(b) of the Civil Liability Act 1961 (as amended) and/or Order 16 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court striking out the within proceedings*.
>
> *2. In the alternative, an Order pursuant to s.27 of the Supreme Court of Judicature Act (Ireland) 1877 and/or the inherent jurisdiction of this*

Honourable Court staying the within proceedings pending the determination of the [Homeowner Proceedings].

3. In the alternative, an Order pursuant to Order 19, rule 28 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court striking out or staying the proceedings as bound to fail and/or failing to disclose a reasonable cause of action."

23. As for paragraph 1 above, neither section 27 of the 1961 Act nor Order 16 RSC confers any jurisdiction on the High Court to strike out proceedings. It may be that those provisions supply a legal *basis* for seeking such an order but the *jurisdiction* to grant such relief must be found elsewhere. Insofar as this paragraph also invokes the inherent jurisdiction of the High Court to strike out proceedings, it overlaps with relief 3 and I will consider that jurisdiction further in that context.

24. As regards paragraph 2, no reference to section 27 of the Supreme Court of Judicature Act (Ireland) 1877 (or any other provision of that Act) was made in Roadstone's written submissions and it was not mentioned in oral argument either. Section 27(5) of the 1877 Act gives the High Court power (or, more correctly, recognises the power of that Court) to stay proceedings before it, *"if it shall think fit".* The High Court clearly has an inherent power to stay proceedings. As Clarke J (as then he was) explained in *Kalix Fund Limited v HSBC Institutional Services (Ireland) Ltd* [2010] 2 IR 581, at para 39, the term "*stay*" covers a range of circumstances. One circumstance is where the High Court is exercising its power to case manage complex litigation (as in *Kalix* itself, which

was one of many claims before the High Court arising from the fraud of the late Bernie Madoff). On that basis, it appears that the High Court would have been entitled to stay the Indemnity Proceedings to await the determination of the Homeowner Proceedings. However, there was no question of it doing so because, as already discussed, the Judge was of the view such an approach would involve a "*convoluted and expensive process"* that would be *"extremely wasteful of resources".* Roadstone accepts that that decision was – section 27(1)(b) apart – within the discretion of the Judge and that is the end of any question of the Indemnity Proceedings being stayed on case management grounds. In reality, insofar as Roadstone is pursuing a "*stay*" of the Indemnity Proceedings, it does so with a view to bringing those proceedings to an end and the issue of whether such a stay should be granted therefore overlaps entirely with the relief sought at paragraph 3.

25. As regards the relief sought at paragraph 3, it is clearly premised on Roadstone's contention that, having issued third party notices (in three of the Homeowner Proceedings), Ballymore is now statutorily precluded from pursuing the Indemnity Proceedings. On that basis, it is said, the Indemnity Proceedings are bound to fail and/or fail to disclose a reasonable case of action and should be struck out (or, in the alternative, stayed). This is the central plank of Roadstone's appeal.

Are the Indemnity Proceedings (so far as they relate to Roadstone) Bound to Fail?

26. In my view, Roadstone's argument that the Indemnity Proceedings are bound to fail does not withstand analysis.

27. In the first place, the Indemnity Proceedings seek indemnity and contribution from Roadstone in respect to *all* of the Homeowner Proceedings where the houses were constructed using stone infill and crushed rock products supplied by Roadstone (the proceedings also claim indemnity and contribution from the other suppliers of stone to Ballymore). On Roadstone's argument, the procedural exclusivity mandated by section 27(1)(b) is triggered only when Ballymore actually issues and serves a third party notice on Roadstone. It is on that basis that it seeks to explain (and excuse) the fact that the strike out application now before this Court did not issue until more than two years (and very many court hearing days) after the commencement the Indemnity Proceedings. Ballymore has served third party notices in only three actions (of the 32 actions now left in Homeowner Proceedings). Its claim for indemnity and contribution against Roadstone is *not* limited to those three actions. Roadstone had sought to avoid that difficulty by relying on the fact that Ballymore had stated its intention to issue and serve third party notices in the remaining Homeowner Proceedings. However, the High Court has now directed that such notices should not be served. Therefore, even on the assumption that Roadstone is entirely correct as to the effect of issuing and serving a third party notice, it is difficult to understand how it can be said that the consequence of doing so in three actions is that the Court should conclude that the much broader claim for indemnity and contribution made in the Indemnity Proceedings is "*bound to fail"* and/or that it fails "*to disclose a reasonable cause of action".* Roadstone never faced up to this significant contradiction in its legal analysis.

28. Separately, the claims made in the Indemnity Proceedings include, but are not limited to, a claim for contribution under Part III of the 1961 Act. Ballymore also claims damages for (*inter alia*) breach of contract, negligence and breach of duty, misrepresentation and negligent misstatement. Ballymore says that, even if section 27(1)(b) is to be construed as providing for any form of procedural exclusivity, it applies only to claims for contribution under Part III. Accordingly, it says, its entitlement to maintain the other claims in the Indemnity Proceedings is unaffected by section 27(1)(b). In response, Roadstone asks the Court to read the reference to "*contribution*" in section 27(1)(b) as not limited to contribution under Part III but encompassing also all other claims by way of contribution, including all the damages claims advanced by Ballymore here.

29. Ballymore certainly appears to have the better side of that argument, both by reference to the statutory language and the authorities which have considered the issue. Section 27(1) commences by apparently identifying its scope of application; it applies where *"a concurrent wrongdoer … wishes to make a claim for contribution* <u>*under this Part*</u>" (my emphasis). It is difficult to see how the references that follow in section 27(a) and (b) to "*contribution*" could plausibly be said to refer not simply to contribution under Part III but to a broader (and wholly undefined) category of contribution, including independent claims for damages at common law. There is nothing in section 27, or anywhere else in Part III, which points to such a construction. Certainly such claims may come within the scope of Order 16 (l) RSC but it has long been understood that Order 16 is broader in its scope that section 27: see, for instance, the judgment of the High Court (Costello J) in *Staunton v Toyota (Ireland) Ltd* (Unreported, High Court,

15 April 1988).[6] Counsel for Roadstone argued that any other reading of section 27(1)(b) would not be consistent with the policy of Part III. But, while the policy of Part III is undoubtedly a relevant factor in this context, it does not permit the court to rewrite the language used by the Oireachtas. The effect of Roadstone's argument, if accepted, would be to make claims for damages which are pursued by separate action subject to discretionary refusal, even where a claim for Part III contribution was not pursued, which appears implausible. It would presumably also have the consequence that the limitation period for the bringing of such claims would be governed by section 31 of the 1961 Act rather than the Statute of Limitations which again does not appear to make sense.

30. As regards the scope of Part III and of section 27, the authorities seem to speak clearly. Giving the principal majority judgment for the Supreme Court in *Gilmore v Windle* [1967] IR 323 – one of the first decisions of significance on Part III – O' Keefe J. stated that section 27 "*deals only with claims for contribution under the Act (i.e. by one of two concurrent wrongdoers against another)"*. He contrasted the scope of section 27 with the wider scope of Order 16, the latter (but not the former) being sufficiently broad to accommodate a claim for damages for breach of contract, including a claim for damages amounting to an indemnity.[7]

[6] *"The Rules make available to defendants Third Party procedures not just for statutory claims for contribution or indemnity under the Civil Liability Act 1961 but also for non-statutory claims arising otherwise than under the Act*." (page 2)

[7] At pages 334-335.

31. In *Buckley v Lynch* [1978] IR 6, Finlay P. observed that the statutory right to contribution had been created by section 21 of the 1961 Act. Section 27, he added, *"provides the procedure for claiming the right of contribution thus bestowed."* [8] *Buckley v Lynch* is cited extensively in Roadstone's written submissions and presented as an authority for the proposition that section 27(1) applies to claims for damages in tort and contract as well as to claims for Part III contribution. That is not a correct reading of *Buckley v Lynch*. It concerned a claim for Part III contribution only and the issue was whether, where such claim was made by way of the third party procedure, the claim came within the scope of section 31 of the 1961 Act, which prescribes the limitation period for *"an action ... for contribution."* The third party argued that where a claim for contribution was made by way of the third party procedure, it was not an "*action .. for contribution*" and was subject to the provisions of section 11 of the Statute of Limitations, rather than more claimant-friendly section 31 of the 1961 Act. On that basis, the third party argued, the claim against it was statute-barred. That argument failed, Finlay P holding that the provisions of section 31 applied to a claim for contribution made by way of the third party procedure as it did to an action for contribution brought by way of separate proceedings.[9]

[8] At page 10.

[9] Section 29(6) of the 1961 Act is also prayed in aid by Roadstone in this context but I do not think that it is of any relevance in determining the meaning of "*contribution*" in section 27(1)(b). Even if section 29(6) has the effect suggested by Roadstone, it is by virtue of the express terms of section 29(6) and it throws no light on the construction of section 27(1)(b).

32. Recently, the provisions of Part III have been the subject of close analysis by the Supreme Court in *Defender Limited v HSBC France (formerly HSBC Institutional Trust Services (Ireland) Limited* [2020] IESC 37, [2021] 1 ILRM 1. *Defender* was another claim arising from the fraud of Bernie Madoff. The plaintiff had entered into a settlement agreement with the trustee in bankruptcy administering the affairs of BLMIS, the company that the late Mr Madoff had used to carry out his trading activities. The issue in *Defender* was whether that settlement had the effect of discharging any liability of HSBC, having regard to the provisions of Part III of the 1961 Act and in particular section 17(2) and section 35(1)(h). O' Donnell J (with whose judgment all other members of the Supreme Court agreed) noted that, in complex cases, there will often be pre-existing relationships between parties that give rise to other claims in addition to the statutory claim for contribution under Part III. Those other claims may include a claim for a contractual indemnity. However, *"[s]uch claims are not .. controlled by the [1961 Act]."*[10] The focus of the Act was on the "*manner in which a CLA claim arises, may be made, and may be resolved."* That was, in O' Donnell J's view, *"central to an understanding of the Act."*[11] Conceptually, the claim for contribution under Part III was entirely distinct from any claims that concurrent wrongdoers may have *inter se*. As O' Donnell J explained, the statutory cause of action for contribution "*is not .. related to anything that either concurrent wrongdoer is alleged to have done to the other. It relates instead to what one concurrent wrongdoer*

[10] Para 18.

[11] *Ibid*.

claims the other concurrent wrongdoer did to the plaintiff." [12] Later in his judgment, O' Donnell J emphasised the importance of remembering "*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."*[13]

33. Thus, there would appear to be weighty authority against the proposition that section 27(1)(b) encompasses all claims made by Ballymore in the Indemnity Proceedings. Even if it can be said – in favour of Roadstone – that the contrary is arguable, that will not do duty for Roadstone in this context. Roadstone is seeking to have the Indemnity Proceedings struck out – in effect dismissed – in *limine*. Persuading the Court that its contentions as to the meaning and effect of section 27(1)(b) are *arguable* gets Roadstone nowhere. It must, rather, persuade us that its construction of section 27(1)(b) is *unarguably correct*. Plainly, that is not the position as regards the question of whether section 27(1)(b) applies only to Part III claims for contribution or is broader in its scope.

34. Strike-out applications are not, in general, appropriate vehicles for the determination of disputed legal issues, unless those issues are straightforward. So much is clear from two recent decisions of the Supreme Court, *Moylist Construction Ltd v Doheny* [2016] IESC 9, [2016] 2 IR 283 and *Jeffrey v Minister for Justice, Equality and Defence* [2019] IESC 27, [2020] 1 ILRM 67 in each of which the sole judgment was given by the current Chief Justice. In *Jeffrey v Minister for Justice.* Clarke CJ (McMenamin and Finlay

[12] At para 13.

[13] At para 123.

Geoghegan JJ agreeing) drew a parallel with the courts' approach to disputed legal issues in applications for summary judgment:

> *"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…."*

The particular issue in *Jeffrey* was the extent of the immunity of a Garda in relation to (inaccurate) statements made by him about the plaintiff's criminal record at a sentencing hearing in the District Court. While the Chief Justice considered there were "*strong arguments to suggest that immunity does arise"* in his view the *Barry v Buckley* jurisdiction could not be used to dismiss a case "s*imply 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."*

35. Here, Roadstone's submission that section 27(1)(b) bars the further prosecution of the Indemnity Proceedings depends critically on its contention that all of the claims made

in those proceedings – including, *but not limited to*, Ballymore's claim for Part III contribution – come within the scope of section 27(1)(b). For that contention to be accepted, the Court would have to be persuaded that the section 27(1)(b) is not capable of any other interpretation (or, to use the language of the Court of Justice, the issue is *acte clair*) and/or that it has been so interpreted by a court whose decision is authoritative and binding on us (or in the language of the Court of Justice, *acte éclairé*). Roadstone's construction of section 27(1)(b) is clearly neither *acte clair* nor *acte éclairé.* In fact, as is evident from the discussion above, it is the construction advanced by Ballymore – that the provision is concerned only with claims for Part III contribution – that appears to better accord with the language of section 27(1), the structure of Part III and with decided (and binding) authority. Certainly, it cannot be said that Roadstone has demonstrated that section 27(1)(b) clearly applies to the range of claims made in the Indemnity Proceedings.

36. It follows that Roadstone's application to strike out the Indemnity Proceedings in their entirety cannot succeed. Even if Roadstone's contentions as to the scope of section 27(1)(b) are properly to be regarded as arguable, that falls significantly short of what is required in this context.

37. On this basis, the Court could properly dismiss Roadstone's appeal. Having sought an order striking out the Indemnity Proceedings as bound to fail, and having failed to establish a basis on which such an order could properly be made, Roadstone's application must fail. But I do not think that it would be entirely satisfactory to determine the appeal on that basis alone.

Should Ballymore's claim for Part III contribution be struck out?

38. Accordingly, I will consider whether Roadstone has established an entitlement to an order striking out part of the Indemnity Proceedings, specifically the claim for Part III contribution made in the proceedings.

39. It is clear that Order 19, Rule 28 RSC – which is, it will be recalled, one of the jurisdictional bases invoked (in the alternative) by Roadstone here – does not assist Roadstone in this context. According to the Supreme Court, the jurisdiction conferred by Order 19, Rule 28 is exercisable only in respect of the entirety of a pleading and does not permit a court to exercise a form of *"'blue pencil' jurisdiction"*: *Aer Rianta cpt v Ryanair Ltd* [2004] IESC 23; [2004] 1 IR 506 (per Denham J at para 24). It thus differs from Order 19, Rule 27 RSC (which is not relied on by Roadstone).

40. In any event, however, Roadstone never had any prospect of obtaining relief pursuant to Order 19, Rule 28. In his judgment in *Jeffrey*, Clarke CJ cited the statement of O' Higgins CJ in *McCabe v Harding* [1984] ILRM 105 (at 108) to the effect that *'in order for r.28 to apply, vexation or frivolity must appear from the pleadings alone'.* That is, of course, a key point of distinction between the Order 19, Rule 28 jurisdiction and the jurisdiction recognised in *Barry v Buckley* [1981] I.R. 306. In an application under Order 19 Rule 28, the Court is confined to considering the pleadings alone. It cannot be said that Amended Statement of Claim in the Indemnity Proceedings is vexatious or frivolous on its face and that case is not made by Roadstone. On the contrary, on its case the claim made by Ballymore in its pleadings was not open to any objection or

challenge whatever until the point in time where third party notices were issued and served in three of the Homeowner Proceedings.

41. In these circumstances, it is not necessary to say anything more about Order 19, Rule 28.

42. That leaves the *Barry v Buckley* jurisdiction. Counsel for Ballymore suggested in submissions that, under *Barry v Buckley*, a court will not dismiss part of a claim. That particular point was not addressed by counsel for Roadstone and no authority either way was opened to the Court.

43. In the absence of any detailed debate on the point, it is appropriate to proceed cautiously. Certainly, there are instances where as a matter of fact a court exercised the *Barry v Buckley* jurisdiction to strike out part of a plaintiff's claim. However, I am not aware of any decision in which the issue has been considered at the level of principle.

44. The decision of the High Court in *Ennis v Butterly* [1996] IEHC 51, [1996] 1 IR 426 is a case where the High Court considered it appropriate to dismiss part of the action. The defendant had sought the dismissal of the entire action. Kelly J dismissed the plaintiff's claim for breach of contract against the defendant arising from his alleged breach of an agreement to marry her and of an agreement to co-habit with her until such marriage was possible. The first aspect of the claim was, in Kelly J's view, excluded by section 2 of the Family Act 1981 and the second aspect was unenforceable as a matter of public policy. However, the plaintiff was permitted to pursue claims for fraudulent and

negligent misrepresentation which were independent of the marriage claims.

45. There are conflicting policy considerations at play in this context. On the one hand, it appears to be highly undesirable that the High Court might routinely be asked to exercise the sort of *"'blue pencil' jurisdiction"* referred to by Denham J in her judgment in *Aer Ríanta v Ryanair*. While her observations were made in the context of an application under Order 19, Rule 28, they have obvious relevance and resonance in the *Barry v Buckley* context also. Denham J explained how the development of such a jurisdiction would have inappropriate consequences:

> *"It would have the potential of initiating a whole new jurisdiction of interlocutory applications whereby parties sought to blue pencil (strike out) portions of statements of claim or defences. It could herald a whole new list in the High Court where parties would fight on the pleadings. Such an approach is contrary to the policy of expeditious litigation. It would involve further costs and raise that consideration also. In addition it would involve motions which could be time consuming; as if part of a pleading is to be sought to be struck out, the probability is that at least one party will seek to have the issue analysed in the context of the whole pleading. Thus the entire pleading would be considered by the court. Indeed, there may be great difficulty in analysing a part of a pleading independent of the rest of the pleading."* (at paragraph 24)

These are, on any view, powerful considerations.

46. On the other hand, where a discrete claim or cause of action is clearly bound to fail *and* where it appears that significant court time and legal costs would be saved if that claim or cause of action were to be excised from the proceedings at an early stage, there are, arguably, compelling countervailing policy considerations in favour of holding that the *Barry v Buckley* jurisdiction should, in principle, be available. It may be that *Ennis v Butterly* should be understood as an example of such approach, though not expressly articulated in such terms. Certainly, the breach of contract claim which was struck out by the High Court appears to have been the primary claim in *Ennis v Butterly* and there can be little doubt but that the striking out of that claim significantly narrowed the scope of the proceedings, with consequent saving in court time and costs.

47. There may be other exceptional circumstances in which a court could properly consider exercising the *Barry v Buckley* jurisdiction in respect of part only of a claim. For instance, where a claim of fraud or other deliberate wrongdoing is made without a proper basis it may be that a court would consider it necessary to strike out that claim in order to vindicate the rights of the defendant. Claims of professional misconduct that are made without a proper basis might fall to be treated in the same way. However, the issue was not debated in any meaningful way and so these observations are tentative (and *obiter*).

48. However, even on the assumption that such a jurisdiction is available to be exercised by the Court on this appeal, it is, in my view, clear that the conditions for its exercise are not satisfied here.

49. In the first place, for reasons which I shall set out shortly, I do not consider that this Court can properly conclude that the Part III contribution claim made in the Indemnity Proceedings is bound to fail. That is, of course, the fundamental *sine qua non* to the grant of any relief to Roadstone in this application.

50. Second, and in any event, it is evident that so far from saving court time and costs, the inevitable effect of striking out the Part III contribution claim from the Indemnity Proceedings would be to give rise to delay and an increase in costs. Were this Court to excise the Part III contribution claim from the Indemnity Proceedings, that would compel Ballymore to pursue that claim by way of third party proceedings within the Homeowner Proceedings but would not, in itself, bring an end to the Indemnity Proceedings (which, it should be remembered, also involve defendants other than Roadstone). Even if, in such circumstances, Ballymore utilised the provisions of Order 16 so as to include *all* its claims against Roadstone in those third party proceedings (and it seems reasonable to assume that it would do so), the net effect would not be to reduce the scope of the dispute between Ballymore and Roadstone in any way. Rather, precisely the same claims would have to be determined by the High Court, albeit within the procedural framework of the Homeowner Proceedings. As the Supreme Court observed when refusing leave for a leapfrog appeal by Roadstone from the decision of the Judge, the end point of the litigation here necessarily requires the trial of the issues of indemnity and contribution between Ballymore and Roadstone. Of course, the claims would have to be pleaded afresh, which would inevitably involve further time and cost (and scope for still further procedural dispute). The Judge has already determined that that issue (as well as the equivalent issues arising as between Ballymore and the other

Defendants to the Indemnity Proceedings) are best and most efficiently determined in the Indemnity Proceedings rather than in the Homeowner Proceedings and that determining the issue in the Homeowner Proceedings would involve a "*convoluted and expensive process"* that would be *"extremely wasteful of resources".*

51. This discussion serves to illustrate the peculiar character of the application here. The complaint made by Roadstone is, ultimately, a purely procedural one. In contrast to most if not all litigants who have invoked the *Barry v Buckley* jurisdiction – whether successfully or otherwise – since the jurisdiction was first recognised in 1981, Roadstone does not come to court asserting that it is being vexed by a claim that is, substantively, so lacking in merit as to warrant the exceptional intervention of the court to bring that claim to an end without a full hearing. Rather, it says, in effect, that while Ballymore is entitled to pursue the claims it makes in the Indemnity Proceedings, it must do so in the Homeowner Proceedings. While it makes complaints of prejudice, I have already expressed the view that there is no substance to those complaints and, in any event, it is clear that, on Ballymore's case, it is not obliged to demonstrate any prejudice. Its objection is one of form not substance. The scenario here is, it seems to me, remote indeed from the rationale underpinning the *Barry v Buckley* jurisdiction and it is very difficult indeed to see how, in such circumstances, it might appropriate to exercise that jurisdiction – one that necessarily involves a discretion vested in the court – in favour of Roadstone, regardless of the legal merits of its arguments as to the meaning and effect of section 27(1)(b).

Is it clear that Section 27(1)(b) bars the claim for Part III contribution from being maintained in the Indemnity Proceedings?

52. I come finally to Roadstone's contention that, having regard to the provisions of section 27(1)(b), Ballymore cannot properly maintain a claim for Part III contribution in the Indemnity Proceedings. On Roadstone's analysis, section 27(1)(b) has an absolute and imperative character that over-rides any power that the High Court may otherwise have to manage proceedings before it. Ballymore's claim for Part III contribution *must* – so Roadstone says – be pursued by individual third party claims brought on foot of third party notices to be served in each of the Homeowner Proceedings and it is beyond the power of the High Court (or this Court on appeal) to permit any alternative procedure to be adopted.

53. An immediate – and significant – difficulty with that argument is that it does not appear to find any support in the terms of section 27(1)(b). That sub-section does *not*, in fact, provide that claims for contribution can only be pursued by the third party procedure. On the contrary, it leaves open *"the bringing of a substantive claim for contribution which is a statutory right of action, conferred by the terms of s.21 of the Act, and which can be prosecuted by an action brought by civil bill or plenary summons"*: *Board of Governors of St Laurence Hospital v Staunton* [1990] 2 IR 31, per Finlay CJ at 35. That position was re-affirmed by the Supreme Court in *ECI European Chemical Industries Limited v MC Bauchemie Muller GmbH* [2006] IESC 15, [2007] 1 IR 156: section 27(1)(b) "*does not prescribe that the claim for contribution may only be brought by*

way of third party proceedings and not by a separate action" per Geoghegan J, at para 5.

54. Section 27(1)(b) does, of course, provide that, when a claim for contribution is pursued by action rather than by the third party procedure, *"the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed."* Accordingly, the party seeking contribution by way of action faces an additional discretionary hurdle.

55. There is a surprising scarcity of authority addressing the nature of the court's discretion under section 27(1)(b) and the considerations by reference to which it is to be exercised. The principal authority is the decision of the Supreme Court in *ECI European Chemical Industries Limited v MC Bauchemie Muller GmbH*. Before discussing that decision, however, that Court's earlier decision in *Board of Governors of St Laurence Hospital v Staunton* warrants mention in this context. The issue in that appeal was whether or not a third party notice should be set aside. In circumstances where the third party notice had been served only after the High Court had heard and determined the action between plaintiff and defendant, the Supreme Court's decision to set aside the notice was unsurprising. The Court (per Finlay CJ) went on to observe that it was open to the defendant to bring an action for contribution against the proposed third party. In that event, he explained, there would be:

> *"vested in the court a new and separate discretion by this sub-section to refuse to make an order for contribution in their favour, even if it were satisfied that*

> *they could establish a right to contribution on the facts presented to it. It would seem clear that this discretion is part of the general policy of the provisions of the Act of 1961 seeking to have all claims determined at the same time and is also a potential protection to a person against whom a claim for contribution is made by unfair or prejudicial procedure. The issue as to whether or not this third party was, by a claim for contribution now made, seriously prejudiced was not fully argued before this Court on this appeal and I express no view as to what the decision of the High Court should be were the defendant now to institute an action for contribution."* (at page 37)

This passage can be read as suggesting that, in the exercise of the discretion vested in the court by the final sentence in section 27(1)(b), prejudice to the third party (the defendant to the claim for contribution) would be a significant – if not the decisive – consideration.

56. *ECI European Chemical Industries Limited v MC Bauchemie Muller GmbH* did involve an action for contribution. ECI had been one of a number of defendants in proceedings brought by a Mr Donnelly. It served a third party notice on MC Bauchemie Muller but the notice had been set aside on the basis that it had not been served *"as soon as [was] reasonably possible".* ECI then issued proceedings against MC Bauchemie Muller claiming indemnity and contribution. Its entitlement to do so was challenged and the High Court set down for preliminary determination an issue as to the entitlement of ECI to maintain an action for contribution in circumstances where it had already made a claim for contribution in the underlying proceedings, as well as a further issue as to

whether the claim for contribution ought to be refused in the exercise of the court's discretion in circumstances where the court had already determined that ECI had failed to serve a third party notice in accordance with the requirements of section 27(1)(b). The High Court concluded that ECI was not disentitled from pursuing the claim for contribution on the basis of having made an invalid claim for contribution by way of the third party procedure. It also concluded that the claim ought not to be the subject of a discretionary refusal based on ECI's previous failure to comply with the requirements of section 27(1)(b). The defendant appealed.

57. The Supreme Court had little difficulty in disposing of the first issue, holding that it would be wrong in principle if a claimant who had defectively served a third party notice that had subsequently been set aside was considered to be in a different position to a claimant that had not served a third party notice at all (para 7). As for the second issue, that raised the difficult question of what were the circumstances in which a court should exercise its discretion to reject a claim for contribution brought by way of action and where the onus of proof lay in that context. Geoghegan J (with whose judgment Hardiman and Fennelly JJ agreed) was of the view that, "*first and foremost"*, the court should consider whether there was a "*good reason*" why a third party notice had not been served as soon as reasonably possible. What might constitute "*good reason*" for this purpose was not explored. In the absence of such a good reason, Geoghegan J was of the view "*that in most cases, irrespective of any question of prejudice, the new proceedings ought to be rejected"* (at para 14). The onus of establishing such a "*good reason*" was on the claimant for contribution. Where that onus was not discharged, the discretion ought normally to be exercised against permitting the claim for contribution

to be pursued. Where it was discharged, a question would arise whether the action could still be rejected on the basis of prejudice to the defendant but whether prejudice was relevant at all was, in the judge's view, "*debatable*" (at para 16). In deciding whether there was "*good reason"* why the third party notice had not been served in accordance with the requirements of the Act, any matter decided on the earlier set-aside application – including "*any relevant time issue*" – was to be regarded as *res judicata* (at para 16). The court concluded by holding that the High Court had erred in its approach to the issue of discretion and remitted it for rehearing. However, there is no record of any further decision in the proceedings.

58. The approach taken to the section 27(1)(b) discretion in *ECI European Chemical Industries Limited v MC Bauchemie Muller GmbH* might be thought to be an unduly narrow one that arguably involves reading into the sub-section restrictive language which the Oireachtas did not choose to employ. The discretion conferred by section 27(1)(b)) is expressed in the very broad terms ("… *the court may in its discretion refuse to make an order for contribution* …"). Section 27(1)(b) clearly contemplates that a claim for contribution may be made by action where there has been a failure to comply with third party procedure. That is the hypothesis on which the Oireachtas legislated to permit such actions to be brought. If the failure to serve a third party notice as required by section 27(1)(b) is, of itself, regarded as sufficient reason to exercise the court's discretion against making an order for contribution – at least in the absence of some exceptional circumstance – that would appear to involve a significant limitation of the court's discretion. Geoghegan J's suggestion that prejudice may not be relevant to the exercise of that discretion also appears somewhat surprising and, as he acknowledged,

the (*obiter*) comments made by Finlay CJ in *Board of Governors of St Laurence Hospital v Staunton* seem to be to the contrary effect. If the defendant to the claim for contribution has not been materially prejudiced by a failure to utilise the third party procedure it appears difficult to understand why the court's discretion should be exercised against permitting a claim for contribution to be pursued.

59. These issues may require further consideration in an appropriate case. Be that as it may, whatever the wider issues raised by *ECI European Chemical Industries Limited v MC Bauchemie Muller GmbH*, and whatever the nature and scope of the "*good reason*" contemplated by the Supreme Court, there can no doubt here that there is "*good reason*" why Ballymore did not serve third party notices in the Homeowner Proceedings (other than in the three actions where notice were served in March 2018, a point to which I shall return). That "*good reason"* is, of course, that the Judge has *directed* that the claims for indemnity and contribution made by Ballymore (including the claim for Part III contribution) should be determined in the Indemnity Proceedings. In the Judge's view, the alternative of having those claims determined on a "*house-by-house*" basis by way of the third party procedure (the alternative favoured by Roadstone) would be *"extremely wasteful of resources"* and would not consistent with the effective management of the overall litigation, in the interests of *all* of the parties (including the plaintiffs in the Homeowner Proceedings).

60. As regards prejudice, while Roadstone asserts that the determination of Ballymore's claims for indemnity and contribution in the Indemnity Proceedings would cause prejudice to it, its assertions are not persuasive. There has been no delay in Ballymore

asserting its right to contribution against Roadstone and Roadstone has not been prejudiced in its defence of Ballymore's claim by reason of the fact that it has been brought by action rather than by way of the third party procedure.

61. In these circumstances, it is difficult to identify any conflict between the provisions of section 27(1)(b) of the 1961 Act and the approach taken by the High Court here. Section 27(1)(b) vests in the High Court a discretion to permit claims for contribution to made by action rather than by way of the third party procedure. That is clear from the language of the section and from the authorities. It appears equally clear that the Judge has exercised that discretion and no basis for impugning the manner of its exercise has been established before this Court. But, again, it is neither necessary nor appropriate to reach a definitive view on this point. What is, in my opinion, clear beyond debate is that Roadstone has failed to demonstrate that section 27(1)(b) clearly precludes Ballymore from maintaining a claim for Part III contribution in the Indemnity Proceedings.

62. Roadstone's contention that contribution cannot be pursued in the Indemnity Proceedings in respect of the three Homeowner actions where third party notices have actually been served by Ballymore might appear to have a firmer foundation in the language of section 27(1)(b). After all, the sub-section provides that "*having served such notice, [the concurrent wrongdoer who wishes to make a claim for Part III contribution] shall not be entitled to claim contribution except under the third party procedure*." However, as the Judge noted, an issue arises as to whether that statutory prohibition applies where – as is the case here – the action for contribution was

commenced *before* (in fact, years before) the service of third party notices in the three Homeowner actions.

63. More generally, the implicit assertion that the service of a third party notice is to be regarded as an irrevocable step, giving rise to consequences that cannot subsequently be reversed or relieved from even pursuant to the express direction of the High Court, is far from self-evident. It is not at all clear to me why or how section 27(1)(b) should be construed as having such an effect or why, in the circumstance here, the High Court should not have the power to direct that, notwithstanding the service of the third party notices (which were issued and served for the purposes of protecting the position of Ballymore and not with the intention that they would be prosecuted to a hearing, as was explained to Roadstone at the time), the claims made in those notices should continue to be pursued in the Indemnity Proceedings, which the High Court considers to be the more appropriate procedure to achieve the efficient and effective management of complex litigation. Roadstone's argument requires the Court to construe section 27(1)(b) as operating as an absolute constraint on the jurisdiction of the High Court to manage proceedings before it. That construction appears to involve a mechanistic and rigid approach to what is a procedural provision, an approach that appears wholly at odds with the underlying objective of Part III to ensure that multi-party litigation is managed effectively and fairly. Absent clear language to that effect – and I see no such language in section 27(1)(b) – I am unwilling to adopt such a construction of section 27(1)(b) and am certainly not prepared to do so in the context of a strike-out application.

64. Accordingly, even this residual contention advanced by Roadstone, limited as it is to

the three actions in which third party notices have actually been served by Ballymore, is not *"simple and straightforward*", at least not in the manner suggested by Roadstone.

65. In these circumstances, Roadstone's appeal must fail.

The "New Evidence" relied on by Roadstone

66. I agree entirely with the approach of Faherty J to the *"new evidence*" relied on by Roadstone, It is said that this evidence "*demonstrates that the argument made by Roadstone, as to the reasons why the claim for indemnity and contributions ought to be determined by the third party procedure instead of these proceedings, were correct*".[14] Even if that were so – and I express no view whatever on the import of this *"new evidence*" – it could not affect Roadstone's appeal. Roadstone's argument is that section 27(1)(b) requires the claim for indemnity and contribution to be determined by the third party procedure. The "*new evidence*" does not bear on that issue one way or the other. Roadstone does suggest that, insofar as the issue was one properly within the discretion of the Judge, the new evidence is "*clearly relevant to the exercise of her discretion*". That may be so but that is a matter for the Judge to consider. Case management directions are, of their nature, open to review and reconsideration where warranted. Should Roadstone consider that there has been a material change of circumstances such as would warrant asking the Judge to revisit the directions previously made by her, that

[14] Roadstone's Supplemental Submissions, at para 18.

must be pursued before the Judge. In saying that, I should not be taken as inviting Roadstone to do so, still less should I be taken as suggesting that there is any adequate basis for doing so.

ESTOPPEL

67. The High Court Judge accepted that Roadstone was estopped from challenging Ballymore's entitlement to maintain the Indemnity Proceedings. She noted in her Ruling that the proceedings "*have been ongoing for more than two years and Roadstone have fully engaged in them without demur knowing that the Plaintiff's claim was for contribution and indemnity in respect of the claims of third parties."* The Judge rejected Roadstone's argument that it did not have standing to bring the application until a third party notice was actually served, observing that "*from the outset these proceedings were clearly proceedings for contribution or indemnity."*[15]

68. Faherty J addresses the estoppel issue in some detail in her judgment.

69. I agree that the authorities which consider the effect of delay on the part of a third party in seeking to set aside a third party notice are applicable by analogy in this context. The decision of the High Court (Morris J) in *Carroll v Fulflex International Company Limited* (Unreported, High Court, 18 October 1995) is a useful starting point. There a third party notice had been served without objection and the third party claim was then

[15] Ruling, at page 10.

fully pleaded and reached the point where it was ready to be tried. At that point – some two years after third party notice had been served, the third party applied to set aide the notice on the basis that it had not been served as soon as was reasonably possible. Although Morris J saw force in that complaint, he held that it would be improper to allow the application to set aside the third party notice. In his view, it was "entirely inappropriate ... that the Third Party should come to Court seeking to set aside a procedure 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 an existing party come before the Court by way of a separate action, as they are entitled to do under the provisions of the Civil Liability Act, in order to seek to enforce the rights they claim to have in the present proceedings." In the judge's view, such an application should only be brought before the applicant had "taken an active part in the Third Party proceedings."

70. Morris J adopted a similar approach in *Grogan v Ferrum Trading Co Ltd* [1996] 2 ILRM 216, where he expressed the view that a third party who had entered a defence in the third party proceedings could not subsequently seek to have the third party procedure set aside:

> *"I take the view that if there is to be an orderly conduct of litigation, the parties are entitled to assume that once a third party notice has been served and an appearance has been entered and a statement of claim has been sought and delivered and a defence to that third party statement of claim has been delivered, that this procedure meets with the approval of the third parties and they will not*

attempt to retreat from it. I believe that by adopting this procedure the third parties have forfeited their rights to make application to the court to have the procedure set aside." (at page 221)

Morris J referred to the defendant's contention that it was too late for the third party to seek to have the third party notice set aside as "*the estoppel point*".

71. *Carroll v Fulflex International Company Limited* and *Grogan v Ferrum Trading Co Ltd* were cited with approval by the Supreme Court in *Boland v Dublin Corporation* [2003] 1 ILRM 172. Allowing an appeal from an order of the High Court setting aside the third party notice served in that case, the Court (per Hardiman J) emphasised the need for a third party to apply to set aside a third party notice as soon as possible and stressed that, while it would be too late to make such an application after the delivery of a defence in the third party proceedings, it did not follow that the fact that a defence had not been delivered meant that such an application had been made in a timely way. The third party had not, in fact, delivered a defence in *Boland* but, in the period of 17 months or so between the service of the third party notice and the issuing of the set aside application, the third party had brought a motion to compel the delivery of a third party statement of claim and, after it was delivered, had then sought particulars arising from it.

72. Here, the Indemnity Proceedings issued in December 2015 and were served in May 2016. An appearance was promptly entered on Roadstone's behalf which sought the delivery of a statement of claim. A statement of claim was delivered in November 2016.

Prior to that, Ballymore issued an inspection motion and extensive affidavits were exchanged in that application in the latter part of 2016 and into 2017. In January 2017, Ballymore threatened a motion for judgment in default of defence, prompting delivery of a very extensive notice for particulars on Roadstone's behalf. After providing replies (running to some 125 pages, including appendices), Ballymore again pressed for the delivery of Roadstone's defence. That promoted a notice for further and better particulars from Roadstone. Following delivery of further replies, Ballymore motioned for judgment in default of defence. Roadstone countered by issuing a motion seeking additional detail in respect of certain of Ballymore's replies to its notice for further and better particulars. Certain further particulars were provided by Ballymore but Roadstone pressed on with its motion. On 29 January 2018, following a two day hearing of the motions, Murphy J declined to order Ballymore to provide any further particulars and directed Roadstone to deliver its defence within 21 days.

73. Meanwhile, in late May/early June 2017, Murphy J heard Ballymore's motion for inspection and sampling of the relevant Roadstone quarries (as well as those of Murphy Concrete). By the time the motion came to be heard, voluminous affidavit evidence (including affidavits sworn by a number of different experts) had been exchanged and the fact that the hearing of the inspection motions occupied three days in the High Court gives some indication of the breadth and intensity of the issues between the parties on the issue of inspection. Indeed, it is apparent from the papers (and from the papers in Roadstone's inspection appeal which has been heard by the same panel of this Court) that, even by the standards of hard-fought commercial litigation, the dispute between Ballymore and Roadstone is of more than usual ferocity.

74. Thus, by the time that Roadstone came to deliver its defence in February 2018 the Indemnity Proceedings had been before the High Court on numerous occasions and had already taken up a very significant amount of court time. Ballymore and Roadstone had obviously incurred substantial legal costs.

75. Roadstone finally delivered its defence in February 2018, 21 months after the Indemnity Proceedings were served on it and 15 months after the delivery of Ballymore's statement of claim. As one would expect in litigation such as this, the defence is comprehensive and detailed. Notably, however, it does not include any plea challenging Ballymore's entitlement to maintain the Indemnity Proceedings by reference to section 27(1) of the 1961 Act, though near the conclusion of the defence there is a denial of Ballymore's entitlement to maintain a claim for a "*bare order for indemnity"* in respect of third party claims other than by way of third party procedure. As Faherty J notes in her judgment, Roadstone now accepts that, in principle, such an order for indemnity can properly be sought by action.

76. This strike out application issued on 24 April 2018. At that point, third party notices had been issued and served in three of the Homeowner Proceedings and Ballymore had indicated an intention to issue and serve such notices in the other proceedings in due course.

77. The procedural history set out in summary above clearly demonstrates that Roadstone took an active part in the Indemnity Proceedings at all times since May 2016. It is clear

also that, in the event that the relief sought by Roadstone in this application is granted, it would involve setting at nought the (very substantial) costs and expenses incurred in the Indemnity Proceedings to date (and matters have progressed further since the issue of this application in April 2018). That would entirely at odds with any notion of the *"orderly conduct of litigation."*

78. In response, Roadstone makes a number of arguments. Its primary argument is that, until the service of third party notices by Ballymore, it had no basis on which to bring this application. I do not agree.

79. In the first place, as I have already noted, there appears to me to be a fundamental inconsistency in Roadstone's position. On the one hand, it says that it could not bring this application until third party notices were served by Ballymore. Consistent with that position, counsel for Roadstone accepted that, if no third party notices had been served by Ballymore, Roadstone could not have brought this application. However, Ballymore has served third party notices in only three of the Homeowner Proceedings. Notwithstanding that fact, Roadstone maintains that the entirety of the claim made against it in the Indemnity Proceedings ought to be struck out. When this issue was raised in argument, counsel for Roadstone made reference to the fact that Ballymore had intended to serve third party notices in all of the Homeowner Proceedings but "*were stopped in their tracks by the High Court judgment."* No doubt, that is so as a matter of fact but I fail to see how it is in point. Whatever the explanation, the fact is that there are 29 Homeowner Proceedings in which no third party notices have been served by Ballymore (not all, of course, involving Roadstone product). If the Court is being asked

to strike out the claims for contribution and indemnity relating to those other proceedings – as it is – then it seems to follow that, on Roadstone's analysis, service of a third party notice is not, after all, any form of *sine qua non*.

80. In any event, the basic premise of Roadstone's argument is unpersuasive. As and from the service of the Indemnity Proceedings on it in May 2016, Roadstone was aware that Ballymore was maintaining a claim for indemnity and contribution (including Part III contribution) against it and was asserting an entitlement to prosecute that claim by plenary action. At that point, it was open to Roadstone to argue that such proceedings were inappropriate and that appropriate procedure for determining issues of indemnity and contribution was by way of the third party procedure in the Homeowner Proceedings, in accordance with section 27(1)(b). On that basis, Roadstone could have applied to have the Indemnity Proceedings stayed: *Kalix Fund Limited v HSBC Institutional Services (Ireland) Ltd*. Whether or not such an application would have succeeded is nothing to the point in this context. Far from bringing such an application, Roadstone elected to engage intensively in the Indemnity Proceedings.

81. The other argument made by Roadstone in this context is that estoppel cannot alter the position at law, which I understand to be an argument that Roadstone's entitlement to rely on section 27(1)(b) is absolute and cannot be affected by any form of estoppel. That is a surprising submission, for which no authority was cited. As a matter of principle, it seems clear that parties may, through their conduct, lose the entitlement to assert their strict legal rights, including rights arising under statute. Thus, a defendant may be estopped from relying on the Statute of Limitations: *Murphy v Grealish* [2009]

IESC 9, [2009] 3 IR 366. A taxpayer may lose the right to pursue an appeal to the Circuit Court by electing to pursue a case stated to the High Court : *O' Brien v Revenue Commissioners* [2016] IEHC 2, [2016] 1 IR 258.

82. Insofar as section 27(1)(b) can properly be said to confer rights on litigants, those rights may clearly be lost by conduct. That is demonstrated by the authorities to which I have referred. The only circumstance in which the third parties in those cases could properly be sued for contribution by way of the third party procedure was where the third party notice was served "*as soon as is reasonably possible."* That very point was made by Finlay CJ in *Board of Governors of St Laurence Hospital v Staunton:*

> *"I am quite satisfied upon the true construction of that sub-section that the only service of a third-party notice contemplated by it and, therefore, the only right of a person to obtain from the High Court liberty to serve a third-party notice claiming contribution against a person who is not already a party to the action, is a right to serve a third-party notice as soon as is reasonably possible. A defendant in an action seeking to claim contribution against a person who is not a party to the proceedings cannot serve any third-party notice at any other time, other than as soon as is reasonably possible."* (at page 36)

It is clear, nonetheless, from decisions such as *Grogan* and *Boland* that a third party may, by their conduct, lose the entitlement to assert non-compliance with the requirement ("*shall ... serve...")* in section 27(1)(b) that a third party notice be served "*as soon as reasonably possible*". There is no reason in principle why the same

approach should not apply to the other procedural requirements in section 27(1)(b).

83. In the circumstances, Roadstone is precluded by its conduct from bringing this application. I do not think it is necessary to consider in detail whether the basis of that preclusion is properly regarded as a form of estoppel or whether it should be seen as an instance of acquiescence or waiver. These doctrines are closely related. A common thread is that the conduct of a party may make it inequitable or unfair to permit that party to assert its strict legal entitlements. That is most certainly the position here.

BALLYMORE'S CROSS-APPEAL

84. I agree with Faherty J that as Roadstone's appeal has failed, the cross-appeal is effectively moot.

CONCLUSIONS

85. For the reasons set out in this judgment, which I have summarised at its commencement, I would dismiss this appeal and affirm the order made by the High Court. I share the provisional view expressed by Faherty J regarding the costs of the appeal.

86. In his judgment in *Defender Ltd v HSBC France*, O' Donnell J observed that the scheme of Part III of the 1961 Act was beginning to show its age. As he also observed, the Act was modelled on relatively simple forms of private law litigation. Certainly, it does not appear that the Act was designed with complex multi-party litigation such as the litigation here in mind. O Donnell J's concern that that sections 17 and 35(1)(h) operated in *"an overly rigid abstract and theoretical way"* is, in my view, equally applicable to section 27. It ought to facilitate rather than frustrate the appropriate management of litigation such as this, in the interests of litigants and in the interests of the administration of justice and there ought not to be, in any circumstances, room for argument that the section compels the High Court to adopt a procedure that is, in its opinion, "*a convoluted and expensive process"* that would be *"extremely wasteful of resources".* In my view, any review of the 1961 Act of the kind suggested by O' Donnell J might usefully include the provisions of section 27 within its ambit.