

## **SOME TOPICAL ISSUES IN CONSTRUCTION LAW DISPUTES**

### **PAPER FOR INAUGURAL MEETING OF CONSTRUCTION BAR ASSOCIATION OF IRELAND**

**Thursday 6<sup>th</sup> June 2013**

---

#### **Introduction**<sup>1</sup>

I am honoured, if somewhat daunted, to have been invited to deliver a paper to the Inaugural Meeting of the Construction Bar Association. I would undoubtedly be liable for the commission of potentially serious torts were I to hold myself out as an expert in matters of construction law. Rather, I understand that my brief is to offer a general practitioner's perspective, based on experience derived from occasional sorties into the world of construction litigation, on the types of legal, strategic and practical issues that confront the practitioners in this field. This paper is therefore addressed to that heroic entity "the general practitioner" with a view to highlighting some of the legal issues of wider importance that may need to be considered and applied in the construction disputes which they encounter in practice.

It is trite to observe that just as the economic boom, fuelled largely by furious activity in the construction sector, generated a good deal of a certain type of work for construction lawyers or those involved in providing legal services to the construction sector, so it is that the collapse of

---

<sup>1</sup> I am particularly grateful to Mark Sanfey SC, Jonathan FitzGerald BL, Lydia Bunni BL and Ray Ryan BL for their help and input into the drafting of this paper.

the construction sector has also generated considerable work in the field of construction related litigation and disputes, albeit work that is inevitably throwing up a series of different issues.

Insolvency of one or more of the parties to a construction project has undoubtedly been the single biggest practical problem faced by claimants who have been wronged – whether as client or affected party to construction projects that have gone awry. In that context, I briefly address one of the potential statutory safeguards for an injured party against the consequences of the wrongdoer having become insolvent - Section 62 Civil Liability, 1961.

One of the more regrettable legacies of the construction boom (and bust) is the extent to which it was characterised by the construction of defective buildings which have been left unremedied. While construction law is undoubtedly an area where the contract is invariably the king, the area of defective buildings is one that throws up some of the more challenging concepts in the area of imposition of tortious liability. A party left owning a defective building may find themselves without a practical remedy for breach of contract against the party with whom they contracted for the purchase or construction of a building, particularly where that party has become insolvent. This in turn raises a question long regarded as a vexed question in Irish (and indeed English) law, being the question of the circumstances in which a party not in a contractual relationship with the plaintiff may nonetheless be liable in negligence for economic loss. This is an issue which regularly surfaces in defective buildings litigation and is topical in light of the present spate of pyrite-related litigation. I propose to briefly deal with what appears to be the state of Irish law in respect of the imposition of a duty of care for economic loss and to identify some of the questions which may arise in such litigation, including where such litigation involves claims against construction professionals.

One of the practical consequences of the construction collapse, and the consequential demise of so many building and construction firms, is that there has been a perceptible rise in the number of claims brought against construction professionals (principally architects, engineers and quantity surveyors) in circumstances where there is a greater probability that such professionals remain in a solvent state and where, perhaps more critically, professional indemnity insurance will be in place. While the principles in relation to professional negligence are reasonably settled,

this is an area where very difficult questions can arise in practice, particularly given the complex matrix of contractual arrangements that tend to be in place in respect of large construction projects and the sometimes opaque distribution of responsibilities found in such contracts.

Another question which has arisen in the area of defective buildings litigation, is the question of the application of the Statute of Limitations to such claims, particularly where defects in buildings may have emerged from latent damage. While the Supreme Court has stated in its recent judgments in *ACC v Gallagher* (a case relating to mis-selling of financial products) that the law in relation to the application of the Statute and latent damage in buildings is settled, the principles are far from easy to apply in practice. I will briefly review the relevant principles and identify some of the matters which need to be watched out for in this area.

Finally, construction law is an area of practice where alternative dispute resolution mechanisms (in particular, conciliation and arbitration) have long been a feature of standard contracts and of the culture of the resolution of construction disputes. To this extent, in light of the quasi-revolution involved in the embrace of alternative dispute resolution (and in particular mediation) in other areas of law, much can be learned as to the benefits (and downsides) of alternative dispute resolution from the experience in the construction sector. Like all of these matters, the approach to dispute resolution in the construction sector has not remained static. I briefly address some of the practical questions that arise in relation to multi-party disputes and ADR. I also note the strong emergence (backed by statutory direction) in the UK of adjudication as a form of dispute resolution in the construction sector and raise some questions as to its potential efficacy in the Irish construction dispute resolution field.

I hope this very provisional survey of potential issues in construction disputes will provide some signposts as to areas which the Association might examine in more detail (and to a greater level of sophistication) in future meetings and seminars of the Association.

## **Impact of Insolvency on Construction Disputes**

### ***Where Defendants go into liquidation or bankruptcy***

Virtually all construction contracts for work to be done by a contractor require that the contractor provide evidence of insurance which would cover defective work and injury to third parties. Employers may also insist on evidence that other advisors such as architects, engineers or project managers also have insurance to provide indemnity in respect of negligence in their duties.

What happens if there is a valid policy of insurance, but the insured has gone into liquidation or bankruptcy?

Section 62 of the Civil Liability Act, 1961 provides for such a situation:

*“62.—Where a person (hereinafter referred to as the insured) who has effected a policy of insurance in respect of liability for a wrong, if an individual, becomes a bankrupt or dies or, if a corporate body, is wound up or, if a partnership or other unincorporated association, is dissolved, moneys payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those moneys are payable, and no part of those moneys shall be assets of the insured or applicable to the payment of the debts (other than those claims) of the insured in the bankruptcy or in the administration of the estate of the insured or in the winding-up or dissolution, and no such claim shall be provable in the bankruptcy, administration, winding-up or dissolution.”*

Paragraph 18 of the First Schedule to the Bankruptcy Act, 1988 relating to proof of debts makes it clear that the schedule is “*without prejudice to ... section 62 of [the Civil Liability Act, 1961] ...*”. The effect of section 62 is therefore that moneys payable under a policy of insurance are ring-fenced and do not form part of the assets of a bankrupt or company in liquidation for distribution among the general creditors.

There has been judicial and academic debate as to exactly what rights an injured party has against the insurance company providing indemnity. Can the insurer be sued directly by the injured party?

In *Dunne v PJ White Construction Company Limited* [1989] ILRM 803, the Supreme Court suggested that the injured party had a right to bring an action against the Defendants' insurers in respect of any money payable under the policy, although the decision was primarily concerned with whether the onus of proof to establish that a right asserted by the insurance company in the pleadings to rescind or repudiate the policy of insurance fell on the Plaintiff or the insurer. The Supreme Court decided that, in order to give effect to section 62, the onus of proof should fall on the insurance company to prove the existence of a right to rescind or repudiate the policy: see this interpretation set out at page 8 of the judgment of Kearns P. in *McCarron v Modern Timber Homes Limited (In Liquidation)* [2012] IEHC 530, discussed below.

In *McCarron*, Kearns P. referred to the judgment of the Supreme Court in *Dunne*, and commented as follows:

*“While confirming therefore that the section creates a right of action (thus overcoming the privity point), the judgment does not go on to say when the cause of action may be said to arise or at what point it becomes enforceable. The precise terms of section 62 must be looked at for guidance. They provide that monies shall be applied in the manner therein specified in discharging all “valid claims against the insured” and it seems to me that a claim cannot be so characterised until liability has been established against the employer and the quantum of the claim assessed. Any claim against the insurer, if brought in the same set of proceedings as those against the employer, will require to be stayed until the liability at least of the employer is first established”.*

Kearns P. in rejecting the contention that the statutory right of action arose at a point earlier than the determination of the claim against the insured further noted the potential difficulties under the Statute of Limitations if the injured party's cause of action under Section 62 against the

insurer arose prior to it being determined that the injured party had a valid claim against the insured which the insurer then had an obligation to meet.

In *Yun Bing Hu v Duleek Formwork Limited (In Liquidation)* [2013] IEHC 50, the Plaintiff sustained an injury to his thumb in the course of construction works. He sued his employer, the first Defendant. He subsequently learned that the employer, which had gone into liquidation, had breached one of the conditions precedent to liability, namely the payment of an excess of €1,000. The Plaintiff got judgment in default of appearance against the first Defendant, and then sought to have Aviva, the insurer, joined as a Defendant. Aviva subsequently issued a motion under order 19, rule 28 on the basis that the proceedings disclosed no reasonable cause of action, or that they were bound to fail.

The Plaintiff sought to rely on section 62 as giving him a right of action directly against Aviva. Aviva argued that the section applies only to “moneys payable to the insured under the policy”, and that no monies were payable to the insured under the policy as the policy had been repudiated. It was submitted that there was no privity of contract which would enable the injured party to contest the repudiation by Aviva of the policy.

Pear J. held that it was of significance that the Plaintiff did not dispute that the first named Defendant failed to pay the excess and that therefore the policy of insurance had been breached. He therefore agreed with the argument that the Plaintiff had no privity of contract with Aviva and could not seek to enforce the contract of insurance where he accepted that there had been conduct of the employer which justified repudiation. In circumstances where moneys were not payable to the insured under the policy, section 62 could not avail the Plaintiff. Pear J. made the orders sought by Aviva “with sympathy for the Plaintiff and therefore with regret...”.

What emerges from these decisions is the importance of being in a position to demonstrate that the injured party has a valid claim against the insured before the statutory displacement of the insurer’s entitlement to rely on privity of contract can start to bite; thereafter, the onus will be on the insurer to demonstrate that there is not a valid basis for paying out, if that is the position the insurer seeks to adopt.

## ***Concurrent wrongdoers***

Section 11 of the Civil Liability Act, 1961 provides that:

*“Two or more persons are concurrent wrongdoers when both or all wrongdoers and are responsible to a third person [the plaintiff] for the same damage, whether or not judgment has been recovered against some or all of them.”*

This short provision can have very profound repercussions for one defendant in a multi-defendant construction action if the other defendants are insolvent or are not otherwise a mark.

It often arises that the builder has gone into liquidation and the argument is made by other Defendants such as the consulting engineers or the project managers that, while the discharge by them of their duties may have been open to some question, the damage was in effect caused by the negligent performance of the builder who failed or refused to carry out their instructions, or seek further instructions where they would have been appropriate. The professionals will often argue that, while the structure might not have been perfect if their plans and instructions had been followed, it would not have been fundamentally defective resulting in the specific damage caused to the Plaintiff with all of the losses resulting from that damage. In circumstances where the builder does not defend the action, the professionals get a “free run” at this argument, i.e. the builder gets blamed for everything.

The question of when it can be said that multiple wrongdoers are “responsible” for “the same damage” is a vexed one. As noted by Tettenborn, *The Law of Damages* (2<sup>nd</sup> Edition, 2010):

*“Causation of damage is one of the most awkward and confusing parts of the law of obligations. Any idea that it can somehow be reduced to a simple factual or practical*

*enquiry is quickly dispelled, as is the notion that there can be any infallible or universal test of what counts as a “cause” of a given event or loss.”<sup>2</sup>*

As noted by Ward L.J. in *Corr (Administratrix of Corr) Deceased v IBC Vehicles Limited* [2006] EWCA CIV 331 at [45]: “Causation may be a matter of common sense but it also imports a value judgment.”

The application of Section 11 has arisen in a number of construction cases.

The first is the decision of Hamilton J. in *Lynch v Beale*, unreported, Hamilton J., High Court, November 23 1974. In that case, a building owner sued his architect, main contractor and nominated subcontractor for loss sustained by him as a result of the negligence and breach of contract of the Defendants in the construction of a hotel premises. The premises collapsed due to two main factors, i.e. subsidence of the foundations in a corner of the building and inadequate design in the first floor of the building. The nominated subcontractor and architect argued that, as there were two separate and distinct causes for the structural defects, the Defendants were not “concurrent wrongdoers”, and that if there was any liability on behalf of any of the Defendants, such liability should be limited to the actual loss resulting from the particular wrong committed by each Defendant.

Hamilton J., in considering this, stated:

*“the damage claimed in this case against all the Defendants is the same damage, viz: the loss sustained by him as a result of the internal collapse of the hotel and the subsidence thereof and the Court is satisfied that the Defendants herein are “concurrent wrongdoers” as defined in the Civil Liability Act 1961.”*

As Kerr puts it in “*The Civil Liability Acts*” (4<sup>th</sup> Edition) (2011):

---

<sup>2</sup> At para 7.05 (in Chapter 7 “Causation of Damages”)

*“It is clear, therefore, that in determining whether parties are to be regarded as concurrent wrongdoers, primary emphasis is to be placed on the damage caused and not on the role played by each of the Defendants, provided each contributed to causation. Where there are two tortfeasors responsible for the same damage, one could have a claim for contribution against the other but that does not absolve an original tortfeasor from his or her liability to the injured party: per Lewison J. in Vision Golf Limited v Weightmans, the Times, September 1, 2005”.*

The dicta of Hamilton J. above were cited with approval and adopted by Finlay Geoghegan J. in *Larkin v Joosub* [2007] 1 IR 521. Finlay Geoghegan J. makes the point at paragraph 36 of that judgment that “it is the damage suffered by the Plaintiff which has been referred to [in section 11(1) of the 1961 Act]...”, not the damage caused by the individual defendants.

Although that case deals with nuisance arising from an adjoining property rather than a building contract, it is instructive in dealing with issues such as quantum of damages, duty of care in negligence to adjoining property-owners, possible exaggeration of claims – the judge decided that the *Shelley Morris* decision was not applicable – the obligation on Plaintiffs to carry out remedial works (or not as the case may be), contributory negligence of the Plaintiff, and allocation of levels of contribution between the Defendants.

## **Issues in Defective Buildings claims: Negligence and Liability for Economic Loss; Professional Negligence and Statute of Limitations**

A cursory review of any of the major Irish or English textbooks on the law of torts confirms the extent to which the question of negligence and economic loss has long been regarded as a “hot topic” in the field of tort.

*McMahon & Binchy* (*Law Of Torts*, 3<sup>rd</sup> Edition) cite various academic commentary speaking of the “dark and uncertain” area of liability and negligence for economic loss, and of this area “long being a pariah in tort” (at para. 10.07).

The debate about the recoverability of damages for pure economic loss is greatest in cases outside the “*Hedley Byrne*” line of cases; economic loss is arguably recoverable under *Hedley Byrne* on a fairly straightforward basis see e.g. the Supreme Court decision in *Wildgust v Bank of Ireland* [2006] 1 IR 570; the decision of Laffoy J in *Bates and Moore v Minister for Agriculture* [2012] 1 IR 247.

A striking feature of the ebb and flow of judicial tides in various common law jurisdictions (including this jurisdiction) on the topic of recoverability of damages for economic loss, outside of negligent misstatement, is the extent to which the principles have emerged from facts arising in a construction context.

### ***Duty of care to avoid infliction of economic loss***

Thus, in the seminal case of *Siney v Dublin Corporation* [1980] 1 I.R. 400, the Supreme Court was content to apply the principles which had been laid down by the House of Lords in *Anns v Merton London Borough* (itself a defective buildings case) to hold that the defendant housing authority corporation owed a duty of care to the plaintiff tenant of a flat built by the corporation which proved uninhabitable due to dampness from defective design of the block of flats in which

the flat was contained. While the case related to defects in a building, the case involved damages to furniture and clothing and to what was termed “interference with the ordinary comfort and convenience” of the plaintiff and his family. The Supreme Court in upholding the High Court’s finding of breach of duty on the party of the Corporation, expressly rejected a submission that damages should be confined to physical or material damage.

In *Ward v McMaster* [1988] IR 337 it was held in the High Court (Costello J.) and in the Supreme Court that the second defendant housing authority (Louth County Council) owed a duty of care in respect of a negligently conducted survey on the part of the Council (conducted at the time the Council was providing the first plaintiff with a loan to purchase the property) in circumstances where it transpired subsequent to the plaintiff’s purchase of the property that it was structurally unsound. Interestingly, while relying on the House of Lords decision in *Anns*, Costello J. in the High Court formulated the legal relationship in the following manner [1985] I.R. 29 at page 52:

*“In the light of the facts to which I have referred it seems to me that there was a sufficient relationship of proximity or neighbourhood between the plaintiff and the Council such that in the reasonable contemplation of the Council, carelessness on their part in the carrying out of the valuation of the bungalow the plaintiff was going to purchase might be likely to cause him damage. They should have been aware that it was unlikely that the plaintiff (in view of his knowledge that they were going to value the premises on his very limited means) would himself employ a professional person to examine it and so they should have known that if the valuation was carelessly done it might not disclose defects in the premises and as a result the plaintiff might suffer loss and damage. So it seems to me that a prima facie duty of care existed and there is nothing in the dealing between the parties which should restrict or limit that duty in any way. In particular, no warning against reliance on the proposed valuation was given.”*

The judgment of Costello J was upheld on appeal, albeit that the Supreme Court more overtly adopted the *Anns* approach. McCarthy J., in dealing with a submission addressed towards the rollback of the two-stage test in *Anns* in England (as exemplified by the judgment of Lord Keith

of Kinkel in the Privy Council decision of *Yuen Kun Yu v AG of Hong Kong* [1987] 3 WLR 776) and Australia (in *Sutherland Shire Council v Heyman* (1995) 59 ALJR 564), stated as follows:

*“Whilst Costello J. essentially rested his conclusion on the ‘fair and reasonable’ test, I prefer to express the duty as arising from the proximity of the parties, the foreseeability of the damage, and the absence of any compelling exemption based upon public policy. I do not, in any fashion, seek to exclude the latter consideration, although I confess that such a consideration must be a very powerful one if it is to be used to deny an injured party his right to redress at the expense of the person or body that injured him.”*

Subsequent to the Supreme Court’s decisions in *Siney* and *Ward v McMaster*, the two-stage test in *Anns* was displaced in England by the three-stage test laid down in the decisions of the House of Lords in *Caparo Industries v Dickman and Murphy* [1990] 2 AC 650, and *Murphy v Brentwood District Council* [1991] 1 AC 398.

The *Caparo* three-stage test was then endorsed by the Supreme Court in *Glencar Exploration v Mayo County Council* [2002] 1 I.R. 84, and has been endorsed by the Supreme Court on a number of occasions since: see *Breslin v Corcoran and the MIBI* [2003] 2 I.R. 203 and *Beatty v Rent Tribunal* [2006] 2 I.R. 191. I will come to these cases shortly.

Given that the Supreme Court in both *Siney* and *Ward v McMaster* relied on *Anns* and *Anns* is no longer regarded as good law, does it follow that that the Supreme Court would arrive at a different decision on the facts of *Siney* and *Ward v McMaster* today?

While Geoghegan J. in *Irish Equine Foundation v Robinson* [1999] 2 ILRM page 289 (find IR ref) offered the view that *“the law relation to recovery of pure economic loss in a negligence action would appear to be different in Ireland having regard to Ward v McMaster,”* it is doubtful if that could be said today in light of the *dicta* in Supreme Court cases since then.

In *Glencar Exploration Plc v Mayo County Council* [2002] 1 IR 84 Keane CJ. relied heavily upon the decision of the House of Lords in the auditors' negligence case of *Caparo v Dickman*<sup>3</sup>. Keane J cited with approval the following passage from the judgment of Lord Bridge

*“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and the situation should be one in which the Court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other”.*(emphasis supplied)

In relation to the “fair, just and reasonable” element of the test, Keane CJ. stated:

*“It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of given scope of the Defendant for the benefit of the Plaintiff, as held by Costello J. at first instance in Ward v McMaster [1985] IR 29, by Brennan J. in Sutherland Shire Council v Heyman (1985) 157 CLR 424 and by the House of Lords in Caparo Plc v Dickman [1990] 2 AC 605. As Brennan J. pointed out, there is a significant risk that any other approach will result in what he called a ‘massive extension of a prima facie duty of care restrained only by indefinable considerations...’.”<sup>4</sup> (emphasis supplied)*

This approach was expressly endorsed by the Supreme Court in *Breslin v Corcoran and the MIBI*<sup>5</sup> where Fennelly J. (*nem diss*) stated as follows:

*“It is particularly helpful that Keane C.J. has, in his recent judgment in [Glencar Explorations p.l.c. v. Mayo County Council \(No. 2\)](#) [2002] 1 I.R. 84, reviewed in a considered manner the very vexed question of the proper test for the imposition*

---

<sup>3</sup>

<sup>4</sup> [2002] 1 IR 84.

<sup>5</sup> [2003] 2 IR 203.

of a duty of care. In doing so, he went a long way to resolving the apparent divergence which had manifested itself from the mid-1980s between the approaches of our courts and those of other common law jurisdictions, in particular those of England and Wales. The merely persuasive status of the decisions of other common law jurisdictions has not dissuaded our courts from taking its inspiration from contemporaneous new steps in the development of the common law. The decisions of the House of Lords in [Donoghue v. Stevenson](#) [1932] A.C. 562 and [Hedley Byrne & Co. v. Heller & Partners Ltd.](#) [1964] A.C. 465 are the best known examples.

The famous two stage test enunciated by Lord Wilberforce in what was once regarded as the landmark case of [Anns v. Merton London Borough](#) [1978] A.C. 728 at p. 751 was, however, open to being read as postulating foreseeability as the single governing test. In truth, it led to much confusion both here and in England. After a period of some doubt both in the English and Commonwealth courts, the House of Lords, taking its lead in part from the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, departed from [Anns v. Merton London Borough](#) in [Murphy v. Brentwood D.C.](#) [1991] A.C. 398. Keane C.J., in [Glencar Explorations p.l.c. v. Mayo County Council \(No. 2\)](#) [2002] 1 I.R. 84, citing *Sutherland Shire Council v. Heyman* , referred to the need to maintain the distinction between duties on the moral plane and those whose breach could be invoked in the law of negligence. He went on at p. 139:-

*"It is precisely that distinction drawn by Lord Atkin between the requirements of morality and altruism on the one hand and the law of negligence on the other hand which is in grave danger of being eroded by the approach adopted in [Anns v. Merton London Borough](#) [1978] A.C. 728, as it has subsequently been interpreted by some. There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously*

*difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in [Ward v. McMaster](#) [1985] I.R. 29 by Brennan J. in [Sutherland Shire Council v. Heyman](#) [1985] 157 C.L.R. 424 and by the House of Lords in [Caparo plc. v. Dickman](#) [1990] 2 A.C. 605. As Brennan J. pointed out at p. 481, there is a significant risk that any other approach will result in what he called a 'massive extension of a prima facie duty of care restrained only by undefinable considerations ...'." (emphasis supplied)*

*I consider that this passage represents the most authoritative statement of the general approach to be adopted by our courts when ruling on the existence of a duty of care. It seems to me that, in addition to the elements of foreseeability and proximity, it is natural to have regard to considerations of fairness, justice and reasonableness. Almost anything may be foreseeable. What is reasonably foreseeable is closely linked to the concept of proximity as explained in the cases. The judge of fact will naturally also consider whether it is fair and just to impose liability. Put otherwise, it is necessary to have regard to all the relevant circumstances."*

Fennelly J. re-iterated his approval of the approach of Keane CJ to the proper test for imposition of the duty of care in *Beatty v Rent Tribunal*<sup>6</sup> . As noted by Fennelly J in his judgment in that case:

*"The alternative formulation [to that in Anns] namely whether it is just and reasonable that liability be imposed, on the other hand, asks whether the duty exists. It is a threshold question. It is also a more flexible formulation. It is more*

---

<sup>6</sup> [2006] 2 IR 191 at 212.

*adaptable to the many circumstances presented in litigation and preferable for cases such as the present. This test has been adopted in most of the modern English cases, as it was by Costello J. in [Ward v. McMaster](#) [1988] I.R. 337, and, finally, by Keane C.J. in [Glencar Explorations p.l.c. v. Mayo County Council \(No. 2\)](#) [2002] 1 I.R. 84. I also applied it in [Breslin v. Corcoran](#) [2003] 2 I.R. 203, with which Denham and Murray JJ., agreed”.*

It would appear, on the application of *Murphy*, that if *Ward v McMaster* were run today in front of the English Supreme Court, the plaintiffs would not succeed. However, given that the approach of Costello J. in *Ward v McMaster* was specifically approved of by Keane J. in *Glencar* when approving the post-*Anns* formulation of the three-stage test in *Caparo*, it would appear safe to conclude that the Supreme Court would decide *Ward v McMaster* (and, in all likelihood, *Siney*) the same way if presented with the facts afresh today.

It should be said that *Beatty v Rent Tribunal*, Geoghegan J. (Denham and Hardiman JJ. concurring) said that he was not expressing any view on the recoverability of damages for economic loss. It should also be noted that the cases in which our Courts have gone furthest in seeking to impose a duty of care for economic loss are cases involving the exercise of statutory functions or powers by local authorities; one can see how the policy factors present in such cases may have helped tip the balance in favour of imposition of duties of care where such duties might not be found so readily to apply when private parties are involved.

All of this simply serves to demonstrate that the test is an inherently flexible one whose outcome is likely to be dictated by the particular facts of the case. In the final analysis, the judiciary remain very much the gatekeepers as regards those claimants who will be let into the fold of entitlement to recover for economic loss which has been negligently inflicted and those who will not.

One can readily see that it may not always be easy to identify who the courts are likely to regard as satisfying the test. For example, in the context of pyrite related litigation, is there a duty of

care owed to the purchasers of houses by parties who supplied defective pyrite containing infill used in the construction of those houses and which led to the houses being defective? Interestingly, Herbert J stated in the case of *O'Donnell v Kilsaran Concrete* [2002] 1 I.L.R.M 551 (which concerned a preliminary issue on the application of the Statute), that he was not expressing any view on the recoverability of economic loss in Irish Law.

Is there a duty of care owed to the purchasers of apartments by designers who negligently designed defective common areas where those defects have devalued individual apartments?

***What constitutes economic loss as opposed to loss stemming from physical damage?***

A further difficulty in this area is the correct characterisation of what constitutes economic loss and in particular how one properly distinguishes between physical damage and economic loss. This is often very much a question of qualitative characterisation, as the cost of repairing a building is on one view an economic loss and, on another, compensation for physical damage.

There is a helpful summary in Keating on *Construction Contracts* (8<sup>th</sup> Edition, 2006) under the heading “Physical Damage and Economic Loss”. It states as follow:

*“The decided cases draw a distinction between loss caused by physical damage and economic loss. This is because the existence of a duty of care not to cause foreseeable direct physical damage is in most circumstances obvious, whereas the existence of a duty of care not to cause economic loss requires special analysis. It may be that the criteria applicable to cases of physical damage and to cases of economic loss are the same – namely, that the damage should be reasonably foreseeable, that the relationship between the parties should be sufficiently proximate and that it should be fair, just and reasonable to impose a duty of care. Economic loss may be suffered: (1) where physical damage is caused to property in which the claimant has no proprietary interest but which, for example, he uses for his business; (2) where the claimant relies on a statement to his detriment, for example, investment advice; (3) where the defendant provides services*

*negligently; and, (4) where a building is built defectively but causes no damage other than to the thing itself.” (At para 7-003)*

In *Murphy v Brentwood* [1991] 1 AC 398, the House of Lords unanimously departed from the holding in *Anns* that where a defect in a house was discovered before any injury or damage to a person or property other than the defective house itself had occurred, no action lay against the local authority who had negligently approved plans for a building which turned out to be defective. As Lord Keith stated in *Murphy v Brentwood*:

*“In my opinion it must now be recognised that, although the damage in Anns was characterised as physical damage by Lord Wilberforce, it was purely economic loss.”<sup>7</sup>*

(The damage in *Anns* was structural damage to flats in the form of cracking of walls and sloping of floors).

### ***Can a claim in negligence succeed where one in contract could not?***

Another difficult area in the context of potential liability in a construction context is that of a concurrent liability in tort arising out of a relationship which is governed by a contract. In *Kennedy v AIB* [1998] 2 I.R. 48, Hamilton C.J. endorsed a passage from the speech of Lord Goff in *Henderson v Merrett Syndicates* [1995] 2 AC 145, to the effect that there was no objection in principle to parties who were in a contractual relationship also owing each other duties in tort. However, in an important qualification of that position, Hamilton C.J. went on to endorse a dictum of Lloyd L.J. from the earlier English Court of Appeal decision of *National Bank of Greece v Pinios Shipping (No.3)* [1988] 2 Lloyds Rep 126, which stated as follows:

*“So far as I know, it has never been the law that a plaintiff who has the choice of suing in contract or tort can fail in contract yet nevertheless succeed in tort.”*

Hamilton C.J. then going on to state:

---

<sup>7</sup> [1991] 1 AC 398 at 466.

*“The case clearly establishes that, when parties are in a contractual relationship, their mutual obligations arise from their contract and are to be found expressly or by necessary implication in the terms thereof and that obligations in tort which may arise from such a contractual relationship cannot be greater than those to be found expressly or by necessary implication in their contract.”*

As *McMahon & Binchy* pertinently observe, *“That is exactly what Lord Goff denied in Henderson.”* (*McMahon & Binchy*, Third Edition, para. 10.25).

It appears that the present state of the law in Ireland is as set out by O’Flaherty J. in *Pat O’Donnell & Co. v Truck and Machinery Sales* [1998] 4 IR 191 that:

*“The general duty of care in tort cannot be manipulated so as to override the contractual allocation of responsibility between the parties. Thus if, for instance, a contract provides – whether expressly or by necessary implication – that the defendant is not liable for a particular risk, then the law of tort shall not be allowed to contradict it.”*

It should be noted that the question of concurrent liability in contract and in tort claims arising out of building contracts has been given added impetus in the UK by the fact that different limitation periods can apply in practice (as a result of the enactment of the Latent Damage Act 1986 in the UK which extends to the limitation period to three years from the “date of knowledge” (up to a maximum “long stop” period of 15 years). This is in marked contrast to the position as a matter of Irish law where there is no discoverability test introduced for physical damage (as opposed the limited classes of personal injuries and defective product damage).

### ***Professional Negligence Claims Against Construction Professionals***

The question of liability for the negligent infliction of economic loss arises regularly in the construction area in the context of professional negligence claims. Construction professionals (as with other professionals) are typically exposed to claims for breach of contract arising out of the

failure to discharge their contractually-assumed duties with due skill and care or for claims for negligent misstatement in circumstances where they provide advice or information which has been relied upon and has caused damage.

As noted by *Jackson & Powell on Professional Liability* (8<sup>th</sup> Edition, 2012):

*“As in the case of other professionals the primary basis for the duties of a construction professional in a particular case is the contract pursuant to which he is engaged. More commonly than with other professions, construction professionals are engaged pursuant to written contracts in standard form... Whether oral or written, the contract will need to be carefully scrutinised in a professional negligence claim in order to determine the nature and extent of the engagement undertaken. For example, an architect engaged by an employer may have been engaged for only some or all of the following duties: advising, examining the site, preparing designs, drawings and plans, supervising the works and certifying their value for the purpose of the payment provisions of the building contract. Unless the terms of a standard form contract are expressly incorporated into a construction professional’s appointment, those terms will not normally be implied...”*

*“Although a construction professional’s duties are defined by the terms of his contract (and any concurrent duty of care or fiduciary duty) it will often be necessary to look beyond the terms of that contract in order to ascertain what precisely is required to discharge those duties. This is because a building project involves a matrix of relationships where each party’s individual responsibilities can only be evaluated in light of the responsibilities assumed by others. Thus in ascertaining the scope of an architect’s express contractual duties under a retainer made in connection with a ‘traditional’ building contract, it may be necessary to examine closely the terms of the contract between the employer and the main contractor or to decide whether special responsibility for design or materials has been undertaken directly to the employer by specialist engineers for sub-contractors.”<sup>8</sup>*

---

<sup>8</sup> At paras 9-017 and 9-018

Plaintiffs in this jurisdiction need to be mindful of limitations on the liability of construction professionals which may be contained in the relevant contracts.

The position set out in *Kennedy v AIB* above, to the effect that, under Irish law, liability in tort may not exceed that of contract, is clearly potentially very relevant to any professional negligence claim against a party with whom the plaintiff has a contractual relationship.

What then of the position where the plaintiff has no contractual relationship with the construction professional but the negligence of the construction professional is said to have caused him loss?

It is important to distinguish in practice between reliance on communicated statements or advice of a construction professional which leads to a claim for economic loss (a category of claim which falls squarely within the *Hedley Byrne* principles and which is in essence a claim for negligent misstatement) and circumstances where the construction professional is sought to be held liable for economic loss from the alleged negligent discharge of his obligations to act with reasonable skill and care. The latter form of claim raises the more difficult questions as to imposition of liability.

In *Henderson v Merrett Syndicates* [1995] 2 AC 145, the House of Lords held that the *Hedley Byrne* principle extended “*beyond the provision of advice and information to include the performance of other services*” (at 178-181). This aspect of the approach of the House of Lords in *Henderson v Merrett Syndicate* has yet to be engaged with in terms by our Supreme Court in a professional negligence context, although it seems fair to observe that the Henderson approach effectively involves an application of stage 3 of the *Caparo*-test endorsed by our Supreme Court in *Glencar*.

Indeed, as *Jackson & Powell* note:

*“Even before Henderson, there were many architects’ negligence cases pleaded in contract and in tort where the availability of the concurrent remedy was not questioned. An example of a leading case where it was assumed that a duty lay in tort as well as*

*contract was Pirelli General Cable Works v Oscar Faber [1983] 2 AC 1. The claimant building owner sued the defendant consulting engineers for the negligent design of a chimney extension. The claim was initially in contract and in tort for the cost of rectification of a chimney which had cracked but the claimants conceded that the contractual claim was time barred. In Murphy v Brentwood [1991] 1 AC 398 Lord Keith, with whom all the other Law Lords agreed, explained Pirelli as a case in which tortious liability arose out of a contractual relationship as a consequence of the Hedley Byrne principle, thus presaging the result in Henderson.”<sup>9</sup>*

*Keating on Construction Contracts* notes (Eighth edition, 2006, at para 7-021) that:

*“The contractor can, in appropriate circumstances, be held liable for economic loss, as the decisions in Barclays Bank v Fairclough Building (1995) 44 CON. L.R. 35 (Court Of Appeal) and Tesco Stores v Costain Construction [2003] EWHE 1487 illustrate.*

*... However, where a professional person owes his client a duty of care in tort as well as in contract, it is thought that architects, engineers and surveyors are not ordinarily to be taken to have assumed responsibilities of third parties who are not their clients to any greater extent than contractors or local authorities. Thus a careless professional would be liable if his carelessness caused physical injury to a third party’s personal property other than property which is itself the product of the negligence, but would not be liable for a third party’s economic loss to the extent discussed under ‘economic loss’ above.”*

The difficulty with applying that commentary in an Irish context is that following *Siney and Ward v McMaster*, the parameters of assumption of responsibilities to third parties by contractors or local authorities may be broadly drawn.

---

<sup>9</sup> At para 9-051. See also footnote 142 to that paragraph which notes that “*Courts in Canada, New Zealand and Australia have also reached the conclusion that a person who has performed professional services may be held liable concurrently in contract and in a negligence unless the terms of the contract preclude the tortious liability*” and sets out a number of those cases.

The key concept underpinning the House of Lords' decision in *Henderson v Merrett Syndicate* – that of whether there was an assumption of responsibility by the defendant to the plaintiff such as to warrant the imposition of a duty of care – is critical to the identification of a professional negligence claim against a construction professional.

If in fact an architect or engineer has assumed responsibility (perhaps above and beyond what is contained in the contractual documentation) for aspects of design or construction, it is surely arguable that there is no reason in principle why he or she might not be liable for the consequences (including consequences in economic loss) for the negligent performance of responsibilities so assumed.

To take a non-contractual example, supposing a contractor under a design and build contract engages an architect to assist in the design aspect of a project and the architect is negligent in his design work, would it held by our Supreme Court that the architect had not assumed any responsibility to the employer for economic loss resulting from that negligent design notwithstanding that the architect was not in a direct contractual relationship with the employer? *Jackson & Powell* offer the view that “*such a claim will rarely succeed*” (at para 9-103). On appropriate facts, it is hard to see that a case *in principle* could not be made out in this jurisdiction.

However, one can equally see that lines are likely to be drawn: for example, does a construction professional's duty of care extend to responsibility for damage caused to property other than the property on which he was engaged to work, flowing from his negligent actions?<sup>10</sup>

Taking a non-economic loss example, what of the position of an architect certifies a staircase as being in compliance with Building Regulations. Many years later a member of the public (who has no connection with the architect) is injured and alleges that the staircase did not comply with the Regulations. Does a duty of care exist?

---

<sup>10</sup> See debate in *Jackson & Powell*, 7<sup>th</sup> Edition, at 9-076 to 9-082.

Unfortunately for litigants (if not their lawyers!) the truth of the matter is that this is a policy-led area where the flexibility of the legal test as pronounced by the Supreme Court is such as to repose a wide margin of discretion as to the imposition of liability on the specific facts of any given case.

### *Statute of Limitations*

The law in relation to the application of the legal test in relation to the application of the statute of limitations in building defect cases appears settled. The Supreme Court has very recently considered the application of the test for accrual of causes of action in negligence under Section 11(2)(a) of the Statute in the case of *Gallagher v ACC Bank*<sup>11</sup>.

*Gallagher v ACC* involved claims in tort (being *inter alia* negligence, breach of duty and negligent mis-statement) for financial loss suffered by the Plaintiff from investing in a Bond (and borrowing money from the Bank to invest in the Bond) in circumstances where the Plaintiff's pleaded case was that he had been caused to buy the Bond (and to borrow to invest in the Bond) when the Bond was a wholly unsuitable one for him and where the Plaintiff pleaded that the very fact of entering the transaction of purchasing the Bond (and borrowing to purchase it) led to him suffering loss.

The Supreme Court ultimately held that as the Plaintiff had instituted his proceedings more than 6 years after purchasing the Bond the claim was statute-barred under Section 11(2)(a) of the Statute. It is clear from the judgment of Fennelly J. that his decision was arrived at on the quite narrow basis of how the Plaintiff had pleaded his claim (the pleaded claim being "that he suffered damage by the very fact of entering the transaction and purchasing the Bond"). Fennelly J. held that the cause of action accrued at the date of entering the transaction and purchasing the Bond (paragraph 116 of his judgment).

---

<sup>11</sup> [2012] IESC 35 (7<sup>th</sup> June 2012)

Fennelly J. takes the opportunity in his judgment to survey the case law more generally in relation to the question of the accrual of the cause of action in tort for the purposes of Section 11(2)(a) of the Statute. In this connection Fennelly J states that:

*“42. The courts have had to consider accrual of causes of action and negligence in the case of three broad categories of damage or loss: personal injury; damage to physical objects, typically in cases of building and engineering works; financial loss. In respect of the first category, the Act of 1957 has been amended to remove the injustice cause to Plaintiffs who were unaware that they had suffered injury until the limitation period had expired. It is notable that no such amelioration of the strict rule has been applied in our law to the second or third categories of loss. The second category has been addressed in our case law, discussed below, after a period of some uncertainty”.*

Fennelly J. goes on, in the same paragraph, to note that: “the third category has caused the most difficulty” and his judgment goes on to consider the principles applicable in the case of the third category.

It seems clear from the passage in the judgment of Fennelly J. cited above that the Supreme Court regards the law in relation to the accrual of cause of action in the case of damage to buildings as being settled in this jurisdiction.

*“48. The principle established by Hegarty is that the cause of action in the tort of negligence is complete and the cause of action accrues when damage occurs....Nonetheless, the solution adopted in Hegarty is not necessarily so clear as to be capable of simple and obvious application in every case, above all in cases of financial loss.”*

Fennelly J. then makes reference (in paragraph 49 of his judgment) to a passage of Griffin J. in *Hegarty v O’Loughran* which stated that “until and unless the Plaintiff is in a position to establish by evidence that damage has been caused to him, his cause of action is not complete

and the period of limitation fixed by that sub-section does not commence to run.” Fennelly J. observes, in relation to that *dictum* that:

*“50. The date of accrual, on this passage is the date when the Plaintiff is in a position to establish by evidence that he has suffered damage. At least to some extent, the test, thus expressed, renders less certain the distinction between the date of commission of the wrongful act and the occurrence of damage”.*

Fennelly J. then goes on to address the reliance by Finlay CJ and McCarthy J in *Hegarty v O’Loughran* [1990] 1 IR 148 on the decision of the House of Lords in *Pirelli General Cable Works v Faber* [1983] 2 AC 1. He does so in the following terms:

*“51. Both Finlay C.J. and McCarthy J [in Hegarty v O’Loughran] cited the decision of the House of Lords in Pirelli General Cable Works v Faber [1983] 2 A.C. 1. That case concerned the accrual of the cause of action where the claim was made against a firm of consulting engineers for negligence in the design of a factory chimney, the negligence consisting in the use of an unsuitable material. The work was completed in June or July 1969; not later than April 1970 cracks developed at the top of the chimney; it was found that the plaintiffs could not, with reasonable diligence, have discovered the damage prior to October 1972; they discovered it in fact in November 1977 and issued proceedings in October 1978. The decision of the House of Lords, applying Cartledge v. E.F. Jopling & Sons, cited above, as stated in the headnote was that:*

*“...the date of accrual of a cause of action in tort for damage caused by the negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or should with reasonable diligence have been discovered, that the plaintiffs' cause of action therefore accrued not later than April 1970, when the cracks occurred in the chimney, and that since that date was*

*more than six years before the issue of the writ, the claim was statute barred...*”

52. The House drew a distinction between a defect which might give rise to damages and the actual damage caused by the defect. Lord Fraser of Tullybelton, in a passage referred to by McCarthy J in *Hegarty* (at page 161) said at page 14:

*“It seems to me that, except perhaps where the advice of an architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when physical damage occurs to the building. In the present case that was April 1970 when, as found by the judge, cracks must have occurred at the top of the chimney, even though that was before the date of discoverability.”*

Fennelly J. concludes his analysis of the Irish law on the accrual of the cause of action for the purposes of Section 11(2)(a) by noting that in England, the limitation legislation was amended to mitigate the severity of the existing law by providing for an alternative 3 year time limit running from the date of knowledge in the cases of latent damage. Fennelly J. notes (at paragraph 58 of his judgment) that: *“no corresponding provision exists in our law, except in cases of personal injury and liability for defective products”*.

In the context of the issues under consideration in this paper, it is noteworthy that Fennelly J. recited McCarthy J.’s reliance in *Hegarty v O’Loughran* on the speech of Lord Fraser in *Pirelli*, to the effect that in the case of damage to buildings *“the cause of action accrues only when physical damage occurs to the building”*.

That then, is the test. However, the real difficulties lie in the application of the test to any given set of facts in a construction context.

The question of the application of section 11(2)(a) of the Statute arose in the High Court in a relatively recent negligent construction case, *Murphy v McInerney Construction Limited and James Griffin*<sup>12</sup>. In that case the Plaintiffs claimed damage against the Defendant builder arising out of the construction of and repair to a dwelling house in 1987. It was alleged that the builder acknowledged defects in the structure of the property in 1996 and repairs and remedial works were then carried out to the property. The proceedings were commenced in 2004, more than 6 years after defects in the structure of the property had been identified. There followed the trial of a preliminary issue as to whether or not the Plaintiffs' claim was statute barred by virtue of the provisions of section 11(2)(a) of the Statute. The Plaintiff sought to contend that the Statute did not run until the date of discovery of the alleged defects. The Defendants relied on the Supreme Court decision in *Hegarty v O'Loughran*.

Having conducted an extensive survey of the relevant authorities, including the Supreme Court decision in *Hegarty v O'Loughran* and the decision of Herbert J. in *O'Donnell v Kilsaran Concrete*, Dunne J. held that it was “quite clear from the authorities... that a discoverability test does not avail a Plaintiff when dealing with a plea that a claim is statute barred under Irish law”.

Dunne J. concluded in *Murphy v McInerney*<sup>13</sup> that:

*“The phrase “the date on which the cause of action accrued” is key to the determination of the issue that arises in this case. The interpretation of that phrase has been considered by the courts in this jurisdiction and the Supreme Court has made clear how it should be determined.”*

On the facts of the case before her, Dunne J. held that the statute period had expired as the damage had occurred considerably before the issue of the proceedings.

---

<sup>12</sup> [2008] IEHC 323

<sup>13</sup> at pp 20-21

Dunne J. also referred in her judgment to the decision of Geoghegan J. (when he was a High Court judge) in the case of *Irish Equine Foundation Limited v Robinson*<sup>14</sup>. That case concerned a claim for negligence for damage flowing from the defective design of a roof of an Equestrian Centre. It was contended by the Plaintiff that time under the Statute commenced running from when the defects manifested themselves as opposed to the date of erection of the building. Geoghegan J. held that discoverability could not be relevant in considering the appropriate commencement date in respect of the limitation period noting that the view of the House of Lords in *Pirelli* on that issue represented Irish law also. He rejected a contention that the Irish law was that damage only occurred when it became manifest. He held that the defects in the roofing could have been detected by experts at any time after construction of the building and that the damage to the building was therefore caused from the date of construction.

The question of the correct application of the Statute is likely to rear its head in relation to defective building claims arising out of some of the more egregious building failures of the recent boom, such as in the pyrite litigation or in litigation relating to negligently designed and constructed blocks of apartments and multiple dwelling units.

---

<sup>14</sup> [1999] IR 442

## **Construction and ADR**

The construction field has long been well ahead of other sectors in its acceptance of Alternative Dispute Resolution mechanisms to resolve construction-related disputes.

For the purposes of this paper, I propose to identify some of the legal and practical issues relating to the deployment of ADR in multi-party disputes and one form of ADR – adjudication – which has gained a strong foothold, backed by statute, in the UK.

### **Multiple parties – arbitration agreements with some but not others**

A particular difficulty is the consolidation or joinder of parties to ADR processes where that is not provided for in the contracts between the parties. In short, it cannot happen without consent. The key to persuading parties towards consent lies in identifying the downsides to insistence on litigation entitlements.

An issue frequently encountered in practice, arising from the multi-party nature of many construction disputes, is the situation that arises where a plaintiff sues a number of defendants in relation to a construction project and there is an arbitration clause with one or more of the defendants but not with others.

What usually happens is that one issues court proceedings against all of the defendants, and if the issue of the arbitration clause arises, the plaintiff's solicitors try to persuade the various defendants' solicitors that it is in everybody's interests to have all matters decided in the one forum. The usual argument made is that, while defendant A has the right to go to arbitration with the plaintiff who must otherwise sue defendants B and C in court, defendants B and C will have a right to join defendant A to the litigation as a third party, as they may want to seek orders for contribution against defendant A. The plaintiff will then have the right to apply to court to have the defendant A confirmed as a defendant in the proceedings in the normal way. In this way,

defendant A would legitimately be a party to an arbitration and, at the same time, legitimately a defendant in the plaintiff's proceedings.

Defendant A will usually insist on going to arbitration on the basis that this course of action will cause the most trouble for the Plaintiff, in that it will be asked to fight in two forums.

The power to stay proceedings to give effect to an arbitration clause was formerly contained in section 5 of the Arbitration Act 1980. This has now been superseded by Article 8 of the UNCITRAL Model Law, brought into law in this jurisdiction by section 6 of the Arbitration Act 2010. Article 8 is as follows:

*“(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed.*

*(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court”.*

MacEochaidh J. considered the nature of article 8 in *P Elliot & Co., Limited (In Receivership and In Liquidation) v FCC Elliot Construction Limited* [2012] IEHC 361. He concluded that Article 8:

*... “does not create a discretion to refer or not to refer matters to arbitration but directs a court to grant or not to grant a stay, depending on the threshold issue of whether the parties to the proceedings are parties to an arbitration agreement. If they are, and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being*

*performed, then the stay must be granted. Contrarily, if the parties are not bound by an arbitration agreement, then the stay, of course, must be refused”.*

MacEochaidh J. did note that Article 16 of the Model Law gives the arbitral tribunal the power to rule on its own jurisdiction, and that ... *“this court could resolve the matter before it by permitting the parties to test the arbitral jurisdiction at the arbitral tribunal...”*. It would appear therefore that applicability of the arbitration clause to the dispute can be ruled upon either by the court or by the arbitrator appointed between the parties.

Another solution to the stance taken by defendant A in our example would be if defendants B and C would agree to join in the arbitration between the plaintiff and defendant A. However, it does not appear that defendant A can be compelled to agree to this. Section 16 of the Arbitration Act 2010 states that, where parties to an arbitration agreement so agree, arbitral proceedings shall be consolidated with other arbitral proceedings, which may include arbitral proceedings involving different parties. However, the agreement of defendant A would be necessary for this.

Also, under section 32 of the Arbitration Act 2010, the High Court or the Circuit Court

*“May at any time whether before or during the trial of any civil proceedings before it – (a) if it thinks it appropriate to do so, and (b) the parties to the proceedings so consent, by order adjourn the proceedings to enable the parties to consider whether any or all of the matters in dispute might be determined by arbitration”.*

As can be seen, consent is again the key here.

Another variation on this theme is where there is a chain of contracts related to a construction project, but the separate contracts contain differing forms of dispute resolution clause. For example, one clause (such as the standard public works contract dispute resolution clause) requires conciliation as a mandatory step prior to any arbitration, whereas another agreement requires mediation as a mandatory step prior to arbitration. Again, consent is key to the parties agreeing to deal with all disputes through one dispute resolution process.

## *Adjudication*

In England, the Housing Grants, Construction Regeneration Act, 1996 (which came into force in May 1998) in section 108, introduced a statutory right in a party to a construction contract to refer any dispute arising under the contract to adjudication. The decision of the adjudicator is final and binding if the contract so provides, but otherwise is binding only until the dispute is finally determined by legal proceedings (or by arbitration if the parties have agreed to arbitration) or by settlement of the dispute. The relevant provisions of the 1996 Act bolster these provisions. The purpose of the provision was to ensure a swift resolution of disputes so as to avoid the holding up of construction projects while parties arbitrated or litigated their differences. The provision anticipates an adjudicator reaching his decision within 28 days of the appointment of the adjudicator, who can be appointed within seven days of a notice of referral under the Act. This statutorily-compelled form of ADR is understood to have enjoyed much success in the UK.

In many ways, the conciliation clauses found in the latest versions of the Public Works Contract has many of the hallmarks of adjudication: e.g. Clause 13.1.11 of the Public Works Contract for Civil Engineering Works designed by the Contractor provides that where the conciliator has recommended the payment of money that even if a notice of dissatisfaction is given (the matter thereby being referred to arbitration) the party concerned shall make the payment recommended by the conciliator on the provision of a bond for the amount of that payment by the other party. This has the potentially sobering effect of forcing the successful party to put its money where its mouth is and to focus minds on the extent to which it is truly worth taking on the risks of arbitration, thereby elevating in potential significance the value of a conciliator's recommendation.

It would be useful to hear as the experience of practitioners (and clients) in the UK as to the efficacy of the adjudication mechanism and its impact on the general contours of dispute resolution in the construction sector to ascertain the extent to which we could learn from such experience in this jurisdiction.

## **Conclusion**

The foregoing constitutes a very provisional survey of certain of the issues faced or potentially faced by lawyers involved in advising on construction disputes in these times. As can be seen, the issues of law, strategy and practicality which arise in a construction dispute context are ones which regularly confront general practitioners in many different areas of law and practice. I hope that the Construction Bar Association provides an ideal forum to foster and deepen the process by which important decisions and issues of general application come to be appreciated and applied in the construction field while decisions in the construction field serve to inform and enhance our wider understanding of the law in practice.

Cian Ferriter

6<sup>th</sup> June 2013