

THE HIGH COURT

[2015 No. 8 CA]

BETWEEN:

CELINE McDONAGH

PLAINTIFF

AND
JOHN McDONAGH

DEFENDANT

JUDGMENT of Kearns P. delivered on 24th day of July, 2015

The applicant, RSA Insurance Ireland Limited, wishes to be joined as either a defendant or notice party to these proceedings. In this appeal, the applicant seeks to reverse the decision of the Circuit Court dated 16th January, 2015 whereby it dismissed the applicant's appeal from an order made by the County Registrar for the Counties of Laois and Offaly dated 17th November, 2014 refusing the applicant's application, brought pursuant to Order 6, Rule 4 of the Circuit Court Rules 2001, to be joined as a co-defendant to the proceedings.

BACKGROUND

The plaintiff and the defendant are brother and sister. On or about 18th November, 2012 the plaintiff was a passenger in the defendant's motor vehicle on the Tullamore to Mountmellick Road when it is alleged that, owing to negligence and breach of duty, including breach of statutory duty, on the part of the defendant, his vehicle collided into the rear of a stationary vehicle causing the plaintiff to suffer severe personal injuries, loss, damage, and expense. The plaintiff commenced personal injuries proceedings by Civil Bill in the Circuit Court on 7th November, 2013.

The defendant's insurer, RSA Insurance Ireland Ltd., has declined to indemnify the defendant arising from what are alleged to be 'material inconsistencies' in accounts furnished in relation to the road traffic accident. The defendant was notified of the refusal of indemnity by letter dated 16th May, 2014. In effect, the insurers in this case believe this to be a fraudulent claim.

By notice of motion dated 1st August, 2014 the applicant sought an order pursuant to Order 6, Rule 4 of the Circuit Court Rules 2001 to be joined as a co-defendant to the proceedings. This application was refused by the County Registrar on 17th November, 2014. The Circuit Court then dismissed the applicant's appeal of this order on 16th January, 2015.

The matter came before this Court on 29th April, 2015. Following submissions by counsel for all parties the matter was adjourned to allow the applicant to deliver a supplemental affidavit setting out the basis upon which the applicant could reasonably allege, or undertake to allege fraud in these proceedings.

STATUTORY PROVISIONS

Order 6, rule 4 of the Circuit Court Rules 2001 was substituted by Rule 7 of the Circuit Court Rules (General) 2007 (SI No. 312 of 2007) which provides as follows –

"No action, cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Judge may in every action, cause or matter deal with the subject in controversy so far as regards the rights and interests of the parties actually before him. The Judge may, at any stage of the proceedings, either upon or without the application of any party, and on such terms as may appear to him to be just, order that the name of any party, whether plaintiff or defendant, who has been improperly joined, be struck out, and that the name of any person who ought to have been joined as a party, or whose presence before the Court may be necessary in order to enable the Judge to adjudicate upon and settle all the questions involved in the cause or matter, be added as a plaintiff or a defendant. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his consent in writing thereto. Every person whose name is so added as defendant shall be served with a Civil Bill in such manner as may be prescribed by any Order of the Court, and the action, cause or matter, as against such party, shall be deemed to have begun only on the making of the Order adding such party."

The issue of joinder of parties is dealt with in the Rules of the Superior Courts at Order 15, rule 13 which is in near identical terms.

The opposition to any joinder of the insurance company is based on the simple proposition that a plaintiff cannot be forced to sue a party he does not wish to sue and that a specific statutory procedure exists which adequately addresses the situation which the insurers wish to address in bringing this application. That is contained in section 76(1) of the Road Traffic Act 1961 which provides as follows –

76.—(1) Where a person (in this section referred to as the claimant) claims to be entitled to recover from the owner of a mechanically propelled vehicle or from a person (other than the owner) using a mechanically propelled vehicle (in this section referred to as the user), or has in any court of justice (in proceedings of which the vehicle insurer or vehicle guarantor hereinafter mentioned had prior notification) recovered judgment against the owner or user for, a sum (whether liquidated or unliquidated) against the liability for which the owner or user is insured by an approved policy of insurance or the payment of which by the owner or user is guaranteed by an approved guarantee, the claimant may serve by registered post, on the vehicle insurer by whom the policy was issued, or on the vehicle insurer or the vehicle guarantor by whom the guarantee was issued, a notice in writing of the claim or judgment for the sum, and upon the service of the notice such of the following provisions as are applicable shall, subject to subsection (2) of this section, have effect:

(a)....

(b)....

(c) where the claimant has so recovered judgment for the sum, or after service of the notice so recovers judgment for the sum or any part thereof, and has not recovered from the owner or user or such insurer or guarantor the whole amount of the judgment, the claimant may apply to the court in which he recovered the judgment for leave to execute the judgment against the insurer or guarantor, and thereupon the court may, if it thinks proper, grant the application

either in respect of the whole amount of the judgment or in respect of any specified part of that amount;

(d) where the claimant has not so recovered judgment for the sum, the claimant may apply to any court of competent jurisdiction in which he might institute proceedings for the recovery of the sum from the owner or user for leave to institute and prosecute those proceedings against the insurer or guarantor (as the case may be) in lieu of the owner or user, and the court, if satisfied that the owner or user is not in the State, or cannot be found or cannot be served with the process of the court, or that it is for any other reason just and equitable that the application should be granted, may grant the application, and thereupon the claimant shall be entitled to institute and prosecute those proceedings against the insurer or guarantor, and to recover therein from the insurer or guarantor any sum which he would be entitled to recover from the owner or user and the payment of which the insurer or guarantor has insured or guaranteed;

(e) the insurer or guarantor shall not, as a ground for refusing payment of moneys to the claimant or as a defence to proceedings by the claimant, rely on or plead any invalidity of the policy or guarantee arising from any fraud or any misrepresentation or false statement (whether fraudulent or innocent) to which the claimant was not a party or privy and which, if constituting a misdemeanour under this Part of this Act, was not the subject of a prosecution and conviction under the relevant section of this Act.

SUBMISSIONS OF THE APPLICANT

When the matter came before this Court on 29th April, 2015 the Court directed that an affidavit setting out the basis for joining the applicant for the purposes of enabling the applicant to plead that a fraud had been perpetrated in relation to the claim. An affidavit was filed on 7th May, 2015 by Joyce Foley, an employee of the applicant insurance company who is assigned to their investigation unit. It is averred that during the course of an investigation into the road traffic accident of 18th November, 2012, the defendant stated that he did not know Mr. Hugh Geoghegan, the driver of the vehicle which was struck by the defendant's vehicle. However, in an affidavit filed by a P. Dempsey, a private investigator employed by Confidential Investigations Athlone, it is stated that the defendant's sister, the plaintiff herein, has been in a relationship with Mr. Geoghegan for twelve years and has a child with him. The private investigator further states that he observed Mr. Geoghegan delivering a person to the defendant's address on 31st March, 2014.

It is submitted that the applicant insurer believes that the accident was contrived and therefore refused to indemnify the defendant. The applicant seeks to be joined as a co-defendant so that a defence of fraud can be pleaded. It is submitted that an order joining the applicant as a co-defendant or notice party should be made so that the insurer can protect its interests in the most cost, resource, and time efficient manner.

Counsel on behalf of the applicant refers the Court to the decision in *Fincoriz SAS v. Ansbacher Limited* [1987] IEHC 19 wherein Lynch J. held –

"Prima facie a plaintiff is entitled to sue whomever he wishes and is entitled not to have to sue a person that he does not wish to sue... In order that a person may be joined as a defendant without the consent and, fortiori, against the wishes of the plaintiff, there must be some exceptional circumstances. The exceptional circumstances must be such that the added defendants are persons who ought to have been joined as defendants by the plaintiff in the first instance or alternatively even if it was not unreasonable that they were not joined as defendants by the defendant in the first instance it is shown at the time of the application to the Court to join them that their presence before the Court will as a matter of probability be necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter."

In the case of *Barlow and Others v. Fanning and UCC* [2002] 2 IR 593 the court held that a person whose good name and reputation might be affected by the outcome of a case was not automatically entitled to be joined as a defendant if his presence was not required by the court in order to effectively adjudicate on the matter. The court in *Barlow* cited with approval the requirement for 'exceptional circumstances' as set out in *Fincoriz*. Keane C.J. also cited the following passage from Halsbury's Laws of England (4th ed.) –

"The general rule of practice is that the plaintiff is entitled to choose the person or person as defendants against whom he wishes to pursue his claim for the relief or remedy he seeks, and that he cannot be compelled to proceed against other persons whom he has no desire to sue. Nevertheless, the court has power to add a person who is not a party to the action as originally constituted as a defendant against the will of the plaintiff, either on the application of the defendant or of the non party. An application by any person to be added as a party must, except with the leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or the question or issue to be determined as between him and any party to the cause or matter."

A person having no legal but only a commercial interest in the outcome of the litigation between the plaintiff and the original defendant cannot be added as a party either for the convenience of the court or otherwise. On the other hand, a person may be added as a defendant, either on his own application or the application of the defendant, where his proprietary or pecuniary rights are or may be directly affected by the proceedings either legally or financially, by any order which may be made in the action, or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly."

The case of *BUPA Ireland Limited v. Health Insurance Authority* [2006] 1 I.L.R.M. 308 concerned an appeal by the notice party, VHI, from an order of the High Court which directed that the case should proceed as between the applicants and the third and forth-named respondents without the presence of VHI as a notice party. VHI contended it should be reinstated as a notice party on the basis that it was a party genuinely interested in and affected by these proceedings. While the Supreme Court held that the High Court had erred in applying Order 15, rule 13, the court indicated that the "proprietary or pecuniary rights" of an applicant were a relevant consideration in the context of an application pursuant to the rule.

It is submitted on behalf of the applicant that another relevant consideration in the context of an application pursuant to Order 15, rule 13 is, as referred to in the passage cited by Keane C.J. in *Barlow* "where the intervener may be rendered liable to satisfy any judgment either directly or indirectly". If judgment is marked against the defendant in these proceedings the plaintiff is entitled to pursue judgment against the applicant as the defendant's insurer pursuant to s.76 of the Road Traffic Act, 1961.

The applicant submits that it is an artificial exercise to permit the plaintiff to secure a judgment against the defendant in what may in effect be an uncontested case where the crucial question regarding the alleged fraud cannot be determined until the plaintiff seeks to invoke s.76. In this regard, counsel refers the Court to the following extract from the decision of Kelly J. in *Duignan v. Dudgeon* [2005] IEHC 348 –

"The essence of the plaintiff's claim is that the trustees were wrong to refuse to transfer his pension entitlements from the fund to another pension scheme. The trustees made that determination on foot of information received by them to the effect that the plaintiff had retired from his position in Arnotts. If he retired he was not entitled to have his pension funds transferred. The plaintiff asserts that no such retirement took place. Whether his departure from Arnotts was by means of retirement or not is a matter between him and Arnotts. It cannot be a matter between the plaintiff and the trustees for they were not his employers..."

In my opinion it is entirely artificial to suggest, as the plaintiff does, that his departure from Arnotts is not the main issue in the proceedings. It is, in many respects, at the forefront of the proceedings and the Plaintiff himself has made it so by his positive assertion that he did not retire from his position. The crucial question of whether that is correct or not can only be decided with Arnotts being joined as a defendant.

In my view it makes no sense for the action to proceed without this issue being properly addressed. The action as constituted at present cannot effectually and completely adjudicate upon and settle that crucial question."

In *Persona Digital Telephony Ltd and Sigma Wireless Networks Limited v. The Minister for Public Enterprise & Ors.* [2014] IEHC 78 Ryan J. stated –

"It is clear that there must be very exceptional circumstances before the choice made by a plaintiff as to whom to sue will be interfered with by the addition of another defendant. Having said that, the rule envisages that the court will make a decision that is not dependent on the consent of the plaintiff. It follows that the absence of such consent is not determinative of the application. It is also relevant that the plaintiff is not deprived of his right to sue any defendant. The decision is concerned with what is necessary to do justice, that is, to decide all the questions involved in the case effectually and completely..."

[The plaintiffs] cannot be forced to make a case that they do not want to make they cannot be obliged to change their pleadings so as to include a claim against the new added party. The point of joining a new defendant is in the interest of justice, in the court's interest in seeing that litigation is properly and effectively conducted and that its processes are operated in a way that is just and fair and also in the interest of the added party because of the impact of the litigation on his rights."

It is submitted that in the present case the applicant should be joined to the proceedings in the interests of justice and so that the litigation is properly and effectively conducted.

Counsel further relies upon an ex tempore decision of this Court in *Daly v. Ryan and Liberty Insurance* (3rd November, 2014) where the Court held that joining the insurer to proceedings rather than awaiting a subsequent application under s.76 in circumstances where they wished to allege fraud was appropriate. The Court indicated that this course allowed for the most efficient use of court time and avoided unnecessary additional costs being incurred by the parties.

The applicant submits that the decision of O'Neill J. in *McDonagh v Stokes* [2014] IEHC 229 as relied upon by the defendant and in which O'Neill J took a different view is distinguishable as the primary question which the court in that case considered was the correct procedure to be adopted under s.76. It is submitted therefore that those parts of the judgment upon which the defendant seeks to rely do not form part of the *ratio decidendi* of O'Neill J's decision and are obiter.

It is further submitted that the European Communities (Fourth Motor Insurance) Directive Regulations, 2003 allows claimants to proceed directly against insurers without first obtaining judgment against the driver of the vehicle that caused injury. Pursuant to the Regulations, the injured party has a direct right of action against the insurers and does not need to sue the driver. It is accepted however that s.76 is unaffected by the Regulations and that an injured party therefore has the right to proceed either against the driver and to seek to have any judgment satisfied by the insurers under s.76, or, to proceed directly against the insurers.

It is therefore submitted on behalf of the applicant that the circumstances of this case are exceptional and it is necessary to join the applicant as a co-defendant or notice party to effectually and completely adjudicate on the issue of whether a fraud has been perpetrated.

SUBMISSIONS OF THE DEFENDANT

Counsel for the defendant submits that it is accepted between the parties that an order joining a party against the wishes of a plaintiff will only be made in exceptional circumstances. However, it is submitted that the exceptional circumstances must be proved and established to the Court at the time of the application and they can not be issues which would only become part of the proceedings as a result of the joinder. In this regard, counsel refers the Court to the following extract from Hallsbury's Laws of England as cited by the applicant –

"An application by any person to be added as a party must, except with the leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or the question or issue to be determined as between him and any party to the cause or matter."

It is submitted that the content of the applicant's various supplemental affidavits does not meet the 'exceptional circumstances' criteria as set out in the relevant case law. The supplemental affidavits relied upon by the applicant simply set out the basis for the insurance company's decision to refuse indemnity. It is submitted that repudiation is not at issue in these proceedings and is therefore not a matter that will fall to be determined by this Court.

Counsel contends that the applicant has no direct or indirect interest in these proceedings. Neither plaintiff has proceeded directly against the applicant pursuant to the 2003 Regulations and therefore there is no such direct effect on the pecuniary or proprietary interests of the applicant unless and until the plaintiff obtains judgment against the defendant and then, pursuant to s.76, seeks leave to apply to the court in which judgment was recovered for leave to execute the judgment against the insurer. If such an application was made, it is submitted that it is at that stage that the applicant could vigorously resist the application and put before the relevant court any relevant evidence of fraud which it has obtained in the course of the investigations it has conducted.

Counsel for the defendant submits that there is absolutely no bar to the applicant presenting evidence of fraud in a s.76 application and, if necessary, an oral hearing may be directed. It is submitted that insurance companies regularly successfully defend such applications on various grounds, including that a fraud has been perpetrated. Therefore, it is submitted that any interest the applicant has in these proceedings is a remote one.

It is denied that the plaintiff would be able to rely on the provisions of s.76(e) to preclude the insurer from making raising the defence of fraud in circumstances where it is alleged that the plaintiff and the defendant colluded. Section 76(e) relates only to fraud, misrepresentation, or a false statement to which a claimant was not a party.

Counsel for the defendant submits that even if the plaintiff were to obtain an uncontested judgment against the defendant and subsequently sought leave to recover against the applicant on foot of that judgment, the plaintiff would do so in full knowledge that were the applicant to successfully establish fraud they would be liable to be found guilty of offences pursuant to sections 14, 24 and 26 of the Civil Liability and Courts Act 2004. It is submitted that these provisions provide a very real disincentive to persons who might bring fraudulent claims.

It is submitted that the plaintiff was perfectly entitled to pursue the claim in the manner it has done so to date and there is nothing improper in the decision not to pursue the claim pursuant to the 2003 Regulations. In all of the circumstances, it is submitted that it is not necessary to join the applicant to these proceedings.

Without prejudice to this submission, counsel contends that even if the applicant is to be joined to the proceedings, it should be joined as a notice party rather than a co-defendant. In this regard, reliance is placed on the following extract from Delany & McGrath's *Civil Procedure in the Superior Courts* –

"The Rules do not make any provision for the joinder of affected persons as notice parties in plenary proceedings and the question arises as to whether such a jurisdiction exists. In YAP v Children's University Hospital Temple Street Ltd a clinical director applied to be joined as a notice party in plenary proceedings brought by the plaintiff consultant against the defendant hospital. While Clarke J. Refused the application, he seemed to accept that he had jurisdiction to join a notice party in an appropriate case and expressed the view that it was procedurally more appropriate that someone against whom relief was not being sought should be a notice party rather than a defendant"

The defendant submits that the appeal should be refused and no alternative relief should be granted.

DISCUSSION

While counsel for the defendant objected to the introduction of fresh evidence contained in the supplemental affidavits filed after this matter first came before this Court, the Court is satisfied that such evidence in relation to the basis upon which the applicant wishes to plead a defence of fraud if joined to these proceedings was necessary in order to enable the Court to comprehensively deal with the substantive issue and to provide clarity on what both parties agree is an important point in cases of this kind.

It is accepted between the parties that a plaintiff is ordinarily entitled to choose the person they wish to commence proceedings against and cannot be compelled to proceed against a person he has no desire to pursue. However, as set out by Lynch J. in *Fincoriz SAS v Ansbacher Ltd.* [1987] IEHC 19, a court may join a party to proceedings against the wishes of the plaintiff, but it must only do so in exceptional circumstances. Similarly, in *Persona Digital Telephony Limited and Sigma Wireless Networks Limited v the Minister for Public Enterprise, Ireland and the Attorney General* [2014] IEHC 78 Ryan J. held that there must be 'very exceptional' circumstances before the plaintiff's choice as to who to sue will be interfered with.

In *BUPA Ireland Limited v Health Insurance Authority* [2006] 1 IR 201 the Supreme Court held that the "proprietary or pecuniary rights" of an applicant were held to be a relevant consideration in the context of an application pursuant to Order 15, rule 13. Having regard to this finding, and the comments of Ryan J. in the *Persona Digital Telephony* case that *"the point of joining a new defendant is in the interest of justice, in the Court's interest in seeing that litigation is properly and effectively conducted and that its processes are operated in a way that is just and fair and also in the interests of the added party because of the impact of the litigation on its rights"*, this Court is satisfied that the applicant in the present case has met the high threshold required to be joined as a notice party.

This is not a case, as referred to in *Barlow and Others v Fanning & UCC* [2002] 2 IR 593, where the applicant seeks to be joined merely because its reputation is at risk and they wish to defend it. Nor is the applicant seeking to be joined simply because it is interested in the proceedings, as opposed to having a genuine legal interest in the outcome of the proceedings. The applicant insurer's proprietary or pecuniary rights are very much at stake in these proceedings. If judgment is entered against the defendant, the plaintiff may then seek to execute the judgment against the applicant under s.76.

While the Court accepts that the plaintiff was not *required* to proceed directly against the applicant insurer, the Court is satisfied that, having regard to the Court's interest in ensuring that litigation is effectively conducted and that valuable court time is used efficiently, the facts of this particular case justify the joining of the applicant as a notice party. It is obvious that there is a real risk that no defence of the kind sought to be made by the insurer will be advanced by the existing defendant and, without prejudice to the substantive hearing, the Court is satisfied on the basis of the supplemental affidavits that there is at least an arguable case in relation to the alleged fraud which would be properly made at this stage. There is no statutory preclusion of such a joinder and the ever-increasing exhortations of appellate courts – as exemplified in the Supreme Court decision in *Talbot v Hermitage Golf Club & Ors.* [2014] IESC 57 – to ensure that cases and legal business generally be disposed of efficiently and expeditiously, coupled with the fact that EC Motor Regulations now expressly provide that insurers may be sued directly, all constitute factors strongly in favour of the course sought by the applicant in this case.

The Court accepts the submissions of the applicant that the decision of O'Neill J. in *McDonagh v Stokes* related primarily to a separate and distinct issue, namely the correct procedure to be applied pursuant to s.76, and that those portions of the judgment relied upon by the defendant did not constitute part of the *ratio decidendi* of the decision. In the subsequent case of *Daly v Ryan and Liberty Insurance* (ex tempore, 3rd November, 2014) this Court permitted an insurer to be joined to the proceedings rather than await judgment being marked against their insured, damages assessed, and ultimately an application pursuant to s.76 of the Road Traffic Act, 1961.

The Court accepts that in the present case, as it seems clear that fraud is being alleged against the plaintiff and the defendant, the applicant would not be restrained by 76(e) from arguing fraud in any s.76 application. As already stated however, the Court is satisfied that, in all the circumstances of this case, requiring the applicant to do so rather than joining them as a party to these proceedings would be an inefficient use of court time and would cause unnecessary costs to be incurred by the parties. However, to

conform to the greatest degree possible with the historic legal jurisprudence, the Court will direct that the insurer be joined as a notice party rather than as a defendant. As a countervailing factor of possible benefit to the plaintiff in the proceedings is the fact that, if successful with the claim, an award of aggravated or exemplary damages may be sought and awarded by the trial judge

DECISION

For the reasons set out above, the Court will grant the relief sought and join the applicant as a notice party to these proceedings.