Neutral Citation: [2014] IEHC 229

**THE HIGH COURT**

**NORTHERN CIRCUIT COUNTY OF DONEGAL**

**[2013 No. 94 CA]**

**IN THE MATTER OF SECTION 76 OF THE ROAD TRAFFIC ACT 1961 AS AMENDED AND IN THE MATTER OF PROCEEDINGS**

**BETWEEN**

**JOHN McDONAGH**

**AND**

**WINIFRED STOKES**

**RECORD NO 42/2011**

**BETWEEN**

**JOHN McDONAGH**

**CLAIMANT**

**AND**

**ARB UNDERWRITINGS LIMITED**

**RESPONDENT**

**JUDGMENT of O'Neill J. delivered on the 2nd day of May 2014**

1. These proceedings come before this Court by way of an appeal against the Order of O'Hagan J. in the Circuit Court, dated 27th June 2013, pursuant to s. 76(1)(b) of the Road Traffic Act 1961 ('the Act') enforcing judgment against the respondent insurance company. The respondent is seeking to have this Order set aside and have the matter remitted to the Circuit Court for a plenary hearing. While there were two injured parties and two distinct sets of proceedings, it was agreed that as the facts of each case are almost identical, the matter should proceed in relation to the above named claimant and that the decision of this Court in these proceedings, would also be determinative of the second injured party's appeal.

**Background**

2. On 25th April 2010, the claimant was travelling as a rear seat passenger in a car driven by Ms. Winifred Stokes. The claimant alleges that this vehicle violently collided with the rear of another vehicle at Kilross junction, Stranorlar, County Donegal, causing him severe personal injuries, loss and damage. The front seat passenger, Mr Martin Stokes, who is the claimant in the related proceedings, was also injured in the collision. On 23rd June 2010, the claimant's solicitor wrote to Ms. Stokes setting out details of the accident and asserting their instructions, that she was liable. On 20th July 2010, the respondent insurance company wrote to the solicitor for the claimant stating "*we have accepted Liability on behalf of our Insured driver for this accident*." An application was made to the Personal Injuries Assessment Board on 1st December 2010, and authorisation was granted to issue proceedings in the Circuit Court. A personal injury summons was issued on 13th January 2011. Correspondence ensued between the solicitors for both parties in relation to acceptance of service of the summons. The summons was served on Ms. Stokes on 24th February 2011. On 30th March 2011, the claimant's solicitor wrote to the respondent's solicitor requesting entry of appearances in the Circuit Court proceedings.

3. On 13th June 2011, solicitors for the respondent insurance company wrote to the claimant's solicitor stating that "*our Principals have advised us that they will not be indemnifying Ms. Winifred Stokes in relation to this particular matter and on that basis I have returned herewith the original Personal Injuries Summons that you sent us in this matter wherein, we haven't endorsed acceptance of service of same*." No reasons were provided in this letter for withdrawing Ms. Stokes's indemnity. Counsel for the respondent insurance company told the court that indemnity was refused on the basis of information received from An Garda Síochána in relation to an investigation into a number of fraudulent or 'staged' accidents in the region. On 16th June 2011, the claimant's solicitor replied, seeking reasons for refusing to indemnify Ms. Stokes, and advising of their intention to proceed to have judgment marked against Ms. Stokes. A motion for judgment in default of appearance was issued on 17th June 2011, and subsequently, judgement was granted by O'Hagan J. on 25th October 2011. Ms. Stokes was informed of this by letter dated 27th October 2011. On 19th June 2012, the claimant's solicitors advised the respondent's solicitors by letter that judgment had been obtained and the matter would be listed before the court for an assessment of damages. On 13th November 2012, the matter came before His Honour Judge Johnson in Letterkenny Circuit Court who assessed both the claimant's and the other injured party's damages the amount of €17,500 each, including special damages, plus costs.

4. On 27th June 2013, the claimant made an application pursuant to s.76 of the Road Traffic Act 1961, to have the judgment of 25th October 2011 enforced against the respondent insurer. A replying affidavit was filed on behalf of the respondent wherein the respondent sought leave to bring oral evidence in relation to the alleged conspiracy and fraud to which they believed the claimant was a party. It was averred that this put the matter outside the scope of s.76. The matter came before O'Hagan J. who did not hear any oral evidence and granted the order in favour of the claimant.

**Statutory Provisions**
5. Section 76 of the Act sets out 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:*
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> *(a) the insurer shall not after service of the notice pay to the owner or user in respect of the sum any greater amount than the amount (if any) which the owner or user has actually paid to the claimant in respect of the sum;*
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> *(b) 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, the insurer or guarantor shall pay to the claimant so much of the moneys (whether damages or costs) for which judgment was or is so recovered as the insurer or guarantor has insured or guaranteed and is not otherwise paid to the claimant, and the payment shall, as against the insured or principal debtor, be a valid payment under the policy or guarantee;*
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> *(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;*
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> *(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;*
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> *(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."*

6. Also of relevance to the present proceedings is s. 76(3) which states:

> *"(3) Subsections (1) and (2) of this section apply only to claims against the liability for which an approved policy of insurance or an approved guarantee is required by this Act to be effected.*

**Submissions**
7. In his affidavit dated 4th October 2013, Mr. Cormac Hartnett, solicitor for the claimant, states that the judgment of His Honour Judge O'Hagan on 25th October 2011, remains valid and has never been set aside or appealed. It was submitted that the respondent failed to enter an appearance at any stage of these proceedings and therefore has no *locus standi* to contest the order of Judge O'Hagan of 27th June 2013, to enforce the judgment under s.76 of the Act. It was submitted that the matter is now at an end and there is no necessity for a plenary hearing as judgment has been obtained and an order made under s.76. It was argued that the respondent has no entitlement to cross-examine the claimant who has obtained a valid and unchallenged judgment against the respondent insurance company.

8. Counsel for the claimant contended that in order to avoid the application of s.76, the respondent is required under s. 76(1)(e) to establish that the claimant was party to fraud or dishonesty in relation to the accident and the claim. It was submitted that there has been no prosecution or conviction of any person in relation to the alleged fraud, and there is no evidence of the claimant having been a party to any conspiracy or fraud. Counsel for the claimant submitted, that had the insurance company wished to resist payment on the grounds of an allegation of fraud, the correct procedure to be followed was to either enter a conditional appearance on behalf of Ms. Stokes earlier in the proceedings, or else apply to be joined as co-defendant for the purposes of filing a separate defence. It was submitted that, having failed to do either of these, the respondent insurer cannot now resist payment in circumstances where an order was granted pursuant to s.76.

9. Counsel for the respondent accepted that s. 76 of the Act exists to protect claimants who find themselves in a position similar to the plaintiff. However, it was submitted that the insurance company, acting on the basis of information from An Garda Síochána, was entitled to repudiate the insurance policy and refuse to indemnify Ms. Stokes in circumstances where there were 'grave concerns' surrounding the authenticity of the accident. Where indemnity is refused or withdrawn, it was submitted that an order pursuant to s.76 could not and should not have been made in the absence of an oral hearing which allowed the respondent the opportunity to adduce evidence in relation to the alleged conspiracy and fraud. It is submitted that the replying affidavit of Mr. Eustace, solicitor for the respondent, in the s.76 proceedings brought fresh matters to the court's attention which put the case outside the scope of s.76. At the time the application under s.76 was made the insurance company had withdrawn indemnity and it is contended that Ms. Stokes did not have in place an approved policy of insurance as required by s.76(3) as set out above.

10. In relation to the claimant's suggestion that the respondent ought to have entered a conditional appearance on behalf of Ms. Stokes or sought to have been joined to proceedings at an earlier stage, counsel for the respondent submitted that the insurance

company could not in any circumstances have entered an appearance on behalf of Ms. Stokes and that they had no means or basis for intervening in the proceedings until the s.76 application. It was further submitted that the respondent's decision to withdraw indemnity was never challenged by or on behalf of Ms. Stokes, and that there was an onus the claimant to satisfy the court that an approved policy of insurance was in place. It was argued that the affidavits filed on behalf of the claimant are deficient in this regard. Counsel for the respondent relied on the case of *Whelan v Dixon* [1963] 97 ILTR 195, as authority for this proposition. In *Whelan*, the owner of a vehicle had an insurance policy in place for the purposes of his business "as a greengrocer and no other", and for social, domestic and pleasure purposes. When the claimant sought to have judgement executed against the insurance company, liability was repudiated on the ground that at the time of the accident the car was being used for a purpose other than those covered by the policy. It was held by Murnaghan J. that the onus of proof for establishing that the car was being used within the limitations of the insurance policy at the time of the accident rested on the claimant. Counsel for the claimant contended that the facts of *Whelan* are distinguishable from the present case as it related to a compulsory insurance policy and the primary issue was the uses covered by the policy rather than an allegation of fraud or conspiracy. It is also submitted that, unlike the issues in *Whelan*, s.76 makes express provision for cases involving fraudulent claims.

11. The respondent contended that the words "*if it thinks proper*" in s.76 (1)(c) show a clear intention on the part of the Legislature to allow a court to exercise discretion and decide each application to execute judgment on its merits. It was submitted that the Circuit judge erred by granting the relief sought without considering the full merits of the respondent's case. Counsel for the claimant submitted that the order of Judge O'Hagan was made within jurisdiction and the respondent is not entitled to a plenary hearing as the matter is now at an end.

**Decision**

12. Having received information from An Garda Síochána in relation to a series of suspected staged road traffic accidents and fraudulent insurance claims, the respondent insurance company was entitled to refuse to indemnify their client Ms. Stokes. Equally, the claimant, who maintains he was injured through no fault of his own, was entitled to make his case to the Circuit Court and to have judgement in default of appearance marked against Ms. Stokes. I agree with the submission by counsel for the respondent that the insurance company could not have entered a conditional appearance on behalf of Ms. Stokes or applied to have been joined as a co-defendant at this stage as in the first place it could not purport to represent Ms Stokes having withdrawn her indemnity under the policy of insurance and secondly, it now wished to pursue a case in its own interest which was essentially adverse to Ms Stokes' interest in the proceedings. The respondent's solicitor did not act for Ms. Stokes or receive any instructions from her. Furthermore, seeking to be joined as a co-defendant in proceedings where no claim was directly made against the respondent insurer, and in which no allegations were made against the respondent insurer, would also have been impermissible under the relevant Rules of Court. The question for this court to consider is what was the proper procedure to be adopted in the s.76 proceedings. I do not accept that there was an onus on the claimant to establish that a valid policy of insurance was in place in circumstances where the claimant may have no knowledge of the fact of or reason for refusing indemnity particularly in circumstances as occurred here, where initially liability had been admitted. A claimant cannot be expected to anticipate every allegation that might potentially be levelled against him and disprove them in his grounding affidavit.

13. At the time the s.76 application was made, the respondent insurance company had refused indemnity. The affidavit of Mr. Jim Eustace in the s.76 proceedings outlined that the respondent wished to adduce oral evidence of the fraud to which they believed their client Ms. Stokes and the claimant were parties. The proper procedure to be followed in such proceedings allows for a response to the motion by affidavit or by oral evidence. I accept that in light of the nature of the allegations against the claimant, oral evidence which could be cross-examined, was essential in this case. The learned Circuit judge erred by failing to allow the respondent's request to adduce oral evidence in relation to the alleged fraud which, if accepted, would have put the matter outside the scope of s.76. and required a refusal of the relief sought in the motion by the claimant.

14. For those reasons, I will set aside the order of the Circuit Court and remit the matter to the Circuit Court for a plenary hearing of the s.76 application.