

THE HIGH COURT

NO. 10597P/2000

BETWEEN

PETER KILCOYNE

PLAINTIFF

AND
**WESTPORT TEXTILES LIMITED (IN VOLUNTARY
 LIQUIDATION)**
AND THE ROYAL AND SUN ALLIANCE PLC

DEFENDANTS

Judgment of Finnegan P. delivered on the 26th day of July 2006.

1. A Plenary Summons in this matter was issued on the 3rd December 2000 against the first named Defendant. The Plaintiff was an employee of the first named Defendant between the years 1970 and 1979 and in that time, the Statement of Claim pleads, he was exposed to excessive noise which has resulted in hearing loss. The Defendant was incorporated in 1961 and went into voluntary liquidation on the 23rd June 1981. In November 2000 it was struck off the Register of Companies but restored to the Register on the 15th June 2002. On the 11th January 2005 the second named Defendant was joined to the action as a Co-Defendant by order of the Master. An amended Statement of Claim was delivered on the 2nd March 2005. The only alterations to the original Statement of Claim consist of the adding to the title of the action of the second named Defendant and of a paragraph describing the second named Defendant as a limited liability company and giving its registered office. Thus on the pleadings the claim against the second named Defendant appears as a claim by an employee against his employer for negligence which is particularised. However correspondence had passed between the Plaintiff's solicitor and the second named Defendant and its solicitors between the 25th April 2001 and the application to join the second named Defendant as a Defendant and both the Plaintiff and the second named Defendant are fully aware of the true nature of the claim sought to be maintained against the second named Defendant. This is a claim in reliance on the provisions of the Civil Liability Act 1961 section 62 and the decision of the Supreme Court in *Michael Dunne v P.J. Whyte Construction Limited (In Liquidation) and Ors* 1989 ILRM 803.

2. The second named Defendant issued a motion on the 6th December 2005 seeking the following reliefs –

(a) An order pursuant to order 63 Rule 9 of the Rules of the Superior Courts appealing the entirety of the order of the Master dated the 11th January 2005 joining the Royal and Sun Alliance Plc as Co-Defendant and substituting hereof an order refusing the Plaintiff's application to join the second named Defendant.

(b) In the alternative an order pursuant to the inherent jurisdiction of the Court dismissing the Plaintiff's claim for want of prosecution and/or delay.

I Further or in the alternative an order pursuant to the inherent jurisdiction of the Court dismissing the Plaintiff's claim against the second named Defendant on the grounds that the said claim is frivolous and/or vexatious and/or discloses no reasonable cause of action and/or is an abuse of the process of the Court.

(d) Further or in the alternative an order pursuant to Order 19 Rule 28 of the Rules of the Superior Courts dismissing the action and/or striking out the Statement of Claim on the ground that it discloses no reasonable cause of action.

3. The Plaintiff's claim is one of approximately 140 claims by former employees of the first named Defendant all of whom had ceased to be employees of the first named Defendant from 1980 onwards. Further relief sought in the Notice of Motion was that the order of the Court in these proceedings should bind the Plaintiffs in the other proceedings but this was not persisted in at the hearing of the motion.

4. On the Affidavits before me it is quite clear that the claim against the second named Defendant as at present constituted and pleaded is unsustainable. I am satisfied that the second named Defendant is entitled to relief under Order 19 Rule 28 that is to have the claim against it struck out on the ground that it discloses no reasonable cause of action. Accordingly I propose to make the order sought.

5. It was canvassed before me that I should deal with the matter on the basis of the true nature of the claim against the second named Defendant and that the Plaintiff be allowed to further amend his pleadings at this stage to reflect the true cause of action. Should I accede to this the second named Defendant proposes to rely upon delay. Much of the Affidavits before me deal with the subject of delay. However I have determined that I should deal with the matter solely on the basis of the pleadings as they stand at present. On the information before me it seems almost inevitable that the Plaintiff will obtain judgment in default of pleading against the first named Defendant. He can then, if so advised, institute proceedings against the second named Defendant as the indemnifier of the first named Defendant. In those proceedings the Defendant (the second named Defendant in these proceedings) can raise the issue of delay and seek to have the proceedings struck out. Rather than proceed on the basis of a notional further amended Statement of Claim I am satisfied that it is preferable that I should allow the matter to proceed on the basis of the proceedings as they stand.

6. In deciding to strike out the Plaintiff's claim I am influenced by the circumstance that the Plaintiff has had from the 11th January 2005 to date to deliver an appropriate amended Statement of Claim setting out in appropriate terms his claim against the second named Defendant but has failed to do so: the amended Statement of Claim delivered is totally defective in that it fails to disclose the true basis of the claim against the second named Defendant. The Defendant in this case has to meet a claim which arose more than 25 years ago and in these circumstances the onus on the Plaintiff having joined the second named Defendant was to proceed promptly and he has not done so.

7. In the circumstances it is appropriate that the Plaintiff's claim against the second named Defendant be struck out pursuant to Order 19 Rule 28 of the Rules of the Superior Courts.