THE HIGH COURT

[2010 No. 10294P]

BETWEEN

MICHAEL MOONEY AND AUDREY MOONEY

Plaintiffs

AND

MARTIN J. KEARNS AND THOMAS GORMALLY AND NOEL MCCARRICK AND SAMANTHA SCHMIDT AND GLOBAL GROUP IRELAND LIMITED

Defendants

THE HIGH COURT

[2010 No. 10344P]

BETWEEN

JOHN BERMINGHAM

Plaintiff

AND

MARTIN J. KEARNS AND THOMAS GORMALLY AND NOEL MCCARRICK AND SAMANTHA SCHMIDT AND GLOBAL GROUP IRELAND LIMITED

Defendants

Judgment of Ms. Justice Murphy delivered the 25th day of January, 2016

1. This case concerns two motions to come off record pursuant to Order 7, rule 3(1), of the Rules of the Superior Courts, issued by LK Shields, who are the solicitors on record for the first named defendant, Martin J. Kearns, in the above two sets of proceedings. The first set of proceedings were commenced by Michael Mooney and Audrey Mooney (2010/10294 P), while the second set of proceedings were issued on behalf of John Bermingham (2010/10344 P). The plaintiffs are represented by the same solicitor, Mr. Thomas O'Dea. Both notices of motion seeking leave to come off record were issued on 12th March, 2015.

2. Mr. Kearns is a solicitor and notary public based in County Galway who obtained a professional indemnity insurance policy from Quinn Insurance Limited for the period from 1st December, 2009 to 30th November, 2010.

3. On 10th November, 2010, proceedings were commenced by the plaintiffs by way of plenary summons. The plenary summons was served personally on Mr. Kearns on 18th November, 2010. The proceedings are two of eighty nine separate actions (one of which has been discontinued) commenced by plaintiffs who invested in property in Adeje, Tenerife, which were sold by the remaining defendants. The plaintiffs allege *inter alia*, misconduct and professional negligence against Mr. Kearns and seek damages for breach of contract, negligence, breach of duty (including statutory duty) and negligent misstatement. The claims relate to the manner in which Mr. Kearns notarised certain documents required by the investors for the purposes of making the investments.

4. The applicant solicitors, LK Shields, were nominated to act by Quinn Insurance on behalf of the first defendant, Mr. Kearns, in respect of all eighty nine cases. On 3rd December, 2010 LK Shields solicitors entered an appearance on behalf of Mr. Kearns in respect of the proceedings concerning both plaintiffs in the instant case.

5. The Statements of Claim in respect of Mr. and Mrs. Mooney, and Mr. Bermingham were delivered to LK Shields on 13th April, 2011. On 5th May, 2011, plenary summons were sent by the plaintiff's solicitor in respect of thirty five other claims. On 2nd June, 2011, LK Shields wrote to the solicitor for the plaintiffs, to confirm receipt of the additional thirty five plenary summonses. That letter also stated as follows:

> *"Please note that as questions arise as to the provision of indemnity to Martin Kearns by his professional indemnifiers in respect of every Summons issued by your firm, we do not intend to enter Appearances to these summonses until such time as Martin Kearns entitlement (or otherwise) to indemnity has been determined".*

6. On 28th June, 2011, Mr. Thomas O'Dea, solicitor for the plaintiffs, wrote to the applicant solicitors seeking confirmation of their position as they had not yet entered an appearance in respect of the thirty five plenary summonses. Mr. O'Dea wrote to LK Shields again on 22nd August, advising that if he did not hear from the applicant solicitors within twenty one days he would issue motions for judgment in default of appearance. LK Shields responded to Mr. O'Dea the following day, noting as follows:

> *"Our position in relation to indemnity remains the same. We are currently awaiting Counsel's advises(sic) in respect of this issue and in the circumstances we should be obliged if you would confirm that you will not issue motions for judgment in default of Appearance until we revert".*

7. Mr. O'Dea responded to the applicant on 29th August, 2011 as follows:

> *"This position is totally unsatisfactory. Our clients cannot be expected to wait indefinitely for your client to decide whether or not to provide cover. We will bring Motions for Judgment in Default of Appearance within the time stated in my letter of 22nd inst unless you immediately confirm whether or not you intend to indemnify the first named Defendant herein".*

8. The Court does not appear to have been furnished with the response from LK Shields, however it can be inferred from Mr. O'Dea's letter of 6th October, 2011 that such communication involved a request for particulars in the instant cases, in which Statements of Claim had been served, since he wrote as follows:

> *"I refer to your letter enclosing Notice for Particulars. We are preparing replies and these will be furnished in due course.*
>
> *In regard to the final paragraph of your letter we note that an unconditional Appearance was entered by you and the question of indemnity was not raised at any time prior to this. I understand therefore that indemnity is not an issue in this case".*

9. The applicant replied to Mr. O'Dea's letter by way of letter dated 19th October, 2011, stating:

> *"We do not accept that the issue of indemnity was not raised prior to our letter enclosing notice for particulars dated 16th September 2011. The matter is still under investigation and we cannot comment on indemnity or cover issues".*

Mr. O'Dea avers that the applicants ultimately entered appearances on behalf of the first named defendant in all eighty nine cases.

10. In or around November, 2011, Liberty Insurance Limited ("Liberty Insurance") purchased the assets and liabilities of Quinn Insurance, including Mr. Kearns' policy.

11. In or around 21st December, 2011, the plaintiffs' solicitor avers that he received a call from Ms. Aoife Bradley of LK Shields seeking his permission to proceed on the basis of a pathfinder case. The plaintiffs' solicitor avers that it was his understanding from this conversation that counsel's opinion had been received and that indemnity was being granted to the first named defendant. On 21st December, 2011, the plaintiffs' solicitor wrote to the applicant as follows:

> *"I refer to our telephone conversation in regard to the above matter. It is our opinion that your proposal of using a 'pathfinder' procedure in respect of any of the above cases is inappropriate. A Defence in each case must now be filed. We expect to receive same early in the New Year or, as stated in our 21(sic) letter, Motions for Judgment in Default of Defence will issue without further notice".*

12. On 21st March, 2012 the plaintiffs' solicitor was served with a notice of motion and affidavit seeking a court order to proceed on the basis of two pathfinder cases. On 22nd March, 2012 the plaintiffs' solicitor received a further letter from Ms. Bradley of LK Shields which stated as follows:

> *"We refer to our previous correspondence on the issue of indemnity resting with our letter to your firm dated 19 October 2011.*
>
> *Kindly note that pursuant to the terms of the relevant Policy of Insurance, and on the advice of Senior Counsel, Martin Kearns' professional indemnifiers (Liberty Insurance Limited) takes the position that there is a separate excess of €20,000 payable by Martin Kearns in respect of each of the 89 claims.*
>
> *We are informing you of this in case it may be relevant to your decision making process in the proceedings.*
>
> *For the avoidance of doubt, our client denies liability. He will be defending all the actions and seeking costs orders, as appropriate."*

13. On 2nd May, 2012, by order of the High Court, following a motion for judgment in default of defence, it was decided, on consent, that the proceedings of Mr. and Mrs. Mooney and those of Mr. Bermingham would be the initial "pathfinder" cases. The remaining eighty six cases were stayed pending the determination of these cases. Costs were also awarded against Mr. Kearns.

14. The applicant solicitors filed a defence on behalf of Mr. Kearns on 23rd May, 2012 and on 24th July, 2012 a reply to the defence was delivered. On 22nd August, 2012 interrogatories were served on LK Shields, same being replied to on 21st January, 2013. On 6th December, 2012 the costs awarded against Mr. Kearns on the earlier motions, were paid.

15. On 18th March, 2013, LK Shields filed an affidavit of discovery on behalf of Mr Kearns. Notice of trial was served on the first named defendant on 14th October, 2014 followed by updated particulars of loss on 18th November, 2014. On 23rd February, 2015, the plaintiffs served a notice of intention to apply for a hearing date, returnable for 5th March, 2015.

16. By letter of 4th March, 2015, Mr. Kearns was notified by Liberty Insurance of their decision to refuse him indemnity under the policy and to withdraw instructions from LK Shields Solicitors to act on his behalf. Mr. Edmund Butler, a partner with the applicant solicitors, avers that the decision to refuse indemnity was taken "*as a result of certain information that has recently come to light in the course of the conduct of the proceedings herein"*. The letter of 4th March also requested that Mr. Kearns file a notice of change of solicitor. He had not done so at the date of hearing of this application.

17. On the same date, the solicitor acting for the plaintiffs received an emailed letter from LK Shields informing him that an indemnity issue had arisen between the first named defendant and their client, Liberty Insurance and that Liberty Insurance had made a decision to decline to indemnify in respect of all eighty nine claims. The letter further stated that the reasons for the declinature were confidential.

18. On 5th March, 2015 the plaintiffs sought a date for trial. Counsel for the first named defendant informed the court that LK Shields were applying to come off record and the matter was adjourned to 19th March, 2015. On the same date, 5th March, 2015, LK Shields wrote to Mr Kearns informing him that liberty to issue a motion to come off record had been obtained and requesting that he nominate a new solicitor and file a notice of change of solicitor. However, Mr. Butler of L.K. Shields, avers that Mr. Kearns has refused, neglected or otherwise failed to file such a notice.

19. On 12th March, 2014, Mr. Kearns was served with a copy of the applicant's notice of motion as well as the affidavit of Mr.

Edmund Butler by email. On 13th March, 2015 Mr. Kearns was personally served with the above documents. Mr. O'Dea also received a copy of those documents on the same date.

20. On 19th March, 2015 Mr. Kearns wrote to Mr. Butler of LK Shields by email in which he indicated his consent to disclosure of its contents. In this email, Mr. Kearns indicated that he was seeking counsel's advice in relation to the declinature and that the matter would probably have to go to arbitration.

21. On 31st March, 2015 Mr. Butler furnished Mr. Kearns with a copy of a proposed replying affidavit which set out the circumstances surrounding Liberty's refusal to indemnify. He requested that Mr. Kearns revert to him in the event that he had any objection to the content of the draft. He avers that, as of 9th April, 2015, he had yet to receive a response and as such is not prepared to disclose such information on the basis of solicitor-client confidentiality.

22. In the replying affidavit of Mr. Thomas O'Dea, solicitor on behalf of the plaintiffs, sworn on 13th March, 2015, he avers that no grounds have been set out upon which Liberty Insurance have refused indemnity so as to justify their solicitors coming off record. The plaintiffs say it is reasonable and appropriate for LK Shields to indicate the circumstances under which this decision was reached, given the considerable time and energy expended by the plaintiffs. Mr. O'Dea says his understanding was that indemnity had been granted and the issue resolved. He avers that on 22nd March, 2012 he was informed of Liberty's decision to indemnify by way of letter from LK Shields. He avers that in circumstances where the proceedings have involved considerable time and expense, no indication is given as to why Liberty Insurance no longer wishes to act in the matter, or why the application was not taken sooner.

23. In the second affidavit of Edmund Butler, partner in LK Shields, sworn on the 9th April, 2015, he avers that the matter is more properly one for legal argument, but that the jurisprudence surrounding Order 7, rule 3(1) provides authority for the proposition that solicitors cannot be compelled to act for an insured party after an insurer withdraws indemnity. He also notes that Order 7, rule 3(1) does not require or entitle the counterparty to litigation to be a respondent or a notice party to an application to come off record and that notice of the present application was provided to the plaintiffs only as a matter of courtesy. It is therefore the applicant's position that the plaintiffs do not have *locus standi* to object to the application and that the plaintiffs are objecting to the application in an attempt to seek a costs order against Liberty Insurance which is wholly inappropriate in the absence of a formal application against Liberty Insurance, who is not a party to the within proceedings.

24. Mr. Butler accepts that no indication was given by LK Shields in his first affidavit as to the circumstances of Liberty's decision to refuse indemnity. He says this was because details concerning representation of Mr. Kearns, including communications between Liberty and LK Shields, could not be disclosed without the first named defendant's express consent, which, up to that point, was not sought or provided.

25. He avers that indemnity has been refused due to a prior notification having been made by Mr Kearns to a previous insurer of claims and circumstances relevant to the within proceedings. Thus, he says it is possible that Mr. Kearns will be entitled to indemnification by his previous insurer on foot of the notification of claims and/or circumstances made by him prior to the period in which he held a Liberty policy. He further explains that these facts had only recently come to the attention of Liberty which acted with expedition once it became aware of those facts.

26. Mr. Butler further rejected any contention that the plaintiffs incurred any unnecessary costs of litigation as a result of the timing of Liberty's refusal to indemnify and states that it is trite to say that it is always the case that a plaintiff suing an insured defendant is on hazard that the insurer may decline indemnity even after nominating solicitors to act on its behalf. He further suggests that it is somewhat ironic that the plaintiffs' legal advisors now express concern about incurring unnecessary costs considering the stance adopted by them in relation to the suggestion of the applicant that the issue be approach on a "pathfinder" basis; that the plaintiffs' solicitors brought a separate motion for judgment in default in each of the eighty nine proceedings; and that when LK Shields subsequently brought an application for directions seeking the selection of pathfinder cases the plaintiffs' legal advisors did not consent to the application until the day of hearing.

27. In a second affidavit of Mr. O'Dea sworn on the 12th May, 2015, leave of the Court having been provided in this regard, he avers that the proceedings were pursued against the first named defendant on the basis that it was reasonably believed that he had insurance cover to indemnify him for allegations of this kind. The proceedings against the other defendants were pursued because of the concern that if they were not, the extent of their alleged wrongdoing might have been considered as amounting to contributory negligence on the part of the plaintiffs, as provided under s. 35 of the Civil Liability Act 1961. He avers that it was never understood that any defendant other than the first named defendant had any insurance cover available in respect of the matters giving rise to the present proceedings and that at no time in the five years since proceedings were first initiated was it ever indicated by any of the defendants and/or their legal representatives, other than the first named defendant, that there was a policy of insurance in place or that they were relying on insurance cover to answer the allegations of civil wrongdoing alleged against them. He further avers to his belief that none of the other defendants would be a mark for recovery.

Submissions of the Applicant

28. Counsel on behalf of LK Shields, Mr. McCullough , submits that in an appropriate case, where a solicitor instructed by an insurer applies to come off record, there is jurisdiction to join the insurer so as to make an order for the payment for all or part of the costs incurred by another party in the litigation by the insurer. He relies on the authority in *O'Fearail v. Colm McManus* [1994] 2 I.L.R.M. 81 and particularly on the decision of *Byrne v. John O'Connor* [2006] 3 I.R. 379 in this regard. He notes in particular the headnote of the *Byrne* decision in which the Supreme Court held as follows:

> *"1. that the court had jurisdiction to join a party to proceedings for the sole purpose of ordering that party to pay costs.*
>
> *2. That, where an insurer exercised its right of subrogation to take over the defence of legal proceedings, the interests of justice did not favour excessive delay on the part of an insurer who eventually elected to repudiate liability under a policy of insurance unless reasonable and diligent inquiries would have failed to reveal the material upon which reliance was ultimately placed to avoid the policy.*
>
> *3. That, if a non-party's delay in repudiating liability under the insurance policy had a direct part to play in the bona fide running up of costs by a party pursuing a remedy which, on the known facts, that party was entitled to pursue, costs incurred in such circumstances should be viewed as a collateral though integral part of the "questions involved in the cause or matter" for the purposes of O. 7, r. 3 of the Rules of the Superior Courts."*

29. Counsel submits that the courts have generally dealt with this issue by way of requiring the insurer to give an undertaking to

discharge the costs which they must bear and cites the following passage of Laffoy J. in McTiernan & Anor v. Quin-Con Developments (Waterford) Ltd. & Ors [2007] IEHC 142:

> *"If the insurer is prepared to give an undertaking to the court to discharge those costs which I have held the insurer must bear, the matter can be dealt with on that basis. Otherwise, the insurer will have to be joined as a party for the purposes of ensuring recovery of those costs".*

30. Counsel says that where an insurer has withdrawn instructions from a solicitor previously insured by it, the court should allow the solicitor to come off record because otherwise, it would represent forced liaison and be of no advantage to the party. This is dealt with more recently by Birmingham J. in *Moloney v. Malhas & Ors; Shortt v. Malhas & Ors*. [2014] IEHC 296. This was a case in which both plaintiffs were dissatisfied with the results of cosmetic surgery that had been performed at two different medical facilities by the same plastic surgeon, Mr. Malhas who, at the time of the proceedings was deceased. Mr. Malhas was a member of the Medical Defence Union (MDU) who had agreed to offer him assistance in dealing with the plaintiff's claims and had instructed solicitors on his behalf. Before his death, Mr. Malhas, had been declared bankrupt and the bankruptcy administrator established that his survivors disclaimed any inheritance. Therefore, there was no estate from which the defendant solicitors could take instructions. As a result, the MDU did not provide any further assistance. In both cases the defendant solicitors applied to come off record at the request of the Medical Defence Union (MDU). In contrast to the Shortt case, the first named defendant in the Maloney case had gone into liquidation and there had been no insurance cover in place when the plaintiff underwent surgery. In that case, Birmingham J. noted as follows at paragraph 16:

> *"No case has been cited to me where leave to come off record has been refused. Even if I was prepared to break with all precedent and refuse leave to come off record, that would be a pointless exercise which would not assist the plaintiffs, or indeed, Cosmedico in any way. The real question, therefore, is whether any conditions should be imposed as a condition of that being allowed happen. In that regard it must be said that the real issue in almost all of the reported cases in the area has been determining what, if any, conditions should be imposed."*

Birmingham J. noted that in *Corroon (A Minor) v. Pillay's General Hospital Limited* (Unreported, High Court, Lavan J., 31st July, 2008) Lavan J. took as the starting position that the general rule was that the parties opposing an application to come off record should be entitled to the costs of the motion. Birmingham J. went on to note that three broad streams could be identified from the case law in this regard. The first, occurred in cases such as Corroon, in which there was no order as to costs and each side was left to bear its own. The second scenario, at the other end of the spectrum, is exemplified by cases such as *Byrne v. John S. O'Connor & Co.* [2006] 3 IR 379 and *McTiernan and Anor. v. Quin-Con Developments (Waterford) Limited & Ors* [2007] IEHC where motions to come off record were granted on condition that the insurance companies pay costs incurred by the plaintiffs to date. In *McTiernan* Laffoy J. concluded that there had been excessive delay on the part of the insurance company in unequivocally extricating itself. Thus, while she acceded to the applicant solicitors' request to come off record, she did so on condition that the insurer bear liability for the costs of processing the claim against the first defendant between March, 2004 – when the plaintiffs should have been told of the decision to repudiate - and July, 2006, when the motion was in fact served, except costs in relation to steps taken by the plaintiffs against the first defendant in which the insurer and the applicants were not involved. In *Byrne* the application to come off record was brought on the same day as the hearing of the main action a situation which O'Donovan J. in the High Court found very unsatisfactory. The Supreme Court also noted in that case: "*that the existence of undisclosed arbitration proceedings relating to liability under the policy of insurance went to the exercise of the court's discretion in making the order*".

31. The third stream is exemplified by the case of O'Fearail v. McManus [1994] 2 ILRM 81 in which O'Flaherty J. held as follows at p. 83:

> *"I would do so however on condition that the costs, both in the High Court and of this hearing will be paid, not by Mr. O'Brien [the solicitor seeking to come off record], but by the insurance company concerned and I would look for Mr. Comyn's undertaking in this regard that the insurance company will discharge the costs of all parties".*

Birmingham J., in his decision *Moloney*, considered that the majority of cases fell into the third stream.

32. The applicant submits that there are no special features of this case that would take the case out of the established norm which requires payment of the costs of the motion only. Counsel notes that the application was not made late in the day nor was there any attempt to conceal any issues in relation to the indemnity, as was the case in *Byrne* in which an arbitration process occurred between the insurer and the insured. Further, counsel submits that there is no delay between the time of cover being withdrawn and the application being made, as was the case in *McTiernan*. The plaintiff was told about the risk in relation to cover from the outset and it was never told otherwise.

33. While the applicant acknowledges that the issue of indemnity was addressed at the outset of the case and that an investigation into the matter was launched, as stated in the affidavit of Mr. Butler, the decision to refuse indemnity was made as a result of certain information which only recently came to light. The applicant also notes that the issue in relation to indemnity was explained in the second affidavit of Mr. Butler as best as could be done given the issue of solicitor-client confidentiality. However, the applicant submits that the Court cannot take the view that this information should have come to light during the earlier investigation process based on the information which is before it since no detailed explanation has been offered as to the circumstances in which this information did come to light.

34. The applicant in this regard draws attention to the following statement of Birmingham J. at paragraph 30 of his decision in *Moloney v. Malhas & Ors; Shortt v. Malhas & Ors*:

> *"I realise, of course, that, as Kearns J. (as he then was) pointed out in Byrne v. John S. O'Connor & Co. [2006] 3 IR 379, a plaintiff will always be on the hazard that an insurer, even after exercising its right of subrogation, may become aware of matters which would entitle it to void its policy, and thus terminate its involvement in the dispute or litigation between the original parties".*

35. The applicant further notes that Birmingham J. did not see any factors present in relation to the case of Ms. Shortt which would justify going beyond the established norm. Birmingham J. further noted that even if the plaintiff had been aware of the issues in relation to Mr. Malhas, the practitioner against whom the plaintiff was taking the action, she would quite likely have continued proceedings against Cosmedico, the hospital. However, Birmingham J. considered that the case of Ms. Moloney was somewhat different on the basis that the defendant clinic was in liquidation and was never covered by insurance. Therefore, had that plaintiff been aware that there was no prospect of recovering from Mr. Malhas she might have hesitated before issuing proceedings. On that basis he allowed Ms. Moloney to recover the entirety of her outlay as a condition of granting the application to come off record.

36. The applicant contends that a parallel can be drawn with the present case since the plaintiffs in this case are continuing to proceed against the other defendants and thus, objectively, the case would have proceeded anyway even if the plaintiffs had known from the outset that Mr. Kearns was not indemnified.

37. The applicant also points to the fact that cover is declined because of notification to a previous insurer such that cover may exist for Mr. Kearns in respect of the claims.

Submissions of the Respondent

38. Counsel on behalf of the plaintiffs, Mr. Connolly, submits, in relation to the pathfinder order, that consent was ultimately given and an application was inevitable in order for such an approach to be facilitated. The plaintiff submits that this case arises as a result of a situation in which eighty nine parties were placed in a position of considerable financial exposure due to the manner in which Mr. Kearns exercised a power of attorney on their behalf. This allegedly involved Mr. Kearns signing documents on the plaintiffs' behalf without the parties in question having met Mr. Kearns, contrary to a fundamental requirement of the notary process. Therefore, the plaintiffs in those cases are seeking declarations that such power of attorney is invalid so that various actions which have been taken by Mr. Kearns' co-defendants on foot of that power, including the opening of bank accounts and the purchase of properties in the plaintiff's names, can be nullified. The plaintiffs also pursued proceedings against the other defendants because of the concern that if they did not, the extent of their alleged wrongdoing might be considered contributory negligence on the part of the plaintiffs, as provided under s. 35 of the Civil Liability Act 1961. Thus, while the plaintiffs acknowledge that these are proceedings that may have proceeded in any event, they consider that the circumstances of the present case distinguish it from the case of Ms. Moloney in *Moloney v. Malhas & Ors*. In this regard the plaintiffs note that they were informed, by letter of 22nd March, 2012, that Liberty Insurance took the position that an excess of €20,000 would apply in respect of each claim and that all actions would be defended. On that basis, the plaintiffs prepared their case and engaged expert witnesses such that they were in a position to proceed as of 23rd February, 2015. Having notified the applicant of this, they were informed by a letter of 4th March, 2015 that indemnity was now being declined. The plaintiffs note that in the case of *Moloney*, there was no indication that the application to come off record was made when the parties were locked into a situation of imminent trial. In that regard, they point to paragraph 5 of the decision of Birmingham J., which indicates that a notice to proceed had to be issued in that case.

39. Thus the plaintiffs submit that in the present application there are two fundamental issues firstly, the timing of the indication given by the solicitors that they were no longer instructed by the insurance company and secondly, whether there is information before the Court to suggest that a thorough investigation was carried out such that the insurance company was in a position to give a strong indication by means of the letter of 22nd March, 2012 that it intended to participate in the defence of the action. While the plaintiffs accept that the applicants are entitled to come off record they contend that there is an onus on the insurance company to carry out an investigation and satisfy the Court of that being done, and if not, significant conditions must be imposed if the applicant solicitor is to come off record.

40. The plaintiffs argue that, despite the second affidavit of Mr. Butler, the insurer has not satisfied the above burden because there is no explanation as to what happened as far back as 2011 when there was correspondence concerning the indemnity issue nor indeed as to what happened between the letter of 22nd March, 2012 and that of 4th March, 2015.

41. The plaintiffs submit that the onus lies on an insurer to show that there has not been any want of due diligence on their part and relies on *Berney v. South Dublin County Council & Ors* [2014] IEHC 319. In that case, while the case was in the personal injury list awaiting hearing, an application was made to come off record in circumstances where it was discovered that inaccurate information had been given by the second named defendant to the insurance investigator. In that case Hedigan J. referred to the judgment of Kearns J. in *Byrne v. John S. O'Connor & Co.* [2006] 3 IR 379 in which he stated as follows:

> "*"Where an insurer exercises its right of subrogation to take over the defence of legal proceedings, as occurred in this case, it effectively stands in the shoes of the party concerned, usually a defendant or third party. It makes all the decisions about the conduct of the case, including ultimate decisions as to whether litigation be fully fought out or compromised. A plaintiff will always be on hazard that an insurer, even after exercising its right of subrogation, may become aware of matters which would entitle it to avoid the policy and thus terminate its involvement in the dispute or litigation between the original parties. However, the interests of justice do not favour excessive delay on the part of an insurer who eventually elects to repudiate, unless reasonable and diligent enquiries would have failed to reveal the material upon which reliance is ultimately placed to avoid the policy. There is no suggestion that any such difficulty would have attended diligent enquiry in this case. Further, an insurer must be taken as being well aware that the plaintiff will incur legal costs as litigation proceeds towards the trial and in this case the application to come off record was only heard on the day when the main action itself was listed for hearing. The delay on all counts by the appellants in this case has not been justified, explained or excused before this Court ... In all of this the decisions of the insurers as to strategy and tactics have had a direct impact on the interests of the plaintiff who ran up costs as he continued to proceed in the bona fide belief that the defendant firm had valid insurance. Those costs can only be seen as a collateral though integral part of the 'questions involved in the cause or matter'. Without an order of the kind made by O'Donovan J., a considerable injustice would have resulted for the plaintiff, who not only was deprived of a mark in damages for his claim in negligence but was in addition left with a bill for legal costs incurred in pursuing a remedy which, on the known facts, he was clearly entitled to pursue."*

42. The plaintiffs submit that in the present case, there is no information at all before the Court to indicate what investigations were carried out in respect of factors which might have required the insurance company to think twice about indemnity or to remove it. The plaintiffs submits that the Court can find that the insurer here had constructive knowledge of a problem which would have been identified if they had asked the correct questions much earlier than the date of the application for a trial date. While the plaintiffs acknowledge that privilege might arise on the part of the applicants, they submit that this does not prevent the insurer from, at the very least, stating that it did everything that a reasonable insurance company would have done. Thus, the plaintiffs seek their full costs up to 4th or 5th of March, 2015, and it is their position that an undertaking for those costs should be given.

43. The applicant submits however that *Berney* does not establish there is an onus on an insurer to establish it carried out as thoroughgoing an investigation as possible. It submits that Hedigan J. simply states in that case that "*the central question facing the Court is whether the insurer conducted as thoroughgoing an investigation as possible before instructing solicitors*" (emphasis added), and says nothing as to where the onus in that regard lies.

44. The applicant contends that in determining where the onus in fact lies regard must be had to the statement of Birmingham J. in *Moloney* at paragraph 25: "*I do not see any factors present in the Shortt case that would justify going beyond what I regard as the established norm*". That established norm is that nothing more than the costs of the motion ought to be incurred by the insurer in the absence of exceptional circumstances. The applicant submits that it must therefore follow as a matter of logic that the onus is on the

party seeking to overcome the established norm. In this regard the applicant submits that on the evidence before it, the Court cannot say there was a failure to carry out as thoroughgoing an investigation as possible.

Decision of the Court
45. As a matter of law it appears clear that the Court cannot compel a solicitor to continue to act for a party. However it is also clear that conditions may be attached to an Order permitting a solicitor to come off record. Whether conditions should be attached depends on the facts of the particular case.

46. In this case the issue of indemnity was live from the outset. On 2nd June, 2011 LK Shields wrote to the plaintiffs' solicitor to inform him:

> *"Please note that as questions arise as to the provision of indemnity to Martin Kearns by his professional indemnifiers in respect of every Summons issued by your firm, we do not intend to enter Appearances to these summonses until such time as Martin Kearns entitlement (or otherwise) to indemnity has been determined".*

47. It is clear from the terms of that letter that more than one question arose relating to the issue of indemnity, for consideration by the insurer at that time. Thereafter the series of correspondence set out above, passed between the plaintiff's solicitor and the solicitor for the first defendant relating to the issue of indemnity. More than nine months later, having apparently completed its investigation and further having taken Senior Counsel's opinion on the liability of the insurer to indemnify the first defendant, the plaintiffs' solicitor received a further letter from Ms. Bradley of LK Shields dated 22nd March 2011 which stated as follows:

> *"We refer to our previous correspondence on the issue of indemnity resting with our letter to your firm dated 19 October 2011.*
>
> *Kindly note that pursuant to the terms of the relevant Policy of Insurance, and on the advice of Senior Counsel, Martin Kearns' professional indemnifiers (Liberty Insurance Limited) takes the position that there is a separate excess of €20,000 payable by Martin Kearns in respect of each of the 89 claims.*
>
> *We are informing you of this in case it may be relevant to your decision making process in the proceedings.*
>
> *For the avoidance of doubt, our client denies liability. He will be defending all the actions and seeking costs orders, as appropriate."*

The clear import of that letter is that having conducted its investigation on the questions relating to indemnity which had arisen and having taken the advice of Senior Counsel thereon, the insurer had decided to indemnify the first defendant. Furthermore the plaintiff's solicitor was specifically advised of an excess of €20,000 payable by the first defendant in respect of each claim, in case that might affect the plaintiff's approach to the proceedings.

48. The Court has no evidence from the applicant as to the nature or extent of the indemnity issues which arose in 2011. Those issues have not been indicated even in broad outline to the Court. What the Court does know is that the insurer conducted an investigation into issues of indemnity over a period of months between October 2011 and March 2012, and thereafter decided to indemnify the first defendant.

49. The letter of 22nd March, 2012 is a clear statement that the insurance company are on cover but that there is an excess of €20,000 in respect of each claim. Furthermore, the letter indicates the insurers' intention to fully defend the proceedings thereby putting the plaintiffs on notice that they will be required to prove their claim and all elements of it. The plaintiffs prepared to do so and incurred significant costs in the process.

50. Three years later, as the plaintiffs sought a date for trial, the insurers declined cover. They have been somewhat coy about their reasons for doing so, claiming solicitor-client privilege. What the Court has been told is that it recently came to their attention that the insured had made a prior notification *"to a previous insurer of Claims and Circumstances relevant to the within proceedings".*

51. The Court has not been told how this new information came to light nor why it was not 'discovered' in the previous investigation in relation to indemnity. Solicitor-client privilege does not seem to the Court to be sufficient explanation for this lacuna. As was held by the Supreme Court in *Byrne v O'Connor* [2006] 3 IR 379:

> *"Where an insurer exercised its right of subrogation to take over the defence of legal proceedings, the interests of justice did not favour excessive delay on the part of an insurer who eventually elected to repudiate liability under a policy of insurance* ***unless reasonable and diligent inquiries would have failed to reveal the material upon which reliance was ultimately placed to avoid the policy****". (Emphasis added).*

It appears to the Court to be inconceivable that reasonable and diligent inquiries in 2010 and 2011 in the context of an investigation into a number of (undisclosed) questions relating to indemnity, would have failed to reveal the material upon which the insurer now seeks to rely to avoid the policy namely, the existence of prior notification to a previous insurer of claims and circumstances relevant to the present proceedings. In the circumstances, to paraphrase and adapt the finding of Laffoy J. in *McTiernan v Quin-con Developments*, it is reasonable to infer that the decision to repudiate should have been made much earlier than 4th March, 2015 at which time the plaintiffs were seeking a date for trial and by which time substantial costs had been incurred by them.

52. In respect of the costs incurred by the plaintiffs subsequent to March 2012 when, had diligent inquiries been made, the contract of insurance might have been repudiated, the applicant suggests that these are costs which would have been incurred in any event as regardless of the issue of indemnity, the evidence is that the plaintiffs would have pursued the first named defendant for judgment. While this is true and is accepted by the plaintiffs, it is not self-evident to the Court that the costs which have in fact been incurred would have necessarily been incurred. There is no evidence before the Court that in the absence of indemnity the first defendant would have vigourously defended the plaintiffs' claims in the manner done by the insurer pursuant to its right of subrogation. Such evidence as is before the Court in fact suggests the contrary. Having been notified on 4th March, 2015 that his insurers were repudiating the contract of insurance, and were proposing to withdraw its instructions from the applicant, the first defendant was requested to file a notice of change of solicitor. That request was repeated in a further letter of 5th March, 2015. No notice of change of solicitor was filed. This motion to come off record was served on the first defendant on 12th March, 2015 and still no notice of change of solicitor has been filed. The first defendant chose not to appear on the hearing of this application. In fact his only substantive response to the information that his insurers were proposing to refuse indemnity was to assert that the matter would probably have to go to arbitration. He has not indicated any intention, either by word or action, of defending these proceedings. In

the circumstances it appears to the Court that the third limb of the findings of the Supreme Court in *Byrne v O'Connor* comes into play, namely;

> *"That, if a non-party's delay in repudiating liability under the insurance policy had a direct part to play in the bona fide running up of costs by a party pursuing a remedy which, on the known facts, that party was entitled to pursue, costs incurred in such circumstances should be viewed as a collateral though integral part of the "questions involved in the cause or matter" for the purposes of O. 7, r. 3 of the Rules of the Superior Courts".*

53. On the facts of this case, the Court is satisfied that the insurer's delay in repudiating liability to indemnify, coupled with its insistence that the plaintiffs prove each and every element of their claims, meets the criteria set out above. The Court accordingly rules that the insurer is liable to discharge the plaintiffs costs from the date when it might reasonably have repudiated its contract of insurance with the first defendant, being in the Court's view a date prior to 22nd March, 2012. Given that the issue of indemnity was under active consideration from at least June 2011 and probably earlier, the Court will fix 1st January, 2012 as the date by which it would have been reasonable to have expected any proposed repudiation to have occurred. It follows that the insurer is liable for the plaintiffs' costs from that date.

54. Unless the insurer is willing to give an undertaking to the Court to discharge those costs which I have held the insurer must bear, I will take such steps as are necessary to have the insurer joined as a party to the proceedings for the purpose of giving effect to the Court's order.