THE COURT OF APPEAL

APPROVED

Record Number: 2023 184
High Court Record Number: 2019/357P
Neutral Citation Number [2024] IECA 33

Noonan J.

Power J.

Allen J.

BETWEEN/

DAVID HIGGINS

PLAINTIFF/APPELLANT

-AND-

MOTOR INSURERS BUREAU OF IRELAND
AND PATRICK MCDONAGH

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered *ex tempore* on the 25th day of January, 2024

1. This appeal concerns the refusal of the High Court to set aside a notice of discontinuance served by the appellant (the plaintiff). The claim arises out of a road traffic accident that happened on the 24th January, 2009 at around 3pm at or near Siobhan McKenna Road in Galway. The plaintiff was driving his motorcycle when it was involved in a collision with a motor car which the plaintiff alleges emerged from a junction into his path causing

him to strike the car. As a result, the plaintiff was thrown to the ground and suffered personal injuries. The motor car did not remain at the scene of the accident. In a statement made to the investigating garda a week after the accident the plaintiff described the car as a bright red car.

2. Before detailing the relevant chronology, it is appropriate to refer to the agreement of the 29th January, 2009 between the Minister for Transport and the Motor Insurers Bureau of Ireland, the first defendant herein. That agreement in broad terms provides for the satisfaction of uninsured claims in road traffic cases in two specific circumstances. The first is where the relevant vehicle is uninsured and the second where it or the driver is unidentified or untraced. Paragraph 2 of the Agreement under the heading *"Enforcement of Agreement"* provides in relevant part as follows:

> *"A person claiming compensation by virtue of this agreement (hereinafter referred to as 'the claimant') must seek to enforce the provisions of this agreement by: -*
>
> > *... 2.3 citing MIBI as co-defendants in any proceedings against the owner and/or user of the vehicle giving rise to the claim except where the owner and user of the vehicle remain unidentified or untraced...*
> >
> > *2.4 citing MIBI as sole defendant where the claimant is seeking a court order for the performance of the Agreement by MIBI..."*

3. Accordingly, where the claim involves an identified but uninsured vehicle, the claimant may sue the MIBI as co-defendant with the owner and/or user of the vehicle. Where however the latter is unidentified or untraced, the appropriate procedure is to name the MIBI as sole defendant. Accordingly, it is not normally permissible to bring proceedings against

the MIBI in respect of an unidentified or untraced vehicle in which another party is joined who is alleged to be the owner and/or user of the vehicle.

4. A very limited exception to that general requirement occurred in *O'Flynn v Buckley* [2009] 3 I.R. 311. This was a fatal injuries claim where the deceased was lying on the road when he was struck by the first uninsured defendant and then by the second insured defendant. The first defendant claimed that the deceased had been first struck by an unidentified and untraced motorist. The MIBI was sued both in respect of the uninsured driver and the unidentified/untraced driver. It sought to have the proceedings dismissed on the basis that it should have been sued as sole defendant in respect of the unidentified/untraced driver. However, it delayed for four years in making the application, which was dismissed by the Supreme Court on that account and also because the court considered that a disjoinder of the issues would adequately meet MIBI's concerns. While on the unusual facts of that case, the MIBI failed to have the claim against it dismissed in relation to the unidentified/untraced driver, it nonetheless remains the position that it should be sued as sole defendant in such circumstances.

5. The relevant chronology appears to be as follows:

- 24th January 2017 - The date of the accident.
- 1st February 2017 - The plaintiff made a statement to the gardaí concerning the circumstances of the accident in which he described the other vehicle involved as a *"bright red car"*. In a separate statement, the investigating garda said that the plaintiff described the vehicle to him at the scene of the accident as being red in colour and *"possibly a Volkswagen Passat."*
- 20th April 2017 - The gardaí wrote to the plaintiff's solicitors indicating that no third party had been identified in relation to the accident.

- 20th July 2017 - It would appear that the MIBI had by this stage appointed liability adjusters, Sproule Graham Partnership, to investigate the accident on its behalf. Mr. Tom Graham of that firm had evidently already been in communication with the plaintiff's solicitor, Ms. Anne Barrett who emailed Mr. Graham at 10.13 saying:

  > *"Tom*
  >
  > *I spoke with [the plaintiff] this morning. He has been investigating in the local area by way of his own enquiries and has obtained a reg number for the offending vehicle of 08 D 39071 which is apparently owned by a Patrick McDonagh. He has informed the gardaí of this information."*

  Mr. Graham replied at 10.32:

  > *"Great stuff. Would like to proceed tomorrow in any event as likely to be 'untraced' assuming McDonagh makes no admissions and/or gardaí unable to charge …"*

- 21st July 2017 - It would appear that as arranged, Mr. Graham met with the plaintiff at the scene of the accident and took a statement from him.
- 24th July 2017 - Mr. Graham emailed Ms. Barrett enclosing a draft of the plaintiff's statement saying:

  > *"… There appears to be no doubt here about what happened but unfortunately, it also appears to be the case that gardaí will not be in a position to prove the identity of the offending motorist. I will however make enquiries with Garda Brendan Owens but it seems*

highly unlikely the suspect (Pat McDonagh) will have made any admissions…"

Shortly thereafter, the plaintiff signed an amended statement evidently prepared by Mr. Graham in which the plaintiff says:

"… I had asked my nephew, who lives near the locus, to keep his eyes and ears open. After about a week or so, my nephew had a name Patrick McDonagh and partial registration number 08 D. A week or so later again he had come up with a make and model for the car and a complete registration number 08 D 39071…

However, it is my understanding that gardaí feel they do not have enough evidence to bring any charges against the suspect …"

- 17th August 2017 - AXA Insurance, the putative insurers of Mr. McDonagh, emailed Ms. Barrett saying:

  "… The vehicle that Mr. McDonagh was driving when this incident occurred was not on cover with AXA at the time and Mr. McDonagh does not have driving other cars on his policy. The vehicle 08 D 39071 was not put on cover until 08/02/2017."

- 15th November 2018 - The Personal Injuries Assessment Board issued an authorisation against MIBI and Mr. McDonagh.

- 16th January 2019 - The Personal Injuries Summons was issued against both MIBI and Mr. McDonagh. In relation to the MIBI, the summons pleads at paragraph 2:

  "The first named defendant is sued pursuant to the provisions of the agreement made between it and the Minister for Transport on the 29th

January 2009, whereby the plaintiff is entitled to claim compensation against this defendant or seek a court order for the performance of the agreement in respect of the negligent driving of the second named defendant, his servants or agents, who at all material times hereto was an uninsured driver of motor vehicle 08 D 39071."

This makes clear that the claim is brought against the MIBI pursuant to clause 2.3 of the Agreement on the basis that the MIBI is responsible for the allegedly uninsured driving of Mr. McDonagh.

- 28th February 2019 - FBD Insurance, nominated to handle the claim on behalf of MIBI, wrote to the plaintiff's solicitors stating:

  "Please note that AXA have confirmed that they are indemnifying the MIBI in respect of this matter. Gary Harford is dealing with this in AXA …

  We confirm that our file is now closed."

- 1st March 2019 - Despite the previous letter, the plaintiff's solicitors wrote to FBD asking for them to nominate a solicitor to accept service and FBD duly nominated Mr. Brian Connolly of AMOSS Solicitors.

- 1st April 2019 - AXA emailed Ms. Barrett saying:

  "This is one where a previous handler had incorrectly advised we did not insure Mr. Patrick McDonagh at the time of the alleged incident, when in fact we did.

  We have advised the MIBI we are the insurer of Mr. McDonagh but are not indemnifying them as our insured denies being involved in any accident.

Before I nominate can you come back to me as to how you, your client, believes the offending vehicle is that of our insured's car and that the driver of the offending vehicle was Mr. McDonagh? Do you have any evidence supporting such allegations? …"

- 2nd April 2019 - The gardaí issued a report which, under the column for names and addresses of the owners of the vehicles involved, identifies only the plaintiff and his motorcycle.
- 18th June 2019 - AMOSS Solicitors wrote to the plaintiff's solicitors in the following terms:

  "We have been informed by AXA Insurance that they insured the co-defendant, Patrick McDonagh, on the accident date.

  Accordingly, the MIBI should never have been joined in these proceedings, and we would ask that the MIBI be removed from the proceedings. The pleaded case is that the second defendant was uninsured. That was not the case.

  If you do not discontinue the case against the MIBI within the next 14 days, we shall arrange for counsel to draft the necessary motion to remove the MIBI from these proceedings and we will be seeking an order for costs as against your client."

- This letter was immediately replied to on the same date:

  "We refer to the above matter and in particular your recent correspondence.

  In the circumstances the plaintiff will discontinue against the MIBI on the basis that no costs are sought."

- 19th June 2019 - Notice of discontinuance was served on MIBI's solicitors by the plaintiff's solicitors.
- 21st September 2020 - Mr. McDonagh delivered his defence denying any involvement in the accident.
- 29th July 2022 - Counsel for the plaintiff applied to the High Court (Coffey J.) for, as appears from the transcript, an order *"to reinstate the proceedings as against the MIBI"*. Counsel explained that the proceedings had been discontinued against the MIBI but a defence and affidavit of verification had now been received from the second defendant suggesting he had no involvement in the accident. Counsel suggested that the application was urgent on the basis that there was a limitation issue involved. Although not disclosed in either the transcript or the order, the application appears to have been made *ex parte* and not grounded on any affidavit. It is not evident from the transcript that the judge understood that he was being asked to set aside the notice of discontinuance because he asked: -

  > *"… You are simply seeking to have the MIBI joined as an additional defendant to the proceedings?"*

  Counsel responded in the affirmative. The judge also asked whether there was an authorisation to join the MIBI and whether the application was within time, both of which were confirmed by counsel. The order of the court records that it was made on consent which is plainly in error. It records that the court ordered that the MIBI *"be reinstated as a defendant in these proceedings."*

- 25th August 2022 - The plaintiff's solicitors advised the MIBI's solicitors of the making of the order and enclosed a copy of a form of amended personal injuries summons, although no leave to amend the summons had been sought or granted by the court.
- 6th September 2022 - AMOSS Solicitors responded making various complaints, including that the application had been made without notice and pointing to the fact that the proceedings had previously been discontinued by agreement on the basis that no costs would be sought by the MIBI despite having incurred the expense of instructing solicitors, counsel and a medical expert. AMOSS noted the basis upon which the MIBI had originally been sued in respect of an uninsured driver but the claim had now changed:

> *"Your amended personal injuries summons now seeks to make a claim that the MIBI should be compensator of your client 'where the owner or user of a vehicle remains unidentified and/or untraced'. Never mind the fact that your client cannot simply make new allegations as against our client, but cannot now in a set of proceedings in which a claim has been discontinued against them, allege that the driver of the offending vehicle was unidentified when in the same set of proceedings your client has identified and named Patrick McDonagh as being the driver of the offending vehicle. This is an abuse of process."*

The letter goes on to advise that the MIBI would be applying to set aside the order.

The application to set aside

6. By notice of motion issued on 29th September, 2022 the MIBI applied for an order pursuant to O. 52, r. 3 of the RSC setting aside the order of 29th July, 2022. The motion appears to have supposed – not unreasonably – that the order of 29th July, 2022 had been sought and made pursuant to O. 52, r. 3. The motion was grounded upon the affidavit of the MIBI's solicitor Mr. Brian Connolly, which set out the facts as I have outlined them above. This affidavit was replied to by an affidavit of the plaintiff's solicitor, Mr. Thomas O'Flaherty which again sets out the facts as I have described them, which are not in dispute. He exhibits the detailed correspondence already mentioned. The gravamen of Mr. O'Flaherty's response appears to be as follows (at para. 17):

> *"I say it was Mr. Connolly's insistence on the Motor Insurers Bureau of Ireland being removed from the proceedings on the basis of confirmation that he had received from AXA Insurance that led to the notice of discontinuance being served. Mr. Connolly has not addressed this correspondence in his affidavit, nor has he addressed the defence of the second named defendant and particularly that the second named defendant was not present at the scene of the accident. I say that your deponent awaits an acknowledgment on behalf of the Motor Insurers Bureau of Ireland that the second named defendant was not present at the scene of the accident on the date of the accident, as pleaded in the defence of the second named defendant."*

7. Mr. O'Flaherty goes on to say that it would be manifestly unjust if the plaintiff were prevented from pursuing his case against the MIBI where the MIBI Agreement of 2009 provides that it is liable for damage caused by an unidentified and/or untraced vehicle.

Judgment of the High Court

8. The motion came on for hearing before Coffey J. on the 29th June, 2023 when he delivered a short *ex tempore* judgment. He referred to the judgment of the Supreme Court in *Smyth v Tunney* [2009] 3 I.R. 322 which the judge said supported the proposition that a plaintiff who served a notice of discontinuance cannot unilaterally withdraw the notice so as to re-proceed against the party in respect of whom proceedings have been discontinued unless there is an abuse of process, which does not arise here. He accordingly set aside his previous order.

The Appeal

9. The appellant contends that the judge erred in accepting that he did not have jurisdiction to set aside a notice of discontinuance and failed to consider in that respect the judgment of this Court in *Murray v The Minister for Education* [2017] IECA 216 and other relevant authorities. Further it is said that the judge failed to consider that the plaintiff had compelling arguments for setting aside the notice *"in particular the behaviour of the defendants to the proceedings in leading the plaintiff's solicitors to believe that the second named defendant was in fact the only party who should be named on the proceedings."*

Discussion and Decision

10. The chronology to which I have referred above makes a number of things clear. The first is that, virtually from the time of the accident, the plaintiff was aware there were difficulties about identifying the other party involved. Although the plaintiff's nephew appears to have initially made some enquiries which suggested that the second defendant, Mr. McDonagh, was the responsible party, there is nothing from the extensive

correspondence to indicate how he established that. Certainly, the gardaí only identified the plaintiff as one of the parties involved in the accident.

11. From a very early juncture, therefore, it was, or ought to have been, clear to the plaintiff's solicitors that this was likely to be an unidentified/untraced motorist case. Indeed, they were expressly advised of this by the MIBI investigator, Mr. Graham, within months of the accident. The plaintiff himself even signed a statement acknowledging his understanding that the gardaí considered that they did not have enough evidence to bring any charges against Mr. McDonagh.

12. Despite that knowledge, the plaintiff's solicitors elected to institute proceedings against Mr. McDonagh and the MIBI, but solely in its capacity as the party responsible for Mr. McDonagh's uninsured driving. The MIBI was not sued under the separate and distinct basis that it is the body responsible for damage caused by an unidentified or untraced motorist. As alluded to above, this would, in the normal way, have required the institution of separate proceedings against the MIBI naming it as sole defendant. That was not done.

13. Instead, a personal injuries summons was issued on the 16th January, 2019 naming Mr. McDonagh and the MIBI on the basis that Mr. McDonagh was the driver and was uninsured. However, the position in that regard was clarified by Mr. McDonagh's insurers on the 1st April, 2019 when they confirmed that he was in fact insured, but made clear that he was denying any involvement in the accident. This can hardly have come as a surprise to the plaintiff's solicitors in the light of all that had gone before. However, despite that information now being available, nothing was done to bring proceedings against the MIBI on the basis of an unidentified or untraced motorist.

14. When AXA gave this confirmation that Mr. McDonagh was actually insured, it is entirely unsurprising that the MIBI's solicitors should, on the 18th June, 2019 write to the

plaintiff's solicitors inviting them to discontinue the claim. There was absolutely nothing untoward about Mr. Connolly's letter in that respect. Indeed, it seems to me that he was duty bound to write in those terms having regard to AXA's confirmation of the insurance position. The plaintiff's ground of appeal which appears to suggest that there was something inappropriate about this *"behaviour"* is entirely misconceived and it is a distortion of the facts to suggest that the plaintiff's solicitors were somehow improperly misled about this. Nothing of the kind occurred.

15. Moreover, it is of central importance in my view to note that this was not simply a case of the plaintiff serving a notice of discontinuance which, as the RSC provide, would have required the plaintiff to discharge all the costs of the party against whom he was discontinuing. On the contrary, MIBI's solicitors offered a compromise to the plaintiff's solicitors which they accepted, namely that if the proceedings were discontinued against the MIBI, it would not seek its costs. I can see no reason why this was not a valid and binding compromise in itself. I fail to see how any of the authorities relied upon by the plaintiff in relation to the setting aside of a notice of discontinuance are of any application to the settlement of a claim by mutual agreement.

16. The suggestion that MIBI's solicitors had some sort of duty to advise the plaintiff that he should sue MIBI in its capacity as the responsible party for the wrong of an unidentified or untraced motorist is completely untenable. There was no such duty and it was entirely a matter for the plaintiff's solicitors to decide who they were going to sue, and in what capacity. Mr. Connolly was perfectly entitled to assume that the plaintiff was happy to proceed against Mr. McDonagh alone on the basis that he was insured and was in a position to establish that he was the responsible party. Mr. Connolly owed absolutely no duty to the

plaintiff to offer legal advice that he was barking up the wrong tree. Yet that seems to me to be in substance what the plaintiff now contends.

17. There are a number of features about the plaintiff's *ex parte* application to Coffey J. to set aside the notice of discontinuance, if that is in fact what he did or thought he was doing, that warrant comment. The first is that the application should never have been made *ex parte* in circumstances where it was highly prejudicial to the interests of MIBI who were not on notice. Neither the fact that the application was made on the last day of term or the fact – if it was the fact – that the Statute of Limitations for any action against the MIBI would expire in September, 2022 justified the *ex parte* application. The indignation, if I might so describe it, of its solicitors subsequently is easy to understand, particularly where they thought they had settled the case.

18. Secondly, it is far from clear to me from reading the transcript of the 29th July, 2022 that it was clearly explained to Coffey J. that he was being asked to make a highly unusual order for the setting aside of a notice of discontinuance served by the person applying for the order. He appears to have been told little or nothing of the circumstances in which the notice of discontinuance was served and in particular, of the fact that it was served on an agreed basis of the MIBI bearing its own costs. Had Coffey J. understood clearly what was being asked of him, it would be surprising if he did not seek some authority to establish that he had jurisdiction to make the order sought.

19. On the contrary, the judge appears to have thought that it was an application simply to join the MIBI as an additional defendant, an authorisation to do so had been obtained and the plaintiff was in time. Judging from the transcript, all of this took less than a minute. It is particularly notable in that regard that when dealing with the subsequent set aside

application, Coffey J. expressed himself satisfied that had the MIBI been represented at the earlier hearing, which it should have been, he would never have made the order.

20. Thirdly, there has been no, or no satisfactory, explanation offered by the plaintiff for the extraordinary delay in making the application. The suggestion is that the application was prompted by the delivery of Mr. McDonagh's defence explicitly pleading that he was not the party involved in the accident. That defence was delivered on the 21st September, 2020, 22 months before the application was made. The suggestion by the plaintiff's solicitors that it was only on a *"close examination"* of the file that this plea came to his attention is extraordinary, for obvious reasons, and certainly if it is intended to be some kind of excuse for the delay.

21. However, as if that delay in itself was not bad enough, it simply cannot be the position that Mr. McDonagh's defence came as some sort of a surprise which galvanised the plaintiff into action the best part of two years later. On the contrary, the plaintiff's solicitors were told clearly and unequivocally by Mr. McDonagh's insurers on the 1st April, 2019, that Mr. McDonagh *"denies being involved in any accident"*. This was fully three years and four months before the *ex parte* application was moved, and only then apparently because the statute was about to expire. Having regard to that catalogue of delay, it ill becomes the plaintiff in my view to be criticising the *"behaviour"* of the MIBI and its solicitor.

22. While I am prepared to accept for the purposes of this appeal, without so deciding, that the court does have jurisdiction to set aside a notice of discontinuance, that in my view is *nihil ad rem* in the context of this case. This is because, first, as I have explained, this was not a simple case of setting aside a notice of discontinuance but was in fact the setting aside of a compromise agreement. Second, even were that not so, the extraordinary delay of the

plaintiff in making an application to the court should in itself militate against the making of the order.

23. Third, the application should never have been made *ex parte* and there were obvious and serious shortcomings with what the judge was told, and more importantly not told, when the application was made. That, in itself, should disentitle the plaintiff to the relief claimed. Fourth, the application was in any event entirely misconceived in circumstances where the plaintiff was not simply seeking to reinstate the MIBI in the character in which they had been sued originally, *i.e.*, as the responsible party for an identified uninsured driver, Mr. McDonagh, but on an entirely new and distinct basis, namely that the MIBI was responsible because the offending driver was unidentified and untraced. This was certainly not explained to Coffey J. nor did he give any leave to amend the summons, as appears to have been purportedly done to make this claim.

24. Fifth, it is doubtful that the procedure here adopted of suing the MIBI as a co-defendant in an unidentified and untraced motorist case is correct when the Agreement, subject to what I have said already, clearly provides for the MIBI being sued as sole defendant in such cases. As its solicitor points out, it is somewhat extraordinary to allege in the same summons on the one hand that the driver is unidentified and untraced, and on the other sue that driver on the basis that he is both identified and traced. The correct procedure would in such circumstances be to issue separate proceedings against the MIBI as sole defendant but perhaps that presented a limitation problem for the plaintiff.

25. While there may be rare cases like *O'Flynn v Buckley* where joining the MIBI as a co-defendant in an unidentified/untraced motorist case may not prove fatal, the facts of that case were particularly unusual and involved more than one vehicle, one of which was unidentified and untraced, one of which was uninsured and one of which was insured. The Supreme

Court reached a pragmatic solution in that case by making an order providing for the disjoinder of issues while allowing the case to proceed against the MIBI as a co-defendant.

26. It can occur from time to time that, as here, the plaintiff believes that a particular motorist is responsible for his injury but may ultimately have difficulty in establishing that as a matter of proof in court. In such cases, the prudent course would appear to be to institute separate alternative proceedings against the MIBI which would logically follow behind the claim against the putative identified motorist so that if the first claim fails, the plaintiff is not left without a remedy. Perhaps that is what should have occurred, and may yet occur, in this case.

27. However, for perhaps somewhat different reasons than were given by the trial judge, the MIBI was entitled to an order setting aside the High Court's previous order. One of the primary grounds of appeal advanced by the plaintiff here is that Coffey J. wrongly concluded that he had no jurisdiction to set aside a notice of discontinuance. While I think it is somewhat academic, that does not appear to me to be what the judge actually said. He said that a plaintiff cannot withdraw a notice of discontinuance unilaterally unless there is an abuse of process. In other words, he was accepting that there was a jurisdiction to set aside, but one confined to an abuse of process situation. The authorities relied on here by the plaintiff, while they suggest that such a jurisdiction may exist, make clear that it is one that is both exceptional and only to be exercised in compelling circumstances. The occurrence of an abuse of process may well be such a circumstance but here, there has in any event been no circumstance demonstrated which warrants the exercise of that jurisdiction, in my view.

28. For these reasons therefore, I would dismiss this appeal.

Power J.: I have considered carefully the judgment delivered by Mr. Justice Noonan presiding and I agree with his conclusion and the reasons he provides therefor.

Allen J.: I have also listened carefully to the judgment of Mr. Justice Noonan and I agree with his analysis and conclusions and with the order proposed.