THE HIGH COURT

[2015 No. 10555 P]

BETWEEN

YE SHI

PLAINTIFF

AND

ERNST & YOUNG LIMITED

AND

RMC LEISURE LIMITED TRADING AS EVENT WORKS

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 31st day of October, 2017

1. This matter comes on for hearing before this Court by way of motion brought by O'Brien, Lynam, solicitors on record for the second named defendant, to come off record in the within proceedings.

2. The application is grounded on the affidavit of Mary Byrne, solicitor, and she avers that the proceedings relate to an incident which is alleged to have occurred on 11th April, 2014, when the plaintiff was working in the course of his employment with the first named defendant. The plaintiff alleges that he was required to attend a sporting event at Belvedere Rugby Club, Ballsbridge, Dublin 4. The sporting event was being organised by the second named defendant. The plaintiff claims that he was required to run backwards on an uneven surface as a result of which he was caused to trip and fall and sustain personal injuries, loss and damage.

3. Ms Byrne avers that acting on the instructions of the second named defendant's insurer, an appearance was entered on behalf of the second named defendant by O'Brien Lynam Solicitors on 18th February, 2016.

4. The basis for the application to come off record is that the second named defendant has failed to discharge an excess of €2,500 in respect of the claim made against the policy of insurance, as required by the policy of insurance.

5. The defendants' insurer is "Syndicate 1991 at Lloyd's". With regard to the policy of insurance entered into by the second named defendant with its insurer, Ms. Byrne avers as follows:

> "7. It will be seen that it is an express term and condition of the policy of insurance and, indeed, a condition precedent to the insurer providing an indemnity to the Second named Defendant under the policy of insurance that the Second named Defendant as the insured is liable for and discharges an excess of €2,500 in respect of each and every claim …
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> 8. It is also clear the terms and conditions of the policy of insurance that the payment of the excess by the Second named Defendant when demanded is a condition precedent to the insurer providing an indemnity to the Second named Defendant under the policy of insurance."

6. Ms Byrne exhibits a letter dated 1st February, 2017 calling on the second named defendant to discharge the €2,500 excess, as provided for in the policy. The letter advised, *inter alia*, as follows:

> "We note that pursuant to your contract of insurance with our client that the payment of the self-insured retention of €2,500 is in fact a condition precedent to indemnity."

The letter advised that in the event that the sum was not received within fourteen days of the letter, the solicitor's instructions were to immediately proceed for an order seeking liberty to come off record.

7. By reason of the failure of the second named defendant to pay the excess, the insurers instructed the solicitors for the second named defendant to issue the within motion.

8. The Court was advised that the first named defendant was adopting a neutral position vis-à-vis the motion to come off record.

The parties' submissions

9. In aid of the application to come off record, counsel for the second defendant's solicitors relies, in the first instance, on "Section 12-Public Liability" in the policy document which provides for an excess of €2,500 in respect of each and every claim. Reliance is placed on the "Conditions (Applicable to Sections 11, 12 &13)" which, *inter alia*, apply to "Section 12-Public Liability". The conditions read as follows:

"1. Insureds Excess

> The Insureds Excess shall be subject to the following Conditions and provisions:
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> (a) The Insurer or its representatives may at any time and at their sole discretion require immediate payment of the Insured's Excess in whole or in part directly to the Insurer or at the Insurer's direction to its appointed representative and in any event the Insured's Excess shall become payable
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> (i) at the settlement and or closure of a claim or
>
> (ii) at the point in time where costs Defence Costs legal fees claims handling costs and loss adjusting expenses incurred exceed or equal the Insured's Excess.
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> (b) The terms of this Policy including the Insurer's rights in the defence of a claim and the Insureds duties in the event of a claim apply irrespective of the application of the Insured's Excess.

(c) The Insurer may at its option including where it is statutorily obliged to do so pay part or all of the Insured's Excess to effect a settlement of any potential claim or suit and upon notification of the action taken the Insured shall promptly reimburse the Insurer for such payment."

10. Counsel places particular reliance on clause on 1(a) above, arguing that clause 1(a) is disjunctive and that, accordingly, it is open to the insurer at its sole discretion to require immediate payment of the insured's excess.

11. Counsel also points to clause 5 of the "General Conditions (Applicable to all Sections)" in the policy which provides:

> "Compliance with Conditions
>
> It is a requirement of this Policy that liability of the Insurers is conditional upon observance the terms of this Policy relating to anything to be done or complied with by the Insured. This shall include any requirements described in this Policy or any clause attaching to and forming part of this Policy as condition precedents to any liability of the Insurers."

12. It is submitted that clause 5 provides for the entitlement of the insurer to repudiate liability if the requirements provided for in the policy are not met. It is further submitted that the onus of proof, which is on the insurer, has been met in this case, given that the second named defendant has been called upon to pay the excess and has not done so.

13. It is submitted that given that the second named defendant was called upon in February, 2017, to pay the excess and failed to do so, that failure constituted a breach of conditions and that, accordingly, given that the liability of the insurers is "conditional upon observance of the terms" of the policy, the failure of the second named defendant to pay the excess entitle the insurers to instruct the second named defendant's solicitors to come off record. Furthermore, it is for the second named defendant (and not the plaintiff) to come to court and dispute the insurer's entitlement to repudiate liability. However, the second named defendant is not disputing the interpretation the insurer has put on the policy of insurance. Nor has the second named defendant disputed the insurer's entitlement to bring the within application.

14. In written submissions, subsequently furnished to the Court, counsel contends that in applications such as the present, the discretion vested in the Court should be exercised in accordance with the principles set by the Supreme Court out in *O'Fearail v. McManus* [1994] 2 I.L.R.M. 81, which are referred to below.

15. The plaintiff opposes the motion to come off record.

16. In the replying affidavit sworn by the plaintiff's solicitor, Padraic Ferry of Inns Chambers, issue to taken with the reliance placed by the insurers on the "Conditions (Applicable to Sections 11, 12 and 13)".

17. Counsel for the plaintiff submits that serious prejudice may accrue to the plaintiff if the order sought by the insurers is made. This is in circumstances where the first named defendant had filed a full defence denying liability and has served a Notice of Indemnity against the second named defendant.

18. In his replying affidavit, the plaintiff's solicitor avers that given that the second named defendant is an events manager which arranged an event for employees of the first named defendant, it may be that there is some documentation pursuant to which the first named defendant is afforded an indemnity by the second named defendant and if that were to be the case, the first named defendant may have a benefit to be claimed under the insurance policy. It is contended that if that were the case, then there is a potential for the first named defendant, if it so opted, to discharge the sum of €2,500 excess as a party with an identifiable interest pursuant to the policy of insurance. In the course of his submissions to the Court, counsel for the plaintiff acknowledged that there is insufficient information in this regard for the plaintiff to canvass any definitive argument on this issue.

19. Counsel for the plaintiff submits to the Court that it is well established, in applications such as the present, that the onus is on the moving party to prove entitlement to repudiate the liability. In this regard, counsel cites *Dunne v. P.J. White Construction Co. Limited* [1989] I.L.R.M. 803 and *Hu v. Duleek Formwork Limited (In liquidation)* [2013] IEHC 50.

20. It is submitted that the second named defendant's insurer has failed to discharge the onus of proving that the second named defendant has breached a condition of the policy of insurance, such that the insurer is allowed to repudiate liability for the plaintiff's claim. It is submitted that this distinguishes the plaintiff's case from the case of *Hu v. Duleek Formwork Limited* where it was agreed by both parties that there was a breach of a condition precedent.

21. Counsel for the plaintiff submits that clause 1 of the "Conditions (Applicable to Sections 11, 12 and 13)" does not express the "Insureds Excess" to be a "condition precedent" for the insurer providing an indemnity to the second named defendant under the policy. It is submitted that the entire claim of the insurer to be entitled to withdraw cover is premised on payment of the excess by the second defendant being a condition precedent to the liability of the insurer to the second defendant. However, the plaintiff's argument is that the requirement to pay the excess provided for in the policy is not expressed as a "condition precedent". This is in contrast to the position set out at clauses 2 and 4 of the "Conditions (Applicable to Sections11, 12 &13)" which provide, respectively:

> "It is a condition precedent to the liability of the Insurers that the Insured shall have a safety statement …"
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> …
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> "It is a condition precedent to the liability of the Insurers that the Insured shall ensure that any firm, company, club or organisation hiring the premises have a public liability insurance policy …"

23. Furthermore Counsel contends that clause 1(c) of the conditions provides that the insurer may opt to pay for all of the insured's excess to effect a settlement of any potential claim and that once notified the insured shall promptly reimburse the insurer for such payment.

24. The plaintiff also takes issue with the reliance placed by the insurer on clause 5 of the "General Conditions (Applicable to all Sections)". In his written submissions, counsel for the plaintiff submits that clause 5 does not expressly state how liability may be affected by any breach. It is submitted that one interpretation of this provision is that non observance may lead to conditions being attached to liability.

25. Counsel also contends that in construing clause 5 of the "General Conditions (Applicable to all sections)", the Court should have regard to various other general conditions in this section of the policy, where the contemplation of a repudiation of liability is expressly worded. In this regard, counsel points to clause 4, "Claims Notification Requirements", which is expressly described as a "condition precedent". It is also provided in clause 4 that "all benefit under this policy shall be forfeited" in the event of the insured or anyone acting on their behalf seeking to obtain a benefit under the policy by any fraudulent means. Moreover, counsel points to clause 10, wherein it is provided that it is a "a condition precedent to the liability" of the Insurer that keys to vehicles and machinery are securely locked away. Counsel also points to clause 11 "Misrepresentation", wherein it is provided that the insurance provided to the insured "shall be voidable in the event of misrepresentation, mis-description or non disclosure in any material particular".

26. It is contended on the plaintiff's behalf that insofar as there may be some ambiguity in the wording of clause 5 of the "General Conditions (Applicable to all Sections)", the Court is entitled to apply the contra proferentum rule, as set out in the extract from Clarke, Contract Law in Ireland, (8th Ed., Round Hall, 2016 at p.440):

> "Two Irish cases provide clear guidance on the position to be adopted with the interpretation and construction of insurance contracts. In Rohan Construction Limited and *Rohan Group Plc v. Insurance Corp. of Ireland Limited* Keane J. observed:
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> "It is clear that policies of insurance, such as those under consideration in the present case, are to be construed like other written instruments. In the present case, the primary task of the court is to ascertain their meaning by adopting ordinary rules of construction. It is also clear that, if there is any ambiguity in the language used, it is construed more strongly against the party who prepared it, i.e. in most cases against the insurer. It is clear the words used must not be construed with extreme literalism, but with reasonable latitude, keeping always in view principal object of the contract of insurance. (See *MacGillivray and Parkington on Insurance Law*) (7th Ed., pp. 433 *et seq*.)"
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> In *Brady v. Irish National Insurance Co. Ltd*. Finlay C.J. also reaffirmed proposition that where an express warranty is vague it is to be construed against the party relying upon it."

27. In his written submissions, counsel for the plaintiff refers the Court, to *inter alia*, Buckley on Insurance Law, 4th Edition, where the author opines, at para. 5.64;

> "The courts will not construe an insurance condition as a condition precedent unless it is expressed to be a condition precedent, or the policy contains a general condition precedent provision. Where the condition is of general application, such as the requirement to pay the premium before making any claim, the effect of the breach is suspensory. Pending payment of the premium, the insured has a contingent right to claim, which cannot crystallise until the premium is paid."

Considerations

28. From Ms Byrne's affidavit, it is clear that her firm has been instructed by the second named defendant's insurer to apply to come off record for the second named defendant on the basis that the second named defendant has failed, refused or neglected to pay the excess of €2,500, as provided for in the policy of insurance. The second named defendant has not appeared in Court to contest the application to come off record. The plaintiff however contests the application, largely on the basis that the insurer has not met the onus which, it is submitted, rests on them in applications of this nature.

29. As can be seen from the submissions of both sides in the present case, much of the argument has centred on the issue of whether the insurer is entitled to repudiate the policy of insurance. The Court has effectively been invited to determine this issue. However, the Court cannot disregard the principle established in *O'Fearail v. McManus*, where O'Flaherty J. held that irrespective of whether repudiation by a company of an insurance policy was correct or incorrect, to refuse an application to come off record would be to insist on a forced liaison and compel the solicitor applying to come off record to act for the defendant. I note that this principle has subsequently been applied by both the Supreme Court and the High Court. (See *Byrne v. John S. O'Connors* [2006] IESC 30; *Maloney v. Malhas &Ors* and *Shortt v. Malhas & Ors* [2014] IEHC 296.

30. In *Maloney v. Malhas &Ors* and *Shortt v. Malhas & Ors*, Birmingham J. dealt with the issue in the following terms:

> *"12. The immediate and obvious difficulty for the plaintiffs is that the authorities are clear that in dealing with an application to come off record, it is not the function of the Court to decide whether an insurer was or was not entitled to repudiate liability. In that regard, in the context of an application by solicitors instructed by the MDU to come off record, Lavan J. in Corroon (A Minor) v. Pillay's General Hospital Ltd. (Unreported, High Court, Lavan J., 31st July, 2008,) commented:*
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> > *"All of the authorities cited to the Court are unanimously of the view that if a firm of solicitors wish - where insurers discontinue providing indemnity - to come off record, they should be entitled to do so".*
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> *He also accepted that "in deciding an application to come off record in the insurance cases, it is no function of the Court to decide whether the insurer was or was not entitled to repudiate liability". The principle which applied to insurance companies, he concluded, also applied to the MDU. Since the decision in O'Fearail v. McManus [1994] 2 I.L.R.M. 81, the courts have set their faces against what has come to be referred to as "enforced forms of liaison". In that case, O'Flaherty J. observed at p. 83:*
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> > *"The present situation, as it has unfolded before us, is that the insurance company, rightly or wrongly, has repudiated. It says that it does not want Mr. O'Brien to act any longer and I think, in those circumstances, it would be a forced form of liaison to say to Mr. O'Brien that he should continue to act for this defendant and I would, in the circumstances, allow him to come off record, and to that extent, I would reverse the order of the learned High Court judge."*
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> *That the principles applicable to insurance companies apply also in the case of the MDU is clear from cases such as Corroon (A Minor) v. Pillay's General Hospital Ltd. (Unreported, High Court, Lavan J., 31st July, 2008,) to which I have already referred, Finn and Dunlea v. Pillay's General Hospital Ltd. (Unreported, High Court, Gilligan J., 5th March, 2008), a decision of Gilligan J., and Sweetman v. Tarpey (Unreported, High Court, White J., 6th February, 2006).*
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> *13. Of note is that in Finn and Dunlea v. Pillay's General Hospital Ltd. (Unreported, High Court, Gilligan J., 5th March,*

2008), Gilligan J. commented:

> *"I do not have to enquire into the proprietary of the MDU decision to discontinue providing assistance to Dr. Pillay. I am satisfied that the MDU is not, as such an insurance company and that it provides assistance and/or indemnity to its members on a discretionary basis, and that such, when granted, can be withdrawn pursuant to its Memorandum and Articles of Association."*

14. These observations of Gilligan J. remain very much in point.

15. While the disappointment experienced by the plaintiffs at the turn events have taken is understandable, it must be said that forcing Arthur Cox & Co. to remain on record, contrary to its wishes, and contrary to the wishes of the MDU, which had previously provided instructions, would not alter or improve the plaintiffs' position in any way.

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. An examination of the cases shows that there have been very considerable divergences in approach in considering whether to impose conditions, and specifically, how to deal with the vexed question of costs. Three broad streams can be identified. There are cases where there has been no order as to costs, and each side has been left to bear its own. Corroon (A Minor) v. Pillay's General Hospital Ltd. (Unreported, High Court, Lavan J., 31st July, 2008,) is such a case. Lavan J., while directing that in the particular circumstances of the case with which he was concerned, each side should bear its own costs, took as his starting position that the general rule was that parties opposing an application to come off record should be entitled to the costs of the motion. The moving party on the current application has urged that the approach of Lavan J. should be followed by me. Right at the other end of the spectrum, is Byrne v. John S. O'Connor & Co. [2006] 3 IR 379, a case where the Supreme Court dismissed an appeal by Admiral Underwriters Agents (Ireland) Ltd. (Admiral) against a decision of O'Donovan J. which had permitted Giles J. Kennedy & Co. Solicitors to come off record for the defendant, but only on the basis that Admiral, the underwriters, was joined as a notice party to the proceedings and directed to pay the costs incurred by the plaintiff to date and also costs in relation to an application brought by the executor of the late Patrick J. O'Connor, former Principal of the defendant firm of solicitors. As this is a case which is central to the arguments advanced by the plaintiffs, it is appropriate to consider the background to that case and the facts of the case, which it must be said immediately, were highly unusual."

31. In *Berney v. South Dublin County Council* [2014] IEHC 319, Hedigan J. reprised the relevant principles in the following terms:

> *"11. The principles applicable by the Court in an application such as this, are helpfully set out by Laffoy J. in her judgment in Tadhg McTiernan v. Quin-Con Developments & Ors. delivered 17th April 2007, as follows:*
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> *"Insofar as it is relevant for present purposes, O. 7, r. 3(1) provides as follows:*
> > *'Where a solicitor who has acted for a party in any proceedings ... has ceased to act for the party, and the party has not given notice of change of solicitor or notice of intention to act in person ... the solicitor may, on notice to be served on the first-mentioned party, personally, or by letter addressed to his last-known place of residence, unless the court otherwise directs, apply for an order declaring that the solicitor has ceased to be the solicitor acting for the first-mentioned party in the proceedings, and the court may make an order accordingly'.*
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> *Order 7, r. 3 was considered by the Supreme Court in O'Fearail v. McManus [1994] 2 I. L.R.M. 81..... The solicitor applied to come off record. In delivering judgment in the Supreme Court, O'Flaherty J. stated that;*
> > *"O.7, r. 3 gives the court a wide discretion. However, the court had to look at the reality of the situation as it then was. The insurance company, rightly or wrongly, had repudiated."*
>
> *It did not want the solicitor to act any longer and in those circumstances it would be a 'forced form of liaison' to say that the solicitor should continue to act for the defendant. In the circumstances the solicitor was allowed to come off record. However, the court attached a condition: that the costs both in the High Court and on the appeal to the Supreme Court, be paid by the insurance company. The court sought an undertaking that the insurance company would discharge the costs of all parties. The fault on the part of the insurance company which that requirement was intended to redress was its failure to conduct a thorough investigation before instructing the solicitor to act."*
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> *The rationale for this view was considered later by the learned judge where she cited the judgment of Kearns J. in the Supreme Court on 15th May, 2006, where 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.""

32. Counsel for the plaintiff, in opposing the present application, relies on the decision in *Dunne v. P.J. White Construction Co Ltd.*, namely that the onus rests with the insurer to establish that it is entitled to repudiate liability where such an entitlement is being asserted. However, having considered the judgment of Finlay C.J. in that case, I am satisfied that the principle enunciated in *Dunne v. P.J. White Construction Co Ltd* has to be seen in the context of the factual matrix in that case, where the plaintiff had obtained judgment against the insured employer and was proceeding pursuant to the provisions of s. 62 of the Civil Liability Act 1961. I am not satisfied, therefore, that the basis upon which the decision in *Dunne v. P.J. White Construction Co Ltd*. was arrived at in any way gainsays the general principles set *by O'Fearail v. McManus* as to how an application to come off record is to be approached, and which have been applied subsequently by the High Court, as referred to above.

33. Furthermore, I note Peart J.'s judgment in *Hu v. Duleek Framework Limited* which, I am satisfied, is also largely dispositive of the plaintiff's arguments in the present case:

> *"9. David Barniville SC for Aviva submits that there is no privity of contract between the plaintiff and Aviva, and that the only party entitled under law to challenge the decision to decline cover for this accident to the plaintiff is the first named defendant, and point to the fact that no such challenge has been made. Mr Barniville has referred to well-known authority on the law relating to privity of contract and there is no need to set forth those references in this judgment. The law in that regard is not in dispute between the parties.*
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> *…*
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> *19. However, sympathy is an insufficient basis for determining whether or not negligence would provide a reasonable cause of action against Aviva. In order to plead negligence there would have in the first instance to be a duty of care owed to the plaintiff of the kind argued for, and then a breach of that duty of care causing loss and damage to the plaintiff. I cannot see that Aviva are under a duty of care to this plaintiff to ensure that he is provided with information as to whether or not the insured has complied with the conditions of his insurance policy with Aviva. The contract is with the insured person, and rights exist in both directions arising from that contract. But I fail to see any basis for any third party duty of care as asserted by Mr Kinsella. If such a duty of care was owed to this plaintiff, the question arises as to whether the same duty is owed to other potential claimants under the policy of whose existence Aviva may not even be aware if proceedings have not been issued. How would such a duty of care be fulfilled? But I do not believe that Aviva is in a position of proximity with potential claimants as to be liable for a duty of care to them. The class of persons to whom such proximity would exist is too vague and uncertain."*

34. Having regard to the relevant principles, as set out above, by which the Court must be guided, I am satisfied that the Court should exercise its discretion and grant the order sought in the notice of motion. In the course of his submissions, counsel acting for the second named defendant's insurer advised the Court that, if the order is made, the insurer will meet the costs of the plaintiff to date in the proceedings, together with the costs of the within motion. Accordingly, I propose to make an order in such terms.