

## THE HIGH COURT

2006 1490 P

## BETWEEN:

LEISURE MANAGEMENT CORPORATION LIMITED

PLAINTIFF

AND

AIG EUROPE (IRELAND) LIMITED

DEFENDANT

**JUDGMENT of Mr Justice Michael Peart delivered on the 17th day of July 2009:**

By Notice of Motion dated 17th July, 2008 the plaintiff seeks an order pursuant to Order 15, rule 13 of the Rules of the Superior Courts adding two companies, Genport Limited and Calla Associates Limited, and one Christopher O'Reilly, as plaintiffs to these proceedings. The two companies are wholly-owned subsidiaries of the plaintiff company, and Mr O'Reilly was at relevant times an employee of one of them.

The defendant company is an insurer with whom the plaintiff took out a policy of insurance to cover certain liabilities in connection with its businesses. The defendant has repudiated liability for certain sums in respect of which the plaintiff has sought to be indemnified. Those sums arise from an award of damages and costs against Genport Limited and an award of damages and costs against Calla Associates Limited in two separate actions.

In these proceedings the plaintiff seeks a declaration that the defendant is liable to indemnify the plaintiff in respect of these sums, and for judgment for the amount thereof.

While the policy of insurance was taken out by the plaintiff, the plaintiff alleges that both Genport and Calla are insured parties under the policy, and that the indemnity covers those parties' liabilities, in addition to any liabilities of the plaintiff itself. The plaintiff's Reply to Notice for Particulars informs the defendant of this, and indicates an intention by the plaintiff to have those two companies added as plaintiffs.

The Defence delivered by the defendant in which it is pleaded that under the terms of the policy "*that in the event of the defendant disclaiming liability of any claim and such claim not being within twelve calendar months from the date of such disclaimer referred to arbitration under the provisions of the Policy of Insurance then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable.*"

Accordingly, as the defendant disclaimed liability on the 17th January, 2006 and 6th August, 2001 respectively, the defendant pleads that each claim has been abandoned and irrecoverable under the policy.

It is pleaded, without prejudice to the foregoing, inter alia, that since the sums sought under the policy are sums for which Genport and Calla are liable, and not the plaintiff, the latter is not entitled to the reliefs claimed in the proceedings.

It is in these circumstances that the plaintiff seeks to join the two companies.

Christopher O'Reilly is a person whose interest is also noted on the policy, and it appears that he was a manager or other employee of the two companies, and as appears from a further affidavit filed, the judgment against Genport was also against Mr O'Reilly on a joint and several basis.

In a replying affidavit on the present motion, the defendant's solicitor, Gavin Carty, refers to the fact that it took two motions by the defendant before the plaintiff eventually delivered its Statement of Claim, and that Replies to Particulars were not delivered until after a further motion was brought by the defendant to compel the plaintiff to furnish Replies to Particulars. He refers also to the fact that as early as June 2006, within a short time of the issue of these proceedings, he had written to the plaintiff's solicitor querying the plaintiff's entitlement to bring these proceedings in circumstances where a liability was incurred by Genport. He did not receive any response to that letter. These matters form the basis of a complaint by the defendant of delay on the part of the plaintiff.

Mr Carty goes on to refer to the disclaimer of liability by the defendant on the 8th August, 2001 and states that any claim in relation thereto is now barred by the provisions of the Statute of Limitations, 1957. He submits in his affidavit that it would not be appropriate to add plaintiffs whose claims are statute-barred, as it could operate to defeat a plea under the statute. In that regard, however, I note that there is no plea contained in the Defence, as currently filed, under the Statute of Limitations. But of course, Mr Carty draws attention to the arbitration clause also, and that has been pleaded and I have already referred to that.

In response to that affidavit the plaintiff's solicitor, Peter Duffy has sworn an affidavit on the 19th November 2008. He takes issue with what Mr Carty stated as to when time began to run in relation to these claims. But he goes on to say that in any event, and as a protective measure, he in fact had issued proceedings on behalf of Genport, Calla, and Christopher O'Reilly on the 1st November, 2006, but did not serve same. That summons cannot now be served without an application to renew same. He states that rather than bring such an application on an ex parte basis, he instead brought the present application. He asserts that there can be no prejudice to the defendant in these circumstances in having these parties joined as plaintiffs in the present proceedings.

In his affidavit, Mr Duffy accepts that there was some delay in the delivery of the Statement of Claim, as stated by Mr

Carty, but that this was for reasons related to some dispute between the plaintiff and his former solicitor, and that this was explained to the Master of the High Court on the occasion of the defendant's motions to compel delivery of the Statement of Claim. He submits that in so far as the defendant is resisting the present application on grounds of delay, this is unsustainable and should rather be the subject of an application to dismiss the plaintiff's claim for want of prosecution.

Counsel for the plaintiff on this motion, Barbara McGrath BL has referred to the provisions of Order 15, rule 13 RSC and also to Order 15, rule 1 RSC.

Order 15, rule 13 RSC gives the Court a general power to, *inter alia*, add, whether as plaintiff or defendant, with or without an application being made in that regard by either party, "any parties ... who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter ..." (my emphasis)

Order 15, rule 1 provides:

*(1) All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transactions or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise .....*

Counsel submits that as the amounts for which indemnity are sought from the defendant under the insurance policy taken out by the plaintiff are sums in respect of which judgment has been given against Genport and Calla and Christopher O'Reilly, wholly-owned subsidiaries and employee respectively, and whose interests are noted on the policy, it is clear that they are each persons *"whose presence before the Court may be necessary to enable the Court to effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter"*.

Matthew Jolley BL for the defendant submits that the plaintiff, and/or the proposed added parties cannot succeed in this action because first of all the arbitration clause has not been invoked within the twelve month period referred to therein and that the claims are therefore deemed to have been abandoned. He also submits that the claims are in any event statute-barred. In these circumstances, where the claims cannot succeed, the Court should not make an order adding the proposed plaintiffs. He relies also to some extent at least on the delay on the part of the plaintiff to date in the delivery of a Statement of Claim and Replies to Notice for Particulars, and that even on this ground the plaintiff should be found not to be entitled to the order sought.

In my view, the parties which the plaintiff seeks to add as plaintiffs are parties who come within Order 15, rule 13 RSC, given that they are the persons whose liability for the judgment sums and costs are payable. They are wholly-owned subsidiaries and an employee of one or both subsidiaries respectively, and it is certainly arguable that the present plaintiff is not the appropriate party to sue under the policy for the indemnity in respect of these sums.

As far as the failure to invoke the arbitration clause is concerned, that is a matter which will have to be the subject of evidence and legal submissions at the hearing. Similarly, whether or not the claims of any of the plaintiffs are statute-barred is a matter to be raised by way of defence to the claim, and will require evidence and legal submissions before the matter can be finally determined. This is not a case where it is already beyond any possible doubt that the claims are statute-barred. The defendant can plead these matters so that they can be determined.

It is hard to see that the defendant is prejudiced by the addition of the proposed added plaintiffs. If the defendant succeeds in defending the claims successfully, it will be entitled to an order for costs against all the plaintiffs. It cannot be said that the costs of the proceedings will be increased significantly by the addition of the proposed plaintiffs, nor will it add to delay in having the case determined, given the Court's powers to make directions in relation to any amended pleadings necessitated by the addition of these additional plaintiffs.

In all these circumstances, it is appropriate to make the order sought adding Calla Associates Limited, Genport Limited and Christopher O'Reilly as plaintiffs to these proceedings, and I will so order.