Neutral Citation [2013] IEHC 50

THE HIGH COURT

Record Number: 2011 No. 5209P

Between:

Yun Bing Hu

Plaintiff

And

Duleek Formwork Limited (In Liquidation)

And

Aviva Direct Ireland Limited t/a "Aviva"

Defendants

Judgment of Mr Justice Michael Peart delivered on the 5th day of February 2013:

1. The plaintiff is a carpenter, and while working for his employer at a building site in Spencer Dock in Dublin on the 17th August 2009, he sustained an injury to his thumb. He believes that this injury was sustained as a result of negligence on the part of his employer the first named defendant. He commenced these proceedings with a view to obtaining compensation for these injuries, and of course believed that his employer had the benefit of a contract of insurance in respect of any claim successfully brought against him on the basis of negligence. He has since learned that while his employer had a contract of insurance which was intended to cover employer's negligence, the first named defendant breached one of the conditions precedent to liability, namely the payment of an excess of €1000.

2. The first named defendant has gone into liquidation, and the plaintiff has obtained judgment in default of appearance against that defendant by order of the High Court obtained on the 28th September 2011. Damages have yet to be assessed.

3. These proceedings, when first issued, named only the plaintiff's employer as a defendant. However, when the plaintiff discovered in due course that the defendant's insurer "Aviva" was repudiating liability for this claim, he sought to have Aviva added as a defendant. That order was granted on the 7th March 2012, and the Personal Injury Summons was amended accordingly on the 9th May 2012 and was served immediately thereafter.

4. Having entered an appearance, Aviva issued a Notice of Motion dated 22nd June 2012 seeking an order to strike out these proceedings pursuant to Order 19,rule 28 RSC on the grounds that they disclose no reasonable cause of action against Aviva. Alternatively, Aviva seek to have the proceedings struck out under the inherent jurisdiction of the Court on that ground and/or on the basis that they are bound to fail.

5. The relief sought against Aviva is set forth as being:

> *" A declaration that any sum awarded by this Honourable Court at the trial of this action and any costs awarded to the plaintiff as a result of his injuries constitutes an award for a wrong and the second named defendant is obliged, under the terms of the policy of insurance entered into with the first named defendant herein, to pay the required monies to the plaintiff and to discharge any sum awarded for damages and costs pursuant to the provisions of the policy of insurance".*

The affidavit sworn by Sandra Murphy of Aviva on the 22nd June 2012 reveals that Aviva first received a notification of the plaintiff's accident on the 3rd September 2009, being just over two weeks after it had occurred. It appointed a firm of loss adjusters to investigate. It reveals also that following the application by the plaintiff to the Personal Injuries Assessment Board, the first named defendant failed to pay its contribution to PIAB's fees despite being requested to do so. By the time the present proceedings were first issued the first named defendant was in liquidation.

6. It appears also that the excess payment of €1000 under the insurance policy, a condition precedent to liability to the insured, had not been paid by the insured by the time these proceedings were issued and served on the first named defendant. The loss adjusters wrote to the liquidator informing him that unless that excess was paid, cover under the policy would be declined. Not having received this payment by the 25th March 2011, the loss adjusters wrote again on that date to state that cover was declined.

7. The plaintiff was unaware of these events at that time. In a replying affidavit sworn on the plaintiff's behalf, Ivan Williams, solicitor, states that if the plaintiff had been made aware that the excess payment of €1000 had not been paid by the insured or the liquidator, it is likely that some form of pressure could have been brought to bear on the first named defendant or the liquidator to ensure that the payment was made, including by possible court order. Alternatively, it is stated, the plaintiff would have endeavoured to discharge that payment himself in order to ensure that his claim would be met under the policy. Mr Williams had been informed by letter dated 25th March 2010 that Aviva had declined cover, but no reason was provided in that letter. The plaintiff did not become aware of the reason until he received Aviva's affidavit grounding this application.

8. Mr Williams goes on to state that the plaintiff is still even at this late stage prepared to himself make the excess payment to Aviva. He complains also about the difficulties which he encountered in finding out the reason for the refusal of cover. He makes the point that it took 14 months to get that information. He makes the point in his affidavit that depriving the plaintiff of an opportunity to make that payment to Aviva himself has wrought an injustice on the plaintiff by him effectively being unable to recover compensation for the injury which he suffered simply because the insured failed to make the excess payment required under the policy of insurance taken out in order to cover claims such as that if the plaintiff.

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.

10. It would appear that the plaintiff is seeking first of all to rely upon the provisions of Section 62 of the Civil Liability Act, 1961 as amended in order to maintain its claim against Aviva. That section provides:

> *"62. -- Where a person (hereinafter referred to as the insured) who has effected a policy of insurance in respect of liability for a wrong, if an individual, becomes a bankrupt … or, if a corporate body, is wound up … moneys payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those monies are payable, and no part of those moneys shall be assets of the insured or applicable to the payment of the debts (other than those claims) of the insured in the bankruptcy … or in the winding up or dissolution, and no such claim shall be provable in the bankruptcy … winding-up or dissolution." (emphasis added)*

Aviva on the other hand submits that in the present case, no moneys are payable to the insured under the policy, as the policy has been repudiated. It submits that the purpose of this section is not to provide to a plaintiff a remedy against the insurance company in circumstances where otherwise there is no privity of contract, but rather to ensure that when an insurance company is liable to pay money to an insured under a policy, and the insured person goes bankrupt or, in the case of a company, goes into liquidation, the insurance monies are 'ring-fenced' to meet the claim made on the policy, and does not disappear into the general fund for the benefit of other creditors.

11. Mr Barniville submits that this meaning is clear from the literal meaning to be given to the words in the section, and that the intention of the Oireachtas is unambiguous, and that if the Oireachtas had intended that by enacting this section it should provide a remedy for persons such as the plaintiff in the circumstances of this case it would have made that clear by the use of different language, whereas the section has been worded in a way that makes it clear that it is only where monies under a policy are payable by the insurance company that they are ring-fenced so as to preserve the fund from the grasp of creditors. In this way, it is submitted that the section clearly cannot avail the present plaintiff, because his circumstances are not contemplated by this particular section.

12. Mr Barniville has referred also to the distinction between the provisions of Section 62 of the Act of 1961, and the provisions of Section 76 (1) of the Road Traffic Act 1961, and in that regard has referred the Court to a passage from the judgment of Laffoy J. in *Power v. Guardian PMPA Insurance Limited* [2007] IEHC 105 in support of his submission that it is clear that it is only when monies are actually payable under a policy of insurance that a claimant can benefit from the provisions of Section 62 of the Civil Liability Act, 1961. At page 9 thereof the learned judge states:

> *"The reality is that the invocation of s. 62 gets the plaintiff nowhere. The nub of the defendant's defence of these proceedings is that the insurance Mr Wheeler had with the defendant on 6th October 1991 did not cover any liability he incurred to the plaintiff as a result of the accident on that day and, therefore, no monies are payable to Mr Wheeler under this policy with the defendant in respect of that liability. For the protection to come into play monies must have become payable to the insured under the policy of insurance."*

13. Finally, I should mention that Mr Barniville has referred this Court to the judgment of Kearns P. in *McCarron v. Modern Timber Homes Ltd* (in liquidation) & ors, unreported, High Court, 3rd December 2012 which strongly supports the arguments put forward by Aviva on this application.

14. Gareth Kinsella BL for the plaintiff has, on the other hand, tried to draw support from a judgment of Finlay CJ in *Dunne v. P.J. White Construction Co. Ltd* (in liquidation) [1989] ILRM 803. In that case the plaintiff was in a very similar position to the present plaintiff in as much as he had been injured at work, and his employer had gone into liquidation. As here, judgment was obtained against the employer in default of appearance and the plaintiff sought to recover compensation from the insurer directly. However, as here, the insurer repudiated liability under the policy on the basis that the general policy conditions had been breached by the insured. In the High Court the plaintiff had lost on the basis that the learned judge (Murphy J.) found that the plaintiff had not discharged the onus of proving a negative, namely that the insurance was not entitled to repudiate the contract of insurance. An appeal was taken to the Supreme Court on the question of whether the onus rested on the plaintiff in that regard, or whether it fell to the insurer to prove that grounds existed which entitled it to repudiate. In the event the Supreme Court concluded that the in accordance with the ordinary rule that he who alleges must prove, the onus in the case rested with the insurance company, and the appeal was allowed. In the event, the case thereafter settled, and the issue as to whether or not that insurer had been entitled to repudiate did not return to the High Court for consideration.

15. The case is clearly not directly on point as far as the present plaintiff is concerned. Of significance in the present case is the fact that the plaintiff does not dispute that the first named defendant failed to pay the excess and that therefore that condition of the policy of insurance was breached. The issue of where the onus lies in relation to the entitlement to repudiate does not therefore arise in the present case. If the question of whether or not Aviva was entitled to repudiate liability was a live issue between the parties, then obviously the *Dunne* case, and indeed another case relied upon by the plaintiff, namely *McKenna v. Best Travel Ltd & ors* [1995] 1 IR.577, would be of assistance to him. But in so far as the plaintiff seeks support for his cause of action against the insurer by reference to the remarks of Finlay C.J in *Dunne* relation to the meaning to be attached to Section 62, He does so by misconstruing or ignoring the reference in the passage relied upon on page 805 of the judgment to "*monies payable on a policy of insurance to an insured …".*

15. I am satisfied in this case that the plaintiff has no privity of contract with Aviva. That is very clear. He cannot seek to enforce the contract of insurance as between the first named defendant and Aviva, especially in circumstances where he does not dispute that the excess payment was a condition precedent to liability under the policy, and does not dispute that the excess payment was requested to be paid and was not paid. Monies are therefore not payable to the insured under the policy. If there was some arguable doubt still existing as to whether or not Aviva was entitled to repudiate liability, then the judgment of the Supreme Court in *Dunne v. P.J.White & Co. Ltd* [supra] could be of assistance, given the remarks of Finlay C.J, albeit obiter in his judgment, that the onus fell upon the insurer to prove what it was alleging, namely that it was entitled to repudiate liability. But that issue is not live in the present case on the evidence which has been adduced. In my view, s. 62 of the Act of 1961 does not provide the plaintiff with a remedy in this case against Aviva.

16. It follows that by reference to the claim against Aviva as appearing in the Amended Personal Injury Summons, there is no reasonable cause of action against Aviva disclosed, and that these proceedings should be struck out either under the provisions of O.

19, r. 28 RSC, or under the inherent jurisdiction of the Court as disclosing no reasonable cause of action, or disclosing a cause of action that was bound to fail.

17. However, before making any such order, I should say that of course the Court's jurisdiction to strike out proceedings on these bases should be exercised sparingly and only in a clear case, otherwise the Court risks depriving a plaintiff of the benefit of a case which might just have a chance of succeeding. That would be manifestly unfair and unjust. The Court should be satisfied not only that the pleadings disclose no reasonable cause of action and/or that the claim is bound to fail, but also that there is no amendment possible to the claim which might save it. In that regard, Mr Kinsella has very ably urged that on the facts of this case the plaintiff could amend the proceedings in order to mount a claim in negligence against Aviva in negligence. In that regard he has submitted that there was gross delay and a failure on the part of Aviva to inform the plaintiff that a pre-condition to Aviva's liability, namely the excess payment, had been breached. Mr Kinsella urges upon this Court that Aviva owed a duty of care to the plaintiff as a person whom it was aware was seeking to recover damages from the insured party, and who would be clearly adversely affected by that breach. It is submitted that Aviva owed it to the plaintiff to so inform him so that the plaintiff would have an opportunity of either taking steps through the courts to enforce the payment of the excess, or at least that the plaintiff himself would have the opportunity to make the payment to Aviva himself.

18. It is at first glance an attractive argument, not least because the Court will naturally have some sympathy for this plaintiff who no doubt sustained a serious injury to his hand, and even though the injury was covered by insurance taken out by his employer, nevertheless through no fault of his own, has found that the cover has been declined because of the non-payment of a relatively small amount of money. Sometimes a policy of insurance is repudiated because the accident was not reported to the insurance company in a timely manner as required, and it is understandable that in such circumstances the insurer may be prejudiced in relation to the efficacy of any investigation it could carry out at a late stage. In other circumstances, liability is repudiated because the policy has lapsed by non-payment of a premium, so that there was not on the day of a particular accident any policy of insurance in existence. However, the present case is very different. There was insurance in place, but the policy was worded in such a way that where a claim is made on the policy the insured person is required when requested to do so to make an upfront excess payment of €1000, even before liability for the accident has been established. It would be fairer in my view if the excess payment, if unpaid by the insured, was to be deducted from any payment that may be made to a third party claimant. It seems to be a manifest unfairness that in such circumstances the entire contract is repudiated and where the injured third party is the one who loses out completely.

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.

20. There have been classes of relationship where a duty of care has been found to be owed on the basis of sufficient proximity. For example, where a solicitor is instructed by a client to prepare a will, he can be liable to a person who, but for the solicitor's negligence, would have been a beneficiary under the will upon the death of the testator, even though that beneficiary is not the solicitor's client and is not in any contractual relationship with that solicitor. But I know of no case where the Courts have found a duty of care to exist between an insurance company and a potential claimant against the insured party, and have been referred to none. It would not be right in the present case in such circumstances to extend the law that far, so as to find that the plaintiff might reasonably argue his claim against Aviva under the law of negligence. In those circumstances I am satisfied that the amendment sought in this regard by Mr Kinsella would not save the proceedings, and indeed, if such was permitted, it would I suspect inevitably lead to a further application to strike out the plaintiff's case as disclosing no reasonable cause of action and/or on the basis that it was a claim that is bound to fail.

21. I must make an order, but with sympathy for the plaintiff and therefore with regret, striking out these proceedings against the second named defendant on the basis that they disclose no reasonable cause of action against the second named defendant, and I do so under the inherent jurisdiction of the Court, and on being satisfied that there is no amendment of the proceedings which could be made to the claim, on the facts of the case, which might save the proceedings for the plaintiff.