

THE HIGH COURT

[2017 No. 12 C.A.T.]

BETWEEN

WINIFRED MCDONAGH

PLAINTIFF

AND

HELEN WARD AND ANTHONY WARD

DEFENDANTS

[2017 No. 10 C.A.T.]

BETWEEN

MARTIN WARD

PLAINTIFF

AND

HELEN WARD AND ANTHONY WARD

DEFENDANTS

[2017 No. 11 C.A.T.]

BETWEEN

PATRICK WARD [A MINOR]

PLAINTIFF

AND

HELEN WARD AND ANTHONY WARD

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 31st day of July, 2017.

Background

1. The above entitled proceedings arise out of a car accident that took place on or about 21st October, 2013, on the public highway at or near Caltralea, Ahascragh, Ballinsloe, Co. Galway. Each of the plaintiffs were passengers in a car which was then driven by the first named defendant and owned by the second named defendant. It is alleged that, by reason of the negligence and breach of duty of the defendants, the car veered out of control and collided with a sign post as a consequence of which the plaintiffs sustained personal injuries loss and damage.

2. At the time of the collision, the second named defendant held a policy of insurance with Zurich Insurance plc. ("Zurich") in respect of the car; therefore, Zurich were the relevant motor liability insurer for the second named defendant and the driver of the car, the first named defendant.

3. Zurich were duly notified of the claim and then carried out investigations. Following the investigations Zurich decided to decline indemnity to the defendants. The reason for this was set out in a letter dated 29th April, 2015. Zurich relied upon a condition of the insurance policy to the effect that Zurich would not be liable in respect of any claim arising when the car was being used or driven "to the knowledge of the insured in an unsafe and unroadworthy condition." The letter stated that, following an inspection of the car, it was noted that the tyre thread depth of two of the tyres was below the legal limit and that the condition of the tyres contributed to the accident.

4. It was stated that the second named defendant had confirmed that he was aware of the condition of the tyres in advance of the accident but had not made any arrangements to replace the tyres. The letter also noted that the second named defendant was subsequently convicted and fined arising out of the condition of the two tyres.

5. In particular, for the purposes of this application, the letter further stated:-

"If we are forced under s. 76 of the Road Traffic Act 1961 to deal with the third party claims, we will seek to recover all sums paid from you.

Please sign the enclose (sic) mandate authorising us to deal with the claim on your behalf and return it to this office".

Under the enclosed mandate the defendants would agree to pay to Zurich all sums paid by it in respect of any settlement or judgment arising from the accident.

6. By letter dated 30th April, 2015, solicitors, instructed by Zurich, wrote to the solicitors on record for the plaintiffs advising them that the indemnity had been declined and proposing that Zurich be joined in the proceedings as a co-defendant. There was no response to this letter. In further correspondence, solicitors for the plaintiffs declined to agree to Zurich being joined as a co-defendant in each of the above proceedings.

7. Subsequently a successful application was made to the County Registrar of Co. Galway to join Zurich as a notice party in the above proceedings. This order was confirmed by the Circuit Court. The plaintiffs have appealed the Circuit Court order to this Court.

8. Thus the issue before this Court are the circumstances under which a court may add a defendant to proceedings despite

objections from the plaintiff.

Submissions of the Parties

9. Zurich ground their application on the affidavit of Mr. David Snow, claims officer, who deposes to the facts set out in the paragraphs above. It is clear from the affidavit, and was confirmed in the course of submissions, that Zurich is not alleging fraud against either of the defendants.

10. While Zurich accept the general principle that a plaintiff is entitled to sue only whom it wishes, they say this principle, on the authorities, is subject to exceptions, in particular, where there are "extraordinary circumstances".

11. Reliance is placed on the decision in *Fincoriz S.A.S. v. Ansbacher and Co. Ltd.* (unreported, High Court, Lynch J., 20th March, 1987) where Lynch J. held:-

"*Prima facie* a plaintiff is entitled to sue whomsoever he wishes and is entitled not to have to sue a person that he does not wish to sue...In order that a person may be joined as a defendant without the consent and, *a fortiori*, against the wishes of the plaintiff there must be some exceptional circumstances. The exceptional circumstances must be such that the added defendants are persons who ought to have been joined as defendants by the plaintiff in the first instance or alternatively even if it was not unreasonable that they were not joined as defendants by the plaintiff in the first instance it is shown at the time of the application to the court to join them that their presence before the court will as a matter of probability be necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter."

12. Further, Zurich relies upon *Barlow v. Fanning* [2002] 2 I.R. 593 wherein Keane C.J. cites a passage from Halsbury's *Laws of England* (4th Ed.) vol. 37:-

"A person having no legal but only a commercial interest in the outcome of the litigation between the plaintiff and the original defendant cannot be added as a party either for the convenience of the court or otherwise. On the other hand, a person may be added as a defendant, either on his own application or the application of the defendant, where his proprietary or pecuniary rights are or may be directly affected by the proceedings either legally or financially, by any order which may be made in the action, or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly."

13. Clearly, it is argued, that Zurich has a "proprietary or pecuniary interest" in the outcome of the proceedings. This is underlined by the provisions of s. 76 of the Road Traffic Act which provides that, were the plaintiff to obtain an award against the defendants, Zurich would have to satisfy that award as it was the insurer involved.

14. Zurich further submitted that it was inevitable that, following the conclusion of the plaintiff's action against the defendants, there would be further proceedings under s. 76. Therefore, it would be a more efficient use of court time and to avoid incurring further unnecessary costs to join Zurich at this stage of the proceedings so that all matters could be resolved at the one hearing.

15. In resisting the application, the plaintiffs argued that there were no "exceptional circumstances" that would allow Zurich be joined against their wishes.

16. The plaintiffs' principal submission was to distinguish the facts of this case from the decision of *McDonagh v. McDonagh* [2015] IEHC 543 where Kearns P. joined an indemnifier as a notice party against the wishes of the plaintiff. It was argued that what differentiated *McDonagh* from this case was that, in *McDonagh*, the indemnifier was alleging fraud.

17. The plaintiffs further relied upon an earlier decision of O'Neill J. in *McDonagh v. Stokes* [2014] IEHC 229 where a decision of the Circuit Court, refusing to allow an indemnifier to adduce oral evidence on a s. 76 hearing, was reversed. In this particular case the indemnifiers were also alleging fraud. In reaching this decision O'Neill J. made a number of observations on the joinder of an indemnifier as a party in proceedings and indicated that, were such an application before him, he would decline to join an indemnifier. However, O'Neill J. allowed the indemnifier to give oral evidence in the s. 76 hearing.

Discussion and Decision

18. The first issue which I have to address are the circumstances under which a court will join a defendant to proceedings against the wishes of the plaintiff. This was addressed by Kearns P. in *McDonagh v. McDonagh* and I find his analysis of the relevant authorities most helpful. In particular, Kearns P. referred to the passages in the judgments of Lynch J. in *Fincoriz SAS v. Ansbacher Ltd.* and Keane C.J. in *Barlow v. Fanning* which I have set out earlier.

19. As Zurich is the indemnifier involved and, as a matter of near certainty, will be called upon to satisfy any award made in favour of the plaintiffs, it cannot but be the case that it has a "proprietary or pecuniary rights...directly affected by the proceedings either legally or financially..."

20. Thus, in my opinion Zurich have satisfied the exceptional circumstances test and ought to be joined as a co-defendant in the proceedings.

21. I do not accept the submissions made by the plaintiffs that fraud is necessary to establish "exceptional circumstances". Were fraud to be alleged in these particular actions then clearly this would be an additional factor which would give rise to the "exceptional circumstances". However, as is clear from the authorities referred to, establishing a proprietary or pecuniary interest in the outcome of the proceedings will suffice.

22. The fact that Zurich may have an opportunity to be heard under s. 76 of the Road Traffic Acts after the plaintiffs have obtained judgment does not amount to a good reason for not joining Zurich at this stage. Though Zurich would be able to defend its position s. 76(1)(c) of the Road Traffic Act 1961 provides:-

"where the claimant has so recovered judgment for the sum, or after service of the notice so recovers judgment for the sum or any part thereof, and has not recovered from the owner or user or such insurer or guarantor the whole amount of the judgment, the claimant may apply to the court in which he recovered the judgment for leave to execute the judgment against the insurer or guarantor, and thereupon the court may, if it thinks proper, grant the application either in respect of the whole amount of the judgment or in respect of any specified part of that amount."

It seems to me that there is no good reason why Zurich should not be afforded an opportunity to make whatever arguments it may wish to make in resisting any liability or seeking an indemnity itself from the defendants in the context of the hearing between the plaintiffs and the defendants.

23. In joining Zurich as a co-defendant this does not, in my opinion, prejudice the plaintiffs' actions. If Zurich had not declined and indemnified the defendants then it would have taken over the defence in the usual way. This would have involved investigating the circumstances of the accident and carrying out the appropriate medical examinations. Further, by joining Zurich as a co-defendant it would be opened to the defendants, who have had cover declined, to claim that they are entitled to be indemnified. Thereby all issues between the plaintiffs and the defendants, between the plaintiffs and Zurich and between the defendants and Zurich can all be heard at the same time.

24. In support of this, I refer to the decision of Ryan J., as he then was, in *Persona Digital Telephony Ltd. v. Minister for Public Enterprise* [2014] IEHC 78 wherein Ryan J. stated:-

"[The plaintiffs] cannot be forced to make a case that they do not want to make they cannot be obliged to change their pleadings so as to include a claim against the new added party. The point of joining a new defendant is in the interest of justice, in the court's interest in seeing that litigation is properly and effectively conducted and that its processes are operated in a way that is just and fair and also in the interest of the added party because of the impact of the litigation on his rights."

25. The earlier decision of O'Neill J. in *McDonagh v. McDonagh* is clearly distinguishable. In that case the court had already made an award and what was in issue was the scope of proceedings allowable under s. 76 the Road Traffic Act 1961. Further, the observations of O'Neill J. concerning the appropriateness of adding an indemnifier as a co-defendant does not form part of the ratio of the decision.

26. In the circumstances, I will accede to the application of Zurich to be joined as a co-defendant in the above entitled proceedings.