Neutral Citation: [2014] IEHC 319

THE HIGH COURT

[2012 No. 3348 P]

BETWEEN

ELIZABETH BERNEY

PLAINTIFF

AND

SOUTH DUBLIN COUNTY COUNCIL AND DES GALLAGHER AND EMMA HUTCHINSON

DEFENDANTS

Decision of Mr. Justice Hedigan on costs delivered on the 5th day of June 2014

1. This application is for an order in relation to such costs as may be claimed by the plaintiff and the first named defendant in these proceedings as against FBD Insurance arising from their solicitor's application to come off record for the second and third named defendants which was allowed by Ryan J. on 27th January, 2014. The plaintiff and the first named defendant claim their costs against FBD Insurance. Judgment was delivered in this case on 14th March, 2014. The Court found in favour of the plaintiff against the second and third named defendants and dismissed the plaintiff's claim against the first named defendant.

2. In the key part of the judgment, the Court found that:

> "The accident was caused by the misuse of the footpath as a vehicle entrance by the second and third defendants, together with the heavy vehicles that were involved in the construction of the second and third defendants' extension. As a result of their actions, the footpath plate outside their second entrance bowed- it created the lip upon which the plaintiff tripped."

3. The plaintiff initially issued proceedings against the first named defendant, solely. She subsequently issued proceedings against the second and third named defendants. In his grounding affidavit for the motion to join these co-defendants dated 10th October, 2012, James McSweeney, solicitor for the plaintiff, stated that the second and third named defendants carried out alterations to their home including alteration to the public footpath by creating and constructing a ramp from the roadway across the pedestrian footpath. In paragraph 6(m) of the particulars of negligence *etc*. contained in the amended personal injury summons dated 30th March, 2012, and served upon the second and third named defendants, it was pleaded that they carried out alterations to the premises that caused the footpath to sink, resulting in the lip that caused the accident. This is exactly what the Court ultimately found.

4. In their defence, the first named defendant, at paragraph 3(c), claimed that the alleged defect on the road (footpath) resulted from the execution of works by or on behalf of the second and third named defendants involving the extension/creation of a vehicular entrance to their property without the consent of the first named defendant.

5. A letter dated 18th April, 2012, sent by the first named defendant to the second and third named defendants, stated that the entrance to their house was altered by a third party on behalf of the second and third named defendants. It stated further that this section of the footpath was changed from pedestrian to vehicular use without their consent or knowledge. This, the letter continued, caused the footpath bay to sink, resulting in the lip which caused the accident.

6. No response has been made to the letter of 17th April, 2014, sent by the solicitors for FBD Insurance to the second and third named defendants at the direction of this court. It is thus accepted by them that they misled their insurers as to their having carried out works on a new second entrance, including the construction of a new ramp between the roadway and the footpath plate immediately outside the new second entrance.

7. In his evidence to the Court at the hearing, Mr. Hayes, engineer for the plaintiff, stated that upon his inspection in November 2010, he found that the second and third named defendants' house had been extended in probable collaboration with their neighbour's house by filling in the gap between them. Substantial work was obviously involved. There was, thus, clear evidence of recent alterations. This included a new section of concrete laid between the original footpath and the kerb. He could tell it was new by the colour of the concrete. He noted the kerb had been lowered in front of that new entrance.

8. Mr. Maguire, engineer for the first named defendant, noted the level of heavy traffic that would have been present at the new entrance in order to provide heavy materials for the building work involved in the extension *i.e*. a readymix truck, digger, skip, *etc*. Mrs. Gallagher, the third named defendant, confirmed this had occurred over a seven-month period. He noted the damage caused to pavements outside sites where building work took place. Invariably, they were heavily damaged following such work. He could see the presence of relatively new building works which indeed were also visible in the photographs. Impressive extension and improvement had occurred to the second and third named defendants' house. A commercial van, the second named defendant's, was daily parked there, and thus crossing the pedestrian plate between the entrance and the new ramp to the kerb.

9. By letters dated 10th October, 2012, to the first, second and third named defendants (the O'Byrne letters), the plaintiff called upon them to exonerate the other defendants in default of which they would proceed against all and seek to recover any costs incurred by a successful defendant.

10. The case came on for hearing on the 5th of December 2013. It waited in the list until the following day but did not get on. In the course of consultation with the second and third defendants, the insurer's legal advisers ascertained that, contrary to his previous assertions, the second defendant had in fact altered the footpath by constructing a new ramp between the road and the footpath. In the result, the insurer repudiated liability. They withdrew instructions from their solicitors who came off record by order of Ryan J on the 27th of January 2014. The order reserved to the trial of the action the issue of costs of the motion and such costs as might be claimed by the other parties against FBD arising from their coming off record. The insurers have undertaken to this court to comply with the court's order as to those costs. This is to obviate the need to join them as a third party. This is a helpful and practical

attitude on their part.

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:

> "Insofar as it is relevant for present purposes, O. 7, r. 3(1) provides as follows:
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> > '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;
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> "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.
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> 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."

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."

12. I gratefully adopt the above as the applicable principles. Applying these to the facts of this case, the central question facing the Court is as to whether the insurer conducted as thoroughgoing an investigation as was possible before instructing solicitors. In determining this, I think the following must be taken into account; the insurers instructed solicitors when Bluebell Solicitors carne on record for the second and third named defendants on 6th December, 2012, following their joinder; from that time on, it appeared to the plaintiff and the first named defendant that those defendants were covered by insurance; the insurers proceeded, they say, on the basis of the categorical assurance given them by their insurered that he had done no work of any kind on the footpath outside his house; all he had done, he told them, was certain cosmetic work on the building, such as pebble dashing of the walls, capping of pillars and new gates on the garage access side, "I have undertaken no work whatever between footpath and roadway", he stated, in his statement attached to the report of Gerry O'Leary dated 9th November, 2011, the investigator for the insurers; the joinder of the second and third named defendants was on the basis set out in paragraph 6(m) of particulars of negligence of the amended personal injury summons dated 30th March, 2012, which alleged that they had done works that caused the footpath to sink; more specifically, in the application to join them, the solicitor for the plaintiffs swore an affidavit in which those works had included the alteration of the public footpath by creating and constructing a ramp from the roadway across the pedestrian footpath; Mr O'Leary, had noted in his report that, by comparison with a photograph of the house when the second and third named defendants bought it, there was little resemblance. The house, he noted, had changed completely in appearance, "he changed the front of the house itself'. But he accepted, with no apparent investigation, the second defendant's statement that he had undertaken no alterations to the footpath and grass margins. Mr. O'Leary wrote that, in fact, the local authority undertook such alterations here. This was not borne out by the evidence.

13. It seems to me that the house in question, both as described by Mr. O'Leary and the second named defendant himself, and confirmed by the photographs produced at the hearing, was one that had evidently been greatly altered. The second named defendant tried to downplay the extent of alteration. However, I would consider that the appearance of the *locus in quo*, should have put the insurers on inquiry. This particularly in the light of the explicit case being pleaded by the first defendant that they had never done any work on the footpath. A thoroughgoing investigation was, in my judgment, called for. This was likely to have revealed that there had been extensive works that had, as the third named defendant later confirmed, involved the presence of heavy vehicles crossing over the footpath plate between the roadway, the ramp and the entrance to the house. The apparent newness of the ramp between the footpath and the road, by comparison with the original footpath, should also have alerted them that the second named defendant was misleading them when he denied any work between the footpath and the road.

14. Thus, in applying the principle of the "thoroughgoing" investigation, I find the insurers fail the test. They fail, not just against the plaintiff, but against the first named defendant also, because I consider Laffoy J's refusal to allow costs to the co defendants in *McTiernan* was based upon the facts of that particular case. I can see no reason why a co-defendant who is also "on the hazard" should not also have the protection of this principle which should be applied *mutatis mutandis* in accordance with the reasoning

outlined by Kearns J as cited above. I can readily accept that the first named defendant would likely have adopted a quite different attitude to the plaintiffs claim had they not been lulled by the apparent security of insurance cover for their co-defendant whom they had every reason to believe would wind up paying costs and damages. They are therefore liable to both Plaintiff and first defendants for their costs herein.

15. The costs to be paid by them to the plaintiff and the first named defendant are as follows:

(i) The full costs of defending the action, because by the date of Bluebells coming off record, the die was cast for those parties. There was, in reality, no going back.

(ii) The costs of the application to come off record.

(iii) The costs of this application for costs because it was a highly complex one requiring detailed, lengthy submissions;

(iv) There will be no order for costs in relation to the abortive costs application on 1st April, 2014, because, in the absence of the second and third named defendants, I was not prepared to proceed with it on that date.