

BETWEEN

ARON CRANNEY

PLAINTIFF

AND

MOTOR INSURERS BUREAU OF IRELAND, HELEN GILLARD, LEITRIM COUNTY COUNCIL

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 13th day of December, 2018**Introduction**

1. The motion before the Court is an application brought by the first named defendant, the Motor Insurers Bureau of Ireland (hereinafter referred to as "the MIBI"), to dismiss the proceedings pursuant to Order 19, rule 28 of the Rules of the Superior Courts (hereinafter referred to as "Order 19, rule 28") and/or the inherent jurisdiction of the Court on the grounds that the proceedings disclose no reasonable cause of action and/or are bound to fail. In the alternative, the MIBI seeks an Order to dismiss the proceedings owing to the Plaintiff's failure to comply with the provisions of the Motor Insurers' Bureau of Ireland Agreement (hereinafter referred to as "the Agreement") and, in particular, Clause 2.3 thereof.

Background

2. These proceedings arise out of a road traffic accident that occurred on or about the 7 February 2014 on a public roadway known as the Sligo to Manorhamilton Road at or near Difreen, Gleancar, County Leitrim. The plaintiff's Personal Injuries Summons (hereinafter referred to as "the Summons") was issued on the 9 January 2017 and was served upon the first named defendant under cover of letter on 5 January 2018. An appearance was entered on behalf of the MIBI on 17 January 2018.

3. The plaintiff alleges, in the Summons, that on the date of the accident, being 7 February 2014, that he was caused to lose control of his vehicle as a result of the presence of deleterious material on the road surface, in particular, oil and/or fuel.

4. It is further pleaded that the said accident was also caused and/or contributed to by reason of the negligence, breach of duty and breach of statutory duty on the part of a Mr Dermot Healy, deceased, in allowing his vehicle to collide with the plaintiff's vehicle. The second named defendant is sued in her capacity as the legal personal representative of the said Mr Healy.

5. The plaintiff further alleges that the accident was caused and/or contributed to by reason of the negligence, breach of duty and breach of statutory duty on the part of the third named defendant in failing to comply with its duties pursuant to the Roads Act 1993 and in failing to keep the said road clear of deleterious materials including oil and/or fuel.

6. At the hearing of the issue, the Court was informed that Notices of Discontinuance had been served on the second and third named defendants and that the MIBI was now the only defendant in the proceedings.

Plaintiff's Claim

7. The plaintiff's claim, as set out in the Summons, seeks:-

"1. Damages for personal injury, loss, damage, inconvenience and expense arising as a result of the negligence and breach of duty, including breach of statutory duty, on the part of the Defendants.

2. A Declaration that the Plaintiff is entitled to compensation from the first named Defendant pursuant to the terms of the Motor Insurers Bureau Agreement together with an Order assessing same. (emphasis added)

3. Interest pursuant to statute.

4. Such further or other order as this Honourable Court shall deem fit.

5. The costs of the proceedings."

8. It was arising from Ground 2 that the substantive argument arose during the hearing of the motion before the Court.

The Motor Insurers' Bureau of Ireland Agreement

9. Section 2 of the Agreement states:

"2. Enforcement of Agreement

A person claiming compensation by virtue of this Agreement... must seek to enforce the provisions of this Agreement by:-

2.1 making a claim directly to MIBI for compensation which may be settled with or without admission of liability, or

2.2 making an application to the Injuries Board citing MIBI as a respondent under the terms of the PIAB Act 2003 which, pursuant to s. 12(1), provides that unless and until such an application is made, no proceedings in court may be brought in respect of the claim,

2.3 citing MIBI as co-defendants in any proceedings against the owner and or/user of the vehicle giving rise to the claim except where the owner and user of the vehicle remain unidentified or untraced, or (emphasis added)

2.4 citing MIBI as sole defendant where the claimant is seeking a court order for the performance of the Agreement by MIBI provided the claimant has first applied for compensation to MIBI under clause 2.1 and has either been refused compensation by MIBI or has been offered compensation by MIBI which the claimant considers to be inadequate and/or applied to the Injuries Board as at 2.2 and having received a release from the Injuries Board to proceed with legal action."

Submissions on behalf of the MIBI

10. Counsel for the MIBI, Mr. Gerard Clarke, S.C., contests that the proceedings are misconceived and are bound to fail owing to an alleged non-compliance on the part of the plaintiff with Clause 2.3 of the Agreement, as set out above.

11. It is argued that a person claiming compensation by virtue of the Agreement must seek to enforce the provisions of the Agreement by citing the MIBI as a co-defendant in any proceedings against the owner and/or user of the vehicle giving rise to the claim *except* where the owner and user of the vehicle remains unidentified or untraced.

12. Counsel for the MIBI says that the appropriate course of action would have been for the plaintiff to issue proceedings as against the MIBI and separate proceedings against any other party that he wished to sue. It is argued that by joining the MIBI as a co-defendant in the proceedings as opposed to having issued separate proceedings renders the proceedings misconceived and non-compliant with Clause 2.3 of the Agreement and thus should be dismissed.

13. It is further argued that the issuing of Notices of Discontinuance as against the second and third named defendants thereby rendering the MIBI the sole remaining defendant does not rectify the initial defect, or retrospectively validate the proceedings, as the Notices only discontinue the proceedings from the date of the Notice and not from the date that the proceedings issued. In essence, the proceedings were bad from the start and cannot now be corrected. It was brought to the attention of the Court that the plaintiff would be entitled to re-constitute proceedings as against the second and third named defendants, should he so wish, but would inevitably be confronted with a Statute of Limitations defence.

14. It is argued that the claim is bound to fail due to the strict adherence that the courts have taken to the technical nature of the Agreement. Counsel states that the courts have consistently held that the MIBI are entitled to rely on conditions precedent to their liability.

Submissions on behalf of the Plaintiff

15. Counsel on behalf of the plaintiff, Mr. John Shortt, S.C., concedes that there was a technical fault on their part in that the MIBI had been joined as a co-defendant in the proceedings rather than having brought separate proceedings as against the MIBI. It is not conceded, however, that this should automatically result in the dismissal of the plaintiff's case.

16. It is argued that the MIBI are now, as a result of the Notices of Discountenance being served on the second and third named defendants, in an identical position as they would have been had they been served with separate proceedings from the outset.

17. Counsel contends that the interests of justice weighs in favour of the Court not dismissing the claim, such as is sought by the MIBI.

Consideration of Submissions

18. The authority which both parties relied upon was the Supreme Court decision in *O'Flynn and Ors. v Buckley and Ors* [2009] 3 I.R. 311. The facts of this case were both tragic and unusual. As a result of an accident, a member of the plaintiff's family died on a public motorway. The plaintiff's family brought a fatal claim against the driver of two motor vehicles who collided separately with the deceased on the night of his death. It was contended that the second named defendant collided with the deceased, who was lying on the roadway sometime after the first named defendant had struck him. The first named defendant had alleged that the deceased had already been struck by an untraced and unidentified driver. As the first named defendant driving was not covered by a policy of insurance, the MIBI was joined in the proceedings. However, as the first named driver contended that an untraced and unidentified driver had also struck the deceased the MIBI were joined both in respect of the uninsured driving of the first named defendant and the driving of the untraced and unidentified motorist. In the course of giving the judgment of the court, Kearns J. referred to the earlier decision of *Devereaux v Minister for Finance and the M.I.B.I.* (High Court, O'Sullivan J., 10 February 1998). In that case, the plaintiff was a passenger in a troop carrier owned by the first named defendant. The troop carrier made a stop to avoid an unidentified and untraced motorist and in the process the plaintiff was thrown forward and badly injured. The MIBI was sued due to the clear involvement of the unidentified and untraced motorist along with the Minister for Finance. Sullivan J. stated:-

"In this case the M.I.B.I. must be cited as a sole defendant under clause 2.3, therefore the proceedings are misconceived."

In reaching his decision, O'Sullivan J. considered the note of an *ex tempore* judgment of Morris J. in *Kavanagh v Reilly and the M.I.B.I.* (High Court, Morris J., 14 October 1996). This was another case where the MIBI had been joined as a co-defendant in circumstances where there was an identified and untraced driver. In that case, Morris J. stated:-

"I believe that the Bureau is entitled to make complaint in relation to this. The Bureau have no intention of taking the plaintiff short in its requirement that it be sued as sole defendant, and the claims of the plaintiff against the Bureau will be dealt with on its merits. At this stage the provisions of the statute will not be raised as the Bureau considers that it does not arise.

In my view the court should not intervene with the provisions of the agreement which have been set forth between the Minister and the Bureau or put an inappropriate burden on the Bureau in relation to its responsibility under the agreement. The agreement has been worked out carefully between the parties and there is in my view a logic and good business sense behind the provisions of the agreement. In these circumstances I believe it is correct and proper that the plaintiff should conform with it and I will therefore strike out the proceedings but I will make no order as to the costs of the application."

19. In *O'Flynn v Buckley*, Kearns J. noted that the MIBI were "wearing two different hats". Firstly, as representing an uninsured driver and secondly, representing an untraced driver. Kearns J. then went on to refer to the provisions of Order 18, rule 1 of the Rules of the Superior Courts 1986, which provides that:-

"Subject to the rules of this Order, the plaintiff may unite in the same case several causes of action; but if it appears to the Court that any such causes of action cannot be conveniently tried or disposed of together the Court may order separate trials of any such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof."

And, Order 18, rule 8 provides:-

"Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the Court for an order confining the action to such of the causes of action as may be conveniently disposed of together."

Kearns J. continued at p. 320:-

"[24] Having considered all the circumstances, I am satisfied that the interests of justice and all of the legitimate concerns of the M.I.B.I. would be met by an order prior to trial providing for the disjoinder of issues under O. 18 of the Rules of the Superior Courts 1986. In my view it would on the facts of this case, be a superfluous requirement verging upon the absurd to require the plaintiffs to institute a second set of proceedings where the M.I.B.I. has been validly joined in a particular capacity in the first instance and where the possible involvement of an untraced motorist has been flagged from the time of the originating letter notifying the claims to the M.I.B.I. without any suggestion from the M.I.B.I. that a second set of proceedings might be necessary. On the face of it there was, and is, no irregularity in the form and constitution of the proceedings."

20. This passage from the judgment of Kearns J., in the Supreme Court, leads me to the conclusion that what is envisaged by clause 2(3) of the MIBI Agreement is that when the involvement of the MIBI, representing an unidentified or untraced motorist, is being considered by a court, the MIBI shall be the sole defendant. It does not follow that the MIBI has to be the sole defendant from the initiation of the proceedings. Therefore, given the service of the Notices of Discontinuances, the MIBI is now the sole defendant which, in my view, is in accordance with the said clause 2.3 of the agreement.

Conclusion

21. By reason of the foregoing, the MIBI is not entitled to the reliefs sought.