Neutral Citation Number: 2007 IEHC 142

THE HIGH COURT

RECORD NO. 2001/17886 P

BETWEEN

TADHG McTIERNAN AND NELLY McTIERNAN

PLAINTIFFS

AND
QUIN-CON DEVELOPMENTS (WATERFORD LIMITED) AND
LL LOCATION LIMITED
AND BY ORDER
NEIL BREHENY AND JOSEPHINE BREHENY,
EAMONN McSWEENEY AND DESCON CONSTRUCTION LIMITED

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 17th April, 2007.

The application
1. This is an application by O'Rourke Reid (the applicants), the solicitors on record for the first defendant, for an order pursuant to O. 7, r. 3 of the Rules of the Superior Courts, 1986 and/or pursuant to the inherent jurisdiction of the court declaring that the applicants have ceased to act for the first defendant and for an order permitting the applicants to come off record for the first defendant. In addition to hearing submissions on behalf of the applicants, the court also heard submissions on behalf of the plaintiffs, the second, third, fourth and fifth defendants, all of whom are now represented by the same firm of solicitors, and on behalf of the sixth defendant.

2. The context in which the application is brought is more complicated than one usually encounters on an application under O. 7, r. 3. Accordingly, it is necessary to consider the proceedings in some detail and the history of this application.

The proceedings
3. The proceedings were commenced by plenary summons which issued on 7th December, 2001. Initially there were two defendants in the proceedings, the first and second defendants. On 18th December, 2001 a firm of solicitors entered an appearance on behalf of the first defendant. Subsequently, on 14th February, 2002 notice of change of solicitor was filed and since then the applicants have been on record for the first defendant.

4. The plaintiffs are the owners and occupiers of premises known as 5 Canada Street in Waterford, where they carry on a veterinary practice. The first defendant is a building contractor and the second defendant is the owner of the premises known as 3-4 Canada Street. The proceedings arose out of the demolition and development of 3-4 Canada Street in or about the month of March, 2001, which works it is alleged were carried out by the first defendant under contract with the second defendant. In broad terms, the plaintiffs say that their premises at 5 Canada Street were damaged and their business was disrupted due to the negligence, nuisance and breach of duty of the first and second defendants in carrying out the said works and that they are entitled to injunctive relief and damages. The applicants were instructed to represent the first defendant in this matter by Orr Risk Management, a Dublin-based firm, who, in turn, were instructed by U.K.-based underwriters, General Star Insurance Company Limited (the insurer), which insured the first defendant.

5. By an order of this Court (Kelly J.) made on 24th November, 2003 the third, fourth, fifth and sixth defendants were added as defendants in the action on application of the plaintiffs. The third and fourth defendants are former owners and occupiers of 3-4 Canada Street, being predecessors in title of the second defendant. The fifth defendant is a consulting engineer, whom it was alleged was retained by the third and fourth defendants in relation to works of construction, demolition and piling of 3-4 Canada Street and the sixth defendant is a company which it is alleged carried out the piling works on behalf of the third and fourth defendants. Notices for contribution and/or indemnity have been served by most, if not all, of the other defendants on the first defendant. On the basis of the documentation before the court, the position is not clear in relation to the sixth defendant.

6. In any event, before the third to sixth defendants were joined and before any such notices were served, the first defendant had failed to comply with an order for discovery made by the Deputy Master on 21st January, 2003. By order of this Court (Kelly J.) made on 7th July, 2003 (the perfected order being subsequently amended by an order made by this Court (Kelly J.) on 30th January, 2004) it was ordered that, unless the first defendant should make discovery in accordance with the order of 21st January, 2003 within twenty-one days of the date of the order, the defence of the first defendant should stand struck out. It was further ordered that in that event the first defendant should have permanent injunctions, both prohibitory and mandatory, in the terms of the injunctive relief sought in the statement of claim and that the plaintiffs should recover against the first defendant such amount as the court might assess in respect of the plaintiffs' claim for damages, such assessment to be held before a judge. Finally, it was ordered that the first defendant pay the plaintiffs' costs of the motion and, in the event of the defence being struck out, the costs of the suit, to include the assessment of damages.

7. The first defendant failed to make discovery with the time prescribed. Therefore, the default judgment in favour of the plaintiffs against the first defendant, which has not been appealed, notwithstanding that the applicants contemplated appealing in August, 2003, stands.

8. The proceedings have continued against the defendants other than the first defendant. On 30th May, 2006 the plaintiffs' solicitors served updated particulars of damage on all of the defendants, including the first defendant. Notice of trial has been served on all of the defendants, including the first defendant. On the day notice of trial was served on the applicants, 14th July, 2006, the applicants issued this application to come off record.

The history of the application
9. This is the second motion to come off record which the applicants have brought.

10. The first motion was issued on 3rd August, 2004, returnable on 1st November, 2004. The events leading to that application commenced with fairly intensive efforts by the applicants in July, August and September, 2003 to procure the swearing of an affidavit of discovery in accordance with the order of 21st January, 2003. Those efforts were directed to Mr. John Quinn, who was a director of the first defendant, although I note that in accordance with the order of 21st January, 2003 the deponent was to be Michael Cahillane. There was no response from Mr. Quinn. As early as 7th August, 2003 the applicants were advising Mr. Quinn that the insurer had instructed them to put the first defendant on notice that it would be withdrawing indemnity due to failure to co-operate

with the applicants. By 10th September, 2003 the applicants were threatening to come off record and that threat was repeated in a letter of 2nd October, 2003 and again in a letter of 28th January, 2004. The insurer and the applicants followed through on their threats, eventually. By letter dated 29th July, 2004 the applicants informed the first defendant that, as a result of its complete failure to assist the insurer in the defence of the claim, the insurer was exercising its discretion not to provide cover in relation to the claim and was repudiating the policy because of the first defendant's conduct in relation to the affidavit of discovery. Further, the applicants were going to apply to this Court to come off record.

11. That led to the first application. The first application was struck out because of the failure of the applicants, who were the moving party, to appear. The applicants put that down to a breakdown in communications between the parties. This application was not initiated until approximately twenty-one months later and the applicants accept the blame for, and do not seek to excuse, that delay.

12. In the period between the striking out of the first application and the initiation of this application the plaintiffs' solicitors, by letter dated 21st March, 2005, informed the applicants that they understood from Nolan Farrell and Goff, Solicitors, who represented Mr. Quinn and his co-director of the first defendant, Rachael Crowley, that they were prepared to swear an affidavit of discovery and co-operate with the insurer in the conduct of the proceedings and that the plaintiffs were favourably disposed to vacate the order striking out the defence, thus enabling the insurer to continue to defend the proceedings. Despite a reminder of 27th April, 2005, there was no response from the applicants.

13. The plaintiffs, emphasising that the applicants did not bring this fact to the attention of the court, have adduced evidence that, by letter dated 27th July, 2006, which post-dated the initiation of this application, Nolan Farrell and Goff, the solicitors representing Mr. Quinn, wrote to the applicants enclosing an affidavit of discovery sworn by Mr. Quinn in the form of a draft which I understand was furnished by the applicants to Mr. Quinn in 2003 and confirming that he was prepared to fully co-operate with the defence of the proceedings and to attend court when necessary. What seems to have provoked Mr. Quinn's activity was that a motion was brought in this Court by the plaintiffs to attach and commit Mr. Quinn and his co-director for failure of the first defendant to comply with the order of 7th July, 2003.

14. However, Mr. Quinn's willingness to co-operate with the insurer, which the applicants say has come "very belatedly", has not moved either the insurer or the applicants to reverse the decision to repudiate and seek to come off record communicated to the plaintiffs in July, 2004. It was pointed out that Mr. Quinn's offer of co-operation does not constitute co-operation on the part of the first defendant, because as was set out in the letter of 27th July, 2006 from Nolan Farrell and Goff, who act for Mr. Quinn in his personal capacity and not for the first defendant, Mr. Quinn at that time had sold his shares in the first defendant and no longer had any involvement with it. Therefore, it was submitted, Mr. Quinn cannot, and has not purported to, give instructions to the applicants on behalf of the first defendant. The applicants have not received any communication from the first defendant since July, 2004. The insurer's position is that the repudiation of the policy, which has not been challenged in any manner by the first defendant, stands and, because of that, the applicants seek to come off record.

The issue

15. It is important to emphasise that there is one, and only one, issue before the court on this application: whether the applicants should be allowed to come off record, and, if so allowed, the conditions, if any, which should be attached to such permission. The following matters are not before the court and the court expresses no view on them:

> (1) whether the insurer has validly repudiated the policy of insurance and the relevance, if any, of the decision of the Court of Appeal of England and Wales in Shinedean Limited v. Alldown Demolition (London) Limited (In Liquidation) [2006] 1 W.L.R. 2696 relied on by counsel for the applicants;
>
> (2) the status of the judgment in default obtained by the plaintiffs against the first defendants vis-à-vis the insurer;
>
> (3) the position of the second to sixth defendants vis-à-vis the insurer having regard to the timing and existence of that judgment and the notices for contribution and/or indemnity;
>
> (4) the implications of the compromise made by the fifth defendant of other proceedings, which I understand are founded on similar facts as to the basis of liability of the common defendants as found these proceedings, in which the second defendant is plaintiff and the first, fifth and sixth defendants are defendants (Record No. 2003/3591P); and
>
> (5) whether any of the defendants would be entitled to join the insurer as a party in the proceedings.

16. On the last point, as it has been addressed, I agree with the applicants that as of now s. 62 of the Civil Liability Act, 1961 has no relevance to the situation which has developed in relation to the first defendant. The purpose of s. 62 is to ring-fence monies payable under a policy of insurance to meet the claims in respect of which the monies are payable where the insured has died, become insolvent or ceased to exist as a corporation or a partnership.

The law

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

> "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."

18. Order 7, r. 3 was considered by the Supreme Court in *O'Fearail v. McManus* [1994] 2 I.L.R.M. 81. The proceedings in that case concerned an allegation of wrongful assault and battery of the plaintiff cyclist by the defendant motorist on 23rd February, 1990. The insurance company which was indemnifying the defendant in respect of his driving of the car instructed a solicitor to take up the matter on their behalf and he duly delivered a defence, apparently, in February, 1990. Subsequently the insurance company took the view that the incident was not covered by the policy of insurance and declined indemnity. The solicitor applied to come off record. In delivering judgment in the Supreme Court, O'Flaherty J. stated that 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. 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.

19. More recently, in *Byrne v. O'Connor & Co.* [2006] I.E.S.C. 30, the Supreme Court followed of the decision in *O'Fearail v. McManus* and it upheld the decision of the High Court which had adopted a different mechanism than had been adopted in *O'Fearail v. McManus* to procure payment of costs – the joinder of the insurance company, instead of seeking an undertaking to the court from the insurance company. The proceedings in that case were for professional negligence and breach of contract against a firm of solicitors. In June, 1993 the firm had notified its insurer of the possibility of a claim. In August, 1994 the insurer nominated solicitors to act on behalf of the firm. The proceedings were initiated by plenary summons in March, 1996. The solicitors nominated by the insurer entered an appearance in September, 1997 and delivered a defence at the same time. They continued to act in the defence of the proceedings until November, 1998 when the insurer changed solicitors and the new solicitors came on record. In December, 1998 the new solicitors strongly hinted that the firm was not entitled to an indemnity, suggesting non-disclosure of facts relating to possible claims and such like. The action was listed for hearing in May, 1999. However, in March, 1999 notice of repudiation was given to the firm and the new solicitors brought an application to come off record. It came on for hearing with the main action. In the High Court, the new solicitors were given leave to come off record pursuant to O. 7 on the basis that the insurer was joined as a notice party to the proceedings and directed to pay both the costs incurred by the plaintiff in the proceedings to date and the costs incurred in relation to the application by the new solicitors and, in default of such payment of costs, the application to come off record would stand refused.

20. The insurer appealed to the Supreme Court against that order. The issue which arose in the Supreme Court was whether the trial judge was entitled to join the insurer as defendant in the proceedings with a view to providing for an effective costs order which he felt was appropriate having regard to the history of the case. In delivering judgment in the Supreme Court on 15th May, 2006 Kearns J. 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 on 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."

21. The reference in that passage to "questions involved in the cause or matter" is to O. 15, r. 13 which provides that the court may at any stage of the proceedings, on such terms as may appear to the court to be just, order that the names of any parties be added whose presence before the court "may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the case or matter". The Supreme Court was satisfied that there was jurisdiction to make the order under appeal and that the discretion was reasonably exercised. There was an additional factor in the case, which informed the decision of the Supreme Court: the failure of the appellants to apprise the Supreme Court of the existence of arbitration proceedings concerning the validity of the repudiation. However, it seems to me from reading the judgment of Kearns J. that, even without that unsatisfactory element, the decision would have been the same. The reason for the imposition of the condition as to costs was not because of uncertainty as to the status of the repudiation; it was because of the delay "on all counts", which I understand to mean both in deciding to repudiate and in applying to come off record. The purpose of the joinder of the insurance company was to provide a mechanism for recovery of costs.

The submissions of the plaintiffs and the defendants

22. Counsel for the plaintiffs submitted that, in the exercise of its discretion, the court should refuse to allow the applicants to come off record. Alternatively, it was submitted, the court should order that the insurer be liable for the costs incurred from 7th July, 2003 to date. It was submitted that the applicants must have had instructions from the insurer up to the commencement of the application. They remained on record and it must be assumed that they did so on instructions. It was submitted that the insurer is not entitled to repudiate, having lulled the plaintiffs into a false sense of security. As I have stated, the validity of the repudiation is not an issue which is before the court.

23. Counsel for the second to fifth defendants and counsel for the sixth defendant endorsed submissions made on behalf of the plaintiffs. However, the sixth defendant reserved its position in relation to bringing an application to join the insurer, as I understand it in relation to the substantive issues and the issue of contribution and indemnity.

24. There was no appearance on behalf of the first defendant. While I am satisfied that the first defendant was served in accordance with the Rules, I think it probable that the current officers and members of the first defendant were not on notice of the application.

Conclusions

25. As I have said, the only issue before the court is whether the applicants should be allowed to come off record, and, if so, on what terms, if any. In essence, as their counsel confirmed, their application is predicated on the policy of insurance having been repudiated, and their client, the insurer, no longer having an interest in the proceedings. It is also based on the fact that they were never able to get instructions from the first defendant for whom they were on record. On the central issue as to whether the applicants should be allowed to come off record, in my view, this case is indistinguishable from the cases considered by the Supreme Court referred to earlier. In the circumstances, to adopt the words of O'Flaherty J., "a forced form of liaison" cannot be imposed on the applicants. Therefore, the applicants will be allowed to come off record.

26. As to whether the insurer should be liable for the costs of the proceedings since 7th July, 2003 or any costs, although the facts

here and, in particular, the grounds put forward by the insurer for repudiating, differ from the facts in the cases before the Supreme Court, in my view, the principle enunciated by Kearns J. in the passage from his judgment in *Byrne v. O'Connor & Co.*, which I have quoted, is equally applicable here. A plaintiff is always on hazard that an insurer may seek to repudiate in the course of the defence of proceedings because of a breach of the policy terms by the insured in relation to co-operating in the conduct of the defence. However, the insurer and its agent, the solicitor it has nominated to represent the insured, must act reasonably promptly in extricating itself from the defence of the proceedings. Otherwise, the insurer is exposing the plaintiff to liability for legal costs which the plaintiff might not otherwise incur.

27. In this case, in my view, there was undoubtedly excessive delay on the part of the insurer in unequivocally extricating itself, as manifested by the actions, or more correctly, the lack of activity on the part of its agents, the applicants. Nothing was done by the applicants for six months between January, 2004 and July, 2004 in relation to endeavouring to procure the co-operation of the first defendant. In the circumstances, it is reasonable to infer that the decision to repudiate was made much earlier than July, 2004, although not communicated to the plaintiffs. When it was communicated, the applicants acted promptly and properly in initiating the first application to come off record. The untimely and unproductive demise of that application could be excused, if the applicants had moved promptly to re-apply to come off record. That they did not, in my view, created an aura of uncertainty as to the status of the repudiation, as evidenced by the correspondence from the plaintiffs' solicitors to the applicants in 2005. Because of the default of the insurer through its agent, the applicants, the leave to come off record must be subject to conditions as to costs.

25. First, the insurer, must, in my view, bear liability for such costs as have been incurred by the plaintiffs in processing their claim against the first defendant as represented by the insurer and the applicants for the period during which the insurer was in default. On the basis of the evidence presented by the applicants to the court, I consider that the insurer and the applicants should have informed the plaintiffs of the decision to repudiate by March, 2004 at the latest and the applicants should have prosecuted the application to come off record expeditiously thereafter. Therefore, I consider that it must be a condition of allowing the applicants to come off record that the insurer bear liability for the costs of processing the claim against the first defendant between March, 2004 and the service of this motion in July, 2006, except costs in relation to steps taken by the plaintiffs against the first defendant in which the insurer and the applicants were not involved. As I understand it, in bringing the motion to attach and commit against Mr. Quinn and his co-director, the plaintiffs "by-passed" the applicants and the insurer. In my view, the insurer should not bear liability for those costs.

29. This case is distinguishable from the cases considered by the Supreme Court in that, in addition to the defendant who was represented by the applicants on nomination by the insurer, there are five other defendants. It is true, as counsel for the applicants submitted, that the plaintiffs were going to have to take steps in the proceedings against those defendants in any event. Notwithstanding that, in my view, the insurer must bear the costs of the steps taken against the first defendant. However, for the sake of clarity, I emphasise that I am not holding the insurer liable for the plaintiffs' costs of processing the proceedings against the other five defendants. Moreover, I see no basis on which the insurer could be made liable for the costs incurred by the other five defendants in defending the plaintiffs' claim.

30. Secondly, it seems to me that it must be a condition of the applicants being allowed to come off record that the costs of all parties of answering this motion be borne by the insurer. If the insurer's handling of this matter had not created the aura of uncertainty to which I have referred, parties who spent a day in court answering this application might have taken a different view.

31. Thirdly, if the costs of the aborted application were awarded against the first defendant, it must be a condition of the applicants being allowed to come off record that the insurer discharge these costs.

Form of order
32. If the insurer is prepared to give an undertaking to the court to discharge those costs which I have held the insurer must bear, the matter can be dealt with on that basis. Otherwise, the insurer will have to be joined as a party for the purposes of ensuring recovery of those costs. I will hear further submissions as to the form of the order.

Service of the order
33. Whatever the form of the order, I find it necessary to refer to O. 7, r. 3(2) in relation to the giving notice by the applicants of the making of the order and its effect, because of the earlier observations in relation to service of this application. In this connection, I direct that the notice be served on the first defendant by registered post at the following addresses: the registered office of the first defendant as per the details recorded in the Companies Registration Office; the last known place of business of the first defendant, which apparently is Unit 3, 6 Crossroads Business Park, Kilbarry, County Waterford; and the addresses given for the current directors and members of the first defendant in the Companies Registration Office. It should also be served on Nolan Farrell and Goff, solicitors for Mr. Quinn.