Neutral Citation Number: [2012] IEHC 530

THE HIGH COURT

[2010 No. 3594P]

BETWEEN

RICHARD McCARRON

PLAINTIFF

AND

MODERN TIMBER HOMES LTD (IN LIQUIDATION), SHAUN McCOLGAN, DANIEL McCOLGAN AND QUINN INSURANCE LTD

DEFENDANTS

JUDGMENT of Kearns P. delivered on the 3rd day of December, 2012

The plaintiff in these proceedings sustained an injury to his left hand whilst operating a panel saw in the course of his employment with the first named defendant on 26th June, 2007. The company went into liquidation on 2nd September, 2008. These proceedings seeking damages for the injury were commenced on behalf of the plaintiff by plenary summons dated 14th April, 2010. In the proceedings the plaintiff has joined both his former employer and the second and third named defendants who were directors of the company. He also sued Quinn Insurance Ltd., the fourth named defendant herein, on the basis that it was the insurer of the first named defendant at the time of the accident and had agreed under the terms of that insurance to indemnify the first named defendant in respect of any claim brought by an employee who sustained injury during the course of his employment with the first named defendant.

It appears that the fourth named defendant refused indemnity to the first named defendant on the basis that Modern Timber Homes failed to comply with the general conditions of the policy and in particular failed to notify the insurer in a timely manner of the claim the subject matter of these proceedings. It is stated that the incident was first notified to Quinn Insurance on 28th January, 2009. On 20th March, 2009, Quinn Insurance informed the liquidator and the plaintiff's solicitors that it was refusing to indemnify the first named defendant company both on grounds that the company failed to notify the claim in a timely manner to the insurer or to provide information and/or assistance in relation thereto.

At the present time, the plaintiff has simply instituted proceedings against his former employer and the directors of his former employer and no judgment or order has been obtained against either of them.

Against this background the fourth named defendant has brought this application seeking an order striking out the plaintiff's claim against the fourth named defendant on the basis it discloses no reasonable cause of action against the fourth named defendant; alternatively, it is claimed that the plaintiff's claim should be struck out in circumstances where there is no privity of contract between the plaintiff and the fourth named defendant.

Counsel on behalf of the plaintiff argued that a right of action permitting the plaintiff to sue the fourth named defendant was created by s. 62 of the Civil Liability Act 1961 whereby the normal rules of privity were not to apply in cases where a company went into liquidation and there were monies payable to that company under a policy of insurance which were applicable only to discharge a valid claim against the insured. Counsel on behalf of the plaintiff argued that the decision of the Supreme Court in *Dunne v. P.J. White Construction Ltd (In Liquidation)* [1989] I.L.R.M. 803 recognised that an injured employee of a company in liquidation had a right of action under s. 62 of the Civil Liability Act 1961 to sue an insurer and nothing in that decision precluded the joinder of the insurance company as co-defendants in the same set of proceedings.

Counsel argued that the joinder of the insurer in the one set of proceedings, apparently permitted by statutory provision in the United Kingdom, had a number of benefits. Firstly, it dispensed with the need for a second set of proceedings to be brought separately against the insurer following judgment against the company in liquidation. It also provided a useful opportunity for the insurance company to challenge the assessment of damages which it could not otherwise do if not a party to the original set of proceedings. It was contended that there was thus no logical or reasonable basis for the fourth named defendant's contention that one set of proceedings must first be brought against the company in liquidation before a second set of proceedings could follow against the insurer.

In reply counsel for the fourth named defendant submitted that a person who is not a party to the contract of insurance between the insurer and the insured has no rights in common law against the insurer. He is estopped from pursuing the insurer, save for statutory exceptions which provide otherwise, under the privity of contract rule. As s. 62 of the Civil Liability Act 1961 provides no such right for a plaintiff unless or until the validity and quantum of a claim against the company is first ascertained, the plaintiff can not invoke s. 62 of the Civil Liability Act 1961. In any event the employer might successfully defend the claim so that there would be no point in having the insurer joined to the proceedings until the validity of a plaintiff's claim is established by means of a judgment obtained against an insured. The causes of action were quite separate and distinct.

DECISION

Counsel for the plaintiff does not seriously challenge the proposition that, absent some statutory provision so providing, the fact that there is no privity of contract between an injured party and the insurer of his employer means that he has no cause of action against the insurer. Put another way, it has long been established that an insured person's rights of indemnity under a policy of insurance against the liability to third parties does not arise until the existence and amount of his liability to the third party is first established, either by action, arbitration or agreement. This was simply stated by Lord Denning M.R. in *Post Office v. Norwich Union Fire Insurance* [1967] 1 All E.R. 577 when he said:-

> "I think the right to sue for these monies does not arise until the liability is established and the amount ascertained".

In *Bradley v. The Eagle Star Insurance Co. Ltd*. [1989] 1 All E.R. 961, the plaintiff over a period of 24 years had been in the employment of a cotton mill where she contracted a respiratory disease by the inhalation of cotton dust. The textile company was

voluntarily wound up. In 1984 the plaintiff brought proceedings against the insurers of the textile company pursuant to the Third Parties (Rights Against Insurers) Act 1930 on the basis that her injuries were caused by the negligence of her former employers which had insured against those risks with the respondents during the relevant period. The matter came before the House of Lords on an application for discovery. It was held that an insured person's right of indemnity under a policy of insurance did not arise until the existence and amount of his liability to the third party had first been established. Lord Brandon (at p. 965) stated:-

> "In my opinion the reasoning of Lord Denning M.R. and Salmon L.J. contained in the passages from their respective judgments in the *Post Office* case set out above, on the basis of which they concluded that under a policy of insurance against liability to third parties the insured person cannot sue for an indemnity from the insurers unless and until the existence and amount of his liability to a third party has been established by action, arbitration or agreement, is unassailably correct."

Given that it is argued on behalf of the plaintiff that s. 62 of the Civil Liability Act 1961 modifies or at least qualifies this well established position for companies in liquidation, it is important to consider the exact terms of the section which provide as follows:-

> "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 dies or, if a corporate body, is wound up or, if a partnership or other unincorporated association, is dissolved, monies 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 monies 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 administration of the estate of the insured or in the winding up or dissolution, and no such claim shall be provable in the bankruptcy, administration, winding up or dissolution."

While acknowledging the absence of legislation in Ireland to mirror statutory developments in the United Kingdom (which said statutes, incidentally, were not provided or opened to the Court), it was argued that the case of *Dunne v. P.J. White Construction Ltd (In Liquidation)* [1989] I.L.R.M. 803 made it clear that a plaintiff enjoyed a right of action arising from s. 62 and that the decision in *Dunne* could further be regarded as an authority for the proposition that it was open to the plaintiff to join the insurance company in the same set of proceedings, albeit that a stay might require to be placed on the plaintiff's claim against the insurer until judgment had been obtained against the insured.

In *Dunne* the plaintiff had obtained judgment in default of defence against the first defendant in proceedings where he had also sued the insurers in respect of an injury suffered by him in the course of his employment with the first defendant. The first defendant had gone into liquidation prior to the judgment and the plaintiff then sought a declaration that the second defendant, who were insurers of the first defendants, were obliged to pay the damages and costs awarded to the plaintiff against the first defendant pursuant to the provisions of the policy of insurance.

It is important to emphasise that the issue decided in *Dunne* was whether the onus of proof to establish that a right asserted by the insurance company in the pleadings to rescind or repudiate the policy of insurance fell on the plaintiff or on the insurer. In the High Court, Murphy J. held that the onus lay on the plaintiff to prove a negative. However, the Supreme Court decided, in allowing the appeal, that, in order to properly implement the protection given by the legislature in s. 62 of the Civil Liability Act 1961, it was necessary, in accordance with the ordinary rule with regard to the question of the onus of proof that he who alleges must prove, that the onus of proof should be on the insurance company to prove what it alleged.

The interesting feature about the case however is that no point appears to have been taken by the insurance company that it had been improperly joined in the proceedings in the first place. At p. 805 Finlay C.J. stated:-

> "Whilst the matter was not raised in the pleadings in the High Court nor referred to in the arguments there, some debate took place in this Court as to whether the plaintiff had a right to bring an action by reason of s. 62 against the insurers. I am quite satisfied that since the issue has not been raised, either in the pleadings or in the High Court, I must deal with this case on the basis that the plaintiff has clearly got such a right. I would express the view, however, notwithstanding the fact that a full debate has not taken place on this issue, that it seems to me that an inevitable consequence of the terms of s. 62 itself is that such a right of action is created by it.
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> Section 62 of the Act of 1961 is specifically designed to protect an injured plaintiff in the precise position of Mr. Dunne in this action so as to ensure that monies payable on a policy of insurance to an insured who is dead, bankrupt, and, in the case of a corporate body, who has gone into liquidation, will not be eaten up by other creditors, but will go to satisfy his compensation, and with that purpose in mind the section must, it seems to me, give to the plaintiff a right to have that right enforced and protected by the courts and that means that he has got a right to sue, as he has sued in this action."

While confirming therefore that the section creates a right of action (thus overcoming the privity point), the judgment does not go on to say when the cause of action may be said to arise or at what point it becomes enforceable. The precise terms of s. 62 must be looked at for guidance. They provide that monies shall be applied in the manner therein specified in discharging all "valid claims against the insured" and it seems to me that a claim can not be so characterised until liability has been established against the employer and the quantum of the claim assessed. Any claim against the insurer, if brought in the same set of proceedings as those against the employer, will require to be stayed until the liability at least of the employer is first established. It is interesting to note that in *McKenna v. Best Travel Ltd* [1995] 1 I.R.577, Morris J. seems to have taken an "either or" approach on the question of simultaneous joinder. In noting that the plaintiff was endeavouring to rely upon s.62 of the Civil Liability Act, 1961, and the authority of *Dunne v. P.J. White Construction Ltd* [1989] I.L.R.M. 803 to make the insurer of the first defendant liable for the loss and damage sustained said:-

> "Such a step would involve either joining the insurance company as a defendant in the action or alternatively commencing fresh proceedings against it."

It strikes me that an "either or" approach may give rise to a problem not addressed in submissions by either side, namely, the date from which time for the claim against the insurer would run under the Statute of Limitations. A litigant who has not joined the insurance company *ab initio* and who assumes that the Statute does not begin to run against his employer's insurer until such time as he has obtained judgment against his employer, may find he is statute-barred if the Court were to accept the construction placed on s.62 by counsel on behalf of the plaintiff. Those contentions, if correct, would mean that the cause of action against the insurer arises at the same time as the cause of action against the employer. Many plaintiffs would find themselves statute barred in the absence of any statutory provision creating an exception for this kind of claim. Thus what might be seen as a difficulty or even an injustice at present might well be replaced or superseded by another of far greater magnitude.

I therefore prefer the interpretation which leans against injustice or illogicality, particularly bearing in mind that the insurer might never be involved at any stage if the employer successfully defends the primary claim.

I therefore accede to the application of the fourth named defendant.