

THE HIGH COURT

[2009 No. 66 P]

BETWEEN

ANN MARIE KIERNAN

PLAINTIFF

AND

COSMEDICO CLINIC DUBLIN LIMITED,

SAMY MALHAS AND MARCO LOIACONO

DEFENDANTS

AND

MEDICAL DEFENCE UNION LIMITED

THIRD PARTY

JUDGMENT of Mr. Justice Binchy delivered on the 30th day of June, 2016

1. By this application, the third party seeks to set aside the third party notice served on it pursuant to an order of this Court dated 7th December, 2015 either pursuant to the inherent jurisdiction of this Court under O. 16 r. 8(3) of the Rules of the Superior Courts or alternatively an order pursuant O. 19 r. 28 of the Rules of the Superior Courts on the grounds that the proceedings disclose no reasonable cause of action. The application is brought against a somewhat unusual background.

2. In January, 2007 the plaintiff underwent a cosmetic procedure, which was performed by the second named defendant at the clinic operated by the first named defendant. The plaintiff alleges negligence on the part of the first and second named defendants in the carrying out of this procedure. As a consequence, she issued a personal injury summons on 7th January, 2009. The third named defendant was named as a defendant as a consequence of a separate procedure and has no involvement in this application.

3. An appearance was entered by the first named defendant on 11th June, 2009, and the summons was served on 12th November, 2009 on O'Rourke Reid Solicitors who had been named as solicitors for the second named defendant on the instructions of the third party. In a letter dated 5th November 2009, to the plaintiff's solicitors, the third party stated "*Mr Malhas was a member of the MDU at the time of the incident and we will be assisting him on this occasion*". Messrs O'Rourke Reid entered an appearance to the proceedings on 16th November, 2009 and on the same date served a request for further information on the solicitors for the plaintiff.

4. Replies were not delivered to this notice until 4th May, 2011; these replies were only delivered on behalf of the plaintiff following the issue of a motion (which was returnable for 9th May, 2011) to dismiss the plaintiff's claim for want of prosecution and / or to compel the plaintiff to reply to the request for information.

5. An offer of settlement of the proceedings was made on behalf of the second named defendant sometime during 2012, but the plaintiff rejected this offer. The third party objects to the disclosure of this offer on the hearing of this application, as it was made without prejudice, and the third party submits that no regard should be had to the same in consideration of this application.

6. On 9th January, 2013, the second named defendant died while resident in Germany. An investigation carried out by the third party disclosed that the second named defendant died insolvent and that the beneficiaries of his estate have disclaimed any interest therein.

7. As a result of the death of the second named defendant, the third party reconsidered the matter and decided against providing any further assistance to the estate of the second named defendant in relation to these proceedings. It instructed Messrs. O'Rourke Reid to apply to come off record and that application was issued and made returnable for 3rd February, 2014.

8. In the meantime the first named defendant had gone into liquidation and the liquidator discharged the solicitors for that defendant by notice filed on 24th October, 2013.

9. At the hearing of the application of O'Rourke Reid to come off record, the plaintiff resisted the motion, but the order was granted. Somewhat unusually, the Court also ordered on that date that the plaintiff should have liberty "to issue a notice of motion seeking liberty to join the MDU to the within proceedings". The plaintiff did not advance such an application.

10. Instead, on 1st April, 2014, the plaintiff issued a motion to appoint an administrator *ad litem* to the estate of the second named defendant. This was heard on 25th June, 2014 and on that date this Court, Cregan J., made an order giving liberty to Philomena Brady (whom I shall refer to hereafter as "the administratrix"), solicitor, of High Street, Trim, Co. Meath to apply for a grant of letters of administration in testate *ad litem* in the estate of the second named defendant, for the purpose of reconstituting these proceedings. Ms. Brady subsequently made application for such a grant which issued on 4th November, 2014.

11. The administratrix then wrote, on 15th January, 2015, to the third party inviting instructions in these proceedings. The third party responded through its solicitors, Arthur Cox, on 26th January, 2015 informing the administratrix that the third party had decided to decline further assistance to the second named defendant and that its solicitors had already been given liberty to come off record in the proceedings. Following the issue of letters of administration in the estate of the second named defendant, the administratrix wrote to Messrs. Arthur Cox enclosing a copy of the letters of administration, and again inviting the third party to "deal with the High Court proceedings" of the plaintiff. On 10th November, 2015, Arthur Cox informed the administratrix that the third party had considered her request and had decided against providing assistance to the estate of the second named defendant.

12. In the mean time, the administratrix had issued a motion to join the third party dated 9th November, 2015 returnable for 7th December, 2015. She did this even though she had not yet brought forward an application to reconstitute the proceedings. The application was grounded on the affidavit of the administratrix dated 10th November, 2015 and in para. 6-9 thereof she deposes as follows:-

"6. I say and believe that at the time of the procedure, the subject matter of the within proceedings, namely 26th January, 2007, Samy Malhas had in place a valid policy of insurance with the Medical Defence Union Limited (MDU) and Messrs. O'Rourke Reid, solicitors, were appointed by the MDU to represent its interests and the interests of the second named defendant in the defence of these proceedings.

7. However, I say that following the death of the second named defendant on or about 9th January, 2013, the MDU withdrew the provision by it of an indemnity to the second named defendant and instructed Messrs. O'Rourke Reid, solicitors, to come off record on his behalf.

8. Subsequently, your deponent was appointed by order of this honourable court made on 25th June, 2014 to act as administrator ad litem in the estate of the second named defendant limited for the purpose of reconstituting proceedings which the plaintiff has instituted against him. In this regard, I beg to refer to a true copy of the said order when produced.

9. I say and believe that the plaintiff is desirous of pursuing her action against the second named defendant and has reconstituted her proceedings for that purpose."

13. The averment set out in para. 9 was, of course, incorrect because the administratrix has still not reconstituted the proceedings, although the Court was informed that an application has been made returnable for this purpose for 4th July, 2016.

14. There followed averments dealing with correspondence between the administratrix and Arthur Cox, and in the penultimate paragraph of her affidavit, the administratrix deposes:

"I say and believe and have been so advised that your deponent could, in the alternative, issue separate proceedings against the MDU seeking, inter alia, declaratory relief and / or an order for specific performance of the Policy of Insurance. However, I say and believe that is it more expeditious, less costly and a better use of court time for the MDU to be joined to these proceedings so that all matters can be attended to and dealt with at the same time. Accordingly, I beg to refer to a draft / third party notice which, subject to the leave of this honourable court, it is proposed to issue and serve upon the MDU and upon which document and marked with the letter "C" I have endorsed my name prior to the swearing hereof."

15. The application to join the third party as such came on for hearing before Gilligan J. on 7th December, 2015 and was heard on an *ex parte* basis and the Court made the order based upon the grounding affidavit of the administratrix. Regrettably, it appears that she did not draw to the attention of the Court the letter from Arthur Cox of 10th November 2014 (stating that that a decision had been made by the board of management of the third party that the estate of the second named defendant should not be assisted.)

16. It can be seen therefore, that the application made by the administratrix was advanced on the basis that the third party has withdrawn an indemnity to the second named defendant, which was provided for in a valid policy of insurance of the third party. The third party notice, having set out the background to the plaintiff's claim states:

"At the time of the said procedure, the second named defendant had a valid policy of insurance with you, the Medical Defence Union. However, to date, the Medical Defence Union has failed to provide an indemnity to the second named defendant in respect of this procedure such that Philomena Brady, an administrator ad litem appointed to defend these proceedings on behalf of the second named defendant, now claims an indemnity from you in relation to this case under the said policy.

17. It is clear from the foregoing that the third party proceedings are based on the proposition that there was in being a policy of insurance as between the second named defendant and the third party, and on no other basis..

Arguments on this application

18. In her affidavit grounding this application, Orla Keane, solicitor for the third party sets out the background to the application as described above. She states that her instructions from the third party are that there was no policy of insurance as between the second named defendant and the third party, and the second named defendant was not entitled to any indemnity from the third party in respect of the plaintiff's claim. She confirms that the second named defendant was entitled to request assistance from the third party (by reason of his membership thereof), but that any such assistance is provided by the third party on a discretionary basis.

19. She says that following notification of the plaintiff's claim, the third party did provide discretionary assistance in the conduct of the second named defendant's defence, as a result of which Messrs. O'Rourke Reid were instructed to act on his behalf. However, this assistance was terminated when the second named defendant died and his estate was found to be insolvent. At that point, the third party exercised its discretion not to provide any assistance to the estate of the second named defendant. Ms. Keane draws attention to articles 45 and 46 of the memorandum and articles of association of the third party company, the effect of which is:-

(i) that the third party may at its discretion provide advice or legal assistance in the defence of a claim;

(ii) that the third party may terminate any advice or legal assistance, in its absolute discretion, at any time and without assigning any reason; and

(iii) that the third party may grant from its funds an indemnity in whole or in part with regard to any action, proceedings, claims or demands by or against any of its members, the estate of a deceased member or the trustees in bankruptcy of any member and may terminate any indemnity at any time at its sole discretion and without assigning any reason.

20. As a consequence of the above, Ms. Keane states that neither Ms. Brady, in her capacity as administratrix, nor the plaintiff have any right to require the third party to provide assistance or indemnity to the estate of the second named defendant.

21. She also argues that had the plaintiff prosecuted her case in a timely manner, the proceedings could "readily have been determined prior to the death of Mr. Malhas".

22. She further avers, without prejudice to her principal point that there is no insurance policy in place and nor was there ever a policy of insurance in place, that the absence of the second named defendant severely impacts upon the conduct of the defence of the proceedings, especially in circumstances where the issue of informed consent to the procedure, about which the plaintiff complains, appears to be a central part of the plaintiff's case. She states that "the plaintiff's delay in prosecuting her action and the death of Mr. Malhas has ensured that difficulties in obtaining full instructions for the conduct of a defence will never be overcome." On all of the above grounds Ms Keane asks for an order striking out or setting aside the third party proceedings.

23. The administratrix responded to the affidavit of Ms. Keane by an affidavit of her own sworn on 11th May, 2016. In what is a short affidavit, she exhibits a letter from the solicitors for the plaintiff dated 26th April, 2016 that sets out the history of the matter from the point of view of the plaintiff. She avers:

"As appears from the said letter, the plaintiff and her solicitors have been engaging with the second named defendant and / or the third party since 2009 and at no stage prior to the application to come off record in February, 2014 was it conveyed to her that they reserved the right to revoke their cover. I further say that as appears from the plaintiff's letter, an offer of settlement was expressly rejected by the plaintiff in and around 2012 on the basis that the third party herein were engaging with the claim and in those circumstances liability and quantum arguments supported her rejection of their offer."

24. She goes on to say that she, the administratrix, is in a position to give instructions on behalf of the second named defendant to the third party and she then further avers that "the plaintiff is entitled to pursue the third party to make good on their promise to indemnify the second named defendant. In this regard, I confirm that I am in the process of reconstituting the proceedings and any delay in that regard should not be held against the plaintiff."

25. Ms. Keane replied to the affidavit of the administratrix by way of supplemental affidavit of 9th June, 2016. She takes issue with any suggestion that the plaintiff was misled as to the nature of the assistance being provided by the third party to the second named defendant. In summary, she avers/argues, inter alia:-

(1) That the plaintiff is not entitled to rely on the initial letter of the third party dated 5th November, 2009 to the solicitor to the plaintiff in support of an argument that the third party had agreed to indemnify the second named defendant. It will be recalled that in that letter it was stated that *"Mr. Malhas was a member of the MDU at the time of the incident and we will be assisting him on this occasion. We have instructed O'Rourke Reid Solicitors of Pepper Canister House, Mount Street Crescent, Dublin 2, Ireland, to deal with the procedural points arising from these proceedings..."* However, Ms Keane points to the pre-printed statement appearing at the end of the letter which states that:-

"The MDU is not an insurance company, the benefits of membership of MDU are all discretionary and are subject to the memorandum and articles of association."

She says that the same or substantially similar information appears at the foot of all correspondence from the third party.

(2) that the memorandum and articles of association of the third party are freely available from its website and / or the registrar of companies and are therefore in the public domain.

(3) Accordingly, the third party's letter to the plaintiff's solicitors of 5th November, 2009 refers to assistance only, and that is qualified by a statement at the foot of the letter and the letter "makes no statement that the MDU would 'cover', 'insure' or 'indemnify' the plaintiff always or at all, as is now claimed."

(4) That insofar as this argument is made at all, it is being made by the administratrix on behalf of the plaintiff in an attempt to advance an estoppel argument. She says that this argument should have been made by the plaintiff at the time Messrs. O'Rourke Reid applied to come off record in 2014, and not indirectly in the context of the within motion. She then goes on to say that events have changed since 2009 and also since 2012, by reason of:-

(i) the insolvency of the second defendant;

(ii) the death of the second named defendant;

(iii) the fact that the beneficiaries of his estate have disclaimed any interest in his estate; and

(iv) the liquidation of the first named defendant and the discharge of its solicitors on 24th October, 2013.

(5) that the administratrix could not give any meaningful instructions to the second named defendant. She says that the administratrix has no information that could be of assistance in the defence of the proceedings and also says that by "setting out views of the plaintiff" in the letter exhibited to her replying affidavit, it is clear that the involvement of the administratrix in this litigation is not of assistance in the defence of the plaintiff's claim".

26. At the hearing of this application, Mr. Barniville SC for the third party submitted:-

(i) That the jurisprudence clearly established that the third party is not an insurer;

(ii) That any assistance given by the third party to its members was discretionary only, subject only to the limitation that that discretion should not be exercised in any whimsical or capricious way (per Megarry VC in *Medical Defence Union Ltd v Department of Trade 1980 CH 82*). Mr. Barniville acknowledged however, that in the case of *Barry v Medical Defence Union Ltd 2005 IESC 41*, Geoghegan J said in the Supreme Court that there is a contractual obligation on the third party to deal fairly with a member's claim, although it was not necessary in that case to determine the extent and nature of that obligation;

(iii) That the administratrix had no *locus standi* to make any arguments based upon estoppel. Such an argument could only be advanced by the plaintiff who is not a party to the third party proceedings or this application;

(iv) That, in any event, there are no grounds upon which an estoppel argument can be made as the plaintiff was not, in any way, misled by the third party;

(v) That the third party has good reasons (set out in para 25(4) above) for terminating its assistance to the estate of the second named defendant; and

(vi) That the administratrix is not in a position to provide any meaningful assistance to the third party in the defence of the plaintiff's proceedings.

27. In reply on behalf of the administratrix, Mr. Craven, S.C., acknowledged that it could not be disputed that there was no policy of insurance in place and further acknowledged that it was not open to the administratrix to advance any arguments based upon estoppel. He said it was regrettable that the administratrix had not yet reconstituted the proceedings, but that such an application was now returnable before the Court on 4th July, and that any procedural difficulties in this regard could be overcome with the indulgence of the court. He also expressed regret for the fact that the administratrix had failed to exhibit the letter of Arthur Cox of 10th November, 2015, at the hearing of the application, to join the third party.

28. He submitted, however, that notwithstanding these concessions, it remained the case that the third party notice was correct in stating that the third party has failed to provide an indemnity to the estate of the second named defendant, and that being the case, the administratrix is entitled to claim such indemnity. He submitted that in the exercise of the inherent discretion of the Court, the Court is entitled to take into account that documents disclosed on discovery or evidence given at the trial of the proceedings may well establish that the discretion enjoyed by the third party was not exercised fairly, or may have been exercised in a manner that was procedurally incorrect.

Decision

29. The application to join the third party to these proceedings was grounded on the affidavit of the administratrix. In para. 6 thereof, she says that the second named defendant had a valid policy of insurance with the third party, but that the third party withdrew the provision of an indemnity to the second named defendant following upon his death. At para. 13 of her affidavit, she says that:-

"In circumstances where the MDU has failed as yet to confirm the provision of not (sic) of an indemnity to your deponent in respect of these proceedings, I say and believe that it is now necessary for your deponent to join the MDU as a third party to this claim."

30. Consistent with that, the third party notice, very clearly asserts that there was a valid policy of insurance as between the second named defendant and the third party, and on that basis the administratrix claims an indemnity under the terms of the policy. It is now acknowledged, correctly, in my view, that it is not open to the administratrix to advance any such claim because the nature of the relationship between the second named defendant and the third party was not one of insurer/insured and there was no insurance policy in place. Therefore, the administratrix is forced to make another argument which is not advanced either in the affidavit grounding the application to join the third party as such, or in the third party notice itself or indeed, in the replying affidavit of the administratrix to this application. The Court is left to speculate upon the grounds which the administratrix might advance to assert an indemnity and in his submissions, Mr. Craven S.C. suggested that the third party should be entitled to examine the reasons for the decision to terminate assistance to the estate of the second named defendant in case they are unfair or not made in accordance with the procedural requirements of the third party. However, there is no allegation of any kind made as against the third party in relation to its decision to terminate assistance.

31. It is very clear that only one case is made against the third party and that is based upon the allegation that the second named defendant had a policy of insurance with the third party. No other case can be inferred from the pleadings and nor has any argument been made that the pleadings could be amended in any way so as to save the third party proceedings from this application. This is not surprising, as it is difficult to see what amendment would achieve that end. It is clear therefore that this application must succeed as the proceedings disclose no reasonable cause of action and have no reasonable prospect of success. The applicant is, therefore, entitled to an order pursuant to Order 19, rule 28 of the Rules of the Superior Courts.

32. I have arrived at the above conclusion on the basis of the pleadings only. However, if the Court were required to consider the application from the point of view of the inherent jurisdiction of the Court, then the court would be entitled to enter upon some consideration of the facts of the case. While it may not be, strictly speaking, necessary to do so in view of the conclusion already made, I think that such consideration leads to the conclusion that the third party notice should be set aside pursuant to the inherent jurisdiction of the court also.

33. The indemnity that is available to members of the third party is for their benefit and not for persons claiming against them, although in practical terms it operates to that effect also. But in the context of assessing the fairness (assuming for present purposes only that in a general way that is the correct test) of any decision of the third party to terminate assistance to a member or the estate of a deceased member, such an assessment can only be made from the point of view of whether or not it is fair to the member, or as in this case, his estate, and not a plaintiff. In this case, the deceased member's estate is insolvent and the beneficiaries of his estate have declined any benefit. Since there are no assets in the estate of the second named defendant, and no beneficiaries who can be prejudiced if the plaintiff proceeds to obtain judgment against the administratrix of his estate, it is difficult to see how any arguments impugning the decision of the third party (on grounds of fairness, or other procedural grounds) could succeed because the decision cannot operate to the detriment of the deceased member or his estate. Moreover no discovery of documents can alter this state of affairs.

34. It is, of course, prejudicial to the plaintiff, but the plaintiff has no privity of any kind with the third party. To the extent that she may argue that she placed reliance upon the earlier indications that indemnity was being provided (although this decision had not actually been taken by the third party; it had only made the more preliminary decision of providing assistance to the second named defendant in the defence of the proceedings) and that such reliance operates to estop the third party from denying indemnity, that is an argument that only the plaintiff can make and not the administratrix.

35. The plaintiff was on full notice of all of these matters and indeed, unsuccessfully opposed the application of Messrs. O'Rourke Reid to come off record, on the instructions of the third party, although it does not appear that she filed any affidavit on that application. In acceding to the application of O'Rourke Reid, Ryan J. (as he then was) ordered that that firm should furnish to the solicitor for the plaintiff all relevant information in their possession and gave liberty to the plaintiff to issue a motion seeking liberty to join the third party to the proceedings. The plaintiff chose not to do that and instead orchestrated the appointment of the administratrix with a view to having her taking whatever action was appropriate to secure an indemnity.

36. Insofar as the third party has placed some reliance on the difficulty that it will have in defending the plaintiff's proceedings on behalf of the estate of the second named defendant, Mr. Craven S.C. said that it is not unusual for cases against doctors to proceed after their death and for indemnity to be provided. This may well be so and, indeed there is provision for indemnity after the death

and/or insolvency of a member in the memorandum and articles of association of the third party. However, Ms. Keane in her affidavit makes the point that the third party would indeed be prejudiced because the issue of informed consent to the procedure in respect of which the plaintiff issued her proceedings is, according to Ms. Keane, a central part of the plaintiff's case. Ms Keane says that the plaintiff's delay in prosecuting her action and the subsequent death of the second named defendant has ensured that difficulties in obtaining full instructions for the conduct of a defence will never be overcome. Her averment in this regard was not disputed by the administratrix in her replying affidavit.

37. While it is misfortunate that the plaintiff declined an offer in settlement of the proceedings, there is always a risk on the part of a plaintiff in declining a settlement offer. Any number of things can go wrong from a plaintiff's point of view after an offer has been declined: new evidence may come to light adverse to the plaintiff's case; a crucial witness may die; a defendant who is not indemnified may become insolvent; or an insurance indemnifier may become insolvent. In this case, the sequence of events that have led to the decision of the third party may, cumulatively, be remote and very misfortunate from the point of view of the plaintiff, but such events, remote as they may be, form part of the risks of litigation.

38. This decision highlights something that is probably not widely known and that is that it is not in law a requirement that doctors must hold professional indemnity insurance in order to practice in Ireland. There is before the Houses of the Oireachtas at the moment the Medical Practitioners (Amendment) Bill 2014 that makes provision for medical practitioners to ensure that they have the minimum level of indemnity applicable to him or her. It might be thought that would, when passed into law, overcome the difficulty encountered by the plaintiff in these proceedings, but of concern is the definition of "indemnity" in s. 2 of the Bill which is defined as meaning:-

"A policy of medical indemnity insurance, or other indemnity arrangement, against losses arising from claims in respect of civil liability incurred by a medical practitioner in respect of any act or omission of that medical practitioner arising from his or her practice as a medical practitioner."

39. I have emphasised the words "other indemnity arrangement" because it seems to me that they are clearly designed to facilitate precisely the kind of cover provided by the MDU to its members. While I appreciate that the circumstances in which the MDU may decline indemnity are likely to be quite rare, and while the particular circumstances of this case are especially so, the fact of the matter is that from the point of view of the public, whose interest in the provision of indemnity is at least as significant as that of the medical practitioner, the provision of an indemnity that is dependant upon the exercise of a discretion must afford the public less protection than the provision of indemnity through a policy of insurance to which s. 62 of the Civil Liability Act, 1961, applies.