Neutral Citation [2014] IEHC 692

THE HIGH COURT

[2012 No. 4802 P]

BETWEEN:

MICHAEL MURPHY

PLAINTIFF

AND

ALLIANZ PLC

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 5th day of December, 2014

1. This is an application brought by the defendant, pursuant to Order 19, Rule 28 of the Rules of the Superior Courts 1986, to strike out proceedings commenced by the plaintiff on the basis that they disclose no reasonable cause of action and are bound to fail.

Background

2. The reliefs sought by the plaintiff in these proceedings refer to earlier proceedings of 2004 entitled *Michael Murphy v Bri-Mo Limited and Patrick McShane*. In the 2004 proceedings, the second named defendant, Patrick McShane, was a labour-only sub-contractor on a site on which Bri-Mo Limited, the first named defendant, acted as the main contractor. The plaintiff was a bricklayer employed by, and working under, the direction and supervision of Mr. McShane. On or around the 9th of January, 2004, some blocks fell from a wall on the foot of the plaintiff, causing him damage.

3. The incident of 9th January, 2004, was reported to Allianz over a year after its occurrence, on foot of which Allianz engaged with Bri-Mo's brokers, Jardine Lloyd Thompson. By letter dated 27th May, 2005, to Bri-Mo's brokers, Allianz noted that, as this was the first notification, it could not confirm indemnity, and it made certain inquiries in relation to the accident. By further letter dated 10th June, 2005, to Bri-Mo's brokers, Allianz sought outstanding wage declarations under Policy Condition No. 8 and reserved its rights under the policy pending resolution of this and any other issues. During this time, Allianz also received certain correspondence from the solicitor for the plaintiff, providing information in respect of the claim and noting that the solicitors firm Fitzsimons Redmond had entered an appearance on behalf of Bri-Mo. Allianz's request for outstanding wage declarations was repeated in a letter dated 21st March 2006 to Bri-Mo's brokers, wherein Allianz advised that it might repudiate the claim if the broker was not resolved within 14 days. However, neither Bri-Mo nor its brokers supplied the outstanding wage declarations. By letter dated 17th May 2006, Allianz wrote to Bri-Mo's brokers, noting that the declarations had not been furnished and confirming that it was withdrawing indemnity under the policy and that the policyholder must make its own arrangements to defend the claim of Michael Murphy. Allianz confirmed that it was closing its file in relation to the matter. Bri-Mo Limited never sought to challenge, at that time or since, Allianz's refusal of an indemnity and repudiation of liability in respect of the plaintiff's claim.

4. On or around 19th September, 2010, Bri-Mo was struck off the Register of Companies. By order dated the 14th of November, 2011, this Court (Ryan J.) granted the plaintiff judgment in default of defence against Bri-Mo with the amount of damages to be assessed before a judge without a jury.

Submissions

5. I think it is appropriate at this juncture to deal with submissions in a thematic way in order to properly reflect on the issues raised.

Section 62 of the Civil Liabilities Act, 1961

6. The plenary summons of the plaintiff, dated 15th May, 2012, seeks five substantive reliefs: the first two substantive reliefs seek respectively a declaration and an order pursuant to s. 62 of the Civil Liability Act 1961 that such damages and costs as may be awarded to the plaintiff in the 2004 set of proceedings against Bri-Mo Ltd. and Patrick McShane constitute monies payable to the plaintiff in a discharge of a valid claim which the defendant is obliged, under the terms of an insurance policy between it and Bri-Mo Ltd., to pay the plaintiff; the third, fourth and fifth substantive reliefs seek damages for breach of statutory duty, breach of contract and negligence and negligent misstatement and/or misrepresentation and breach of duty, respectively.

7. Counsel for the defendant submits that, insofar as s. 62 of the Civil Liability Act 1961 is concerned, the plaintiff's claim discloses no reasonable cause of action and/or is bound to fail for two reasons:

> (A) Firstly, s. 62, on its terms, applies only where a person who has effected a policy of insurance in respect of liability for a wrong "if an individual becomes bankrupt or dies or, if a corporate body is wound up, or if a partnership or other unincorporated association is dissolved." In this case counsel submits, Bri-Mo, a corporate body, had affected a policy of insurance with Allianz. However, while Bri-Mo was struck off the Register of Companies in 2010 for failure to file annual returns, it was not wound up, either voluntarily or by order of this Court. Thus, the defendant submits that s. 62 of the civil liability act 1961 has no application to these proceedings because Bri-Mo Ltd. is not now and never was in liquidation. It is clear from oral submissions as made to the Court that the plaintiff has no fixed intention to wind up Bri-Mo Ltd. The defendant argues that the plaintiff has taken no steps to place the company in liquidation either since the institution of these proceedings on 15th May 2012 or since the restoration of the company to the register on 25th November, 2013. The defendant argues that the liquidation of Bri-Mo Ltd is not a mere technical requirement that might be overlooked at the discretion of the parties or the Court. It is a fundamental precondition to the insurer's liability under s. 62 of the Civil Liability Act 1962. On this basis alone, the defendant submits that the proceedings ought to be struck out. For this reason, counsel for the defendant contends that s. 62 of the Act of 1961 does not apply in this case.
>
> (B) Further, s. 62 goes on to provide that "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…" Mr. McShane did not hold employer's liability insurance. However, Bri-Mo maintained employer's liability insurance with Allianz under a Combined Construction Policy. Policy Condition No. 8, entitled 'Premium Adjustment,' requires the insured party to supply

certification of wages, salaries, and other earnings or of turnover for the period of insurance within 90 days of the expiry of the said period and provides *inter alia* that, if this is not supplied, Allianz will not provide any indemnity for bodily injury which might otherwise be the subject of an indemnity. As set out by Policy Condition No. 1, the observance and fulfilment of the terms and conditions of the policy are conditions precedent to any liability on the part of Allianz to make any payment under the policy. As such, counsel for the defendant submits that due to the failure of Bri-Mo to observe the condition precedent under Policy Condition No. 8 relating to the supply of wage certification, Allianz was entitled to, and did in fact, refuse an indemnity and repudiated liability in respect of the plaintiff's claim against Bri-Mo under the relevant policy of insurance. Bri-Mo never, at the time of repudiation or since, has challenged the said refusal of indemnity and repudiation of liability. Counsel argues that the plaintiff cannot now go behind that decision. The only party entitled to challenge that decision would have been Bri-Mo itself and even that party could not do so at this juncture, over seven years after it was made.

8. The defendant also submits that there is no contract or contractual nexus between the parties which could found a claim for damages for breach of contract. Further, it is submitted that the defendant owes no duty of care to the plaintiff. Counsel relies on the case of *Hu v Duleek Formwork Ltd. (In Liquidation) and Aviva* [2013] IEHC 50 in this regard. Having considered certain classes of relationship where a duty of care had been found to exist on the basis of sufficient proximity, such as the duty of a solicitor to a beneficiary under a will, Peart J. stated at paragraph 20:

> *"But I know of no case where the Courts have found a duty of care to exist between an insurance company and a potential claimaint against the insured party, and have been referred to none. It would not be right in the present case in such circumstances to extend the law that far, so as to find that the plaintiff might reasonably argue his claim against Aviva under the law of negligence."*

9. Counsel for the plaintiff submits that the defendant's notice of motion should be struck out and the plaintiff be allowed to proceed with his action. Following the authority of *McCarron v Modern Timber Homes Ltd (In Liquidation) & Ors* [2012] IEHC 530 counsel states that it is clear from the judgment of Kearns P. that the plaintiff has adopted the entirely correct procedure in first seeking judgment as against his employer Bri-Mo Ltd. before seeking redress against Allianz as Bri-Mo's insurer. In *McCarron*, Kearns P. held that it was inappropriate to join an insurer in proceedings until the primary claim as against the employer had been determined. Thus the plaintiff's case against Allianz could only proceed upon determination of the primary claim against Bri-Mo Ltd. That claim has been duly determined in the plaintiff's favour with only the matter of the assessment of damages being outstanding. Counsel argues that Allianz, being aware of the original proceedings against Bri-Mo Ltd. could have applied to be joined as a party to those proceedings but it chose not to) The claim against Allianz should now proceed in order to establish their liability to pay those damages.

10. Moreover, counsel for the plaintiff argues that given the serious nature of the application of Allianz for Mr. Murphy, effectively terminating the possibility of his recovering compensation for his injuries by way of these proceedings, Mr. Murphy is entitled to have the evidence adduced by Allianz tested in the normal way. Mr. Murphy should be entitled to cross-examine a witness from Allianz as to whether the policy being relied on by Allianz to see whether or not the policy was entered into and whether the terms and conditions were furnished to Bri-Mo Ltd or its broker. In addition, in the course of these proceedings, Mr. Murphy will seek third party discovery from Bri-Mo Ltd and its broker (if any) and any other relevant parties which evidence may strengthen the plaintiff's case. Counsel argues that it would be premature and an unwarranted intrusion on the plaintiff's right to litigate to dismiss this claim at this time.

Repudiation of indemnity

11. Fundamentally, the plaintiff challenges the repudiation of the insurance claim by Allianz on three main grounds:

> (1) That the correspondence exhibited by the defendant constitutes hearsay;
>
> (2) That there is no evidence of JLT's role or of communication with BRI-MO directly;
>
> (3) And that the repudiation was not a valid one because the condition invoked did not entitle Allianz to repudiate

12. Counsel for the plaintiff submits that no evidence has been exhibited to show that Bri-Mo Ltd. were ever informed of or knew about any repudiation of indemnity. No evidence has been exhibited to show that Jardine Lloyd Thompson ("JLT"), acting as broker for BRI-MO Limited, were ever informed of or knew about any repudiation. No evidence has been exhibited to show that Allianz were entitled to ignore Bri-Mo Ltd in dealing with the matter the way they did. No evidence has been exhibited to show that there were valid grounds for any repudiation in the first place.

13. The plaintiff further submits that the difficulty that the plaintiff has is that Allianz is seeking to avoid its direct liability to Bri-Mo Ltd and its contingent and indirect liability to Mr. Murphy by relying on a clause to repudiate its policy with Bri-Mo Ltd. In fact, the plaintiff argues, the legal position is that the clause being relied on by Allianz does not entitle to it and would not entitle it to repudiate its policy to Bri-Mo Ltd or its ultimate contingent liability to Mr. Murphy.

14. In response, the defendant argues that there can be no real dispute about the repudiation of the claim in this case and that the evidence before the Court confirms that the claim was validly repudiated. The defendant points to the correspondence between JLT and Allianz – which has been exhibited behind the affidavits of Ms Helen Rackard (solicitor for the defendant) and, most recently, behind the affidavit of Paul Griffin (claim's handler in defendant company) – which the defendant claims puts the position beyond doubt. Counsel submits that the correspondence confirms that BRI-MO Ltd at all times acted through its broker JLT; that the claim was first notified on 20th May, 2005, over 16 months after the accident occurred, and over a year after the plaintiff had initiated his proceedings; that Allianz at all times reserved its position in respect of policy indemnity; that Allianz sought, on a number of occasions over the course of almost a year, outstanding declarations in respect of wages which were required under the policy but that these were never furnished; that eventually, after affording the insured every opportunity to comply with this requirement, Allianz repudiated the claim on this basis; and that there was no response, still less a challenge, to the repudiation from either BRI-MO or its broker, JLT.

15. In response to the statements of Mr. Adrian Ledwith's (solicitor for the plaintiff) affidavit, supporting the contention that the policy was not validly repudiated by Allianz, the defendant submits that these statements simply speculate or suggest uncertainty about the modalities of repudiation. There is no denial of the repudiation or the basis of repudiation as such by Mr Ledwith. There is no suggestion that the repudiation was ever challenged by or on behalf of Bri-Mo.

16. The defendant submits that the plaintiff simply has no standing or authority to make these arguments challenging the repudiation of the claim because there is no privity of contract between Allianz and the plaintiff. If the repudiation were to be challenged, it is

submitted by the defendant, it is the insured (Bri-Mo Ltd.) which would have the necessary standing and authority to challenge it. However, even an insured would have to do so in a timely fashion. It is submitted by counsel for the defendant that such a claim at this remove would not only be impermissible under the policy (policy condition no. 11 provides that "claims not referred to arbitration within 12 calendar months from the date of disclaimer of liability shall be deemed to have been abandoned") but it would also clearly be statute-barred (Section 11(1) (a), Statute of Limitations Act 1957.) It is further submitted by counsel that there is no basis in law for permitting a third party to challenge a repudiation of a claim for indemnity some eight years after the repudiation took place.

17. The plaintiff takes issue with the role of Jardine Lloyd Thompson and the failure to communicate the repudiation to Bri-Mo Ltd directly. As requested by the Court, the defendant submitted that it has placed all communications in relation to this claim between Allianz and the solicitor for the plaintiff before the Court in chronological order in the affidavit of Mr. Paul Griffin. The defendant further contends that it is abundantly clear from the evidence before the court that JLT at all times acted as broker and agent for Bri-Mo Ltd.

18. In relation to the policy condition at paragraph 1, the plaintiff contends that an obligation to return an "auditor's certificate" in respect of "wages, salaries and other earnings and/or turnover" within "90 days of the expiry of each period of insurance" is an event which simply cannot occur before the policy itself comes into effect. It is therefore argued that it is not a condition precedent to the validity of the policy. Counsel argued that this term of the policy could not be and could not have been a condition precedent either to the policy coming into effect or the obligation to pay out on foot of the policy. It is clear, the plaintiff suggests, on its true construction, that this is a "condition subsequent" or a "collateral stipulation."

19. The plaintiff seeks to rely on the judgment of the English Court of Appeal in *Re Bradley v Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 4 & 5. In this case, there was a clause making "observance and fulfilment" of the policy conditions a condition precedent to any liability. The plaintiff in this case was a farmer. His proposal form indicated that there were one or two employees. Condition 5 of the policy required the insured to keep a wages book and required him to furnish a correct account to the insurance company. The wages book was not kept. Cozens–Hardy M. R. held:

> "I think the fifth condition is one and entire, and it is to my mind unreasonable to hold that one sentence in its middle is a precedent while the rest of the condition cannot be so considered. A policy of this nature, in case of ambiguity or doubt, ought to be construed against the office and in favour of the policy-holder, and it seems to me unreasonable to hold that the office can escape from all liability by reason only of the omission to duly record in a proper wages book the name of every employee and the amount of his wages. This is only required for the purpose of the statement which, by the proposal, the insured agreed to render at the end of each period of insurance. In my opinion, it ought not to be regarded as in any sense a condition precedent, and it follows that, in my opinion, the appeal fails and must be dismissed with costs."

20. The plaintiff submits that this authority lends substantial support to the plaintiff's claim. It is submitted that, on any analysis, it renders the plaintiff's claim that the policy has not be repudiated as, at an absolute minimum, a viable claim. The plaintiff contends that there is no evidence before the court that the policy was ever sent to Bri-Mo Ltd and there is no evidence that BRI-MO Ltd was ever notified that anything was outstanding. The letters to Jardine Lloyd Thomas referred to "declarations" on 10th June 2005 and "outstanding wage declarations," on 23rd March, 2006. At no time is there reference to the actual condition being relied on or to the allegedly outstanding "auditor's certificate." The plaintiff submits that the letter reporting to repudiate the policy, dated 17th May, 2006, referred to outstanding "audited wage declarations" rather than an outstanding "auditors' certificate." The plaintiff submits that the repudiation, even on its own terms, was defective.

21. The plaintiff further relies on the judgment of the English Court of Appeal in *George Hunt Cranes Limited v Scottish Boiler and Insurance Company Limited* [2002] 1 All E.R. (Comm) 366. This judgment has been noted in Buckley on Insurance Law (3rd Editions at paragraphs 538-539.) There, the author noted that "a blanket classification of a series of terms as 'conditions precedent' was to be viewed with suspicion and each terms had to be considered separately." The plaintiff submits that the term of the policy is not a condition precedent but was either a mere warranty or a collateral stipulation.

22. Alternatively, the plaintiff submits that the identified condition relied upon by Allianz was, if not a mere condition or collateral stipulation, a condition subsequent. The plaintiff contends that it is clear that the policy was effective as of the date of Mr. Murphy's accident on 9th January, 2004. When the claim was notified to Bri-Mo Ltd on 11th March, 2004, the plaintiff argues that the policy was effective and subsisting. The plaintiff states that the complaint about an outstanding "auditors' certificate" could not have arisen until 90 days after, until March 2005 i.e. 90 days after the conclusion of the relevant insurance period. The plaintiff submits that it would be illogical that Allianz have an ongoing liability to Bri-Mo Ltd from January 2004 to March 2005 and then it disappeared. That would be to operate as a retrospective invalidity. There is no provision for that in the contract.

23. The judgment of Kearns J. in *McCarron v Modern Timber Homes Limited* (Kearns J, 3rd December 2012) was delivered after the plaintiff issued his proceedings. The plaintiff argues that it would appear from this decision that the Court held that the Statute of Limitations does not run against a plaintiff seeking to rely on s. 62 of the Civil Liability Act 1961 until the insured company has been put into liquidation and damages have been assessed. In these circumstances, the plaintiff argues that the issuing of proceedings by Mr. Murphy was necessary and prudent. These proceedings ought to be seen as a "protective writ" in that regard, the plaintiff argues, and it should be noted that the proceedings were issued two days before the expiry of six years from the date of the purported repudiation of the policy.

24. In relation to the plaintiff's reliance on *Bradley v Essex & Or* [1012] 1 KB 4 & 5 in submitting that Allianz was not entitled to repudiate because the condition relied upon was not, or ought not to have been, a condition precedent, counsel for the defendant submits that this authority is of no assistance to the plaintiff. Firstly, it is argued that *Bradley* is entirely distinguishable from the present case because the challenge to the refusal of an indemnity was taken by the insured himself against the insurer and in a timely fashion. In this instant case, the defendant submits that there is simply no privity of contract between the plaintiff and Allianz, and the challenge is being made some eight years after the repudiation. Secondly, the defendant submits, the condition precedent in *Bradley* is in any event distinguishable from the condition at issue in these proceedings, Policy Condition No. 8. This condition explicitly provides, at (b) (ii), that "should the insured fail to supply such auditors' certificate in accordance with this Condition then the company will not provide any indemnity for any bodily injury nuisance or loss of or damage to material property which might otherwise be the subject of indemnity under this policy in the period of insurance for which the auditors' certificates remain outstanding." The defendant submits that the consequences of non-compliance with Policy Condition No. 8 in this case could not have been set out in clearer terms in the provision.

25. In the plaintiff's supplemental submissions, it is stated that, in having purported to repudiate its policy with Bri-Mo Ltd, Allianz "has behaved in an opportunistic manner." In the affidavits filed on its behalf, it is suggested that Allianz gave the plaintiff an

undertaking which it failed to honour and that, had the plaintiff been advised of the repudiation, "the plaintiff's case would have been dealt with in an entirely different manner" (Second affidavit of Adrian Ledwith sworn on 15th May 2014.) However, counsel for the defendant argues that none of this is borne out by the facts before the Court. The plaintiff initiated the proceedings on 29th April 2004. By the time the claim was notified to Allianz in its capacity as Bri-Mo's insurer, Bri-Mo had already instructed solicitors, Fitzsimons Redmond, to act on its behalf in respect of the proceedings. The statement of claim was delivered to the first named defendant in late 2007 and to the second named defendant in early 2008. Solicitors entered an appearance on behalf of Mr McShane on 25th June, 2008. In January 2010, Fitzsimons Redmond informed the plaintiff's solicitor that Allianz was not providing an indemnity. In July 2010, Fitzsimons Redmond informed the plaintiff's solicitor of their intention to come off record. Between May 2005 and July 2010, Bri-Mo had solicitors on record for it in the proceedings with whom the plaintiff's solicitor dealt directly. On or around 19th September 2010, Bri-Mo was struck off the Register of Companies. It was not until 14th November 2011 that the plaintiff obtained judgment in default of defence against Bri-Mo Limited, well over 7 years after initiating the proceedings. The plaintiff does not appear to have pursued Mr McShane, who was his direct employer, and has offered no explanation for not doing so. It was only some months after he obtained judgment in default of defence against Bri-Mo, in March 2012, that the plaintiff's solicitor sought to re-engage with Allianz, which, counsel alleges, he had known for some time, had long since repudiated the claim. While it is for the plaintiff to explain why the proceedings were advanced in this manner, and why the plaintiff's solicitor never engaged with Allianz from 18th January 2006 until March 2012, it is implausible for the plaintiff or his solicitor to suggest, in the context of this motion, that the responsibility for the manner in which the proceedings have been conducted like with Allianz. The plaintiff's claim, insofar as it subsists, is against Bri-Mo Limited and Mr McShane, not Allianz, the defendant submits.

26. In respect of the claim, as appears from the correspondence between Allianz and JLT, notwithstanding the late notification of the claim on behalf of Bri-Mo, Allianz investigated the claim and engaged with both Bri-Mo and the plaintiff's solicitor in this regard. However, despite being afforded every opportunity to submit the required documentation over the course of almost 12 months, Bri-Mo failed to furnish the necessary auditor's declarations in respect of wages required under policy condition no. 8. For this reason, Allianz eventually repudiated liability in respect of the claim on 17th May 2006.

27. In respect of these proceedings, when Mr Ledwith re-engaged in correspondence with Allianz in March and April 2012, Allianz confirmed the refusal of indemnity to him under cover of letter dated 25th April 2012. Although the plaintiff's solicitor knew of the repudiation since at least 2012, the plaintiff's solicitor nonetheless threatened proceedings against Allianz, which then issued on 15th May 2012. Despite issuing the proceedings, and Allianz's entry of an appearance on 30th May 2012, no statement of claim has ever been delivered and no steps whatsoever were taken in relation to the proceedings. Having received no response to correspondence from solicitors for the defendant to the plaintiff's solicitor asking that proceedings be discontinued, the defendant thereafter issued this motion to strike out the proceedings.

28. Counsel for the defendant argues that at the time these proceedings were instituted, on 15th May, 2012, the plaintiff's solicitor was, or ought to have been, aware that Bri-Mo was not and never had been in liquidation. The plaintiff's solicitor was also aware, from at least January 2010, that Bri-Mo's claim for an indemnity had been repudiated by Allianz. In the circumstances, it is argued by the defendant, the plaintiff's solicitor was, or ought to have been, aware that the plaintiff had no valid cause of action against Allianz. Notwithstanding this knowledge on the plaintiff's solicitor's part, proceedings were threatened and then issued on behalf of the plaintiff against Allianz. Having taken no steps in the proceedings since they issued on 15th May 2012, and having failed to comply with its obligation to deliver a statement of claim, the plaintiff now seeks to resist this motion to strike out on the basis that the plaintiff might now proceed to have damaged assessed against Bri-Mo and have Bri-Mo placed in liquidation. The defendant concludes by saying that in the interests of the efficient use of court time, the proceedings should have been discontinued following the letter from the solicitors for the defendant dated 27th January 2014.

Hearsay Evidence

29. Counsel for the plaintiff argues that that affidavit of Ms. Rackard is almost entirely comprised of hearsay evidence. Ms. Rackard's averments represent out of court statements from employees of Allianz or they are relying on documents which would have to be proved by an employee of Allianz. In that regard, the plaintiff notes the recent judgment of O'Malley J. in *Ulster Bank Ireland Limited v Darmody* [2014] IEHC 140 where she upheld the well-established proposition that an employee of a related company could not give evidence as to the books and records of that company in proceedings. O'Malley J. placed reliance upon *The Criminal Assets Bureau v Hunt* [2003] 2 IR 168.

30. In response, counsel for the defendant argues that it is specifically provided in article 40, rule 4 of the Rules of the Superior Courts, and well-established in the practice of the Courts, that hearsay may be included in affidavits in interlocutory applications. In this case, Ms. Helen Rackard has exhibited the correspondence and other documents, including the policy, from her client's file. This documentation speaks for itself and it is hearsay only on the most technical sense. Insofar as the plaintiff relies on the decision of O'Malley J. in the High Court in *Ulster Bank v Dermody* [2014] IEHC 140, it is submitted by the defendant that this decision concerned the very different issue of the admissibility of banking records and, in any event, arose in the context of an application for summary judgment, as opposed to an interlocutory application in plenary proceedings.

Application to "Stay" Proceedings

31. Counsel for the plaintiff, in its oral and supplemental submissions, argues that conflicts in evidence between parties are to be resolved in favour of the party against whom a dismissal is sought (*CNN v Butterley* [1997] 1 ILRM 28 and *Mehta v Marches* The High Court 5 March 1996.) Applying this legal tenet to the application of Allianz, counsel argues that it is clear that there is a factual contest as to whether Allianz in fact sought any information from Bri-Mo Ltd and there is a further contest as to whether Allianz or Jardine Lloyd Thompson communicated Allianz's information requirements to Bri-Mo Ltd or warned Bri-Mo Ltd of the potential repudiation. These matters are clearly and directly in dispute. The Courts have established that a claim should not be dismissed where a stay of proceedings might afford a fair resolution for the parties.

32. It is submitted by the defendant that this is not an appropriate case in which to grant a stay of proceedings for the following reasons:

(1) As things currently stand, the plaintiff has no cause of action against Allianz;

(2) While the plaintiff now seeks a stay on the basis that it would proceed to seek an assessment of damages and to place Bri-Mo in liquidation, the plaintiff has not offered any undertaking to the Court in this regard;

(3) Even if such an undertaking were offered at this late stage, it is appropriate to have regard to the fact that the plaintiff has taken no steps on either front since he obtained judgment in default of defence on 14th November, 2011, almost two and a half years ago, and since he initiated these proceedings on 15th May, 2012, over two years ago;

(4) The plaintiff has also failed to comply with the Rules of the Superior Courts by failing to deliver a statement of claim. Indeed it is suggested that, having initiated the proceedings, a statement of claim could not be drafted and delivered "pending advices from Allianz as to why they were repudiating liability and their failure to provide this information";

(5) Even if the plaintiff sought an assessment of damages and placed Bri-Mo in liquidation at this stage, he would still face the fundamental difficulty that he has no valid claim in respect of which moneys are payable within the meaning of s. 62 of the Civil Liability Act 1961 because the claim under Bri-Mo's policy has been validly repudiated over eight years ago;

33. For all these reasons, and in light of the broader circumstances in which the proceedings have been instituted, it is submitted by the defendant that this is an appropriate case for the exercise of the Court's sparingly used jurisdiction to strike out proceedings. In circumstances such as the instant case, it is clear from the two recent authorities of this Court, *Richard McCarron v Modern Timber Homes Ltd (In Liquidation) & Ors* [2012] IEHC 530 and *Hu v. Duleek Formwork Ltd. (In Liquidation) and Aviva* [2013] IEHC 50, that the appropriate course of action where there is no valid cause of action is to strike out the proceedings entirely.

Conclusion

34. The jurisdiction to strike out proceedings can arise in two ways, which are clearly set out in the seminal judgment of Costello J. in Barry v. Buckley [1981] 1 I.R. 306. First, Order 19, rule 28 of the Rules of the Superior Courts permits the Court to strike out any pleading "on the ground that it discloses no reasonable cause of action..." or, in the case of the action being shown by the pleadings to be frivolous or vexatious, permits the Court to stay or dismiss the action. Secondly, apart from Order 19, rule 28, "the Court has an inherent jurisdiction to stay proceedings", a jurisdiction which "exists to ensure that an abuse of the process of the Court does not take place". 3 Costello J. continued:

> "This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the plaintiffs case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant."

35. In *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425, the Supreme Court (McCarthy J.), after referring to *Barry v. Buckley*, commented:

> "... By way of qualification of the jurisdiction to dismiss an action at the statement of claim stage, I incline to the view that if the statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed.
>
> Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought.
>
> Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture. With that qualification, however, I recognise the enforcement of a jurisdiction of this kind as a healthy development in our jurisprudence and one not to be disowned for its novelty though there may be a certain sense of disquiet at its rigour. The procedure is peculiarly appropriate to actions for the enforcement of contracts, since it is likely that the subject matter of the contract would, but for the existence of the action, be the focus of another contract."

36. These principles have been consistently upheld in the Superior Courts of Ireland and most recently in the Supreme Court judgment of Clarke J. in *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21 at paras. 2.3 – 2.9, which judgment succinctly deals with the distinction between the inherent jurisdiction and the jurisdiction under the Rules of the Superior Courts, and the entitlement of this Court acting under its inherent jurisdiction to look beyond the pleadings to the facts of the case which have been placed before the court. This Court accepts that the jurisdiction involved is one to be used sparingly.

37. The central issue in my view in this matter is the application of s. 62 of the Civil Liability Act 1961, which states:-

> "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, moneys 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 moneys are payable, and no part of those moneys 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."

38. It is in my view quite clear that in order for the plaintiff to be in a position to succeed under s. 62 of the Civil Liability Act 1961, the insured company must, in this instance, be wound up and secondly, monies payable to the insured under the policy shall be applicable only to discharge in full all valid claims against the insured in respect of which monies are payable.

39. The factual situation which is not contested is that the insured, in this instance Bri-Mo Ltd, is not now and never has been in liquidation and despite the submissions as made by counsel on behalf of the plaintiff in an effort to circumvent the factual situation that prevails, in my view it is a basic principle for the plaintiff to set up its case that Bri-Mo Ltd would have to be wound up. Accordingly, the facts of this case do not bring the plaintiff within the provisions of s. 62 of the Civil Liability Act 1961, and on this principal basis alone it is the view of this Court that the plaintiff's case cannot succeed and is, in effect, doomed to failure.

40. In respect of the subsidiary argument that even if Bri-Mo Ltd was in liquidation, again to set up the plaintiff's case he would have to satisfy the court that he was entitled to monies payable to the insured under the policy and I am satisfied, having regard to the particular circumstances of this case, that the claim that was brought in respect of the plaintiff's injury was validly repudiated by the defendants over seven years previously and that the solicitors for the plaintiff were aware of this fact from at least January, 2010. furthermore, the repudiation was never challenged by the insured.

41. Further, in this regard, in *McCarron v. Modern Timber Homes Limited & Ors* , Kearns P. stated that 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 under the existence and amount of his liability to the third party is first established either by action, arbitration or agreement, and that a valid claim can not be so characterised until liability has been established against the employer and the quantum of the claim assessed.

42. In *Hu v. Duleek Formwork Limited (in liquidation) & Aviva* [2013] IEHC 50, this Court (Peart J.) considered in some detail the provisions of s. 62 of the Civil Liability Act 1961, and stated:-

> "I am satisfied in this case that the plaintiff has no privity of contract with Aviva. That is very clear. He cannot seek to enforce the contract of insurance as between the first named defendant and Aviva, especially in circumstances where he does not dispute that the excess payment was a condition precedent to liability under the policy, and does not dispute that the excess payment was requested to be paid and was not paid. Monies are therefore not payable to the insured under the policy. If there was some arguable doubt still existing as to whether or not Aviva was entitled to repudiate liability, then the judgment of the Supreme Court in *Dunne v. P.J. White & Co. Ltd [supra]* could be of assistance, given the remarks of Finlay C.J, albeit obiter in his judgment, that the onus fell upon the insurer to prove what it was alleging, namely that it was entitled to repudiate liability. But that issue is not live in the present case on the evidence which has been adduced. In my view, s. 62 of the Act of 1961 does not provide the plaintiff with a remedy in this case against Aviva."

43. Accordingly, I am satisfied that even if Bri-Mo Ltd was in liquidation, the plaintiff's claim would still be unsustainable because it does not constitute a valid claim against the insured in respect of which monies are payable under the policy of insurance, particularly by reason of the fact that the quantum of the insured liability has not been assessed.

44. There is no privity of contract between the defendant and the plaintiff in these proceedings, and the defendant owes no duty at law under contract, statute or in tort to the plaintiff such as might give rise to a claim against it in damages.

45. Issue was taken with the content of the affidavit of Ms. Rackard, solicitor for the defendants, on the basis that the averments as therein contained were based on and contained matters of hearsay evidence. Counsel for the plaintiff took the view that the documents should be proved and made reference to the recent judgment of O'Malley J. in *Ulster Bank Ireland Limited v. Darmody* [2014] IEHC 140. The issue, however, in the matter before O'Malley J. centred on the well established proposition that an employee of a related company cannot give evidence as to the books and records of that company in proceedings, and further reliance was placed on *The Criminal Assets Bureau v. Hunt* (the Supreme Court, 18th March, 2003).

46. I take the view relying on the specific provisions in Article 40, r. 4 of the Rules of the Superior Courts that it is the well established practice of the Superior Courts that hearsay evidence may be included in affidavits in interlocutory applications, and in this particular instance all that Ms. Rackard has done is exhibited correspondence and other documents, including the relevant policy of insurance from her client's file which documentation, in my view, effectively speaks for itself and can only be described as hearsay in the most technical sense. In an application such as is presently before the court, in accordance with the Rules of the Superior Courts and well established practice, I take the view that this Court is entitled to have regard to the content of Ms. Rackard's affidavit, albeit based on hearsay evidence and to attach such weight to the evidence as the court in the exercise of its discretion deems appropriate. The situation that arises in this case, having regard to the particular material referred to, would clearly not warrant the costs involved in having several different parties swear affidavits in respect of documents such as the defendant's policy of insurance which, in any event, is not disputed. Accordingly, I do not consider that there is any merit in the objection as raised on the plaintiff's behalf in this regard.

47. As regards the proposal on the plaintiff's behalf that the proceedings be stayed I prefer the arguments as advanced on the defendant's behalf and do not consider that there is any merit in granting a stay, particularly having regard to the conclusion I reach herein, in relation to s. 62 of the Civil Liability Act 1961 and the passage of time since the cause of action herein arose.

48. In my view the particular circumstances of this application warrant the exercise of the sparingly used jurisdiction of the court to strike out proceedings. Section 62 of the Civil Liability Act 1961, has no application in the particular circumstances that arise, and for the reasons as set out herein in my view the plaintiff's claim as against the defendant is doomed to failure and accordingly, pursuant to O. 19, r. 28 of the Rules of the Superior Courts the plaintiff's claim will be struck out on the ground that the proceedings disclose no reasonable cause of action and further, there will be an order pursuant to the inherent jurisdiction of the court striking out the proceedings on the ground that they are bound to fail.