[2019] IEHC 550

THE HIGH COURT

2009 No. 2571 P

Between:

SUSAN LEVINGSTONE

Plaintiff

– and –

ARTHUR O'LEARY, AIDAN KENNY AND PADDY KELLY

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 17th July, 2019.

I. Introduction

1. This is an application for, *inter alia*, an order pursuant to O.7, r.3(1) of the Rules of the Superior Courts, as amended, granting LK Shields Solicitors liberty to come off record for the first-named defendant in the within proceedings.

II. Background

2. By letter of 16.02.2018, Liberty Insurance sent a letter to Mr O'Leary, advising him that he was being declined insurance cover. The letter runs through the background facts to the within application in some detail and is worth reciting at some length:

> *"Dear Mr O'Leary…*
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> *As you are aware, LK Shields Solicitors were appointed by us to investigate the above* [*i.e*. the within] *High Court proceedings. Since LK Shields commenced corresponding with you in May 2012 they have failed to receive adequate assistance and information from you.*
>
> *LK Shields wrote to you on 16 May 2012 seeking your comments on the Plaintoff's draft Statement of Claim. Numerous reminders issued to you, for example on 19 June 2012, 28 August 2012, 21 September 2012, 21 December 2012, 26 April 2013, 5 February 2015, 13 February 2015, 9 March 2015, 18 March 2015, 23 April 2015 and 29 May 2015. By the time a finalised statement of claim was received from the plaintiff's solicitors on 15 July 2015, your comments on the draft statement of claim had still not been received.*
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> *LK Shields wrote to you on 3 March 2016 setting out a number of queries for you. Their letter was marked as urgent and sought a response by 9 March 2016. LK Shields also wrote to you on 21 June 2016 setting out a number of additional queries for you. That letter was also marked urgent and sought a response to both their letter of 3 March 2016 and 21 June 2016 by 24 June 2016. You did not provide a response to the queries contained in aforementioned letters until 18 July 2017 despite numerous reminders having issued to include on 10 March 2016, 7 April 2016, 21 June 2016, 5 July 2016, 14 July 2016 and 25 May 2017.*
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> *In addition, some of the responses belatedly provided by you on 18 July 2017 were inadequate and/or gave rise to further queries. LK Shields wrote to you by way of email on 19 July 2017 setting out their further queries and despite reminders issuing on 20 July 2017, 25 July 2017, 5 September 2017 and 20 September 2017 you have still not responded.*
>
> *In addition to the above correspondence, LK Shields has had a number of telephone conversations with you and left numerous messages for you in an effort to get you to engage and provide the necessary information and assistance.*
>
> *Further, LK Shields wrote to you on 5 September 2017 enclosing the amended draft defence and asked you to confirm that you were happy with the draft defence as a matter of urgency so that it could be delivered to the plaintiff's solicitors. When no response was received from you by 20 September 2017, LK Shields left a message for* [name stated] *…on his mobile and at you offices asking them that* [name stated]*…contact them urgently. LK Shields also spoke with* [name stated]*…on 20 September who advised that he would speak to* [name stated]*…about LK Shields' letter of 5 September and that you would revert to LK Shields. In addition LK Shields sent a follow-up email to you on 20 September seeking a response as a matter of urgency and advising that your failure to respond was delaying the delivery of the defence. LK Shields also left messages for* [name stated]*…on his mobile and at your offices on 25 September 2017 and tried to contact* [name stated]*…on that date on his mobile. Despite the above, LK Shields have still not received a response from you confirming that the amended defence can issue.*
>
> *You have been advised on numerous occasions by LK Shields that cover/indemnity is reserved until our investigation has been completed. You have also been advised by LK Shields that it is a condition of your policy that you give all such information and assistance as your insurer may require (condition 7(a)(iv)) and that the observance and fulfilment of the terms and conditions of your policy, insofar as they relate to anything to be done or complied with by you, is a condition precedent to any liability of the insurer under the policy (condition 12). In addition, LK Shields advised you that if you continued to fail to cooperate in respect of the matter, there was a real risk that your insurers would decline indemnity/cover in respect of the matter.*
>
> *Your failure to properly engage with LK Shields has been a recurring feature throughout these proceedings. The above are merely examples.*
>
> *Your failure to give such information and assistance as required is in breach of condition 7 of your policy and I regret to inform you that a decision has been made to formally refuse to provide indemnity/cover in respect of these [i.e. the within] proceedings. We have withdrawn LK Shields Solicitors' instructions to act for and on behalf of the First Named Defendant (Arthur O'Leary) in the proceedings.*
>
> *We should draw your attention to Condition 13 of the policy, a further copy of which was provided to you by LK Shields on 21 June 2016, which provides as follows:*

> *'Any dispute between you and the Company on our liability in respect of a claim or the amount to be paid shall, in default of agreement, be referred within nine calendar months of the dispute arising, to an Arbitrator….If the dispute has not been referred to arbitration within the aforementioned nine-month period, then the claim shall be deemed to have been abandoned and not recoverable thereafter'…".*

3. No dispute was referred to arbitration within the nine-month period.

III. Some Law

(i) Coming Off Record.

4. No case has been cited to the court in which leave to come off record has been refused, the general view being, since the decision of the Supreme Court in *O'Fearail v. McManus* [1994] 2 ILRM 81, that the courts should not, to paraphrase the wording of O'Flaherty J. in that case, place a solicitor and client into a "*forced form of liaison*". Additionally, the court notes the observation of Birmingham J., as he then was, in *Moloney v. Malhas and ors* [2014] IEHC 296, para.12, cross-referring in this regard to the observation of Lavery J. in *Corroon (a minor) v. Pillay's General Hospital Ltd* (Unreported, High Court, Lavan J., 31 July 2008), that "[I]*n deciding an application to come off record in…insurance cases, it is no function of the Court to decide whether the insurer was or was not entitled to repudiate liability*". However, that does not mean, when it comes to the question of costs, that the court may not have regard to how an insurer proceeded.

(ii) Costs.

5. The position as to costs has been comprehensively detailed by Birmingham J. in *Moloney*, esp. paras. 16 and 22-25, with the position as identified in that judgment being respectfully adopted by this court as correctly representing the position under the law as it now stands. It is clear from *Moloney* that the court, in an application such as that now presenting, is free to make three types of orders relating to costs, *viz*. (1) no order as to costs, (2) order the costs of the motion, (3) order costs beyond the costs of the motion. The majority of cases, it seems, are considered to fall into the third category.

6. When it comes to whether this case might fall into Category (3), counsel for LK Shields observes as follows in her helpful written submissions, under the heading "*No Excessive Delay Warranting a Costs Order Beyond the Remit of Motion Costs":*

> "*It is respectfully submitted that the Plaintiff would have to show that there are 'unusual features' to this case that would lead to departure from the standard order of the award of the costs of the motion only and not costs extending beyond that.* [The quoted phrase is drawn from *Moloney*, para.20, considered hereafter].
>
> *A key aspect to be considered in this regard is whether there is undoubtedly excessive delay on the part of the insurer in unequivocally extracting itself and it is respectfully submitted that in this instance there is not.*
>
> *In* Moloney [*etc*.,]…*Birmingham J. went on to consider the Supreme Court decision in* Byrne *v.* John S O'Connor [[2006] IESC 30]:
>
> > '20. It will be seen, therefore, that there were a number of unusual features, not least the undisclosed arbitration proceedings and the fact that the motion to come off record came on for hearing on the same day as the main action.
> >
> > 21. Another case where the costs awarded went beyond costs of the motion to come off record was the case of Mc*Tiernan and anor v. Quin-Con Developments (Waterford) Ltd and Ors* [2007] IEHC 142. There, Laffoy J. concluded that there was undoubtedly excessive delay on the part of the insurer in unequivocally extricating itself. In these circumstances, as a condition of allowing the applicant's solicitors come off record, liability was imposed on the insurer for costs incurred, subject to certain excepted terms which did not involve the insurers, between March 2004, when, at the latest, according to Laffoy J., the plaintiffs should have been told of the decision to repudiate, and July 2006, when the motion issued.'
>
> *This case can be distinguished from* Byrne v. John S O'Connor *in that there was no unreasonable delay on the part of the insurer in coming off record and further, the plaintiff was informed of the declinature on the date of its issue namely 16 February 2018."*

7. If the court has regard to the detail recited by Liberty in the above-quoted letter, the court does not see how it could plausibly be claimed that here "*there was no unreasonable delay on the part of the insurer"* in terms of the enquiries that led to its letter of declinature and ultimately (and inexorably) to the within application:

> *16.05.2012 LK Shields seek Mr O'Leary's comments on the statement claim.*
>
> *19.06.2012 Reminder letter sent.*
>
> *28.08.2012 Reminder letter sent.*
>
> *21.09.2012 Reminder letter sent.*
>
> *21.12.2012 Reminder letter sent.*
>
> *26.04.2013 Reminder letter sent.*
>
> [*Apparent gap in correspondence, though the letter states that throughout the entire period there were a number of telephone conversations and messages left* "in an effort to *get* [Mr O'Leary]…to engage and provide the necessary information and assistance."]
>
> *05.02.2015 Reminder letter sent.*

13.02.2015 Reminder letter sent.

09.03.2015 Reminder letter sent.

18.03.2015 Reminder letter sent.

23.04.2015 Reminder letter sent.

29.05.2015 Reminder letter sent.

In fact it does not appear that any meaningful reply was received from Mr O'Leary until 18.07.2017, and the replies received at that point "were inadequate and/or gave rise to further queries". *A letter seeking further queries was sent on 19.07.2017 and the following ensued*:

20.07.2017 Reminder letter sent.

25.07.2017 Reminder letter sent.

05.09.2017 Reminder letter sent.

20.09.2017 Reminder letter sent.

16.02.2018 Date of issue of letter of declinature; still no response received to the letter of 19.07.2017.

8. The court respectfully does not see, in the face of the constant failure of Mr O'Leary to respond, that it should have taken close on 6 years from 16.05.2012–16.02.2018 for the insurer to decide that Mr O'Leary was in breach of condition 7(a)(iv) of the policy. The extraordinary level of delay that the insurers manifested in this regard (for whatever reason; it appears that the reason was not to proceed to declinature too quickly, though Liberty certainly did not do that – quite the opposite) renders this case one possessed of an 'unusual feature'. It seems to the court, on the evidence before it, that by the commencement of the second batch of reminder letters on 05.02.2015, i.e. close on three years after the initial letter was sent and with LK Shields (and the insurers) being no further down the road in terms of getting Mr O'Leary to provide the necessary information and assistance, the insurance company was in a position to decline cover on the basis eventually proceeded with. That is not to determine whether the repudiation is valid or not; it is simply to identify the point/period from/in which the court considers that the insurer's handling of matters strayed into such an extraordinary level of delay as to render this case one possessed of an 'unusual feature', albeit different from the 'unusual features' that presented in *Byrne*. It seems too to the court that to give the insurer the benefit of the close on 3-year period identified by it suffices to meet the legitimate concern raised by counsel for LK Shields in her submissions, *viz*. that *"Given the seriousness of progressing to declinature…the Insurer should not be penalised for affording the First Named Defendant every opportunity to engage with the Insured before the Insured progressed to declinature".*

9. The foregoing being so, what is the court to do as regards costs? The answer lies in the decision in *McTiernan* – albeit that the facts of that case do not quite tally with those at play here – where Laffoy J. observes, *inter alia*, as follows, at paras.25 and 28-32, under the heading "*Conclusions*", her observations in this regard being of use in determining the within application also:

> *"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.*
>
> *28. 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….*
>
> *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.*
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> *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.*
>
> *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. "*

IV. Conclusion

10. Having regard to the foregoing and for the reasons identified by this Court in the within judgment, the court will allow the applicants to come off record, subject to the condition that the insurer must bear the costs of the within application and also such costs as have been borne by the plaintiff after 05.02.2015 in processing her claim against Mr O'Leary, as represented by the insurer. If the insurer is prepared to give an undertaking to the court to discharge those costs which the court has just held that 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.