Neutral Citation [2015] IEHC 690

THE HIGH COURT

[2008 No. 2790P]

BETWEEN/

THOMAS KENNEDY, JOHN GRAHAM, PAUL FLANNERY, VINCENT BROWNE, MICHAEL MURPHY, MICHAEL HENNESSY, Ó MATHUNA (BÁID) TEORANTA, JOHN O'DONNELL, NEIL MINIHANE, KIERAN O'DRISCOLL, PETER CARLTON, DONAL HEALY AND GERARD MINIHANE

PLAINTIFFS

AND

GREG (OTHERWISE JOHN G) CASEY AND MAIREAD CASEY PRACTISING UNDER THE STYLE AND TITLE OF CASEY AND COMPANY

DEFENDANTS

JUDGMENT of Kearns P. delivered on the 6th day of November, 2015.

The plaintiffs in these proceedings are a group of fishermen who are members of an informal organisation known as the Irish Tuna Association. This association was set up to fight a ban on the use of driftnets for the fishing of tuna. The ban followed the adoption of a European Council Regulation providing for the introduction of a ban on fishing for albacore tuna by way of driftnets from the 1st January, 2002. While the ban came into effect on that date, it was preceded by an earlier Council Decision 1999/27/EC of 17th December, 1998. It was acknowledged that fishermen such as the plaintiffs should diversify out of certain fishing activities and be in receipt of payments of compensation from the Irish State. When in January 2002 such compensation had not been paid, the plaintiffs instructed Casey & Company, solicitors, to look after their interests and to pursue a claim by way of legal proceedings for compensation. Such proceedings were commenced in 2007 (The High Court, 2007 No. 9273P) ("the State proceedings") but have not yet been determined in the High Court. There were delays in the commencement of these proceedings in circumstances where it is alleged that Mr. Casey of Casey & Co. informed the plaintiffs on a number of occasions that he had already issued proceedings in the High Court when in fact that step had not yet been taken. The plaintiffs found it was very difficult to get in touch with Mr. Casey or his sister who was in charge of the office during a period of illness suffered by Mr. Casey.

The State proceedings have been recently set down for hearing. The defendants in those proceedings include the Minister for Agriculture, Fisheries and Food, the Minister for Finance, Ireland and the Attorney General. Amongst other pleas, the defendants have pleaded the Statute of Limitations by way of defence together with laches and delay. An attempt by the defendants in the State proceedings to have the plaintiffs' claim against them struck out was brought unsuccessfully in 2011. Accordingly, these proceedings remain extant and viable and will go to a full hearing in due course.

Under the present proceedings, brought as they are against the plaintiffs' former solicitors ("the negligence proceedings") it is contended that the defendants' solicitors were negligent in failing to institute the State proceedings in a timely manner with the potential consequence that the entitlement to compensation that such proceedings would have obtained for the plaintiffs has been lost because of the defendants' delay and inactivity. In this context, it should be noted that the State proceedings which commenced in December 2007 were brought on the plaintiffs' behalf by a new firm of solicitors, Messrs. Pierse & Fitzgibbon.

Messrs. Michael Houlihan & Partners, instructed by the Solicitors Mutual Defence Fund ("SMDF") came on record for the defendants in the negligence proceedings but on the 25th October, 2012 applied to come off record following a decision made by the SMDF not to provide indemnity to the defendants. This application to come off record was granted by the High Court (Ryan J.) in February 2013. Those proceedings have likewise not reached finality, the suggestion made on behalf of the plaintiffs being that it is, or would be, futile to pursue them further due to the absence of professional indemnity insurance cover for the defendants.

It is against this factual background that a notice of motion, the subject of the present application, was issued in November 2014 on behalf of the plaintiffs seeking to join the SMDF as a co-defendant, either under Order 15, rule 13 of the Rules of the Superior Courts or pursuant to the inherent jurisdiction of the court, or pursuant to the provisions of the Solicitors Acts 1954 – 2008 and the regulations made thereunder.

> Order 15, rule 13 of the Rules of the Superior Courts provides as follows:-
>
> *"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added … Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."*

SUMMARY OF THE PLAINTIFFS' CONTENTIONS

The plaintiffs contend that the SMDF is a party whose presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the negligence proceedings.

In a lengthy affidavit sworn in support of the joinder, Mr. Robert Pierse, solicitor in the firm of Pierse & Fitzgibbon, deposes that, under the Solicitors Acts 1954-2008, solicitors are obliged to hold proper professional indemnity insurance and require to demonstrate that

fact before being issued with their annual practice certificate. Regulations made under the Solicitors Acts provide for a scheme of qualified insurers to be recognised by the Law Society and the SMDF is such an insurer who at all material times provided such insurance for the defendants. He deposes as to his belief that the SMDF cannot under the terms of the Professional Indemnity Insurance Regulations 2007 repudiate cover, notwithstanding that in the instant case both defendants have been removed from the roll of solicitors pursuant to order made by the President of the High Court.

As already indicated, the plaintiffs became extremely concerned about the tardiness with which the defendants had been pursuing proceedings on their behalf and contacted the Law Society in July 2005 at which stage the firm of Pierse & Fitzgibbon commenced representing the plaintiffs. This firm commenced the negligence proceedings against the defendants in April 1998 and in the following month Messrs. Michael Houlihan & Partners entered an appearance instructed by the SMDF. A statement of claim in the negligence proceedings was delivered in March 2009 and, following various court skirmishes about particulars, a defence was delivered in February 2011. A reply to the defence was delivered in May 2011. Further particulars of the plaintiffs' alleged loss and damage was furnished in December 2011. It may be noted en passant that an enormous amount of work was involved in addressing particulars in these proceedings as individual schedules of loss for each of the plaintiffs were required to be furnished. Various court applications seeking more comprehensive particulars ensued in 2012. As Mr. Pierse says in his affidavit, it was plain that the defendants through their solicitors instructed by the SMDF, intended to contest the claims fully and comprehensively.

However, on the 25th October, 2012, Messrs. Michael Houlihan & Partners filed a notice of motion seeking an order to come off record. No specific reason was furnished to the plaintiffs other than the statement that the board of SMDF had exercised a discretion available to them under the terms and conditions of membership and articles of association not to indemnify the defendants in respect of the plaintiffs' claim.

The application was opposed unsuccessfully.

Mr. Pierse deposes that in these revised circumstances, the plaintiffs have been seriously prejudiced. Neither of the two defendants have any assets of value. The first named defendant was struck off the roll of solicitors and the second named defendant has ceased to practise.

Mr. Pierse states that while the application is one brought pursuant to the Rules of the Superior Courts, it is also made under the inherent jurisdiction of the court. In this context, Mr. Pierse deposes that, through the withdrawal of their instructions through a nominated solicitor, the SMDF has effectively destroyed any chance on the plaintiffs' part of securing damages for the manner in which their then solicitors provided legal services for reward on their behalf. They have in addition been exposed to a Statute of Limitations plea in the proceedings instituted against the State defendants against whom it is claimed that Mr. Casey should have proceeded at a much earlier stage.

He deposes that if the intended co-defendant, namely SMDF, is joined in the present proceedings, it will afford the SMDF an opportunity to explain and justify its decision to decline indemnity cover under the terms of the Solicitors Acts and the regulations made thereunder, and, in the absence of some adequate justification, explanation or reason, will permit the court to award damages against the SMDF.

SUMMARY OF THE SMDF POSITION
In an affidavit sworn on the 3rd March, 2015, Patrick Dorgan, a director of the SMDF, states that the SMDF opposes its proposed joinder to the proceedings as a co-defendant or in any capacity on the basis that its presence before the court is neither necessary nor desirable in order for the court to be able to adjudicate on the real issues in controversy in the proceedings. He contends that no cause of action which the plaintiff might wish to assert as against the SMDF appears from Mr. Pierse's affidavit.

He refers to the fact that the plaintiffs issued proceedings (the "State proceedings") in which various reliefs have been sought include claims for (i) a declaration that the plaintiffs have a legitimate expectation to compensation from the State for losses incurred by them as a result of the introduction of the EU regulation; and (ii) a declaration that the State failed to fulfil its obligations in representations to compensate the plaintiffs as agreed on the 8th June, 1998.

He deposes that the negligence proceedings have not been progressed to any extent by the plaintiffs since Messrs. Michael Houlihan & Partners were allowed come off record in 2013. This, he says, appears to be for the reason that the defendants have no assets, which is clearly the motive behind the application to join the SMDF as co-defendant.

In this regard, he deposes that the solicitors formerly acting for the defendants on the instructions of SMDF came off record when, as it was entitled to do, the SMDF made the decision pursuant to the terms and conditions of its membership and articles of association not to indemnify the defendants in respect of the plaintiffs' claim. The SMDF validly declined to provide an indemnity to the defendants and, significantly, the defendants themselves have not challenged this decision. Even more importantly, he says, the decision on the part of the SMDF is not in issue in either the State proceedings or in the negligence proceedings, nor could it be. He further deposes that he has no knowledge of the defendants' assets or means but, for the avoidance of doubt, states that the exercise of the SMDF to exercise their discretion in this case had nothing to do with their financial worth or lack thereof. Further, the decision made by the SMDF did not render "nugatory" the exercise by the plaintiffs of their right of access to the High Court to have the issue of negligence against their former solicitors determined, because the plaintiffs remain free to prosecute the negligence proceedings against the defendants to final judgment.

He further contends that the plaintiffs' prospects of establishing any claim against the defendants in the negligence proceedings must depend on at least two factors, first being (a) that the claim in the State proceedings is one that has a real prospect of success; and second (b) that the State proceedings fail (and the opportunity to obtain damages provided by them thereby lost) on the grounds of pre-commencement delay. Finally, even if the plaintiffs obtain an award in these proceedings (the negligence proceedings) this would not of itself give them any claim against the SMDF. Quite simply, there is no contractual nexus between the plaintiffs and the SMDF. For these reasons he believes that no proper basis has been identified for the joinder of the SMDF to these proceedings as a co-defendant. He believes it would be unjust, illogical and prejudicial to the SMDF if it were required to be joined to these proceedings when no claim is or can be advanced against them by the plaintiffs. The idea that they could or should be joined to the proceedings to explain or justify a decision to decline indemnity to the defendants could never constitute a proper basis for the relief sought in the present application.

DISCUSSION
Before proceeding to consider the legal submissions filed and argued by both sides, it is, the Court believes, helpful to essay a simple analysis of the factual circumstances which warrant the joinder of a party to an existing set of legal proceedings – in this case, proceedings which have advanced to a very late stage.

First, the plaintiffs clearly have no contractual nexus with the SMDF. They were never insurers of the plaintiffs, had no dealings with them, and, perhaps more significantly, had not been the subject matter of any application by the defendants (who do have such a connection) to be joined in the present proceedings.

The first port of call for the plaintiffs must, of necessity, be their claim for compensation against the State defendants in the State proceedings. Only when those proceedings are completed will it be known if the plaintiffs are successful or unsuccessful. If successful, there will be no requirement to maintain the proceedings against the defendants in the negligence proceedings and still less any requirement to seek to involve the defendants' insurers. Equally, if the plaintiffs' claim against the State defendants fails on the merits (as distinct from failing because of the Statute of Limitations), there can be no arguable case against either the existing defendants, and still less their insurers. It is only if the State proceedings determine that a good cause of action with an attendant award in compensation has been lost by virtue of delay leading to the successful invocation of the Statute of Limitations, that the first glimpse of a liability in respect of some other party, namely the defendants in the negligence proceedings, can arise. Counsel for the SMDF has argued, to my mind forcefully and effectively, that the present application is at the very least premature in those circumstances.

Assuming, however, that in the State proceedings the plaintiffs do establish that they lost a winnable claim for compensation by reason of delay on the part of the defendants, the issue of any alleged negligence on the part of the defendants would then have to be addressed. As of now, it would appear that the negligence proceedings are being fully contested. It is difficult, if not impossible, to see how those proceedings could be heard and determined prior to the determination of the State proceedings. Neither the State proceedings or the negligence proceedings are proceedings in which the insurer is seeking to be joined on the basis that the defendants in either or both sets of proceedings are incapable of defending the plaintiffs' claims. They are simply not a necessary party for the determination of such issues. While a suggestion has been made that the defendants may not be a mark for any damages, it has not been agitated that, as a matter of law, they are incapable of defending the proceedings brought against them, which is quite a different matter altogether. Such a scenario could well arise where an insurer has strong evidence to show that a fraudulent claim has been generated between a plaintiff and a defendant in a case which cannot adequately be defended without the insurer's participation. No such case is advanced here.

On any analysis, therefore, the potential liability of the insurer swims into consideration only when two other sets of proceedings have been heard and determined. In the present instance, neither of those two events has yet occurred.

However, even assuming that the best case scenario from the plaintiffs' point of view were to eventuate, that would still leave a situation where it would be the defendants, rather than the plaintiffs, who would seek to be indemnified by the insurer and, in the instant case, the defendants have sought no such indemnity. In essence, the defendants have accepted the repudiation or withdrawal of cover by the SMDF.

It is against this somewhat unpromising backdrop, that the plaintiffs' legal submissions must now be considered.

THE PLAINTIFFS' SUBMISSIONS
The plaintiffs' submissions fall essentially under three headings, the first of which may be characterised as the *locus standi* submission, whereby it is argued on behalf of the plaintiff that the defendant solicitors and the SMDF are "joined at the hip" by legislation and regulations made thereunder, to such a degree as to overcome any objections based on *locus standi* or lack of privity.

Alternatively, it is submitted on behalf of the plaintiffs that the statutory code affecting solicitors and their requirements to protect clients by means of insurance confer third party rights on persons such as the plaintiffs, such as entitle the plaintiffs to join the insurer in the present proceedings.

Finally, it is also argued on behalf of the plaintiffs that by virtue of their conduct in acting for as long as they did on the defendants' behalf, and having moreover failed to provide any clear reason for withdrawing cover, that the SMDF are estopped from indemnifying and insuring the defendants herein.

(a) "Joined at the Hip"
Section 26 of the Solicitors (Amendment) Act 1994 provides that the Law Society may make regulations to provide for indemnity against losses arising from claims in respect of any description of civil liability incurred by a solicitor arising from his practice as a solicitor, and for that purpose authorises the Society to establish and maintain any indemnity fund, including a mutual fund.

Regulations made under the section may specify terms and conditions on which indemnity against losses is to be available to solicitors from any indemnity fund approved of by the Society and any circumstances in which the right to such indemnity is to be excluded or modified.

It goes without saying that no solicitor can conduct or carry on practice without such insurance. The Solicitors Acts 1954-2002 (Professional Indemnity Insurance) Regulations 2007 (S.I. No. 617 of 2007) set out in detail the statutory provisions giving effect to the mandatory requirements for all solicitors to carry professional indemnity insurance.

The SMDF is described by name in the regulations and further to regulation 2, comes within the definition of "qualified insurer".

Mr. James O'Reilly, senior counsel for the plaintiffs, argued that under these regulations there are minimum terms and conditions which are required to be present in any professional indemnity insurance. For example, under clause 5.3, it is expressly provided that there shall be no avoidance or repudiation of cover:-

> *"The insurance must provide that the insurer is not entitled to avoid or repudiate the insurance on any grounds whatsoever including, without limitation, where there has been non-disclosure or misrepresentation by the insured, whether such non-disclosure or misrepresentation is or is alleged to be innocent, negligent or fraudulent."*

Mr. O'Reilly argues that these provisions are open to the interpretation that give the plaintiffs the *locus standi* to maintain the present application. He does, of course, acknowledge that clause 1.4 of the minimum terms and conditions does expressly preserve to the SMDF *"any discretion that the SMDF … may have, whether under statute, its organisational documents or otherwise howsoever to determine in its discretion whether to indemnify a firm or a member or any other person".*

The plaintiffs are adversely affected by the manner in which the defendants carried out instructions to institute proceedings against the Minister for the Marine and Natural Resources in the State proceedings. The Society, it was argued, must exercise its powers under the relevant legislation in the public interest as well as in the interest of the solicitors' profession and in this regard reliance was

placed on the decision of the House of Lords in *Swain v. The Law Society* [1983] 1 A.C. 598.

(b) The Privity Issue
To the extent that the SMDF relies upon the terms and conditions of its membership and articles of association not to indemnify the defendants, it was argued on behalf of the plaintiffs that the SMDF is referring to a relationship between the fund and Casey & Co. which operates in private law. It was submitted this could not affect the responsibilities of the SMDF where it is applying solicitors professional indemnity insurance regulations enacted by the Society in a public law context for the purpose of providing protection to members of the public and also to solicitors against whom claims are brought by clients or former clients. Thus, he argued, the relevant legislation creates a *jus quaesitium tertio* in respect of members of the public who have advanced a claim coming under the description of civil liability against Casey & Co. in the expectation that the said firm of solicitors have a policy of professional indemnity insurance. The relevant statutory provisions are present to protect Casey & Co. against the very contingency that has arisen in these proceedings. Accordingly, the relevant statutory provisions may be interpreted in a manner similar to s.62 of the Civil Liability Act 1961. Reliance on this part of the plaintiffs' argument was placed by counsel on decisions of the High Court in *Kennedy v. Ireland (No.1)* [2000] 2 I.R. 105 and *Dunne v. P.J. White Construction Co. Ltd. (In liquidation) and Michael Paine & Ors.* [1989] I.L.R.M. 803. In addition, reliance was placed upon a recent judgment in *McCarron v. Modern Timber Homes Ltd. (In liquidation), Sean McColgan, Daniel McColgan & Quinn Insurance Ltd.* [2013] 1 I.R. 169.

(c) The Relevant Statutory Code
The Relevant Statutory Code mandating Professional Indemnity insurance cover for solicitors in private practice is undoubtedly intended to inure for the benefit of clients of solicitors and the solicitors themselves. The plaintiffs in this case requested the SMDF to clarify and explain what specific provision of the Solicitors Acts or of the relevant professional indemnity insurance regulations entitle them to act as they have. This request was made by the plaintiffs' solicitors on the 20th February, 2013 following the ruling of the High Court (Ryan J.) declaring that their then solicitors had ceased to be solicitors acting on behalf of the defendants. The response of the SMDF on the 21st February, 2013 was simply to state that the reasons for declinature are a matter confidential between Messrs. Casey & Co. and the fund, adding that they were not in a position to comment on any of the other matters raised on behalf of the plaintiffs. Further inquiries repeating a request for information were similarly dismissed.

Counsel argued that the statutory provisions upon which reliance is placed are required to be applied and operated in accordance with the principles of natural and constitutional justice and basic fairness of procedures. (*East Donegal Co-Operative Livestock Marts Ltd. v. The Attorney General* [1970] I.R. 317).

The SMDF is granted the status of an insurer under the 2007 regulations and clause 5.3 of the minimum terms and conditions provides for no avoidance or repudiation in the manner already described.

By failing to reply to the plaintiffs and explaining the precise statutory provisions upon which reliance is placed, whether primary or secondary legislation, the SMDF has failed to act in accordance with the principles of natural and constitutional justice and basic fairness of procedures under the aforesaid statutory provisions. In those circumstances, the contract of professional indemnity insurance contemplates a cause of action such as that instituted by the plaintiffs the subject matter of these proceedings. By acting as they have done, the SMDF had acted in breach of the principles of basic fairness of procedure and should be estopped from benefiting from such conduct in the particular circumstances. If necessary, the court should fashion some exception to the privity rule in the particular circumstances of the case.

THE SUBMISSIONS OF THE SMDF
It was strenuously argued on behalf of the SMDF that there was no requirement on the court to immerse itself in the considerations advanced on behalf of the plaintiffs in circumstances where the presence of the SMDF in the proceedings had not been demonstrated as being necessary. No cause of action vesting in the plaintiffs as against the SMDF had been made out.

The factual matrix could not be clearer. The plaintiffs have sued the State for compensation and those proceedings are pending before the High Court. Until that claim is determined, the question of what claim (if any) the plaintiffs may be able to maintain against the defendant solicitors cannot sensibly be addressed or assessed. If the State proceedings are successful, any claim against the defendant solicitors would evaporate. Equally, a determination by the court that the claims made in the State proceedings lack merit would again doom the negligence proceedings to failure. It is only in the event that the State proceedings fail on the basis of being statute-barred that any life could remain in the negligence proceedings and then only to the extent that the court hearing the State proceedings (or, alternatively, the court hearing the negligence proceedings) finds that there was substance in the claims against the State and that those claims would, or could, have succeeded but for being allowed to become statute-barred.

In such circumstances, any claim against the SMDF is remote and implausible. The suggestion that the defendant solicitors and the SMDF are either "joined at the hip" or that the plaintiffs stand in the shoes of the defendant solicitors vis-à-vis the SMDF, disregard a number of critical matters as follows:-

(a) There is no contractual nexus whatsoever between the plaintiffs and the SMDF.

(b) In any event, the defendant solicitors never had (nor do they now have), a contractual entitlement to indemnity from the SMDF.

(c) Any claim for indemnity made by the defendant solicitors to the SMDF was at all times subject to the discretion of the SMDF.

(d) The plaintiffs do not have standing to challenge the decision of the SMDF in exercise of that discretion to decline indemnity to the defendant solicitors. The SMDF does not accept that the defendant solicitors had or have any proper basis for challenging the decision of the SMDF, or that the plaintiffs would have such a basis if they had standing, which they do not.

(e) The argument that s.26 of the Solicitors (Amendment) Act 1994 gives the plaintiff such standing is without merit. The invocation of the decision of the House of Lords in Swain v. The Law Society adds no support to the plaintiffs' argument, as that case involved quite different issues.

(f) Section 62 of the Civil Liability Act 1961 has no application to the circumstances at issue herein and any reliance on that section for the purpose of the present application is misdirected and mistaken.

(g) Any encroachment on the rule of privity of contract of the kind contended for by the plaintiffs would be a matter for

the legislature and not for the courts.

DISCUSSION OF LEGAL SUBMISSIONS

In the first instance, it is important to note that the cause or matter to which the plaintiffs seek to join the SMDF is the existing claim in negligence and breach of duty brought by the plaintiffs against the defendant solicitors. This existing claim relates to an alleged failure by the defendant solicitors to institute appropriate proceedings against the relevant competent authorities, including Ireland and the Minister for the Marine and Natural Resources regarding what is said to be the failure on the part of the State to implement a conversion plan for the purposes of the 1999/27/EC: Council Decision of 17th December, 1998 to provide compensation enabling fishermen serving on board and the owners of fishing vessels to face the economic consequences of having to give up fishing activities.

In *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519, Murphy J. noted that:-

> *" … the words 'cause or matter' in O.15, r.13 mean the action as it stands between the existing parties (Amon v. Raphael Tuck & Sons Ltd. [1956] 1 Q.B. 357 at p.369). Certainly the court has jurisdiction to refuse to add parties for the purpose of introducing a new cause of action. In Raleigh v. Goschen [1898] 1 Ch. 73, Romer J., explained why, in that case at any rate, such a course should not be adopted, although he was careful to indicate that the plaintiff would have whatever rights were available to it in other proceedings against the parties whom it had sought to add."*

Likewise, it seems clear that the court has jurisdiction to refuse to join parties to an action where there is no direct cause of action against the proposed defendant. Thus in *Melia v. Melia* [2004] 1 I.R. 321, the High Court (Peart J.) refused an application brought on behalf of a minor plaintiff under Order 13, rule 15 of the Rules of the Superior Courts to join the second defendant's insurer to the proceedings in circumstances where the plaintiff had no direct action as against the insurer.

In the instant case, it seems clear that the joinder of the SMDF is sought to ensure that, if the plaintiffs succeed in the negligence proceedings, they will be permitted to agitate that the SMDF's decision to refuse indemnity to the defendants' solicitors was unlawful or otherwise wrongful. However, it is quite plainly not an issue in these proceedings. It simply cannot arise unless or until the plaintiffs obtain judgment against the defendants' solicitors.

In reality, such a right can vest only in the defendants if and when a judgment against them is obtained by the plaintiffs.

It is plain from the affidavit of Mr. Pierse that the motivation for the present application is the lack of means of the defendants. However, surely this cannot give rise to a scenario where, in every case where an insurer disclaims liability under a policy, a defendant must first be means tested to determine his capacity to fight or compromise a piece of litigation? It was candidly accepted by Mr. O'Reilly, counsel for the defendants, that if the defendants had substantial assets, the present application would never have been brought.

However, the defendants' impoverished circumstances do not create an issue that arises in the proceedings as against the defendant solicitors insofar as it is based on claims of alleged negligence and breach of duty by those defendants. The plaintiffs remain free to prosecute the negligence proceedings against the defendant solicitors to final judgment and indeed could perhaps well have done so already without any need for the present application. In my view, the presence of the SMDF as a defendant to the action will not further the plaintiffs' claims in this context nor will it assist the court to determine whether in fact the defendant solicitors were negligent as has been alleged.

In this respect, the instant case is quite different from that considered in *McDonagh v. McDonagh* [2015] IEHC 543. In that case the insurers applied to be joined as a party to the proceedings (and were joined as a notice party) in circumstances where the insurer advanced evidence on the making of the application to suggest that the parties to a road traffic accident were engaged in a collusive fraud on the insurance company. Had fraud been established in the main action, quite clearly the plaintiff's claim would have failed, but, absent the presence of the insurer as a party to the proceedings, that claim of fraudulent collusion ran the risk either of not being made, leaving it over to a separate, (and in the court's view quite unnecessary) application after judgment pursuant to s.76 of the Road Traffic Act 1961 for leave to execute the judgment against the insurer. Against a background where the European Communities (Fourth Motor Insurance) Directive Regulations 2003 (S.I. No. 651/2003) allows claimants to proceed directly against insurers without first obtaining judgment against the driver of a vehicle that caused injury, a particular legal landscape may be said to be developing in a Road Traffic Act context which, absent some similar legislative developments, could hardly be said to arise in the case of other claims, such as the present one.

In *McCarron v. Modern Timber Homes Ltd. (In liquidation) & Ors.* [2012] IEHC 530, a plaintiff who had sustained an injury to his left hand in the course of his employment with the first named defendant brought proceedings against his former employer, two former directors of the employer and Quinn Insurance as a fourth defendant on the basis that it was the insurer of the employer at the time of the accident and had agreed under the terms of that insurance to indemnify the employer in respect of any claim brought by an employee who sustained injury during the course of his employment.

The insurer refused indemnity to the employer on the basis that it had 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 the proceedings.

The fourth defendant brought an application seeking an order striking out the plaintiffs' claim against it on the basis it disclosed no reasonable cause of action, or, alternatively on the basis that there was no privity of contract between the plaintiff and the fourth defendant. The plaintiff in turn sought to rely on the provisions of s.62 of the Civil Liability Act 1961, arguing that the decision of the Supreme Court in *Dunne v. P.J. White Construction Co. Ltd. (In liquidation)* [1989] ILRM 803 recognised that an injured employee of a company in liquidation had a right of action under the provision to sue an insurer and further arguing that nothing in that decision precluded the joinder of the insurance company as a co-defendant in the same set of proceedings as the insolvent entity.

In that case, as in this case, counsel for the insurer pointed out that the employer might successfully defend the claim so there would be no point in having the insurer joined to the proceedings until the validity of the plaintiff's claim was established by means of a judgment obtained against the insured.

In that case, having considered the judgment in Dunne and in the light of the arguments made before the court, I stated as follows:-

> *"While confirming therefore that the section creates right of action … , 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 money shall be applied in the manner therein specified in discharging all 'valid claims against the insured' and it seems to me that a claim cannot 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 …. 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."

Again, in that case, the application brought before the court was only brought due to the existence of a particular statutory provision providing certain rights, in that case s.62 of the Civil Liability Act 1961. No such statutory provision exists in relation to the claim advanced by the plaintiffs in these proceedings.

Turning to that aspect of the defendants' submissions which relate to the provisions of the Solicitors Acts and Regulations, there is no doubt that, in exercising its powers under s.26 of the Solicitors (Amendment) Act 1994 to make regulations providing for indemnity against losses arising from claims in respect of any description of civil liability incurred by solicitors, the Law Society exercises a public function. The plaintiffs claim that this extends to s.26(2) of the 1994 Act and the provision enabling the Law Society to establish and maintain a fund and to require solicitors to maintain a policy of insurance with insurers approved of by the Society, including the mutual fund known as the Solicitors Mutual Defence Fund Ltd.

In this context the plaintiffs seek to place reliance upon the decision of the House of Lords in *Swain v. The Law Society* [1982] 2 All ER 827 to argue that the Law Society is performing a public duty designed to benefit not only solicitors and their staff but also solicitors clients. While that may well be the case, the decision is not an authority for the broader and quite different proposition that the nature of the duty being performed by the Law Society is such that it confers a direct cause of action on the client of a solicitor as against the solicitor's insurer. That issue simply did not arise in Swain, which was concerned with the right of a solicitor to claim from the Law Society the commission taken by it from insurance brokers in respect of insurance premiums paid by solicitors in connection with indemnity under a master policy taken out by the Law Society. The gravamen of the decision of the House of Lords was that, as the Law Society was performing not merely a private duty to premium – paying solicitors but a public duty, there was no remedy against it in breach of trust or equitable account. However, nothing in the instant case possesses qualities which might in different circumstances warrant intervention by the court to grant relief by way of judicial review. This is not a judicial review case.

The court is thus at a loss to see how its own decision in *Kennedy v. The Law Society of Ireland* [2000] 2 I.R. 104 can be invoked in support of an argument that they have locus standi to pursue a direct claim as against the SMDF. To the extent that the particular decision in Kennedy may provide some support for an argument that the SMDF is or ought to be amenable to judicial review as exercising a public law function, that does not advance what is essentially a private law claim, which in this case is an argument that the plaintiffs ought to be permitted in this action to pursue the SMDF in the context of a negligence action (now some seven years in being) brought against the defendant solicitors.

The quintessential weakness of the plaintiffs' arguments may perhaps best be seen in the contention contained at s.6 of their submissions which is that, having regard to the present unsatisfactory state of the law with regard to third party rights in the context of insurance contracts, the court ought to interpret the provisions of s.26 of the Solicitors (Amendment) Act 1994 and the regulations made thereunder in a manner similar to s.62 of the Civil Liability Act 1961. However, even this argument fails on the basis that it simply has no bearing on the issues or application at hand to join the SMDF as a co-defendant to the negligence proceedings.

Even if I am mistaken in any of the views expressed above, I am quite satisfied that the present application is premature in the sense that it has been brought before either the State proceedings or the negligence proceedings have been determined one way or another.

Finally, with regard to the issue of estoppel, the Court certainly feels a measure of sympathy for the predicament of the defendants having regard to the interval of time which elapsed before the SMDF instructed their solicitors to come off record. However, that is likewise an issue which falls to be agitated as between the defendants and the SMDF and not between the plaintiffs and the SMDF.

The ultimate illogicality of the plaintiffs' arguments in the present case is that, if correct, there would be no need to ever bring proceedings against an allegedly negligent solicitor or to seek to have some determination made in such proceedings, as the short cut of simply suing the SMDF would leapfrog those legal imperatives.

DECISION

For all the reasons elaborated above, the Court is satisfied that it is unable to accede to the application brought by the plaintiffs herein.