THE HIGH COURT

[2017 No. 353 CA]

BETWEEN

ALEXANDER QUATJA

PLAINTIFF

AND

ALEXANDRU BADILA

FIRST NAMED DEFENDANT

AND

AXA INSURANCE LIMITED

SECOND NAMED DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 23rd day of March, 2018.

1. The plaintiff resides at 26, Ashbrook, Oranmore, County Galway. At the time of the issuing of the proceedings, the defendant was resident at Ballybane, Galway.

2. The underlying proceedings arise out of a road traffic accident which occurred on 8th April, 2014. The plaintiff alleges that he was stopped at a junction at Headford Road, Galway when the defendant's vehicle drove into the rear of the his vehicle, in consequence of which he sustained loss of consciousness, injuries to his lumbar and cervical spine, grazing to his forehead and discomfort of his right knee.

3. The first named defendant was indemnified by AXA Insurance Limited ("*AXA*"). Following initial investigations, officials of AXA became suspicious of the circumstances of the accident which ultimately resulted in the company refusing to accept service of the proceedings and their application to be joined as co-defendant. AXA suspected that there was collusion between the plaintiff and the defendant.

4. When the matter came before the Personal Injuries Assessment Board, on 6th November, 2014, the application for assessment was rejected by AXA. An authorisation pursuant to provisions of the Personal Injuries Assessment Board Act issued on 14th March, 2016 and the personal injuries summons issued on 6th May, 2016.

5. The reasons for the suspicions of the insurance company are outlined in an affidavit sworn on 1st September, 2016 by Ms. Roisin McGuinness, insurance official of the second named defendant. She avers that on 11th April, 2014, the first named defendant made a statement to an AXA investigator in which he asserted that he did not know any of the passengers in the plaintiff's vehicle. However, it is sworn that three weeks prior to the defendant obtaining insurance cover, he applied to AXA in respect of a different vehicle and the address that he gave on that application was an email address of a passenger who was in the plaintiff's car at the time of the collision. It is also averred that he provided the mobile telephone number of that person as his own.

6. In addition it is averred that while the defendant maintained that he had three passengers in his vehicle, the gardaí did not observe one of the passengers at the scene, nor, when they were at the scene, were they told that such person was a passenger. No affidavit evidence was adduced from members of An Garda Síochána. Suspicion was also raised in respect of the post accident position of the vehicles and the finding of a claw hammer near the scene, noting that two windows in the car were broken.

7. In a replying affidavit of Mr. Quatja, sworn on 4th October, 2016, he vehemently denies that there is collusion and takes grave exception to the assertions in, and implications of Ms. McGuinness's affidavit.

8. AXA applied to the County Registrar to be joined as co-defendant to the proceedings. The Court understands that this application was made on the basis that if the plaintiff established negligence against the defendant then the plaintiff could seek to recover judgment against AXA pursuant to the procedures envisaged by s. 76 of the Road Traffic Act 1961; and that therefore AXA had a proprietary and pecuniary interest in the outcome of the case and were entitled to be joined as parties thereto.

9. On 10th October, 2016, the County Registrar ordered that AXA be joined as co-defendants and that the title of the proceedings be amended accordingly.

10. AXA has delivered a full defence alleging, *inter alia*, that the collision was stage managed between the plaintiff and the defendant. An affidavit of verification of the defence has been sworn by Ms. McGuinness.

11. The order of the County Registrar was not appealed and therefore, in consequence, the entitlement of AXA to participate in these proceedings is established.

12. The rationale of the joinder of an insurance company in a case such as this was addressed by Kearns P. in *McDonagh v. McDonagh* [2015] IEHC 543 where he observed:-

> *"This is not a case, as referred to in Barlow and Others v Fanning & UCC [2002] 2 IR 593, where the applicant seeks to be joined merely because its reputation is at risk and they wish to defend it. Nor is the applicant seeking to be joined simply because it is interested in the proceedings, as opposed to having a genuine legal interest in the outcome of the proceedings. The applicant insurer's proprietary or pecuniary rights are very much at stake in these proceedings. If judgment is entered against the defendant, the plaintiff may then seek to execute the judgment against the applicant under s.76."*

Kearns P. noted that there was no statutory provision precluding such joinder and recognised the ever increasing exhortations of appellate courts to permit a notice party to be joined, in order to ensure that cases and legal business in general be disposed of efficiently and expeditiously. Further, in the particular circumstances of the case, he also referred to the fact that EC Motor Regulations now expressly provide that insurers may be sued directly. These were factors strongly in favour of the course sought by

the applicant in that case. Kearns P. was satisfied that it was clear that fraud was being alleged against the plaintiff and while the applicant insurance company would not be restrained by s. 76(e) from defending such application on the basis of fraud, the court was satisfied that requiring the applicant to defend a s. 76 application rather than joining them as a party to the proceedings, would be an inefficient use of court time and would cause unnecessary costs to be incurred by the parties.

13. In the Court's view, AXA's *locus standi* has been acknowledged by the making of the order by the County Registrar. It is implicit in the making of that order that this is an exceptional case and that AXA has a necessary proprietary or pecuniary right and interest in the outcome of the proceedings. In *McDonagh*, Kearns P. accepted that it was appropriate that the indemnifier be joined to the proceedings as notice party rather than defendant. No issue has been raised in this case on the joinder of AXA as a defendant, rather than as notice party. In *McDonagh v. Ward* [2017] IEHC 513, a decision of Meenan J., the insurance company was joined as co-defendant.

11. The plaintiff brought a motion for judgment in default of appearance against the first defendant; and on that motion objected to the *locus standi* of AXA to be heard or to contest the application. Reliance was placed on O. 27 of the Circuit Court Rules.

12. The Circuit Court judge entered judgment against the first named defendant and it is from that order that this appeal has been brought by AXA.

13. Certain of the decisions opened to this Court concerned applications by a non party to apply to set aside judgments previously obtained by a plaintiff against defendant: see for example, *Windsor v. Chalcraft* [1938] 2 All E.R. 751 where McKinnon L.J. of the Court of Appeal stated at p. 757:-

> *"In this case, by virtue of the provisions of the Road Traffic Act, the underwriters, the strangers to the litigation, have much more than a contractual right with the nominal defendant. They have an actual interest by reason of the liability imposed upon them by statute to make good the amount of the judgment to the plaintiff, and for that reason it seems to me that they, of all people, are the sort of strangers interested in the judgment as being injuriously affected by it, who have a right, within the principle laid down by Bowen L.J., to intervene, and to ask to have the judgment by default set aside."*

In the same case, Greer L.J. emphasised a requirement that "*complete justice*" be done between all the parties. The facts of that case are instructive because it concerned an application by a party, who was not already joined in the action, to be heard and to apply to set aside a judgment because they had a pecuniary interest in the outcome as they were under a statutory liability to pay the plaintiff the amount of the judgment.

14. Authorities such as *Mehaffey v. Mehaffey* [1905] 2 I.R. 292 establish that in circumstances where judgment is allowed to be marked by collusion between the plaintiff and the defendant, a third party who might be affected by such judgment, such as the administrator of a deceased's estate, may make application to have the judgment set aside.

15. It seems to the Court that the defendants, having already been joined as a co-defendant in this case, can be in no worse position and have any less locus standi than the insurance company in *Windsor v. Chalcraft*.

16. Counsel for the second named defendant, Mr. Murray S.C., also opened to the court to the decision in *Gurtner v. Circuit & Anor*. [1968] 2 Q.B. 587. There, it was held by the Court of Appeal that where the determination of an action between two parties would directly affect the third person's legal rights or his pecuniary interests, the court had a discretion under the appropriate rules of court in England, to order that person to be added as a party to the action on such terms as the court considered desirable so that "*all matters in dispute could be effectually and completely determined and adjudicated upon*". During the course of his decision, Diplock L.J. stated at p. 602 as follows:-

> *"Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely 'adjudicated upon' unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard."*

17. On the basis of these authorities it appears to the Court that the second named defendant in this case, who actually enjoys the benefit of an order joining them in the exceptional circumstances of the case, must have *locus standi* on any particular application where such application may affect the conduct of the case and have the potential to impact upon its liability and obligation to indemnify as statutory insurers. I see nothing in the Circuit Court Rules to deprive the second defendant of such standing. If the rules were to be so interpreted, then a recognised right to participate in the case, already acknowledged by their joinder, might be negated, contrary to the principles of natural justice. I do not interpret the Circuit Court Rules as so doing. It seems to me that the principles underlying the joinder should apply to any application in the proceedings which might affect the conduct of the case and potential liability of the party so joined.

18. What has concerned the Court is whether it is sufficient to order that a stay be placed on the order of Circuit Court rather than to overturn the ruling. Mr. Murray S.C. submits that by having a standing judgment, with or without a stay, there continues in being what must be deemed to be an appropriate decision on part of the framework question to be determined at trial. He urges that it is less cumbersome and more practically efficient to avoid a situation whereby a trial judge might find himself or herself fettered by reason of the existence of the interlocutory judgment. Stated otherwise, the second named defendant fears that the fact that there exists on the court record a judgment validly obtained may have implications for the manner in which the case may be conducted at hearing, including the view which the trial judge may take in relation to the fact of the existence of that judgment, with or without a stay.

19. Further, counsel quite correctly points out, this is not a review application – *i.e*. an application to have a judgment set aside on the grounds it was entered through fraud, mistake or the other sustainable grounds for such application. This is a *de novo* appeal and on this appeal, this Court enjoys the same discretion as the Circuit Court judge enjoyed.

20. During the hearing of this application, Mr. Flannery S.C. for the plaintiff, fairly indicated that he could not identify any particular prejudice in having all issues concerning alleged collusion dealt with before the Circuit Court, rather than to have the issue litigated at a later stage in defence to any application that might be made under a s. 76 of the Act. Nevertheless, he expressed concern that the setting aside of the judgment and the reversal of the order of the Circuit judge may in some way be viewed in a prejudicial manner as against his client at trial or that unintended consequences or inferences might be drawn by the trial judge by reason of the vacation

of the order.

Conclusion
21. The second named defendant has been joined as a co-defendant in the proceedings. This order has not been appealed by the plaintiff. The necessary implication of the joinder and the order so made is that exceptional circumstances exist in this case which in the interest of justice dictate and require that the second named defendant be joined to enable it to fully participate in the defence of the action. In this Court's view, an indemnifier such as the co-defendant joined in this case, who has a pecuniary or proprietary interest in the outcome, in the interests of natural justice, must also have standing in respect of any interlocutory application brought before the court which may have an effect on the manner in which the defence is conducted. To hold otherwise, potentially, would be to negate or detract from the right already established to participate in the proceedings. This is a *de novo* appeal. The plaintiff has not established any prejudice which might be suffered by him by the Court exercising its jurisdiction to vacate the order of the Circuit Court judge, and to adjourn the motion for judgment in default of appearance to the hearing of the action.

22. It seems to the Court that a further persuasive factor in the exercise of its discretion is the nature of the allegations in the defence – collusion. If this is proved at trial, not alone is it likely go to the heart of the second named defendant's obligation to indemnify, but may also go to the heart of any order which this Court may make as between the plaintiff and the defendant.

23. If the defence of collusion is established at hearing, then, it may be open to the court, in accordance with its inherent jurisdiction, to vacate any interlocutory order for judgment previously made. See by way of analogy the decision in *Nixon v. Loundes* [1909] 2 I.R. 1, where Gibson J. stated at pp. 5 and 6:-

> *"The motion to set aside the judgment in based on alleged fraud and collusion between the plaintiff and the defendant, there being no real debt at all, or, if there was, the amount being dishonestly exaggerated, the object being to defeat creditors. The defendant was in embarrassed circumstances during this period, and several other judgments were obtained against him. If the Court has jurisdiction to grant the present application, the evidence should be of the strongest character.*
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> *The motion is based by Mr. Murphy on a Court Rule, Order XXVII, Rule 17, as to default judgments, and on two decisions – Jacques v. Harrison (1884) 12 Q.B.D. 165 and Mahaffey v. Mahaffey [1905] 2 I.R. 292. The scope of the rule is explained by Bowen, L.J., in 12 Q.B.D. at p. 170. It does not enable a third party in an ordinary action to set aside a judgment, or to substitute himself as defendant. The present motion rests on fraud and the inherent jurisdiction of the Court over judgments vitiated by fraud. Whether such judgment if by default or consent, or otherwise, is immaterial."*

Continuing, Gibson J. stated at p. 7:-

> *"But can such judgment be removed from the record on motion? In the absence of authority I would have hesitated to introduce such form of relief for the first time. I find, however, that in Harrod v. Benton (1828) 8 B. & C. 217, upon a motion to set aside a judgment with execution on a warrant of attorney alleged to be fraudulent against creditors, the Court decided that in a clear case the judgment could be set aside on a creditor's motion, but that where the facts were not clear, there should be an issue to try the question of the fraud. Had this decision been before the Court in Mahaffey's case I think the judgment there would have been set aside finally without any further pleading, as the plaintiff was found guilty of manifest fraud and collusion."*

24. At p. 9, Kenny J. stated:-

> *"But, independently of the General Order [that is i.e. the rule of court pursuant to which the application above is brought] I think there can be no doubt that the Court has inherent jurisdiction to deal with its own record, at the instance of any party affected by it, when it is improperly placed on the files of the Court."*

25. In all the circumstances of the case, I believe that it is appropriate that the judgment which was entered in default of appearance against the first named defendant by the Circuit Court judge, should be vacated and the said motion should be adjourned to the hearing of the action.

26. In conclusion, to assuage the plaintiff's concerns, I should make it quite clear that nothing in the order which is hereby made or in this judgment should be construed as an expression by this Court of the strengths or weaknesses of the claim or the defence. While certain allegations are made in the pleadings regarding the staging of an accident, these have not been, and indeed may never be, proven. These are matters for the trial judge's determination. It is right to record that what is pleaded in the defence of the defendants are no more than allegations which the plaintiff vehemently denies. If it fails to establish the matters pleaded in its defence, the second named defendant runs a significant risk that the court hearing the case might consider the award of punitive damages. Such potential outcome has been referred to by Kearns P. in *McDonagh* where he stated:-

> *"As a countervailing factor of possible benefit to the plaintiff in the proceedings is the fact that, if successful with the claim, an award of aggravated or exemplary damages may be sought and awarded by the trial judge."*

27. I echo those sentiments. An indemnifier who has taken the steps, and makes the allegations which the second named defendant has taken and made in this case, runs a significant risk of an award of aggravated or exemplary damages, if the defence is unsuccessful.

28. In the circumstances, I will allow the appeal and vacate the order of the Circuit Court.