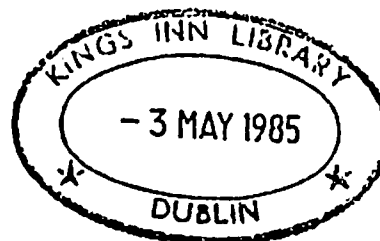


BETWEEN:

FRANCIS BROWNE



Plaintiff

and

NORWICH UNION FIRE INSURANCE SOCIETY LIMITED
AND AUSTIN O'CONNOR

Defendants

Judgment delivered by the President of the High Court on the
4th day of February 1985

This is an application brought by the Plaintiff pursuant to the provisions of Order 19 Rule 28 of the Rules of the Superior Court for an order that the objection and defence filed and delivered herein by the first-named Defendant (hereinafter referred to as "The Company") be struck out that the same is frivolous and/or vexatious and for an order that judgment be entered herein for the Plaintiff.

The nature of and basis for the Plaintiff's claim in these proceedings is set forth in detail in the Statement of Claim delivered on his behalf on the 19th day of January 1984 and this judgment should be read in conjunction therewith.

In these proceedings, the Plaintiff claims:-

- (a) a declaration that on the 26th day of January, 1976, there was in force a policy of insurance No. 73412X50224 in respect of liability for an accident sustained during the course of his employment by Arctic Transport Ltd. (now in liquidation and of which the second-named Defendant was Liquidator) on that

date and which policy had been affected by his employers with "The Company".

- (b) An order directing that the sum of £227,689.00 assessed as damages in respect of liability for the said accident payable to the employer by "The Company" pursuant to the terms of the said Insurance Policy be paid to the Plaintiff together with accrued interest and costs in such manner as this Honourable Court may seem fit and in conformity with the provisions of Section 2 of the Civil Liability Act, 1961.

In the "objection and defence" delivered on behalf of "The Company", "The Company" in the first instance, objects:-

"to the Plaintiff's claim herein as made against it on the grounds that the Plaintiff's proceedings do not disclose any action at law as against the first-named Defendant and will apply at the hearing of this action for an Order that the Plaintiff's claim as against the first-named Defendant be dismissed with costs."

and proceeds to deny the averments of fact contained in the Plaintiff's statement of claim, thereby in effect putting the Plaintiff on proof thereof.

It seems to me from a consideration of the said defence, however, that the fundamental issues raised by "The Company" are contained in the objection and the matters pleaded at Paragraph 16, 17, 18 and 19 of "The Company's" defence.

Paragraph 16 provides that:-

"If, which is denied, at any time material to these proceedings

there was in existence a policy of insurance in respect of employers liability between the first-named Defendant and "the Employers" the said policy was subject to express or in the alternative implied terms and conditions and the first-named Defendant as it was entitled to do repudiated the said policy of insurance on or about the 28th day of February 1979 which repudiation was accepted by the Employers and which repudiation was not contested by reference to arbitration within 12 calendar months from the date of such repudiation in accordance with the terms and conditions of the said policy and which right to contest the said repudiation had been abandoned by the Employers in accordance with the terms and conditions of the said policy."

Paragraph 17 provides that:-

"If, which is denied Arctic Transport Ltd. (in liquidation) is indebted to the Plaintiff in the sum of £227,689.00 together with costs, the said sum is not due and owing by the first-named Defendant to the Plaintiff but is due and owing by the second-named Defendant to the Plaintiff in his capacity as liquidator of Arctic Transport Ltd."

Paragraph 18 provides that:-

"The first-named Defendant denies that the provisions of Section 62 of the Civil Liability Act, 1961 has any application to the circumstances that pertain in these proceedings either in the manner as alleged or at all".

Paragraph 19 alleges that:-

"There is no privity as between the Plaintiff and the first-named Defendant".

Section 62 of the Civil Liability (No. 41) Act, 1961 provides that:-

"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."

From a consideration of the terms of the Statement of Claim herein, the affidavit of the Plaintiff and the submissions made on his behalf by Mr. Mackey, the Plaintiff's claim herein maybe briefly summarised as follows:-

1. On the 28th day of January 1976 there was in effect a policy of insurance entered into between Arctic Transport Ltd. and "The Company" whereby "The Company" agreed to indemnify Arctic Transport Ltd. against all claims for damages in respect of injuries sustained by their employees, including the Plaintiff during the course of their employment by Arctic Transport Ltd.

2. That the Plaintiff in these proceedings suffered injury during the course of his employment by Arctic Transport Ltd. and due to their negligence and that by virtue of the provisions of the said policy, Arctic Transport Ltd. were entitled to be indemnified against such claim by "The Company".
3. That on the 13th day of July 1978 the said Arctic Transport Ltd. was wound up by order of the High Court and the second-named Defendant in these proceedings was appointed Provisional Liquidator and by order dated the 26th day of July 1976 was appointed Official Liquidator of "The Company".
4. That on the 4th day of November 1983, damages in respect of the Plaintiff's injuries, loss and damage was assessed in the sum of £227,689.00.
5. That such sum together with costs has not been paid to the Plaintiff by the Liquidator of the said Arctic Transport Ltd.
6. By virtue of the provisions of Section 62 of the Civil Liability Act, 1961 the amount payable on foot of the said policy cannot be used by the Liquidator to discharge any of the liabilities of the Company other than the Plaintiff's claim herein.
7. That by virtue of the said Section, that as it prohibits the use of the moneys payable on the said policy for any purpose other than the satisfaction of the Plaintiff's claim that the Liquidator and "The Company" are trustees of the said moneys for and on behalf of the Plaintiff.

It is fundamental to this claim that it be established by the Plaintiff that there was in force and in effect at the date of the accident in which the Plaintiff suffered injury, a valid policy of

insurance whereby "The Company" indemnified Arctic Transport Ltd. against such claim.

Until that fact, which is denied by "The Company", is established the other matters in the proceedings cannot and should not be determined.

Consequently, I cannot hold that the objection and defence delivered on behalf of "The Company" is either frivolous or vexatious. The Statement of Claim and the objection and defence raise important considerations of fact and of law and will have to be determined by the Trial Judge.

Consequently, I refuse the application made on behalf of the Plaintiff.

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