

APPROVED

[2022] IEHC 69



THE HIGH COURT

2015 No. 6404 P

BETWEEN

ANTHONY MORROW

PLAINTIFF

AND

EMELIA BURNS  
CHARLES MORROW  
THE MOTOR INSURERS BUREAU OF IRELAND

DEFENDANTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 25 February 2022**

## INTRODUCTION

1. This matter comes before the High Court by way of an application for leave to amend the pleadings in a personal injuries action. The proposed amendment, on its face, appears to be minor. In essence, it involves the addition of a reference to “*the second named defendant*” at a particular point in the pleadings. In truth, the implications of the proposed amendment for the proceedings are profound. If allowed, it would radically change the complexion of the case made against

NO REDACTION REQUIRED

the Motor Insurers Bureau of Ireland by making it potentially liable for a different driver than the driver identified in the original pleadings.

## **CHRONOLOGY**

2. The chronology of the proceedings is summarised in tabular form below:

15 June 2012	Accident
21 May 2014	Application to PIAB
26 February 2015	PIAB authorisation
6 August 2015	Personal Injuries Summons
12 May 2016	First defendant's notice for particulars
17 May 2016	Appearance entered for first defendant
14 November 2016	Order directing replies to particulars
3 August 2017	Appearance entered for third defendant
21 December 2018	First and third defendant's notice for particulars
10 May 2019	Replies to particulars
9 October 2020	Defence of first and third defendants
3 December 2020	Liberty Insurance notified by second defendant
18 November 2020	Notice of indemnity and contribution
3 March 2021	Motion issued seeking to amend pleadings
19 July 2021	Liberty Insurance void policy (ten day notice)
20 December 2021 &	
7 February 2022	Hearing of motion to amend

## **PROCEDURAL HISTORY**

3. These proceedings arise out of an accident which occurred on 15 June 2012. The case as pleaded is that the plaintiff had been on the back of a trailer attached to a stationary truck at a business premises owned by his father, the second named defendant. It is pleaded that the driver of another vehicle, the first named defendant, caused her vehicle to collide with the truck and trailer. It is further pleaded that the collision caused the plaintiff to fall to the ground, and that a tractor tyre, which had previously been loaded on top of the trailer, then landed

upon him. As a result of the accident, the plaintiff has sustained very severe injuries.

4. The case as pleaded is that the first and second named defendants were jointly responsible for the accident. The particulars of negligence alleged against each differ. The case pleaded against the first named defendant is that she had driven her vehicle in a negligent manner by reversing it into the parked truck and trailer. The case pleaded against the second defendant relates to the manner in which the truck and trailer had been loaded and parked up, and more generally, to the management of the business premises. In particular, it is alleged that the second named defendant had driven the truck and trailer into position, and that he had been responsible for the loading of the trailer including, relevantly, the placing of a tractor tyre as part of the load.
5. The proposed amendment is in respect of the case pleaded against the third named defendant, the Motor Insurers Bureau of Ireland (“*MIBI*”). It should be explained that the MIBI has an obligation, under an agreement with the Minister for Transport, to satisfy judgments entered against an uninsured driver in certain circumstances. The version of the agreement which had been in force at the time of the accident is dated 29 January 2009 and has been exhibited as part of the application to amend (“*the MIBI Agreement*”).
6. The MIBI is only liable to meet an unsatisfied judgment against an uninsured driver in the circumstances outlined in the MIBI Agreement. Relevantly, liability is excluded where the person injured voluntarily entered the vehicle and the MIBI can prove that that person knew that the vehicle was not insured. See §5.2 of the MIBI Agreement as follows:

“Where at the time of the accident the person injured or killed or who sustained damage to property voluntarily

entered the vehicle which caused the damage or injury and MIBI can prove that they knew that there was not in force an approved policy of insurance in respect of the use of the vehicle, the liability of MIBI shall not extend to any judgement or claim either in respect of injury or death of such person while the person injured or killed was by his consent in or on such vehicle or in respect of damage to property while the owner of the property was by his consent in or on the vehicle.”

7. The case as originally pleaded had been that the MIBI is obliged to satisfy any judgment entered against the *first named* defendant. In fact, there had been a valid policy of insurance in place in respect of the first named defendant’s vehicle as of the date of the accident and her insurers have responded to the claim. There would not appear, therefore, to be any basis upon which a claim for compensation could be made as against the MIBI in respect of the first named defendant.
8. Certainly, this seems to have been how the MIBI understood the case against it. As explained on affidavit, the MIBI took the view that, in circumstances where the first named defendant is fully indemnified by her own insurers (AXA Insurance), there would be no question of any judgment against her going unsatisfied. There was thus no conflict between the respective interests of the MIBI and AXA Insurance. On this basis, the solicitors acting on behalf of AXA Insurance subsequently came on record for the MIBI as well as for the first named defendant.
9. The solicitors acting on behalf of the MIBI, in a letter to the plaintiff’s solicitor, had expressly drawn attention to the fact that no order over was being sought as against the second named defendant. See letter of 21 September 2016 as follows:

“It also appears that notwithstanding this (*sic*) there are two motor vehicles involved in this incident the Plaintiff is not

seeking any court order over against the MIBI in respect of any judgment he might obtain against the second named Defendant notwithstanding that the second named Defendant is accused of road traffic act negligence in the proceedings issued. We are flagging this now as it is a matter for the Plaintiff's solicitors as to what reliefs are sought on his behalf but the First named Defendant will be raising this issue in the context of its own defence and the omission by the Plaintiff in his personal injuries summons.

Separately, you might confirm that the Plaintiff is satisfied that he will be able to prove that the registered owner of vehicle, 01 RN 2736 was the second named Defendant at the time of the incident, the subject matter of these proceedings and clarify whether the Plaintiff has established who was the insurer of that vehicle at the time of this incident. We ask this as AXA's own investigations have established a different owner and again this will be relevant in the context of the defence raised by the First named Defendant and indeed whether the Plaintiff has identified the correct persons in his proceedings."

10. It does not appear that any response was ever received to this letter. It was not until March 2021 that the plaintiff took steps to amend his pleadings. It appears that this was prompted by receipt of the joint defence of the MIBI and the first named defendant on 9 October 2020. (See affidavit of plaintiff's solicitor of 21 January 2022).
11. The plaintiff now seeks to reorient his case against the MIBI by asserting that the MIBI is obliged to satisfy any judgment entered against either the first and/or second named defendant. The text of the proposed amendment reads as follows. (The amendments are indicated by way of the underlining or striking through of the affected words, as per the draft exhibited to the grounding affidavit).

"A declaration that the third named Defendant is obliged to satisfy in full any judgment or part of a judgment remaining unsatisfied within 28 days after the date upon which judgment is entered against the first and/or second named Defendant pursuant to an agreement entered into between the Minister for Transport and the ~~second~~ third named Defendant dated 29 January 2009."

12. No attempt has been made in either the original or amended version of the pleadings to set out the basis upon which the MIBI is liable for the actions of either the first or second named defendant. This is a significant omission. There is an obligation upon a plaintiff in a personal injuries action to provide full and detailed particulars of the claim, and of each allegation, assertion or plea comprising that claim (Civil Liability and Courts Act 2004, section 8).
13. The basis of the claim against the MIBI has since been outlined, in written and oral submission, as follows. The plaintiff contends that the second named defendant is an “*uninsured driver*” for the purposes of the MIBI Agreement. More specifically, it is said that there is no valid policy of insurance in place in respect of the truck and trailer. Whereas there had been a policy of insurance in place as of the date of the accident, it is said that the relevant insurance company (Liberty Insurance) has since voided the policy on the grounds of material non-disclosure and/or material misrepresentation.
14. The plaintiff’s solicitor has exhibited correspondence from Liberty Insurance dated 29 April 2021 and 19 July 2021. It is apparent from this correspondence that the existence of a claim arising out of the accident on 15 June 2012 was not notified to Liberty Insurance until 3 December 2020, that is, at a remove of some eight years. The claim had been notified by the second named defendant, notwithstanding that the policy of insurance is in the name of the plaintiff. The insurance company has since purported to void the policy, on the basis that the truck had not been in the ownership of the insured, i.e. the plaintiff, but had been owned and operated by his father, the second named defendant, in the course of his machinery trading business. The insurance company goes on to state that—

even if a valid policy of insurance had been in place—the failure to immediately notify the claim rendered the policy non-responsive in any event.

15. The second named defendant has not entered an appearance to the proceedings. To date, no application for judgment in default of appearance has been sought by the plaintiff.
16. The motion for leave to amend the pleadings initially came on for hearing before me on 20 December 2021. The motion was part-heard on that date before being adjourned to allow the plaintiff's side to file a further affidavit setting out his position in respect of the policy of insurance. The hearing resumed on 7 February 2022 and judgment was reserved to today's date.

#### **LEGAL TEST FOR APPLICATION TO AMEND**

17. The principles governing an application to amend pleadings are well established. The modern approach commences with the judgment of the Supreme Court in *Croke v. Waterford Crystal Ltd* [2004] IESC 97; [2005] 2 I.R. 383. Geoghegan J., delivering the unanimous judgment of the Supreme Court, held that the primary consideration in an application for leave to amend must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation. Geoghegan J. observed that there had been an overemphasis in the earlier case law on an obligation to give good reason for having to amend the pleadings. As to delay in the making of an application to amend, Geoghegan J. accepted that an application to amend might properly be refused if made at a very late stage of the proceedings; for example, if made shortly before the date scheduled for the hearing of the action. A court should,

however, consider whether any prejudice to the other party could be addressed instead by an adjournment and an appropriate costs order.

18. The judgment in *Croke v. Waterford Crystal Ltd* also confirms (at paragraph 39) that it is open to a court to make a decision, in principle, to grant leave to amend, but to direct that the moving party produce a revised draft of the proposed amendments.
19. More recently, the Supreme Court considered the principles governing an application to amend pleadings in the specific context of a personal injuries action in *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21. The Supreme Court held that the introduction of a more elaborate and extensive form of pleadings in personal injuries actions under the Civil Liability and Courts Act 2004 did not modify the court's discretion to allow leave to amend under Order 28, rule 1 of the Rules of the Superior Courts. The Supreme Court, *per* MacMenamin J., stated the general principle as follows (at paragraph 42 of the judgment):

“It is clear, of course, that courts do have a discretion to amend. That discretion must be exercised judicially. Where an amendment may be made without prejudice to the other party, to enable the real issues to be tried, it should be allowed. A court must consider whether prejudice can be overcome by an adjournment. If so, that amendment should be made, and an adjournment, if necessary, granted, to overcome any possible prejudice. If the amendment puts another party to extra expense that can be regulated by a suitable order as to costs, or by the imposition of a condition that the amending party shall indemnify the other party against such expenses [...]. A court will, *inter alia*, consider an applicant's conduct in the proceedings, and any question of delay. It is now long established that the function of courts is to decide the rights and duties of parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. [...]”.



20. In the present case, the application for leave to amend is opposed, in part, on the basis that the proposed amendments fail to disclose a reasonable cause of action against the MIBI. (See paragraphs 23 to 25 below). This ground of opposition presents a question of principle as to the extent to which it is permissible, on a procedural motion to amend, to embark upon a consideration of the merits of the proposed amendments.
21. The court has helpfully been referred to the judgment of the High Court (Clarke J.) in *Woori Bank v. KDB Ireland Ltd* [2006] IEHC 156. There, it was held (at paragraph 21) that the court should lean in favour of allowing an amendment, which is otherwise appropriate, unless it is “*manifest*” that the issue sought to be raised by the amended pleading must “*necessarily fail*”. The court should not, on a procedural motion to amend, enter into the merits or otherwise of the issue sought to be raised, save to the extent of asking itself whether the issue which would be required to be tried as a result of the amended pleading is one which must necessarily fail.
22. This theme is elaborated upon by the judgment of the High Court (Kelly J.) in *Cuttle v. ACC Bank plc* [2012] IEHC 105. That judgment emphasises that it is not the task of the court to adjudicate on the merits of the proposed amendments or to speculate on the likelihood of their success at trial. The judgment goes on to say that the appropriate test is whether the proposed amendment, had it been part of the original statement of claim, would have survived an application to strike out *in limine* on the basis of having no reasonable prospect of success. (The parties in *Cuttle* had been in agreement that this was the appropriate test to apply). The judgment then states that the court, in the exercise of its discretion to grant leave to amend, must bear in mind the very limited circumstances in

which an application to strike out or dismiss proceedings can be successfully made. The general approach in *Cuttle* has since been endorsed by the Court of Appeal in *Dormer v. Allied Irish Bank plc* [2017] IECA 199.

#### **STANCE OF THE MOTOR INSURERS BUREAU OF IRELAND**

23. The MIBI seeks to resist the application to amend on three broad grounds as follows. First, it is said that there has been extraordinary delay on the part of the plaintiff in articulating a claim for compensation against the MIBI in respect of the second named defendant. The proposed amendment was first mooted in March 2021. This is so notwithstanding that the solicitors acting on behalf of the MIBI, by letter dated 21 September 2016, expressly drew attention to the fact that the personal injuries summons did not seek an order over against the MIBI in respect of any judgment which the plaintiff might obtain against the second named defendant. (The text of the letter has been set out at paragraph 9 above). No steps were taken at that time to amend the pleadings.
24. Secondly, it is said that to allow the amendments to be made at this stage, some nine years' post-accident, would result in a "*manifest injustice*" to the MIBI. The MIBI would have to defend these proceedings on the basis of a "*completely new argument*" predicated on allegations against the second named defendant. It is also suggested that the MIBI will now have to seek co-operation from the second named defendant which it may not receive.
25. Thirdly, the underlying merits of any claim against the MIBI are challenged. In particular, it is said that the plaintiff did not give the requisite notice of an intention to seek compensation from the MIBI within time, and has failed to produce any material which demonstrates that the second named defendant is an

“*uninsured driver*” for the purposes of the MIBI Agreement. More generally, it is said that the claim is not one which involves an uninsured driver *per se*, but is instead predicated on the proposition that the policy of insurance has been avoided because of the plaintiff’s own non-disclosure and misrepresentation.

## **DISCUSSION AND DECISION**

26. The case law establishes that where an amendment may be made without prejudice to the other party, to enable the real issues to be tried, then it should be allowed. It is necessary, therefore, to consider whether the MIBI would be prejudiced by permitting the proposed amendment.
27. The proposed amendment would radically change the complexion of the case against the MIBI. The MIBI would, for the first time, be exposed to a potential liability to satisfy any judgment entered against the second named defendant. This potential liability was only notified to the MIBI in March 2021, when it was served with the notice of motion seeking leave to amend. The introduction of such a radical change, some nine years after the date of the accident, presents a risk of prejudice. The lapse of time may be such that the ability of the MIBI to defend the changed case against it may have been undermined. The recollection of witnesses will have faded, and physical evidence, which might otherwise have been retained, may be lost.
28. As it happens, however, the risk of prejudice has been reduced by the fact that the MIBI had been joined in the proceedings from the outset, albeit that its liability had been confined to any judgment entered against the first named defendant. The joinder had the consequence that the solicitors acting on behalf of the MIBI and the first named defendant jointly had taken steps to investigate

the mechanics of the accident. This had been done to determine whether the MIBI and the first named defendant might have a claim for indemnity and contribution against the second named defendant. Thereafter, on 18 November 2020, the MIBI and the first named defendant jointly served a notice of indemnity and/or contribution on the second named defendant. It is expressly pleaded that if the accident occurred in the manner alleged by the plaintiff, then the operative cause of the accident was the unsafe and dangerous fashion in which the second named defendant's truck and the trailer attached thereto was loaded with goods (to include a tractor wheel) and was subsequently parked at the locus of the accident by the second named defendant.

29. It is readily apparent from the detailed particulars of negligence pleaded in the notice of indemnity and/or contribution that a careful investigation of the circumstances of the accident had been carried out on behalf of the MIBI and the first named defendant.
30. Of course, the issues in dispute between the MIBI and the plaintiff are not confined to a consideration of the mechanics of the accident, nor to the question of whether either defendant bears any liability for same. There is a more fundamental dispute as to whether recourse to the MIBI is available at all in the circumstances of this case. It will be recalled that the plaintiff's case, as outlined in legal submission, is that the truck and trailer should be treated as an "*uninsured vehicle*" for the purposes of the MIBI Agreement. It is said that the policy of insurance dated 13 June 2012 has been voided by Liberty Insurance for alleged non-disclosure and/or misrepresentation.
31. The MIBI disagrees with the plaintiff's analysis. In particular, the MIBI has not conceded that the insurance policy excluded use of the truck by the second

named defendant. Nor has the MIBI conceded that the insurance policy has been properly avoided by Liberty Insurance. Reliance is placed on the provisions of section 76 of the Road Traffic Act 1961 (as amended) which limit the entitlement of an insurer to invalidate a policy of insurance on the grounds of misrepresentation to which the claimant was not a party or privy. More generally, it is submitted that the tenor of the MIBI Agreement is that it is intended to protect the victims of uninsured driving, not a person who had brought about the repudiation of an insurance policy through material non-disclosure or material misrepresentation to their own insurers.

32. This dispute as to whether the plaintiff is entitled to have recourse to the MIBI Agreement presents difficult legal issues. The MIBI Agreement is intended to implement the EU Motor Insurance Directive (2009/103/EC). The judgments of the Court of Justice of the European Union in Case C-442/10, *Churchill Insurance Company*, EU:C:2011:799, and Case C-287/16, *Fidelidade-Companhia de Seguros*, EU:C:2017:575 appear to suggest that a vehicle may still be regarded as insured, notwithstanding that the policyholder initially made false statements concerning the identity of the owner and of the usual driver of the vehicle concerned. Moreover, the MIBI Agreement itself and the EU Motor Insurance Directive both allow for the exclusion of the payment of compensation where it can be proved that a person voluntarily entered the vehicle which caused the injury when they knew it was uninsured.
33. The resolution of these difficult legal issues will, ultimately, be a matter for the trial judge. Having regard to the case law discussed at paragraphs 20 to 22 above, I am not satisfied that it is “*manifest*” at this interlocutory stage that the case against the MIBI must “*necessarily fail*”.

34. For the purpose of the application to amend the pleadings, the principal question is whether the inordinate delay by the plaintiff has prejudiced the ability of the MIBI to pursue a defence based on these legal issues. Counsel on behalf of the MIBI has submitted that the investigation, at a remove of many years, of the unusual facts relating to the ownership of the truck and trailer and the basis upon which the policy of insurance had been obtained, is intrinsically prejudicial and unfair. It is said that the MIBI would face a significant task in analysing the affairs of the plaintiff and his father as of June 2012.
35. There is much force in these submissions. The outcome of the proceedings, if amended, will be dependent on the precise circumstances in which the policy of insurance came to be obtained in June 2012, a matter of days prior to the accident. It may also depend on the ownership of the truck. The position of the plaintiff in respect of these matters is vague. This is so notwithstanding a number of requests for further and better particulars.
36. In response to the application to amend, the MIBI has recently sought to obtain contemporaneous documentation in respect of the insurance policy, including, for example, a copy of the proposal form. See letter of 28 January 2022 from AXA Legal Services to McGinley Solicitors LLP.
37. Subject to the caveat which follows, I have concluded, on balance, that the making of the proposed amendment will not cause any material prejudice to the MIBI in respect of these issues. This conclusion is premised on the assumption that copies of the contemporaneous documentation in respect of (i) the application for, and the issuance of, the policy of insurance in 2012; and (ii) the registration of the ownership of the truck subsequent to its importation from Scotland in May / June 2012, are still in existence. If so, the MIBI will be able

to establish the factual matrix relevant to its arguments in respect of the availability of recourse to the MIBI Agreement.

38. Any prejudice to the MIBI can further be reduced by directing the plaintiff to plead his case properly. The proposed amendment is too vague, and fails to meet the requirements in respect of pleadings prescribed under the Civil Liability and Courts Act 2004.
39. In principle, therefore, I propose to allow the plaintiff to amend the personal injuries summons. This is contingent upon the fulfilment of the two conditions identified under the next heading below.

#### **CONCLUSION AND FORM OF ORDER**

40. Having regard to the very unusual circumstances of this case, leave to amend will be allowed. The fact that the MIBI had been joined in the proceedings from the outset—albeit in a narrower role than that now envisaged—has had the consequence that steps were taken timeously on its behalf to investigate the mechanics of the accident. This has reduced the risk of the MIBI being prejudiced in its ability to defend the enlarged case now made against it, notwithstanding the inordinate delay on the part of the plaintiff in seeking to amend his pleadings.
41. The grant of leave to amend is contingent upon the fulfilment of the following two conditions. The first is that copies of the contemporaneous documentation in respect of (i) the application for, and the issuance of, the policy of insurance in June 2012; and (ii) the registration of the ownership of the truck subsequent to its importation from Scotland in May / June 2012, are still in existence and are made available to the MIBI.

42. The second condition is that the plaintiff's solicitor submits a revised draft of the proposed amendments, setting out the precise basis upon which it is alleged that the MIBI is liable to meet any unsatisfied judgment entered against the second named defendant. This revised draft should include particulars as to ownership of the truck, and the issuance and subsequent invalidation of the policy of insurance. The revised draft is to be circulated to the other parties to the proceedings by Monday, 21 March 2022.
43. In deciding whether to allow leave to amend, I have not lost sight of the fact that one consequence of the proposed amendment is that the MIBI may now require its own legal representation, separate from that of the first named defendant. It will be recalled that the MIBI and the first named defendant are currently jointly represented. The MIBI might well take the view that its interests no longer necessarily coincide with those of the first named defendant in circumstances where the MIBI is now exposed to a potential liability to satisfy the claim against the second named defendant. The questions of liability and causation as between the first and second named defendants *intra se* may assume a new significance.
44. The putting in place of separate legal representation will undoubtedly result in further delay and expense. The prejudice so created is not, however, sufficient to justify the refusal of leave to amend. Rather, it can be addressed by an appropriate costs order and case management directions. The MIBI will have liberty to apply, however, if practical difficulties transpire in respect of the subsequent use by the MIBI's new legal representatives of material generated by its former solicitors.
45. Finally, it should be noted that counsel on behalf of the plaintiff accepts that a decision to allow the pleadings to be amended does not imply any adjudication



by the court upon the more general question of the delay in these proceedings. Counsel specifically advanced his application on the basis that it did not preclude the bringing of an application to strike out the proceedings by reference to any alleged inordinate and inexcusable delay in the prosecution of same.

46. These proceedings will be listed for case management on Monday, 28 March 2022 at 10.45 am. The question of the costs of the motion to amend will also be dealt with on that date.

*Appearances*

Richard Lyons, SC and Patricia McCallum for the plaintiff instructed by McGinley Solicitors LLP

Paul Fogarty for the first and third named defendants instructed by AXA Legal Services

No appearance by the second named defendant

Approved  
Gemma S. Mans