THE HIGH COURT

[2023] IEHC 522

[Record No. 2007 3122 P]

BETWEEN

D.G. (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND C.G.

PLAINTIFF

AND

MICHAEL HUTCHINSON, THE MOTOR INSURERS' BUREAU OF IRELAND, THE MINISTER FOR TRANSPORT, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms Justice Bolger delivered on the 15th day of September 2023

1. This is the application of the third, fourth and fifth named defendants (hereinafter referred to as *"the State"*) to strike as the plaintiff's (hereinafter referred to as *"Liberty"*) actions as disclosing no reasonable cause of action and/or being frivolous and vexatious and/or being bound to fail. The underlying action is taken by Liberty Insurance, who invoke the plaintiff's name and claim to have (i) a right of subrogation and (ii) the right to seek *Francovich* damages against the State.

Background

2. The original plaintiffs were involved in road traffic accidents between 2000 2005 when traveling as passengers in a part of a motor vehicle which had no seating accommodation for them (*"unseated passengers"*). At the time of those accidents, s.65 of the Road Traffic Act 1961 and Regulations made thereunder, required insurance policies to exclude liability for personal injuries sustained by such unseated passengers. Each of the drivers sued by the original plaintiffs were insured by Quinn Insurance Ltd, and that business

was transferred to Liberty in April 2011. The original plaintiffs brought proceedings against the drivers, Quinn/Liberty and the Motor Insurers' Bureau of Ireland (*"MIBI")*, and later joined the State defendants. The High Court found that Quinn/Liberty was liable to the plaintiff as the Third Motor Insurance Directive (hereinafter referred to as *"the Directive"*) had not been transposed by the State and was to be interpreted as not allowing the liability exemption on which Quinn/Liberty relied. That decision was appealed to the Court of Appeal but, in the meantime, and apparently on the basis of what the High Court had found, Quinn/Liberty settled with the original plaintiffs whilst preserving those plaintiffs rights to pursue the State parties (and, therefore, Liberty's rights to pursue such a claim as a subrogated action.) The State did not consent to or participate in those settlements, but was made aware of their existence.

3. The Supreme Court addressed related matters by referring questions of law to the CJEU in a different case involving a claim by another unseated passenger against an uninsured driver and the MIBI; *Farrell v. Whitty* [2015] IESC 39 and *Smith v. Meade* [2016] IECA 389. In *Farrell v. Whitty* (Case C-356/05 ECLI:EU:C:2007:229), the CJEU found the Irish statutory provisions were incompatible with EU law and held that the Directive was directly effective before the national courts of the Member States. In a later reference in *Smith v. Meade* (Case C-122/17, ECLI:EU:C:2018:631)*,* the CJEU held that the exclusion of cover to unseated passengers in the insurance policies was ineffective and could not be relied on by the insurer to refuse liability in respect of injured unseated passengers. That case came back to the Court of Appeal which asked the parties for submissions on the issue of subrogation. In the meantime, and before matters were finally determined by the Court of Appeal, the State chose to indemnify that insurer (FBD). Liberty claim, in these proceedings, that they then settled with the plaintiffs in the belief and understanding that the State would adopt a similar approach to their cases. Ultimately that did not occur and so Liberty have continued these proceedings seeking *Francovich* damages from the State on the basis of what they claim is their right to equitable subrogation. The State parties seek to strike out those proceedings.

4. For the purpose of this application to strike out, the State accept all facts pleaded by the plaintiffs.

Decision

(i) The court's jurisdiction to strike out proceedings

5. The high threshold required for striking out proceedings under the court's inherent jurisdiction is well established and exists *"to ensure that an abuse of process of the courts does not take place"* (*Barry v. Buckley* [1991] I.R. 306 at 308 and affirmed in *Keohane v. Hynes* [2014] IESC 66 at 6.5). The State must satisfy the high burden of proving that Liberty's arguments are unstateable such that they are bound to fail and to allow them to proceed would constitute an abuse of the court's process.

6. The courts have previously identified the circumstances in which the strike out jurisdiction should not be used. For example, Murray J. (as he then was) in *Jodifern v. Fitzgerald* [1999] IESC 88, [2000] 3 I.R. 321 explained at p. 334:-

> "*The object of such an Order is not to protect a Defendant from hardship in proceedings to which he or she may have a good defence but to prevent the injustice to a Defendant which would result from an abuse of the process of the Courts by a Plaintiff. Clearly, therefore, the hearing of an application by a Defendant to the High Court to exercise its inherent jurisdiction to stay or dismiss an action cannot be of a form of summary disposal of the case either on issues of fact or substantial questions of law in substitute for the normal plenary proceedings.*"

This decision was referred to by the Supreme Court in *Keohane v. Hynes* at para. 6.5 in stating:-

> "*As again noted by Murray J. in Jodifern, whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis."*

The Supreme Court concluded, in that case at para 6.6 that:-

> "*all the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than*

when the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law"

7. The courts have been very clear in confirming that proceedings should not be dismissed at an interlocutory stage where complex legal issues arise that require *"the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored"* (Clarke J. (as he then was) in *Moylist Construction v. Doheny* [2016] IESC 9 at 3.12). The same point had been made previously by the Supreme Court in *Delahunty v. Player and Wills* [2006] IESC 21, [2006] 1 I.R. 304 in confirming that cases were complex issues of law and fact are raised are not appropriate for disposal under the court's strike out jurisdiction.

8. Where an amendment of pleadings would save the claim, it must be assumed in favour of the plaintiff (*Lawlor v. Ross* [2001] IESC 110), a point which has been accepted by the State in this case. Liberty have raised issues in the course of their submissions which are not contained in the pleadings, particularly around delay. This may require an amendment of the pleadings and, insofar as that may occur, I take the high point of the plaintiffs' case as its amended case.

9. Liberty have raised both the probability and possibility of adducing evidence, subject to sight of the State's defence which has not yet been filed. If they do have to call evidence and/or seek discovery in order to make their case, that militates against exercising the court's jurisdiction to strike out as long as that evidence and/or discovery is *bona fide* and goes to relevant issues of dispute in the case. Here, I am told by Mr. Collins SC for Liberty that they do intend to call evidence in relation to (i) the basis for their belief and understanding when they entered into a settlement with the original plaintiff, that the State would adopt an approach to indemnify them similar to what the State had done with FBD Insurance in *Smith v. Meade;* and (ii) expert evidence in relation to the impact of those settlements on Liberty's reserves which were created by their premia on the basis of calculations made at a time when they (like all insurers) did not indemnify their insured drivers from claims from unseated passengers as that was ostensibly prohibited by s. 65 of the Road Traffic Act at that time; and (iii) an explanation for the delay that has occurred in this case since 2013 as a result of the various proceedings before the Court of Appeal, the

CJEU and the Supreme Court. Mr. Collins SC says discovery may be necessary depending in part on the contents of the State's defence.

10. Liberty's position in relation to evidence and discovery seems to me to be *bona fide* and based on the facts and legal claims as currently formulated in the pleadings.

(ii) The complexity of the legal issues

11. Liberty asserts that the legal issues in this case around subrogation, *Francovich* damages and the import of the decisions of the CJEU and related decisions of the Court of Appeal, are complex and involved and are very far from routine. That is not seriously challenged by the State. The State bears the high burden of proving that the arguments that Liberty maintains are unstateable and bound to fail such as it would be an abuse of process to allow the matter to go to trial, in accordance with the strike out jurisdiction as discussed above.

12. The legal issues here are undoubtedly complex and, in part, different from the established jurisprudence that might apply in some of the more obvious cases where the court's jurisdiction to strike out proceedings as bound to fail has been exercised. Liberty intends to call evidence on three separate aspects of the case where it is clear from the affidavits before this Court and the submissions made, that there will be fundamental and significant disagreements between the parties, particularly in relation to the circumstances in which Liberty decided to settle these claims with the original plaintiffs and the technical issues around Liberty's claim that the settlement monies paid by them caused them a loss in coming from reserves that were not designed to cover a liability of which they were unaware at the time the premia were designed and costed. The State maintains that Liberty got what it bargained for and/or made those settlement payments on a voluntary basis. Nevertheless, Liberty is entitled to adduce evidence, including expert evidence, to order challenge that position.

13. Liberty relies heavily on the statements made by Hogan J. in *Smith v. Meade* [2016] IECA 389 and by Advocate General Bot when that matter was referred to the Court of Justice and, ultimately, on statements made by the Court of Justice in its judgment, to the effect that the insurer in that case, in circumstances very similar to these cases, had subrogation

rights in respect of the settlements made. In *Smith v. Meade* Hogan J., referred, at para. 1, to *"the complex legal issues which arise in the case"*, which he said, at para. 2, was *"a more complicated one and goes well beyond the parameters of even a serious personal injuries action"* and, again, at para. 32, where he referred to *"these difficult issues"*. He describes what happened following the High Court decision (which was later overturned) which found that the exclusion in the driver's policy from liability required by s. 65 of the Road Traffic Act, was void and could not be relied on by FBD. Thereafter a settlement was reached between FBD and the plaintiff. Hogan J. said, at para. 7, that *"FBD have clearly subrogation rights in respect of this award"* and, at para. 8, that it could not *"realistically be suggested that the present appeal has been rendered moot"* by reason of the settlement. Hogan J. reiterated, at para. 30, that *"FBD clearly has subrogation rights in respect of the award which was made to the plaintiff"*. Later in his judgment, at para. 50, he said;-

> "*There can, moreover, be little doubt but that the cost of the insurance policy written by FBD in the present case reflected what it legitimately understood to be the limits of its insurance risks and those risks did not extend to passengers travelling in vans which did not have fixed seats*."

Finally, at para. 69, Hogan J. says:-

> "*The importance of these questions cannot be overstated so far as this appeal is concerned. If this Court is obliged to disapply the exclusion clause in the insurance policy, then it follows that the plaintiff could properly have recovered as against the first defendants and FBD would in turn have been obliged to indemnify these defendants. Alternatively, if there is no such obligation on the national court, FBD would be free to seek to recover from the State the €3m. it paid out to the plaintiff by way of settlement by means of appropriate legal proceedings (which might include a Francovich claim)."*

That was the third occasion on which Hogan J. suggests quite forceful, that there is merit in the *Francovich* damages claim now pursued by Liberty. It is possible that Hogan J.'s observations may assist Liberty in challenging the State's contention that they are not entitled to *Francovich* damages due to a lack of causal connection between the non-transposition of the Directive and the damage allegedly sustained by Liberty. Mr. Doherty

BL for the State describes Hogan J.'s entire judgment as *"one vast obiter dictum"*. Even if that is correct, and those statements are not binding on this Court, it does not mean I can or should find them to be, in effect, unstateable arguments that have no prospect of success such that Liberty's case is bound to fail and should be struck out at this interlocutory stage as an abuse of the court's process.

14. Liberty also relies on statements made by the Advocate General and CJEU in answering the questions referred to it by the Court of Appeal. In describing the dispute at para. 18 of its judgment, the CJEU states that *"FBD has a right of subrogation with respect to* [the settlement]*"* in describing the facts as found by the referring court. However that does confirm, yet again, the view of the Court of Appeal in relation to the subrogation argument. The CJEU ultimately answered the questions referred to it by saying that the Directive did not require the national court to disapply national law and the exclusion clause in the policy as a consequence of that national law. However, it went on to say:-

> *"In a situation such as that at issue in the main proceedings, a party adversely affected by the incompatibility of national law with EU law or a person subrogated to the rights of that party could however rely on the case-law arising from the judgment of 19 November 1991, Francovich and Others (C-6/90 and C-9/90, EU:C:1991:428), in order to obtain from the Member State, if justified, compensation for any loss sustained."*

15. Similar statements were made by Advocate General Bot in relation to equitable subrogation and in relation to FBD's rights to subrogation and a possible claim for *Francovich* damages against the State. Mr. Collins SC says that Liberty is comes within the CJEU's description of a party adversely affected by the incompatibility of national law with EU law. As a result, they are entitled to pursue Francovich damages from the State.

16. Clearly, neither the Advocate General nor the CJEU has jurisdiction to interpret national law or to make findings on national law that could bind this court. However, the determination of this case may not necessarily be limited to questions of national law and there may be more complex arguments about whether mixed questions of national law and European law are involved.

17. The State contends that none of the statements on which Liberty relies, including those of Hogan J. in the Court of Appeal, the Advocate General and the CJEU in *Smith v. Meade* (which it accepts were made) are binding on this court. They say that the comments of Hogan J. in the Court of Appeal were obiter *dictum* and the analysis of subrogation by the Advocate General and the CJEU relate to issues of national law over which the CJEU has no jurisdiction. The State suggests that, insofar as subrogation rights were purportedly recognised by the Advocate General and/or the CJEU, this was based on the factual summary formulated to the CJEU by the Court of Appeal in accordance with the procedure in an Article A267 reference. Even if that is so, it could potentially constitute a finding of the Court of Appeal, but I do not think I need to make any such finding or to find that the statements made were not binding on this Court as I am satisfied that the making of such statements establish, in themselves, that the legal issue that Liberty raise in this case around subrogation, and *Francovich* damages, fall well short of the standard of unstateable necessary for this Court to find that Liberty's arguments are bound to fail.

18. The statements made by the CJEU cannot be rejected and the arguments contained therein could not be found by this Court, at this stage, to be unstateable such that they are bound to fail and constitute an abuse of the court's process to be permitted to proceed. The issue is one that would be more properly determined by the trial judge following full argument.

19. In addition, I am told that the Court of Appeal in *Smith v. Meade* invited submissions on the issue of subrogation but, before the issues were further addressed by the court, the case was settled on the basis as set out above when the State indemnified FBD. The fact that those submissions were sought by the Court of Appeal sits uncomfortably with the arguments now made by the State that Liberty's arguments around subrogation and *Francovich* damages are unstateable.

20. My findings on the potential stateability of Liberty's arguments in relation to subrogation and *Francovich* damages in the light of the State's settlement in *Smith v. Meade* combined with my acceptance of Liberty's *bona fides* in its intentions to call evidence and possibly to seek discovery, satisfies me that the State have not discharged the high burden

of proving that Liberty's case is bound to fail such that it would be an abuse of the court's process to allow it to proceed.

21. In addition, the issues raised around equitable subrogation are complex and detailed, covering a jurisdiction that has been recognised in the authorities as broad and can be available as a restitutionary remedy (*Banque Financiere de la Cite v. Parc (Battersea) Ltd & ors.* [1999] 1 AC 221). Similarly, the issues raised by the State on Liberty having engaged in a bare assignment of a cause of action, effectively an objection on maintenance champerty grounds, is a complicated legal point engaging controversial and complicated arguments about public policy. I make no observation or finding as to the merits of the arguments made by the State or Liberty's response thereto, but insofar as I have to assess the complexity of them, I find that they rest at the outer degree of complexity. That is not the space within which I could find that they are arguments that are unstateable and bound to fail such that it would be an abuse of the court's process to allow them to proceed to trial.

22. The State also relies on Liberty having voluntarily let the MIBI out of the proceedings. That may be a relevant argument at trial, but it does not persuade me at this interlocutory stage that Liberty's arguments are unstateable.

23. In all of the circumstances, I find that the complexity of the legal issues involved in this matter bring this case within the type of case that Clarke J. said in *Moylist Construction v. Doheny*:-

> "*A court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves complex and such as would require the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored*." (at para. 3.12)

24. I am, therefore, refusing this application to strike out the proceedings at this stage.

<u>Indicative view on costs</u>

25. As Liberty have succeeded in defending this application to strike out the proceedings, my indicative view on costs is that, in accordance with s. 167 of the Legal Services Regulation

Act 2015, that they are entitled to their costs, but it is also my indicative view that a stay should be put on the execution of those costs pending the outcome of the proceedings. I will put the matter in before me on 10:30am on 12 October 2023 to hear such further submissions as either party may wish to make in relation to costs and any other orders that are required to be made at this stage. If either party wishes to lodge written submissions, these should be lodged with the court at least 48 hours before the matter is back before me.

Counsel for the defendant/appellant: Barry Doherty BL

Counsel for the plaintiff/respondent: Michael Collins SC, Stephen Fennelly BL