



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 249

Record Number: 2020/43

High Court Record Number: 2017/7450P

Whelan J.

Donnelly J.

Noonan J.

BETWEEN/

JOHN HAUGHTON

PLAINTIFF

-AND-

QUINNS OF BALTINGLASS LIMITED

DEFENDANT/RESPONDENT

-AND-

ZURICH INSURANCE PLC

THIRD PARTY/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 5th day of October, 2021

1. The issue presented by this appeal relates to the circumstances in which a court may appropriately permit a defendant to seek the joinder of a third party to proceedings. The plaintiff's claim against the defendant ("Quinns") is one for damages for personal injuries.

The claim by Quinns against the third party (“Zurich”) is one for indemnity under a policy of insurance. Leave was granted by the High Court (Barrett J.) on an *ex parte* basis to issue and serve a third party notice on Zurich. The High Court (Simons J.) delivered a written judgment on the 19th December, 2019 whereby he dismissed an application by Zurich to set aside the third party notice. Zurich appeals that decision.

Background

2. The facts of this matter, as they appear from the pleadings, are set out in the judgment of the High Court and a brief synopsis will suffice. Quinns operates an agri-store business at its premises in Athy, County Kildare. The plaintiff is a farmer who attended at the premises on the 21st July, 2015 in order to obtain cattle meal. The meal was dispensed by a vehicle called a Manitou Maniscopic Loader. The Manitou Loader is a mechanically propelled vehicle registered for use on the public highway and fitted with number plates.

3. In his statement of claim, the plaintiff pleads that part of this machine, being a hydraulically controlled bucket of a loading shovel, was used to dispense cattle meal and in the course of so doing, the bucket was caused to close on the plaintiff’s left arm, crushing it. The plaintiff claims damages for the consequent personal injuries. Central to this application, Quinns at the relevant time had a policy of insurance with Zurich which was a commercial vehicle fleet policy that covered, *inter alia*, the Manitou Loader. At the same time, Quinns also had a public liability insurance policy with a different insurer, namely Amlin UK (“Amlin”).

4. The plaintiff, having obtained an authorisation from the Personal Injuries Assessment Board, issued a personal injuries summons on the 14th August, 2017. It would appear that Quinns had notified Amlin initially of the claim and Amlin nominated Kent Carty, solicitors, to represent Quinns in the proceedings. A full defence was delivered and the pleadings

closed on the 23rd November, 2017. On the 5th February, 2018, Kent Carty wrote to Zurich seeking an indemnity in respect of the plaintiff's claim pursuant to Quinns' motor fleet policy, indicating that in default of receiving confirmation of such indemnity, an application would be made to join Zurich as a third party. No substantive response was received to this letter.

5. On the 9th April, 2018, Quinns issued a motion seeking to join Zurich as a third party. This was heard by the High Court (Barrett J.) on the 11th June, 2018 with the court delivering a written judgment on the 1st October, 2018 directing the joinder of Zurich (*Haughton v Quinns of Baltinglass Ltd.* [2018] IEHC 532).

6. On the 6th December, 2018, Zurich declined indemnity in an email to Quinns' brokers, which is set out by Simons J. at para. 18 in the High Court judgment. In summary, Zurich took the position that the claim was a matter for Amlin as Quinns' public liability insurers, pointing out that at the time of the accident, the vehicle was being operated on private property for the purpose of loading feed into a feed bag and was not being used as a means of transport. Zurich also noted that the motor policy provided for an indemnity on condition that the person claiming the indemnity was not entitled to an indemnity under any other policy.

7. On the 9th January, 2019, Zurich brought the within motion seeking to set aside the third party proceedings. In that motion, the substantive relief sought by Zurich is an order striking out the third party proceedings pursuant to O. 19, r. 28, which provides that any pleading may be struck out on the ground that it discloses no reasonable cause of action or is frivolous or vexatious. Alternatively, Zurich invokes the inherent jurisdiction of the court to strike out the proceedings.

8. The third party notice itself was issued on the 21st June, 2018 and is set out in relevant part by the trial judge at para. 22 of his judgment. An indemnity was sought by Quinns on three grounds;

- (a) pursuant to the terms of the Zurich policy itself;
- (b) the policy falls to be interpreted pursuant to EU Motor Insurance Directive 2009/103/EC of the 16 September 2009;
- (c) Quinns' claim is based on the judgment of the Court of Justice of the EU in CJEU C-162/13 *Vnuk v Zavarovalnica Triglav*.

9. In the alternative to the foregoing, Quinns contends that the court should determine whether, arising from the foregoing grounds, Zurich is obliged to indemnify the defendant in respect of any liability which Quinns is found to have, or whether Zurich is obliged to satisfy in full any award of damages to which the plaintiff may be entitled.

10. Zurich's motion to dismiss is grounded upon the affidavit of its solicitor, Rachel Gilroy, sworn on the 4th January, 2019. At para. 3, she avers that the circumstances of the accident as alleged by the plaintiff are critical to the within application. In the affidavit, Ms. Gilroy says that the third party proceedings are misconceived and sets out the basis for this contention. At para. 9, she says that Zurich is not the actual wrongdoer and owes no duty to the plaintiff, who is not a party to the contract of insurance between Quinns and Zurich. Accordingly, the dispute between Quinns and Zurich is entirely separate to the proceedings. She concludes therefore that Zurich is not an appropriate or necessary party.

11. The suggestion thus appears to be that because Zurich is not a concurrent wrongdoer within the meaning of the Civil Liability Act, 1961, it is not an appropriate third party. She then turns to the European law issues raised and contends that *Vnuk* has no relevance because the vehicle in question was insured. She contends that as the accident occurred on private

property, the provisions of the Road Traffic Act, 1991 requiring compulsory insurance, do not apply and further, the accident did not occur by reason of a motor accident.

12. She distinguishes *Vnuk* on the basis that it refers to the normal use of a motor vehicle but in this instance, the Manitou Loader was not being used as a mode of transport but for the purpose of dispensing feed and in that regard, Zurich relies on another decision of the CJEU in Case C-514/16 *Isobel Maria Pinheiro*.

13. In a separate objection to the third party proceedings, Ms. Gilroy avers that the Zurich insurance policy contains an arbitration clause and since the parties are contractually obliged to proceed by way of arbitration, it is not appropriate for Zurich to be joined as a third party.

14. The final point raised by Ms. Gilroy is that there has been a delay by Quinns in bringing the application to join the third party and that the application was not brought “as soon as was reasonably possible”. This is a clear reference to the provisions of s. 27 of the Civil Liability Act, 1961, which applies to concurrent wrongdoers. Ms. Gilroy avers that as a result of this delay, Zurich has been prejudiced in its ability to investigate and defend the claim, in particular because the Manitou Loader is no longer available.

15. In support of its application to set aside the third party notice in the High Court, Zurich delivered written submissions. These submissions make contentions that overlap Ms. Gilroy’s affidavit but also raised new issues. In the first instance, Zurich submitted that the application to join the third party was not made within 28 days from the time limited for delivering the defence as required by O. 16, r. 1(3) of the RSC. This complaint was not previously raised by Zurich either in its notice of declinature or in Ms. Gilroy’s affidavit.

16. The submissions also argue that Quinns had failed to offer any excuse for the delay in joining the third party and relied in that regard on the judgment of the Supreme Court in

O'Byrne v. Stein Travel Ltd [2012] IESC 62. The submissions also contend at para. 8 that Zurich has been prejudiced by the delay but the prejudice relied upon is not the fact that the Manitou Loader is no longer available but rather that the plaintiff's claim has since been settled by Amlin, which additionally renders the third party issue moot.

17. Separately, under the heading "*Locus Standi/Privity of Contract*", Zurich's written submissions set out the provisions of O. 16 and submit that in reality, Amlin are seeking to join Zurich, but Amlin have no *locus standi* to make such a claim because they have no contractual or other relationship or privity of contract with Zurich. In this respect Zurich relies on two judgments of the High Court, *McCarron v Modern Timber Homes (in Liquidation) and Ors* [2013] 1 IR 169 and *Kennedy & Ors v Casey t/a Casey & Company* [2015] IEHC 690. It will be seen that this contention is somewhat different from the privity issue raised by Ms. Gilroy in her affidavit, namely that there was no privity between the plaintiff and Zurich.

18. Zurich also objects to the joinder on the basis that the claim against it is a separate and distinct matter from the claim of the plaintiff against Quinns and as such is not appropriate for third party proceedings. Written submissions reiterate Ms. Gilroy's contention that as the Zurich policy contains an arbitration clause, the proceedings are misconceived. The submissions further contend that *Vnuk* is not applicable and Barrett J. was incorrect to conclude that it was.

Judgment of the High Court

19. The trial judge noted at the outset that the question of Zurich's liability to indemnify Quinns is potentially a complex piece of litigation, involving as it does not only the precise terms of the policy of insurance, but the implications of the parallel Amlin policy and the provisions of European law. Those issues did not fall to be determined in the judgment.

20. The trial judge noted that three specific objections were made by Zurich to the third party proceedings; first, a failure by Quinns to bring the application within the stipulated 28 day period; second, the issues in the third party proceedings are entirely different from those arising in the plaintiff's claim; and third, the claim is frivolous and vexatious and bound to fail. The judge commented on the apparent paradox between the two positions adopted by Zurich, on the one hand, that the proceedings were too complex to be determined in a personal injuries action, yet on the other, are so obviously destined to fail that the bringing of the third party proceedings represents an abuse of process.

21. The judge proceeded to set out the facts as pleaded, the interactions between Quinns and Zurich and the terms of the third party notice. Under the heading "Subrogation", the judge noted that Zurich contended that the third party proceedings involved include a dispute between two insurance companies but there was no privity of contract between those insurance companies and this meant that Amlin is not entitled to enforce the policy between Zurich and Quinns.

22. He noted Zurich's reliance on *McCarron v Modern Timber Homes Limited* and *Kennedy v Casey t/a Casey & Company* but he felt that this argument could not be reconciled with the principle of subrogation entitling Amlin to stand in the shoes of Quinns in pursuing Zurich. He noted that incidentally there was no evidence as to Amlin's direct involvement in the third party proceedings which were properly brought by Quinns. He distinguished the two judgments referred to on the basis that they involved attempts by plaintiffs to join defendant's insurers directly as co-defendants.

23. He then turned to the 28 day time limit under O. 16 and the three specific objections of Zurich.

24. Dealing first with the 28 day time limit, the trial judge noted that this is not a case to which s. 27 of the Civil Liability Act, 1961 applies because Quinns and Zurich are not “concurrent wrongdoers” within the meaning of the 1961 Act. The requirement to join Zurich as a third party “as soon as reasonably possible” under s. 27 does not therefore arise. Consequently, the reliance on *Stein Travel* by Zurich is misplaced in circumstances where that was a case to which s. 27 applied.

25. In any event, by contrast with *Stein*, the delay in that case was far longer than in the present and in *Stein Travel*, no explanation had been offered whereas here there was one, viz. Zurich had been called upon shortly after the 28 day period to provide an indemnity but did not respond. He considered other authority under s. 27 by way of analogy.

26. He held that the third party proceedings should not be set aside for delay for three reasons. First, it was reasonable to engage with Zurich before applying. Second, the five month delay had no appreciable effect on the progress of the proceedings and third, Zurich had suffered no specific prejudice as a result of that delay. Zurich had notice since February 2018 and the prejudice relied upon, being the settlement of the personal injuries action, did not occur until the 24th January, 2019 and was thus not attributable to the delay in issuing the motion to join Zurich.

27. On the second objection, the judge found that as this was a claim for an indemnity, on a literal reading of O. 16, r. 1, it was clearly applicable. He observed that while the case law suggested that there is overlap between O. 16 and s. 27, the provisions are not coterminous so that O. 16 is not confined to “concurrent wrongdoers”. Authority for that conclusion is to be found in the judgment of the Supreme Court in *Gilmore v Windle* [1967] IR 323, from which the judge cited relevant passages (at para. 48-50). He was also of the view that the

judgment of Clarke J. (as he then was) in *ACC Bank Plc v Johnston* [2011] IEHC 376 supported that conclusion.

28. The judge also observed that while the legal issues in the third party proceedings may not be the same as those in the plaintiff's claim against Quinns, there is an overlap on the facts. Thus, the precise use being made of the vehicle at the material time and the precise circumstances of the accident may both be material to the personal injuries claim and the indemnity claim. This gave rise to a practical benefit in having both claims determined together.

29. The judge's view was that the settlement of the personal injuries claim did not justify the setting aside of the third party proceedings and if anything, it was a factor against setting them aside. The third party proceedings were properly instituted for the purpose of ensuring that all issues be determined in a single set of proceedings and the subsequent settlement did not alter this. If they were now to be set aside, this would result in the very mischief which O. 16 is intended to avoid, *i.e.* a multiplicity of proceedings. Requiring Quinns to issue fresh proceedings against Zurich would not be an efficient use of resources and could be potentially unfair if limitation issues were to arise.

30. On the third issue of the proceedings being frivolous and vexatious and bound to fail, the argument under O. 19, r. 28 could be disposed of shortly because it was clear that the third party notice, on its face, properly pleaded a cause of action against Zurich. On whether the proceedings should be dismissed as being bound to fail, the trial judge placed reliance on the judgment of Clarke CJ in *Lopes v Minister for Justice Equality and Law Reform* [2014] 2 IR 301 and *Moylist Construction Limited v Doheny* [2016] 2 IR 283 and certain passages therein suggesting that where complex legal issues concerning, for example, the

proper interpretation of documents arose, such cases were unlikely to be suitable for summary disposal in a motion of this nature.

31. On this question, the trial judge was satisfied that the institution of the third party proceedings could not be considered to be an abuse of process. Furthermore, the evidential basis put forward by Zurich for striking out the application was unsatisfactory because all of the contractual documents had not been put before the court such as, for example, the schedule to the policy, the certificate of insurance and the endorsements. Notwithstanding the absence of these important documents, Zurich was inviting the court to conclusively determine the contractual issues and this could not be done.

32. The judge said that Zurich had argued that the claim was bound to fail in circumstances where:

- (i) the policy did not apply where the vehicle was not being used as a means of transport; and
- (ii) Quinns was not entitled to indemnity because indemnity was available under another insurance policy; and
- (iii) an indemnity was not available in circumstances where no claim was notified within 30 days of the relevant occurrence.

33. The judge noted that this latter objection was made for the first time during the course of the hearing and was not referred to in the grounding affidavit so that there was no evidence before the court as to when Zurich was first notified of the claim.

34. Addressing each of those arguments in turn he again found that it was not possible to deal with the first argument without all of the documents. Even apart from that, Zurich relied on the fact that the vehicle was not being used as a mode of transport and additionally, on

private property. Quinns responded to this by reference to another judgment of the CJEU in Case C-648/17 *BTA Baltic Insurance Company*, which superseded *Vnuk*. That authority suggested that the concept of “use of vehicles” included any use consistent with the normal function of the vehicle.

35. On the private property issue, Zurich submitted that on the authority of Case C-122/17 *Smith v Meade*, an EU Directive cannot be relied upon in a dispute between private parties where the effect is to disapply a contractual clause contained in a contract of insurance. The judge observed that while this may be so, the case law of the CJEU may have a bearing on the interpretation of the Zurich policy, instancing a number of arguments that might be made by Quinns in that respect. On this point, he concluded that none of the difficult legal issues arising could properly be resolved in a peremptory manner by striking out the third party proceedings.

36. On the next issue concerning the parallel insurance, Zurich relied on the wording of the policy as excluding its liability but the judge’s view was that it was not obvious that this necessarily followed from the specific wording concerned. In any event, the issue was not one that could properly be resolved in a strike-out application of this nature, with the judge again pointing to the documentary deficit identified earlier.

37. On the last point concerning the claims notification period, raised for the first time at the hearing, the judge held that the evidential basis for this argument had not been established. The grounding affidavit was silent as to when the claim was first notified to Zurich. But even apart from that, as a matter of law the position was not clear cut, for example, whether time was of the essence of the clause. The failure of Zurich to raise the point earlier might give rise potentially to a waiver on its part. He considered it to be

remarkable that no reference of any kind was made to this point in the original declinature of indemnity of the 6th December, 2018.

38. On the final issue of arbitration, the judge observed that the existence of the arbitration clause does not of itself preclude a party from instituting proceedings before the courts. If such proceedings are instituted, it is a matter for the other party to apply to stay the proceedings pending a reference to arbitration. Such an option was available to Zurich but no application for a stay was made and accordingly, the question of arbitration simply did not arise for consideration in the context of an application under O. 16.

39. Having summarised his conclusions, the judge dismissed the application.

Zurich's Appeal

40. In its grounds of appeal, Zurich contends that the trial judge erred in holding that Quinns was entitled to enforce the contract of insurance by way of third party proceedings. The judge conflated the principles of subrogation and contribution and was wrong to determine that Quinns was taking a subrogated claim in the absence of any evidence to that effect. Further, the judge failed to give proper weight to a number of factors including that the third party claim was a stand-alone cause of action, that there had been delay, and that the plaintiff's claim had been settled. The judge failed to have regard to the purpose of third party proceedings and O. 16 given that the plaintiff's claim was settled and different issues arose between Quinns and Zurich. The judge failed to properly have regard to the terms of the policy in declining to dismiss Quinns' claim.

Discussion

41. I think it is fair to say that the primary argument pursued by Zurich in its submissions to this court is that the trial judge fell into error in concluding that this was a subrogation

claim. Zurich's case is that this could not be a subrogation claim in circumstances where the insured, in this case Quinns, has already been indemnified by one insurer, who seeks to bring a claim against another insurer who insures the same risk. This, it is said, is properly characterised as a claim for contribution between insurers, rather than a claim for indemnity by an insured under the terms of its policy.

42. Zurich refers to a number of leading insurance authorities in support of the proposition that the claim being made by Quinns in this case is, in reality, a claim by Amlin for contribution, which is an independent equitable doctrine not to be confused with subrogation. Accordingly, Zurich in its submissions contends that a claim for contribution, unlike subrogation, must be taken in the insurer's own name. Thus, the failure to do so in this case is said to be fatal to the application to join Zurich.

43. This submission is to be contrasted with what appears at para. 12 of Zurich's submissions in the High Court: -

“12. The third party relies in this regard on the decision of Kearns P. in *McCarron v Modern Timber Homes* [2013] 1 IR 169 and *Kennedy v Casey t/a Casey & Company* [2015] IEHC 690 to the effect that Amlin UK have no *locus standi* to make this claim for contribution and/or indemnity as against a third party as no contractual or other relationship or privity of contract exists between them. The third party additionally did not owe a duty of care to either the plaintiff or Amlin UK.” (*my emphasis*)

44. Both of these judgments of Kearns P. were concerned with claims by plaintiffs for loss sustained as a result of the negligence of the defendants. In each case, the relevant defendant was insured by a policy of insurance and the plaintiffs sought to directly sue, as defendants, the insurers concerned. The High Court held that such claims could not be brought in circumstances where there was no legal relationship between the plaintiffs and the insurers.

45. Claims involving insolvent defendants may fall into a different category by virtue of s. 62 of the Civil Liability Act, 1961 but that does not arise in the circumstances of this case.

46. I fail to see how these authorities support Zurich's contention that Quinns may not bring proceedings against them for indemnity. The plaintiff herein is not seeking to sue Zurich, rather Zurich's policyholder. There was some debate during the course of this appeal as to whether Quinns in reality has any interest in this claim or it is purely a claim brought by Amlin. The evidence on this point is unclear, as the trial judge recognised, but the fact remains that the application is brought by Quinns, and is grounded on an affidavit of a solicitor who avers, without contradiction, in the first paragraph of that affidavit, that he is the solicitor on record on behalf of the defendant, Quinns, and makes the affidavit with the full authority and consent of Quinns.

47. The fact that Mr. Carty, the solicitor concerned, was originally nominated by Amlin, may give rise to the inference that this may be a subrogation claim, but that is neither here nor there in my view and the evidence does not conclusively establish matters one way or the other. It is for example possible that Amlin may have instructed Mr. Carty originally but he is pursuing the claim on behalf of both Amlin and Quinns to recover insured and uninsured losses, such as a policy excess. As the trial judge pointed out, the evidence does not clearly establish the position.

48. It certainly provides no basis for Zurich to contend that the claim cannot be pursued because Amlin has no *locus standi*. The passage I have noted above from Zurich's High Court submissions contends that because there is no contractual nexus between Amlin and Zurich, Amlin cannot pursue a claim for contribution. Rather remarkably, precisely the opposite contention is advanced, and for the first time, before this court on appeal, namely

that if there is dual insurance, which Zurich dispute, Amlin can sue for contribution but only if it does so in its own name.

49. Thus, in contrast with Zurich’s approach in the High Court suggesting that the third party proceedings should be dismissed because Amlin had no privity and thus could have no claim against Zurich, the submissions of Zurich in this court state (at para. 20(i)): -

“These proceedings amount to a claim for contribution arising from the potential double insurance or double application of two competing insurance policies. The claim is therefore not suitable for third party proceedings as any such claim must be taken by way of plenary proceedings and by Amlin UK in its own name.”

50. Not only therefore is this argument one raised on appeal for the first time, but in my view it contradicts Zurich’s case in the High Court.

51. The court’s approach to new arguments on appeal was recently discussed by this court in *Promontoria (Arrow) Limited v Mallon & Anor* [2021] IECA 130 where I noted (at para. 24): -

“24. ...In *Lough Swilly Shellfish Growers Co-Operative Society Limited v Bradley & Ors* [2013] 1 I.R. 227, O'Donnell J. referred to a ‘spectrum’ of cases where new evidence or arguments might arise on appeal. At one end of the spectrum (the difficult end from the appellant's point of view), lay cases where new evidence would have to be adduced or where arguments sought to be made that were diametrically opposed to those made in the court below...”

52. In the same case, I refer to the judgment of the Supreme Court in *Ennis v Allied Irish Bank Plc* [2021] IESC 12 where MacMenamin J. said: -

“18. But, although a grant of leave to argue new points, or raise new evidence, may arise in the interests of justice, it must be viewed from another perspective. Exceptions are not to be seen as a licence for lax procedure. There are serious competing considerations which will also concern a court when new arguments are sought to be raised on appeal. A person entitled to win a case should not be faced with the prospect of losing it because a valid and decisive point was not made at the trial at first instance. There are real dangers in allowing a practice which is over-lax in permitting new grounds to be raised on appeal. Parties must be required to make their full cases at trial. An over-generous approach to permitting new grounds to be raised on appeal for the first time could only encourage either sloppiness, imprecision, or lead to attempts to take tactical advantage (*per* Clarke J. (as he then was) in *Ambrose*, paras. 4.11 – 4.13).”

53. These comments were made in the context of plenary trials but apply, perhaps less strictly, in summary proceedings. Commenting further on this in *Promontoria v Mallon*, I said (at para. 31): -

“31. ...However, lest it be thought that the *Ennis* decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although McMenamin J. allowed for greater flexibility in non-plenary cases, he said (at paragraph 15 of his judgment) that the *K.D.* principle remained ‘the general principle’ *i.e.* that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the High Court. He also said that while there were exceptions, they must be ‘clearly required in the interests of justice’. McMenamin J. viewed the *Ennis* case as falling within the category of ‘truly exceptional’.”

54. I think these considerations apply with equal force to the argument of Zurich described above. It is impermissibly raised for the reasons previously explained.

55. In any event, I believe it to be misconceived in circumstances where Quinns is entitled to pursue a claim for indemnity on foot of its contract with Zurich, particularly where the circumstances do not establish, as Zurich contends, that it is in fact a claim for contribution.

56. Zurich also appears to contend that the third party procedure is not appropriate in this case because it is an “independent stand-alone cause of action”. Zurich implies, without saying so outright, that the third party procedure is in reality only appropriate for claims between concurrent wrongdoers that fall within the provisions of the 1961 Act and to which s. 27 applies. While there is undoubtedly overlap between O. 16 and the statutory provisions concerning concurrent wrongdoers, they are not, as the trial judge said, coterminous. Surprisingly, Zurich contends that the trial judge failed to have adequate regard to the fact that it is not a concurrent wrongdoer.

57. I cannot understand the basis for that submission. The trial judge made it clear that Zurich was not to be regarded as a concurrent wrongdoer but that fact alone did not preclude the application of O. 16. As the trial judge observed, the literal wording of O. 16 makes it applicable to claims for indemnity, and indemnity is what is claimed by Quinns against Zurich herein. Zurich suggests that the judge’s reliance on the dicta of Clarke J. (as he then was) in *ACC Bank Plc. v Johnston* [2011] IEHC 108 was misplaced where Clarke J. said (at para. 6.1): -

“...There are a wide range of bases on which it may be considered appropriate to join a third party to proceedings. The defendant may have some entirely independent reason for being entitled to claim relief connected with the main action as against the proposed third party. For example, a defendant may claim that a third party is liable

to indemnify the defendant under a contract (whether of insurance or otherwise). The defendant may claim to have a separate cause of action against the third party which is sufficiently connected with the claim brought by the plaintiff against the defendant so as to make it convenient that both matters be dealt with together...”

58. Zurich seeks to distinguish the facts of that case suggesting that the quotation was taken out of context and it is in any event *obiter*. I am however satisfied that it accurately represents the law and there is no reason in principle why an insured cannot seek an indemnity against its insurer in third party proceedings, as here. As against that, Zurich relies on a passage from the judgment of O’Donnell J. in *Hickey v McGowan* [2017] 2 IR 196 who said (at para. 45): -

“... Firstly, it remains the case in Ireland, in my view, that it is not permissible to seek either to join an insurance company to a personal injuries action, or to address the question of the presence or absence of insurance in such proceedings. Strictly speaking the existence of insurance is irrelevant to the legal issues to be determined whatever its practical significance. The law is meant to apply equally to the rich, the poor, the insured and the uninsured, and questions of liability must be determined on that basis...”

59. Contrary to what Zurich suggests, it seems to me that it is Zurich that have taken this quotation out of context and misunderstood it. It seems clear from the context in which O’Donnell J. was speaking that he was referring to the fact that, as in *McCarron* and *Kennedy*, a plaintiff in a personal injuries action cannot, in normal circumstances, sue the insurer of the negligent defendant. O’Donnell J.’s comments have no relevance in my view to the issue that arises in the present case.

60. Zurich also submits that the trial judge erred in holding that there was an overlap in terms of factual matters but suggest that, in circumstances where Quinns has settled the plaintiff's claim, there is not in fact going to be any factual finding, as there will be no evidence from the plaintiff as to how the accident occurred. This submission is not understood. There is no reason why either party to the third party proceedings cannot call the plaintiff to give evidence should they require him. As already pointed out, Zurich's solicitor, in the affidavit grounding this application, swore that the circumstances of the accident are critical to the within application.

61. As to the applicability or otherwise of the *Vnuk* case, that cannot be a matter to which the court ought have regard in deciding whether to grant liberty to join a third party, as that goes to the determination of one of the core issues in those third party proceedings. The same considerations apply to Zurich's submissions that the terms of its policy exclude its liability in the present case. That cannot be determined in a procedural application of this kind for the reasons outlined by the High Court judge, with which I agree fully, particularly having regard to the absence of critical contractual documentation which the trial judge highlighted.

62. Zurich again raises the issue of delay and prejudice in this appeal but I am satisfied that the trial judge correctly dealt with those and again, I agree entirely with his reasoning. Zurich re-canvasses *O'Byrne v Stein Travel* but it seems to me that the conclusion of the trial judge about the relevance of this case is correct and it does not assist Zurich.

63. It is difficult to resist the conclusion that, with the exception of the new argument impermissibly raised by Zurich in this appeal, much of what is advanced is a reiteration of the merits of its case in the High Court, rather than an identification of error on the part of the trial judge. This court is not a venue for rearguing the merits of cases, in particular in

interlocutory applications. As was noted by Irvine J. in *Lawless v Aer Lingus* [2016] IECA 235 at para. 22: -

“22. ...This is an appeal against the order made by the High Court judge in the exercise of her discretion in relation to an interlocutory matter. This is not a re-hearing of that application and that being so this Court should afford significant deference to the decision in the High Court. It is nonetheless clear that if an appellate court can detect a clear error in the manner of the approach of the High Court judge it is of course free to interfere with that decision. Further, even if the appellant cannot identify such an error the appellate court may nonetheless allow an appeal if satisfied that the justice of the case can only be met by such an approach...

23. However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to reargue their application *de novo* in the hope of persuading this Court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion.”

64. I am satisfied that the trial judge appropriately exercised his discretion in this case in a proportionate manner in directing the joinder of Zurich, who have not to my mind demonstrated any error of principle or injustice in the judgment of the High Court.

65. I would accordingly dismiss this appeal.

66. My provisional view with regard to costs is that as Quinns has been entirely successful, it should be entitled to its costs of the appeal. If Zurich wishes to contend for alternative form of order, it will have liberty to apply to the Court of Appeal Office within 14 days for a further short hearing on the issue of costs. If such application is made and results in the order proposed herein, Zurich may be additionally liable for the costs of such further costs hearing.

67. As this judgment is delivered electronically, Whelan and Donnelly JJ. have indicated their agreement with it.