THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 148

Court of Appeal Record No 2019/181

Noonan J.

Power J.

Collins J.

BETWEEN

MYTHEN CONSTRUCTION LIMITED

Plaintiff/Appellant

AND

ALLIANZ PUBLIC LIMITED COMPANY

Defendant/Respondent

JUDGMENT of Mr Justice Maurice Collins delivered on 8 June 2020

BACKGROUND

1. Mythen Construction Limited ("*Mythen*") appeals against the refusal of the High Court (Reynolds J) to direct Allianz Public Limited Company ("*Allianz*") to make discovery of certain documents sought by Mythen.

2. Before referring to those documents further, it is necessary to say something more about these proceedings.

The Proceedings

3. In 2012 Mythen was retained by a third party to construct a new swimming pool and leisure centre in New Ross, Co. Wexford. Mythen in turn appointed Bidcon Construction Limited ("*Bidcon*") as a domestic subcontractor to construct the roof of the leisure centre complex and that roof was in due course constructed by Bidcon.

4. In February 2014, the roof was extensively damaged during a storm. As a result, Mythen (as the primary contractor) says that it sustained losses amounting to a total of €1,803,843.55. It looked to Bidcon to make good these losses. At all material times, Bidcon held a combined construction insurance policy written by Allianz which included public liability cover ("*the Policy*"). That being so, Bidcon looked to Allianz to indemnify it against any liability that it might have to Mythen. However, by letter of 19 September 2014 Allianz notified Bidcon's brokers that it was satisfied that the Policy did not provide for the loss, relying in this context on two specific exclusions in the Policy.[1]

[1] The exclusions are set out in section 2 of the Policy. Clause 6 excludes any liability "*caused by or arising any design plan or specification or any treatment or advice (remedial professional or otherwise) given administered or omitted by the Insured or an Employee or partner or director of the Insured for which a fee is would normally be charged*." Clause 9 excludes any liability *"for loss or damage to or the costs of removal repair alteration*

5. At some point (the precise date is not evident from the appeal papers) Mythen issued proceedings against Bidcon to recover its losses. However, in June 2016 Bidcon went into voluntary liquidation. Mythen then sought and obtained the leave of the High Court to proceed with its claim and, on 16 January 2017, it obtained judgment against Bidcon in the amount of €1,803,843.55 plus costs.

6. In July 2017, Mythen commenced these proceedings against Allianz, the Statement of Claim being delivered in February 2018. Mythen seeks a declaration pursuant to section 62 of the Civil Liability Act 1961 (*"Section 62*") that Allianz is bound to indemnify it "*in respect of the negligence, breach of duty, and/or breach of statutory duty, and breach of contract*" on the part of Bidcon in relation to the installation of the leisure centre's roof. In the alternative it seeks an order directing Allianz to pay the sum of €1,803,843.55 to it. Judgment in that sum is also sought, as are damages for breach of contract. All of these reliefs are stated to be sought pursuant to Section 62.

7. Mythen's claims are – so Allianz says – "*misconceived at law*". According to Allianz, Mythen "*has no right of action, either pursuant to the provisions of section 62 of the Civil Liability Act 1961 or otherwise*."[2] Its assertion of a contractual claim against Allianz is also, it is said, "*misconceived at law*". Allianz also says that Bidcon had not

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replacement or reinstatement of any (a) structure erected (b) product supplied by or on behalf of the Insured (c) Contract Works caused or necessitated by any defect therein or any unsuitability thereof for its intended purpose."

[2] Allianz's Defence (delivered on 5 July 2018) at paragraph 1.

been entitled to an indemnity and that indemnity had been declined validly and lawfully and that, if Bidcon wished to dispute that declinature, it was open to it to have the dispute referred to arbitration within 12 months of the "*date of disclaimer of liability*". Having failed to do so, any dispute was deemed to have been abandoned. As Mythen could not be in a better position than Bidcon would have been, Mythen is (according to Allianz) "*estopped in these proceedings from maintaining a claim which was not available to Bidcon."*[3]

8. Notwithstanding these pleas, Allianz has not sought to have Mythen's claim dismissed on the basis that it is doomed to fail nor has it sought the trial of any preliminary issue directed to the issue of whether Mythen had any cause of action against it and/or whether any claim is time-barred or otherwise excluded because of Bidcon's failure to challenge the declinature of cover by Allianz within the time period stipulated in the Policy or at all.

The Request for Discovery and the High Court's Ruling

9. In September 2018 Mythen requested Allianz to make voluntary discovery of the

[3] *Ibid*, at paragraph 10. The arbitration clause in the Policy provides that "*[a]ll differences arising out of this Policy shall be referred to the decision of an arbitrator to be appointed by the parties or failing agreement by the President for the time being of the Incorporated Law Society of Ireland. Here any difference is referred to arbitration the making of an award shall be a condition precedent to any right of action against the Company. Claims not referred to arbitration within 12 calendar months from the date of disclaimer of the liability shall be deemed to have been abandoned."*

Policy and also sought discovery of

> *"All documentation and communications (include electronic communications, all recordings etc) passing between [Allianz] and [Bidcon] and/or its legal advisors and/or the liquidator of that company and/or the liquidator's legal advisers in relation to [Allianz's] refusal to indemnity [Bidcon], including a letter of repudiation dated the 19th September, 2014."*

10. The stated reason for seeking this documentation was Mythen's need to ascertain *"the precise reason as to why indemnity cover was refused and the rationale therefor which is not at all clear from the Defence or from any correspondence received."*

11. Allianz agreed to discover the Policy. As regards the second category, it agreed to discover the declinature letter but Allianz's solicitors expressed difficulty in understanding the basis on which the remaining documents were sought. They failed to see "*what entitlement [Mythen] may have to challenge the decision of [Allianz] to decline an indemnity as it is not party to the contract of insurance."* Reference was also made in this context to the fact that Bidcon had not challenged the declinature within the appropriate time-period set out in the Policy.

12. A motion for discovery duly issued and the parties exchanged affidavits that effectively re-iterated their respective positions. The motion came on for hearing before Reynolds J on 4 February 2019. The Judge declined to direct any discovery beyond that already agreed. In her *ex tempore* ruling, she stated as follows:

> *".. I'm quite satisfied that in fact you have no entitlement to the discovery that's being sought. It's clear there's no privity of contract between the plaintiff and the defendant and indeed the authority as open[ed] to me is quite clear. The onus is clearly going to rest on the defendant to establish that they're entitled to repudiate the contract, but really the plaintiff has no hand, act or part in that and as I say the authority is clear so I must refuse your application for discovery, save and except what has been agreed as between the parties."*

13. The authority referred to by the Judge was the decision of the High Court (Peart J) in *Hu v Duleek Formwork Limited (in liquidation)* [2013] IEHC 50 which was also referred to before this Court.

14. I will refer further to *Hu* below. The Judge clearly appears to have taken *Hu* to establish that there is no privity of contract between Mythen and Allianz and, on that basis, appears to have taken the view that the application for discovery necessarily failed. At the same time, however, the Judge expressly acknowledged that "*the onus is clearly going to rest on the defendant to establish that they're entitled to repudiate the contract"*. Leaving aside any question of onus (which, as we shall see, was addressed by the Supreme Court in *Dunne v PJ White Construction Co Ltd (in liquidation)* [1989] ILRM 803), that clearly suggests that Allianz's entitlement to "*repudiate"* the contract was, as far as the Judge was concerned, an issue in the proceedings. In fact, there is no issue of repudiation as such in these proceedings. There is no suggestion of any non-disclosure, misrepresentation or failure to notify on

the part of Bidcon. The coverage issue is whether or not the risk here is excluded by one or both of the clauses invoked by Allianz, as well as the issue connected to the arbitration clause. But if the issue of whether Allianz was entitled to refuse indemnity is indeed an issue in these proceedings – as the Judge appears to have accepted – it might be thought to follow that Mythen was entitled to discovery of documents going to that issue. The Judge clearly thought otherwise, however.

The Appeal

15. Mythen says that the Judge failed to grasp that Section 62 gives rise to a statutory exception to the normal privity of contract rule, citing the decision of the Supreme Court in *Dunne v PJ White Construction Co Ltd (in liquidation).* On its case, it has a cause of action against Allianz pursuant to Section 62. Insofar as that is disputed by Allianz, the resolution of that issue will be a matter for the judge hearing the action in due course. Citing the decision of the High Court (Clarke J) in *Hartside Ltd v Heineken Ireland* [2010] IEHC 3, Mythen says that it is not appropriate to *"resolve potentially contested issues at the preliminary stage of a discovery application"*. It was not for a court hearing an application for discovery to *"embark on any examination as to the chances of success or failure of the pleaded claim giving rise to the discovery sought."* The documents sought here – so it is said – are clearly both "*relevant*" and "*necessary*" because Mythen had little or no knowledge of the basis on which Allianz had refused indemnity and the discovery sought would be of vital importance in enabling it to challenge the contention that the refusal was valid. The documents – so it is said – are likely to explain (in more detail than the declinature letter) Allianz's decision to refuse

indemnity and may include engineers' reports dealing with the damage to the leisure centre roof and its cause(s). The documents may also be relevant to the question of arbitration.

16. As regards Allianz's reliance on the arbitration clause in the Policy, Mythen says that this has no application to claim pursuant to Section 62 and also indicates that it will rely on the decision of the Court of Appeal of England and Wales in *William McIllroy (Swindon) Ltd v Quinn Insurance Ltd* [2011] EWCA Civ 825, [2012] 1 All ER (Comm) 241 at the trial in answer to this point.

17. In response, Allianz says that it is incorrect that Section 62 gives rise to any statutory exception to the privity of contract rule. It relies in this context on statements made in *Buckley on Insurance Law (*4th ed; 2016) regarding Section 62, the Supreme Court's decision in *Dunne v PJ White Construction Co Ltd (in liquidation)* and the contrast between Section 62 on the one hand and the provisions of the (UK) Third Parties (Rights against Insurers) Act 1930. According to the author, the belief that Section 62 constitutes a statutory exception to the privity of contract rule is based on a *"questionable interpretation"* of *Dunne v PJ White Construction Co Ltd (in liquidation)* which he notes was an *ex tempore* decision and where the only issue on appeal related to the onus of proof. According to the author, Section 62 did not (unlike the relevant UK legislation) transfer to the plaintiff the rights of the insured under the policy or give the plaintiff a right to seek specific performance or a right to arbitrate. It does not "*in any way, attempt to interfere with the privity of contract rule."* Allianz

also relies on the High Court's decision in *Hu* and on another decision of the High Court (Gilligan J) in *Murphy v Allianz plc* [2014] IEHC 692.

18. Allianz also argues that, given the failure of Bidcon to challenge the declinature within the time specified in the Policy, Mythen cannot maintain these proceedings in any event. Under the relevant provision of the Policy (already set out above), any claim that Bidcon might have had against Allianz is deemed to have been abandoned as far back as September 2015, long before the commencement of these proceedings. Allianz also relies on the fact that the making of an arbitration award is stated to be a condition precedent to any right of action against Allianz.

DISCUSSION

General

19. Allianz does not dispute that the documents sought by Mythen are relevant to its pleaded claim and to the issues arising between the parties on that claim. It does seek to suggest that the documents sought are not "*necessary*" but that suggestion is not made on the basis that the documents can be obtained by Mythen by some other means or that they are not capable of conferring any litigation advantage on Mythen, at least by reference to Mythen's pleaded case. Rather, it is based on the argument that the documents go to an issue that, on Allianz's case as to the meaning and effect of Section 62, it will not be "*necessary*" for the trial court to reach or decide.

20. Equally, there is no suggestion that requiring Allianz to make the discovery sought would impose any undue or disproportionate burden on it. Given the discrete nature of the category sought, that is hardly surprising. It is not said that the documentation sought is confidential (in contrast to the position in *Hartside*). A point was made by Mr Howard (for Allianz) about the absence of any cut-off date in the category sought which, he said, would mean that documents post-dating Allianz's decision to refuse indemnity could be captured. However, on being pressed by the Court, Mr Howard very fairly acknowledged that such documents could be relevant to the refusal and, as Mr Gardiner (for Mythen) explained to the Court in his reply, the category was intentionally drawn without such a cut-off date because later documents were

potentially relevant to the arbitration issue, which arises only after declinature in any event.

21. Thus – unusually – the hearing before this Court involved only very limited discussion of the category of documents at issue. Instead the fault-line between the parties ran directly through Section 62. I have already sketched the respective positions of the parties but it is, I think, necessary to say something more about Allianz's position. The fundamental premise of its argument is that Section 62 does not operate to put a third party (such as Mythen here) into the position of the insured. It follows - so it is said - that Mythen has no entitlement to challenge the correctness of Allianz's decision to decline indemnity. As insured, Bidcon had had such an entitlement (though it lost it through its failure to arbitrate) but Mythen has no such right. While it may be that a third party would have such a right in the UK as a result of the Third Parties (Rights against Insurers) Act 1930, that was not (Allianz argues) the intention or effect of Section 62.

22. In response to questioning from the Court as to what (so far as Allianz was concerned) are the issues in the proceedings and how those issues would be resolved at trial, Mr Howard indicated his disagreement with the suggestion by the Judge that the "*onus is clearly going to rest on the defendant to establish that they're entitled to repudiate the contract.*" In his submission, the correctness of Allianz's decision to decline indemnity is not an issue in the case and there is no onus on Allianz to establish that the declinature was valid (in the sense of being correct). Rather, all that Allianz had to establish was that it had material available to it on which it could properly rely in

making the decision to decline cover. In essence, it appears that - on the case that Allianz makes - the only onus on it would be to prove that a decision to decline cover was made as a matter of fact and – perhaps – to establish the basis on which the decision was made but it would not be open to Mythen to seek to challenge the validity of that decision, even (so it appears) on an attenuated judicial review/reasonableness type standard.

23. That was, the Court was told, the position that Allianz had adopted in the High Court also and it seems that the Judge's reference to Mythen having "*no hand, act or part"* in the determination of Allianz's entitlement to "*repudiate*" reflects her acceptance of Allianz's arguments.

How should a court approach disputed issues of law on a discovery application?

24. While Mr Gardiner made submissions on Section 62, his fundamental position was that issues as to the meaning and effect of it were matters for the hearing of the action and not for resolution in an application for discovery. As mentioned, Clarke J's decision in *Hartside* was cited in support of that proposition.

25. In *Hartside*, a dispute arose as to whether a particular category of documents ought to be discovered. The documents related to sales by the defendant to a third party (M). The plaintiff said that the documents were relevant to its claim that the defendant had acted in breach of its obligations under a joint venture agreement between the parties by supplying products to the plaintiff on less favourable terms than it supplied to other

parties purchasing comparable volumes. M was one of the parties to whom the defendant was alleged to have supplied product on more favourable terms. However, the defendant contended that the JV obligation related only to wholesalers and that M was not a wholesaler. It also said that the volumes of product purchased by M was not "*comparable*". On these grounds, the defendant contended that the documents – which it said contained highly confidential commercial information – were not relevant to any issue properly arising in the proceedings and ought not to be discovered.

26. Clarke J identified the point of principle that arose as being " *as to the approach which the court should take where the real reason why a set of documents is said not be relevant is that it is argued that there is no legitimate basis for suggesting that the issue to which those documents might be relevant can properly arise in the case."* He continued:

> *"5.5 It is, of course, clear that such questions could, in theory, arise in virtually any case. At its simplest almost all cases involve a series of sequential propositions which need to be established in order that the plaintiff concerned might succeed. Even the most basic case will involve questions of liability, causation, and loss. Questions of loss, for example, only arise when liability and causation has been established. Thus, there is a sense in which materials relevant only to the calculation of loss will only be relevant in the proceedings if the plaintiff establishes liability and a causal link between the alleged loss and the cause of action. It could not, of course, follow that it would be appropriate for the court to determine, in the words of McCracken J. in Hannon, "as a*

> *matter of probability" whether the document is relevant to the issue to be tried on the basis of considering whether, as a matter of probability, the plaintiff is going to get to the issue of loss by reason of surmounting the obstacle of liability and causation. Rather the proper approach to the application of the test identified by McCracken J. is that the issue of loss is an issue in the case, albeit one which may not need to be determined in the event that other issues go a particular way. Once it is probable that a document would be relevant to the calculation of loss, then its discovery must be directed (in the absence of any other good reason for not so doing) even though there might well be a risk that loss will never come to be assessed by the court at all. Loss is an issue because it is pleaded and denied. Whether it may be reached as a consequence of decisions on other issues is neither here nor there in the context of discovery. To take any other view, would be to invite the court to attempt to resolve potentially contested issues at the preliminary stage of a discovery application. The relevant general proposition must, therefore, be that, provided that an allegation is properly made on the pleadings, then documents which are probably relevant to the resolution of that issue should be discovered even though that issue may only arise in the event that other matters are resolved in favour of the party concerned."*

27. That "*general proposition*" was subject to certain qualifications. In the first place, the issue to which the discovery was directed "*must fairly arise on the pleadings*".4

[4] At para 5.6.

Secondly, particular issues might arise where the material sought on discovery was confidential. A balance might have to be struck which could involve requiring a party "*to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent's relevant documentation.*" If a party failed to pass that threshold, discovery might be refused in the exercise of the court's discretion. Here, however, it has not been suggested that the discovery sought by Mythen gives rise to any confidentiality concerns analogous to the issued in *Hartside*..

28. It was not suggested in argument that *Hartside* was wrong or ought not to be followed by this Court. In fact, Allianz did not really engage with *Hartside*.

29. In my view, the approach taken in *Hartside* is clearly correct as a matter of general principle. As Clarke J observed, to "*take any other view, would be to invite the court to attempt to resolve potentially contested issues at the preliminary stage of a discovery application."* That is not the function of the court hearing an application for discovery and if the court had to engage in such issues as a necessary preliminary to applying the established discovery rules, the discovery jurisdiction would rapidly become practically unworkable. Applications for discovery would become forums for debating and determining complex legal issues wholly unsuited for resolution within the proper parameters of such applications.

30. Here, Mythen has clearly pleaded a cause of action based on Section 62. It pleads the facts necessary to bring itself within the scope of the section (the fact that Bidcon had a policy of insurance in respect of liability for a wrong; the fact of the liquidation of

Bidcon and the fact that Mythen obtained judgment against Bidcon), pleads that Allianz has wrongfully refused to indemnify Bidcon and pleads that it is entitled to maintain proceedings directly against Allianz pursuant to Section 62. If Mythen's analysis of Section 62 is correct, then the issue of whether Allianz was entitled to refuse indemnity – what was referred to by Mr Howard as "*the merits*" of its decision to decline indemnity – is an issue squarely in the case. Indeed, on Mythen's case, it is the central issue. Allianz's contentions that Mythen's claim is, in various ways, "*misconceived*" and that the issue of Allianz's entitlement to refuse to indemnify Bidcon is not an issue that ought properly to be reached in these proceedings may well turn out to be correct. However, it is no function of this Court – any more than it was properly a function of the High Court – to seek to adjudicate on these contentions within the confines of a discovery application.

31. If Allianz considered that the claim against it was so manifestly without merit that it (Allianz) should not be put to the burden of making discovery, it had a remedy available to it. It could have sought to dismiss the claim - as the defendant insurers did successfully in *Hu* and in *Murphy v Allianz* – but it did not do so. It could have sought to have a preliminary issue determined as to the correct effect of Section 62 and/or the implications of the Bidcon's failure to arbitrate but, again, it did not do so. It was not of course obliged to take any such step, as Mr Howard observed to the Court. But having elected not to do so, it is not, in my opinion, open to Allianz to meet the application for discovery here by asserting, in effect, that Mythen's pleaded claim will fail in *limine* and therefore that discovery is not "*necessary*".

32. That is, in my view, sufficient to resolve the appeal here. However, in deference to the submissions made, I propose to make some further observations about Section 62. I shall also discuss the arbitration issue specifically.

Section 62

33. Section 62 is in the following terms:

> "*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.*"

34. There has long been debate as to the meaning and effect of Section 62. In *Dunne v PJ White Construction Co Ltd (in liquidation)* [1989] ILRM 803 the plaintiff had obtained judgment against his employers arising from a workplace accident. In the course of the proceedings, the employers went into liquidation. The plaintiff sued the

employers' insurers, relying on Section 62. The High Court had dismissed the claim at the conclusion of the plaintiff's evidence on the basis that the plaintiff had failed to negative a right asserted by the insurers to rescind or repudiate the policy. The plaintiff appealed.

35. Noting that the issue of whether the plaintiff had a right to bring an action against the insurers had not been raised in the pleadings or argued before the High Court, Finlay CJ (with whose *ex tempore* decision Henchy, Griffin, Hederman and McCarthy JJ agreed) considered that the appeal had to be dealt on the basis that the plaintiff had such a right. However, he then went on to express the view that it was an inevitable consequence of the terms of Section 62 itself that such a right of action was created by it:

> "*Section 62 of the Act of 1961 is specifically designed to protect an injured Plaintiff in the precise position of Mr. Dunne in this action so as to ensure that monies payable on a policy of insurance to an insured who is dead, bankrupt, and, in the case of a corporate body, who is gone into liquidation, will not be eaten up by other creditors, but will go to satisfy his compensation, and with that purpose the Section must, it seems to me, give to the Plaintiff a right to have that right enforced and protected by the Courts and that means that he has got a right to sue, as he has sued in this action.*"[5]

[5] At page 805.

36. As regards the onus of proof issue, Finlay CJ thought that the position adopted by the insurers would involve a very wide and unjustified breach of the ordinary rule that he who alleges must prove. But, in his view, the matter went further than that. As between insured and insurer the insured had the advantage of a presumption that the policy was good unless and until the insurer established a right to rescind or repudiate.[6] Yet, he continued:

> *" .. it is suggested that the injured party with the special statutory protection arising under Section 62 of the Civil Liability Act , as Mr. Dunne has in this case, is deprived of that very valuable presumption. It is quite clear that as a matter of justice, such a person may, in many cases, find it impossible and, in most cases, must find it immeasurably more difficult than the insured would, to negative a rescission or a right of repudiation. In my view, there would be no warrant for such an unjust application of rules of procedure or of a question of the onus of proof in an action and I would not be prepared to subscribe to it unless I saw anything, either in the general principles of law or in the terms of Section 62 which make it necessary for me to do so. I do not see anything in either of those areas.*
>
> *On the contrary, I think properly to implement the protection given by the Legislature in Section 62 to a person in the precise position of this Plaintiff, it is necessary that the onus of proof should be the other way."*

[6] It is equally well-established that an insurer that asserts that a risk is excluded by an exclusion in a policy has the burden of establishing the application of such an exclusion: see Geoghegan J in *Analog Device Ltd v Zurich Insurance Ltd* [2005] IESC 12, [2005] 1 IR 274, at paragraphs 16 & 17

37. The observations of Finlay CJ on the issue of whether Section 62 gives a cause of action against an insurer in circumstances such as the present were avowedly *obiter*. But it does not follow that those observations have no weight or are to be regarded as meaningless. As Mr Gardiner pointed out in the course of the appeal hearing, those observations were concurred in by the other members of a full court and, at trial, Mythen will have the advantage of being able to point to those observations and to urge on the High Court that they ought to be regarded as to correctly setting out the effect of Section 62. In response, Allianz will be free to make the points made in *Buckley on Insurance Law,* as well as such other arguments as it considers appropriate. Those arguments may prevail but (putting it at its lowest) it cannot sensibly be suggested that such an outcome is inevitable.

38. *Dunne v PJ White Construction Co Ltd (in liquidation)* appears to be the only appellate court decision relating to Section 62 but we were referred to a number of High Court decisions on the section. I will deal with these briefly.

39. In *Power v Guardian PMPA Insurance* [2007] IEHC 105, the High Court (Laffoy J) explains that what is now Section 62 was originally contained in section 76(4) of the Road Traffic Act 1961. The plaintiff in *Power* had been injured while travelling as a passenger in the vehicle of a friend. He sued a number of parties and ultimately settled his claims save for the claim against the vehicle owner/driver. The plaintiff sued the defendant insurer, relying on section 76(1) of the Road Traffic Act 1961 as well as Section 62. The judgment is principally concerned with section 76(1) and the

compulsory insurance regime. Given that the insured was neither bankrupt nor dead, and that in any event the plaintiff had not obtained judgment against him, the Section 62 claim was on any analysis hopeless. In any event, the Judge examined the insurance position and concluded that the relevant insurance did not extend to cover for passengers and that such cover was not required by the compulsory insurance regime in place at the time of the accident (because the vehicle was a van).

40. The decision of the High Court (Kearns P) in *McCarron v Modern Timber Homes Limited (in liquidation)* [2012] IEHC 530, [2013] 1 IR 169 is more relevant. It again involved a workplace accident. As far as Kearns P was concerned, the judgment in *Dunne v PJ White Construction Co Ltd (in liquidation)* confirmed that Section 62 created a right of action (thus overcoming what the President referred to as *"the privity point")* but it had not decided when the cause of action may be said to arise or what at point it became enforceable. Looking at the terms of Section 62, and in particular the reference to the discharge of "*valid claims against the insured",* Kearns P was of the view that such a claim would arise only when "*liability has been established against the employer and the quantum of the claim assessed."*[7] Thus Section 62 accorded with the general principle "*than an insured person's rights of indemnity under a policy of insurance against the liability to third parties does not arise until the existence and amount of his liability to the third party is first established, either by action, arbitration or agreement."*[8] Only at that point would the Statute of

[7] At paragraph 15.

[8] At paragraph 8, citing *Post Office v Norwich Union Fire Insurance Society* [1967] 2 QB 363 and (in paragraph 9) *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957.

Limitations run against a plaintiff *vis-à-vis* the insurer.[9] As the plaintiff had not obtained judgment against the insured, it followed that the application of the insurer to have the claim against it dismissed should be allowed.

41. Here of course Mythen obtained judgment against Bidcon in January 2017, before commencing these proceedings in July 2017.

42. The decision of the High Court (Peart J) in *Hu* was central to the Judge's decision here and therefore warrants close consideration. Once again it arose from a workplace accident. The first defendant (the employer) had employers' liability cover with the second defendant (Aviva). It appears from the judgment that the policy provided for the payment by the insured employer of an excess of €1,000 in respect each claim <u>and</u> provided that such payment was a condition precedent to liability. The plaintiff's claim had been notified to Aviva and Aviva had sought payment of the excess but it was not paid by the company or the liquidator. In those circumstances, Aviva declined cover. When the plaintiff learned of the excess issue, he indicated a willingness to make the payment himself. He also complained of the fact that the issue had not been brought to attention earlier, suggesting that pressure could have been brought to bear on the employer or the liquidator to make the payment or that he might have made the payment at that stage. Crucially, however, the plaintiff did not dispute that the excess had not been paid and did not dispute that the failure to pay it was a breach of a condition of the policy. It followed (in the Judge's view) that there was no "*live issue*

[9] At paragraphs 15 & 16.

between the parties" as to whether or not Aviva was entitled to repudiate. That distinguished the case from *Dunne v PJ White Construction Co Ltd (in liquidation):*

> *"If there was some arguable doubt still existing as to whether or not Aviva was entitled to repudiate liability, then the judgment of the Supreme Court in Dunne v. P.J. White & Co. Ltd [supra] could be of assistance, given the remarks of Finlay C.J, albeit obiter in his judgment, that the onus fell upon the insurer to prove what it was alleging, namely that it was entitled to repudiate liability. But that issue is not live in the present case on the evidence which has been adduced. In my view, s. 62 of the Act of 1961 does not provide the plaintiff with a remedy in this case against Aviva."*

43. On that basis, the plaintiff's claim was dismissed (though only after Peart J considered and rejected an argument that the plaintiff should be permitted to amend to make a claim for negligence against Aviva based on its failure to give him timely information as to the employer's failure to make the excess payment).

44. I do not read the judgment of Peart J as establishing any general principle to the effect that no cause of action arises against an insurer under Section 62 and/or that a decision by an insurer to refuse indemnity cannot be challenged by a party in the position of Mythen here. Nowhere in his judgment does Peart J express any disagreement with the observations of Finlay CJ in *Dunne v. P.J. White & Co. Ltd* . On the contrary, he clearly distinguishes that decision on the basis that, in the case before him, there was no "*live issue*" as to the entitlement of Aviva to repudiate. On that basis, there is

nothing surprising about the conclusion that the plaintiff's claim against Aviva ought to be dismissed as its challenge to the refusal of cover was bound to fail.

45. Finally, there is the decision of the High Court (Gilligan J) in *Murphy v Gilligan* on which Mr Howard placed particular reliance in his oral submissions. Again, it involved a workplace injury sustained by the plaintiff, who had been a labour-only subcontractor on a construction site. The main contractor was insured by Allianz and (after some delay) it reported the accident to Allianz. Allianz then sought outstanding wage declarations from the insured, as it was entitled to do under the policy.[10] That request went unheeded and was repeated, with a warning that the Allianz might repudiate in the event that the material was not provided. However, the declarations were still not provided and Allianz duly notified the insured's brokers that it was withdrawing indemnity. That was in May 2006. The insured did not challenge Allianz's withdrawal of indemnity. Six years later, the plaintiff sued Allianz. He had at that stage obtained judgment against the insured but the damages had not been quantified. Furthermore – and significantly – while the insured had been struck off the register for failure to make annual returns, it had not been wound up.

46. In any event, wide-ranging submissions were made to the High Court on behalf of Allianz, echoing many of the arguments advanced in this appeal. In his decision, Gilligan J first held that the fact that the insured was not in liquidation meant that the

[10] A requirement to keep records of the number of employees/sub-contractors employed and the wages payable to them and to produce those records to the insurer at regular intervals and/or on request is a normal feature of EL insurance and a condition to that effect is included in the Policy here (Policy Condition 9).

plaintiff did not come within Section 62 at all. On that *"principal basis alone*", the plaintiff's case was doomed to failure.[11]

47. As to the "*subsidiary argument*" that, even if the insured was in liquidation, the plaintiff would have to satisfy the court that he was entitled to moneys payable to the insured under the policy, Gilligan J was "*satisfied, having regard to the particular circumstances of this case, that the claim that was brought in respect of the plaintiff's injury was validly repudiated by the defendants over seven years previously*" and that the plaintiff had been aware of that fact since 2010. Reference was also made to the fact that the "*repudiation*" had not been challenged by the insured in this context. The Court then referred to *McCarron* and *Hu* and indicated its view that, even if the insured was in liquidation, the plaintiff's claim would not be a valid claim "*particularly by reason of the fact that the quantum of the insured's liability has not been assessed."*[12] The Court's ultimate conclusion was to the effect that Section 62 had "*no application in the particular circumstances that arise."*

48. Again, I do not read the judgment of Gilligan J as establishing any general principle to the effect that no cause of action arises against an insurer under Section 62 and/or that a decision by an insurer to refuse indemnity cannot be challenged by a party in the position of Mythen here. Again, there is no suggestion in the judgment that the judge took a different approach to that suggested by the Supreme Court in *Dunne v P.J. White*. Given that the insured was not in liquidation, and having regard to the fact

[11] At paragraph 39.

[12] At para 43.

that the plaintiff's claim against the insured remained unquantified, the Section 62 claim clearly could not succeed. But so far from holding that the validity of Allianz's decision to refuse indemnity was beyond challenge in the proceedings, Gilligan J clearly held on the evidence that the claim had in fact been *"validly repudiated."*

49. In both *Hu* and *Murphy,* therefore, the High Court proceeded on the basis that there was no "*live issue*" as to the entitlement of the insurer to decline cover. In other words, it was clear to the High Court that there were no "*moneys payable to the insured under the policy*". That is not, Mr Gardiner says, the position here. Mythen disputes the applicability of the exclusions relied on by Allianz. Its case is that the loss here was caused by poor workmanship and this, it says, is an insured peril. It is not in the position of the plaintiff in *Hu* who accepted that a condition precedent to indemnity had not been fulfilled or the plaintiff in *Murphy* who was not in a position to contest as a matter of fact the basis on which indemnity had been refused.

50. It is the case that in both *Hu* and *Murphy* there are statements to the effect that there was no privity of contract between plaintiff and insurer.[13] Moreover, in *Murphy*, Gilligan J stated that Allianz owed no duty at law under contract, statute or in tort to the plaintiff such as might give rise to a claim against it in damages.[14] However, although a claim for damages for breach of contract is made by Mythen here, that claim – which is made in the alternative – is not central to the proceedings. Nor, it appears to me, is the privity of contract issue. As I understand it, the central claim

[13] *Hu*, at paragraph 15; *Murphy* at paragraph 44.

[14] Also at paragraph 44.

made by Mythen is that, in the circumstances here, Section 62 – rather than the Policy - gives it a cause of action against Allianz, for an indemnity rather than damages. In my opinion, it simply does not follow from the fact that there may be no privity of contract between Mythen and Allianz that Mythen has no cause of action against Allianz pursuant to Section 62. The observations of Finlay CJ in *Dunne v P.J. White* were premised not on any assumption of privity but on the purpose of Section 62 and the "*special statutory protection"* which, in his opinion, the Oireachtas intended to give to parties such as Mythen. Furthermore, as I have explained, I do not read the judgments in either *Hu* and *Murphy* as indicating that, as a matter of principle, such a cause of action does not exist.

51. As already observed, this is an appeal about discovery only. The legal and factual merits of the substantive positions of the parties are not before this Court for adjudication. I express no view on the correct construction of Section 62. That is a matter for the hearing of the action and any appeal that may arise from the High Court's findings on that issue. However, insofar as the Court was invited by Allianz to examine the authorities – and in particular *Hu* and *Murphy* – and to deduce from them that Mythen's claim here is so clearly unsustainable, or that the hearing of this action will so clearly be confined to the narrow issues identified by Allianz, that the discovery sought here cannot be said to be "*necessary*" and was therefore correctly refused by the Judge, I find myself quite unable to draw any such conclusion from the authorities cited.

The Arbitration Clause

52. Allianz places significant emphasis on the fact that its refusal of indemnity here was not challenged by Bidcon. That, in itself (so it is said) represents an insurmountable hurdle for Mythen in pursuing a claim against Allianz.

53. Again, this issue is not before the Court for determination on this appeal and the purpose of discussing it is not to offer any definitive view on it but rather the more limited one of seeing whether Allianz's position is so clearly correct that it might properly be said that the discovery sought by Mythen is not "*necessary*" for the fair resolution of these proceedings.

54. That Bidcon did not challenge the refusal of indemnity by Allianz does not appear to be in dispute. However, the point in time when Bidcon lost the right to bring such a challenge is less clear. According to Allianz, Bidcon had a period of 12 months from the date of declinature. Thus, as and from September 2015, any claim by the insured was, on Allianz's analysis, deemed to have been abandoned by Bidcon.

55. As against that, the general principle - recognised in *McCarron* – is that an *"insured person's rights of indemnity under a policy of insurance against the liability to third parties does not arise until the existence and amount of his liability to the third party is first established, either by action, arbitration or agreement."* Here, the "*existence and amount*" of Bidcon's liability to Mythen was first established when Mythen obtained judgment on 16 January 2017.

56. In *William McIllroy (Swindon) Ltd v Quinn Insurance Ltd* [2001] EWCA Civ 825, [2012] 1 All ER (Comm) 241, the Court of Appeal held, in the context of an arbitration clause in a public liability policy, that no "*dispute*" could arise between insured and insurer, such as to trigger the arbitration time-limit, until the insured's liability was established and quantified. That particular finding was not, it should be said, dependent on the provisions of the Third Parties (Rights against Insurers) Act 1930. Rather, it derived from the principle of law acknowledged in *McCarron*, which in turn derived from *Post Office v Norwich Union Fire Insurance Society* [1967] 2 QB 363 and *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957 (which were cited in both *McCarron* and *William McIllroy (Swindon) Ltd v Quinn Insurance Ltd).* While the arbitration clause in the Policy refers to "*difference*" rather than "*dispute*", it would seem surprising if that variation in terminology were to be found to be material in this context.

57. If that be so, it would seem to follow that these proceedings were commenced (in July 2017) *within* the 12 month period in the arbitration clause and, accordingly, *before* any deemed abandonment by Bidcon of any claim against Allianz. That may well be significant in the context of the arbitration issue in these proceedings.

58. Of course, these proceedings are court proceedings rather than arbitral proceedings and the claimant is not Bidcon but Mythen. But if, in principle, Section 62 gives persons in the position of Mythen a cause of action against an insurer – and that is of course another issue in these proceedings - how might such a claim be pursued

otherwise than by proceedings in court, brought by a person other than the insured? In truth, Allianz's complaint is not that it is sued in court by Mythen or that it has been deprived of the advantages of arbitrating its "*differences*" with Mythen. Its complaint is that it is being sued by Mythen at all.

59. Furthermore, on what basis might an arbitration clause in a contract of insurance to which Mythen is not a party operate to exclude such proceedings? Given Allianz's insistence that Section 62 does not have the effect of putting Mythen into the shoes of Bidcon, its contention that Mythen is nonetheless bound by the provisions of the arbitration clause in the Policy is arguably inconsistent (though Allianz denies that). Furthermore, to permit a Section 62 claim to be defeated by an arbitration clause in insurance policies might be said to frustrate the operation of Section 62 and undermine the "*special statutory protection*" which, according to Finlay CJ in *Dunne v PJ White*, the section was intended to confer on persons in the position of Mythen here.

60. There is no doubt but that the interaction of Section 62 on the one hand and, on the other, arbitration clauses such as that in the Policy here (clauses which are of course frequently found in insurance policies of the kind at issue here) gives rise to many difficult questions. Existing authority on Section 62 has not really addressed these questions, certainly not in any direct way. It may be that these proceedings will lead to some or all of these open questions being resolved. However, it does not appear to me that the Court on this appeal can – or should – make any prediction as to *how* those questions may be resolved. As with the other issues raised by Allianz as to the effect of Section 62, therefore, I am unable to conclude that its position as to the effect of

the arbitration clause is so clearly correct that the Court could properly conclude that the discovery sought is not "*necessary*" for the fair resolution of these proceedings.

DISPOSITION

61. For the reasons set out above, I am of the view that the High Court Judge erred in refusing discovery here. The Judge went beyond the proper parameters of the jurisdiction she was exercising and decided the application not by reference to the issues on the pleadings but rather on the basis of her view as to how those issues would be resolved at trial.

62. Apart from the objection that the discovery sought was not "*necessary*" because the validity of its declinature was not properly an issue in the proceedings, no grounds were advanced by Allianz to the effect that the discovery ought to be refused.

63. In my view, the category sought satisfies the requirements of Order 31, Rule 12 and is properly discoverable. Accordingly, in lieu of the order made by the Judge, I would make an order directing Allianz to make discovery on oath of the following:

> *"All documentation and communications (include electronic communications, all recordings etc) passing between and Bidcon Construction Limited and/or its legal advisors and/or the liquidator of that company and/or the liquidator's legal advisers in relation to Allianz Public Company Limited's refusal to indemnify Bidcon Construction Limited."*

64. I would propose to fix 6 weeks for the making of this discovery, the affidavit of discovery to be sworn by the company secretary of Allianz. If any aspect of such

proposed directions give rise to any practical difficulty, the parties should bring those difficulties to the notice of the Court and they can be addressed.

65. As regards costs, I note that Allianz sought and obtained an order for the costs of the discovery application in the High Court. In my opinion, that order clearly cannot be allowed to stand and must be set aside. It appears to me that, having regard to the conclusions reached above, the appropriate costs order provisionally appears to be that Mythen should have the costs of the discovery application in the High Court and the costs of its appeal to this Court. If, however, Allianz wishes to contend for a different order for costs it will have liberty to make a written submission to that effect within 14 days of this judgement with Mythen having a further 14 days to respond. It if considers necessary to do so, Allianz should then have a further period of 7 days in which to furnish any observations on Mythen's response.

In circumstances where this judgment is being delivered electronically, Noonan J and Power J have authorised me to indicate that they agree with it.