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THE HIGH COURT

1981 No. 11437P

BETWEEN:

JOSEPH BOYCE

Plaintiff

and

PETER Mc BRIDE

Defendant

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

This is an application brought by the Plaintiff for an order giving the Plaintiff leave to join the Eagle Star Insurance Company Limited as a Defendant in place of the Defendant named in the above entitled proceedings and for liberty to issue and serve a concurrent plenary summons against the said Eagle Star Insurance Company Ltd. of 5 Linen Hall Street, Belfast in the County of Antrim, Northern Ireland.

The application arises in rather unusual and, if I may say so, exceptional circumstances.

The Plaintiff herein was injured in an accident which occurred on the 22nd day of July, 1979 at Dromanny, Letterkenny in the County of Donegal when a car, which he was driving, was involved in a collision with a motor vehicle, the property of and driven by Peter McBride, formerly 9 Sunningdale, Omagh in the County of Tyrone

The said Peter McBride died as a result of the injuries which he sustained in the said accident.

Though the correspondent has not been exhibited in any of the affidavits filed on behalf of the Plaintiff, it would appear from

subsequent correspondence which has been exhibited in the affidavits sworn by Kieran R. O'Gorman who is described therein as the Principal of the firm of O'Gorman, Cunningham & Company, Solicitors, carrying on practise at Port Road, Letterkenny in the County of Donegal that the Eagle Star Insurance Company Limited were notified of the Plaintiff's claim in their capacity as indemnifiers of the said Peter McBride, deceased.

By letter dated the 8th day of July, 1981 and written by J. O'Sullivan who is described therein as the Claims Superintendent of the Shield Insurance Group, Shield Life Insurance Company Limited, of Shield House, 45/47 Pembroke Road in the City of Dublin, the Plaintiff's said Solicitors were informed that:-

"the papers in connection with this claim had been forwarded to us for attention by the Eagle Star Group in Belfast and any further correspondence should be addressed to this Office."

In the said letter, they asked the said Solicitors to submit full details of his client's claim for their consideration and asked that any medical reports should be forwarded to them.

He received no reply to the said letter and wrote again on the 8th day of October 1981, referring to the said letter and stating that he would "be glad to hear from you in reply as quickly as possible".

On the 16th day of October, 1981 the Plaintiff's Solicitors wrote in reply as follows:-

"We refer you to yours of the 8th of July 1981, would you please note that we have been endeavouring for well over a year to have the Eagle Star nominate Solicitors to accept service of proceedings in this matter and they have refused to do so. You would now be aware that in fact we

have forwarded all the necessary documentation to our Town Agents to make application to the High Court for leave to serve outside the jurisdiction. We would await hearing from you with regard to this matter before proceeding any further as it is absolutely imperative that proceedings be now issued and served immediately in this case."

On the 12th day of October, 1981 an application was made to Mr. Justice Barrington for liberty to issue and serve the plenary summons herein on the intended Defendant at 9 Sunningdale, Omagh, Tyrone, Northern Ireland.

Such application was grounded on the affidavit of the Plaintiff and stated at Paragraph 8 that:-

"the intended Defendant herein resides at 9 Sunningdale, Omagh, in the County of Tyrone "

It is impossible to understand how this affidavit came to be drafted and sworn by the Plaintiff because it is quite clear that the Plaintiff's Solicitor was at this time and had for some considerable time prior to that known that the said Peter McBride had died as a result of the injuries sustained in the accident herein before referred to.

The matter proceeded as if the said Peter McBride was alive and on the 21st day of October, 1981 Mr. O'Sullivan wrote to the Plaintiff's Solicitor acknowledging receipt of the letter dated the 10th of October, 1981 and stated:-

"We will nominate Messrs. John P. Redmond & Company, Solicitors, 17 Kildare Street, Dublin 2 to accept service of any proceedings which you may be instructed to institute. In the meantime, may we again refer to your letter dated

the 8th day of July last wherein we asked you to indicate if you were in a position to submit full details of your client's claim for our consideration.

We await hearing from you."

On the 29th day of October, 1981 the Plaintiff's Solicitor wrote to the said Claims Superintendent as follows:-

"Dear Sirs,

We thank you for your letter of 21st October. Please note we are now serving High Court proceedings on Messrs. John R. Redmond & Co., Solicitors. Please also note that we have been granted permission by the High Court to serve same outside the jurisdiction due to your unwillingness to nominate Solicitors to accept service outside the jurisdiction. Please note that we will be serving Statement of Claim shortly and will set out our client's claim in full.

Please note we are very surprised that you have been so incorporat in this matter in nominating solicitors to accept service of proceedings.

Yours faithfully"

The Plaintiff's Solicitor then wrote to Messrs. John P. Redmond & Co. on the 29th day of October, 1981 enclosing the High Court plenary summons which had been issued in this case.

They wrote agaon on the 20th day of November, 1981 and the 26th day of November, 1981.

On the 30th day of November, 1981 Messrs. John P. Redmond & Co., Solicitors wrote to the Plaintiff's Solicitor as follows:-

"Dear Sirs,

We apologise for the delay in replying to your letters of the 20th inst. and the 29th October. We now return the originating plenary summons with acceptance of service endorsed thereon. An appearance has already been served on your Dublin Agents. We await Statement of Claim.

Yours faithfully"

On the 11th of November, 1981 Mr. O'Sullivan of the Shield Insurance Group had written to the Plaintiff's Solicitor as follows:-

"Dear Sirs,

We have your letter dated the 29th October.

You will appreciate that the delay in dealing with this claim was not of our making. The papers were only sent to us in May of this year by the Eagle Star Group in Belfast and as soon as they confirmed that their policy cover was in order, we wrote to your goodself on the 8th of July, 1981 advising of our interest on their behalf.

Furthermore, in that letter we asked if you were in a position to submit full details of your client's claim for our consideration.

In addition, we enquired if they were any other further medical reports available other than the one furnished by J. A. Hanley dated the 17th of December, 1979. If so, will you please consider sharing these reports with us.

We await hearing from you.

Yours faithfully"

On the 17th December, 1981 the Plaintiff's Solicitor wrote to Messrs. John P. Redmond and & Company:-

"Dear Sirs,

We are now ready to file Statement of Claim in the above action. Will you please let us have letter consenting to late filing of same by return.

Yours faithfully"

Mr. O'Sullivan wrote again to the Plaintiff's Solicitor on the 4th of January 1982 stating:-

"Dear Sirs,

We should be glad to hear from you in reply to our letter dated the 11th November last.

Yours faithfully"

The Plaintiff's Solicitor wrote to the Shield Insurance Group on the 13th of January, 1982 and wrote to the solicitor nominated by them on the same date. Then on the 20th day of January, 1982 a letter was written on behalf of the Shield Insurance Group to the Plaintiff's Solicitor as follows:-

"Dear Sirs,

We acknowledge receipt of your letter dated the 13th day of January.

In view of the difficulties concerning medical reports it would be our intention to have your client medically examined ourselves as we are unsure at this stage when our representative will be in the Donegal area. We are aware that your client's Medical Attendant Surgeon Hanley is indisposed at the moment and in the circumstances, perhaps you would nominate another Doctor whom our Doctor could contact in order to make the necessary arrangements. It will be our intention to request Surgeon Golden in Kilkenny to carry out the examination on

our behalf.

We look forward to hearing from you."

On the 27th day of January, 1982 Messrs. John P. Redmond & Company wrote to the Plaintiff's solicitor enclosing a letter consenting to late filing of the Statement of Claim.

On the 29th day of January, 1982 the Plaintiff's solicitor wrote to Shield Insurance Group in connection with a medical examination and they replied thereto on the 2nd day of February, 1982.

The final arrangements were then made for an examination of the Plaintiff.

The Statement of Claim herein was delivered on the 26th day of January, 1982.

A notice for particulars dated the 2nd day of March, 1982 was delivered to the Plaintiff's solicitors by the Solicitors on record for the Defendant, Messrs. John P. Redmond & Company.

These were replied to. A medical examination was eventually arranged for the 11th day October, 1982.

Further correspondence was exchanged between the Solicitors in connection with the filing of a defence. No defence was delivered and on the 24th day of November, 1982 the Shield Insurance Group wrote to the Plaintiff's solicitor stating as follows:-

"Dear Sirs,

Thank you for your letter of 16th November. We have written fully to our Solicitor, John P. Redmond & Co., regarding the matter and we expect that you will hear from them shortly.

Yours faithfully."

That concludes the correspondence which has been exhibited in the affidavits before me.

It is obvious from the foregoing that the proceedings instituted on behalf of the Plaintiff were ill-conceived. The Defendant named in the said proceedings was at the time of the institution of such proceedings dead. No proceedings can be instituted against a dead man. Such proceedings should be instituted against his legal personal representative.

The Plaintiff's Solicitor was at fault in applying to the Court for leave to issue such proceedings and in permitting to have averred in the affidavit grounding such application the fact that the Defendant resided at the address given therein and was not an Irish citizen.

The deceased's insurers were aware of the fact that their insured had died as the result of injuries sustained in the accident, were at fault in failing to draw the Plaintiff's Solicitors attention to such fact, were at fault in nominating a Solicitor to accept service of the proceedings, were at fault in nominating a Solicitor to accept service of the proceedings, were at fault in instructing the said Solicitor to enter an appearance thereto, the said Solicitors were at fault in entering an appearance thereto, in accepting delivery of the Statement of Claim, and in seeking particulars in relation thereto.

Both parties were grievously at fault in this matter.

In an attempt to rectify the position which has arisen, an application has been made on behalf of the Plaintiff to substitute as Defendant the Eagle Star Insurance Company Ltd., the indemnifiers of the deceased. This is necessary because any claim against the estate of the deceased is now statute barred.

Naturally, this application is opposed, I am satisfied that the said Insurance Company is estopped from opposing the said application having regard to the steps already taken in the proceedings and authorised by them at a time when they were fully aware of the position.

I will make an Order directing the Eagle Star Insurance to nominate a person to act as Defendant in these proceedings within fourteen days and that in default of such nomination the Eagle Star Insurance be joined as Defendant.

app. *Sean Hanlon*