[2019] IEHC 872

THE HIGH COURT

2017 No. 7450 P.

BETWEEN

JOHN HAUGHTON

PLAINTIFF

AND

QUINNS OF BALTINGLASS LIMITED

DEFENDANT

ZURICH INSURANCE PLC

THIRD-PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 December 2019

INTRODUCTION

1. This matter comes before the court by way of an application to set aside third-party proceedings. The application is made pursuant to Order 16, rule 8(3) of the Rules of the Superior Courts.

2. The main proceedings, i.e. the proceedings between the Plaintiff and the Defendant, take the form of a personal injuries action arising out of an accident said to have occurred on the Defendant's premises. For ease of exposition, the Plaintiff will be referred to hereinafter as *"the Injured Party",* and the Defendant will be referred to as "*the Insured".*

3. The question which arises in the third-party proceedings is whether Zurich Insurance plc ("*Zurich*") is required to indemnify the Insured in respect of this personal injuries claim pursuant to a policy of commercial motor fleet insurance. The resolution of this question will necessitate an examination of the precise terms of the policy of insurance, and, in particular, will require consideration of the implications of the existence of a *parallel* policy of public liability insurance provided by a different insurer. It will also be necessary to consider certain issues of EU law arising under Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles. The third-party proceedings have the potential, therefore, to be a complex piece of litigation.

4. None of these issues fall to be determined in this judgment however. This is because Zurich objects that the third-party proceedings are irregular. Three specific objections are made as follows. First, it is said that the Insured failed to bring the application to join Zurich as a third-party within the twenty-eight day time-limit prescribed under Order 16, rule 1(3). This delay is alleged to have caused prejudice to Zurich. In particular, complaint is made that the personal injuries claim has since been settled as between the Injured Party and the Insured. This is said to have denied Zurich the opportunity of contesting the claim or seeking to compromise same on the basis of a lesser offer of settlement.

5. Secondly, it is said that the issues arising in the third-party proceedings are entirely different from those which arise in the personal injuries action. The requisite connection between the main proceedings and the third-party proceedings such as would justify the making of an order under Order 16 is absent.

6. Thirdly, it is submitted that the claims advanced in the third-party proceedings are frivolous and vexatious and bound to fail. Application is made to strike out and/or dismiss the third-party proceedings on this basis.

7. As appears, Zurich has adopted the paradoxical position that the claims advanced in the third-party proceedings are—at one and the same time—too complex to be determined in a personal injuries action, yet are so obviously destined to fail that the bringing of the third-party proceedings represents an abuse of process.

8. The sole purpose of this judgment is to rule on the various procedural objections outlined above. It is only in the event that the third-party proceedings survive Zurich's challenge that the substantive merits of the third-party proceedings will then be heard and determined.

PROCEDURAL HISTORY

9. The main proceedings arise out of an accident said to have occurred at the Insured's premises on 21 July 2015. Given the dispute which has since arisen as to whether Zurich is obliged to provide an indemnity in respect of the accident, it is necessary to rehearse the details of the accident. The summary which follows is based solely on the pleadings, and does not entail the making of any findings of fact by this court.

10. The Insured operates what is described as an "agri-store business" in County Kildare. The Injured Party, who is a farmer, had attended at the premises on 21 July 2015 for the purposes of purchasing feed for his cattle. It seems that cattle feed is dispensed at the premises by using a motor vehicle with a hydraulically controlled bucket attached to its front. (The vehicle resembles a JCB such as might be found on a building site, save that it does not have a digger at the back). It seems that cattle feed is scooped up in this bucket from a stockpile and then loaded into large canvas bags for customers. It is pleaded that, due to the negligence of the employee operating the vehicle, the bucket had been caused to close and crushed the Injured Party's left arm.

11. The vehicle is registered as a motor vehicle and has been fitted with a registration plate. This is potentially relevant to the question of whether Zurich is required to indemnify the Insured pursuant to the motor fleet insurance policy.

12. On 14 August 2017, the Injured Party issued the within proceedings by way of personal injury summons. The relevant authorisation having been previously provided by the Personal Injuries Assessment Board.

13. It appears that the initial approach of the Insured had been to seek indemnity pursuant to a policy of public liability insurance which it held with a different insurance company, namely Amlin UK.

14. Amlin UK nominated a firm of solicitors, Kent Carty Solicitors, to act on behalf of the Insured in the proceedings. An exchange of pleadings took place in the ordinary way, and the formal pleadings were closed on 23 November 2017 when a full defence was delivered.

15. By letter dated 5 February 2018, Kent Carty Solicitors wrote to Zurich and called upon them to confirm within 14 days that Zurich would provide a full indemnity in respect of the personal injuries claim pursuant to the Insured's motor fleet insurance policy. The letter indicated that, in the absence of such confirmation, an application to join Zurich as third-party to the proceedings would be made. No substantive response was received to this letter. (See affidavit of Gavan Carty dated 22 March 2019).

16. Thereafter, on 9 April 2018, the Insured issued a motion seeking an order pursuant to Order 16, rule 1(1) of the Rules of the Superior Courts joining Zurich as a third-party to the within proceedings. This application came on for hearing before the High Court (Barrett J.) on 11 June 2018. Barrett J. made an order on that date granting liberty to issue and serve a third-party notice. Barrett J. subsequently provided his written reasons in a reserved judgment dated 1 October 2018, *Haughton v. Quinns of Baltinglass Ltd*. [2018] IEHC 532.

17. Zurich entered an appearance on 8 August 2018. A notice of motion was subsequently issued on 9 January 2019 seeking to set aside the third-party proceedings.

INTERACTION BETWEEN INSURED AND ZURICH

18. It seems that, in parallel to the correspondence between the solicitors, there had been an exchange between Zurich and the brokers acting for the Insured. Zurich formally declined to provide indemnity in respect of the personal injuries claim by email dated 6 December 2018. The relevant part of the email reads as follows.

> "As you are aware, the Personal injury action taken by Mr John Haughton against the Insured is currently being handled by Kent Carty Solicitors who were engaged by the Insured's Public Liability insurer – MS Amlin. It has always been our view that the above dated incident was a matter for the Public Liability insurer only to respond. Following our investigations, our position remains unchanged. The following matters of relevance have assisted us in reaching this position:
>
> 1. The Plaintiff's Personal Injury Summons specifically pleads that the Plaintiff was a visitor and was owed a duty of car (sic) under the provisions of the Occupiers' Liability Act 1995.
> 2. The incident occurred as a result of unsafe work practices i.e. allowing customers into the bulk storage area whilst loading and unloading was taken (sic) place.
> 3. The vehicle in question was stationary and being operated by the Insured's employee on the Insured's premises (private property) to load feed into a feed bag. It was not being used as a means of transport at the time of the accident.
>
> We note that MS Amlin have instructed Kent Carty Solicitors to defend this claim and that, in effect, their policy has responded to this claim. In the circumstances, Section 1 – Liability to Third Parties, Part 2 (i) of the Insured's motor policy wording applies. This section states as follows:-

> We will indemnify any person or firm named in the effective Certificate of Insurance in the section headed 'Persons or Classes of Persons whose liability is covered' in connection with any vehicle for which indemnity is granted by this Policy but only for your negligence provided that the person or firm claiming indemnity: (i) is not entitled to an indemnity under any other Policy.
>
> In circumstances where the claim is clearly a matter for the Insured's Public Liability insurer, and further in circumstances where the Insured has obtained an indemnity from their Public Liability insurer, we must advise that we will not be in a position to provide the Insured with an indemnity in respect of this matter.
>
> […]
>
> We do not accept that the Insured is entitled to an indemnity from Zurich Insurance Plc under the terms of the policy and for the reasons outlined at 1 - 3 above."

19. The email rehearses the procedural history of the proceedings, and indicates an intention to pursue an application to set aside the third-party proceedings on the basis that they are misconceived. Reference is also made to the fact that any disputes under the insurance policy must be referred to arbitration.

20. As appears from the passages cited above, one of the grounds for declining cover was that the vehicle was being used on *private property* and was not being used as a means of transport. The implication being that the motor fleet insurance would only extend to the use of vehicles on the public road or other public place. This point is repeated in the written legal submissions filed by Zurich (see, in particular, paragraphs 19 and 22) where reference is made to section 56 of the Road Traffic Act 1961 which imposes an obligation to hold insurance for the use of a mechanically propelled vehicle in a public place. As explained at paragraph 73 below, the Insured contends that any such interpretation of the motor fleet insurance policy would be inconsistent with EU law.

21. It is notable that there is no reference in the email of 6 December 2018 to the 30-day notification period under the policy of insurance. It does not feature as one of the reasons for declining cover. Notwithstanding this omission, the position subsequently adopted by Zurich at the hearing before this court is that the failure to notify a claim within time is such a fundamental breach of the insurance policy that the claim cannot now succeed. I will return to this omission when discussing Zurich's application to dismiss the proceedings as an abuse of process.

THIRD-PARTY NOTICE

22. The third-party notice is dated 21 June 2018. The relevant provisions of the third-party notice read as follows.

> "The Defendant claims against you to be indemnified against the Plaintiff's claim and the costs of this action and/or contribution to the extent of the Plaintiff's claim or the following relief or remedy, namely, that Zurich Insurance plc do fully indemnify the Defendant in respect of any liability which the Defendant is found to

have in respect of that claim (and in respect of the Defendant's costs of these proceedings) or alternatively that Zurich Insurance plc do satisfy any entitlement to damages which the Plaintiff is found to have in the within proceedings, or to make such contribution in respect thereof as this Honourable Court shall deem just on the grounds that:

a) Arising from a Commercial Motor Fleet Insurance Policy between Zurich Insurance plc and the Defendant ('the Policy'), Zurich Insurance plc is obliged to meet and satisfy the claim brought by the Plaintiff in these proceedings and/or to fully indemnify the Defendant in respect of any liability which the Defendant is found to have to the Plaintiff in these proceedings.

b) The Defendant's claim as against Zurich Insurance plc derives from the Policy, and the interpretation required to be given thereto arising from the laws of the European Union, in particular the EU Motor Insurance Directives (now consolidated and codified into the 6th Motor Directive, Directive 2009/103/EC of 16 September 2009).

c) Without prejudice to the generality of the foregoing, the Defendant's claim against Zurich Insurance plc derives from the Policy and is based upon *inter alia* the judgment of the Court of Justice of the European Union in the case of *Damijan Vnuk v Zavarovalnica Triglav* [2014] CJEU C-162/13."

Further or alternatively and without prejudice to the foregoing, the Defendant contends that the following question should be determined by the Court in the within proceedings, namely:

> 'Whether, arising from Directive 2009/103/EC of 16 September, 2009 and/or *inter alia* the judgment of the Court of Justice of the European Union in *Damijan Vnuk v Zavarovalnica Triglav* [2014] CJEU C-162/13, and having regard to the relevant Policy of Motor Insurance between Zurich Insurance plc and the Defendant, Zurich Insurance plc is obliged to indemnify the Defendant in respect of any liability which the Defendant is found to have in these proceedings, or alternatively whether Zurich Insurance plc is obliged to satisfy in full any award of damages to which the Plaintiff may be adjudged entitled in the within proceedings?"

SUBROGATION

23. Before embarking upon a detailed discussion of the application to set aside the third-party proceedings, it may be convenient first to dispose of the following discrete argument which had been advanced on behalf of Zurich.

24. Counsel on behalf of Zurich had sought to characterise the third-party proceedings as involving, in truth, a dispute between two insurance companies, namely Zurich and Amlin UK. Counsel submitted that the absence of any privity of contract between the two insurance companies meant that Amlin UK is not entitled to enforce the policy of insurance entered into between Zurich and Quinns of Baltinglass Ltd. It was further submitted that the third-party proceedings should be set aside on this basis. The

judgments in *McCarron v. Modern Timber Homes Ltd*. [2012] IEHC 530; [2013] 1 I.R. 169 and *Kennedy v. Casey t/a Casey & Company* [2015] IEHC 690 were cited in this regard.

25. With respect, this argument cannot be reconciled with the principle of subrogation. It is long since established that an insurer who has indemnified its insured under a policy of insurance has a right of subrogation. The insurer is entitled to stand in the shoes of the insured. Crucially, however, any proceedings are taken in the name of the insured and not the insurer.

26. The third-party proceedings have properly been taken by Quinns of Baltinglass Ltd. The fact, if fact it be, that the insurance company, Amlin UK, may be exercising its rights of subrogation to direct that the third-party proceedings be taken does not alter the legal position. If and insofar as Amlin UK may have any involvement in directing the third-party proceedings—and no evidence has been adduced on this issue—it stands in the shoes of Quinns of Baltinglass Ltd.

27. The cases relied upon are distinguishable on the basis that they both involved an attempt by a plaintiff to join an insurance company directly to proceedings to answer to a claim against an insured. The plaintiff had no privity of contract with the defendant's insurer. In the absence of the claim falling within a statutory exception—such as, for example, that provided for under section 62 of the Civil Liability Act 1961 in the case of an insurer who is wound up—a plaintiff is not entitled to join the defendant's insured. By contrast, in the present case the third-party proceedings are properly constituted as between Quinns of Baltinglass Ltd. and Zurich, and seek to enforce a contract to which they are both parties.

(1). ORDER 16 AND TWENTY-EIGHT DAY TIME-LIMIT

28. The first ground relied upon to set aside the third-party proceedings is the failure to make the application to issue the third-party notice within the twenty-eight day period allowed for under Order 16, rule 1(3). That rule reads as follows.

> (3) Application for leave to issue the third-party notice shall, unless otherwise ordered by the Court, be made within twenty-eight days from the time limited for delivering the defence or, where the application is made by the defendant to a counterclaim, the reply.

29. The present case is somewhat unusual in that the application to issue third-party proceedings is grounded exclusively upon Order 16. Most other cases rely on both Order 16 and section 27 of the Civil Liability Act 1961.

30. It has never been suggested that Zurich is a "concurrent wrongdoer" for the purposes of the Civil Liability Act 1961. The application to join Zurich as a third-party was thus not subject to the statutory obligation under section 27 of the 1961 Act to bring the application "as soon as is reasonably possible". This distinction must be borne in mind in considering the case law in that almost all of the authorities are concerned with the statutory obligation.

31. Counsel for Zurich relied, primarily, on the judgment of the Supreme Court in *O'Byrne v. Stein Travel Ltd*. [2012] IESC 62; [2013] 1 I.L.R.M. 297 ("*Stein Travel*"). The circumstances of the present case are distinguishable for the following reasons. First, the application in *Stein Travel* was subject to the statutory obligation to bring the application "as soon as is reasonably possible".

32. Secondly, the period of delay in *Stein Travel* had been in excess of two years (the time for delivery of the defence had expired on October 24, 2008, but the motions to join the third-parties were not issued until January 26, 2011). By contrast, the delay in the present case is approximately five months (the time for delivery of the defence had expired on October 3, 2017, but the motion to join the third-party was not issued until April 9, 2018).

33. Thirdly, in contrast to the defendant in *Stein Travel*, the Insured has offered an explanation for the delay. More specifically, it has been explained on affidavit that the Insured's solicitors had written to Zurich on 5 February 2018, i.e. shortly after the expiration of the twenty-eight day period, and called upon them to confirm within 14 days that they would provide a full indemnity in respect of the personal injuries claim pursuant to the Insured's motor fleet insurance policy. No substantive response was ever received to that letter.

34. The criteria to be taken into account in determining whether to set aside third-party proceedings have been considered more recently in two judgments of the Court of Appeal. In *Greene v. Triangle Developments Ltd*. [2015] IECA 249, it was held that it is incumbent on the court to look not only at the explanations which were given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third-party notice was or was not served as soon as is reasonably possible. This requirement to consider the "whole circumstances" of the case was reiterated in *Kenny v. Howard* [2016] IECA 243. The majority judgment indicates that whereas prejudice to the third-party might be considered in the mix, third-party proceedings may nevertheless be set aside even in the absence of specific prejudice.

> "It seems to me that a third party applying to set aside a notice served by a defendant could argue that he had suffered prejudice and that a shorter period than might otherwise be allowed ought to be imposed in determining what was as soon as reasonably possible. I find it difficult to understand how a defendant who is in default of the clear requirement of the subsection can escape the consequences by proposing that the third party has not suffered any specific prejudice. The authorities cited do not go as far as suggesting that the section's impact may be defeated by demonstrating the absence of prejudice. In the present case, it seems to me that it is irrelevant whether or not [the Third-Party] has suffered prejudice by reason of the delay."

35. Whereas these principles were stated in the context of the statutory obligation to bring the application "as soon as is reasonably possible", they are of some assistance in the context of an application governed exclusively by Order 16.

36. I have concluded that the third-party proceedings should not be set aside for the following reasons. First, it was reasonable for the Insured to engage with Zurich before making a formal application to join it as a third-party. The Insured's solicitors had written to Zurich on 5 February 2018, i.e. shortly after the expiration of the twenty-eight day period. No substantive response was ever received to this correspondence, and the motion to join was issued some two months later on 9 April 2018.

37. Secondly, the five month delay in issuing the motion to join the third-party did not have any appreciable effect on the progress of the proceedings. The chronology suggests that—as with most personal injuries proceedings—the time-limits for pleadings under the Rules of the Superior Court were not being strictly complied with.

38. Zurich itself did not issue its own motion to set aside the third-party proceedings until 9 January 2019, i.e. some seven months after the order of 11 June 2018. Whereas there is no time-limit prescribed for making such an application, Order 16, rule 7 does suggest that a third-party is expected to make an application to vary directions within twenty-eight days, i.e. the time limited for the delivery of a defence.

> 7. After the third-party enters an appearance, and before the expiration of the time limited for delivery of defence, he may, after serving notice of the intended application upon the plaintiff and all defendants, apply to the Court to vary any directions given by the Court under sub rule (1) of rule 1 of this Order.

39. It might be inferred that any application to set aside should be made in a similar timeframe.

40. Thirdly, whereas it is not a decisive factor, some weight can be attached to the fact that Zurich has not suffered any specific prejudice as a result of the delay. Zurich had actual notice of the proceedings from early February 2018, i.e. the date of the letter from Kent Carty Solicitors. The one example of alleged prejudice relied upon by Zurich, namely the settlement of the personal injuries proceedings on 24 January 2019, is not attributable to the delay in issuing the motion to join. The settlement occurred more than seven months after Zurich had been joined to the proceedings. Moreover, Zurich cannot be said to have suffered any specific prejudice in circumstances where the Insured will have to justify the amount of the award in its proceedings against Zurich. If, for example, the award was found to be excessive, then Zurich would not be liable to indemnify the Insured for the full amount. (This is, of course, subject always to the Insured establishing that Zurich is obliged to provide cover for the accident in the first place).

(2). NEXUS BETWEEN MAIN PROCEEDINGS AND THIRD-PARTY PROCEEDINGS

Submissions of the parties

41. The second ground upon which it is sought to set aside the third-party notice is that there is not a sufficient connection between the subject-matter of the main action and the third-party proceedings. This ground of objection has been formulated as follows in the written legal submissions: the dispute in relation to the indemnity is said to be a "separate and distinct matter", "not substantially the same" and "an entirely separate and distinct cause of action".

42. Counsel on behalf of Zurich, Mr Richard Lyons, SC, submits that the dispute in respect of the interpretation and applicability of the motor insurance policy involves "very complex issues" of EU law, and that these are unsuited to third-party proceedings. Such matters should not, it is said, be determined in the context of a straightforward personal injuries claim. Counsel characterises the third-party proceedings as involving an entirely separate and distinct cause of action.

43. In response, counsel on behalf of the Insured, Mr Martin Hayden, SC, submitted that a claim for indemnity pursuant to an insurance policy clearly falls within Order 16, citing *ACC Bank Plc v. Johnston* [2011] IEHC 376, [6.1].

Findings of the court

44. The resolution of the question of whether the Insured is entitled to pursue its claim for an indemnity by way of third-party proceedings necessitates consideration of the wording of Order 16, rule 1 as follows.

> 1.(1) Where in any action a defendant claims as against any person not already a party to the action (in this Order called 'the third-party'):
>
> (a) that he is entitled to contribution or indemnity, or
> (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or
> (c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third-party or between any or either of them,
>
> the Court may give leave to the defendant to issue and serve a third-party notice and may, at the same time, if it shall appear desirable to do so, give the third party liberty to appear at the trial and take such part therein as may be just, and generally give such directions as to the Court shall appear proper for having any question or the rights or liabilities of the parties most conveniently determined and enforced and as to the mode and extent in or to which the third-party shall be bound or made liable by the decision or judgment in the action.

45. A claim by a defendant that it is entitled to an indemnity from its insurers in respect of the plaintiff's claim would, *on a literal reading*, appear to come within Order 16, rule 1(1)(a) above. The Insured in this case asserts that it is "entitled to … indemnity" against Zurich. The indemnity is said to arise under the motor fleet insurance policy. Section 1.1 of the policy provides, in brief, that [Zurich] "will indemnify [the Insured] against all sums which [the Insured] becomes legally liable to pay by way of damages or costs on account of … bodily injury to any person caused by or in connection with" any motor vehicle described in the schedule.

46. The next matter to be considered is whether there is any reason to depart from the literal interpretation of Order 16. More specifically, should the terms of Order 16, rule 1(1)(a) be interpreted as being limited to contribution and indemnity as between "concurrent wrongdoers" within the meaning of the Civil Liability Act 1961. On this narrower interpretation, Order 16 could not be invoked to allow a *contractual dispute* to be pursued by third-party proceedings where the main proceedings are based in *tort*. (It is common case that Zurich is not a "concurrent wrongdoer" in that it is not alleged that Zurich is responsible to the Injured Party for any wrong).

47. It seems clear from the case law that whereas there is considerable overlap between Order 16 of the Rules of the Superior Courts and Section 27 of the Civil Liability Act 1961, the two provisions are not coterminous. In principle, therefore, the third-party procedure under Order 16 is not confined to "concurrent wrongdoers".

48. This is confirmed by the Supreme Court judgment in *Gilmore v. Windle* [1967] I.R. 323. The main proceedings had been brought by an infant plaintiff, suing by his father and next friend, claiming damages for negligence in the driving, management, care and control of a motor car, the property of the defendant. The defendant alleged that the accident was caused by the sudden and total failure of the brakes on her motor car. The defendant sought leave to join, as a third-party, the proprietors of the garage from whom she had purchased the motor car only a few days before the accident. The High Court had refused leave, and the matter then came before the Supreme Court on appeal.

49. The majority of the Supreme Court (Walsh and O'Keeffe JJ, Lavery J. dissenting) allowed the appeal and held that leave to join the proprietors of the garage should be allowed. For present purposes, it is relevant to note that the Supreme Court accepted that the defendant and the third-party were not necessarily "concurrent wrongdoers". The proper designation of the parties would depend on the ultimate outcome of the proceedings.

> "If the facts alleged by the defendant can be established, she may have a good defence to the present proceedings, in which case no claim to contribution or indemnity under s. 27 of the Act of 1961 would arise. Alternatively, it is possible that both the defendant and the garage would be held to be at fault and that each was liable to the plaintiff in tort, in which case their respective degrees of fault could be ascertained in this action. Another possibility is that the defendant might be held liable to the plaintiff in tort, but entitled to damages amounting to an indemnity under her contract with the garage when she bought the car."

50. Notwithstanding these possible permutations, the Supreme Court held that the procedure under Order 16 of what were then the Rules of the Superior Courts 1962 was available.

> "While s. 27 of the Act of 1961 deals only with claims for contribution under the Act (i.e. by one of two concurrent current wrongdoers against another), Order 16, r. 1, of the Rules of the Superior Courts, which came into force on the 1st January, 1963, permits of third-party proceedings in a much wider class of cases. On the facts alleged by the defendant in the present case, she may possibly be able to establish a right to damages against the third party for breach of contract, and such damages might be such as to amount to an indemnity. Under the former Rules of Court a claim for damages of that nature (even though amounting to an indemnity) was held not to be suitable to be brought by third-party proceedings— *Bolger v. Brennan and Harding* (4), and *Butterly v. United Dominions Trust (Commercial) Ltd*. (5); but paragraphs (b) and (c) of Order 16, r. 1, are now wide enough to cover a claim of this nature. The Court can, therefore, grant leave to issue and serve a third-party notice, either in respect of the claim for contribution under s. 27 of the Act of 1961, or in respect of the claim for damages for breach of contract, or in respect of both such claims."
>
> *Footnotes omitted.

51. It would seem to follow, therefore, that the third-party procedure is, in principle, available in the case of a claim for an indemnity under an insurance policy notwithstanding that the insurer is not a "concurrent wrongdoer" with the insured/defendant, and that the claim against the insurer is contractual whereas the claim as between the plaintiff and defendant is in tort.

52. This interpretation is supported by the following passage from *ACC Bank plc v. Johnston* [2011] IEHC 376, [6.1].

> "[…] It is important to say something about third party claims before going on to analyse the two points raised. 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 that 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. However, unless the defendant has an independent or standalone cause of action against the third party, then it seems that in order to be able to pursue a third party claim, a defendant has to be able to establish that the proposed third party is a concurrent wrongdoer, in the sense in which that term is used in the Civil Liability Acts."
>
> *Emphasis (italics) added.

53. The third-party procedure was thus properly invoked in the present case. The Insured is seeking an indemnity pursuant to an insurance policy in respect of the events giving rise to the personal injuries claim. Moreover, whereas the legal issues arising as between the main proceedings and the third-party proceedings may not be the same, there is an overlap in terms of the factual matters. Zurich has purported to decline cover on the grounds *inter alia* that the vehicle was not being used as a means of transport at the time of the accident. In particular, Zurich draws attention to the fact that the vehicle was on private property, and was being used to load cattle feed.

54. One of the factual issues which might potentially arise in the third-party proceedings is as to the precise nature of the use being made of the vehicle. It is apparent from the third-party notice that the Insured intends to rely on case law from the Court of Justice of the European Union ("*CJEU*") in respect of Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles *("the Motor Insurance Directive*"). This case law indicates that the concept of "use of vehicles" under the Motor Insurance Directive is not limited to road use, that is to say, to travel on public roads, but that that concept covers any use of a vehicle that is consistent with the normal function of that vehicle. This case law will be discussed in more detail under the next heading below, but for present purposes the key point is that the precise circumstances of the accident would have been at least potentially relevant both to the determination of the personal injuries claim and to the contractual claim. Put otherwise, the manner in which the vehicle was being used would, potentially, be relevant to determining the distinct legal issues of (i) whether there had been negligence, and (ii) whether the use of the vehicle was of a type covered by the policy of insurance.

55. There was a practical benefit, therefore, in having the main proceedings and the third-party proceedings determined together. Of course, the precise procedural details could be dealt with by way of directions pursuant to Order 16, rule 8. See, for example, the judgment in *Gilmore v. Windle* [1967] I.R. 323.

> "The court has a general discretion in all cases whether or not to allow the notice to be served, seeing that leave is required in all cases. It has been held that the procedure will not be allowed where the result will be to embarrass or delay the plaintiff, but the practice in the past appears to have been to grant leave to issue the notice where the applicant made out that he was prima facie entitled to contribution or indemnity, and to leave over consideration of the merits of the claim and objections by the plaintiff to be dealt with on the application for directions under rule 7. If leave to issue and serve a third-party notice is given in the present case, and if the third party enters an appearance and wishes to contest liability, it will be necessary, on the application for directions, to decide how the questions arising for determination should be dealt with. One of these questions would be whether, on the facts of the present case, the third party is a concurrent wrongdoer by whose tortious act the plaintiff has suffered injury. A separate question is whether the third party is under a contractual liability to the defendant for breach of an express or implied warranty as to the condition of the car. On the application

for directions the court would have to consider whether these two questions should be tried before, concurrently with, or after the issue between the plaintiff and the defendant."

56. I am satisfied that the order allowing the service of a third-party notice was properly made on 11 June 2018. The insurance claim represents a claim for an indemnity for the purposes of Order 16, rule 1(1)(a). Moreover, for the reasons set out above, the two proceedings could conveniently be determined together.

57. It remains to be considered whether the fact that the personal injuries claim has since been settled represents a change in circumstances which would justify setting aside the third-party proceedings now.

58. If anything, the fact that the main proceedings have been compromised is a factor against setting aside the third-party proceedings. The institution of the third-party proceedings achieved the objective underlying Order 16, i.e. the objective of ensuring that all issues be determined in a single set of proceedings. The subsequent settlement of the personal injuries claim does not alter this. Indeed, if the third-party proceedings were to be set aside because of the settlement, then this would result in the very mischief which Order 16 is intended to avoid, i.e. a multiplicity of proceedings. The Insured would have to issue a fresh set of proceedings. This is subject, of course, to the possibility of an application for a stay under the Arbitration Act 2010. I return to this point at paragraph 93 below.

59. The fact that only the third-party proceedings remain outstanding has the consequence that the logistical difficulties, i.e. as to whether the two cases should be heard consecutively or concurrently, and as to the role the third-party's legal representatives would have played in the main proceedings, do not have to be addressed.

60. It might be said, of course, that shorn of the main proceedings, the contractual dispute as between the Insured and Zurich has lost the character of third-party proceedings. It is no longer subsidiary or parasitic to the main proceedings. This is not, however, a reason for setting aside the third-party proceedings. That would only result in the parties having to recommence the litigation in a fresh set of proceedings. This would not be an efficient use of resources. Moreover, it would be unfair to a party, who has commenced third-party proceedings within the relevant limitation period, if those third-party proceedings had to be set aside in the event of the main proceedings settling. This would expose the defendant to the risk of having any *fresh* proceedings defeated by reference to the Statute of Limitations or a contractual limitation period.

61. In summary, I am satisfied that—rather than the third-party proceedings being set aside and the litigation recommence between those parties—the correct approach is that the necessary directions now be given in respect of the exchange of pleadings in the third-party proceedings and the case brought on for full hearing.

(3). APPLICATION TO DISMISS AS FRIVOLOUS AND VEXATIOUS

62. In addition to seeking to set aside the third-party proceedings pursuant to Order 16, rule (8), the motion of 9 January 2019 also seeks to have the third-party proceedings struck out pursuant to Order 19, rule 28 of the Rules of the Superior Courts and/or pursuant to the court's inherent jurisdiction. More specifically, Zurich invites the court to strike out the third-party proceedings on the basis that same discloses no reasonable cause of action and/or is frivolous or vexatious.

63. For the reasons explained by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21; [2014] 2 I.R. 301, [16] to [18], it is important to distinguish between the jurisdiction to strike out and/or to dismiss proceedings pursuant to (i) Order 19, rule 28 of the Rules of the Superior Courts, and (ii) the court's inherent jurisdiction. An application under the Rules of the Superior Courts is designed to deal with circumstances where the case as pleaded does not disclose any cause of action. For this exercise, the court must assume that the facts—however unlikely that they might appear—are as asserted in the pleadings.

64. By contrast, in an application pursuant to the court's inherent jurisdiction, the court may, to a very limited extent, consider the underlying merits of the case. If it can be established that there is no credible basis for suggesting that the facts are as asserted, and the proceedings are bound to fail on the merits, then the proceedings can be dismissed as an abuse of process. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings.

65. Counsel on behalf of the Insured has drawn my attention, in particular, to the judgment of the Supreme Court in *Moylist Construction Ltd. v. Doheny* [2016] IESC 9; [2016] 2 I.R. 283. Clarke C.J. summarises the approach to be taken to strike-out applications in the context of contractual disputes as follows at paragraphs [21] to [23] of the judgment.

> "That is not, of course, to say that there will not be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the court to reach a conclusion on those questions on the hearing of a motion to dismiss. That is also not to say that the fact that a plaintiff may make a large number of points, each one of which is clearly unstateable, should not prevent a dismissal from being ordered. As Denham J. observed in a different context in *Bula Ltd. v. Tara Mines Ltd.* (No. 6) [2000] 4 I.R. 412 at p. 462, '[s]eventeen noughts are still nothing'.
>
> But I would caution against the appropriateness of the use of the application to dismiss under the inherent jurisdiction of the court in relation to proceedings where, even if there are no factual disputes or any such factual issues as might come within the strictures identified in *Keohane v. Hynes* [2014] IESC 66, (Unreported, Supreme Court, 20 November 2014), *nonetheless the legal issues or questions concerning the proper interpretation of documentation are complex.** In such cases, the very complexity of the issues (even if the court has a fairly clear

view on them) makes it difficult to determine, within the confines of a motion heard on affidavit, that the plaintiff's case is such that it can safely be said that it is bound to fail.

For the reasons identified by Murray J. in *Jodifern Ltd. v. Fitzgerald* [2000] 3 I.R. 321, and as applied in *Keohane v. Hynes* [2014] IESC 66, (Unreported, Supreme Court, 20 November 2014), a motion to dismiss should not be used as a means of obtaining a summary disposal of the case in circumstances where the issues which will need to be addressed in deciding whether the proceedings are bound to fail are themselves complex. Leaving aside those cases which might fall into the 'seventeen noughts are still nothing' category, it is necessary to consider whether a case where the issues have to be analysed on appeal, as they were in this case, for a full day's hearing, can avoid the appropriate depiction of being too complex to be properly dealt with within the ambit of a motion to dismiss as being bound to fail."

*Emphasis (italics) added.

66. I turn now to apply these principles to the facts of the present case. The application to strike out pursuant to Order 19, rule 28 can be disposed of shortly. The application has been moved prior to the delivery of a statement of claim in the third-party proceedings. The only "pleading" to date in the third-party proceedings is the third-party notice dated 21 June 2018. The relevant extracts of same have been set out at paragraph 22 above. As appears, the principal claim advanced in the notice is that Zurich is obliged pursuant to a commercial motor fleet insurance policy to meet and satisfy the claim brought by the Injured Party and/or to fully indemnify the Insured in respect of any liability which the Insured is found to have to the Injured Party. The notice thus discloses a cause of action known to the law, i.e. a claim for an alleged breach of a contract of insurance. The proceedings cannot therefore be struck out pursuant to Order 19, rule 28.

67. I turn next to consider the application to strike out the third-party proceedings pursuant to the court's inherent jurisdiction. This jurisdiction is intended to protect against an abuse of process. The principal question for the court in determining such an application is whether the *institution* of the proceedings represents an abuse of process. It is not enough that the court might be satisfied that the case is a very weak one and is likely to be successfully defended. Rather, the court must be satisfied that the proceedings disclose no cause of action and/or are bound to fail. For the reasons explained in *Moylist Construction Ltd. v. Doheny* (above), a motion to dismiss should not be used as a means of obtaining a summary disposal of the case in circumstances where the issues in the proceedings are complex.

68. The evidential basis for this aspect of the strike-out application is unsatisfactory. The entirety of the contractual documentation has not been put before the court. All that has been exhibited is a document entitled "Commercial Motor Fleet Insurance Policy Document" ("*the Policy Document*"). This is a *pro forma* document, and sets out the general terms and conditions of the insurance policy. There is no express reference in this document to Quinns of Baltinglass Ltd., nor to the vehicle involved in the accident the

subject-matter of the personal injuries action. Moreover, it is stated at the beginning of the Policy Document that the policy, schedule, certificate of insurance and any endorsements should be read as if they were one document. Notwithstanding that it is inviting the court to determine the contractual issues definitively on this motion, Zurich has omitted to exhibit the schedule, certificate of insurance or endorsements.

69. In the absence of the above documentation, it is not possible for this court to make an informed decision as to the nature and extent of the contractual obligations. The failure to exhibit the certificate of insurance is particularly unfortunate in that this is a statutory document and must contain certain prescribed information. It is also relevant in identifying the extent of the activities covered by the insurance policy.

70. In addition to these evidential difficulties, the strike-out application is further undermined by an inconsistency of approach on the part of Zurich. The position initially adopted, in both the notice declining cover and the written legal submissions filed before this court, had been that (i) the motor fleet insurance did not apply in circumstances where the vehicle was not being used as a means of transport, and (ii) the Insured was not entitled to an indemnity under the motor fleet insurance where an indemnity was available under another insurance policy, i.e. the public liability insurance policy. During the course of the hearing before this court, an additional (third) objection was introduced as follows: (iii) an indemnity was not available in circumstances where no claim had been notified within 30 days. This third objection has not been addressed in the affidavit grounding the application to strike out the third-party proceedings, and there is no positive averment before the court as to when Zurich says that it was first notified of the claim.

71. I address each of these three objections under separate headings below.

(i) Vehicle not being used as a means of transport

72. It is not possible to address properly the first objection, namely that the motor fleet insurance did not apply to the use being made of the vehicle, without sight of the full extent of the contractual documentation. In particular, it would be necessary to have sight of the schedule and certificate of insurance to know how precisely the insured activity is defined. Even if one leaves aside this fatal omission for the moment, the legal position is not as clear-cut as Zurich's submission suggests. The submission is to the effect that the vehicle was not being used as a mode of transport, but rather was solely used for the purposes of dispensing cattle feed. It is further submitted that the vehicle was being used on private property.

73. In response to this submission, the Insured relies on a line of case law from the CJEU in respect of the interpretation of the Motor Insurance Directive. In particular, reference has been made to the judgment in Case C-648/17, *BTA Baltic Insurance Company*. This judgment is the latest in a line of case law commencing with the judgment in Case C-162/13, *Vnuk*. The gist of the case law is summarised in *BTA Baltic Insurance Company* as providing that the concept of "use of vehicles" in the context of compulsory insurance is not limited to road use, that is to say, to travel on public roads, but that that concept

covers any use of a vehicle that is consistent with the normal function of that vehicle. The judgment also confirms that the fact that the vehicle involved in the accident was *stationary* when the accident occurred does not, in itself, preclude the use of that vehicle at that time from falling within the scope of its function as a means of transport and, therefore, within the scope of the concept of "use of vehicles".

74. The Insured intends to rely on this line of case law in support of an argument that the motor fleet insurance extends to cover the circumstances of the accident involving the use of the vehicle to load cattle feed at its premises.

75. Zurich's response to this is to say that section 56 of the Road Traffic Act 1961 does not require compulsory insurance for the use of a mechanically propelled vehicle on private property. If and insofar as the Motor Insurance Directive might require otherwise, it is said that the provisions of the Directive cannot be relied upon in a dispute between private parties. Counsel for Zurich cites Case C 122/17, *Smith v. Meade* as authority for the proposition that a national court, hearing a dispute between private persons, which finds that it is unable to interpret the provisions of its national law that are contrary to a provision of a directive in a manner that is compatible with that provision, is not obliged to disapply those provisions of national law. Put otherwise, even if a directive satisfies all the conditions required for it to produce "direct effect", it cannot be relied upon in a dispute between private parties to produce horizontal "direct effect". The CJEU confirmed that EU law did not require a contractual clause contained in an insurance contract, as a consequence of provisions of national law, to be disapplied. The judgment in *Smith v. Meade* has an obvious resonance with the present case in that it too concerned compulsory motor insurance.

76. This submission is correct insofar as it goes. Yet, the case law of the CJEU may nevertheless have some bearing on the *interpretation* of the motor fleet insurance. Whereas the Insured cannot deploy the case law to contradict the express wording of the contract of insurance, the Insured might be able to deploy same as an aid to the interpretation of the contract. For example, it might be argued that—where it can be achieved without doing violence to the contractual language—the contract should be interpreted so as to conform with the requirements of the Motor Insurance Directive. It might be said that it was an implied term of the contract that the parties intended that the extent of the insurance cover is coterminous with that required under national and/or EU legislation. (See also page 13 of the Policy Document which refers to provisions of any compulsory motor insurance legislation operative within the territorial limits of the policy).

77. None of these difficult legal issues can properly be resolved in a peremptory manner pursuant to an application to strike out the third-party proceedings.

(ii). Indemnity available under another insurance policy

78. The second ground relied upon by Zurich in support of the argument that the third-party proceedings are bound to fail on the merits is that Zurich is not required to provide an

indemnity in circumstances where, or so it is alleged, the Insured is entitled to indemnity under another insurance policy, namely its public liability insurance policy with Amlin UK.

79. Counsel relied in this regard on the following at Section 1 of the Policy Document (at page 5 thereof).

> "1. Indemnity to Insured
>
> We will indemnify you against all sums which you or your personal representatives become legally liable to pay by way of damages or costs on account of death or bodily injury to any person or damage to property caused by or in connection with any motor vehicle described in the Schedule for any one accident or a series of accidents arising out of one event.
>
> Property damage is limited to the amount stated in the Schedule.
>
> […]
>
> 2. Indemnity to Other Persons
>
> We will indemnify any person or firm named in the effective Certificate of Insurance in this section headed 'Persons or Classes of Persons whose liability is covered' in connection with any vehicle for which indemnity is granted by this Policy but only for your negligence provided that the person or firm claiming indemnity:
>
> (i) is not entitled to indemnity under any other Policy
> (ii) observes, fulfils and is subject to the terms exceptions and conditions of this Policy in so far as they can apply."

80. With respect, it is not at all obvious that these contractual provisions bear the meaning contended for on behalf of Zurich. On one reading at least, the provisions draw a distinction between the obligation to indemnify the Insured, i.e. Quinns of Baltinglass Ltd., and the obligation to indemnify "other persons". On this reading, the Policy Document says no more than that Zurich will not provide cover to "other persons" in circumstances where those persons have the benefit of an indemnity under another policy.

81. Insofar as the position of the Insured is concerned, the more relevant contractual provision would appear to be that at page 12 of the Policy Document, under the heading "General Conditions".

> "3. Other insurances.
>
> *If any other insurance covers the same damage, loss or liability we will not be liable to pay more than our rateable proportion provided always that nothing in this condition will impose on us any liability from which we would have been relieved by proviso (i) and (ii) of subsection (2) of Section 1."*

82. It is at least arguable that the most that the existence of a parallel policy of insurance covering the same damage, loss or liability does is that it *reduces* Zurich's liability to its rateable proportion. On this reading, Zurich could not decline cover in its entirety.

83. The alternative interpretation put forward on behalf of Zurich is that the Insured may find itself caught in a round robin whereby each individual insurer is entitled to decline cover on the basis that an indemnity is available under another policy of insurance. This would have the outcome that no indemnity would be available.

84. These issues cannot properly be resolved on an application to strike out the third-party proceedings. Not only does the court not have the entirety of the contractual documentation in respect of the motor fleet insurance before it, it has not had sight of any documentation in respect of the public liability insurance. The court does not know, for example, whether the personal injuries claim properly falls within the scope of the latter policy. Put shortly, the evidential basis for the determination of the legal issues has not been laid. Even if it had, the interpretation of the (limited) documentation put before the court by Zurich is not so obviously correct as to allow a finding to be made, on a summary application, that the Insured's claim against Zurich is bound to fail.

(iii). Claims notification period

85. An additional, third ground for saying that the third-party proceedings are bound to fail was introduced for the first time at the hearing before this court. It was submitted that the Insured had failed to comply with the requirement under the Policy Document to notify Zurich of the claim within 30 days of its occurrence.

86. Counsel relied, in particular, on the following provisions of the Policy Document. The first is found at page 3 as follows.

> "Claims Notification period
>
> Please note that all Claims must be notified to Zurich within 30 days of their occurrence.
>
> Please refer to the General Exceptions and Conditions section of this document and familiarise yourself with your obligations as failure to comply with the policy conditions could result in your claim being refused."

87. The next contractual provision relied upon is at page 13 of the Policy Document.

> "6. Duty to Comply with Policy Conditions
>
> the observance and fulfilment of the terms of this Policy in so far as they relate to anything to be done or complied with by you will be conditions precedent to any liability of us to make any payment under this Policy. Upon proof of breach of this condition we will be entitled to recover from you all sums paid by us including those for which we would not have been liable but for the provisions of any compulsory motor insurance legislation operative within the Territorial Limits of the Policy."

88. The evidential basis for an argument that the claim was not notified within time has not been established. The only evidence adduced on behalf of Zurich is by way of an affidavit of a solicitor from DAC Beachcroft, which firm is on record in the proceedings for Zurich. This affidavit does not state when the claim was first notified to Zurich. All that has been exhibited of relevance is a copy of an email of 6 December 2018 from Mr Mark Lawless of Zurich notifying the recipient that Zurich is declining to provide cover for three specified reasons. (The relevant extracts from the email have been set out at paragraph 18 above). Although not explained in the solicitor's affidavit, it *appears* that this email is addressed to an insurance broker acting on behalf of the Insured.

89. Whereas it might be inferred from the date of this email, i.e. 6 December 2018, that it is in response to an email on behalf of the broker which postdates the accident by a considerable period of time, the onus is on Zurich to set out clearly on affidavit the precise chronology. If an insurance company wishes to rely on an alleged failure to comply with a contractual time-limit to strike out proceedings in their entirety, then there is an obligation upon them to put before the court the relevant evidence in this regard.

90. The solicitor's affidavit grounding the application to strike out the third-party proceedings does not refer to the alleged breach of the 30 day notification period at all.

91. In addition to these evidential difficulties, the legal position is not clear -cut. First, it is not obvious from the terms of the Policy Document that time was of the essence. Secondly, it is at least arguable that the failure on the part of Zurich to make any reference to the alleged breach of the notification period in the email of 6 December 2018 declining to provide an indemnity precludes Zurich from now relying on same for the purposes of the strike-out application. The email might, in principle, be construed as a waiver on the part of Zurich of the alleged breach.

92. None of this is to say that these issues would necessarily be resolved against Zurich at full hearing. Rather, the point is that the legal position is not so obvious that it is appropriate to strike out the third-party proceedings on this basis. Indeed, if (as is now belatedly asserted on behalf of Zurich) the claim for indemnity is self-evidently out of time, it is remarkable that no reference to this is made in the detailed email of 6 December 2018 setting out the reasons for declining to provide an indemnity.

ARBITRATION CLAUSE

93. Counsel on behalf of Zurich attached much significance to the fact that the Policy Document contains an arbitration clause as follows.

> "3. Arbitration
>
> If any dispute arises under this Policy, the dispute will be referred to an Arbitrator, who will be appointed jointly by you and us in accordance with current statutory provisions. You will not take any legal action against us over the dispute before the Arbitrator reaches a decision. Claims not referred to arbitration within 12 calendar

months from the date of disclaimer of liability will be deemed to have been abandoned."

94. It is said that if and insofar as an issue in relation to the policy of insurance arises, then the proper and appropriate procedure is to refer any dispute to arbitration. This reflects the approach taken in the email of 6 December 2018 declining cover, wherein express reference was made to the arbitration clause.

95. The existence of an arbitration clause does not automatically preclude a party to the contract from instituting proceedings before the courts. If such proceedings are instituted, however, the other party is entitled to apply to have the matter referred to arbitration and to have the proceedings stayed.

96. It would have been open to Zurich to make an application pursuant to Article 8 of the UNCITRAL Model Law on International Commercial Arbitration *(" the Model Law*") to refer the dispute to arbitration. The Model Law is given effect to in the domestic legal order by the Arbitration Act 2010.

97. Article 8 of the Model Law provides as follows.

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

98. The fact that the High Court had made an order in June 2018 joining Zurich to the proceedings as third-party did not affect the legal entitlement of Zurich to make an application pursuant to Article 8. The grant of leave to issue third-party proceedings did not entail any adjudication on the part of the court as to whether the dispute should be determined by way of proceedings before the court or by way of arbitration. This is simply not a question which arises for consideration in the context of an application under Order 16. The court is concerned only with assessing whether there is the requisite connection between the main proceedings and the intended third-party proceedings. For the reasons set out in detail at paragraphs 44 et seq., a dispute as to whether the third-party is required to indemnify the defendant pursuant to a policy of insurance can properly be the subject of third-party proceedings.

99. Zurich could, therefore, have responded to its having been joined to the proceedings as third-party by issuing a motion seeking an order pursuant to Article 8 of the Model Law. For its own reasons, however, Zurich determined to follow a different course and, instead,

issued a motion on 9 January 2019 seeking to set aside the third-party proceedings and/or strike out the third-party proceedings.

100. This court expresses no opinion on whether this course of action on the part of Zurich constitutes the submission of a "statement on the substance of the dispute" such as to preclude an order for reference pursuant to Article 8 of the Model Law.

CONCLUSION

101. The third-party procedure provided for under Order 16 is, in principle, available in the case of a claim for an indemnity under an insurance policy notwithstanding that the insurer is not a "concurrent wrongdoer" with the insured/defendant, and that the claim against the insurer is contractual whereas the claim as between the plaintiff and defendant is in tort.

102. Whereas the legal issues arising in the main proceedings and the third-party proceedings may not be the same, there is significant overlap in terms of the factual matters. Zurich has purported to decline cover on the grounds *inter alia* that the vehicle was not being used as a means of transport at the time of the accident. In particular, Zurich draws attention to the fact that the vehicle was on private property, and was being used to load cattle feed. The manner in which the vehicle was being used is, potentially, relevant to determining the distinct legal issues of (i) whether there had been negligence, and (ii) whether the use of the vehicle was of a type covered by the policy of insurance. The third-party procedure was thus properly invoked in the present case.

103. The third-party proceedings should not be set aside for failure to comply with the twenty-eight day period prescribed under Order 16 of the Rules of the Superior Courts. The reasons for this finding are set out in detail at paragraphs 36 to 40 above, and can be summarised as follows. First, it was reasonable for the Insured to engage with Zurich before making a formal application to join it as a third-party. Secondly, the five month delay in issuing the motion did not have any appreciable effect on the progress of the proceedings. Thirdly, whereas it is not a decisive factor, some weight can be attached to the fact that Zurich has not suffered any specific prejudice as a result of the delay.

104. Zurich has adopted the paradoxical position that the claims advanced in the third-party proceedings are—at one and the same time—too complex to be determined in a personal injuries action, yet are so obviously destined to fail that the bringing of the third-party proceedings represents an abuse of process. In truth, the legal issues are complex and cannot be resolved properly in the context of an application to strike out proceedings on a summary basis.

105. Zurich's application as per its notice of motion dated 9 January 2019 is dismissed.