Neutral Citation no. [2007] NIQB 110 | Ref: **HIGF5989**

Judgment: approved by the Court for handing down (subject to editorial corrections)* | Delivered: 27/11/07

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

GRACE ELLEN CAULFIELD (A MINOR) BY ELLEN KNOX HER MOTHER AND NEXT FRIEND

Plaintiff;

-and-

SAMUEL HYLANDS AND ALBERT COPELAND AS TRUSTEES OF LURGAN BAPTIST CHURCH

Defendants;

and

GERALD TITMUS

Third party.

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HIGGINS L J

[1] This is a preliminary issue by way of summons in which the Third Party challenges the validity of Third Party proceedings issued against him. In October 2001 the minor plaintiff attended a children's church weekend at Loughan Marina, near Coleraine. The weekend was organised by Lurgan Baptist Church of which the minor plaintiff was a member and whose Trustees are the defendants in this action. On 13 October 2001 while attending the event the minor plaintiff was struck by a firework and suffered serious personal injuries involving the loss of an eye. During the day adult supervisors discovered that some of the children had acquired fireworks. These were confiscated on the understanding that they would be set off later

that evening. The fireworks were set off allegedly by the Third Party, Mr Gerald Titmus, at the request of the church member in charge of the weekend event. The Third Party, Mr Titmus, was attending the event as a spiritual speaker, which function he performed regularly, though he was not a member of the Lurgan Baptist Church.

[2] Proceedings were issued by the minor plaintiff on 28 October 2003. An Appearance was entered on 24 November 2003 by solicitors instructed by the defendants' insurers, Royal & Sun Alliance Insurance Plc. A Statement of Claim was served on 10 December 2003. Liability was being denied but before service of the defence, Third Party proceedings were issued on 3rd February 2004 and served on 6 February 2004 by first class post on Mr Titmus by the solicitors instructed by the defendants' insurers. The Third Party Statement of Claim was served on 2 November 2004 and Defence to same served on 6 December 2004. The minor plaintiff's action against the defendants was settled in April 2005 but the third party proceedings were adjourned in order to investigate whether the third party was covered by a relevant policy of liability insurance. Zurich Insurance confirmed that the Third Party was covered by a relevant policy and Harrisons Solicitors were instructed by Zurich Insurance to conduct the defence of the third party proceedings in place of the third party's own solicitors.

[3] When the third party proceedings came on for hearing in May 2006 an issue arose as to whether the defendants' insurers had the authority of the insured Church to issue third party proceedings against Mr Titmus in the name of the Trustees of Lurgan Baptist Church or some other legal right permitting them so to do.

[4] The defendants' solicitor wrote to the third party on 3 February 2004 informing him that the defendants' intended to proceed against him. Mr Titmus was originally represented by his own solicitors instructed by him to defend the third party proceedings. On 4 February the Third Party phoned the defendants' solicitors and informed them that the Church did not hold him responsible and that they were going to inform the brokers and the insurers of this fact. On 5 February 2004 the defendants' solicitor wrote to the Church Secretary informing him that they had instructions to proceed to issue and serve proceedings on the Third Party. On 11 February 2004 the insurers wrote to the brokers indicating that there was a clear case for the Third Party to answer which they could not ignore. The insurers also noted the views of the Church. The defendants did not indicate that they had any objection to the third party proceedings.

[5] It transpired that on 30 January 2004 an Elder of Lurgan Baptist had written to the Church insurance brokers on behalf of the Church, exonerating the Third Party from any responsibility for the accident resulting in the injury to the minor plaintiff and renouncing any intention of bringing any legal

action against him. The letter, which was sent a few days before the third party proceedings were in fact issued, referred to a meeting of the Elder of the Church on 26 January 2004. It stated, inter alia, –

> "As a result of these deliberations the Elders of Lurgan Baptist want to make the following points:
>
> 1. Mr Gerald Titmus had been invited by Lurgan Baptist church to participate in the Young People's Weekend during which this unfortunate accident happened.
> 2. The Elders of Lurgan Baptist Church apportion no blame to Mr Gerald Titmus for the freak accident that culminated in the horrific injury to Grace Knox (sic).
> 3. The Elders of Lurgan Baptist Church do not support any action being taken against Mr Gerald Titmus."

[6] This letter was sent by the brokers to the insurers by letter dated 3 February 2004 but was not scanned by the insurers until 10 February 2004. It did not come to the attention of the insurers' solicitors (acting on behalf of the defendants) until 9 May 2006. On 5 February 2004 the solicitor acting on behalf of the defendants and instructed by the insurers wrote to the Church Secretary informing him that he had instructions to proceed to issue and serve proceedings on the Third Party. No response was received to that letter. On 11 February 2004 the defendant's insurers wrote to the brokers. In that letter they recognised the 'moralistic view in this matter but must consider the legal aspects of the case'. They stated they had taken counsel's advice and it was clear that the third party had a case to answer.

[7] All of the above matters had been preceded by earlier correspondence. The brokers acting on behalf of the defendants wrote to the insurers on 30 July 2003 asking for an update on the present position. On 6 August 2003 the insurers replied that they were making further inquiries and needed to establish the identity of the personal insurers of the third party. On 31 December 2003 the brokers wrote again asking for a further update. On 9 January 2004 the insurers replied that they had received counsel's advice that the third party should be joined as a party to the proceedings.

[8] At no time had the Elders, who are the executive decision-making body of the Church, nor any one acting on their behalf, given authority for third party proceedings to be issued against Mr Titmus or consented to such proceedings being issued.

[9] The Defendants' case, as pleaded in the Third Party Statement of Claim, is that the Defendants are entitled to an indemnity or alternatively a contribution in respect of the damages and costs paid to the minor plaintiff.

[10] On 25 May 2006 the Third Party served an amended Defence paragraph 6 of which claimed –

> "6. The Third Party avers, in point of law, that at the date of the issue of the third party proceedings herein, the Defendants did not authorise or consent to the issue of same, and that the Third Party is therefore entitled to judgment against the Defendants in respect of same."

[11] On 7 June 2006 the solicitors for the defendants served a reply to the amended defence. In paragraph 2 they pleaded –

> "2. The Defendants deny that in point of law they need to authorise or consent to the issue of third party proceedings herein as alleged or at all. They aver that by the terms of their contract of insurance – particularly clauses 2 of the general conditions 3, 5(B) and 6 of the claims conditions – their insurers became entitled to take over and conduct in their name the defence or settlement of any claim or to prosecute any claim in their name for the insurer's benefit and their insurers became entitled to have full discretion in the conduct of any proceedings and in settlement of any claim."

[12] In paragraph 6 it was pleaded that the defendants have now given their consent to the issue and continuance of the third party proceedings.

[13] The amended defence and reply thereto provided the basis for the preliminary point the subject of the summons before the Court.

[14] The defendant's solicitors sought particulars of 1) how 'in point of law' the Third Party was entitled to judgment against the Defendants because they allegedly did not authorise or consent to the proceedings and 2) how any lack of authorisation or consent would entitle the Third Party to judgment against the Defendants. The Third Party replied –

> "It is a fundamental principle that a party in whose name proceedings are issued must consent or authorise the issue of same. In the absence of such

> consent or authority the proceedings issued are in the nature of a nullity. At no time have the Defendants consented to, authorised or ratified the issue of the third party proceedings herein. As such, the Third Party is entitled to judgment in respect of same."

[15] It was submitted that the correspondence demonstrates that at the time of the issue of the Third Party proceedings the Church insurers did not have the consent or authority of the Church to issue those proceedings against the Third Party. Furthermore the Defendant's insurers did not make any payment to the minor plaintiff until some time after the settlement of the claim in April 2005.

[16] The relevant insurance policy identifies the insured as –

> "Trustees Committee and Officers for the Time Being of the Baptist Union of Ireland whose names appear on the certificates issued by the brokers each of whom shall separately be called the Insured."

The General Conditions provide inter alia –

> "2. Observance of the terms of this Policy relating to anything to be done or complied with by the Insured is a condition precedent to any liability of the Company except in so far as is necessary to comply with the requirements of any legislation enacted in great Britain Northern Ireland the Channel Islands or the Isle of Man relating to compulsory insurance of legal liability to employees."

The Claims Conditions provide –

> "5 (B) No admission offer promise payment or indemnity shall be made or given by respondent on behalf of the insured without the written consent of the company which shall be entitled to take over and conduct in the name of the insured the defence or settlement of any claim or to prosecute any claim in the name of the insured for its own benefit and shall have full discretion in the conduct of any proceedings and in the settlement of any claim.
>
> 6. The insured shall at the Company's request and expense do and concur in doing and permit to be done all such acts and things as may be necessary or

> reasonably required by the Company for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the Company shall be or would become entitled or subrogated upon the Company paying for or making good any loss under this Policy whether such acts and things shall be or become necessary or required before or after the Company indemnifies the Insured."

[17] It was submitted by Mr Ringland QC, who with Mr Humphreys, appeared on behalf of the Third Party, that in this case the third party proceedings were issued by the solicitors instructed and acting on behalf of the insurance company who were the defendants' insurers. The defendants did not consent to the issue of these proceedings nor were they requested to do so. The proceedings were issued some fourteen months before any payment was made by the insurers in settlement of the plaintiff's claim. The issue of the proceedings was an act of subrogation and as such could only arise after payment was effected by the insurers of the defendants. Payment under the policy of insurance is a condition precedent to the exercise of the right of subrogation. He relied on passages in McGillivray on Insurance Law (10 edit) Ivamy General Principles of Insurance Law (6 edit) and Page v Scottish Insurance Corporation Ltd 1929 140 LT 571. Mr Ringland submitted that the issue of the third party proceedings in this case caused the third party proceedings to be a nullity which could only result in judgment in favour of the Third Party as pleaded in the defence to the third party claim.

[18] Mr Ferrity who appeared on behalf of the defendants submitted that in a contract of indemnity (which the contract of insurance is) the issue of subrogation depends on the intention of the parties to the contract as well as the terms and conditions of the contract itself. In this instance the rights of subrogation arose on the assured being indemnified, not on payment made by the insurer. If the Third Party's argument was correct it was a technical point cured by the later consent of the Defendants as appears in the pleadings.

[19] True subrogation, which means the substitution of one person for another, involves the transfer to the insurers of the assured's rights of action against third parties. It may be expressed in this way - where A indemnifies B under some form of agreement for loss caused by C to B, then A is entitled to exercise B's rights against C, provided A has made full indemnity on foot of the agreement between A and B. Lord Mansfield stated in Mason v Sainsbury 1782 3 Doug. 61 at 64 " every day the insurer is put in place of the assured". While the effect of subrogation is to confer upon the insurer the rights of the assured, the real claimant against the third party remains the assured, in whose name any proceedings should be brought. McGillivray on Insurance Law at 22-24 states that –

" the insurer is entitled to exercise rights of subrogation if:

a) the insurance is an indemnity insurance;

b) he has made payment under it and

c) his rights of subrogation are not excluded by a term of the parties contract".

[20] Page v Scottish Insurance Corporation Ltd 1929 140 Ll L Rep 134, on which Mr Ringland QC relied, was a case in which two actions were consolidated. The other case was entitled Foster v Page. Page was driving a Buick motor car owned by Foster and insured by the Scottish Insurance Corporation when it was in collision with a Rolls Royce driven by a lady. She successfully sued both Page and Foster though the insurance company at first denied, for reasons that are not relevant, that they were liable under the policy. Page was a motor dealer and the insurance company requested him to repair the Rolls Royce. When Page sued for the cost of the repair the insurance company issued proceedings against him in the name of Foster for the losses arising from the accident. While the actions were pending the insurance company paid the damages awarded to the lady owner of the Rolls Royce, but only following an arbitration against the insurance company. At page 137 Scrutton LJ referred to his understanding of the principles of subrogation in these terms -

> "But I always understood that the underwriter had no right to subrogation until he had fully indemnified the assured under the policy. When he had fully indemnified the assured he then had the equitable right to diminish his loss by using in his own favour and in the name of the assured any rights the assured could use against a third party in respect of the subject-matter of the loss.
>
> There are a series of cases in which that has been said. I look at Castellain v Preston, 11 Q.B.D. 380, at p. 389, where Lord Esher said:--
>
> He cannot be subrogated into a right of action until he has paid the sum insured and made good the loss. I look at Darrell v Tibbitts, 5 Q.B.D. 560, at p. 563, and I find Lord Esher saying:--
>
> The doctrine is well established that where some thing is insured against loss either in a marine or a

> fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against. That is, after the assured has been paid by the insurers for the loss. I turn to the House of Lords in Simpson v. Thomson, sup., and in the case of the two ships I find at p. 284:--
>
> I know of no foundation for the right of the underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

That this was the common law in relation to contracts of insurance was confirmed by the codification of marine insurance law in the Marine Insurance Act 1906 and section 79 in particular.

[21] In Page at page 138 Scrutton LJ observed that there remained some points to be clarified relating to the rights of an underwriter who had paid all he was required to pay, but which did not satisfy the assured's claim in full , to claim subrogation. He left that issue for further consideration.
Later he summarised the issue in the case at page 138 -

> "Another question seems to arise. It is said that at the time the writ was issued the underwriter had paid all that was due in respect of the particular claim for which the writ was issued and that it does not matter that there was some other claim under the same policy and in respect of some expenditure which the underwriter had not paid. That is said to be the position in this case. The insurer says: 'True, I was disputing the amount you claimed in respect of third-party liability, but I had by reinstatement made good to you so that you suffered no loss by the damage to your own car. Consequently, I was entitled to be subrogated to that part of your claim under the policy irrespective of the fact that there was a claim which I had not paid.'

> I think that that is an erroneous view of the doctrine of subrogation. I think the right to be subrogated to the rights of the assured does not pass to the underwriter until he has satisfied all the claims under the policy in respect of the particular subject-matter, and that if you get one car, one accident, one policy and one premium, I do not think that the underwriter can claim to be subrogated until he has satisfied all the claims arising out of that policy and paid for by that one premium in respect of that one accident and that one car.
>
> What is the result of that? It appears to me that when the Scottish Insurance Corporation used the name of Forster to bring an action for negligence against Page they had not satisfied, they had not indemnified, they had not paid the assured the claims he was making in respect of that one car and that one accident. It follows that they had no right in my opinion to use his name.
>
> I think that they acquired the right during the course of the action when they paid the owner of the Rolls Royce, or paid to the assured the sum he had to pay the owner of the Rolls Royce. But it is no answer when you have brought an action prematurely to say: "I had a right to bring the action three months later and that will redeem my fault in bringing the action three months too soon." I do not think the fact that the amount due on the third-party liability was paid before the action came on for trial relieved them from the consequences of the original default in bringing the action in the name of Forster at a time when there was no authority to bring it."

[22] Greer LJ who agreed with the decision of Scrutton LJ identified the question for the court in these terms at page 139-

> "The question the Court has to determine is whether on the facts stated by my Lord the Scottish Insurance Corporation were entitled on Jan. 3, 1927 (when they issued their writ), to claim in the name of the assured (Mr. Forster) against Mr. Page damages for loss sustained by the assured owing to the negligence of the defendant. If they were not entitled to begin the

> proceedings they cannot cure the defect because they became entitled during the course of the proceedings. The cause of action must exist at the date of the writ. If it is ascertained that no cause of action exists at the date of the writ the only course for the plaintiff to adopt is to abandon that action and bring another when the cause of action has arisen."

Sankey LJ set out the relevant legal principle at page 140 -

> " adopt as my guide the sentence which has been read by my Lord from Castellain v. Preston, 11 Q.B.D. at p. 389: "He cannot be subrogated into a right of action until he has paid the sum insured and made good the loss." The question, therefore, would appear to me to be whether at the time the writ was issued the insurer could rightly say that he had paid the sum insured and had made good the loss."

Later he commented at the same page -

> "Further than that, as pointed out by Lord Justice Greer, they put on the record a defence denying liability--although it is true that when they came into experienced hands at the trial the greater number of these defences were abandoned. Therefore, I do not think it possible to find in respect of the £117 2s. 6d. that they had discharged their liabilities under the contract of insurance.
>
> But even if that were so they certainly had not discharged the third-party liability by indemnifying Mr. Forster against the damages which the owner of the Rolls Royce car obtained against him. They disputed liability for that. It went to arbitration. The arbitrator gave his award on Aug. 15, 1928, saying the insurance company were liable, and they (as one would have expected) immediately paid. But that was in August, 1928, long after the writ in the action they had brought claiming the right to be subrogated into the rights of Mr. Forster. Therefore on this point I think the appeal should be allowed.
> On the other point, that the objection should have been taken at an earlier stage, I do not think the Russian Commercial & Industrial Bank v. Le Comptoir d'Escompte de Mulhouse, &c., [1925] A.C.

> 112; 19 Ll.L.Rep. 312, is an authority here. In that case it was held:--
>
> It was not open to the defendants to raise by way of defence to the action *141 the objection that the London branch manager had no authority to bring the action in the name of the plaintiff bank, but that they ought to have moved to strike out the name of the bank as plaintiff."

[23] While there was some unanimity as to the general principles involved different views were expressed in the reasoning that lead to the unanimous result. It is clear that the fact the insurers were still denying liability under their policy when the writ issued was a significant matter in the finding that no rights of subrogation had arisen, as well as the failure to pay the damages.

[24] In Banque Financiere v Parc Ltd 1998 1 AC 221 Lord Hoffman made some pertinent observations about the law on subrogation. At page 231 he stated –

> " My Lords, the subject of subrogation is bedevilled by problems of terminology and classification which are calculated to cause confusion. For example, it is often said that subrogation may arise either from the express or implied agreement of the parties or by operation of law in a number of different situations: see, for example, Lord Keith of Kinkel in Orakpo v. Manson Investments Ltd. [1978] A.C. 95, 119. As a matter of current terminology, this is true. Lord Diplock, for example, was of the view that the doctrine of subrogation in contracts of insurance operated entirely by virtue of an implied term of the contract of insurance (Hobbs v. Marlowe [1978] A.C. 16, 39) and although in Lord Napier and Ettrick v Hunter [1993] A.C. 713 your Lordships rejected the exclusivity of this claim for the common law and assigned a larger role to equitable principles, there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract. Furthermore, your Lordships drew attention to the fact that it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation, being no more nor less than an express assignment of his rights of recovery against any third party. Subrogation in this sense is a contractual arrangement

> for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One is part of the law of contract and the other part of the law of restitution. Unless this distinction is borne clearly in mind, there is a danger that the contractual requirement of mutual consent will be imported into the conditions for the grant of the restitutionary remedy or that the absence of such a requirement will be disguised by references to a presumed intention which is wholly fictitious. There is an obvious parallel with the confusion caused by classifying certain restitutionary remedies as quasi-contractual and importing into them features of the law of contract."

[25] Relying on this authority Mr Ferrity submitted that the approach to be adopted and the interpretation to be applied depended in large measure on the terms and conditions of the contract of insurance.

[26] Clause 2 of the General Conditions stipulated that observance of the terms of the policy by the insured was a condition precedent to any liability of the insurer, legislative provisions apart. Clause 5(B) permitted the insurer to conduct the defence of any claim and provided that no admission offer or payment could be made by the assured without the written consent of the insurer. Thus it was submitted that Clause 5 (B) gave the insurers control of the proceedings against the defendants as well as the right to prosecute any claim in the name of the insured for its own benefit as well as complete discretion in the conduct of all proceedings.

[27] Clause 6 provides for rights arising from subrogation upon the company paying for or making good any loss under the policy. Thus it may be said the policy reflects the common law as acknowledged in the textbooks and the cases cited.

[28] It was not disputed that the third party proceedings were commenced before settlement was reached with the minor plaintiff and before payment of the damages. Mr Ferrity submitted that this required to be considered in

context. The reality was that the insurers undertook the defence of the defendants from the service of the writ of summons. They instructed the solicitors and retained complete control over the defendants' defence of the proceedings and ultimately were instrumental in the settlement. Any damages to be paid would be discharged by them under the terms of the contract of insurance. The defendants had no role to play other than to assist the insurers and their solicitors in the defence of the action and to do so in good faith. Their consent to the third party proceedings was not required. They did not object to those proceedings but considered the Third Party to be blameless in the incident. In truth, Mr Ferrity submitted, the insurers had undertaken the indemnity of the defendants from the instructions to the solicitors to enter an appearance to the writ of summons. Thus the meaning to be attached to the word 'indemnifies' was crucial. There is some merit in this submission, based as they are in the reality of defence undertaken by insurers in the vast majority of cases whether they progress to the issue of pleadings or not. However it ignores the important fact that at the time of the issue of the third party claim, liability was not yet admitted and no payment had been made. The claim that the insurers were, at that time, subrogated to the right of the defendants to issue proceedings against the Third Party, and any other rights in that regard, cannot be sustained. Therefore the third party proceedings were issued without the authority of the defendants. Only when the damages were paid were the defendants truly and irrevocably indemnified.

[29] It was submitted by Mr Ringland QC that the issue of the proceedings without the authority of the defendants rendered the third party proceedings a nullity. No authority was quoted for this proposition. Mr Ferrrity posited that consent, subsequent to the settlement and payment was sufficient for the proceedings to retain their legitimacy. However no authority was quoted in support of this proposition either.

[30] An action begun in the name of a plaintiff which did not exist as a legal entity at the time of the issue of the writ will be a nullity and the court has no power under Order 15 Rule 6 to join a valid plaintiff to such proceedings – see White Book 15/6/1 and Dubai Bank v Galadari (No4) The Times February 23 1990 approved by the Court of Appeal in Fielding v Rigby 1993 1 WLR 1355 at 1359. In Lazard Brothers v Midland Bank Ltd 1933 AC 289 Lord Wright declared that where a judgment debtor was at the date of the writ and at all material times non-existent, the court had power to set aside judgment and declare a nullity. This was an exercise of the inherent jurisdiction of the High Court. In Daimler Co. v. Continental Tyre, &c., Co. 1916 2 A C 307 Lord Parker declared that if there was no such person as the plaintiff in existence in law the "the Court must refuse to treat these proceedings as other than a nullity". In International Bulk Shipping and Services Ltd. v. Minerals and Metals 1996 2 Lloyds Reps 474 it was held that an action commenced in the name of a non-existent person or company was a nullity. The non-existence of

a plaintiff apart, research has revealed no other circumstances in which an action has been declared a nullity. This is probably understandable in light the wide power of amendment and substitution available under the Rules of the Supreme Court.

[31] The Defendants in the minor plaintiff's claim and the plaintiffs in the third party proceedings were not non-existent nor a non-existing legal entity at the date of the issue of the third party proceedings. Indeed they were the only and appropriate plaintiff for the third party proceedings. They existed and were properly named. The difficulty alleged is that the insurers had no authority to use their name in those third party proceedings. Does the absence of such authority in circumstances in which the appropriate party is in existence and is properly named, render the whole of the third party proceedings a nullity? I do not think so.

[32] Halsburys Laws of England Vol 28 paragraph 830 states that a writ issued without authority is not a nullity and cites Presentaciones Musicales SA v Secunda 1994 Ch 271 as authority for that proposition. This was a copyright case involving musical tapes of a singer (the late Jimi Hendrix). The relevant portion of the headnote reads –

> "Held, dismissing the appeal, that a writ issued within the limitation period applicable to the cause of action but without the authority of the nominal plaintiff was not a nullity; that the nominal plaintiff could subsequently ratify and adopt the writ notwithstanding the expiration of the limitation period, provided that the ratification did not extend the time fixed for doing an act, whether by statute or agreement or (per Roch L.J.) did not adversely affect any rights of property which had arisen since the issue of the writ; that (per Roch L.J.), since the expiry of the limitation period would merely bar the plaintiff's remedies, ratification would not adversely affect any rights of property which had arisen since the issue of the writ; that, in the circumstances, the liquidators' ratification of the unauthorised acts of the solicitors of the plaintiff company was effective; and that, accordingly, the liquidators could adopt the proceedings as their own"

At page 280 Dillon LJ said –

> "Where a writ is issued without authority, the cases show that the writ is not a nullity. For the nominal plaintiff to adopt the writ, or ratify its issue, does not

> require any application to the court. Accordingly, on the same general principle that justifies Pontin v Wood [1962] 1 Q.B. 594, the plaintiff, in the simple example of an action raising a single cause of action which has been begun by solicitors without authority, must be entitled to adopt the action notwithstanding the expiration of the limitation period applicable to that cause of action."

[33] It is only in very exceptional circumstances that a writ or proceeding would be declared a nullity. The non-existence of the plaintiff as a person or legal entity at the inception of the proceedings is a clear example. Where a person or entity is capable of ratifying proceedings at a later, why should such ratification not be recognised, particularly where any impediment has since been removed. The relationship between the assured and the insurer in this regard must be relevant.

[34] My conclusion therefore is that although the insurer began the third party proceedings without the authority of the defendants, that did not render the proceedings a nullity and they were capable of being ratified at a later time, as they were. Therefore the application to treat the proceedings as a nullity is dismissed and the third party proceedings should proceed to trial.