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Judgment: approved by the Court for handing down | *Delivered:* **20/06/2003**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MICHAEL BURNS

PLAINTIFF;

-and–

PATRICK BURNS

DEFENDANT;

-and–

ROYAL SUN ALLIANCE INSURANCE PLC

THIRD PARTY.

HIGGINS J

[1] This is an appeal from Master McCorry whereby he refused the Third Party's application under Order 15 Rule 6 of the Rules of the Supreme Court, to be joined as an additional Defendant to the proceedings between the plaintiff and the defendant.

[2] The plaintiff was born on 9 December 1970 and is now 32 years of age. The defendant is the plaintiff's father and in 1974 he was the owner and occupier of a butcher's shop at Main Street, Castlewellan, County Down. On or about 11 July 1974 the plaintiff entered the meat preparation room of the butcher's shop, activated the mincer machine and as a result all the fingers of his right hand were amputated. The plaintiff was then aged 3 years and 8 months.

[3] On 4 January 2001 the plaintiff issued a writ against his father the defendant claiming:

> "Damages for personal injury loss and damage sustained by him by reason of the negligence and breach of statutory duty of the defendant, his servants and agents in and about the occupation, care and control and safe-keeping of the shop premises at Main Street, Castlewellan."

[4] A legal aid certificate to defend the action and to prosecute an action against the Third Party was granted to the defendant on 9 June 2002. A defence was delivered on 13 September 2002. In his defence, the defendant denied the plaintiff's claim and each allegation of fact set out in the statement of claim and pleaded that the causes of action alleged, if any, were barred by the lapse of time and by the provisions of the Limitation (NI) Order 1989. On 12 September 2002 the defendant issued a Third Party Notice against the Royal & Sun Alliance Insurance PLC (the Third Party) claiming an indemnity against liability in respect of the full amount claimed by the plaintiff. The notice for indemnity is grounded in a policy of insurance allegedly taken out by the defendant with the Phoenix Assurance Company Limited, of which the present Third Party is successor in title. The Third Party Notice contains the customary averment that if the Third party wishes to dispute the Plaintiff's claim against the defendant or the defendant's claim against the Third Party, an appearance must be entered within 14 days of service. An appearance was entered by the Third Party on 18 February 2003. No policy of insurance, as alleged in the Third Party Notice, has been traced by the Third Party or discovered by the defendant. If such a policy exists it probably contains a clause permitting the insurers to instruct legal representatives to defend the claim on behalf of the defendant.

[5] On 7 February 2003 the Third Party issued a summons for an order pursuant to Order 15 Rule 6 of the Rules of the Supreme Court providing that the Third Party be joined as an additional defendant to the action. The summons was supported by the affidavit of Ivan Warner, solicitor, a partner in Samuel D. Crawford & Company, the solicitors on record for the Third Party. In his affidavit Mr Warner avers that the Third Party considers the action between the plaintiff and his father to be a 'friendly action' in which the plaintiff has no intention of pursuing judgment against his father unless he is indemnified by the Third Party. The insurers received no notification of the accident in 1974. The first notification was receipt of the writ of summons in January 2001. The Third Party's solicitor avers that an issue under the Limitation (NI) Order 1989 will arise and that such should be tried as a preliminary issue, the outcome of which may avoid the expense of a full trial. He contends that the action may not be fully and properly defended due to the close relationship between the plaintiff and the defendant. He avers

further that it would be just and convenient for the Third Party to be joined as a defendant in order that the issues that are usually explored by a defendant are properly investigated and the action properly and appropriately defended. No replying affidavits have been lodged by the plaintiff or the defendant. Master McCorry refused the application on 28 February 2003 and the third party appealed by notice dated 5 March 2003. Mr Michael Maxwell appeared on behalf of the third party, Mr Hunt on behalf of the plaintiff and Mr McEwan appeared on behalf of the defendant. I am grateful to counsel for their skeleton and oral arguments.

[6] It was submitted by Mr Maxwell that should the plaintiff succeed against the defendant and the defendant be entitled to indemnity by the Third Party, the Third Party will in effect be the 'paymaster' in this case. As a Third Party the insurer has limited rights in the action. He has no right to argue the limitation point, nor to have the plaintiff medically examined. He is unable to investigate the financial loss pleaded, either by way of a notice for particulars or interrogatories. Mr Maxwell submitted that it would be open to the defendant to consent to judgment and to do so for damages at the top end of the range. If the Third Party wished to challenge the amount of damages he would have to apply to be joined as a party on appeal, as occurred in Millen v Brown 1984 NIR 328.

[7] Both the plaintiff and the defendant resisted the application by the Third Party to be joined as a defendant. Mr Hunt on behalf of the plaintiff submitted that there was no claim by the plaintiff against the Third Party and therefore no basis upon which they could be joined as a defendant. The Third Party was in no different position from that of any Third Party in personal injury proceedings. They had no right to argue a limitation point between a plaintiff and defendant. He submitted that the Third Party's only interest in the proceedings between the plaintiff and defendant was financial or commercial, which gave him no right to intervene.

[8] Mr McEwan on behalf of the defendant submitted that the assertion made on behalf of the Third Party that the defendant would not contest the action and do so fully and properly, was without foundation. In his pleadings the defendant denied the plaintiff's claim and had raised the limitation defence.

[9] Mr McEwan suggested that the cheaper and most efficacious solution to the situation was for the indemnity and/or limitation issues to be tried as preliminary points. Mr Maxwell disagreed with this approach. To decide the indemnity issue first would not prevent a 'friendly' settlement between the plaintiff and the defendant. If the limitation issue was tried first, the Third Party would have no right to address the court on it and would therefore be prejudiced.

[10] Comparisons were drawn with cases in which the MIB is joined as a defendant and various old cases were referred to. Mr Maxwell submitted that Gurtner v Circuit 1968 1 AER 328 was authority for the proposition that, if a person or legal entity would be affected in his legal rights or in his pocket, by the determination of the action between the plaintiff and the defendant, that is, that he would be bound to foot the bill, then the court had a discretion to join him as a party to the action.

[11] In Gurtner v Circuit the MIB was joined as a defendant on their undertaking to pay any damages that might be awarded to the plaintiff. The application in that case was grounded in Order 15 Rule 6 (2)(b) which provided that the court may order any person to be added as a party

> "whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon'.

[12] Order 15 Rule 6 has been amended but the terms of Rule 6(2)(b) remain as Rule 6(2)(b)(i) and a new Rule 6(2)(b)(ii) added.

[13] Reservations have been expressed about the width of the ratio decidendi in Gurtner v Circuit and about whether it applies only to potential parties obliged by statute to satisfy judgment against another party. Mr McEwan submitted that Gurtner v Circuit was applicable only in cases in which the party to be joined is the MIB and Mr Hunt submitted that it could only apply where the intended party gave an undertaking as to damages, which to date was not forthcoming in this case.

Order 15 Rule 6 (2) now provides -

> "(2) (**a**) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter (whether before or after final judgment)] the Court may on such terms as it thinks just and either of its own motion or on application –
>
> (*a*) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
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> (*b*) order any of the following persons to be added as a party, namely –

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."

[14] Thus there are now several bases upon which a person maybe added as a party to an action. Sub-paragraph (ii) is in much broader terms than sub-paragraph (i). If sub-paragraph (ii) applies then the reservations expressed about Gurtner v Circuit do not arise for consideration. Under sub-paragraph (ii) it is necessary to show that a question or issue may exist between a person proposed to be added as a party and an existing party to the action and that the question or issue arises out of or is related to or connected with the relief or remedy claimed in the action. Sub-paragraph (ii) has been considered in several cases.

[15] In Millen v Brown 1984, supra, substantial damages were awarded to the plaintiff against the first defendant driver whose insurers had repudiated liability. The second defendant driver was exonerated in the trial. Under Article 98 of the Road Traffic (NI) Order 1981 the plaintiff could recover the amount of damages and costs against the first defendant's insurers if he failed to recover them from the first defendant. The insurers wished to appeal the amount of damages and applied for an order under Order 15 Rule 6(2)(b) that they be added as a defendant for the purposes of bringing an appeal. The Master allowed the application and his ruling was upheld on appeal. Carswell J (as he then was) held that there existed an issue between the plaintiff and the insurers arising out of or relating to or connected with the remedy claimed by the plaintiff and directly related to the subject matter of the action, in that the insurers were bound by statute to satisfy the judgment obtained against the first defendant. It was held that the requirements of

Order 15 Rule 6(2)(b) (ii) were satisfied by the creation or existence of a nexus between the plaintiff and the insurers by virtue of Article 98 of the Road Traffic (NI) Order 1981. Accordingly it was held that the court had jurisdiction, in a proper case, to allow the joinder of an insurer who is under the same liability or potential liability as the insurers in that action. Carswell J expressed no opinion whether joinder could have been ordered under Order 15 Rule 6(2)(b)(i).

[16] Millen v Brown does not permit the joinder of insurers in every case in which insurers may have an interest in the outcome of the original proceedings. The applicant to be joined as a party must show that there may exist a question or issue between the applicant and a party to the action arising out of or relating to or connected with the relief or remedy claimed and that it would be just and convenient to determine that question or issue between them, as well as between the existing parties to the action. This was recognised by Carswell J at p332F of his judgment. Millen v Brown does not say that the insurers could have been joined before the trial of the action. The issue between the insurers and the plaintiff only arose after the trial of the action and by virtue of Article 98 of the Road Traffic (NI) Order 1981. Article 98 states:

> "**98.**-(1) Where a person (in this Article referred to as 'the claimant') has in any court, in proceedings of which the insurer or the giver of the security hereinafter mentioned had notice, obtained judgment against the owner or the driver of a motor vehicle for a sum in respect of the liability for which that owner or driver is insured by a policy issued, or secured by a security given; for the purposes of this Part, and the claimant has not recovered from that owner or driver the whole amount of the judgment, the claimant may, within such time as may be prescribed by rules of court or county court rules, apply to the court in which he recovered the judgment for an order against he insurer or the giver of the security, as the case may be, to pay to the claimant any sum payable under the judgment, including any sum payable thereunder in respect of costs, and thereupon the court may, if it thinks proper, grant the application either in respect of the whole amount of the judgment and costs, or in respect of any specified part of that amount.
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> (2) The notice mentioned in paragraph (1) shall be in such form as maybe prescribed by rules of court or county court rules, and shall be given to the insurer or the giver of the security, as the case may be, before or

within 7 days after the commencement of the proceedings in which the judgment is sought.

(3) A court before whom an application under this Article is made shall not, as a ground for refusing the application, take into consideration any invalidity of the policy or security arising from any fraud or any misrepresentation or false statement (whether fraudulent or innocent) unless –

(*a*) the claimant was a party or privy to the fraud, misrepresentation or false statement; or

(*b*) the fraud, misrepresentation or false statement, is constituting an offence under Article 174, has been made the subject of a prosecution and conviction under Article 174.

(4) References in this Article to the owner or driver of a motor vehicle shall, where the context so admits, be construed as including the personal representative of the owner or driver, as the case may be."

[17] Under Article 98 the plaintiff's rights against the insurers only arise after he has obtained judgment against the owner or driver of a motor vehicle and where the owner or driver has failed to discharge the judgment. In Millen v Brown it was emphasised that the insurers had no other means of challenging what appeared to be a very high award in favour of the plaintiff. Article 98 provides that the successful plaintiff who has not recovered judgment from the owner or driver may apply to the court in which he recovered judgment for an order against the insurer. The insurer would then become a party to that application. The court may if it thinks proper grant the application of the successful plaintiff either in respect of the whole amount of the judgment or in respect of any specified part of that amount. That order, to which the insurers must then be a party, would be subject to appeal. It seems the insurers in Millen v Brown wished to go to the Court of Appeal first. Interestingly these issues were never resolved in the Court of Appeal as the case was settled between the insurers and the plaintiff before the appeal was heard.

[18] Some reliance was placed on section 1 of the Third Parties (Rights against Insurers) Act (NI) 1930 which transfers an insured party's rights against his insurer to the person to whom the insured party becomes liable in the event of the insured party becoming bankrupt or insolvent. No transfer

can take place before the liability is incurred. It does not seem to me that this section advances the position of the Third Party in this case.

[19] Rule 6(2)(b)(ii) was also considered in Tetra Molectric Limited v Japan Imports Limited (Win Lighter Corporation intervening) 1976 RPC 541. The proprietor of a patent relating to cigarette lighters, commenced an action for infringement of a patent against an English import company. The English company did not make the lighters but obtained them from a Japanese corporation and acted as distributors in England. The Japanese corporation agreed to conduct the case on behalf of the English company and to pay for the litigation and to indemnify the English company in the event of liability being established against them. At the trial the patent was held to be invalid. The plaintiff patentee appealed. While the appeal was pending a dispute arose between the Japanese corporation and the English import company when the import company was accused of misappropriating a trade mark. The English import company then indicated to the Japanese corporation that they no longer intended to resist the appeal. The Japanese corporation applied to the Court of Appeal to be joined as a respondent to the appeal as it did not feel that its interests were likely to be advanced with vigour by the defendant, when new distributors in England had been appointed. The patentee objected to the application. The Court of Appeal held that there was power to join the Japanese Corporation under Rule 6(2)(b)(ii) and that the requirements of justice and the efficient conduct of the appeal required this to be done on the Japanese Corporation giving security for costs. Buckley LJ said at p544 –

> "It has been argued that upon the construction of that paragraph there must be shown to be a question or issue between the applicant – that is Win in the present case – and the party to the proceedings between whom and the applicant it is said that a question or issues exists; and of course that must be so. It seems to me that in the present case there clearly is a question or issue between Win and the plaintiff company in which both parties have an important interest, namely the validity of the plaintiffs' patent… The validity of the patent and the question of whether Win's lighters infringe the patent are matters of very considerable commercial importance to Win, because there is a large market for their lighters in this country."

[20] In that case a clear issue arose between the intervener, the manufacturer of the lighters and the plaintiff, the alleged holder of the patent in respect of the lighters. The use of the words 'any party' in Rule 6(2)(b)(ii)

indicates that the issue may arise between the intervener and the defendant, provided the issue arises out of or is related to or connected with the remedy or relief claimed between the plaintiff and the defendant.

[21] Rule 6(2)(b)(ii) was also considered in Sanders Lead Co Inc v Entores Metal Brokers Ltd. The headnote reads –

> "The plaintiffs brought an action against the defendants claiming payment of the purchase price of a quantity of lead. The defendants, while not disputing their purchase of the lead, claimed that the purchase had been made from a subsidiary of the plaintiffs and that the purchase price was owed to the subsidiary instead of the plaintiffs. The defendants set up a special account in which they held the amount owing pending resolution of the dispute. By an unconnected contract the subsidiary agreed to purchase a quantity of lead from the applicants and when the subsidiary breached the terms of that contract the applicants brought an action for damages against the subsidiary and obtained a Mareva injunction over all the assets of the subsidiary within the jurisdiction. The injunction specifically referred to the moneys held by the defendants in their special account. The plaintiffs applied to be, and were, joined as defendants in the action between the applicants and the subsidiary which had given rise to the Mareva injunction. That action was ordered to be tried at the same time as the action between the plaintiffs and the defendants. The applicants then applied under RSC Ord 15, r 6(2)(*b*)(ii) to be joined as defendants in the action between the plaintiffs and the defendants, on the ground that there existed between the applicants and a 'party to the cause or matter … a question or issue arising out of or relating to or connected with [the] relief or remedy claimed in the cause or matter' which it was just and convenient to determine at the same time. The judge ordered the applicants to be joined as defendants in the action, on the basis that they would suffer immediate and direct financial harm if the defendants allowed the action to go by default since ownership of the defendants' debt would thus be decided in a way which defeated the applicants' claim. The plaintiffs appealed against the order.

> **Held –** A person had to have an interest directly related to the subject matter of an action before he was entitled to intervene in the action under RSC Ord 15, r 6(2)(*b*)(ii). A mere commercial interest in the outcome of the action, divorced from its subject matter, such as the interest of a creditor of one of the parties, was not sufficient to entitle a person to intervene. Since the question whether the defendants' debt was owed to the plaintiffs or the subsidiary was not in issue between any of those parties and the applicants, and since the Mareva injunction had not conferred on the applicants any proprietary interest in, or charge over, the moneys in the defendants' special account the applicants were not entitled to intervene in the action between the plaintiffs and the defendants. The judge therefore had no jurisdiction to order the applicants to be joined as defendants in the action. In any event, even if he had had jurisdiction he ought to have exercised his discretion by refusing to allow the applicants to be joined, because it was only in the most exceptional circumstances that a Mareva creditor ought to be permitted to intervene in an action where his interest in the outcome related solely to the fate of his injunction. The plaintiffs' appeal would therefore be allowed."

[22] In giving the main judgment of the court Kerr LJ made the following observations about Rule 6(2)(b)(ii) -

> "In my view the rule requires some interest in the would-be intervener which is in some way directly related to the subject matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action, is not enough. It may well be impossible, and would in any event be undesirable, to attempt to categorise the situations in which the interests of would-be interveners are sufficient to satisfy the requirements of the rule. The authorities show that the existence of a cause of action between the intervener and one of the parties is not a necessary prerequisite for this purpose. But they also go no further than to show that there must be some direct interest in the subject matter, such as an alleged infringement of a patent, trade mark or copyright with which the intervener is concerned (see *Tetra Molectric Ltd v Japan Imports Ltd* (*Win Lighter Corp*

> *intervening*) [1976] RPC 541 and *Rexnord Inc v Rollerchain Distributors Ltd* [1979] FSR 119), though even in such cases the interest of the intervener must raise an existing issue and not merely a contingent one (see *Spelling Goldberg Productions Inc v BPC Publishing Ltd* [1981] RPC 280). Another illustration is provided by cases where the intervener can show that he will in some way be compelled to 'foot the bill', depending on the outcome of the action (see *Gurtner v Circuit* [1968] 1 All ER 328 at 331, [1968] 2 QB 587 at 595), though I bear in mind that the wording of Ord 15, r 6(2) was then much narrower than it is now. However, as counsel for Metal rightly conceded, no case has gone so far as to allow intervention by someone who is only a creditor, or alleged creditor, with no more than a creditor's commercial interest in the outcome of the action, and in my view it makes no difference whatever that the creditor in question is one who has obtained a Mareva injunction whose fate may in some way depend on the outcome."

[23] These cases show that for the purposes of Rule 6 (2)(b)(ii) the intervener must have some direct interest in the subject mater of the original claim. The original claim in the instant case is for damages for alleged negligence and breach of statutory duty by the defendant. The Third Party has not shown any direct interest in that issue as between the plaintiff and the defendant, that gives rise to an issue between the plaintiff and the Third Party or the Defendant and the Third Party about negligence or breach of statutory duty. The only connection suggested is the alleged contract of insurance between the defendant and the Third Party, but that exists independently of the alleged negligence or breach of statutory duty alleged between the plaintiff and the defendant. Thus there is no basis for joinder as an additional defendant under rule 6(2)(b)(ii).

[24] Kerr LJ stated in the passage from his judgment quoted above, that another illustration of the application of the rule is provided by those cases in which the intervener can show that he will be compelled 'to foot the bill'. This is a reference to Gurtner v Circuit 1968 1 AER p328 which was decided on the old Rule 6(2)(b), now Rule 6(2)(b)(i). This gives the court a discretion to join any person who ought to have been joined as a party or whose presence is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. It is not suggested that the Third Party ought to have been joined as a party to the original action, rather that they are a necessary party under the second limb of this rule. Mr Maxwell relies directly on the authority of Gurtner v Circuit and it is necessary to consider whether, in view of the reservations expressed

about it and in particular the introduction of the new rule in 6(2)(b)(ii), it has survived as an authority and if so does it apply in this case.

[25] In Gurtner v Circuit the plaintiff was injured in a road traffic accident in which the defendant was riding a motor cycle. By the time attempts were made to serve the writ the defendant had moved to Canada and could not be traced nor could his insurance company. No-one had authority to enter an appearance on behalf of the defendant and it looked as if judgment would go against the defendant by default. If the plaintiff obtained judgment against the defendant by default, the Motor Insurers Bureau, by reason of their agreement with the Minister of Transport would be required to satisfy the judgment within seven days. Statements made to the police at the time of the accident indicated that liability was a serious issue in the case. The MIB wished to raise the question of liability and damages, as well as issues relating to the renewal of the writ. They applied to be added as defendants to the action. The Master granted the application on the MIB's undertaking to pay any damages awarded. Chapman J reversed his decision. On appeal to the Court of Appeal Denning MR preferred a wide interpretation of Rule 6 (2)(b). He stated he did not agree with the narrow construction put on the rule by Devlin J in Amon v Raphael Tuck & Sons Ltd and applied by Stephenson J in Fire Auto Marine Insurance Co Ltd v Greene and expressly stated that the Fire Auto and Marine case was wrongly decided and should be overruled. At p 332 Lord Denning MR said:

> "It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute 'to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome. I would apply this proposition to the present case. If the Motor Insurers' Bureau are not allowed to come in as a defendant, what will happen? The order for substituted service will go unchallenged. The service on the defendant will be good, even though he knows nothing of the proceedings. He will not enter an appearance. The plaintiff will sign judgment in default of appearance. The judgment will be for damages to be assessed. The master will assess the damages with no-one to oppose. The judgment will be completed for the ascertained sum. The defendant will not pay it. Then the plaintiff will be able to come

> down on the Motor Insurers' Bureau and call on them to pay because they have made a solemn agreement that they will pay. They made an agreement with the Minister of Transport on June 17, 1946, by cl. 1 of which they agreed that, if a judgment for an injured person against a motorist is not satisfied in full within seven days, the Motor Insurers' Bureau would pay the amount of the judgment to the injured person."

Later at p 331 he said

> "It is thus apparent that the Motor Insurers' Bureau are vitally concerned in the outcome of the action. They are directly affected, not only in their legal rights, but also in their pocket. They ought to be allowed to come in as defendants. It would be most unjust if they were bound to stand idly by watching the plaintiff get judgment against the defendant without saying a word when they are the people who have to foot the bill."

[26] Diplock LJ (as he then was) said that the MIB had a lively interest in seeing that all the defences that could properly be raised in the action were raised. He thought that the tests adopted by Devlin J in Amon and Stephenson J in Fire, Auto and Marine were not to be treated as comprehensive. He said that in the Fire, Auto and Marine case the MIB had a commercial interest in resisting the declaration that the policy of insurance was void, but that such an interest was not enough for the purposes of the rule. At p 334 he said

> "The bureau are plainly not 'a person who ought to have been joined as a party'. The action is perfectly well constituted without them. The question is whether, within the meaning of the rule, the bureau are 'a person … whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon … '."

[27] Then he goes on to state why he thought it was right that the MIB should be added as a defendant. At p 335 he stated –

> "The bureau's legal obligation differs from the statutory obligation of an ordinary insurer under s 207 of the Road Traffic Act, 1960, owed to a judgment creditor in a running-down action to satisfy

> the judgment obtained against the assured, in that the insurer's legal obligation is directly enforceable by the plaintiff in the running-down action, whereas the bureau's legal obligation is not enforceable by the plaintiff himself but is enforceable for his benefit by the Minister who is *not* a party to the action. Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely "adjudicated upon" (my italics) unless the rules of natural justice are observed, and all those who will be liable to satisfy the judgment are given an opportunity to be heard. In the case of an ordinary insurer, this does not arise in practice, since the standard terms of a third-party liability policy give to the insurer a contractual right to conduct the defence of the running-down action in the name of the assured. As I read his judgment in the Fire, Auto and Marine case, however, John Stephenson J would have allowed an ordinary insurer to be added as a party to a running-down action if the policy of insurance did not contain such a term; and this, I think, would be right.

[28] It is clears that Diplock LJ took the view that the MIB was in a unique situation and observed that Devlin J in Amon's case did not have them in mind. He was at pains to make clear that his reasoning was based on the special position of the MIB and not of universal application. At p 336 he stated –

> "Having drawn attention to the undesirability of propounding general propositions, I desire to emphasise that my judgment in the present case is based on the special position of the bureau under their contract with the Minister. What reasons influenced the government to adopt this oblique and extra-statutory way of imposing liability on the bureau, despite the legal complications this involves, I do not know. The courts must, however, accept it as it is and try, so far as we are permitted by the rules, to make it work with justice to the bureau as well as to the persons for whose benefit the Minister made the

> contract. Nothing that I have said is intended necessarily to have any wider application than to this unique legal situation resulting from the Minister's contract with the bureau. I prefer to decide other cases on their own different facts when they arise."

[29] Salmon LJ agreed with the judgments of both Denning MR and Diplock LJ without observing on the differences between them.

[30] Gurtner v Circuit and Amon's case were considered by Buckley J in Settlement Corporation and Others v Hochschild (No 2) 1970 1 AER 60. The case commenced on 28 April 1969 and judgment was given on 12 May 1969. In his judgment Buckley J stated that if the particular circumstances of a case satisfied the test laid down by Devlin J in Amon's case, they must also satisfy the interpretation of the rule as favoured by the Court of Appeal in Gurtner's case. He then said at p66 –

> "Accordingly if the relief sought by a plaintiff or, as in the present case, a counterclaiming defendant may affect a third person in respect of his legal rights or obligations the jurisdiction under the rule may arise.
>
> No distinction is, I think, to be drawn here between rights and obligations at common law and equitable rights and obligations. The mere fact, however, that the relief may affect someone who is not a party in respect of his rights and obligations is not enough, in my judgment, to give rise to jurisdiction under the rule. In respect of anyone who is not a person 'who ought to have been joined as a party' it must also be demonstrated that he is a person (see RESC Ord 15 r 6(2)(b) –
>
> > ' …. whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon …'"

Thus he had in mind, the requirements of the rule as then drawn.

[31] Re Vandervell Trusts was heard at first instance and judgment given in January 1969. Buckley J held that the Commissioners of Inland Revenue should be struck out as defendants to the action, as they were not persons who ought to have been joined as parties nor was their presence necessary to ensure the effectual and complete determination of all matters within the

meaning of Rule 6(2)(b). While the plaintiffs and the commissioners had an identical interest in the outcome of this friendly action, the relief sought in the action could properly be sought and determined in proceedings in which the only parties were the plaintiffs and the trustees. He distinguished Gurtner v Circuit on the basis that in that case there was no-one to defend the plaintiff's claim. Having considered Gurtner's case and the approach taken by Lord Denning MR and Diplock LJ he said at p 1059 –

> "Now, it has been said in the present case that the decision of the issues between the plaintiffs and the trustees will affect the Commissioners of Inland Revenue in their pocket because if the trustees succeed in their claim to be entitled to retain the dividends it may be that the liability of the estate to tax in respect of these dividends will disappear; and, therefore, it is said, this is a matter in which the Commissioners of Inland Revenue have an important interest affecting their pocket and it is desirable that they should be heard in these proceedings and that the judgment should be binding on them. But the position seems to me very different in the present case from the position in Gurtner v Circuit because there the whole point of the case was that there was no one to fight the plaintiff's claim unless the bureau was allowed to do so, and the bureau was the body that was going to have to meet the claim eventually. In the present case, however, there are the plaintiffs themselves who are concerned to dispute the case put forward by the trustees and the interests of the plaintiffs and the inland revenue go hand in hand except so far as the matter may be affected ex post facto by the deed of 19 January 1965 which, as I have pointed out, may have the result of leaving the estate liable for tax although the trustees are entitled to retain the dividends. But apart from that aspect of the matter, the plaintiffs and the inland revenue have an identical interest; and in those circumstances I do not think that it can be said that the presence of the Commissioners of Inland Revenue before the court is necessary to ensure that all matters in dispute in the cause or matter may be 'effectually and completely determined and adjudicated upon', and unless that can be said the case is not one which falls within the ambit of the rule at all."

[32] Thus he looked to the wording of the rule to see whether the commissioners fell within its terms and in his view they did not. The appeal to the Court of Appeal was heard on 20 and 21 May and judgment given on 22 May. Lord Denning MR presided and the appeal was allowed and the commissioners added as a party to the action. Lord Denning MR in his judgment approved the wider interpretation of the rule that he had applied in Gurtner's case in these terms –

> "That wide interpretation was adopted and applied by this court in the recent case of *Gurtner v Circuit*. I know that there have been cases at first instance (such as *Amon v Raphael Tuck & Sons Ltd*, and *Fire Auto and Marine Insurance Co Ltd v Greene*), when the rule has been given a narrow interpretation. But that narrow interpretation should no longer be relied on. We will in this court give the rule a wide interpretation so as to enable any party to be joined whenever it is just and convenient to do so. It would be a disgrace to the law that there should be two parallel proceedings in which the self same issue was raised, leading to different and inconsistent results. It would be a disgrace in this very case if the Special Commissioners should come to one result and a judge in the Chancery Division should come to another result as to who was entitled to these dividends. Such different and inconsistent results are to be deplored and avoided. It can be done by bringing all parties before the court so as to have the issue finally decided between all of them and so that all be bound."

Sachs LJ also adopted the broader construction and Karminsky LJ followed Lord Denning MR.

[33] The appeal to he House of Lords, which was heard the following year, related primarily to two separate issues - whether the application to join the commissioners fell within rule 6(2)(b) and whether an issue relating to assessment of tax could be litigated in the High Court. Much argument was presented to their Lordships about the merits or otherwise of the narrow construction favoured by Devlin J in Amon's case and the wider interpretation favoured by Lord Denning MR in Gurtner's case. Lord Reid referred to the proceedings as 'friendly' and that the commissioners were willing to be added as a party and wished to see the tax issues properly presented and dealt with. Despite that approach by the commissioners the majority of the House agreed that the commissioners could not be joined and Lord Reid was willing to agree with them. He made no observations on the rule. Lord Morris agreed with the approach of Buckley J and said that the

application did not fall within the rule. The only question was whether the commissioner's presence was 'necessary' to ensure that all matter in dispute in the cause or matter could be effectually and completely determined. The matters in dispute between the executors and the trustees could be determined in the absence of the commissioners and therefore their presence was not necessary. Lord Morris said he agreed with the opinion of Lord Wilberforce. Viscount Dilhorne referred to the test applied by Lord Denning MR in the Court of Appeal, that the court would join any party whenever it was just and convenient to do so. Whether that was wider than the test suggested by Devlin J in the Amon case he did not need to consider. He went on to say that his difficulty in accepting Lord Denning's test was that it appeared wholly unrelated to the words of rule 6 (2)(b), which gave power to join a person as a party only if his presence was necessary for the effectual and complete determination and adjudication upon all matters in dispute in the cause or matter. He went on to say at p936 –

> "All matters in dispute in the action will, it seems to me, be effectually and completely disposed of without the Inland Revenue being added as a party. Their presence is not necessary to ensure that the court can effectually and completely determine whether Mr Vandervell was entitled to the beneficial interest in the shares and whether, if he was, the deed operated retrospectively so as to deprive his executors of a right to the dividends paid before its execution.
>
> The rule does not provide that a party may be added on account of matters in dispute in another cause or matter. And even if it did, for the reasons I have given, it could not be said that the determination of the matter in dispute in this action would effectually and completely determine the liability to surtax. I do not regard the proceedings on the appeals against the assessments and this action as parallel proceedings, nor do I feel that it is accurate to say that the self same issue arises in both proceedings."

[34] Lord Wilberforce was willing to give a generous interpretation to rule 6(2)(b) but agreed with Lord Morris and Buckley J that its terms did not enable the commissioners to be added as a party in the instant case. Lord Diplock decided that the proposal to add the commissioners to the action would involve an irregularity in the procedure laid down by Parliament for the determination of surtax appeals. He said that the court should not give its aid to such a proposed irregularity and gave no ruling on Order 15 Rule 6 (2)(b).

[35] The case of Gurtner v Circuit was not mentioned by any of their Lordships though it was referred to in argument. A distillation of the speeches would suggest that their Lordships were of the opinion that a court should consider each case against the clear words of the rule. The decision in White v London Transport Executive 1971 3 AER 1 and in particular the judgment of Stamp LJ would suggest that to be so as well. The advice of Carswell J in Millen v Brown that it may be necessary to exercise caution in accepting everything said in Gurtner v Circuit appears well justified.

[36] In my view the proper approach, certainly in cases which do not involve the MIB, is to consider the facts of the case against the words of the rule and not to add encumbrances or burdens relating to 'who pays' and which are outwith the clear wording of the rule. It is interesting to note that in White's case, supra, Edmund Davies LJ (as he then was) found that Gurtner v Circuit afforded no guidance on the new MIB agreement as it related solely to the earlier 1946 Agreement, the terms of which were different.

[37] Applying those principles to this case the first matter is to determine what is in issue in the present proceedings between the plaintiff and defendant and then to ask whether it is necessary for the determination of those proceedings that the Third Party be joined. What is in dispute between the plaintiff and the defendant is the degree of care and control exercised in relation to the preparation room and the mincing machine situated therein. Arising from that there is an issue as to the application or disapplication of the Limitation Act or Order. Is the presence of the Third Party necessary to ensure that those matters in dispute are effectively and completely determined and adjudicated upon. The Third Party has no interest in the issues between the plaintiff and the defendant relating to the preparation room and mincer machine other than an interest as insurer. The Third Party submits that the defendant may not contest the matter with any or sufficient vigour or may agree to effect a settlement of the dispute. The defendant is being sued and is represented by solicitors and counsel with a duty to their client and the court. A defence denying liability and raising the Limitation Act or Order as an issue has been served. The submission that the defendant may not contest the case with any or sufficient vigour or effect an inappropriate settlement is and remains only an allegation, though there is some force in the description of the proceedings, as a 'friendly action'. If there is no policy of insurance relevant to the proceedings then the defendant will bear the brunt of the proceedings himself. If there is a relevant policy of insurance then the Third Party should be able to take over defence of the action through its own lawyers. The Defendant is not likely to run the risk of repudiation of any contract of insurance by proceeding on his own to judgment or settlement and looking to the insurers' thereafter. In those circumstances it does not seem to me that the presence of the Third Party as a defendant is necessary to ensure that all matters in dispute are effectively and

completely determined and adjudicated upon. Therefore the appeal will be dismissed, the order of the Master affirmed with costs above and below.

[38] Order 33 empowers the court to give directions as to the questions or issues to be tried either before, at or after trial. Order 33 Rule 3 states –

> "3. The Court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of law, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the questions or issue shall be stated."

[39] Thus the court may identify questions or issues that should be tried before the main trial. In this case I would identify two matters. One is whether there exists a policy of insurance that covers the defendant in respect of an action for negligence or breach of statutory duty relating to the use and occupation of the butcher's shop premises and, if so, whether the Third Party is entitled under the policy to take over the defence of the action on behalf of the defendant (the indemnity issue). The other is whether the proceedings against the defendant are time barred under the Limitation Order (NI) 1989 (the limitation issue). I direct that the indemnity issue be tried first and following judgment on that issue, then the limitation issue be tried.