Neutral Citation No. [2010] IEHC 27

THE HIGH COURT

1999 11113 P

BETWEEN

FERGUS DUFFY

PLAINTIFF

AND

IRISH PROGRESSIVE LIFE ASSURANCE COMPANY LIMITED, PRUDENTIAL LIFE OF IRELAND LIMITED AND FAS TRAINING AND EMPLOYMENT AUTHORITY

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 29th day of January, 2010

The application
On this application the first and second defendants seek two separate and distinct reliefs. The contentious relief sought is an order, pursuant to the inherent jurisdiction of the Court, dismissing the plaintiff's claim against these defendants on the ground that by reason of delay in the initiation and prosecution of the proceedings a trial of the proceedings would be contrary to their rights under the Constitution. It is appropriate to postpone consideration of the other order sought until the issue whether the first and second defendants are entitled to dismissal of the plaintiff's proceedings on the ground of delay is determined.

The plaintiff's claim
In these proceedings the plaintiff seeks an order for specific performance of his entitlements under a Group Permanent Health Insurance Plan (the policy) entered into by his employer, the third defendant, with the first and second defendants, and, in particular, directing the first and second defendants to pay out disability benefits to the plaintiff on foot of the policy, including whatever arrears are due under the policy. The plaintiff also claims damages for breach of contract, breach of duty and misrepresentation.

In the policy the word "disability" was defined as meaning in respect of an employee of the third defendant covered by the policy that such employee "is totally unable, by reason of sickness or bodily injury … to carry out either the duties pertaining to the full-time remunerative occupation in which he or she was engaged immediately before the onset of such sickness or bodily injury or the duties pertaining to any other occupation for which he or she is reasonably fitted by knowledge and training, and is not carrying out any other occupation for remuneration or profit".

The plaintiff, who commenced employment with the third defendant in 1978, was one of the beneficiaries of the policy. The basis of his claim is that between 10th May, 1995 and 25th August, 1998 he was unable to work and was obliged to go on sick leave due to noise induced damage to his hearing. It is specifically pleaded in the statement of claim that the plaintiff attended Dr. Maurice Gueret and Mr. Eric Fenelon, a Consultant ENT Surgeon. Both confirmed that the plaintiff was suffering from bilateral tinnitus as a result of occupational noise exposure and bilateral deafness and, as a result, that he was unable to work, it is pleaded.

History of claim pre-proceedings
The history of the plaintiff's claim before the commencement of these proceedings was that on 13th October, 1995 he submitted an application for payment of disability benefit under the policy, which would become payable after the first 26 weeks of prolonged disability, to the first defendant. In connection with that application he was examined by Mrs. R. A. Chalton, Consultant ENT Surgeon, on 18th January, 1996 on behalf of the first defendant. Mrs. Chalton issued a medical report to the first defendant on 25th January, 1996. As a result of that report, on 7th February, 1996 the first defendant informed the plaintiff's employer, the third defendant, that they were "declining the claim on the basis that the claimant does not suit the definition of disability pertaining to the policy". On 19th February, 1996 the plaintiff's solicitors wrote to the first defendant appealing the rejection of his claim. At that stage, the plaintiff's solicitors sought a copy of Mrs. Chalton's report. The first defendant responded on 1st March, 1996 refusing to furnish copies of any medical evidence and that position was persisted in thereafter when subsequent requests were made by the plaintiff's solicitors. On 29th August, 1996 the first defendant informed the plaintiff's solicitors that its Chief Medical Officer was still of the opinion that the plaintiff did not suit the definition of disability as outlined in the policy conditions. In other words, the appeal was effectively rejected. The plaintiff subsequently made a complaint to the Insurance Ombudsman. On 5th March, 1997 the Insurance Ombudsman informed the plaintiff that, because of the quantum of the plaintiff's claim, it was outside her jurisdiction.

These proceedings were not commenced until over a year after the plaintiff returned to work with the third defendant on 25th August, 1998.

Core issue
The key issue which arose between the plaintiff and the first and second defendants prior to the commencement of the proceedings and the core issue on the pleadings is whether by reason of bilateral tinnitus the plaintiff was unable to work during the period of his absence from work. It is denied by the first and second defendants that he was unable to work and that any entitlement to disability benefit under the policy arose.

It emerged on this application that in July 1995 the plaintiff initiated personal injury proceedings against the third defendant and, perhaps, former employers in respect of the deafness and tinnitus which he developed in the course of employment through exposure to occupational noise. It also emerged that liability was admitted in June 2000 and that the

proceedings were subsequently settled. The existence and settlement of those proceedings, in my view, has no bearing on the issue the Court has to determine on this application.

Time-line of proceedings
The chronology of the procedural steps in these proceedings, as between the plaintiff and the first and second defendants, is as follows:

8th November, 1999 Plenary summons issued

17th November, 1999 Statement of claim delivered

7th December, 1999 Appearance entered

6th March, 2000 Notice for particulars issued by these defendants

21st March, 2001 Defence delivered

12th February, 2002 Plaintiff's replies to notice for particulars

14th July, 2003 Plaintiff's request for voluntary discovery

10th November, 2003 These defendants' response to discovery request indicating willingness to make very limited discovery

25th May, 2004 Plaintiff's threat to bring motion to compel discovery

7th December, 2004 Plaintiff's motion to compel discovery

15th February, 2005 Order of the Master directing discovery

5th May, 2005 Affidavit of discovery sworn on behalf of these defendants

October 2005 Discovered documents made available

8th January, 2007 Reply to defence of these defendants delivered

10th January, 2007 Notice of intention to proceed filed

12th February, 2007 Notice of trial served

16th April, 2008 Certificate of readiness of counsel for the plaintiff filed

8th December, 2008 Second notice of trial served

December 2008 Case listed for hearing on 6th February, 2009 at the list of fixed dates on the application of the plaintiff

January/February 2009 Hearing date of 6th February, 2009 vacated

Subsequent list to fix dates Case listed for hearing on 15th July, 2009 and for mention on 18th June, 2009

18th June, 2009 These defendants informed the plaintiff and the Court that this application would be brought

25th June, 2009 Notice of motion issued returnable for 6th July, 2009

Some observations are pertinent in relation to that chronology.

First, simultaneously during the foregoing time-line the procedural steps as between the plaintiff and the third defendant were proceeding. The significant steps were that the third defendant entered an appearance on 26th November, 1999 and delivered its defence on 4th June, 2002. The plaintiff delivered his reply to that defence on 7th October, 2002.

Secondly, I would surmise that when the solicitors for the plaintiff were contemplating filing notice of intention to proceed in January 2007 they discovered that a reply to the defence of the first and second defendants had not been delivered. The reply which was in fact delivered was no more than a joinder of issue and did not to any significant extent define the issues as between the plaintiff and the first and second defendants.

Thirdly, what transpired in January 2009 when all of the defendants discovered that the case had been listed for hearing on 6th February, 2009 is of considerable significance in the context of the issue the Court has to determine. On 14th January, 2009 the solicitor for the first and second defendants wrote to the plaintiff's solicitors seeking the agreement of the plaintiff's solicitors to the date for hearing being vacated. In that letter, it was pointed out that expert reports had not been furnished and that a formal letter seeking disclosure of medical records and suchlike would be issued "imminently". It was further stated that the solicitors awaited confirmation as to the availability of their client's expert to attend the hearing. On the same day, the solicitors for the third defendant also wrote to the plaintiff's solicitors stating that the case was not ready for hearing and seeking that the hearing date be vacated pending discovery issues (i.e. the plaintiff making discovery at the behest of the third defendant) being finalised. The clear implication in both letters was that the matter would be re-listed at a later stage. In fact the solicitors for the first and second defendants expressly requested that the matter be adjourned to the next list to fix dates.

Fourthly, on 16th June, 2009, presumably in response to a request from the solicitors for the first and second defendants, the date of which has not been disclosed, the plaintiff's solicitors delivered a disclosure notice which was expressed to be

given pursuant to the provisions of S.I. 391/1998. This notice identified the plaintiff's expert witnesses as Mr. Fenelon, Dr. Gueret, Dr. Kenneth Sinanan, Consultant Psychiatrist, and Seagrave-Daly & Lynch Limited, Consulting Actuaries. It listed the medical reports upon which the plaintiff would rely as medical reports of Mr. Fenelon dated 27th June, 1994, 8th September, 1994, 24th July, 1995, 18th April, 1996, 14th June, 1996 and 18th February, 1999, a medical report of Dr. Gueret dated 7th July, 1995, a medical report of Dr. Sinanan dated 27th March, 1996, and an actuarial report of Seagrave-Daly & Lynch Limited dated 28th November, 2006.

Emergence of evidential difficulties
Certain difficulties for the parties in adducing medical evidence emerged after the case was first listed for hearing on 6th February, 2009, apparently for the first time.

In the affidavit of Valerie Neiland, the solicitor for the first and second defendants, on which this application is grounded, Ms. Neiland deposed to the fact that, after the case was listed for hearing, contact was made with the Medical Council in an effort to locate Mrs. Chalton for the purposes of giving evidence. It was ascertained that Mrs. Chalton had died on 25th June, 1998.

In the replying affidavit of the plaintiff's solicitor, Elizabeth Farquharson, it was disclosed that Mr. Fenelon was also deceased. In a subsequent affidavit sworn on 3rd December, 2009, Ms. Neiland deposed to the fact that he had died on 4th August, 2005.

On this application, the third defendant put evidence before the Court in the form of an affidavit of Michael Bowden, the third defendant's Manager of Legal Services, sworn on the 24th July, 2009, in which was exhibited letters from their proposed medical witnesses. One was a letter from Mr. Alexander W. Blayney, Consultant ENT Surgeon, to the effect that he had no hand-written notes in relation to the plaintiff and, as such time had elapsed since his previous reports issued, he no longer had his notes on file, but proffered an updated medico-legal report and audiological assessment should it be required. Another was from Dr. John P. A. Ryan, Consultant Psychiatrist, who stated that he had been unable to find his written notes regarding his examination of the plaintiff on 16th January, 1999 but indicated a willingness to act as a witness in the case. Both letters were in response to letters from the solicitors for the third defendant which were dated 25th June, 2009.

All of the reports referred to in the disclosure notice of 16th June, 2009 have been put before the Court, as has the report dated 25th January, 1996 of Mrs. Chalton. Counsel for the first and second defendants analysed the medical reports with a view to leading the Court to draw the inference that, if it were available, the evidence of Mr. Fenelon and Mrs. Chalton would support the contention of these defendants that the plaintiff was not unable to work between May 1995 and August 1998. On the basis of the answers to specific queries which had been put to her by the first defendant, in particular, on the question as to whether the plaintiff was capable of carrying out his own or a different occupation on a full or part-time basis, to which her response was that he probably was within constraints regarding noise exposure which she had outlined, I consider that it is reasonable to infer that, if it were available, Mrs. Chalton's evidence would support the position of the first and second defendants. However, I do not think it is reasonable to infer from Mr. Fenelon's reports that, if his evidence were available, he would express an opinion that, as a matter of probability, the plaintiff was not unable to work during the relevant period.

The law
Although the principles of law which are relevant to the determination by the Court, in the exercise of its inherent jurisdiction, of an application by a defendant for an order dismissing the plaintiff's proceedings on the ground of delay either in initiating the proceedings or in prosecuting them or both have been the subject of very considerable judicial comment in recent years in cases in which the principles were being applied, the summary of the relevant principles set out in the judgment of Hamilton C. J. in the seminal Supreme Court decision in Primor Plc. v. Stokes Kennedy Crowley [1996] 2 I.R. 459 still gives clear guidance to a Court which has to make such a determination. Hamilton C. J. stated (at p. 475):

> *"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:*
>
> *(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
>
> *(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
>
> *(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
>
> *(d) in considering this latter obligation the court is entitled to take into consideration and have regard to*
>
> *(i) the implied constitutional principles of basic fairness of procedures*
>
> *(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*
>
> *(iii) any delay on the part of the defendant – because litigation is a two party operation, the conduct of both parties should be looked at,*
>
> *(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
>
> *(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular*

case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

The application of the foregoing principles in this case gives rise to three questions:

(a) whether the first and second defendants have established that there has been an inordinate delay on the part of the plaintiff in initiating and prosecuting these proceedings;

(b) if the answer to the first question is in the affirmative, whether the first and second defendants have established that such delay is inexcusable; and

(c) if the answer to the second question is in the affirmative, whether the balance of justice is in favour or against the proceedings continuing.

I will consider each question in turn.

Inordinate delay
Counsel for the first and second defendants identified the most significant periods of delay as being the following: the period of two and a half years between the rejection by the Insurance Ombudsman of the plaintiff's complaint in March 1997 and the initiation of these proceedings in November 1999; the period of over two years which it took the plaintiff to respond in February 2002 to the notice for particulars raised by the first and second defendants in March 2000; the further period of almost a year and a half until the plaintiff sought voluntary discovery in July 2003; the further period of over a year between rejection of that request for voluntary discovery in November 2003 and the filing of the notice of motion seeking an order compelling discovery in December 2004; the period of fourteen months between delivery of the discovery documentation in October 2005 and the filing of notice of intention to proceed in January 2007; and the further period of almost two years until a date was sought for the hearing in December 2008. Counsel for the defendants also submitted that overall the delay in bringing the case to trial was inordinate.

In my view, there has been inordinate delay on the part of the plaintiff in prosecuting these proceedings. Broadly speaking, the cause of action accrued in 1996 when the plaintiff's application to be paid disability benefit in accordance with the policy was rejected. The earliest listing of the proceedings for hearing was not sought until December 2008, over twelve years later. That it took the plaintiff such a long period to bring an action of the nature of the plaintiff's action to trial, unquestionably involves inordinate delay on the part of the plaintiff. That such is the case was not really contested on behalf of the plaintiff.

Inexcusable delay
The basis on which the plaintiff's solicitor sought to excuse the delay in her replying affidavit sworn on 23rd July, 2009 was the refusal of the first and second defendants to furnish Mrs. Chalton's medical report "in the usual way". That refusal was stated to have been "the main reason for the delay in this case". That proposition does not stand up to scrutiny. After the proceedings were initiated the plaintiff did not seek discovery of the medical report of Mrs. Chalton, presumably, because it was obvious that the response of the first and second defendants would be that it was a privileged document. The plaintiff's solicitor served notice of trial and counsel for the plaintiff certified the action as being ready for hearing without having obtained Mrs. Chalton's report. Indeed, it would appear that what prompted reliance on the absence of the report was the fact that it was exhibited in the grounding affidavit on this application. The absence of a medical report obtained by the first and second defendants in response to the plaintiff's application for payment of disability benefit under the policy was not, and could not have been, an excuse for the delay in prosecuting the plaintiff's claim expeditiously.

Another matter which was adverted to as explaining the delay in the second affidavit sworn by the plaintiff's solicitor on 22nd December, 2009 was that there were changes of personnel in the plaintiff's solicitor's firm in 1996 and 1997. Further, the counsel who was initially briefed in the matter in April 1997 did not respond "for a considerable time" and eventually effectively returned the brief. A second counsel was engaged in January 1999. The purpose of adverting to those matters was to demonstrate that during the period between March 1997 and December 1999, when the proceedings were issued, the delay was not attributable to the plaintiff personally. Even if the plaintiff was not personally blameworthy for the delay during the two and a half year period immediately before the initiation of the proceedings, that does not excuse the subsequent delay in prosecuting the proceedings.

Having regard to the evidence, the only conclusion which can be drawn is that the delay on the part of the plaintiff in prosecuting the proceedings was and is inexcusable.

Balance of justice
The basis on which the first and second defendants contended that the balance of justice favoured dismissing the proceedings was that the delay on the part of the plaintiff in bringing these proceedings to trial has given rise to a substantial risk that it is not now possible to have a fair trial and serious prejudice has been occasioned to these defendants in consequence of the delay. Counsel for these defendants identified the following matters as the sources of prejudice:

(a) the non-availability of Mrs. Chalton to testify on behalf of these defendants;

(b) the non-availabilty of Mr. Fenelon to testify and to be subject to cross-examination on behalf of these defendants;

(c) the disclosure that the plaintiff intends to call Dr. Sinanan as a witness as late as June 2009, when Dr. Sinanan had examined the plaintiff in March 1996; and

(d) the fact that the available expert witnesses will be hampered by the passage of time and, in the case of the third defendant's experts, the absence of contemporaneous notes and will be forced to rely on medical reports written a decade or more ago.

The gravamen of these defendants' complaint that they have been prejudiced in consequence of the delay in bringing the action to a hearing is that the outcome of the action will turn on whether the plaintiff establishes that he was unable to work between May 1995 and August 1998 because of circumstances which come within the definition of "disability" in the policy. The evidence which is crucial to that issue is the evidence of medical experts who dealt with and examined the plaintiff during the period in question. In the case of Mrs. Chalton, the position of these defendants is that if the proceedings had been progressed in a timely fashion they would have become aware earlier that Mrs. Chalton had died in 1998 and they could have had the plaintiff examined by an alternative expert at a point in time far closer to the relevant period that is now possible. There would also be a better prospect of Mrs. Chalton's records being recovered and available. The response of counsel for the plaintiff to that argument was that the plaintiff did not cause the prejudice complained of, in that Mrs. Chalton predeceased the commencement of these proceedings and delay in the prosecution of the proceedings was not causative of the alleged prejudice.

In my view, the plaintiff's submission is correct. The proceedings were commenced approximately a year and a half after the death of Mrs. Chalton. When the proceedings were served on these defendants, one would have expected their legal advisers to inquire as to the availability of Mrs. Chalton to testify in the proceedings. One would certainly have expected that, when they were delivering their defence in March 2001 and including therein an express denial that the plaintiff was or had been unable to work, some inquiry would be made as to whether they could adduce the evidence to stand over that denial. In my view, such difficulty as the defendants will encounter because of the non-availability of Mrs. Chalton is a consequence of their own failure to ensure, once the proceedings were issued, that they would be in a position to marshal the evidence to support the position they have adopted throughout in defence of the claim.

As regards the non-availability of Mr. Fenelon, both counsel for these defendants and counsel for the third defendant acknowledged that he would not have been amenable to a subpoena served by any of the defendants. Counsel for the plaintiff acknowledged that the fact that the plaintiff will not be in a position to adduce evidence from Mr. Fenelon presents a problem, but it is a problem which the plaintiff will have to overcome because the plaintiff will have to prove his case. Notwithstanding that, the plaintiff has resisted the dismissal of these proceedings. In my view, the non-availability of a medical expert whom the plaintiff would have called if he was available is not a ground for dismissing the proceedings.

The fact that the first and second defendants only became aware of Dr. Sinanan's involvement with the plaintiff in June 2009 and did not seek to have a psychiatric examination of the plaintiff earlier is attributable to the manner in which these defendants conducted the defence of the proceedings and is not attributable to the delay on the part of the plaintiff in progressing the proceedings. It is noteworthy that the third defendant had the plaintiff psychiatrically examined by Dr. Ryan in January 1999, received a report from him in February 1999 and have obtained his confirmation that he is willing to testify.

Undoubtedly, the passage of time dims the memory. However, the medical experts to whom the third defendant referred the plaintiff obviously gave contemporaneous written reports to the third defendant. On the basis of the letters from them to the third defendant exhibited in Mr. Bowden's affidavit, it is not possible to conclude that they regard the absence of hand-written notes as an impediment to testifying.

For the foregoing reasons I have come to the conclusion that the first and second defendants have not, and will not, suffer prejudice which is attributable to delay on the part of the plaintiff in progressing the action, as contended by these defendants, rather than to their own management of the claim and the proceedings. However, apart from that, there are other reasons why the balance of justice does not favour dismissing the proceedings.

As the chronology of the proceedings discloses, there were periods of delay on the part of the first and second defendants in defending the proceedings. For example, there was a delay of a year and a half between these defendants having received the statement of claim and the delivery of their defence. They resisted the request for voluntary discovery, which necessitated a motion to compel them to make discovery, which was successful. However, most of the delay between the request in July 2003 and the order of the Master in February 2005 must be laid at the door of the plaintiff. Nonetheless, delay on the part of these defendants is a factor to be taken into account, although it is not a factor to which I have attached much weight.

Of much more significance is the contention on the part of the plaintiff that the first and second defendants' conduct amounted to acquiescence on their part in the plaintiff's delay. On the question of acquiescence, counsel for these defendants referred the Court to the observations of Kearns J., as he then was, in Desmond v. MGN [2008] IESC 56. In fact, Kearns J. was quoting a passage from the judgment of Fennelly J. in Anglo Irish Beef Processors Ltd. v. Montgomery [2002] 3 I.R. 510, which is to be found at p. 519, in which Fennelly J. stated:

"….. When considering any allegation of delay or acquiescence by the defendants, [the court] will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiffs' claim dismissed.

Ó Dálaigh C.J. said in Dowd v. Kerry County Council [1970] I.R. 27 at p. 41:

'… in weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution …. The adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances it is acted upon by a defendant in the hope that he will 'get by' without having to face the peril of being decreed. Litigation is a two-party operation, and the conduct of both parties should be looked at.'

In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something 'akin to acquiescence' as indicated in the judgment of Henchy J. [in O'Domhnaill v. Merrick [1984] I.R. 151]."

One of the aspects of the conduct of the first and second defendants which the plaintiff pointed to was the fact that they failed to respond positively to the request for voluntary discovery, necessitating the bringing of a motion to compel discovery by the plaintiff. While, as I have indicated, the delay between the rejection of the plaintiff's request and the making of the Master's order must be regarded as the responsibility of the plaintiff, nonetheless, these defendants put the plaintiff to the expense of bringing the motion and they did so in the context that, in the letter rejecting the request for voluntary discovery, they indicated that they wished the matter to proceed. In my view, that approach was akin to acquiescence.

Moreover, the conduct of the first and second defendants following the listing of the action for hearing on 6th February, 2009, which I have outlined earlier, is akin to acquiescence in that they requested that the proceedings be adjourned to the next list to fix dates. That was done and subsequently a new hearing date was assigned for the case. But the defendants did not move to have the proceedings dismissed until roughly three weeks before the new hearing date, having put the plaintiff to further expense in furnishing the disclosure notice.

Having regard to all of the relevant factors, I am of the view that the balance of justice favours the proceedings continuing.

Relief under Order 17, rule 4
On the notice of motion the plaintiff also sought an order pursuant to Order 17, rule 4 and/or Order 15, rule 13 of the Rules of the Superior Courts substituting Irish Life Assurance Plc for the first defendant or, as may be appropriate, adding Irish Life Assurance Plc as a party to the proceedings. The basis on which that order was sought was that on 13th December, 1999 the insurance liabilities of the first defendant (formerly named Prudential Life of Ireland Limited) were transferred to Irish Life Assurance Plc by order of the High Court. A copy of the relevant order has been exhibited, which makes it clear that it was an order pursuant to s. 13 of the Assurance Companies Act 1909 and for the purposes of s. 36 of the Insurance Act 1989. The effective date for the purposes of the order was 31st December, 1999. The order expressly provided that on and from the effective date any legal proceedings then pending against the first defendant in connection with transferred policies should, by virtue of the order, be continued by or against Irish Life Assurance Plc.

Insofar as is necessary, I will make an order substituting Irish Life Assurance Plc for the first defendant.

Orders
There will be an order dismissing the application to have the plaintiff's claim dismissed.

There will also be an order substituting Irish Life Assurance Plc for the first defendant.