Neutral Citation [2015] IEHC 303

THE HIGH COURT

COMMERCIAL

[2012 No. 1540 P]

[2013 No. 127 COM]

BETWEEN

QUINN INSURANCE LIMITED (UNDER ADMINISTRATION)

PLAINTIFF

AND

PRICEWATERHOUSECOOPERS (A FIRM)

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered the 19th day of May, 2015

Introduction

1. The plaintiff is an insurance company. It was put into administration on 15th April, 2010. It has ceased to write new business. To date, the High Court has approved the drawing by the plaintiff of more than €1.2 billion from the Insurance Compensation Fund to meet the deficit between its assets and liabilities.

2. The defendant is a firm of registered auditors. For the years 31st December, 2005, 2006, 2007 and 2008 ("the Material Period") the defendant was the auditor of the plaintiff and reported on the plaintiff's financial statements and separately on the plaintiff's regulatory returns.

3. The plaintiff has sued the defendant for breach of contract and breach of duty in or about its auditing of the plaintiff's books and records in the Material Period and separately in relation to its regulatory returns on the basis that the defendant ought to have known that the relevant financial statements and regulatory returns did not give the reported true and fair view of the state of the plaintiff's affairs for each year of the Material Period. It is common case that this will be an enormous, complex case, involving very difficult issues of fact and law and a potential claim for damages in the order of €800 million. For the purposes of this judgment, the relevant aspect of the plaintiff's claim against the defendant is the allegation that the financial statements materially understated the plaintiff's liability for insurance claims (otherwise known as the plaintiff's "Technical Provisions").

The motion

4. The defendant has brought a motion seeking an order compelling the plaintiff to provide further information in relation to certain aspects of the claim relating to the allegation that the Technical Provisions were materially understated. It seeks three categories of particulars as follows:

(a) Particulars relating to the plaintiff's re-estimation of the alleged under statement;

(b) Particulars relating to the alleged underwriting losses attributed by the plaintiff to the defendant and; and

(c) Particulars relating to the financial consequences of reopened claims.

Technical Provisions

5. As an insurance company, the plaintiff had an obligation to make provision for the future cost of claims in its annual accounts. These are referred to as the Technical Provisions. The future cost of claims is by definition an estimate. The core allegation in this case is that for the Material Period the Technical Provisions were very seriously understated and the plaintiff seeks to hold the defendant responsible for the enormous losses it has suffered as a result of serious under-provisioning for claims.

6. During the Material Period the defendant was engaged by the plaintiff to audit the financial statements prepared by the plaintiff and to audit the statutory forms of the plaintiff's annual return to the Financial Regulator. The financial statements were to include a total for the Technical Provisions that took account of all available information relevant to the estimation of Technical Provisions up to the date on which each set of financial statements was approved by the directors.

7. Mr. Tony Weldon of the defendant explained the exercise of estimating technical provisions of insurance companies in his affidavit of 3rd March, 2015, as follows:-

> *"12 Very simply, an estimate of claims reserves is included in the financial statements and regulatory returns of any insurance company. This estimation of the required claims reserves is an estimate only and can obviously include allowance for thousands of claims, all with various unknown and known variables and all at different stages of progression. Estimating the Technical Provisions is an inherently uncertain exercise, which is heavily dependent on the exercise of professional judgement. The question that arises is whether an estimation falls within a reasonable range and auditing guidance generally emphasises that it is only if the estimate falls outside a reasonable range that a misstatement can be regarded as having arisen.*
>
> *13 The exercise of estimating appropriate claims reserves is particularly complex for what are described as "long-tail"*

insurance claims, which formed a significant proportion of the Plaintiff's outstanding claims. These are insurance claims which do not proceed to final settlement until a length of time beyond the policy year and indeed, potentially years after the expiration of the policy in question…

14 Information regarding the claims incurred with long-tail insurance emerges over time and accordingly there is a high degree of estimation. The nature of the legal process involved in settling claims also means that there can be large changes in the outcome of estimates, such as where the attribution of liability to one side or the other changes. When changes in the external environment are factored in as well, the consequence is that there is a high degree of uncertainty…

16 There are a number of methodologies that can be used by actuaries to estimate claim reserves, such as extrapolation from past claims data for a company, with respect to both paid claims and incurred claims which have not yet been paid. It is also possible to apply a loss-ratio method based on premiums and to combine a number of different methodologies….

17 In each year of the Material Period, the Plaintiff engaged Milliman Advisers Limited ("Milliman"), a highly reputable actuarial firm, to provide an estimate of its Technical Provisions.

18 In general, the most material and complex judgement affecting the annual regulatory returns for a non-life insurer is the adequacy of its booked Technical Provisions. In order to obtain additional confidence in the adequacy of the booked Technical Provisions, a key requirement imposed on authorised non-life insurers is that the adequacy of the booked Technical Provisions is supported by a Statement of Actuarial Opinion ("SAO") signed by an appropriately qualified actuary."

At para. 31 Mr. Weldon explained:-

"Accordingly, the ultimate estimates are dependent on the following:

(1) The appropriateness of the key data inputs;

(2) The selection of appropriate assumptions and actuarial methods to apply to such input data; and

(3) The appropriateness of the conclusions drawn by the actuary from the application of each method and/or the combining of the results of different methods."

8. Thus in each year in the Material Period it was the obligation of the directors of the plaintiff to prepare their estimates of the Technical Provisions. Unusually, the plaintiff did not employ in-house actuaries. It relied upon the expertise of Milliman. The plaintiff therefore produced its estimates for the relevant years in the Material Period with the assistance of Milliman. Milliman relied upon the data furnished by the plaintiff but exercised their own independent professional judgement in assessing the data and selecting the appropriate methodologies to apply in these circumstances.

9. The final overall estimate of Technical Provisions depends upon the actuarial methodologies used, a variety of data sources and inputs, the assumptions applied and the professional judgement of the actuary.

10. Once the plaintiff, with the assistance of Milliman, produced their estimate of the Technical Provisions the defendant was obliged to audit this figure as part of the overall audit of the business of the plaintiff. To that end the defendant itself availed of actuarial expertise, an in-house branch of the defendant, PwC AIMS. However, its role was to audit the financial records of the plaintiff, not to audit the work of Milliman.

11. It is common case that actuaries exercise a considerable degree of professional judgment in calculating the Technical Provisions. The final overall estimate of Technical Provisions will depend upon the actuarial methodologies used, a variety of data sources and inputs, the assumption applied and the professional judgement of the actuary. It is also common case that there may legitimately be a range of results based on the same data, depending on the methodologies used and the individual judgement and professional expertise employed by the actuary conducting the estimate. It is only if the figure estimated for the Technical Provisions materially underestimates and therefore is considerably outside the accepted range that it could be considered to be wrong.

12. The plaintiff in administration was concerned that as the claims materialised there was significant under-provisioning in respect of the claims in the previous years. The administrators instructed Mazars to re-estimate the Technical Provisions for the years 2005 to 2008. They concluded that the original estimates were so far outside of a range of reasonable estimates that they could not have been conducted properly in accordance with the appropriate and relevant professional standards. They concluded that they were materially underestimated.

13. The plaintiff's case with regard to the defendant's alleged failures in respect of the Technical Provisions is first, there is an allegation that the Technical Provisions as estimated by Milliman were seriously underestimated. Secondly, it alleges that the defendant could and should in the course of its audit have realised that Milliman's estimates of the Technical Provisions were seriously understated.

14. In addressing the question as to whether the estimates made by Milliman were wrong (in the sense of lying outside the reasonable range of estimates which could result from different assumptions made by different actuaries), Mazars did not attempt to adjust Milliman's estimates by reference to particular factors which Milliman and/or the plaintiff (and/or the defendant in auditing the provisions) did or did not take into account or to which they gave insufficient weight. Instead, Mazars took the plaintiff's underlying data that was available to the plaintiff and Milliman during the Material Period and performed their own estimation of what they considered the Technical Provisions should have been, taking account of a list of relevant factors in the way that Mazars say a competent actuary should have done. Even allowing for the fact that there is a range of possible estimates that might legitimately be made by such a process, they say that the estimates made by Milliman lie outside any such reasonable range of estimates and they say that this leads to the conclusion that the Milliman estimates were seriously understated. However, it is not the case of the plaintiff that it is pointing to a specific adjustment to be made to the Milliman estimates by reference to a specific factor or still less to quantify what portion of the Milliman estimates have been miscalculated by reference to any one specific relevant factor. This was not an exercise that Mazars has done. They did not seek to de-construct the methodology or the calculations made by Milliman by reference to any individual relevant factor. They did identify an extensive list of what they say were all of the relevant factors that ought to be taken into account in properly estimating the plaintiff's Technical Provisions for the Material Period. In determining the

best estimate Mazars did not attribute a value or weight to each or indeed any relevant factor. They addressed the factors in the round in determining the Technical Provisions necessary rather than on an item by item basis.

Underwriting losses
15. Part of the plaintiff's case is that if the defendant had identified the problems with the Technical Provisions, then those provisions would of necessity have been increased significantly. This would increase the liabilities on the plaintiff's balance sheet. This would have had two effects. Their reserves would have to be commensurately greater. This means that the plaintiff would not have been in a position to make gifts to related companies in the Material Period. In addition, the plaintiff argues that had appropriate provisions been made it would have been apparent to the plaintiff that its business was in a more parlous situation than it in fact believed. It argues that certain actions would have been taken by the directors of the plaintiff and/or the Financial Regulator if the issue in relation to the Technical Provisions had been brought to their attention by the defendant at the end of each financial year from 2005 ending with 2008.

16. The plaintiff states that had the issue been identified at the end of 2005 it would not have considered it appropriate or would not have been in a position to make gifts up to €110 million of the total gifts of €175 million that the plaintiff made in 2006 to companies related to the Quinn Group. It is said that in addition the plaintiff would have adjusted its pricing model to decrease the amount of loss making business written by it in the market from 2007 to 2010 inclusive. The plaintiff's case is that it would thereby have avoided substantial underwriting loses which at present it estimates at approximately €500 million.

17. It similarly argues that if the defendant had identified the issue with the Technical Provisions at the end of the succeeding years 2006, 2007 and 2008 there would have been different consequences but based upon the same premise: gifts and loans could not or would not have been made and that the pricing model would have been adjusted with consequential avoidance of underwriting losses. In respect of the year end 2006, gifts of €210 million could not have been made in its financial years 2007 and 2008. It could not have made loans to Barlo in its financial year 2008 and would have thereby avoided bad debts of €43 million written off as a result of the loans. The plaintiff would have adjusted its pricing model to decrease the amount of loss making business written by it in the market between 2008 to 2010. This would have avoided losses of approximately €440 million.

18. It is argued that had the issue been identified at the end of 2007 the plaintiff would have exited the Great Britain/Northern Ireland ("GB/NI") business. As this was a significant loss making area, this strategy would have generated substantial savings. It is also argued that it would have increased its rates on loss making lines of business and avoided substantial underwriting losses on those lines of business between 2009 and 2010. Alternatively it would have exited GB/NI business and generated substantial cost savings as a result of closing offices and reducing staff overheads. It would also have increased its rates on loss-making lines of business and avoided substantial underwriting losses on business written by it in 2010. It also says it would not have made the gift of €75 million that it made in 2008 and it would not have made loans to Barlo in the financial year 2008 and would thus have avoided bad debts of €43 million written off as a result of these loans. It says that the net effect of this would have resulted in avoiding losses of approximately €432 million.

19. Had the Technical Provisions issue been raised at the year end of the financial year 2008, the plaintiff pleads that the plaintiff would have been placed into administration and would have avoided underwriting losses on business written by it in 2010. Alternatively it would have exited GB/NI business and generated substantial cost savings as a result of closing offices and reducing staff overheads. It would also have increased its rates on loss-making lines of business and avoided substantial underwriting losses on business written by it in 2010. These losses amount to approximately €250 million.

20. In calculating its losses claimed in these proceedings, the plaintiff has stated that it is not seeking to recover from the defendant all of the underwriting losses it incurred over all of the years. Instead, it is seeking to recover all of the underwriting losses in respect of the particular years which losses the plaintiff says would have been avoided if the identified steps had been taken in the years in question.

Reopened claims
21. The plaintiff has pleaded that a large number of claims were reopened in each accident year up to 2008. It is said that this should have been identified as presenting a real risk that the underlying claims model used by the plaintiff was not working effectively. The sheer number of reopened files raised significant issues about the reliability of the approach to claims and claims reserves. Further, the number was far greater than the industry norm which should have alerted the defendant to the frailty of the data. It would affect the professional judgment employed in assessing the estimates. It is said that the scale of the reopened claims during the material period required an appropriate adjustment which would have required a material increase to the level of claims reserves required and it is said the defendant negligently failed to identify this issue. The plaintiff has made clear that its case is based upon the fact of the number of files being reopened and not the reasons for reopening of the files. The point is relevant to the issue whether or not the defendant was negligent in auditing the Technical Provisions during the Material Period; it is not a separate claim. No particular losses are ascribed to this alleged problem, though obviously the fact that the plaintiff subsequently incurred losses as a result of reopened files is highly relevant to the overall case advanced by the plaintiff.

Legal submissions
22. The defendant is seeking further and better particulars of the plaintiff's claim as set out in the statement of claim. The defendant is of course entitled to particulars of the plaintiff's case. The parties are largely in agreement in relation to the relevant principles to be applied in determining this issue. There is disagreement as to whether the defendant is entitled to the particulars identified in the schedule to the notice of motion.

23. Order 19, rule 3 of the Rules of the Superior Courts provides:-

> *"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved…"*

24. Order 19, rule 7(1) provides as follows:-

> *"A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered, upon such terms as to costs and otherwise, as may be just.*

25. The defendant emphasised the fact that the Court enjoys a discretion in determining whether or not to order particulars and laid particular emphasis on procedural fairness. Counsel referred to the well known decision of the Supreme Court in *Mahon v. Celbridge Spinning Co. Ltd.* [1967] I.R. 1 at p.3:-

> *"The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline the case he will have to meet at the trial…."*

The defendant cited Keane J. in *McGee v. O'Reilly* [1996] 2 I.R. 229 at p.234:-

> *"In our system of civil litigation, the case is ultimately decided having regard to the oral evidence adduced at the trial. The machinery of pleadings and particulars, while of critical importance in ensuring that the parties know the case that is being advanced against them and that matters extraneous to the issues as thus defined will not be introduced at the trial, is not a substitute for the oral evidence of witnesses and their cross-examination before the trial judge."*

26. The defendant relied upon the observations of Clarke J. in *Moorview Development Ltd. v. First Active* [2005] IEHC 329 at para. 7.2 as follows:-

> *"It should be noted that the facts that a party is required to be told, as part of the pleading process, are not the facts as they may objectively be, but the facts as his opponent alleges them to be. Therefore an assertion that the other party well knows the relevant fact will rarely be a sufficient answer to what would otherwise be a proper request for particulars. A requesting party may well have its own view about what the truth in respect of a relevant factual issue is but that does not absolve his opponent, where it is part of his case, from setting out in reasonable detail the relevant facts which he alleges."*

27. In *Playboy Enterprises International Incorporated v. Entertainment Media Network Works Limited* [2015] IEHC 102 at para. 13 Baker J. accepted that the test to be applied when deciding whether to order further and better particulars was whether the particular arises from the pleading and whether in general the furnishing of further and better particulars is necessary to ensure fairness between the parties.

28. Reliance was placed on the case of *Cooney v. Browne* [1985] I.R. 185 where Henchy J. in the Supreme Court at p.191 stated as follows:-

> *"Where the particulars are sought for the purpose of the hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing. "The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise": Spedding v. Fitzpatrick (1888) 38 Ch. D. 410, at p. 413. Thus, where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial."*

29. The defendant also argued that the particulars sought were necessary in order to bring greater precision to the issues between the parties so that the discovery ultimately sought in this enormous and complex case might be reduced. The Court was referred to the decision of Clarke J. in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland)* [2010] IEHC 19. At para. 4.1 he stated:-

> *"It has been suggested in some quarters that the fact that, in the Commercial Court, parties are required, well prior to trial, to exchange statements setting out a précis of the evidence which any witness, whether of fact or expert, is due to give, coupled with the requirement to exchange written submissions on the legal issues which are likely to arise at the hearing, significantly reduces the need for a very high level of particularity at the pleading stage. There is, undoubtedly, some truth in that proposition. One point of pleadings (and a very important aspect of same in cases where there is not likely to be a pre-trial exchange of witness statements and submissions) is to define with some precision the questions which are likely to arise at the trial so that the parties can not be prejudiced by being taken by surprise. Clearly in circumstances where witness statements and written submissions have to be exchanged, the extent to which a party could reasonably be taken by surprise at trial is significantly reduced. However, there is another important function which pleadings play, particularly in cases where significant discovery is likely to follow."*

30. He went on in paragraph 4.3 to observe the fact that:-

> *"…overly broad discovery carries with it the risk that in virtually every case, the costs of the proceedings will be increased for no gain in terms of the likely justice in the vast majority of cases, so that whatever party has to bear the burden of paying for that discovery (normally the loosing party), will bear a larger burden than might otherwise have been the case. The injustice, to at least one party in virtually every case, that would arise in those circumstances is obvious."*

31. At para. 4.6 he pointed out that the Court is obliged to engage in a balancing act:-

> *"To enable a party to move to discovery without having adequately pleaded its case is to run the risk of a significant injustice by virtue of that party being allowed to trawl through the other side's often confidential information without real justification. On the other hand, to require a party to plead at a level of detail (in advance of discovery or the like) which it could not reasonably obtain other than by discovery or other procedural steps can lead to an obvious injustice. A balance again needs to be struck."*

32. The defendant also urged that these particulars sought should be provided on the basis of the complexity of the case. It relied upon the decision of Baker J. in the *Playboy* case cited above where she stated at para. 14:-

> *"Further, certain other factors must be taken into account, and litigation surrounding alleged breach of contract or infringement of confidentiality is litigation which is complex both in law and in fact, in the legal issues and in the factual nexus that can give rise to either a claim under such statutory headings or a defence to such claims. It is in the interests of the parties, as well as appropriate in the interest of justice generally, and the efficient use of court time and resources that the issues in complex litigation be identified, and if necessary be reduced prior to trial, or indeed prior to the making by the parties of discovery, especially when one considers in the modern age of computers, discovery can be so voluminous as to require an army of lawyers and advisors to analyse."*

33. To summarise the principles arising from these cases; the particulars sought must arise out of the pleadings and the party is entitled to know its opponent's case in broad outline. The party is entitled to know the facts as the opponent alleges them to be. The purpose of the pleadings is to ensure that a party is not taken by surprise at the trial and pleadings are to define the issues between the parties. A party is not entitled to the evidence which its opponent intends to lead. The Court should also have regard to whether or not the particulars sought are necessary to ensure fairness between the parties especially if the case is complex either legally, factually or both. Finally, the Court may also take into account whether the particulars, if granted, might reduce the scope of discovery in the case.

34. In the context of litigation in the Commercial Court, the importance of the role of pleadings in ensuring that a party will not be taken by surprise at trial will necessarily be reduced by reason of the fact that the parties will be obliged to exchange witness statements and written submissions and to agree books of core documents and to engage in other mandated pre-trial procedures before the commencement of the trial. While this does not alter the obligation of a party fairly to particularise its case, it has a bearing in the Court's assessment as to whether or not a party is likely to be taken by surprise at the trial and whether the requirements of procedural fairness require that the particulars sought should be directed to be provided.

35. The final point raised by the defendant to be considered is the question as to whether or not granting the particulars sought in this case could reduce the burden of discovery which will undoubtedly be enormous in this trial. I endorse the views of Clarke J. in *Thema*. However, the affidavits in this case do not really assist in assessing the extent to which the granting of any particular request for particulars would result in the reduction of any particular category of discovery documents. This is not to be taken as a criticism of the affidavits filed on behalf of the defendant in this motion. In the circumstances of this case it would have been very difficult to point out precisely how the potential scope of discovery could be reduced by the granting of particular requests for particulars. I merely point this out to explain why in fact I have been unable to take into account the possible impact of directing or not directing replies to the particulars sought on the future scope of discovery to be made in this case in deciding whether or not to grant the order requested.

36. In its submissions the plaintiff also relied upon the Rules of the Superior Courts and the decisions in *Mahon v. Celbridge Spinning Co. Ltd., McGee v. O'Reilly and Cooney v. Browne*. The plaintiff emphasised that a party is entitled to know the case it has to meet in broad outline or to know the essence of the case not the evidence its opponent intends to adduce (though, of course, in the Commercial Court the party will be furnished with its opponent's witness statements which generally are admitted as evidence in chief at the trial of the action). Reliance was placed on the judgment of Dunne J. in *Quinn Insurance Limited & Ors v. Tribune Newspapers plc and Ors* [2009] IEHC 229 at p.9 where she commented on the decision of *Mahon v. Celbridge Spinning Co. Ltd*. as follows:-

> *"There is no doubt whatsoever that a party is entitled to know the nature of the case being made against them. However, the role of particulars is not to require a party to furnish detailed particulars of specific aspects of the case. It is sufficient that the issues between the parties should be adequately defined and that the parties should know in broad outline what is going to be said at the trial of the action."*

37. The plaintiff also referred to the decision of Hogan J. in *Burke v. Associated Newspapers (Ireland) Ltd.* [2010] IEHC 477 at para. 17 as follows:-

> *"In general, therefore, while a litigant is entitled to know from the pleadings the nature of the case he has to meet, he is not entitled to learn in advance the evidence which his opponent will lead in support of that contention. The distinction between what is a matter for pleadings on the one hand and what is a matter for evidence on the other is often a fine one and it is also one which is sometimes difficult to apply consistently in practice. Nevertheless, it seems clear that a Plaintiff (or a Defendant, as the case may be) is not entitled to further particulars once the essence of the case which he has to meet is clear from the pleadings."*

38. The plaintiff placed some emphasis upon the impact of pre-trial procedures involving the exchange of witness statements on the need for further particulars in the context of seeking to avoid a trial by ambush. The plaintiff referred to the decision of *Lord Woolf Mr in McPhilemy v. Times Newspapers Ltd.* [1999] 3 All ER 775 at pp. 792-3:-

> *"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader… No more than a concise statement of those facts is required.*
>
> *As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than provide clarification. In addition, after disclosure and the exchange of witness statements, pleadings frequently become of only historic interest."*

39. The plaintiff summarised the following as being the relevant applicable principles:-

> (a) First, that neither particulars nor pleadings can be a substitution for the trial, with oral evidence and cross examination before a judge;
>
> (b) Secondly, the particulars (as for pleadings, of which they form part) are required only to give the opponent the "broad outline" or "essence" of the case he must meet;
>
> (c) Thirdly, in an order compelling a party to reply to a notice for particulars will be refused where the Court is satisfied that the parties seeking the particulars knows the broad outline of the case that it will have to meet.
>
> (d) Fourthly, that a litigant is not entitled to particulars of his opponent's evidence.
>
> (e) Fifthly, that any request for particulars must derive from the opponent's pleaded case;
>
> (f) Sixthly, the question of a party being taken by surprise is of reduced significance in proceedings involving witness statements; and

(g) Seventhly, in the interests of good case management, the Court should be vigilant in policing excessive and burdensome pre-trial procedures.

Summary of legal principles

40. I accept that the following principles are relevant to the decision I have to make in respect of the defendant's motion in this case. The defendant is entitled to particulars of the plaintiff's case as the plaintiff wishes to advance it. The defendant is entitled to know the facts as the plaintiff alleges them to be. If the particular sought does not arise from the pleading then the question is, is the furnishing of the particular necessary to ensure fairness between the parties? If the particulars are not necessary or desirable for the purposes of a fair hearing then they should not be ordered. In complex litigation the requirement for precision is of particular importance. Nonetheless a party is only entitled to know the broad outline of its opponent's case and the issues in the case; it is not entitled to know the evidence its opponent intends to adduce and it is not entitled to seek this by way of particulars.

41. It is thus necessary to assess the case the plaintiff wishes to advance. It is then necessary to assess whether or not it has been pleaded so that the defendant can understand the case it has to meet and understand the issues in the case. The plaintiff says that it has given very extensive particulars of its case and that the particulars now sought ought to be refused. The defendant is entitled to know the plaintiff's case but, it is not entitled to particulars of facts or information which do not form part of the plaintiff's case even if the information sought will assist its defence. They are not particulars of the claim. While frequently there will be no distinction between these two points, nonetheless it is important to be clear about the purpose of providing further and better particulars and therefore the scope of the particulars to which any party is entitled.

Discussion

Technical Provisions

42. The particulars sought in relation to the calculation of the Technical Provisions fall broadly into two categories. In simple terms, the defendant needs to know why, according to the plaintiff, the estimates as calculated by the plaintiff and Milliman for the relevant years in the Material Period were wrong and materially underestimated the Technical Provisions. Secondly, it seeks to know the details of the Mazars re-estimation of the Technical Provisions so that it can understand how Mazars approached the exercise, understand the data used, the methodology employed and the assumptions and professional judgements which the plaintiff will say at trial were the appropriate ones in all the circumstances. The plaintiff has objected to providing the particulars on the basis that the defendant understands and knows the case it has to meet and that the particulars sought amount to an inappropriate interrogation of evidence including expert evidence which will be adduced at the trial of the action. Its counsel submits that the statement of claim and the particulars delivered set out very fully the plaintiff's case against the defendant.

43. It can fairly be said that the pleadings set out the case to be advanced against the defendant in relation to its alleged wrongdoing. However it is not clear from either the pleadings or the particulars furnished to date precisely what the plaintiff says was wrong with the Technical Provisions as calculated by the plaintiff and Milliman in the Material Period. It is common case that the plaintiff will first have to establish that these estimates were materially underestimated. In order for the defendant fairly to meet this case, I am of the opinion that it needs particulars of why the plaintiff alleges the Technical Provisions were in fact materially underestimated.

44. On the other hand, I do not believe that the defendant is entitled to particulars of how Mazars conducted the re-estimate of the Technical Provisions in preparation for this case. The plaintiff's case is not advanced upon a direct comparison between the Mazars exercise and the exercise previously carried out by the plaintiff and Milliman. It follows that the requested particulars do not in fact arise out of the plaintiff's claim and therefore do not relate to the issues in the case. Clearly they relate to the evidence which the plaintiff will lead at trial. However, it is well established and the authorities are clear that a party is not entitled to its opponent's evidence by way of particulars of the claim or defence.

45. Furthermore, the plaintiff says that it has not in fact conducted the exercise of comparing the differences between the Mazars calculation with the Milliman calculation in the manner contended for by the defendant. It says it simply does not have the information in the format requested by the defendant in its notice for particulars. In order to answer the questions actually posed by the defendant in relation to these matters, it would have to carry out a further analysis and calculations which it has not done and which do not form part of its case against the defendant. This is a further reason for refusing these requests for particulars.

46. Thirdly, the parties are agreed that there is a range of possible estimates that might legitimately be made in calculating the Technical Provisions. Therefore, while the Mazars re-estimation is relevant to the plaintiff's allegation that the original estimation of the reserves was wrong it is not the plaintiff's case that the Mazars re-estimate of the Technical Provisions is the only correct estimate of the provisions. It will be perfectly possible for another actuary to re-estimate the reserves for the Material Period, taking account of the errors alleged by the plaintiff to have arisen, and bona fide to arrive at different values and ultimately at a different estimate for the Technical Provisions. Provided appropriate account is taken of the relevant factors and there is appropriate professional expertise and judgement employed in preparing the estimates, it could legitimately be argued that this further re-estimation is as valid as that conducted by Mazars. It follows that the exercise carried out by Mazars is truly a matter of evidence which ultimately will be subject of expert reports and cross-examination rather than particulars of the plaintiff's claim against the defendant.

47. Accordingly I direct of the plaintiff to reply to Rejoinders 11(3) II; V; VIII; and XI. The balance of the particulars sought are Rejoinder 11(3) III; VI; IX; XII; and XIII (A-G). With the exception of XIII F and G, each of these particulars relates to the re-estimation of the Technical Provisions by Mazars rather than identifying the alleged errors in the estimates actually carried out during the Material Period, or they seek to identify the differences between the original estimation and the re-estimation. The question of comparing the calculation with the exercise carried out by Mazars does not arise out of the plaintiff's claim and therefore is not in the circumstances an appropriate matter for particulars. Insofar as they seek to identify standards or contemporaneous information and data that Mazars relied upon when re-estimating the provisions, when identifying the errors alleged to have occurred in the original exercise, particulars of available data or information which was not considered or to which insufficient weight was paid will be identified as will the actuarial standards insofar as they were not or not appropriately applied. I therefore refuse these particulars with the exception of XIII F and G which I allow. These are directed to the alleged errors (by omission) in the original estimates.

Underwriting Losses

48. In relation to the underwriting losses which the plaintiff seeks to recover from the defendant, there was a small measure of agreement. The plaintiff says that some of these losses will crystallise in the near future. The final sale price for the sale of the

plaintiff's business in the Republic of Ireland to Liberty Insurance will be fixed towards the end of 2015 and the Joint Administrators anticipate that they will be seeking the approval of the President of the High Court in June, 2015 for the sale of the plaintiff's UK and European legacy liabilities to Catalina Ireland. Once each of these events occurs, the plaintiff says the underwriting losses will have fully crystallised and then the plaintiff will be in a position to furnish specific figures. These as the particulars sought in the schedule to the notice of motion at II- Rejoinder 21(12) II A-C (though there may be an issue in relation to foreign exchange losses).

49. The plaintiff has provided three separate replies to the particulars raised by the defendant relating to the underwriting and other losses that the plaintiff says occurred by reason of the failure of the defendant timeously to notify it that the Technical Provisions in each relevant year in the Material Period had been understated. It replied on the 14th March, 2014, the 24th June, 2014, and the 22nd October, 2014. The plaintiff's case is set out above in paras. 15-20. The replies of the 22nd October, 2014, largely flesh out and supersede the replies of the 14th March, 2014. It is therefore unnecessary to direct that particulars be provided in respect of the replies of the 14th March, 2014 as the plaintiff's case is elaborated upon in October, 2014. I therefore decline to direct replies to particulars in Rejoinder 21(12) V in order to avoid duplication.

50. The plaintiff has pleaded that if the defendant had brought the under-reserving to the attention of the directors and/or Financial Regulator that they either would not have considered it appropriate or would not have been in a position to make gifts totalling €110 million in the financial year 2006, €210 million in the financial years 2007 and 2008 and €75 million in the year 2008. It does so on the basis that the reserves would have to be increased to meet the true provision that ought to have been made for the Technical Provisions. It is not a question of reconsidering any particular gift so much as the quantum of the gifts made in each particular year. Therefore it is not necessary to provide the particulars sought in relation to the precise gifts which it is alleged the plaintiff would have refrained from making in the relevant years in the Material Period. The defendant has sufficient information to understand the issues in the case and the further particulars are not required. I therefore refuse the particulars sought at: VI; VIII; XII A; XIII A; XIV A; and XV A.

51. The defendant argues that it needs to know how the steps described generically in the replies to particulars by the plaintiff could in reality have resulted in the savings alleged by the plaintiff or indeed any savings. It argues that it is seriously prejudiced in meeting the losses claimed by the plaintiff where it is simply said that the plaintiff would have adjusted its pricing model to decrease the amount of loss making business or it would have increased its rates on loss making lines of business or it would have exited the GB/NI business and generated substantial business costs savings. The plaintiff argues that it has explained its position to the defendant in general terms which it says is sufficient for the defendant to understand the case been made by the plaintiff. It says that its case on causation is a relatively simply one. *"It postulates that, absent the Defendant's omissions, the Plaintiff would not have been permitted to write any further loss-making business; whether because it was entirely prevented from writing further business, or because it was prevented from trading in certain business lines or territories."*

52. In my opinion the defendant does not have sufficient information to understand the issues in relation to causation as set out in the replies to particulars of the 22nd October, 2014, in relation to this aspect of the case. It is entitled to know how the plaintiff says it would have adjusted its pricing model, how it would have increased its rates on loss making lines, what were those loss making lines, what precisely would have been the effect of exiting the GB/NI in either 2006, 2007 or 2008. I therefore direct that the plaintiff furnish replies to Rejoinders 21(12) VII A, B & D; IX A, B & D; X A, C, D,E & F; XI A, C, D, E & F; XV B (this is allowed as it is for an earlier year); XVI A; and XVII A. The following requests for particulars appeared to replicate these which I have directed the plaintiff to reply to, therefore to avoid unnecessary duplication and confusion, I am not directing replies to the following: XII B & C; XIII B, C & F; XIV B & C; XV D, E & F; XVI C, D & E; and XVII C, D & E.

53. Given that I have directed that the plaintiff is to provide particulars of how it alleges it would have adjusted its pricing model, increased its rates, and would have exited the GB/NI market, in some detail, I do not believe that it is appropriate to direct the plaintiff to provide particulars of the calculations set out in its replies to particulars. I believe that the particulars which I have directed to be given are sufficient to enable the defendant to understand the issues in the case in which it has to answer. I therefore refuse the particulars sought at Rejoinder 21(12) VII C; IX C; X B & H; XI B & H; XII D & E; XIII D & E; XIV D & E; XV C & I; XVI B & H; and XVII B & H.

54. I accept the plaintiff's submission that the following request for particulars are matters for evidence and not proper matters for particulars or have substantially been covered by the particulars that I have ordered are to be provided: VII E; IX E; X G; XI G; XII F; XIII F & G; XIV F & G; XV G & H; XVI F & G; and XVII F & G. I make no order in respect of these requested particulars.

Reopened claims

55. On the 15th November, 2013, the defendant asked the plaintiff to specify the number of "reopened" claims Quinn Insurance Ltd. ("QIL") had for each year of the time period in which it is contended QIL's level of "reopened" claims gave rise to an internal control problem. Initially this information was not provided but on the 14th March, 2014, the plaintiff states that the number of reopened claim files in the years comprised in the Material Period were 2005: 1,282; 2006: 5,456; 2007: 22,051; and 2008: 31,350. The plaintiff's case was that it was the extraordinary increase in the number of reopened claim files which gave cause for concern and it was not relying on the reason why the files were being reopened.

56. The defendant sought the following further and better particulars.

> **(I) For each financial year, in tabular format if possible, please provide a breakdown of the number and value (in terms of claims cost) of reopened files in each accident year up to 2008, and further categorised by principal reason that caused the files to be reopened.**
> **(II) For each financial year, in tabular format if possible, please provide details of the value of the claims cost deterioration relating to reopened claims files in each accident year up to 2008 arising in financial years 2009 and later.**
> **(III) Please particularise the extent to which the Plaintiff alleges that:**
>
> **A. files reopened in 2006, 2007 and 2008 and had been closed in 2005 or prior years and were reopened because of information that was available at the time of the Defendant's audit of the Plaintiff's 2005 financial statements.**
>
> **B. files reopened in 2007 and 2008 had been closed in 2006 or prior years and were reopened because of information that was available at the time of the Defendant's audit of the Plaintiff's 2006 financial statements.**
>
> **C. files reopened in 2008 had been closed in 2007 or prior years and were reopened because of information that was available at the time of the Defendant's audit of the Plaintiff's 2007 financial statements.**

(IV) Please explain why the information provided a response to III above was not made available by the Plaintiff to the Defendant and/or to Milliman during the Defendant's audits for the Material Period.

57. As stated above, the defendant is entitled to particulars of the case advanced by the plaintiff. It is not entitled to seek information by way of particulars of matters which it requires for its defence if it does not relate to the case it has to answer. These particulars do not relate to the plaintiff's case in relation to reopened claims. The plaintiff's case is not based upon either the value of the reopened claims or the reason that the files have been reopened. It has not checked each of the approximately 60,000 reopened files to ascertain the reason the individual files were reopened or the value of the files or the breakdown of the files by reference to each class of business within each geographical region. The defendant is seeking information by way of a notice for particulars of matters which the plaintiff simply does not have because it has not carried out the relevant analysis as it forms no part of its case. Rejoinder 97(1)I is not a proper matter for particulars as it does not arise out of the plaintiff's claim. Furthermore, in order to provide the particulars sought the plaintiff would have to carry out an extremely onerous exercise which is not part of its case. This clearly would be inappropriate and unfair to the plaintiff. The value of the claims cost deterioration relating to reopened claimed files in each action year up to 2008 is not directly part of the plaintiff's claim and therefore the particular II is not a proper matter for particulars. Rejoinder 97(1) III A-C are related to the reasons for the reopening of the closed files and therefore are not a matter for particulars. I accept that the plaintiff's was correct in refusing Rejoinder 97(1) IV as that likewise was not a matter for particulars and was based on a premise not advanced by the plaintiff. I therefore refuse these particulars.

58. The final request is Rejoinder 135 I A where the defendant seeks a breakdown of the number of plaintiff's reopened files by reference to each financial year and by reference to each class of business within each geographical region. The defendant has not clarified why this breakdown is required and it does not arise out of the case pleaded by the plaintiff. I refuse this also.

Conclusion

59. I direct the plaintiff to reply to the following particulars identified as Rejoinders in the schedule to the notice of motion: 11(3) II; V; VIII; XI; XIII F& G; 21(12) II A-C; VII A, B & D; IX A, B & D; X A, C, D, E, & F; XI A, C, D, E & F; XV B; XVI A; and XVII A. I refuse the balance of the particulars sought. I will hear the parties in relation to the time to be allowed for compliance with this order.