Neutral Citation: [2017] IEHC 566

THE HIGH COURT

[2015 No. 7590 P]

BETWEEN

EILEEN RYAN

PLAINTIFF

AND

BRIDGET LEONARD AND DENIS LEONARD

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 5th day of October, 2017.

1. This judgment is given in the trial of a preliminary issue directed to be tried by Twomey J. on 11th July, 2016, namely whether the claim of the plaintiff against the defendants has been the subject of prior accord and satisfaction.

2. The plaintiff was involved a road traffic accident on 5th June, 2013 as a result of which she claims to have suffered personal injuries, loss, damage and expense. Liability was at no time in issue in regard to her claim against the defendants.

3. The plaintiff issued a personal injuries summons on 21st September, 2015, claiming damages for personal injuries, loss and damage arising from the alleged negligence and breach of duty of the defendants, and each of them, in and about the driving of the motor vehicle which collided with the vehicle which she was driving. The defence pleaded by way of preliminary objection that the claim had been the subject of a prior accord and satisfaction arising from a settlement said to have been made between the plaintiff and a representative of AXA Insurance Limited ("AXA"), the insurer of the defendants, on 19th June, 2013, fourteen days after the accident, by which the plaintiff accepted the sum of €4,000 in full compromise of her claim for damages for personal injuries and special damages. The sum of €4,000 was broken down as to €3,500 thereof in respect of general damages and €500 in respect of out of pocket expenses. The cost of repairing the damage to the plaintiff's motor vehicle was dealt with separately and did not become an issue in these proceedings.

4. The preliminary issue came on for hearing before me grounded on affidavit and the basic facts are not in contention.

Sequence of events leading to alleged accord and satisfaction

5. The affidavit of Joseph Fitzpatrick, a partner in the firm of solicitors acting for the defendants, sworn on 12th January, 2016 shows the sequence of events leading to the payment to the plaintiff by or through AXA.

6. Immediately after the accident, the plaintiff contacted AXA, probably to deal with her car damage and to make arrangements for the repair of the vehicle, but the first memo of any communication with her is an AXA file note dated 6th June, 2013, the day after the accident, which records a phone conversation with the plaintiff in which she expressed herself "annoyed" that she had not received a call from AXA and that she was anxious that arrangements be made to repair her car. The memo records that the plaintiff then went on to say that she had been to hospital, that an X-ray had shown no fractures, that she felt "very sore", had been given a prescription for painkilling medication by her general practitioner and had been certified unfit for work for a week. She said she intended going back to her doctor when the week was over. The writer then went on to record the following:

> "I went through a cpc letter with her and told her we would take care of her out of pocket expenses and l.o.e. if she has any. She agreed that I am to call her on Tuesday and see how she is and if she wants we can have someone call out to her."

7. The reference to "the cpc" is to the Central Bank's Consumer Protection Code ("the Code"), and to "l.o.e" to loss of earnings.

8. The next file memo is dated 11th June, 2013, and also records an incoming call from the plaintiff in which it is recorded that "she said still has a lot of pain radiating down her back" and was due to return to her doctor on Thursday, 13th June. It is recorded that the plaintiff acknowledged she had received a letter from AXA that morning and that she "would be happy" if the AXA representative called her again on Thursday afternoon, after she had visited her doctor.

9. The next recorded phone call was on 13th June, 2013, which records an outgoing call from AXA. The plaintiff had been back to her doctor and had been certified as still unable to work for another week. It is recorded that she said she was "still feeling sore on her back and neck but said she feels some improvement". The last sentence of that file note is important and reads as follows:

> "I mentioned to her if would be ok if we had someone call her to see her to discuss her injuries and she said that was fine."

10. The next day, 14th June, 2013 a representative of AXA, Robert McMahon, called to the home of the plaintiff. The contemporaneous, or near contemporaneous, memorandum of that meeting describes the plaintiff as complaining of a soft tissue injury to her neck and of pain radiating into her shoulder blades, and that she remained under the care of her general practitioner who had prescribed anti-inflammatory medication which she continued to take. She said she had "improved a little", but had not yet had physiotherapy as her doctor considered it to be too early to do so, and that she was due back to see her doctor the following week and "would consider matters after she had spoken to him". At that meeting, it seems the plaintiff advised that she might let matters rest for a few weeks to see how her injury progressed.

11. Four days later on 18th June, 2013, the plaintiff telephoned Mr. McMahon and said that she would revert to him after meeting her doctor the following week, and that she was "a little improved" and hoping to return to work if her doctor permitted.

12. The compromise agreement was made in a telephone conversation initiated by the plaintiff the following day, 19th June, 2013. The contemporaneous note records that she indicated that she wanted to settle the matter although she was still off work and due to return to her doctor the following day. She said she felt well enough to return to work and a discussion was had regarding likely out of pocket expenses, doctors' bills and other special damages. The figure of €4,000 was offered as an "all-in" figure to include special damages to date and into the future. The plaintiff was advised that she was entitled to the benefit of a "cooling off" period of

ten days but said she was happy to waive this and to settle the matter immediately.

13. This agreed amount was then paid to the plaintiff.

14. The plaintiff in her replying affidavit, sworn on 22nd February, 2016, says she is now "very dissatisfied" with the sum received in purported settlement of the claim and that she remains symptomatic.

15. The plaintiff avers that at the time she entered into the agreement to compromise she had "no prior knowledge of the value of personal injuries in terms of compensation" and that she learnt of what she calls the "true value" of her claim when she attended her solicitor to discuss a second accident on 8th October, 2014, in which she suffered related injuries and in respect of which separate proceedings for damages for personal injuries have been commenced, and in which liability is not in issue. AXA also insures the defendant in that claim.

The relevant facts regarding the value of the compromise

16. Following the road traffic accident on 8th October, 2014, the plaintiff suffered an injury to a lower disc which required surgery. She has remained symptomatic and suffers from pain in her lower back with radicular symptoms in the legs. A number of MRI scans have been performed. The scan on 1st March, 2014, before the second accident, showed degenerative changes and a centrolateral disc protrusion on the right. This had reduced by 3rd November, 2014, but the scan on that date, close to the second accident, showed a new centrolateral protrusion to the left at L4/5. A scan taken in January, 2017 showed the L5/S1 protrusion to have increased again. The plaintiff makes the argument that the fact her lumbar spine injury had improved somewhat by the time of the second accident suggests that the disc condition was traumatic in origin.

17. It is the case that the plaintiff has objective clinical verifiable signs of low back injury, and while it is not my function in this case to take a view with regard to the link between the injury in the first and second accidents, I can fairly extrapolate that the figure of €4,000 agreed to be paid to the plaintiff on foot of the compromise for damages for personal injuries arising from the first accident does not reflect the value of her claim in the circumstances. She suffered injury to her neck and back, was removed from the locus by ambulance to hospital, was symptomatic at the time of the compromise negotiations, was still under the care of her general practitioner and taking prescribed analgesic medication. It is common case that the second accident exacerbated the injury or pre-existing condition, and as AXA also indemnifies the defendant in regard to the claim in the second accident, the extent of the causative connection will undoubtedly be a matter of some significance at trial and in regard to which both parties will argue for a different conclusion.

18. For the purpose of the present application, I consider that the compensation figure of €4,000 paid to the plaintiff in respect of the injuries incurred in the first accident did not represent the value of the claim, and indeed, fell far short of its value. However, in the light of the correct approach identified in the authorities, the inadequacy of the figure is not a factor that could lead me to the view that the compromise was not validly made. I turn now to examine the arguments from contract law.

The arguments from the law of contract

19. The defendants argue that the proceedings have been compromised and accordingly the plaintiff may not as a matter of law proceed with her action. The basic proposition as explained in *Plumley v. Horrell* (1869) 20 L.T. 473, where Lord Romilly M.R. stated the law, is not in dispute:

> "*Prima facie* everybody would suppose that a compromise means that the question is not to be tried over again. That is the first meaning of compromise. When I compromise a law suit of with my adversary, I mean that the question is not to be tried over again."

20. Foskett in his authoritative text on Compromise (8th Ed., 2015) at para. 6.01 states the proposition as follows:

> "An unimpeached compromise represents the end of the dispute or disputes from which it arose. Any issues of fact or law that may have formed the subject matter of the original dispute are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of a new action."

21. No dispute exists between the parties as to the correctness of this proposition of law, or the policy reason which underlies it, namely that the interests of justice require that there be an end to litigation, and that parties are held to their bargains.

22. The plaintiff is dissatisfied with the amount paid to her following the conclusion of the purported settlement and the defendants correctly say that the court will not, on account of one of the first principles of contract law, look to the adequacy of the consideration agreed to be paid. The defendants correctly also argue that the fact that the plaintiff did not have legal advice prior to entering into the compromise is not fatal to the creation of a binding contract. As was stated recently by Mahon J. giving the judgment of the Court of Appeal in *Flynn v. Desmond* [2015] IECA 34 at para. 17:

> "A litigant is entitled to process, manage and conclude his litigation in the absence of legal advice or representation, and many choose to do so. There is, of course, a very considerable public interest in upholding the finality of settlements and courts have been traditionally wary of permitting any litigant to undo any such settlement."

23. The defendants also correctly argue that the fact that the plaintiff believed her injuries would clear up when, in truth, they appear not to have, does not in itself make the bargain unconscionable as the plaintiff claims. Reliance is placed on the recent judgment of the Court of Appeal in *Geaney v. O'Connor* [2016] IECA 95 in which the defendant counterclaimant had brought an application to set aside a consent judgment. That case proceeded in part on the basis that the defendant had sought to argue that the judgment had been obtained by fraud. Peart J. considered the fact that the defendant had said in the course of the hearing before the High Court that he regretted that he had settled the case, and concluded that:

> "The fact that,…he now regrets that he settled the case is not a sufficient reason for the Court to set aside the judgment. Parties who settle their claims are entitled to finality. By that I mean that in this case Mr. Geaney was entitled to know and expect that after the consent judgment was entered and the case thereby disposed of before Feeney J. these proceedings were at an end, and that what remained thereafter was whatever would be involved in getting his judgment satisfied by Mr. O'Connor. That is the certainty that the law provides to a person in the position of Mr. Geaney by its consistent jurisprudence to the effect that only in very exceptional circumstances will a final order of the court be permitted to be set aside." (para. 12)

24. The mere fact that a person is dissatisfied with the terms of a contract, including a contract of compromise, is not sufficient to

enable a court to disregard that settlement or set it aside.

25. Charleton J. considered the proposition that a court will set aside a bargain entered into when there is inequality of bargaining power in *Irish Bank Resolution Corporation Limited v. Cambourne Investments Incorporated & Ors*. [2012] IEHC 262, [2014] 4 I.R. 54, where he said at para. 42:

> "The nature of the terms agreed between the parties in many loan cases may ultimately have largely been produced as a result of an inequality of bargaining power. That the terms of a contract, while not expressly, may nevertheless implicitly be by and large to the benefit of a bank can be said to be merely reflective of the position of comparative economic strength that financial institutions tend to find themselves in. On the basis of the objective principle, there is not at present authority in this jurisdiction in favour of the proposition that it is for the court to seek to subjectively assess the value of the consideration that passes between parties to a transaction. This may go some way to explaining why no general principle of unconscionability based on an inequality of bargaining power, and as advocated for, *inter alia*, by Lord Denning in a series of cases commencing with the decision in *Lloyds Bank v. Bundy [*1975] Q.B. 326, at p. 334 et seq., has found its way into decisions in this jurisdiction."

26. Charleton J. rejected a general jurisdiction based on an argument that a contract may be set aside on account of inequality of bargaining power and considered that, while mutuality of obligations in contract established a starting point, and while circumstances might put a contracting party on inquiry, or the court may be satisfied that the contract is entered into as a result of undue influence, there was no basis on which equity might intervene to set aside a contract on account of inequality of bargaining power, and he rooted his argument in the principle that the court may not enquire into the adequacy of consideration.

Absence of capacity?
27. The plaintiff in her replying affidavit describes the meeting with Mr. McMahon at her home on 14th June, 2013. She said she was "very upset" as a result of the accident and argues that the discussion had with Mr. McMahon on that day must be seen in that context. There is no evidence before me on which I can conclude that the pain which was then being suffered by the plaintiff impacted upon her decision-making capacity and accordingly, I cannot agree with the argument of counsel for the plaintiff that she was physically vulnerable at the time of the negotiations and that her vulnerability had the consequence that she was unable to come to a clear and informed decision.

28. However, later in her affidavit, the plaintiff says that the offer made by Mr. McMahon was on a "take it or leave it" basis and she understood that no further negotiation would occur and that no further offer would be forthcoming. She says that she:

> "…trusted that AXA Insurance were providing an appropriate sum and settlement of your Deponent's claim."

29. The plaintiff also says that she did inform Mr. McMahon on 14th June, 2013 that she was still in pain, had ongoing symptoms and, albeit she had improved a little, "there was no clear prognosis available."

30. This averment must be seen in the context of the letter from AXA which informed the plaintiff of her options, and I turn now to examine this.

The letter from AXA of 6th June, 2013
31. AXA sent a letter to the plaintiff dated 6th June, 2013, the day after the accident, in performance of its obligation under the Code. In that letter, AXA set out the options by which the plaintiff could process her claim for compensation for personal injuries and loss. The three options were set out as follows:

> (a) The negotiation of a "fair and reasonable settlement" with AXA directly;
>
> (b) An application through the Injuries Board, and a copy of the one page guide published by the Injuries Board setting out the nature of its process was enclosed; or
>
> (c) A settlement to be negotiated through a solicitor.

32. The letter contained the following concluding paragraphs:

> "You should be aware that any costs of appointing a Solicitor or legal representative are not covered under the IB process and must be paid by you. The IB will only award costs in exceptional circumstances. You can also appoint a motor assessor to assess any damage to your vehicle but this would also be at your own expense.
>
> It is our preference to deal with you directly as in our experience, claims are settled faster this way."

33. The letter from AXA set the context of the negotiations and is important in a number of respects. On its face, it identifies that it was sent in performance of obligations imposed upon AXA by the Code and for that purpose set out three options available to the plaintiff. What is singularly missing from the letter, however, is any reference to a fourth option, one which is engaged by very many plaintiffs, the rejection of an offer from the Injuries Board and the commencement of a claim for damages for personal injuries through the courts. In those circumstances, a plaintiff who successfully processes a claim and achieves a damages award in excess of that offered through the Injuries Board process would almost never be fixed with the costs of the litigation, and would have his or her costs paid in addition to the damages. That fourth option is a real one, not identified in the letter.

34. The Code requires that an insurer or insurance intermediary make a person aware of his or her options prior to entering a compromise, and the letter setting out the relevant information sent by AXA was incomplete and, in my mind, potentially misleading. It set out three options, only one of which would be cost neutral from the point of view of the plaintiff. The absence of full information could have tainted the negotiation and meant that at the time the plaintiff negotiated with Mr. McMahon, she was not fully informed of her options.

35. Having regard to the uncontroverted evidence of the plaintiff that the negotiation with Mr. McMahon was done on the basis that AXA had made its best offer on a "take it or leave it" basis, the plaintiff found herself negotiating in circumstances where if she did not accept the offer, she believed she would find herself pursuing one of the other two options identified, both of which would have meant that she incurred legal costs, and where costs would be deducted from any settlement figure.

36. The Central Bank rules of practice including the Code, which was substantially revised in 2012, regulate, *inter alia*, insurance

companies or insurance intermediaries such as AXA, and the letter of 6th June, 2013 was sent by AXA in purported compliance with the requirements of the Code regarding information to be provided to a consumer for the purposes of negotiations.

37. The case law that has evolved with regard to the role of the codes issued by the Central Bank in private litigation suggests that a code would not of itself be incorporated into a private contract: see Laffoy J. in *Stepstone Mortgage Funding Limited v. Fitzell* [2012] IEHC 142, [2012] 2 I.R. 318; Birmingham J. in *Zurich Bank v. McConnon* [2011] IEHC 75, and my judgment in *Ryan v Danske Bank A/S trading as Danske Bank & Anor.* [2014] IEHC 236.

38. The Supreme Court in *Irish Life and Permanent plc v. Dunne and Irish Life and Permanent plc v. Dunphy* [2015] IESC 46, [2015] 2 I.L.R.M. 192 affirmed the largely uncontentious proposition that compliance with the relevant banking code was not an implied term of the contract. With regard to the question of the impact of a failure to comply with the relevant code on the enforceability of a loan contract, Clarke J. considered that a court must have regard to:

> "whether other requirements of public policy, as gleaned from the relevant legislation itself, require that, in the context of a case such as this, a party should not be permitted to rely on what otherwise would be its legal entitlement." (para. 5.12)

39. Clarke J. identified one factor in the evaluation as whether "the contract in question is designed to carry out the very act which the relevant legislation is designed to prevent" (at para. 8.32). This echoes the dicta of Laffoy J. in *Stepstone Mortgage Funding Limited v. Fitzell.* Laffoy J. was hearing an application for possession of the principal private residence of the defendants and was considering the question of whether the relevant code had been complied with by the plaintiff bank, and said the following with regard to non-compliance with the code:

> "I find it impossible to agree with the proposition that, in proceedings for possession of a primary residence by way of enforcement of a mortgage or charge to which the current code applies… the plaintiff does not have to demonstrate to the court compliance with the current code…. surely a court which is being asked to make an order which will, in all probability, result in a person being evicted from his or her home, is entitled to know that the requirement in provision 47, which has been imposed pursuant to statutory authority, is complied with." (para. 29)

40. Hogan J. took a similar view in *Irish Life and Permanent plc v Duff* [2013] IEHC 43, and refused to grant an order for possession of a principal private residence because of lack of compliance with the relevant code.

41. The decision in *Irish Life and Permanent plc v. Dunne and Irish Life and Permanent plc v. Dunphy* was concerned with the Code of Conduct on Mortgage Arrears, but the considerations expressed by the Supreme Court must inform my thinking on the application before me in the present case, as the Code in respect of which the AXA letter was sent performs a broadly similar function.

42. The Code of Conduct on Mortgage Arrears is concerned with the manner in which mortgage lenders must treat borrowers facing mortgage arrears and the possibility of repossession arising therefrom. The question that arises in the present case is whether the letter sent by AXA on 6th June, 2013 amounted to sufficient performance by it of its obligations under the Code, and whether the letter was adequate to meet those requirements. I consider that the letter sent by AXA on 6th June, 2013 did not fully inform the plaintiff of the options available to her to deal with her claim, and note the letter was expressly given in purported compliance with a requirement of the relevant Code. The contract by which the claim was compromised might be avoided on account of the fact that the plaintiff was not fully informed of matters AXA was required to explain and identify.

43. I consider it arguable at least that the purpose of the Code, and the obligation imposed on the insurance company to inform a person dealing with it for the purpose of a possible compromise of a claim, create an obligation of accuracy and completeness on all actions of the insurance company with a view to protecting the customer, as the Code created a means to inform the consumer prior to the completion of a contract and for the purposes of the contractual negotiations.

44. Because in my view the letter was incomplete, I cannot at an interlocutory stage, and on affidavit, make a determination on the preliminary point of law directed to be tried by the order of Twomey J. The matter must fall to be determined at a plenary hearing at which a trial judge will assess the evidence, and hear more complete argument with regard to the role of the Code, the accuracy or completeness of the letter sent in purported compliance with the Code, and whether as a matter of fact and law the deficiency I have identified is capable of rendering void the compromise by the plaintiff of her claim.

45. Accordingly, I find myself unable to determine the trial of the preliminary issue on affidavit and without further legal argument.