

THE HIGH COURT

[2014 No. 4230 P.]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED

(IN SPECIAL LIQUIDATION)

AND

CATRIONA FITZPATRICK

PLAINTIFF

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 29th day of November, 2017

1. Mrs. Fitzpatrick has made a claim to a beneficial interest in various investment assets held in the sole name of her husband, Sean Fitzpatrick, over which the plaintiff Irish Bank Resolution Corporation ("IBRC") holds security. IBRC seeks declaratory and other relief against Mrs. Fitzpatrick regarding those claims.

2. This judgment is given in the application by IBRC for leave to issue six individual questions by way of interrogatories relating to the claim by Mrs. Fitzpatrick to an interest in the relevant assets, and regarding the dates on which she had or formulated her intention to claim an interest in those assets or when she notified such intention.

3. The case is to be heard by way of the determination of a number of issues set out in an issue paper directed by me following case management hearings. The issue paper relates to some matters arising in other proceedings to be heard in conjunction with the present proceedings bearing record number 2012 No. 5413P commenced by Christopher Lehane, the Official Assignee in bankruptcy against Mrs. Fitzpatrick, her husband, and two of their children; and other proceedings bearing record number 2012 No. 47M commenced by Mrs. Fitzpatrick under s. 36 of the Family Law Act 1995 against her husband and Mr. Lehane.

4. The application for leave to deliver interrogatories is opposed and Mrs. Fitzpatrick has refused to answer any of the interrogatories sought to be directed to her.

The background facts

5. The background to the proceedings is a loan agreement entered into between Anglo Irish Bank ("Anglo"), Mr. Fitzpatrick, Mrs. Fitzpatrick and three of their adult children on 11th February, 2009, by which they borrowed the sum of €87m by way of renewal and restructuring of existing facilities with Anglo.

6. IBRC as successor in title of Anglo asserts that the purpose, or one of the purposes, of the loan agreement was to improve the security position of Anglo, and to provide additional security over then encumbered assets held by Mr. Fitzpatrick in his sole name.

7. The loan agreement provided for the limitation of recourse against Mrs. Fitzpatrick and the three adult children of the couple, such that the recourse of Anglo against those parties was limited to their interest in the asset identified to Anglo and excluding assets held in the sole name of Mrs. Fitzpatrick. IBRC asserts that the factual basis of the agreement, and the intention of the parties, was that the assets in the sole name of Mr. Fitzpatrick were to be made available to meet the obligations of Mr. Fitzpatrick.

8. Mr. Fitzpatrick was adjudicated bankrupt on 12th July, 2010, and has since been discharged.

9. IBRC is the largest secured and unsecured creditor in the bankruptcy.

10. After her husband was adjudicated a bankrupt Mrs. Fitzpatrick asserted a claim to a beneficial interest in nineteen properties and investment funds held in the sole legal title of her husband. That claim is articulated in the proceedings.

The proceedings

11. The statement of claim seeks a declaration that Mrs. Fitzpatrick has no beneficial interest in the assets in her husband's sole name, and that the agreement made between Anglo and Mrs. Fitzpatrick contained an implied term she would not make a claim on the assets, that she is estopped by convention from making the claim as she, her servants or agents, misrepresented to Anglo that the relevant assets were entirely owned by her husband, and a declaration that part of a loan agreement be rescinded on the grounds of mutual or unilateral mistake.

12. By my order made on 3rd March, 2015, ten issues were directed to be tried and subsequent case management directions have provided for the sequential delivery of witness statements and legal submissions to reflect the fact that it is agreed that the burden of proof in the first issues lies on Mrs. Fitzpatrick, and in the remaining issues on IBRC.

13. The first issue, in respect of which Mrs. Fitzpatrick bears the burden, relates to whether Mrs. Fitzpatrick is entitled to a beneficial interest in the assets held in the sole name of her husband based on the presumption of advancement or because the assets were acquired from joint savings or joint borrowings.

14. Issues two to ten, the burden in respect of which lies on IBRC, relate to the meaning of the recourse provisions contained in the loan agreement, whether the loan agreement contained an implied term that Mrs. Fitzpatrick would not make any claim to the assets in the sole name of her husband, whether an estoppel arises, whether the non-recourse provision is void and of no effect by reason of the provisions of s. 59 of the Bankruptcy Act 1988, as amended, or by virtue of s. 10 of the Conveyancing (Ireland) Act 1634, or s. 74(3) of the Land and Conveyancing Law Reform Act 2009.

15. As can be seen, at least some of the issues to be resolved at the hearing concern the knowledge of Mrs. Fitzpatrick of her asserted beneficial title in the assets in her husband's sole name, and the extent of that interest at the time of the loan agreement, and when her husband was adjudicated bankrupt.

The interrogatories

16. The interrogatories sought to be delivered are as follows:-

- (i) Was not the defendant aware of her interest in the "Assets" (as defined in the Appendix hereto) prior to 27th January, 2009?
- (ii) Did not the defendant attempt to claim a beneficial interest in the Assets at the date of the representation made by the defendant's advisers, Bernard Somers and Associates on 27th January, 2009?
- (iii) Was not the defendant aware of her interest in the Assets prior to 4th February, 2009?
- (iv) Did not the defendant attempt to claim a beneficial interest in the Assets at the date of executing the facility letter dated 4th February, 2009?
- (v) Did not the defendant intend to claim a beneficial interest in the Assets prior to the adjudication in bankruptcy of Sean Fitzpatrick on 12th July, 2010?
- (vi) Had not the defendant advised Sean Fitzpatrick of her intention to claim a beneficial interest in the Assets prior to his adjudication in bankruptcy on 12th July, 2010?

17. The reference to the date of 27th January, 2009 is to the date of the letter from Somers and Associates on behalf of Mr. Fitzpatrick, Mrs. Fitzpatrick, and their three adult children which made a proposal for the amendment of their existing arrangements with Anglo.

18. The reference to the letter bearing the date of 4th February, 2009 is to the facility letter from Anglo containing the terms and conditions by which the then existing facilities were renewed and varied.

The principles governing the grant of leave

19. Save in the case of a claim grounded on fraud or alleged breach of trust, a party may with leave of the court, deliver interrogatories in writing for the examination of the opposite party, relating "to any matters in question in the cause or matter". Order 31, Rule 2, provides that leave shall be given only where the interrogatories are "considered necessary either for disposing fairly of the cause or for saving costs".

20. A number of judgments of the Superior Courts dealing with the principles that govern the making of an order giving liberty to deliver interrogatories have been referred to in argument. Two judgments of appellate courts bookend these authorities: the first judgment in time being that of the Supreme Court in *J&LS Goodbody Limited v. Clyde Shipping Company Limited* (Unreported, 9th May, 1967), [1967] JIC 0901, the judgment of Walsh J. The last judgment in time is that of the Court of Appeal in *McCabe & Anor v. Irish Life Assurance plc & Anor* [2015] IECA 239, [2015] 1 I.R. 346.

21. A number of authorities between 1995 and 2000 explored the parameters of the jurisdiction. In general, the threshold requirement for the granting of leave is that the interrogatories be relevant to the cause or matter, and that they be considered necessary.

22. What is "necessary" has arguably given rise to some tension in the authorities. The earliest High Court judgment in time, is that of Costello J. in *Mercantile Credit Company of Ireland Limited & Anor v. John Heelan & Ors* [1994] 2 I.R. 105. There, Costello J. suggested that the use of evidence given in reply to interrogatories "is an exception which must be justified by some special exigency in the case which, in the interest of doing justice, requires the exception to be allowed". (at p. 110)

23. Some disagreement occurred in the course of the hearing as to whether the test identified by Costello J. is different from that in the later authorities, or as was argued by counsel for the applicant, there has been a move away from that approach towards that identified in particular in the recent judgment of the Court of Appeal where Kelly J. expressly held that there was no test of "so called special exigency" (para. 37) and no text different from the test of necessity in the Rules.

24. For reasons which will appear I do not consider it necessary to determine whether the test explained by Costello J. is different from that found in the later authorities, or whether there has developed a different approach to the test of necessity. It must, however, be observed that all but one of the later judgments made express reference to the judgment of Costello J. in *Mercantile Credit Company of Ireland Limited & Anor v. John Heelan & Ors*. No judgment of an appellate court or any later judgment of the High Court has expressly departed from his approach.

25. Laffoy J. in *McCole v. Blood Transfusion Service Board & Ors* (Unreported, 11th June, 1996), [1996] WJSC-HC 4095, summarised the principles identified by Costello J. in *Mercantile Credit Company of Ireland Limited & Anor v. John Heelan & Ors* and approved a test identified by Coleman J. in *Det Danske v. KDM* [1994] 2 Lloyds Rep. 534 to identify "the intersection between interrogatories, on the one hand, and cross-examination on the other hand", and came to the conclusion that the matters in respect of which leave to deliver interrogatories was sought "were matters for oral evidence at the trial of the action".

26. The judgment of Costello J. in *Mercantile Credit Company of Ireland Limited & Anor v. John Heelan & Ors* was not referred to by Lynch J. in *Bula Limited v. Tara Mines Limited* [1995] 1 ILRM 401, although he did accept that the purpose of interrogatories is "to avoid injustice where only one party has knowledge and the ability to conveniently to prove facts which are important to be established in aid of the opposing party's case".

27. It is clear from the judgment of O'Sullivan J. in *Money Markets International Stockbrokers Limited (In Liquidation) v. Fanning & Ors* [2000] 3 I.R. 215, an "exigency or necessity" is a pre-requisite in all applications where leave to deliver interrogatories is contested, and O'Sullivan J. considered that the "purpose of exhibiting interrogatories is to seek admissions which will become evidence to be relied upon by the interrogating party". As he described it, the answers to the interrogatories should "lighten the burden of proof".

28. The litigation purpose served by the delivery of interrogatories was analysed in some detail in the recent judgment of the Court of Appeal in *McCabe v. Irish Life*, where Kelly J. (as he then was) delivering the judgment of the Court, having reviewed all of the authorities, noted that the delivery of interrogatories can "obviate the necessity for expensive and time consuming discovery, can dispose of issues prior to trial, can lessen the numbers of witnesses in a result of overall shortening of trials". The Court held that the interrogatories sought to be delivered did "serve a clear litigious purpose" (para. 34).

29. The approach of Kelly J. is consistent with the approach of the courts in a number of areas of practice and procedure where

litigation efficiency is sought to be positively supported. His judgment is based on more than a mere desire for efficiency, but he did regard the delivery of interrogatories as desirable in the interest of justice, and rejected the "very restricted view of the circumstances in which interrogatories might be used" (para. 7).

30. Kelly J. linked necessity with the objective of "saving costs" and considered "as a matter of probability they will save significant costs and shorten the trial" (para. 34).

31. The judgment of Kelly J. is relied on by counsel for the applicant in a number of respects. He argues that it squarely places litigation efficiency as one governing purpose of the Rules, and that because of the rejection by the Court of Appeal of any requirement that there be a "special exigency", the Court of Appeal decision is authority for a general proposition that the delivery of interrogatories should not be confined to exceptional cases.

32. As I have said above, I do not consider it necessary to fully explore that question as it seems to me that litigation efficiency is not likely to be achieved by the delivery of the interrogatories in the present case. This is for a number of reasons.

33. It is clear from the issue paper and the fact that the burden of proof is agreed to lie with Mrs. Fitzpatrick in respect of her claim to a beneficial interest and with IBRC in respect of the claim for rescission, for an implied term or arising under estoppel or by virtue of law of mistake, that evidence will be required from Mrs. Fitzpatrick and from relevant witnesses on behalf of IBRC relating to a series of transactions, documents and events. The legal and factual complexity of the claims is apparent.

34. I accept that some answers from Mrs. Fitzpatrick might impact on the contents of the witness statements or on the legal submissions to be delivered by either or both parties and that may perhaps result in some saving of pre-trial costs, but I am not satisfied that the length of the trial or the complexity of the questions are likely to be altered much by the imposition of a requirement on Mrs. Fitzpatrick that she reply to the interrogatories.

35. That litigation efficiency may be the guiding principle in certain cases seems to be undoubtedly the case, but the desire for such efficiencies is not the only factor to be taken into account by the court and fairness to the person upon whom interrogatories are sought to be delivered is also a factor and one expressly identified in the Rules, which requires the interrogatories sought to be delivered not cause an injustice or unfairness to the other party.

36. In *McCabe v. Irish Life*, the Court of Appeal considered that it was not unfair to require the plaintiff to answer the interrogatories, but it is relevant that no evidence had been put before the Court to show actual unfairness or oppression, either because extensive investigations or research would be required or otherwise. Kelly J. also considered that to require a plaintiff to answer interrogatories because the answers might or might not tell the "whole story" was not a relevant test as the answers to the questions were not dispositive of the issues of law, which would remain to be determined by the court.

37. The interrogatories sought to be delivered in *McCabe v. Irish Life* arose in the context of a claim by the defendant that a life assurance contract entered into by the plaintiff and his then deceased wife was voidable on the grounds of material non-disclosure. Leave was sought to deliver interrogatories concerning the medical history of the deceased including details of her prescribed medication, medical interventions and state of mind over a twenty year period.

38. While Kelly J. did reformulate some of the interrogatories in order to clarify the questions, no argument seems to have been raised that the questions sought to be asked related to questions of opinion or "evidence".

Information or evidence?

39. Shanley J. in his judgment in *Woodfab Limited v. Coillte Teo* [2000] 1 I.R. 20, considered the question of necessity and identified a two stage test as follows:-

"However it does appear that once the party seeking to deliver interrogatories satisfies the court that such delivery would serve a clear litigious purpose by saving costs or promoting the fair and efficient conduct of the action in question then the court should be prepared to allow the delivery of the interrogatories unless it is satisfied that the delivery and answering of the interrogatories would work an injustice upon the party interrogated."

40. Shanley J. quoted from the judgment of Costello J. in *Mercantile Credit Company of Ireland Limited & Anor v. John Heelan & Ors* and expressly adopted the criteria as further explained by Lynch J. in *Bula Limited v. Tara Mines Limited*, namely that questions which related to "opinions, conduct or the meaning or effect of documents" were to be excluded.

41. Shanley J. gave liberty to the plaintiff to deliver some of the interrogatories but in regard to others he refused the application, *inter alia*, because some of the questions required the defendant "to draw inferences from facts set out in a document", others were unnecessary, others were "based on a hypothesis" and others might have required a single deponent to answer questions relating to an opinion or policy of a limited company at different times and likely to be held by different officers of that company.

42. Costello J. in *Mercantile Credit Company of Ireland Limited & Anor v. John Heelan & Ors.*, had noted a distinction between the use of interrogatories to obtain "information" or "admissions" and the use of interrogatories to "obtain evidence for the purpose of proving" a case against the other party. Lynch J. in *Bula Limited v. Tara Mines Limited* also made the distinction between evidence and facts on the one hand and evidence or "opinion or matters of law such as the meaning or effect of documents or statements or conduct" on the other. (At p. 405).

43. While this distinction is found in a number of cases relating to the use of interrogatories to obtain evidence which is impermissible, and their use to obtain admissions regarding facts, the distinction is not always clear. Lynch J. in *Bula Limited v. Tara Mines Limited* made the distinction, and this was taken up by Shanley J. in *Woodfab Limited v. Coillte Teo*, and by O'Sullivan J. in *Money Markets International Stockbrokers Limited (In Liquidation) v. Fanning & Ors.*

44. I must confess some difficulty in understanding the precise distinction between facts and evidence in a general sense, but it does seem to me a distinction may more easily be drawn between questions that seek to elicit facts, and those which seek to elicit more complex matters such as opinions, inferences, or intentions. That distinction is important in the present case.

45. It seems to me that the interrogatories sought to be delivered by IBRC are matters that may not readily be characterised as relating to facts. The interrogatories sought to be delivered in *Money Markets International Stockbrokers Limited (In Liquidation) v. Fanning & Ors.* related to documentation showing a trail of financial transactions in the forms of cheques, credit transfers etc. No question was pursued relating to the purpose of the transfers or their legal effect or meaning.

46. As can be seen from a reading of the purposed interrogatories in the present case, the question sought to be raised relate to the intention or awareness of the defendant at the different times identified.

47. Counsel for Mrs. Fitzpatrick makes the argument that intention is a construct, and to interrogate a person with regard to his or her private thoughts is to interrogate a frame of mind, a matter requiring complexity and nuanced responses. It is argued that the questions are not to that extent "value neutral" and that the form of the questions is therefore impermissible.

48. Counsel for IBRC argues the alternative approach, namely that while the questions do relate to the state of mind of the defendant at the relevant time, the questions are not framed to attempt to elicit her view of the legal consequences of the answers. Counsel accepts that the questions now sought to be asked of Mrs. Fitzpatrick will be asked at the hearing, but that an answer at this stage would assist greatly in the preparation for trial.

49. My view is that the questions as framed are not permissible, although it is the case as is acknowledged by counsel for both parties that the type of question in respect of which leave may be granted may be of a more textured type than the somewhat cumbersome style of question intended to elicit a "yes" or "no" response. Kelly J. suggested that the "archaic style of framing questions in the negative" had long since been abandoned, and by way of example referred to the judgment of the High Court in *Anglo Irish Bank Corporation v. Browne* [2011] IEHC 140.

50. However, it is apparent from the judgment of the Court of Appeal in *McCabe v. Irish Life Assurance plc*, that the questions must be "crystal clear" and "enable equally clear answers".

51. The form of the interrogatories in the present case lack this precision and clarity for a number of reasons. While it is apparent that what is sought to be interrogated is the plaintiff's intention and awareness of her "interest", it must be the case that what was intended to be explored was the extent of Mrs. Fitzpatrick's awareness and intention in regard to the beneficial interest in the assets, the legal interest in which was held by her husband. However, to ask Mrs. Fitzpatrick to furnish clear answers to the question whether she was "aware" of those interests or intended to claim the interests at the identified time, amounts to asking her a series of questions that could admit of an answer along a spectrum between yes and no. She might answer "maybe", or it may be the case that the answers to the questions admit a narrative. She equally might say that her awareness or intention regarding her alleged interests and claims in the relevant assets had at the relevant dates yet to be explored either with her husband, his advisers or her own legal and financial advisers.

52. I consider that the questions sought to be asked in regard to the intentions of Mrs. Fitzpatrick or her opinions, must be regarded as impermissible having regard to the tests as outlined by Costello J. in *Mercantile Credit Company of Ireland Limited & Anor v. John Heelan & Ors* which were expressly adopted by Fennelly J. in *Woodfab Ltd v. Coillte Teo*. I consider that it is more likely than not, that if questions in this form are put to Mrs. Fitzpatrick in the course of oral hearing, a judge would hear and consider her answers in the context of the totality of relevant evidence, and that the meaning and effect of the answers will be explored in examination-in-chief and cross-examination. The blunt instrument of interrogatories is not suitable for this type of answer, and for that reason, I do not consider that the interrogatories seek information or facts, but rather answers to matters more akin to opinions or meanings, the effect or the factual context of which may not admit a clear answer.

53. I am influenced by the approach of Laffoy J. who refused to grant leave for the delivery of interrogatories in *McCole v. Blood Transfusion Service Board & Ors*, on a number of grounds, some of the interrogatories were rejected on the grounds that they were matters "which would be more fairly explored" in oral evidence, where the nuances and inferences would be best addressed (p. 17). She also refused to give leave in respect of interrogatories, which she regarded as not questions of fact but rather "deductions or inferences to be drawn from observable facts".

54. The broad class of interrogatories sought to be delivered in the present case are analogous to those rejected by Laffoy J.

The question of injustice?

55. While litigation efficiency is undoubtedly in the interests of the parties and in the interest of the administration of justice, efficiency cannot displace the normal process in an adversarial legal system and the interplay between those interrogatories which may be permitted, and those which are rejected has highlighted a tension that sometimes exists between the necessity of interrogatories for disposing fairly of the cause or matter, in saving costs, and the interests of doing justice. Costello J. considered this in his judgment in *Mercantile Credit Company of Ireland Limited & Anor v. John Heelan & Ors*, where he stressed the importance that the court would bear in mind "that such actions are in principle to be heard on oral evidence" (O. 1, r. 2), and that the use of evidence on affidavit is an exception.

56. While the case law does not support a proposition that the delivery of interrogatories is an exception that should rarely be used, or that a court should engage a degree of scrutiny with regard to an application for leave to deliver interrogatories, the words of Costello J., described by Fennelly J. in *Woodfab Ltd v. Coillte Teo* as "cautionary words", requires the court to be satisfied that reasons exist which justify the service of interrogatories, that the requirements of O. 31, r. 2 of the Rules have been met and, in particular, that the interrogatories are "necessary" either for disposing fairly of the cause or matter, or for saving costs. The balance is not always readily apparent, but it seems to me to be the case that, should the interrogatories be of a style that is capable of admitting a complex or nuanced answer, the court will lean in favour of refusing leave in the light of these "cautionary words", which are derived from first principles and the inherent nature of the adversarial system.

57. Fennelly J. quoted with approval a description by Butler-Sloss L.J. in *UCB Bank plc. v. Halifax* (Court of Appeal of England and Wales 10th June 1997, [1997] EWCA Civ J0610-9), where she described the administering of interrogatories as "not a normal step in the proceedings". The desirability of efficient litigation must be tempered by the principles of necessity and relevance, and the test of necessity imports more than merely a requirement that interrogatories be useful or even very useful. The inclusion of that language of necessity in the Rules of the Superior Courts to my mind shows that a degree of caution should be exercised in regard to the criteria to be applied in assessing the nature of the questions, even if, as Kelly J. said in *McCabe*, the more archaic style of questioning is no longer to be preferred.

58. Counsel for Mrs. Fitzpatrick also argued that the interrogatories are impermissible in that they could constitute a snare or trap. The answers are to be given under oath, Mrs. Fitzpatrick could be in breach of an order of the court if she refuses to answer or says that she is unable to answer in a clear way, and that however she answers the question she could be exposed. Counsel argues that to speak of Mrs. Fitzpatrick's "intention" or "awareness" could involve some degree of hypothesis or admit an answer that is relevant to financially adverse circumstances.

59. The authorities suggest that in a suitable case a court hearing an application for leave to deliver interrogatories may reformulate

the questions sought to be asked. I am not satisfied that in the present case the interrogatories can be reformulated in a manner that would avoid the the risk of injustice, as I am unable to formulate questions which might not amount to what counsel describes as a possible "snare", as the issues are of such complexity that the questions and answers might be open to more than one interpretation.

60. For these reasons, I refuse to grant the order sought in the motion that IBRC be given leave to deliver the interrogatories in the form sought.