Neutral citation [2013] IEHC 139

THE HIGH COURT

[2009 No. 6146 P.]

BETWEEN

FRANCIS RHATIGAN, ANTHONY RHATIGAN AND JOHN GRABY

PLAINTIFFS

AND

EAGLE STAR LIFE ASSURANCE COMPANY OF IRELAND LIMITED

DEFENDANT

RULING of Mr. Justice Cooke delivered the 15th day of March 2013.

1. By notice of motion dated the 8th January, 2013, the plaintiffs seek an order under O.31, r. 15 of the Rules of the Superior Courts requiring the defendant to produce for inspection a number of documents which have been listed in the Second Part of the First Schedule of an affidavit of discovery made on behalf of the defendant by its Claims Manager, Paul Murphy, on the 23rd November, 2012. The defendant has refused to do so upon grounds of a claim of entitlement to litigation privilege in respect of them. The particular items in question are listed there as documents Nos. 132 to 143 of Category 1 and Nos. 148 to 153 of Category 2. The first set of documents comprises an exchange of letters between the defendant and one of its re-insurers, Revios, on dates between the 7th September, 2004, and 11th May, 2006. The second set comprises letters exchanged between the defendant and another re-insurer, Partner Re, between the 7th September, 2004 and the 14th February, 2006.

2. The plaintiffs in the proceedings are the legal personal representatives of Noel Rhatigan, deceased, and the primary relief claimed is an order for specific performance of a contract of insurance made between ACC Bank plc and the defendant on the life of the deceased and assigned to the plaintiffs on the 19th June, 2009, by that bank.

The plaintiffs claim to be entitled to payment of a sum of €2 million on foot of that policy following the death of the said Noel Rhatigan on the 30th August, 2004.

3. The deceased had been a director and shareholder in Clydebay Holdings Limited which had obtained loan facilities from ACC Bank and it had been a condition of that loan arrangement that a policy of life assurance in the sum of €2 million on the life of Mr. Rhatigan be put in place as security. The policy in question was issued on the 12th May, 2004, with a commencement date of the 1st June, 2004. According to the statement of claim delivered in this action, the late Mr. Rhatigan was diagnosed with cancer on the 8th June, 2004. He died on the 30th August, 2004.

4. The policy in question has since been repudiated by the defendant and, in its defence, it asserts that the policy was void and/or voidable upon grounds of misrepresentation and non disclosure of material facts which have been particularised in a reply to a request of particulars dated the 2nd June, 2010. The defendant's assertions in that regard relate, inter alia, to non disclosure of medical history, to the fact that the deceased smoked up to 60 cigarettes a day and the fact that he had a family history of cancer. The defendant also relies upon the fact that on the 11th February, 2004, the late Mr. Rhatigan had also made a proposal for a policy of life insurance for the same risk to another company.

5. The plaintiffs dispute the claim to litigation privilege essentially upon the ground that the documents in question could not have been created in contemplation of or for the purpose of litigation because they predate the point in time at which litigation could be considered to have been intimated or could have been apprehended by or in the contemplation of the defendant. It is claimed that the first intimation of any litigation was a letter of the 10th August, 2006, and the documents sought to be inspected are all documents written prior to that date.

6. Mr. Murphy in a replying affidavit to the motion maintains that the defendant had litigation in contemplation as early as late August, 2004. He maintains that before the death of Mr. Rhatigan occurred on the 30th August, 2004, his company had received a telephone call from ACC Bank on the 26th August, 2004, requesting a "terminal illness claim" form. This is used to claim payment of the life cover benefit in advance of death as provided for under the policy where a life insured has been diagnosed with a medical condition and the life expectancy is less than twelve months. Mr. Murphy claims that upon hearing of this request he was immediately suspicious given that the life insured had been diagnosed as terminally ill when apparently in good health less than three months earlier.

7. When notified of the death of Mr. Rhatigan on the 1st September, 2004, a letter was immediately written to the deceased's general practitioner seeking a report with a view to investigating non disclosure of the medical history. From the very outset accordingly, it is claimed that the defendant envisaged repudiating the policy and declining the claim. He explains:

> "Litigation privilege applies from the date upon which the party first contemplates litigation. Litigants (particularly experienced litigants such as insurance companies) regularly contemplate litigation and prepare their defence of same prior to the first imitation of legal proceedings. An insurance company expects and contemplates litigation when it refuses to pay out on foot of claim made on a policy of insurance. In this case the defendant was notified of the claim in August 2004."

8. Mr. Murphy also avers that the correspondence in question was correspondence with the two re-insurers which jointly carried the vast majority of the risk of the insured sum and on that basis the correspondence is equivalent to internal communications within an insurance company which is preparing to defend a claim which it does not accept to be valid. He maintains that the claim made under the policy in August/September 2004, was not merely being investigated by the defendant; it was being investigated with a view to repudiating the policy and declining the claim. It was in that context that the letters in question were written to and exchanged with the re-insurers.

9. The essential issue raised by this application, accordingly, concerns the point in time at which litigation privilege can be asserted as an entitlement. The plaintiffs do not apparently dispute that correspondence between the defendant and its re-insurers is, in principle, capable of being covered by litigation privilege. The documents listed in the Second Part of the First Schedule include further correspondence exchanged with each of the re-insurers upon dates subsequent to those of items 143 and 153 mentioned above. The claim to privilege in respect of those later letters is not challenged.

10. It has not been disputed in the submissions that for a claim to litigation privilege to succeed, the party asserting it must demonstrate that the documents or communications in question came into existence with the dominant purpose of preparing to bring or defend litigation. Where litigation is actually commenced, there will normally be little difficulty for a defendant in asserting privilege in respect of documents written after that date in connection with the litigation. But the entitlement to claim privilege also extends to communications brought into existence prior to the actual commencement of litigation provided it is shown that litigation was contemplated or reasonably apprehended. O'Hanlon J. in *Silverhill Duckling Ltd v.Minister for Agriculture* [1987]I.R. 289, adopted the approach of the House of Lords in *Waugh v. British Railways Board* [1980] A.C. 521 in expressing the view that "the dominant purpose for a document coming into existence in the first place should have been the purpose of preparing for litigation then apprehended or threatened."

11. It would be by no means unusual for a person involved in some event or incident in which damage or injury has occurred to take the prudent step of seeking legal advice as to what steps he might adopt to protect his interests even before a claim was made by the injured party or a letter before action was received. Such an anticipatory request for general advice in relation to a claim not yet formulated or advanced could clearly be the subject of a well founded claim to privilege in any subsequent proceedings. In his judgment in the Supreme Court in *Fyffes v. DCC* [2005] 1 I.R. 59 at p.84, McCracken J. observed that the principle of privilege in the preparation or conduct of litigation requires "that a litigant must be in a position to communicate freely with his or her legal advisers, and further must be entitled to obtain expert evidence from third parties to assist, not only in the preparation of the case, but in the assessment as to whether there is any case to be made."

12. A further factor is obviously relevant in the particular circumstances of the disputed documents in the present case. The exchange of correspondence is between the insurer and two re-insurers and is not necessarily documentation seeking, containing or giving legal advice as such. The letters in question presumably involve the defendant informing the two re-insurers of the particular circumstances of the request made by ACC Bank and subsequent notification of the death and, one would suppose, an exchange of views as to the strategy to be adopted and the steps by way of investigation to be pursued.

13. In the judgment of the Court, the disputed documents in this case are entitled to litigation privilege in those circumstances. It is of particular significance that the defendant is an insurance company which has repudiated a life insurance policy upon grounds of misrepresentation and non disclosure. A decision on the part of a life insurer to repudiate such a policy is clearly one of importance which can be taken only after appropriate investigation as to the availability of reliable information which will support the grounds which might be invoked for the purpose. Where the payment otherwise due under the policy is a substantial sum it is clear that in deciding to repudiate, the company will inevitably have to take into account the likelihood of the repudiation being contested by litigation. Accordingly, the very investigation of possible grounds for repudiation will be bound with an assessment as to the ability of the company to stand over the repudiation in the event of its being sued on the policy.

14. In this particular case, the insurer was alerted to grounds of suspicion when it received the phone call from ACC Bank on the 26th August, 2004. This was particularly so because the anticipated claim was based upon the request for a terminal illness form in circumstances where the illness in question was cancer and the life assured had purported to be in good health less than three months earlier. It was not, in other words, a circumstance in which the prospective claim was based upon a totally fortuitous event such as death in a road accident.

15. This approach is, in the view of the Court, consistent with that adopted by O'Hanlon J. in somewhat analogous circumstances in his judgment in *P.J. Carrigan Limited v. Norwich Union Fire Society Limited* [1987] I.R. 618. That was a case in which a fire had broken out in the plaintiff's premises and notification was given shortly afterwards that a claim would be made under the fire insurance policy. The defendant insurers immediately sought a report from loss adjusters. Privilege was subsequently claimed in respect of that report when litigation commenced and a senior official of the insurer in an affidavit supporting that claim deposed that the probability of litigation was already in contemplation by the defendants at the time when the loss adjusters report was received because of a number of suspicious circumstances relating to the claim. O'Hanlon J. held:-

> "I am satisfied on the evidence which has been adduced on behalf of the defendants in this case that the possibility of repudiating liability under the policy was a very real factor in their thinking from the time the claim to be indemnified was made by the plaintiffs, and that when commissioning the report from (the loss adjusters) they were concerned to obtain not merely an evaluation of the claim in terms of financial loss, but also whatever expert advice could be given as to the circumstances in which the fire broke out. They already viewed the claim with some suspicion and wished to know whether any evidence available at the scene of the fire suggested that their suspicions were well-founded. In other words, they were, even at that early stage, contemplating the possibility of a showdown with the plaintiffs, in which they, the defendants, might well decide to repudiate liability under the policy, and the plaintiffs in turn would then have to decide whether they were prepared to embark on litigation to enforce their claims under the policy.
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> While no litigation was threatened at the time the report was commissioned I am satisfied that it was apprehended, in the thinking of the defendants, and that this apprehension constituted a dominant purpose in looking for the report. In these circumstances I am of opinion that the document is privileged and I propose to refuse the application for further and better discovery."

16. It is true that in the particular circumstances of that case there was a somewhat more direct connection between the document and the prospective litigation in that when commissioning the report the insurer had directed that it be furnished by the loss adjusters to the company's solicitors and it was provided under a heading: "Privileged Private and Confidential for the Attention of Legal Advisers only".

17. It is also true that the Court has been given no equivalent description in detail of the actual content of the letters in respect of privilege is now claimed. Nevertheless it is clear from the evidence given by Mr. Murphy that it comprises an exchange between the defendant and its re-insures arising out of the implications raised by the telephone call from ACC Bank which indicated that a claim was to be made together with the subsequent notification a matter of days later that Mr. Rhatigan had died. As the prospective claim was substantial and the risk was shared by the defendant and its re-insurers, it was both necessary and inevitable that the defendant should discuss and plan its reaction to the claim with the re-insurers. As with the commissioning of the report from the loss adjusters in the above case, the immediate request for a medical report made to the general practitioner demonstrates that in the

early days of September 2004 the defendant's staff were already setting about the gathering of information and evidence in order to substantiate their suspicions in contemplation of repudiating liability under the policy. In the judgment of the of Court, where the litigation in which the claim for privilege arises relates to a substantial benefit which has been repudiated under an insurance policy, the taking of the decision to repudiate is so likely to provoke litigation that the steps taken by the insurer towards making such a decision must necessarily be characterised as steps taken in apprehension of litigation.

18. It follows in the judgment of the Court that the same principle must extend to communications which come into existence in such circumstances between an insurer and its re-insurer, given that the re-insurer will be exposed to potential liability if inadequate steps of investigation are adopted or the wrong decision on repudiation is taken. Although the letters may appear in this particular case to be distant in point of time from the ultimate commencement of proceedings, it is the dominant purpose for which they were written which attracts the application of the principle and, in the words of McCracken cited above, this includes the purpose of assessing "whether there is any case to be made".

19. For these reasons the Court is satisfied that the claim to privilege has been made out and that the defendant therefore has a sufficient excuse for not complying with the plaintiffs' demand to inspect under the rule. The order sought in the notice of motion will accordingly be refused.