

THE HIGH COURT

[2008/54327 P]

BETWEEN

MARY B. CURRAN

PLAINTIFF

AND

BANK OF IRELAND TRUST SERVICES LIMITED AND THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 5th day of October, 2016.**Introduction**

1. This application to strike out the defence for failure to make proper discovery concluded yesterday evening. The trial of the action is next listed for hearing on the 9th November 2016.

Background

2. The plaintiff asserted in her Statement of Claim dated 9th July, 2008, that she is the eldest niece of the late Mary Hayes, who died in 1998 and of the late Ms. Nora Hayes who died in 2005 aged over 100. The plaintiff explained that she arranged a meeting with the first named defendant ("**Trust Services Limited**") to satisfy her aunts about the management of their affairs by Trust Services Limited in January, 1998.

3. It is not particularly relevant to the consideration of the matters now before the Court to recount any other particular background history. Suffice to say that the plaintiff was entitled to a share of whatever residue remained in the estates of her said aunts which have been administered. The plaintiff has a sense of grievance, if not injustice, about her inability to understand the reduction in assets which were managed by Trust Services Limited from the period 1998 to 2005 at least.

4. The Supreme Court, on 23rd February, 2015 directed the plaintiff to file and serve a revised Statement of Claim upon determining an appeal from a High Court order which had dismissed the plaintiff's action on the grounds that any cause of action of the plaintiff was bound to fail.

5. The revised Statement of Claim dated 16th March, 2015, alleges *inter alia* that the defendants neglected to give any proper account to the beneficiaries of the trusts and estates which were managed by Trust Services Limited. The plaintiff has given particulars of alleged imprudent investments. In addition, the plaintiff refers to alleged depletion of assets belonging to her longest surviving aunt, Nora, in circumstances of alleged conflicts of interest and alleged failure to make enquiries.

6. Following the delivery of a focused and traverse type of defence on 16th December, 2015, the plaintiff's solicitors delivered a reply dated 12th January, 2016, which joined issue with particular positive averments made by the defendant. At the same time, those solicitors sought five categories of discovery which all related to the assets of the plaintiff's late aunts including, in particular, category five, which mentioned a property known as Clareville, Golf Links Road, Lahinch, Co.Clare and litigation in relation to same involving another beneficiary.

7. On 21st March, 2016, Mr. David Casey swore an affidavit as to documents which appeared to accord with the requirements of Order 31 (13) of the Rules of the Superior Courts ("**RSC**") and form number 10 of appendix C to the RSC in relation to each of the categories of documents sought.

8. I might say at this stage that the Court had fixed 26th April, 2016, as the trial date for this action.

9. By letter dated 11th April, 2016, the plaintiff's solicitors sought to explain how they regarded the affidavit as to documents as defective. They emphasised that Order 31(12)(1) of the RSC refers to discovery of documents which are or have been in the possession, power or procurement of the defendants. They asked for details of the measures taken to procure documents from the defendants' branches and the offices of the solicitor who acted for or on behalf of the estates.

10. Ms. Lumsden, solicitor for the defendants, in her reply of 13th April, 2016, concisely commented in a helpful way on the concerns expressed and the limitations which face the defendants arising from the bank's policy of destruction after seven years and the lack of relevance of the personal accounts. A further exchange of letters ensued with service of a copy of the supplemental affidavits of discovery sworn in April and June, 2016, for and on behalf of each of the defendants.

11. We now come to the Notice of Motion issued on 25th April, 2016, returnable for the following day which was adjourned to yesterday's date. The Court is asked by the plaintiff to strike out the defence for failure to comply with an agreement to make the voluntary discovery on the grounds that there must be other documents which the defendants had but which have not been described.

12. Mr. McGarry SC for the defendant brought the Court's attention to the wording, meaning and thrust of para. 7 to the discovery affidavits which I might paraphrase as follows :

According to the best of my knowledge, information and belief the defendants have not now, nor ever had in their possession, custody or power or in the possession, custody or power of their solicitors or agents, any documents etc. whatsoever in relation to the matters in question in this suit except for the documents set forth in the schedules to the affidavits.

13. In a phrase and applying words which can be attributed to Shakespeare in Hamlet: " He will be hoisted by his own petard" at trial if the deponents for the defendants are found wanting in their obligations under the rules for discovery and the agreement to make discovery.

14. Senior Counsel for the plaintiff rhetorically asked: how can he establish facts without pursuing discovery which the plaintiff and her solicitor argue for and for which they rely on a forensic accountant's views in relation to what should be there?

15. The Court is acutely aware of the adversarial as opposed to inquisitorial nature of proceedings such as exist here for the plaintiff's claim. The Rules and Practice of the Superior Courts provide for discovery, interrogatories and various means for identifying facts which remain to be proven by examination and cross examination at trial. It is not for this Court to embark on such an inquest.

16. The Court has not been satisfied that the defendants are in breach of the agreement to make voluntary discovery or of the RSC in relation to making discovery. It is not for the Court to assist or give directions in relation to proving what is necessary for a claim; legal practitioners regularly face difficulties in identifying and establishing facts in order to ground the cause or causes of action which may be identified as the best to achieve the objectives of their clients.

17. The follow sentences from the judgment of Keane C.J. in *Johnston v. Church of Scientology (ex tempore)* [2001] 1 I.R. 682 at p.13 emboldens the Court's view that the plaintiff's remedy, if any, for her perceived grievance about the alleged failure to discover documents may be sought by means other than by the application to strike out the defence for failing to make agreed voluntary discovery. I paraphrase the relevant quotation as follows:

It (i.e. the perceived lack of full disclosure) may come as a surprise and the other party may still say well I think they must have other documents, they may say that but if the defendant says on oath that they have not got the documents, then that is a compliance with the order for discovery and the person can have no complaints.

18. In addition, this Court has not been satisfied that the defendants misunderstood the agreement to make voluntary discovery and notes that it was pointed out on behalf of the defendants that the individual bank accounts of the plaintiff's late aunts in the 1990's at branches of the bank were not considered by the defendants to be part of the agreement to make voluntary discovery. Moreover, this attempt to seek that type of documentation at such a remove in time and so close to the second trial date, without the plaintiff having any clear right to same, tends to rankle. That is not to say that the plaintiff is precluded from making an application but such an application requires the application to address the relevance, necessity and the interest of justice factors which will be considered by the Court.

19. In those circumstances, the Court refuses the application to strike out the defence.