



## THE COURT OF APPEAL

Kelly J.  
Irvine J.  
Hogan J.

2015/222

Joseph McCabe and Clara McCabe

Plaintiffs/Respondents

And

Irish Life Assurance plc

Defendant/Appellant

And

Danske Bank a/s trading as National Irish Bank

Third party

### Judgment of Mr. Justice Kelly delivered on the 9th day of November 2015

#### Introduction

1. It is almost 50 years since the Supreme Court, in an unreported judgment of the 9th May, 1967, in the case of *J. & LS. Goodbody Limited v. Clyde Shipping Company Limited* encouraged a greater use of interrogatories in High Court litigation. Walsh J., speaking for the court, said this:-

*"I would also like to express my agreement with the view expressed by the learned High Court judge that interrogatories ought to be used more than they are. This procedure and all other pre-trial procedures which are available should be encouraged because anything which tends to narrow the issues which have to be tried by the court and which will reduce the area of proof must result in considerable saving of time and money which cannot but be beneficial to the parties and to the administration of justice in general."*

2. That judgment of the Supreme Court is largely forgotten and the exhortation contained in it is for the most part ignored.

3. Often the delivery of interrogatories can obviate the necessity for expensive and time consuming discovery, can dispose of issues prior to trial, can lessen in the number of witnesses and result in an overall shortening of trials. In many cases which lend themselves to the delivery of interrogatories the procedure is simply ignored.

4. Under the provisions of O. 31, leave of the court is required for the delivery of interrogatories except in cases alleging fraud or breach of trust. When the Commercial Court was set up in 2004, its rules permitted parties in commercial list litigation to deliver interrogatories without leave of the court. That procedural change gave rise to a much more extensive use of interrogatories in Commercial Court proceedings. They have been beneficial in achieving the desired results.

5. Since the decision of the Supreme Court in Goodbody's case, litigation has increased enormously in quantity, complexity and cost. It is high time for the exhortation of the Supreme Court of 1967 to be acted upon.

6. In that decision the Supreme Court made it clear that:-

*"One of the purposes of interrogatories is to sustain the plaintiff's case as well as destroy the defendant's case and that interrogatories need not be confined to facts directly in issue but may extend to any facts, the existence or non existence of which is relevant to the existence or non existence of the facts directly in issue. Furthermore, the interrogatory sought need not be shown to be conclusive on the question in issue, but it is sufficient if the interrogatory should have some bearing on the question and that the interrogatory might form a step in establishing the liability. It is not necessary for the person seeking leave to deliver the interrogatory to show that it is in respect of something he does not already know."*

7. Those observations also deserve to be brought to the attention of practitioners since many appear to have a very restricted view of the circumstances in which interrogatories may be used. That may in part explain why they are used so infrequently. It is clear from the observations of Walsh J. that robust questions may be posed on a much wider basis than is generally appreciated.

8. Having made these observations, I turn to the issues which arise on this appeal from a refusal by Barr J. in the High Court to permit the delivery of interrogatories in this case.

#### This case

9. These proceedings were commenced by plenary summons issued on the 15th April, 2011. The principal relief which is sought is payment to the plaintiffs of a benefit of €250,000 on foot of a policy of life assurance entered into in or about November 2005, in respect of which one of the lives insured was Marie McCabe (the deceased). The plaintiffs are the widower and daughter respectively of the deceased. The deceased died on the 26th August, 2009.

10. The defendant contends that the contract of insurance was one of utmost good faith and that the deceased was under a duty to disclose to it all material facts. In breach of that duty it is contended that the deceased did not disclose the following facts, each of which was a material fact of which she was aware, but the defendant was unaware. The facts alleged at para. 9 of the defence are as follows:-

*"(a) On the 10th May, 1984, the deceased was admitted to Adelaide and Meath Hospital, Tallaght, Dublin 24, under the care of Dr. Gerald H. Tomkin, Consultant Physician. After admission the deceased underwent treatment for possible anorexia nervosa and was discharged on the 21st May, 1984.*

*(b) In 1995 the deceased was admitted to Cavan General Hospital following an overdose and was referred to Dr. Vincent Russell, Consultant Psychiatrist.*

*(c) On the 21st December, 2000, the deceased was noted by her GP, Dr. William Hanly, to have a history of alcohol dependency.*

*(d) On the 7th February, 2001, the deceased was admitted to Cavan General Hospital following a head injury sustained while under the influence of alcohol.*

*(e) On the 23rd February, 2001, the deceased attended Dr. McCaffrey, Baileborough Clinic, regarding alcohol abuse and was prescribed Librium.*

*(f) In October 2001, the deceased was admitted to Aiséirí Treatment Centre, Cahir, Co. Tipperary and completed a 30 day in-patient detoxification programme.*

*(g) From 2000 until September 2005, the deceased remained under the care of Dr. Vincent Russell, Consultant Psychiatrist, in relation to a long standing history of psychiatric problems, and was prescribed medications on numerous occasions during this period, including Seroxat, Xanax, Paroxetine, Dalmane, Lexotan, Zimovane, Efexor."*

These particulars are direct quotations from the defence and counterclaim of the defendant.

11. Furthermore, the defendant pleads that the deceased completed or signed a proposal form in which she failed to disclose the following facts each of which was material and of which she was aware, but the defendant was not.

*"(a) The deceased incorrectly replied 'No' to the question 'Are you currently unwell or do you suffer from any physical defect or is there any ailment or disease to which you have a tendency?'*

*(b) The deceased incorrectly replied 'No' to the question, 'Are you currently taking prescribed drugs, medicines, tablets or other treatment or have you taken such a course lasting more than two weeks within the past year?'*

*(c) The deceased incorrectly replied 'No' to the question, 'Have you been referred by a doctor to a specialist at any hospital or clinic within the past five years or have you seen such a specialist in the past five years?'*

*(d) The deceased incorrectly replied 'No' to the question, 'Have you ever suffered from or had treatment for cancer or other growth or tumour, multiple sclerosis, epilepsy or blackouts, paralysis or numbness, mental or nervous disorder, double vision or eye disorder, ear disorder, asthma or any lung disorder or liver, stomach or bowel disorder?'"*

12. The reply to defence and counterclaim denies that the deceased acted in breach of duty to disclose all material facts. The reply furthermore contends that if the deceased failed to disclose the alleged material facts that did not constitute material non disclosure. Finally, the plaintiffs say that they await strict proof of the completion of the proposal form by the deceased. It is contended that the proposal form was completed by Danske Bank, its servants or agents, who at all material times acted as broker and agent for the first defendant. Danske Bank has been joined as a third party to this litigation.

#### **Preparation for trial**

13. In an effort to narrow the issues in dispute between the parties, thus shortening the trial and saving costs, the defendant on the 12th November, 2013, served a notice to admit facts on the plaintiffs. The facts which they sought to admit were those set out in paras. (a) through (g), of para. 9 of the defence which I have already quoted in full.

14. It took six months for the plaintiffs solicitors to reply to that notice. The reply was a bare refusal to admit the facts. No attempt was made to explain why that stance was being taken.

15. Faced with this refusal, the defendant's solicitors wrote enclosing draft interrogatories dealing with the same issues that were sought to be dealt with in the notice to admit facts. This request elicited nothing more than a letter of acknowledgment of receipt of the request. Again no attempt was made on the part of the plaintiffs' solicitors to deal with the issue.

16. Faced with this failure to engage by the plaintiffs solicitors, a motion was brought seeking leave to deliver the interrogatories in question. That motion was heard by Barr J. and resulted in the judgment of the 21st April, 2015, which is the subject of this appeal.

17. It is to be noted that no replying affidavit was sworn in response to the affidavit which grounded the application for leave to deliver the interrogatories.

#### **The interrogatories**

18. The following are the interrogatories which were sought to be delivered:-

1. *"Was not the late Marie McCabe (the deceased), on the 10th May, 1984, admitted to Adelaide and Meath Hospital, Tallaght, Dublin 24 under the care of Dr. Gerald H. Tomkin, Consultant Physician?"*

2. *"Did not the deceased, after admission to the Adelaide and Meath Hospital on the said date, undergo treatment for possible anorexia nervosa before being discharged on the 21st May, 1984?"*

3. *"Was not the deceased admitted to Cavan General Hospital in 1995 following an overdose and referred to Dr. Vincent Russell, Consultant Psychiatrist?"*

4. *"Did not the deceased have a history of alcohol dependency prior to the completion of the proposal form for the policy of insurance the subject of these proceedings?"*

5. *"Was not the deceased noted by her GP, Dr. William Hanly on the 21st December, 2000, to have a history of alcohol*

dependency?"

6. "Was not the deceased admitted to Cavan General Hospital on the 7th February, 2001, following a head injury sustained while under the influence of alcohol?"

7. "Did the deceased not attend Dr. McCaffrey, Baileborough, Clinic, on the 23rd February, 2001, regarding alcohol abuse, who prescribed Librium?"

8. "Did not (sic) attend Dr. McCaffrey prescribed (sic) Librium in respect of the deceased's alcohol abuse?"

9. "Was not the deceased admitted to the Aiséirí Treatment Centre, Cahir, Co. Tipperary in October 2001?"

10. "Did not the deceased complete a 30 day inpatient detoxification programme in the Aiséirí Treatment centre at that time?"

11. "Did not the deceased between 2000 and September 2005, remain under the care of Dr. Vincent Russell, Consultant Psychiatrist?"

12. "Was not her long standing history of psychiatric problems the reason for her remaining under the care of Dr. Vincent Russell in this period?"

13. "Was not the deceased prescribed the following medications on numerous occasions between 2000 and September 2005, - Seroxat, Xanax, Paroxetine, Dalmane, Lexotan, Zimovane, Efexor.?"

19. The interrogatories were sought to be delivered to and answered by both plaintiffs.

20. The High Court refused permission to deliver any of the interrogatories.

### **The High Court judgment**

21. The basis for the refusal to permit delivery of the interrogatories is set forth in the conclusions reached by the judge. He said:-

*"I am satisfied that in the circumstances of this case, it would be unfair to order the plaintiffs to furnish answers on affidavit to the questions raised in the interrogatories. I am of the view that the plaintiffs are correct when they say that the questions posed relating to the deceased's medical conditions and treatment during her lifetime, do not lend themselves to simple "yes" or "no" answers. To force them to furnish such answers would be an injustice as the whole story would not be told.*

*The issue of the deceased's prior medical conditions and her treatment therefore, are going to be crucial issues at the trial of the action. It is not unreasonable that the defendants, who are resisting payment out under the contracts (sic) of life assurance on grounds of material non-disclosure on the part of the deceased, should prove this fact by oral evidence at the trial of the action. Furthermore, justice requires that the plaintiffs should be given the opportunity to test the evidence of the doctors by means of cross examination. In the circumstances, I refuse leave to issue interrogatories in this case."*

### **Order 31**

22. Order 31, rules 1 to 11 inclusive, deal with the delivery of interrogatories.

23. As I have already pointed out, save in cases where relief is sought in respect of fraud or breach of trust, leave of the court is required before interrogatories may be delivered.

24. In deciding upon such an application the court (pursuant to O. 31, r. 2):

*"Shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents, relating to any matter in question. Leave shall be given as to such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs."*

25. In the present case the plaintiffs solicitors failed to engage at all when asked to admit relevant facts or to respond to the draft interrogatories. Not merely was no offer made by the plaintiffs' solicitors, they simply refused to cooperate at all. That, in my view, is an unacceptable approach to the conduct of litigation. The court is entitled to expect that solicitors involved in the conduct of litigation behave reasonably in cooperating with their opposite number to progress the litigation to the mutual benefit of their respective clients. As a result of this omission there was no offer which the court could take into account pursuant to the provisions of O. 31, r. 2.

26. Order 31, r. 6, provides that any objection to answering any one or more of the several interrogatories on the ground that it is or they are scandalous or irrelevant, or not *bona fide* for the purpose of the cause of matter, or that the matters inquired into are not sufficiently material at that stage, or any other ground, may be taken in the affidavit in answer. Such objections would normally of course fall to be dealt with on the hearing of the motion seeking leave to deliver the interrogatories. But even thereafter such objections can be taken in the affidavit in answer.

27. Under O. 31, r. 10, the sufficiency or otherwise of an affidavit objected to as an insufficient response to interrogatories is to be determined by the court on motion.

28. Under O. 31, r. 11, if a person omits to answer, or answers insufficiently, the interrogating party may apply to the Court for an order requiring him to answer, or to answer further, as the case may be; and he may be directed to answer or answer further, either by affidavit or by viva voce examination, as the Court may direct.

### **Discussion**

29. As is plain from the text of the interrogatories sought to be delivered, they seek to elicit a sworn response from the plaintiffs on

whether the deceased required the medical interventions which are contended for at para. 9 of the defence and counterclaim. This sworn response may be used in evidence at the trial.

30. The facts which are pleaded in the defence on this topic relate to medical attention given by a minimum of four different doctors over a period of in excess of 20 years. Four separate medical facilities are involved. It is quite clear that if the defendant is required to formally prove the deceased's medical history it will involve the attendance of all of these doctors and perhaps officials from the various facilities, thus incurring significant costs and adding to the length of the trial.

31. Apart from the *Goodbody* case which I mentioned at the outset of this judgment, the topic of interrogatories has attracted the attention of the Superior Courts on a number of occasions in relatively recent years. I make mention of some of these cases as assisting in an analysis of the judgment under appeal.

32. In *Woodfab Limited v. Coillte Teoranta* [2000] 1 I.R. 20, Shanley J. said:

*"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."*

33. In *Money Markets International Limited v Fanning* [2000] 3 I.R. 215, O'Sullivan J. said:-

*"The purpose of exhibiting interrogatories is to seek admissions which will become evidence to be relied upon by the interrogating party. They will not prove the entire of that party's case but will lighten the burden of so doing to the extent that certain elements required to be proved will be established in the replies. I am unable to see, therefore, how admissions about facts 'cannot be used as a means to prove the interrogating party's case.'"*

34. I am of opinion that the interrogatories sought to be delivered here serve a clear litigious purpose. As a matter of probability they will save significant costs and shorten the trial.

35. I am unable to see how it can be said that requiring the plaintiffs to answer the interrogatories would be either oppressive or unjust. No evidence in support of such a contention was ever placed before the High Court. Indeed it was not even suggested in correspondence since there was in reality no correspondence from the plaintiffs' solicitors.

36. Whilst I am of the view that the proposed interrogatories require some minor recasting which I deal with later in this judgment, each of them admits of a yes or no answer. Again nothing was put before the court either by way of evidence or in exhibited correspondence to suggest that the plaintiffs are not aware of the answer to these various interrogatories. Counsel did suggest that the daughter of the deceased would be unable to answer some of the questions because they relate to matters which took place either before she was born or when in her infancy. If that be the case it ought to have been dealt with in evidence. In any event these interrogatories are being administered to both plaintiffs and if she is unable to answer some of the questions she can say so and give the reasons for her inability to do so.

37. In the respondents notice it is said that the defendant failed to establish any exigency requiring the delivery of interrogatories. This line of argument was disposed of by Shanley J. in the *Woodfab* case where he held that the existence of a so called special exigency was no different from the requirement set down in the Rules of the Superior Courts that interrogatories would only be allowed where they were necessary to ensure the fair disposal of the cause or for the reduction of costs.

38. It is clear from the judgment under appeal that the judge refused to permit the delivery of interrogatories in this case solely on the basis that he considered them to be unfair.

39. I infer that in limiting his refusal to that ground the judge was of opinion that the defendants had demonstrated that the delivery of interrogatories were necessary for disposing fairly of the cause or for saving costs. If I am right in that inference I believe the judge was correct in so concluding. I am quite satisfied that the defendants have demonstrated these interrogatories are necessary, particularly from the point of view of saving costs.

### **Unfairness**

40. As the sole basis for refusal by the High Court was alleged unfairness, it is necessary to look at in some detail.

41. First, there is nothing inherently unfair in directing the delivery of interrogatories simply because a claim is being made on foot of an insurance policy which has been avoided for an alleged non disclosure. Such an order was made in the Supreme Court of New South Wales in the case of *Stealth Enterprises Australia Pty Limited v. Callidan Insurance Limited* [2013] NSW SC 1757. There the defendant successfully submitted that the delivery of interrogatories was necessary to fairly dispose of the issue of non disclosure at the trial of the action.

42. Second, there is not a word of evidence put before the court on the part of the plaintiffs to suggest that there is anything unfair or oppressive in the content of the interrogatories which are sought to be delivered.

43. It has been suggested that the plaintiffs would be required to carry out extensive investigation and research into the medical history of the deceased in order to answer the interrogatories. No evidence was led in the court below to support such an assertion. Nor am I convinced that such is the case. In any event, if the plaintiffs truly do not have such knowledge, then that can be dealt with in the course of the affidavit in answer to the interrogatories.

44. The trial judge was also of the view that requiring the plaintiffs to answer the interrogatories would be an injustice as "the whole story would not be told". He was also of the view that the plaintiffs should be given an opportunity to test the evidence of the doctors by means of cross examination. But that approach appears to me to miss a crucial point. If the interrogatories are delivered and the plaintiffs accept the accuracy of the facts pleaded by answering the questions posed in the affirmative, the question of whether those facts were sufficient to justify the avoidance of the policy will be a question of law. No further medical evidence will be required. Cross examination of medical witnesses will be of no assistance in that regard. If, on the other hand, the answers to the interrogatories are not as anticipated by the defendants then they will have no option but to call the relevant witnesses to give viva voce evidence. Thus the plaintiffs will be able to cross examine.

45. I am unable to accept that there is anything unjust or oppressive in directing the delivery of these interrogatories.

46. I am of opinion however, that there must be some minor adjustments made to them in order to make the questions posed crystal clear and to enable equally clear answers to be sworn to by the plaintiffs. I set out the amended questions in a schedule to this judgment.

47. In adjusting the questions I have followed the form of question which is regularly put when interrogatories are used in Commercial list cases. The archaic style of framing questions in the negative has long since been abandoned. (See *Anglo Irish Bank Corporation Limited v. Browne* [2011] IEHC 140).

#### **Decision**

48. For the reasons which I have outlined, I am of the view that this appeal ought to be allowed and the order of the High Court be set aside.

#### **Schedule**

1. Was the late Marie McCabe (the deceased), on the 19th May, 1984, admitted to the Adelaide and Meath Hospital, Tallaght, Dublin 24, under the care of Dr. Gerald H. Tomkin, consultant Physician?
2. Did the deceased undergo treatment for possible anorexia nervosa before being discharged from that hospital on the 21st May, 1984?
3. Was the deceased admitted to Cavan General Hospital in 1995 and referred to Dr. Vincent Russell, Consultant Psychiatrist?
4. Did the deceased have a history of alcohol dependency prior to the completion of the proposal form for the policy of insurance the subject of these proceedings?
5. Was the deceased noted by her GP Dr. William Hanley, on the 21st December, 2000 to have a history of alcohol dependency?
6. Was the deceased admitted to Cavan General Hospital on the 7th February, 2001, following a head injury sustained whilst under the influence of alcohol?
7. Did the deceased attend Dr. McCaffrey, Baileborough Clinic, on the 23rd February 2001, regarding alcohol abuse?
8. Did Dr. McCaffrey prescribe Librium in respect of the deceased's alcohol abuse?
9. Was the deceased admitted to Aiséirí Treatment Centre, Cahir, Co. Tipperary, in October 2001?
10. Did the deceased complete an in-patient detoxification programme in the Aiséirí Treatment Centre in or about October 2001?
11. Did the deceased between 2000 and September 2005 remain under the care of Dr. Vincent Russell, Consultant Psychiatrist?
12. Did the deceased remain under the care of Dr. Russell between 2000 and September 2005 because of her psychiatric problems?
13. Between 2000 and September 2005 was the deceased prescribed the following medications
  - (a) Seroxat,
  - (b) Xanax,
  - (c) Paroxetine,
  - (d) Dalmane,
  - (e) Lexotan,
  - (f) Zimovane,
  - (g) Efexor.?"