Neutral Citation Number: [2009] IEHC 273

THE HIGH COURT

2005 2031 P

BETWEEN

CAROLINE COLEMAN

PLAINTIFF

AND

NEW IRELAND ASSURANCE PLC TRADING AS BANK OF IRELAND LIFE

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 12th June, 2009

1. Introduction

1.1 The plaintiff ("Ms. Coleman") has unfortunately been diagnosed with Multiple Sclerosis ("MS"). Some time ago, in circumstances which it will be necessary to explore, she entered into an insurance policy with the defendants ("New Ireland") which included so called Critical Illness cover. Part of the relevant policy terms provided for the payment to Ms. Coleman of €95,231 (originally IR£75,000) in the event of her coming to suffer from various specified illnesses, including MS. On that basis, Ms. Coleman claims to be entitled to the payment of that sum.

1.2 New Ireland accept that the conditions necessary for the payment of the sum have arisen in that it is accepted that Ms. Coleman *prima facie* qualifies for the payment concerned under the terms of the policy. However, New Ireland seek to defend these proceedings on the basis of what is said to have been a failure adequately to disclose material matters at the time when the insurance policy was first put in place. Before detailing the precise issues which arise between the parties it is appropriate to turn, therefore, to the facts, most of which are not in controversy between the parties.

2. The Facts

2.1 Ms. Coleman was born in December, 1972. In the late 1990s, she was engaged in the purchase of a house which involved obtaining a mortgage facility from Bank of Ireland. In that context she was required to take out life protection cover. New Ireland operates within Bank of Ireland as a provider of such assurance. With that in mind, an appointment was arranged by Ms. Coleman's local Bank of Ireland branch with a representative of New Ireland, for the purposes of seeking to put in place the relevant cover.

2.2 Ms. Coleman's initial requirement was for cover in the sum of IR£60,000. Following a discussion with and advice from New Ireland's representative, it was decided that Ms. Coleman would apply for what was called "living cover". That form of cover included both a standard life cover which would result in the sum of IR£60,000 being paid on Ms. Coleman's death, but also critical illness cover in the same sum which would result in Ms. Coleman being paid the sum in question in the event that she should suffer from one of the specified illnesses detailed in the policy.

2.3 At the same meeting Ms. Coleman signed a proposal form which, as is normal practice, contained within it various questions concerning, amongst other things, Ms. Coleman's health history. It is agreed by all witnesses that what in fact happened was that the New Ireland representative concerned read out the questions to Ms. Coleman and filled in the answers, as given by Ms. Coleman, in her own handwriting. Ms. Coleman then signed the document in question. It was also accepted by Ms. Coleman that the representative concerned had explained to her, in advance of going through the specific questions, the importance of making full disclosure of any material matters concerning her health.

2.4 It is again common case that the proposal was accepted on what were normal terms subject to one matter. Ms. Coleman disclosed, in answer to one of the relevant questions, that she had had some difficulties with her back. While not material, in itself, to these proceedings it should be noted that the policy concerned contained, by agreement, an exclusion in relation to critical illness cover by reference to that back trouble.

2.5 The following year Ms. Coleman wished to increase the level of her cover from IR£60,000 to IR£75,000. On the occasion in question it would seem that a further application form and questionnaire was filled in. The evidence given on behalf of New Ireland suggests that it was New Ireland's practice at that time, that persons seeking a top up form of insurance would be asked to fill in the relevant questionnaire (or, perhaps, more accurately would be asked the questions from which the representative concerned would fill in the answers), by reference only to any material changes in the situation from the time when the original proposal form was put in place. It is fair to say that the proposal form concerned does not say that in terms. Indeed, the wording of the proposal form is no different in the case of a top up proposal, on the one hand, or an original proposal, on the other hand. In other words, the person concerned is asked for any relevant medical details under various headings, irregardless of the time period from which the relevant medical details might stem. That position remains the case where a top up insurance is put in place. In any event all of the questions on the top up proposal form were answered in a way which disclosed no medical difficulties. Strictly speaking the top up proposal form is, therefore, on any view, incorrect. Ms. Coleman had disclosed a number of matters in her original proposal form which were not repeated in the proposal form for top up insurance. However, on the basis of the evidence from New Ireland, I am satisfied that, as a matter of probability, Ms. Coleman was informed that it was unnecessary to make any further disclosure in relation to issues already disclosed on the original proposal form. On that basis, it is clear that the real question that needs to be answered in these proceedings concerns the disclosure set out in the original proposal form.

2.6 In particular, two aspects of that proposal form are relied on by New Ireland.

2.7 The section of the proposal form dealing with medical history is section D. In part 3 of section D, the proposer is invited to identify the name and address of the proposer's doctor and to "give the date and reasons for any visits you have made,

including the results of any checkups". The answer given to that question in the original proposal form is simply flus/colds. In addition the proposer is asked "have you seen any other doctors or specialist?" The answer to this question is no. As will become clear there is no doubt, as a matter of fact, that both of those answers are incorrect.

2.8 Parts 4 and 5 of section D ask the proposer whether the proposer had ever suffered from various conditions. Under 4(h) there is a disclosure of the back injury to which I have made brief reference earlier. Under part 5(c) the proposer is asked whether the proposer had "any other tests or suffered any other illness?" The only disclosure under that heading is to the effect that there had been tests for suspected gallstones which were negative and had not given rise to any subsequent problems.

2.9 There is no other disclosure in respect of any tests carried out or illnesses suffered. It is again clear that, as a matter of fact, those answers are also incorrect.

2.10 Against that background it is necessary to go back to a time some eight years prior to the proposal form being filled in. At the time in question, Ms. Coleman was nineteen years of age and had just commenced study as a trainee nurse. In the few days immediately before Christmas 1990, Ms. Coleman began to suffer some problems with her eyesight which became relatively severe on Christmas day leading to her attending her general practitioner. That general practitioner (Dr. Herlihy) gave evidence to the effect that he was concerned that the symptoms which she displayed might be indicative of MS. He also made it clear that he did not, on the occasion in question, inform Ms. Coleman of his concerns because he was worried as to the effect which an expression of those concerns might have on her. In his own words he was anxious to ensure that she would go, immediately, for further tests but was not anxious to express himself in any way that would alarm her. On that basis he said something to the effect that she had only one pair of eyes and should take care of them. He, therefore, suggested she should immediately go for tests. She went, again on Christmas day, for tests at Cork Regional Hospital. It would seem that the hospital wished to keep her in overnight for further testing, but allowed her, in fact, to go to student nursing accommodation which was on site. The following day, when she returned, she was given some treatment in the form of drops and was asked to come back in for further tests a number of days later. She returned on the 3rd January, 1991, and was discharged three days later. Contemporary medical records disclose that by early January Ms. Coleman had become asymptomatic. Those records also disclose that, prior to the incident over Christmas, Ms. Coleman had no neurological or other relevant symptoms. On all of the evidence it is clear that the treatment concerned worked in a very short period of time so that Ms. Coleman became entirely asymptomatic within a short number of days. It is also clear that Ms. Coleman underwent a number of tests on returning to hospital, including a lumbar puncture and a scan. Ms. Coleman also saw a consultant on at least two occasions.

2.11 It is again clear on the evidence that, while a formal diagnosis of MS was not made at that stage, all of the doctors concerned believed that it was highly likely that Ms. Coleman was suffering from MS. It is equally clear that none of the doctors concerned (including her own GP to whom these matters were reported) informed her of the fact. Indeed she was told, correctly, that the scan was normal but was not told that some of the other tests pointed to demyelinating disease or MS. There is, therefore, no doubt on the evidence but that Ms. Coleman was not, in fact, told that she might well be suffering from MS on the occasion in question. It is equally clear that she suffered no further symptoms or any other matters that required medical attention relevant to this case prior to filling in the proposal form some eight or (in the case of the top up proposal) nine years later. There can be no doubt, therefore, that at the time when Ms. Coleman signed both of the relevant forms she was not aware of the fact that there had been an opinion taken to the effect that it was highly likely that she was suffering from MS. It should be noted immediately that, on the basis of the that evidence, counsel for New Ireland quite properly accepted that no case could legitimately be made out for suggesting that Ms. Coleman was in breach of any obligation to disclose MS as such.

2.12 However, it is clear that the investigations carried out to which I have briefly referred and the attendant tests and consultation with doctors (including a specialist) were not disclosed. It is on that failure of disclosure that New Ireland relies.

2.13 Ms. Coleman says that at the time when she gave answers to the representative of New Ireland to enable the proposal form to be filled in, she had completely put the incident some eight years earlier out of her mind. Against that background, in reality two issues separated the parties at the hearing before me. The first was as to the precise legal test to be applied in the case of a non-disclosure of the type asserted by New Ireland. This is a matter of law to which I will next turn. The second concerned the precise characterisation of what happened as a matter of fact and in particular, the extent to which it was credible for Ms. Coleman to assert that she had completely put the matters to which I have referred out of mind. When I have reviewed the legal principles I will return to the facts with particular reference to that issue. However, as indicated, I turn firstly to the legal issues.

3. The Law

3.1 The requirement that a proposer for a policy of insurance must make full disclosure is more than well settled. Thus, an insurer can avoid a policy of insurance where either:-

A. The insured fails to disclose a material fact; or

B. The proposer makes a positive misrepresentation in the course of the negotiations.

Furthermore, an insurer may be entitled to avoid a contract of insurance where there has been a breach by the proposer of a term of the contract of insurance warranting that a certain set of facts is the case. Whether, and to what extent, there has been any such warranty is a matter of construction of both the insurance policy itself together with connected documents such as any proposal form.

3.2 It is of particular relevant that, in the context of the possible consequences of a failure to disclose a medical condition which had been diagnosed but which was not known to the proposer, the Supreme Court gave consideration to the application of the above general principles in such circumstances in *Keating v. New Ireland Insurance Company* [1990] 2 I.R. 383.

3.3 In *Keating*, the relevant proposer's doctors were aware that the proposer suffered from angina. There was no evidence which was sufficient to satisfy this court, however, that the proposer in fact knew of his condition. The proposer had disclosed that he had undergone certain medical tests but, it would appear, the insurer concerned had not followed up on any questions that might have been raised. In those circumstances the insurance policy was upheld.

3.4 Two particular issues were canvassed on the appeal. The first was as to whether the proposer had been guilty of a misrepresentation by virtue of his failure to disclose a condition of angina. In that context, McCarthy J. (with whom the other

members of the court agreed), said the following (at p. 392):-

> "The insurers were not informed of these material facts; was it a non-disclosure? One cannot disclose what one does not know, albeit that this puts a premium on ignorance. It may well be that wilful ignorance would raise significant other issues; such is not the case here. If the proposer for life insurance has answered all the questions asked to the best of his ability and truthfully, his next-of-kin are not be damnified because of his ignorance or obtuseness which may be sometimes due to a mental block on matters affecting one's health."

So far as a failure to disclose is concerned it seems clear, therefore, that a party can only be subject to having his or her policy of insurance by voided by an insurance company if there is a failure to disclose a material fact of which the proposer was aware (or perhaps in certain circumstances might not have been aware by virtue of wilful ignorance).

3.5 Secondly, insofar as the answers to questions raised in a proposal form is concerned, a party will only be exposed to the risk of the contract of insurance being voided where the party fails to answer such questions to the best of the party's ability and truthfully. This would be so even where an answer is inaccurate as a result of ignorance or even, in the words of McCarthy J., the "obtuseness which may be sometimes due to a mental block on matters affecting ones health".

3.6 It should be noted that there is nothing in the terms of the proposal form in this case which would cause a deviation from those general principles. The declaration with which the proposal form ends (in para. A), declares that the proposer has disclosed all relevant facts and that all statements made on the application form are true and complete "to the best of my knowledge".

3.7 It is clear, therefore, that any material non-disclosure or any materially inaccurate answer to a question on the proposal form are to be judged by reference to the knowledge of the proposer, and whether answers given were to the best of the proposer's ability and truthful.

3.8 So far as the other aspect of the potential grounds for avoiding an insurance policy (that is breach of warranty) is concerned, McCarthy J., said the following (at p. 2394):-

> "Whilst acknowledging that parties are free, subject to legislative interference, to make such lawful contracts as they may wish, in my view there are certain clear principles that must be applied in construing a contract of insurance of the kind with which the court is presently concerned. Some of these may be stated as follows:-
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> 1. Parties of full age and competence are, subject to any statutory impediment, entitled to contract as they wish.
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> 2. Whist acknowledging the right of parties to express the pre-contract representations as being the basis of the contract, same must be read in the light of the actual terms of the contract subsequently executed. The contract, so to speak, takes over from the proposal.
>
> 3. If insurers desire to found the contract upon any particular warranty, it must be expressed in clear terms without any ambiguity.
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> 4. If there is any ambiguity, it must be read against the persons who prepared it (see *Anderson v. Fitzgerald* (1853) 4 H.L.C. 484 at 503, 507, 514 and *Thomson v. Weems* (1884) 9 App. Cas. 671 at 682, 687).
>
> 5. Like any commercial contract, such a policy must be given reasonable interpretation."

3.9 In like manner, Walsh J. (who agreed with McCarthy J.), took the view that the declaration in *Keating's* case should be interpreted as meaning that the answers were warranted to be true to the best of the proposer's knowledge and belief. It is not even necessary to go into difficult questions of interpretation in this case as the express terms of the declaration simply declare that the answers to the questions are true to the best of the proposer's knowledge.

3.10 Thus, whether viewed (a) as a warranty (in the absence of the sort of clear wording mentioned in *Keating* making it clear that the warranty went beyond knowledge and belief), (b) under the general duty to disclose, or (c) under the entitlement to avoid on the basis of a misrepresentation by reason of mis-answering or failing to answer correctly any of the questions on the proposal form, it seems to me that the test comes down to the same issue. Was there a material failure to disclose matters which were within the knowledge of the proposer so as to lead to the answer or failure to disclose being properly described as untruthful.

3.11 Against that background it is necessary to return to the facts.

4. A Return to the Facts

4.1 For the reasons already analysed there is no doubt but that the answer to at least two of the questions raised on the proposal form were inaccurate. Ms. Coleman had seen a specialist and had undergone tests neither of which facts were disclosed. In those circumstances, the question arises as to whether it can properly be said that she has disclosed all relevant facts and answered the questions to the best of her knowledge.

4.2 It is true to say that, at the time in question, that is to say when the tests were carried out and Ms. Coleman saw the relevant specialist, those matters must have been significant enough. Ms. Coleman did, after all, go to her GP on Christmas Day and thereafter go to a hospital for tests and was subsequently kept in for a number of days to undergo further tests. However, it must be remembered that these events occurred at a time when she was still a teenager. The proposal form came eight years later. Likewise, I accept her evidence which is to the effect that having now recollected the matters in question, she remembers looking up a pocket Nurses Medical Dictionary which made reference to the condition which she was told she had at the time. On all the evidence it seems to me clear that the only relevant information that was communicated, at the time, to Ms. Coleman was to the effect that she had suffered from "Optic Neuritis". She drew attention to the definition of Optic Neuritis in the dictionary concerned. It simply describes the condition as an inflammation of the eye.

4.3 In this context it is also necessary to have some regard to the evidence of her consultant neurologist, Roderick Galvin. Dr. Galvin, like Dr. Herlihy, did not inform Ms. Coleman that there was high degree of likelihood that she was developing MS. He did, in a letter to Dr. Herlihy of the 7th June, 1991, say that he had:-

"Explained to her that there was a possibility that this or other neurological symptoms could trouble her in the future, but that this would hopefully not be the case."

4.4 That was, however, a letter written by a consultant to a general practitioner. Ms. Coleman did not accept that she had been told that there was a possibility that she might suffer other neurological symptoms. She does accept that she was told that the eye inflammation from which she had suffered the previous Christmas might come back.

4.5 I am satisfied that Dr. Galvin was, like Dr. Herlihy, concerned to ensure that Ms. Coleman was not unduly alarmed and did not, therefore, express himself in any terms which might cause alarm. In the circumstances, on balance, I am not satisfied that it was intimated to Ms. Coleman that there was any ongoing risk arising from the condition which she developed for a few days over the Christmas period other than a possibility that it might recur. In that context it must be recalled that by the time she became engaged in filling in the proposal forms over eight years later, there had been no such reoccurrence. It must also be noted that there had been no other relevant symptoms before the episode over Christmas 1990.

4.6 In the circumstances, I am satisfied as a fact that Ms. Coleman had put the entire incident out of her mind on the basis that it did not appear to have been significant and that the symptoms had not recurred. This occurred, in my view, as a matter of probability due to something along the lines of the mental block of which McCarthy J. spoke in *Keating*.

4.7 In those circumstances I am satisfied that, as of the date of the proposal, Ms. Coleman answered the questions raised truthfully and to the best of her knowledge as it then was. This was not a case of wilful ignorance or deliberate or culpable forgetfulness.

5. Conclusions

5.1 In those circumstances I am not satisfied that:-

A. Ms. Coleman was guilty of any material non-disclosure of a fact which she knew at the relevant time;

B. Failed to answer any question truthfully or to the best of her knowledge at that time; or

C. Was in breach of any warranty or condition contained within the contract of insurance.

5.2 In the circumstances, I am satisfied that Ms. Coleman is entitled to succeed for the recovery of the sum of €95,230.76. On the basis that her application for payment of that sum was made towards the end of 2003, I am satisfied that, had New Ireland not come to an incorrect view as to its entitlement to avoid, the application should have been processed and a payment made by, at the latest, the 30th June, 2004. In the circumstances I propose awarding Ms. Coleman Courts Act interest from the 1st July, 2004 to date.