

## THE HIGH COURT

[2011 No. 3492 P.]

BETWEEN

JOSEPH MCCABE AND CLARA MCCABE

PLAINTIFF

AND

THE IRISH LIFE INSURANCE PLC. AND DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

DEFENDANT

**JUDGMENT of Mr. Justice Eagar delivered on the 6th of March, 2017**

1. The defendants in this case sought by motion an order pursuant to O. 31, r. 11 of the Rules of the Superior Courts requiring the plaintiffs to answer the interrogatories set out either by affidavit or *viva voce* examination, and in the alternative an order pursuant to O. 31, r. 21 of the Rules of the Superior Courts dismissing the plaintiffs' action for want of prosecution for failing to comply with an order to answer interrogatories. This motion was dated the 28th of January 2016.

2. The schedule attached to the notice of motion had thirteen questions and the thirteenth question involved seven subsections.

3. The grounding affidavit of Nessa Gardiner, solicitor, David Boyle solicitors says that the litigation involves of policy of life assurance entered into in or about November 2005 in respect of which one of the lives assured was Maria McCabe (the deceased). The plaintiff alleges in the proceedings they are entitled to the payment of benefits under the said policy arising out of the death of the deceased on the 26th August 2009.

4. In its defence and counter claim delivered on the 23rd April 2013 the defendants plead that the deceased failed to disclose to the defendants' certain material facts concerning the deceased personal medical history as pleaded in the defendants' counter claim and deriving out of these matters the defendants have alleged that the contract of life assurance was voidable for material nondisclosure and the defendant is entitled to avoid the contract, and did so.

5. In December 2014 the defendants' solicitors wrote enclosing draft interrogatories dealing with the same issues which were the subject of the notice to admit facts.

6. A motion was issued seeking leave to deliver interrogatories, and the motion was refused by the Master. The defendants' appeal was heard by the High Court (Barr J.) on the 23rd and 26th of February 2015 and judgment was reserved until the 21st of April 2015 when the application was refused. The defendants appealed to the Court of Appeal and on the 9th November, the Court of Appeal delivered a reserved judgment giving leave to deliver interrogatories. The order of the Court of Appeal was perfected on the 10th November 2015 and on the 21st December 2015 Ms. Gardiner stated that David Boyle solicitors wrote to the plaintiffs' solicitors including interrogatories and the terms approved by the Court of Appeal and a copy of the order.

7. Subsequently, on the 29th January 2016 under cover of two separate letters from the plaintiffs' solicitors dated the 3rd February 2016 and received on the 5th of February 2016, Ms. Gardiner referred to copies of the affidavits of Joseph McCabe and Clara McCabe, and that these affidavits contained the plaintiffs' purported answers to the entire interrogatories served on behalf of the defendants. She said that the purported answers to the interrogatories were insufficient. She said that Joseph McCabe stated that he had no direct knowledge of the answer of five of the interrogatories and Clara McCabe had in answering four of the interrogatories stated she had no direct knowledge of the answer.

8. The first named plaintiff at the time the policy was taken out was married to the late Marie McCabe, and the second named plaintiff is a legal representative of the late Marie McCabe. She further states that she believed that the deceased medical records are available to the plaintiffs. In answer to the motion, counsel on behalf of the defendants indicated that they had on the 28th of October 2016 received by registered post the medical file of Dr. Hanley who is the general practitioner of the deceased.

9. Counsel on behalf of the plaintiffs indicated that there were difficulties with regard to dealing with the medical notes, given that it would be traumatic for the plaintiffs to have to go through the medical reports.

10. The judgment of Court of Appeal in this matter was delivered by Kelly J. (as he then was) first of all, and says:

*"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 voided for an alleged nondisclosure.*

*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 is sought to be delivered.*

*Third, 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 allowed in the court below to support such an assertion. Nor am I convinced that such is the case. In any event if the plaintiffs do not have the knowledge then that can be dealt with in the courts of the affidavits in answer to the interrogatories."*

11. Now the plaintiffs have the medical reports, it seems to this Court that it is open to the solicitors for the plaintiffs to identify the issues which are the subject matter of the interrogatories by reading Dr. Hanley's report, and then to discuss same with the plaintiffs so that they can swear affidavits in answer to the interrogatories.

12. In all the circumstances of the case it seems to this Court that the defendants are entitled to the reliefs sought in the notice of motion at para. 1 and this Court makes an order pursuant to O. 31, r. 11 of the Rules of the Superior Courts requiring the plaintiffs to answer the interrogatories set out in the schedule to the notice of motion either by affidavit or *viva voce* examination. The affidavits in this case must be served within twenty-one days of the perfection of this order.

