Neutral Citation: [2015] IEHC 254

THE HIGH COURT

[2011 No. 3492 P.]

BETWEEN

JOSEPH MCCABE AND CLARA MCCABE

PLAINTIFFS

AND

IRISH LIFE ASSURANCE PLC AND DANSKE BANK T/A NATIONAL IRISH BANK

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 21st day of April 2015

Background

1. The first named plaintiff was married to one, Marie McCabe, who died on 26th August, 2009, (hereinafter referred to as *"the deceased"*). The second named plaintiff is the daughter and legal personal representative of the deceased.

2. The plaintiffs alleged that by a proposal form dated on or about 2nd November, 2005, the first named plaintiff and the deceased sought mortgage protection life insurance from the first named defendant for the purposes of insuring both of their lives in respect of a joint mortgage loan agreement with the third party for a property at Ross, Mountnugent, Co. Meath. On the said application form, the proposer was stated to be National Irish Bank.

3. The plaintiffs allege that the said application form was completed on a date unknown by the third party, its servants or agents. On or about 2nd November, 2005, the first named plaintiff and the deceased signed the said form.

4. It is alleged that the defendant accepted the said application and a life assurance policy bearing number 12060736 *("the policy")* issued on 2nd November, 2005. Under the policy, the defendant agreed, *inter alia*, to insure the joint lives of the plaintiff and the deceased in consideration of the payment by the plaintiff and the deceased to the defendant of the premium specified therein. It was a term or condition of the policy that, in the event of the death of the plaintiff or the deceased during the currency of the policy, the first named defendant would, subject to the terms and conditions therein contained, pay to the second named defendant the sum of €250,000 in order to discharge the aforesaid mortgage agreement, which sum was to reduce over a period of 25 years in a manner specified within the said mortgage agreement.

5. The defendant has refused to pay out any money on foot of the said contract of life assurance due to the alleged material non-disclosure by the deceased of her prior psychiatric history.

6. In these proceedings, the plaintiffs seek payment of the sum of €250,000 due under the said contract of life assurance. They also seek a declaration that the plaintiffs and each of them are entitled to the performance of the contract of insurance. In the alternative, they claim damages for breach of contract, negligence and breach of duty against the defendant.

7. The plaintiffs brought a complaint to the Financial Services Ombudsman in relation to the third party. The plaintiffs were unsuccessful in their claim. The plaintiffs brought a statutory appeal against the Ombudsman's decision. Those proceedings are stayed pending the outcome of the within proceedings. The plaintiffs had originally sued the third party as a co-defendant. On 22nd January, 2012, the plaintiffs served a notice of discontinuance against Danske Bank. This was due to the fact that as they had brought a complaint before the Financial Services Ombudsman, they were not entitled to bring any civil proceedings against Danske Bank. The defendant has joined Danske Bank AS t/a National Irish Bank as a third party to the proceedings.

8. In this application, the defendant seeks liberty to issue interrogatories which are to be answered by both plaintiffs.

The Interrogatories

9. The defendant seeks liberty to issue the following interrogatories:-

> *"1. Was not the late Marie McCabe ('the deceased') on 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 21 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 Hanley, on 21st November, 2000, to have a history of alcohol dependency?*
>
> *6. Was not the deceased admitted to Cavan General Hospital on 7th February, 2001, following a head injury sustained while under the influence of alcohol?*
>
> *7. Did the deceased not attend Dr. McCaffrey, Bailieboro Clinic, on 23rd February, 2001, regarding alcohol abuse, who prescribed Librium?*

8. [This has been deleted]

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

10. Did not the deceased complete a 30 day in-patient 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 and Efexor?"

10. The defendant has obtained extensive discovery of the deceased's medical records. This has enabled the defendant to phrase the interrogatories with some precision. The defendant submits that by allowing the interrogatories, they will substantially shorten the issues which have to be determined at the trial of the action. This will lead to a significant reduction of the costs of the trial itself.

11. The defendant points out that prior to the drafting of the interrogatories, they had served a Notice to Admit Facts on 12th November, 2013. This notice was in largely the same format as the interrogatories. The plaintiffs refused to admit the facts sought in the said notice. The defendant then brought this motion seeking liberty to issue interrogatories.

12. The defendants submitted that the relevant legal principles governing the delivery of interrogatories were set out by Lynch J. in Re Bula Limited (In Receivership) [1995] ILRM 401 at p. 405 as follows:-

"As I understand the law, the basic purpose of interrogatories is to avoid injustice where only one party has knowledge and the ability conveniently to prove facts which are important to be established in aid of the opposing party's case, such opposing party not having such knowledge nor the ability to prove the facts either at all or without undue difficulty. O. 31, r. 2 of the Rules of the Superior Courts emphasises that:-

'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.'

It is worth noting that this admonition appears three times in O. 31, namely at r. 2 as quoted above, r. 12(3) and r. 18(2).

Interrogatories to be allowable must be as to facts in issue or facts reasonably relevant to establish facts in issue. Interrogatories as to mere evidence as distinct from facts or as to opinions or matters of law such as the meaning or effect of documents or statements or conduct are not permissible. Nor is it appropriate that unnecessary interrogatories should be put such as to facts within the knowledge of and readily capable of proof by the interrogating parties."

13. In *Mercantile Credit Co. of Ireland v. Heelan* [1994] 2 I.R. 105, Costello J. made a number of general observations in relation to the delivery of interrogatories. He stated as follows in relation to O. 31 of the Rules of the Superior Courts:-

"Order 31 makes provision for the delivery of interrogatories. Parties may deliver interrogatories but only interrogatories 'which…relate to any matters in question in the cause or matter' (rule 1). Where leave of the court is required such leave is given to deliver 'such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs' (rule 2). Interrogatories are replied to by affidavit (rule 9) and at the trial any party may use in evidence any one or more of the replies (rule 24)."

14. Later in the judgment, Costello J. made the following comments as to the circumstances in which leave to deliver interrogatories will be given:-

"That leave to deliver interrogatories will only be given when they are necessary for 'disposing fairly' of the cause or matter, or for saving costs. In considering the fair disposal of an action commenced by plenary summons the court must bear in mind that such actions are in principle to be heard on oral evidence (O. 1, r. 2) and that the use of evidence on affidavit given in reply to interrogatories is an exception which must be justified by some special exigency in the case which, in the interest of doing justice, requires the exception to be allowed."

15. Costello J. gave the following conclusions at pp. 115-116, of the judgment:-

"(2) Interrogatories which seek admissions as to the existence of documents and signatures to documents identified in discovery documents will normally be allowed, unless there are special reasons why in the interest of justice an order should not be made.

(3) Interrogatories which seek admissions about the facts surrounding documents identified in discovery affidavits must relate to the issues raised in the pleadings and cannot be used as a means to prove the interrogating party's case.

(4) Interrogatories which seek information must, likewise, relate to the issues raised in the pleadings and not to the evidence to be adduced in the case.

(5) Although the rule allows interrogatories to be served for the purpose of saving costs, the interest of doing justice between the parties is the paramount consideration in applications under it and so an order will be refused if a fair hearing of the issues between the parties might be prejudiced by it, even if the costs of the proceedings could be reduced by making the order."

16. In *Woodfab Limited v. Coillte Teo* [2000] 1 I.R. 20, Shanley J. specifically adopted the statement of principles as laid down by Costello J. in the *Mercantile Credit* case (supra). Shanley J. gave the following statement of principle:-

> *"As I have indicated, the various decisions to which I have been referred have gone to some length to emphasise that giving leave to deliver interrogatories must be regarded as an exception in any case to be heard on oral evidence and must be justified by the party seeking to deliver interrogatories. That the party seeking leave to deliver interrogatories must establish that they are necessary can be seen from O. 31, r. 2 of the Rules of the Superior Courts. However 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."*

17. The defendant also referred to the decision of the Supreme Court of New South Wales in *Stealth Enterprises Australia PTY Limited v. Callidan Insurance Limited* [2013] NSW SC 1757, where interrogatories were permitted which assisted the insurer in establishing the non-disclosure which had been pleaded by the insurance company. The defendant submitted that the case showed that the delivery of interrogatories was necessary to fairly dispose of the issue of non-disclosure at the trial of the action. The defendant argued that that the issues in the *Stealth Enterprises* case were the same as those that arise in the present proceedings.

18. The defendant pointed out that there was no affidavit from the first named plaintiff and his daughter. They did not say that they did not know the information sought. They simply did not want to give answers to the questions. The defendants referred to the decision of the Supreme Court in *J&LS Goodbody Limited v. Clyde Shipping Co. Limited* (Unreported, Supreme Court, 9th May, 1967) where the court stated as follows in relation to the purpose of the delivery of interrogatories:-

> *"While Order 31 Rule (2) of the Rules of the Superior Courts provide that leave to deliver interrogatories shall be given only when it is considered necessary either for disposing fairly of the cause or matter or for saving costs, it is well established that one of the purposes of interrogatories is to sustain the plaintiffs' case as well as to destroy the defendants' case (see the judgment of this Court in Keating v. Healy) 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 interrogatories sought need not be shown to be conclusive on the question in issue but it is sufficient if the interrogatories sought 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."*

19. The Supreme Court concluded its judgment by saying that interrogatories should be used more than they were at that time:-

> *"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."*

20. It was submitted that these principles had been adopted and applied by the High Court in *Money Markets International Stockbrokers Limited (In Liquidation) v. Fanning & Ors* [2000] 3 I.R. 215, where it was held that the necessity referred to in O. 31, r. 2, of the Rules of the Superior Courts 1986, could be satisfied if the party exhibiting interrogatories could establish that the answers to them would save costs or promote the fair and efficient conduct of the action in question. The directing of replies must be subject to the overriding principle that compelling such replies would not work injustice upon the party interrogated.

21. The defendants submitted that by directing the plaintiffs to answer the interrogatories, this would lead to a significant shortening of the trial of the action and would have a consequent saving in costs.

22. In response to the plaintiff's submission that the defendants could call the various doctors, whose existence had been disclosed in the discovery documentation, to establish the fact of non-disclosure, the defendant maintained that it would be unduly costly and time consuming to go down that route. The defendant argued that it would lead to a significant shortening of the trial if the plaintiffs were directed to answer the interrogatories.

23. The plaintiffs submitted that it would be unfair to allow the interrogatories as they did not permit of simple "*yes*" or "*no*" answers. The issue was more complex and it was necessary to hear from the various doctors. The plaintiffs further submitted that the defendant had huge resources and that in these circumstances it was not unreasonable to expect them to establish the non-disclosure by the deceased, by means of oral evidence. This would only result in them having to call two or three doctors who had treated the deceased at the relevant times.

24. The plaintiffs further submitted that this was not a case where the plaintiffs were the only ones who had the requisite knowledge. Indeed, the plaintiffs argued that they were in the same position as the defendants, in that they were being asked to answer interrogatories which related to the deceased. They were not being asked to account for actions that they had taken in the past, but to provide answers in relation to the medical conditions and medical treatment administered to the deceased during her lifetime. In these circumstances, it was argued, that both parties had to rely on the discovery documentation. The plaintiffs submitted that there was no reason why the relevant facts could not be proven in the usual manner by oral evidence, where the relevant doctors would be subject to examination and cross examination by both parties.

25. The plaintiffs referred to the decision in *McCole v. Blood Transfusion Service Board* (Unreported, High Court, 11th June, 1996), where Laffoy J. held as follows in relation to the calling of witnesses to prove disputed facts:-

> *"Thirdly, it is contended that no exigency exists which requires the information to be extracted at this interlocutory stage. In my view, in the case of numbers 45 and 46 which relate to the Expert Group, this objection is well founded because there is no reason why the plaintiff cannot call a witness for instance, the secretary to the Expert Group, to deal with the matters to which these interrogatories relate at the trial of the action."*

26. The plaintiffs pointed out that in the *Stealth Enterprises* case, the plaintiff had been a member of a motorbike gang and interrogatories were raised on this issue. The material non-disclosure was that of the plaintiff himself. Whereas, in this case, the interrogatories referred to the treatment afforded to the deceased, which was not something solely within the knowledge of the plaintiffs.

27. The plaintiffs also submitted that they should not be denied the opportunity to test the evidence given by the doctors by means of cross examination.

28. The plaintiffs submitted that the defendants had the documents relating to the deceased's medical history. As such, they had extensive knowledge of the facts in issue. They could call the relevant witnesses to give evidence at the trial of the action.

29. The plaintiffs submitted that in order for the interrogatories to be ordered, the answers must be essential and must not be capable of being obtained from a witness. It is not appropriate to order interrogatories to assist cross examination. In this regard, the plaintiffs referred to *Danske Hedeselkabet v. KDM International Plc* [1994] 2 Lloyd's Rep. 534 and to the following portion of the judgment in particular:-

> *"Fifthly, requests for information ascertainable by cross examination at the trial are inappropriate unless the party questioning can establish that it is essential for the proper preparation of his case that such information is made available to him before trial, in the sense that if the matter is left until cross examination at the trial that party will, or probably will be irremediably prejudiced in his conduct of the trial or the trial may be unduly interrupted or otherwise disorganised by the late emergence of the information."*

Conclusions

30. 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.

31. The issue of the deceased's prior medical conditions and her treatment therefor, 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 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.