[2020] IEHC 575

THE HIGH COURT

[Record no. 2015/10533 P.]

BETWEEN

THE WHITE COUNTRY INN (A FIRM)

PLAINTIFF

AND

SHAUNA CROWLEY AND ULSTER BANK IRELAND LIMITED

DEFENDANTS

JUDGMENT of Mr.Justice Barr delivered electronically on the 13th day of November, 2020

1. The plaintiff is a partnership made up of a Mrs. Eileen Geraghty, who lives in Bolton, United Kingdom and the first defendant, who is her daughter, who resides at Banteer, Co. Cork. The plaintiff firm is the owner of a licensed premises known as The White Country Inn, at Banteer, Co. Cork. It appears that at all material times, the pub business has been run by the first defendant on behalf of the firm. Unhappy differences have arisen between the first defendant and Mrs. Geraghty.

2. In these proceedings, the plaintiff is essentially seeking that accounts and inquiries be taken in relation to various sums which the plaintiff alleges is owed to it by the defendants.

3. In particular, it is alleged that as security for a loan taken out with the second defendant in February 2010, the second defendant was assigned a policy of life assurance that had been effected on the life of the first defendant with Aviva Life and Pensions in October 2000. In the statement of claim in these proceedings, Mrs. Geraghty alleges that she received a letter from the second defendant on 10th October, 2014, informing her that the second defendant had agreed to release the security held by it over the Aviva policy as a result of a request from the first defendant in circumstances of her ill health. It is further pleaded that Mrs. Geraghty subsequently learnt that proceedings had issued by the first defendant against the second defendant and Aviva in connection with the policy and that those proceedings had been settled by a payment being made to the first defendant. The plaintiff alleges that the proceeds of the settlement of that action, should have inured to the benefit of the firm, as the payment had been made in connection with the previous Aviva policy.

4. In response to that aspect of the case, the first defendant has pleaded that the policy of insurance which was effected in October 2000, expired by efflux of time on 19th October, 2010. She pleaded that in December 2011, she had been diagnosed as suffering from thyroid cancer. That was one of a number of serious illnesses that had been covered under the previous policy. In the event that she had contracted such an illness during the currency of the policy, she would have received a payment under the policy. However, as the policy had expired, no claim was made by her on foot of it. However, she did institute proceedings in 2012 against the second defendant and Aviva on account of the fact that there had been an option in the policy of insurance, whereby she could have renewed the policy for a further period without the need for medical underwriting. She sued the second defendant and Aviva in negligence for failing to advise her of that fact. Those

proceedings were subsequently compromised by a payment being made to the first defendant by the second defendant and/or Aviva. The first defendant has not disclosed the terms of the settlement agreement, as she has pleaded that these are confidential between the parties to that litigation.

5. In its statement of claim, the plaintiff also alleges wrongdoing and breach of duty on the part of the second defendant in connection with a number of loan facilities that it had made available to the firm. It is pleaded that the second defendant entered into a series of loan agreements purportedly with the plaintiff by facility letters dated May 2005, 13th December, 2007, 27th February, 2009, 8th September, 2009, 8th February, 2010, and 16th October, 2010; none of which were alleged to have been accepted with the authority or knowledge of the plaintiff. It is pleaded that the relevant facility letters purport to bear Mrs. Geraghty's signature, but in each case the signature is a forgery, while the facility letter of May 2005 provided for acceptance by the first defendant alone. The plaintiff pleads that it is a stranger to the borrowings on foot of the said facility letters.

6. It is further pleaded in the statement of claim that the second defendant wrongfully and in breach of its duty to the plaintiff knew that the first defendant was wrongfully appropriating the litigation in relation to the Aviva policy, which, it is alleged, the second defendant knew that the first defendant was not entitled to do. In the alternative it was pleaded that the second defendant had that knowledge because its servants or agents wilfully shut their eyes to the obvious facts, and/or wilfully and recklessly failed to make such inquiries as an honest and reasonable person would have made. The statement of claim goes on to particularise various alleged acts of wrongdoing on the part of the second defendant in relation to the various facilities advanced by it for the purported advantage of the plaintiff.

7. In the statement of claim the plaintiff claims against the defendants: equitable compensation for breach of fiduciary duty and breach of trust, together with damages for breach of contract and/or negligence against the second named defendant.

8. By letter dated 4th October, 2019, the plaintiff's solicitor sought the making of voluntary discovery by the second defendant. Neither the second defendant, nor its solicitor, replied to that letter. At the hearing of this application, Ms. Harriet Meagher BL on behalf of the second defendant, indicated that her client was willing to make voluntary discovery of the following categories of documents: the documents at Category 1(e) insofar as same referred to pleadings in the policy litigation; Category 2(a); and Category 3(a) and (b); other than those categories, her client was not willing to make discovery of any of the other categories sought in the letter seeking voluntary discovery.

9. Counsel stated that her client objected to making the discovery sought, other than the categories which had been agreed, on the basis that the documentation sought was not relevant or necessary to enable the plaintiff to either put forward its case at the trial of the action, or damage the case on the part of either of the defendants at the trial. It was submitted that the categories of documents sought, were simply too vague and as such, given that the period for which the documents were sought was stated in the letter to

cover a ten-year period between 1st May, 2005 and 16th December, 2015, it would place an unreasonable burden on the second defendant to be required to make discovery of the categories for that period of time.

10. In relation to the specific categories, counsel stated that in relation to Category 1, which essentially concerned the Aviva policy and the resulting litigation that emanated in connection therewith, her client was willing to make discovery of the pleadings in that action. It was submitted that that was sufficient for the plaintiff's requirements. In relation to the settlement agreement that had been reached in relation to those proceedings, it was submitted that that was confidential between the parties to that litigation and furthermore such agreement was not relevant to the matters in issue between the parties in the present proceedings.

11. In relation to Category 2, it was submitted that as the second defendant was prepared to make discovery of the various facility letters and documents recording the terms and conditions thereof, that was sufficient for the plaintiff's requirements. To provide any further documentation was merely to enable the plaintiff to go on a general fishing expedition. The purpose of the facilities would be clear from the content of the facility letters. It was further submitted that the wording of the other sub-categories within Category 2 were simply too vague or broad and would involve the second defendant in making discovery of an unreasonable amount of documentation and therefore would be overly burdensome on it to comply with such an order.

12. In relation to the documents sought at Category 3, the second defendant had agreed to make discovery of the documents sought at (a) and (b). The documentation sought at sub-category (c) concerned the internal guidelines of the bank in relation to bank mandates and authorised signatories. It was submitted that such documentation would not enable the plaintiff to advance the case made against either of the defendants on the pleadings as they stood at the present time.

13. In relation to Category 4, which sought documents relating to dealings between the first defendant (in the name or on behalf of the partnership or otherwise) and the second defendant in the relevant period, it was submitted that that category was simply too broad. It would encompass any dealings of any nature whatsoever between the first defendant and the second defendant over a ten-year period at any branch throughout the country. It was simply unreasonable and burdensome to expect a bank to make discovery in such vague terms and over such a protracted period of time.

14. The second defendant also relied on the affidavit sworn by Ms. Ciara Murphy, solicitor, on behalf of the second defendant on 30th October, 2020, wherein she had stated that the plaintiff had not said whether it disputed the various pleas that had been made by the defendants in relation to the nature of the policy litigation, as had been outlined in the defences of each of the defendants. In these circumstances, it was submitted that the issues were not crystallised between the parties and accordingly it was premature to make an order for discovery at this stage. Ms. Murphy further stated that the plaintiff had not identified any issue referable to the facility letters that required discovery. She

pointed out that the plaintiff firm had the facility letters, which recorded the terms upon which the bank had advanced monies to the plaintiff firm. She stated that the plaintiff had not identified any reason why discovery was necessary in order to enable Mrs. Geraghty to make the case that she was unaware of the terms of the facility letters.

15. In relation to the documentation sought at Category 4, Ms. Murphy stated that these documents were not relevant for the reasons identified in relation to Category 1, namely that no reply had been filed on behalf of the plaintiff and therefore the issues had not been sufficiently clarified to warrant discovery. She also stated that there were no "*dealings*" between the bank and the first defendant in the relevant period, save for the litigation arising out of the Aviva policy already referred to. In all of the circumstances, it was submitted that the Court should decline to order the second defendant to make discovery of the categories of documents, other than those which had already been agreed to by the second defendant.

16. In response, Mr. Corkery BL referred to O. 23 and O. 27, r. 11 of the Rules of the Superior Courts, which effectively provided that it was not necessary to file a reply to defence, unless a party wished to specifically plead something in response thereto. It was further provided that in the absence of a reply being filed, the plaintiff was taken to deny all matters pleaded in the defence. In these circumstances, it was submitted that the issues had been crystallised on the pleadings filed to date, because the plaintiff was taken as having denied each and every assertion made by the defendants in their respective defences.

17. In relation to the period for which discovery had been sought, it was submitted that while this was a ten-year period, it was not unduly burdensome on the second defendant, because it was only being asked to make discovery of the dealings between the second defendant and one particular individual over that period. This was not a case where the individual had a multiplicity of subsidiary companies, or holding companies. In these circumstances it was submitted that it would not be unduly burdensome to ask the bank to make discovery of its dealings with the first defendant during the period in question.

18. It was submitted that as the plaintiff claimed that the firm was entitled to the benefit of the proceeds of any litigation arising out of or in connection with the Aviva policy, that the plaintiff was entitled to have sight of the documentation sought at Category 1. This was particularly relevant in light of the fact that there appeared to be a dispute between the defendants in relation to the letter sent by the second defendant to Mrs. Geraghty in October 2014, wherein it had stated that as a result of a request from the first defendant, in circumstances of her ill-health, the second defendant had agreed to release that security; while the first defendant had pleaded that she had never asked the second defendant to release any security on grounds of her ill health, or at all. It was submitted that in order to ascertain the truth or otherwise of that statement made by the second defendant in October 2014, it was necessary for the plaintiff to have all relevant information concerning both the Aviva policy and the subsequent litigation, which had been sought at Category 1.

19. In relation to the documents sought at Category 2, which were essentially documentation concerning the various facilities that had been made available by the second defendant for the benefit of the plaintiff, it was submitted that having regard to the assertion by Mrs. Geraghty that she had no knowledge at all of any of these facilities, that the documentation sought at Category 2 was relevant and necessary to her claim as set out in the statement of claim. Furthermore, given her assertion that her signature had been forged on various loan documents, the documentation sought at Category 3(c), being the internal guidelines of the second defendant in relation to bank mandates and list of authorised signatories, was necessary, to enable the plaintiff to see whether the bank had adhered to its own guidelines in its dealings concerning the various facilities. This was relevant in relation to the claim in negligence made against the second defendant.

20. In relation to the documents sought at Category 4, being documents concerning dealings between the first and second defendants over the relevant period, counsel submitted that while it had been submitted on behalf of the second defendant that it would be unduly burdensome on the part of the second defendant to make such discovery, the second defendant had not provided any evidence whatsoever as to the level of effort, manpower or time that would be required if such discovery was ordered against it. It was submitted on the basis of the decision in *Tobin v. Minister for Defence* [2019] IESC 57, that where such a plea was going to be raised by the person of whom discovery had been requested, it was necessary for them to provide concrete evidence that they would in fact be placed under an unreasonable burden if discovery of the type sought, was ordered against it: see paras. 7.19 and 7.23.

21. Having considered the pleadings in this case, the affidavits filed on behalf of the parties and the submissions of counsel, the Court has come to the following conclusions on this application. The Court is satisfied that with the exception of the documentation sought at Category 1(g), which will be dealt with separately, the documentation sought from the second defendant at Category 1 is both relevant and necessary to enable the plaintiff to properly pursue its claim at the trial of the action. It is clear from the statement of claim that the plaintiff is making the case that because the policy of life assurance effected on the life of the first defendant, had been assigned to the second defendant as security for a loan made by it to the plaintiff, therefore, any payments that were made either under the policy, or it is argued in connection therewith, should have inured for the benefit of the firm. While that is hotly disputed by each of the defendants, the Court is satisfied that the categories of documents set out in Category 1 are relevant to the case that the plaintiff wishes to make at the trial of the action. Accordingly, the Court will direct that the second defendant make discovery of the documents set out at Category 1(a) to (f) inclusive.

22. Slightly different considerations come into play in relation to the documentation sought at Category 1(g), being the settlement agreement arising out of the litigation between the first defendant and the second defendant and Aviva Life and Pensions. Firstly, the Court accepts that settlement agreements of civil litigation are generally confidential in nature. Accordingly, in considering this aspect, the Court has had regard to the decisions in

Independent Newspapers (Ireland) Limited v. Murphy [2006] IEHC 276; *Flogas Ireland Limited v. Tru Gas Limited* [2012] IEHC 259 and *Tobin v. Minister for Defence*.

23. The Court is satisfied that the plaintiff would only need to know the terms of the settlement reached between the first defendant and the second defendant and Aviva in the policy litigation, if the trial judge in the present proceedings were to come to a conclusion that such litigation was in fact so intimately connected with the previously expired Aviva policy, that the proceeds of the litigation were in fact assets of the partnership. It is only in such circumstances that the plaintiff would have an entitlement to know the value of the settlement reached between the parties in that litigation. Accordingly, the Court proposes to make an order in respect of Category 1(g) that the second defendant is obliged to make a list of documents recording the settlement and furnish the list to the plaintiff; the second defendant is also directed to preserve such documentation and await the further ruling of the trial judge in relation to the production thereof to the plaintiff. Such order is in accordance with the form of order directed by Clarke J. (as he then was) in the *Independent Newspapers* case: see para. 4.7 of the judgment.

24. In relation to Category 2, the second defendant has agreed to make discovery of the documents set out at sub-para. (a). The Court is satisfied that the documentation sought at subs-paras. (b), (c) and (d) are also relevant and necessary to the claim being made by the plaintiff in relation to these facilities. The plaintiff makes the case that Mrs. Geraghty was unaware of any of these facilities being made available to the firm; does not know what monies were advanced; nor for what purpose the money was either advanced, or actually used and did not sign the application forms, or any documentation connected with the said facilities. In these circumstances she is entitled to see all documentation concerning the facilities which the second defendant admits that it made available to the firm.

25. In relation to Category 3, the only item in dispute is sub-para. (c) which concerns internal guidelines or rules within the second defendant in relation to partnership customers and in particular to partnership authority for dealings on behalf of a partnership. It seems to me that this would not involve any great burden on the second defendant, as it would merely have to provide whatever guidelines or rules it had in place over the ten-year period concerning these matters. I cannot imagine that that would amount to a large volume of documentation. I am also satisfied that the documentation is relevant to the plea made on behalf of the firm, through Mrs. Geraghty, that her signature was forged on the documentation and she had no knowledge of any loans being made for the benefit of the firm. While the Court is not saying that such assertions by Mrs. Geraghty may be accurate or true; the existence of such documentation is relevant to the assertions she has made in her pleadings to date. This is particularly so in light of the claim in negligence made by the plaintiff against the second defendant.

26. Finally, in relation to the documentation sought at Category 4, being documents relating to dealings between the first defendant and the second defendant during the relevant

period; while it has been argued on behalf of the second defendant that it would be burdensome to require the second defendant to make discovery of such a vague category of documents, it has not provided any cogent evidence that this would involve any particular burden on the bank. Such evidence is required where a party is going to make the case that it is unduly burdensome on them to have to make discovery of a particular category of documents: see *Tobin v. Minister for Defence*, paras. 7.19 and 7.23. Furthermore, it is difficult to see how such an argument can be made having regard to the averment made by Ms. Murphy in her affidavit sworn on 30th October, 2010 at para. 9, wherein she stated *"there were no 'dealings' between the Bank and the first defendant in the relevant period"*. In addition, the Court accepts the argument put forward by counsel on behalf of the plaintiff, that what was sought under this category was only the dealings between the bank and one individual person and having regard to the ease with which computer searches can be made, it was not unreasonable to require the bank to furnish details of dealings that it had with that particular individual over the ten-year period requested. Accordingly, the Court will direct the second defendant to make discovery of the documents sought in Category 4.

27. Having regard to the findings made by the Court in its judgment herein, the Court will direct that the second named defendant make discovery on oath of all of the documents set out in the letter seeking voluntary discovery from the plaintiff's solicitor dated 4th October, 2019, with the exception of the documentation sought at para. 1(g), in respect of which category the second defendant is only obliged to provide a list of such documents and the production thereof can await the further directions of the judge dealing with the trial of the action. The second defendant can nominate a person to swear the affidavit on its behalf. The parties can seek to reach agreement in relation to the period of time within which the affidavit must be filed.

28. The parties can make written submissions on the terms of the final order and on the issue of costs and on any other related matters, within two weeks from the date of delivery of this judgment.