APPROVED

THE HIGH COURT

[2024] IEHC 215

Record No. 2020/4889P

BETWEEN/

BETTY RYAN

PLAINTIFF

-AND-

AHMED ABEL HAQ, EURO HEALTHCARE LIMITED, HEALTH SERVICE EXECUTIVE, SOUTH TIPPERARY GENERAL HOSPITAL AND ASTORA WOMENS HEALTH LLC

DEFENDANTS

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 12th day of April 2024

INTRODUCTION

Preliminary

1. The issue in these applications relates to one interrogatory directed to two of five Defendants.

2. By way of background summary, the Plaintiff issued proceedings on 8th July 2020 in relation to medical procedures she underwent for urogynecological complaints. Specifically, the Plaintiff alleges that she was unaware that her treating obstetrician and gynaecologist (the First Named Defendant) had inserted a second "*Monarc Subfascial Hammock*" medical device or 'mesh' during the procedure on 13th March 2012 and that she only became aware of this second device when she took up and reviewed her medical records on 12th September 2018.

3. The Plaintiff pleads that she was received as *a private patient* for the medical procedures carried out in a *public hospital* and paid for the services under contract. Insofar as the contractual limb of her case, and these applications, are concerned, the Plaintiff is advancing the claim under the Sale of Goods and Supply of Services Act 1980 ("the 1980 Act"), which if upheld, she maintains, allows her recover against the party who "*acted as a seller*" as defined in the 1980 Act. She says that based on the Plaintiff's interaction with the defendants (specifically that she paid for the service in the hospital) it is unclear which of the First to Fourth Named Defendants were contracted with for the purpose of supplying her with the Fifth Named Defendant's device and the proposed

interrogatories in this application have a single objective: to identify and confirm which of two the defendants (or both), the Health Service Executive ("HSE") (the Third Named Defendant) and/or South Tipperary General Hospital (the Fourth Named Defendant), the Plaintiff contracted with and who ultimately bears a liability (in the event that she is successful) under contract.

4. Identical applications with the same interrogatory replicated in each motion, are brought against the Third and Fourth Named Defendants who are legally represented now by the same lawyers. (This judgment refers to the terms interrogatory and interrogatories interchangeably).

5. Consistent with the approach adopted by both Ms. Sarah Reid BL (for the Plaintiff) and Mr. Michael Binchy BL (for the Third and Fourth Named Defendant)s in addressing this application, reference will be made in this judgment to the reliefs sought against the Third Named Defendant – the HSE – but the judgment applies to both the Third and Fourth Named Defendants.

6. By Notice of Motion dated 15th May 2023, the Plaintiff sought an order pursuant to O. 31 of the Rules of the Superior Courts 1986, as amended ("RSC 1986") directing the HSE to furnish interrogatories in respect of the following:

   "*A. In so far as the Plaintiff entered a contract for medical services with the Defendants herein, jointly, and in circumstances where as part of those medical services, the Plaintiff was provided with the Fifth Defendant's device; was*

a contract entered into between the Plaintiff and the Third Defendant for the provision of the said device?"

7. Both Ms. Reid BL, for the Plaintiff, and Mr. Binchy BL, for the HSE and South Tipperary General Hospital, agree that the issue for my decision is whether or not this interrogatory meet the legal test for an interrogatory.

8. Ms. Reid BL, for example, states that the essence of the interrogatory is to be found in the question of "*was a contract entered into between the Plaintiff and the Third Defendant for the provision of the said device?*" It is submitted by counsel that the sentences before that are merely scene setting *i.e.*, "*insofar as the Plaintiff entered a contract for medical services with the Defendants herein, jointly, and in circumstances where as part of those medical services, the Plaintiff was provided with the Fifth Defendant's device*". Ms. Reid BL submits that in circumstances where the Plaintiff is unaware and seeks confirmation as to which of these Defendants she contracted with, the Plaintiff brought these applications as against the Third Named Defendant, the HSE as overarching medical providers in the State and as against the Fourth Named Defendant, South Tipperary General Hospital, as the location where the contract was performed, and the deviced provided *i.e.*, the purpose and objective of the interrogatory is to clarify which party bears a liability to her under contract.

9. Further, a similar argument is made to that canvassed in *McGregor v HSE* [2017] IEHC 504 (at paragraphs 10 and 11 of the unreported judgment),

namely, that in these applications, the HSE and the hospital have, in their respective Defences, put the Plaintiff on *full proof* of its contractal claim. Ms. Reid BL submits that the claim to be met crystallises once the defences have been received. It is therefore contended that the Plaintiff is justified in seeking to deliver this interrogatory because it can only sue, and if successful can only recover against, whomever the Plaintiff has contracted with.

10. Mr. Binchy BL disagrees, and states that the interrogatories are in fact seeking to raise a legal question and are predicated upon suppositions which engage legal complexities in relation to the position of the HSE and the hospital relative to the positions of the First Named Defendant Ahmed Abel Haq, the Second Named Defendant, Euro Healthcare Limited, and the Fifth Named Defendant, Astora Women's Health LLC.

11. The nature of the complexity to what would appear, at first blush, to be a straightforward issue concerning a single interrogatory, can be understood in the context of examining further the cause of action and the parties to the action.

The cause of action

12. As referred to in the beginning of this judgment, by a Personal Injury Summons issued on 8th July 2020, the Plaintiff alleges that she was a patient of the First, Second, Third and Fourth Named Defendants and underwent surgical insertion of two pelvic mesh devices, first on 28th January 2010, and, second on 13th March 2012, which devices were produced and manufactured by the

Fifth Named Defendant in order to treat urogynecological complaints which the Plaintiff had been experiencing. The Plaintiff states that she was unaware of the insertion of a second device during the procedure on 13th March 2012 and only became aware of it when reviewing medical records in September 2018. The Plaintiff alleges that as a result of the said treatment and/or the devices and/or the aftercare received in respect of same, she suffered significant personal injury and discomfort including injury to her internal organs, including alleged pelvic pain and dyspareunia.

The Parties

13. The Plaintiff alleges *inter alia* in her Indorsement of Claim for the Personal Injury Summons that she was treated by the Defendants for urogynecological complaints and had successive medical devices inserted to treat urinary incontinence symptoms on 28th January 2010 and 13th March 2012.

14. The First Named Defendant is an obstetrician and gynaecologist, formerly practising in the Second Named Defendant's facility, and was the Plaintiff's private treating physician for the purpose of both alleged surgicial procedures.

15. The Second Named Defendant is a private medical facility and it is alleged that this was the facility where the Plaintiff was first received and treated for her urogynecological symptoms by the First Named Defendant and it is alleged that the Second Named Defendant was the employer of and/or is vicariously liable for the actions of the First Named Defendant. It is further pleaded that in the alternative to the First Named Defendant, the Second

Named Defendant was the supplier of a device to the Plaintiff during the procedure and entered a contract with the Plaintiff for medical treatment and care.

16. The Third Named Defendant (the HSE) is a statutory corporate body and the owner, occupier, manager and administrator of the Fourth Named Defendant, South Tipperary General Hospital, where the Plaintiff was received and treated for urogynecological symptoms by the First Named Defendant for the insertion of a second mesh device (*i.e.*, the Plaintiff pleads that the Fourth Named Defendant is where the contract was performed and the device provided). As stated, the Fourth Named Defendant is a public hospital.

17. The Fifth Named Defendant is a private company engaged in the business of manufacturing, producing and supplying medical devices such as the mesh device, the subject of these proceedings, and it is alleged that it was the manufacturer, supplier and distributor of the products used in the procedures carried out on the Plaintiff on 28th January 2020 and again on 13th March 2012 by the First Named Defendant.

THE PERSONAL INJURY SUMMONS

18. The Plaintiff's claims in the Indorsement of Claim of the Personal Injuries Summons issued on 8th July 2020 are essentially three-fold: first, medical negligence claims are alleged in relation to her treatment; second, a product liability claim is alleged against the manufacturer because it is alleged that the

device injured the Plaintiff; the third issue, which is the subject of these applications, is described as the contractual point, which I now address.

The Contractual Point

19. As just mentioned, this application – seeking an Order of the court to direct interrogatories – concerns what is described on behalf of the Plaintiff as "*the contract point*" (the third limb of the Plaintiff's cause of action).

20. In order to assess the proposed interrogatory, it is useful, in the first instance, to explore the precise nature of Plaintiff's contractual claim to which, it is said, the interrogatory is predicated on.

21. The contractual claim (or contractual point) refers to the Plaintiff's alleged right to recover for breach of contract because she claims that she engaged in a private contract for services in a public hospital which was then breached *i.e.*, it is *inter alia* alleged in paragraph 7 of the Indorsement of Claim that "*the defendants their servants or agents, caused or occasioned or permitted the sale and/or provision to the Plaintiff of Goods, being the Mesh, which was unfit for purpose, of umerchantable quality, not reasonably durable and/or dangerous (including but limited to the meaning of those terms within the Sale of Goods and Supply of Services Acts) whereby the Plaintiff has suffered personal injury loss and damage*" and particularised at paragraph 9(r) of the Indorsement of Claim as "*providing the Plaintiff with a product that was unfit for use and/or of unmerchantable quality within the meaning of the Sale of Goods and Supply of Services Act, 1980*."

22. On behalf of the Plaintiff, it is submitted that this third limb of the Plaintiff's cause of action could be viewed as being novel, but that she is entitled to plead it and it will be a matter for the trial judge as to whether or not the point will succeed. The Legal Submissions on behalf of the Plaintiff describe this 'contractual point' as follows:

> "*The Plaintiff has pleaded that she entered a contract with the First, Second, Third and/or Fourth Defendants one or all of whom caused, occasioned or permitted the sale and/or provision of Goods (namely the Fifth Defendant's mesh device). Arising from the performance of the devices in vivo and the damage to her internal organs therefrom, the Plaintiff claims the said devices were unfit for purpose, of unmerchantable quality, not reasonably durable and/or dangerous (within the meaning of the Sale of Goods and Supply of Services Acts). See paragraph 9(r) of the Indorsement of Claim in that [sic.] regard.*
>
> *The Plaintiff is therefore advancing a claim under the Sale of Goods and Supply of Services Act, which, if upheld, allows recovery against the party who 'acted as seller' as defined in the Act. Based on the Plaintiff's interaction with the Defendants (specifically that she paid for the services in the hospital) it is unclear which of the First through Fourth Defendants were contracted with for the purpose of supplying her the Fifth Defendant's device*".

23. The 'novelty' of this plea is captured in that part of the Legal Submissions under "*B. The Plaintiff's breach of contract claim-a distinct issue to be tried*":

> "*As appears from the pleadings, the Plaintiff is pursuing the First through Fourth Defendants for providing her with devices that were, each of them, unfit for use and of unmerchantable quality. This claim is pleaded, separate to the claim against the manufacturer of the device (the Fifth Defendant) and raises distinct issues of liability and recoverability in contract law.*
>
> *The application of the Sale of Goods and Supply of Services Act 1980 to the provision of medical services has yet to be considered by the Irish Courts in the context of private medical care. The Plaintiff in these proceedings makes the claim that the Act applies and was breached in the circumstances of her interactions with the Defendants. It will have to be determined by the Superior Courts whether and to what extent she is entitled to recover under that Act, as a matter of law. However, should she succeed before the Court in due course, in order to recover under the legislation, she must pursue the party she contracted with in the first instance.*
>
> *The terms of the legislation are clear that only a 'seller' bears a liability to the person they sold the offending goods to. In the present case and based on her dealings with the hospital (where the contract was performed) the Plaintiff has privity of*

contract with the parties she contracted with and she cannot recover against parties outside that contract, including the Fifth Defendant herein, even where she to satisfy the Court that the device was unfit for use and of unmerchantable quality which is a manufacturer issue.

For that reason, the Plaintiff seeks to confirm who were the parties to the contract(s) she entered into in respect of the medical care she received. The interrogatory sought therefore seeks to ascertain who provided the Fifth Defendant's device to the Plaintiff where it is unclear if the HSE or the Hospital retain a contractual responsibility for same".

RULES OF COURT & APPLICABLE PRINCIPLES

O. 31, r. 2

24. O. 31, r. 2 RSC 1986 provides that:

"*A copy of the interrogatories proposed to be delivered shall be delivered with the notice of application for leave to deliver them, unless the Court shall otherwise order, and the particular interrogatories sought to be delivered shall be submitted to and considered by the Court. In deciding upon such application, the Court 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. My assessment of the interrogatory in this application must be viewed in the context of where the Superior Courts have said that the use of interrogatories should be encouraged, especially where they serve a clear litigious purpose and are likely to save significant costs and shorten the trial (see *J. & L.S. Goodbody Ltd. v The Clyde Shipping Co. Ltd.* (unreported, Supreme Court, 9th May, 1967), *McCabe & Anor v Irish Life Assurance plc* [2015] IECA 239; [2015] 1 I.R. 346 per Kelly J. (as he then was) at paragraph 3).

26. In *Kiely v U2 Limited* [2023] IEHC 153, the High Court (O'Moore J.) approved the following propositions submitted on behalf of the plaintiff in that case as representing the relevant legal principles:

    "*(i)The interrogatories were served without leave of the court, and this is required pursuant to O. 31, r. 1 of the Rules of the Superior Courts 1986.*

    (ii) Leave to deliver interrogatories will only be given if the moving party establishes: -

    > *"(a) The information sought is relevant to the facts in issue in the proceedings;*
    >
    > *(b) The interrogatories are necessary either for disposing fairly of the cause or matter or for saving costs; and,*

> *(c) The interrogatories are not vexatious or oppressive and it would not be unfair to require a party to answer them". (Delaney & McGrath, in Civil Procedure (4th Ed. 2018) at paras. 12 –23)*

(iii) In considering the criterion set out at (b) above, the applicable rule is set out by Lynch J. in Bula Ltd. v. Tara Mines Ltd. [1995] 1 ILRM 401 at 405: -

> *"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".*

(iv) "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". Lynch J., ibid

(v) The onus is on the party seeking the interrogatories to establish in evidence that each interrogatory is appropriate.

The burden is to be met by meaningful evidence, as opposed to boilerplate averments:- see Hyland J. in Secansky v. Commissioner of An Garda Siochana [2021] IEHC 731".

27. In *AIB plc v Doran* [2020] IEHC 210, the High Court (per Simons J. at paragraphs 26-29), set out the following general principles which govern the use of interrogatories:

    "*26. First, interrogatories may be served not only in relation to facts directly in issue, but also in respect of facts the existence or non-existence of which is relevant to the existence or non-existence of facts directly in issue. (Goodbody Ltd v. Clyde Shipping Company Ltd, unreported, Supreme Court, 9 May 1967).*

    27. Secondly, the right to serve interrogatories is not confined to facts which are in the peculiar knowledge of the other party. Rather, they may also be used for the purpose of obtaining an admission from the other side. (Goodbody Ltd v. Clyde Shipping Company Ltd, unreported, Supreme Court, 9 May 1967).

    28. Thirdly, interrogatories will only be allowed where they are necessary either for disposing fairly of the cause or matter or for saving costs. (Order 31, rule 2). See also McCabe v. Irish Life Assurance plc [2015] IECA

239; [2015] 1 I.R. 346.

> *29. Fourthly, interrogatories will not be allowed where what is being sought is not an answer in respect of a factual matter, but rather relates to the interpretation of the contents of a document. (Bula Ltd. v Tara Mines [1995] 1 I.L.R.M. 401 (at 406); Woodfab Ltd v. Coillte Teoranta [2000] 1 I.R. 20 (at 26)).*"

ASSESSMENT & DECISION

28. To recap, the question asked is "*insofar as the Plaintiff entered a contract for medical services with the Defendants herein, jointly, and in circumstances where as part of those medical services, the Plaintiff was provided with the Fifth Defendant's device; was a contract entered into between the Plaintiff and the Third Defendant for the provision of the said device?*"

29. Even accepting that the question in the first two sentences are a preamble or scene-setting prior to the actual interrogatory, for the following reasons, I am not of the view that either the enire question (referred to above) or that part of the question which asks – *was a contract entered into between the Plaintiff and the Third Defendant [or the Plaintiff and the Fourth Defendant] for the provision of the said device?* – properly construed, is an interrogatory within the meaning of O. 31 RSC 1986 and the established case law.

30. First, the explanation of the third limb of the Plaintiff's claim in the Plaintiff's Legal Submissions (set out earlier) while setting out its rationale, also emphasises *inter alia* the following points: (i) the novelty of the (third) claim and the invocation of the Sale of Goods and Supply of Services Act 1980 in that context and its alleged application to the First, Second, Third and Fourth Named Defendants (each and/or any of them); (ii) the layered complexity of this (contractual) claim as against the First, Second, Third and Fourth Named Defendants; and (iii) what is in effect an *a priori* request to confirm a legal question in order to identify, from the Plaintiff's perspective, the legal position of the Defendants (or the Third and Fourth Named Defendant) under the Sale of Goods and Supply of Services Act 1980 and whether "*the HSE or the Hospital retain a contractual responsibility*" to the Plaintiff. This is in fact borne out in the Plaintiff's written Legal Submissions where it is pointed out that it "*will have to be determined by the Superior Courts whether and to what extent she is entitled to recover under that Act [the Sale of Goods and Supply of Services Act 1980] <u>as a matter of law</u>.*" (Emphasis added).

31. Second, and in contrast, when the question posed in an interrogatory is 'factual' its reformulation becomes an easier task. However, this is a more difficult exercise in the context of the question posed here because 'the contract issue' pleaded by the Plaintiff raises the prospect of an alleged contract within the meaning of the Sale of Goods and Supply of Services Act 1980 as between each and/or any of the Defendants (or the Third or Fourth Named Defendant, if the question is limited to the last sentence) in relation to the provision of the device/mesh with, for example, both sentences in the

Notice of Motion dated 15th May 2023 referring to the device as, first, "*the Fifth Named Defendant's device*" and, second, "*the device*". The question ("*was a contract entered into between the Plaintiff and the Third Defendant for the provision of the said device?*") invites, in the first instance, a legal analysis and is based on *the assumption* that there is a contract because the Plaintiff has pleaded what is accepted to be a novel plea that "*providing the Plaintiff with a product that was unfit for use and/or of unmerchantable quality within the meaning of the Sale of Goods and Supply of Services Act, 1980.*"

32. In contrast, in an illustration of what was characterised by Mr. Binchy BL as the kind of "plain vanilla fact" which was an appropriate matter for an interrogatory to address (including questions referring *inter alia* to dates, times, persons and locations etc), was that referred to by this court (Barr J.) in *McGregor v HSE* [2017] IEHC 504 (at page 20 of the unreported judgment) at question (11) as follows:

> "*(11) Confirm that the plaintiff was discharged home from Cork University Hospital on 15th September, 2015, with a further prescription for Diazipan and a morphine-based tablet."*
>
> > *This question refers to a pure question of fact, which should be readily ascertainable from the medical records. Accordingly, I will allow this question*".

33. The emphasis on 'facts' is a cornerstone of a court's consideration of whether leave should or should not be granted to deliver interrogatories.

34. In this regard, in *Crofter Properties Limited v Genport Limited* (unreported, High Court (McCracken J.), 30th November 2001, for example, the defendant in that case sought leave of the court to deliver interrogatories to the plaintiffs in relation to the defendant's counterclaim in the proceedings where the defendant alleged that certain telephone calls made by the plaintiff (and its servants or agents) to the UK police were of a malicious, untrue and defamatory nature. To that end, the defendant had obtained third party discovery from Eircom. It sought to identify approximately 28 of those telephone numbers and to raise interrogatories to oblige the plaintiff to confirm under oath the owners of these telephone lines and their connection with the plaintiff.

35. McCracken J. described the case as "*very strange and unusual. The proceedings were part heard and the court considered the time and cost that would be saved by the delivery of interrogatories in the calling of one witness or 28*", stating *inter alia* that he could not see that establishing certain facts by way of interrogatories was unjust or prejudicial to that one witness and "*he knew of no principle whereby, once a witness for a party gives evidence of a certain fact, that another witness may not be heard to give contrary evidence, even if both witnesses are called by the same party*" He allowed certain of the interrogatories, some with amendments and refused leave on others. Citing the judgment of Ó'Dálaigh C.J. in *J. & L.S. Goodbody Ltd. v The Clyde Shipping*

Co. Ltd. (unreported, Supreme Court, 9th May 1967), Costello J. (as he then was) in *Mercantile Credit Company of Ireland v Heelan* [1994] 2 I.R. 105, McCracken J. stated:

> "*In the present case, therefore, the matters which I have to consider are, firstly whether they are necessary either for disposing fully of the matter or for saving costs, secondly whether they are relevant in the sense explained by Ó'Dálaigh C.J. in the judgment quoted above, thirdly whether they should not be allowed because they are simply fishing and fourthly whether in any event the plaintiffs would be prejudiced unfairly*".

36. The extract of that passage of the judgment of Ó'Dálaigh C.J. in *J. & L.S. Goodbody Ltd. v The Clyde Shipping Co. Ltd.* (unreported, Supreme Court, 9th May, 1967), (the fuller quotation of which is set out by McCracken J. *Crofter Properties Limited v Genport Limited* (unreported, High Court (McCracken J.), 30th November 2001 at page 2)) relied on by the Plaintiff in this application refers to "*that interrogatories need not be confined to facts directly in issue but may extend to any facts, the existence or non-exitence 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 questions in issue but it is sufficient if the interorogatories sought should have some bearing on the question and that the interrogatories might form a step in establishing the liability. It is not necessary for the person

seeking leave to deliver the interrogatory to that it is in respect of some thing he does not already know".

37. Third, and in contrast to the emphasis on facts just described, that part of the *cause of action* subtending these applications which addresses the alleged 'contract point' raises primarily a question of law as to the legal relationship between each of the Defendants as per the following plea: "*the defendants their servants or agents, caused or occasioned or permitted the sale and/or provision to the Plaintiff of Goods, being the Mesh, which was unfit for purpose, of umerchantable quality, not reasonably durable and/or dangerous (including but limited to the meaning of those terms within the Sale of Goods and Supply of Services Acts) whereby the Plaintiff has suffered personal injury loss and damage*".

Further, in this regard, the question in the proposed interrogatory does not, in my view, come within the understanding of the '*litigation purpose'* of interrogatories which was identified by the High Court in *IBRC Limited (In Special Liquidation) v Fitzpatrick* [2017] IEHC 715 (per Baker J. at paragraph 28) by reference to the decision of the Court of Appeal in *McCabe v Irish Life Assurance plc* [2015] I.R. 346, as follows:

> "*The litigation purpose served by the delivery of interrogatories was analysed in some detail in the recent judgment of the Court of Appeal in McCabe v Irish Life, where Kelly J. (as he then was) delivering the judgment of the Court, having reviewed all of the authorities, noted that the delivery*

of interrogatories can "obviate the necessity for expensive and time consuming discovery, can dispose of issues prior to trial, can lessen the numbers of witnesses in a result of overall shortening of trials". The Court held that the interrogatories sought to be delivered did "serve a clear litigious purpose"" (paragraph 34).

38. Fourth, on behalf of the Plaintiff, (as referred to earlier) whilst Ms. Reid BL correctly submits that it will be a matter for the trial judge to determine the strength or weakness of this third limb or cause of action of her case and that she is entitled to plead it, the characterisation or explanation of 'the contract point', which counsel submits is *the* central point in this application seeking leave to deliver interrogatories, only serves to emphasise the complex legal nature of the point being made, *i.e.*, it is alleged that the Plaintiff was received as a *private patient* by her surgeon (the First Named Defendant) in South Tipperary General Hospital (the Fourth Named Defendant) which is a *public hospital* owned by the HSE (the Third Named Defendant) and as part of a private medical procedure, the Fifth Named Defendant's device was inserted in the Plaintiff and caused her injury.

39. Fifth, while this case shares in common with *McCabe v Irish Life Assurance plc* [2015] I.R. 346 a general chronology which included: (a) the service of a notice to admit facts; (b) no response; and (c) an application seeking leave to deliver interrogatories (and Ms. Reid BL maintains her criticism *pace* Kelly J.(as he then was) in *McCabe* in relation to the lack of any engagement by the

Third and Fourth Named Defendants save for Mr. Binchy BL's response to this motion), the notice to admit facts and subsequent interrogatories in *McCabe v Irish Life Assurance plc* were very different from this application. The notice to admits facts in *McCabe* was served by the defendant (Irish Life Assurance plc) in that case on the plaintiff (Mr. McCabe) and referred to facts which were alleged at paragraph 9(a) to (g) of is defence where these facts involved circumstances where Mr. and Mrs. McCabe had entered into a contract of life assurance with Irish Life Assurance plc and when Mrs. McCabe later died, Irish Life Assurance plc alleged that the life assurance contract was voidable on grounds of material non-disclosure at the time the proposal form for the life assurance contract was completed by Mrs. McCabe. In *McCabe* the facts which had been pleaded by Irish Life Assurance plc on this aspect related to medical attention given by a minimum of four doctors, over a period of in excess of twenty years, in four separate medical facilities. In these circumstances, the Court of Appeal was satisfied that the delivery of the interrogatories by the defendant was necessary for disposing fairly of the case and for saving costs. The interrogatories, some of which were reformulated by the court, addressed factual matters concerning the medical history of the deceased including details of her prescribed medication, medical interventions and state of mind over a twenty year period.

40. Further, and of importance in assessing the interrogatory proposed in this application, in *McCabe v Irish Life Assurance plc* [2015] I.R. 346 the Court of Appeal made an important distinction between *fact and law*, in allowing the appeal and in making the following observation of the trial judge's view that

that requiring the plaintiffs to answer the interrogatories would be an injustice as "*the whole story would not be told*" and 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*".

41. The High Court in *IBRC Limited (In Special Liquidation) v Fitzpatrick* [2017] IEHC 715 (per Baker J. at paragraph 36) referred to this distinction between fact and law in observing *inter alia* that "*[i]n McCabe v. Irish Life, the Court of Appeal considered that it was not unfair to require the plaintiff to answer the interrogatories, but it is relevant that no evidence had been put before the Court to show actual unfairness or oppression, either because extensive investigations or research would be required or otherwise. Kelly J. also considered that to require a plaintiff to answer interrogatories because the*

answers might or might not tell the "whole story" was not a relevant test as the answers to the questions were not dispositive of the issues of law, which would remain to be determined by the court."

42. In this case, in contrast, the Notice to Admit Facts dated 3rd November 2022 previously served by the Plaintiff on the Third and Fourth Named Defendants confirms the complexity of the question concerning the legal relationship as between all of the Defendants, including the Third and Fourth Named Defendant (which is replicated in the interrogatories), as follows:

    "*A. Insofar as the Plaintiff entered a contract for medical services with the Defendants herein, jointly, and in circumstances where as part of those medical services, the Plaintiff was provided with the Fifth Defendant's device, was a contract entered into between the Plaintiff and the Third Defendant, or the Plaintiff and the Fourth Defendant for the provision of the said device?*

    Insofar as there may have been several parties in the supply chain, facilitating the contract, the breach of which falls to be litigated in these proceedings and makes no admission in respect of concurrent contractual parties and any claim that may lie against such parties, named in these proceedings and which the Plaintiff continues to pursue.

Please note that arising from the response provided to the above, the Plaintiff reserves the right to raise further pleas and/or seek discovery in respect of the Defendant's contractual and supply chain documents relating to the Fifth Defendant's device and the provision of same to her by the Defendants, jointly."

43. Sixth, in *Bula Ltd v Tara Mines Ltd* [1995] 1 I.L.R.M. 401, the High Court (Lynch J.) at p. 405 stated that "*[i]nterrogatories to be allowable must be as to facts in issue or facts reasonably relevant to establishing facts in issue. Interrogatories as to mere evidence as dictinct 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*".

44. In *Defender Ltd v HSBC Institutional Trust Services (Ireland) DAC* [2018] IEHC 322 the High Court (Twomey J.) addressed the objection in that case in relation to proposed interrogatories which related to matters of law as follows:

    "*31. As previously noted, interrogatories cannot seek an answer on a matter of law. Defender objects that over 90 interrogatories relate to matters of law.*

    32. Interrogatory 9.4.4 asks whether Defender was aware that BMIS had a discretion over trading stocks which resulted in BMIS having a concentration of functions and a conflict of interest. However, it seems clear to this Court that the

question of whether BMIS had a conflict of interest is a legal question.

33. Similarly interrogatory 11.2 asks whether BMIS was authorised under the terms of a trading agreement dated 4th May, 2007, to buy, sell, and trade in stocks. Again, this seems to this Court to involve a legal interpretation of an agreement.

34. Likewise, interrogatory 16.30 asks whether HSBC was required to execute/follow Proper Instructions (a term defined in the Custodian Agreement dated 3 May, 2007 between Defender and HSBS) provided by Defender. Again, since Proper Instructions is a defined term defined in the Custodian Agreement between Defender and HSBC, this involves a legal interpretation of that agreement.

35. HBSC's answer to these objections is that it has indicated a willingness to reformulate the question. However, this Court has to deal with the interrogatories as raised and not to any reformulation of them. In this regard, to the extent that certain interrogatories relate to matters of law, this objection by Defender is therefore sustained and this Court will hear from the parties regarding the exact type of order, if any, which is required to address this Court's decision in this regard".

45. Whilst Ms. Reid BL characterises the context of the interrogatories as an application simply to identify and confirm which one of the HSE parties – the HSE itself or the hospital – the Plaintiff contracted with, and against whom

she is entitled to proceed against, if successful in her claim, that question involves, as the Notice to Admit Facts and the Interrogatories confirm, legal analysis in relation to an alleged contractual supply chain in the context of the 1980 Act and comes within the prohibition referred to above by Twomey J. in *Defender* and also identified in *Bula Ltd v Tara Mines Ltd* [1995] 1 I.L.R.M. 401 per Lynch J. at p. 405), *Allied Irish Banks v Doran* [2020] IEHC 210 per Simons J. at paragraph 29; *Harrison v Charleton* [2020] IEHC 597 per Hyland J. at paragraph 56; *Harrison v Charleton* [2022] IECA 260, judgment of the Court of Appeal (comprising Ní Raifeartaigh, Collins and Binchy J.J.) affirming the judgment of the High Court.

46. In terms of the possible reformulation of the question asked in this application, I do not believe excising the sentences which Ms. Reid BL refers to as 'scene setting' addressess the requirement that the question must address facts and not legal issues.

47. Further and paraphrasing Kelly J. in *McCabe v Irish Life* (at paragraphs 46 and 47) and Baker J. in *IBRC Limited (In Special Liquidation) v Fitzpatrick* (at paragraph 50), I do not believe that an adjustment or adjustments (whether minor or not or adopting the practice of the Commercial Court) could be made to this interrogatory in order to make the question posed "*crystal clear*" and to enable equally clear answers to be sworn to by the Defendants in this case.

48. Further, the claim of prejudice made on behalf of the Plaintiff in this application, namely the costs exposure in continuing against two defendants

and the delay in responding from at least November 2022 in relation to the Notice to Admit Facts (if not earlier in 2020), is predicated on the prior question as to whether or not the question raised properly invokes the interrogatory process in O. 31 RSC 1986.

49. In the circumstances, for the reasons set out above, I refuse to grant the order sought in the motion that the Plaintiff be given leave to deliver the interrogatory set out in the Notice of Motion dated 15th May 2023.

PROPOSED ORDER

50. Accordingly, the order sought in the motion that the Plaintiff be given leave to deliver the interrogatory set out in the Notice of Motion dated 15th May 2023 is hereby refused.

51. I shall put the matter in for mention before me on Thursday 18th April 2024 at 10:30 to address the question of costs and ancillary matters.