[2020] IEHC 574

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. These proceedings have an unfortunate background. The plaintiff is a firm made up of two partners, being Mrs. Eileen Geraghty, who lives in Bolton in the United Kingdom and her daughter, the first defendant, who resides in Banteer, Co. Cork. The plaintiff firm is the owner of a licensed premises known as The White Country Inn in Banteer, Co. Cork. It appears that all material times, the pub business has been run by the first defendant on behalf of the firm. In these proceedings, the firm essentially seeks orders that accounts and inquiries be taken to ascertain what sums of money may be due and owing by the defendants, and each of them, to the firm.

2. In very broad summary, it is alleged by the firm that the first defendant has failed to properly account to it for undisclosed sums of money that have been accrued by the first defendant pursuant to a policy of life assurance taken out with Aviva Life and Pensions and the proceeds of certain litigation that ensued thereafter in connection with that policy, which proceedings were ultimately settled for an undisclosed sum; together with allegations that the first defendant has failed to properly account for profits made by the business since in or about 2005 and further allegations that there was misappropriation of funds in connection with certain loan facilities given to the firm by the second defendant.

3. It is not necessary to go into the dispute between the parties in any greater detail, because this application solely concerns the making of discovery by the first named defendant. Indeed, the first defendant has consented to make discovery of all of the categories of documents sought by the plaintiff's solicitor in his letter dated 4th October, 2019, save for one sub-category. Accordingly, it is only necessary to go into the nature of the dispute between the parties insofar as it concerns this category of documents.

4. It appears to be common case between the parties, that in or about October 2000, a policy of life insurance was taken out on the life of the first defendant with Aviva Life and Pensions Limited. The benefit of that policy was assigned by the first defendant to the second defendant as security for a loan which the second defendant made for the benefit of the plaintiff firm in February 2010. Under the policy taken out with Aviva, in the event that the first defendant died during the currency of the policy, a particular sum would be paid out by the insurers. The policy also provided that in the event of the insured contracting certain nominated critical illnesses during the currency of the policy, a payment out of a lesser sum would also be made in that event.

5. The plaintiff pleads in its statement of claim that in or about October 2014, Mrs. Geraghty received an unexpected letter from the second defendant in relation to the Aviva policy. It is pleaded that in that letter, the second defendant noted the security held by it over the Aviva policy and stated that as a result of a request from the first defendant, in circumstances of her ill health, it had agreed to release that security. It is pleaded that that agreement between the first and second defendants for the release of the second defendant's security over the Aviva policy, was made without the plaintiff's knowledge or consent.

6. The present proceedings were commenced by plenary summons issued on 16th December, 2015. A statement of claim was delivered on 27th March, 2017. A defence was filed on behalf of the first defendant, then acting as a lay litigant, on 21st February, 2019.

7. It is possible to summarise the response of the first defendant to the allegation in relation to the proceeds of the Aviva policy. Her case is that she was a stranger to the letter received by Mrs. Geraghty from the second defendant in October 2014. She did not agree with the content of that letter. She stated that the policy of insurance that had been taken out in October 2000, expired at the end of its term on 19th October, 2010. No claim was made by her on foot of that policy during the currency of the term.

8. The first defendant alleges that in or about December 2011, she was diagnosed as suffering from thyroid cancer. It was one of serious illnesses which had been covered under the terms and conditions of the Aviva policy, which had expired on 19th October, 2010. She further stated that she subsequently discovered that the second defendant and/or Aviva ought to have advised her that upon expiry of the Aviva ten-year policy that she, as the insured person under that policy, had an option to enter into a new policy of insurance without the need for her to undergo any medical underwriting. In 2012, she instituted High Court proceedings against the second defendant and Aviva seeking damages for negligence for their failure to inform her that she had this option of renewal under the old policy, which she had not availed of, because she had not been advised of its existence. Those proceedings were ultimately settled on terms that the first defendant alleges were confidential between the parties to that litigation.

9. The only category of documents that is in dispute between the plaintiff and the first defendant in relation to this application for discovery concerns the documents set out at Category 1(g) which is in the following terms:-

> *"(g) documents evidencing or recording the making or implementation of any compromise of the policy litigation."*

10. On behalf of the plaintiff, it was submitted by Mr. Corkery BL, that it was the plaintiff's case that the original policy of insurance had clearly been assigned to the second defendant for the benefit of the firm. While the insured under that policy was the first defendant, she had assigned the benefit of that policy to the second defendant as security for a loan that it had made to the firm. Accordingly, in the event that there was a

payment made under that policy, the proceeds thereof would have become payable to the second defendant and would have inured to the benefit of the plaintiff, by reducing its loan to the second defendant in the amount of the payment under the policy of insurance.

11. Counsel submitted that in these circumstances, the proceeds of the allied litigation, which was closely and intimately connected with the Aviva policy, also constituted assets that should inure to the benefit of the firm, notwithstanding that they had been the product of litigation between the first defendant and the second defendant and a third party, the existence of which litigation was totally unknown to the plaintiff, until receipt of the letter by Mrs. Geraghty from the second defendant on 10th October, 2014. In these circumstances it was submitted that the terms of the compromise of the proceedings between the first defendant and the second defendant and Aviva, was clearly something that was highly relevant to the issues that arose between the plaintiff and the defendants in these proceedings. Accordingly, it was submitted that the terms of the settlement agreement and any documents evidencing such, were clearly relevant and necessary to the issues that arose on the pleadings.

12. In response, Mr. McGuffin BL on behalf of the first defendant, noted that the first defendant had at all times adopted both a proactive and cooperative attitude towards the making of discovery by her in these proceedings. In response to the letter seeking voluntary discovery, she had replied thereto by letter on 3rd December, 2019, pointing out what documentation she had within her possession, power or procurement and essentially agreeing to make discovery thereof. In such circumstances, it was submitted that there had been no need for the plaintiff to issue the motion in the terms that it had done. Turning to the actual request for documents in the letter seeking voluntary discovery, Mr. McGuffin stated that his client was willing to consent to an order for discovery of each of the categories sought, save for the settlement agreement reached by the first defendant with the second defendant and Aviva in the proceedings known as the policy litigation.

13. Counsel submitted that the terms of settlement were confidential between the parties to those proceedings, one of whom was not a party to the present proceedings. He stated that it was well settled in Irish law that where documents were genuinely confidential, while that was not a bar to an order for discovery being made in respect of such documents, it was something which the Court would have regard to and it was settled that the courts would be particularly cautious in directing that discovery be made of documents that were truly confidential: see *Independent Newspapers (Ireland) Limited v. Murphy* [2006] IEHC 276 at paras. 4.3 – 4.7; *Flogas Ireland Limited v. Tru Gas Limited* [2012] IEHC 259 at paras. 8 – 11 and *Tobin v. Minister for Defence* [2019] IESC 57 at paras. 7.10 – 7.12.

14. Counsel further submitted that there was a more fundamental hurdle for the plaintiff to overcome, in that the policy of insurance that had been taken out for the benefit of the firm had expired by efflux of time on 9th October, 2010. The subsequent proceedings between the plaintiff and the first defendant and Aviva did not concern the policy of

insurance, but rather concerned alleged negligence on the part of the defendants to those proceedings for failure on their part to inform her that she had an option under the expired policy to renew the policy without the need for medical underwriting. That was a right that had inured in the first defendant in personam and had nothing to do with the plaintiff's cause of action in these proceedings. Accordingly, it was submitted that the plaintiff had not shown that production of the terms of settlement of the other proceedings was relevant or necessary to its claim in the present proceedings. It was submitted that on both these grounds the Court should decline to order discovery of this category of documents.

15. Having considered the pleadings in this case, including the affidavits filed in respect of this application and having regard to the arguments of counsel, the Court is satisfied on the basis of the decisions in the *Independent Newspapers (Ireland) Limited, Flogas Ireland Limited and Tobin* cases, that the Court should be slow to direct production of confidential documents unless it is sure that the production of same is both relevant and necessary to enable the requesting party to either properly and fully put its case before the Court at trial, or to defend itself from any assertions that may be made by the opposing party at the trial of the action.

16. In reaching its decision herein, the Court is also mindful of the fact that the first defendant has agreed to make extensive discovery on a voluntary basis and in relation to the Aviva policy she has agreed to make discovery of the documents governing the Aviva policy; documents relating to the terms or effect of the policy; documents relating to the entitlements of the first defendant and/or of the plaintiff under the terms of or otherwise in connection with the policy; documents relating to any dealings or communications in connection with the policy; the pleadings and affidavits in the policy litigation and documents evidencing or recording any assessment or evaluation of the merits of any claim or defence in the policy litigation. In these circumstances, it cannot be said that the plaintiff is being kept in the dark in relation to either the Aviva policy, or the litigation that ensued thereafter.

17. The Court is mindful of the fact that parties to litigation are entitled to have the terms of settlement thereof kept confidential. This is particularly so where one of the parties to the settlement agreement, is not a party to the current proceedings. The Court is of the opinion that the actual terms of settlement of the proceedings which have been referred to as the policy litigation, would only become relevant in these proceedings in the event that the trial judge was to come to the view that the proceeds of such litigation did in fact form part of the assets of the firm. However, the trial judge would have to make a number of findings of fact prior to the actual terms of settlement becoming relevant to the issues between the parties in this case.

18. In these circumstances, the Court proposes to adopt the approach which was utilised by Clarke J. (as he then was) in *Independent Newspapers (Ireland) Limited* and in his ex tempore judgment in *Yap v. Temple Street Hospital*, which was that he would not direct the making of immediate discovery of the confidential documentation, but would direct

that same would be preserved pending further order of the trial judge, depending on what findings were made by him in the course of the trial of the action. That seems to me to be a sensible approach to adopt, because it ensures that the information will be available to the plaintiff, in the event that she can establish at the trial of the action, that the proceeds of such litigation should have inured for the benefit of the firm. In such circumstances, the trial judge can then go on to order disclosure of the terms of settlement of the policy litigation. This protects the confidentiality of the terms of settlement, unless ordered otherwise by the trial judge.

19. The Court will direct that in relation to the documentation sought at Category 1(g) that the first defendant is obliged to furnish a list of the documents coming under this category, but is not obliged to divulge the terms of the settlement, but must preserve such documentation and await the further ruling of the trial judge thereon.

20. In relation to the remainder of the documentation sought in the letter seeking voluntary discovery from the plaintiff's solicitor dated 4th October, 2019, the Court will direct as follows:-

> On consent the first named defendant is ordered to make discovery of the documents set out in the letter from the plaintiff's solicitor dated 4th October, 2019 (with the exception of Category 1(g), of which discovery is to be made in the manner outlined above). The first named defendant is to swear the affidavit of discovery. Such affidavit to be sworn within a period of six weeks from date of perfection of the order herein.

21. The parties may furnish written submissions on the final terms of the order and in relation to costs and on any other matter that they may wish to raise, within a period of two weeks from delivery of this judgment.