

THE HIGH COURT

[2018 No. 5653 P]

BETWEEN

DAVID COONEY AND GILLIAN DAVITT

PLAINTIFFS

– AND –

KBC BANK IRELAND PLC

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 30th June 2021.

SUMMARY

This is an unsuccessful application for an order for further and better particulars. This summary is part of the court's judgment.

1. This is an application for further and better particulars brought in the context of a case in which a breach of contract has been admitted by KBC, apology made, and remedial steps taken that include an offer of compensation. KBC believes that the compensation offered is sufficient, the plaintiffs disagree, and hence the proper amount of compensation is going to be a key issue at the trial. This application falls to be decided in accordance with some well-worn principles concerning particulars and notices for particulars. Unfortunately for the plaintiffs, when one

applies those principles to the application, their application must fail in every respect. To understand why, it is useful to consider those principles first.

2. The first authority to consider is *Cooney v. Browne (No. 2)* [1985] I.R. 185. That case concerned an application by the plaintiff for an order directing the first and second named defendants to furnish replies to the particulars sought by him by a notice dated 26th July 1984 in the context of defamation proceedings. In his judgment, Henchy J. observed, *inter alia*, as follows, at p.191:

“The determining considerations seem to be these. Where particulars are sought for the purpose of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason: see O19, rule 6, (3). Where the particulars are sought for the purpose of the hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing. ‘The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise’: Spedding v. Fitzpatrick (1888) 38 Ch D 410, at p 413. Thus, where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial.”

3. Four principles it seems to the court are readily identifiable in the foregoing:

- (1) **Where particulars are sought for the purpose of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason. (Cooney)**

- (2) **Where the particulars are sought for the purpose of the hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing. (Cooney).**
- (3) **The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise. (Cooney; Spedding)**
- (4) **Where a pleading is so general/imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from particular items of evidence) which he will have to deal with at trial (Cooney).**

4. Another leading judgment in this area is that of *Armstrong v. Moffatt* [2013] IEHC 148. At issue in that case was the extent to which the plaintiff there was required to respond to a notice for particulars served by the defendants. In the application the court was also called upon to re-examine the extent to which the traditional understanding regarding the extent to provide particulars in personal injury cases had been affected by the enactment of the Civil Liability and Courts Act 2004. In the course of his judgment, Hogan J., following consideration of a number of leading cases, observes, *inter alia*, as follows:

“18. [O]ne cannot help thinking that the reported cases did not quite reflect the reality of practice on the ground. Not least in personal injury cases, the particulars sought in many cases had reached something of an art form. Quite often no possible detail or dimension of a statement of claim (or, since the 2004 Act, the indorsement of claim required for a personal injury summons) remained unexplored at the hands of pleaders who at times seemed to revel in this glorious new art form. It

was by no means uncommon to find notices for particulars stretching to twenty or more paragraphs, often replete with individual subparagraphs. Most litigants (or, perhaps more accurately, their solicitors and junior counsel) simply yielded dutifully to these requests, as it was often more convenient and expedient to do so rather than to take a stand on principle. In retrospect, the courts should, perhaps, have been more prepared to strike out many of the pre-rehearsed requests as oppressive and, in some cases, as constituting quite simply an abuse of process”.

5. Of note also are Hogan J.’s observations, at paras. 23-27 concerning what he perceived to be an interrogatory dressed up as a pleading:

“23 *....[A] request of this nature reflects a widespread and ingrained practice whereby what amounts to an interrogatory is dressed up as a request for particulars. Here it may be recalled that Ord. 19, r. 7(1) provides:*

“A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceedings requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.” (emphasis supplied)

24. *The underlined words make clear that the particulars sought must relate a matter stated in the pleading. Yet as the plaintiff has said nothing about legal costs insurance in her indorsement of claim, it follows that, quite independently of any changes brought about by the 2004*

Act, the defendants would not be entitled to particulars of this kind.

25. *As we have just noted, this request for particulars in reality an attempt to serve an interrogatory by means of a notice for particulars. But this is plainly outside the scope of Ord. 19, r.7. This very point was made by Lowry L.C.J. in Coyle v. Hannan [1975] N.I. 160. Here the plaintiff put in an estimate for future loss of earnings as a result of a car accident but admitted that he had been unemployed for the last two years prior to the accident. The defendants then sought particulars of his previous employment, but the Northern Irish Court of Appeal would not allow particulars of this kind.*

26. *As Lowry L.C.J. stated ([1975] N.I. 160, 163-164):*

“The defendant has no right, under the guise of seeking particulars, to interrogate him about his working record before the accident, to interrogate him about his working record before the accident unless the plaintiff by his mode of pleading, as, for example, by alleging that he had been in steady employment for ten years preceding the accident, has rendered himself liable to furnish and better particulars of a matter stated in his pleading.”

27. *This passage captures the point perfectly. So far as the present case is concerned, the question of legal costs*

insurance does not even remotely arise from ‘any matter stated in any pleading’. This is yet a further reason why this request for particulars must be disallowed, because as the request for particulars does not arise from a matter stated in the pleadings, it falls outside of the scope of Ord. 19, r. 7.”

6. Two principles, it seems to the court, can be derived from the foregoing:

- (5) **The courts will look askance on over-expansive requests for particulars. (*Armstrong*).**
- (6) **Any particulars sought/ordered must relate a matter stated in the pleadings. (*Armstrong*).**

7. Turning next to *AIB Plc v. AIG Europe Ltd* [2018] IEHC 677, that was a case arising from the John Rusnak fraud perpetrated on AIB. In it the court, proceeding by reference to previous case law, identifies various principles of relevance in the context of an application for an order for (further and better) particulars. The principles at [7]-[15] have not been touched upon above:

- “[1] *[F]urther particulars will not be ordered before defence or reply (as the case may be) unless the court is of opinion that they are ‘necessary or desirable to enable the defendant or plaintiff, as the case may be, to plead or ought for any other special reason to be...delivered’ ...*
- [2] *....The fundamental principle is that a party should know in advance, in broad outline, the case which that party will have to meet at the trial....*
- [3] *...[W]here a pleading is so general or so imprecise that the other side cannot know what case he or she will have to meet at trial, further particulars will be ordered....*
- [4] *However...a party will only be entitled to ‘such particulars as will inform him of the range of evidence (as distinct from*

any particular items of evidence) which he will have to deal with at the trial'.

- [5] *...[P]articulars cannot be used as a mechanism to extract details as to the evidence to be given by the opposing party....*
- [6] *Particulars will not be ordered unless they are genuinely required to enable a party to know the case to be made by the opposing party at trial....*
- [7] *...[T]he court will not entertain an application for further and better particulars which are oppressive or unreasonable.*
- [8] *...[T]he court will not direct a party to provide particulars of a denial in a pleading....Logically, the same principle must apply to a non-admission....*
- [9] *Particulars of a denial will...be ordered where the denial amounts in substance to a positive allegation....*
- [10] *...[A] party is not entitled to hide behind a traverse in those cases governed by O. 19, r. 15 [RSC (1986), as amended]....*
- [11] *...[I]f...[a] matter has not been appropriately pleaded in accordance with O. 19, r. 15, the court may refuse to allow the party responsible to subsequently make a positive case (within the ambit of application of these rules) at the trial....*
- [12] *It is no answer to a request for particulars for a party to contend that the relevant facts are already known by the party making the request....*
- [13] *The requirement in the Commercial Court that, prior to trial, the parties must exchange witness statements, can be relevant in the context of an application for further particulars [as].... the question of a party being taken by surprise is of reduced significance in proceedings involving witness statements....*

[14] *There may be circumstances where it is appropriate to direct that particulars should only be furnished after discovery....*

[15] *...[T]he purpose of pleadings and of particulars is to ensure that the issues in the case are sufficiently identified in advance of the trial. It has, therefore, been observed that in more complex cases, particulars may have a more expansive role than in the case of more routine cases”.*

8. Extracting from the above those principles which have not been touched upon previously above (principles [7] to [15]), the following additional principles may be stated:

(7) The court will not entertain an application for further and better particulars which are oppressive or unreasonable. (*AIB v. AIG*).

(8) The court will not direct a party to provide particulars of a denial in a pleading. Logically, the same principle must apply to a non-admission. (*AIB v. AIG*).

(9) Particulars of a denial will be ordered where the denial amounts in substance to a positive allegation. (*AIB v. AIG*).

(10) A party is not entitled to hide behind a traverse in those cases governed by O. 19, r. 15 RSC. (*AIB v. AIG*).

(11) If a matter has not been appropriately pleaded in accordance with O. 19, r. 15 RSC, the court may refuse to allow the party responsible to subsequently make a positive case (within the ambit of application of these rules) at the trial. (*AIB v. AIG*).

(12) It is no answer to a request for particulars for a party to contend that the relevant facts are already known by the party making the request. (*AIB v. AIG*).

(13) The requirement in the Commercial Court that, prior to trial, the parties must exchange witness statements, can be relevant in the context of an application for

further particulars as the question of a party being taken by surprise is of reduced significance in proceedings involving witness statements. (*AIB v. AIG*).

(14) There may be circumstances where it is appropriate to direct that particulars should only be furnished after discovery. (*AIB v. AIG*).

(15) The purpose of pleadings and of particulars is to ensure that the issues in the case are sufficiently identified in advance of the trial. It has, therefore, been observed that in more complex cases, particulars may have a more expansive role than in the case of more routine cases. (*AIB v. AIG*).

9. In *Aranwell Ltd v. Pura Food Products* [2004] Lexis Citation 3810, Herbert J. observes that “A party to proceedings [is]...not...[when] seeking particulars entitled to be furnished with copies of documents and records cited or referred to in the pleadings.” Discovery is a separate process.

10. One principle, it seems to the court, may be derived from the foregoing:

(16) A party to proceedings is not when seeking particulars entitled to be furnished with copies of documents and records cited or referred to in the pleadings (*Aranwell*); discovery is a separate process.

11. Finally, there is the judgment of Costello J. in *Tromso Sparebank v. Beirne and Ors.* [1988] Lexis Citation 3235. There, the plaintiff had instituted proceedings against the defendants claiming damages for fraud and actionable conspiracy. The second and third defendants had sought and obtained further and better particulars of the claim against them and had subsequently filed a defence. They then applied for an order striking out the statement of claim for want of cause shown against them. It was held by Costello J., dismissing the application, *inter alia*, that it was well established that fraud must be clearly pleaded, but the second and third defendants had open to them an alternative remedy which was to seek further and better particulars of the plaintiff's claim, but before doing so they should inform the plaintiff by letter

in what respect the statement of claim was deficient otherwise they were at risk on the costs of such a motion. Thus, per Costello J:

“The pleadings and the reply to the Notice for Particulars indicate the case that the Defendants have had to meet. On the documents before me I cannot hold that what has been pleaded and indicated in the reply to the Notice for Particulars indicates that the pleadings are an abuse of the process of the Court. The reality of this case, it seems to me, is that the Defendants now claim that the particulars which they have been given are inadequate. As I have said, there are rules of Court which permit a notice to be brought. This was done and the Notice for Particulars was served and a reply was delivered on 19 February. There was a defence filed on 18 March, and it is open to the assumption, but one which, of course, can be rebutted, that once the defence was filed the Defendants were satisfied with the replies to the Notice for Particulars. Perhaps that assumption can be shown not to be justified. Perhaps it can be shown that the reply to the Notice for Particulars is inadequate. The remedy is to bring a motion forcing the Plaintiffs to give further and better particulars and that is what should be done in this case if the Defendants want further particulars. However, it seems to me that they might be in danger of losing the costs of the motion if they do not write a letter indicating in what respects the reply is inadequate.”

12. One principle, it seems to the court, may be derived from the foregoing:

- (17) **A party is at risk of losing the costs of motion for further and better particulars if that party does not write a letter to its opponent prior to the motion issuing indicating in what respects the reply is inadequate and giving an opportunity for a further and better reply. (Tromso Sparebank).**

13. For ease of reference, the various principles identified in Bold text above are reiterated in the Appendix hereto.

14. The court turns below to the further and better particulars sought and brings the above principles to bear.

Item 1. *“At paragraph 4(i) of the Defence it is denied that the contract between the plaintiff and the defendant was a contract of uberrima fide. By reference to the contract, set out the term and/or condition upon which this plea of grounded”.*

Court: This seeks details of a denial. The plaintiffs are not entitled to the details of a denial.

Item 2. *“At paragraph 4(ii) of the Defence it is denied that the contract between the plaintiffs and the defendant imposed a duty of uberrima fide on the defendant. By reference to the contract, set out the term and/or condition upon which this plea is grounded”.*

Court: As Item 1.

Item 3(b). *“Define the very first day that the tracker mortgage began”.*

Court: This represents an attempt to (mis-)use a request for particulars as interrogatories.

Item 5(a). *“Identify what remedial steps were taken”.*

Court: This request does not arise from the pleadings.

Item 5(d). *“Identify when the first remedial steps were actually taken”.*

Court: As Item 5(a).

Item 5(e). *“Identify the first communication issued by the defendant to the Central Bank of Ireland concerning the remedial steps”.*

Court: As Item 5(a).

Item 5(f). *“Identify the first communication issued by the Defendant to the Plaintiffs concerning the remedial steps”.*

Court: As Item 5(a).

Item 5(g). *“Define what is meant by the word error as being the event which the Defendant has highlighted”.*

Court: Again this is an attempt on the part of the plaintiffs to interrogate certain issues rather than an attempt to understand the evidence that the plaintiffs will face at trial.

Item 5(h). *“Confirm whether the error was mistaken or deliberate on the part of the Defendant, their servants or agents”.*

Court: As Item 5(g).

Item 5(i). *“Identify when the error was first notified to the Central Bank of Ireland and by whom within the Defendant’s organisation”.*

Court: As Item 5(g).

Item 5(m). *“Identify the person who spotted the error on the part of the Defendant”.*

Court: This is a form of interrogatory (albeit not a permissible interrogatory).

Item 8(e). *“Identify the notification by reference to a document and a date issued by the Defendant to the Central Bank of Ireland authorising the application of €216,170.20 to the Plaintiff’s mortgage balance”.*

Court: This seeks to raise a point that is not raised in the pleadings.

Item 9(b). *“Identify the specific authority issued by the Central Bank of Ireland to the Defendant to hold such funds”.*

Court: This is a matter for evidence.

Item 11(a). *“Define the term ‘time value, money’”.*

Court: This is an attempt to interrogate further a matter where the pleading is clear and has met with a proper response.

Item 11(b). *“Identify by reference to a document issued by the Central Bank of Ireland in which the term time value, money is deemed to be permissible to be applied by the regulator”.*

Court: This involves an interrogatory, it is not a matter for particulars, and it involves a request for a document that is in any event inappropriate: the issue as to the level/adequacy of compensation is a matter for the court.

Item 13. Court: Under this item heading, the plaintiffs seek details as to how KBC quantified the compensation that it is prepared to offer. They are simply not entitled to this. If I agree to offer compensation of €X or seek to settle a case for €X, my opposite number has no entitlement to an explanation as to how arrived at the sum of €X.

Item 14(k). *“Identify by reference to dates all communications exchanged with the Central Bank of Ireland (Central Credit Register Unit) concerning the Plaintiff’s loan account”.*

Court: As Item 5(a).

Item 14(l). *“Identify what date the Irish Credit Bureau details were corrected and confirm that this information will be provided now without the necessity of having to issue formal request for voluntary discovery”.*

Court: If the plaintiffs want documents they must go down the discovery route. A party to proceedings is not when seeking particulars entitled to be furnished with copies of documents and records cited or referred to in the pleadings.

Item 14(m). *“Identify what date the Central Credit Register details were corrected and confirm that this*

information will be provided now without the necessity of having to issue a formal request for voluntary discovery”.

Court: As item 14(1).

Item 15. *“At paragraph 5(ix)(x) of the Defence the Defendant has pleaded the Plaintiffs have been properly compensated in respect of the Defendant’s error. Particularise how this is alleged by reference to the error, the first notification of the error, the tracker examination and the fact that all compensation has not been properly received by the plaintiffs”.*

Court: Either the compensation offered is sufficient or it is not: that can be determined at hearing.

Item 20. *“At paragraph 14 of the Defence the Defendant indicates that it intends to call expert banking accountancy and actuarial evidence at the trial of the action. Identify now by reference to the name and qualifications of those experts intended to be called so as to ensure that they do not clash with the experts retained by the Plaintiffs who will be called as part of the Plaintiff’s case at the trial of the action”.*

Court: There is no obligation on KBC to identify at this time the experts that it intends to call.

Conclusion

15. This is an application that can be and has been determined by reference to well-established principles. The application of those principles yields the consequence that none of the further and better particulars sought will be ordered. The court notes too that a notice for better

particulars should have issued in advance of the within application, which notice could have been engaged with, yielding a potential netting of issues for the court to consider.

16. As this judgment is being delivered remotely, the court notes that it is minded, having regard to the matters touched upon in the previous paragraph, to make an order for costs in favour of KBC. If any of the parties object to the making of this costs order they should let the registrar or the court's judicial assistant know within 14 days of the date of this judgment and the court will schedule a brief costs hearing.

APPENDIX

Principles Applicable to Application for Further and Better Particulars

- (1) Where particulars are sought for the purpose of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason. (*Cooney*)
- (2) Where the particulars are sought for the purpose of the hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing. (*Cooney*).
- (3) The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise. (*Cooney*; *Spedding*)
- (4) Where a pleading is so general/imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from particular items of evidence) which he will have to deal with at trial (*Cooney*).
- (5) The courts will look askance on over-expansive requests for particulars. (*Armstrong*).
- (6) Any particulars sought/ordered must relate a matter stated in the pleadings. (*Armstrong*).
- (7) The court will not entertain an application for further and better particulars which are oppressive or unreasonable. (*AIB v. AIG*).
- (8) The court will not direct a party to provide particulars of a denial in a pleading. Logically, the same principle must apply to a non-admission. (*AIB v. AIG*).
- (9) Particulars of a denial will be ordered where the denial amounts in substance to a positive allegation. (*AIB v. AIG*).
- (10) A party is not entitled to hide behind a traverse in those cases governed by O. 19, r. 15 RSC. (*AIB v. AIG*).

- (11) If a matter has not been appropriately pleaded in accordance with O. 19, r. 15 RSC, the court may refuse to allow the party responsible to subsequently make a positive case (within the ambit of application of these rules) at the trial. (*AIB v. AIG*).
- (12) It is no answer to a request for particulars for a party to contend that the relevant facts are already known by the party making the request. (*AIB v. AIG*).
- (13) The requirement in the Commercial Court that, prior to trial, the parties must exchange witness statements, can be relevant in the context of an application for further particulars as the question of a party being taken by surprise is of reduced significance in proceedings involving witness statements. (*AIB v. AIG*).
- (14) There may be circumstances where it is appropriate to direct that particulars should only be furnished after discovery. (*AIB v. AIG*).
- (15) The purpose of pleadings and of particulars is to ensure that the issues in the case are sufficiently identified in advance of the trial. It has, therefore, been observed that in more complex cases, particulars may have a more expansive role than in the case of more routine cases. (*AIB v. AIG*).
- (16) A party to proceedings is not when seeking particulars entitled to be furnished with copies of documents and records cited or referred to in the pleadings (*Aranwell*); discovery is a separate process.
- (17) A party is at risk of losing the costs of motion for further and better particulars if that party does not write a letter to its opponent prior to the motion issuing indicating in what respects the reply is inadequate and giving an opportunity for a further and better reply. (*Tromso Sparebank*).