[2020] IEHC 312

THE HIGH COURT

[No. 2015/2848 P]

BETWEEN

GEORGINA SAUNDERS

PLAINTIFF

AND

IRISH LIFE ASSURANCE PLC

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 24th day of June 2020

Introduction

1. This judgment considers the duty to furnish material facts requested in an online questionnaire when applying for a life policy and then the obligation to review the replies prior to inception.

2. The opening of the case together with the replying written submissions for the plaintiff focussed on the duty of the defendant life assurer, as set out by McMahon J. in *Manor Park Homebuilders Limited v. AIG Europe (Ireland) Limited* [2008] IEHC 174:-

> "… to make its own reasonable enquiries to carry out all prudent investigations and to act at all times in a professional manner"

3. The failure of the defendant to seek medical records before inception of the policy was compounded, according to counsel for the plaintiff, by the omission to make enquiries following the death of the life assured about the answers given in the questionnaire. In other words, this judgment addresses the factual matrix which can be established.

Factual Background

4. The plaintiff gave evidence that her relationship with the late Eamonn Dunne ('*the deceased*') started in August, 2007. They shared interests in gym, fitness and cinema particularly. She did not witness Mr. Dunne abusing alcohol or using drugs. They moved into a rented apartment and she became pregnant around March, 2008 leading to the birth of their son in January, 2009.

5. On the 4th of April, 2008 the plaintiff visited a branch of the PTSB with the deceased to enquire about getting a mortgage. The plaintiff, as opposed to the deceased, instigated the visit. Despite the plaintiff's steady income, the PTSB representative advised that the absence of other readily identifiable unencumbered assets meant that loan approval would not be forthcoming at that stage. The deceased was divorced. The plaintiff testified that the PTSB official then suggested that they take out a life policy which prompted the plaintiff to think about having some security for her unborn child. Ultimately the plaintiff and the deceased sat down with another official in the PTSB branch that day to complete an online application for a joint life policy with the defendant.

6. The plaintiff understandably could not recall in March, 2020 much of what she was asked in the PTSB branch for the online application completed in April, 2008. The plaintiff in direct examination denied that the deceased had been asked about whether he had had "treatment for mental or nervous disorder" or had "ever taken drugs for other than

medicinal purposes". The impression sought to be given to the Court was that the PTSB official with his laptop entered replies in the online application without confirming them with either the plaintiff or the deceased. Under cross examination the plaintiff then testified that she did not "recall" whether specific questions were asked. She described the "quick procedure" for completing the online questionnaire.

Declaration

7. The declaration dated the 4th of April, 2008, signed by the plaintiff and the deceased had five paragraphs, three of which are particularly relevant:-

> "I have read and understand the note concerning my obligation to tell Irish Life about all material facts in connection with the application (Online application process and telling Irish Life about material facts) in the booklet and understand that if I do not tell Irish Life all material facts, this contract could be void. I declare that all statements recorded in answer to the questions in my online application form as well as those about tobacco consumption (including any statements written down for me) are true and complete. I understand that I will receive a copy of the online application form questions and my answers are for my own records.
>
> I understand that I must tell Irish Life in writing about any changes in my health or circumstances before this insurance starts. I understand that this insurance will not start until Irish Life has accepted me for cover and I have paid the first payment.
>
> I consent to Irish Life obtaining information from any doctor who at any time has attended me concerning anything which affects my physical or mental health and I authorise them to give Irish Life this information. Irish Life may also get information from any insurance company and I also authorise them to give Irish Life this information. I agree that this authority will stay in force after my death as well as before…"

8. The plaintiff said that she had not read the terms and conditions booklet, subsequently issued by the defendant. She only went through them when giving evidence before this Court in March, 2020. The plaintiff accepted that she could have received a letter addressed to herself and the deceased dated the 7th of April, 2008, which enclosed the life options booklets. That letter noted:

> "Our decision to accept you for cover is based on the information you provided in either your paper or online application form. It is important that you take note of the following… You must carefully review your answers to the health questions to make sure they are correct: (attached) …"

9. The court is satisfied, from the answers of the plaintiff and the other testimony about the standard practice of the defendant at the time, that the said letter was made available to the plaintiff and the deceased in April, 2008 and before the payment of monthly instalments from the plaintiff's own account for the policy commenced.

Death of Mr. Dunne

10. On the 23rd April, 2010, the deceased was shot dead. The plaintiff avoided reading or being involved with the significant publicity about his murder and the criminal activities of the deceased. At that time her relationship with the deceased had become strained due, among other factors, to the surveillance of Mr. Dunne and his associates by An Garda Síochána. The deceased lived with his mother for months prior to his murder. The plaintiff described her "tough time" and having "a bit of a breakdown" before the murder. It took nearly six months for the plaintiff to submit a claim form to the defendant.

11. In a letter to the plaintiff dated the 14th of April, 2011, the defendant referred to "non-disclosure of key material facts" arising from the records of the treatment and medication prescribed for the deceased from 2001-2005 in respect of depression with notes about abuse of drugs and alcohol. The defendant, as was its entitlement under its agreement, requested those records following notification of the death of the deceased. The defendant in that letter to the plaintiff stated:-

> "Had the medical details outlined above been disclosed to Irish Life, as they should have been, Irish Life would not have been in a position to offer Mr. Dunne the cover applied for in 2008".

12. The submission for the plaintiff that this latter statement was incorrect was not supported, ultimately, by the testimony of Mr. Duffy head of underwriting in the defendant since 2003. He made the decision for the defendant to decline the claim leading to this litigation. Mr Duffy confirmed that a history of depression would not preclude the issue of a policy. However the historical use of drugs and abuse of alcohol by the deceased together with his depression, were the material facts which were not disclosed and which would have precluded the defendant from offering cover on the life of the deceased.

"Expert evidence"

13. The individual called to give expert evidence in order to underscore the submissions made in the opening had experience in general insurance only. Suffice to say that his suppositions having regard to the Insurance Act 2015 in the United Kingdom with a review of decisions by "the Financial Ombudsman Service" are of no value.

14. On the other hand, Mr. Duffy explained candidly the application and policy issue process along with his decision to decline the claim. He was cross-examined rigorously about how and when medical records and further medical examinations are sought by the defendant.

2011 Application

15. Mr. Duffy clarified that the doctor for a relative of the plaintiff had erroneously forwarded records to the defendant which indicated alcohol abuse on the part of the plaintiff following a legitimate request pursuant to another application by the plaintiff for a life policy. The plaintiff submitted an application for a new 20-year life policy in April 2011 but she did not pursue it after the defendant declined to offer cover. Copies of the 2011 application form with the misleading copy record were put to the plaintiff in cross-examination. Counsel for the plaintiff described that bundle as "*the ambush document*". Neither the plaintiff nor her legal team were aware of "the ambush document" prior to the

cross-examination of the plaintiff. Despite the surprise, the plaintiff calmly rejected that attack on her honesty and credibility. In fact, the plaintiff did not pursue the refusal to offer terms for a life policy in 2011. She only learnt of the incorrectly copied record of her relative during cross examination at the trial of these proceedings. Nothing further needs to be said for the purpose of this judgment about the error of the doctor which occurred other than to conclude that the honesty of the plaintiff in her applications to the defendant for life policies sought in 2008 and 2011 was not impugned successfully at the trial of these proceedings.

16. The central issues of fact relevant to this Court relate to the omission of the deceased to disclose the material facts about his drug and alcohol abuse from 2001-2003 particularly. The plaintiff said that she was not aware of those details until she received the declinature letter dated the 14th of April, 2011, from the defendant.

Relevant questions

17. Submissions on behalf of the plaintiff about the law were outlined in the opening. Written submissions for the defendant were delivered following the conclusion of the evidence. Finally, as agreed written replying submissions were delivered for the plaintiff. There was no necessity for a hearing in open court for further oral submissions. Having considered the evidence and submissions, the Court considers that the following are the relevant questions at this stage: -

    (1) Was the deceased obliged to disclose the facts about his drug use, alcohol abuse and treatment in April 2008?

    (2) Should the Court allow the plaintiff rely on her suggestion that the PTSB official who completed the online application in 2008 did not ask the deceased for his reply to the relevant questions in the questionnaire, when there was no mention of this allegation until she gave evidence in March 2020?

    (3) Was the defendant or its agents guilty of culpable indolence and if so what is the effect of the alleged indolence?

Obligation to disclose the material facts

18. The plaintiff's case begins with her belief, on leaving the PTSB following the online application, that she had cover for the lives of the deceased and herself. The plaintiff acknowledges that she did not read the material subsequently sent to her and the deceased. Effectively the Court is asked to assess whether the defendant ought to have made its own inquiry in 2008 by seeking medical records or arranging an independent examination of the plaintiff.

19. Mr. Wibberley (an underwriter for reinsurers which operated in the Irish and UK markets) explained the rather rule specific guidelines used for determining whether to offer cover and the terms by life insurers. Up to 80% of all life policies issued do not require medical evidence of any sort because the insurer depends on replies to a questionnaire and the confirmation of those answers. Mr. Wibberley outlined how the global underwriting manual which the defendant used in 2008 ruled out "anyone who has taken ecstasy or

cocaine…for a period of five years" for consideration. Despite skilful cross-examination of Mr. Wibberley and Mr. Burke, there is no evidence that the defendant would have offered cover for the life of the deceased in 2008 if it had been alerted to the material facts. Rather the disclosure of those facts (now accepted on behalf of the plaintiff) would have led to a request for the medical records at the very least if a refusal to cover was not immediately forthcoming. A drug test for the deceased and an independent medical report would probably have been sought by the defendant life assurer if the plaintiff and the deceased persisted in their request for life cover later in 2008. I am satisfied that the defendant would not have offered cover for the life of the deceased in any event at that time.

20. The simple fact is that the deceased had an obligation to correct the replies given in the online questionnaire about the material facts even if he was not prompted or inclined to reveal those facts in front of the plaintiff or the PTSB official. The declaration dated the 4th of April, 2008, and the subsequent posting of the policy documents support the legitimacy of the defendant's reliance on the obligation to disclose the material facts. It is unfortunate if the plaintiff continues to believe that the deceased had no obligation in April, 2008 to disclose to the defendant his past significant use of drugs, abuse of alcohol and treatment for depression.

21. The defendant was understandably taken aback at the trial to learn that the plaintiff was distinguishing her sworn confirmation in a reply given in 2017 to an interrogatory that the deceased had completed the online application with negative responses to specific questions about drug abuse. The case for the plaintiff at trial was that the PTSB official did not ask the specific questions of Mr. Dunne.

22. In view of the conclusion above that the deceased had an obligation to disclose, it may be unnecessary for the Court to make a finding about the recent distinguishing of the reply to the interrogatory. For the sake of completeness, I find that the rather subtle distinction made by the plaintiff at trial arises from the self-interest of the plaintiff to succeed in her claim. The suggestion for the plaintiff taken at its height did not excuse the deceased from disclosing the material facts at least during the days following the meeting at the PTSB branch.

23. The deceased was not honest when he gave or confirmed his replies to questions whether posed at the meeting in the PTSB or contained in the pack posted out by the defendant. It is indeed regrettable if the plaintiff believes that the omissions of the deceased can be excused by her recent sketchy account of what transpired in the PTSB on the 4th April, 2008. The Court takes account of the significant elapse of time from 2008 to 2020 when assessing the effect of what the plaintiff now suggests for the first time. It is appreciated that sworn replies to interrogatories are either in the positive or negative. The fact that the case now made was not pleaded specifically informs the Court. Requests for particulars are sought when facts require clarification so that the outline of the claim can be established. In short, the Court is sceptical about the distinction which is only recently made. Neither the solicitors for the plaintiff, nor the so-called expert witness engaged by

them, mentioned this subtlety prior to the commencement of the trial in correspondence or in the report submitted. Having regard to the self-interest of the plaintiff in this regard and the thrust of her entire evidence, I find on the balance of probabilities that the speed with which the online application was completed in the PTSB branch did not cause the deceased whether by act or omission to confirm the incorrect replies to the questionnaire.

Culpable indolence

24. The question is posed by counsel for the plaintiff about whether the deceased should have been prompted or spurred on in his memory in view of the following statement of McCarthy J. in *Aro Road and Land Vehicles Limited v. ICI* [1986] I.R 403 at p. 413:-

> "[T]he test remains one of the utmost good faith. Yet how does one depart from such a standard if reasonably and genuinely one does not consider such fact material; how much the less does one depart from such a standard when the failure to disclose is entirely due to a specific failure of recollection? Where there is no spur to the memory…can a failure of recollection lessen the quality of good faith?"

And at p. 415:

> "If no questions are asked of the insured, then in the absence of fraud, the insurer is not entitled to repudiate on grounds of non-disclosure. Fraud might arise in such an instance as where the intending traveller has been told of an imminent risk of death and then takes a life insurance in a slot machine at an airport. Otherwise, the insured need but answer correctly the questions asked; these questions must be limited in kind and number".

The questionnaire relevant to the claim before this Court is quite specific about the detail sought.

25. The plaintiff was asked questions at trial to elicit her knowledge about threats to the life of the deceased and of the precautions which he took, including the wearing of a bullet proof vest, as when he had been arrested. The plaintiff said that she was not so aware. Lest there be any doubt, the Court is not taking the allegations contained in those questions into account in its determination because it did not hear evidence about the accuracy or otherwise of those details.

26. The judgment of Clarke J. in *Caroline Colman v. New Ireland Assurance plc* [2009] IEHC 273 was cited as authority for the principle that any materially inaccurate answer given to a question on a proposal form, must be judged by reference to the knowledge of the proposer, with due regard to the proposer's ability. The submission continued:-

> "…If the questions are not asked at inception of the policy it may then be concluded that the insurer was willing to underwrite the risk without requiring additional disclosure and if so, the insurer can't later avoid the contract and purport to repudiate liability on the grounds of non-disclosure.

27. The defendant does not rely on the *uberimae fidei* doctrine but rather the failure of the deceased to alert the defendant about material facts sought in the questionnaire which was subsequently sent to him in hard copy for confirmation.

28. The facts in *Coleman v. New Ireland Assurance plc* and those of this claim are significantly different. The answers of Ms. Coleman to two questions for a critical illness policy were inaccurate. She had seen a specialist and had undergone testing in her adolescent years. Clarke J. found that doctors had not advised her of an ongoing risk. She "had put the entire incident out of her mind on the basis that it did not appear to have been significant and that the symptoms had not recurred."

29. There is no evidence in these proceedings that the deceased had put his drug abuse out of his mind in 2008. On the contrary the plaintiff merely says that she was not aware of his abuse of drugs. There is nothing to lead this Court to find that the deceased acted honestly when the incorrect replies remained.

30. The conclusions of the Court are that:

    (i) the deceased was obliged to give details of his past drug and alcohol abuse with depression to the defendant in April 2008;

    (ii) it dismisses the recent suggestion that the defendant caused the deceased to believe that he need not be accurate in giving the details sought;

    (iii) the defendant was not guilty of indolence in considering the application for life cover or in the circumstances surrounding the online application. The defendant has satisfactorily explained its process and how it was applied.

    (iv) the claim of the plaintiff commenced by plenary summons issued on the 14th April, 2015, is dismissed.