

Drowning in Documents? Irish Supreme Court Reasserts Traditional Discovery Tests

In a landmark decision by Chief Justice Clarke, the Irish Supreme Court has reasserted the traditional legal tests for granting discovery orders, and put the onus squarely on the requested party to demonstrate that any alleged compliance with a discovery request would be too onerous.

Though the court had regard to the burden and costs involved in the discovery process, it also considered the valuable contribution which discovery can make to the conduct of litigation and, consequently, access to justice.

The decision overturns the Irish Court of Appeal's judgment in the same case. That court had expressed concerns about the breadth of discovery orders and the resulting burdens on requested parties, in the context of the explosion of documents and data caused by modern communications technology, deeming contemporary discovery practice as being "in crisis". The Court of Appeal sought to recalibrate that practice by insisting that where discovery was likely to be extensive, a court should not make a discovery order unless the requesting party demonstrated that all alternative avenues were exhausted and had been shown to be inadequate. Instead, it is for the requested party, if it chooses to argue that a particular category is too broad or burdensome, to demonstrate that other less costly means of eliciting the information sought are available.

Though the decision is the definitive statement of the current law in the area, further developments are expected when the Review Group on the Administration of Civil Justice, chaired by the President of the High Court, issues its recommendations for anticipated wide-ranging reform of civil procedure in the Irish Courts.

Background

The plaintiff was employed as an aircraft mechanic with the Irish Aer Corps between 1989 and 1999. In 2014 he issued personal injury proceedings against his employer, the Minister for Defence (the "**Minister**"), claiming damages for personal injuries allegedly suffered by being exposed to toxic chemicals in the course of his employment at Casement airfield. Specifically, the plaintiff claimed that the exposure arose as a result of the handling of equipment and through inhalation, and by an initiation rite known as 'tubbing' which involved being doused with chemicals by other personnel. The Minister admitted that the plaintiff had been employed but otherwise denied the plaintiff's claims.

In the High Court, the plaintiff sought and obtained most of the 15 categories of documents he sought from the Minister. The Minister appealed the decision to the Court of Appeal. That court had regard to the fact that the proceedings were routine and the alleged injuries of only moderate severity. It felt that the breadth of certain categories – in particular

seeking documents relating to all chemicals in use at the airfield dating back to 1990 – was very onerous and disproportionate to the likely benefit of the documents to the plaintiff, and so it required that the plaintiff first explore other avenues, such as interrogatories, for eliciting the information sought before any discovery order would be made. The plaintiff sought and was granted leave to appeal to the Supreme Court, unusually, on the basis that the vexed question of discovery and its associated cost was an issue of general public importance.

Supreme Court Decision

The Chief Justice recorded that the principles to be applied in deciding whether or not to order discovery were relatively well settled but that a number of judgments in recent times showed that there could be problems associated with potentially very onerous discovery obligations, with difficulties arising as to how the courts should respond to those problems.

The Chief Justice recalled the merits of discovery – that a party may not have all the evidence it required in its possession to make its case and that sight of documentary records assisted to verify a witness' oral evidence – but also recounted that discovery can hinder access to justice and can be used as a procedural tactic to delay or frustrate proceedings, if it was disproportionately burdensome.

The court considered recent case-law on discovery and stated four fundamental principles that it had discerned:

1. Relevance and necessity remained the key criteria.
2. The default position should be that, if a category of documents is relevant, then it is *prima facie* necessary.
3. The requested party can displace this default position if it can show, in detail

and by evidence or by argument that compliance with the category will be particularly burdensome. If adopting such a position, the requested party is expected to set out these details as early as in its reply to the requesting party's voluntary discovery request.

4. When there is such a challenge to the necessity test, the court must weigh a range of factors including:
 - a) The extent of the burden likely placed on the requested party;
 - b) The expected importance of the category of requested documents to the case;
 - c) The manner in which parties have pleaded their case: a plaintiff cannot truly complain of overbroad discovery if he has adopted a 'kitchen sink' approach to its claim document, nor a defendant if it has put the plaintiff on proof of even relatively uncontroversial elements of the case; and
 - d) Whether there are other means of achieving the same information but at a much reduced cost to discovery.

Significantly the Supreme Court rejected the Court of Appeal's finding that the requesting party must show that it has exhausted all other avenues before discovery would be granted.

Comment

The decision overturns the Court of Appeal's 'heresy' as to the requirement on the requesting party to show that all alternative avenues to elicit the information sought would be or had been inadequate before discovery would be ordered. While there is no doubt that discovery

has become ever burdensome, a feature of the Court of Appeal decision, and the asserted crisis with discovery practice, was the absence of any discussion on the role of technology to assist in reducing the time, cost and overall burden of extensive discovery exercises, and so the necessity for that court to 'recalibrate' practice.

For requested parties, it is clear that they can no longer make sweeping submissions at a discovery hearing to the effect that a particular category of documents is disproportionate. The courts expect: (1) detailed reasons, supported by evidence of the projected scale and cost of the exercise, if the argument is based on fact, or cogent submissions if the argument is legal points (e.g. the information the plaintiff seeks to elicit can be achieved by interrogatories rather than discovery); and (2) that those detailed reasons are furnished in correspondence prior to any motion issuing. The clear message from the Supreme Court is that where extensive discovery is anticipated, parties should engage at an early stage.

While the output of the Review Group chaired by the President of the High Court is eagerly awaited, the Supreme Court's decision reaffirms the traditional burden of discovery. While it would be glib to suggest that the answer to the problem of technology is more technology, in reining in the cost of discovery caused by spiralling numbers of documents there is undoubtedly an increasing role to play for more advanced project management and technology-assisted review tools, including increasingly sophisticated machine-learning systems.

Further Information

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