Discovery Requests Clarified - Tobin v Minister for Defence [2019] IESC 57

Introduction

Many practitioners welcomed the Court of Appeal decision in *Tobin v Minister for Defence* wherein Judge Hogan referred to the current discovery process as a "*crisis facing the courts*". The decision invited parties to exhaust other procedural avenues in order to reduce costs and improve the efficiency of the litigation process. The learned Judge considered certain discovery requests too burdensome and costly for the parties involved and as a result posed a problem in terms of accessing the administration of justice. Further comments from Justice Peter Kelly in the Review of the Administration of Civil Justice Group enforced this view of reform of the discovery procedure and the use of alternative procedures. Notwithstanding of the above, the Supreme Court in its July 2019 decision overturned the decision of the Court of Appeal and provides clarity in respect of Discovery requests.

Background

The proceedings issued by the Plaintiff, Mr. Tobin, arise from a claim for severe personal injuries against his employer, the Minister for Defence. Mr Tobin asserts that in the course of his employment, as an aircraft mechanic in the Air Corps, he was exposed to dangerous chemicals and solvents in different geographical locations. The Plaintiff sought voluntary discovery from the Minister for Defence by letter setting out 15 categories of documents requested. The Defendants estimated the request would take approximately two hundred and twenty man hours creating a tremendous logistical and financial burden on them. Notwithstanding the significant amount of work involved in the discovery request, the High Court granted the Plaintiff a significant portion of the discovery sought with certain amendments. The Court ordered that Interrogatories were not sufficient to deal with the burdensome elements of the discovery request.

The backdrop of the decision in the Court of Appeal involved Judge Hogan's description of the *crisis* that faced the courts in terms of the breadth of certain discovery requests. He acknowledged that discovery requests can incur significant legal costs on litigants therefore impairing access to the administration of justice and imposing disproportionately onerous requirements upon them. The Court of Appeal considered the Plaintiff's discovery request to be "*very onerous and in likelihood out of all proportion to the likely benefit which might otherwise accrue to the Plaintiff".* The Court of Appeal ordered other procedural avenues should be exhausted appropriately including Interrogatories and Notice to Admit Facts before requesting discovery from another party. This represented a significant change for all practitioners.

The Supreme Court

The Supreme Court unanimously decided to overturn the Court of Appeal decision and reinstated the High Court order. Essentially the Court found there is no onus on the requesting party to prove that all procedural avenues have been exhausted before issuing a request for discovery. Additionally the Defendant did not establish to the Court that the availability of interrogatories would have created less of a financial burden or otherwise.

The Supreme Court decision ultimately "*recognised the importance*" of parties making discovery in our legal system by iterating that it is an essential tool in terms of challenging the veracity and consistency of claims being proffered by each party. The Court maintained that this keeps parties honest during proceedings but at the same acknowledging that the vast amount of documentation discovered will never be evidenced in Court. The Court recognised the expense involved in the discovery process and was cognisant that parties should be able to access justice in a timely and cost effective way.

The Court held, in accordance with relevant case law, that it is the responsibility of the requesting party to establish that the categories of discovery sought are "*relevant*". There is no basis for the discovery request if this cannot be established by the requesting party. To determine "*relevance*", a Court should examine what has been pleaded to date and the Court was critical of the "*kitchen sink"* approach taken by the Defendant when delivering a full Defence placing the Plaintiff on full proof of his claim. According to the Court the Defendant should have attempted to narrow the issues on pleadings as otherwise it contributed to the burdensome discovery request. Documents requested by discovery should be "*necessary*" as well as "*relevant*". The Court can apply the proportionality test to ascertain whether documents are truly necessary, by applying factors such as determining how onerous or burdensome the request is on the parties, or whether other means can facilitate the same result. Once relevance and necessity have been established prima facie, the onus shifts to the requested party to establish that the threshold for the test of necessity has not been reached.

Comment

Some reformation of our discovery procedure was expected by practitioners in light of the Court of Appeal decision last year. There was an expectation that other procedural avenues would be used with the result of limiting burdensome discovery requests, however in the wake of the most recent decision this is not the case. Whilst the Supreme Court appreciated the cost element and other burdensome elements of the discovery process, the status quo remains both procedurally and substantively. The primary lesson for all practitioners is to carefully plead or defend claims by narrowing/nuancing the issues, otherwise onerous discovery obligations may apply.

For further information please contact **Mary Byrne** or **Ruth Hereward** of OBL Solicitors