

THE HIGH COURT

[2021] IEHC 611

RECORD NO. 2016 9801 P

BETWEEN

GAL BRAHAMI AND ORIT BRAHAMI

PLAINTIFFS

AND

KELLEHER CHARTERED SURVEYORS LIMITED

DEFENDANT

EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 12 July 2021

Introduction

1. This is an application that, although not originally identified as such, is now an application made pursuant to Order 31 rule 12 sub-rule 11 RSC for additional discovery, as per the amendment that I have ordered to the defendant's motion of 11 November 2020.

Order 31, R.12(11)

2. As counsel correctly identified, sub-rule 11 has only recently received judicial discussion in the Court of Appeal decisions of *Hireservices (E) Ltd & anor v. An Post* [2020] IECA 120 and *Micks-Wallace v. Dunne* [2020] IECA 282.

3. Sub-rule 11 provides:

(11) Any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the Court for an order varying the terms of the discovery order or agreement. The Court may vary the terms of such order or agreement where it is satisfied that:

(i) further discovery is necessary for disposing fairly of the case or for saving costs, or

(ii) the discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery.

4. In short, the rule permits a person to apply to court to vary the terms of a discovery agreement or order. The Court may do so where it is satisfied, *inter alia*, that further discovery is necessary for disposing fairly of the case or for saving costs.
5. The circumstances in which that jurisdiction should be exercised were identified in *Hireservices* where Murray J. observed that the power to direct parties to make additional discovery originally flowed from the inherent jurisdiction of the courts to vary interlocutory orders but that this power has now been grounded in sub-rule 11.
6. Critically for the purposes of this application, he says at paragraph 19 that an application pursuant to sub-rule 11 "*will not be granted simply because the documents are relevant and necessary in the sense explained most recently in Tobin v Minister for Defence [2019] IESC 57*". He notes that the interests of all in the efficient disposition of proceedings requires that a party has one chance to seek discovery and having agreed to an order for discovery must "*have good reason for coming again*". He notes that an interlocutory order

can generally only be reopened where there is a good reason for doing so, such as a material change in circumstances. He notes that the court retains the power to make an additional order for discovery “when it determines that an injustice would be done without such a direction.”

7. Murray J. goes on to say that “however all of this is the exception rather than the norm. The default position is that the discovery is as agreed or directed, and that some good reason must be given for revisiting that agreement or order”.
8. In that case he held that no good reason had been given to justify the directing of new categories of discovery eight years after discovery was agreed and seven years after it was made.
9. In *Micks-Wallace*, Murray J. noted at paragraph 33 that a party seeking additional discovery must “show good reason why the discovery was not originally sought”. At paragraph 35 he observes that, in deciding whether good reason has been made out for not seeking the additional discovery originally, the court must have regard to two potentially competing factors. On the one hand, it is in the interests of the efficient disposition of proceedings that parties are encouraged to seek discovery promptly. On the other hand, parties should be discouraged from seeking more discovery than strictly required to address the case as formulated and that if a party can point to developments in a case since the making of discovery, it will often have good grounds for seeking to vary the discovery originally agreed or ordered.

Application

10. I turn now to the application of these principles to the instant case. This is a claim against a company of chartered surveyors by a married couple. The defendant was engaged to carry out a survey of the property and to deliver a precontract surveyor’s report. At the time of engaging the defendant, the plaintiffs were aware of an oil spill in the back garden and asked the defendant to address the issue. It is alleged that the defendant who attended at the property and provided a report, did not adequately investigate, assess, and advise the plaintiffs in relation to the oil spill. They say that it was necessary to carry out extensive remediation works due to the contamination and to move out of the property for a number of months while the remediation took place. The plaintiffs seek damages as per the statement of claim dated 10 April 2017 in the order of €240,000.
11. The plenary summons was issued on 3 November 2016, the statement of claim in April 2017 and the defence on 8 November 2017. Particulars were raised by the defendant on 8 November 2017 and replies to particulars were answered on 18 February 2018. There was an agreement to make very limited discovery in November 2018. The discovery affidavit was served in February 2019. In February 2019 there was a change of solicitors and Ronan Daly Jermyn came on record for the defendant.
12. There was significant engagement between the parties in relation to particulars, with the defendant remaining dissatisfied with particulars in relation to the remediation costs but agreeing not to motion the plaintiffs.

13. On 9 April 2020 the solicitor for the plaintiffs served a certificate of readiness. In April 2020, the solicitors for the defendant indicating that a further request for discovery was contemplated and that a letter of request would be forwarded. Ultimately that motion for discovery was issued on 11 November 2020.
14. That motion sought two categories of documents.
15. The first was in respect of documents relating to all advice received by the plaintiffs regarding the necessity for remedial works alleged to have been caused by the wrongdoing alleged against the defendants.
16. The second category was in relation to all documents relating to the remedial works alleged by the plaintiffs to have been carried out on their premises, the cost thereof and the payment for same including all invoices for the works particularised in the statement of claim and the payment of same.
17. The motion was grounded on an affidavit of Ms Lisa Mansfield sworn 3 November 2020, solicitor for the defendant.
18. It is important to consider the terms of this affidavit given the weight placed on the necessity for good reason in the jurisprudence referred to above. At paragraph 11 she says that the discovery already sought and obtained is not relevant to the issues the subject matter of the current request for discovery. It is not alleged that there is any overlap between the previous discovery and that now sought and so I do not need to delay on this question. However, it is clear that the mere fact that the categories sought are different to those already sought is not a good reason *per se* for further discovery. It is rather that, if the new categories cover the same ground as the categories already obtained, it is even harder to obtain an order for additional discovery.
19. The next sentence in that paragraph states that "*the necessity for this discovery became clearer following further engagement from our expert in April 2020*".
20. The third sentence refers to delay which I will deal with separately below.
21. Ms Mansfield also says that the plaintiffs have not engaged in any substantive way with the discovery requests and she says at paragraph 12 that the documents are necessary, are not extensive and give rise to no significant burden. She also says the request for discovery is not made for the purposes of delaying the hearing.
22. She exhibits the letter of 30 September 2020 where the additional discovery is sought. It is important to note that that letter provides reasons as to why the discovery documents are necessary and relevant but that no reasons are given as to why the application was not made at the time discovery was originally sought or why the defendant is entitled to come again at this point in time.
23. There is a replying affidavit from Mr Callan, solicitor for the plaintiffs, sworn 19 March 2021 and then a further affidavit from Ms Mansfield sworn 13 April 2021. In that affidavit

she addresses the question of delay in bringing the application, the plaintiffs' attempts to get the case on for hearing, the issue of an inspection of the property back in 2016 (which I do not believe is relevant to the question that I have to determine) and the dispute between the parties relating to particulars. At paragraph 18 she addresses again the questions of relevance and necessity. She avers that it would be unfair to permit the plaintiffs to decide unilaterally whether to withhold or tender the documents, as well as referring again to the identification by the defendant's expert of the necessity of the documents and the substantial nature of the claim.

24. What is most striking about Ms Mansfield's affidavits and the letter seeking discovery is that there is no attempt to identify good reason for "coming again", in the words of Murray J. No material change in circumstance is identified – although I fully accept that that is not a pre-requisite if some other good reason is identified. Equally, no developments in the case that justify a second bite of the cherry are identified – again not a necessary proof but possibly a good reason.
25. The only averment that might conceivably be considered to be a reason for the failure to include these categories when discovery was first sought is the reference to the identification by the defendant's expert of the necessity for the documents. However, no detail at all is given in this respect and no explanation is given as to why this was only done in April 2020. In particular, it is not explained why this was not done back in November 2018 when discovery was agreed.
26. In those circumstances it seems to me that no substantive reason has been identified at all, let alone any good reason. Counsel for the defendant focused very much on the interests of justice test identified in *Higher Services* as the justification for the additional discovery. The defendant says that without this discovery it will have to cross-examine witnesses without knowing in advance what material they have relied on, in particular the plaintiffs' experts; that it may have to issue subpoenas; and that this will put it at a disadvantage and undermine the interests of justice.
27. Any disadvantage to the defendant in not having the documents sought has accrued by reason of its failure to take a necessary step and seek those documents at the appropriate time. That is not a compelling "interests of justice" argument.
28. Moreover, it seems to me that the disadvantage may be ameliorated at least in part by the experts exchanging reports and meeting with each other. That will give the defendant visibility into the plaintiffs' claim. Indeed, the plaintiffs have already furnished one report to the defendant, while the defendant has chosen not to furnish any of its reports.
29. Further, in relation to the vouching of special damages (as required by the second category) the plaintiffs bear the burden of proof of showing that they have suffered loss and damage, and without vouching those losses they will not be entitled to recover them. Therefore, although the lack of documents may make the trial more unwieldy, it does not seem to me that it will cause an injustice to the defendant.

30. But fundamentally the defendant fails to engage with the core finding of Murray J. – that there must be good reason, that a party has one chance to obtain discovery, and that seeking additional discovery is the exception rather than the norm. Nothing in this application persuades me that this is anything other than an attempt by the defendant to mend its hand, by seeking discovery that ought to have been but was not sought in 2018. That is not the purpose of sub-rule 11.
31. For those reasons I am not prepared to grant the application for discovery.
32. Finally, I should comment on the role of delay in an application such as this. The test is whether or not good reason has been shown for additional discovery. The test is not whether there has been delay or whether the application will cause delay in getting the case on.
33. In adjudicating on whether to grant additional discovery, the necessary hurdle having been passed in relation to good reason, the court may of course in the exercise of its discretion consider delay. In this instance, it appears to me that the defendant undoubtedly delayed in bringing its application for additional discovery. It was brought two years after the original agreement on discovery. Even after new solicitors came on record in February 2019, the motion was not brought until November 2020. It is no answer to say that the plaintiffs have also delayed since it is not the plaintiffs making this application. But in any case, given that good reason has not been shown, I need not further consider the question of delay.