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Important Supreme Court Decision on Discovery

by **Muireann Granville**

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Tobin v Minister for Defence [2019] IESC 57

A recent Supreme Court decision provides clarity for parties seeking potentially onerous and wide-ranging discovery.

In a widely publicised judgment in July 2018, the Court of Appeal in *Tobin v Minister for Defence* [2018] IECA 230 overturned a High Court Order for discovery stating that it was too broad and placed too great a costs burden on the Defendant. The Court of Appeal laid emphasis on the fact that alternative pre-trial procedures – such as a Request for Interrogatories or a Notice to Admit Facts – could more succinctly achieve the same objectives as discovery. The Court of Appeal decision was appealed to the Supreme Court.

In July 2019 a five- judge Supreme Court issued a unanimous judgment overturning the Court of Appeal decision, and reinstating the original Discovery Order of the High Court (subject only to an amendment of the temporal limitations of one category).

What is discovery?

The process of discovery involves one party seeking to inspect documents which are or were held by the other party to a dispute (and/or on occasion documents held by third parties) and which are relevant to the issues in the proceedings. The purpose in seeking to inspect any such relevant documents is to advance that party's case or to damage an opponent's case. In the past, this generally involved the review and scheduling of a few bundles or boxes of paper files. However, as technology has advanced, discovery has escalated into what can become a mammoth and costly exercise in many cases. Emails, texts, "whatsapp" messages, phone recordings, social media interaction and even the metadata behind electronically-generated documents are all within the parameters of what may have to be reviewed for the purpose of complying with a request or order for discovery.

Why is discovery necessary?

The Chief Justice, Judge Clarke delivered the judgment in Tobin on behalf of the Supreme Court and recounted the general principles around the discovery process. He carried out a useful reminder and analysis of the benefits, necessity, and also challenges involved in discovery in our common law jurisdiction where cases are decided on evidence presented by the parties. Such evidence can be tested for its veracity or reliability by cross-examination or challenged by the presentation of competing evidence. The Chief Justice noted the importance of not losing sight of the valuable contribution discovery can make to the administration of justice. In essence discovery improves the chance of the court being able to get at the truth in cases where facts are contested. On the other hand, the Chief Justice referred to the possibility that discovery can also hinder access to justice if it becomes disproportionality burdensome.

Legal test for discovery

The Chief Justice reviewed the case law on discovery to discern the correct legal test that should be applied by courts when faced with discovery applications. He confirmed that the test for determining the necessity

of discovery is that such disclosure must be both relevant and necessary for the fair disposal of the case and to save costs. In addition, in the modern context and in an effort to reduce costs and delays the Chief Justice emphasised two further considerations:

1. proportionality; and
2. that more efficient methods of disclosure should first be pursued.

The Supreme Court took the view that the default position would remain one where what is relevant would also be necessary unless the necessity requirement had been clearly discharged by a party for one or various reasons (for example if another less costly and time consuming procedural mechanism such as interrogatories could be used to disclose such documentation). However, it seemed to the Chief Justice that while the use of alternative methods of seeking discovery may be relevant if the imposition of an obligation to make discovery was overly burdensome, it did not seem to him appropriate to say that a requesting party must establish that they have exhausted all other procedures before discovery can be sought.

Rationale for discovery – keeping parties honest

The judgment examined the rationale for discovery and noted that it allowed a party access to material which could be presented to the court as evidence which may bear on questions of fact which have the potential to influence the proper result of the case. The Chief Justice also noted that discovery was a way to keep parties to a dispute honest in their pleadings before the court.

In examining the rationale of keeping parties honest, the Chief Justice noted that this was often overlooked. He commented that documentation which is discovered but which does not make its way into evidence at trial nonetheless has the effect of keeping the parties honest because a party making discovery will have to make an oral case at trial that is consistent with the documentary evidence.

Exhausting other options before seeking discovery

The Court of Appeal had observed that the discovery process which was designed to assist with the fair administration of justice now threatened to undermine it in some cases by imposing particularly burdensome demands on the parties to the proceedings. Hogan J stated that it was for the judiciary "to re-calibrate and adjust that practice" by insisting that in cases where the documentation sought on discovery is likely to be extensive, judges should refuse to grant an order for discovery unless all other avenues have been exhausted and these have been shown to be inadequate.

However, the Supreme Court felt that it was not in fact necessary for a requesting party to establish that they have exhausted all other procedures before discovery can be sought. The Chief Justice commented that it would be for the requested party to demonstrate that "… the application would be particularly burdensome and to put forward evidence and argument to support that contention. It is also for that party, at least initially, to suggest any alternative means of obtaining the relevant information which are said to be less burdensome but potentially equally effective."

A "kitchen sink" approach to pleading

In its judgment, the Supreme Court laid particular emphasis on the manner in which the State had defended the case, having chosen to put Mr Tobin on proof of his entire claim. It was noted that the discovery sought would have been reduced had a "more nuanced" approach been taken by the State. It was similarly stressed that a Plaintiff who takes a 'kitchen sink' approach to their pleadings cannot legitimately complain that they are subject to a broad discovery order.

Likely effect of '*Tobin*'

Following the Court of Appeal decision last year, many practitioners anticipated that the discovery process would be reformed. The Court of Appeal decision encouraged parties to explore other avenues in advance of seeking discovery. In the wake of that decision, parties had been more mindful of avoiding seeking discovery which could be deemed to be excessive or burdensome.

Whilst the Supreme Court acknowledged that the discovery process was often expensive and at times unmanageable, it made clear that in this case, the High Court was correct to order discovery of a significant

portion of the fifteen categories sought by Mr Tobin from the State.

The substantive test for discovery has not been amended and parties can continue to pursue discovery requests without the need to exhaust other avenues first. That said however it is perhaps useful to remember that the relevance of documents or categories of documents for discovery is determined by reference to the pleadings. Caution should be exercised by parties when pleading their case, as an overly-broad approach is likely to lead to the imposition of onerous discovery obligations.

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