[2020] IEHC 255

THE HIGH COURT

[2018 No. 6174 P]

BETWEEN

FRANK SOMERS

PLAINTIFF

AND

COSGRAVE DEVELOPMENTS (DUBLIN) LIMITED, SCAFF HIRE LIMITED, JOHN KILBAINE AND H&M SCAFFOLDING LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18th day of May, 2020

1. Before the court is a motion for discovery brought by the third-named defendant (who is the employer of the plaintiff) against the first-named defendant who is the main contractor on the site on which the incident to which the action relates occurred. In that regard I have received helpful submissions from Mr. Martin Canny B.L. for the third-named defendant and from Ms. Lisa Kelly B.L. for the first-named defendant.

2. Works on the site in question at Culanor, Upper Eden Road, Dún Laoghaire, began around November 2015. The plaintiff complains that on 1st July, 2016 he suffered personal injuries in falling from scaffolding at the site. The personal injury summons identifies the four defendants as being respectively the main contractor, a subcontractor, a bricklayer who was a subcontractor and was the employer of the plaintiff, and finally, in the case of the fourth-named defendant, a provider of scaffolding services. The defence of the third-named defendant dated 29th May, 2019 denies that any injuries were occasioned by the negligence of that defendant, contends that any liability attaches to the other defendants and pleads contributory negligence.

3. On 28th August, 2019 the third-named defendant sent a discovery letter to the first-named defendant and the following day, 29th August, 2019 served a notice of indemnity and contribution against all defendants. On 4th September, 2019 the first-named defendant replied stating that the request was premature because the first-named defendant had not served its defence and that, therefore, the pleadings were not closed. On 14th November, 2019 the third-named defendant's solicitor replied pointing out that, *"the relevant pleadings have been delivered"*; that is, the pleadings as between the two relevant defendants.

4. A reminder letter was sent on 11th December, 2019 and ultimately a motion (which is undated in the book of pleadings given to me) issued in January 2020 seeking an order for discovery. The first-named defendant's solicitors replied to this motion in correspondence changing tack somewhat by seeking particulars and by stating that the third-named defendant had failed to give full particulars of the claim set out in the notice for indemnity and contribution and therefore *"pleadings pursuant to the notice of indemnity and/or contribution are not yet closed and your seeking discovery at this juncture is entirely premature."*

5. The formal notice seeking further and better particulars of the claim made by the third-named defendant was not issued by the first-named defendant until 3rd March, 2020.

That was replied to on 23rd March, 2020 by a reply which contended that the particulars sought were more a matter for evidence, but providing them anyway, and also contending that the particulars might need to be clarified after discovery.

Was the first-named defendant correct that pleadings were not closed because the defence had not been served?

6. The general principle is that an order for discovery should not be made until the pleadings are closed: see *A.L. v. M.N.* (Unreported, Supreme Court, Murphy J. (McGuinness and Hardiman JJ. concurring), 4th March, 2002) and Hilary Delany, Declan McGrath & Emily Egan McGrath, *Delany and McGrath on Civil Procedure*, 4th ed, (Dublin, Round Hall 2018) at p. 427.

7. Order 16, r. 12(1) of the Rules of the Superior Courts is very illuminatingly discussed by Delaney & McGrath at p. 422, and allows service of a notice of indemnity and contribution which may be followed under r. 12(2) by an application by either party for directions as to pleadings on foot of the notice to be made within 28 days. In default of an application within that time, the questions raised in the notice are to be determined at or after the trial of the plaintiff's claim as directed by the court. Thus, in the absence of an application under r. 12(2), the service of the notice is the final pleading as between the two relevant defendants. The pleadings are, therefore, closed as between those defendants. The fact that one of the defendants has not delivered a defence to the plaintiff's claim is not relevant for that purpose. I will deal with the question of particulars separately below. Thus, the first-named defendant was incorrect to contend in correspondence that the pleadings were closed in the context of a claim by a fellow defendant who had served a notice of indemnity and contribution, in the absence of any application to the court for directions as to pleadings under O. 16, r. 12(2).

Was the first-named defendant correct that pleadings were not closed because particulars had not been furnished?

8. Leaving aside the problem that court directions as to pleadings were not sought within 28 days, Ms. Kelly submits that a notice of indemnity and contribution is a "*pleading*" within s. 2 of the Civil Liability and Courts Act 2004, which provides that*: ""pleading" means, in relation to a personal injuries action, a personal injuries summons, a defence, a defence and counterclaim or any other document (other than an affidavit or a report prepared by a person who is not a party to that action) that, under rules of court, is required to be, or may be, served (within such period as is prescribed by those rules) by a party to the action on another party to that action;"*

9. While one can see the logic on a literal interpretation, taking s. 2 in isolation, for the argument that a notice of indemnity and contribution served by one defendant on another defendant is a "*pleading*" and accordingly must be particularised, it is clear that the implications of such an interpretation would be firstly that the traditional staccato format of the notice of indemnity and contribution would be incorrect and that the notice should be a much more detailed specification of negligence by the other defendant concerned; and secondly, that any notice of indemnity and contribution should be accompanied by a verifying affidavit. Is that a correct interpretation?

10. When one looks at the 2004 Act overall, it is clear that the drafting of the Act is not apposite to cover pleadings as between defendants. For example, s. 13(1) provides that: "*(1) All pleadings in a personal injuries action shall— (a) in the case of a pleading served by the plaintiff, contain full and detailed particulars of the claim of which the action consists and of each allegation, assertion or plea comprising that claim, or (b) in the case of a pleading served by the defendant or a third party contain full and detailed particulars of each denial or traverse, and of each allegation, assertion or plea, comprising his or her defence"*. The drafter thus envisaged that a defendant would in any "*pleading*" for the purpose of the Act be engaging only in denials or traverses or alternatively putting forward a "*defence*" consisting of allegations, assertions or pleas. The tone is very much one of reciprocity and of bilateral arrangements as between plaintiffs and defendants, rather than as between individual defendants.

11. Likewise, s. 11 of the 2004 Act provides for further information to be exchanged between plaintiff and defendant, again on a reciprocal basis, but is entirely silent as to exchange of information between defendants. That is not consistent with an intention that documents exchanged between defendants are to be classed as pleadings for the purpose of the Act.

12. Similarly, s. 12 in terms of pleadings served by a defendant is limited to a defence and counterclaim, with no reference to claims as between defendants.

13. For what it's worth, s. 32(1) of the Act amends the definition of "*proceedings*" in s. 4(1) of the Personal Injuries Assessment Board Act 2003, to specifically exclude a notice of indemnity or contribution from the definition of "*proceedings in court".* That provides modest support to the analogous concept that "*pleading*" is not intended to cover such a notice.

14. The concept of a literal interpretation is sometimes misunderstood. A literal interpretation can only be meaningful if it takes into account the full context including the wording of the Act as a whole. Taking the latter dimension into account here indicates that the term "*pleading*" in s. 2 of the 2004 Act was not intended to cover documents setting out claims as between defendants, such as the notice of indemnity or contribution or a request for particulars as between defendants or a reply arising therefrom. The present case is perhaps an interesting example of how a look at the overall statutory context can narrow what might otherwise seem in isolation to be wide language. There is nothing in principle wrong about that because that is how language works. All terms are to be viewed in context, and to artificially wrench any sentence or fragment from its context is to set off on the path of interpretative error. That is not to downgrade the importance of the words used, but simply to make the point that language and overall context including purpose are related and are not watertight separate compartments.

15. Turning aside then from any argument based on the 2004 Act, the general principle is that an outstanding notice for particulars is not a bar to an order for discovery as long as the moving party's case is adequately pleaded and particularised: see *AMEC PLC v. Bord Gáis Éireann* [1997] IEHC 117 (Unreported, High Court, 4th July, 1997), and *Delaney & McGrath* at pp. 428 - 429.

16. The problem for the first-named defendant here is that at the time the motion was issued there was nothing outstanding. Particulars were only sought after the motion for discovery was issued, so even if the notice for particulars was outstanding (which it wasn't) and even thought counsel for the first-named defendant may not have had much time to digest the replies, that is not a bar to an order for discovery if the particulars were only sought in response to the discovery request.

Was the request for discovery premature because the notice of indemnity and contribution had not been issued at the time of the request itself?

17. In oral submissions, Ms. Kelly argued that the request for discovery was premature because it was delivered one day before the date of the notice of indemnity and contribution. That is a fair point in the sense that strictly speaking pleadings had not closed at that point, although they had by the time the request for discovery fell to be replied to. It perhaps should be pointed out that this was not a point that the first-named defendant's solicitors ever made in correspondence; and also in the particular circumstances of this case it is a *de minimis* objection. But, leaving those aspects aside, this point might have more resonance in a case where a discovery request was issued prematurely and then immediately followed by a motion. Here there were reminder letters that reiterated the request and, therefore, cured any purely *de minimis* technicality as to prematurity.

Is discovery relevant and necessary?

18. Turning then to the merits of the discovery request, it seems to be quite focused and broadly is both relevant and necessary. As Mr. Canny very perceptively points out, "*there is always scope for tinkering with the language*" of a discovery request, but I think that only limited tinkering is required here. As distinct from the more typical case, the solicitors for the first-named defendant have not engaged with the specifics of the request or made any counter-offer because they (incorrectly in my view) advanced preliminary objections which simply do not cut the mustard. In particular, there is no replying affidavit on behalf of the first-named defendant so it is not open to that party to dispute the factual premise of the application. Ms. Kelly in submissions has done the best possible job to try and fill that gap, but ultimately one cannot get away from the fact that the categories of documents sought are quite narrowly drawn and fairly reasonable in terms of their substance, having regard to the criteria of relevance and necessity.

19. Turning to the specific categories sought, the position is as follows:

    (i). the accident report form and witness statements - Ms. Kelly says that the third-named defendant has much of this material, but in the absence of an affidavit particularising the details of this, that objection does not carry much weight and in principle these documents are relevant and necessary;

    (ii). documents identifying the relationship between the defendants - that is a somewhat vague category, and it seems to me that would be better phrased in terms of contracts or similar written arrangements between the defendants identifying their respective responsibilities; and as so reworded that seems to me to be relevant and necessary;

(iii). documents touching on why a loading bay with use for a teleporter was not provided - Ms. Kelly says that is a matter for other defendants, however, one gets into a hall of mirrors if that sort of argument is to be accepted; no doubt the other defendants would say it is a matter for the first-named defendant. The ultimate question is whether the documents sought are relevant and necessary to the moving party's claim, and the answer to that is clearly yes. If they are outside the possession, power and procurement of the first-named defendant, that is a different situation, but otherwise they are proper documents to be discovered;

(iv). documents regarding whether a scaffolder (that is a scaffolding specialist) was present at the time of the incident - Ms. Kelly says that is a matter of evidence, but the fact that something will be explored in evidence is not, as such, a bar to discovery; if there are any documents on this issue, then they are necessary and relevant, and if there are no such documents, then needless to say they don't have to be generated in response to the request;

(v). documents identifying the number of scaffolders employed and their tasks - that again is said to be a matter for the other defendants and a similar logic to that addressed above applies as to why that objection is not an answer to the point;

(vi). documents recording complaints - it is said that the third-named defendant knows of complaints, but again in the absence of an affidavit one can't make much headway with that objection. The point is made that this is a relatively wide request, and also that complaints in contexts other than the particular site here would not be relevant, but in principle if there were unheeded complaints in similar circumstances on other sites, that could be evidence of negligence on 1st July 2016 at this site. Obviously, that is not in any way to assume that there were any such complaints, but one has to address the question of relevance from a hypothetical viewpoint. As regards the open-ended nature of the request it seems to me it should be limited to a three-year period prior to the incident complained of;

(vii). this category seeks various documents related to material generated in the first-named defendant's role as project supervisor for the construction stage, such as the safety and health plan - a complaint is made that the category is generic, but it does not seem to me to be that generic; it is all safety-related and seems relevant and necessary;

(viii). scaffolding policy and maintenance records – that is said to be a matter for the other defendants, and a similar logic applies as above as to why that is not an answer here and why the material should be discovered;

(ix). certain correspondence between the defendants - again it is suggested that could be directed to the other defendants and no doubt they would say the same thing, so again that doesn't seem to be an answer to the point; and

(x). documents regarding whether the teleporter driver concerned was employed by the first-named defendant or any other party - if such documents exist, they are relevant and necessary. The point is made that this issue could have been addressed by a notice to admit facts, but as I pointed out in *Griffin v. Irish Aviation Authority* [2020] IEHC 113 (Unreported, High Court, 26th February, 2020), there is not much practical benefit in sending parties off on a wild goose chase to use some other procedure if the procedure actually availed of is an acceptable vehicle to resolve the issue. That had been the case in *Armstrong v. Moffat* [2013] IEHC 148, [2013] 1 I.R. 417, where Hogan J. refused what I respectfully say seem to me to be some reasonable requests for particulars on the basis that the defendant should have pursued interrogatories, a singularly inappropriate method to answer open-ended questions: see para. 15 of *Griffin*. The court should not collude in the sort of circular procedural merry-go-round that can arise in these kind of situations. If information is going to have to come out at some point, parties should really be encouraged (and if encouragement fails, ordered) to just provide it at the earliest opportunity.

Order

20. Accordingly, the order will be that the first-named defendant make discovery of the documents sought with the adjustments referred to in terms of categories (ii) and (vi) above, and I will hear the parties on timescale and on the relevant deponent.