

THE HIGH COURT

[2023] IEHC 21

Record No. 2017/8013P

BETWEEN

PATRICK SHEERAN

PLAINTIFF

- and -

DUBLIN CITY COUNCIL

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 17 January 2023

Introduction

1. This is an application for discovery brought in the context of a personal injuries action in respect of injuries sustained on 13 June 2014 by a cyclist when he was cycling along Pearse Street in Dublin 2. In his Personal Injury Summons of 5 September 2017, he pleads that his bike struck a defect in the road surface in consequence of which he was thrown off his bicycle. He suffered serious injuries and was out of work for 15 weeks. He fractured his elbow requiring surgical fixation and 2 plates and screws were inserted. He pleads a memory deficit and eyesight deterioration due to the impact to his head.
2. He alleges that the defendant, Dublin City Council, was guilty of negligence *inter alia* because it failed to properly repair the path/surface, it created a hazard in the nature of a trap and it caused the road surface to drop vertically and to ravel and fissure.

3. In its defence of 19 December 2017, the defendant pleads that there was no misfeasance on the part of the defendant and the defendant will rely upon the defence of non-feasance and that if there was any defect in the road, same arose by reason of normal wear and tear over a period of years.

Discovery

4. An affidavit of discovery was sworn by Ms. Lynch of the defendant on 16 August 2019. In that affidavit she avers that she made the affidavit pursuant to an agreement between the parties that “*the defendant make voluntary discovery of the following pursuant to agreement between the parties further to correspondence*”. She does not identify what “the following” consists of but rather refers to correspondence between the parties consisting of two letters from the defendant to the plaintiff’s solicitors and four letters from the plaintiff’s solicitors to Dublin City Council.
5. The affidavit of discovery does not at any point identify the category agreed. The sole description of documents in the Schedule is as follows “T2RDM26590-1”. The documents are appended to the affidavit and amount to two documents – the first is a half-page document entitled “T2 form for T2 RDMNT6590-1”. This refers to a work description as being “core holes”, the location is described as “Pearse Street” and the duration date being from 10/08/2013 to 8/09/2013.
6. There is one additional document being a document headed up “Road works control directive” issued on 9 August 2013 and refers to Pearse Street and includes a description of the customer as “road maintenance”. The operative dates are stated to be from 10 August 2013 to 8 September 2013. That document appears to be a regulatory type document as the first sentence is in the following terms:

“In accordance with section 101D of the Traffic Act 1961 ... Dublin City Council direct that the roadworks detailed above be carried out during the period shown

subject to the conditions specified and to amendments/additions to those conditions listed below”.

7. The conditions in question are regulatory type conditions and do not go to the engineering details or describe the nature or specific location of the works.
8. Following receipt of this affidavit, the solicitors for the plaintiff wrote to Dublin City Council on 10 December 2019 identifying that the plaintiff’s engineer had expressed surprise at the dearth of documentation relating to the work carried out on Pearse Street and seeking confirmation that no other documents existed. On 18 March 2020 the plaintiff’s solicitors wrote threatening to strike out the defence as it was non-compliant with the discovery Order.
9. On 6 April 2020 the law agent for Dublin City Council wrote that due to the Covid-19 outbreak, her client had been unable to address the query, and this would remain the position until there was a lessening of such restrictions. On 11 February 2021 solicitors for the plaintiff wrote detailing the documents that would have been expected from the works carried out at the location of the accident, including the preceding T1 form, documents pertaining to works by the defendant and subcontractors if any, the risk assessment and work plans, documents relating to the core holes including mapped locations of where they were taken, work records or reports etc.
10. No reply was provided to this letter and there appears to have been no engagement by the defendant.

Motion of 27 May 2021

11. It was in those circumstances the motion of 27 May 2021 was issued. The relief sought in the Notice of Motion was for an Order directing the defendant make discovery of the following category:

“All notes, records, documents or memoranda (howsoever held) relating to all works of design, construction, repair, maintenance and upkeep of the relevant section of Pearse Street for a period of 80 years pre—accident i.e. pre-13 June 2014”.

12. That motion was grounded upon an affidavit of Elizabeth Burke, solicitor for the plaintiff, sworn 26 May 2021. No replying affidavit was filed on behalf of the defendant.
13. When the motion came before me today 16 January 2023, it became clear that counsel for the defendant had not understood that the matter was listed for hearing today and was not in a position to proceed with the motion. The matter had been called on the previous Thursday. I was anxious to dispose of this motion given the very significant delay in relation to discovery in these proceedings, given the accident took place in 2014 and the proceedings were instituted in 2017. Therefore, I agreed with both counsel that I would determine the motion on paper and give a written judgement.

Decision

14. I am asked for an Order of discovery in circumstances where there was a voluntary agreement between the parties and an affidavit of discovery was already sworn. The normal position is that where there is an agreement to make voluntary discovery, that agreement may be enforced in the same way as an Order requiring a party to make discovery – Rules of the Superior Courts, Order 31, rule 12(7).
15. However, the plaintiff has not sought an Order striking out the defence for failure to make discovery or further and better discovery. Rather he has sought an Order for discovery in the terms outlined above.
16. The affidavit of Ms. Lynch refers to an agreement between the parties to make voluntary discovery further to correspondence but does not identify the agreement. The

correspondence includes two letters from the defendant to the plaintiff's solicitors being 27 November 2018 and 6 February 2019 neither of which are exhibited or available to me. Nor do I have copies of all the letters from the plaintiff's solicitors. In those circumstances, it seems to me that I should consider the motion afresh because I do not have before me a precise identification of what the parties agreed to when they previously engaged in relation to discovery.

17. I am quite satisfied that discovery ought to be made since it goes to a key issue in the case i.e. whether Dublin City Council had carried out works at the relevant location, and if so, the nature of the works. This is highly relevant to the question of misfeasance/non-feasance. This will be an important issue in the determination of liability.
18. I am satisfied that the description of the documents as identified in the category in the Notice of Motion is appropriate as it will capture documents that are relevant and necessary. However, it seems to me that the period of 8 years prior to the accident is excessively long, particularly where I am aware from the discovery made already that works took place in 2013. I will therefore limit the period to 5 years prior to the date of the accident.
19. Equally, the reference to "*the relevant section of Pearse Street*" is unacceptably vague and no details in any of the papers have been provided as to the exact locus of the accident. I will ask the parties to submit by agreement a precise description of the relevant area which should encompass the site of the accident and an appropriate area proximate to the accident. The parties have liberty to apply if they cannot agree on that description, but I hope that facility will not need to be availed of.
20. When the defendant is making discovery, it should keep in mind the obligations of a party when making discovery. These are well set out, for example, in the Good Practice

Discovery Guide issued by the Commercial Litigation Association of Ireland which is readily available free of charge online. The deponent must be confident that they are truly in a position to make the requisite averment that the party has no documents other than those identified in the Schedules. That may mean explaining in the body of the affidavit why the First Schedule identifies less documents than one might expect in the context of the category sought and the circumstances of the case. In this case, the defendant ought to have special regard to the averment at paragraph 9 of Ms. Burke's affidavit and if the affidavit does not include documents of the nature identified, to explain why that is so.

Conclusion

21. Having regard to the foregoing, I make the following Order:

- The description of the location to be provided to the Registrar no later than 23 January 2023 by close of business;
- The name of the deponent to be provided to the Registrar no later than 23 January 2023 by close of business;
- The discovery is to be made no later than 6 weeks from the date of today's Order.

22. When that information is provided, I will make an Order for discovery in the following terms:

The defendant shall make discovery of the following category:

All notes, records, documents or memoranda (howsoever held) relating to all works of design, construction, repair, maintenance and upkeep of [insert precise description of location] for a period of 5 years prior to 13 June 2014.

