THE COURT OF APPEAL

McKechnie J.
Irvine J.
Hogan J.

Record No. 679/2014

[Article 64 Transfer]

Carol Burke

Plaintiff/Appellant

- and -

Boston Scientific

Defendant/Respondent

Judgment of Ms. Justice Irvine delivered on the 28th day of July 2016

1. This is an appeal against the order of the High Court (Ryan J.) refusing the appellant's ("Ms. Burke") application for inspection brought by her pursuant to Order 31 rule 18 of the Rules of the Superior Courts

Background
2. The plaintiff at the time of the events material to this appeal was a payroll specialist working for the defendant company at its premises in Ballybrit, Galway.

3. In her proceedings, which she commenced in February 2010, Ms. Burke maintains that she was subjected to a sustained period of bullying, harassment and intimidation in particular during 2007 as a result of which she has sustained personal injuries for which she claims damages.

4. A full defence was delivered on 20th July 2010. This included a plea of contributory negligence on the part of Ms. Burke.

5. Ms. Burke brought an application seeking discovery of documents which she considered necessary and relevant to the proof of her claim and by order of 5th March 2012 O'Neill J. ordered discovery of nine categories of documents including certain e-mails, minutes of meetings, telephone logs etc.

6. It is perhaps relevant to note that Ms. Burke maintains that the defendant habitually backed up all of its e-mail communications to an Outlook exchange server and further, that by letter dated 18th May 2009, an undertaking was sought from the defendant that it preserve any materials relevant to the proceedings.

7. Discovery was eventually made on the defendant's behalf by Ms. Josephine Jakes on 16th July 2012. In the first schedule of her affidavit Ms. Jakes identified the documents which were available to be discovered. Then, at para. 3 she referred to the second schedule to her affidavit wherein six categories of documents were identified. These were numbered 1 to 6 and correspond with categories (a), (c), (d), (g), (j) and (k) of the original order for discovery. Ms. Jakes did not confirm that these documents ever existed. What she said was that if they did exist they had long since been deleted and were not then in her "possession, custody or power". I note she did not declare whether such documentation as might have been in existence at an earlier stage was within her procurement, as is the obligation of a party against whom discovery is ordered.

8. By letter dated 12th October 2012, Ms. Burke's solicitor sought an explanation as to how the defendant had been able to discover emails for the months of November and December 2007 but yet could not procure similar documentation for October 2007.

9. Being dissatisfied with the discovery made by the defendant, Ms. Burke then brought her application for inspection in the following terms:-

> "1. An order pursuant to Order 31 rule 18 of the Rules of the Superior Courts directing the provision of inspection facilities to the plaintiff in respect of the following matters:–
>
> (a) Inspection of the Defendant's servers in use during the period from September 2007 to March 2008, to include on-site and off-site servers and back-up equipment and/or of the defendant's PC or laptop computer (including the processor (s) contained therein) used by the plaintiff, by experts retained on behalf of the plaintiff;
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> (b) Inspection of the internal telephone logs/records of Lorraine Kelly between 27th November 2007 and 7th December 2007."

Ruling of the High Court judge
10. From the transcript of the hearing before the High Court, it would appear that Ryan J. refused the relief sought based on the following conclusions:-

> (i) Firstly, as a matter of law, the party for whose benefit discovery is made is entitled to inspect any documents as discovered under Order 31. However, that is a relief which relates to a document that has been discovered, rather than one that has not been discovered.
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> (ii) Secondly, that if the party in whose favour a discovery order is made believes that the party against whom they have obtained discovery has failed to produce documents within their possession, power or procurement, their remedy is to apply for an order seeking further and better discovery. The rules do not envisage the party who harbours the suspicion that certain relevant documents have been withheld the right to seek what he described as a "handy way" of finding out whether such documents do in fact exist. The suspicious party could not be granted an order which would permit them

trawl through documents held by their opponent which might not be relevant to the proceedings or documents held by a third party server where to do so might transgress the rights of other parties not involved in the proceedings. Such an approach was not permissible.

11. In the aforementioned circumstances Ryan J. concluded that Ms. Burke's remedy lay in an application for further and better discovery or an application to cross examination Ms. Jakes on her affidavit.

The appeal
12. On 4th December 2012 the plaintiff appealed the order of Ryan J. to the Supreme Court and that appeal has since been transferred to this court under Article 64.

13. By motion dated 18th February 2015 Ms. Burke sought liberty to adduce additional evidence at the hearing of this appeal. At para. 6 of her affidavit sworn in support of that application, she stated that she had no confidence in the adequacy and completeness of the original affidavit of discovery sworn by Ms. Jakes and she set out a series of complaints concerning that affidavit.

14. Of particular note was her assertion at para. 7 of her affidavit that emails between 8th September 2007 and 26th November 2007 had been deleted from her laptop and that this was the precise period to which her complaints of bullying and harassment relate. The fact that documents had been generated over this period was proved, she maintained, by an index to such correspondence which the defendant had not deleted from the laptop and which she was in a position to exhibit in her affidavit.

15. By order of this court made on 2nd March 2015, Ms. Burke was granted leave to rely on the evidence contained at para. 7 of the aforementioned affidavit at the hearing of this appeal.

16. The order permitting Ms. Burke to introduce new evidence on the appeal would appear to have caused the defendant to re-appraise the adequacy of its response to the original order for discovery particularly in light of the fact that the appeal was retained in the court's diary for mention from time to time so that it might update the court on its efforts to ensure that full and complete discovery had or would be made.

17. At some stage during that process a data stick was provided to the plaintiff with confirmation that it contained all of the emails that she had maintained were missing from the laptop and the court was advised that the defendant would swear a supplemental affidavit of discovery which would refer to other documents not contained on the data stick. As a result of exchanges between the parties, the court directed the defendant to swear a supplemental affidavit explaining the reasons why the emails had earlier been omitted.

18. On 15th October 2015 Mr. Kevin Fitzgerald swore an affidavit setting out the efforts that had been made by the defendant to comply with the order of the High Court. However, the plaintiff was not happy with that affidavit thus her affidavit sworn on 26th October 2015 wherein she once again challenged the adequacy of the discovery and the explanations furnished by the defendant. That affidavit in turn led to further affidavits being filed on the defendants' behalf. The first of these was what is described as a composite affidavit of discovery sworn on 9th November 2015 and the second an affidavit of 26th November 2015 dealing with the complaints made by Ms. Burke in her affidavit of 26th November 2015.

Submissions
19. For the purposes of reaching my conclusions on the present appeal I have read and considered the extensive written submissions filed by both parties. I have also had the benefit of hearing the oral submissions made by Ms. Burke on her own behalf and those made by Mr. Fox S.C. on behalf of the Defendant.

20. Ms. Burke submits that this court should overturn the order of the High Court and grant her the order for inspection which she seeks. She urges the court to allow the appeal on the basis that it should conclude that the defendant has not complied with its discovery obligations. In particular she relies upon the following facts:-

(i) The recent composite affidavit of discovery sworn by Mr. Fitzgerald on 9th November 2015 contains many more documents than were originally discovered by Ms. Jakes when she purported to comply with the order of O'Neill J. in March 2012. This, she submits, proves that the High Court judge was misled when he was told in the course of the High Court hearing that the defendant had made full and proper discovery.

(ii) The defendant has not complied with the directions of this court that they provide proper explanations for:-

(a) its failure to make discovery of certain emails between the 8th September and 26th November 2007 which were excluded from Ms. Jake's original affidavit of discovery, and

(b) its failure to include 3 other emails on a USB stick furnished to the plaintiff on 20 July 2015 on the basis that it contained all of the documentation to which she was entitled by way of discovery.

(iii) The defendant was evading its obligations in respect of discovery by having its affidavit sworn by Mr. Fitzgerald who she believes does not have full access to or knowledge concerning the documentation which may be available to be discovered and which are relevant her claim.

(iv) While she accepts that the defendant has, albeit belatedly, discovered all of the documents in respect of which she has actual knowledge she nonetheless believes that there are probably other documents which are not in Mr. Fitzgerald's updated composite affidavit of discovery which are being withheld from her. In this regard she relies upon the fact that it has taken four affidavits from the defendant to clarify its position in relation to the original order for discovery made in 2012.

21. On the defendant's behalf Mr. Fox SC maintains that the appeal is misconceived. The High Court could only order inspection in respect of documents which had been referred to in Ms. Jakes's affidavit of discovery. An applicant for inspection must be in a position to identify the precise documents which they wish to inspect.

22. Mr. Fox accepts that the affidavit of discovery as initially sworn by Ms. Jakes was incomplete. However, he maintains that full and proper discovery has now been made by Mr. Fitzpatrick in his composite affidavit of discovery sworn on the 9 November 2015.

However, any delay or default on the part of the defendant in making proper discovery does not undermine the validity of his fundamental submission which is that the plaintiff's application for inspection was always misconceived because it was not directed to any documents which had been discovered by the defendant. The supplemental discovery made by the defendant was made on foot of orders for directions made by this court in an independent process which do not impinge upon the appeal. The proper procedure to be adopted by a party who claims that discovery is incomplete is to bring an application for further and better discovery or seek to cross examine the deponent to that affidavit as to its contents.

Decision

23. It is undoubtedly the case that since the plaintiff served her notice of appeal the defendant's position concerning the adequacy of its original affidavit of discovery has shifted significantly in that it has since accepted the inadequate and insufficient nature of its original affidavit sworn in response to the order for discovery made in March 2012. That this has occurred is probably due in no small measure to the fact that Ms. Burke brought an application seeking to admit new evidence on the appeal which gave the defendant rightful cause for concern regarding the discovery it had already made.

24. However, what is before the court on the appeal is not a motion for further and better discovery. It is an appeal against the order made by the High Court judge on an application for inspection pursuant to Order 31 rule 18 of the Rules of the Superior Courts. Accordingly, the correctness or otherwise of the decision of Ryan J. must be viewed in the context of the jurisdiction conferred on the court by the provisions of Order 31 rule 15 and rule 18. This is what the relevant rules provide:-

> "Order 31 (15):
> Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings, or affidavit or list of documents reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit copies thereof to be taken; and any party not complying with such notice shall not afterwards be at liberty to put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice; in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.
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> Order 31 (18)
>
> (i) If the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit or list of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party.
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> (ii) An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs. "

25. In the present case, the application which Ms. Burke made to the High Court is of a type which simply is not covered by the provisions of Order 31 rule 15 or rule 18. She did not seek inspection of any document or documents which were actually discovered by the defendant. She sought inspection of all of the data stored by the defendant on its own server or that which it had stored with third party servers in the hope of identifying documents which the defendant had failed to discover. For my part I am quite satisfied that Ryan J. was correct to conclude that to afford the plaintiff that type of relief would, as he advised, not only be beyond his jurisdiction under the rules but would have the potential to afford the plaintiff access to documentation belonging to third parties not involved in this dispute.

26. As is clear from the provisions of Order 31 rule 15 and rule 18, the right of a party to inspection of documents is confined to documents known to exist and which have been identified in an affidavit of discovery or specifically referred to in pleading.

27. Applications for inspection have become increasingly rare since the advent of photocopying and computer technology. It has become relatively standard practice for the party who makes discovery to send copies of the documentation disclosed in the first schedule to their opponent with the affidavit of discovery. That said, there are a wide range of reasons as to why a party may want to inspect an original document which has been disclosed. For example, a party may wish to have sight of an original document to have a signature assessed by a handwriting expert, or may wish to view the manner in which a sequence of original notes which have been photocopied may present in an original folder or medical chart.

28. The most common use of the application for inspection is where a party makes discovery of a document but objects to producing it on the grounds that is privileged or where the applicant wishes to challenge the validity of some redaction made to a document which has been discovered. However, the inspection sought in the present case does not fall into any of these categories as it does not relate to any document which had been disclosed by the defendant as of the date of the High Court hearing. The application was made because of the plaintiff's suspicions regarding the absence from the affidavit of discovery of documents which she believed should have been available for inclusion.

29. I am quite satisfied that the High Court judge was correct in his interpretation of the limitations of the plaintiff's right to inspection of documents which were actually discovered as opposed to those which were omitted and this is borne out by the decision of Kelly J. in *Cooper Flynn v. RTE* [2000] 3 I.R. 344 where concerning the scope of Order 31 rule 18 he stated as follows at p. 348:-

> "As is clear from its terms, rule 18 provides a mechanism whereby inspection of documents which have been included in an affidavit of discovery may be ordered."

30. Since the plaintiff herself has relied upon certain extracts from Delaney and McGrath (3rd edition) I feel it might be of assistance to refer to what is said by the authors concerning the difference between applications for discovery and applications for inspection. This is what they advise at11-36:-

> "Applications for inspection most frequently arise in the context of discovery when a party seeks inspection of documents

which have been discovered but in respect of which an objection to produce on the ground of privilege has been made. There is, in that regard, an important difference between discovery and inspection because the party making the application will always be aware of the existence of the documents which he seeks to inspect. As Barron J. explained in *Holloway v. Benelos Publications Ltd (No 2)*:-

> "The essence of an order for discovery is that it requires the person to whom it is directed to list documents of which he is aware but of which the applicant for the order need not necessarily be aware. On the other hand, the essence of an order for inspection is knowledge of the existence of the particular documents sought to be inspected"."

31. In my view, the plaintiff's residual complaints concerning the sufficiency of the defendant's composite affidavit of discovery are matters, which if she wishes to pursue them, must be dealt with by the High Court at first instance, perhaps by way of application for further and better discovery. They cannot be dealt with by this court as they do not bear upon her entitlement to the order for inspection which she sought from Ryan J. They bear upon the defendant's compliance with the order made by O'Neill J for discovery on the 5th March 2012 and compliance with that order must be dealt with by the High Court at first instance. If this court were to embark upon a consideration of whether Mr. Fitzgerald's composite affidavit of discovery satisfies the defendant's discovery obligations under the original High Court order the defendant would be denied its right to appeal that order, a right which it enjoys under the Superior Court Rules.

32. In the alternative, Ms. Burke might decide to challenge the sufficiency of the discovery now made by the defendant by seeking to cross-examine Ms. Jakes and/ or Mr. Fitzgerald concerning the content of their affidavits. She might in the course of such an examination decide to raise with Mr. Fitzgerald her concerns that he did not have full access to or knowledge of the data stored by the defendants to enable him make a proper affidavit of discovery in accordance with the High Court order. However, I want to impress upon Ms Burke that I am not encouraging her to pursue either avenue in the High Court. Neither am I giving her any indication that I consider that the High Court might be susceptible to granting her any such relief. I mention these procedural options solely for the purpose of demonstrating that her application for inspection to Ryan J. in the High Court was, as submitted by Mr. Fox, procedurally misconceived.

33. For the aforementioned reasons I would dismiss the appeal.