THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 148

Kelly J.
Irvine J.
Hogan J.

2014/1143

127/14

2012 No. 10836

Helen Ring

Plaintiff

and

David Mulcahy and Bon Secours Hospital, Bon Secours Health System

Defendants

Ex tempore Judgment delivered on the 20th day of April 2015 by Mr. Justice Kelly

1. This is the plaintiff's appeal against an order of the 10th March, 2014, made by O'Malley J. in the High Court, striking out a motion which had been brought seeking discovery. In order to understand how that order came to be made it is necessary to mention the background to this litigation.

2. The plaintiff in this case in 2008, when she was then 64 years of age, sought advice from the first named defendant who is a consultant orthopaedic surgeon in respect of knee pain that she was experiencing.

3. The advice which she was given, it is alleged, was that she ought to have a knee replacement operation. She had that operation. It was carried out on the 26th November, 2008. Afterwards, unfortunately, she developed an infection and she continued to experience pain involving the knee.

4. In August 2010, she was described, it is alleged, by the first named defendant, the consultant surgeon, as having a persistent low grade infection in the knee. He then asked her to attend at his rooms and indicated that the option available to her was to undergo a two stage revision surgery on the right knee, which he would perform.

5. The plaintiff agreed to undergo that and she did so. The revision surgery was carried out in November 2010. Subsequent to it, the knee deteriorated further. Unfortunately for the plaintiff she ultimately had to have an above the knee amputation of her right lower limb which took place on the 17th October, 2011.

6. Subsequently she brought these proceeding against both the surgeon and against the Bon Secours Hospital Bon Secours Health System as defendants.

7. The hospital is a private hospital and the consultant was carrying out a private practice at all relevant times.

8. The discovery which was sought was on foot of a notice of motion which was issued on the 5th February, 2014, and was first made returnable on the 24th February, 2014. The discovery was sought against the first named defendant Mr. Mulcahy.

9. It is important to bear in mind that in October 2013, discovery had been sought and obtained against the second defendant. There is an order of the 29th October, 2013, made by Cross J. in which he ordered three categories of discovery which were the three categories that were sought of him. They are replicated in the first of the three categories of discovery which were sought against Mr. Mulcahy in the motion which is the subject matter of this appeal.

10. When O'Malley J. came to deal with the matter, she was told that this motion had been before her colleague O'Hanlon J. some few weeks before-hand. Apparently on that occasion, that judge, upon becoming aware of the fact that an order for discovery in respect of three of the categories had already been made against the hospital, required an affidavit setting out what material had been obtained on foot of that order with a view to being better informed as to what discovery might be considered necessary as against the first named defendant.

11. For whatever reason that does not appear to have been done. The matter then came on before O'Malley J. who made the order striking out the motion.

12. In the agreed note of her ruling, one finds the following. She *said "I read the plaintiff's replying affidavit and it merely sets out again the reasons why the plaintiff is seeking discovery from both the first and second defendants and why the plaintiff is entitled to discovery. Nowhere does it address what documents were discovered by the second defendant. This motion should not have been opened de novo before me today and I am not disposed to grant discovery today as it would constitute discovery on the double and that is not the purpose of discovery. Therefore I am striking out the motion and if further and better discovery is required, it may be sought at a later date".*

13. In articulating her views in that fashion, I think the judge was doing no more than giving effect to what had been said in *Linfen Limited v. Rocca* [2009] IEHC 292, by MacMenamin J. when he was dealing with multi party litigation involving discovery. What he said in that case was: *"in a multi party case such as this, a court should seek to ensure that discovery is in fact necessary between a particular applicant and respondent. To lose sight of this consideration is to run the risk of needless duplication and to impose on the parties an unwarranted financial burden".*

14. In order to obtain an order for discovery, it is axiomatic that one has to demonstrate that the documents which are sought are

relevant to the issues which will fall to be tried. In this case the plaintiff's claim is that she was persuaded to have this surgery without a properly informed consent being forthcoming from her and secondly that there was negligence on the part of the defendants under various different headings.

15. Merely to demonstrate that documents are relevant is not sufficient however, because it must also be shown that the documents are necessary. That is, necessary either for disposing fairly of the cause or matter or for saving costs. As was said in *S.D. v. B.D.* [2005] IEHC 331*, "relevance is a necessary but not sufficient precondition for a discovery order".*

16. The third thing of course that has to be satisfied is that the documents which are sought are not disproportionate. Fourthly it has to be demonstrated that discovery is required because the documents are not available from any other source.

17. In the present case, it is perfectly clear that the discovery which was ordered against the hospital months before this application was made did have a relevance to the application that was moved before O'Malley J.

18. I believe that it would be entirely wrong for a discovery order of the type which was sought to have been made by the judge here, in circumstances where there was already going to be discovery of three of those categories as a result the order made by Cross J.

19. With a view to satisfying the test of necessity the most that could have been asked of Mr. Mulcahy was that in respect of those three categories he would discover any documents in excess of those already discovered by the second named defendant. Otherwise one has precisely the mischief identified by MacMenamin J. in *Linfen's* case of the same discovery being made twice over. This was correctly identified by the trial judge here when she spoke about discovery on the double.

20. It is accepted that Mr. Mulcahy is willing to make discovery in respect of categories 1, 2 and 3, insofar as he has documents in excess of the material which has been discovered by the hospital. It is crucial that in litigation of this sort, there should be an element of cooperation between parties. In truth this application ought not to have been brought in the High Court in the form in which it was until after discovery was made by the hospital. It could then be identified with some degree of precision as to what was being sought of Mr. Mulcahy in categories 1, 2 and 3. He would then discover any documents not already discovered by the hospital and which are relevant to the issues that fall to be tried in the action.

21. Mr. Mulcahy has indicated a willingness to make such discovery now and that disposes in effect categories 1, 2 and 3.

22. Category 4 was agreed by letter of the 13th January, 2014, as a category that would be agreed, so it does not attract any attention for the purpose of this appeal.

23. Category 5 seeks all documents including those stored electronically and not in hard copy form relating to any complaints made against the first defendant as a medical practitioner before the date of the matters complained of in the endorsement of claim on the personal injuries summons.

24. In my view, that category has no relevance to the issues that will fall to be tried in this action by reference to an examination of the pleadings. Neither do I believe it to be in any way necessary. Indeed the way in which it is framed is really a blunderbuss form with no time limitation, indeed no limitation of any sort. In any event I do not see any basis upon which it could be said that having regard to the pleadings, which is where one has to look in order to discern relevance, that these documents are relevant. Even if they were, I do not believe they could be regarded as being necessary to dispose fairly of the cause or matter having regard to what is pleaded. Therefore the judge was correct to refuse discovery insofar as that category is concerned.

25. In my view the order of the High Court should be adjusted to accommodate what I have indicated in categories 1, 2 and 3. Category 4 is as I say agreed and there can be no question, in my view, of granting category 5. The appeal should be dismissed subject to the variation in respect of categories 1, 2 and 3.

Ms. Justice Irvine: Yes, I agree with the judgment of Mr. Justice Kelly and I too agree that the only discovery that should be allowed on this appeal is in relation to categories 1, 2 and 3 and confined in the manner which has been outlined by Mr. Justice Kelly. There is one matter to which I would like to make mention and it is this. I am quite satisfied that by the time the plaintiff's application came before the High Court, that the discovery which was then being sought of the first named defendant should have been reduced and refined having regard to the discovery which at that stage was already in its possession from the second named defendant. I very much join with the sentiments expressed by MacManamin J. in *Linfen's* case that what proceeded before the High Court was an application to duplicate and replicate relief which had already been obtained as against the second named defendant. Not only does that have significant costs implications in the context of proceedings of this nature, it also has the effect of slowing down proceedings of this type, but most importantly it puts a very substantial and significant drain on the resources of the Health Service. I would like to demonstrate this, just briefly, by referring to the reliefs sought at para. 1 of the notice of motion. This asks each of the defendants in turn to discover the medical hospital and other records and documents, x-rays and scans relating to the plaintiff including any information or data relating to the plaintiff which is stored electronically and not in hard copy form, but limited to matters in issue in this action. The hospital, at the time this application before the High Court had already sat down and addressed what scans, x-rays, documents (stored electronically or otherwise) was in their possession. To ask the consultant orthopaedic surgeon to conduct the same exercise in my view, places an unwarranted pressure and unnecessary pressure on a defendant in such circumstances.

Mr. Justice Hogan: I agree with the judgment that has just been delivered by Mr. Justice Kelly and I endorse the sentiments which Ms. Justice Irvine has just expressed as well.