Neutral Citation No. [2013] NIQB 53 | *Ref:* **STE8861**

Judgment: approved by the Court for handing down | *Delivered:* **03/05/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

RICHARD MONAGHAN

Plaintiff;

-and-

THE VERY REVEREND GRAHAM
sued on behalf of the
TRUSTEES OF MILLTOWN CEMETERY

Defendant.

STEPHENS J

Introduction

[1] This is an application by originating summons brought by Richard Monaghan, the plaintiff, for pre-action discovery pursuant to Section 31 of the Administration of Justice Act 1970 and Order 24 Rules 8 and 9 of the Rules of the Court of Judicature (Northern Ireland) 1980. The application was heard by Master Bell who declined to make an Order and the plaintiff has appealed to this court. I gave an *ex tempore* ruling a transcript of which was prepared. I have corrected that transcript.

[2] The plaintiff alleges that on 27 November 2010 he slipped and fell on black ice in Milltown Cemetery sustaining personal injuries. Milltown Cemetery is owned and occupied by trustees and the plaintiff wishes to bring proceedings against the defendant in a representative capacity representing the trustees. In the language of section 31 the plaintiff is likely to be a party to subsequent proceedings as is the defendant.

[3] The documents which the plaintiff seeks are:

(a) All documentation relating to the gritting of pathways at or about Milltown Cemetery on or about 27 November 2010.

(b) All documentation relating to the system of gritting in place for 6 months prior to 27 November 2010 and 6 months thereafter.

(c) All documentation for 3 years prior to 27 November 2010 relating to any complaints in relation to ice on the pathways.

(d) All documentation in relation to accidents for 3 years prior to 27 November 2010 in connection with persons slipping and falling due to the presence of ice on the pathways.

[4] The defendants contend, and the Master held, that the documents are not necessary at this stage for disposing fairly of the cause or matter or for saving costs.

[5] For convenience I set out at the start of this judgment Section 31 of the Administration of Justice Act 1970. It is in the following terms:

> "On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court in which a claim in respect of personal injuries to a person or in respect of a person's death is likely to be made, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—
>
> (a) to disclose whether those documents are in his possession, custody or power; and
>
> (b) to produce to the applicant such of those documents as are in his possession, custody or power."

[6] Mr McCrea appeared on behalf of the plaintiff and Mr Morrissey on behalf of the Trustees of Milltown Cemetery, the defendants.

Factual background

[7] As I have indicated the plaintiff alleges that on 27 of November 2010 he slipped and fell on black ice in Milltown Cemetery.

[8] I turn to the correspondence between the parties. It was initially thought by those representing the plaintiff that the correspondence commenced with the plaintiff's solicitor's letter of claim dated 14 February 2011. However it was revealed by counsel on behalf of the defendants during the course of today's hearing that the initial letter was written personally by the plaintiff and sent by him to the defendant before he instructed his own solicitors. There was no reply from the defendant or his insurers to that letter. The defendant's insurers have a copy of that letter. The plaintiff did not retain a copy. Until today the plaintiff's solicitor was unaware of the existence of that letter. The defendant agreed that a copy of that letter would be made available to the plaintiff's solicitors.

[9] On 14 February 2011 the plaintiff's solicitors sent a letter of claim to the defendant. The letter complies with the requirements of the pre-action protocol for personal injury litigation dated 1 April 2008, revised 27 of June 2008. The letter stated:

> "We are informed that our client was injured when he was visiting his mother's grave. Mr Monaghan got dropped off in a taxi at the Republican car park and proceeded to head to his mother's grave which is approximately 100 yards on the right hand side as you go down the main walkway. The client carefully walked to his mother's grave and stayed there for approximately 20 minutes. He then left with the intention of going to visit another relative's grave. We are instructed that he walked a further 12 feet when he stood on black ice. Our client's left foot went from beneath him, resulting in him forcefully banging his right knee off (sic) the ground. As the client got up he was soaked through. At all relevant times the client was a visitor to the premises within the meaning of the Occupier's Liability Act (Northern Ireland) 1957. "

As I have indicated the letter of claim complied with all the other provisions of the protocol. It continued:

> "In the meantime we would advise you that, at this stage of our enquiries, the documentation as per the attached schedule will be relevant to this action, and so would ask you to ensure that they are preserved in their entirety pending the resolution of this matter.
>
> If you intend to deny liability please let us have sight of these documents as soon as possible."

It then listed out the documents in a schedule as follows:

> "Accident Book Entry
> Foreman/Supervisor Accident Report
> Gritting Procedures and Records
> Documents listed above relative to any previous accidents of a similar nature"

[10] The defendant's insurers, Allianz plc, wrote on 15 March 2011 indicating that they had received the letter of 14 February 2011 addressed to the defendant and confirming that they acted on behalf of the defendant. They went on to make some further enquiries in the course of that letter. A further reply was sent on 15 June 2011 to the letter of claim in the following terms:

> "We refer to the above incident, we cannot accept any liability rests with our policy holder and repudiate any suggestion that our policy holder was negligent or that they were in breach of any statutory duty or that they were in any other way liable. We have therefore no proposals to put to your client in this matter."

[11] As can be seen from the letter dated 15 June 2011 there was not even the beginning of an attempt by the defendant's insurer to explain why liability was denied. The plaintiff was, of course, interested in determining the reasons and accordingly the plaintiff's solicitors wrote again on 7 September 2011 in the following terms:

> "We acknowledge receipt of your letter dated 15 June 2011. We would be obliged if you could indicate to us why you do not believe that your policy holder was negligent or in breach of statutory duty. As occupiers of the property, your policy holder allowed the plaintiff to enter the premises and therefore he was a lawful visitor. Under the Occupier's Liability Act (Northern Ireland) 1957 as amended, the owner of the property has a duty to take reasonable care. We do not believe that your policy holder has discharged the duty to take reasonable care. The plaintiff was walking along the main thoroughfare that had not been gritted at all.
>
> Accordingly, so that we can advise our client further we would be obliged if you could indicate to us why you say that liability is not accepted."

There was no acknowledgement of that letter let alone any substantive reply.

[12] Five months later and on 8 February 2012 the plaintiff's solicitors again wrote to the defendant's insurers, Allianz plc, in the following terms:

> "We would welcome hearing from you in relation to the contents of (the earlier letter). We would also require from you information and documentation as to whether the area in question was gritted. Whether it had been previously gritted, whether or not the proposed defendant were (sic) aware of the weather conditions or what the system of gritting was like and whether or not there was a system in place at all for gritting.
>
> Unless we receive this information from you within 21 days we will have no alternative but to bring an application for pre-action disclosure.
>
> We look forward to hearing from you."

Again there was no acknowledgment of and no reply to that letter.

[13] The originating summons for pre-action disclosure was then issued on the 18 October 2012.

The issues in the prospective action

[14] It is not appropriate at this stage to exhaustively define all the issues which may or will emerge at trial, but it is sufficient to state that if the action proceeds the plaintiff will have to establish on a balance of probabilities that he slipped and fell in the manner which he has alleged. The defendant in response may wish to rely on a system for dealing with ice, which system may be informed by the incidence of ice or slipping accidents involving ice prior to this accident occurring.

[15] The documents which are sought relate to the issues which are likely to arise in the substantive proceedings between the plaintiff and the defendant.

Pre-action Protocol

[16] At a fundamental level the pre-action protocol is an articulation of fairness. Before proceedings are issued the plaintiff should give proper information to allow a view to be formed by the defendant. A similar obligation rests on the defendant. Paragraph 10 of the pre-action protocol states that the defendant's insurer/solicitor

should reply to the letter of claim stating whether liability is denied, and if so, *providing reasons for the denial of liability* (emphasis added).

[17] Paragraph 12 of the pre-action protocol under the heading "Documents" states:

> "If the defendant denies liability, he ought to enclose with the letter of reply any documents in his possession which are material and relevant to the issues between the parties and which would be likely to be ordered to be disclosed by the court either on an application for pre-action discovery or on discovery during proceedings. The aim of early discovery of documents by the defendant is not to encourage "fishing expeditions" by the claimant but to promote an early exchange of relevant information to help in clarifying or resolving issues in dispute. The claimant's solicitor can assist by identifying in the letter of claim or in a subsequent letter the particular categories of documents which are considered to be relevant."

[18] The defendant's insurers did not comply with the protocol. No reasons were given for the denial of liability. No documents were made available despite the categories being requested or alternatively being obvious. The defendant's insurers still have not complied. They were afforded an opportunity to give reasons for failing to comply but chose not to do so. They do not wish to suggest any basis upon which their failure to comply or their response to the plaintiff was fair. They expressly acknowledge that their failure to comply was unhelpful.

[19] Any failure to comply with the pre-action protocol can be taken into account in the exercise of discretion. The powers of the court extend to orders for costs under Order 62 Rule 11 of the Rules of the Court of Judicature (Northern Ireland)1980, see *Lunny and another v McGivern* [2013] NIQB 49. Ordinarily orders for costs are sought by one party to the litigation but there is also a public interest in play where there has been non-compliance with a pre-action protocol. In such circumstances a court can impose an order for costs to encourage compliance. The powers of the court include specifying the basis of taxation, see Order 62 Rule 12 of the Rules of the Court of Judicature (Northern Ireland) 1980. The usual basis of taxation is the standard basis but circumstances might require costs to be paid on an indemnity basis. On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party. On a taxation of costs on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any

doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.

Discussion

[20] It is contended by the plaintiff and accepted by the defendant that the plaintiff has complied with the provisions of Order 24 Rule 8 of the Rules of the Court of Judicature (Northern Ireland) 1980. The issue is whether the defendant has established that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs at this stage or at all. The onus of establishing that is on the defendant for which see the Supreme Court Practice 1999 Volume 1 page 475 at paragraph 24/8/2. That paragraph is in the following terms:

> "…it is for the party objecting to the order for discovery … to satisfy the court that the discovery is not necessary, or not necessary at the stage the cause or the matter has reached (*Dolling-Baker v Merrett* [1991] 2 All ER 890 and *Ventouris v Mountain* [1991] 2 All ER 472 at 486 per Parker LJ.)"

Accordingly the test is whether the defendant has established that the discovery is not necessary or not necessary at this stage. In deciding that question one looks to the objectives which are disposing fairly of the cause or the matter or for saving costs. Obviously a document which does not relate to any matter in question is not a necessary document for disposing fairly of the cause or matter. Documents that relate to any matter in question are not limited to documents which would be admissible in evidence (*Compagnie Financiere du Pacific v Peruvian Guano* [1882] 11 QBD 55) nor to those which would prove or disprove any matter in question: any document which it is reasonable to suppose, "contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences" must be disclosed.

[21] The scope of pre-action disclosure has been considered in a number of cases including *Dolling-Baker v Merrett* [1991] 2 All ER 890, *Black and Others v Sumitoma Corporation and Others* [2001] EWCA Civ 1819, *Campbell v Tameside Metropolitan Borough Council* [1982] 2 All ER 791, *Burrell's Wharf Freeholds Ltd v Galliard Homes Ltd* [1999] EWHC Technology 219 and *Darren Marshall suing as the executor of the estate of Terence Patrick Marshall (deceased) v Allots (a firm)* [2004] EWHC 1964. I do not propose to summarise the principles set out in those cases. In England and Wales pre-action discovery is governed by Section 33(2) of the Supreme Court Act 1981 and the Civil Procedure Rules. There are differences between the position in Northern Ireland and the position in England and Wales. For instance the Civil Procedure Rules use the word "desirable" rather than "necessary."

[22] A Section 31 application should not be used as a fishing expedition, see paragraph [32] of *Tweed v Parade Commission for Northern Ireland* [2007] 1 AC 650. A potential instance of a fishing expedition would be a person with no impairment to recollection who purported not to know how he had come to fall in circumstances where he could reasonably be expected to know. That is not this case.

Conclusion

[23] I consider that the documents sought by the plaintiff are clearly necessary for the fair disposal of the cause or matter and for saving costs. They may not be determinative in that even if there was an adequate system dealing with ice the question remains as to whether the plaintiff fell as he alleges and as to whether the system was in fact implemented. They do not have to be determinative before an order is granted. I allow the appeal and make an order that the defendant by 12 noon on 29 May 2013 disclose whether the documents set out in paragraph 3 of this judgment are in his possession, custody or power and to produce to the applicant such of those documents as are in his possession, custody or power.

[24] The usual order in relation to costs is set out in the Supreme Court Practice 1999 Volume 1 page 475 at paragraph 24/7A/9. Ordinarily the person against whom an order is sought under section 31 of the Administration of Justice Act 1970 is entitled to his costs of the application and of complying with any order made unless the court orders otherwise. However, where the person against whom an order is sought is at fault, for instance where he has been dilatory in replying to a proper request to disclose documents, the court may deny him his costs or in exceptional cases order him to pay the applicant's costs of the application. In this case there has been a clear breach of the pre-action protocol, it has been persisted in, it has been unexplained and I consider that to be fault on the part of the defendant.

[25] I consider it appropriate to order the defendant to pay not only the costs of both this appeal and of the hearing before the Master on an indemnity basis but also the costs of complying with the order.

[26] I make it clear that by complying with this order the defendant's insurers will still not have complied with the pre-action protocol in that they will not have provided reasons for the denial of liability. If there is a continuing failure to comply with the pre-action protocol then it may have further consequences.