

Neutral Citation No. [2012] NIQB 7

Ref: **WEA8415**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **03/02/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

SCOTTS ELECTRICAL SERVICES LTD

Plaintiff;

-v-

NORTHERN IRELAND WATER

Defendant.

WEATHERUP J

[1] The plaintiff applied for discovery of particular documents under Order 24 rule 7 and for inspection of the documents under Order 24 rule 10. Mr Donaghy appeared for the plaintiff and Mr Dunlop for the defendant.

[2] The application was made before delivery of the Statement of Claim. Order 24 Rule 1 of the Rules of the Court of Judicature states the general rule that "after the

close of pleadings" there shall be discovery of documents relating to matters in question in the action. Order 24 Rule 3 provides for general discovery by list of documents. Order 24 Rule 7 provides that the Court may at any time make an Order for discovery of particular documents by affidavit. Order 24 Rule 9 provides in relation to both general and particular discovery that the Court shall not make an Order if discovery is not necessary, or not necessary at that stage, and in any event shall not order discovery if it is not necessary either for disposing fairly of the case or for saving costs.

[3] The White Book at paragraph 24/7/2 states that the Court has jurisdiction to order discovery of documents before service of the Statement of Claim but the making of such an order generally calls for definition of the issues and should not normally be made. It is common case that discovery can be made before delivery of the Statement of Claim, as an exceptional measure. In Stewart v. Ratner Safe Company [1907] Irish Law Times 74 the plaintiff applied for an order for discovery of documents alleging that it was impossible to draft the Statement of Claim in as much as the terms of the agreement sued upon was embodied in a letter written by the defendants to the plaintiff, which letter the plaintiff had lost. Andrews J made an order that the defendants make general discovery of documents and against that order the defendants appealed. Counsel for the defendants submitted that the Court should not at that stage have made a general order for discovery but that such discovery should be limited to the specific letter containing the agreement. On the appeal Boyd J stated that it was absolutely in the power of Andrews J to grant or refuse the order in the exercises his discretion. The order was stated to be an exceptional one at that stage of proceedings but would be granted when the case was proper. A trial Judge may no longer have absolute discretion in such matters, if ever, but one exceptional instance of early discovery arises where that is necessary to enable the Statement of Claim to be drafted.

[4] Counsel referred to consideration of the issue in O'Neill v. Golf Links Systems [NIQB Unreported 17/05/2002]. It fell to be considered whether discovery might have been obtained before delivery of the Statement of Claim in earlier proceedings. It was found that the plaintiff had reasonable prospects of obtaining early discovery in the earlier proceedings; the nature of a claim for breach of copyright being clear, the nature of the defendant's trading being such that he had the knowledge of the dealings that had taken place; the demands of justice requiring discovery when the nature of the claim could be specified, the allegations being not merely to be inferred and discovery enabling the plaintiff to prepare a properly particularised and comprehensive Statement of Claim. Reference was made to the following -

Law Society of Ireland v. Rawlinson [1997] 3 IR 592 where the plaintiff obtained discovery before delivery of the Statement of Claim based on an inability to prepare and properly particularise a comprehensive Statement of Claim, a further instance of the ground recognised in Stewart v Ratner above. The court recognised the power to order early discovery in exceptional circumstances but not when the Writ was issued as a 'fishing bill'.

Speyside Estate and Trust v. Raymond and Freeman [1950] Ch D 96 where the reasons for the order for discovery prior to delivery of a Statement of Claim were stated to include the fact that the defendant alone had knowledge of the dealings that had taken place with the money in question.

Gollon Holdings v. Adcock [1981] NSWLR 691 where it was stated that an order would be made to meet the demands of justice and in particular where the application was not a fishing expedition and the nature of the claim had been made clear.

RHM Foods Ltd v Bovril Ltd [1982] 1 All ER 673, by contrast, where, in a passing off action, the plaintiff sought discovery of the defendant's papers before delivery of a statement of claim with a view to proof of an intention to deceive the public. In effect the plaintiff was alleging fraud on the part of the defendant but had not stated as much in the grounding affidavits. Early discovery was refused as the plaintiff was found to be fishing for evidence of an inferred allegation.

[5] The plaintiff's claim arises under the Utilities Contracts Regulations 2006 for damages for loss and damage said to have arisen as a result of the award by the defendant of a contract for electrical works in 2011 to ROL Electrical Testing Limited ("ROL"). In the tendering process Grahams Limited ("Grahams") came second and the plaintiff came third. The plaintiff issued a Writ of Summons on 4 November 2011 and now seeks discovery of documents prior to delivery of the Statement of Claim. The plaintiff's grounding affidavit indicates that in respect of the tender for periodical electrical inspection and testing ("PEIT") the plaintiff was notified on 5 August 2011 that it had not been successful and was supplied with details of its performance in the tender together with details of the winning tender.

[6] On 15 August 2011 the plaintiff wrote to the defendant setting out various concerns in relation to the tender process. The letter indicated concerns under three headings. The first concern under the heading 'Relevant Experience' questioned the experience of the successful tenderer. The plaintiff enclosed a table of sites tested by ROL between certain dates, referred to engineers who had been working on the sites and stated that four of those engineers had since left the ROL and that the company had only a limited level of water industry experience.

[7] The second concern under the heading 'Resources' referred to the tender documents and to the requirement for five approved electricians with suitable City and Guilds qualifications and 3 years' experience of carrying out PEIT and working in an industrial environment with complex control systems gained in the last 10

years. The plaintiff contended that the successful tenderer could not satisfy that requirement.

[8] Thirdly again under the heading 'Resources' the plaintiff's letter referred to the training and certification requirements and stated that ROL personnel did not have the requisite training.

[9] The defendants responding letter dated 18 August 2011 indicated in respect of relevant experience that ROL had demonstrated that it had the relevant industrial experience and their bid was scored accordingly and all contractors were assessed and scored on the same basis. Secondly in relation to resources and the qualifications of the personnel it was stated that ROL had supplied the individual CVs which indicated that those nominated to work on the contract had the required levels of skills and experience. Thirdly in relation to training the defendant stated that it had requested a copy of a 3 year training plan to identify what training had been provided and ROL were assessed on the basis of the training programme provided.

[10] The plaintiff was dissatisfied with the response from the defendant and made a Freedom of Information request and was provided with certain redacted documentation. The result was that the plaintiff formed the view that the successful tenderer's application had included false information in that one of the personnel named did not work for ROL at the date of the tender but rather worked for the plaintiff. That being so the plaintiff considered that the other information provided by ROL may be equally unreliable.

[11] The plaintiff subsequently supplemented the complaints about the tender process by including similar claims in respect of the second contractor Grahams, to the effect that it had limited experience and either did not satisfy the criteria or in the

assessment of tenders by the defendant should not have scored significantly in relation to experience.

[12] The plaintiff issued the Writ of Summons on 4 November 2011 and on an Appearance being entered made this application for discovery. The replying affidavit of Lewis Murray, a senior category manager in the defendant, addressed the concerns that had been raised by the plaintiff. In respect of experience he noted that ROL had scored 4 out of 5 under the relevant heading and pointed out that experience was based on the bidder demonstrating experience of relevant projects of similar size and scale (not its employees). Further the plaintiff had focussed on water industry experience although the relevant experience could be obtained within the industrial sector generally. In other words it was suggested that the plaintiff had interpreted the tender requirements too narrowly.

[13] Secondly in relation to the ROL personnel the replying affidavit stated that the tender documents required the identity of those personnel who would be 'available' to carry out the work. There was no requirement to identify employees who would do the work. Thus the tender documents envisaged the potential use of sub-contractors in the discharge of the contract. ROL had provided a list of people who were not employees but were available to carry out the work. ROL did not have to establish that the person named by the plaintiff was an employee but only that he was available to work on the contract. It was pointed out that ROL had scored 12 ½% out of a potential 20% in respect of personnel and the defendant was satisfied that ROL's bid was compliant with the requirements of the tender document in relation to personnel.

[14] In relation to the plaintiff's complaint about the qualifications of the ROL personnel the response of the defendant's affidavit was that the defendant had been satisfied that the ROL tender satisfied the specified experience levels and that ROL

had identified a minimum of five approved electricians who had the requisite qualifications and experience.

[15] The defendant's approach to the application for discovery prior to delivery of the Statement of Claim was that there should be no order for discovery as the plaintiff has not identified any breach of the Regulations; the plaintiff has changed the terms of the challenge made to the award of the contract; the plaintiff would not have won the tender even if there were grounds to displace ROL as the successful tenderer because Grahams were the second tenderer in the order of merit and would therefore replace ROL; further that this case was not exceptional and thus would not warrant discovery of documents prior to the Statement of Claim.

[16] The grounds of challenge were refined as the application proceeded and now appear to be first of all that the named ROL personnel were not available to undertake the contract works. This is the complaint that originally focused on whether the personnel had the status of employees, a matter on which the plaintiff was mistaken. The plaintiff claims that one of the named personnel was not available, in that the plaintiff had information, stated Counsel from the Bar, that this person would not work for ROL. This led Counsel to contend that if that were so in relation to the person named that it may also be true in relation to the four others who were named as satisfying the requirements of the tender. The plaintiff asks what the defendant did to verify the availability of the workmen who were stated to be available.

[17] The second issue that the plaintiff now focuses on is that the ROL electricians were not qualified. While it was accepted that each had the required academic qualification through the City and Guilds certificate they were said not to have the requisite work experience required in the tender documents. The plaintiff appears to have reached that conclusion based on a calculation involving the ages of the workmen, the dates of the awards of City and Guilds certificates and the number of

years of experience required. The CV of each electrician was relied on by the defendant and it was stated on affidavit on behalf of the defendant that each had the requisite work experience. Again the plaintiff asks what the defendant did to verify that the electricians did indeed have the required experience.

[18] The third issue relates to Graham's experience. Counsel for the plaintiff now contends that Grahams lacked the requisite experience and questions how Grahams were scored in relation to their experience.

[19] The defendant says that the ROL tender satisfied the tender criteria. The plaintiff says information in the ROL tender was unreliable to the extent referred to above. The plaintiff does not contend that there was anything in the ROL tender or elsewhere available to the defendant to alert the defendant to unreliability in the ROL tender. However it is said that the defendant did not seek to verify the information provided by ROL, particularly after the plaintiff made its concerns known to the defendant. The plaintiff's concerns were raised after the award of the contract to ROL.

[20] The plaintiffs approach proceeds on the assumption that the information supplied by ROL and Grahams was unreliable. I do not have evidence in relation to the unreliability of the information supplied but I have the assertion of Counsel on behalf of the plaintiff that it was so, coupled with the contention that the defendant was in breach of the Regulations by failing to verify the information supplied.

[21] The plaintiff's amended schedule of documents accompanying the discovery application sets out a wide range of documents that include the paperwork in relation to the tenders of ROL and Grahams, the paperwork from the assessment panel, the correspondence, guidance notes, records of investigations, technical criteria and all relevant documents.

[22] In principle an order for discovery may be made prior to delivery of a Statement of Claim. I will assume for present purposes that the ROL tender stated that the five engineers were available for work, the 'employee' issue first relied on by the plaintiff being irrelevant. Further I will assume that the defendant did not seek to verify the availability of the named electricians. In addition I assume that the ROL tender claimed the experience required in the tender criteria and that the defendant did not seek to verify that experience.

[23] I am satisfied that it is not necessary for the plaintiff to have discovery of documents to plead the case against the defendant in the Statement of Claim. The plaintiff has identified the issues relied on against the defendant. It has not been established that there are any exceptional circumstances in the present case that would warrant discovery of documents prior to delivery of the Statement of Claim. In any event particular discovery at this stage is not necessary either for disposing fairly of the case or for saving costs. Seeking the documents at this stage is akin to fishing for evidence against the defendant. When the issues have been identified in the pleadings the defendant may be required to make discovery of relevant documents in the usual manner.

[24] I dismiss the plaintiff's application for discovery of documents prior to delivery of the Statement of Claim.