EVERSHEDS SUTHERLAND

Navigating the process of discovery

A review and refinement of the guiding principles

In today's environment of discovery applications seeking significant amounts of documentation, the Supreme Court has taken the opportunity in *Tobin v Minister for Defence*[1] ("Tobin") to review and refine the guiding principles of discovery. In this briefing we look at the Supreme Court's guidance and consider its practical application.

Access to justice

The Supreme Court in *Tobin* observed that where discovery becomes disproportionately burdensome, it can hinder access to justice. The comments echo previous concerns of the court expressed in *Persona Digital Telephony Ltd & anor v Minister for Public Enterprise & ors*[2] and again in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Limited & Ors*[3] which considered the prohibition on litigation funding in Ireland. Clarke CJ referred to an increasingly significant problem with access to justice in a world where litigation is becoming increasingly complex.

The concerns apply with equal force to complex and onerous discovery applications. The Supreme Court referred to the valuable contribution discovery can make to the administration of justice. However, the opposite equally applies where it can hinder access to justice if unduly burdensome.

The discovery "crisis"

The Court of Appeal (COA) in *Tobin* described the modern day discovery process as being in a 'crisis'. Hogan J, giving judgment for the COA, observed that *"something is seriously amiss with the discovery system as it currently operates"*. The comments arose in the context of the defendant's complaints about the administrative burden it faced in complying with the vast discovery requested, in what Hogan J termed *"a routine personal injuries case"*.

Hogan J refused most of the discovery sought finding that the information could be obtained by interrogatories. Importantly, Hogan J held that in cases where the discovery sought is likely to be extensive, no discovery order should be made until all other procedural avenues (eg interrogatories and notice to admit facts) have been exhausted and shown to be inadequate[4].

The Supreme Court guidance

The Supreme Court overturned the decision of the COA, noting the value of the discovery process, and giving useful guidance on how the courts should deal with discovery applications that may impose a disproportionate burden on the parties.

A. The importance of the pleadings

The rubric that continues to apply in discovery applications is the requirement to show *relevance and necessity* of the documents sought.

In assessing a party's objections to burdensome discovery, the Supreme Court found that a court can take into account the manner in which the case is pleaded to determine whether the objecting party contributed to this situation by the way in which they pleaded their case. For example, has a plaintiff adopted a 'kitchen sink' approach to its pleadings, or has a defendant put all facts in issue by sweeping denials in its defence, rather than a focused and considered position.

B. The proper approach to discovery

The Supreme Court helpfully set out the approach to be followed in navigating the process of discovery:

i. The starting point is to assess the relevance of the documents sought. This will be determined by reference to the pleadings.

1 [2019] IESC 57
2 [2019] IESC 57
3 [2018] IESC 44
4 The decision calcifies earlier soundings from the courts on the effectiveness of alternative interlocutory tools such as interrogatories: Goodbody Ltd v Clyde Shipping Company Ltd [1967] 5 JIC 0901 and Anglo Irish Bank Corporation v Browne [2011] IEHC 140; and followed in Kelland Homes Ltd v Ballytherm Ltd & Ors [2019] IEHC 46.

ii. Once relevance is established, the default position is that production of the relevant document is necessary. In other words, relevance may also establish necessity.

iii. The default position as to 'necessity' can be displaced where the discovery sought is particularly burdensome. In that circumstance the court will have to weigh, on balance, a range of factors including:

   a. the extent of the burden which compliance will be likely to place on the party concerned

   b. where possible, the expected role the disputed documents can reasonably be expected to play in the resolution of the case

   c. any alternative, less costly means of achieving the same result

   d. whether confidential documents are in issue

It may be that such factors will allow a court decide that discovery is not immediately necessary.

C. The practical steps in dealing with a discovery request

The Supreme Court explained that the burden of proving the relevance of the documents rests on the requesting party. It then falls to the requested party, if it opposes discovery, to show that the documents are not necessary. The Court suggested that the following steps are taken:

i. Respond to the request stating why discovery should not be ordered. Suggest any alternative means that could be used.

ii. If the reasons are based on facts, the requested party should outline those facts. The requested party should be capable of putting evidence before a court establishing those relevant facts.

iii. If the reasons are based on legal argument then the requested party should give reasons as to why production is not necessary.

Significantly, the Supreme Court, in departing from the COA approach, confirmed that a requesting party does not need to exhaust all other procedural avenues available (eg interrogatories or notice to admit facts) before pursuing a discovery application.

Where to now?

The Supreme Court decision highlights the role that discovery can play in promoting or hindering access to justice. Interestingly the Supreme Court classified the burden on the defendant in complying with discovery in this case as 'moderate' rather than 'extreme' (220 hours). The guidance from the court is welcome, particularly around the approach parties adopt to their pleadings.

Modern day discovery requests can be burdensome and disproportionate, given the widespread creation of data and electronically stored information. This is recognised by the courts and by government. Separately, the Review of the Administration of Civil Justice established by the Minister for Justice in 2017, is tasked with making recommendations to reform the administration of civil justice in the state. Part of its role includes a review of the law of discovery. Work is ongoing and its recommendations awaited.

Eversheds Sutherland eDiscovery platform

Eversheds Sutherland has experience in conducting large scale electronic discoveries. Our eDiscovery platform *ES Locate*, allows us to provide clients with a fast and accurate review of electronic data. *ES Locate* is an invaluable support tool to our litigation teams and was successfully employed in recent High Court proceedings involving a review of over 160,000 documents as part of the discovery process.

Technology assisted review (TAR) in the discovery process is important in reducing costs in large scale discoveries. ES Locate, is a form of TAR that identifies electronic documents using data analytics and predictive coding to review electronically stored information in a quick and efficient manner. The platform analyses thousands of documents in seconds, and the results are presented in interactive user-friendly formats. The platform along with our experience allows us to provide clients with an end-to-end and cost efficient service in the discovery process.

Key contacts

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