

[2015] IEHC 41**THE HIGH COURT****[2011 No. 7566 P]****BETWEEN:-****PAUL HARRINGTON
PLAINTIFF****AND****CORK CITY COUNCIL AND CORK COUNTY COUNCIL
DEFENDANT**

*Practice and Procedure – Order 39, rule 46 of the Rules of the Superior Courts 1986 –
Expert reports – Fairness*

Facts: A plaintiff sought damages for personal injuries sustained when removing another injured person from a vehicle involved in road traffic accident. The issue for the purposes of this case was the plaintiff's obligation to disclose expert reports from those who were to be called to give evidence in the proceedings pursuant to Order 39, rule 46 of the Rules of the Superior Courts 1986. The first defendant delivered its disclosure schedule to the plaintiff listing the witnesses they intended to call. The first defendant reserved the right to call expert evidence or produce reports pursuant to any matters that arise during the proceedings. The plaintiff refused to furnish the defendant with copies of the reports referred to in its disclosure schedule. The plaintiff first wanted an undertaking from the first defendant. The plaintiff wanted to ensure that the reports from their experts would not be given directly or indirectly to any of the experts retained by the defendant until the defendant experts furnished their reports. The first defendant refused to limit its defence in such a way and the plaintiff therefore withheld their expert reports. The plaintiff submitted that in the interest of fairness his obligation to furnish reports should be allowed to be conditional upon the defendant agreeing to this undertaking.

Held by Kearns P: The court was satisfied that the fairness requires a simultaneous exchange of expert reports and that the European Court of Human Rights jurisprudence emphasises 'equality of arms' in litigation. The court ordered that the plaintiff's disclosure of his reports in accordance with O. 39, r. 46(3) be conditional upon the first defendant's undertaking that those reports would not be given to any expert retained by the first defendant until after such expert has furnished his report.

Reporter: LLJ

JUDGMENT of Kearns P. delivered on the 30th day of January, 2015

1. The present proceedings were initiated by a personal injuries summons dated the 17th August, 2011, wherein the plaintiff claims damages for alleged personal injuries sustained while removing an injured person from a motor vehicle at the scene of an accident on or about the 30th October, 2010.

2. This is a matter which came before the Court by way of notice of motion dated the 8th September, 2014, seeking the Court's direction in respect of the plaintiff's obligation to disclose the reports of experts intended to be called to give evidence in relation to issues in the within proceedings pursuant to Order 39, rule 46 of the Rules of the Superior Courts 1986, as amended.

3. The application is grounded on the affidavit of Mr. John Buckley, solicitor for the first named defendant, sworn on the 24th June, 2014. Mr. Buckley deposed that by letter dated the 1st March, 2012, solicitors for the plaintiff, Ernest J. Cantillion, delivered to Ronan Daly Jermyn, solicitors for the first named defendant, a disclosure schedule of expert witness reports from witnesses intended to be called at hearing pursuant to his obligations under Order 39, rule 46.

4. The first defendant delivered its disclosure schedule pursuant to the said statutory obligations by letter dated the 20th September, 2013, listing the witnesses intended to be called. No expert witnesses or reports were disclosed, however, the first defendant reserved the right to call any expert evidence or produce expert reports pursuant to the proceedings 'as matters may arise'.

5. The first defendant thereafter requested the plaintiff to furnish it with copies of the reports referred to in its disclosure schedule. The plaintiff has, however, refused to do so absent an undertaking from the first defendant that it will not divulge the contents of the plaintiff's expert reports to any experts which the first defendant chooses to commission in advance of the trial. The first defendant has refused to limit the conduct of its defence in such a way and as a result the plaintiff has refused to deliver copies of the said reports to the first defendant. Thus, an impasse has arisen between the parties and it has fallen upon this Court to determine the matter.

Law

6. Order 39, Rule 46 of the Rules of the Superior Courts 1986 requires both the plaintiff and defendant in a personal injuries action to furnish a schedule listing all reports from expert witnesses intended to be called at trial prior to the trial date. The parties are thereafter required to exchange copies of the reports listed in the schedules. These requirements are contained in O.39, r. 46(1) which reads as follows:-

“(1) The plaintiff in an action shall furnish to the other party or parties or their respective solicitors (as the case may be) a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in

respect of the action or within such further time as may be agreed by the parties or permitted by the Court.

Within seven days of receipt of the plaintiff's schedule, the defendant or any other party or parties shall furnish to the plaintiff or any other party or parties a schedule listing all reports from expert witnesses intended to be called. Within seven days of the receipt of the schedule of the defendant or other party or parties, **the parties shall exchange copies of the reports listed in the relevant schedule.**"(emphasis added)

The Supreme Court in *Kincaid v. Aer Lingus Teoranta* [2003] 2 I.R. 314 held that the "exchange" of reports should be contemporaneous to avoid the danger that the rules can be abused to enable one party to gain an advantage over another. Geoghegan J. giving the sole judgement of the court, with which McCracken J. and McGuinness J. concurred, held:-

"The obligation under O.39, r. 46(1) is to 'exchange' scheduled reports. If a party's solicitor ensures that the 'exchange' is contemporaneous, there is no danger of the so called 'abuse' arising. If each party's solicitor ensures that an actual contemporaneous exchange of reports takes place, there is no danger that the procedure can be abused in the manner suggested by the plaintiff."

Both the plaintiff and the first defendant in their respective submissions agree that the disclosure rules have no role to play in investigating the strengths or weaknesses of an opponent's case citing the dicta of Murphy J. in *Galvin v. Murray*[2001] 1 IR 331 at p. 336 where it was held:-

"... the disclosure rules are designed to forewarn other parties' of expert evidence with which they may be confronted. The rules have no role to play in investigating strengths or weaknesses of the opponent's case."

7. It is the plaintiff's submission that **fairness** requires that his obligation, which is not disputed, to disclose his reports in accordance with O.39 r.46(3) be conditional upon the first defendant's undertaking that those reports will not be given, directly or indirectly, to any expert retained by the first defendant until after such expert has furnished his report. The plaintiff submits that should he be required to disclose his expert reports under the current circumstances the first defendant would obtain an unfair litigious advantage which was the very tactic the Supreme Court feared in *Kincaid*.

8. In order to guard against this injustice the plaintiff urges the Court to invoke its inherent jurisdiction and duty to protect the fairness of its own processes. In support of this contention the plaintiff cites *inter alia* Kelly J. in *P.J Carroll & Company Ltd. v. The Minister for Health and Children* [2005] 3 I.R. 457 where it was held:-

"There is a jurisdiction inherent in the court which enables it to exercise control over processes by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process. It is a residual source of power which the court may draw upon as necessary wherever it is just or equitable to do so."

9. In addition to the court's inherent jurisdiction the plaintiff submits that O.39, r. 50 expressly recognises the risk of injustice in the disclosure process by providing that the court can, in the interests of justice, make an order that the provisions of r. 46 shall not apply in relation to any particular report or statement (or portion thereof), which is in the possession of such party and which he maintains should not be disclosed and served as required.

10. It is the first defendant's case that disclosure by the plaintiff of his expert reports would not result in any unfairness as alleged by the plaintiff. It submits that there is no entitlement for a party to withhold a report merely because the other party does not have an expert. The first defendant argues that there can be no prejudice to the plaintiff as if any expert reports are commissioned by the first defendant, the plaintiff will receive the reports and will be afforded the opportunity to review these reports prior to the trial of the action.

11. In support of its argument the first defendant relies on the *dicta* of the Queen's Bench Division of the High Court of England and Wales in *Kirkup v. British Rail Engineering Limited* [1983] 1 W.L.R 190 where it was held:-

“In a proper case it may well be permissible to order one party to disclose his report first, so that the expert consulted by the other party may address his mind specifically to the points made in it. Although to do this may be said, in one sense, to give the latter party an advantage, it may do much towards crystallising the issues and may even lead to an earlier and fairer settlement of the action.”

12. The plaintiff submits in response however that this *dicta* from *Kirkup* represents the exception not the rule to the disclosure of expert reports. The plaintiff submits that the court in *Kirkup* took some pains to demonstrate that the personal injuries litigation with which it was concerned was unusual and formed part of a series of similar, but not identical, claims and it was this factor which justified departure from the established rule in that case.

13. In further support of its position the first defendant also submits that no unfairness or prejudice will result from disclosure of the expert reports as experts have an independent duty to the court. It is the first defendant's argument that should it decide to commission an expert report at a later stage, the fact that their expert will have sight of the plaintiff's expert reports would not result in any unfairness or prejudice as their expert owes a duty to the court to produce an independent uninfluenced report of his/her own. In support of this contention the first defendant relies on the judgement of Crestwell J. in *National Justice Cia Naviera SA v. Prudential Assurance Company Limited* [1993] 2 Lloyd's Reports 68 where the learned trial judge emphasised that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation.

14. The first defendant further argues that the plaintiff is not entitled to imply into the rules a set of criteria that are not included and which cannot be read into O. 39, r.46 regarding an undertaking not to furnish expert reports. The first defendant argues that the rules of

disclosure have evolved over time and it would therefore not be appropriate to draw up a series of steps which have not been included in the rules.

15. The first defendant finally argues that providing an undertaking not to furnish disclosed reports to any expert retained on behalf of the first defendant until after such expert has furnished his report would undermine the position of experts in furnishing reports to parties in litigation. The first defendant submits that an expert must be in a position to comment in a substantive manner on the facts in issue. Therefore, there is no purpose in retaining an expert to furnish a report who cannot do so on the basis of all available materials as this would not assist the court. In reply, the plaintiff submits that this position adopted by the first defendant is self-evidently inconsistent with the principle of simultaneous exchange of expert reports as per the Supreme Court's decision in *Kincaid*.

Conclusion

16. I am satisfied by reference to the various authorities cited that the requirements of fairness require a simultaneous exchange of expert reports and that requirement is not abrogated by the non-existence at this point in time of expert reports to the defendants. While specific cases have not been opened to the Court, the jurisprudence of the European Court of Human Rights in recent years has repeatedly emphasised the concept of "equality of arms" in litigation and I think it fair to say that this concept has increasingly permeated judicial thinking in this jurisdiction also. The plaintiff's apprehension that the first defendant will secure a litigious advantage in the current circumstances obtaining in this case is not one without any foundation.

17. While the Court is not going so far as to express a view as to whether some calculated strategy to that effect exists in this case, it would hold with the plaintiff's submissions. This is to do no more than follow and implement the decision of the Supreme Court in *Kincaid v. Aer Lingus Teoranta* [2003] 2 I.R. 314.

18. There is no suggestion in the present case that the first defendant does not intend to retain an expert or lacks the means to do so. Accordingly, I do not see this case as being one where there should be some exception to the normal litigation processes.

19. As the first defendant has certified that no expert report exists on its behalf to be furnished in accordance with O. 39, r.46(3) the onus has fallen upon the plaintiff to furnish his expert reports on the defendants which he accepts. However, in accordance with the Supreme Court decision in *Kincaid* it is the order of this Court that the plaintiff's disclosure of his reports in accordance with O. 39, r.46(3) be conditional upon the first defendant's undertaking that those reports will not be given, directly or indirectly, to any expert retained by the first defendant until after such expert has furnished his report.