

# THE HIGH COURT

[2019 No. 8549 P]

**BETWEEN**

**BARTOLOMEI BURBAN**

**PLAINTIFF**

**– AND –**

**FINESSE MEDICAL LIMITED**

**DEFENDANT**

**JUDGMENT of Mr Justice Max Barrett delivered on 22<sup>nd</sup> July 2021.**

1. This is an application for discovery brought pursuant to O.31, r.12(4) RSC. It is made in the context of personal injuries proceedings brought by Mr Burban against his onetime employer for whom Mr Burban worked as a maintenance technician. The indorsement of claim on his personal injuries summons describes the circumstances that gave rise to the within proceedings in the following terms:

*“5. On or about the 20<sup>th</sup> April 2017, the plaintiff had to replace a roll of paper on a machine at the said factory and in order to do so he had to bend down and/or squat so that he could access a replacement roll – which was stored under a table – and then pull that roll of paper out from under that table. The plaintiff then had to lift that roll of paper from the floor and onto the said table. He then had to remove a shaft from the said machine and insert it through the centre of the said roll*

*of paper. Finally, he had to lift the said roll of paper by placing each of his hands on either side of the said shaft, move it to the said machine – which involved carrying and turning – and manoeuvre that shaft – with the said roll of paper – onto its receptacle on the said machine while holding the said shaft and roll of paper in a bent position and/or while unable to clearly see the said shaft’s receptacles. The plaintiff sustained an injury to his back in the course of performing the said task and that injury was caused by reason of the negligence, breach of contract, breach of duty and/or breach of statutory duty on the part of the defendant, its servants and/or agents.*

...

*6. Further and/or in the alternative, on or about the 21<sup>st</sup> November 2018, the plaintiff was asked by a co-employee to assist that co-employee in removing a shaft from an almost empty roll of polymer at the said factory. The centre of the said roll was made of Styrofoam and the said shaft had been pushed through that Styrofoam. The said shaft had to be pulled out of the said Styrofoam so that the roll could be replaced. The said shaft and almost empty roll had been removed from the relevant machine and placed on a lifting apparatus. On the occasion in question the plaintiff and his co-employee were both pulling the said roll of polymer from the said shaft when suddenly and without warning one separated from the other and the plaintiff suffered an injury to his back.”*

2. The above text is quoted solely to offer a sense of background. The court has no view on whether or not Mr Burban will succeed in his claim.

3. The defendant has highlighted a number of features to the within proceedings. First, Mr Burban did not report to the defendant that he had suffered the alleged accident of 20<sup>th</sup> April 2017 at the time of its alleged occurrence or soon thereafter. Second, his warning letter regarding his first/second alleged accident issued on 29<sup>th</sup> March 2019/7<sup>th</sup> February 2019, some 23/2½ months later, with neither warning letter stating the nature of the wrong alleged to have

been committed. Third, by solicitor's letter of 18<sup>th</sup> September 2020, Mr Burban in late-2018/early-2019 suffered the double misfortune of falling down the stairs in his home and tripping in the shower.

4. As Finlay J. observed in *AIB Plc v. Ernst & Whitney* [1993] 1 I.R. 375, at p.390:

*“[T]he basic purpose and reason for the procedure of discovery...is to ensure as far as possible that the full facts concerning any matter in dispute before the court are capable of being presented to the court by the parties concerned, so that justice on full information, rather than on a limited or partial revelation of the facts arising in a particular action, may be done.”*

5. In terms of deciding whether to order discovery, the legal touchstone is relevance to the matter in issue. Next, under O.31, r.12(5) an order for discovery will not be made if the order is not necessary for disposing fairly of the cause or matter or for saving costs. And last, whether as an attribute of necessity, or as a separate, freestanding factor (and the course of case-law would suggest that it is or is becoming the latter), comes proportionality.

6. In any event, moving on to the discovery application at hand, the categories are identified in bold and the court's response indicated immediately below each category.

7. ***“(1) All attendance records and notes in respect of all medical, physical and/or neurological treatment and/or advice sought by or given to the plaintiff, including but not confined to all doctors’, hospital, consultants’ and/or physiotherapists, attendance records, admission records, treatment records and all X-rays, CT and/or MRO scans, and all medical reports, notes and/or records relating thereto, including all medical certificates of unfitness to work, in Ireland and/or in any other jurisdiction, for the period of five years up to and including on 20<sup>th</sup> April 2017 and thereafter to date.”***

8. At first glance, this seems a remarkable volume of pre-accident material. However, Mr Burban appears to have been the victim of some form of assault in 2013/2014 when he suffered a head injury and, notably, his claim in the present proceedings includes a claim for migraines, excruciating pain in his head, pained vision, and adverse reaction to light. He also appears to

have been treated for backache in 2016. So there is a clear need to have regard to information concerning his previous history of head and back injury. The post-injury information is relevant because of the accidents at home. They will also assist, for example, as regards whether there was a timely reporting of the injuries and any efforts at mitigation. However, the five-year period is just too long: to ensure proportionality the court will limit the pre-injury documentation to the period from 1<sup>st</sup> January 2013 onwards. Otherwise the court will order this category as sought.

**9. “(2) All letters of claim, injuries board applications and correspondence, and all pleadings, particulars, witness statements, medical reports, correspondence and/or court orders (other than in respect of the present proceedings), whether in respect of civil/statutory and/or criminal litigation, in Ireland and/or in any other jurisdiction for the period of five years up to and including on 20<sup>th</sup> April 2017 and thereafter to date, including in respect of his disclosed ‘assault in 2013/2014’ in which ‘he suffered a head injury’”.**

10. Subject to the time constraint identified in respect of category (1) (which falls to be applied for the same reason to category (2)), this category is relevant and necessary (a) for the defendant to investigate and verify Mr Burban’s exact litigation, injury, and accident history, and (b) for the reasons identified in respect of category (1). Subject to the time constraint identified in category (1), the court will order this category of discovery.

**11. “(3) All records, correspondence and/or documentation relating to the plaintiff’s work attendance and absence records, including all medical certificates therefor in Ireland and/or in any other jurisdiction, and relating to all income received from 21<sup>st</sup> November 2018 to date.”**

12. This category seems relevant and necessary and proportionate as regards establishing the reality and extent of Mr Burban’s loss of earnings to date and into the future (which are not identified in the summons, save to the extent that they are indicated to be ‘Unascertained’, or in the replies to particulars. The court will order this category as sought.

**13. “(4) All applications for and medical assessments relating to all social welfare and/or state benefits...sought and/or received by the plaintiff in Ireland and/or in any other**

*jurisdiction for the period of 3 years up to and including 20<sup>th</sup> April 2017 and thereafter to date.”*

14. This category seems relevant and necessary and proportionate as regards, *inter alia*, assisting in the establishment of (a) what Mr Burban’s exact net losses are, (b) whether Mr Burban failed to avoid and/or mitigate his alleged losses, (c) the extent of the amounts already received in benefits in circumstances where Mr Burban indicates that he has been claiming for loss of earnings and medical expenses but has not indicated the extent of the amounts claimed/paid, (d) what Mr Burban has asserted as regards obtaining such benefits. The court will order this category of discovery; however, to ensure proportionality the court will limit the timespan of this category of discovery from 20<sup>th</sup> April 2017 onwards (the date of the alleged first accident).

15. *“(5) All records, correspondence and/or documentation relating to applications for employment and/or alternative employment training, educational, job-seeking and/or training course programmes made by or on behalf of the plaintiff and/or as to his participation therein, in Ireland and/or in any other jurisdiction for the period of one year up to and including 21<sup>st</sup> November 2018 and thereafter to date”.*

16. It seems to the court that this category is relevant and necessary and proportionate as regards establishing whether Mr Burban has failed to avoid and/or has failed to mitigate any of his alleged losses, including by failing to seek or avail of employment and/or alternative employment and/or training. The court will order this category of discovery as sought.

17. *“(6) All records relating to the plaintiff’s use of, membership of and /or participation in all gym, sporting, leisure, hobby and/or recreational activities, facilities, venues, events and/or past-times and all correspondence and/or documentation relating thereto, for the period of one year prior to 20<sup>th</sup> April 2017.”*

18. As drafted, this category would include providing details of Mr Burban’s membership of his local stamp collecting club, if member he is. In the notice of motion, the following justification is offered for seeking this category of discovery:

*“Category (6) is being sought as being relevant and necessary in assisting us, by the use of the best documentary evidence to investigate and distinguish the reality of the plaintiff’s allegations that he has had ongoing difficulties with hillwalking, swimming activity, with resultant weight gain....This category is also being sought to verify [presumably to assist in calibrating] the plaintiff’s post-accident physical capabilities”*

19. It seems to the court that this is a good rationale for discovery but not of the discovery sought. To ensure relevance, necessity and proportionality, the court will order discovery of ‘all records relating to the plaintiff’s use of, membership of and/or participation in all exercise and/or fitness and/or gym and/or sporting clubs, facilities or societies’ during the period sought.

20. ***“(7) All Revenue returns made by or on behalf of Mr Burban and/or any business and/or legal entity operated by or on behalf of the plaintiff or in which he had any financial interest in Ireland and/or in any other jurisdiction for the period of one year prior to 20<sup>th</sup> April 2017, and thereafter to date”.***

21. This category seems relevant and necessary and proportionate as regards identifying and assessing the plaintiff’s claim for loss of earnings and his work attendance and income. The court will order this category as sought.

22. ***“(8) All records as to the plaintiff’s ‘plans to start a garden table manufacturing business’ for the period of 2 years prior to 20<sup>th</sup> April 2017 and thereafter to date.”***

23. This category seems relevant and necessary to identify and assess the plaintiff’s claim that his alleged injuries forced him to stop ‘his plans to start a garden table manufacturing business’. The court will order this category as sought.

24. ***“(9) All insurance proposal forms, policy schedules, claims documentation and all correspondence, documentation and communications of any kind between the plaintiff and all insurance companies, brokers and/or intermediaries, in Ireland and/or in any other jurisdiction, for all kinds of insurance, for the period of three years up to and including 20<sup>th</sup> April 2017 and thereafter to date”.***

25. As drafted this would include interactions concerning any pet insurance that Mr Burban may have purchased. In the notice of motion, the following justification is offered for seeking this category of discovery:

*“This category is being sought as we wish to investigate and verify the plaintiff’s description of his state of health, incident and/or accident history to those to whom he was obliged to tell the truth, his insurers, [for the period of three years] up to and including 20<sup>th</sup> April 2017 and thereafter to date”.*

26. It seems to the court that this is a good rationale for discovery but not of the discovery sought. To ensure relevance, necessity and proportionality, the court will order discovery of category (9) but limit it in scope to accident, health, motor and travel insurance.

**27. *“(10) All documentation relating to all servicing, use, mileage, NCT, CRVT and/or MOT testing and insurance of every vehicle owned, rented and/or used by the plaintiff for the period of one year up to and including 20<sup>th</sup> April 2017 and thereafter to date.”***

28. This is a ‘fishing’ category. To the extent that motor insurance is relevant it is captured by category (9). Discovery of this category is respectfully refused.

**29. *“(11) All statements of account for all bank and/or financial institution accounts and/or savings held and/or operated by or on behalf of the plaintiff in Ireland or in any other jurisdiction for the period from 21<sup>st</sup> November 2018 to date.”***

30. This category is relevant, necessary and proportionate as regards establishing the plaintiff’s actual income. The court will order this category as sought.

**31. *“(12) All travel out of Ireland undertaken by the plaintiff to any other jurisdiction in the period of one year up to and including 21<sup>st</sup> November 2018 and thereafter to date”.***

32. This is a ‘fishing’ category and will be refused.

**33. “(13) All documentation evidencing each of the plaintiff’s claims for special damages for the period from 20<sup>th</sup> April 2017.”**

**34.** This documentation is relevant, necessary and proportionate and will be ordered as sought.

**35.** The court requests that the parties prepare a draft order of discovery by reference to this judgment and provide it to the court’s registrar so that the order can issue thereafter.

**36.** The court will hear the parties as to costs.