

THE HIGH COURT

[2004 No. 9718P]

BETWEEN

AUGUSTIN MAMBA AND ADE ADEYANJU

PLAINTIFFS

AND

IBM IRELAND PRODUCTS DISTRIBUTION LIMITED AND MARTINA O'LOONEY

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 15th day of January, 2010.**Preliminary issue**

The chain of events which led to the hearing of the issue to which this judgment relates commenced with a notice of motion dated 14th November, 2008 wherein the first named plaintiff (Mr. Mamba) applied to the Master of this Court for an order pursuant to Order 28, rule 1 of the Rules of the Superior Courts (the Rules) seeking leave "to amend the Personal Injuries Summons herein". The application was resisted by the defendants. By order of the Master made on 23rd April, 2009 it was ordered that the notice of motion be amended to convert the motion "into an application to amend the statement of claim by replacing [it] ... with the statement of claim as it appears in exhibit ALT3 under the heading of endorsement of Claim". The amended notice of motion was adjourned to "the Judges' List" on 11th May, 2009.

What happened on 11th May, 2009 was that it was directed that an issue be tried as a preliminary issue. Unfortunately, the order of the Court, as perfected, does not disclose the issue to be tried. After reciting that counsel for the defendants had "objected to the amendment of the said summons", the order states that the Court directed that "the issue in the first named plaintiffs case be tried", that Mr. Mamba deliver points of claim and an affidavit "in relation to the issue to be tried" within three weeks and that the defendants deliver replies and points of defence "in relation to the issues to be tried" within a further three weeks of receiving the points of claim and affidavit.

When the issue came on for hearing on 30th October, 2009, the following documentation was before the Court:

- (1) the notice of motion dated 14th November, 2008, the affidavit on which it was grounded and the exhibits referred to in the affidavit, including exhibit ALT3;
- (2) the points of claim on the preliminary issue delivered on behalf of Mr. Mamba, which was accompanied by an affidavit sworn by Mr. Mamba on 5th June, 2009;
- (3) the points of defence delivered on behalf of the defendants, accompanied by an affidavit sworn on 3rd July, 2009 by Barry Reynolds, a member of the firm of Arthur Cox, the solicitors on record for the defendants;
- (4) the following orders:
 - (i) an order of the Master 7th June, 2005 ordering that the Plenary Summons issued on 8th June, 2004 be renewed for the period of six months;
 - (ii) the order of the Master of 23rd April, 2009 already referred to;

and

 - (iii) the order of the Court of 11th May, 2009 already referred to.

By way of clarification, the order of 11th May, 2009 discloses that the Court directed that the plaintiffs' cases "be split and proceed to continue and be treated as if the proceedings commenced separately". Further, it is clear that originally there were three additional defendants to the proceedings whom, it appears, are no longer parties to Mr. Mamba's claim. For present purposes the issue the Court is concerned with is an issue between Mr. Mamba and the two defendants named in the title, the first defendant being Mr. Mamba's former employer.

Given the fact that the issue directed to be tried is not set out in the order of 11th May, 2009, it is necessary to resort to the points of claim and points of defence to ascertain what the issue is, or, at any rate, what the parties believe it is.

According to Mr. Mamba's points of claim, it is "whether [Mr. Mamba] sought to bring a personal injuries action outside of the statutory period permissible under the provisions of the Personal Injuries Assessment Board Act 2003" (the Act of 2003). According to the points of defence delivered on behalf of the defendants, it is whether Mr. Mamba's "personal injuries action is lawfully before the Court in circumstances where he issued his Plenary Summons without authorisation" (para. 3.1), stating that the question turns on the interpretation of s. 12 of the Act of 2003. Mr. Reynolds's affidavit clarified the defendants' understanding of the issue further, in that he averred that it is whether Mr. Mamba is entitled to maintain the personal injuries aspect of his claim in circumstances where he had not received authorisation from the Personal Injuries Assessment Board (the Board) prior to the institution of his proceedings against the defendants. Later in his affidavit, Mr. Reynolds set out his understanding of the preliminary issue as relating solely to the question whether the terms of the Act of 2003 preclude the plaintiff from further prosecuting the personal injuries aspect of his claim.

At the hearing, counsel for Mr. Mamba stated that para. 3.1 of the points of defence was a correct statement of the issue.

The position of the parties as outlined in the preceding paragraph seems to me to indicate that originally there may have been some lack of clarity as to what the problem is and what the issue to be tried is. An exposition of the undisputed facts and the relevant statutory provisions will identify the problem and will clarify what the real issue is.

The factual background

The undisputed facts are as follows:

(a) On 8th June, 2004 the plenary summons in these proceedings was issued. As one of the plaintiffs, Mr. Mamba claimed damages for "personal injuries, hurt, emotional distress, loss and damages caused" to him by reason of-

- (i) breach of service contracts while in the defendants' employment,
- (ii) discrimination against him by reason of his racial origin while in employment,
- (iii) discrimination by discriminatory treatment while in employment,
- (iv) harassment, bullying and victimisation while in employment,
- (v) wrongful interference "with private matter, life and or records" while in employment,
- (vi) abuse of power,
- (vii) defamation, and
- (viii) a series of actions cumulatively amounting to "breach of implied term of trust and confidence" on the part of the defendants.

The plenary summons was issued by both plaintiffs in person and the endorsement was signed by Mr. Mamba. The plenary summons was in Form No. 1 in Appendix A, Part 1, as prescribed by Order 1, rule 2 of the Rules.

(b) In January 2005 Mr. Mamba submitted an application to the Board as a claimant for compensation. On 4th February, 2005 the Board issued an authorisation under s. 17 of the Act of 2003 authorising Mr. Mamba, pursuant to s. 17(6), to bring proceedings in respect of the relevant claim, details of which were given as "harassment and bullying at work", the claim being against the first defendant. The covering letter dated 4th February, 2005 from the Board, which accompanied the authorisation, explained that the Board had decided that it would not be appropriate to assess Mr. Mamba's claim, as his injuries "are wholly of a psychological nature".

(c) Following renewal of the plenary summons pursuant to the Master's order of 7th June, 2005, it was served on the defendants in November, 2005.

(d) Mr. Mamba delivered his statement of claim on 2nd December, 2005. He was still acting in person at that stage. The statement of claim is in an unconventional form. Notwithstanding that, it is clear from the statement of claim that Mr. Mamba was basing his claim on alleged discrimination, negligence, breach of contract and breach of statute, although the statute is not identified. Towards the end of the statement of claim it is stated:

"All these things are about my psychiatric injury.

The employer (management []) knew or ought to have known the situation but did not do anything to prevent this to happen".

As regards the claim against the second defendant, it is alleged that she is liable for negligence and bullying and some particulars are given. There follows a statement: "This brought about all my injury".

(e) Following the delivery of the statement of claim there was an exchange of correspondence between Arthur Cox and Mr. Mamba. No issue was raised as to what Mr. Reynolds averred to subsequently as "the potential shortcoming" in Mr. Mamba's case, that is to say, the issue on which it is sought to have the Court's determination.

(f) The defendants' defence was delivered on 10th April, 2006. Following a plea that the statement of claim does not disclose any cause of action, the defence traversed each and every allegation contained in the statement of claim. The plea that Mr. Mamba has failed to disclose any cause of action in his pleadings was reiterated and it was asserted that he had failed to particularise properly any cause of action which he has and had failed to particularise any loss or damage allegedly suffered by him. There was no mention of the Act of 2003 in the defence, nor was there any plea that the plaintiffs' claim was statute barred.

(g) Mr. Mamba retained the services of the solicitors currently on record for him, Daly, Lynch, Crowe & Morris, in or around November 2006. That firm subsequently brought the motion on foot of the notice of motion dated 14th November, 2008 on behalf of Mr. Mamba. Mr. Reynolds, having earlier averred that no proceedings have been instituted by Mr. Mamba on foot of the Board's authorisation of 4th February, 2005, has averred that the defendants objected to the amendment on the basis that the proceedings had not been commenced on foot of that authorisation and that, as far as the defendants were concerned, such an authorisation could not apply retrospectively.

(h) The document exhibited as ALT3 is in the form of a Personal Injuries Summons, following Form No. 1 in Appendix CC, as provided for in Order 1A of the Rules, which was introduced on 2nd June, 2005 following the enactment of the Civil Liability and Courts Act 2004 (the Act of 2004) and the coming into effect of the Rules of the Superior Courts (Personal Injuries) 2005 (S.I. 248 of 2005). The portion thereof which comes under the heading of "Endorsement of claim" follows

the conventional format of a statement of claim. It claims damages for, *inter alia*, serious personal injury, mental distress, stigma damage, loss, damage, inconvenience and expense alleged to have been caused or occasioned by reason of the negligence and breach of duty, including breach of statutory duty, and breach of contract on the part of the defendants.

The relevant statutory provisions

The provision on which the defendants' case that, as a matter of law, Mr. Mamba is precluded from further prosecuting the personal injuries aspect of his claim is based is s. 12 of the Act of 2003. Section 12(1) provides as follows:

"Unless and until an application is made to the Board under section 11 in relation to the relevant claim and then only when the bringing of those proceedings is authorised under section ... 17 ... and subject to those sections or rules, no proceedings may be brought in respect of that claim."

For the purposes of Chapter 1 of Part 2 of the Act of 2003, where s. 12 is to be found, the expression "relevant claim" is defined as meaning "a civil action to which this Act applies" (s. 9). In s. 3 it is provided that the Act applies to four categories of civil action specified in paragraphs (a) to (d) inclusive thereof. Paragraph (a) relates to "a civil action by an employee against his or her employer for negligence or breach of duty arising in the course of the employee's employment with that employer". Paragraph (b) relates to road traffic accidents and paragraph (c) relates to use or occupation of land. Paragraph (d) relates to a civil action not falling within any of the preceding paragraphs, but excludes an action for medical negligence. The expression "civil action" is defined in s. 4(1) as meaning an action intended to be pursued for the purposes of recovering damages in respect of a wrong for (a) personal injuries, or (b) both personal injuries and damage to property (but only if both have been caused by the same wrong).

Section 3 of the Act of 2003 came into operation in two stages. First, by virtue of the Personal Injuries Assessment Board Act 2003 (Commencement) (No.2) Order 2004 (S.I. No. 252 of 2004), paragraph (a) of s. 3 came into operation on 1st June, 2004. Subsequently, by virtue of the Personal Injuries Assessment Board Act 2003 (Commencement) (No.3) Order 2004 (S.I. No. 438 of 2004), paragraphs (b) (c) and (d) of s. 3 came into operation on 22nd July, 2004.

The issue with which the Court is concerned clarified

It seems to me that the issue which the Court has to determine is best formulated as an issue as to whether, or, having regard to an argument which was not raised in Mr. Mamba's points of claim but which emerged at the hearing, to what extent, Mr. Mamba is precluded from prosecuting his claim in these proceedings by reason of not having obtained the authorisation of the Board prior to initiating the proceedings.

Unfortunately, as in my experience frequently happens, having regard to what emerged at the hearing, trying that issue has done very little to define the claims which Mr. Mamba is entitled to have litigated in these proceedings.

The respective positions of the parties

The position adopted on behalf of Mr. Mamba in the points of claim appears to be posited on the assumption that Mr. Mamba's claim for damages for personal injuries, as initiated by the plenary summons, comes within the ambit of paragraph (a) of s. 3 of the Act of 2003 as regards every allegation of wrong on which it is grounded. In summary, the arguments made in the points of claim are as follows:

(a) that Mr. Mamba, as a lay litigant, was not cautioned or advised and did not receive the guidance one would have expected he would have received from sources identified, which include the Central Office, which issued the plenary summons, the Board, which issued the authorisation, and the Master, who renewed the plenary summons, and the defendants, who raised the issue only five years after the plenary summons issued, when the motion to amend was brought;

(b) that, although the Court is not at this juncture concerned with "a Statute of Limitations issue per se", the same principles should apply to the determination of the issue before the Court as would apply to such an issue, it being argued that, first, the Court should have regard to the fact that the defendants have failed to plead the Statute of Limitations or any issue arising from the Act of 2003 and, secondly, that the Statute of Limitations allows of exceptions and, therefore, account should be taken of the blameless ignorance of Mr. Mamba of a subtle and very technical provision;

(c) that the defendants are not prejudiced, taken short or surprised in any way by the time and manner of Mr. Mamba's actions as currently constituted; and

(d) that to preclude Mr. Mamba's personal injuries claim would be a breach of his constitutional right of access to the Courts and his right to litigate for the remedy which the law provides for him.

It was also submitted on behalf of Mr. Mamba that, where the technical point raised by the defendants is incapable of being resolved in Mr. Mamba's favour, it is open to the Court to direct that Mr. Mamba be permitted to proceed with his action, or to recommence it, notwithstanding the time limits specified in the Statute of Limitations. No authority was cited for that proposition.

At the hearing of the issue, counsel for Mr. Mamba advanced an alternative argument as to the application of s. 3 of the Act of 2003 to Mr. Mamba's action and submitted that it is only insofar as it is grounded on an allegation of negligence that it is captured by paragraph (a) of s. 3 and that, insofar as it is grounded on breach of contract or breach of statutory duty it comes within the ambit of paragraph (d) of s. 3, which did not come into operation until after the plenary summons was issued.

That argument significantly altered the parameters of the issue.

The position of the defendants on the issue as to whether Mr. Mamba's claim is lawfully before the Court was that it turns entirely on the proper construction and application of s. 12(1) of the Act of 2003. Counsel emphasised the expressions "unless and until" and "then only" in that sub-section and submitted that particular weight must be attached to them in interpreting the section. It was submitted that the failure of Mr. Mamba to comply with the statutory condition precedent contained in the sub-section means that these proceedings were not lawfully instituted. Accordingly, it was submitted, the personal injuries aspect of his claim should be dismissed.

As regards the contention that Mr. Mamba had some special status as a lay litigant and did not receive guidance from the various sources outlined in the points of claim, the defendants' position was that Mr. Mamba cannot rely on the fact that he did not receive

such guidance. Further, s. 12(1) is an absolute provision which applies universally and the Court is bound to apply it.

It was submitted on behalf of the defendants that the Statute of Limitations has no relevance to the issue and that the legal principles applicable to the Statute of Limitations are not applicable to the operation of s. 12(1). In particular, it was submitted that, unlike the Statute of Limitations, which has been interpreted as barring the right but not the remedy, and which, accordingly, must be pleaded by a defendant, s. 12(1) imposes a legal prerequisite to the valid institution of proceedings which bars both the right and the remedy unless and until authorisation has been obtained from the Board. On that basis, it was submitted, there was and is no requirement on a defendant to plead s. 12(1).

The defendants' position was that, when Mr. Mamba obtained the authorisation of the Board on 4th February, 2005, the only option open to him was to discontinue these proceedings, which had not yet been served, and issue fresh proceedings on foot of the authorisation. It was submitted that Mr. Mamba at that stage might have faced a Statute of Limitations problem. Be that as it may, it was submitted, that is what is required by s. 12.

Counsel for the defendants acknowledged that counsel for Mr. Mamba had a stateable point that, insofar as Mr. Mamba's claim for damages for personal injuries is grounded on an alleged breach of contract (but, significantly, not on an alleged breach of statutory duty) it is governed by paragraph (d) of s. 3 of the Act of 2003. However, he did not concede the point, although, as I understand it, he did concede that Mr. Mamba should be allowed to amend his pleadings to incorporate that point, subject to the defendants being allowed to amend their defence.

Conclusion on the issue

It is important to stress the limited nature of the issue with which the Court is concerned, namely, whether, or, the extent to which, Mr. Mamba's claims in these proceedings are lawfully before the Court and may be prosecuted by him, given that the plenary summons was issued without the authorisation of the Board having been first obtained in accordance with s. 12 of the Act of 2003. In particular, it must be emphasised that the Court is not concerned with the issue whether, or to what extent, Mr. Mamba should be allowed to amend his statement of claim. Nor is the Court concerned with the application of the Statute of Limitations to Mr. Mamba's claims and, indeed, on the evidence and the submissions before the Court it is impossible to form a view as to when his cause or causes of action accrued.

In my view, the meaning and effect of s. 12(1) of the Act of 2003 is clear. It precludes a litigant from initiating proceedings in relation to a civil action to which the Act of 2003 applies at the time of initiation without first having applied to the Board under s. 11 and having obtained the authorisation of the Board under one or other of the provisions listed in s. 12(1). Such a requirement does not unlawfully interfere with the litigant's right of access to the courts. The Act of 2003 regulates the manner and forum in which personal injuries claims are to be determined. Section 12(1) is a provision designed to ensure that such regulation is effective. Section 12(1), when operative, has universal application. The Court has no jurisdiction to excuse non-compliance with it, where it is applicable, even if the consequence is that the claimant, even a claimant who has not the benefit of legal advice, is deprived of a remedy.

When these proceedings were initiated on 8th June, 2004, s. 12(1) applied to a civil action within para. (a) of s. 3, but it did not apply to a civil action within paras. (b), (c) and (d) of that section. The simple answer to the issue is that, to the extent to which a claim made by Mr. Mamba in these proceedings comes within para. (a) of s. 3, and to that extent only, the claim cannot be prosecuted in these proceedings because of non-compliance with s. 12(1). As a corollary, to the extent that a claim made by Mr. Mamba in these proceedings falls within para. (d) of s. 3, the requirements of s. 12(1) in relation to such claim had not become operative on 8th June, 2004 and such claim is properly before the Court and can be prosecuted in these proceedings.

For the avoidance of doubt, I should make it clear that I consider that the authorisation which issued from the Board on 4th February, 2005 after these proceedings had been initiated cannot be relied on by Mr. Mamba in connection with the prosecution of any claims in these proceedings.

Unfortunately, that simple answer does not address what emerged at the hearing and what now appears to be the core issue between the parties on the application of the Act of 2003. That is the extent to which the claims made by Mr. Mamba fall within para. (a) of s. 3, rather than within para. (d) of that section. As I have recorded, counsel for the defendants recognised that a claim by Mr. Mamba founded on breach of contract was arguably outside para. (a), but not a claim founded on breach of statutory duty.

For a number of reasons, I do not consider it appropriate to express a view on what now appears to be the real issue between the parties on the application of the Act of 2003 at this juncture.

First, I am of the view that there was no sufficient analysis in the parties' submissions of what the Oireachtas meant by the phrase "for negligence or breach of duty" in para. (a). It occurs to me that a comparison of the wording of s. 3(1) of the Statute of Limitations (Amendment) Act 1991 (the Act of 1991) with the wording in para. (a) may be instructive, particularly as the Oireachtas clearly had the provisions of the Act of 1991 in mind when enacting the Act of 2003, as s. 50 of the latter Act indicates.

Secondly, apart from the absence of sufficient submissions on the proper construction of para. (a), it was unclear at the hearing whether, or to what extent, Mr. Mamba is relying on breach of statutory duty. While it was made clear that he was invoking an unidentified provision of the "Equality Acts", which I take to mean, primarily, a provision of the Employment Equality Act 1998, whether the foundation of his claim based on the provision in question is a claim for breach of contract, by reason of a term being implied into his contract of employment by virtue of that provision, or, alternatively, is a claim for breach of statutory duty was left up in the air.

Thirdly, to the extent that he acknowledged that Mr. Mamba has a stateable case that his claim for breach of contract is within s. 3(d), counsel for the defendants expressly reserved his position on the entitlement of the defendants to plead reliance on the Statute of Limitations to any amendment allowed to the statement of claim, in addition to pleading reliance on the Act of 2003. Therefore, the probability is that an issue as to whether, or to what extent, Mr. Mamba's continuing claims are statute- barred will have to be tried at some stage in the proceedings.

In the light of the manner in which the respective positions of the parties changed at the hearing and the insufficiency of the analysis of the precise nature of Mr. Mamba's claims and the proper construction of para. (a) of s. 3, it would be inappropriate at this juncture to determine which of the claims of Mr. Mamba in these proceedings fall outside para. (a) of s. 3 of the Act of 2003. To the extent to which those matters cannot be agreed between the parties, I propose that they should be dealt with on the motion to amend the statement of claim. However, given the manner in which the real issue as to the application of the Act of 2003 was teased out at the hearing, I would suggest that the parties endeavour to reach agreement on the amendment of the statement of claim and the

defence.

Insofar as is necessary, I will hear further submissions of the parties as to how the matter should progress from here.