

THE HIGH COURT

2004 9182 P

Linda Sherry

Plaintiff

And

Primark Limited t/a Penneys

And

Grosvenor Cleaning Services Limited

Defendants

Judgment of O'Neill J. delivered on the 19th day of March 2010

1. Factual Background

1.1 The plaintiff was an employee of the first named defendant. She alleges that on the 5th January, 2004, whilst at work in its Mary Street department store in Dublin, she slipped and fell on descending a wet staircase, thereby sustaining personal injuries, loss and damage. A plenary summons was issued by her on the 31st May, 2004, against the first named defendant only.

1.2 The Personal Injuries Assessment Board Act 2003 ("the Act of 2003") came into force on the 1st June, 2004, pursuant to the Personal Injuries Assessment Board Act 2003 (Commencement) (No. 2) Order 2004 (S.I. No. 252 of 2004).

1.3 The first named defendant entered an appearance on the 28th October, 2005. A statement of claim was delivered on the 10th May, 2006. A defence was delivered by the first named defendant on the 17th August, 2006, which, at para. 8, sought to attribute blame for the plaintiff's accident to the second named defendant. Accordingly, on the same date, the first named defendant issued a notice of motion seeking liberty to issue and serve a third party notice on the second named defendant.

1.4 At the hearing of that motion, on the 23rd October, 2006, the plaintiff applied to join the second named defendant as a co-defendant in the action. An order was made by this Court (De Valera J.) joining the second named defendant as a co-defendant on that date.

1.5 The time for issuing an amended plenary summons was extended by order of this Court (McKechie J.) on the 25th June, 2007. An amended plenary summons and statement of claim were served on the second named defendant on the 27th July, 2007.

1.6 The plaintiff submitted an application to the Personal Injuries Assessment Board ("PIAB") in respect of the second named defendant on the 28th January, 2008. An authorisation to bring proceedings in respect of the claim was issued by PIAB on the 7th February, 2008, pursuant to s.17 of the Act of 2003.

1.7 On the 30th May, 2008, a notice claiming indemnity and/or contribution was served on the second named defendant by the first named defendant. On the 14th November, 2008, a notice of motion seeking judgment in default of appearance against the second named defendant was issued by the plaintiff. An order extending the time for entering an appearance was made, by consent, on the 15th December, 2008. A "without prejudice" or conditional appearance was entered on behalf of the second named defendant on the 12th December, 2008. Another notice of motion seeking judgment in default of defence against the second named defendant was issued on the 27th February, 2009. That is the motion for determination before this Court .

1.8 The second named defendant submits that the plaintiff's proceedings against it are not properly before this Court as the plaintiff failed to obtain an authorisation from PIAB under the Act of 2003 in advance of bringing proceedings against it. It relies on s.12(1) of the Act of 2003 in this regard. The plaintiff rejects this proposition and also contends that s.6(1) of the Act of 2003 is applicable in any event. It was agreed by the parties that proceedings were commenced against the second named defendant on the 23rd October, 2006, in accordance with the terms of O.15 r.13 of the Rules of the Superior Courts 1986.

2. The Law

2.1 Section 12(1) of the Act of 2003 states:-

"12.—(1) 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 14, 17, 32 or 36, rules under section 46 (3) or section 49 and subject to those sections or rules, no proceedings may be brought in respect of that claim."

2.2 Section 6 of the Act of 2003 states:-

"6.—(1) Nothing in this Act affects proceedings brought before the commencement of this section."

2.3 Section 10[(b)] of the Act of 2003 states:-

"10. – This Chapter

(b) prohibits the bringing of proceedings in respect of such a claim unless specified conditions are satisfied."

2.4 Section 4(1) of the Act of 2003 defined proceedings as "*proceedings in court*". That section was amended, however, by s.32(1) of the Civil Liability and Courts Act 2004 ("the Act of 2004"). It states:-

"32.—(1) For the avoidance of doubt, the reference in the definition of 'proceedings' in section 4(1) of the Act of 2003 to 'proceedings in court' includes, and shall be deemed to have always included, a reference to—

(a) proceedings by way of a counterclaim, and

(b) proceedings by way of the service of a third party notice (other than a third party notice claiming only an indemnity or a contribution)."

2.5 Order 15 rule 13 of the Rules of the Superior Courts 1986 states:-

"13. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."

2.6 Section 3([1]) of the Statute of Limitations ([Amendment]) Act 1991 is as follows:-

"3.—(1) An action, other than one to which section 6 of this Act applies, claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty ... shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

3. The Issues

3.1 The first issue to be determined is whether s.12(1) of the Act of 2003 is a jurisdictional or a procedural provision.

3.2 The second issue is whether the joining of a co-defendant in existing proceedings constitutes the "*bringing of proceedings*" for the purposes of ss.12([1]) and s.6([1] of the Act of 2003)..

4. Counsels' Submissions

4.1 Mr. Buttanshaw B.L., for the applicant, submitted that the joining of an additional defendant in existing proceedings does not constitute the "*bringing of proceedings*" by a plaintiff against an additional defendant and is not, as a result, affected by s.12(1) of the Act of 2003. In his submission that section was clearly procedural, rather than jurisdictional, in that, the provisions of the Act of 2003 do not confer upon the High Court a jurisdiction to entertain and to determine personal injuries actions in certain circumstances but rather place limitations on a party's right to pursue such actions. The jurisdiction of the High Court to hear such actions was a pre-existing one, he argued. He submitted that the Act of 2003 is designed to regulate the exercise of that jurisdiction and was procedural in nature and compliance with it's provision was not a condition precedent to the invocation of the Court's jurisdiction. He contrasted s.12(1) of the Act of 2003 with pieces of legislation conferring jurisdiction on the High Court, such as s.117 of the Succession Act 1965 and s.9 of the Civil Liability Act 1961.

4.2 Mr. Buttanshaw drew an analogy between s.12(1) of the Act of 2003 and s.3(1) of the Statute of Limitations (Amendment) Act 1991, in that, these sections permitted the raising of a procedural defence in due course. He argued that those sections did not deprive a plaintiff of the entitlement to bring proceedings but as matter of procedure enabled a defendant to plead by way of defence either a limitation period or in this case, the alleged failure to obtain an authorisation from PIAB.

4.3 The second named defendant had been joined as a defendant to the instant proceedings by an order of the High Court and, in his submission, it was not open to the second named defendant to assert that it was not properly before this Court in circumstances where that order had not been appealed or an application made to set it aside. He observed

that even if the second named defendant was correct it would not be released from proceedings as an indemnity notice had been served and s.32(1) of the Act of 2004 did not require an authorisation to be obtained in advance of proceedings commenced by service of a third party notice for a claim for indemnity or contribution. Another feature of s.32(1) of the Act of 2004, he contended, was that it did not deal with the situation where a defendant is added to an existing action and this supported the view that the joining of a defendant did not constitute the "*bringing of proceedings*" for the purposes of the Act. This was so, in his submission, as under O.15 r.13 of the Rules of the Superior Courts 1986 a court could decide of its own motion that a defendant could be joined without any action on the part of the plaintiff, in contrast to a claim by way of counterclaim or third party notice.

4.4 He further contended that s.6(1) of the Act of 2003 permitted a plaintiff in proceedings that had been commenced prior to the coming into force of the Act of 2003 to join additional defendants in those proceedings without having to make an application to PIAB pursuant to s.11 of the Act of 2003 or to obtain an authorisation. He relied on a decision of Johnson P., the only record of which was contained in a letter from the solicitors involved in the case, published in the *Law Society Gazette* of April 2006, to the effect that s.6(1) of the Act of 2003 permitted a defendant to be joined to proceedings which had been commenced before the coming into force of the Act of 2003 without an authorisation.

4.5 Ms. Moorehead S.C., for the second named defendant, characterised s.12(1) of the Act of 2003 as a jurisdictional provision. She submitted that the foundation stone of personal injuries litigation since the Act of 2003 is the granting of an authorisation and that s.12(1) of the Act of 2003 contained a statutory prohibition on bringing civil proceedings, subject to certain statutory exceptions, unless a plaintiff had gone through PIAB or had been issued with an authorisation. She observed that no distinction was made in the Act of 2003 between original and added defendants. The fact that a counterclaim and a third party notice were treated differently, as per s.32(1) of the Act of 2004, was understandable, in her submission, as a defendant or co-defendant were in the first line in terms of liability.

4.6 As to the parallel drawn by the plaintiff with the s.3(1) of the Statute of Limitations (Amendment) Act 1991 she submitted that section only stopped or prevented an action proceeding in certain circumstances and it did not entitle the High Court to refuse to permit the institution of proceedings. Section 12(1) of the Act of 2003, in her submission, had the effect of not permitting the High Court to allow the institution of proceedings without an authorisation.

4.7 Ms. Moorehead pointed out that the proceedings against her client were not brought before the commencement of s.6(1) of the Act of 2003. As a consequence, she submitted, that section could not apply.

5. Decision

5.1 This motion necessitates a consideration of the status of a personal injury action commenced without an authorisation from PIAB having been obtained, i.e. whether a court has jurisdiction to entertain such a case.

5.2 A starting point for this examination must be to ascertain the purpose of the Act of 2003. The preamble describes the purpose of the Act of 2003 as follows:-

"AN ACT TO ENABLE, IN CERTAIN SITUATIONS, THE MAKING OF ASSESSMENTS, WITHOUT THE NEED FOR LEGAL PROCEEDINGS TO BE BROUGHT IN THAT BEHALF, OF COMPENSATION FOR PERSONAL INJURIES (OR BOTH SUCH INJURIES AND PROPERTY DAMAGE), IN THOSE SITUATIONS TO PROHIBIT, IN THE INTERESTS OF THE COMMON GOOD, THE BRINGING OF LEGAL PROCEEDINGS UNLESS ANY OF THE PARTIES CONCERNED DECIDES NOT TO ACCEPT THE PARTICULAR ASSESSMENT OR CERTAIN OTHER CIRCUMSTANCES APPLY, TO PROVIDE FOR THE ENFORCEMENT OF SUCH AN ASSESSMENT, FOR THOSE PURPOSES TO ESTABLISH A BODY TO BE KNOWN AS THE PERSONAL INJURIES ASSESSMENT BOARD AND TO DEFINE ITS FUNCTIONS AND TO PROVIDE FOR RELATED MATTERS."

5.3 Section 3 of the Act of 2003 sets out the types of civil actions to which the Act applies. It includes "*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*", as arises here. The only actions that are expressly excluded, by virtue of s. 3(d), are medical negligence actions. Part 2 of the Act of 2003 sets out the mandatory assessment procedures in respect of those actions to which the Act of 2003 applies. Section 10 provides that chapter 1 of the Act specifies the procedures that must be employed by "*every claimant who wishes to recover damages in respect of a relevant claim*" and by "*the Board in consequence of those proceedings having been employed by such a claimant*". It further states that the same chapter "prohibits the bringing of proceedings in respect of such a claim unless specified conditions are satisfied." Section 11 of the Act outlines the format of the application process to PIAB. Section 12 prevents proceedings being brought to court unless certain conditions are satisfied, that is, the making of an application under s.11 and an authorisation having been granted. Section 17 details the circumstances where PIAB may decide not to make an assessment of damages or can discontinue the making of an assessment and must issue an authorisation to issue court proceedings. Section 54 stipulates that a principal function of PIAB shall be "*to arrange for the making, in accordance with this Act, of assessments of relevant claims the subject of applications to it under section 11*".

5.43 The Act of 2003, therefore, sets out to regulate the processing of complaints of personal injuries resulting from the torts referred to in the Act. If a claim is one to which the Act applies, then it is subject to processing under the mandatory procedural framework contained in that Act. This will result in the assessment of damages or the issuing of an authorisation to bring court proceedings. Section 12(1) stipulates that an application first be submitted to PIAB for an authorisation from PIAB before court proceedings may be brought. It contains a statutory prohibition on actions being instituted at all unless and until an application is made to PIAB and an authorisation issued; only then can court proceedings be brought. Thus, there are two statutory condition precedents, which are inextricably linked, which must be fulfilled before an action can be commenced in Court. There is a marked difference between the language used in s.12([1]) and that employed in s.3([1]) of the Act of 1991. Furthermore s.10([b] of the Act of 2003] expressly prohibits the bringing of proceedings unless specified condition are satisfied, i.e. those set out in s.12([1]). That, combined with the purpose of the Act, as gleaned from the preamble and the general scheme of the Act, as revealed from the foregoing summary of some of its relevant provisions, strongly suggests that the intention of the Oireachtas was to prevent or prohibit the commencement of court proceedings until the procedures set out in the Act of 2003 were followed leading either to an assessment of damages or the issuance of an authorisation. Thus, in my view, the correct conclusion is that the s.12([1]) operates as a jurisdictional rather than a procedural provision, so that a court does not have a jurisdiction to

permit the commencement of proceedings in respect of a relevant claim, until the foregoing procedures under the Act of 2003 have been exhausted. If it were permissible to commence an action in respect of a relevant claim, leaving the issue of the authorisation as a matter to be raised in defence, it is safe to say that the entire scheme of the Act of 2003 would be hopelessly undermined. Looked at in this way, the view that s.12([1]) is jurisdictional rather than procedural, is greatly reinforced.

6. The “bringing of proceedings”

6.1 Does the joining of a co-defendant in existing proceedings constitute the “*bringing of proceedings*” by a plaintiff against an additional defendant? Does s.6(1) of the Act of 2003 simply apply to the original proceedings, brought in this case in 2004? The plaintiff submits that s.6(1) applies to all court proceedings including orders adding co-defendants after the date of commencement of the Act of 2003. An argument against this is that a defendant brought in by order of the court would not have the benefit of the claim being assessed by P.I.A.B. and that unfairness may result.

6.2 Whether s.6(1) applies comes down to the meaning of the term “*proceedings*”. As noted above, s.4(1) of the Act of 2003 defined it as “*proceedings in court*” and s.32(1) of the Act of 2004 expanded this definition to expressly include proceedings brought by way of counterclaim or by third party notice. Although s.32(1) of the Act of 2004 did not expressly refer to the joining of additional defendants under O.15 r.13 of the Rules of the Superior Courts 1986, I am satisfied that the concept “*proceedings*”, for the purposes of the Act of 2003, does include the joining of additional defendants on an application by a Plaintiff. The absence of a reference to the joining of additional defendants in s.32(1) of the Act of 2004, in my view, suggests that it was the intention of the Oireachtas in formulating the definition of “*proceedings*” in s.4(1) of the Act of 2003, to include the joining of additional defendants under O.15 r. 13 in that definition. I say this because the express reference in s.32(1) of the Act of 2004 to counterclaims and third party procedure, these being responses from a defendant to a claim of a plaintiff in respect of which an authorisation would have been given by PIAB, indicates that it may have been perceived that these were not covered by the general obligation to apply to PIAB in the first instance. In contrast, an application by a Plaintiff to join an additional defendant could have been seen as no different to the original claim by the Plaintiff against the original defendant or defendants.

6.3 Thus, in my judgement, applications to join new defendants to existing proceedings were always contemplated and included in the definition in s.4(1) of the Act of 2003, with one exception. A necessary exception from the definition would occur where a Court of its own motion decided to join a new defendant. This arises because of the necessity to avoid a constitutionally impermissible interference in the administration of justice which would result if a judge were prevented from joining an additional defendant whom the Court had determined should be joined in order to do justice in the case. This is wholly different to an application by a Plaintiff to join a new defendant. In the latter case the effect of ss.10([b]) and s.12([1]) of the Act of 2003 is to prohibit such a plaintiff from invoking the jurisdiction of the Court, if an authorisation has not been obtained for a relevant claim. Thus, there is no interference with the operation of the jurisdiction of the Court, the Plaintiff is merely prohibited from asking the Court to exercise its jurisdiction. Similarly, s.6(1) of the Act of 2003 is there to express in clear statutory form the separation of powers principle as it must apply to proceedings in being before the Act of 2003 came into force.

6.4 The Court itself did not move to join the second named defendant in this case. The application was made by the Plaintiff, albeit on the application by the first named defendant to join the second named defendant as a third party. As this was done after the coming into force of the Act of 2003, in my judgement, the Plaintiff was not entitled to make that application and the Court did not have jurisdiction to entertain it, without the Plaintiff first obtaining an authorisation from PIAB. The subsequent issuance of an authorisation from PIAB was ineffective to cure this jurisdictional deficit.

7. Conclusion

7.1 It necessarily follows that I must refuse the Plaintiff’s application for judgment in default of defence and indeed it would seem necessary to set aside the order joining the second named defendant as a co-defendant in the proceedings.