Neutral Citation [2016] IEHC 413

THE HIGH COURT

[2012 No. 7160 P.]

BETWEEN

MICHAEL DUGGAN

PLAINTIFF

AND

TOM MCDONALD

BRIAN STARKEN

AND EAMONN DEVLIN

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 19th day of July, 2016.

1. By this application the first named defendant seeks an order pursuant to Order 28, rule 1 of the Rules of the Superior Courts granting the first named defendant leave to deliver an amended defence in the within proceedings.

2. In these proceedings, the plaintiff claims damages for, *inter alia*, assault (including sexual assault), battery, trespass to the person, false imprisonment, infliction of emotional suffering, physical and/or sexual abuse arising out of events that are alleged to have occurred while the plaintiff, who was then aged 12, was on a trip to Lourdes which was organised by the religious congregation for which the third named defendant is the legal nominee. The assaults complained of are alleged to have been carried out by the first named defendant who was then a member of the religious organisation of which the second named defendant is the legal nominee.

3. The proceedings were commenced by way of plenary summons which issued on 12th July, 2012. A statement of claim was delivered on 20th June, 2013. A defence was delivered on behalf of the first named defendant on 14th January, 2014.

4. On 31st July 2014, the Supreme Court delivered a decision in the case of *Gwen Clarke v. John O'Gorman* [2014] IESC 72 in which the Supreme Court determined that a claim for personal injuries alleged to have been suffered as a result of an assault (also in that case sexual assault) is a claim for personal injuries, and is, consequently, a civil action captured by the Personal Injuries Assessment Board Act, 2003.

5. The Supreme Court further determined in that case that section 12 of the Act of 2003, which states that no proceedings shall be brought in respect of any claim (to which the Act of 2003 applies) unless and until an application is made to what was then known as the Personal Injuries Assessment Board (now simply the "Injuries Board") is procedural in nature only, and does not operate as a jurisdictional bar to the issue of proceedings. Accordingly, a defendant wishing to raise the issue must do so by way of pleading, and not by way of submission to the Court that it lacks jurisdiction to hear the claim. No such plea was made in the defence filed by the first named defendant and by this application the first named defendant seeks the leave of the Court to deliver a defence incorporating the following plea:

> *"Further, and in the alternative, and without prejudice to the following, the plaintiff has not made application to the Injuries Board within the meaning of s. 11 and 12 of the Personal Injuries Board Act, 2003 (as amended). The Injuries Board has not issued authorisation to the plaintiff in relation to any incident, claim or injury. The action for damages arising from the alleged incident, claim or injury (which is denied) is a "civil action" within the meaning of the Personal Injuries Assessment Board Act, 2003 (as amended). In consequence thereof the plaintiff is prohibited from bringing or maintaining in relation to any incident, claim or injury. In the premises the first named defendant hereby contends that the plaintiff is not entitled to the reliefs claimed or to any relief as against the first named defendant."*

6. The defence as already delivered on the part of the first named defendant contains an absolute denial on the part of the first named defendant of each and every allegation made against him. In addition, the first named defendant has pleaded that the claim is statute barred by virtue of the provisions of the Statute of Limitations Act, 1957 and/or that the first named defendant is prejudiced in meeting the plaintiff's claim by reason of the inordinate and inexcusable delay on the part of the plaintiff in bringing forward these proceedings.

7. This application is grounded upon the affidavit of Dara Robinson, Solicitor for the first named defendant who avers that he is advised by counsel that the failure to make the plea the subject of this application in the original defence was an omission and *bona fide* mistake, which became apparent from the decision of the Supreme Court in *Clarke*. It is submitted on the part of the first named defendant that it is entitled to amend its defence at any time up to and including the trial of the proceedings herein unless the plaintiff is likely to suffer a prejudice which cannot be remedied either by an appropriate costs order, another order or other directions from this Court. In this regard, the first named defendant relies upon the decision of the Supreme Court in the case of *Walter Croke v. Waterford Crystal Ltd. & Anor*. [2004] IESC 97 and *Woori Bank and Hanvitt LSP Finance Ltd. KDB (Ireland) Ltd.* [2006] IEHC 156.

8. In both of these cases, the kind of prejudice that might result in a refusal of an application to amend pleadings was considered. These cases make it clear that to deny a party an application to amend pleadings on grounds of prejudice the prejudice suffered by the party opposing the application must not be a prejudice stemming from the amendment itself. It is submitted on behalf of the first named defendant that any prejudice which the plaintiff may suffer is procedural in nature only and that this application is no different to an application to amend a defence to plead to the Statute of Limitations, which, it is submitted, is well established will be allowed upon application to the Court.

9. The first named defendant argues that, insofar as the plaintiff may argue in opposition to this motion that the plaintiff will suffer a substantial delay in progressing these proceedings if he is obliged to submit an application to the Injuries Board, obtain an

authorisation for the issue of proceedings and thereafter recommence proceedings, the plaintiff has himself delayed the progression of these proceedings in circumstances where the first named defendant has in fact been calling upon the plaintiff to serve a notice of trial since 2015, and the plaintiff has only recently done so.

10. An identical application to that now brought by the first named defendant was previously brought on behalf of the third named defendant and was heard by Cross J. who declined to grant that defendant an order permitting him to amend his defence. There is no written record of that decision, but the first named defendant submits that the circumstances of this application are materially different because a defence was not filed on behalf of the third named defendant until 23rd June 2015, almost 11 months after the decision of the Supreme Court in *Clarke*.

11. For his part, the plaintiff relies upon the decision of Cross J. to deny to the third named defendant the same relief now sought in this application by the first named defendant. It is submitted that the first named defendant has delayed too long in bringing forward this application (it was filed on 31st May, 2016) in circumstances where the decision in *Clarke* was delivered on 31st July, 2014. It is submitted that the plaintiff will be significantly prejudiced if the first named defendant is now allowed to amend his defence in circumstances where the case is now ready for hearing, and the effect of such a plea would be to require the plaintiff to make an application to the Injuries Board, obtain an authorisation and thereafter issue proceedings afresh; it is submitted that this is likely to cause a further delay of not less than two years and will increase the risk to the plaintiff that the first named defendant will succeed with his plea based upon the Statute of Limitations/delay. Such an increase in the risk of success of such a defence is, it is submitted, a matter which can in no way be compensated to the plaintiff. While in the ordinary course of events, the prejudice that flows to a plaintiff from permitting a defendant to plead the Statute of Limitations is not of such a kind as to deny a defendant to amend his defence, to allow the first named defendant to amend his defence in the way that he now requests will have the effect of creating a risk for the plaintiff that is of a different character, because it will have the effect of moving forward significantly the date of issue of the plaintiff's proceedings, putting the plaintiff at a much greater risk that a plea that the claim is statute barred will succeed. Counsel for the plaintiff submits that the authorities in relation to applications of this kind make it clear that applications to amend a defence will be allowed where a defendant wishes to make an amendment in order to ensure that all matters at issue between the parties are placed before the Court for determination. It is further submitted that such a defence has already been filed on behalf of the first named defendant and that what he now wishes to do is make an amendment that is procedural in nature and that does not relate to the matters of fact in dispute between the parties, but which will, if permitted, significantly prejudice the plaintiff.

12. Counsel for the plaintiff also relies on the decision already handed down by Cross J. on the application of the third named defendant. He submits that even though the third named defendant filed his defence 11 months after the delivery of the Supreme Court decision in *Clarke* that apparent difference in circumstance to this application (which was highlighted by counsel for the first named defendant) cannot be considered to be a substantive difference in circumstances where this application has been brought almost 2 years after the delivery by the Supreme Court of its decision in *Clarke*.

Decision

13. This application was brought some twenty-two months after the Supreme Court handed down its decision in *Clarke*. That aside, the pleading which the first named defendant now wishes to advance could have been made even without the benefit of the Supreme Court decision in *Clarke*, although it must be acknowledged that there was some uncertainty as to whether such claims were subject to the act of 2003 before the decision in *Clarke*. If the amendment to the defence now sought is allowed, it seems inevitable that the plaintiff will have to withdraw the existing proceedings and commence a claim before the Injuries Board, and will not be able to bring forward further proceedings pending the issue of an authorisation from that Board.

14. The first named defendant has already filed a defence pleading that the plaintiff's claim is statute barred and no doubt will do so again in the event that new proceedings are necessitated, and would certainly be entitled to do so. That being the case, it seems virtually inevitable that in those circumstances the plaintiff's claim would become statute barred by virtue of the amended plea alone, because the issue date of the proceedings, which issued in July 2012, will be moved forward by in excess of four years. While in one sense it may be argued that this is a prejudice stemming from the amendment itself (which ordinarily would not deny an applicant the right to amend his pleadings) in another critical sense, it is not; the amendment, if allowed, would have the effect of requiring the issue of new proceedings on a much later date, in circumstances where the delay on the part of the applicant in bringing this application is in turn a significant factor in the time lost in the issue of new proceedings. It is difficult to see therefore, how the effect of the amendment to the defence that the first named defendant now asks this Court to permit could not be regarded as being anything other than highly prejudicial to the plaintiff's case, in a way that cannot be remedied by any other order of the Court. Accordingly, I dismiss the application.