[2020] IEHC 251

THE HIGH COURT

[2019 No. 184 MCA]

BETWEEN

MUHAMMAD TAYYAD

APPLICANT

AND

RILTA ENVIRONMENTAL LIMITED

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 1st day of April, 2020

1. By virtue of the provisions of the Personal Injuries Assessment Board Act 2003, ("the *Act*"), it is necessary to make application to the Injuries Board prior to the institution of proceedings in certain actions where damages are claimed for personal injuries. Section 12 of the Act empowers the court to make an order, *inter alia*, for the preservation of evidence in advance of such proceedings.

2. The applicant alleges that he was involved in an accident at work on his employer/respondent's premises on 7th January, 2019. It occurred while he was ascending a ladder/climbing structure and from where he was dropping a hosepipe to ground level. He alleges that he lost his footing and fell, in consequence of which he suffered injuries.

3. On 24th February, 2019, pursuant to s. 11 of the Act application was made on his behalf to the Injuries Board in the prescribed form (Form A). Under the heading "*Brief description of how the accident occurred*" the following was inserted:- "*Claimant tripped on a wet surface while ascending a ladder in his workplace.*"

4. The applicant now seeks an order pursuant to s. 12 of the Act requiring the respondent to preserve certain items of evidence ("*the items of evidence*") in advance of the issuing of proceedings. These are as follows:

    a. The incident report form compiled in relation to the accident giving rise to the injuries sustained by him on 7th January, 2019;

    b. CCTV footage of the incident;

    c. The cleaning roster for the respondent's premises from the 6th January, 2019 to the 8th January, 2019.

5. The application is grounded on the affidavit of Ms. Georgina Robinson, solicitor for the applicant, and sworn by her on the 13th May, 2019. She contends that the items of evidence should be preserved so that they can be made available to the applicant in the conduct of his proceedings. A letter of claim was sent to the respondent on 30th January, 2019, in which it was alleged that the accident occurred as a result of the company's failure to maintain the climbing structure in a safe condition. Ms. Robinson also advised that the hazard in question was of a slippery, oily nature. Having called upon the company to admit liability she cautioned that, if necessary, proceedings would be

instituted. In the event that liability was not admitted by way of open letter within ten days from the date of her letter, Ms. Robinson required the respondent company to preserve the items of evidence. This motion was threatened in the event that her letter was not replied to. A reply was not received.

6. Ms. Robinson wrote a second letter on the 12th April, 2019, again requiring the respondent to preserve the items of evidence. A reply was not received. She wrote on the 28th May, 2019 advising that in the absence of a response, an application pursuant to s. 12 of the Act would issue. Again, a reply was not forthcoming. This application duly issued on 30th May, 2019.

7. Although the respondent has not filed an affidavit in response, the court was informed that in a letter sent after the application was brought, solicitors representing the respondent informed Ms. Robinson that CCTV footage is not available.

Section 12

8. Section 12 provides, *inter alia*, as follows:-

> *"(2) Nothing in subsection (1) or any other provision of this Act is to be read as affecting the right of a claimant or a respondent to invoke, subject to and in accordance with this section, the jurisdiction of any court to make an order referred to in subsection (3) that could be made if proceedings, but for subsection (1), were to be brought or were about to be brought in respect of the relevant claim and the court shall, accordingly, have jurisdiction, subject to and in accordance with this section, to make such an order despite the enactment of subsection (1).*
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> *(3) The order mentioned in subsection (2) is any order of an interlocutory kind or power to make which is provided for by rules of court or otherwise inherent in the court's general jurisdiction in civil proceedings and, in particular, an order restraining the transfer of assets to a place outside the State for the purpose of defeating the rights of another arising out of the relevant claim or the dissipation of assets for that purpose and an order requiring evidence to be preserved.*
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> *(4) In relation to the invocation of the foregoing jurisdiction of the court the following provisions have effect—*
>
> *(a) the application for the order concerned shall be made by motion on notice or, as appropriate, ex parte motion,*
>
> *(b) without prejudice to the principles or rules that govern generally the exercise of that jurisdiction, the court shall not exercise that jurisdiction to make any order (not being an order relating to the transfer or dissipation of assets) unless it is satisfied that—*
>
> *(i) the making of the application therefor is bona fide and for the sole purpose of ensuring the fair and just disposition of any proceedings*

that could be brought in the event of the issue of an authorisation referred to in subsection (1), and

(ii) the making of the order is required so as to enable the fair and just disposition of those proceedings,

and the court shall ensure that the manner in which any such application is dealt with does not prejudice any procedures which are being or may be followed under this Act in relation to the relevant claim,

(c) on the hearing of any such application the court shall have power to grant the relief sought or, subject to this section, make any other interlocutory order that is appropriate to the application or may adjourn, from time to time, the hearing of the application or dismiss the application and, in any of the foregoing cases, may make such order as to costs as it considers appropriate,

(d) the person making any such application shall be subject to the same duties as he or she would be subject to if the application were to be made in the course of proceedings brought in respect of the relevant claim and may (in addition to any undertaking he or she may be regarded as having given by operation of law) be required to give such undertakings as the court may specify in the circumstances,

(e) in the event of proceedings being brought in respect of the relevant claim pursuant to an authorisation referred to in subsection (1), any order made in exercise of the foregoing jurisdiction shall be deemed to be an order made in the course of those proceedings and the court may, accordingly, continue to exercise jurisdiction in respect of the order, and

(f) in the event of no proceedings being brought in respect of the relevant claim, the court may make such order as to the discharge of the order referred to in paragraph (e), to any other matters in consequence of the order so referred to and to the costs of the matter as is necessary or appropriate in the circumstances.

The applicant's submissions

9. Counsel for the applicant, Ms. Murphy B.L., submits that the jurisdiction of the court under s. 12 to order the preservation of evidence arises independently of and is not dependent on circumstances in which there is a risk of the transfer of assets to a place outside the State or where there is a concern about the dissipation of such assets. This is not seriously contested by the respondent.

10. Counsel refers, by way of analogy, to the principles applicable to the preservation of evidence in criminal proceedings, as discussed in *Braddish v. DPP and His Honour Judge Haugh* [2001] 3 I.R. 127:-

"The authorities establish that evidence relevant to guilt or innocence must so far as is necessary and practicable be kept until the conclusion of the trial. These authorities also apply to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence."

11. It is submitted that the applicant is doing no more than seeking the protection of the court to enable and ensure a fair trial of the issues between the parties in the event that it is necessary to institute proceedings and liability contested. A concern is expressed that the failure to preserve the items of evidence could fatally prejudice the position of the applicant.

12. It is submitted that the criteria outlined in s. 12(4)(b) are fulfilled. Regarding the first limb of the test, it is submitted that the repeated unanswered correspondence illustrates the *bona fide* nature of the application which is made to ensure the fair and just disposition of any potential proceedings. It is argued that the items of evidence are relevant, and in the event that liability is not admitted, it is highly likely that a court would order discovery of them in any future application.

13. It is submitted that the second part of the test is satisfied because, if proceedings are instituted, the items of evidence will be necessary to enable the fair and just disposition of the proceedings. If they are then unavailable to the applicant, he will be considerably disadvantaged in the presentation of his claim. It is also submitted that the applicant might be criticised for not taking steps to seek the preservation of such material, pending the processing of the claim.

14. Reliance is also placed on O. 50, r. 4 of the Rules of the Superior Courts, which provides:-

"4. The Court, upon the application of any party to a cause or matter, and upon such terms as may be just, may make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid may authorise any person to enter upon or into any land or building in the possession of any party to such cause or matter and for all or any of the purposes aforesaid may authorise any samples to be taken or any observations to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

15. It is contended that the items of evidence, in respect of which preservation is sought, are items "*as to which any question may arise therein*".

16. Regarding the third limb of the test, Ms. Murphy B.L. emphasises that the application is brought to preserve, not to inspect or discover. To make the orders sought would not place an undue burden on the respondent and there is no departure from the regular process such as, for example, requesting the respondent to take some step or action which is not expressly provided for by the Act.

The respondent's submissions

17. Counsel for the respondent, Mr. Kitson B.L., in resisting the application, stresses that there is currently no *lis* in existence between the parties.

18. A suggestion in written submissions, that the jurisdiction of the court to make a preservation order only arises in the context of an application for an order restraining the transfer of assets outside the State for the purposes of defeating the rights of another arising out of the claim, or the dissipation of those assets, was not advanced at hearing. It is accepted that the jurisdiction to make an order requiring evidence to be preserved is not dependent on those issues and it is accepted that the matters referred to in s. 12(3) should be read disjunctively. It is submitted, however, that the type of orders referred to in s. 12(3), and the principles applicable when such orders are sought, should inform the approach of the court to the exercise its jurisdiction under s. 12 of the Act, and that an approach which is no less restrictive should apply to an application made in advance of proceedings under s. 12 of the Act.

19. Reliance is placed on the decision of Ryan J. in *SoftCo v. DHL Information Services (Europe) S.R.O.* [2013] IEHC 623 as being illustrative of the restrictive type of approach which must equally apply on this application. The court there considered an application to permit the plaintiff to attend at the defendant's premises to conduct an audit of computer files and programmes. The application was made under O. 50, r. 4 before the matter was fully pleaded. Ryan J. observed at para. 13 of his judgment:-

> *"The plaintiff's case is that it needs inspection of the defendant's computers in order to draft the statement of claim. It is accepted that it is unusual to order inspection or other interlocutory procedure at this early stage of an action. Counsel for DHL, Mr. McDowell SC argues that it is wholly inappropriate to order any such procedure at this early stage. It is obvious that SoftCo would like to find out what happened to its software and what happened to the data stored in it and how HP managed to extract the data from the system but that does not mean that inspection is necessary in order to draft the statement of claim."*

20. Noting that inspection would not normally be ordered until pleadings are closed and that the right of a party to seek inspection or discovery is in no way dependent on the strength of the plaintiff's claim, Ryan J. accepted that, in principle, there should not be an order for inspection until it has been shown to be practically necessary and it will normally be difficult to show that until the pleadings have been closed. The plaintiff's argument give rise to a question of when a party is entitled to inspect in advance of setting out his claim "*in order to find out the true situation?".*

21. Ryan J. rejected the application. He accepted that there is no rule that a party is not entitled to examine another's property, records or computers before pleading its case and that there may be circumstances in which a person is entitled to inspect to see if his rights have been infringed but "*it is obvious that a significant element of necessity would have to be established*." He did not regard it as being necessary to order inspection at that time but accepted that if an application for inspection be made at a later stage of the

proceedings that the consideration of such application would be "*very different from the present request.*"

22. Ryan J. also noted that inspection, if ordered, would be impossible to police. The court would not be able to say when enough was enough, because it would not know just what was in dispute. He continued:-

> *"43 …. it would be a matter for the plaintiff to keep digging until it was satisfied it had got the evidence it needed; the defendant would not be able to stop the process because it would not know the terminus of the examination.*
>
> *44. The court would find it difficult if not impossible to circumscribe the compass of the inspection without conducting the very exercise that would happen in the course of the proceedings in the exchange of pleadings and particulars and in the process of discovery of documents."*

In conclusion, he decided that the answer was not '*no'* to an inspection but '*not yet*' to an application for inspection because the time was not ripe for that procedure.

23. Counsel for the respondent submits, by analogy, that given the high level of proof of necessity required in an application in which proceedings are in being, the standard should be no less where proceedings have not yet been instituted.

Discussion

24. It seems to me that the rules concerning the preservation of evidence in criminal matters, where the obligations of the parties are neither coterminous nor coextensive with those of parties to a civil action, are of minimal assistance in the interpretation of s. 12 of the Act. The type of application in *SoftCo* differs in many respects from an application under s. 12. The application was made following the institution of proceedings where authorisation was not required. The special jurisdiction conferred on the court by s. 12 of the Act did not arise for consideration. Nonetheless, counsel for the respondent submits that *SoftCo* concerned the application and interpretation of the provisions of O. 50, r. 4 which, given the provisions of s. 12(3) of the Act, are equally applicable on this application. Therefore, he submits that this court should adopt a no less rigorous approach than that in *SoftCo*; and that the approach of Ryan J. ought to inform the approach to be adopted in an application under s. 12 of the Act. He also submits that the principles applicable to applications for interlocutory orders, such as for inspection and discovery, must, *a fortiori*, apply in the context of an application made prior to the institution of proceedings.

25. In my view, there is much merit to this submission. It is clear from the provisions of s. 12(4) that the statutory power is framed in restrictive and negative terms and can only be exercised when the court is satisfied of the existence of the criteria outlined in s. 12(4)(b)(i) and (ii). Therefore, I believe that the power of the Court under s. 12 of the Act should be construed strictly not least because a respondent to such an application has not yet become a party to litigation and thus his or her position ought not be any less favourable than that of a defendant in extant proceedings.

26. There are a number of factors which ought to be considered. The order sought is confined to the preservation of evidence. It may be that no great burden will be placed on the respondent by the making of the order - no evidence of such burden has been adduced. The preservation of such evidence may also aid the respondent as much as the applicant. Nevertheless, in balancing the rights of the parties, it must be borne in mind that proceedings may never be instituted against the respondent, albeit the Act provides for the mechanism of discharge of such an order in s. 12(4)(f).

27. The parties are to some extent *ad idem* regarding the interpretation of certain expressions and words in s. 12(3). The applicant seeks the *preservation of evidence*, something which is expressly provided for in subs. (3). It is not therefore necessary to consider whether the words "*in particular*" in that subsection implies any further restriction or extension.

28. The exercise by the court of its jurisdiction under s. 12(3) on an application for the preservation of evidence is circumscribed by the provisions of s. 12(4)(b) which prohibit the court from making an order unless it is satisfied:

    1. That the application is *bona fide* and for the sole purposes of ensuring the fair and just disposition of any proceedings that could be brought in the event of the issue of an authorisation; and

    2. The making of the order is required so as to enable the fair and just disposition of the proceedings.

    The court is also obliged to ensure that the manner in which any such application is dealt with "*does not prejudice any procedures which are being or may be followed*" under the Act in relation to the claim.

29. In this case it is clear that the only procedure activated is the application to the Injuries Board under s. 11 of the Act. I do not see how this application for preservation of evidence can be said to prejudice the application under s. 11. None has been identified.

30. The court is also satisfied on the basis of the evidence and the contents of the affidavit of Ms. Robinson and the exhibits thereto that the application is *bona fide*. Further, in my view, it cannot be said that the application is for any purpose other than ensuring a fair and just disposition of the proceedings. No other purpose is suggested or identified. In arriving at this conclusion, I have taken into account the failure of the respondent to reply to not one, but three letters, in advance of this application.

31. The applicant is an employee of the respondent who claims to have suffered an injury at work. The items referred to in the notice of motion, in my view, are potentially relevant evidence in a case such as this.

32. The court is disposed to make an order in terms of para. 1 of the notice of motion, the incident report form, and para. 2 the CCTV footage (although I note that the respondent states that none such is available - if that be the case then there is nothing to preserve).

With regard to para. 3 however, it appears to me that requiring the respondent to preserve the cleaning rosters for its entire premises for three days is unnecessarily broad and is not required for the fair and just disposition of any proceedings that may be instituted. An order for preservation of evidence made under s. 12 of the Act cannot be of greater extent than that which the court has jurisdiction to make within extant proceedings under the provisions of O. 50, r. 4 where, fundamentally, the court must be satisfied that what is sought is relevant, necessary and proportionate. In my view, this same general guiding principle applies with equal if not greater force to an application under s. 12 of the Act.

33. Counsel for the applicant invited the court to consider making an order for the preservation of the cleaning roster on a more restrictive basis and it appears to me that the balance of justice requires that this be done. Making an order for the preservation of cleaning rosters in connection with the ladder/climbing structure and the area of ground in its immediate vicinity and/or within the room within which the ladder/climbing structure is situate, ought to meet the justice of the situation.

Summary and Conclusion

34. I am satisfied that the court has jurisdiction to make the order sought, that the application is *bona fide* and for the sole purpose of ensuring the fair and just disposition of any proceedings that could be brought following the issue of an authorisation under s. 12(1) of the Act. Further, I am also of the view that the making of the order does not prejudice any procedures which are in being or may be followed under the Act in relation to any claim which may be pursued.

35. The court therefore, makes the following orders:

    1. An order pursuant to s. 12 of the Personal Injuries Assessment Board Act, 2003 requiring the respondent to preserve any incident report form compiled in relation to the injuries sustained by the plaintiff on the 7th January, 2019.

    2. An order pursuant to s. 12 of the Personal Injuries Assessment Board Act, 2003 requiring the respondent to preserve any and all CCTV footage of the incident on the 7th January, 2019.

    3. An order pursuant to s. 12 of the Personal Injuries Assessment Board Act, 2003, requiring the respondent to preserve the cleaning roster in respect of the ladder/climbing structure on which the plaintiff was working at the time of his fall, and the area within the immediate vicinity of the ladder/climbing structure and the room in which the climbing structure/ladder is situate, for the period requested.

36. The parties shall have liberty to apply.