[2020] IEHC 296

THE HIGH COURT

[Record No. 2009/11641 P.]

BETWEEN

MARY KATE SKEFFINGTON

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 19th day of May, 2020

1. In these proceedings, the plaintiff seeks a declaration that s. 51B of the Personal Injuries Assessment Board Act, 2003, as amended (the "2003 Act") is unconstitutional and/or incompatible with the European Convention on Human Rights.

2. The background facts and circumstances of this matter are relatively uncontroversial and, indeed, most pertinent facts were agreed. Accordingly, the matter proceeded before the court in the absence of any oral evidence.

Background

3. The plaintiff was involved in a road traffic accident on or about the 24th day of November, 2007.

4. By open letter dated 17th April 2008, AXA Insurance Ltd on behalf of the defendant accepted full liability.

5. In accordance with the standard statutory requirements within the 2003 Act, which are recited below, on the 15th day of May, 2008, the Plaintiff made an application, pursuant to s.11 of the 2003 Act. On the 22nd October 2008 a schedule of special damages was also sent to the Personal Injuries Assessment Board '(PIAB') by Callan Tansey Solicitors, who were and remain the plaintiff's solicitors.

6. On the 30th April, 2009, in a letter to the plaintiff's solicitors, PIAB confirmed their assessment of the plaintiff as follows:-

   (a) an assessment in the sum of €19,160; and

   (b) a further sum of €350 which it stated had been allowed towards the fees and expenses "reasonably and necessarily incurred by Ms. Skeffington in making the application to the Board".

   The letter also states:-

   > "If both Ms. Skeffington and the respondent agree to accept the assessment, we will issue an "order to pay". This "order to pay" has the same status as a court decree."

7. The formal notice issued on 30th April and states as follows:-

"If you accept the assessment and if the assessment is accepted or deemed to be accepted by the respondent(s),

The respondent(s) shall be obliged to pay to you, in addition to the amount of the assessment, an amount of €350 being the fees or expenses that, in the opinion of the Board have been reasonably and necessarily incurred by you in complying with the provisions of the Act or any rules made thereunder in relation to the claim."

8. By letter dated 15th May, 2009, the plaintiff's solicitors enclosed a standard rejection form signed by the plaintiff and seeking the authorisation to enable her to issue court proceedings.

9. On 21st May, 2009, the authorisation pursuant to s. 32 of the PIAB Act issued on the following basis:-

"As the assessment has not been accepted by both parties, we attach an authorisation which will permit the claimant to take legal action to resolve her claim if she so wishes."

10. The application, assessment and authorisation procedure, as set out above, is now well known and well-established.

11. To continue the narrative, the plaintiff issued her personal injury summons on the 26th November, 2009 [2009/10700P] and shortly thereafter the above entitled proceedings issued on the 22nd December, 2009.

12. The personal injury proceedings proceeded, uneventfully, with a notice of trial issuing on the 6th December, 2010. By notice of tender offer dated 5th April, 2011, an amount of €40,701.00 was tendered, that sum was accepted by the plaintiff and accordingly the matter did not proceed to trial.

13. Within the present proceedings, the plaintiff had originally sought to challenge the constitutionality of ss. 51A and 51B of the 2003 Act. The fact that she obtained a greater award than the PIAB assessment, necessitated the plaintiff's formal confirmation that, within these proceedings, she was restricting her claim to matters relating to s. 51B.

14. The plaintiff's essential complaint is that, having incurred fees and expenses in connection with her PIAB application, such fees and expenses were not recoverable on the subsequent taxation arising from her personal injury action, nor was the amount recoverable pursuant to the 2003 Act itself.

15. The notice of additional particulars of loss and damage furnished on behalf of the plaintiff, on 26th November, 2012 states that, pursuant to the provisions of s. 51B of the PIAB Act, 2003, the fees and expenses incurred by this plaintiff, which were not recoverable, total €2,627.30 and comprise:-

(a) The PIAB application fee of €50 (in fact it appears that this fee was, in fact, reimbursed within the assessment of her expenses claim in the sum of €350).

(b) Professional fees – a significant narrative is included which culminates in a fee of €2,000 plus VAT, together with certain other costs for postage and sundries of €13.00 plus VAT.

16. Within the defendant's reply to a notice to admit facts, whilst the sums themselves, as set out above, are not admitted, but, in respect of the broader issue of the entitlement to recover those sums pursuant to s. 51B of the 2003 Act, para. 2, of that reply dated 4th November 2013 is in the following terms:-

"2. This is a matter of law and not fact and is not admitted. Without prejudice to the foregoing, the defendant admits that s. 51B(2) provides that, in any taxation of costs no amount shall be allowed in respect of any fees or expenses incurred by a claimant in connection with a PIAB application other than fees or expenses incurred by a claimant in connection with a PIAB application other than fees or expenses referred to in sections 35, 44 or 45 of the Personal Injuries Assessment Board Act, 2003."

PIAB application – the statutory mechanics of the application

17. Section 4 of the 2003 Act defines "civil action" as:-

"means an action intended to be pursued for the purpose of recovering damages, in respect of a wrong, for-

(a) personal injuries, or
(b) both such injuries and damage to property (but only if both have been caused by the same wrong)…"

The plaintiff's claim is clearly one seeking damages arising from personal injuries governed by section 4.

18. Section 12 makes it clear that unless and until an application is made to the Board under s. 11 no proceedings shall be brought in respect of that claim. In short, a personal injury action such as this cannot be commenced before the courts unless there is an application to the Board and an authorisation issued on foot of that application.

19. Section 14 provides the procedure in respect of a respondent/defendant. If a respondent, in writing, within a specified time period, consents to the assessment being made or fails to state in writing whether or not he or she does consent, then the Board will, subject to ss. 17 and 18, arrange for that assessment to be made.

20. Alternatively, if a respondent does state in writing that he or she does not consent to the assessment being made, then the Board shall issue what is referred to in subs. 4 of s. 14 as an authorisation and is defined within that subsection as:-

"(4) An authorisation under this section shall state that the claimant is authorised to, and operate to authorise the claimant to, bring proceedings in respect of his or her relevant claim."

21. Section 20 of the Act defines "assessment" which means "an assessment of the amount of damages the claimant is entitled to in respect of the claim on the assumption that the respondent or respondents are fully liable to the claimant in respect of the claim".

22. Accordingly, therefore, an assessment is made either when the respondent states that they wish for an assessment to be made or if they fail to respond at all.

23. Section 30 deals with what happens after an assessment is made. Essentially, having stated that the assessment is reduced to writing and served on both the claimant and the respondent together with a notice which requests:-

"(a) in the case of a notice served on the claimant, the claimant to state to the Board in writing within 28 days, or such greater period as may be specified by rules under section 46 , from the service of the notice whether he or she accepts the assessment, and

(b) in the case of a notice served on a respondent, the respondent to state to the Board in writing within 21 days from the service of the notice whether he or she accepts the assessment."

24. Section 31, in essence states that where a claimant fails to reply in writing and in response to the notice under s. 30 within the period specified as to whether or not the assessment is accepted, then that person will be deemed not to have accepted it. The position is the same in respect of the respondent pursuant to section 31(2).

25. Section 32 deals with a case where a claimant has failed to reply in writing or within the specified period in accordance with s. 31(1) or either claimant or respondent has stated in writing within the appropriate period that the assessment is not accepted:-

" …it shall be the duty of the Board, as soon as may be after the expiry of that period, to issue to the claimant a document that contains the statement and operates to have the effect mentioned in subsection (3)…

(3) An authorisation under this section shall state that the claimant is authorised to, and operate to authorise the claimant to, bring proceedings in respect of his or her relevant claim and such an authorisation shall be in addition to any authorisation issued under section 14 to the claimant."

26. Section 35 refers to circumstances where the claim is by a next friend or a committee of a minor or a person of unsound mind and to a proposed action for damages under s. 48 of the Act of 1961. It is, in turn, linked to s. 45 regarding a direction given to a next friend or committee of the claimant of any kind. None of those criteria applies on the facts of this case and the circumstances of this plaintiff.

27. Section 44 deals with the expenses incurred by the claimant in respect of any assessment and it is set out in full below. It appears common case that the expenses assessed by PIAB of €350 awarded to this plaintiff for the costs and expenses "necessarily incurred" are the costs referenced in section 44 of the 2003 Act.

The legislation – s.51B and s.44 of the 2003 Act (including PIAB's explanatory memorandum)

28. Section 51B, enacted pursuant to the PIAB (Amendment) Act 2007, states as follows:-

> "1. This section applies irrespective of whether an assessment of the relevant claim referred to in this section has been made or whether any assessment so made has been accepted, or is deemed to have been accepted under this Part by any person.
>
> 2. If a claimant brings proceedings, in accordance with this Act in respect of his or her relevant claim, then, in any taxation of costs in those proceedings, no amount shall be allowed in respect of any fees or expenses incurred by the claimant in connection with the application he or she made under section 11 in respect of the relevant claim or in complying with any provision of this Act in respect thereto, other than fees or expenses referred to in sections 35, 44 or 45."

29. Section 44 is of relevance and it states:-

> "(1) Without prejudice to section 45, on an assessment having been made, the Board may include in the notice it served under s. 30 in relation to the assessment the following statement.
>
> (2) That statement (the "statement") is one to the effect that the Board will direct, if the assessment is accepted by the claimant and accepted or deemed to be accepted by the respondent or one or more of the respondents, that the respondent or respondents who accept or are deemed to have accepted the assessment shall pay to the claimant, in addition to the amount of the assessment, a specified amount, being the whole or part, as the Board, in its discretion, determines, of the amount of the following fees or expenses of the claimant.
>
> (3) Those fees or expenses are fees or expenses that, in the opinion of the Board, have been reasonably and necessarily incurred by the claimant in complying the provisions of this Part or any rules under section 46 in relation to his or her relevant claim.
>
> (4) If the assessment is accepted or deemed to be accepted, in accordance with this Part, by the claimant and the respondent or one or more of the respondents the Board shall direct that that respondent or those respondents shall pay to the claimant the amount specified in the statement.
>
> (5) The statement shall indicate, in brief terms, the nature of the fees or expenses to which the amount specified in the statement relates; not later than 10 days before the expiry of the period mentioned in section 30(2)(b) a respondent may request

the Board to furnish to him or her such further details as he or she may reasonably specify in relation to the nature of those fees or expenses and the manner in which the foregoing amount was calculated by the Board and the Board shall comply with such a request.

(6) In this section "fees or expenses" do not include fees or expenses to which section 45 applies."

30. The other document relied upon by the plaintiff (and, indeed, referenced also by the defendant) is the explanatory memorandum produced by PIAB. It is entitled "Guidelines on Legal Costs under Section 44 of PIAB Act 2003". I was informed that this document has been made publicly available since June 2009. Under the heading "Application made using a Solicitor", it states:-

> "A claimant is entitled to submit a claim directly to the Board or through another party. This is a decision for the claimant. There is no right to recover fees incurred."

That is certainly clear in its terms. The guideline continues:-

> "It is acknowledged that there will be circumstances where the Board may not be in a position to provide the assistance required by the claimant. In such circumstances, the Board may advise a claimant of the desirability of obtaining professional advice or agree that such services were necessary. The Board will exercise discretion and consider if the fees and expenses were reasonably and necessarily incurred and such fees and expenses will be included in any assessment that is made.

In considering whether fees and expenses were reasonably and necessarily incurred, the Board will consider:

- Whether the Board could have provided the assistance, for which fees and expenses are sought.
- The inability of the claimant to sufficiently appreciate the legal consequences of taking a step as required under the Act.
- The inability of a claimant to conduct their business directly with the Board.
- Any other relevant details.

It is important to note that each case will be considered on its individual merits."

31. The plaintiff submits that the matters that the Board considers pursuant to s. 44, in respect of this plaintiff, are not contained in any matters under the heading "When fees have been Allowed". Rather, the operative section is under the next heading within the guideline of "Where Fees have not been Allowed", where it asserts:-

> "As the Board provides assistance for claimants to complete their application and comply with the provisions of the Act, it is not envisaged that fees and expenses will be allowed in circumstances where the claimant could have availed of the

Board's services. Additionally, fees and expenses are not allowed for legal costs incurred which are not for the purposes of complying with the requirements of this Act. For example:

- Advice in relation to the bringing of the claim.
- Advice in relation to liability or the likely success of the claim.
- Medical and actuarial reports not commissioned by…
- Lack of understanding of the PIAB Act and the rules made thereunder.
- Consideration of whether to accept or reject the assessment and the consequences under the Personal Injuries Assessment Board (Amendment) Act, 2007."

32. That would again appear clear in its terms and applicable to this plaintiff.

33. In the assessment itself, it does appear that €300 was assessed in relation to the provision of a medical report and that the €50 filing fee was in fact also accepted as an expense recoverable pursuant to section 44 of the 2003 Act.

34. The plaintiff's ultimate bill of costs, pursuant to the court order of 7th October, 2011 dealing with the settlement of the personal injury litigation, sets out both the amount sought in dealing with the PIAB application and in respect of the personal injury proceedings.

35. It also records the fee ultimately recovered on taxation (not allowing anything in respect of the costs sought in respect of the PIAB application as outlined above) as the sum of €20,806.08 (inclusive of VAT), which includes an instruction fee (exclusive of VAT) of €12,500. It also appears that some of the expenses sought within the initial PIAB application (in respect of various medical reports) were in fact permitted within the taxed bill of costs. What is clear is that the legal expenses were not. The actual order of the taxing master is not within the papers, but there is a comprehensive letter from the cost accountant and no issue arises in respect of the figures quoted.

36. An unsigned fee note dated 8th May 2009, very clearly stamped across both pages, as 'pro-forma invoice', is forwarded to the Plaintiff by her solicitors, seeking the total sum of €4,203.80 for acting in the PIAB process, which includes the sum of €2,000 plus VAT in respect of the instruction fee. It would appear, as alluded to above, that certain monies sought in respect of various medical reports, were ultimately recovered on taxation in respect of the personal injury litigation. There is no evidence before this court that any amount was discharged by this plaintiff which, if this court were required to ultimately consider the question of damages, may be an issue as to whether this plaintiff might recover this particular sum. I also note that these proceedings issued on the 22nd December 2009, well in advance of any adjudication of costs by the taxing master.

Challenge to the Constitution

37. Arising from the matters set out above the Plaintiff contends that s. 51B of the 2003 Act is unconstitutional as it breaches three linked issues:-

a) The constitutional right of access to the courts;

b) The constitutional right to obtain effective legal assistance; and

c) The constitutional commitment to the administration of justice.

In short that s.c51B of the 2003 Act is invalid with regard to Articles 34, 40.3 and 43 of the Constitution.

The Authorities

38. In considering the authorities, both parties cited the Supreme Court decision of *O'Brien v. PIAB* [2008] IESC 71. That case, in essence, concerned the lawfulness of the approach then adopted by PIAB in not entering into correspondence with solicitors, which it considered inappropriate, and corresponding only directly with claimants. The Supreme Court confirmed that the practice was in breach of the 2003 Act. In that case, Denham J. stated as follows:-

> "PIAB submitted that it is a purely administrative body, that it is not a court, and that there are no proceedings before it. That the process is simply a postponement of court proceedings.
>
> However, I am satisfied that the process before PIAB has serious consequences for a claimant…
>
> The fact that the process in PIAB is not adjudicative does not exclude the right to legal representation. There are many situations which are not adjudicative and which a person may wish to have a lawyer by his side. The lawyer places the person on an equal footing. It creates a situation which is even handed."

After confirming the right to legal representation as a fundamental right the Court continued:-

> "It may be that more people will process their claim in the respondent themselves as time goes by. But, lawyers not being excluded form the respondent by statute, a claimant may choose to be legally represented. This choice may be taken for many reasons, such as a lack of time to attend to the claim, or a fear of dealing with institutions, or general illness which while not rendering a person incapable affects their situation, or any other reason. The right to legal representation is a right which a claimant may exercise, in the knowledge that costs of legal representation will not be paid by the respondent."

39. The defendant emphasises that portion of the judgment where the entitlement to obtain legal advice is confirmed but not with any concomitant entitlement to costs in respect of fees incurred for such advices.

40. Within *O'Brien*, Macken J. stated, (in respect of the PIAB Act):-

> "It is difficult to imagine a civil action before the respondent save the most minor as being other than one having significant consequences, including legal consequences, at least for a claimant for whom the scheme is mandatory, and probably also for a respondent to a claim. It is axiomatic from the scale of the possible awards, according to the materials published by the respondents for claimants under the scheme, that claims may cover injuries arising not just from minor wrongs but also from difficult, complicated or complex events. Even the circumstances surrounding the making of a claim leading to a relatively small award may be difficult, complex or complicated, for a myriad of reasons, and in consequence be equally of immense importance legally and personally for a claimant."

Thereafter Macken J. stated:-

> "The provisions of s. 7(1) are neither intended nor permitted to interfere with the entitlement of a claimant to obtain legal advice, the only caveat being that under the legislation a claimant does not have a right to be indemnified in respect of the costs of such advice. This clearly includes such advice as may be sought in relation to the completion of an application or in relation to correspondence between a claimant and respondent. The position concerning costs appears to be subject to an unelaborated discretion vesting in the respondent to award costs."

41. O'Donnell J. in *Clarke v. O'Gorman* [2014] IESC 72, considered the overall structure of the PIAB Act, as follows:-

> "The structure of the Act in this regard in reasonably clear. It does not seek to remove claims for personal injuries from the court system in favour of any compulsory system of arbitration or administrative determination. Indeed, given the provisions of Article 34.2 of the Constitution on the full and original jurisdiction of the High Court, and the concept of the administration of justice contemplated under Article 34.1, it may have been considered that such a compulsory scheme might be problematic. Whether such an assumption was made, and if so, whether it is correct, are not issues that need detain us. The fact is that for whatever reason, the Act leaves firmly alone the entitlement of parties to litigate claims in the courts established under the Constitution. Instead, what it seeks to do is to encourage an early settlement of the bulk of straightforward claims in a manner which minimises the legal and other costs associated with litigation. It seeks to achieve this objective by providing an independent assessment on the value of the claim but also seeking to ensure that parties, and in particular the plaintiffs, consider any offer which is made pursuant to the Personal Injuries Assessment Board procedure by compelling plaintiffs in the designated class of cases to submit their claims for assessment before commencing litigation…"

The Court continued:-

"Analysed in constitutional terms, the Act does not seek to achieve its object by any subtraction from the jurisdiction of the courts under Article 34; it is instead a limitation on the unspecified personal right of access to the courts to litigate those claims guaranteed by Article 40.3. A PIAB authorisation is perhaps the most well known, but by no means the only circumstance, in which a party must seek some form of permission or authorisation before commencing a claim. This case does not raise any question of compatibility of this scheme with any provision of the Constitution, but this analysis may be helpful in considering the issues which arise in this case".

42. In respect of the constitutional right of access to the courts, *McCauley v. The Minister for Posts and Telegraphs* [1966] I.R. 345, Kenny J. in expressly connecting the existence of an unenumerated right of access with the Constitution's conferral of full original jurisdiction on the High Court, stated the proposition in the following terms:-

> "That there is a right to have recourse to the High Court to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee in Article 40, sect. 3, seems to me to be a necessary inference from Article 34, sect. 3, sub-sect. 1, of the Constitution which provides:-
>
> > "The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."
>
> If the High Court has this full original jurisdiction to determine all matters and questions (and this includes the validity of any law having regard to the provisions of the Constitution), it must follow that the citizens have a right to have recourse to that Court to question the validity of any law having regard to the provisions of the Constitution or for the purpose of asserting or defending a right given by the Constitution for if it did not exist, the guarantees and rights in the Constitution would be worthless."

43. The two cases upon which the plaintiff placed considerable emphasis are those of the UK Supreme Court decision of *R. (on the application of the UNISON) v. Lord Chancellor ('Unison')* [2017] UKSC 51 and a decision of the Supreme Court of Canada in *Trial Lawyers Association of British Columbia & Anor. v. Attorney General of British Columbia* [2015] 3 LRC 50 ('*Trial Lawyers Association'*).

44. In *Unison* the Supreme Court was considering the terms of a statutory instrument which provided that claims to the Employment Appeals Tribunal could be commenced and continued only upon the payment of fees. Lord Reed, delivering the judgment of the majority, stated as follows:-

> "But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they

have to do so, and, on the other hand, that, if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable".

45. Under the heading "The Right of Access to Justice in the Present Case" the court begins by confirming that fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing access to justice.

The court continued:-

> "In order for the fees to be lawful, they must have to be set at a level that everyone can afford, taking into account the availability of full or partial remission. The evidence now before the court, considered realistically and as a whole, leads to the conclusion that that requirement is not met".

46. By analogy with the facts of the present case the plaintiff argues that restrictions and the ability to recover costs will be unconstitutional if there is a real risk that they would prevent the persons effectively from having access to justice. The plaintiff also relies upon the passage in *Unison*, which in turn quoted from Lord Bingham in *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532 that "the degree of intrusion must not be greater that is justified by the objective which the measure is intended to serve".

47. Counsel for the defendants contend that, contrary to the facts in Unison, there is no mandated payment of a fee required by the State. In respect of the fee (€50) that must be discharged as a filing or processing fee to initiate the process, it does appear that this fee was reimbursed by PIAB under the heading of expenses (s.44 of the 2003 Act). It is also pointed out that *Unison* was taken by a trade union in judicial review proceedings, statistical evidence was advanced as to the diminution of claimants (described as 'sharp, substantial and sustained') since the imposition of the fee. Here this plaintiff was not precluded in satisfactorily advancing her claim. The defendants submit that *Unision* is authority for the proposition that there is a right not to be charged a disproportionate fee to use a court service.

48. Whilst accepting the factual distinctions regarding *Unison*, the plaintiff emphasised that, whilst in Unison the barrier to access is the payment to the court, here the barrier to access is the necessity to apply to PIAB in the first instance.

49. In *Trial Lawyers Association*, the Supreme Court of Canada was considering a case where a party, in instituting the proceedings and setting them down for trial, had been obliged to incur a hearing fee to the state, based upon the duration of the case. As well as the raising of a fee, there was also a system whereby the fees could be waived under certain circumstances. One of the arguments was that, by the imposition of such fees, it barred access to the Superior Courts. The court considered in that case whether, what it

accepted was a restriction of access to the courts, was satisfactorily dealt with in the exemption or discretionary waiver provision within that rule. The Chief Justice stated:-

> "Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.
>
> Is it the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court."

50. Thereafter, McLachlin C.J. stated:-

> "The contention that this hearing fee regime promotes proportionality and efficiency by weeding out unmeritorious cases and encouraging shorter trials, thereby actually increasing access to the courts, does not answer the findings of the trial judge that it unconstitutionally prevents access to the courts."

51. The defendants contend that the factual basis of this case is also different; in *Trial Lawyers Association* the claimants' lawyers were presented with a significant bill for their attendance in court, had the case continued the fee would have been equivalent, on a daily basis, to the claimant's net monthly income. The defendants seeks to distinguish this on the basis that in that case the legal provision effectively denied people the right to take their cases to court, as opposed to s.51B of the 2003 Act which does not have the same effect.

52. Moreover, the defendants argue that, again to differentiate the facts from *Unison* or *Trial Lawyers Association*, no evidence was adduced that this restriction impeded this plaintiff's right of access to the courts. The plaintiff contends that once her *locus standi* is established that thereafter it is appropriate that perceived deficiencies in the constitutionality of the section can be highlighted in more general terms than that of the plaintiff personally. I accept this.

53. From the case law the plaintiff extrapolates two principles. The first is that the imposition of fees or any restriction on costs is unlawful if there is a real risk that persons will be effectively prevented from having access to justice and secondly the restriction remains unlawful even if it can be justified as reasonably necessary to meet a legitimate objective.

54. In assessing s. 51B, the plaintiff, therefore, submits:-

    (a) That the legal costs incurred in connection with the application are not going to be included within section 44 of the 2003 Act.

    (b) The provision applies regardless of the reasonableness of the necessity or reason for having obtained assistance in the particular circumstances of the claim.

(c) It applies regardless of the needs or vulnerabilities of an individual claimant. I do not discern any special need or vulnerability of this plaintiff.

(d) It applies irrespective of a claimant's income or ability to pay for legal advice.

(e) It applies irrespective of the conduct of the other party.

55. The consequences claimed are as follows:-

(a) A claimant may be deterred from making an application by reason of an inability or a wish not to spend any additional monies.

(b) That in making the application and taking the advice that part of the award is reduced in the discharge of those legal fees.

(c) That a claimant will proceed without legal advice and may, as a consequence, omit matters which would have been advantageous to her claim. Again, whilst it has been pointed out that this plaintiff obtained a significantly greater award pursuant to the notice of tender within the court proceedings, there is no suggestion that her notice of assessment was in any way inhibited by the reality that her legal fees would not be discharged for that purpose. Indeed, as already noted, I am unaware as to whether, on the specific facts of this case, any monies were discharged by this plaintiff prior to or following the taxation of her solicitor's costs in the High Court personal injury action, in respect of her PIAB application.

56. The plaintiff also points out that, whilst the making of an assessment, in accordance with the matter set out above, constitutes a court order, any taxation of costs can only arise pursuant to the institution of proceedings. It is further suggested that the implication may well be motivated by a desire to discourage claimants from possibly bringing a PIAB application and /or in proceeding any further beyond the assessment stage (i.e. not pursuing court litigation).

57. From the Supreme Court decision in *O'Brien*, the defendants contend that the constitutional right engaged within the PIAB process, being the right to legal representation, properly exists within the statutory framework established by the 2003 Act. They further contend that there is nothing within s. 51B that is inconsistent with the principles in *O'Brien*. The defendants assert that the right of any claimant to legal representation is clear, but the right remains one that has to be exercised in the knowledge that there is no right to recover all costs associated with that representation in any taxation of costs that may subsequently arise. In my view, that neatly encapsulates the position and the issue upon which this Court is required to adjudicate.

58. In their submissions to the court, the plaintiff has been careful to distinguish its case from any argument as to a straightforward entitlement to costs *per se*. However, the cases within this jurisdiction that have been cited within this litigation, concern themselves, in large part with the importance of the issue of costs within that process. The plaintiff cites Clarke J. (as his then was) in *Farrell v. Governor and Company of Bank of Ireland* [2012]

IESC 42 ('*Farrell*'). In this case the Court was considering the question of security for costs in respect of long running and complex litigation and in that context considered the issue of costs in a broader sense. Clarke J stated :-

> "…..It might be said that costs orders play two roles……Thus the first underlying rationale behind the award of costs is that justice requires that a successful party not be penalised in having to bear the reasonable costs of court proceedings.
>
> But there is another justification. If there were not provision requiring generally for the payment of costs to the successful party then there would be a real risk that the bringing or defending of proceedings could be used as a tactic little short, at least in some cases, of blackmail. A plaintiff could threaten proceedings which would undoubtedly put the defendant to significant costs in the hope that the defendant would buy off the case (even if it was wholly unmeritorious)… Likewise a defendant, with no real defence, could implicitly threaten a plaintiff with a defence by trench warfare which would greatly increase the costs of a plaintiff his rights and entitlements and thus, in truth, devalue those rights and entitlements by placing an unreasonable high price on their establishment."

The Court continued :-

> "That analysis is designed to show that the powers of the court to award costs is a very important aspect of the armoury of the courts designed to ensure that parties are treated justly and that the court process is not abused."

59. In *Carmody v. The Minister for Justice* [2009] IESC 71, (*Carmody*) the Supreme Court was considering the constitutionality of a section of the Criminal Justice (Legal Aid) Act 1962, which only permitted legal aid in respect of a solicitor only and not counsel. Murray C.J. stated:-

> "Having regard to the extremely wide scope and range of offences which come within the jurisdiction of the District Court in the field of criminal law and the increased complexity of modern legislation and regulatory measures, with which the court is by no means unfamiliar, the court is satisfied not only that the necessity in the interest of justice for a defendant to be represented by counsel as well as a solicitor…..In order to vindicate the constitutional right of an indigent defendant in the District Court to a fair trial he or she must be entitled to legal aid with representation by counsel as well as solicitor where it is established that because of the particular gravity and complexity of the case or other exceptional circumstances such representation is essential in the interests of justice."

60. I, of course accept the comments of the Supreme Court in *Farrell* as to the importance of the costs issue in any litigation (and particularly in that case with regard to the applicability of directing the provision for security in respect of those costs) and in any defendant having access to appropriate legal representation within criminal proceedings as in *Carmody* above.

61. In dealing with the issue of expenses within the PIAB process itself, the defendants cite the judgment of Ryan J. (as he then was) in *Plewa and Giniewicz v. Personal Injuries Assessment Board* [2010] IEHC 516 (‘*Plewa’*). This was an application for judicial review as to the validity of a decision by PIAB in respect of the failure to award certain legal fees in the assessment of their respective claims (not, as the plaintiff has been at pains to point out, a constitutional action). In any event, Ryan J. (as he then was) quoting Macken J. in *O’Brien* as set out above, considered s.44 of the 2003 Act as follows:-

> “Section 44 of the Act of 2003 does not confer an entitlement to legal costs in all cases and claims to such costs require consideration by the Board on a case by case basis……..
>
> There is nothing wrong with the Board setting out a policy in relation to legal fees. In fact, the fixing of a general policy would appear to be a prudent method of ensuring fairness of a general policy, certainly and consistency in decision making…..”

As to the PIAB process the Court continued :-

> “A person does not need to have detailed information about the legal system in order to make a claim to the Board… the great majority of persons making applications for compensation to the Board would not have any knowledge of tort law or personal injuries litigation in this jurisdiction; they would not have law degrees and they would not be qualified barristers or solicitor with particular expertise in personal injuries litigation. If every such person is entitled to the costs of legal advice, it would mean that it is reasonable and necessary for every non-lawyer applying to the Board to get unnecessary information and to have the other party ordered to pay for it. That is not supported by the scheme of the Act or of the decision of the Supreme Court in O’Brien. Indeed, it would seem to run counter to s. 29, which envisages that the Board may advise a claimant or a respondent of the desirability of his or her obtaining legal advice in particular circumstances.”

62. The defendant also cited a series of authorities in relation to the right to recover legal costs arising from participation before the courts or within an administrative process; namely *Dillane v. Ireland* [1980] I.L.R.M. 167 (“*Dillane*”), *Henehan v. Allied Irish Banks* (unreported High Court Finlay P., 19th October, 1984) (‘*Henehan’*) and culminating in the decision of Baker J. in *Mansfield and ors v. District Judge Lucey* [2017] IEHC 158 (‘*Mansfield’*).

63. In *Dillane*, the plaintiff was precluded from recovering his costs pursuant to the relevant section of the District Court Rules against the prosecuting Garda, where the summonses in question were withdrawn. In seeking to challenge the constitutionality of the relevant section the Supreme Court held that the plaintiff’s eligibility for costs in the circumstances of that case could not be enumerated as a constitutionally protected property right.

64. *Henehan* (a case concerning the potential recoverability of certain costs by a lay litigant) confirms that the jurisdiction for the awarding of costs is part of the machinery associated with access to those courts and, therefore, "construed in the light of the Constitutional origin of that right of access and the obligation of the Courts to make such a constitutional right real and effective".

65. The defendants contend that that rationale does not extend to establishing a principle that there is a constitutional right to costs in all classes of proceedings or that it must exist in order to validate the constitutional right of access to the courts.

66. The line of authorities advanced by the defendant in this regard concludes with the decision in *Mansfield*. In that case, it was argued that a constitutional right existed in respect of the costs of a successful appellant before the District Court, in respect of the relevant firearms legislation. Baker J., in rejecting the argument, stated as follows:-

> " I consider the applicants' submissions to be incorrect. The applicants enjoy a right of access to the District Court by way of appeal from the decision of the Garda Superintendent. No authority has been opened which might suggest that a constitutional right to costs in all classes of proceedings must exist in order to support and give concrete realisation to the right of the access to the courts. Hogan & Whyte in their authoritative text "*J.M. Kelly: the Irish Constitution"* (4th Ed.) at para. 7.3.150 make the following statement with which I agree:
>
> > 'Attempts to establish that the State has a positive constitutional duty to assist a civil litigant who is denied effective access to the Courts because of factors such as poverty, for which the State is not directly or immediately responsible, have almost invariably failed'. "

67. In considering *Henehan*, Baker J. stated that it was:-

> "…authority for the proposition that a litigant in person may be entitled to some categories of costs and expenses properly incurred for the purposes of presenting a case. This is not, in my view, authority for a general proposition that parties to all classes of litigation must be entitled to their costs, and his judgment relates to the measurement of costs in circumstances where the costs had been awarded in a manner within the jurisdiction of the High Court, and disallowed by the Taxing Master."

ECHR

68. In considering whether s. 51B is incompatible with the European Convention on Human Rights ('the Convention') the plaintiff claims within the Notice served pursuant to RSC Order 60A, that the impugned provision of the 2003 Act constitutes (a) an interference with the peaceful enjoyment of her possessions pursuant to Article I of Protocol 1 of the Convention, (b) constitutes an interference with plaintiff's right to an effective remedy before a national authority contrary to Article 13 and (c) constitutes an interference with her right to a fair hearing by an independent tribunal in determination of her civil rights, contrary to Article 6.1.

69. The Plaintiff cites the well-known case of *Airey v. Ireland*, (Application No 6289/73, 6th February 1981) (*'Airey'*) dealing with the availability of legal aid in Irish law, where the European Court of Human Rights stated:-

> "The Government contend that the application does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer.
>
> The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."

The court continued:-

> "For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position ….. can effectively present his or her own case. This view is corroborated by the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January, 1972 to December, 1978, without exception, the petitioner was represented by a lawyer…".

70. In the case of *Steel and Morris v. The United Kingdom, (Application 68416/01 15th February 2005) the court stated:-*

> "The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see *Airey*…). It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side…"

71. *Kniat v. Poland*, no.71731/01, ECHR 2005 and *Kordos v. Poland*, no. 26397/02 ECHR 2009 are relied upon by the plaintiff where the ECHR made clear that the face that a party may have received compensation out of which the expenses can be discharged does not alter the nature of the expenses themselves.

72. The defendants essentially contend that rights arising under the convention do not require that a person be awarded their costs in respect of an application process within an administrative process created by statute. It is also contended that the cases relied upon by the plaintiff and emanating from the court in general deal with cases where the issue of costs arises within specific litigation. In that regard they quote from O'Neill J. in *O.F v. Judge O'Donnell & ors* [2009] IEHC 142 as follows:-

> "Recovery of costs per se is not an essential feature of the right of access to court or tribunals (Article 6) or of an effective remedy (Article 13). The costs issue only engages the Convention and invariably Article 6, rather than Article 13, at the point where a lack of provision in law for the recovery of costs acts as an impediment to

access to the courts. Thus the jurisprudence of the European Court of Human Rights requires that, firstly, there be a consideration of whether the particular litigation costs, having regard to the particular circumstances of the case, constitute an obstacle to the applicant's right of access to the courts resulting potentially in a breach of article 6.1, and if the answer to this question is in the affirmative, secondly, does the prohibition on making a costs order satisfy the proportionality test?"

73. In *Mansfield*, Baker J. in respect of a possible infringement of Article 6.1 of the Convention, also points to the fact that issues concerning reimbursement of litigation costs in circumstances where certain costs are allowable relates as does the judgment in *Henehan*, ' to the measure of costs or the class of costs recoverable, and does not amount to authority for a more general proposition that a right exists under EHCR'.

74. The cases cited from the European Court of Human Rights appear to be directed to the entitlement to claim or seek costs within the context of a hearing before a court. *O'Brien* and *Clarke v. O'Gorman* make it clear that any claimant within this jurisdiction must enjoy a right of access to the courts. No party has disputed that proposition. This plaintiff has that entitlement and right and I therefore do not consider the case law cited above to be directly applicable to the facts of this case nor to expressly deal with any entitlement of an adjudicative body such as PIAB to preclude the recovery of legal costs incurred, if any, within its administrative process.

Observations and Conclusion

75. Section 51B of the 2003 Act is, in my view, clear in its terms and I do not discern any difference between the parties as to the manner of its interpretation. In essence, if you come within its parameters, then no amount is permissible by way of recovery for legal fees upon taxation other than, for this plaintiff, those permissible expenses pursuant to s. 44 of the 2003 Act.

76. Section 44 of the 2003 Act is, in my view, equally clear as to the parameters of permissible expenses. I am satisfied that, in respect of this plaintiff, her filing fee of €50 was permitted by PIAB with an additional €300 for the furnishing of a medical report.

77. It is clear that s. 44 does provide some discretionary basis for the provision of certain "expenses". Those expenses are incurred within the PIAB application process and there is a degree of discretion, for example if PIAB seeks additional information from a claimant. The defendant, within this litigation has from the outset accepted the legal parameters of s. 51B, as outlined by counsel for the plaintiff and set out within this judgment.

78. The issue, thereafter, is the degree to which the failure to make any provision (the plaintiff describes the rule as "inflexible") for the recovery of legal costs upon taxation in accordance with s. 51B is in itself unconstitutional. It does not deny access to the courts. Does it, however, operate as a bar upon a claimant's right of access to those courts such as to prevent an applicant engaging in the PIAB process at all or engender an unwillingness to seek legal advice within it?

79. Counsel for the plaintiff has stressed throughout that its case does not concern the entitlement to recover costs and her counsel, on more than one occasion, chided the defendants for what they contend to be an incorrect categorisation of the plaintiff's case. The plaintiff's case, it is asserted, is rather the contention that any measure, such as s. 51B, which has the effect of restricting access to the courts is unlawful if there is a real risk that persons will be effectively prevented from having access to justice. In short that the non-recovery of legal costs per s.51B is the vehicle for denying access to justice.

80. The decision in *O'Brien* strongly and unequivocally maintains the entitlement of any claimant before PIAB to obtain legal representation. Any suggestion of any potential interference in that entitlement, as adverted to by O'Donnell J. in *Clarke v. O'Gorman,* would likely fall foul of certain constitutional entitlements vested in every citizen. This plaintiff has instructed solicitors throughout the PIAB process, the personal injury litigation and the subsequent taxation of her costs.

81. No applicant to PIAB, such as the plaintiff, can, in my view, be under any misapprehension that any legal costs incurred within that application process will be discharged by PIAB or upon any subsequent taxation.

82. The fact that a respondent within that same PIAB process may be able to recover such costs on taxation is also considered by counsel for the plaintiff to be an inherent unfairness in any equality of arms between the parties. I am not aware if respondents are obliged to discharge any costs or fees to PIAB in respect of its adjudication, within the PIAB process. I am also unaware if those or other PIAB costs are generally sought and recoverable in any taxation. However, there is no part of the 2003 Act which precludes them from doing so. I cannot discern sufficient potential inequality between the parties on this basis.

83. Of course, s. 51B refers to a claimant who has decided to pursue the court process – it relates to the question of the taxation of costs which must refer to the taxation consequent upon court litigation. The only *proviso* or discretion is for the provision of certain expenses provided by s. 44 of the 2003 Act.

84. In my view, it would be unusual for any taxation of costs consequent upon litigation to permit or include within its provisions, taxation of any costs outside of that process.

85. There may be many instances where a potential litigant seeks legal advice when considering seeking legal redress in any number of areas. On the basis of that advice, or for a myriad of other reasons, an individual may decide not to proceed further and discharge a fee for those legal advices. I appreciate that if any individual wishes to institute proceedings arising from a personal injury, then the PIAB process is obligatory, but in embarking upon that process (where steps have been taken to seek to ensure that the means of application is clear) if an applicant wishes to take additional legal advice in respect of that process then no applicant can be in any doubt that that fee is incurred by him or her.

86. The PIAB process is an administrative one. I am not satisfied in respect of this plaintiff personally, or, more generally, that applicants within the PIAB process have failed to avail of it, owing to an apprehension they cannot discharge that possible additional cost in the discharge of legal fees. In *Unison* there was evidence of a significant reduction in claimants after the introduction of the new fee regime. Section 51B was first enacted pursuant to a 2007 amendment to the principal 2003 Act. I am unaware of any reduction of claimants on foot of its enactment.

87. I have carefully noted the comments of both Ryan J. in Plewa and O'Donnell J. in *Clarke v. O'Gorman* that the PIAB process is designed to be administrative in nature and straightforward in application. Both judgments also stress (particularly within the judgment of Ryan J.) that, within the structure of the 2003 Act, the scheme and indeed the methodology of any PIAB application is clear and by now well known and well understood.

88. Of course, I accept this plaintiff's entitlement to seek legal advice, but I do not see the prohibition upon the recovery of those legal costs in any subsequent taxation of costs or within the payment of expenses within s. 44 of the 2003, to be unconstitutional. Within this case, I do not discern that s. 51B has operated as a bar on a claimant obtaining his/her constitutional right of access to the courts as required.

89. The courts have considered, on the basis of the authorities opened to this court, in the context of the 2003 Act and otherwise, the obligations of the right of access to the courts and the right of legal representation before an administrative panel. What they have not done is to assert that the inability to recover legal costs associated with that legal representation before an administrative panel, where there are limits by legislation on the recovery of those costs, is, in and of itself, incompatible with the Constitution.

90. Section 51B enjoys the presumption of constitutionality. It is apparent that no caselaw within this jurisdiction makes it clear or incumbent upon any court in determining the constitutionality of legislation to ensure or require that provision be made for the discharge of legal fees, to which any claimant might avail within an administrative process and /or with this PIAB process.

91. In my view, the same can be said in respect of the ECHR; the caselaw does not preclude restrictions upon the failure to recover of legal fees within an administrative process and in my view s. 51B does not operate as a bar upon access to the courts.

92. For the reasons set out above, I am not satisfied that s. 51B operates as a breach on a claimant's constitutional right of access to the courts, her right to obtain effective legal assistance and the constitutional requirement for the proper administration of justice.

93. Accordingly, the declaratory reliefs sought within paragraphs 1 and 2 of the Statement of Claim are denied. The claim for damages does not therefore arise.

94. I will hear the parties as to what if any consequential or other orders are required including any as to costs.