Neutral Citation Number: [2010] IEHC 516

THE HIGH COURT

JUDICIAL REVIEW

2008 1128 & 1385 JR

BETWEEN

GRZEGORZ PLEWA AND KRZYSZTOF GINIEWICZ

APPLICANTS

AND

PERSONAL INJURIES ASSESSMENT BOARD

RESPONDENT

JUDGMENT of Mr. Justice Ryan, delivered on the 19th day of October, 2010

1. These are two applications for judicial review of decisions made by the respondent Board about solicitors' fees. In the case of the first applicant, Mr. Plewa, the Board refused to include in its assessment any of the fees claimed by the applicant for legal advice and in the case of the second applicant, Mr. Giniewicz, the sum allowed was 40% of the legal fees claimed. The applicants claim that the Board acted unreasonably and in breach of its obligations under the Personal Injuries Assessment Board Act 2003, as amended. Leave was granted by Peart and MacMenamin JJ. by orders of the 13th October and 8th December, 2008 respectively.

The Personal Injuries Assessment Board

2. The Personal Injuries Assessment Board is, in effect, a kind of conciliation system for personal injury claims. A person who wishes to claim compensation for personal injuries is required by the Act of 2003, as amended, to apply to the Board before issuing proceedings. The procedure is that the claimant completes and submits a form with biographical details and some basic information about the circumstances in which he or she sustained the injuries (Form A) and must submit a medical report from his treating practitioner. If the allegedly responsible party ("the defendant") agrees, the Board proceeds to consider the papers and to make a recommendation of a sum of money that it thinks sufficient to compensate the claimant for the injury ("an assessment"). The Board must also decide what fees and expenses claimed by the applicant should be included in the assessment that it proposes to be paid by the defendant. Under s. 44 of the Act of 2003, the Board has the capacity to recommend payment of fees or expenses, which can include legal costs which the applicant incurred "reasonably and necessarily" in complying with Part 2 of the Act of 2003. The defendant can choose whether to accept or reject the assessment, as can the claimant. If both sides accept the Board's assessment, the claim is disposed of on that basis without going to court and the defendant pays the sum assessed by the Board.

3. An application to the Board has two possible outcomes. The first is that the Board does not proceed to make an assessment, or that the assessment is not accepted by one or other relevant party; in that case, the Board gives a certificate enabling the claimant to proceed in court. The second outcome is that the matter is disposed of by the payment by the defendant to the claimant of the sum assessed by the Board. One potential consequence should be noted. If a claimant rejects an assessment which the defendant has accepted, and if the case proceeds to court and the claimant recovers less in damages than the amount of the Board's assessment, the claimant may be penalised in costs pursuant to s. 51A of the Act of 2003, as inserted by the Personal Injuries Assessment Board (Amendment) Act 2007. The situation, in other words, is much the same as that which arises where a plaintiff has not accepted a lodgement paid into court in satisfaction of a claim but, after proceeding with the action, is not awarded more than the amount paid into Court.

Background Facts

4. The applicants are Polish nationals who were living and working in Ireland when they sustained personal injuries as a result of accidents. Mr. Plewa had a road traffic accident on the 8th December, 2005 in which he suffered a skull fracture and other injuries with serious sequelae. Mr. Giniewicz was involved in an accident on the 26th October, 2007 caused by his employer, although there was some question as to the identity of that entity or person. His injuries consisted of soft tissue damage.

5. The applicants separately engaged the same firm of solicitors which conducted their business with the respondent Board on their behalf. The firm had contacts with the Polish community in Ireland and had on its staff a Polish legal executive who, in addition to his legal duties, acted as translator and interpreter for the applicants. The solicitors billed the applicant in each case for translation services and those costs were claimed as expenses that were "reasonably and necessarily" incurred pursuant to s. 44 of the Act of 2003. The process in each case resulted in an assessment by the Board which was accepted by the defendants. In both cases, the assessment included some of the expenses claimed including the costs of the application, a medical report and the translation services. However, in the case of Mr. Plewa, the Board awarded none of the legal fees claimed and in the case of Mr. Giniewicz it awarded just 40% of the legal fees claimed.

Mr. Plewa's Case

6. Mr. Plewa's solicitors submitted a completed Form A to the Board on behalf of the applicant in February, 2007. In August of that year, the Board notified the solicitors that the defendants had consented to the assessment of the claim, and enclosed a Schedule of Special Damages and a Loss of Earnings certificate for completion by the applicant's solicitors.

7. The solicitors furnished the completed Schedule of Special Damages to the Board in November, 2007 accompanied by a standard form covering letter intended for use in any case that goes to the Board. The letter states that legal fees have been reasonably and necessarily incurred by the applicant within the meaning of s. 44 of the 2003 Act and then sets out seven boxes to be ticked as

appropriate. The following four boxes were ticked in the case of Mr. Plewa:-

- The Claimant is a foreign national;
- The Claimant has limited / no understanding of the English language;
- The Claimant does not have any knowledge of the Law of Torts within this jurisdiction; and
- The Claimant does not have a Law Degree and is not a qualified Barrister or Solicitor with particular expertise in the areas of personal injury litigation and the assessment of quantum for general damages in relation thereto.

8. The other three boxes which were not ticked in the case of Mr. Plewa were:-

- The Claimant has limited education and a limited capacity to interpret complex legislation and documentation, the meaning and import of which has serious consequences for his / her property rights;
- The Claimant suffers from limited cognitive function and has difficulty in complying with the provisions of Part 2 of the PIAB Act and dealing with all matters arising therefrom and relies entirely upon the professional legal advice of his / her Solicitors; and
- The Claimant is a minor.

9. The appended Schedule of Special Damages was as follows:-

- PIAB Application Fee - € 50.00
- Cost of Medical Report submitted with Application - 325.00
- Legal Advice Fee (including VAT) - € 2420.00
- Translation and Interpreting Fee - € 350.00

10. The solicitors enclosed a fee advice note listing the amount of € 2000 plus €420 VAT as a "Professional Fee". Also enclosed were a fee note from the treating doctor and a fee advice note in the sum of € 350 for translation and interpreting services provided by the firm's Polish legal executive; it is noted that it was he who had sent a letter of claim to the proposed defendant and his insurer in October, 2006 in Mr. Plewa's case. Neither the solicitors' fee note nor the interpreter's fee note particularised the work undertaken for the fee charged.

11. After a number of reminders from the Board, the solicitors also furnished a letter from Mr. Plewa's employer with a completed Loss of Earnings certificate in May, 2008.

12. The Board issued a notice of assessment in Mr. Plewa's case by letter dated the 24th July, 2008. A substantial amount was awarded for general and special damages and €725 for fees and expenses, allocated as follows:-

(1) Application Fee - € 50.00

(2) Medical Fee - € 325.00

(3) Translation Fees - € 350.00

13. Thus, while the Board allowed the application, medical report and translation fees claimed without deduction, it allowed nothing for fees incurred for legal advice and services. How this came about was explained in an affidavit sworn by Mr. Maurice Priestly, Director of Operations of the Board:-

> *"The said decision in respect of legal fees was made for and on behalf of the Board by three employees of the Board to whom the performance of functions under Chapter 2 of Part 2 of the 2003 Act is assigned ("the assessors"), one of whom was me, this Deponent. Before making that decision, the assessors carefully considered all of the documentation received by the Board in relation to the claim to ascertain whether there were any aspects of the claim in respect of which legal services and/or advice was reasonably and necessarily required by the Applicant for the purpose of complying with Part 2 of the 2003 Act and the Rules made thereunder. The assessors concluded that legal services and/or advice were not reasonably and necessarily required by the Applicant for the purpose of complying with Part 2 of the 2003 Act and the Rules made thereunder. Accordingly, in the exercise of the discretion of the Board pursuant to section 44 of the 2003 Act, no award was made in respect of them on assessment."*

14. On the following day, the applicant's solicitors requested the Board to clarify the reason for the omission of Mr. Plewa's legal advice fee of €2420. The Board's reply dated the 29th July, 2008 was in general terms, stating only that *"Your comments are noted. The Board allowed fees and expenses, that in their opinion, were reasonably and necessarily incurred by Grzegorz Plewa"*. By further letter dated the 30th July, 2008 the solicitors again requested the Board to set out the reasons for its decision on the legal fee claimed. On the following day, they furnished the Board with a "without prejudice" Notice of Acceptance.

15. On the 7th August, 2008 the Board replied, stating:-

> *"The Board did not consider that it was reasonable and necessary for Mr Plewa to incur the costs of €2,420. 00 claimed in order to comply with Part 2 of the PIAB Acts 2003 and 2007 and the Rules made thereunder."*

16. The defendant confirmed acceptance of the assessment and the Board proceeded to issue an Order to Pay. The within proceedings issued shortly thereafter and leave to apply for judicial review was granted by Peart J. on the 13th October, 2008.

Mr. Giniewicz's Case

17. Matters followed a very similar course in the case of Mr. Giniewicz, except that in his case there was some difficulty in establishing the correct defendant. The solicitors submitted a completed Form A to the Board on behalf of Mr. Giniewicz in February, 2008 appended to which were a medical report; letters of claim; printouts from the Companies Registration Office website in relation to the defendant companies; and correspondence from insurance companies. The Board notified the solicitors in June, 2008 that two of the defendant companies had consented to assessment, and furnished a schedule of Special Damages and a Loss of Earnings Certificate for completion by the solicitors. The Board also arranged for the applicant to be examined by a member of an independent medical panel on a nominated date.

18. The solicitors furnished the completed Schedule of Special Damages in July, 2008. The same standard form covering letter was used as in Mr. Plewa's case and the same four of the seven standard reasons were ticked (see paragraphs 7 and 8 above). The attached Schedule of Special Damages was as follows:-

- PIAB Application Fee - € 50
- Cost of Medical Report submitted with Application - € 350
- Translation Fee - € 350
- Legal Fee (including VAT) - € 1,331
- A&E Invoice - first visit - € 60

19. The solicitors also enclosed a fee note in which they set out, in a very general way, work which they said they had carried out on behalf of Mr. Giniewicz, as follows:

- Meeting the client and taking initial instructions;
- Advising the client as to whether he had a case;
- Identifying the wrongdoer(s) concerned;
- Taking instructions in relation to the nature of the injuries sustained and identifying all relevant doctors' and medical evidence;
- Issuing the appropriate letters of claim and complying with the provisions of the Civil Liability and Courts Act 2004;
- Preparing Form A application to the Board and complying with the Act of 2003 and all regulations made thereunder;
- Complying with all reasonable requirements of the Board and any enquiries or queries which they had made;
- Completing Schedule of Special Damages and gathering together all necessary documentation for submission to the Board including particulars of loss of earnings; and
- Receiving an Assessment from the Board and advising the applicant as to the adequacy of the Assessment.

20. The letter concluded with the statement that for the items listed a reasonable professional fee was €1,000.00 plus VAT at 21%. A further €100.00 plus VAT was claimed for "postage, telephones, photocopying and sundry outlays", without any further particulars. There was also a fee note from the treating doctor and a fee note in the amount of €350.00 from the in-house translator. The latter bore the same address as the solicitors and, as in the case of Mr. Plewa, provided no detail as to the time or any other work that was involved.

21. By letter dated the 21st October, 2008 the Board notified its assessment in the case, awarding a certain amount for general and special damages plus €1,234 towards the following fees and expenses reasonably and necessarily incurred:

(1) Application Fee - € 50.00

(2) Medical Fees - € 350.00

(3) Legal Fee (including VAT) - € 484.00

(4) Translation Fees - € 350.00

22. By way of explanation for this award, Mr. Priestly avers as follows:

> *"The said decision in respect of legal fees was made for and on behalf of the Board by two employees of the Board to whom the performance of functions under Chapter 2 of Part 2 of the 2003 Act is assigned (and who are hereinafter referred to as 'the assessors'). In this context, I am informed by the assessors and believe as follows. The allowance of €400 plus V.A.T. in respect of legal fees was made for legal services and / or advices provided in relation to the identification of the party /parties potentially liable in respect of the alleged matters the subject of the Applicant's claim. Before making that decision, the assessors carefully considered all of the documentation received by the Board in relation to the claim to ascertain whether there were any aspects of the claim in respect of which legal services and / or advice was reasonably and necessarily required by the Applicant for the purpose of complying with Part 2 of the 2003 Act and the Rules made thereunder. In that regard, the assessors noted that four respondents had been identified in the application form, two of which were employment agencies. The assessors considered that the identification of the party /parties potentially liable in respect of the alleged matters the subject of the Applicant's claim was a matter in respect of which a claimant reasonably and necessarily, required legal service and/or advice. Save in respect of fees for the aforesaid legal services and/ or advices, the assessors considered that the legal fees incurred by the Applicant were not reasonably or necessarily incurred for the purpose of complying with Part 2 of the 2003 Act and the Rules made thereunder. Accordingly, in the exercise of the discretion of the Board pursuant to section 44 of the 2003 Act, it was determined that part only (and not the whole) of the costs of the legal services and/or advice obtained by the Applicant should be paid to the Applicant."*

23. Thus, only 40% of the solicitors' fee claimed was allowed. As in the case of Mr. Plewa, the solicitors were unhappy with the legal fees allowed and they asked the Board by letter of the 23rd October, 2008 for the reasons for the reduction of the fee and the criteria used in arriving at the reduction. The Board replied on the 3rd November, 2008 stating:-

> *"Fees of €400. 00 plus VAT were allowed by the Board under Section 44 of the PIAB Act 2003. The Board is obliged to exercise its discretion in measuring, in whole or in part, the amount of the fees and expenses that have been reasonably and necessarily incurred by a claimant in complying with part 2 of the PIAB Act 2003, and the rules made thereunder".*

24. The solicitors pressed the matter in a letter of the 7th November, 2008 in which they asserted that the applicant was *"at the very least"* entitled to have answers to these "very simple questions" before deciding whether to accept the assessment. The Board responded on the 13th November, 2008 in rather general terms, saying that:-

> *"When considering the costs that ought to be allowed to Mr Giniewicz in complying with the provisions of Part 2 of the PIAB Act 2003 and the Rules made thereunder, the Board had regard to the totality of his claim and in particular the issue in relation to the identification of the correct Respondents".*

25. By reply dated the 17th November, 2008 the solicitors argued that the Board had failed to answer "two very simple questions" raised in its previous letters and asserted that the matters stated in the Board's replies made no sense. The solicitors notified the Board that Mr. Giniewicz wished to accept of the assessment:-

> *"without prejudice to our client's right to subsequently institute proceedings against the Board for its failure to act appropriately and lawfully in respect of the exercise of its powers under s. 44(3) of the PIAB Act 2003, and furthermore its failure to provide reasons as to why Mr. Giniewicz's legal fee was reduced from the amount sought to the sum of €400. 00 plus VAT (to include postage, phones and sundries) and to set out the criteria based upon which such reduced fee was arrived at".*

26. Upon receipt of the applicant's notice of acceptance, the Board issued an Order to Pay to the defendant. The applicant issued proceedings shortly thereafter and leave was granted by an order of MacMenamin J. on the 8th December, 2008.

27. In each case Mr. Priestly swore a second affidavit on the 10th December, 2009; those affidavits are in essentially the same terms. In those affidavits, Mr. Priestly set out the content of guidelines drafted in 2007 on the subject of legal costs and modified by the Board in December, 2007 and he explained that in 2008 further guidance was given to the assessors on the issue of legal costs and additionally following the decision of the Supreme Court in the *O'Brien* case that is considered below. In 2009 a document in relation to the guidelines was published on the Board's website; that document is exhibited in the proceedings and sets out the general policy applied by the Board.

The Oireachtas Committee Meeting

28. On the 15th October, 2008 Ms. Dorothea Dowling, Chairperson of the respondent Board, and Ms. Patricia Byron, Chief Executive of the Board, made a presentation to the Oireachtas Joint Committee on Enterprise, Trade and Employment in relation to the general administration of the Board. The applicants reply on extracts from a transcript of that meeting which, in their contention, demonstrates that the Board had pre-judged the issue of costs even before it considered the applicants' claims. In the case of Mr. Giniewicz, this was included in the original statement of grounds but in Mr. Plewa's case liberty to amend the statement of grounds to include two new grounds was required; this was granted by order of Hedigan J. dated the 13th February, 2009. Among the passages complained of were the following, the first taken from the evidence of the Chairperson of the Board:-

> "We find it extraordinary that as an independent statutory body we are prohibited from contacting any person who has a solicitor to explain how the system works, how long the process will take, or to refer to the one and only form one has to fill out and then outline the next two steps one must follow. That is difficult to understand, especially given the result of the case in the High Court of *Domican v Axa Insurance Limited* that held an insurance company could write to an injured party who had a solicitor. It is hoped in our Supreme Court appeal not only that we will be successful but that we will get clarity on this point because quite frankly I think at the outset there was a misunderstanding that perhaps we were trying to do down the legal profession. The legal profession has a rightful and important part to play in litigation cases but, as Ms Byron indicated, the vast majority of cases are not in fact litigation. The person one needs to ask about the adequacy of one's compensation is one's doctor, whether one is going to get better, if one is better, whether one's condition is stable, whether one will suffer from arthritis in the future or if there will be any further comeback from an injury. That is medical advice not legal advice."

The Chief Executive replied to a question and commented:

> " ... A proper medical report is the only document in our office that drives an award. A complete medical report is needed because otherwise we will be hampered in making a correct award. If the right award is not made, it will be rejected by the claimant and the case will go to court. In a court environment there are opportunities to earn legal fees, whereas there are no such opportunities in the PIAB environment. A court environment involves litigation and is adversarial. A case has to be mounted and the costs must be paid. In the PIAB environment there are no legal issues, negotiations, mounting of cases or oral hearings. It is a simple, lean administrative process and we have only one function. We establish the facts regarding the two parties, the nature and extent of injuries, and make the award based on the book of quantum which tracks court awards. It is a very straightforward process. In cases in which there is not a medical report, there is a lacuna in which fees can be earned."

29. These cases are part a series of more than 20 in which the same solicitors have represented applicants to the Board and where similar issues arise in regard to the legal fees awarded by the Board.

The Issues in the Case

30. Neither applicant complains about the amount awarded to him in compensation by the Board; their complaints relate to the legal fees awarded. The essential question is whether the Board properly assessed their applications to be reimbursed for seeking legal advice. The matters to be considered are the exercise of the Board's discretion under s. 44 of the Act of 2003, the reasons given for the decisions to refuse the full amount of legal fees claimed, the reasonableness of the decisions and the question of objective bias.

31. The Board denies that judicial review applies in the circumstances of this case because it complied with all its legal obligations

under the legislation and it did so in a manner that is consistent with fair procedures. The application for legal fees was considered by the Board according to its normal system which was to have an assessor look into the claim for expenses and make a recommendation in a procedure that was fair and reasonable in the circumstances. It is not a matter for this Court to decide whether the assessments of legal fees were correct but rather to look at the process as a whole and then to decide on the legality and fairness. There was material on which the Board could and did reasonably reach its conclusions and therefore the matter is not open to judicial review.

32. The Board argues that even if the matter is appropriate for detailed examination by the Court, then its decisions satisfied the requirements of fairness and reasonableness. The function of the Board under the legislation is to exercise a discretion and that is what it did in these cases. There can be no basis for suggesting that there should be an award for legal costs in all cases and that is, in effect, what is being claimed here. The Act of 2003 requires the Board to make decisions. Decisions will inevitably be different in different cases. It is, of course, for the Board and the Board alone, with the assistance of its own assessors, to make the judgment as to what is reasonably and necessarily incurred in the way of expenses in an individual case. Finally, the contentions made in relation to the Oireachtas Committee presentation are fundamentally misplaced and the applicants rely on selected extracts out of context.

The PIAB Legislation

33. Section 7 of the Act of 2003 provides:-

> *"(1) Nothing in this Act is to be read as affecting the right of any person to seek legal advice in respect of his or her relevant claim and no rule shall be made under section 46 that affects that right.*
>
> *(2) Subsection (1) shall not be read as requiring any procedure to be followed by the Board or hearing to be conducted by it that would be required to be followed or conducted by a court were the relevant claim concerned to be the subject of proceedings."*

34. Section 29 of the Act provides that:-

> *"(1) If the Board considers it to be a reasonable inference from the manner in which a claimant or a respondent has completed, or is completing or attempting to complete, a step required to be taken by him or her by or under this Act that he or she does not have a sufficient appreciation of the legal consequences the taking of that step, or the following of the procedures generally under this Act, may have in respect of his or her rights or obligations as regards the relevant claim, it shall be the duty of the Board to do one, or more than one, as it considers appropriate, of the following things.*
>
> *(2) Those things are*
>
> > *(a) to advise the claimant or respondent, as appropriate, of the desirability of his or her obtaining legal advice in the matter,*
> >
> > *(b) to provide an explanation to the claimant or the respondent of the legal consequences generally a failure to complete properly the step concerned or to follow properly the procedures generally under this Act may have in respect of a claimant's or respondent's rights or obligations as regards a relevant claim,*
> >
> > *(c) to provide such assistance as the Board considers reasonable to the claimant or the respondent, as appropriate, in completing the step concerned properly or; as the case may be, re-taking that step in a proper manner. [...]"*

35. Section 30(3) determines that:-

> *"If*
>
> *(a) a next friend or, as appropriate, a guardian of the claimant or the respondent, (or, as the case may be, any one or more of 2 or more respondents) who is a minor or a person of unsound mind is acting on behalf of the claimant or that respondent or those respondents in the matter, or*
>
> *(b) a committee of the claimant or the respondent (or, as the case may be, any one or more of 2 or more respondents) who is a person of unsound mind is acting on behalf of the claimant or that respondent or those respondents in the matter, the notice referred to in subsection (1) shall also include a direction to the next friend, guardian or committee that he or she or it obtain legal advice from a person who is independent of him or her or it as to whether the assessment ought to be accepted."*

36. Finally, s. 44 provides:-

> *"(1) Without prejudice to section 45, on an assessment having been made the Board may include in the notice it serves under section 30 in relation to the assessment the following statement.*
>
> *(2) That statement ("the statement') is one to the effect that the Board will direct 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 with 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. […]"*

The O'Brien Case
37. Both sides relied on the case of *O'Brien v. Personal Injuries Assessment Board* [2009] 3 I.R. 243 in support of their positions and it is convenient to refer to it here. In that case the applicant's solicitors furnished the Board with an authorisation requesting the Board to correspond with the applicant solely through his solicitors. However, the Board corresponded directly with the claimant and copied such correspondence to the claimant's solicitor. The applicant challenged the Board's policy by way of judicial review. The Board argued that the policy was necessary and expedient to its functions as it reduced legal costs and increased efficiency. MacMenamin J. in the High Court granted a declaration that in adopting this policy, the Board acted in breach of the Act of 2003 and had not demonstrated how its interference with the lawyer / client relationship was necessary, expedient or incidental to its functions.

38. On appeal, the Supreme Court affirmed the findings of the High Court. Denham J. found that it could not be inferred from the Act of 2003 or presumed that the Oireachtas intended to exclude lawyers acting for claimants at PIAB. She stressed that the PIAB process has serious consequences for a claimant and she concluded (at p. 261):-

> *"[L]awyers not being excluded from [PIAB] by the 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 [PIAB]."** (Emphasis added)*

39. Macken J. further noted (at p. 276) that even personal injuries cases 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."* She found (at p. 281) that a claimant's decision that his interests would best be served by mandating his solicitor to deal with the Board in relation to his claim seems *"not only reasonable but even, in an appropriate case, prudent."* She concluded (at pp. 287-288):-

> *"The provisions of s. 7(1) [of the Act of 2003] 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 the board**. The position concerning costs appears to be subject to an unelaborated discretion vesting in the board to award costs.** Counsel for the appellant disclosed during the course of the appeal that the current position is that costs are now sometimes awarded, depending on the nature of the case. According to counsel for the respondent, this is different to the position as explained by the appellant in the High Court**. My decision however is not dependent on this apparent thane in approach to costs**, and for the purposes of this judgment**, costs are simply part of the overall background to the issues raised**, save in respect of the legal consequences of the Act of 2007, already mentioned above." (Emphasis added)*

40. Macken J. further held (at p. 289) that *"[t]he fact that, on appeal, it is said that costs are allowed in certain cases, does not however grant a right to costs to a claimant, so can makes no difference to the interpretation of s. 7(1) of the Act."*

General Principles
41. Well-established principles governing applications for judicial review include the following:-

> • Judicial review is not an appeal from an administrative decision but a review of the manner in which the decision was made (see *R v. Chief Constable of North Wales Police, ex p. Evans* [1982] 1 W.L.R. 1155, at p. 1173).
>
> • The Court cannot substitute its opinion for that of the decision-maker because it would have reached a different conclusion to the decision-maker (see *e.g. O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 93; *Meadows v. The Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 21st January, 2010)).
>
> • There is limited scope to interfere with the exercise of discretion by an administrative body (see e.g. *Keegan v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642; *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 93).
>
> • The decisions of administrative bodies to which the legislature has entrusted decisions which require the deployment of knowledge and expertise available to it are afforded particular deference in the context of judicial review applications (see e.g. *Ryanair v. Flynn* [2000] 3 I.R. 240; *Meadows v. The Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 21 St January, 2010)).

42. A public body upon which a discretionary power is conferred is entitled to guide the implementation of that discretion by means of a policy or set of rules and, where a very wide discretion is conferred on that body, it is particularly appropriate for the body to develop a policy as to the way in which its discretion will be exercised so as to assist in providing consistency and certainty:

> • In *Mishra v. The Minister for Justice, Equality and Law Reform* [1996] 1 I.R. 189, Kelly J. held that there is nothing in law which forbids the Minister upon whom a discretionary power is conferred to guide the implementation of that discretion by means of a policy or set of rules; however, care must be taken to ensure that the Minister's policy does not disable the exercise of discretion in individual cases.
>
> • Fennelly J. in *McCarron v. Kearney* (Unreported, Supreme Court, 11th May, 2010) held as follows in relation to the exercise of discretion
>
> *"[I]t would be wrong to preclude a decision-maker from formulating guidelines by reference to which he makes it clear that he will make his decisions. It would be inimical to good administration. and to consistency in decision-making to oblige all decision-makers to treat each decision entirely on its own, without reference to previous decisions or to criteria designed to serve the public interest."*

43. Administrative decision-makers are not required to provide discursive judgments as a result of their deliberations (*O'Donoghue v. An Bord Pleanála* [1991] 1 I.L.R.M. 750). In *Meadows v. The Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 21st January, 2010) Murray C.J. said:-

"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context."

Analysis
44. The Board's decisions must be considered in the context of the applications that were made in these two cases. An administrative body has to assess each application in light of the facts, circumstances and documents that are advanced in support of the relief sought.

Exercise of Discretion
45. The functions of the Board under s. 44 were to form an opinion and to exercise a discretion: for a claim to succeed the Board had to be of the opinion that the fees were (a) reasonably and (b) necessarily incurred by the claimant (c) in complying with Part 2 of the Act. Then it had to exercise its discretion whether to include in the assessment the whole or part of the fees. The Board does not pay fees or expenses to a claimant; its role is to propose what ought to be paid by the responsible party and received by the injured person by way of fair compensation.

46. The applicants contend that in refusing to award the legal fees claimed, the Board applied a blanket policy of treating legal fees differently to medical and other expenses. They say it was inconsistent for the Board to allow the medical and translation fees claimed in full and without query but to disallow the full amount of the legal fees claimed.

47. 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. As was held by Macken J. in *O'Brien,* the Act was enacted *"with a view to reducing the costs, in particular legal and other professional costs, associated with the resolution of such personal injuries claims by means of court proceedings*" and is "*intended to provide a mechanism for resolving civil actions for personal injuries, without the costs involved in court proceedings*." If the Board decided to award legal fees in every case, without inquiry as to the reasonableness or necessity of those fees for the purpose of complying, that would be an abrogation of its obligations under the Act.

48. In the case of Mr. Giniewicz, the assessors decided that one element of the claim did reasonably and necessarily require legal advice and so they allowed part of the costs claimed. In the case of Mr. Plewa they decided that none of the legal fees claimed were necessarily and reasonably required. It is true that the affidavit evidence provided as to how the claims were assessed and the awards made by the Board was in fairly general terms and no mode of calculation of the precise amount is set out. On the other hand, the affidavits do provide the essential information as to why only part of the costs was allowed. In each case the Board considered the application for an assessment by reference to the supporting documents submitted. It did so in its usual way using assessors appointed for that purpose. It came to a decision as to the reasonableness and necessity of the fees claimed; based on the information before it.

49. 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, certainty and consistency in decision-making. The policy of the Board in relation to legal fees (as set out in the affidavits of Mr. Priestly) was neither unyielding nor inflexible, each case being considered by the assessors on its individual merits. There is no evidence that the Board's policy disabled it from awarding legal fees that were considered to have been incurred reasonably and necessarily for the purpose of complying with Part 2 of the Act. The evolution of the policy displays a degree of flexibility in response to changing circumstances. It cannot be said that the Board imposed so rigid a policy as to have unlawfully fettered its discretion. Nor can the policy be condemned as unfair or irrational.

50. I cannot find any evidence that the Board unlawfully fettered its discretion, acted in an improper way in the exercise of its discretion or failed to fulfil its functions properly under s. 44 of the Act.

Duty to Give Reasons
51. The decisions of the Board did not set out in express, detailed terms the reasons not to allow the full amount of the legal fees claimed. However, the adequacy of the somewhat general explanation provided by the Board has to be assessed in the context of the claim put forward by the solicitors on behalf of the applicants. It is apparent that there is a real inconsistency in the complaint made by the solicitors that the Board did not give them reasons for reducing their costs, in circumstances where the solicitors themselves provided no solid information as to how those costs were justified or how they were calculated. The claims were characterised by general propositions that were advanced in largely standard form letters which lacked specific information related to the applicants, except in relation to their language requirements.

52. The solicitors submitted to the Board that the legal fees were reasonably and necessarily incurred because the applicants were foreign nationals, had limited knowledge of the English language, did not have any knowledge of the law of torts in Ireland, did not have law degrees and were not qualified barristers or solicitors with expertise in the area of personal injury litigation and the assessment of quantum.

53. A person does not need to have detailed information about the legal system in order to make a claim to the Board. As was noted by the respondents, 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 of or the judgment 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.

54. I find the solicitors' submissions as to the difficulties posed by the applicants' nationality to be equally unimpressive. The nationality of an applicant would appear to have relevance only in relation to potential language difficulties, which in this case were remedied by the provision of translation and interpretation services at the cost of € 350 each, for which the Board ordered the defendants to reimburse both applicants in full. I cannot see how the applicants' nationality / language difficulties could have further impact in terms of justifying the legal fees claimed. They were therefore in a similar position to any competent, adult English-speaking claimant. They were at no geographical disadvantage as they were in Ireland throughout the claims process.

55. The Act protects a vulnerable person (e.g. a minor or person with disability) or one who is incapable of appreciating the consequences of accepting or rejecting an assessment by mandating the Board to direct or recommend independent legal advice.

However, the applicants in these cases were not in a vulnerable condition by reason only of their Polish nationality.

56. The applicants' complaint that the Board failed to take account of their language difficulties is accordingly without substance.

57. The claims made by the applicants in these cases were straightforward and were the kind of claims intended to be dealt with by the Board and thereby diverted from the courts' burgeoning caseloads. The only matter which could be described as being "complex" at any level was the identification of the correct defendant in the case of Mr. Giniewicz.

58. It was the function of the Board to decide what it considered was reasonable and necessary. It was not for the solicitors to generate the expense and for the Board to show why it should not have been incurred. The solicitors had to make the case as to necessity and reasonableness for the Board to consider. In the circumstances, the examination by the Board and its assessors was necessarily general and the reasons for the decisions could only be expressed in rather general terms.

59. Ultimately, it seems to me that although the reasons given were quite general, the applicants were not in any doubt as to why their legal fees were rejected.

Reasonableness

60. The applicants contend that it was unreasonable for the Board not to award the full amount of the legal costs claimed. It is beyond doubt that the applicants had the right to be represented by a solicitor; that is not in dispute in these proceedings. It follows, in the applicants' contention, that they were entitled to be reimbursed for engaging solicitors to represent them in the PIAB process. They further contend that the legal fees which they claimed were reasonable and they have each filed an affidavit sworn by a legal costs accountant to that effect. They also submit that the Board failed to appreciate their language difficulties and vulnerability. Each of the applicants has filed a supporting affidavit saying that the costs were reasonable. In my view, these affidavits suffer from the same frailty as the solicitors' original bills for costs; that is, complete non-specificity. The legal costs expert says only in the most general terms that she considers the fees claimed to be reasonable, without describing what she did to arrive at that opinion. She does not say what specific work the solicitors did, the seniority of the person who did the work, how long it took, why it was necessary, what was the basis of charge and why it was justified.

61. No itemised bill was provided by the solicitors in either case and the reasons given for the fee claimed in the case of Mr. Giniewicz (as set out at para. 19 above) were general and non-specific. Thus, no clear explanation was given for the fees. Even after the fees were refused (in whole and in part respectively), the solicitors did not furnish any information to the Board as to how the sum claimed in each case was calculated or what particular work was undertaken or how long it took or by whom it was done.

62. If costs go to taxation, the Taxing Master has to take into account the work done, the time taken and the level of expertise of the person who did it. It is fundamental to ask in respect of an account for any service what work was done and how long it took to do it. It is worth noting that s. 68 of the Solicitors (Amendment) Act 1994 requires a solicitor to provide his client, on the taking of instructions, with particulars in writing of his charges or an estimate of the charges or, where that is not practicable, the basis on which the charges are to be made. This essential information, which is required by law to be given to the client, was not furnished by the solicitors to the Board when they made the claim for costs. The applicants have exhibited a letter from the solicitors to the Board, assuring the latter somewhat dismissively that they had complied with the requirements of s. 68. However, the particulars provided to the applicants under s. 68 were not exhibited in the proceedings.

63. In *O'Brien*, Macken J. held that it may be reasonable and prudent for a claimant to engage a solicitor *"in an appropriate case".* Both Denham and Macken JJ. stressed that the right to legal representation in the PIAB process is subject to the caveat that an applicant has no absolute entitlement to recover the costs of such representation. Denham J. went so far as to state that *"A claimant cannot recover his costs for legal representation at PIAB."* Although it was not in issue in that case, the Supreme Court did not find the legal costs limitation to present any difficulties for the constitutionally-protected right to legal representation or the principle of equality of arms. Thus, the applicants have incorrectly interpreted *O'Brien* insofar as they rely upon that decision as authority for the contention that they are entitled as of right to fees for legal advice in relation to the PIAB process.

64. In all the circumstances, I do not find that there was any improper exercise of discretion by the Board or failure to comply with the legislation. I do not find that there was a failure to give reasons or irrationality, unreasonableness or other defect in the Board's decisions.

Objective Bias

65. The test for objective bias is not the viewpoint of the party affected but by the standard of a reasonable person who knows the relevant facts. The Supreme Court addressed this question in *O'Callaghan v Mahon* (30th March 2007). Denham J. said that the test *"refers to a reasonable apprehension by a reasonable person, who has knowledge of all the facts, who sees what is being done... It is not the apprehension of a party."* Fennelly J. said that bias was established *"if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision-maker will not be fair and impartial."*

66. In this case the reasonable observer's presumed knowledge includes the legislation under which the Board operates, the facts of the particular applications that were made by the solicitors on behalf of the applicants and the legal issues then awaiting resolution in the decision of the Supreme Court in *O'Brien's* case.

67. The applicants contend that the statements made by the Chairperson and Chief Executive to the Oireachtas Committee on 15th October, 2008 exhibit an attitude on the part of the Board that solicitors had no role in its process; that doctors give all relevant advice; that there are no legal issues and that it is not a situation for legal fees to be earned, and that the appropriate person to advise about the acceptance or rejection of an assessment by the Board is a doctor. It is argued that the extracts demonstrates bias, prejudice, hostility and dislike against the involvement of solicitors acting in respect of applicants to the Board and against the award of reasonable legal fees arising from such representation.

68. This matter was addressed in the affidavit evidence of Ms. Byron, the Chief Executive Officer of the Board. The affidavits of Mr. Priestly are also relevant in so far as they describe how these applications were handled. No application was made to cross-examine the deponents. I think it is clear from this evidence that the applicants' interpretation of the Oireachtas Committee statements is unjustified.

69. Even if they are considered independently, without reference to the affidavits, the statements made by the officers of the Board do not in my view bear the meanings the applicants attribute to them. It is true that a small part of the transcripts if taken alone and read literally gives some comfort to the applicants' argument but a fair and reasonable reading of the exchanges as a whole does not

support a case of bias. The statements made by the Chairperson and Chief Executive suggest that compensation is determined by reference to medical information rather than on the basis of an oral hearing in respect of disputed matters including legal issues such as liability. There are many straightforward cases and the mere fact that a solicitor is retained does not necessarily mean that the solicitor's fees will have been reasonably and necessarily incurred for the purposes of s. 44 of the Act of 2003. However, the Board members did *not* express the position that legal advice is never required or that no award is ever made in respect of legal fees. No informed observer would reasonably infer objective bias from the transcript of the Oireachtas Committee meeting.

70. The suggested reading of the Oireachtas proceedings would be contrary to the terms of the Acts, as an informed reasonable person would be aware.

71. In, my view, the allowance in Mr. Giniewicz's case of a proportion of the fees claimed and the reason provided for that decision would appear to negate any absolute policy not to allow legal fees. The circumstances in which the decisions were made also point to the same conclusion. The Board assessed the claims by reference to the documents submitted in support. It did so in its usual way using assessors appointed for that purpose.

72. In the circumstances I am satisfied that the applicants have not established objective bias.

Conclusion
73. The applicants have not established any failure by the respondent to comply with the Act of 2003 nor were they able to demonstrate any breach of fair procedures, unlawful fettering of discretion, unreasonableness, objective bias or other ground to invalidate the Board's decisions. The application for judicial review fails.