Neutral Citation No. [2005] IEHC 101

THE HIGH COURT

[2004 No. 785 JR]

BETWEEN

DECLAN O'BRIEN

APPLICANT

AND

THE PERSONAL INJURIES ASSESSMENT BOARD AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 11th day of March, 2005

1. Having delivered judgment herein on 21st January, 2005 I adjourned the matter so as to allow counsel to agree a draft declaration giving effect to the judgment. It has not been possible to reach such agreement.

2. Consequently I will now deal with the form of the order and certain ancillary matters regarding costs.

3. Prior to doing so I wish to point out the following matters.

1. It is clear that identified issues to be determined in the case were agreed, reduced to writing and set out in an issue paper. They are recited in the judgment.

2. It is equally clear that *the parameters* of the case were set out in the written and oral submissions made by the parties before, and in the course of argument in the case.

3. That position is equally crystal clear from the submissions made by each of the parties during the course of the case.

4. The true range of the issues in the case are also identified in the transcript and were fully addressed by applicant, respondent and *amicus curiae*.

5. The key issue is: whether the respondent in declining to accept or act upon the authorisation dated 16th August, 2004 (described as a "confirmation and authority by client") by corresponding directly with the applicant (and copying such correspondence to his solicitors) is acting in breach of s. 7 of the Personal Injuries Assessment Board Act, 2003, or without authority under any other provision of the Act".

6. I do not believe that on any fair reading of the transcript it could be inferred that the matters truly in issue in the case were confined as to whether or not the question of the conduct of the respondent was *ultra vires* s. 7 of the Act simplicter. What was at issue was the question of vires in the context of the entire Act.

7. Each counsel made submissions on the *vires* question having regard to the totality of the act, not any section alone; and certainly not confined to s. 7.

8. The identification of issue was confirmed in the course of the submissions on costs made on 1st February, 2005.

9. It was for that precise reason that I indicated that the approved version of the judgment would deal specifically with that point. The matter is dealt with in my findings on 1st February last. This was without objection from any party on that date.

10. I consider the reason for the absence of any such dissent was precisely for the reason that it was clear, as a legal argument evolved, that the question of the impugned conduct and the issue of *vires* under the Act as a whole was the matter at issue.

11. To say otherwise I believe runs counter to the arguments of *all the parties* advanced in the hearing.

12. I would particularly refer the parties to p. 12 of the transcript of the 1st February, 2005 in this context.

4. The declaration to be encompassed in the judgment will therefore be that

"The respondent in declining to accept or act upon the authorisation dated 16th August, 2004 (described as "a confirmation and authority by client"), by corresponding directly with the applicant (and copying such correspondence to his solicitors) is acting in breach of s. 7 of the Personal Injuries Assessment Board, 2003 or without authority under any other provision of the Act."

5. The judgment and order will further recite:

"2. Having regard to the declaration contained in paragraph 1 hereof the court does not find it necessary to rule on the balance of the issues referred to in "the list of issues agreed between the parties".

6. The next point which arises for consideration relates to the submissions of Mr. Fitzsimons S.C. regarding the procedure then to be adopted by the respondents in relation to the applicant's own claim.

7. In order to facilitate matters Mr. Whelehan S.C., for the applicant, indicated that so far as *his client* was concerned the declaration at paragraph 1 was not intended to prevent the respondent from sending copies of notices required to be served under s. 30 of the Act to the claimant in addition to giving the said notice to the applicant's solicitor. As I indicated at the time I considered that this was a reasonable approach having regard to the background facts.

8. I have been asked to assist the respondent Board by giving an indication or ruling as the procedure to be adopted by the Board in other cases and particularly in relation to s. 30 of the Act.

9. In reaching the decision I have, I must have regard to the following factors

1. This was a *lis inter partes*. The decision is based on the facts of the case and the issues argued before the court.

2. What is sought as a declaration in a form which would govern other hypothetical or real cases where the facts are not known to the court and where the conduct of the parties, and the nature of any mandate or letter of authority may vary.

3. Insofar as the parties to the instant proceedings are concerned, there is now no dispute in existence as to the procedure which is to be adopted.

4. Insofar as the circumstances of other case are concerned the court would be constrained to approach the matter based on hypothetical facts, or in circumstances which have not been fully argued in this case.

5. In such circumstances therefore, it seems to me that to make any broader order or declaration would be to do so in circumstances not based on concrete facts.

6. The absence of such concrete facts is the missing element which render a case "hypothetical". In the circumstances I believe that this is a case where the court should exercise its discretion only by framing the order based on the facts of the case (see *Zamir and Woolf* The Declaratory Judgment 3rd edition Chapter 4.055 et Seq). I recognise and appreciate the reasons why the matter was brought to my attention. But I am afraid I can go no further than the factual and legal framework of the case as argued.

10. I would also draw attention to the fact that the general ambit of s. 30 of the Act was not specifically argued nor was it made the subject matter of submissions such as would have justified it being encompassed in any declaration herein.

11. It is only fair to state that I did observe on 1st October, 2004 (p. 10 of transcript) that the course of action being suggested by the respondent seemed extremely reasonable, but it will be recollected that when the matter was mentioned on that date Mr. Whelehan SC specifically pointed out he was there to represent the interests of his client only. Counsel for the Law Society was not present on 1st February, 2005.

12. I turn to the issue of costs.

13. It has been fairly accepted on all sides that the matter of costs was dealt with only in a general way on 1st February, 2005. Mr. Fitzsimons S.C. has specifically drawn attention to a number of issues which he contends require specific determination.

1. It is not in dispute that the applicant is entitled to the costs of the application for leave to bring judicial review proceedings on 4th October, 2004.

2. The applicant is also entitled to the costs of the substantive hearing of all three days.

3. I turn now to the various hearings which took place in the intervening period relating to the application to amend proceedings, the application for mandamus, and the application by the Law Society to be joined as *amicus curiae* or to intervene in the proceedings.

14. In making an order on these issues I am having regard to the following considerations:

(a) that the matter proceeded as one of urgency;

(b) that as found in the judgment there was a lack of consensus *ad idem* between the parties as to the nature of the undertaking of the Board in correspondence regarding registration

(c) there was a degree of confusion on the part of the applicants as to precisely the nature of the offer made by the Board

(d) in view of the urgency of the case there was understandable difficulty on the part of all parties in the framing of the precise issues at stake and in responding thereto prior to embarking on the substantive hearing. This included the issue of the pleadings and also the identification of the specific sections of the Act which were in issue. For the purposes of the hearing, there was an onus on not one but all parties to set out clearly their positions although I accept there was an order to that effect against the applicant.

(e) the contribution of the Law Society was of assistance to the court. It did not add to the length of the proceedings in any substantive way. Indeed the applicant's opening submissions were substantially reduced thereby.

15. Having regard to all these factors I take the view that each of the parties should bear their own costs in relation to those interlocutory applications. This I believe is in accordance with the spirit of my finding regarding the application for the Attorney General for his costs.

16. As I have indicated the applicant will have the costs of the application for leave and of the substantive hearing.

17. The applicant will have the costs of taking judgment on 25th January, 2005.

18. With regard to the subsequent applications, each party will bear its own costs.