Neutral Citation [2015] IEHC 465

THE HIGH COURT

[2013 No. 615JR]

O'S

APPLICANT

-AND

RESIDENTIAL INSTITUTIONS REDRESS BOARD

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 16th July, 2015.

PART I

KEY ISSUE ARISING

1. Should the court quash a decision of the Residential Institutions Redress Board striking out Mr O'S's application to extend the time for him to seek compensation for alleged physical abuse suffered by him as a child at a residential institution?

PART II

GENERAL APPROACH OF THE COURT

2. This is an unhappy case. Mr O'S alleges that he was taken into care in a particular residential institution as a child and that he suffered physical abuse while he was there. He has sought compensation from the Residential Institutions Redress Board. He comes to court complaining that his application has been struck out, in effect for want of timely prosecution.

3. Clearly, many of the individuals presenting to the Board were and are persons whose terrible childhood experiences have left them vulnerable and led often, if not always, to considerable suffering in adult life. Suffice it to note in this context that Mr O'S is someone who has faced and continues to face significant challenges in his adult life; he would undoubtedly suggest these challenges to derive partly or wholly from a childhood spent in residential care that he claims was marred by physical abuse.

4. Mr O'S's application for compensation was made pursuant to the Residential Institutions Redress Act, 2002. In terms of the court's general approach to considering the within application, the court is mindful that the Act of 2002 was acknowledged by Hogan J. in *A.G. v. Residential Institutions Redress Board* [2012] IEHC 492 at para.18 to be a remedial statute. This was confirmed earlier this year by Denham C.J. when the Supreme Court considered the same case on appeal (see *O'G v. The Residential Institutions Redress Board* [2015] IESC 41 at para.33), albeit that the decision of the Supreme Court involved its finding against the eventual decision that Hogan J. had felt compelled to arrive at in light of certain previous case-law of the High Court.

5. The Supreme Court's finding on appeal that the Act of 2002 is a remedial statute has the effect that the Act falls to be construed as widely and liberally as fairly can be done. (See in this regard the comments of Walsh J. in *Bank of Ireland v. Purcell* [1989] I.R. 327). Specifically in this regard, the court considers that when it comes to strike-outs of applications for want of compliance with a direction of the Board, the Board must bring to its considerations a generous understanding of the underlying difficulties that are suffered by many, perhaps all who come within the scope of the redress scheme. More particularly, the court considers that inaction on the part of Mr O'S in terms of compliance with directions of the Board falls to be viewed in a very different light from similar failings of a more conventional applicant before a statutory body or indeed a more conventional applicant for judicial review.

PART III

KEY FACTS

6. On or about 1st December, 2009, Mr O'S first contacted the offices of Byrne Carolan Cunningham Solicitors by telephone for the purpose of instructing a solicitor to lodge an application with the Residential Institutions Redress Board on his behalf.

7. Byrne Carolan Cunningham swiftly made application to the Residential Institutions Redress Board. By letter of 3rd December, 2009, the Board acknowledged receipt of this application and forwarded an application form, together with instructions in relation to its completion.

8. On or about 16th September, 2011, Mr O'S, through his solicitors, submitted to the Board a 'Late Application Form' seeking redress pursuant to the provisions of the Residential Institutions Redress Act, 2002. The sharp-eyed will note the delay between issuance of the form and submission of the later application. The court understands from the hearing that, unsurprisingly perhaps, numerous of the people who have historically made application to the Board have been quite vulnerable individuals; as a result, 'hiccups' and delays in the application process have been by no means uncommon.

9. Mr O'S received a reply to his application by letter dated 8th November, 2011, wherein the Board acknowledged receipt of the Legal Application Form and advised that it appeared that Mr O'S had previously instructed another firm of solicitors (Peter McDonnell & Associates) to file an application on his behalf, which had been duly done on 15th December, 2005. The Board further advised that the application had been rejected by the Board on 23rd March, 2010; this decision was upheld by a Review Committee, following an appeal hearing on or about 30th September, 2010. The Board requested that Mr O'S's new solicitors take urgent instructions from Mr O'S in relation to his previous application. The Board further advised that it would not be progressing Mr O'S's late application.

10. Upon receipt of the foregoing documents, Mr O'S's solicitors sought instructions from Mr O'S. They were instructed that due to Mr O'S's history of drug and alcohol abuse, Mr O'S had not been in a position in to engage with the Board or with his first solicitor in relation to his earlier application.

11. By letter of 14th May, 2012, the Board wrote to Mr O'S's solicitors seeking a response to its letter of 8th November, 2011, and requiring them to attend at the Board's offices on 23rd May, 2012 to provide an explanation as to why there had been a delay in, for example, furnishing such documentation as would enable the Board to make a final determination in respect of the late application. The Board also advised that this would be the final opportunity to deal with outstanding matters or to lodge outstanding documentation with the Board in respect of the late documentation, and that thereafter the file would be transferred to the appropriate sub-division of the Board to make a final decision in respect of the late application.

12. By letter of 17th May, 2012, Mr O'S's solicitor replied to the Board, extending Mr O'S's apologies for not engaging fully with his earlier application and asking that the earlier application be re-opened. It was further explained that Mr O'S had a history of alcohol and drug abuse and that it was as a consequence thereof that problems had arisen as regards progressing his application.

13. By letter of 17th July, 2012, the Board advised that Mr O'S's late application had recently been considered by the Late Applications Division of the Board. A history of the first application was set out and it was specifically noted that Mr O'S's first solicitors had indicated to the Board that their last contact with Mr O'S had been in 2005. The Board further stated that in the period between 2005 and 2012, it appeared that Mr O'S had done nothing to prosecute this first application. The Board asserted that it had afforded Mr O'S every reasonable opportunity to move the matter forward but Mr O'S had failed to prosecute his first application. The letter concluded as follows: *"[T]he Board takes the view that it has done everything that could reasonably be expected of it in relation to Mr O'Shea's [first] application and…will not reopen the [first] application".*

14. Following receipt of this letter, Mr O'S's solicitors attempted to advance matters before a Review Committee. Some correspondence went to and fro. Ultimately, the Review Committee, while expressing its sympathies to Mr O'S, declined to have any further involvement in the matter.

15. On or about 11th March, 2013, the Board, acting pursuant to s.8(7) of the Residential Institutions Redress Board Act, 2002, as inserted by s.44 of the Residential Institutions Statutory Funds Act, 2012, issued a document entitled "*Notice of Intention to Strike Out a Request to Extend a Time Period Referred to in Section 8(1) of the Residential Institutions Redress Board Act, 2002*". This notice related to Mr O'S's second application. The Board directed that Mr O'S should furnish to the Board on or before 10 a.m. on 18th April, 2013 "*[p]roof that your client meets the requirements of Section 8(2) and/or (3) of the Residential Institutions redress Board Act, 2002*".

16. Mr O'S was further advised in this Notice that the matter would be listed before the Board on 18th April, 2013 or the first available opportunity thereafter to verify compliance with the Notice. It was further advised that if compliance was not so verified, the Board might strike out the request.

17. The matter came before the Board on 26th April, 2013. Mr O'S's solicitor was present on behalf of Mr O'S. He explained that he was not in a position to furnish 'proof' as directed by the Board and requested an adjournment or, in the alternative, that the matter be listed for an oral hearing in order that the Board might determine, in accordance with its statutory function, whether Mr O'S's case came within the provisions of s.8(2) and (3) of the Residential Institutions redress Board Act, 2002. This request was refused by the Board, which proceeded to strike out the matter.

18. The 'strike out' at the hearing was followed by an entirely consistent written *"Decision to Strike Out Request for an Extension of Time Pursuant to Section 8(6) of the Residential Institutions Redress Board Act, 2002, as inserted by Section 44 of the Residential Institutions Statutory Fund Act, 2012"* dated 29th April, 2013. In this Decision, the Board (or a division of it), having found that the Board had issued a Notice in accordance with s.8(7) of the Acts and that Mr O'S had failed to comply with a direction therein and that the matter had been listed before the Board and Mr O'S's legal representative heard, struck out Mr O'S's application.

PART IV

KEY STATUTORY PROVISIONS

19. Mention has been made in passing of certain provisions of the Act of 2002, as amended. It is worth reciting these in greater detail before proceeding further.

i. Long title

20. The Residential Institutions Redress Act, 2002, as amended, is described in its Long Title as *"An Act to provide for the making of financial awards to assist in the recovery of certain persons who as children were resident in certain institutions in the State and who have or have had injuries that are consistent with abuse received while so resident and for that purpose to establish the Residential Institutions Redress Board to make such awards and to provide for the review of such awards by the Residential Institutions Review Committee and to provide for related matters"*.

21. The court makes mention of the long title because, as will be seen hereafter, the Board in the within proceedings seeks to rely on the fact that the Board was always intended to have a finite existence and this must be brought to bear in the court's consideration of the application now presenting. The court, however, considers that the primary objective of the Act of 2002 is clearly outlined in its long title. The Act places a premium on providing redress to individuals whose innocence was stolen from them when, to borrow from Sarah Kay, their world was but the size of a crayon box and it should have taken every colour to draw it. All provisions of the Act fall to be construed within that overriding objective.

ii. Section 8

22. Section 8(1) of the Act of 2002 provides that "*An applicant shall make an application to the Board within 3 years of the establishment day*". By statutory instrument, the Minister for Education and Science appointed 16th December, 2002, as the establishment day for the purposes of the Act. Hence the statutory deadline for making an application for redress was 15th December, 2005.

23. Under s.8(2) of the Act of 2002 "*The Board may, at its discretion and where it considers there are exceptional circumstances, extend the period referred to in [s.8(1)].*"Under s.8(3), such an extension must be granted "*where it is satisfied that an applicant was under a legal disability by reason of unsound mind at the time when such application should otherwise have been made and the applicant concerned makes an application to the Board within 3 years of the cessation of that disability.*"Under s.8(4), as inserted by s.1 of the Residential Institutions Redress (Amendment) Act 2011, "*Notwithstanding the provisions of [the Act of 2002, as amended], the Board shall not consider an application under this section that is made on or after 17 September 2011.*"

24. Pursuant to s.8(6) and (7), as inserted by s.44 of the Residential Institutions Statutory Fund Act 2012, the Oireachtas has provided the Board with a discretion to strike out applications for an extension of time where the applicant fails to comply with a direction of the Board contained in a notice of intention to strike out (which notice must be sent at least 28 days prior to the strike-out). Thus s.8(6) and (7) provide as follows:

> *"(6) Notwithstanding anything contained in subsection (2) or (3), the Board may strike out a request before it to extend the period referred to in subsection (1) where the person making the request has failed to comply with a direction of the Board under subsection (7).*
>
> *(7) The Board shall not, under subsection (6), strike out a request unless it gives at least 28 days' notice in writing to the person making the request of the Board's intention to so strike out unless the person complies with the direction of the Board contained in the notice."*

PART V

CONTENTIONS AND RESPONSES MADE

i. Overview
25. The Board's direction of 3rd March, 2013, required that Mr O'S furnish to the Board on or before the following 18th April "*proof that your client meets the requirements of Section 8(2) and/or (3) of the Residential Institutions Act 2002*." On 26th April, the Board, acting under s.8(6) struck out Mr O'S's request for an extension of time because of non-compliance with a direction of the Board under s.8(7); this was formalised in an order of the 29th. Notably, no consideration of the merits of Mr O'S's application was required to be carried out prior to such strike-out. The profound effects for Mr O'S of a strike-out without any consideration, in the context of an Act that is a remedial statute, has the consequence that the Act must be strictly construed against an unwarranted strike-out of a claim.

ii. Board cannot require proof of compliance?
26. Mr O'S contends that the Board is not entitled to require an applicant to provide proof of compliance with s.8(2) before the Board is willing to engage with its statutory function.

27. The court does not accept this contention. It accepts as correct the Board's response that before granting an extension it must be satisfied that there are exceptional circumstances: a logical corollary of this is the Board is entitled to require evidence as to the existence of exceptional circumstances. This seems consistent, *inter alia*, with the provision in s.11(3) of the Act of 2002 that the Board shall, subject to the provisions of the Act, determine its own procedures.

iii. Direction impermissibly vague?
28. Mr O'S contends that the Board's direction of 11thMarch was impermissibly vague in that it gave no indication as to what proof was appropriate or sought.

29. The Board states, at para.37 of its Statement of Opposition that

> *"[T]he Board is entitled, pursuant to its powers under sections 5(2), 5(4)(a) and 11(3) of the 2002 Act, to require that documentary evidence , whether in the form of a sworn Affidavit by the Applicant and/or medical evidence, be submitted before it can consider an application for an extension of time….The Applicant and/or his legal representatives were aware from 3rd December 2009 onwards – and were again expressly notified by means of the Notice and Direction of 11th March 2013 – of the Board's requirement that evidence be submitted…".*

30. Again, the court considers, for the reasons stated above, that the Board is entirely correct that it is entitled to seek documentary evidence of eligibility for redress. The difficulty that the court considers to arise for the Board is that no indication was given in the notice as to the nature or substance of the evidence sought. Mr O'S had no means of knowing from the direction what he was required to produce at the meeting of 26th April.

31. It does not do to contend (as the Board does) that Mr O'S's solicitor, being experienced in these types of applications, would have known the type of documentation that was required to be produced. If the direction of 11th March, 2013, is to be viewed as a lawful direction within the meaning of the Act of 2002, where failure to comply with the direction could lead to the claim being struck out, the direction was impermissibly vague. Moreover, no-one knew better what type of evidence the Board would have considered generally adequate, yet no indication, even in generic terms, was contained within the direction.

32. If there is a process provided by the Oireachtas whereby a failure to comply with a direction can lead to a claim being dismissed or struck out, effectively *in limine*, the recipient of the direction must know in advance of any hearing what exactly is required. Yet it appears from the Board's contentions that no matter what documentation Mr O'S (or his representative) had brought to the meeting of 26th April, it considered itself to retain the discretion to strike out.

iv. Failure to treat Act of 2002 as remedial statute?
33. Mr O'S contends that the Board erred in law in failing to treat and interpret the Act of 2002 as a remedial statute. In its Statement of Opposition the Board states that:

> *"[I]t is denied that the Residential Institutions Redress Act 2002 is a 'remedial statute'. A remedial statute is one the purpose of which is to correct or cure an unintended defect in…existing legislation and to help to give full effect to the legislative intent behind the initial or original legislation. The Act of 2002 is not such a statute."*

34. It is clear from *O'G* case that the Supreme Court takes a precisely opposite view. Moreover, if ever there was evidence that the Board failed to treat the Act of 2002 as a remediating statute, the above-quoted text from its Statement of Opposition is surely it.

35. Counsel for the Board argues that in practice the Board does and has historically taken a liberal and facilitative approach to the processing of applications by applicants for redress; but that there are limits to the latitude it can give applicants in what is a voluntary and finite scheme.

36. The court does not equate (a) being liberal and facilitative, with (b) compliance by the Board with a legal requirement that, when discharging its functions under the (remedial) Act of 2002, the Board bring to its considerations a generous understanding of the underlying difficulties that are suffered by many, perhaps all who come within the scope of the redress scheme.

37. The court does not consider the fact that the redress scheme may be intended to be finite as a ground which suffices to defeat the overriding objective of the legislation as set out in the long title (and considered above) – as if, in truth, any of us who have read and heard, over the last two decades or so, of the myriad miseries visited on generations of misfortunate children in residential care, needs to look to the long title of the Act of 2002 in order to understand what the Oireachtas was about when it enacted that measure.

38. For the reasons just stated, the court considers that the Board erred in law in failing to treat and interpret the Act of 2002 as a remedial statute, and also allowed the intended finite nature of the scheme to impinge upon achievement of the overriding objective of the legislation.

v. Should the matter have been listed for oral hearing?
39. At the hearing of 26th April, 2013, Mr O'S's solicitor was asked what his current instructions were from his client. The transcript of the hearing shows that in reply he said, *"I suppose the instructions from him is that he wants me to do the best I [can] for him. The only option I can see now is if the original application cannot be opened, is to ask for his late application to be considered by way of an oral hearing"*. He stated that from his conversations with Mr O'S, the latter was not a well man:

> *"It was difficult for him to engage, he wasn't aware an application had been filed on his behalf [this in reference to the first application]. He does accept that he made contact with those solicitors and he set of a chain of events. So, I'm just simply saying not to drift away from the Applicant who I think should be entitled to an opportunity perhaps to speak for himself".*

40. This met with the rather un-generous response at the hearing that Mr O'S's solicitor was not medically qualified, as if it takes a medical qualification for a professional lawyer who has progressed many redress applications to gauge with some accuracy the functional ability or mental state of a particular client. Indeed, this response suggests again to the court that the Board at the hearing did not have sufficient regard to the remedial nature of the Act of 2002. However, the point of especial significance in this regard is that in seeking an oral hearing, Mr O'S's solicitor was in truth seeking no more than what had been the common practice of the Board to this point. The court has before it the affidavit evidence of two solicitors in this regard, one sworn by Mr Brian F. Carolan (Mr O'S's solicitor) and another sworn by Mr Declan Duggan, a solicitor from Cork who has experience of redress applications but who appears to be unconnected to the within proceedings.

41. Mr Carolan avers, *inter alia,* that:

> *"I say that in my experience the present case is the only occasion at such a call-over on which the Board has both refused an oral hearing and refused an adjournment in circumstances where I had sought one or the other in order to seek final instructions from an Applicant. The Respondent [the Board] declined to follow either of these possibilities. I say that in my experience this decision is wholly inconsistent with how the Respondent has treated other applications. I say that I am aware of numerous cases where at a call-over the Respondent has allowed adjournments for the third, fourth and fifth occasion, particularly where I have indicated to the Respondent that the Applicant has [particular]…health issues."*

42. Mr Duggan avers, *inter alia*, that:

> *"I say I filed and completed more than 100 Residential Institutions Redress Board applications, all of which were late applications. I have appeared at the Respondent Board's call-overs when requested on a regular basis. I say that in my experience I was never refused, nor, do I believe, did I ever witness a refusal of, an adjournment where the matter was listed for the first time. I also believe I never experienced a refusal to provide further time in circumstances where I believed and stated that further time would have been productive….*
>
> *Further, I do not recall ever witnessing a refusal of an application for an oral hearing in respect of a late application where same had been sought on behalf of an applicant for redress….*
>
> *Frequently an adjournment of a matter in the call-over list would have been sought in order to seek instructions from a client, particularly where the matter was listed at a call-over for the first time. I say that in my experience and from recollection it would have been unprecedented for an application to be refused if the matter was in the list for the first time. I have attended call-overs where adjournments were granted on the basis that on the next adjourned date, the application would be listed as peremptory as against the Applicant."*

43. The contention that the Board ought to have allowed an oral hearing meets with the response from the Board that such contention fails to take account of the very particular and unusual circumstances of the case, that Mr O'S's solicitor at no point submitted to the Board at its hearing that he had not expected it to make a determination on that date, and that it does not comprehend how in the short time between the enactment of the Act of 2012 and the hearing on 26th April, 2013, an expectation could have arisen on the part of Mr O'S's' solicitor in this regard.

44. As regards the Board's reference to the particular and unusual circumstances of this case, that is a sword which cuts both ways: it is not clear to the court that in the context of the within case, the Board had sufficient regard to (a) the fact of the Act of 2002 being a remedial statute, (b) the particular circumstances with which Mr O'S presents (the medical concerns raised by his solicitor appear to have been dismissed without meaningful basis), (c) the fact that, as considered above, Mr O'S in terms of compliance with directions of the Board, falls to be viewed in a very different light from similar failings of a more conventional applicant before a statutory body, and (d) the expectations to which its own previous behaviours had given rise when it came to hearings such as that on 26th April, 2013.

vi. Taking of irrelevant matters into consideration?
45. Mr O'S contends that the Board took irrelevant matters into consideration insofar as it considered relevant, when making its decision to strike out, the fact that Mr O'S's solicitor had failed to reply to a letter of 17th July, 2012. The court does not accept this contention. It is clear from the evidence that the Board's pre-dominant and almost exclusive regard in striking out the application for extension of time was that it found as a fact that Mr O'S had failed to comply with a direction, and had regard to the fact that this delay occurred within the context of still greater delay.

vii. Unreasonableness?
46. The final ground in the Statement of Grounds for judicial review is a general, 'catch-all' ground to the effect that in all the circumstances the Board acted unreasonably in striking out Mr O'S's claim. The Board contends that its decision to strike out was reasonable, that it was exercised consistent with the legislative intention underpinning s.8(6) and (7) of the Act of 2002, that it occurred in the context of a breach of the direction of 11th March, 2013, and that it must be viewed in the context of Mr O'S's history of delay.

47. The court considers that: in having regard to the legislative intention of s.8(6) and 8(7), the Board omitted to have due regard to the overriding objective of the Act of 2002, as considered above and as set out in the long title to that Act; that the direction was, for the reasons stated above, impermissibly vague; and that there is no indication that Mr O'S's history was itself viewed – as in the context of a remedial statute it ought to have been – in the context of the medical issues that, however briefly, were flagged with the Board on 26th April, 2013, and swiftly dismissed without proper regard to the professional experience of Mr O'S's solicitor.

PART VI

CONCLUSIONS

48. For the reasons stated above, the court will grant an order: (1) quashing the decision of the Board dated 29th April, 2013, striking out Mr O'S's request to extend the period for making an application for redress in accordance with s.8(6) of the Act of 2002, as inserted by s.44 of the Act of 2012; and (2) remitting the matter to the Board for the purposes of a re-consideration of Mr O'S's application.