THE HIGH COURT

[2014 No: 5 CT]

IN THE MATTER OF THE HEPATITIS C TRIBUNAL ACT, 1997 AS AMENDED, SECTIONS 6 (3) (c) AS AMENDED BY THE HEPATITIS C COMPENSATION TRIBUNAL (AMENDMENT) ACT, 2002

AND IN THE MATTER OF SECTION 5 (15) 0F THE HEPATITIS C COMPENSATION TRIBUNAL ACT, 1997 AS AMENDED BY THE HEPATITIS C TRIBUNAL (AMENDMENT) ACT, 2002

AND IN THE MATTER OF ORDER 105 (A) OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

A.N.

APPELLANT

AND

THE MINISTER FOR HEALTH AND CHILDREN

RESPONDENT

JUDGMENT of Mr. Justice Bernard J. Barton delivered the17th. day of June 2015

1. This matter comes before the court by way of motion on notice whereby the appellant seeks, in the first instance, an order pursuant to the provisions of Order 105 (A) rule 2 (5) and Order 122, Rule 7 of the Rules of the Superior Courts extending the time within which to bring an appeal from an award of general and special damages made by the non statutory Hepatitis C Compensation Tribunal on the 6th of October, 1997. The application is contested by the respondents.

Statutory provisions

2. On the 21st of May, 1997 the Hepatitis C Compensation Tribunal Act 1997 (the Act) became law. The Act provided for the establishment of a Tribunal for the purposes of making awards of compensation to claimants diagnosed positive for hepatitis C resulting from the use of Human Immunoglobulin Anti-D or as a result of receiving a blood transfusion or blood product within the state as well as to certain other categories of claimant specified in s. 4 (1) of the Act as amended by the Hepatitis C Compensation Tribunal (Amendment) Act 2002 and the Hepatitis C Compensation Tribunal Act 2006.

3. By S.I. 443/1997 the respondent appointed November the 1st, 1997 as the establishment day of the tribunal provided for under the provisions of the Act.

4. Section 6 (1) of the Act provided that as and from the establishment day the non statutory scheme Compensation Tribunal, established by the respondent on the 15th of September, 1995, would stand dissolved.

5. Section 6 (3) of the Act provided that :

> *"A person who has had a claim for compensation determined by the non-statutory scheme Tribunal may—*
>
> *(a) apply to the Tribunal to hear evidence at the discretion of the Tribunal which was not made available to the non-statutory scheme Tribunal in calculating the award made to that person,*
>
> *(b) apply to the Tribunal to hear evidence on any statutory or non-statutory benefits which she or he has received or is entitled to receive which were taken into account by the non-statutory scheme Tribunal in assessing an award to that person,*
>
> *(c) apply to the Tribunal for an award of aggravated or exemplary damages or an amount to be paid to her or him from the Fund,*
>
> *(d) apply to the Tribunal for the adjustment of any award made by the non-statutory scheme Tribunal to an award to which she or he would have been entitled had section 2(l)(a) of the Civil Liability (Amendment) Act, 1996 , been in force at the time of the making of the award, or*
>
> *(e) appeal an award."*

6. The bringing of appeals from decisions of the Hepatitis C Compensation Tribunal, including appeals from the non statutory Tribunal, are regulated by Order 105(A) of the Rules of the Superior Courts 1986, as amended by S.I. No. 392 of 1998 and entitled "Rules of the Superior Courts (No. 7) (Appeals from the Hepatitis C Compensation Tribunal) 1998" (the Rules).

7. Order 105(A) 2. (5) provides that :

> *"Any appeal brought by a person pursuant to s. 6 (3) (e) of the Act shall be brought by originating notice of motion within six months from the date of the commencement of these rules or within such further period as may be permitted by the court under Order 122".*

8. The jurisdiction vested in the court to enlarge or abridge time under Order 122 is expressed in Rule 7 which provides that ;

"Subject to any relevant provision of statute, the court shall have power to enlarge or abridge the time appointed by the rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

9. Section 5 (15) and (16) of the Act makes provision for appeals to the High Court from the decisions of the statutory Tribunal and in this regard Order 105(A) 2(1) provides that any such appeal shall be brought within one month from the date of receiving notice of the making of the award or within such greater period as may be prescribed by the Minister. Section 5. (9)(a) provides that the period for acceptance, rejection or appeal of an award is one month (or such greater period as maybe prescribed by the Minister) from the date of receipt of the notice of the making of the award.

10. It follows from the foregoing that there are significant differences between the provisions of the Act which are concerned with appeals from awards of the statutory and non statutory tribunals respectively.

Background

11. The appellant was born on the 14th of July 1969. She was diagnosed as a carrier of haemophilia A when an infant. Because she is factor VII deficient she requires factor VII replacement therapy to cover any surgical or dental operation. In the course of her childhood and in her teenage years she was treated with a variety of blood products including a treatment with factor VII in April 1986 when she was about sixteen years of age.

12. As a result of that treatment she contracted hepatitis c but remained unaware of that until a diagnosis in May 1993 that she was hepatitis c positive following which the appellant brought an application for compensation pursuant to the terms of the non statutory tribunal scheme. Under the terms of that scheme there was no right of appeal from any decision of the non statutory Tribunal nor, for that matter, was there any provision made for an award to be made by that Tribunal of aggravated or exemplary damages but all of which were subsequently provided for by the Act.

13. The appellant's application for compensation was heard by the non statutory Tribunal on 6th of October, 1997. She was awarded a total sum of £408,693 of which £150,000 was in respect of general damages and £158,693 in respect of past and future loss of earnings.

14. Given that the award was made prior to the establishment day of the statutory Tribunal, the applicant's understanding of the options open to her were that she could either accept or reject the award ; she also believed , incorrectly, that she no right of appeal. A rejection of the award left her with a procedure by way of plenary or special summons which, quite apart from other issues, would necessarily have resulted in a disclosure of her identity. Upon this understanding, together with a serious depression from which she was suffering at the time, the appellant considered herself to be in the position where she had no realistic option other than to accept the award.

15. Although the Act had become law in May 1997, the rules regulating the procedure and time limits for the bringing of appeals against any decision of either the statutory or non statutory tribunal were not promulgated until the 23rd of October, 1998. At the time when the appellant decided to accept the award she was unaware of the right to appeal an award of the non statutory tribunal provided for by the Act and remained so up until the time when, in December of 1999, she emigrated to South Africa.

16. In the absence of any contact from the Tribunal or her former solicitors in relation to her right of appeal, the applicant first became aware of that when she consulted another firm of solicitors on her return to Dublin from South Africa in 2002.

17. Whilst she was then advised of her right to appeal she was also advised that the time for doing so had expired: No advice was given that she could have brought an application for an extension of time to appeal the award.

18. It is also apparent from correspondence with her former solicitors that, having been consulted by the appellant, they discussed the options with counsel and that the advice which they had received with regard to reopening the matter was not at all encouraging. Their recollection of what had transpired at that time was that whilst there had been a brief discussion during which they offered to review their file and furnish an opinion, no instructions in that regard were received from the appellant. Her recollection of the advice which she received then was that the time within which she could have brought an appeal had expired and that that was the end of the matter or so she thought until she consulted her present solicitors in November 2013.

19. The appellant was always dissatisfied with the award and would have brought an appeal had she known of her right to do so especially in light of the decision of this court in *PK v. The Minister for Health and Children* delivered on the 19th of April, 1999. The date of that decision is potentially significant in the context of this application since the six month period from the coming into force of the rules on the 23rd of October, 1998 had yet to expire.

20. It is also apparent from the affidavit of the appellant's solicitor, Mr. Raymond Bradley, and from the replying affidavit sworn on behalf of the respondent by Maeve O'Brien, assistant principal, that an advertisement was placed in the Irish Times and other national newspapers on the 1st of November, 1997 which gave notice of the dissolution of the non statutory scheme Tribunal. That advertisement also included notification that a right of appeal from awards made by that Tribunal had been provided for by the Act. It appears, however, that the appellant did not see this advertisement nor was its content otherwise brought to her attention

21. In addition to the foregoing, official notification of the promulgation of the rules was published in Iris Oifigiuil and letters giving notice of the making of the rules were also sent to a number of interested individuals, including Ms. Rosemary Daly, administrator of the Irish Haemophilia Society.

22. Although the appellant was a member of the Society there is no evidence that she received a letter or any advice from that organisation at any time regarding the making of the rules or of her right to appeal the award.

23. A further attempt to notify claimants in general of the new rules was made by way of advertisement issued by the respondent and published in the national press on the 2nd of November 1998, entitled *"Hepatitis C Compensation Tribunal – time limits for lodging appeals against the decisions of the compensation Tribunal (statutory and non statutory)"* .

24. With regard to the right to appeal a decision of the non statutory Tribunal the advertisement contained the following information *"the rules provide that any person wishing to appeal to the High Court against a decision of the non statutory Tribunal must lodge the appeal within six months of the commencement date i.e. by the 23rd of April 1999."* The notice was not seen by nor the content otherwise brought to the attention of the appellant.

25. Notwithstanding these notification measures it is clear from averments and the correspondence exhibited in the affidavit of Raymond Bradley, and in particular from a letter received by Mr. Bradley sent by the secretary to the statutory Tribunal, Mr. Michael Ryan, dated the 11th of July, 2003, that the Tribunal did not undertake to advise clients or their solicitors about the time limits or of a closing date for lodging appeals in respect of non statutory awards.

26. This stands in stark contrast to the approach which was taken with regard to awards of the statutory tribunal, where express notice in relation to time limits was given to claimants in the award letter.

27. Furthermore, it appears that individual letters of notification were sent to (a) claimants to whom awards had been made and who had represented themselves as well as to (b) claimants and or their solicitors who had had awards made by the non statutory tribunal but where acceptances had not been received either by the establishment day under the Act or at the time when the rules came into force in 1998.

28. As to the position of other claimants not falling into either of those categories, it was Mr Ryan's belief that the advertisement of the 1st of November 1997 had also been copied to all solicitors on record with the Tribunal.

29. Whether or not that belief is correct the file of the appellant's former solicitors has long since been destroyed and the respondent being unable to access or otherwise produce a copy of any such letter it is not known whether it was ever sent and, if so, whether it was ever received by them. What does seem clear, however, is that neither the content of that notice nor the statutory changes were directly brought to the attention of nor were they otherwise known to the appellant before her return to Ireland in 2002.

30. The materials available to the court on this application show that at the time, or shortly after the Act became law, there was some confusion on the part of the tribunal and the respondent in relation to the date on which the Act came into force as well as to the application and effect of certain provisions of the Act in respect of the non statutory scheme and those claiming or who had claimed under it.

31. Quite apart altogether from the differences of approach to communication with certain categories of claimant evident from the correspondence already referred to, this confusion or misunderstanding is well illustrated by the terms of clause 5 of the non statutory scheme, amended in June 1997, which specified that a claimant who had received notice of an award would have a period of one month after the establishment day to accept or reject the award. In point of fact there is no such provision in the Act applicable to non statutory claimants, moreover, when addressing the options open to such claimants, no right of appeal was mentioned.

Submissions.

32. Written as well as oral legal submissions were made and have been considered by the court. There was general agreement between the parties concerning the jurisprudence of the Superior Courts applicable to an application for an extension of time in which to bring an appeal. In the modern era that may be said to commence with a decision of the former Supreme Court in *Eire Continental Trading Company Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170 which sets out the criteria upon which the jurisdiction of the court is to be exercised. The discretionary nature of the jurisdiction was described by Lavery J. in the following terms:

> *"In the words of Sir Wilfred Greene M.R. in Gatti v.Shoosmith…:- "The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised."*

33. As to that there are three conditions which it may generally be said are required to be satisfied before the court should allow an extension of time, these being

> *"1. The applicant must show that he had a bona fide intention to appeal formed within the permitted time.*
>
> *2. He must show the existence of something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient.*
>
> *3. He must establish that an arguable ground of appeal exists."*

34. Whilst in the view of Lavery J. those conditions were proper matters for consideration by the court in determining whether or not time should be extended, he went on to observe that: *"… they must be considered in relation to all the circumstances of the particular case."*

35. In *Brewer v. Commissioners for Public Works* [2003] 3 I.R. 359 Geoghegan J. referring to these words observed:

> *"I would interpret those words of Lavery J. as indicating that while these three conditions were proper matters to be considered, it did not necessarily follow in all circumstances that a court would either grant the extension if all these conditions were fulfilled or refuse the extension if they were not. The court still had to consider all the surrounding circumstances in deciding how to exercise its discretion."*

36. It is clear from the many judgments of this court and the Supreme Court that the decision in *Eire Continental* is a seminal authority which has stood the passage of time, moreover, in so far as it can be said to set out a test to be satisfied it is one which applies in the vast majority of cases. The reason for that was explained by Clarke J. in his judgment in *Goode Concrete v. CRH Plc. Roadstone Wood Ltd. and Kilsaran Concrete* delivered on the 10th October 2003 in which he observed at para. 3.3

> *"The underlying obligation of the court (as identified in many of the relevant judgments) is to balance justice on all sides. Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice. Prejudice to successful parties who have operated on the basis that, once the time for appeal has expired, the proceedings (or any relevant aspect of the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also a factor of high weight. Precisely how all of these matters will interact on the facts of an individual case may well require careful analysis. However, the specific Eire Continental criteria will meet those requirements in the vast majority of cases."*

37. In his view it was difficult to envisage circumstances where it would be in the interests of justice to allow an appeal to be brought outside the permitted time where the court is not satisfied that there were any arguable grounds of appeal established nor could it be in the interests of justice to allow wholly unmeritorious appeals to progress.

38. Where a party is aware or ought to have been aware of a time limit within which to appeal then unless there was an intention to do so and a good explanation as to why it was not proceeded with in time then enlarging time should not be allowed. Given that in most cases the only material which any party will need to consider in deciding whether or not to bring an appeal will be the evidence and materials which were before the court of first instance it is ,as Clarke J. observed ,*"…not unreasonable to require the party, in the interests of the overall administration of justice and the balance of justice as between the parties, to come to a decision within the time specified and to bring the appeal either within that time or such further period as the court might, exceptionally, allow if there is some excuse for the notice of appeal not being filed in time."*

39. He also recognised that there can be cases where different situations apply such as where, unusually and exceptionally, the basis of the appeal stems from factual circumstances outside of the materials which were before the High Court. In such cases, apart from establishing an arguable basis for an appeal, he considered that the other two other criteria would need to be modified. In that regard he was satisfied that the court should consider the following factors:

> *"(a) the time when the party seeking an extension of time first became aware of the facts on which it wishes to rely;*
>
> *(b) the extent of which it was reasonable for that party to engage in further enquiry before bringing an application to the court for extension of time;*
>
> *(c) the time which elapsed between information coming to the attention of the relevant party and the application for an extension of time measured by reference to the time limit of 21 days within which a party is expected, in an ordinary case, to appeal to the Supreme Court; and*
>
> *(d) any other factors arising in the special circumstances of the case but in particular any prejudice which might be said to have been caused to the successful party in the High Court by reason of the overall lapse of time between the order sought to be appealed against any application for an extension of time."*

40. The differences between the statutory and non statutory schemes for the provision of compensation to the victims of Hepatitis C, including those relating to time limits, have been considered in a number of decisions since the Act came into force. In *D.B. v. The Minister for Health and Children infra* the Supreme Court determined that an appeal against the award of the statutory tribunal brought outside the statutory one month period as prescribed by s.5 (9) (a) of the Act, was statute barred.

41. It was submitted on behalf of the appellant that the difference between the provisions regulating appeals from awards of the statutory and non statutory tribunal constituted a recognition by the Oireachtas that some of the claimants who had had their applications for compensation determined by the non statutory tribunal would be either unaware of the right to appeal conferred on them by the Act and/or of the time within which such right of appeal was required to be exercised and that non statutory claimants were to be afforded different treatment with regard to the bringing of appeals than those who had had their applications determined by the statutory tribunal.

42. The existence of such different considerations was identified by McGuinness J. in her judgment in *D.B. v. the Minister* infra at p 53 in the following terms:

> *"In the Act of 1997 the Oireachtas has itself made a clear distinction between the provisions applied to persons who received awards under the non statutory scheme (who are dealt with under s. 6) and those who received awards from the tribunal (who are dealt with under s. 5). As part of this distinction, a different time limit for appeal is provided for those who received awards under the non statutory scheme. There are other important differences in the two types of claimant. As was submitted by counsel for the Minister and Counsel for the tribunal, there are perfectly understandable reasons which may have motivated the Oireachtas in differentiating between the two classes of claimant. The crucial factor for the court however, in interpreting the statute is that the differentiation of the two classes of claimant was the policy actually adopted by the Oireachtas in the Act."*

43. Addressing the rationale for the differentiation between the classes of claimant and in particular the provisions providing for appeals from awards of the statutory and non statutory tribunals Geoghegan J. observed at p 63

> *"Much play has been made of the fact that under O. 105 (a) of the Rules of the Superior Courts any appeal brought by person pursuant to s. 6 (3) (e) of the 1997 Act shall be brought by originating notice of motion within six months from the date of the commencement of the rules or within such further period as may be permitted by the court under O. 122. But it was entirely reasonable that persons who had received awards from the non statutory scheme should be given an extended time for appealing because they had to learn first of the very existence of the new Act and any rights they might have. All of that could take a considerable length of time and there was nothing discriminatory in giving them this longer period. Furthermore this period was not given by the Act itself. The Act simply gives them the right of appeal; it is the rule making committee which rightly prescribed the lengthy period."*

44. In her judgment Denham J., as she then was, states at p25

> *"The Oireachtas treated applicants under the different tribunals differently. The schemes were different. The clear and unambiguous words of the statute set out the law. The Oireachtas intended to treat non statutory scheme tribunal claimants in a different manner as to time limits within which to appeal. This was provided for in the plain language of s. 5 (9) (a)."*

45. In *O.D. v. The Minister for Health and Children*, in which the judgment of this court was delivered by O'Neill J. on the 29th July 2003 ,and in *M. v. The Minister for Health and Children*, in which judgment of this court was delivered by Hanna J. on the 21st July 2005, the issue of an extension of time within which to bring an appeal from an award of the non statutory tribunal, fell to be considered.

In O.D v. the Minister where the appellant was unaware of the existence of a right to appeal or of the decision in *P.K. v. The Minister* [1999] 2 I.R. 45, time for the bringing of an appeal was enlarged. Likewise, in *M. v. The Minister*, Hanna J. also extended the time for bringing an appeal against an award of the non statutory tribunal in not dissimilar circumstances.

46. With regard to the *Eire Continental* criteria, it was submitted, on behalf of the appellant, that she could not form an opinion to appeal at a time when no right to appeal existed, moreover, if there was a right to appeal it was necessary that she be made aware of that right before she could be required to form the requisite intention to exercise it. In the particular circumstances of this case

the appellant had not been advised at the time when the award was made that the Act, which had come into force in May 1997, provided a right to appeal that award nor was she contacted or otherwise advised in relation to the promulgation of the rules in 1998.

47. It was further submitted that whilst the appellant has always been dissatisfied with the award it was not until after her return from South Africa in 2002, when she again consulted solicitors, that she first became aware of the existence of her right to appeal and which she would have exercised but for the limited advice that she had received namely that the time for doing so had expired. It was contended, therefore, that whilst she had formed the necessary intention in respect an appeal she did not prosecute it by reason of the limited nature of advice and on foot of which she had been led to believe that the time for doing so had expired. It was not until she again consulted solicitors in May 2013 that the appellant discovered that she had been labouring under a fundamental mistake of law which, it was submitted, was an operative mistake for the purposes of the *Eire Continental* criteria.

48. With regard to establishing an arguable ground of appeal, it was submitted, on behalf of the appellant that, apart altogether from the change in her health and circumstances in which she now finds herself as a result of her hepatitis infection, the decision in *P.K. v. The Minister* concerning the appropriate level of general damages in cases such as the present would, as in the cases of *O.D. v. The Minister and M. v. The Minister*, most likely result in an enhanced award of general damages being made to her on appeal. In this regard it was indicated during the course of the hearing by senior counsel for the appellant, Mr. Danaher, that in the event of the court acceding to her application any appeal would be confined to one of general damages.

49. It was acknowledged on behalf of the appellant that a significant period of time had elapsed between the time when she became aware of her right to appeal and the bringing of the within application, however, it was submitted that no part of this delay was attributable to any personal blameworthiness on her part rather that was attributable to professional advice which she had sought and received and as a result of which she had formed a mistaken belief firstly in relation to the existence of her right to appeal and secondly , when she became aware of it , her legal entitlements as to the exercise of that right. Further or, alternatively, she had not been contacted and notified of her statutory rights by the tribunal.

50. Insofar as it might be said that acceding to the application would result in prejudice to the respondent arising in respect of evidence in connection with injuries either not given or available at the time of the hearing of the original application, it was submitted that the statutory scheme envisaged the possibility of claimants returning to the tribunal for further compensation in certain circumstances. Accordingly, having to deal with a further hearing after such a long period of time was not unusual in the overall context of the statutory scheme. Moreover, apart altogether from the confusion which existed in the understanding of both practitioners and the tribunal as to interpretation and the application of the statutory provisions during the period between the passing of the Act and the promulgation of the rules, it was contended that any prejudice arising would have been avoided or substantially mitigated had the cohort of non statutory claimants ,which included the appellant, had been treated in the same way as statutory claimants who had been communicated with directly or through their solicitors.

The respondent's submissions.

51. It was submitted on behalf of the respondent that when the appellant returned from South Africa in 2002 and consulted her former solicitors she ought to have taken the opportunity of obtaining the formal advices, including an opinion of counsel, which were offered to her. Having failed to do so and given the period of time which has elapsed between then and late 2013, when she did take such advice, the court should exercise its discretion to refuse the application.

52. It was further submitted that the appellant had not in fact formed an intention to appeal within the time permitted by the rules or within the period between the award in October 1997 and November 2013 and that having failed to take formal advice from her solicitors and/or counsel in 2002 there was no operative mistake, accordingly, the appellant was unable to satisfy two of the three Eire Continental criteria.

53. Furthermore, it was contended that if the court were to accede to the application it would result in the respondent being seriously prejudiced by reason of the uncertainty and the absence of any finality which would arise, moreover, given the large number of claimants who had received awards from the non statutory tribunal but who did not appeal, granting the relief sought by the appellant would expose the respondent to uncertain contingent liabilities. I took this submission to mean that the granting of an extension of time to the appellant would result in a flood of similar applications for which provision would then have to be made.

54. As to the likely consequences for the respondent in respect of the appellant being permitted to proceed with an appeal at this remove from the decision of the non statutory tribunal, it was submitted that had any appeal been prosecuted within the time prescribed by the rules or within any extended time as might have been allowed on foot of an application in 2002 or 2003 at the latest, any such appeal would long since have been dealt with. Furthermore, on the basis of the appellants current medical status, it was likely that the hearing of any appeal at this stage would involve the respondent being asked to meet if not a new case then certainly a very different case to that which would likely have been presented within the time prescribed by the rules or within any reasonable time thereafter.

55. The respondent also submitted that in the absence of actual knowledge as to her rights in the period between the award and her return home from South Africa in 2002, the appellant ought to have been aware of them when she consulted solicitors then and that the consequences of her failure to obtain comprehensive legal advice when offered at that time should rest with her rather than be visited upon the respondent.

56. It was further submitted that in 1997 it would have been open to the appellant under the scheme to reject the award and to institute proceedings by way of plenary summons or, alternatively, to appeal the award of the tribunal by way of special summons pursuant to the provisions of O. 3 of the Rules of the Superior Courts as being a matter coming within the meaning of class 21 of the classes specified in that Order.

Reply

57. The appellant submitted by way of reply that there was no evidence that by granting an extension of time in which to appeal the award of the non statutory tribunal that a flood of similar applications would be made nor was there any evidence offered by the respondent as to the number of such applications already brought.

58. The appellant also submitted that it was never the practice of claimants to appeal the decisions of the non statutory tribunal by way of special summons and in any event such procedure was neither appropriate nor in fact authorised. Instituting proceedings by way of plenary summons would have defeated the purpose of the Act in so far as it provided a means for the assessment of damages without reference to the issue of liability and where the identity of the claimant would remain anonymous.

Decision.

59. Although the respondent contended that the appellant ought to have known of the Act and the changes brought about by it, including a right to appeal awards of the non statutory tribunal, the appellant's uncontroverted evidence , which the court accepts, is that it was not until November 2013,when she consulted her present solicitors ,that she first became aware of the existence of the courts jurisdiction, conferred by Order 105(A), to extend the time within which she could bring an appeal

60. That there was some confusion and lack of clarity in relation to the position and rights of those claimants who had had their applications determined by the non statutory tribunal prior to the establishment day on the 1st of November 1997 is understandable since, apart from the provisions of s.6, the Act was otherwise concerned with the establishment of the statutory tribunal and with making provision for and in respect of claims proceeding under its terms. Whereas s. 5 (9) (a) provides that a claimant to whom an award is made by the statutory tribunal was to have one month or such greater period as might be prescribed from the date of receipt of the notice of the making of it to either accept, reject or appeal the award, s. 6 (3) (b) was completely silent as to time within which an appeal against an award of the non statutory tribunal could be brought.

61. When the non statutory scheme was amended in June 1997 an assumption would appear to have been made that the time limits applicable to the statutory tribunal were also intended to be applied to non statutory awards. That this was so is evident from the copy correspondence enclosed together with the letter dated the 11th July 2003 and sent by the tribunal to the appellant's present solicitors in connection with other cases in which they had been instructed at the time. That approach although understandable at the time was not in fact warranted by the wording of the Act.

62. However, once the rules were promulgated, it is apparent from the correspondence exhibited in the affidavit of Maeve O'Brien, which includes a letter addressed to Ms. Rosemary Daly, administrator of the Irish Haemophilia Society, that the respondent's view of the rules, insofar as they provided for the period of time within which to appeal an award made by the non-statutory tribunal, was that such claimants had a period of six months from the date of the commencement to do so. That this was an approved and generally held view is also evident from the content of the national press advertising of the 2nd November, 1998, the purpose of which was to draw attention to the time limits for lodging appeals against decisions of the statutory and non-statutory tribunals.

63. When addressing the question of time limits applicable to awards of the non-statutory tribunal, the advertisements expressly stated that claimants "*…must lodge the appeal within six months of the commencement date i.e. by the 23rd April, 1999"*. It is significant that neither the advertisement in the national press nor the correspondence addressed to the chairpersons, secretaries or administrators of the interested associations, including the haemophilia society, made any reference to the extension of time provisions in the rules, on the contrary the use of the word "*must*" and the specific mention of a date by which an appeal had to be lodged in the advertisement could not reasonably have led to an understanding or conclusion on the part of the reader other than that unless an appeal was lodged by no later than the 23rd of April 1999, it would be to late to do so thereafter.

64. I am satisfied and accept that the appellant did not receive any advice whether oral or written and that she did not otherwise become aware of her right to appeal before she returned to Ireland in 2002. I am also satisfied and find that the advice which she received from her solicitor when she returned to Ireland was the first occasion on which she became aware of her right to appeal and that the limited nature of that advice was entirely consistent with the view of the respondent expressed in the correspondence and advertising to which reference has already been made, namely that the time limit for the bringing of an appeal against an award of the non statutory tribunal was six months, a period which, by 2002 ,had long since expired

65. Against this background and in particular with regard to the fact that the advice of her then solicitors accurately reflected the view which the respondent itself had expressed in correspondence and in the national press, it would be harsh to the point of being unjust to visit on the appellant any negative consequences arising upon her failure to instruct her former solicitors to obtain a formal legal opinion in relation to the matter. It was entirely reasonable that the appellant relied on the advice that she received at the time, moreover, the respondent can hardly be heard to complain now about the appellant's failure to obtain a comprehensive legal opinion as to the meaning and extent of the rule in question when its own publically expressed view then was that any appeal had to be brought within the six month time limit.

66. Given that the purpose of the correspondence and advertising in the national press was to draw attention to the time limits for lodging appeals against decisions of both the statutory and non-statutory tribunals, the failure to make any reference to the provisions which enabled non-statutory tribunal claimants to apply to the High Court for an order extending the time within which to bring an appeal is, in my view, absent any explanation for the omission, incomprehensible.

67. With regard to the submission of the respondent that the appellant could have appealed the decision of the non-statutory tribunal by way of special summons procedure on the basis that it was a matter coming within of the meaning of Order 3 Class 21 of the rules of the Superior Court as amended, I am quite satisfied that it was not the practice at the time to seek to appeal the decisions of the non-statutory compensation tribunal in that way , moreover, it was anticipated at the time when the Act became law in May 1997 , and as provided for by s. 7, that the Minister would make regulations where necessary to give effect to the Act and that rules to regulate the procedure and time limits in respect of appeals would be promulgated , which they were ,albeit delayed by more than a year until October 1998.

68. As it is the appellant's application having been determined after the Act came into force, although unaware of it, she had a statutory right to appeal the award and in respect of which she ought to have been advised before making her decision. In the event she wasn't and so accepted the award. As to why, pending the promulgation of regulations, it was not the practice to appeal by way of special summons that was most likely attributable to a number of factors which included the anticipated procedural regulations, the absence of a time limit within which to bring an appeal, and the understandable concern of most if not all claimants that their identity remain anonymous.

69. Whether before the Act came into force it would have been possible to appeal by way of special summons procedure is questionable since, as the non statutory scheme did not confer a right to appeal, any such proceedings would have been liable to be dismissed as not being required or authorised by law within the meaning of Order 3 class 21 see *Ryanair Ltd v. Commission for Aviation Regulation* [2008] IEHC278.

70. Whatever the reason for not so proceeding during the period between the Act coming into force and the promulgation of the rules, once they came into force on the 23rd of October 1998 provision was made which regulated the appeals procedure and which preserved the anonymity of the claimant. Given the public perception of hepatitis C infection it is entirely reasonable that claimants would want to retain the right of anonymity afforded to them under the Act so it seems to me that between the understandable desire to preserve anonymity, the anticipation of the making of procedural rules and the absence of a statutory time limit within which to appeal an award of the non statutory tribunal, it is not at all surprising that in the intervening period no practice of appeal by way of special summons developed .

71. In any event ,whether or not the appellant would have sought to exercise a right of appeal by way of special summons procedure between the time of her award and the date on which the rules were promulgated is, in my view, academic since I am satisfied on the evidence available to the court that whether as a result of the absence of advice at the time from her then solicitors or as a result of her not seeing or her attention not having been drawn to advertisements in the national press or as a result of a failure on the part of the tribunal to communicate directly with her or with her former solicitors , the appellant was ignorant of any right to appeal before she returned to Ireland in 2002, moreover, I am also satisfied that the appellant was always dissatisfied with the award made to her and that had she known of her right to appeal whether as a result of legal advise or otherwise that she would in all likelihood have acted promptly upon it .

72. The circumstances of this case amply illustrate the rationale for treating non statutory claimants differently to statutory claimants in the way recognised by the Supreme Court in *DB v. The Minister*. As was observed by Geogheghan J. *"… it was entirely reasonable that persons who had received awards from the non-statutory scheme should be given an extended time for appeal because they had first to learn of the very existence of the new act and any rights they may have. All of that can take a considerable length of time and there was nothing discriminatory in giving them this longer period."*

And so it has proved to be for the appellant.

Conclusion

73. Having due regard to the findings made by the court that the appellant had formed an intention to appeal the award when she first became aware of her right to do so in 2002 it would be manifestly unjust to conclude that because the appellant had not formed an intention to appeal within the six month period as prescribed by the rules that one of the *Eire Continental* criteria had not been satisfied especially in circumstances where the appellant was aware neither of her right to appeal nor of the prescribed time limit within which it ought to have been brought. To satisfy the requirement that an intention to appeal was formed within the permitted time limit necessarily involves knowledge both of the existence of the right as well as the time within which it is required by law to be exercised .

74. Consistent with that view, it seems to me, is the provision of a statutory jurisdiction in the court to extend the time for the bringing of an appeal where, as in the circumstances of this case, the claimant first becomes cognisant of the full extent of her statutory rights after the expiry of the six months time limit.

75. However even if I am wrong in this regard, that is not, in my view, fatal to the appellant's application. The fact that a party seeking an extension of time may fail to satisfy one or more of the criteria as laid down in *Eire Continental* does not necessary mean that the application to extend time will be refused anymore than satisfaction of all three criteria will necessary result in the court exercising its discretion to enlarge the time .

76. Turning to the other criteria it is necessary that the court consider the question of something like mistake. In this regard the appellant was in the first instance clearly mistaken as to the existence of her right to appeal the award of the non-statutory tribunal and secondly, when she became aware of that right she was also mistaken as to the exercise of that right or as to how it might be exercised. Absent awareness of a right to bring an application for an extension of time from 2002 until November 2013 the appellant laboured under an operative mistake that because the time for the bringing of an appeal had expired there was no possibility that it might yet be prosecuted.

77. The exceedingly long delay which has occurred in this case has not been overlooked and is one of the factors which, in the exercise of the discretion by the court, would ordinarily weigh against granting an extension of time especially as it is clear on the evidence in this case that had the appellant been advised of her right of appeal, as she ought to have been at the time of the award, she would have sought to exercise that right. Consequently the necessity of bringing an application, such as that now before the court, would not have arisen. It is also undoubtedly the case that when she did become aware of her right to appeal in 2002 an application could have been brought then, however, the court accepts the explanation offered by the appellant as to why that was not done; put simply, although she was advised by her former solicitors that she had a right to appeal but was out of time to do so she was not advised that she could have brought an application for an extension of time. When she did receive that advice in 2013 she instructed her present solicitors to bring this application: I think it highly likely and am satisfied that had she received that advise in 2002 she would done likewise.

78. As to the question of an arguable ground of appeal, I am satisfied that, having regard to the decision of this court in *PK v. The Minister*, there can be little doubt but that on the question of general damages alone the appellant has an arguable ground of appeal and would most likely have an enhanced award of general damages made to her. In fairness to the respondent its complaint was directed towards the new evidence which would probably be led on any appeal heard at this remove rather than towards the consequences for general damages which would flow from an application of decision in *PK* as to the appropriateness of the level of general damages.

79. Whilst the respondent submits that the delay in this case is excessive and of itself warrants the court in exercising its discretion against acceding to the appellants application, and in respect of which the respondent cites *Murphy v. Gilligan* [2009] 2 IR 271 as authority, I am satisfied that the circumstances of that case are entirely different to those under consideration here. As was observed by Geoghegan J. in his judgment in that case the structure of the Proceeds of Crime Act 1996, which included provisions for the bringing of applications, had over many years been explained by the Supreme Court; moreover, the application to extend the time in that case could have been proceeded with long before it was brought.

80. As has been recognised in so many judgments since *Eire Continental* was decided, the discretion of the court is a free one and is to be exercised upon taking into consideration all of the circumstances of the particular case. Accordingly, having due regard to the findings made upon the evidence, the materials available, and taking all of the circumstances of this case into consideration, I am satisfied that the Court should exercise its discretion by granting an extension of time within which the appellant may appeal the award of the non statutory tribunal and the court will so order. I will discuss with counsel the form of the final orders to be made.