THE HIGH COURT

CIRCUIT APPEAL

2018 No. 468 CA

BETWEEN

THOMAS CLARKE

PLAINTIFF

AND

GOVERNOR OF WHEATFIELD PRISON

IRISH PRISON SERVICE

DEFENDANTS

JUDGMENT of Mr Justice Garrett Simons delivered on 6 June 2019.

INTRODUCTION

1. This matter comes before the High Court by way of an appeal from the Circuit Court. The appeal concerns the calculation of the limitation period for personal injury actions. More specifically, the dispute between the parties centres on the question of when an application to the Personal Injuries Assessment Board ("*the Injuries Board*") can be said to have been "made" so as to suspend the running of time for the purposes of the Statute of Limitations. It is common case that an *incomplete* application form on behalf of the Plaintiff was submitted to the Injuries Board within the limitation period. The application form did not, however, identify the date upon which the alleged accident is said to have occurred. Notwithstanding a series of letters from the Injuries Board requesting this information, the date of the alleged accident was not provided until almost two years after the date of the original submission of the application form. As of the date the information was provided, the limitation period had already expired.

2. The central issue in this appeal is whether the Circuit Court was correct in concluding that the application could not have been said to have been "made" to the Injuries Board until the missing information in respect of the date of the accident was ultimately supplied.

3. The resolution of this issue requires consideration of the rules made by the Injuries Board. As explained presently, one of the curiosities of this case is that no form has been prescribed under the rules in respect of the making of an application to the Injuries Board.

FACTUAL BACKGROUND

4. The Plaintiff herein has issued proceedings in the Circuit Court seeking damages for personal injuries said to have been incurred on 15 June 2012. At the time of the alleged accident, the Plaintiff was detained as a prisoner at Wheatfield Prison, Clondalkin. The Personal Injury Summons indicates, at Schedule 3 thereof, that the Injuries Board issued an authorisation pursuant to Section 14 of the Personal Injuries Assessment Board Act 2003 (as amended) on 1 March 2017. The proceedings were subsequently instituted on 14 July 2017.

5. The Defendants have filed a full Defence to the proceedings. It is pleaded by way of preliminary objection that the proceedings are statute barred pursuant to the Statute of Limitations.

6. The dispute the subject-matter of the present appeal concerns the events leading up to the issue of the authorisation by the Injuries Board on 1 March 2017. It is common case that an application for the assessment of damages was submitted on behalf of the Plaintiff pursuant to Section 11 of the Personal Injuries Assessment Board Act 2003 (as amended) on 22 January 2014. The application had been made by way of a *pro forma* application form. The application form consists of a series of boxes which are to be filled in by an applicant. The form in this case had been only partially completed. In particular, under the heading "Accident Details", the boxes next to the questions "date of injury/accident" and "time of injury/accident" have both been left blank.

7. The application form had been forwarded to the Injuries Board under cover of letter dated 21 January 2014 from the Plaintiff's solicitors, Thomas Loomes & Company. The application form is stamped as having been received by the Injuries Board on 22 January 2014.

8. The application form indicated that the Plaintiff was making claims in respect of two separate incidents. The first claim was against a medical doctor and involved an allegation that the Plaintiff had been left on prescribed medication for too long a period, and that his eyesight had suffered as a result. A claim of this type does not fall within the remit of the Injuries Board and, accordingly, would not have required an authorisation. See Section 3 (d) of the Personal Injuries Assessment Board Act 2003 ("the provision of any medical advice or treatment to a person" is excluded). As explained presently, this claim was not ultimately pursued by the Plaintiff, and forms no part of the claim pleaded in the Personal Injury Summons of 14 July 2017. The second claim was in respect of an accident at the prison. It is alleged that the Plaintiff had been injured as a result of a stack of wooden planks having fallen upon him.

9. The Injuries Board had written to the Plaintiff's solicitors immediately upon receipt of the incomplete application form. Two letters dated 22 January 2014 were sent as follows. The first letter indicated that the Injuries Board was awaiting receipt of the following information.

> "We await receipt of the following:
>
> ☐ Completed Form A – we return for full completion
>
> ☐ Date of incident ?
>
> ☐ Medical report from treating doctor on Medical Assessment Form (Form B)
>
> ☐ Payment of €45 which can be made by cheque, postal order, laser or credit card. You can provide your card

details to our helpline or complete the details in the space below. […]

> Please also note that if it is the case that Mr. Clarke's claim arises out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person, as set out in Section 3 (d) of the PIAB Act 2003, then the claim is outside the remit of the Personal Injuries Assessment Board and there is no necessity for an application to be made to the Board.
>
> We would be obliged if you would please confirm the position regarding Mr. Clarke's application."

10. This second aspect was repeated in a separate letter of the same date, 22 January 2014.

11. Thereafter, there followed a lengthy exchange of correspondence whereby the Injuries Board continued to request the Plaintiff's solicitors to confirm the date of the accident and to confirm the position in respect of the claim as against the medical doctor. Relevantly, a number of these letters from the Injuries Board expressly stated that the Plaintiff had only a limited legal timeframe within which to bring his claim. In other words, the Plaintiff's solicitors were being reminded of the obligation to comply with the Statute of Limitations.

12. The date of the accident was only confirmed for the first time by letter dated 14 December 2016 from the Plaintiff's solicitors, as follows.

> "We refer to the above and we apologise for the delay in replying to you in relation to this case but we have had severe difficulty in obtaining clear instructions from our client.
>
> The position is that our client wishes to proceed against the Irish Prison Service arising out of an incident that occurred on the 15th June 2012 when he was hit by timber in Wheatfield Prison.
>
> Our client will not be proceeding with any other action on foot of this application and we confirm that he had a medical examination last Saturday. The position is that the Plaintiff broke his hand and elbow in the prison.
>
> We confirm that we will let you have medical report as soon as same comes to hand.
>
> In the meantime we would be very much obliged if you would deem the matter complete as of May 2014 as we have had severe limitations in obtaining instructions due to our client's incarceration and the difficulty in obtaining a medical report.
>
> We do appreciate that you have written to us previously in this regard but we have had, as we have already stated, have had severe difficulties in obtaining instructions."

13. The Injuries Board replied by letter dated 10 January 2017.

> "We acknowledge Mr Clarke's application is complete for the purposes of S50 of the PIAB Act on the 14/12/2016 in respect of the incident which took place on 15/6/2012.
>
> You will be aware we have written to yourselves on numerous occasions seeking confirmation of the date of incident in respect of Mr Clarke's claim and have received correspondence from yourselves dated 21/1/2014, 27/1/2014, 24/2/2014, 11/6/2014, 11/4/2016, 12/4/2016, 14/4/2016, 8/8/2016 and 14/12/2016.
>
> It is only in your most recent letter dated 14/12/2016 and received by us on that day is any reference made to the incident, which is the subject matter of this application, having occurred on 16/5/2012. We are therefore unable to acknowledge Mr Clarke's application as complete prior to the 14/12/2016.
>
> We are obliged to serve Notice of this claim on the Respondents, however before we do so, please specify who Mr Clarke wishes to name as the Respondent or Respondents in his application. Please also let us have a medical report in respect of this incident. If a medical report is presently not available, please advise."

14. The Injuries Board ultimately issued an authorisation on 1 March 2017.

PROCEEDINGS BEFORE THE CIRCUIT COURT

15. The Defendants issued a Notice of Motion on 23 April 2018. The Notice of Motion sought the following relief. First, an order pursuant to Order 34, rule 1 of the Rules of the Circuit Court directing the trial of a preliminary issue in respect of whether the proceedings were statute barred. Secondly, an order that the proceedings were statute barred.

16. It does not appear that a formal order was ever made *directing* the trial of a preliminary issue, nor was there an agreed statement of facts prepared. Nonetheless, the Circuit Court appears to have determined the question of whether the proceedings were statute barred as a preliminary issue. This issue was decided against the Plaintiff by a written judgment dated 7 November 2017, and the Circuit Court made an order on the same date dismissing the proceedings and awarding the costs of the motion to the Defendants. The Plaintiff has appealed against this order.

17. The appeal came on for hearing before me on 5 June 2019. Counsel on behalf of the Defendants, Barry Browne, BL, indicated that his side were prepared to accept for the purposes of the trial of a preliminary issue that the facts are as stated in the affidavits filed by the Plaintiff and the Plaintiff's solicitor. The appeal then proceeded on that basis.

18. For future reference, however, it would be preferable were the party seeking the trial of a preliminary issue to identify as part of its motion papers an agreed statement of facts, and for this to be formally recorded in the order directing the trial of a preliminary issue.

DISCUSSION

19. The limitation period in respect of "personal injuries" actions is two years from the date on which the cause of action accrued or from the date of knowledge (if later) of the person injured. See Statute of Limitations (Amendment) Act 1991 (as amended).

20. A person who wishes to pursue an action for personal injuries is, first, required to apply to the Injuries Board for an assessment

pursuant to the Personal Injuries Assessment Board Act 2003 ("*PIAB Act*"). Legal proceedings may only be issued in circumstances where the respondent has rejected the assessment, and the Injuries Board has issued an authorisation to bring proceedings in respect of the claim.

21. The making of an application for an assessment and awaiting the outcome of that process will, obviously, take time. It was necessary, therefore, for the legislation to address the interaction between the Statute of Limitations and the assessment process. The interaction is governed by Section 50 of the PIAB Act as follows.

> "50.— In reckoning any period of time for the purpose of any applicable limitation period in relation to a relevant claim (including any limitation period under the Statute of Limitations 1957 , section 9 (2) of the Civil Liability Act 1961, the Statute of Limitations (Amendment) Act 1991 and an international agreement or convention by which the State is bound), the period beginning on the making of an application under section 11 in relation to the claim and ending 6 months from the date of issue of an authorisation under, as appropriate, section 14, 17, 32, or 36, rules under section 46(3) or section 49 shall be disregarded."

22. (It should be noted that Section 50 has recently been amended by the Personal Injuries Assessment Board (Amendment) Act 2019, but it is common case that the within proceedings fall to be determined by reference to the pre-2019 position in circumstances where the proceedings were issued in July 2017).

23. The purpose of Section 50 has been described as follows by the Supreme Court in *Renehan v. T & S Taverns Ltd t/a Red Cow Inn* [2015] IESC 8; [2015] 3 I.R. 149, [13].

> "The Act of 2003 is intended to facilitate the early resolution of personal injuries claims and thus to reduce the burden of costs upon defendants, and particularly insurers. It operates by requiring persons who have personal injuries claims as defined by the Act to submit a claim for assessment to the Board established under the Act. Assuming the proposed defendant agrees to assessment, an assessment is issued which, if the parties are willing to accept, will resolve the case. If the plaintiff refuses to accept an assessment he or she is then issued with an authorisation which permits the commencement of proceedings. Similarly, if as occurred here, the defendant refuses either to consent to the assessment process or to accept the assessment issued, a prospective plaintiff is issued with an authorisation and proceedings may be commenced. It is apparent therefore that this process may take some little time and in order to facilitate the process, and the consideration of any offer, provision is made in the Act for a standstill period while an application is considered by the Board and for some time thereafter, which is not reckoned for the purposes of the Statute of Limitations. […]"

24. As appears from the pre-2019 version of Section 50, provision is made for what might be described as a "standstill period", during which period time is not reckonable for the purposes of the Statute of Limitations. Crucially, however, this standstill period does not begin until the "*making of an application under section 11 in relation to the claim*". The dispute in the present case centres on the question as to when a claim can be said to have been "*made*".

25. The making of a claim is regulated under Section 11 as follows.

> "(1) A claimant shall make an application under this section to the Board for an assessment to be made under section 20 of his or her relevant claim.
>
> (2) That application shall be in the form specified by rules under section 46 and be accompanied by such documents as may be so specified."

26. As appears, an application must be in the form specified by rules under Section 46. This Section provides as follows.

> "46(1) Subject to the provisions of this Part, the Board may make rules concerning the procedure to be followed under this Part in relation to—
>
> (a) the making of applications under section 11,
>
> (b) the making of assessments under section 20, and
>
> (c) matters consequential on, or incidental to the foregoing."

27. As of the date of the institution of the Circuit Court proceedings in July 2017, the relevant rules were the Personal Injuries Assessment Board Rules, 2004 (S.I. No. 219 of 2004). This version of the Rules has since been revoked and replaced by the Personal Injuries Assessment Board Rules, 2019 (S.I. No. 140 of 2019).

28. Rule 3 of the 2004 version of the Personal Injuries Assessment Board Rules provides as follows.

> "3. (1) An application under section 11 of the Act shall—
>
> (a) be made in writing or by electronic mail,
>
> (b) contain such information as may from time to time be specified by the Board, and
>
> (c) be accompanied by the following documents:
>
> (i) a copy of a document that has been given or sent, by or on behalf of the claimant, to the person or persons whom he or she believes to be liable to pay compensation to him or her in respect of the claim, notifying the person or persons of his or her relevant claim and seeking the payment of compensation, which copy shall indicate the date on which the document was so given or sent;
>
> (ii) copies of any other correspondence between the claimant and that person or those persons in relation to the relevant claim,
>
> (iii) a report, containing such information as may from time to time be specified by the Board, prepared by a medical practitioner who has treated the claimant in respect of the personal injuries, the subject of

the relevant claim, in relation to those injuries,

(iv) receipts, vouchers or other documentary proof in relation to loss or damage in respect of which special damages are being sought in the relevant claim;

(v) any other document that the claimant considers relevant to the claim,

(vi) any other document that the Board or any member of the staff of the Board duly authorised in that behalf by the Board considers relevant to the claim and specifies in a notice in writing given or sent to the claimant before the receipt by the Board of the application.

(2) An application under section 11 of the Act shall be accompanied by such charge in relation to an application as may be imposed on the claimant by the Board pursuant to Regulations made by the Minister under section 22 of the Act.

(3) In relation to a relevant claim, the date of—

(a) the receipt by the Board of an application under section 11 of the Act for the purposes of section 13 of that Act, and

(b) the making of an application under section 11 of the Act, for the purposes of section 50 of that Act,

shall be the date on which the application in a form specified in sub rule (1)(a), containing the information specified in sub rule (1)(b) is acknowledged in writing as having been received by the Board."

29. Curiously, the Rules do not exhaustively prescribe the content of an application for an assessment. Rather, the Injuries Board purports to reserve unto itself a right to "specify" the information to be included in an application. In practice, it appears that the Injuries Board makes available a *pro forma* application form on its website. This form identifies the information to be provided. Counsel on behalf of the Plaintiff, Mr Michael Coen, BL, has drawn attention to the anomaly that the Rules do specify *other* types of forms, e.g. the form of notice to respondents under Section 13.

30. It is doubtful whether this approach is consistent with the statutory scheme. Section 11 (1) expressly provides that an "application shall be in the form specified by rules under section 46". This indicates that the determination of the form of the application is to be specified formally in statutory rules, which rules will themselves be subject to the controls provided for in the case of statutory instruments. The Injuries Board has purported to sidestep these legislative requirements by instead reserving unto itself the right to "prescribe" the information to be provided by some sort of extra-statutory means. This is unsatisfactory. As this case illustrates, a failure on the part of an applicant to make an application in the prescribed form can have the consequence of restricting a person's right of access to the courts. (See *Healy v. Noonan* [2017] IEHC 206, [2017] 2 I.R. 371). The precise requirements should, therefore, be prescribed in detail under the Rules, as is required under Section 46. The *ad hoc* approach is not appropriate.

31. Notwithstanding these misgivings as to the validity of the Rules, I have concluded that the within appeal must be determined by reference to the Rules as they are. The Plaintiff has not alleged that the Rules are *ultra vires* insofar as they purport to reserve unto the Injuries Board a right to prescribe the information to be provided by some sort of extra-statutory means. Moreover, such a challenge could only properly be brought by way of judicial review proceedings in the High Court which named the Injuries Board as respondent. As noted earlier, this matter has come before the High Court by way of an appeal from the Circuit Court and, accordingly, the jurisdiction of this court is not the same as it would exercise in the context of judicial review proceedings.

32. In the absence of a challenge to the validity of the Rules, the legal position is clear-cut. The procedural requirements which must be met before an application can be said to have been made for the purposes of the standstill provisions under Section 50 of the PIAB Act are expressly stated at Rule 3 (3) (above). In short, the standstill period runs from the date upon which the application in a form specified in sub rule (1)(a), containing the information specified in sub rule (1)(b), is acknowledged in writing as having been received by the Injuries Board.

33. The *pro forma* application form submitted by the Plaintiff specifies that the date of the accident is to be provided. It is common case that the date of the accident was not, in fact, notified to the Injuries Board until 14 December 2016. The Injuries Board, in its letter of January 2017, identifies the date of this letter as the date upon which the application was made.

34. As an aside, it is to be noted that on one reading of Rule 3 (3), the standstill period only runs from the *date of acknowledgement* which may, of course, be a number of days after the date of actual receipt. This would appear to be inconsistent with the express provisions of Section 11. See *Kiernan v Brunkard Electrical Ltd*. [2011] IEHC 44. See also *Figueredo v. McKiernan* [2009] 2 I.L.R.M. 526. At all events, it is not necessary to resolve this issue on the facts of the present case in circumstances where the Injuries Board identified the date as the date of the receipt of the information on 14 December 2016, and not the later date upon which this letter was formally acknowledged.

35. The *pro forma* application form clearly indicates that an applicant must identify the date of the accident. Thus, the date of the accident is "specified" information for the purposes of Rule 3 (1)(b). The failure to provide this information until 14 December 2016 had the legal consequence that an application had not been "made" for the purposes of Section 50 of the PIAB Act until that latter date.

36. Counsel on behalf of the Defendants placed reliance on the judgment of the High Court (Noonan J.) in *Healy v. Noonan* [2017] IEHC 206, [2017] 2 I.R. 371. On the facts of Healy, the original application for an assessment had misstated the date of the accident. The Injuries Board subsequently wrote to the applicant and drew his attention to a discrepancy between the date of the accident as stated on the application form and the date as stated in the medical report. In response to this letter, the applicant resubmitted precisely the same application form as previously submitted, with the sole change that in the box entitled "date of injury/accident" he struck through the previous date and substituted the correct date. The Injuries Board then wrote a second time, identifying a further error which the Board could have, but did not, raise at the time of the first letter. The High Court held that the Board could not rely on the second error.

37. For present purposes, what is relevant is that the court proceeded on the basis that the date of the application was the date upon which the *amended* application form had been submitted. Counsel for the Defendants in the present case seeks to infer from this that of the High Court had tacitly accepted that the misstatement of the date of the accident meant that the first application

was not properly made, and that it follows as a corollary of this that the High Court considered the identification of the correct date as a condition precedent to the making of a valid application.

DECISION

38. An application is not properly "made" for the purposes of Section 50 of the PIAB Act until such time as an application which provides the information specified in the *pro forma* application form is provided. The specified information includes the identification of the date upon which the alleged accident occurred. Whereas there is, in principle, room for the application of a *de minimus* exception whereby certain failures to comply with the strict requirements might be overlooked, there must be substantial compliance with the Rules. The date upon which the alleged accident occurred is, self-evidently, information which is central to the assessment of the claim, and to the subsequent notification of the parties against whom damages are being sought. Those parties need to know the date of the accident in order to properly identify the event which is said to give rise to a liability on their part. This will be especially so where, as on the facts of the present case, a claim is being made against a large organisation which deals with numerous individuals. The prison authorities could not reasonably be expected to make an informed decision on liability without knowing the date of the alleged accident in order that they could consult with relevant members of staff and review relevant documentation. The omission of the date of the accident cannot be overlooked as *de minimus*.

39. I have concluded, therefore, that an application for the purposes of Section 50 was not "*made*" in this case until the Plaintiff's solicitors furnished details of the date of the alleged accident under cover of their letter of 14 December 2016. As of this date, the two-year limitation period had long since expired. Section 50 does not operate to revive a stale claim. The within proceedings were instituted before the Circuit Court on 14 July 2017. This is more than two years after the date of the alleged accident on 15 June 2012. The proceedings are, accordingly, statute barred.

PROPOSED ORDERS

40. I propose to make an order dismissing the appeal from the Circuit Court. I affirm the order dismissing the proceedings on the basis that same are statute barred under the Statute of Limitations (Amendment) Act 1991 (as amended). I make an order directing that the Plaintiff is to pay the costs of the Defendants in respect of both the proceedings before the Circuit Court and before the High Court (such costs to be taxed in default of agreement).