

THE HIGH COURT

[2024] IEHC 203

[2022 No. 79 CA]

BETWEEN

PATRICK DILLON

APPELLANT/PLAINTIFF

AND

IRISH LIFE ASSURANCE PLC

RESPONDENT/DEFENDANT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 11th day of April, 2024.

INTRODUCTION

1. This is an appeal from a decision of the Dublin Circuit Court dated 3 May 2022 in which the Court dismissed the plaintiff's proceedings on the grounds that they were frivolous, vexatious or bound to fail. The decision of the Circuit Court was in response to a motion brought by the defendant seeking to have the proceedings struck out because the plaintiff had not obtained an authorisation from the Personal Injuries Assessment Board ("*PIAB*") and/or an order pursuant to section 10(3) of the *Civil Liability and Courts Act 2004*.

2. The arguments in this appeal covered a range of matters relating to the potential interaction between the *Personal Injuries Assessment Board Act, 2003*, as amended, ("*the Act of 2003*") and claims under *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC*

(*General Data Protection Regulation*), OJ 2016 L 119/1 (“*the GDPR*”) which is implemented by the *Data Protection Act 2018*. However, the essential point in this appeal is whether the claims made by the plaintiff that he suffered “*distress, upset, anxiety, inconvenience, loss and damage*” because of alleged breaches of his data rights and for which he claims damages, constitute a “*civil action*” for the purposes of *the Act of 2003*. If the plaintiff’s case is a “*civil action*” then he was required to seek and obtain prior authorisation for the proceedings from the PIAB.

3. In approaching this application, I am guided by the principle that the jurisdiction to strike out proceedings should be exercised with care and only in clear cases, as emphasised by McCarthy J. in *Sun Fat Chan v. Osseous Ltd* [1992] 1 IR 425.

BACKGROUND

4. The underlying proceedings were commenced by way of an Equity Civil Bill dated 14 June 2021. The plaintiff was the owner of a life assurance policy with the defendant. The gravamen of the plaintiff’s complaint was that the defendant had unlawfully and incorrectly sent letters containing the plaintiff’s personal data to an unauthorised third party. In total, it appears that six letters concerning his policy were issued in error and sent to the third party. Those letters were sent on 23 May 2020, 25 May 2019, an unspecified date in May 2009, 25 December 2008, 25 September 2008, and on an unspecified date in May 2008.

5. The plaintiff pleads the above matters amounted to data breaches and were caused by the negligence and breach of duty, including breach of statutory duty on the part of the defendant. Paragraph 7 of the Equity Civil Bill sets out particulars of negligence and breach of duty, including breach of statutory duty. Because of the range of dates on which the breaches

are alleged to have occurred, the plaintiff in his pleadings relies on the provisions of both the *Data Protection Acts 1988 and 2003*, and *the GDPR*. In his submissions in connection with this appeal, the plaintiff has narrowed his claim to data breaches that are alleged to have occurred after the introduction of *the GDPR*, on 25 May 2018. This judgment proceeds on the basis that the claims, therefore, relate to the breaches after 25 May 2018, even if no formal motion was brought to narrow the claim in that way.

6. The pleaded consequences of the data breaches alleged are set out at various points in the Equity Civil Bill. At para. 4, it is stated that the breach caused “*distress, upset, anxiety, inconvenience, loss and damage to the plaintiff*”. The same formulation – *distress, upset anxiety, inconvenience, loss and damage* – is also used at paras. 5, 6 and 10 of the Equity Civil Bill. The plaintiff claims the following substantive relief: -

- “1. *A declaration that the Defendant breached the Data Protection Acts 1988 & 2003 and or the General Data Protection Regulation (EU) 2016/679, as applicable, in the opinion of this Honourable Court.*
2. *Damages for negligence and breach of duty including statutory duty, not exceeding the jurisdiction of this Honourable Court.*”

7. On 26 October 2021, the defendant raised a Notice for Particulars. The particulars were replied to on 10 November 2021. The material particulars were dealt with at para. 1 in the Notice for Particulars, and I have set out below the relevant queries and responses: -

1. *As the Indorsement of Claim pleads distress, upset, anxiety, inconvenience, loss and damage:*

(a) *Please confirm whether or not the alleged inconvenience, loss and damage consists of or include anything beyond or additional to the alleged distress, upset and anxiety;*

Answer: No

(b) *If so, please provide full and detailed particulars of the alleged inconvenience, loss and damage;*

Answer – Not applicable

(c) *In particular, and without prejudice to the generality of the preceding subparagraph (b), please confirm that the Plaintiff is not claiming special damages. Alternatively, if he is claiming special damages, please provide full and detailed particulars of the items of special damage being claimed.*

Answer – The plaintiff is not claiming special damages at this stage.

8. A Defence was delivered on 10 December 2021. The Defence sets out preliminary objections including a specific objection focused on the absence of prior authorisation from PIAB. The remainder of the Defence addresses the substantial case raised by the plaintiff and denies that the plaintiff is entitled to any of the reliefs claimed. The defendant issued a motion on 14 March 2023 seeking to have the plaintiff's claim struck out on the basis that there was no authorisation from PIAB and/or on the basis that the proceedings were commenced by an Equity Civil Bill and not a Personal Injuries Summons as required by section 10(3) of the *Civil Liability and Courts Act 2004*. The affidavit grounding this application was sworn on 1 March 2022. In the affidavit, the solicitor for the defendant sets out the history of the proceedings and

asserts that the plaintiff ought to have, but did not obtain, an authorisation in respect of the injuries claimed in these proceedings from the PIAB. There was no replying affidavit, but the position of the plaintiff is that there was no need for prior authorisation in this case.

THE LEGAL FRAMEWORK

9. There is a degree of common ground between the parties with regard to the overall legal principles governing this application.

10. The manner in which *the Act of 2003* operates in connection with claims for damages for personal injuries has been the subject of determinative consideration by the Supreme Court in *Clarke v. O’Gorman* [2014] 3 IR 340. The following key points emerge from that judgment:

- a. Section 10 defines “*relevant claim*” as meaning a civil action to which *the 2003 Act* applies.
- b. Section 12(1) of *the Act of 2003* provides that no proceedings may be brought in respect of a relevant claim unless and until (a) an application is made to the Board and (b) the bringing of the proceedings is authorised under sections 14, 17, 32 or 36, or the rules under section 46(3) or section 49.
- c. Section 12(1) of *the Act of 2003* does not operate as a jurisdictional bar, but instead operates to bar a remedy where a plea to that effect was made by the defendant. In that regard, s. 12(1) of *the Act of 2003* corresponds with various provisions in the *Statute of Limitations 1957*, as amended.
- d. Section 3 of *the Act of 2003* make clear that the Act applies to a large range of civil actions, other than those “*arising 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.” The qualifying criteria is the nature of the relief sought in those civil actions.

e. Section 4(1) of *the Act of 2003* defines a “civil action”, and describes the necessary features of such an action:

- i. The action is in respect of a wrong;
- ii. It is pursued for the purpose of recovering damages; and
- iii. The damages are for personal injuries.

f. Section 4(2) of *the Act of 2003* goes on to confirm that for the purposes of a “civil action”, the word “wrong” has the same meaning as it has in the *Civil Liability Act, 1961* (“*the Act of 1961*”).

g. “wrong” is defined in s. 2(1) of *the Act of 1961* as:-

“... a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the wrong is intentional.”

h. As noted by the Supreme Court in *Clarke v. O’Gorman*, “wrong” in this regard is “*a concept of the broadest application which captures most, if not every, cause of action litigated in civil proceedings at common law.*”

i. *The Act of 2003* also adopts the definition of “personal injury” from *the Act of 1961*, which is:

““personal injury” includes any disease and any impairment of a person’s physical or mental condition, and “injured” shall be construed accordingly;”

11. The judgment in *Clarke v. O’Gorman* explains the critical distinction between the cause of action pleaded and the relief being claimed in respect of the wrong alleged in the cause of

action. As put by O'Donnell J. (as he then was) at para. 18, “[p]ersonal injuries are the injuries suffered which, if caused by a wrong, may give rise to a remedy, most often an award of damages.”

12. That distinction is further explained at para. 29:-

“For reasons already touched on, causes of action on the one hand, and claims for personal injuries on the other, are not similar concepts. ...A cause of action is something logically and legally different from the type of damage suffered as a result of the facts giving rise to the cause of action. The fact that a claim can be described as one for personal injuries does not mean it is not an action for assault, for example. Since they are different things, the description of the cause of action on the one hand and the damage alleged in consequence on the other are not mutually exclusive categories of causes of action, but instead overlap and intersect.”

13. Hence, regardless of how the proceedings may be described colloquially, the actions captured by *the Act of 2003* are those where the remedies claimed to have been caused by the wrong include damages for personal injuries.

14. One of the potential difficulties with the operation of *the Act of 2003*, highlighted by the Supreme Court, arises in cases which were not obviously identifiable as personal injuries cases. In *Clarke v. O’Gorman*, at para. 19, the Supreme Court highlighted those difficulties can arise where a party drafts proceedings in a way that is broad enough to facilitate any possible argument that may be helpful in the course of the proceedings. The Supreme Court noted that:

“This is particularly problematic because the Act of 2003 does not, as it might, provide, for example, that if any claim is made in respect of personal injuries then the entire proceedings are captured by the Act of 2003. Subsection (i) of s. 4(1) excludes actions for personal injuries from the concept of civil action, if, in addition to any claim for damages for personal injuries, ‘it is bona fide intended, and not for the purpose of circumventing the operation of section 3, to claim damages or other relief in respect of any other cause of action.’”

15. However, the exception in s. 4(1)(i) of *the Act of 2003* has been interpreted by the Supreme Court in a particular manner: Claims are excluded claims where, in addition to a claim for personal injuries, it is *bona fide* intended to claim damages or other relief “*in respect of any other cause of action*” [emphasis added]. In *Clarke v. O’Gorman*, the Supreme Court made clear that the “*other cause of action*” referred to should be interpreted or understood as meaning “*other than the cause of action giving rise to the claim for personal injuries.*” This is explained in para. 30, where O’Donnell J. observed: -

“A civil action is defined as an action for the purpose of recovering damages in respect of a wrong, for personal injuries. The term ‘other cause of action’ refers back to ‘wrong’ and not ‘personal injuries’. The phrase ‘other cause of action’ in s. 4(1)(i) means therefore in my view a cause of action other than that in which personal injuries are claimed.”

DISCUSSION

The Interpretation of Keane v. Central Statistics Office [2024] IEHC 20

16. Both parties made arguments in relation to my judgment in *Keane v. Central Statistics Office* [2024] IEHC 20. There are important points of distinction (both in terms of fact and

legal principles) between the current appeal before this court and *Keane*, with the effect that *Keane* does not provide a full or clear answer to the issues in this case.

17. In that case, the plaintiff was employed by the defendant as a census enumerator for a period in 2016. In November 2017, the defendant erroneously disclosed the plaintiff's P45 documents to third parties, as part of a broader data disclosure.

18. The plaintiff commenced proceedings in the Circuit Court claiming that the defendant acted in breach of contract, and was negligent and breached its duty of care, including its statutory duty, towards the plaintiff. While the case was not framed as an action seeking to recover damages for personal injuries, this court found that the claims could only be understood as ones in which damages were sought in respect of personal injuries. In her pleadings, the plaintiff placed heavy emphasis on the fact that she claimed to have suffered anxiety and distress due to the actions of the defendant in disclosing her personal data, and this was framed clearly in medical terms. The plaintiff pleaded that she suffered from symptoms of severe stress and anxiety, which affected the plaintiff in her daily life. It was claimed that her sleep and appetite had been affected, and that the anxiety and stress she suffered had triggered and exacerbated symptoms of psoriatic arthritis that had been in abeyance for some time prior to the disclosure. In replies to particulars, the plaintiff had expressly referred to the views of a medical practitioner that the return of the arthritic symptoms was related to stress. Accordingly, *Keane* was a case in which, however it was framed, the remedy claimed was damages in respect of personal injuries.

19. In addition, in *Keane* the pleaded wrong pre-dated the introduction of *the GDPR* regime and it was claimed that the defendant breached the duty of care provided for in section 7 of the

Data Protection Act 1988. In that regard, Feeney J. in *Collins v. FBD Insurance plc* [2013] IEHC 137, had found that a claim for damages for breach of the s. 7 duty of care was a claim for damages in respect of a wrong, in effect a statutory tort. As such, Feeney J. was clear that in order to obtain compensation for a breach of the s. 7 duty of care it was necessary for the claimant to establish that there had been a breach, that there had been damage, and that the breach caused the damage. Under *the 1988 Act* regime, there was no provision for non-material damage.

20. The Circuit Court in *Keane* had found that the plaintiff's claim was a "civil action" within the meaning of section 3(d) of *the Act of 2003*. The learned judge found that the plaintiff should have applied to PIAB for the assessment of claim pursuant to s. 11 of *the Act of 2003*, but she had not done that. As a consequence and having regard to the approach adopted by the Supreme Court in *Clarke v. O'Gorman*, the Circuit Court found that the plaintiff's proceedings remain extant but the principal remedy, damages for personal injury, which was being sought by the plaintiff was bound to fail by reason of non-compliance with *the Act of 2003*.

21. That finding was affirmed in an appeal to this court. In that regard, in summary, I found that the causes of action identified in the Civil Bill were for breach of contract, negligence, breach of duty including breach of statutory duty, breach of confidence and breach of privacy rights. Those were "wrongs" within the meaning of section 2(1) of *the Act of 1961*. Damages were sought by the plaintiff in respect of these wrongs. Adopting a common-sense approach to the pleadings, including the replies to particulars, the entire tenor of the pleaded case was that the only damage expressly identified by the plaintiff to have flowed from the wrongs alleged to have been committed by the defendant was stress, anxiety, distress and the exacerbation of her psoriatic arthritis. No other specific loss or damage was referred to in the Civil Bill or in

the replies to particulars. In those premises, the plaintiff's claim was a civil action intended to be pursued for the purposes of recovering damages for personal injuries in respect of a wrong.

22. I also rejected an argument made by the plaintiff to the effect that because damages could not be recovered for stress and anxiety in the absence of a recognised psychiatric illness this meant that the plaintiff's claim was not a claim for personal injuries. That rejection was grounded in the fact that the definition of "*personal injuries*" in *the Act of 2003* expressly was framed by reference to the very broad definition in s. 2 of *the Act of 1961*, which included *any impairment of a person's physical or mental condition*. It was not restricted to impairments that currently give rise to recoverable damages or loss in an action.

23. This appeal concerns a situation where – following the approach adopted by the plaintiff in his written submissions – the claims relate to a different statutory cause of action, which can include a claim for compensation for non-material damage. In addition, there is far less of an emphasis on medical sequelae resulting from the breaches.

The claims relating to the GDPR

24. The plaintiff sought to argue that the approach of the court ought to reflect the fact that the claims made by the plaintiff essentially are claims for non-material damage as provided for under *the GDPR* and the implementing provisions in the *Data Protection Act 2018*.

25. In the first instance, I am not satisfied that the claim as pleaded can be reduced to a simple claim for non-material damage under *the GDPR*. While I am obliged to approach the plaintiff's case on the basis that the material facts pleaded are true, and I have attempted to take the plaintiff's case in its best light and at its height, it must be observed that the plaintiff has

not sworn a replying affidavit and my consideration therefore is restricted to the terms of the case as pleaded. It is true that the plaintiff's claim is predicated on various alleged failures on the part of the defendant to comply with its obligations under a variety of data protection provisions. However, the case is not pleaded exclusively in those terms. There is a claim for breach of statutory duty – which can be treated as a claim made pursuant to section 117 of the *Data Protection Act 2018* – but there is also a general plea of negligence and breach of duty which is said to include the claim for breach of statutory duty. Although there is a clear contractual underpinning to the relationship between the plaintiff and the defendant there is no claim made in contract. The relief claimed is “*damages for negligence and breach of duty including statutory duty*”.

26. Moreover, I do not accept that the fact that claims are also made under the compensation provisions of *the GDPR in and of itself* can lead to a conclusion that the action does not require to be authorised under *the Act of 2003*.

27. Section 117(2) of the *Data Protection Act 2018* expressly provides that a data protection action *shall be deemed for the purposes of every enactment and rule of law to be an action founded on tort*. Hence, the plaintiff's claim in this case falls within the definition of a wrong for the purposes of *the Act of 1961*.

28. Section 117(4) provides that the court hearing the action shall be entitled to grant, *inter alia*, compensation for damage suffered by the plaintiff because of the claimed infringement. In that regard, “*damage*” is defined as including “*material and non-material damage*”. There is no reference to damages for personal injuries, but the framing of the definition of damage using the word “*includes*” cannot be understood as ruling out the possibility of an award of

damages if the injured party claims to have suffered a personal injury as a result of the infringement. While in many cases a breach of the rights of a data subject may not result in personal injuries, it is certainly conceivable that in some circumstances there could be a valid claim that the injured party suffered some form of recoverable psychiatric injury consequent on an infringement.

29. I also do not accept that there is any difficulty from a general EU law perspective in requiring a party to obtain prior authorisation under *the Act of 2003* where there is a claim in which the relief claimed for the alleged wrong includes damages for personal injuries under section 117 of the *Data Protection Act 2018*.

30. The question of how to approach “*non-material damage*” for the purposes of *the GDPR* has been considered by the CJEU. In Case C-300/21 *UI v. Österreichische* (‘the Austrian Post Case’), two lower courts in Austria had dismissed a claim for compensation on the grounds that compensation could only be awarded where damage reached a “*threshold of seriousness*”. The case was referred by the Austrian Supreme Court to the CJEU, who held that it was not appropriate to apply a “*threshold of seriousness*” when dealing with a claim for compensation for non-material damage.

31. The CJEU considered Recital 146 of *the GDPR* which stated that: “*The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation.*”. Accordingly, the Court found that it would be contrary to that broad concept of “*damage*” in the EU legislation, if the concept was limited solely to damage that reached a certain degree of seriousness. In that regard, there is nothing in the *Data Protection Act 2018* that restricts a claim for damages to claims above a

particular threshold of seriousness. The Circuit Court has concurrent jurisdiction with the High Court to hear data protection actions, and in those cases the minimum jurisdictional monetary limit usually applicable to claims in the Circuit Court cannot apply. The Circuit Court can award modest compensation for non-material damage in an appropriate case.

32. The plaintiff argued that the application of Part 2 of *the Act of 2003* to a claim for non-material damage in a data protection action would be contrary to EU law as undermining the consistent, coherent and high level of protection with regard to the processing of personal data which is required by *the GDPR*.

33. I do not consider that there is any conceptual problem with requiring a claim made pursuant to *the GDPR* to be the subject of a PIAB application and authorisation *if* that claim properly is construed as one in which damages for personal injuries are sought to be recovered in respect of a wrong. As found in *Clarke v. O’Gorman*, s. 12 of *the Act of 2003* simply operates as a bar to a remedy where a successful plea is made to that effect by a defendant.

34. In *UI v. Österreichische Post AG*, the CJEU confirmed that national procedural rules will apply to *GDPR* claims for compensation so long as the principles of equivalence and effectiveness are observed:

“53. *In that connection, it should be recalled that, according to settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not, in situations covered by EU law, less favourable than those governing similar domestic situations (principle of equivalence) and that*

they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) ...”

35. It may be cumbersome to have to make an application to PIAB where there is a well-founded apprehension that the Board will grant an authorisation pursuant to s. 17 of *the Act of 2003*, having decided not to arrange for the making of an assessment. However, that situation operates as a procedural prerequisite in Irish law for certain categories of cases. It does not prevent a party bringing a claim for non-material damage in the Circuit Court, but simply imposes a procedural filter. In much the same way, if a claimant for non-material damage is faced with a *Statute of Limitations* issue, this does not suggest any incompatibility with *the GDPR*. Rather such claims are subject to pre-existing and neutrally applied procedural rules.

Further observation on the interaction between the GDPR and the Act of 2003

36. It can also be observed that *the Act of 2003* has been amended by the Oireachtas to exclude certain claims from its ambit. The *Civil Law (Miscellaneous Provisions) Act 2011* inserted a new section 3A into *the Act of 2003* providing that *the Act of 2003* does not apply to certain civil actions pursuant to, *inter alia*, the Warsaw Convention, the Montreal Convention or the Athens Convention. As noted by the defendant, the Oireachtas equally could have taken steps to disapply *the Act of 2003* to civil actions under *the GDPR* regime, but it did not.

The effect of seeking a declaration as well as damages

37. Whatever way the claims made by the plaintiff are framed, they are allegations of “wrongs” within the meaning of *the Act of 1961*, and that damages are claimed. The fact that a declaration is also sought as part of the overall relief does not alter that analysis.

38. In *Campbell v. O'Donnell & Ors* [2009] 1 IR 133, the plaintiff sought a declaration against the Motor Insurers' Bureau of Ireland in addition to seeking damages against the other defendants. The Supreme Court upheld the decision of the High Court that the plaintiff was not entitled to issue proceedings against the MIBI without prior authorisation from the PIAB; seeking a declaration was an action "*in respect of a wrong*" for the purposes of *the Act of 2003*; hence, seeking the declaration could not be treated as independent of the cause of action pleaded against the other defendants. In this appeal, the declaration sought is a remedy that is sought in respect of the same wrongs that are claimed to give rise to a remedy in damages, and I do not see that they can be separated out so as to constitute different civil actions.

The definition of "Personal Injuries"

39. The central dispute here lies in the definition of "*personal injuries*", and whether the claim in this appeal for damages for *distress, upset anxiety, inconvenience, loss and damage* fall within that definition, i.e., whether the claim is one for any impairment of a person's mental condition. The issue can be refined by noting that damages for inconvenience, loss and damage cannot fall within the definition of personal injuries, and thus the focus is on the pleaded use of the words *distress, upset and anxiety*.

40. Before considering the plaintiff's main arguments it is necessary to address certain ancillary arguments that were made.

41. First, the plaintiff says that he does not seek to make a claim for personal injuries, which he, in any event, could not recover. However, it seems to me that this aspect of the plaintiff's argument conflates the definition of "*personal injuries*" with the question of when damages will be recoverable for personal injuries. *The Act of 1961* defines a personal injury as including

any impairment of a person's mental condition. It is not restricted to impairments that currently can give rise to a recoverable award of damages. The court is not entitled to disapply the statutory definition or modify it by implying the additional words "*which give rise to a claim for recoverable damages*". The plaintiff referred to the *Judicial Council's Personal Injuries Guidelines* of March 2021 which reinforce the existing Irish law proposition that, in the absence of a physical injury, recovery is permitted only in respect of recognisable psychiatric illness or injury and upset, distress, grief, disappointment and humiliation do not attract compensation. Again, it is necessary to differentiate between the legal definition of "*personal injury*" as provided for in *the Acts of 2003 and 1961*, and the question of whether damages are recoverable in respect of particular matters falling within that definition. The matter is put simply and clearly in the *Judicial Council Personal Injuries Guidelines* at p. 14, "... *not all damage warrants an award of compensation.*" The fact that a claimed impairment does not warrant an award of damages does not remove it from the definition of personal injury in the legislation.

42. Second, the plaintiff argues that the claim is not a personal injuries claim because what he seeks are non-material damages in the sense provided for in *the GDPR and Data Protection Act 2018*. However, as set out above, the pleaded claim is one of negligence and breach of duty including statutory duty. I consider that the plaintiff makes an unwarranted distinction between the claim for non-material damages and a personal injuries claim. A data protection action is an action founded on tort and therefore a wrong within the meaning of *the Act of 1961*. The focus of *the Act of 2003* is on the question of whether the remedy sought in an action alleging a wrong is or includes damages for personal injuries. There is no conceptual difficulty in a data protection action also being a civil action for the purposes of *the Act of 2003*, particularly where *the Act of 2003* simply provides for an initial filtering process that in theory could lead to an early and inexpensive resolution of the dispute.

43. Third, the plaintiff stated that the current practices of PIAB generally require the submission of a form of medical report with any claim for authorisation, and argues that this reinforces their assertion that the type of claim envisaged in the Equity Civil Bill does not fall within the definition of “*personal injuries*”. Again, I do not consider that this argument can have the effect of modifying the underlying meaning of the legislation. If the proper application of *the Act of 2003*, in the sense of requiring an application to be made to PIAB even where an assessment is highly unlikely, is cumbersome for some cases this appears to be the inevitable consequence of the application of the legislation.

44. The central and most substantial argument made by the plaintiff in this case is that what is set out in the Equity Civil Bill - *distress, upset anxiety* - simply is not captured by the definition of “*personal injury*”. In response to the defendant’s argument that the claims made by the plaintiff plainly amounted to a claim for damages for impairment of his mental condition, the plaintiff argued that the formulation, “*distress, upset, anxiety, inconvenience, loss and damage*”, was a description of an emotional reaction and was a way of describing non-material damage for the purposes of recovery under *the GDPR*. The plaintiff submitted that he was pleading that the non-material damage he suffered was effectively upset, distress and embarrassment caused by the data protection breach; and that distress, upset or embarrassment in ordinary language cannot be described either as a “*disease*” or as an “*impairment of a person’s physical or mental condition*”.

45. The plaintiff relied on the definition of “*impairment*” in the electronic version of the Oxford Dictionary of English, which presented two definitions:-

“1. *The action of impairing, or fact of being impaired; worsening, deterioration, damage; a (degree of) injurious lessening or weakening.*

...

2. *spec. A (degree of) physical or mental disability or reduced function, (in later use) esp. in a specified capacity or part of the body.”*

46. On one level it is possible to understand the claim that the plaintiff was caused to suffer *distress, upset, anxiety, inconvenience, loss and damage* as a result of the infringement of his data rights as little more than a form of reflexive boilerplate pleading. In that sense, the phrase could be treated as lacking a sufficiently precise meaning to make it capable of grounding an application to strike out the proceedings. Certainly, the court must have considerable sympathy for a lawyer who includes that type of phraseology in a pleading without intending it to carry the weight or attract the scrutiny that has been applied in this case. Nevertheless, it is clear that this type of pleading has in fact given rise to difficulties in other cases, and I do not consider that the pleading can simply be understood as so vague or general to be treated as lacking any legal meaning or consequence.

47. There is authority that in certain types of breach of contract claims an injured party may be able to recover damages for distress and inconvenience. The circumstances in which such a claim validly could be made are discussed by Hogan J. in the High Court in *Walter & Anor v. Crossan Homes Ltd & Ors* [2014] 1 IR 76. In that case, the plaintiffs claimed damages for distress and upset connected with serious difficulties that arose in a property transaction. Hogan J. found that in principle damages for distress and inconvenience were recoverable in actions for breaches of certain types of contract. However, he explained that damages for mental distress, upset and inconvenience were not recoverable in an action for negligence. For that reason, he acceded to an application by the third to sixth-named defendant solicitors (who had acted for first and second-named vendors) to strike out the claims in negligence against them,

there being no privity of contract between the plaintiffs and those defendants. Because of the finding that the claim for damages for mental distress was bound to fail it was not necessary for the Court to address the alternative basis for the motion which was that no authorisation had been obtained from PIAB.

48. The case of *Murray v. Budds & Anor* [2017] 2 IR 178, concerned an action for professional negligence in which the plaintiff had sought to amend his case to make a claim for worry and stress. The question was whether that claim should be treated as a claim for damages for personal injuries to which the shorter limitation period for such actions applied. When the matter was before the Court of Appeal, the Court had found that the claims sought to be made by the plaintiff constituted claims in tort seeking to recover damages for personal injuries. Those new claims were out of time and, as such, the amendments should not have been permitted. The Court of Appeal also found that damages for worry and stress were not recoverable in the absence of any pleaded recognisable psychiatric injury. The Court of Appeal relied on the decision of Hogan J. in *Walter v. Crossan Homes Ltd* for the proposition that, in negligence cases, damages for mental distress, upset and inconvenience falling short of nervous shock or psychiatric injury were not recoverable.

49. The Supreme Court affirmed the decision of the Court of Appeal. Denham C.J. found that the claims in question were statute barred, and also that a claim for “worry and stress” without any psychiatric illness does not give rise to recoverable damages in a tort action. However, the Court also considered the circumstances in which damages could be recovered from worry and stress in a breach of contract claim. The Court considered the line of authority from *Addis v. Gramophone Company Ltd* [1909] AC 488, when the House of Lords had found that the courts, in general, will not permit damages for worry or upset resulting from a breach

of contract. That line of authority was found to remain the law in Ireland. The authorities were grounded on policy considerations which included the view that mental distress or injured feelings are incapable of exact proof, and that remedies in breach of contract cases are intended to place the injured party in the financial position that would have been obtained if the breach had not occurred. Exceptions to that general rule can arise where the object of the contract includes the provision of peace of mind, the most obvious example being a contract in relation to a holiday.

50. Again, the cases of *Murray v. Budds* and *Walter v. Crossan Homes Ltd* considered primarily the question of whether damages for mental distress, upset or injured feelings were recoverable in the circumstances that arose. Here, the recoverability issue does not appear to arise where the claim is that the plaintiff suffered non-material damage as provided for by section 117 of the *Data Protection Act 2018*. However, the court cannot ignore that the Supreme Court in *Murray v. Budds* had no apparent difficulty in treating the claims for worry and stress as amounting to a form of claim for personal injuries. While the claims were considered in the context of limitation period issues, the definition of “*personal injuries*” is consistent throughout *the Act of 1961*, *the Statute of Limitation Acts* and *the Act of 2003*.

51. This brings the court back to the specific wording that is repeatedly used in the pleadings in this case: “*distress, upset, anxiety, inconvenience, loss and damage*”. Clearly, the words *inconvenience, loss* and *damage* cannot be treated as a description of a personal injury. However, on the basis of the approach adopted by the Supreme Court in *Murray v. Budds*, it is very difficult to ascertain a basis for treating a claim that a plaintiff suffered “*distress*”, “*upset*” and “*anxiety*” as substantially different to a claim that a plaintiff suffered “*worry and stress*”. Certainly, in some cases, anxiety and distress can amount to an impairment of a person’s mental

condition – particularly given that *the Act of 1961* uses the words “*any*” in the initial part of the definition.

SUMMARY

52. In the premises, and for the reasons set out above, I am, with some reluctance, compelled to find that the proceedings brought by the plaintiff were a form of civil action within the meaning of *the Act of 2003* and as such required prior authorisation from PIAB. As this judgment is being delivered electronically, I will list the matter for a final hearing to address the formulation of final orders, including costs. In that regard, I will invite the parties to consider the judgment with a view to agreeing, if possible, on the terms of the final orders and list the matter before me at 10.30 am on Friday 26 April 2024.