

# THE HIGH COURT

[2022] IEHC 94

[2006 No. 4930 P]

BETWEEN

DAVID ROSE

PLAINTIFF

AND

MICHAEL MURRAY, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

**Judgment of Mr. Justice Cian Ferriter delivered on the 18th day of February  
2022**

## **Introduction**

1. This is the first named defendant's application to dismiss the plaintiff's proceedings for want of prosecution, both pursuant to O. 122, r. 11 RSC (on the basis that the plaintiff has failed to take a step in the proceedings for a period in excess of two years) and further pursuant to the court's inherent jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay in both the commencement of prosecution of the proceedings.

## **Applicable Legal Principles**

2. While his written submissions contained arguments based on both the *O'Domhnaill v Merrick* [1984] IR 151 line of authority and also the line of authority commencing with the Supreme Court decision in *Primor v. SKC* [1996] 2 IR 459, at the hearing before me the first named defendant rested his application on the "*Primor*" line of authority, as subsequently developed.

3. The legal principles applicable to applications of this type are well established and do not need to be rehearsed at any length in this judgment. In short, it is clear that the court has a jurisdiction to dismiss proceedings where there has been both inordinate

and inexcusable delay on the part of the plaintiff in prosecuting the proceedings and where the balance of justice favours the dismissal of the action. The onus is on the moving party (the first named defendant in this case) to establish that there has been inordinate and inexcusable delay. If the applicant discharges the onus of demonstrating that there has been inordinate and inexcusable delay, it then falls to the respondent (the plaintiff in this case) to establish countervailing circumstances which would otherwise allow the proceedings to continue on the balance of justice.

4. It is clear from the *Primor* jurisprudence that where there has been significant delay prior to the issue of proceedings, there is a special obligation of expedition on plaintiffs to prosecute proceedings without delay once the proceedings have commenced.

5. In assessing the balance of justice, the applicant does not have to establish prejudice amounting to a significant risk of an unfair trial; the recent authorities have established that relatively modest prejudice may suffice to dismiss the proceedings once inordinate and inexcusable delay has been established: see *McNamee v. Boyce* [2016] IECA 19 and *Millerick v Minister for Finance* [2016] IECA 206. However, it is clear from the authorities that the court has to have regard to all of the relevant circumstances on the facts of the case in assessing the balance of justice and the presence or absence of prejudice is not of itself necessarily determinative of where the balance of justice should fall.

6. As we shall come to, the first named defendant relies in support of his application on the suggestion by O’Flaherty J. in *Primor* that once it is established that delay has been inordinate and inexcusable “*the matter of prejudice would seem to follow almost inexorably*”. This *dictum* was quoted with approval by Quirke J. in *O’Connor v. John Player & Sons Ltd* [2004] IEHC 99, where Quirke J. dismissed the plaintiff’s claim in that case where a lengthy period had elapsed since the events the subject of the proceedings even though no concrete evidence had been adduced on behalf of the defendants identifying specific prejudice which would be suffered by them as a result of the plaintiff’s delay in prosecuting her claim.

## **Background**

7. In these proceedings, which were instituted by plenary summons dated 23<sup>rd</sup> October, 2006, the plaintiff sues the first named defendant (in his capacity as nominee of the Christian Brothers of St. Helen's Provincialate) for damages for sexual abuse sustained at the hands of the plaintiff's then teacher, Brother Sean Drummond, while a pupil in the Creagh Lane Christian Brother's primary school in Limerick. While his statement of claim pleaded that the sexual abuse occurred "*on or about 1965 to 1972 when the plaintiff was in fourth, fifth and sixth class, and when the plaintiff was kept back in that class for a further year*", in replies to particulars the plaintiff narrowed the period of his claim to the period from September, 1967 to June, 1968.

8. The plaintiff was born on 6<sup>th</sup> August, 1958. He was accordingly 48 at the time of institution of the proceedings. He pleads that he has suffered psychological trauma since the abuse complained of, and that he continues to be symptomatic, with evidence of a chronic post-traumatic stress disorder. He pleads lifelong and severe emotional and psychological damage stemming from the abuse.

9. The plaintiff pleads in his statement of claim that he was left so damaged by the events that "*he was mentally and emotionally incapable of coping with the damage or with any criminal or civil claim arising therefrom until appropriate counselling and medical intervention were made available to the plaintiff from in or about April 2005*".

10. While it was pointed out that the first named defendant was likely to plead the Statute of Limitations in the event that the matter proceeds (the first named defendant has not filed a defence to date in the proceedings), the question of the Statute is obviously not one before me on this application.

11. The plaintiff swore an affidavit in opposition to the application, in which he avers that:

*“As a result of the abuse which I have suffered I have had chronic issues my entire life. I had a significant drug addiction problem up until 2000 and I continue to suffer from chronic depression and chronic posttraumatic stress disorder.”*

12. The plaintiff exhibited medical reports from a psychotherapist, Eileen Prendiville, dated 12<sup>th</sup> April, 2005, and two reports from a consultant psychiatrist, Dr. Patrick Doyle, dated 9<sup>th</sup> April, 2010 and 15<sup>th</sup> January, 2019. These reports are addressed to the plaintiff’s solicitor and were clearly commissioned in the context of these proceedings. Those reports appear to confirm the devastating consequences of the abuse which is pleaded to by the plaintiff.

13. In his affidavit, the plaintiff avers that the Gardaí commenced a criminal investigation into the matter of the abuse perpetrated by Brother Drummond. This criminal investigation commenced around 2007 and led to the prosecution of Brother Drummond. Brother Drummond pleaded guilty to 36 separate offences of indecent assault against the plaintiff and eighteen other students in Creagh Lane National School, Bridge Street, Limerick in June, 2009 and was sentenced to two years’ imprisonment on 9<sup>th</sup> December, 2009 in the Circuit Criminal Court, Limerick. A newspaper report of the conviction and sentencing of Brother Drummond was exhibited, and no objection was taken to its contents being included as part of the evidence on the application. That article records that Brother Drummond *“admitted assaulting nineteen boys at Creagh Lane National School, Bridge Street, Limerick on dates unknown between July 1<sup>st</sup> 1967 and July 31<sup>st</sup> 1968”*. As noted above, these are the dates which the plaintiff relies upon for his civil claim, as per his replies to particulars.

### **Chronology of timeline re prosecution of proceedings**

14. The plaintiff tendered the following chronology of events which I reproduce for ease, while noting that the first named defendant takes issue with whether a number of the matters recorded on this chronology can constitute steps relevant to the prosecution of the proceedings:

Plaintiff	Initiating letter to Christian Brothers	21 <sup>st</sup> November 2005
	High Court judgment in <i>O'Keefe v Hickey &amp; Ors</i> was delivered by de Valera J	20 <sup>th</sup> January 2006
Plaintiff	Issued plenary summons	23 <sup>rd</sup> October 2006
Plaintiff	Delivered Statement of Claim	13 <sup>th</sup> July 2007
1 <sup>st</sup> Defendant	Entered an Appearance	13 <sup>th</sup> August 2007
	Statement to Garda Gerard Hogan of criminal complaint of sexual abuse	16 <sup>th</sup> August 2007
State Defendants	Entered an Appearance	4 <sup>th</sup> September 2007
1 <sup>st</sup> Defendant	Delivered notice for particulars	29 <sup>th</sup> April 2008
	Supreme Court decision <i>O'Keefe v Hickey, Minister for Education &amp; Science, Ireland &amp; the Attorney General</i>	19 <sup>th</sup> December 2008
Plaintiff	Notice of discontinuance served on the State after Supreme Court judgment in <i>O'Keefe v Hickey &amp; Ors</i>	6 <sup>th</sup> April 2009
1 <sup>st</sup> Defendant	Brother Drummond pleaded guilty in criminal case, Circuit Criminal Court, Limerick, Judge Moran	June 2009
1 <sup>st</sup> Defendant	Brother Drummond sentenced for two years in prison - Plaintiff present in Court	9 <sup>th</sup> December 2009
Plaintiff	Plaintiff first Attended Dr Patrick Doyle, psychiatrist regarding the abuse	7 <sup>th</sup> April 2010
Plaintiff	Report of Dr Patrick Doyle	9 <sup>th</sup> April 2010
1 <sup>st</sup> Defendant	Frank Buttimer & Co to come on record for First Defendant in Christian Brother Cases. Communication from Maxwell solicitors. Notice of change of solicitor not served by Frank Buttimer & Co.	25 <sup>th</sup> May 2010
	European Court of Human Rights decision in <i>Case of Louise O'Keefe v Ireland</i>	28 <sup>th</sup> January 2014
	Consideration of joining State Defendants to the case after the ECHR judgment and known challenge by the State Defendants in three test cases.	
	Judgments of Noonan J in three test cases dismissing claims against the State Defendants commencing with <i>Wallace v Creevey &amp; Ors</i>	1 <sup>st</sup> June 2016

Plaintiff	Plaintiff inquired if Maxwells was continuing on record for the Defendant	12 <sup>th</sup> December 2018
Plaintiff	Review with Dr Doyle in relation to sexual abuse	15 <sup>th</sup> January 2019
Plaintiff	Warning letters for defence sent to Maxwells as Frank Buttimer & Co had not served a notice of change of solicitor	18 <sup>th</sup> July 2019 17 <sup>th</sup> October 2019
Defendant	Maxwells called upon us to serve a notice of intention to proceed and advised that if we issue a motion for Judgment in default of defence they would advise their client to bring a motion to strike out for laches and want of prosecution.	21 <sup>st</sup> October 2019
Plaintiff	Notice of intention to proceed served on Maxwells as Frank Buttimer & Co had not served a notice of change of solicitor	25 <sup>th</sup> November 2019
Plaintiff	Reminder to Maxwells that they were still on record	22 <sup>nd</sup> May 2020
Defendant	Maxwell Solicitors wrote seeking a further copy of the notice of discontinuance on the State defendants to allow Frank Buttimer & Co to come on record	26 <sup>th</sup> May 2020
Plaintiff	Sent a further copy of the notice of discontinuance to Maxwells as requested	28 <sup>th</sup> May 2020
Defendant	Frank Buttimer & Co filed Notice of change of solicitor in Central Office but not served on Plaintiff's solicitors due to oversight on their part.	9 <sup>th</sup> June 2020
Defendant	Maxwells confirmed that they had sent the notice of discontinuance to Frank Buttimer & Co to allow them to come on record in the matter	20 <sup>th</sup> July 2020
Defendant	Frank Buttimer & Co issued motion to strike out for delay	14 <sup>th</sup> January 2021
Defendant	Frank Buttimer & Co served notice of change of solicitor	19 <sup>th</sup> March 2021
Defendant	Return date for motion to strike out for delay	26 <sup>th</sup> April 2021

15. The plaintiff's solicitor, Paul Bergin, of O'Neill & Company Solicitors in Limerick, swore an affidavit in reply to the first-named defendant's application.

16. The first relevant tranche of time addressed in the affidavit is that from the institution of the proceedings on 21<sup>st</sup> January 2006 to the service of a notice of

discontinuance Ireland and the Attorney General (“the State defendants”) on 6<sup>th</sup> April 2009.

17. Mr Bergin exhibited various *inter partes* correspondence and correspondence between his firm and the Chief State Solicitor’s Office (“CSSO”) on behalf of the State defendants. This included a letter from the CSSO to the plaintiff’s solicitors of 17<sup>th</sup> September, 2007, which acknowledged receipt of the plaintiff’s statement of claim, but which set out the position that, in light of precedents cited in the letter, Ireland and the Attorney General were not appropriate defendants in the matter.

18. Mr. Bergin, in his affidavit, notes that the High Court delivered a decision in the case of *O’Keeffe v. Hickey* in January, 2006, in which it was held that the State was not vicariously liable for sexual abuse which occurred to a plaintiff while attending a school managed by a religious order. The appeal from that decision was heard by the Supreme Court, which delivered its judgment in the appeal on 19<sup>th</sup> December, 2008. Mr. Bergin avers that “*this decision was awaited by the plaintiff in this case as it was going to have a profound effect on the within proceedings as it would be treated by all parties as a test case for the case against the State on the within the proceedings*”. That averment is not denied in any replying affidavit on behalf of the first named defendant.

19. Mr. Bergin says that in light of the Supreme Court judgment in *O’Keeffe v. Hickey*, the CSSO wrote to the plaintiff requesting that the proceedings against the State defendants be discontinued. Shortly thereafter, a notice of discontinuance was served on the CSSO, and copied to the first named defendant’s then-solicitors (Maxwell Solicitors) on 6<sup>th</sup> April, 2009. The notice of discontinuance was dated 6<sup>th</sup> April, 2009 and served on the first named defendant’s then-solicitors on 7<sup>th</sup> April, 2009.

20. The next tranche of time addressed by Mr Bergin is that from April 2009 to December 2018. He addresses the lapse of time in this period as follows.

21. Mr. Bergin avers that he acted as solicitor for the plaintiff in this case but also for plaintiffs in a number of other cases against the Christian Brothers arising out of the actions of Brother Drummond. He states that, in early 2010, he was advised by Maxwell Solicitors (the solicitors originally on record for the first named defendant) “*that they*

were no longer instructed by the Christian Brothers and advised that Frank Buttimer & Company Solicitors were taking over the defence of each of the actions”. He avers that “thereafter I received a notice of change of solicitors, notice for particulars and a defence in the majority of cases for Frank Buttimer & Company Solicitors and I afforded my colleagues of Frank Buttimer & Company Solicitors time in order to carry out the necessary steps in relation to each of the cases”.

22. Mr. Bergin avers that the referral of the *O’Keeffe* case to the ECHR “was followed closely”, with the judgment of the ECHR in the case of *Louise O’Keeffe v. Ireland* delivered by that court’s Grand Chamber on 28<sup>th</sup> January, 2014. He says that this determined that the State defendants were liable for the sexual abuse which occurred to the plaintiff in that case while attending a school managed by a religious order. He avers that, following the judgment of the ECHR in the *O’Keeffe v. Ireland* case, “steps were being taken by the plaintiff to join the State defendants to the proceedings again”, when three test cases in other proceedings were taken by the State to strike out the order joining it to those other proceedings. Judgment in these three test cases was delivered by Noonan J. on 1<sup>st</sup> June 2016 and the decision confirmed that the plaintiff would not be successful against the State defendants at the hearing of the action before the High Court as a result of the Supreme Court decision in *O’Keeffe v. Hickey & ors.*

23. Mr. Bergin says that, thereafter, the plaintiff elected to proceed against the first named defendant only “and as a notice of change of solicitor had not been filed by Frank Buttimer & Company Solicitors, this firm wrote to Maxwell Solicitors on the 12<sup>th</sup> December 2018 enquiring if they continued to be instructed by the first named defendant”.

24. Mr. Bergin’s affidavit does not explain why no step at all was taken between 1<sup>st</sup> June, 2016 and that letter of 12<sup>th</sup> December, 2018.

25. Mr Bergin then addresses the period from December 2018 to the date of issue of the strike out motion, 21<sup>st</sup> January 2021.



26. No response was received to the letter to the Maxwell Solicitors of 12<sup>th</sup> December, 2018, so the plaintiff's solicitor followed up with letters to Maxwell Solicitors, seeking a defence, on 18<sup>th</sup> July, 2019 and 17<sup>th</sup> October, 2019. Maxwell Solicitors replied on 21<sup>st</sup> October, 2019 looking for a notice of intention to proceed and advising that, if a motion for judgment was sought, they would advise their client to issue a motion to strike out for laches and want of prosecution. The plaintiff's solicitors issued a notice of intention to proceed on 25<sup>th</sup> November, 2019 and served that on Maxwell Solicitors on 27<sup>th</sup> November, 2019.

27. From an affidavit sworn by Emma Leahy of Frank Buttimer & Company Solicitors, Cork, the solicitors now on record for the first named defendant, it appears that Frank Buttimer & Company received the file in respect of the matter from Maxwell Solicitors on 13<sup>th</sup> January, 2020. She says that her town agents were instructed on 14<sup>th</sup> February, 2020 to file a notice of change of solicitor but that the town agents advised that this could not be filed due to the fact that a notice of discontinuance had been filed on 6<sup>th</sup> April, 2009. She accordingly wrote to Mullany Walsh Maxwell Solicitors (the updated name for Maxwell Solicitors) on 21<sup>st</sup> February, 2020 seeking their assistance in obtaining the notice of discontinuance. It appears that the plaintiff's solicitors forwarded a copy of the notice of discontinuance to Mullany Walsh Maxwells on 28<sup>th</sup> May, 2020, with her town agents being instructed to file a notice of change of solicitor on behalf of the first named defendant on 2<sup>nd</sup> June, 2020. She avers that "*the notice of change of solicitor was returned to this office and due to an oversight was not in fact served on the solicitors for the plaintiff*".

28. On 21<sup>st</sup> January, 2021, the strike out motion was served on the plaintiff's solicitors by Frank Buttimer & Company Solicitors. This appears at a time when they had not yet served a notice of change of solicitors.

29. Replies to particulars were delivered by the plaintiff's solicitors on 13<sup>th</sup> April, 2021, when the plaintiff's solicitors had not received a response to a letter of 8<sup>th</sup> February, 2021 to Frank Buttimer & Company Solicitors.

## **Application of Principles to the facts here**

30. I will now turn to consider the application of the established legal principles to the facts.

### **Inordinate Delay**

31. There is no doubt but that the lapse of time both between the occurrence of the events in question (in 1967/1968) and the inception of the proceedings (in October 2006) and since the inception of the proceedings to date is inordinate. The real questions that arise on this application are whether there has been inexcusable delay and, if so, whether the balance of justice favours non-dismissal of the proceedings.

### **Is the Delay Excusable?**

32. While the first named defendant highlighted the period of time between the plaintiff reaching the age of majority (then being 21 years of age) in August, 1979 and the sending of a pre-action letter on his behalf on 21<sup>st</sup> November, 2005 (a period of just over 26 years) as being a period of inexcusable delay, his counsel accepted that this period of delay was relevant more to the balance of justice than to the question of excusability of delay in the prosecution of proceedings per *Primor* while emphasising that pre-commencement delay served to heighten the obligation on the plaintiff to proceed to prosecute his proceedings with diligence once his proceedings had issued.

33. The first named defendant relied on the period between the delivery of a notice for particulars by the first named defendant on 29<sup>th</sup> April, 2008 or, alternatively, on the service of a notice of discontinuance on the second and third named defendants (Ireland and the Attorney General) on 6<sup>th</sup> April, 2009, to the service of a notice of intention to proceed on 25<sup>th</sup> November, 2019 as being a period of wholly inexcusable delay, effectively a ten-year period of inexcusable delay.

34. The first named defendant relies on *dicta* in the authorities to the effect that the explanation offered to excuse any delay must be scrutinised, must be supported by

evidence and must legitimately excuse the relevant delay and submits that the plaintiff has offered no legitimate excuse for the delay in this period.

35. The plaintiff submitted as an excusing circumstance the fact the he was awaiting the outcome of the *O'Keefe* litigation before the ECHR and the “test cases” seeking to re-join State defendants subject to the ECHR’s decision in *O'Keefe v. Ireland*, which culminated in the decision of Noonan J. of 1<sup>st</sup> June, 2016 confirming that the Supreme Court decision in *O'Keefe v. Ireland* still prevailed. The first named defendant says in response that at no stage did the plaintiff’s solicitor write to or otherwise communicate with the first named defendant’s solicitors stating that the proceedings were on hold pending the outcome of these matters or requesting the first-named defendant’s consent to that course of conduct.

36. Counsel for the first name defendant submitted that the decision of Irvine J. in *Millerick* made clear that it was not a sufficient excuse to blame delay in prosecution of proceedings on awaiting the outcome of events in other cases, particularly where that course of action is not the subject of communication with the other side. Counsel for the plaintiff in response submitted that there have been plenty of instances in the past where personal injuries cases were adjourned pending the outcome of test litigation (e.g. in relation to the demise of Setanta Insurance many years ago).

37. In my view, the lapse in time in the prosecution of the proceedings between 26<sup>th</sup> May, 2010 (when Maxwell Solicitors communicated with the plaintiff’s solicitors to inform him that Frank Buttimer & Co. would be coming on record for the first named defendant in the plaintiff’s and other related cases) to 12<sup>th</sup> December, 2018 (when the plaintiff recommenced correspondence with the solicitors then still on record for the first named defendant, Maxwell Solicitors) (a period of some eight and a half years) is not fully excusable.

38. There is no excuse at all proffered for the period from 1<sup>st</sup> June, 2016 (the date of the decision of Noonan J. in the three test cases in dismissing claims against State defendants re-joined following the ECHR judgment in *O'Keefe v. Ireland*) to 12<sup>th</sup> December, 2018 (when the plaintiff recommenced correspondence with the solicitors then still on record for the first named defendant, Maxwell Solicitors).

39. As regards the period from May 2010 to June 2016, while I do not doubt that the plaintiff's advisors were keeping a close eye on the progress of Louise O'Keeffe's ECHR case against Ireland, and the potential implications of that decision once delivered in January, 2014, it does not seem to me that this provides sufficient excuse for a failure to prosecute the proceedings in the interim or, at a minimum, to propose to the first named defendant that the proceedings be parked pending the outcome of the ECHR case, or the subsequent test cases ultimately dealt with by Noonan J. in June, 2016 and to ascertain the first named defendant's attitude to such a course of action. The first named defendant did not actively acquiesce in the plaintiff pressing "pause" on his proceedings. A Defence had not been filed and no step was taken by the plaintiff (such as issuing a motion for judgment in default of defence) to force the first named defendant's hand in that regard.

40. The plaintiff's case against the first named defendant was one in vicarious liability for Brother Drummond's actions. That case was not intrinsically dependent on the plaintiff's case against the State defendants. The plaintiff had discontinued its case against the State defendants in April 2009. From April 2009 onwards, the plaintiff's case was only against the first named defendant.

41. Furthermore, as counsel on behalf of the first defendant correctly pointed out, the plaintiff was under an added onus to prosecute his proceedings with expedition given the lengthy lapse of time between the events in issue in the proceedings and the commencement of the proceedings.

42. I should say that I do not accept the plaintiff's contention that the first named defendant is responsible for the lengthy delay in this period on the basis that the first named defendant's solicitors informed the plaintiff's solicitors in May, 2010 that new solicitors were coming on record and the new solicitors failed thereafter to come on record and the first-named defendant failed to deliver a defence. It cannot be plausibly contended that the onus was on the first named defendant to make the next move in the face of the plaintiff doing nothing to advance his case for over 8 years.

43. Accordingly, in my view, there was inexcusable delay of some eight and a half years in the matter.

### **Balance of Justice**

44. In light of my conclusions on inordinate and inexcusable delay, it is necessary to address the balance of justice.

45. The onus is on the plaintiff to demonstrate whether there are sufficient countervailing circumstances to warrant non-dismissal of the action in circumstances where there has been inordinate and inexcusable delay of a considerable period.

46. I am conscious that an extremely lengthy period of time has elapsed since the occurrence of the events which are the subject of these proceedings. This is a factor which must weigh significantly in assessing whether the balance of justice favours the dismissal of the proceedings at this point. As the authorities make clear, the greater the lapse of time between the events the subject of the proceedings and the trial of the proceedings, the greater the risk that prejudice may result to the defendant.

47. However, in my view, in the very particular circumstances of this case there are a number of factors which when considered cumulatively tip the balance of justice in favour of the proceedings not being dismissed. I address these factors below.

#### *Prejudice to first-named defendant*

48. John Burke, a member of the congregation of Christian Brothers, swore an affidavit grounding the application in which he avers that *“it is clear that the first named defendant has been obviously prejudiced simply as a result of the plaintiff’s delays themselves both in the institution of the proceedings and since”*, pointing out that the first named defendant is being asked to try to deal with events alleged to have occurred over five decades ago. However, it is noteworthy that notwithstanding that the first named defendant is sued as being vicariously liable for Brother Drummond’s actions, there are no matters of specific prejudice averred to by Mr Burke as stemming from the considerable lapse of time (such as unavailability through death or otherwise

of potentially relevant witnesses, an absence of potentially relevant documentation or the like).

49. The first-named defendant submitted that prejudice could be assumed given the very lengthy period of time elapsed since the occurrence of the events the subject of the proceedings, relying in this regard on *O'Connor v John Player & Sons Ltd* [2004] IEHC 99 ("*O'Connor*"). However, in my view, *O'Connor* is readily distinguishable from the case here. This is borne out by the following passage in the judgment of Quirke J in *O'Connor*, in the context of his consideration of the balance of justice on of the facts of that case:

*"However a defendant, faced with a claim, is entitled to be provided with particulars of the wrong alleged, the full nature and extent of the injury and loss claimed and the connection alleged between those two factors. This is required so that the validity of the claim and the extent of the damages sought can be assessed by the defendant. Such particulars must be provided within a reasonable time. Thereafter the defendant is entitled to the trial with reasonable expedition.*

*In this case, the claim was made more than 6 years ago. It related to injury allegedly sustained during a period of over 50 years prior to the institution of proceedings. More than 4 years after the issue of proceedings, the only detail, if such be, provided to the defendants indicating the nature and extent of the plaintiff's claim against them, was a three-line endorsement of claim on a plenary summons. Only after the issue and service of notices seeking to dismiss the plaintiff's claim four years and 11 months later, was a statement of claim, in general terms, and in "boilerplate" form, finally delivered on behalf of the plaintiff. The delivery of that document has not substantially advanced the plaintiff's claim in relation to causation and quantum from the point at which it rested when these proceedings were initiated in 1997.*

*The defendants have cooperated with the plaintiff in the matter of collection of medical reports and have incurred the expense of investigating this claim over a period in excess of 5 years.*

*It is inescapable that they have suffered the type of prejudice identified in the many authorities cited, which follows inexorably with the passage of time of the kind this case.*

*Furthermore the defendants must speculate as to the precise nature of the plaintiff's claim against them. No evidence has been adduced, even at this late stage, which would inspire any confidence that they can, in the short, or even in the medium term, expect to receive from the plaintiff pleadings which will adequately identify that claim. I am accordingly satisfied that the prejudice to which the defendants have been subjected has now been so exacerbated by the plaintiff's extraordinary delay that the interests of justice require that a claim against the defendant should be dismissed for want of prosecution and I so hold".*

50. In my view, the facts here are readily distinguishable from those in the *O'Connor* case. Here, the underlying abuse which is at the centre of the plaintiff's claim has been the subject of a conviction to the standard of beyond reasonable doubt. The plaintiff has detailed that abuse and provided medical evidence of its devastating impact. The plaintiff pleads that because of the severely adverse impact of the abuse, he was inhibited from being in a position to issue proceedings before he did. In contrast to *O'Connor*, the first-named defendant cannot contend that it cannot properly divine the nature of the claim against it or the damage said to be caused by that claim.

51. The authorities also make clear that any prejudice to the defendants to be weighed in the balance of justice must be prejudice stemming from the period of culpable delay. While clearly a very lengthy period of time has elapsed since the events in issue, that was also the case when the proceedings were instituted and there is no evidence before me that that burden has been materially exacerbated by the eight-year period of culpable delay in the prosecution of the proceedings.

### *Conviction of Brother Drummond*

52. In my view, the fact that Brother Drummond has been convicted of the offences the subject of the proceedings is a material factor in the balance of justice. While of course the case against the first named defendant is one in vicarious liability, the necessary precondition to getting a case in vicarious liability off the ground (being proof of the fact that the alleged sexual abuse occurred at all) has been established beyond reasonable doubt. This puts the case in a very different category to the plaintiff in *O'Connor*.

### *Gravity of injuries to plaintiff*

53. In *Gorman v. Minister for Justice* [2015] IECA 41, it was recognised that the seriousness of the injuries allegedly sustained is a factor which the court is entitled to take into account in considering the balance of justice. The plaintiff pleads that he has suffered very grave injuries as a result of the matters complained of. That contention is supported *prima facie* by the medical evidence which he has tendered on this application.

### *Reason for pre-commencement delay*

54. While counsel for the plaintiff sought to rely on *dicta* of Murray J. in *P.O.C. v. DPP* [2008] 3 IR 87 at 105 to the effect that the court would be entitled to take judicial notice of the fact that an inherent element of sex abuse cases is that the victims of sexual abuse are very often reluctant or find it impossible to come forward to report the abuse to others and, in particular, to those in authority, there is in fact *prima facie* evidence before me in this case in the form of the medical reports that the plaintiff was seriously affected by the sexual abuse he suffered at the hands of Brother Drummond such that he did not, in fact, disclose this to anyone until 2002 i.e. four years before the proceedings commenced but well over 30 years after the events in question.

55. As regards the question of pre-commencement delay in assessing the balance of justice, in my view, the medical evidence tendered on behalf of the plaintiff on the application provides a sound basis for excusing very substantially the period of delay



up to the date of institution of the proceedings. In making that observation, I should not be taken as expressing any view on the Statute issues which the first named defendant has fairly indicated it will be pleading and which will have to be assessed separately following establishment of all the relevant facts and assessment of the appropriate legal arguments. The first named defendant will, of course, be able to advance such Statute of Limitations defences and arguments as it wishes to deploy now that the case will be proceeding.

*The first- named defendant's own delay*

56. While I have held that the first named defendant was not responsible for the delay in the period from May 2010 to December 2018, the plaintiff sought to advance the case that the defendant's conduct thereafter in its delay in arranging for a notice of change of solicitors to be filed, should be weighed against the first named defendant on the balance of justice. While I do not attach much weight to this factor, it does seem to me that the first named defendant was itself guilty of delay, particularly in the period from the service on him of the notice of intention to proceed in November 2019 (in circumstances where the defendant had called for that document) to the issue by it of this strike out motion in January 2021.

*Other cases have proceeded against Brother Drummond arising out of his Creagh Lane abuse*

57. The plaintiff submitted that it is a matter of public record that there are multiple other personal injuries cases against the same defendant which are either ongoing or have been litigated to conclusion in respect of the other eighteen victims of Brother Drummond's period in Creagh Lane, whose complaints, along with the plaintiff's, were the subject of the criminal prosecution which resulted in his conviction. The plaintiff submits it would be most unjust for his case not to be permitted to proceed in the circumstances. While those facts were not on affidavit, they were relayed to me by Senior Counsel for the plaintiff, an officer of court, who has been involved in the litigation. It is also clear from the contents of Mr. Bergin's affidavit that the first named defendant has the same solicitor on record in many other civil cases relating to claims

arising out of the abuse perpetrated by Brother Drummond in Creagh Lane in the same period.

58. While I do not regard this factor as dispositive, I do believe it underscores the view I have formed by reference to the other factors identified above, which is that the balance of justice favours the plaintiff's case proceeding. I do not see that any material injustice can be claimed to arise if the plaintiff's case here is permitted to proceed where other cases against the same defendant arising out of abuse perpetrated by the same individual in the same school in the same period have also proceeded.

59. In light of the foregoing factors, which arise on the very particular circumstances of this case, in my view the balance of justice favours the plaintiff being permitted to proceed with his action.

### **Conclusion**

60. Accordingly, I will dismiss the first named defendant's application.

61. In light of the significant lapse of time since the events the subject matter of the proceedings, it behoves the parties to ready to close out the pleadings and ready this case for trial as soon as practically possible.