Approved
No Redactions Required

THE COURT OF APPEAL

CIVIL

Court of Appeal Record Nos 2018/93 & 2018/110

Neutral Citation No. [2020] IECA 239

Kennedy J

Ní Raifeartaigh J

Collins J

BETWEEN

NIAMH McDONALD

Plaintiff/Respondent

AND

TOMMY CONROY

First Defendant/Appellant

GOREY COMMUNITY SCHOOL

Second Defendant/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 6 August 2020

1. This is a lengthy judgment and it may therefore be helpful to set out an index to its contents.

INTRODUCTION

2. Before the Court are two appeals from an Order of the High Court (Eagar J) made on 19 January 2018 directing that the Plaintiff ("*Ms McDonald*") recover damages in the sum of €210,000 (inclusive of aggravated damages of €10,000) against the First Defendant ("*Fr Conroy*") and the Second Defendant ("*the School*"). Certain orders for costs were also made in favour of Ms McDonald.

3. The Order of 19 January 2018 followed from the reserved judgment of Eagar J given on 9 October 2017 (*"the Judgment*") which in turn followed from a very lengthy hearing before him. The action was heard over a total of 30 hearing days, commencing in late November 2016 and concluding in June 2017. More than 20 witnesses gave evidence, including Ms McDonald and Fr Conroy, as well as the principal of the School, Mr Finn.

4. In her Statement of Claim, Ms McDonald claims that, between 2004 and 2007, while she was a pupil in the School, she was physically and sexually assaulted, falsely imprisoned and sexually abused by Fr Conroy, who was a religion teacher in the School and was also its Chaplain.[1] The Judge upheld these claims. Though it was not part of

[1] Fr Conroy has since left the priesthood. However, he was a priest at the time of the events the subject of these proceedings and, given that he was referred to as Fr Conroy in the Judgment, I shall refer to him in that manner also.

Ms McDonald's pleaded claim, the Judge also held that Fr Conroy was guilty of the tort of "*grooming*". As against the School, Ms McDonald claimed that it was vicariously liable for the wrongful actions of Fr Conroy and the Judge upheld that claim also. A claim against a third defendant, sued as representative of the Catholic church failed. The Judge's decision to dismiss the claim against the third defendant has not been appealed.

5. The proceedings before the High Court had a number of important features. First, Fr Conroy at all times denied that he ever had any form of sexual relations with Ms McDonald. Indeed, he did not merely deny the allegations against him in his defence but in fact counterclaimed against Ms McDonald, alleging (*inter alia)* that she was guilty of abuse of process and malicious falsehood. While professing itself a "*stranger*" to the veracity of the allegations, the School nonetheless also challenged the credibility of Ms McDonald to a significant extent. A large part of the High Court hearing was therefore directed to the determination of what occurred between Ms McDonald and Fr Conroy or, as the Judge put it, "*who in this case has told the truth"*. Ultimately, all disputed issues of fact were resolved by the Judge in favour of Ms McDonald. However, the manner in which these disputes of fact were resolved by the Judge has been the subject of significant criticism by Fr Conroy and the School in these appeals.

6. The second important aspect of the proceedings before the High Court arose from Ms McDonald's age. She was born on 22 April 1988 and thus turned 17 on 22 April 2005 (and 18 on 22 April 2006). While at all times denying that the sexual acts complained of by Ms McDonald had occurred, Fr Conroy argued in the alternative that such acts

(as described by Ms McDonald in her evidence) were in any event consensual and uncoerced. On that basis it was urged on the High Court that all such acts as occurred after 22 April 2005 (and, it was said, all of the sexual acts alleged by Ms McDonald took place after that date) were acts to which Ms McDonald could consent as a matter of law and to which – so the High Court Judge was invited to conclude from the evidence – she had in fact consented. Submissions to the same effect were made by the School. This issue was not addressed by the Judge in his Judgment and, unsurprisingly, this omission was the subject of sharp criticism in the submissions of Fr Conroy and of the School on these appeals. Each of the Appellants asks the Court to conclude that Ms McDonald could and did consent to the sexual acts which the Judge found to have occurred and that, accordingly, no cause of action properly arises against them, even on the basis of the Judge's findings of fact as to what had occurred between Ms McDonald and Fr Conroy.

7. There was, thirdly, a significant limitation issue in the case. Ms McDonald turned 18 on 22 April 2006. These proceedings commenced on 29 January 2013. Fr Conroy and the School both pleaded that all or a significant part of the claims against them were statute-barred. In response, Ms McDonald relied on the provisions of the section 48A of the Statute of Limitations 1957 (inserted by the Statute of Limitations (Amendment) Act 2000). Again, this issue was resolved in favour of Ms McDonald and, again, the manner in which the Judge reached and explained that determination is trenchantly criticised by both Appellants.

8. Finally, in the course of the proceedings the Judge made certain remarks concerning clerical sex abuse in the Diocese of Ferns which prompted both Fr Conroy and the School to apply to the Judge to recuse himself. The Judge refused to do so and the action proceeded to a conclusion. However, both Fr Conroy and the School challenge the Judge's refusal before this Court.

9. The two appeals were heard together over two days. Subsequent to the hearing, the Court, through its Registrar, wrote to the parties for the purpose of bringing to their attention the provisions of Section 3A of the Criminal Law (Sexual Offences) Act 2006 (inserted by section 18 of the Criminal Law (Sexual Offences) Act 2017) and Section 3(2) of the Child Trafficking and Pornography Act 1998, (as substituted by the Criminal Law (Human Trafficking) Act 2008) and giving them an opportunity to address the Court as to the significance, if any, of these provisions for the resolution of the issues in the appeal.

10. All of the parties made further submissions to the Court addressing those provisions and reference will be made to these provisions as far as relevant below. The Court is grateful to the parties for all of their submissions, written and oral.

THE ISSUES ON APPEAL

11. The principal issues arising in these appeals will be apparent, at least in outline, from the brief summary above. There are other issues raised in the respective Notices of Appeal, such as whether the damages awarded by the Judge were excessive (an issue raised by both Appellants). In its Notice of Appeal, the School challenges the Judge's finding that it was vicariously liable for the wrongful conduct of Fr Conroy but this issue was not pursued at hearing and it will not be necessary to address it further. Various complaints are made to the effect that the High Court hearing was unsatisfactory, including that Ms McDonald was permitted to pursue a claim for grooming that was not pleaded; that she was permitted to give evidence of events which had not been identified in her pleadings or in the particulars of her claim that had been furnished in advance of the hearing and that the Judge permitted Dr Cryan (the psychiatrist called by Ms McDonald) to give evidence directed to the limitation issue in circumstances where that issue was not addressed in the report that had been furnished to the Court and to the other parties in accordance with SI 391/1998. More generally, it is said that the Judge did not examine the evidence appropriately, that he failed to address significant inconsistencies in the accounts given by Ms McDonald, that he failed to explain his findings adequately and that his judgment is unsatisfactory in a number of significant respects.

12. I do not think that it is necessary to deal with all of these issues *seriatim*. What I propose to do is to address what I regard as the fundamental issues arising on the appeals and

then, in light of my conclusion on those issues, to consider what further issues (if any) require to be addressed.

13. There are, it seems to me, four issues which must in any event be addressed:

- Whether there is any basis for interfering with the Judge's factual findings, leading to the ultimate conclusions expressed in paragraph 88 of his judgment as follows:

> *"My conclusion is that the plaintiff has established on the balance of probability that the first-named defendant wrongfully, physically and sexually assaulted, falsely imprisoned and sexually abused here. In line with the judgment of White J in Walsh v Byrne [2015] IEHC 414, this Court finds that the tort of grooming has been established."*

- The issue of consent or (as it is also put by the Appellants) whether Ms McDonald has any cause of action against the Appellants.

- The legal basis for the "*tort of grooming"*.

- The Statute of Limitations issue.

14. The Appellants say that the resolution of any of these issues in their favour (with the exception, perhaps, of the grooming issue) must result in the setting aside of the High

Court Judgment. If the Court is persuaded that Ms McDonald has no cause of action (on the basis that Ms McDonald consented to the alleged sexual acts), then – so the Appellants say – the appropriate order is that the claim be dismissed. Otherwise, the claim must be remitted for rehearing by the High Court.

DISCUSSION

Issue 1 - The Challenge to the Judge's Factual Findings and Conclusions

The Framework for Assessment

15. Before considering the criticisms of the Judge's factual findings and conclusions advanced by the Appellants, the reference framework within which such criticisms are properly to be assessed must be identified. It was not the subject of any significant controversy.

16. The starting point is the decision of the Supreme Court in *Hay v O' Grady* [1992] 1 IR 210. In his judgment (with which Finlay CJ, Hederman, O' Flaherty and Egan JJ agreed), McCarthy J set out a series of important principles delineating the proper role of an appellate court in reviewing findings of fact made by a trial court. These emphasise that, provided that such findings of fact were supported by credible evidence, an appellate court is bound by them, however cogent the evidence to the contrary may appear to be. An appellate court should also be slow to substitute inferences of fact for those drawn by the judge, at least where such inferences depend on oral evidence or recollection of fact.[2] These principles are, of course, cited time and again and are part of the staple diet of appellate courts.

[2] At page 217.

17. What is not always sufficiently appreciated is that the appellate self-restraint mandated by *Hay v O' Grady* has an important *quid pro quo*. As it was put by McCarthy J:

> *"These views emphasise the importance of a clear statement, as was made in this case, by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows."*

18. This aspect of *Hay v O' Grady* was developed by the Supreme Court in *Doyle v Banville* [2012] IESC 25, [2018] 1 IR 505. Giving the only judgment (Denham CJ and McKechnie J agreeing) Clarke J (as the Chief Justice then was) referred to *Hay v O' Grady*, explaining that the context in which it was decided was the then recent abolition of jury trials in most personal injury actions. *Hay v O' Grady* was, he explained, concerned with the issue of whether the approach that had historically been taken on appeal to factual decisions by a jury was also to apply to findings made by a judge sitting alone. The position deriving from *Hay v O' Grady* was somewhat different in that the Supreme Court had made it clear that, in certain circumstances at least, inferences of fact could be reviewed on appeal and (he continued) it was also important to note what McCarthy J had said as to the importance of a clear statement of the judge's findings of fact, which I have already set out above. Clarke J continued:

> *"[10] In addition it does need to be said that there are other consequences of the move to trial by judge alone. Any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party*

concerned won or lost… To that end it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred. Where, as here, a case turns on very minute questions of fact as to the precise way in which the accident in question occurred, then clearly the judgment must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred. The obligation of the trial judge, as identified by McCarthy J. in Hay v. O'Grady, to set out conclusions of fact in clear terms needs to be seen against that background."

That obligation, Clarke J emphasised, is to analyse "*the broad case made on both sides*" and it is no function of an appellate court to rummage through the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument that arguably was not adequately addressed. The obligation of the court *"is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides.*"

19. Later in his judgment, Clarke J stated that where arguments are made as to which of two competing accounts should be accepted "*the court must, of course, address the broad drift of the argument on both sides so that the parties may know why the court came to its conclusion*."[3] In a case such as the one before the court (involving a road

[3] At para 12

traffic accident) the extent to which the trial court is influenced by the credibility of eye-witness accounts, forensic evidence or expert engineering evidence was largely a matter for the trial judge in the assessment of the evidence. But the judge was duty-bound to "*address the main arguments put forward by the competing parties as to how the relevant accident actually occurred*" by reference to such evidence as the parties relied on.[4] That did not, however, require the trial judge to "*address each and every possible point that might have been canvassed, however tangentially, in the course of the evidence or argument*" and any failure to do so does not provide a "*legitimate basis for maintaining an appeal."*[5]

20. According to Clarke J, "*part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts.*" Such a situation was different to that where the judge preferred one piece of evidence over another for "*a stated and credible reason*" – the appellate court having no function to second guess the judge's view in the latter situation.[6]

21. How these principles apply in practice is usefully illustrated by *Doyle v Banville* itself. It involved a road traffic accident. An important issue in the case was at where the sequence of events that ultimately led to the accident had begun. Part of that inquiry

[4] Para 13.

[5] Para 21.

[6] Para 14.

involved the question whether the car with which the plaintiff collided was stationary or not at the time of that collision. The driver of that car (D) gave evidence her car had stopped, or virtually stopped, at the point of collision. That evidence was helpful to the defendant. However, another witness (W) gave evidence that the car had travelled a significant distance before coming to a halt. That evidence assisted the plaintiff. The High Court judge dismissed the claim. The difficulty with his judgment was that he expressly indicated that he accepted the evidence of both D and W in full. In reality, it seemed that the judge had preferred the evidence of D. He could not have accepted the evidence of both. Had he indicated that he preferred D's evidence, that finding would have been unimpeachable. However, in the absence of such a finding, and in circumstances where, to the contrary, the judge had purported to accept the evidence of W in full, Clarke J considered that there was a clear error in the High Court's judgment such that as to require a retrial.

22. The decisions of the Supreme Court in *Healy v Ulster Bank* [2015] IESC 106 and of this Court in *Keegan v Sligo County Council* [2019] IECA 245 were also relied on by the Appellants as illustrating the obligation of the trial judge to engage with the evidence and to make clear findings where there are material conflicts of evidence, as well as the consequences of any failure to do so. In *Healy v Ulster Bank*, the case turned on what was said at a particular meeting between the plaintiff and the Bank. While the High Court judge had accepted that the meeting was also attended by the plaintiff's mother, his judgment did not engage with the substance of her evidence, which supported the account of the meeting given in evidence by her son, whose evidence the High Court rejected. Giving the sole judgment in the Supreme Court, Hardiman J

concluded that "*to make no finding whatever as to the veracity or reliability of her evidence, seems an undoubted error, a* 'failure to engage', *as opposed to* 'a mere tangential error'. *It was* 'one which related to a point of some significance in the case'. *There was an obligation to address her testimony.*" A retrial was ordered accordingly. A retrial was also ordered in *Keegan v Sligo County Council*, due to the trial judge's failure to engage in a meaningful way with the conflicting accounts that had been given by the plaintiff of how an accident occurred, as well as his failure to address an issue of contributory negligence.

23. The importance of not allowing complaints of "*non-engagement*" to be used as a vehicle to circumvent the principles in *Hay v O' Grady* was emphasised by the Supreme Court in *Leopardstown Club Limited v Templeville Developments Ltd* [2017] IESC 50, [2017] 3 IR 707. As was observed by McMenamin J in his judgment in that case:

> "***[109]*** *Save where there is a clear non-engagement with essential parts of the evidence, therefore, an appeal court may not reverse the decision of a trial judge, by adverting to other evidence capable of being portrayed as inconsistent with the trial judge's primary findings of fact.*"

Non-engagement with evidence, he emphasised, meant "*there was something truly glaring, which the trial judge simply did not deal with or advert to, and where what was omitted went to the very core, or the essential validity, of his findings."* There is, therefore, *"a high threshold."* (*Ibid*, at para 110).

24. *Donegal Investment Group plc v Danbywiske* [2017] IESC 14, [2017] 2 ILRM 1 is also relevant in this context. *Donegal Investment Group* addresses the application of the principles in *Hay v O' Grady* and *Doyle v Banville* to expert evidence and to findings made by a trial judge on the basis of such evidence.

25. Here the High Court heard conflicting evidence from Dr Cryan (the psychiatrist called by Ms McDonald) and Dr O' Connell (the psychiatrist called jointly by the School and the Third Defendant). That evidence was critical to the Court's resolution of the limitation issue which is considered separately below. However, it is apparent from the Judgment that the psychiatric evidence also had a significant influence on the Judge's factual findings[7] and it will be addressed in that context also. The manner in which the Judge addressed this conflicting evidence was significantly criticised by the Appellants and the decision in *Donegal Investment Group* therefore warrants careful consideration.

26. *Donegal Investment Group* involved a dispute about the valuation of the shares in a company the subject of a dispute pursuant to section 205 of the Companies Act 1963. The High Court had heard conflicting expert evidence and had reached a conclusion as to value – involving the use of a particular EBITDA multiplier – that did not reflect the position of either party. On appeal, this Court set aside the High Court's finding on the basis that the multiplier applied by the judge could not be sustained on the evidence. The Supreme Court gave leave to appeal from that decision.

[7] See for instance paragraphs 78, 81 and 89 of the Judgment.

27. Giving the sole judgment in the Supreme Court, Clarke J referred to the observations of the High Court (Charleton J) in *James Elliott Ltd v Irish Asphalt Ltd* [2011] IEHC 269 as to the role of a trial judge in assessing expert evidence. It was evident from Charleton J's analysis that the *manner* in which an expert gives evidence – the way in which an expert responds to questioning or the views of an expert witness tendered by the other side – can play an important part in the trial judge's assessment of that evidence. That being so, Clarke J thought that the parties were correct to accept that the principles in *Hay v O' Grady* were applicable to the role of an appellate court in scrutinising findings made by a trial judge with the assistance of expert evidence. However, where experts differed, their reasons for doing so could be examined in detail, allowing a trial judge to assess whether the reasoning of one or the other stood up better for scrutiny. It followed that:

> "*5.6. While it is true, therefore, that the assessment of all evidence, whether expert or factual, requires both the application of logic and common sense, on the one hand, and an assessment of the reliability or credibility of the witness gleaned from having been in the courtroom, on the other, it may be fair to say that it is likely that a decision based on expert evidence will be significantly more amenable to analysis on the basis of the logic of the positions adopted by the competing witnesses and the assessment of the trial judge of their evidence on that basis.*
>
> *5.7. Precisely because a decision to prefer the evidence of one expert over another is likely to be influenced, to a much greater extent than might be the*

case in respect of factual evidence, by the rationale put forward by the competing witnesses, there may be somewhat greater scope for an appellate court to assess whether the reasons given by a trial judge for preferring one expert over another can stand up to scrutiny. That being said it must remain the case that an appellate court should show significant deference to the views of a trial judge on the question of findings based on expert evidence because the trial judge will have had the opportunity to see the competing views challenged and scrutinised at the hearing."

28. As for the level of explanation required of a trial judge, Clarke J stated that "*it may not require any great deal of explanation for adopting a particular view on a straightforward issue governed by expert evidence*." While a greater obligation to explain arose where the judge adopted an approach significantly different from the positions espoused by the experts, where "*a trial judge favours one approach espoused by an expert over another espoused by a different expert then that choice may not require a great deal of explanation in a judgment other than to indicate in brief terms the reason why the views of one expert was preferred. Obviously each of the experts will give their reasons for preferring their own approach.*"[8]

[8] At para 7.4.

29. Following a close analysis of the judgment of the High Court, Clarke J concluded that it did not adequately explain the basis on which the judge had taken the approach he had. He then made some important general observations:

> *"8.8. It is, in my view, important to emphasise that the exercise which an appellate court has to carry out when scrutinising the judgment of a trial judge is not one to be conducted in a mechanical way so as to encourage parties to attempt to find some element of the findings of the trial judge which is said to be insufficiently explained. It must be recalled that a judgment is arrived at the end of a very open and transparent trial process. The case will have been fully pleaded, the evidence fully heard and submissions made on both sides. In many cases, and in particular in the Commercial Court, there will be further procedures including the exchange of witness statements and expert reports. Against that backdrop it will often be possible readily to infer why a particular finding was made even if there is no express statement in the judgment. The parties will know how the case ran. An appellate court can read the record of the case. The judgment needs to be read in the light of the case as made and defended before the trial judge.*
>
> *8.9. But there can be cases where it is just not possible to ascertain, with any reasonable degree of confidence, the reasons why a trial judge adopted a particular approach in relation to an important part of the facts. Where a finding of fact is of significant materiality to the overall conclusion of the case and where the reasons of the trial judge are neither set out in the judgment or*

can safely be inferred from the run of the case and the structure of the judgment itself, then an appellate court is unable properly to carry out its task of scrutinising the judgment to see whether the findings of fact are sustainable in the light of the principles set out in cases such as Hay v. O'Grady and Doyle v. Banville. In such circumstances an appellate court will have no option but to allow an appeal to the extent appropriate and take whatever further steps may be required in all the circumstances of the case in question."

The Appellants here say that this is just such a case "*where it is just not possible to ascertain, with any reasonable degree of confidence, the reasons why"* the Judge adopted the approach he did to the psychiatric evidence.

30. Reference was also made to the decision of this Court in *O' Driscoll v Hurley* [2015] IECA 158 and in particular to what was said to be this Court's endorsement of the decisions of the Court of Appeal of England and Wales in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 and *English v Emery Reinbold and Streick Ltd* [2002] 1 WLR 2409. *Flannery* and *English* addressed the extent to which a trial judge is obliged to give reasons for his or her conclusions. Irvine J set out the following passage from the judgment of Philips MR in *English*:

"19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. That does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But

the issues of the resolution which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

31. In her judgment, Irvine J rejected a submission that a trial judge was obliged to set out in their judgment a synopsis of the evidence. In her view, the "*purpose of the judgment is to explain to the parties why a particular conclusion was reached so that they may properly understand why they won or lost and whether, in the circumstances, an appeal is warranted. As is clear from the decision in English, there is no particular template to which a trial judge must conform when writing his or her judgment and their duty is confined to giving a clear explanation for their decision.*"[9]

32. That is, in my view, a very helpful synopsis of the position. While I do not read *O' Driscoll v Hurley* as going further than *Hay v O' Grady* and *Doyle v Banville,* those cases were largely concerned with findings of fact and *O' Driscoll* (and the authorities to which it refers) provides a useful reminder that where there are disputed <u>legal</u> issues which are critical to the ultimate resolution of an action, the judge's resolution of those

[9] At para 19.

issues must also be sufficiently explained "*so that [the parties] may properly understand why they won or lost."*

33. In addressing this aspect of the appeal, it is essential to keep the proper boundaries of this Court's role in mind. It is important not to overstep the Court's appellate function by substituting the Court as fact-finder. That is not its role. At the same time, it is important that the Court should not surrender its proper appellate function; it is entitled – indeed it is the Court's duty – to "*ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts."*

34. In approaching this task, the Court must have due regard to the nature of the High Court hearing. A large number of witnesses gave evidence over very many hearing days, spread over a period in excess of 6 months. That evidence related to events which had occurred (or were alleged to have occurred) between 9 and 12 years before the High Court hearing commenced. It was inevitable that there would be many conflicts, inconsistencies, gaps and uncertainties in the evidence. The Judge was not obliged to identify and resolve all of these. He was deciding a civil claim for damages, not conducting an inquiry. It was important for the Judge – as it is for this Court on appeal – not to lose sight of the wood for the trees or get lost *"in the undergrowth of the evidence tendered or the arguments made."* The Judge's task was to have regard to the evidence, to identify the issues that required to be resolved, to make findings on those issues and to explain the basis for those findings sufficiently, within the parameters set

out in the case-law discussed above. This Court must be astute to avoid applying any exaggerated or unrealistic standard in its review of the Judgment.

35. However, in exercising its functions, this Court must also bear in mind the nature of the claim made by Ms McDonald and the nature of the allegations made by her. In essence, she claims that she was subjected to a pattern of sexual abuse by Fr Conroy over a lengthy period while she was a pupil in the School. Those allegations are clearly very serious and the Judge's findings that they had been made out on the evidence has serious implications for both Fr Conroy and the School, extending beyond the immediate financial liability for damages and costs. That is so, in my view, even if the Appellants are correct in their contention that the conduct alleged by Ms McDonald (and found by the Judge to have occurred) does not give rise to any claim in tort. Even if that be so, the Judge's findings that Fr Conroy engaged in the conduct complained of by Ms McDonald are likely to have significant consequences for his position as a teacher in the School. In addition, the fact that Fr Conroy was a Catholic priest during the period to which those findings relate seems to me to be relevant in this context. There can be no doubt but that the conduct alleged by Ms McDonald, if it occurred, amounted to a gross breach of Fr Conroy's duties as a priest. Of course, if those findings are justified, Fr Conroy alone bears the responsibility for whatever adverse consequences that follow. However, given the nature and implications of the findings at issue here, it seems to me that the Court should review those findings very carefully, though always within the proper parameters of its appellate function.

Assessment

36. It should be said immediately that some of the criticisms of the Judgment made by the Appellants are effectively uncontested. I have already set out the Judge's conclusion in paragraph 88 of his Judgment to the effect "*that the plaintiff has established on the balance of probability that the first-named defendant wrongfully, physically and sexually assaulted, falsely imprisoned and sexually abused her."* The Judge's finding of false imprisonment was the subject of sharp criticism by both Appellants, with Ms Reilly (for Fr Conroy) and Mr McDonagh (for the School) each submitting that there was *no* evidence capable of sustaining it. According to Mr McDonagh *"[f]alse imprisonment wasn't remotely part of the case".*

37. In his submissions, Mr Fitzgerald (for Ms McDonald) did not stand over the finding of false imprisonment and did not attempt to identify any evidential basis for that finding. That was, of course, a perfectly proper position for Mr Fitzgerald to adopt if he considered that such finding could not be sustained. But it is nonetheless a striking state of affairs. A finding that Fr Conroy had falsely imprisoned Ms McDonald was, on any view, a serious matter. As Ms Reilly observed, false imprisonment is a serious criminal offence in addition to constituting a tort. It is difficult indeed to understand how the Judge could have made such a finding in circumstances where it is common case that there was no evidential basis for it. In light of that significant error on the part of the Judge, it is, in my view, reasonable to approach his other findings with particular care.

38. I will deal separately below with the Judge's findings regarding grooming and the approach taken by Ms McDonald to those findings on appeal.

39. Notwithstanding that paragraph 88 of the Judgment refers to "*physical and sexual assault"* and *"sexual abuse",* the core finding made by the Judge appears to have been to the effect that Fr Conroy sexually assaulted Ms McDonald. There is nothing in the Judgment that suggests that the Judge's references to physical assault or sexual abuse referred to acts or conduct different to those that the Judge found to constitute sexual assault and Mr Fitzgerald did not suggest otherwise.

40. In his submissions on appeal, Mr Fitzgerald appeared to submit that the Appellants' criticisms of specific aspects of the Judgment were misplaced because the issue was not whether Ms McDonald and Fr Conroy had sexual contact 25 times, 35 times or 45 times. The number, he said, did not matter because once was enough. At one level, that is undoubtedly so. However, Ms McDonald's case was that she had sexual relations with Fr Conroy not once but on multiple occasions. Furthermore – and significantly – there were a relatively small number of alleged incidents that were the particular focus of attention in the High Court because they were said to have occurred in or near the presence of third parties (many of whom gave evidence). The Judge's findings in relation to these incidents were the focus of particular criticism by Fr Conroy and the School. If such criticism is otherwise well-founded, it is not, in my opinion, an answer to it to say that, on Ms McDonald's case, there were many other incidents of sexual contact. If the Judge erred in accepting the evidence of Ms McDonald – and rejecting the evidence of Fr Conroy – in relation to those specific incidents, that necessarily

impacts on the Judge's overall assessment as to what occurred between Ms McDonald and Fr Conroy.

41. At paragraph 5 of the Judgment, the Judge sets out his approach to assessing the evidence:

> *"This judgment will set out relevant evidence in chronological sequence. By moving thematically through the evidence in the case, and any evidence corroborating the position of the plaintiff or first-named defendant, the Court will move to addressing the central question of the case, namely, who in this case has told the truth. After assessing the evidence in this manner and reaching factual conclusions, the issue of the Statute of Limitations, and vicarious liability will be addressed."*

42. This "*mission statement*" (as it was characterised by Ms Reilly for Fr Conroy) was criticised by both Appellants as stating the Judge's task too narrowly. It was said that the Judge ought to have had regard not just to any evidence that *corroborated* the evidence of Ms McDonald or Fr Conroy but also to any evidence which *contradicted* or *undermined* that evidence. Both Appellants submitted that there were multiple factors which undermined the evidence of Ms McDonald which the Judge failed to acknowledge or address. It was also said that, while it was of course necessary for the Court to assess the credibility of Ms McDonald and Fr Conroy, it was simplistic to set as the "*central question*" which one of them was telling the truth. That approach had, it was said, led the Judge into error because he had not properly examined the evidence

in the round and had ignored important third party evidence and/or gave inadequate weight to such evidence.

43. There were four principal areas where – so it was said – the Judge's treatment of the evidence was so unsatisfactory that his Judgment should be set aside:

- The first related to a trip to The Gambia and what is said to have been a failure on the part of the Judge to address inconsistencies in various accounts given by Ms McDonald as to the circumstances in which she came to spend a night in Fr Conroy's bedroom during that trip, as well as inconsistencies between her accounts and the account given by another student, Ms O' S.

- The second related to a trip to Cologne and what is said to have been the Judge's failure to address evidence given by Esther Kavanagh which contradicted Ms McDonald's evidence that Fr Conroy had performed oral sex on her one night after Ms McDonald had gotten sick after she had been drinking.

- The third related to what was said to have been the Judge's failure to engage with the evidence of Elizabeth Kenny, a sister of Fr Conroy, to the effect that she was living with Fr Conroy for significant parts of 2005 (from August until the end of October) and of 2006 (from May to October) as well as spending regular weekends in his house and that therefore Ms McDonald could not have been regularly visiting Fr Conroy in his house for the purpose of sex during these periods, as Ms McDonald said she had been.

- The fourth related to the Judge's acceptance of the evidence of Dr Cryan and his failure (according to the Appellants) in that context to engage with the evidence of Dr O' Connell.

44. The Statement of Claim pleaded that between "*2004 and 2007 the plaintiff was repeatedly and wrongfully physically and sexually assaulted, falsely imprisoned and sexually abused and subjected to sexualised behaviour*" by Fr Conroy. By way of particulars of these allegations, reference was made to a trip to The Gambia which Ms McDonald had undertaken in transition year (TY) along with other TY students and Fr Conroy. That trip took place in February 2005, two months before Ms McDonald's 17th birthday. On one evening (so it was pleaded) Fr Conroy "*invited the plaintiff and another student* [later identified in replies to particulars as Ms O' S] *to sleep in his bed with him*" and the "*three of them spent the night together in his bed".* After that trip, Fr Conroy started to send private text messages to Ms McDonald which became increasingly personal and sexual in nature. After her 17th birthday, Fr Conroy "*initiated the physical side of the relationship*", which progressed from kissing to oral sex. By the time the plaintiff was in sixth year, she was having sexual contact with Fr Conroy once a week.

45. The trip to The Gambia was the subject of significant attention at trial, as was another school trip undertaken by Ms Conroy subsequently, to Cologne, Germany. The Cologne trip took place in August 2005, by which time Ms McDonald was 17. The trip to Cologne had not been expressly referred to in the Statement of Claim. After objection

was taken to Ms McDonald addressing the Cologne trip in her evidence, the Judge ruled that it had been sufficiently raised in the Statement of Claim, albeit that Cologne had not been specifically identified.

The Trip to The Gambia and the night spent by Ms McDonald in Fr Conroy's bedroom

46. Ms McDonald's account of the evening/night which (according to her Statement of Claim) she spent in Fr Conroy's bed, in the company of another student, was scrutinised very closely at trial. According to Mr McDonagh (for the School) it was possibly "*the most important single incident in the entire case."*

47. The allegation in the Statement of Claim was in clear and specific terms, namely that Fr Conroy invited Ms McDonald and another student on the trip to sleep in his bed with him and the "*three of them spent the night together in his bed*". While it was never part of Ms McDonald's case that any overtly sexual conduct occurred at any stage of The Gambia trip, presumably this allegation was made so as to particularise the allegation that Ms McDonald had been "*subjected to sexualised behaviour"* from 2004 onwards and it appears to have been so understood by the Judge.

48. In a statement that she subsequently made to the HSE, Ms McDonald stated that on the night in question "*we all stayed in his bed we just fell asleep and nothing happened. I thought it was weird at the time but it was not discussed then or afterwards.*"

49. The School says that Ms McDonald's actual evidence was significantly at variance with her pleaded claim. Asked by Ms Reilly whether Fr Conroy had invited her to stay the night, Ms McDonald said "*I think I just fell asleep on the bed*."[10] She and Ms O' S had been woken up by Fr Conroy at about 6 am and told to leave the room.[11] Ms McDonald gave clear evidence to the effect that Ms O' S had been in the bed also,[12] though at a later point in her evidence she indicated that she was could not clearly recollect whether that was the case or not.[13] Ms McDonald accepted (in cross-examination by Mr McDonagh) that Fr Conroy had not, in fact, invited her and another student to sleep *in* his bed with him.[14] She and her friend had been invited into Fr Conroy's room to play Jenga, Fr Conroy (who, according to Ms McDonald, was "*drunk*") had fallen asleep and Ms McDonald and her friend had ended up falling asleep *on* his bed.[15] She later woke up with Fr Conroy beside her.[16] She maintained in her evidence that that she could not see much difference between what she had described and how it had been put in the Statement of Claim. Ms McDonald was examined closely on a statement in replies to particulars to the effect that the other pupil had not been present when the "*invitation*" (however it was to be characterised) was issued by Fr Conroy. That, Ms McDonald accepted, appeared to be an error, one which she could not explain.

[10] Day 5 (7 December 2016), page 116

[11] *Ibid*.

[12] Day 5 (7 December 2016) at page 125.

[13] Day 9 (15 December 2016), 155-156.

[14] *Ibid*.

[15] *Ibid*, page 156.

[16] *Ibid*.

50. The other student, Ms O' S, was called as a witness for Ms McDonald. She said that she spent the night in a chair in Fr Conroy's room.[17] She did not think that she had slept. Ms McDonald and Fr Conroy were "*in the bed*". She "*wasn't impressed"* by that but did not want to leave because she did not want people to think that Ms McDonald and Fr Conroy were alone together.[18] She had never been invited by Fr Conroy to sleep in his bed with him.[19] She had not been in the bed and therefore it was not the case that she had been in the bed on one side of Fr Conroy, with Ms McDonald on the other side, with Fr Conroy's arms around the two of them.[20] She did not believe that she previously suggested that Ms McDonald had climbed into Fr Conroy's bed when Fr Conroy was asleep.[21] She thought what had occurred was "*something wholly inappropriate.*"[22]

51. In this context, it is also relevant that Dr Cryan had recorded in her report, as part of the history given to her by Ms McDonald, that Fr Conroy had been in the middle of the bed with his arms around both Ms McDonald and Ms O' S.[23] Dr Cryan had included that in

[17] Day 18 (24 February 2017) at page 8.

[18] *Ibid*, page 10.

[19] Day 18, page 53.

[20] Day 18, pages 22 (to Ms O' Reilly) and 53 (to Mr McDonagh).

[21] Day 18, pages 50-51 (referring to an earlier conversation between Ms O' S and the School Principal. Mr Finn)

[22] Day 18, page 56.

[23] Page 2 of Dr Cryan's report.

her report because she thought that it constituted grooming.[24] It was, Dr Cryan accepted in cross-examination, a "*significant*" piece of information and Dr Cryan accepted that, if in fact, two pupils had not been in the bed with Fr Conroy, that would be "*significantly different*"[25], though she maintained that, in any event, it was inappropriate that two students should spend the night in the bedroom of a teacher.

52. Finally, Fr Conroy gave evidence that his room had been empty when he went to sleep. He had then woken up to find Ms McDonald asleep "*beside me in the bed.*"[26] Ms O' S was asleep on a chair. He described this as an "*ambush*" as the girls had entered his room without his permission and said that he had told them both that it was an "*outrage*" and had told them to leave "*in no uncertain terms*".

53. Although, as I have said, there was never any suggestion of any sexual activity in The Gambia, the allegation that Fr Conroy had invited Ms McDonald and her friend to stay the night in his bed, and that they had in fact done so, was an important element of Ms McDonald's case. According to the School, "*scandalous allegations*" had been made by Ms McDonald in her Statement of Claim but, in her evidence, she had given "*a radically different account*".[27] That account was "*much more innocuous*" than the pleaded allegation.

---

[24] Day 16 (21 February 2017), page 106. The incident in The Gambia is referred to in Dr Cryan's report but is not characterised as "*grooming*". In fact, there does not appear to be any reference "*grooming*" in that report.

[25] Day 16 (21 February 2017) , pages 42-44.

[26] Day 22 (8 March 2017) at 92.

[27] Written submissions at paragraphs 128 & 129.

54. The evidence given at the hearing, and the extent to which Ms McDonald's evidence differed from the allegations in the Statement of Claim (recorded also in her statement to the HSE and in Dr Cryan's report), was not, it is said, properly reflected in the Judgment and the Judge, in particular, failed to engage properly with the evidence given by Ms O' S.

55. In the section of his Judgment entitled "*Chronology of Events",* the Judge summarises in some detail the evidence concerning the incident on The Gambia trip. He recites Ms McDonald's evidence that she had fallen asleep *on* Fr Conroy's bed, with Fr Conroy in the bed beside her. He states that Ms O' S's evidence supported the plaintiff's account. As already recounted, Ms O' S had stated that Ms McDonald and Fr Conroy were *in* his bed together. He notes Fr Conroy's evidence (the tenor of which he later rejected)[28] to the effect that Ms McDonald "*got into his bed*".

56. Later in his Judgment, the Judge sets out his "*Factual Conclusions*" and in that context identifies what he refers to as "*matters of substance [that] have not been disputed"* by Fr Conroy. There was, in the Judge's view, "s*ome undisputed evidence*" including:

> *"the fact that sexualised behaviour occurred in The Gambia as between the plaintiff and the first named defendant one night"*[29]

[28] Judgment, at paras 82 & 83.

[29] Judgment, at para 72.

The Judge later observes that it went without saying that "*the undisputed evidence of a school chaplain finding himself in bed with a school girl is evidence of sexualised behaviour. This evidence of sexualised behaviour has provided a picture of the developing relationship between the plaintiff and the first-named defendant".* [30]

57. Much emphasis was placed by Mr McDonagh on the fact that the Judge in his Judgment repeatedly refers to Ms McDonald having been "*in*" Fr Conroy's bed, whereas on her own evidence she fell asleep "*on*" rather than "*in*" his bed. However, in her evidence (which the Judge clearly accepted) Ms O' S had clearly said that Ms McDonald had been "*in*" bed with Fr Conroy and that was Fr Conroy's evidence also (though otherwise his evidence diverged significantly from the evidence of both Ms McDonald and Ms O' S). In any event, it is not clear to me that, in the particular context here, the distinction has the importance suggested by the School. If it was inappropriate for Fr Conroy to allow Ms McDonald to sleep next to him *in* his bed, it was surely equally inappropriate for him to permit her to sleep next to him *on* his bed.

58. But, in my view, significant issues nonetheless arise concerning the Judge's analysis of the evidence relating to this incident. While the Judge stated that Ms O' S's evidence had supported Ms McDonald's account, there was in fact a material divergence between their evidence on what might be thought to have been a significant point, namely whether or not Ms O' S had been in Fr Conroy's bed. Despite what is said in paragraph

[30] Judgment, at para 80.

14 of the Judgment, Ms McDonald in fact had given clear evidence to the effect that Ms O' S had been in the bed also.[31] Ms O' S gave very clear evidence to the contrary effect. Ms McDonald's pleaded case was that all three had spent the night in the bed following on an invitation to do so from Father Conroy. She had told the HSE that all three of them had spent the night in bed together and that is also what she had told Dr Cryan – indeed the suggestion made to Dr Cryan that Fr Conroy had been in the bed between Ms McDonald and Ms O' S with an arm around each clearly added an additional layer of impact and gravity to the allegation.

59. If the Judge accepted Ms O' S's evidence that she had not spent the night in Fr Conroy's bed – and her evidence to that effect does not appear to have been challenged though, as noted, the evidence initially given by Ms McDonald was inconsistent with it – it would follow that Ms McDonald's pleaded case was incorrect. It would also follow that the accounts given by Ms McDonald to the HSE and to Dr Cryan were inaccurate; not, it may be said, as regards a tangential or incidental detail but as to a significant element of the narrative. If the Judge accepted Ms O' S's evidence, these discrepancies would have had to have been addressed by him.

60. If, on the other hand, the Judge concluded that Ms O' S had in fact spent the night in Fr Conroy's bed, that would have involved rejecting a central element of her evidence. But the reliance which the Judge placed on her evidence – see for instance the reference to her evidence at paragraph 85 of the Judgment – appears wholly inconsistent with any

[31] Day 5 (7 December 2016) at page 125.

suggestion that any material element of that evidence was rejected by him. If the Judge considered that Ms O' S was wrong in saying that she had not been in Fr Conroy's bed, it was incumbent on him to say so in clear terms and to explain his finding and also to explain how, notwithstanding that finding, he otherwise regarded Ms O' S as a reliable witness.

61. It is, of course, true that important elements of Ms McDonald's evidence appeared to be broadly confirmed by the evidence of Ms O' S and that Ms O' S had characterised what had occurred as "*something wholly inappropriate".* But even on Ms McDonald's account, what had occurred fell considerably short of what had been alleged because her evidence was to the effect that, rather than being invited into Fr Conroy's bed, she fell asleep on it while playing Jenga. That was another – arguably significant – departure from the case pleaded in the Statement of Claim.

62. Unfortunately, however, the Judge did not address any of these issues. He may well have been entitled to reach the conclusions he did regarding *"sexualised behaviour"* on The Gambia trip but, in my opinion, could properly do so only after making clear findings as to what occurred and addressing the evident discrepancies in and between the various accounts that had been given by Ms McDonald and between her evidence and the evidence of Ms O' S. These were important not simply in terms of determining what exactly had happened that night in The Gambia but also in terms of the wider credibility issues arising.

The Trip to Cologne and the Evidence of Esther Kavanagh

63. At trial, the trip to Cologne assumed a much greater importance than a reading of the pleadings and particulars, however careful, might have suggested.

64. In her evidence, Ms McDonald had stated that, on their return from the trip to The Gambia, Fr Conroy had given her a hug which, in a later text, he told her was a "*special*" hug. Shortly after their return, there was a "*photo-night*" in Fr Conroy's house where the participants shared photographs of their trip. In the course of that evening, Ms McDonald said, there was "*messing*" and at one stage she ended up hiding in the utility room along with Fr Conroy. While nothing happened, she had felt uncomfortable. She described a trip to the cinema with Fr Conroy and a number of other pupils to celebrate her 17th birthday and stated that Fr Conroy had dropped her home last. She said that he gave her an intimate kiss.

65. Ms McDonald's 17th birthday was on 22 April 2005. The trip to Cologne took place in August 2005. According to Ms McDonald's evidence in the High Court, she and Fr Conroy become more intimate in the intervening period, starting with frequent texting and culminating in a sexual relationship. Her evidence was that that sexual relationship started before the Cologne trip (though she had suggested to Dr O' Connell that it had started in Cologne).[32]

[32] Day 31 (3 March 2017) at page 30. In contrast, Ms McDonald had made no mention to Dr Cryan of any sexual activity with Fr Conroy while on the trip to Cologne: Day 16 (21 February 2017), pages 103-104.

66. The Cologne trip was organised by Fr Conroy. Again it involved a group of students from the School, all from the TY year that had just concluded, as well as a number of adult supervisors. Its main purpose was to attend a Papal mass organised for World Youth Day. The group was split up between different places of accommodation. Ms McDonald was staying with a host family in an apartment. Though not originally assigned to that apartment, Fr Conroy ended up staying there also, along with a number of other students, including F D. Ms McDonald was sharing a bedroom with a number of others, including Mr. D. Esther Kavanagh, a youth worker who was an acquaintance of Fr Conroy and who was on the trip at Fr Conroy's invitation to help with supervision, was also staying in that room.

67. On one of the evenings, the pupils were allowed to take alcoholic drinks. Ms McDonald appears to have had too much to drink and, after returning to the apartment, she became sick on the floor of the bathroom. According to Ms McDonald, Fr Conroy helped her to clean herself up and then brought her into his "*bed*" (he was sleeping on an air mattress on the floor of what appears to have been a landing or hall, immediately adjacent to the bedroom) and performed oral sex on her.[33] The son of the host family was sleeping in the same room/area at the time. Ms McDonald described getting up early and going back to her room and into her own bed.[34] That was about 05.00 or 06.00

[33] Day 4 (6 December 2016), page 33-34.

[34] Day 6 (8 December 2016), at page 103.

but, Ms McDonald was clear, she was in Fr Conroy's bed until then.[35] She described how her underwear was hanging over her pyjamas and that, when she returned to her room, her friends, including F D, laughing at her, much to her annoyance.[36]

68. Mr D gave evidence to the effect that Ms McDonald had been absent from her room and had come back in the early morning with her underwear on "*the wrong way*". He didn't remember Ms Kavanagh being in the room. He accepted that he had had a lot to drink. He did not remember there being any other person sleeping in the room where Fr Conroy was sleeping.[37] He had not suspected that there was any form of sexual relationship between Ms McDonald and Fr Conroy: he had learned of that allegation shortly before the High Court hearing and he had been "*surprised*" and "*horrified*".[38]

69. Ms Kavanagh was called as a witness by Fr Conroy and gave evidence that she put Ms McDonald into her (Ms McDonald's) bed after she had been ill.[39] Ms McDonald (who was, according to Ms Kavanagh, "*a bit worse for wear*") had fallen asleep after a short while. Ms Kavanagh had then gotten into her own bed (in the same room) but had kept Ms McDonald under watch for any movement or sound that might indicate that might be getting sick again as she was concerned that she might choke. She remained watching for an hour and a half to two hours approximately before she fell asleep herself. When

[35] Day 6, page 107.

[36] *Ibid*.

[37] Day 17 (22 February 2017), pages 43-47.

[38] Day 17, pages 62-63.

[39] Day 26 (16 March 2017), page 123 and following.

she woke up the following morning (and her evidence was that she rose every morning at 6 am), Ms McDonald was asleep in her own bed. According to Ms Kavanagh, it was not correct that Fr Conroy had put Ms McDonald into his bed after she had been sick and it was *"absolutely not the case*" that Fr Conroy had performed oral sex on Ms McDonald that night.[40]

70. Ms Kavanagh was cross-examined but the transcript material furnished to the Court does not disclose any challenge on the central elements of her evidence, though it was suggested to her that Ms McDonald might have left the bedroom to go to the bathroom while she (Ms Kavanagh) was in the shower and thus that Mr D's evidence that Ms McDonald was not in the room when he woke up may have been correct.

71. In his Judgment, the Judge does not make any clear finding as to whether Fr Conroy performed oral sex on Ms McDonald that night in Cologne. He recites Ms McDonald's evidence to that effect and also refers to the evidence of Mr D. He refers to Ms Kavanagh's evidence that she had put Ms McDonald to bed but does not make any reference to her evidence that she had continued to watch Ms McDonald after she fell asleep or to her evidence that Ms McDonald's account of having sex with Fr Conroy in his air-bed was not correct. In the section of his Judgment headed "*Factual conclusions"*, the Judge recites as an undisputed fact that Fr Conroy *"slept in close confines with the plaintiff in the house in Cologne*". No doubt that was true as a matter of fact but it is not clear to me what significance is to be attached to it, given that the

[40] *Ibid*, page 132.

undisputed evidence was many members of the group were sleeping "*in close confines*" in the Cologne apartment. Later, the Judge states that *"the evidence of the independent witnesses*" – and Ms Kavanagh is identified as one of the witnesses being referred to – was "*crucial to the plaintiff's case".* The Judge "*emphasised that this Court considers these witnesses to be credible and finds their evidence on the whole to be cogent and convincing.*"[41] In the next paragraph of his Judgment, the Judge refers to the fact that *"the narrative presented by the plaintiff in this case had been corroborated by independent witnesses*".

72. The obvious difficulty here, however is that, far from corroborating Ms McDonald's narrative as to what had happened that night in the Cologne apartment, Ms Kavanagh's evidence flatly contradicted it. Ms McDonald's evidence was that, after she had been sick, Fr Conroy had put her into his bed and then engaged in sexual activity with her. Ms Kavanagh had very clearly said in her evidence that that was not the case and that she had put Ms McDonald into her own bed (and watched over her until she fell asleep and for a considerable period after she did so). That 180 degree conflict of evidence was obviously crucial in determining what had occurred on the night, which (as the case had developed) was a very important issue in the proceedings. In my opinion, it was essential that it should have been resolved clearly by the Judge.

[41] At paragraph 79. The reference to the evidence "*on the whole*" being cogent and convincing might appear to imply that there may have been aspects of that evidence of those witnesses that the Judge did not consider to be cogent and convincing but no such evidence was identified by the Judge in his Judgment.

73. The Judge's failure to address this aspect of Ms Kavanagh's evidence was accepted by Mr Fitzgerald to be "*a defect in his judgment*" but, he suggested, it was of "*small, small significance*" because "*the big issue*" was not the number of times that Ms McDonald and Fr Conroy had had sex but, rather, whether there had been a sexual relationship at all. I do not agree. Ms McDonald alleged in her evidence that she and Fr Conroy were sexually intimate in the Cologne apartment, in the presence of a member of the host family and in close proximity to other members of the group. It was entirely understandable that the allegation should be the subject of close scrutiny given the circumstances in which the alleged sexual conduct occurred and the number of potential witnesses to it. If Ms McDonald's allegation was well-founded, it appeared to demonstrate a striking degree of brazenness on the part of Fr Conroy, as well as suggesting that he had taken advantage of the fact that Ms McDonald had consumed what appears to have been a significant amount of alcohol. If, on the other hand, Ms Conroy's allegation was not well-founded, that clearly would have significant potential implications for the credibility of her evidence generally and for the Court's approach to the other allegations that she was making against Fr Conroy.

74. In my opinion, the Judge's failure to address the substance of Ms Kavanagh's evidence and his related failure to make any clear finding as to whether oral sex took place in the Cologne apartment as alleged by Ms McDonald amount to a significant deficiency in his Judgment.

Ms McDonald's Alleged Visits to Fr Conroy's House and the Evidence of Elizabeth Kenny

75. In her evidence, Ms McDonald stated that, after her relationship with Fr Conroy became sexual, they met up roughly once a week – and at a minimum every two weeks – for the purpose of having sex.[42] In her evidence she described frequent visits to Fr Conroy's house in this context, usually on Saturday afternoons.

76. In cross-examination it was put to Ms McDonald that this evidence could not be true because Elizabeth Kenny, a sister of Fr Conroy, would give evidence to the effect that she had lived with Fr Conroy for a significant part of 2005 (from August until the end of October) while in the first trimester of pregnancy (as well as spending regular weekends later on during that pregnancy) and again from the birth of her baby in May 2006 until October 2006. If Ms McDonald's evidence was correct, it was suggested in cross-examination, then she would have come across Ms Kenny and *vice versa*. Ms McDonald said she was unaware that Ms Kenny had been residing in the house at any stage and had never noticed anything that indicated that there was a young baby living there. In cross-examination, she suggested that there may have been periods during which she did not visit Fr Conroy's house but she was not in a position to recall when that might have been or why. In her direct evidence Ms McDonald had not referred to any such interruption or suspension in the pattern of her visits.

[42] Day 4 (6 December 2016), page 25.

77. Ms Kenny gave evidence in due course and in Fr Conroy's closing submissions it was submitted to the Judge that the evidence of Ms McDonald and Ms Kenny could not be reconciled in a way which supported Ms McDonald's claim to have regularly been in Fr Conroy's house on Saturdays.[43]

78. However, there is no reference to Ms Kenny's evidence, or to the submissions made by reference to it, in the Judgment.

79. As a matter of principle, it was open to the Judge not to accept the evidence of Ms Kenny (though it is unclear to what extent – if any – that evidence was challenged on cross-examination). It was also open to him to take the view that, even accepting Ms Kenny's evidence, it did not necessarily lead to the conclusion that Ms McDonald's evidence should be rejected. However, in my opinion, the Judge could not properly ignore Ms Kenny's evidence or fail to address the submissions that had been made in reliance on that evidence. As the Judge himself observed in his Judgment, sexual acts take place in private. As he notes, where "*mere assertion*" is met by "*bald denial*", difficult issues of proof can arise. In this context, the Judge rightly looked to see whether Ms McDonald's narrative was *corroborated* by third party evidence. But the Court was also bound to examine the evidence to see whether it *contradicted* or *undermined* Ms McDonald's narrative. If Ms Kenny's evidence was accepted, it tended to undermine Ms McDonald's account. That evidence thus had to be addressed and the Judge's failure to do so, in my opinion, amounts to a material deficiency in his Judgment.

[43] Fr Conroy's written closing submissions at page 19.

The Psychiatric Evidence

80. The Judge's specific analysis and findings on the Statute of Limitations issue are addressed later in this judgment. That issue aside, it is evident from the Judgment that the Judge's factual findings relied to a material extent on the evidence of Dr Cryan (who gave evidence on Ms McDonald's behalf). Thus at paragraph 78, the Judge states that Ms McDonald is suffering from "*recurrent depressive disorder and complex post-traumatic stress disorder, disorders that Dr Cryan linked back to the plaintiff's secret and illicit relationship with the first-named defendant"* and, at paragraph 81, he states that the *"medical evidence offered by Dr Cryan is consistent with the plaintiff's account."*

81. Dr Cryan was not Ms McDonald's treating doctor and, in fact, no treating doctor or other treating medical professional was called to give evidence on Ms McDonald's behalf. Dr Cryan had prepared a report in August/September 2012 (the copy provided to the Court has both dates) based on an assessment carried out on 11 August 2012. That report (Dr Cryan's only report) was prepared without sight of Ms McDonald's full medical records, though Dr Cryan did have certain information from the GP practice attended by Ms McDonald. In the report, Dr Cryan expressed the view that the symptoms reported by Ms McDonald were *"best conceptualised as a delayed post-*

traumatic stress disorder (PTSD), which is at least of moderate severity, and which is associated with recurrent depressive disorder and anxiety."[44]

82. Dr Cryan was called to give evidence on 17 February 2017 (Day 15 of the hearing). At that stage, 4½ years had passed since the assessment of August 2012. Dr Cryan stated in evidence that she had spoken "*briefly*" to Ms McDonald that morning. Objection was taken to Dr Cryan giving evidence about that encounter but the Judge ruled that it could be given. It emerged that the meeting had lasted approximately 15 – 20 minutes.[45] Dr Cryan did not take any notes at the meeting.

83. Dr Cryan was brought through her report in her direct evidence. Asked whether she had reached a conclusion as to whether Ms McDonald was suffering from a psychological injury at the time of her examination, Dr Cryan stated that "*I thought that she was suffering from what we call complex post-traumatic stress disorder, where I suppose the stressor has been a chronic stressor, and also recurrent depressive disorder*." Over further objections from the defendants, Dr Cryan was permitted to give evidence to the effect that Ms McDonald's PTSD was *"almost certainly related*" to her reported experience of her relationship with Fr Conroy.[46]

---

[44] Delayed PTSD had also been referred to in the Plaintiff's replies to particulars dated 8 July 2013, where it was stated that the symptoms being suffered by Ms McDonald "*are characterised as delayed post-traumatic stress disorder which is associated with recurrent depressive disorder and anxiety related to the fear of exposure and the long-standing need to keep the relationship secret."* (emphasis added)

[45] Day 15 (17 February 2017), page 59.

[46] Day 15, at pages 41- 42.

84. Dr Cryan was cross-examined at some length. A number of points emerged in the course of that cross-examination which featured prominently in the submissions of the Appellants, and in particular the submissions of the School, at the hearing of these appeals. Dr Cryan confirmed that she had not had access to Ms McDonald's medical records (which had been discovered by Ms McDonald and made available to Dr O' Connell). She had not had any contact with Dr Lane, the consultant psychiatrist to whom Ms McDonald had been referred for treatment. She had not had any contact with any of the counsellors involved in treating Ms McDonald. That, she acknowledged, was not *"best practice*".[47] Dr Cryan had presumed that she was being called only to give evidence on her report and that Ms McDonald's treating practitioners would be giving evidence also. She was surprised that she had not been asked to see Ms McDonald for a second time in advance of the hearing. In advance of giving her evidence, she had read – or perhaps more accurately, looked at – only one of the two reports prepared by Dr O' Connell, the psychiatrist engaged by the Second and Third Defendants. She thought it was the first report but could not be absolutely certain. She had not reviewed her own file thoroughly and had failed to notice on it the statement made by Ms McDonald to the HSE from which, Dr Cryan accepted, much of the history in her report had been drawn.[48]

[47] Day 16 (21 February 2017), at pages 86-87.

[48] Day 16, page 76.

85. Perhaps the most striking aspect of Dr Cryan's evidence, however, was her evidence concerning her opinion of Ms McDonald's PTSD. As already noted, in her report Dr Cryan had expressed the view that Ms McDonald's symptoms were *"best conceptualised as a <u>delayed</u> post-traumatic stress disorder (PTSD)"* (my emphasis). In her direct evidence, Dr Cryan had stated that Ms McDonald was suffered from "*what we call <u>complex</u> post-traumatic stress disorder"* (again, my emphasis). Dr Cryan's direct evidence did not suggest that there was any difference between Delayed PTSD on the one hand and Complex PTSD on the other. In cross-examination, however, Dr Cryan acknowledged that Complex PTSD was "s*omewhat different*" to Delayed PTSD and that Complex PTSD was "*actually something different*".[49] Dr Cryan was not, in fact, of the view that Ms McDonald suffered a Delayed PTSD disorder; "*it would be more correctly termed Complex PTSD*." Asked how her diagnosis could have changed, Dr Cryan indicated that it was "*an error on my part*". "*Perhaps*", she allowed, *"I ought to have been more careful*" but she had always meant Complex PTSD. She had not changed her opinion but had used "*a sloppy word by saying 'delayed' when she meant 'complex'*" and "*might have used sloppy language when I said 'delayed.'*"[50]

86. Dr O' Connell prepared two reports (dated 16 June 2014 and 12 September 2016). In his first report – also prepared without access to Ms McDonald's medical records – he noted that the pleadings referred to a diagnosis of PTSD and explained that he did not think "*such a diagnosis is appropriate in circumstances where a person has not been*

[49] Day 16, pages 90-91.

[50] Day 16, pages 95-96.

subjected to actual or threatened death, serious injury, or sexual violence as is required to meet the diagnostic definition." He noted that Ms McDonald had described symptoms consistent with a diagnosis of depression. He considered it unlikely that her depression was associated with "*functional impairment*".

87. In his second report – prepared with the benefit of sight of Ms McDonald's full medical records and based on interview and examination in August 2016 – Dr O' Connell opined that Ms McDonald continued to suffer from a depressive illness which, he noted, was not being treated. In his view, she would benefit from both antidepressant treatment and additional cognitive behaviour therapy (CBT). He reiterated his opinion that Ms McDonald was not suffering from PTSD but "*rather a relapsing remitting depressive disorder."*

88. Dr O' Connell gave evidence on Day 31 of the trial. In his evidence in chief, he explained that the bar to making a diagnosis of PTSD was set "*very high*" and requires that there be "*evidence of sufficiently severe trauma.*"[51] In his direct evidence, he was very clear that Ms McDonald was not suffering from either Delayed PTSD or Complex PTSD. In his view, the narrative history that Ms McDonald had given was more consistent with a relapsing remitting depressive disorder.[52] He explained in some detail why he disagreed with Dr Cryan's evidence that Ms McDonald was suffering from Complex PTSD.

[51] Day 31 (3 March 2017) at page 36.

[52] *Ibid*, at page 37.

89. In cross-examination Dr O' Connell, while accepting that it was a matter of degree, appears to have remained firm in his view that, even on Ms McDonald's account of what occurred (and Dr O' Connell was careful not to express any view on the factual issues before the Court), it would not have had sufficient traumatic impact on her to justify a diagnosis of PTSD.[53]

90. In his Judgment, the Judge hardly refers to Dr O' Connell's evidence. There is one passing (and inaccurate) reference to the fact that Ms McDonald had gone to see him earlier in 2017 and, in the context of the limitation issue, there is a reference to the fact that Dr O' Connell had agreed that Ms McDonald was suffering from a recurring depressive order. The Judgment makes no reference to the fact that Dr O' Connell had given evidence of his opinion that Ms McDonald was not suffering from PTSD – whether Delayed or Complex – and offers no explanation whatever for the Judge's evident (though unarticulated) preference for the evidence of Dr Cryan.

91. In any circumstances, that would be unsatisfactory. In the particular circumstances here, the position is clearer still in my view. While, in principle, the Judge was entitled to prefer the evidence of Dr Cryan over that of Dr O' Connell, he was bound to give some explanation for that preference. That would be so in any case where conflicting expert testimony had been heard on an issue or issues of importance. But here, there were a number of particular factors which, on their face, might be thought to impact upon the

[53] *Ibid*, at pages 91-95.

Judge's assessment of whose evidence should be preferred and/or negatively affect the weight to be given to Dr Cryan's evidence. Dr O' Connell had seen Ms McDonald more often and more recently than Dr Cryan (excepting the brief meeting on the morning she began her evidence). His evidence was informed by a consideration of Ms McDonald's full medical records. Dr Cryan's preparations for giving evidence were manifestly inadequate – she had failed to review her own file thoroughly and had, at most, read only one of Dr O' Connell's two reports.

92. Most significantly, on Dr Cryan's own account, the report she had prepared – which, she was aware, had been provided to the Court and which she addressed in detail in her direct evidence – contained a significant error. By the time she gave her evidence, Dr Cryan was aware that her report stated her diagnosis as Delayed PTSD when (according to Dr Cryan) the correct diagnosis – and the one she always intended – was Complex PTSD. Rather than bringing that error to the attention of the Court and of the Defendants – as clearly she ought to have done – Dr Cryan effectively glided over that distinction and gave her oral evidence as though it were entirely consistent with her report. Presumably, Ms McDonald's legal team did not notice this inconsistency or appreciate that the report presented to the Court contained an error. If they had, no doubt they would have immediately brought that fact to the attention of the Court and of the Defendants. In any event, it seems to me that, on any view, that gave rise to a serious issue as to the reliability of Dr Cryan's evidence and the weight properly to be attached to that evidence.

93. These factors did not necessarily preclude acceptance of Dr Cryan's evidence but did, in my view, give rise to a greater obligation on the part of the Judge to explain why he apparently accepted that evidence in preference to that of Dr O' Connell.

94. In circumstances where the Judgment fails to engage at all with the evidence of Dr O' Connell and fails to provide any explanation why the Judge apparently preferred the evidence of Dr Cryan to that of Dr O' Connell, it follows that, in my view, this criticism of the Judge's treatment of the psychiatric evidence is also well-founded.

95. Before leaving this issue, I would add that, in my opinion, it was quite inappropriate that Dr Cryan was invited to give, and despite the objections of the Defendants was permitted by the Judge to give, evidence of her opinion as to whether Ms McDonald's allegations regarding her relationship with Fr Conroy were true. It was a matter for the Judge to determine, by references to the evidence of fact tendered at trial, what occurred. It was not a matter for the opinion of Dr Cryan. As the Defendants expressly recognised when making their objections, it was permissible for Dr Cryan to give evidence to the effect that her diagnosis was consistent with Ms McDonald's allegations but she should not have been invited or permitted to go beyond that in her evidence.

Conclusions on Issue 1

96. As I have already emphasised, it is essential to keep the proper boundaries of this Court's role in mind. It is important not to overstep the Court's appellate function by substituting the Court as fact-finder. That is not its role. At the same time, it is important

that the Court should not surrender its proper appellate function; it is entitled – indeed it is the Court's duty – to "*ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts.*"[54]

97. With all due regard to the proper parameters of this Court's role, I have nonetheless reached the clear conclusion that, in respect of the four areas focused on by the Appellants, both individually and cumulatively, there are significant and material errors in the Judge's engagement with the evidence and in the findings of fact made (or omitted to be made) by him. The Judge failed to engage with "*key elements*" of the case made by the Defendants and, in my view, these failings "*went to the very core, or the essential validity*" of the Judge's findings.

98. It follows in my view that the High Court Judgment must be set aside on this ground.

99. In the circumstances, it is not necessary or appropriate to consider any of the further complaints made on behalf of Fr Conroy and/or the School as to the nature of the fact finding exercise undertaken by the Judge.

[54] *Doyle v Banville*, at para 14.

Issue 2 - Consent/Cause of Action

100. There are two related but distinct strands to the Appellants' appeals so far as the issue of consent/cause of action is concerned.

- First, both Fr Conroy and the School submit that the Judge's failure to address their arguments on the issue of consent/cause of action is unsatisfactory to the point that the Judgment should be set aside;

- Second, they submit that this Court should find (as they had urged the High Court to find) that, even if the sexual acts alleged by Ms McDonald to have taken place had in fact occurred, the evidence of Ms McDonald herself made it clear that those acts were consensual. On that basis, it is said, this Court should conclude that Ms McDonald's action must fail and, rather than remitting the proceedings to the High Court, the proceedings should simply be dismissed.

101. These two strands appear to me to raise distinct issues and for that reason I will address them separately.

The Case Made by the Appellants in the High Court

102. Each of the Appellants says that the issue of consent was an issue in the proceedings from a very early stage. Each says that they raised the issue in their defence. In fact, neither defence pleads consent in any immediately recognisable fashion. In his defence,

Fr Conroy pleads that the particulars of wrong alleged against him in the Statement of Claim "*do not disclose a valid cause of action against*" him.[55] The pleading in the School's defence is similarly opaque. Under the heading "*Preliminary Objection*", and immediately following a plea that the action was statute-barred, the School pleads "*that the matters alleged in the Statement of Claim served herein do not give rise to any cause of action stateable in law against the [School] and the [School] reserves the right to have the said question of law raised prior to the giving of any evidence in these proceedings."*[56] The "*question of law"* that the School considered this plea to raise is not further identified in its defence.

103. At trial, Ms McDonald gave evidence over 7 hearing days, during which she was closely cross-examined by counsel for Fr Conroy and the School. It appears never to have been put to Ms McDonald – at least in express terms – that, if the sexual acts between Fr Conroy and herself described in her evidence had in fact taken place, she had consented to them and that therefore no wrong had been done to her. Of course, Fr Conroy was denying (and continues to deny) that any such sexual acts ever took place. The School was in a somewhat different position. Its pleaded stance was that it was a "*stranger*" to the allegations made by its former pupil. However, its internal disciplinary procedure had effectively exonerated Fr Conroy of any allegations of sexual misconduct. Ms McDonald was cross-examined at length by counsel for the School and, it is fair to say,

[55] Paragraph 9.

[56] Paragraph 2.

significantly challenged as to the reliability of key parts of her evidence. In contrast, Fr Conroy was not cross-examined by the School.

104. In these circumstances, neither Fr Conroy nor the School was in a position to make any overt suggestion that the sexual acts complained of by Ms McDonald might indeed have taken place but had not involved the commission of a tort or other wrong because they were consensual. That no doubt explains the absence of such suggestion being put to Ms McDonald in the course of her lengthy cross-examination. In his evidence, Fr Conroy denied that he had had sexual relations with Ms McDonald and no claim was made by him that he had had consensual sexual relations with her. But both Appellants say that, in any event, Ms McDonald's evidence made it clear not only that the sexual acts she complained of took place after she turned 17 (on 22 April 2005) – and thus that she was in a position as a matter of law to consent to them – but also that she did, in fact, consent.

105. Various extracts from the evidence of Ms McDonald were relied on as demonstrating these related propositions:

- On Day 4 (examination in chief by Mr Fitzgerald), Ms McDonald gave evidence that in the period between her 17th birthday and the Cologne trip, "*the sexual element of the relationship had progressed*" to oral sex.[57] Asked how she would describe "*your friendship or relationship*" with Fr Conroy after the

[57] Day 4, pages 22-24.

summer of 2005, Ms McDonald explained that the *"relationship continued. There was a lot of texting and also the sexual side of the relationship continued. I suppose I found it harder emotionally because I knew it was wrong but I was so far in that I couldn't tell anybody or do anything about it."*[58]

- On Day 5 (cross-examination by Ms Reilly), Ms McDonald indicated that she had been "*very protective of the relationship".* She did not see it as abuse at the time: "*I felt like it was my fault that I was in the relationship*".[59] Describing her disclosure to an older sister she said that "*I said I had a relationship with Fr Tommy*."[60] Asked whether she had used the word "*abuse*" when telling her sister, she answered "*No".* She had referred to "*relationship*", explaining that *"I did not realise the impact it had at that stage"* and "*still felt very protective of what had happened".* Asked whether she had "*thought it was all ok*", Ms McDonald replied "*Well, yes, unfortunately*". She would have seen it "*as a friendship probably at the time".* It was not an obsession or a crush. Asked whether it was "*coercion*", Ms McDonald initially replied "*No, probably not*" and when pressed, "*No*".[61] Asked again about her disclosure to her sisters, Ms McDonald stated that she was not in a position to discuss it with them

[58] Day 4, page 34.

[59] Day 5, page 40.

[60] Day 5, page 43.

[61] Day 5, page 44.

immediately because "*I did not see it was abuse at that stage I saw it as a relationship.*"[62]

- Also on Day 5 (and again to Ms Reilly), Ms McDonald stated that the sexual element of her "*relationship*" with Fr Conroy progressed when she was 17 and explained that Fr Conroy had said in a text message that "*he would wait until I was 17.*"[63]

- On Day 6 (to Ms Reilly), Ms McDonald was asked about evidence she had given the previous day where she had referred to what had occurred in The Gambia as the "*beginning of a relationship that developed over time"* and in response said that what she meant was "*an unequal relationship and what I considered to be abusive relationship*." Asked whether she was confusing friendship and relationship "*back then*", Ms McDonald said "*No, I would not say the relationship started until after my 17th birthday.*"

- On Day 7 (cross-examination by Ms Reilly), Ms McDonald described performing oral sex on Fr Conroy for the first time in August/September/October 2005. Asked how this had been initiated, Ms

[62] Day 5, page 49.

[63] Day 5, page 67.

McDonald stated that "*he did not put me under pressure, no, but I knew that he wanted it… but, no, he did not put me under pressure.*"[64]

- Also on Day 7 (to Ms O' Reilly), Ms McDonald gave evidence of attempt(s) by Fr Conroy to have sexual intercourse with her. She had said in her evidence that she did not want Fr Conroy to be the first person she had intercourse with. Asked whether she was suggesting that Fr Conroy had put her under pressure, Ms McDonald said that she was "*not saying that he forced himself on me.*" There had been an "*attempt*" which was "*with her agreement*." She had "*thought about it and, yes, considered it.*"[65]

- Ms McDonald also gave evidence on Day 7 (again to Ms O' Reilly) that she and Fr Conroy had got back in contact at the end of the summer of 2007 and resumed sexual activities but that this had finished in the summer of 2009.[66]

106. According to both Fr Conroy and the School, given that Ms McDonald was 17 or older at the time of the sexual activity with Fr Conroy that she described in her evidence, she was capable of giving a valid and effective consent to it. The evidence referred to above – as well as the absence from Ms McDonald's evidence of any suggestion of violence, duress or any factor that overbore her will or was otherwise capable of vitiating her

[64] Day 7, at page 49.

[65] Day 7, page 53.

[66] Day 7, page 60.

consent – was, it was said, consistent only with Ms McDonald having in fact consented to any such sexual activity.

107. While the Court has not seen any transcripts of the closing oral submissions, the written closing submissions of the parties were provided to the Court. Fr Conroy's submissions referred to the statutory provisions governing the criminal offence of sexual assault and in particular the provisions of the Criminal Law (Sexual Offences) Act 2006. Those provisions fixed the "*threshold age for engaging in sexual acts*" – at least as far as the criminal law was concerned – at 17. It followed (so the submission suggested) that Ms McDonald was "*of full age to consent to the sexual acts complained of.*"[67] It is not, I hope, unfair to Fr Conroy and his legal team to observe that the equivalence of the age of consent for the purposes of the criminal law of assault and for the purposes of a claim in tort was assumed rather than explained.

108. In its closing written submissions to the High Court, the School submitted that Ms McDonald "*was entitled in law to consent to the activity she now complains of and, on her own evidence, did so consent.*"[68] The precise legal basis for the School's submission that Ms McDonald was entitled to consent was not further identified in those submissions.

[67] Paragraph 9.3 of Fr Conroy's submissions of 26 May 2017.

[68] Paragraph 7 xiv) of the School's (undated) submissions.

109. In her submissions (which were delivered before the submissions of Fr Conroy and the School), Ms McDonald acknowledged that Fr Conroy had waited until she had just turned 17 before commencing a sexual relationship with her.[69] That sexual relationship had taken place in the context of a student-teacher relationship between Ms McDonald and Fr Conroy. All of the evidence heard by the High Court – so Ms McDonald submitted – was to the effect that a sexual relationship between teacher and student was entirely inappropriate and likely to cause psychological injury to the student.[70] Fr Conroy was – so it was said – a person of authority and trust in the School and there had been an imbalance of power which precluded Ms McDonald's capacity to consent.[71] Reference was made in this context to a decision of the Court of Appeal of England and Wales, *Bowen v JL* [2017] EWCA Civ 82 which is referred to further below.

110. No point appears to have been taken in the High Court – and certainly none was taken before this Court – as to the entitlement of Fr Conroy or the School to advance a defence based on consent effectively "*in the alternative*". That is so even though, before the High Court, the School itself appeared to be of the view that Fr Conroy was not entitled to raise the issue of consent.[72]

---

[69] Paragraph 1i of Ms McDonald's submissions.

[70] Paragraph 1k-1o & paragraph 1v. The evidence referred to in this context included the evidence of Fr Conroy who agreed that "*if the Plaintiff is telling the truth, it is an exploitative position*." Day 23 (9 March 2017), at page 10.

[71] Paragraph 1r.

[72] At paragraph iv) of the School's submissions to the High Court.

111. There does not appear to have been any significant discussion of the question of where the onus lay on the issue of consent i.e. whether the absence of consent was an element of the tort of assault which Ms McDonald was obliged to establish or whether it was a matter of defence, the onus of establishing which was on Fr Conroy and the School.

The Judgment of the High Court

112. It is clear, therefore, that at the conclusion of the High Court hearing, the issue of consent was a very significant one for the High Court Judge. Both Fr Conroy and the School were contending that, even if the High Court found as a matter of fact that the sexual acts complained of by Ms McDonald had in fact taken place, that did not give rise to any cause of action against them because Ms McDonald had the capacity to consent to those acts and had in fact consented to them. Ms McDonald, on the other hand, contended that she had been exploited by Fr Conroy and submitted that, despite the fact that she was 17 when their relationship became sexual, the nature of the relationship between teacher and pupil meant that she had lacked the capacity to give an effective consent in the circumstances.

113. The Judge was required to resolve this issue appropriately. In order to do so, he had to make a finding whether, as a matter of law, Ms McDonald had capacity to consent to the sexual activity she had described and (if so) whether, in all the circumstances, she had, in fact, effectively consented. The Judge should also have addressed the issue of the onus of proof. Unfortunately, the Judge failed to address these questions in his

Judgment. Strikingly, nowhere in his Judgment is there any reference to the issue of consent.

114. As already noted, in paragraph 88 of that Judgment, the Judge expresses the conclusion that Ms McDonald had established on the balance of probability that Fr Conroy "*wrongfully, physically and sexually assaulted ... and sexually abused*" Ms McDonald. It appears to be implicit in that conclusion that Ms McDonald could not and/or did not consent to the sexual acts complained of but, even if that is so, the basis for that unarticulated finding is not apparent. In answer to a question from the Court, Mr Fitzgerald accepted that the Judgment said nothing about consent but suggested that paragraph 88 had to be read as implicitly endorsing the submission that, because she was a "*school girl*" at the relevant time, Ms McDonald could not consent and therefore the issue of consent was irrelevant.

115. As Clarke J stressed in *Doyle v Banville*, a "*party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost".* As it was put by Irvine J in this Court in *Hurley v O' Driscoll*, the "*purpose of the judgment is to explain to the parties why a particular conclusion was reached so that they may properly understand why they won or lost and whether, in the circumstances, an appeal is warranted."* On the key issue of consent, the Judgment simply fails to explain why Ms McDonald won, and Fr Conroy and the School lost.

116. Did the Judge accept that the age of consent was 17 but find as a matter of fact that Ms McDonald had not consented? If so, what was the basis for that conclusion? Did the

Judge consider that the onus of establishing consent rested on Fr Conroy and the School and conclude that they had not discharged such onus? On the other hand, did the Judge consider that Ms McDonald had discharged the onus of establishing that she had not consented? Did the Judge consider that any apparent consent from Ms McDonald was vitiated and, if so, what was that vitiating factor or factors? Did the Judge consider that the age of consent was other than 17? It may be that the Judge accepted Ms McDonald's submission to the effect that, because of the pupil-teacher relationship between Ms McDonald and Fr Conroy, she lacked the capacity (or ought to be considered as a matter of policy to lack the capacity) to give an effective consent. But he may also have considered that, on the evidence, the relationship involved an imbalance of power such that, though Ms McDonald did have the capacity to consent, she did not give a free and informed consent in the circumstances here.

117. In my view, it would be wholly inappropriate to read paragraph 88 as implicitly endorsing – *sub silentio* and without explanation – a novel proposition of law such as that advanced by Mr Fitzgerald here. It may be that the Judge's conclusion that Ms McDonald was assaulted reflected an acceptance of that proposition. However, as the discussion above illustrates, there were many other possible routes to such a conclusion. Whatever route the Judge followed, it ought to have been identified and explained. It is not for this Court on appeal to engage in a speculative reconstruction of the Judge's rationale or to seek at this stage to address the many significant questions left unanswered by the Judgment.

118. In my opinion, having regard to the significance of the consent issue, the absence from the Judgment of any engagement with the submissions of the parties and of any clear findings on that issue leads inevitably to the conclusion that the findings of assault and abuse in paragraph 88 of his Judgment must be set aside.

Should Ms McDonald's claim be dismissed rather than being remitted?

119. The Appellants argue that, rather than remitting the proceedings to the High Court for rehearing, this Court should find (as they had urged the High Court to find) that, even if the sexual acts alleged by Ms McDonald had in fact occurred, those acts were clearly consensual. On that basis, it is said, this Court should take the view that Ms McDonald's action must fail. In these circumstances, it was said, remittal would serve no useful purpose.

120. On Fr Conroy's behalf, it was said that as a matter of Irish law a person may validly consent to sexual activity at age 17. That was, as Ms Reilly put it, "*a bright-line rule*". The age of consent was for the purposes of the criminal law set at 17 (reference being made in this context to the Criminal Law (Sexual Offences) Act 2006) and persons aged 17 are deemed as a matter of law to be in a position to consent to sexual activity and, if they did, *"it is none of the law's concern*". That was recognised both by the criminal law and by the civil law. The issue of age was, it was said, "*fundamental*" and there was no basis for any different approach because Ms McDonald was a secondary school pupil and/or because of the fact that she had a teacher/pupil relationship with Fr Conroy.

121. The position adopted by the School was essentially to the same effect. In its written submissions, the School asserts that the legal position concerning Ms McDonald's capacity to consent "*cannot be a source of controversy*". According to the School's submissions, section 3(7) of the Criminal Law (Sexual Offences) Act 2006 (*"the 2006 Act")* sets the age of consent at 17.[73]

122. In response to these submissions, it was said on Ms McDonald's behalf that, given that she was a pupil in the School at the time of the events and acts complained of by her, and that Fr Conroy was at the time a teacher and Chaplain in the School, with "*executive power"* in the School, it was not a situation where consent could arise at all. The relative positions of Fr Conroy and Ms McDonald effectively vitiated any question of consent and rendered Ms McDonald's age "*utterly irrelevant.*" If that were not so, Mr Fitzgerald said, it would be "*open season for the teachers*." Where relationships between teachers and secondary school pupils were concerned – even pupils aged 17 or older – there was a form of "*presumed dominion*."

123. None of the parties identified any authority bearing directly on the issue of what, for the purposes of the civil law, is the age of consent to sexual activity such as that alleged to have occurred here.

[73] At paragraph 37. The submissions in fact referred to section 3(3) of the 2006 Act but I have corrected that error in the text above.

124. Each of the Appellants took the position that the civil law followed the criminal law in this respect. If a person aged 17 is considered to be in position to give effective consent to particular sexual activity for the purposes of the criminal law, there is no reason (so it was said) to take any different approach for the purposes of the civil law. That (it was said) is so whatever the context and there is no basis for applying any different approach to sexual activity between a 17 or 18 year old secondary school pupil and his or her teacher/Chaplain. In such a scenario, the pupil is capable of giving consent as a matter of law and the only issue will be whether, as a matter of fact, such consent was freely given or whether it was vitiated by one or more factors such as fraud, duress or temporary or longer-term mental incapacity.

125. Section 3(7) of the 2006 Act does not, in express terms, fix the age of consent for the *"sexual acts"* to which that section applies. Rather, it effectively precludes reliance on any defence of consent in a prosecution for an offence under the section:

> "*(7) It shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.*"[74]

[74] This is section 3(7) as enacted. A new section 3 was substituted by section 17 of the Criminal Law (Sexual Offences) Act 2017. Section 3(6) is the equivalent provision in the new section but is now subject to the limited qualification set out in section 3(8).

126. It should also be noted that section 3(7) applies only to an offence under section 3, involving a person engaging "*in a sexual act with a child who is under the age of 17 years*." "*Sexual act*" in this context means only certain specified sexual acts: section 1 of the 2006 Act. Many forms of sexual activity – including, it seems, the acts of oral sex which, on Ms McDonald's evidence, Fr Conroy performed on her – fall outside the scope of the 2006 Act. For the period 2004-2007, it appears that, for the purposes of the criminal law, a person aged 15 years or older could consent to such activity or, perhaps more correctly, that such consent was effective to render lawful what would otherwise have been a sexual assault: section 14 of the Criminal Law Amendment Act 1935.

127. Thus, as the Court observed in the course of the hearing of the appeal, if one were to adopt the approach that the relevant criminal law age cut-off is simply to be read across into the civil law, and applied in all circumstances including in the context of teacher/pupil relations in a secondary school setting, it would follow that, if Fr Conroy had engaged in particular forms of sexual activity with Ms McDonald when she was 15 or 16, her consent would be an absolute defence to any civil claim against him (and, by extension, the School). That was not the situation presented here but that appears to be the logical – if unsettling – consequence of the Appellants' common position that the civil law must follow the criminal law on the issue of consent to sexual activity, regardless of context or circumstance.

128. In fact, since the enactment of the Criminal Law (Sexual Offences) Act 2017, which inserted a new section 3A into the 2006 Act, it has been a criminal offence for a *"person in authority"* to engage in a *"sexual act*" (as defined in section 1 of the 2006 Act) with

a child who has reached the age of 17 but is under 18.[75] "*Person in authority"* is defined to include any person for the time being in *loco parentis* to a child or who is responsible for the education, supervision or welfare of that child. Fr Conroy was, it seems clear, a "*person in authority*" *vis-à-vis* Ms McDonald while she was a pupil in the School in which he was teacher and Chaplain. While the 2017 Act was included in the material provided to the Court, this provision was not referenced in the written or oral submissions made to the Court.

129. In addition, since 2008 the Oireachtas has prohibited the "*sexual exploitation*" of children, defined for that purpose as persons under the age of 18: see section 3 of the Child Trafficking and Pornography Act 1998, as amended by section 3 of the Criminal Law (Human Trafficking) Act 2008. For the purposes of section 3 *"sexual exploitation*" includes "*inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act".* Notwithstanding the title of the 2008 Act, this aspect of section 3 is of general application and is not confined to situations of human trafficking. The Court was not referred to these provisions in argument either.

130. While noting that these were provisions of the criminal rather than the civil law and also that their enactment post-dated the events the subject-matter of the appeals, the Court took the view that they were potentially relevant. Accordingly, the Court through its Registrar brought the provisions to the attention of the parties and gave them an

[75] Of course, as noted elsewhere in this judgment, Ms McDonald was in fact 18 for much of the period to which her claim relates. This adds a further layer of complexity to the issue of consent here.

opportunity to make any observations they considered appropriate. All of the parties did so.

131. As might be expected, Ms McDonald sought to draw support from these provisions, emphasising the evidence that had been given to the High Court to the effect that, if the relationship between Ms McDonald and Fr Conroy was as she alleged it had been, it was inappropriate and exploitative. Her case that, having regard to the power and control that Fr Conroy exercised over her, she did not have the capacity to give an effective consent to the acts complained of was, it was said, "*bolstered by the fact that it is recognised in statute.*"

132. On the other hand, the Appellants pointed out that there was no necessary correspondence between the criminal and civil law in this context. According to Fr Conroy, the primary focus of the civil law was on "*subjective*" consent i.e. whether the person concerned was competent to give consent and, if so, whether any apparent consent was vitiated. The concern of the criminal law was protective and, it was said, bore no relation to capacity or consent. The Oireachtas has not created any stand-alone civil wrong in section 3 of the 1998 Act (as amended) or section 3A of the 2006 Act and it did not follow that, even if someone could bring themselves within the factual ambit of those provisions, a private law remedy would lie against the other party.

133. In its submissions, the School made the point that in many instances consensual sexual conduct between adults – such as buggery or incest – as well as sexual offences involving children were prohibited by the legislature. While in such circumstances it

was provided that consent "*shall not be a defence*" to a criminal prosecution, that acknowledged that the person(s) involved may have consented as a matter of fact. That was true of section 3A(7) of the 2006 Act which, it was said, recognised "*the reality of the entitlement of a person of the indicated age to consent to the sexual act, but then goes on to indicate that such consent does not amount to a defence to the proceedings.*"

134. These are, no doubt, valid points but they nonetheless represent a shift in emphasis (at least) on the part of the Appellants. At a stage when it appeared that the criminal law provided for a hard-edged age threshold of 17, each of the Appellants was content to rely on it, without more, as representing the appropriate civil law age cut-off also. Now, it is said there is no necessary connection between the two and that civil liability does not necessarily attach even where there may have been a breach of the criminal law.

135. That, as a matter of principle, the criminal and civil law may not be exactly aligned in this context cannot be disputed. As the School submits, it does not follow from the fact that an act may constitute a criminal offence that the actor is *necessarily* thereby exposed to civil liability. The converse is, of course, also true: acts that may give rise to civil liability are not *necessarily* (and in practice frequently are not) criminal offences.

136. Section 3A is not directed to any issue of civil liability for sexual assault or abuse. But it is nonetheless worth considering what it is in fact concerned with. It criminalises certain acts which would otherwise not be a crime on the basis that those acts take place between a "*person in authority*" and a 17 year old child over which that person has

authority. That (as Fr Conroy submits) is clearly intended to be "*protective*" of such children but far from that bearing "*no relation to capacity or consent"*, it appears to me that the issues of capacity and consent are central to section 3A. It is clear that, in cases where there is such a relationship of authority, the Oireachtas was of the view that the ordinary rules of consent do not give adequate protection to 17 year old children. That in turn appears to reflect a concern that the dynamics of such relationships give rise to a risk of exploitation/abuse of trust such that any apparent consent of the child to sexual acts with a person in authority may not involve real, free and informed consent on their part and a judgment that a sexual relationship in such circumstances is liable to cause harm to the child.

137. Section 3A appears to have prompted, at least in part, by the Report of the Oireachtas Joint Committee on Child Protection published in November 2006, a copy of which was provided to the Court by Ms McDonald. The Report expresses the view that an offence involving the sexual abuse or exploitation of a child by an adult in a relationship of authority with that child is serious *"not only because of the nature of the act of abuse itself, but also because of the abuse of trust that has been placed in the offender".*[76] The Report noted that the law already provided for enhanced sentences for such offences but it considered that the law should go further: "*the fact that a person occupies a position of trust may have additional significance. Sexual activity with a minor who is of or above the age of consent (assuming that the age of majority and the age of consent remain different), and over whom the offender stands in a position of authority, is an*

[76] At paragraph 5.6.1.

unacceptable breach of trust."[77] The Committee went on to recommend that the age of consent to sexual activity with a person in authority should be 18 years, noting that it reflected the approach in Council Framework Decision 204/68/JHA on combating the sexual exploitation of children and child pornography.[78]

138. The concerns that apparently animated the Joint Committee are not theoretical or hypothetical. On the contrary, there was a significant amount of evidence given in the High Court – none of which appears to have been disputed in any way – to the effect that a sexual relationship between teacher and student such as that alleged by Ms McDonald would be inappropriate, exploitative and likely to be seriously harmful to the student. Evidence to that effect was given by Fr Conroy himself,[79] as well as by Mr John Burke, a teacher who gave evidence on his behalf. Mr Burke agreed that the conduct alleged by Ms McDonald, if it occurred, would be "*the most gross misbehaviour*", "*an absolute breach of the duty of care*" and if there had been such "*gross misconduct*" he would not be surprised that there could be *"serious health problems either physical or psychological*" for the student.[80]

139. In his evidence, Mr Michael Finn, Principal of the School, agreed that the conduct alleged against Fr Conroy would be *"totally wrong in a relationship between a teacher*

[77] At paragraph 5.6.2.

[78] At paragraphs 7.6.1 and 7.6.2. A copy of the Framework Decision (adopted in December 2003) was also provided to the Court.

[79] Day 22 (8 March 2017) at pages 80-81 and Day 23 (9 March 2017) at page 10.

[80] Day 29 (23 March 2017) at pages 26-27.

and a student.[81] He agreed that teachers owed a duty of care to students and that, if the alleged conduct were to occur between teacher and pupil, that would be a *"breach of duty*" and that *"potentially a lot of damage could be the result of that."*[82] That damage would, in his view, be *"[c]ertainly psychological and… possibly have a physical impact as well.*"[83]

140. That Mr Finn – a professional teacher and experienced educationalist – should give such evidence is hardly surprising. The evidence before the High Court suggested that conduct of the kind alleged by Ms McDonald – involving a sexual relationship between teacher and pupil – was prohibited by the School's rules, as it seems such relationships were and are generally prohibited in secondary schools in the State, regardless of the age of the pupil. It may be that such rules advance a number of objectives but the protection of pupil welfare, based on a recognition that such relationships are liable to cause harm to pupils, is surely an important factor. Such rules also reflect –so it seems to me – an appreciation of the risk that such relationships may be exploitative precisely because of the imbalance of power between teacher and pupil.[84]

[81] Day 32 (29 March 2017) at page 46.

[82] Day 32 at page 47.

[83] *Day* 32, page 48.

[84] Gillespie, *Sexual Exploitation of Children, Law and Punishment* (2008) states that the relationship between teacher and pupil is "*perhaps the most obvious example*" of when it would be appropriate to restrict sexual behaviour given that "*there can be strong reasons to question whether the imbalance of power that is inherent in such a relationship makes it difficult for a child to exercise free consent."* (at paragraph 11-17)

141. In her evidence Dr Cryan expressed the view that the "*relationship was an exploitative relationship by an adult who was in a position of power; and in my view in respects tantamount to sexual abuse, although completely accepting that Ms McDonald was 17 at the time."*[85]

142. Significantly, on this issue there was no dispute between her and Dr O' Connell. In cross-examination Dr O' Connell agreed that, if established as a fact, the alleged conduct of Fr Conroy could be characterised as "*clearly inappropriate",* "*abusive*" and "*a misuse of a power relationship".* The "*list of adjectives*", he said, was "*long*". He also agreed that he would consider such a relationship as "*sex abuse*" and "*exploitative*".[86] If it were proven, "*this was an abusive .. exploitative relationship.*"[87] Furthermore, while Dr O' Connell's evidence was to the effect that, even assuming that the conduct alleged had occurred, it did not cause trauma to Ms McDonald sufficiently severe to warrant a diagnosis of PTSD, he accepted that someone in "*an exploitative sexual relationship, particularly going through a period of childhood into adolescence"* could experience "*psychological trauma".*[88] If the "*sexual abuse"* was accepted as a fact by the court, Dr O' Connell accepted that it would have the *"greatest significance*"

[85] Day 15 (17 February 2017), at page 40.

[86] Day 31 (28 March 2017) at page 76.

[87] *Ibid*, at page 78.

[88] *Ibid*, at page 79.

in terms of the factors contributing to her symptoms of depression and distress[89] and "*the major factor ... in her development of her psychiatric symptoms.*"[90]

143. Considered against the backdrop of this evidence, the argument made by Fr Conroy, but also by the School, that any sexual relationship between Fr Conroy and Ms McDonald was consensual and that its consensual character absolutely excludes any claim for civil redress by Ms McDonald is rather surprising. If there was such a sexual relationship, it involved a gross breach of trust by Fr Conroy, as teacher and as Chaplain. It is, perhaps, particularly surprising that the School should be of the view that sexual relations between teacher and student ought to be entirely beyond the reach of the civil law provided that the student is 17 and consents, in circumstances where its own principal expressly recognised the harm that such relations can cause to the student and where such conduct was prohibited by the School (and, it seems, by schools generally). If that is indeed the position as a matter of the law of tort in this jurisdiction, it might be thought to give rise to a significant question whether, having regard to the imperative requirements of Article 40.3 of the Constitution, that law is adequate to protect the personal rights of children.

144. The fact that such conduct is generally prohibited by school disciplinary codes provides an important measure of protection for students but a school disciplinary process

[89] *Ibid*, at page 84.

[90] At page 85.

obviously cannot provide direct redress for the harm that may be caused to a student by such conduct.

145. Whether the parameters of the tort of assault are capable of adaption and development so to address the particular issues that arise when persons in authority have sexual relations with children over whom they exercise authority – in other words whether the civil law might be developed in a manner parallel to (if not identical to) developments on the criminal law side – raises difficult and complex issues which do not appear to have ever been considered in this jurisdiction. There are many competing considerations. Certainty in the law is one and there are obvious advantages in having – as it was put – a *"bright line rule*". It may be argued that any change in this area should be a matter for the Oireachtas. On the other hand, with some limited exceptions – such as the provisions regarding consent to medical procedures in section 23 of the Non-Fatal Offences Against the Person Act 1997 – the Oireachtas has not considered it appropriate to legislate in this area, leaving the contours of tortious conduct, including issues of consent, to be developed by the common-law.

146. In the High Court and again in this Court Mr Fitzgerald relied on the decision of the Court of Appeal of England and Wales in *Bowen v JL* [2017] EWCA Civ 82. I do not consider that decision to be of any real assistance. It appears from the judgment of Burnett LJ that the County Court Judge had concluded that JL had not consented to sexual activity with a priest during a period when, though he had reached the age of consent, he was still a secondary school student. The basis for that conclusion appears to have been that JL was emotionally dependent on the priest and therefore his apparent

consent was not real. That doubtlessly echoes the case made by Ms McDonald. However, the precise basis for the County Court's decision is not apparent and the Judge's findings were challenged on appeal, though that challenge was not reached because the Court of Appeal concluded that the Judge ought to have held that JL's claim was in any event statute-barred. There is nothing in the Court of Appeal decision itself that assists Ms McDonald here.

147. There are, however, Canadian decisions that recognise and attempt to address the complex issues that arise relating to consent to sexual activity where that activity takes place in the context of relationships characterised by apparent imbalances of authority or power.

148. In referring to these decisions, which were not the subject of submission, I do not mean to suggest that Irish law should necessarily follow the same path. Rather, the discussion of them is merely intended to illustrate that, in other common-law jurisdictions, courts have felt able to develop the common law in a manner which, in their view, was responsive to the concern that, in particular contexts and relationships, traditional concepts of consent may not be adequate to protect vulnerable persons from sexual exploitation.

149. *Norberg v Wynrib* [1993] 2 LRC 408 – a decision of the Supreme Court of Canada – concerned a doctor-patient relationship. The adult plaintiff was addicted to a pain-killer. In return for writing her prescriptions for the drug, the defendant doctor extracted sexual favours. Ultimately, the plaintiff sued the doctor for sexual assault, negligence and

breach of fiduciary duty. She succeeded in the Supreme Court, though the Court was divided as to the basis for its decision. Three judges held the doctor was liable in damages for assault. In their opinion, there were certain relationships, characterised by power imbalances, where the issue of consent involved consideration of more than whether there had been any overt force or coercion. By analogy with unconscionable transactions in contract law, in their view certain relationships might exclude the possibility of "*meaningful consent*". Two other judges considered that only the principles applicable to fiduciary duties and their breach were capable of encompassing the totality of the wrong done to the plaintiff. The defendant held power over the plaintiff, who was vulnerable. The doctor had owed fiduciary duties to the plaintiff and had breached his duties in the circumstances.

150. *Norberg v Wynrib* has been cited and applied subsequently. In *KM v HM* (1992) 96 DLR (4th) 289 the Supreme Court approved the analysis of McLachlin J in *Norberg v Wynrib* in holding that the sexual assault by a father on his child constituted both an actionable battery and a breach of fiduciary duty. *Norberg v Wynrib* was also applied by the Supreme Court of British Columbia in *A.B. v C.D.* [2011] BCSC 775, which involved facts more closely resembling the alleged facts here and involved consideration by the court of a provision of the Criminal Code similar to Section 3A which, in the court's view recognised that "*young people are inherently vulnerable to persons in positions of authority or trust. While such young people may think that they*

are making a free choice to engage in a relationship with a person in authority, the very nature of the relationship precludes a free choice."[91]

151. These developments in Canada have been discussed in a number of academic articles and books: see for instance, Allen, "Civil Liability for Sexual Exploitation in Professional Relationships" (1996) 59 *MLR* 56 and Feldthusen "The Canadian Experiment with the Civil Action for Sexual Battery" (chapter 10 of Mullany (ed) *Tort in the Nineties* (1997).[92]

152. No claim for breach of fiduciary duty is made here and it may well be too late for such a claim to be made at this stage, though the fact (if fact it be) that the limitation period has expired does not necessarily preclude an amendment: *Krops v Irish Forestry Board* [1995] 2 IR 113, approved in *Smyth v Tunney* [2009] IESC 5, [2009] 3 IR 322. In any event, a finding that a claim for breach of fiduciary duty lies in the circumstances here

[91] At paragraphs 101 and 102.

[92] See also Coleman, "Sex in Power Dependency Relationships: Taking Advantage of the 'Fair Sex'" (1988) 53 *Alb L Rev 95*, which was cited with approval by the Supreme Court of Canada in *Lynn v Dagg* (1988) 46 CCLT 25 (a teacher-pupil case) which was in turn relied on in *Norberg v Wynrib*. According to Coleman, in "*power dependency relationships*" - which include teacher-student and clergy-penitent relationships - consent to a sexual relationship is inherently suspect, noting that *"exploitation occurs when the 'powerful' person abuses the position of authority by inducing the 'dependent' person into a sexual relationship, thereby causing harm."*

would require a significant development of the law, in circumstances where, historically, its focus has been on the protection of economic and/or property interests.[93]

153. According to Mr Fitzgerald, Ms McDonald does makes a claim for negligence and breach of duty against Fr Conroy (and vicariously against the School), though he acknowledges that such a claim was not addressed by the Judge in his Judgment and that Ms McDonald has not sought to revive that claim in her Respondent's Notice. Whether any claim for negligence/breach of duty was in fact made by Ms McDonald beyond a claim of negligent appointment/supervision against the School is a matter of dispute. The Appellants say that, in any event, a claim in negligence/breach of duty would not lie in the circumstances at issue here, where (so it is said) Ms McDonald's complaint arises from intentional conduct on the part of Fr Conroy. In circumstances where, in my view, Ms McDonald's claim ought to remitted for rehearing in the High Court and in the absence of any significant argument on the point before this Court, I do not think it would appropriate to enter into any extended analysis of that question. I will limit myself to observing that it is not at all obvious to me why, in principle, a claim in negligence/breach of duty could not lie in the circumstances here, particularly if it be the case that (as both Appellants submit) no claim in assault lies because Ms McDonald consented to the sexual activity with Fr Conroy. Whether such a claim would or should succeed is, of course, quite another matter entirely.

[93] See the discussion by Allen (*op cit*, at page 72) of the decisions of the Court of Appeal and House of Lords in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley* [1985] 1 AC 871.

154. In any event, a claim in assault is made by Ms McDonald. It was not properly adjudicated on by the Judge. The Judge failed to make a clear finding on the issue of consent, both as a matter of fact and as a matter of law. It was not just the submissions of Fr Conroy and the School that the Judge failed to engage with; he also failed to engage with the submissions made to him on Ms McDonald's behalf to the effect that the relationship between her and Fr Conroy was such that no effective consent could or was given by her. That submission may find some support in the material I have referred to above, though of course the Judge did not have the benefit of any of that material.

155. In these circumstances, it appears to me that this Court could not properly conclude – as the Appellants have invited it to conclude – that, in effect, Ms McDonald's claim for assault cannot succeed. No clear factual findings on the issue of consent are before this Court and it is not for this Court to make findings of fact as if it were the court of trial. Equally, in my view, the legal position is not so clear as to properly permit this Court to conclude that Ms McDonald's claim must necessarily fail, as the Appellants submit. To the contrary, it seems to me that the claim raises significant legal issues which appear not to have been considered in this jurisdiction to date. These issues merit proper consideration and adjudication and, given that they have not been properly adjudicated on to date, the proper course is to not to dismiss the proceedings but rather to remit them to the High Court for re-hearing. The High Court can address all issues and determine afresh whether the assault claims ought to succeed or fail, as well as any other issues properly within the scope of the Plaintiff's claim.

156. In that context, it may be helpful to make some observations on the onus of proof. These observations are tentative because the issue was not the subject of any detailed argument before the Court. Furthermore, as will become apparent, there is a surprising lack of clarity on the issue in the authorities.

157. McMahon & Binchy, *Law of Torts* (4th ed; 2013) does not discuss the issue at length but appears to regard consent as a matter of defence, stating at paragraph 22.65 that consent to physical contact that would otherwise be a trespass will render that contract lawful. However, the authority cited for that proposition – a passage from the judgment of Palles CB in *Hegarty v Shine* (1878) 4 LR Ir 288, at 296 – appears to provide little support for it and, indeed, appears to suggest that the absence of consent is a constituent element of the tort. If that is so, it would seem to follow that the burden of establishing the absence of consent would be on the plaintiff.

158. That was the approach taken in at first instance in *Freeman v Home Office (No 2*) [1984] 1 QB 524, as noted by the editors of *Clerk & Lindsell on Torts* (22nd ed; 2017) at paragraph 3-104. That, they say, appears to be inconsistent with the weight of authority, which regards consent as a defence, noting that as a general rule the burden of proving a discrete defence rests on the defendant. Various authorities from England and Wales, Canada and Australia are cited in support of that approach.

159. On the other hand, Hopwood *et al*, *The Law of Tort* (3rd ed; 2014) states unequivocally that the claimant has the burden of pleading and proving the absence of consent, relying on the authority of *Freeman*.[94]

160. In the context with which this appeal is concerned, it may be relevant that Sections 3 and 3A of the 2006 Act both appear to be drafted on the premise that consent is a matter of defence. If that premise is correct, it would be surprising if a different approach was applicable in a civil action for assault. In general, there might appear to be cogent policy reasons, rooted in considerations of personal autonomy and bodily integrity, for requiring a defendant to establish consent, at all events where the circumstances are not such as to give rise to any implication or assumption of consent. When the issue of consent arises in circumstances such as those presented here – involving alleged sexual relations between a person in a position of authority and a person (who was, for much of the relevant period, a child) over whom he had authority – it might be thought that the arguments for requiring the defendant to establish consent, rather than requiring the plaintiff to establish its absence, are particularly compelling. But there are, no doubt, other factors that ought to be considered and, in the absence of any significant discussion of this issue, it would not be appropriate to express any definitive view. Insofar as the onus of proof may be the subject of dispute, it is appropriate that it should be determined by the High Court at first instance on the basis of full argument.

[94] At paragraph 9.10., though noting that in *Ashley v Chief Constable for Sussex* [2006] EWCA Civ 1085, [2007] 1 WLR 398, Sir Anthony Clarke MR expressed the view (*obiter*) that the conclusion reached in *Freeman* as to where the burden lay was *"open to debate*".

Conclusions on Issue 2

161. I would, accordingly, allow the Appellant's appeals on this ground and set aside the findings of assault and abuse in paragraph 88 of the Judge's Judgment but reject the invitation to dismiss Ms McDonald's claim. For the reasons set out above, the proper course in my opinion is to remit the proceedings to the High Court for re-hearing.

Issue 3 – The "*Tort of Grooming"*

162. As I have already mentioned, in paragraph 88 of his Judgment the Judge stated that:

> "*In line with the judgment of White J in Walsh v Byrne [2015] IEHC 414, this Court finds that the tort of grooming has been established.*"

163. Leaving aside for a moment the issue of whether there is a tort of grooming and – if there is – what are its parameters and constituent elements, no such tort had in fact been pleaded by Ms McDonald. That it was not included in the pleadings as drafted is hardly surprising, given that the Statement of Claim pre-dated the decision of the High Court in *Walsh v Byrne*. But if, in the aftermath of that decision, Ms McDonald wished to make the case that such a tort had been committed by the defendants or any of them, she ought not to have been allowed to do so without first obtaining leave to amend her Statement of Claim. In every case, it is important that there should be clarity as to what claims are being advanced by a plaintiff (just as it is important that there should be

clarity as to what defences are being relied on by a defendant). Where the claim is in respect of a novel tort – and there was no dispute before us that grooming is a novel tort (if it exists) – it is all the more important that the claim should be clearly pleaded. That would have permitted the defendants to interrogate the claim through particulars. It is wholly undesirable that such a claim should be allowed to be advanced "*on the hoof"* so to speak.

164. In any event, it seems that grooming was in the case by the time that Dr Cryan came to give her evidence and all of the parties addressed themselves to *Walsh v Byrne* in their closing written submissions in the High Court. It was common case before this Court that *Walsh v Byrne* was the only Irish authority on the tort of grooming. The Court was not referred to any authority from any other jurisdiction recognising the existence of such a tort.

Walsh v Byrne [2015] IEHC 414

165. In *Walsh v Byrne* the plaintiff sued the defendant, a teacher and the leader of a brass band that the plaintiff had joined as a child, for sexual abuse that had begun when the plaintiff was 11 and continued until he was 16 or 17. In addition to damages for personal injuries and sexual assault, the plaintiff sought a declaration that "*the entire relationship created by the defendant with the plaintiff was a continuum of oppression of the plaintiff involving manipulation, psychological domination and acts of assault and battery and this continuum of oppression was tortious.*"

166. The defendant was not legally represented and did not give evidence. On the basis of the evidence of the plaintiff, White J found that the alleged abuse had occurred and also found, by reference to that evidence and the evidence of a psychiatrist, that section 48A applied and thus the claim was not statute-barred. White J then referred to the plaintiff's argument that the court should develop the law "*by recognising the practice of grooming for the purposes of sexual abuse as either a new tort or the development of existing tort law.*" It appears that, in making that argument, the plaintiff had relied on *McDonnell v Ireland* [1998] 1 IR 134 and in particular a passage from the judgment of Keane J where he emphasised the flexible and dynamic nature of the tort action in the context of considering whether a claim for breach of constitutional rights was properly to be considered to be a claim for "*breach of duty*" for the purposes of the application of section 11(2) of the Statute of Limitations 1957. Reference was also made to the decision of the Supreme Court in *MN v SM* [2005] 4 IR 461 in which, in the context of considering the appropriate level of damages in a claim for sexual assault/abuse carried out over a period of 5 years, Denham J had emphasised the fact that what was an issue was "*a continuum of abuse over years*" which had had a greater effect on the plaintiff than the individual assaults: the "*consequence to the plaintiff was greater than the sum of the individual assaults.*"

167. White J then referred to the evidence of Dr Rosaleen McElvaney (a clinical psychologist who gave evidence on the plaintiff's behalf) and to a number of academic articles on the subject of grooming to which she had referred. That material was provided to this Court at its request and I shall refer to further below. White J then stated his conclusions as follows:

"22. In this case, the mental trauma suffered by the plaintiff, is not just confined to the acts of assault and battery, but arises also as a result of the consequences of the breach of trust of the defendant who had played such an important role in the plaintiff's life. The court's objective consideration of the purpose of the defendant's kindness, concern and considerable investment of time, to the period when the abuse stopped was for the insidious purpose of satisfying his own sexual desire. For those reasons, it is appropriate to extend the law of tort, to cover what is now a well recognised and established pattern of wrongdoing, where a child is befriended, where trust is established and where that friendship and trust is used to perpetrate sexual abuse.

23. The court would define this as a combination of behaviour by which a child is befriended, to gain his or her confidence and trust and which includes a process by which a person prepares a child, significant adults and the environment for the abuse.

24. The behaviour can involve many acts of individual kindness, but with the aim of gaining access to the child and maintaining the child's compliance with the abuse and secrecy to avoid disclosure.

25. The plaintiff is entitled to succeed and is also entitled to aggravated damages."

The Judge awarded damages in a single sum of €200,000, with no allocation of any specific part of that award to grooming.

168. The material referred to by Dr McElvaney in her evidence in *Walsh v Byrne* was Gillespie A. (2002). "Child protection and the internet - challenges for Criminal Law" [2002] *Child and Family Law Quarterly* 411 and Craven, Brown, and Gilchrist, "Sexual grooming of children: Review of literature and theoretical considerations", *Journal of Sexual Aggression* (November 2006) Vol 12, No 3, pp 287 -299.

169. As its title suggests, the Gillespie article was concerned with the issue of how the *criminal* law could respond to the problem of grooming, particularly over the internet. As to what grooming is, the author stated that:

> *"It is impossible to define precisely what 'grooming' is, or when it starts or finishes, as the process can take a long time and involve many different acts. However, the expression is generally used to refer to the process by which a child is befriended by a would-be abuser in an attempt to gain the child's confidence and trust, enabling them to get the child to acquiesce to abusive activity,"*

170. Ms Craven and her co-authors are psychologists rather than lawyers. After a survey of the literature, including Gillespie's article, they propose the following definition of grooming:

> "*A process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to*

the child, gaining the child's compliance and maintaining the child's secrecy to avoid disclosure. This process serves to strengthen the offender's abusive pattern, as it may be used as a means of justifying or denying their actions."

171. Both of these definitions were set out by White J in his judgment and his reference to "*what is now a well recognised and established pattern of wrongdoing"* appears to refer back to these articles. Certainly, no authority – Irish or otherwise – in which grooming was recognised as a civil tort appears to have been opened to White J. In any event, at the conclusion of his judgment, White J set out the conduct which, in his view, the law of tort ought to be extended to cover, as follows:

"*23 The court would define this as a combination of behaviour by which a child is befriended, to gain his or her confidence and trust and which includes a process by which a person prepares a child, significant adults and the environment for the abuse.*

24. The behaviour can involve many acts of individual kindness, but with the aim of gaining access to the child and maintaining the child's compliance with the abuse and secrecy to avoid disclosure."

The High Court Judgment

172. In his Judgment, the Judge quoted this passage with approval and continued:

"In accordance with the evidence of Dr Cryan, the evidence before this Court of the acts that took place as between [Fr Conroy] and [Ms McDonald] constituted grooming, The mental trauma suffered by the plaintiff is not confined solely to the tortious acts of assault and false imprisonment but also arise from the consequences of the breach of trust by [Fr Conroy] who played such an important role in the plaintiff's schooling and local community."

173. The Judge does not, in this part of his Judgment, identify the acts of grooming which he had found to have taken place but earlier in his Judgment he refers to Dr Cryan's evidence that these included Ms McDonald's experience in The Gambia, the executive power of Fr Conroy in the School and the fact that Fr Conroy was held in high regard by the McDonald family and that the family had recommended that she talk to him following a break-up with a boyfriend, as well as the fact that Fr Conroy had been invited to the McDonald home for a family birthday party.

Submissions and Conclusion on Issue 3

174. These findings are strongly criticised by both Fr Conroy and the School. Fr Conroy submits that grooming is not a stand-alone tort giving rise to a cause of action in itself. Grooming, it is said, is actionable only if it leads to sexual abuse. It cannot take place after a person reaches the age of consent (which, as already discussed, Fr Conroy says is age 17) unless the person is of unsound mind. For grooming to be established on the facts here, it would have to be shown that it was of such severity that, by the time that Ms McDonald turned 17, her capacity to consent to sexual activity had been vitiated

but, it was said, there was no evidence of any act or event in the period between the trip to The Gambia in February 2005 and her 17th birthday in April that could constitute grooming, particularly in light of Dr Cryan's acceptance that grooming generally involved more than one or two incidents and took place over months or years. Submissions to the same effect were made on behalf of the School. It also submitted that there was no stand-alone tort of grooming – if the defendant in Walsh had not committed acts of abuse, no damages could have been awarded for "*grooming*". In any event, it was said, even on Ms McDonald's own case "*nothing happened*" in the period leading up to her 17th birthday.

175. In his submissions, Mr Fitzgerald maintained the position that there is a stand-alone tort of grooming. It had started when Ms McDonald was sent by her family to talk to Fr Conroy following a breakup with a boyfriend. That was so, according to Mr Fitzgerald, even though that contact was initiated by Ms McDonald and her family and even though any disclosure was not initiated by Fr Conroy and, the evidence suggested, he had simply listened to Ms McDonald. He disputed the suggestion that grooming necessarily came to an end on Ms McDonald's 17th birthday. However, when the Court questioned what part of the Judge's damages award was to be attributed to his finding that grooming had taken place, Mr Fitzgerald frankly acknowledged that it wasn't possible *"to take the grooming part out and give it a separate amount of damages from the damage that's done by the sexual conduct.*" Later in his submissions, Mr Fitzgerald indicated that he was relying on grooming not as a stand-alone tort (which, he said, was not necessary for his case) but rather as a fall-back argument in the context of his fundamental assertion that Ms McDonald's consent had been vitiated.

176. The appeals here give rise to significant questions about whether there is a stand-alone tort of grooming and, if so, what its constituent elements are and how it relates to established torts such as sexual assault. Issues of consent also arise on the facts here. In my opinion, it would not be appropriate to attempt to resolve these difficult issues in these appeals. If Ms McDonald wishes to pursue a claim for grooming at the rehearing of these proceedings, she must first seek leave to amend her Statement of Claim to include such a claim. Assuming that leave is given, that claim should be particularised in the ordinary way and ultimately determined by the High Court by reference to the whatever arguments and evidence may be adduced at the rehearing.

Issue 4 – Statute of Limitations

Preliminary

177. As already indicated, there was also a significant limitation issue at trial. Ms McDonald turned 18 on 22 April 2006. These proceedings commenced on 29 January 2013. However, Ms McDonald applied to PIAB for authorisation on 7 December 2012. In accordance with section 50 of the Personal Injuries Assessment Board Act 2003 (as amended), the time between that date and the 29 January 2013 is to be disregarded for the purposes of the Statute of Limitations.

178. The limitation period in respect of the tort of assault is 6 years from the date that the cause of action accrues: section 11(2) of the Statute of Limitations 1957. For the purposes of the Statute, Ms McDonald was under a disability until she reached age 18. Any claim for assault occurring before she turned 18 therefore *prima facie* had to be brought within 6 years of 22 April 2006 i.e. by 22 April 2012 and any claim for assault occurring after she turned 18 had to be taken within 6 years of the alleged assault.

179. The limitation period applicable to claims for damages in respect of personal injuries caused by negligence, nuisance or breach of duty is 2 years from the date of accrual: section 3(1) of the Statute of Limitations (Amendment) Act 1991 (as amended by the Civil Liability and Courts Act 2004). *Prima facie*, therefore, any such claim by Ms McDonald in respect of events predating her 18th birthday had to be brought by 22 April 2008.

180. In their respective defences, Fr Conroy and the School each expressly pleaded that the claims against them were statute-barred. One might have expected Ms McDonald to deliver a reply joining issue on the Statute and identifying the basis on which, on her case, the Statute did not apply so as to bar her action. As Geoghegan J observed in *Croke v Waterford Crystal Limited* [2005] 2 IR 383, "*[i]f there is an answer to a plea of the Statute of Limitations that answer must be pleaded in a reply.*" That is proper practice and it ought to have been followed here.

181. Ms McDonald's failure to properly plead the limitation issue is particularly surprising given that it appears that the Third Defendant (who, it seems, also pleaded the Statute) actually brought a motion to have the limitation issue tried as a preliminary issue. That motion was, apparently, adjourned by consent to the hearing of the action. So it ought to have been apparent to all parties that the limitation issue was a live issue in the proceedings which would have to be addressed.

182. In any event, at trial Ms McDonald relied on the provisions of section 48A of the Statute of Limitations 1957 (inserted by the Statute of Limitations (Amendment) Act 2000). No other provision of the Statutes of Limitations – such as the "*date of knowledge*" provisions in the 1991 Act – were relied on by Ms McDonald.

183. In material part, Section 48A provides as follows:

"(1) A person shall, for the purpose of bringing an action—

(a) founded on tort in respect of an act of sexual abuse committed against him or her at a time when he or she had not yet reached full age, or

(b) against a person (other than the person who committed that act), claiming damages for negligence or breach of duty where the damages claimed consist of or include damages in respect of personal injuries caused by such act,

be under a disability while he or she is suffering from any psychological injury that—

(i) is caused, in whole or in part, by that act, or any other act, of the person who committed the first-mentioned act, and

(ii) is of such significance that his or her will, or his or her ability to make a reasoned decision, to bring such action is substantially impaired."

184. For present purposes "*full age*" means the age of 18. It follows that Section 48A has no relevance to any part of Ms McDonald's claim as relates to events occurring after 22 April 2006.

185. Where section 48A is applicable, the person concerned is under a "*disability"*. Section 49(1) of the Statute of Limitations 1957 provides for the consequences of such a disability in terms of the operation of the limitation period for (*inter alia*) tort claims. Section 5 of the Statute of Limitations (Amendment) Act 1991 make equivalent

provision for personal injury claims. Broadly, where a cause of action accrues while a person is under a disability, the applicable limitation period only runs from the time when the person ceases to be under such disability.

186. The leading authority on the application of section 48A is *Doherty v Quigley* [2011] IEHC 361, [2015] IESC 54. The plaintiff there brought a claim in relation to alleged abuse in the period between 1982 (when the plaintiff was 12) and 1989. The proceedings had not been commenced until 2007, at which point the plaintiff was 37 years old. In the interim period, the plaintiff had successfully completed third level education and was working as a teacher. She had also made a number of statements to the Garda Síochána complaining of her abuse by the defendant (the first in 1993), which led to the defendant being prosecuted and the plaintiff giving evidence against him in 2000 and (after a disagreement by the jury and an unsuccessful attempt made by the defendant to prohibit a retrial) again in 2007, when the jury disagreed once more.

187. Notwithstanding the arguments of the defendant that this fact pattern was inconsistent with any contention that the plaintiff's will or capacity to bring proceedings had been "*substantially impaired*", the High Court (Ryan J) held that section 48A applied and that the claim was not statute-barred accordingly. The Supreme Court dismissed the defendant's appeal on the limitation issue, with Murray J giving the only judgment.

188. Whether a plaintiff is entitled to rely on section 48A was, in his view, "*essentially a question of fact to be determined by the trial judge.*"[95] As to whether the section 48A mandated an objective or subjective test, Murray J stated:

> *"27. I am not so sure it is at all helpful to analyse how a judge should approach the application of s.48A by examining whether it should be subjective or objective. In most cases there is an element of both when deciding mixed questions of fact and law. In any event, in this case, for the purpose of applying s.48A to the circumstances of the respondent, the learned trial judge had to be satisfied essentially that (a) she was suffering from a psychological injury, (b) caused by an act of the appellant, and (c) of such significance that her will to bring the action was substantially impaired, or her ability to make a reasoned decision to bring the act was substantially impaired. These are essentially questions of fact to be decided by the trial judge in the ordinary way on the balance of probabilities.*
>
> *28. ... Having determined that the respondent was suffering from psychological injury arising from the acts perpetrated by the appellant, the trial judge's task then was to determine, not her understanding of the nature of the acts and the remedies available to her, but the impact of the psychological injury as regards any impairment of her capacity to take a decision to bring civil proceedings.*

[95] At paragraph 18.

This can only be decided having regard to the evidence before the trial judge, including the medical evidence as regards her personal situation."

189. Addressing the specific submissions of the defendant to the effect that the evidence established that the plaintiff had led "*a normal life*" and was capable of making major decisions, including a decision to bring a claim against the defendant long before she actually did, Murray J allowed that, if one left aside the medical evidence, there was undoubtedly force in those submissions.[96] But, he immediately added, "*it would be quite wrong and unreal to consider these elements separate from the expert medical evidence concerning the psychological state of mind of the respondent, particularly with regard to addressing, coping with and dealing with the consequences of the acts of sexual abuse found to have been committed by the appellant against her over an extended period of years.*"[97]

190. Murray J went on to observe (at paragraph 47) that section 48A does not suggest that *"the victim's ability must be totally impaired, or indeed substantially impaired at every moment of time."* There could be short periods or windows where a victim might have the capacity to bring proceedings only for the underlying psychological injury to intervene before the opportunity to act arose. The courts had long recognised the difficulties which victims of sexual abuse may have in making a complaint for criminal purposes, or even bringing civil proceedings.

[96] At paragraph 35.

[97] At paragraph 36.

191. As is evident from the judgment of Murray J, there was significant medical evidence before the High Court – from the well-known consultant psychiatrist, Professor Ivor Browne – to the effect that the plaintiff was suffering from *"'full blown' Post Traumatic Stress Disorder (PTSD)"* by which she remained "s*eriously incapacitated*" and that, as a result, her will and/or her ability to make a reasoned decision to bring the claim against the defendant had been "*substantially impaired*". Clearly, such evidence was accepted by the trial judge and the Supreme Court considered that the trial judge was entitled to reply on that evidence to conclude that section 48A applied.

192. In his submissions here, Mr Fitzgerald referred to certain paragraphs of the judgment of Murray J as indicating that it is not a matter for an expert medical witness to give evidence in relation to impairment. Rather, Mr Fitzgerald submitted, it was a matter for the judge to listen to the evidence of such a witness or witnesses and then to make his own assessment on impairment and then to make his own assessment having heard that evidence. Whether section 48A applies is, of course, a matter for assessment by the trial judge having regard to all the evidence, but I do not read *Doherty v Quigley* as indicating that it is not a matter for an expert medical witness to give evidence in relation to impairment. Detailed evidence had in fact been given by Professor Browne in the High Court on that issue and there is nothing in the judgment of Murray J which suggests that such evidence ought not to have been heard or considered. On the contrary, it is evident from the passages from his judgment already set out that Murray J regarded the medical evidence as critical. The judge did not accept that Professor Browne was competent to make legal points about section 48A and Murray J agreed with the judge's

view: see paragraph 49 of his judgment. However that was a separate issue from the proper approach to the evidence of the witness "*explaining the psychological condition of the respondent and its implications*" which was within the witness' expertise.

The Judge's Findings on the Limitation Issue

193. The Judge's analysis of the limitation issue is brief and so I shall set it out in full:

> *"91. In line with the dicta of Ryan J. in Doherty [A. P. U. M.] v. Quigley [2011] IEHC 361, the Court holds that the plaintiff in this case has suffered a serious psychological injury, within the meaning of section 48A, such that her capacity to sue has been "substantially impaired". The Court accepts the evidence of the plaintiff, that she struggled to reveal the relationship to her family, and that after her initial disclosure, she did not feel ready to make a further disclosure to the authorities. She gave evidence that whilst as a student at UCD in the period between 2010 and 2011, she went to a counsellor but he was of no assistance. She agreed to report the abuse when she felt pressure from the counsellor Kay Gilliland, that the safety of other children was at risk.*
>
> *92. This Court also places emphasis on the evidence of Dr. Cryan in assessing the plaintiff's mental capacity and ability to litigate this claim. The plaintiff has suffered from depression and anxiety, and at times experienced suicidal ideation, in considering drowning herself, or taking an overdose. The plaintiff suffered from self-blame, guilt, shame, fear of exposure. Above all, she feared*

that she would not be believed. Dr. Cryan opined that the plaintiff's symptoms were consistent with her account of an illicit and secretive relationship with the first-named defendant.

93. Dr. O'Connell gave evidence on behalf of the defendants, and agreed that the plaintiff was suffering from a recurring depressive disorder.

94. The plaintiff continues to experience depressive symptoms and episodes of recurrent stress. She is currently on medication and has had cognitive behavioural therapy. She requires anti-depressants and anxiety medication.

95. The Court finds that the plaintiff is not prevented by the Statute of Limitations from bringing a claim for damages for injury as a result of the actions of the first-named defendant."

194. Though not specifically referenced in this section of the Judgment, the Judge had earlier found that Ms McDonald was "*suffering from recurrent depressive disorder and complex post-traumatic disorder, disorders that Dr Cryan linked back to the plaintiff's secret and illicit relationship with [Fr Conroy]."*[98]

[98] Judgment, at paragraph 78.

Discussion and Conclusion on Issue 4

195. I have already discussed the findings made by the Judge by reference to the psychiatric evidence in the context of considering issue 1 above. The views I expressed as to the adequacy of the Judge's analysis are, of course, equally applicable in this context.

196. Dr Cryan's report did not specifically address the limitation question (though it did discuss the circumstances surrounding the disclosures made by Ms McDonald to her family, to the HSE and to the School). There was no discussion of section 48A and Dr Cryan did not express any view as to whether Ms McDonald had been under a "*disability*" within the terms of that section. The issue of whether Ms McDonald's *"will, or … her ability to make a reasoned decision, to bring"* an action for redress had been "*substantially impaired"* was not addressed either. As already discussed, Dr Cryan expressed the view in her report that the symptoms reported by Ms McDonald were "*best conceptualised as a delayed post-traumatic stress disorder (PTSD), which is at least of moderate severity, and which is associated with recurrent depressive disorder and anxiety*."

197. Given that the limitation issue was so clearly a live issue in the proceedings, it is very surprising that it was not addressed in any report from Dr Cryan. Even if the limitation issue had arisen after the date of her report, a further report could and should have been obtained from Dr Cryan if it was intended that she would give evidence on that issue. In fact, the evidence in the High Court suggested that Dr Cryan was first asked to address the limitation issue on the day she began her evidence.

198. Dr O' Connell prepared two reports which have been referred to above. In his first report, he noted that the pleadings referred to a diagnosis of PTSD[99] and explained that he did not think "*such a diagnosis is appropriate in circumstances where a person has not been subjected to actual or threatened death, serious injury, or sexual violence as is required to meet the diagnostic definition.*" He noted that Ms McDonald had described symptoms consistent with a diagnosis of depression. He considered it unlikely that her depression was associated with "*functional impairment*". In his second report, Dr O' Connell opined that Ms McDonald continued to suffer from a depressive illness which, he noted, was not being treated. He reiterated his opinion that Ms McDonald was not suffering from PTSD but "*rather a relapsing remitting depressive disorder."*

199. When Dr Cryan came to give her evidence, objection was taken by the Defendants to her being asked to address the limitation issue on the basis that the issue had not been addressed in her report.[100] The School also objected that no "*groundwork*" had been laid by Ms McDonald's own evidence for the admission of evidence from Dr Cryan on

[99] As already noted, in replies to particulars dated 8 July 2013, it was said that the symptoms being suffered by Ms McDonald "*are characterised as delayed post-traumatic stress disorder*"

[100] In response to this objection, it was suggested by Counsel for Ms McDonald that she was under no obligation to address the limitation issue in her evidence because the issue was a matter of defence. At the level of general principle, limitation is indeed a matter of defence. Here, however, it was evident that much of the claim was *prima facie* statute-barred. The only basis on which it was contended that the claim was not statute-barred was that Ms McDonald was under a "*disability*" within the meaning of Section 48A. In my opinion, the burden of establishing such disability clearly rested on Ms McDonald.

the issue because (according to the School) her evidence had not been to the effect that she had been unable to bring forward her claim at an earlier stage. However, the Judge ruled that Dr Cryan should be permitted to give evidence on the limitation issue. The stated basis for this ruling was that the court had "*judicial notice of the damage that is caused by sexual abuse, something which the Supreme Court have articulated for many [years]*". It is clear from the transcript that the Judge had particularly in mind the decision of the Supreme Court in *H v DPP* [2006] IESC 55, [2006] 3 IR 575.

200. I confess that it is not obvious to me what relevance the Supreme Court's decision in *H v DPP* has in this context. *H v DPP* was not concerned with section 48A or any issue of limitation. Judicial notice of the damage caused by sexual abuse does not explain or excuse the failure on the part of Ms McDonald and her legal team to procure a further report from Dr Cryan on the limitation issue – which was of course concerned with Ms McDonald specifically and individually rather than any general issue as to the impact of sexual abuse – which would then have been subject to disclosure in accordance with SI 391 of 1998. As it was, the Defendants were effectively ambushed by the evidence given by Dr Cryan on the issue, a situation entirely at odds with the intendment of that instrument.

201. In any event, when asked – by way of an impermissibly leading question – whether the injury suffered by Ms McDonald was a *"significant psychological injury"*, Dr Cryan agreed that it was "*very significant"*. Asked what effect such an injury would have had "*on her ability to make a reasoned decision",* Dr Cryan answered as follows:

"In my opinion, Judge, her ability or will to make such a decision was impaired. It was with great difficulty that Ms McDonald told her older sister about what happened, and then she managed to tell the family on her return to New Zealand (sic). At that point she really did not want to make any further disclosure. She didn't feel able to do so. I think this goes to central features of chronic post traumatic stress disorder, like self blame, guilt, shame, fear of exposure, fear of not being believed."

202. This passage from Dr Cryan's evidence was, according to Ms O' Reilly, "*the highwater mark*" of her evidence on the limitation issue (a characterisation that Mr Fitzgerald dod not dispute). Even so, in her submission, it did not justify the Judge's conclusion that section 48A applied. In the first place, Dr Cryan had not directed herself to the statutory threshold, which was one of *substantial* impairment. Secondly, it was said that the reasons given by Dr Cryan for her *"headline statement*" did not support the contention that she lacked capacity to the extent required by section 48A.

203. The Judge's finding that section 48A applied was also challenged by Mr McDonagh for the School. I have already discussed Mr McDonagh's submissions concerning the reliability of Dr Cryan's evidence and his well-founded criticisms of the Judge's assessment of her evidence. These are, of course, directly relevant to the limitation issue also. In particular, given that Dr Cryan's evidence on the limitation issue appears to have been largely based on her opinion that Ms McDonald had been suffering from PTSD, the discussion above regarding the evolution of Dr Cryan's evidence on PTSD, and the unheralded shift from the view stated in her report that Ms McDonald was

suffering from "*Delayed*" PTSD to her evidence on oath that she was, in fact, suffering from "*Complex*" PTSD is obviously relevant in this context also. However, the primary focus of Mr McDonagh's specific submissions on the limitation issue was the manner in which the Judge dealt with the evidence of Dr O' Connell.

204. The reports prepared by Dr O' Connell have been referred to. Dr O' Connell gave evidence on Day 31 of the trial. In his direct evidence, he was very clear in his view that Ms McDonald was not suffering from either Delayed PTSD or Complex PTSD. In his view, the narrative history that Ms McDonald had given was more consistent with a relapsing remitting depressive order.[101] He explained in some detail why he disagreed with Dr Cryan's evidence that Ms McDonald was suffering from Complex PTSD. He did not resile from that view in cross-examination. He also appears to have rejected any suggestion that, for the purposes of Section 48A, Ms McDonald had been suffering from a significant impairment.[102] Ultimately, in answer to Mr McDonagh on re-examination, Dr O' Connell stated that:

> *"I don't accept that she is under a disability or that she has PTSD, as I have endeavoured to make plain my views on that. I have a view that she may have a relapsing or remitting depression but that is also qualified by the background history of vulnerability factors that I think lead to her personality structure. That*

[101] Day 31, at page 37.

[102] *Ibid*, at pages 101 – 102, 103, 106-107.

itself would also not impair her capacity with respect to instructing lawyers or indeed day-to-day living."[103]

Asked whether Ms McDonald had ever been under such a disability, Dr O' Connell indicated that he did not believe so.

205. The point in reciting these portions of the evidence given by Dr O' Connell is not to suggest that such evidence ought necessarily to have been preferred by the Judge to the evidence given by Dr Cryan. Although – as already discussed in detail – there were a number of aspects of Dr Cryan's evidence that, in my view, demanded particular scrutiny by the Judge (but which were not, in fact, referred to by him in his Judgment), he was, in principle, free to prefer her evidence over the evidence of Dr O' Connell. But even allowing that – as per Clarke J in *Donegal Investment Group plc v Danbywiske* – "*that choice may not require a great deal of explanation in a judgment other than to indicate in brief terms the reason why the views of one expert was preferred"*, the Judge was required to give <u>some</u> explanation for that choice. It seems to me, in fact, that something more was required in the circumstances here but that is a moot point given that the Judgment does not even record a preference for the evidence of Dr Cryan, less still offer any explanation – however brief – for that preference.

206. In fact, as Mr McDonagh understandably emphasised in the course of his submissions, the limited reference to the evidence of Dr O' Connell in the Judgment might seem to

[103] *Ibid.*

suggest that there was little or no conflict between Dr Cryan and Dr O' Connell on the limitation issue. That was decidedly not the case.

207. Firstly, in paragraph 92 of the Judgment (set out above), Dr Cryan's evidence is framed in terms of the "*depression and anxiety*" suffered by Ms McDonald, with no express reference (in this part of the Judgment) to Dr Cryan's evidence (which was accepted by the Judge) that she was suffering from Complex PTSD. That evidence was, it appears, the basis on which Dr Cryan expressed the views she did regarding the application of Section 48A (her evidence, it will be recalled, was that Ms McDonald's unwillingness/inability to disclose her abuse by Fr Conroy was attributable to the "*central features of chronic post traumatic stress disorder, like self blame, guilt, shame, fear of exposure, fear of not being believed*").[104]

208. Secondly, and significantly, the Judge then goes on (in paragraph 93 of the Judgment) to record that "*Dr. O'Connell … agreed that the plaintiff was suffering from a recurring depressive disorder."* That was correct as far as it goes but any impression that this statement might give to the effect that there had been some significant degree of consensus on the limitation issue would be entirely incorrect. The relevant issue in the limitation context was not whether the plaintiff, Ms McDonald, was suffering from depression. The issue was whether she had been suffering from a "*psychological injury"* caused (in whole or in part) by the acts of Fr Conroy which was "*of such significance that ... her will, or … her ability to make a reasoned decision, to bring such*

[104] This is also apparent from the evidence given by Dr Cryan on Day 15 (17 February 2017), page 42.

action is substantially impaired." The plaintiff's contention, based in large measure on the evidence of Dr Cryan, was that she was, on the basis that she was suffering from Complex PTSD of sufficient severity to substantially impair her will and/or her ability to bring an action against Fr Conroy (and the School) earlier than she did. Far from agreeing with that contention, Dr O' Connell clearly disagreed with it and disagreed with the evidence of Dr Cryan. That is nowhere reflected in the Judgment, however.

209. In the language of McMenamin J in *Leopardstown Club Ltd v Templeville Ltd,* Dr O' Connell's evidence, and the Judge's failure to engage with it, go *"to the very core, or the essential validity, of his findings"* on the limitation issue. This is a case where, reading the pleadings and expert reports, reviewing the transcripts and knowing how the case ran and reading the Judgment in light of the case as made and defended, it is "*just not possible to ascertain, with any degree of confidence, the reasons why*" the Judge made the findings that he did on the limitation issue. In my view, it follows ineluctably that those findings must be set aside.

210. Given that, ultimately, I would set aside the entire judgment and order of the High Court and direct a retrial of Ms McDonald's claim, it does not appear to be either necessary or appropriate to address any of the other issues raised by the Appellants on the Statute, save for one. As I have already explained, Section 48A was the only provision relied on by Ms McDonald at trial to defeat the limitation defence pleaded by Fr Conroy and the School. Section 48A applies only to acts committed against a person before they reach "*full age*". Ms McDonald reached full age on her 18th birthday on 22 April 2006. It follows that Section 48A has no relevance to any part of Ms McDonald's claim as

relates to events occurring after that date. Accordingly, insofar as Ms McDonald's claim was based on events that took place after 22 April 2006 (and her claim was, it is clear, based on events that took place up to the point where she left the School in Summer 2007) the claim was statute-barred and the Judge erred in failing to make such a finding. The period from April 2006 to Summer 2007 in fact represents a very significant proportion of the overall period to which Ms McDonald's claim relates.

Other Issues

The Recusal Issue

211. The fact that, in the course of the hearing, both Fr Conroy and the School applied to the Judge to recuse himself has already been referred to.

212. On one view, this issue is moot in light of the conclusions I have reached above and the order that, in my opinion, properly follows from those conclusions. However, it was a part of the Appellants' appeal (though not substantively addressed in their oral submissions) and I do not think it would be fair to the Judge simply to leave the issue unresolved.

213. The recusal application arose from comments made by the Judge on the morning of Day 8 of the hearing, in the course of Ms Reilly's cross-examination of Ms McDonald. The context was an issue being explored by Ms Reilly about Ms McDonald's earlier interactions with another priest in the Ferns Diocese (referred to in evidence as "*Father*

JJ"). Referring to Father Conroy and Father JJ, Ms Reilly put it to Ms McDonald that "*for you to ask this court to accept that two priests of the Ferns diocese would take it upon themselves to commence text contact with a student of the school is effectively asking the Court to believe that lightning can strike twice.*"[105] In response to an intervention by the Judge, Counsel explained that the point she was making was that "*it is highly unlikely that both sets of texts were initiated by the priests.*" To this, the Judge stated that:

> "*I have read the Murphy Report into the Ferns diocese, so from that point of view I might be somewhat sceptical of your question.*"[106]

214. Nothing was said immediately about this remark but, on the afternoon of Day 8, Counsel for the Third Defendant (Mr Declan Buckley SC) sought clarification of the Judge's remarks in response to which the Judge emphasised that no inference was to be drawn from them – he explained that he had read the Murphy Report and was aware of the issues discussed there and had acted (while in practice as a solicitor prior to his appointment as a judge) for two priests who had been involved.[107] The Judge accepted that there was a significant difference between the matters covered by the Murphy Report and the circumstances of the case at hearing. At that stage Ms Reilly indicated that her side had taken the view that they would wait until the transcript was available

[105] Day 8, page 13.

[106] Day 8, page 15.

[107] Day 10, page 68.

"*to see the sequence of questions and the answers and when the observation arose and the context."* [108]

215. Ms Reilly concluded her cross-examination of Ms McDonald in the course of Day 8. Mr McDonagh then began his cross-examination of her, which continued for the remainder of that day, the entirety of Day 9 and into Day 10. On the morning of Day 9, Ms Reilly had indicated that there was a "*matter*" that she wished to bring to the attention of the Court, though the nature of that "*matter*" was not identified. Then, immediately after the evidence of Ms McDonald had concluded on Day 10, she made a formal application for the Judge to recuse himself.

216. The Judge's comments about the Murphy Report – so it was said by Fr Conroy and the School, first to the High Court Judge and then to this Court – indicated that the Murphy Report had been "*incorporated into the evidence*" by the Judge and that the Report caused him to be sceptical of questions and evidence that might suggest that Fr Conroy might be innocent of the allegations against him. It was pointed out to the Judge that a former Bishop of Ferns – who had been the principal focus of the Murphy Report – was listed as a witness for the Third Defendant (though the Judge indicated that he had been unaware of that fact). Concern was also raised about the Judge's disclosure that he had acted for a number of priests from the Ferns Diocese. In general, it was submitted to the Judge that the threshold for objective bias identified in the caselaw had been met. That

[108] *Ibid.*

the action had been at hearing for a considerable number of hearing days was, it was suggested, not a relevant consideration.[109]

217. The recusal application was made "*totally out of the blue*", according to Mr Fitzgerald and, in the circumstances, he sought time to respond which the Court afforded to him. He made his responding submissions on behalf of Ms McDonald and Fr Conroy and the School replied to those submissions on Day 11 (13 January 2017). The Judge then gave a brief ruling on Day 12 (10 February 2017). He rejected the contention that he should recuse himself, laying emphasis on the judicial oath he had taken and commentating sharply on the timing of the application and the consequences for Ms McDonald in the event that the application was granted. The hearing then resumed, though not immediately.

218. As regards the timing of the recusal application, I can readily understand that Ms Reilly for Fr Conroy required an opportunity to consider the Judge's remarks and to obtain instructions from her solicitors as to how to proceed. The School was in the same position. However, the action was at trial, Ms McDonald was in the witness-box and, in these circumstances, it was imperative that any recusal issue would be addressed as soon as possible. Furthermore, the issue was one which arose from comments made by the Judge in the course of the hearing. No investigation or inquiry was involved. If it did not seem immediately obvious to Fr Conroy and to the School that the Judge's

[109] Day 10, pages 65-66 (per Mr McDonagh SC)

comments gave rise to a reasonable apprehension of bias, it would seem to follow that there was no proper basis to ask him to recuse himself.

219. In these circumstances, a decision one way or another should have been made promptly. If some limited time was needed to take instructions, it might have been wise for the Appellants to ask for a short adjournment for that purpose. In the event, the application was not made until Day 10. The explanation for that delay – apart from the Appellants' need to obtain instructions – was that Ms McDonald was in the witness box and it appeared to be appropriate to allow her evidence to conclude before raising the issue of recusal. While I can understand that position to a point, the decision was not one for the Appellants alone to make, without reference to the Judge or to Ms McDonald and her legal team. Instead, the intended application should have been mentioned to the Court as soon as a decision was made to bring it and the timing of the application could then have been discussed with input from all parties and the Judge would then have been in a position to decide whether to hear the application immediately or whether to defer it until the conclusion of Ms McDonald's evidence.

220. Instead, Ms McDonald was cross-examined by the School – for part of Day 8, all of Day 9 and part of Day 10 – without any indication to the Judge (beyond the cryptic comment made by Ms Reilly at the start of Day 9) or to Ms McDonald's legal team that the Appellants intended to seek the Judge's recusal immediately on the conclusion of her evidence. Mr Fitzgerald's statement that the application came "*totally out of the blue"* does not appear to have been challenged in any way. It is very surprising – to put it at its lowest – that, in the circumstances here, counsel for Ms McDonald should learn

that Fr Conroy and the School were seeking the recusal of the Judge only when counsel for Fr Conroy stood up to move the recusal application.

221. In any event, the Judge heard the application and ruled against it. In his ruling he referred to a number of the authorities that had been opened to him and identified the correct test. He expressed concern at the prospect that, if the application was granted, there would be a retrial at which Ms McDonald would have to give evidence again and would be subject to cross-examination again, with the cross-examiners having the advantage of being "*armed with the transcript*". It is said that the Judge was not permitted to have any such concern. The Appellants – particularly the School – say that the Judge was precluded from having any regard whatever to the practical consequences of acceding to the application to recuse himself, relying on observations made by Irvine J in this Court in *Commissioner of An Garda Siochana v Penfield Enterprises* [2016] IECA 141 to the effect that "*inconvenience, costs and delay do not ... count in a case where the principle of judicial impartiality is properly invoked*." [110]

222. That, no doubt, is so. But it seems to me that the Judge's remarks here were directed to something else, namely the specific prejudice to Ms McDonald (not to the other parties) that would potentially follow if the Judge were to recuse himself. That prejudice arose, at least in part, from the fact that Ms McDonald's cross-examination had continued to conclusion after the Judge had made the comments complained of. If the recusal application had been made in a timely way – or at least flagged to the Court in a timely

[110] Citing *AWG Group Limited v. Morrison* [2006] 1 WLR 1163 at 1166

manner – then it is possible that Ms McDonald would not have been cross-examined by the School at all prior to the determination of the recusal application. Whether or not the Judge considered that the approach of Fr Conroy and the School was tactical (and he was invited to take that view by Ms McDonald), he was, in my view, entitled to have regard to the reality of the situation that presented itself as a result of the approach they had taken: see the comments of McMenamin J in *Goode Concrete v CRH Plc* [2015] IESC 70, [2015] 3 IR 493, at paragraph 146.

223. In any event, nothing urged on this Court on appeal has persuaded me that the Judge's ruling ought to be set aside. The principles applicable to applications of this kind were not in any significant dispute and were considered by me in some detail in my judgment in *In the matter of Permanent TSB Group Holding Plc* [2020] IECA 1. There it was said that comments made by the High Court judge indicated pre-judgment. The High Court judge rejected an application to recuse himself (made in advance of the substantive hearing) and that holding was affirmed on appeal to this Court. Having reviewed the authorities, I expressed the view that the threshold for recusal on grounds of prejudgment – at least where the application was based on comments made in the course of proceedings – is a relatively high one: see paragraph 60.

224. In my opinion, the application for recusal did not come close to meeting the applicable threshold. The Judge merely expressed scepticism about a particular line of questions that Ms Reilly was pursuing. The premise for that line of questions – that it was "*highly unlikely*" that two different priests in the Ferns Diocese would initiate texting with a young person – appears to have no apparent factual or logical foundation and in the

circumstances, the Judge was perfectly entitled to express scepticism about the basis for these questions.

225. That the Judge referred to the Murphy Report in this context does not, in my opinion, alter the essential position in any way or serve to "*incorporate*" the Report into the evidence.

226. In my view, a reasonably informed observer who was present in the High Court on Day 8 of the hearing, and heard the comments made by the Judge, as well as the subsequent exchanges between the Judge and counsel for the Third Defendant, would not have understood – or had any reasonable apprehension – that the Judge was hostile to the defendants, that he had formed a premature view as to the credibility of Ms McDonald's evidence or that he was going to decide the action by reference to material – the Murphy Report – that was not in evidence before him.

227. In these circumstances, I would dismiss the appeals insofar as they relate to the recusal issue.

Damages/Aggravated Damages

228. In light of my conclusion that the judgment and order of the High Court should be set aside and that all issues must be remitted to the High Court for rehearing, it does not appear necessary or appropriate to express any view on the level of the damages awarded by the Judge, other than to observe that that award would seem to have been

made by reference to the entire period to which Ms McDonald's claim relates. Insofar as that claim relates to events occurring after Ms McDonald's 18th birthday on 22 April 2006 it is statute-barred and it follows that no damages should have been awarded in relation to events after that date. If this Court had had to review the award made by the Judge, that would necessarily have had a material impact on its assessment.

DECISION

229. For the reasons set out above, I would set aside the Judgment and Order of the High Court and direct a rehearing of these proceedings. In the circumstances, I believe that it would be preferable if that rehearing were to take place before a different High Court Judge.

230. In directing a rehearing, I am very conscious of the fact that the parties have already been through a very lengthy hearing in the High Court. I am also very conscious that the proceedings relate back to events in 2004-2007. I am also aware of the fact that the Appellants have long made complaints about delay in the commencement and prosecution of the proceedings on the part of Ms McDonald and the adverse impact of that delay on their defence of the claim. In my opinion, however, the interests of justice clearly require a rehearing of these proceedings, burdensome as that will be for the parties. That is indeed regrettable but, in the circumstances here, it is, in my opinion, unavoidable.

231. I have no doubt but that the High Court will facilitate as early a hearing of the remitted proceedings as is practicable in current circumstances. Any issues that require to be addressed prior to hearing – such as the pleading issues touched on in this judgment as well as any issues concerning compliance with SI 391/1998 – should be addressed by the parties without delay. There may be merit in seeking case management of the proceedings but that will be a matter for the parties.

232. The parties will need to be heard from as regards the form of order to be made by the Court and the issue of costs. I would allow the Appellants 28 days within which to make a written submission on these issues. Any such submissions should be sent to Ms McDonald's solicitors at the same time as being sent to the Court of Appeal Office and she will then have a period of 28 days to respond. The Court will then consider whether any remaining issues can be dealt with on the basis of the submissions or whether a further hearing is required.

In circumstances where this judgment is being delivered electronically, Kennedy J and Ní Raifeartaigh J have indicated their agreement with it.