Record No: 2014/6177P.

THE HIGH COURT

BETWEEN/

MR Y

Plaintiff

– and –

BR EDMUND GARVEY AS HEAD OF THE EUROPEAN PROVINCE OF THE CONGREGATION OF CHRISTIAN BROTHERS

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 3rdFebruary, 2016.

Part 1: Overview

1. Mr Y claims that he suffered sexual abuse as a child. He maintains that this took place while he was at a school operated by the defendant religious order and that the perpetrator of the sexual abuse was a since-deceased lay-teacher at that school. Some of the alleged abuse is claimed to have taken place directly in front of, or in proximity to, other pupils. There is no suggestion that all of those other pupils are dead or are otherwise unavailable to give evidence at trial.

2. The alleged abuse happened in the early- to mid-1960s but Mr Y appears to have repressed his recollection of the sexual abuse until about three years ago. His doctor, a distinguished psychiatrist with long experience of cases of this nature, states the occasion of sexual abuse to Mr Y as a fact, points to the difficulty that Mr Y has had with recalling the abuse that occurred, and suggests that this repression of recollection makes the overall delay between the events complained of and these proceedings "*reasonable and typical*".

3. Mr Y has now brought a claim for damages against the defendant religious order for, *inter alia*, negligence, breach of duty, breach of statutory duty and violation of his constitutional rights by the order, its servants or agents. While every right-thinking person would have a natural sympathy for any alleged victim of sexual abuse, the defendant religious order is of course entitled to a fair trial of any claim against it. The religious order comes now to court contending, in effect, that at this remove in time a fair trial of the within proceedings is impossible and that Mr Y's action ought therefore to be struck out. This Court must decide whether an application of the relevant legal tests does or does not favour the continuation of the within proceedings.

Part 2: Mental Repression

4. The court has seen a medical report on Mr Y prepared by Dr Brendan McCormack, a consultant psychiatrist with considerable experience in dealing with victims of sexual abuse. Dr McCormack begins by stating as a fact that Mr Y "*suffered from severe sex abuse during his childhood"*, recounts what has been described to him of Mr Y's school-time experiences, and deals at some length with the issue of mental repression. Thus he states:

> *"Mr Y described the atmosphere of fear which pervaded the school….Fear of serious consequences is…a typical reason for delay in disclosure of abuse. In order for abuse of this kind to occur it must be kept secret; this is always through fear, either direct threats to the person or of the consequences of disclosure for the child. Disclosure would have involved a challenge to authority. Many patients have described a lack of trust in authorities of all kinds as a result of the fundamental breach of trust by those who were in positions of authority. As was the case for scores of people in this country, the authority and social position of clergy and teachers would have precluded Mr Y from proceeding. In an era when it was often stated that children should be seen and not heard, children were not encouraged that they would be believed….*
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> *Remembering this type of trauma [sexual abuse] is a complex matter as it involves both physical and psychological trauma. There are a number of psychological and physiological theories as to why people suffer long term emotional difficulties following such trauma: all acknowledge the difficulty discussing the trauma and that successful therapy usually involves a re-experiencing of the emotions associated with the trauma. Traumatic memories are inextricably linked to the emotional state in humans: the experience of the trauma [is such that] the events are not fully experienced or worked through at the time they are occurring, but rather are compartmentalised and sequestered away as a means of survival. However this defence is usually only partially successful and the experience periodically emerges in unprocessed forms causing a variety of symptoms such as anxiety, poor sense of self-worth, negative self-regard, depression, nightmares and in some cases vivid images or flashbacks. Discussing the details of these events of the past outside of a therapeutic setting where the memories and emotions can be worked through, can give rise to a severe exacerbation of these and other symptoms. Mr Y has described how difficult and upsetting it is for him to recount these events.*
>
> *It is therefore reasonable and typical for Mr Y to have delayed bringing an action in regard to his past abuse."*

5. So, from a medical perspective, it appears that every understanding falls to be afforded to Mr Y for any delay in commencing the within proceedings.

Part 3: Availability of Witnesses

6. Though it makes for unpleasant reading, and that is to put matters mildly, it is necessary to quote a portion of the Statement of Claim to show that, in the particular circumstances of this case, any suggestion that there is a general unavailability of witnesses to at least some of the alleged instances of abuse rings hollow to the Court. The relevant portion of the Statement of Claim reads as follows:

"In or about the years 1962 to 1965, the Plaintiff was regularly assaulted and sexually assaulted by Mr A. Mr A was a lay/substitute teacher….He was not the Plaintiff's main teacher and in fact taught in another class in [the school]…but he did teach the Plaintiff's class a number of times every year. He often appeared to the Plaintiff to have been drunk during classes, regularly smelt of alcohol and would be missing from school for a few weeks at a time. Mr A, on occasion, requested that the 'good looking boys', in the Plaintiff's words, stay back after class. Mr A would instruct the Plaintiff to masturbate him and this would often be in the presence of other pupils who were also abused by Mr A. During class, while all students had been instructed to write in the copybooks, Mr A called the Plaintiff up to his desk with his copybook. In the classroom there was a main blackboard fixed to the wall with a smaller blackboard on an easel in front of the main blackboard. Mr A would sit on a stool behind this smaller blackboard out of the view of the students. Mr A would talk and joke with the Plaintiff behind the smaller blackboard before taking his penis from his trousers and instructing the Plaintiff to masturbate Mr A behind a blackboard in the classroom, during class, while the other students were still in the classroom….This type of incident of abuse happened to the Plaintiff a number of times, possibly 3, and the Plaintiff is of the opinion that Mr A also abused other boys in his classroom in the same manner.

In addition to having to masturbate Mr A during class, the Plaintiff was also forced by Mr A to perform oral sexual acts on Mr A [outside class but on school premises, it would appear unseen]…"[Emphasis added].

7. Mr A is dead. However, it does not appear that all of the schoolchildren who are alleged in the underlined portions of the above-quoted text (a) to have witnessed the supposed abuse done by Mr A and/or (b) to have suffered similar abuse, are dead, or, for some other reason, could not be called as witnesses. As witnesses they can be questioned, their credibility assessed, and the likelihood determined as to whether they have conspired to tell a horrible lie, or have independently decided that a terrible truth ought at last to be told.

Part 4: Inordinate and Inexcusable Delay?

8. The law applicable to 'strike out' applications has been ploughed and re-ploughed on many occasions in recent years by the superior courts. Notwithstanding that there is helpful Supreme Court case-law in this area, perhaps the most useful recent summary of the applicable precepts is set out at paras. 25 to 39 of the Court of Appeal's decision last year in *Gorman v. The Minister for Justice, Equality and Law Reform and Ors* [2015] IECA41. *Gorman* emphasises the need for administrative efficiency, *i.e*. the efficient despatch of proceedings. However, it would be a mis-reading of *Gorman*, a mis-interpretation of the case-law to which it refers, and a mis-application of Art.6 of the European Convention on Human Rights, to conclude that our system of court-administered justice has evolved to the extent that substantive justice would ever be sacrificed on the altar of administrative efficiency. Moreover, as is evident in *Gorman*, the test in applications such as that now before the court remains as it has been since at least the time of the Supreme Court's decision in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, a decision that involved both a synthesis and a development of previously established principle. Thus the court must ask if there has been inordinate delay. It must ask if there has been inexcusable delay. Then, even if there has been inordinate and inexcusable delay, it must ask where the balance of justice lies. The need for administrative efficiency may pull in one direction and the courts have been more conscious of such 'pullings' in more recent times. Even so, this need is but one factor in the court's considerations. Among those considerations, the need for substantive justice is ever present. *Gorman*, and other cases to which the Court of Appeal makes reference in that case, do no more than tout administrative efficiency as a significant pointer to where the balance of justice lies, but it is substantive justice that remains a constant pole star to which the courts must look when steering their actions.

Part 5: Application of the PrimorPrinciples.

(i) Inordinate delay?

9. Has there been inordinate delay on the part of Mr Y in bringing the within proceedings? 'Inordinate' is a somewhat archaic term, not commonly used in everyday speech, and it is useful to remind oneself of exactly what it means. A Google search of the word brings up the following definition: "*unusually or disproportionately large; excessive*". It also offers the following useful synonyms: "*excessive, undue, unreasonable, unjustifiable, unwarrantable, disproportionate, out of all proportion, unconscionable, unwarranted, unnecessary, needless, uncalled for, exorbitant, extreme, outrageous, preposterous*". Given the mental repression that Dr McCormack indicates to present in Mr Y's case – it appears that Mr Y only recalled the abuse around three years ago – it defies belief that the defendant could contend, let alone that it would expect the court to find (and, for the avoidance of doubt, the court does not find) that Mr Y's delay is in any way inordinate by reference to the circumstances at hand, never mind "*excessive, undue, unreasonable, unjustifiable, unwarrantable, disproportionate, out of all proportion, unconscionable, unwarranted, unnecessary, needless, uncalled for, exorbitant, extreme, outrageous, [or] preposterous"*.

(ii) Inexcusable delay?

10. Has Mr Y's delay been "inexcusable"? A Google search for the word "inexcusable" brings up the definition "*too bad to be justified or tolerated*", and such synonyms as "*indefensible, unjustifiable, unjustified, unwarrantable, unwarranted, unpardonable, unforgivable*". For much the same reasons as were given under the previous heading – in effect, the mental repression presenting and the fact that Mr Y appears only to have become aware of the abuse around three years ago – is inexcusable or, indeed, "*indefensible, unjustifiable, unjustified, unwarrantable, unwarranted, unpardonable*, [or] *unforgivable*".

(iii) Balance of justice?

11. As the court has concluded that the delay arising in the within proceedings is neither inordinate nor inexcusable, it is not strictly necessary for it to consider where the balance of justice lies in the within proceedings. However, for the sake of completeness it does so.The critical question that arises for the court in this regard is, to borrow from the phraseology of Lord Diplock in *Allen v. Sir Alfred McAlpine & Sons Limited* [1968] 2 Q.B. 229, 254, whether justice has been 'put to the hazard'. But what is 'justice' in this context? Justice in the form of allowing the continuation of Mr Y's attempt to secure redress from the courts for what he claims happened to him? Or justice for a religious order against which that attempt is directed and which already derives advantage from the fact that the burden of proof when it comes to Mr Y's establishing his claim – a burden that is not lightly discharged or readily satisfied –falls on Mr Y?

12. The defendant religious order, for its part, points to the fact that the alleged abuser is dead, and that there is limited (but not a complete absence of) documentation available to it to defend its case. The religious order invokes *Whelan v. Whelan* [2014] IESC 75, where Hardiman J., at para.18 of his judgment, emphasises the need for "*mutuality*" in court proceedings. And it places reliance too on a not dissimilar finding by the Court of Appeal last year in *Cassidy v. Provincialate* [2015] IECA 74. A couple of points might be made in this regard:

- first, when it comes to *Whelan*, it is well to remember the truly exceptional circumstances that presented in that case:

there the plaintiff sued her maternal grandfather in relation to historical child sexual abuse; prior to the proceedings coming on, the plaintiff's grandmother died, the grandfather became senile and was made a ward of court, and the true defendant was the grandfather's personal representative, an individual who likely had no connection to the case apart from being in the unenviable position of having to defend it. Moreover, in *Whelan* the case concerned sordid acts done secretly; this case concerns like acts allegedly done to a schoolboy in a school-building and in some instances before or close by other pupils.

- second, it is not enough for a defendant to point to the fact that one person, however important to a case, is dead, and then 'sit back on its laurels', confident that this in and of itself is sufficient to ensure that an application such as that now before the court will be decided in its favour. Indeed in *Cassidy*, for example, the court stated, at para.60, that it was not just the death of the alleged abuser but "*of all the other witnesses…[that] puts the matter beyond doubt*" – so some doubt still presented despite the death of the alleged abuser. Here, as mentioned above, the sexual abuse that Dr McCormack states to have been perpetrated upon Mr Y, took place not just within a school but before other school-pupils, and there is no suggestion that all of those pupils are dead or, for some other reason, unavailable as witnesses.

13. Given (i) the mental repression of recollection to which Mr Y has been subject, (ii) that the burden of proof lies on Mr Y in the prosecution of his claim (a fact which has to tend to even the scales of justice), and (iii) that there is also an apparent availability of witnesses, the court – if it were required to consider where the balance of justice lies and, for the reasons stated above, it is not – would have concluded that it was preferable to allow Mr Y to proceed with his action. It seems to this court too that for the still-surviving teachers (lay and religious) who worked at the relevant school throughout the period when Mr Y was a pupil there, and who never did any wrong, there is something of a public interest on their part in seeing that alleged wrong-doers, and those who had responsibility for them, are capable of being and are pursued in litigation. In that way the good name of those who never did any wrong seems more fully preserved, while any wrong-doers and any who were responsible for them and who did not properly discharge that responsibility properly, are publicly held to account when victims so seek and the legal prerequisites to the commencement and continuation of such proceedings by those victims are – as here – satisfied.

Part 6: The European Convention on Human Rights and the Requirements of Constitutional Justice

14. In approaching the issue of delay and want of prosecution, the European Convention on Human Rights, in particular Art.6 thereof, is clearly relevant. Indeed, under s.4 of the European Convention on Human Rights Act 2003, the court is required to take judicial notice of, *inter alia*, the terms of the Convention, and judgments of the European Court of Human Rights. It seems to this Court that application of the *Primor* principles necessarily involves the High Court in precisely the type of analysis that the European Convention on Human Rights implicitly apprehends. So having arrived at the findings that it has reached in the context of the *Primor* principles – in effect that Mr Y's case can proceed – the court does not consider that it is required to reach an alternative result by separate reference to the European Convention on Human Rights. Nor, the court notes in passing, does it consider that the Constitution somehow intrudes upon the court's application of the *Primor* principles so as to require a different result. This is because the *Primor* principles already seek to give effect to the requirements of constitutional justice and to accord more generally with the Constitution, including but not limited to Art.34.1 thereof.

Part 7: The Statute of Limitations

i. Overview

15. The religious order has also claimed in the within application that Mr Y's action is barred under the Statute of Limitations. The court does not accept that this is so. To understand why the court has reached this conclusion, it is necessary to consider s.2 of the Statute of Limitations (Amendment) Act 2000 in some detail. Section 2 inserted into the Statute of Limitations 1957 a new s.48A which states as follows:

> *"48A. –(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.*
>
> *(2) This section applies to actions referred to in subsection (1) whether the cause of action concerned accrued before or after the passing of the Statute of Limitations (Amendment) Act, 2000, including actions pending at such passing.*
>
> *(3) An action referred to in subsection (1), that but for this subsection could not, by virtue of this Act, be brought, may be brought not later than one year after the passing of the Statute of Limitations (Amendment) Act 2000, provided that, after the expiration of the period within which such action could by virtue of this Act have been brought, but prior to 30 March, 2000 –*
>
> *(a) the person bringing the action obtained professional legal advice that caused him or her to believe that the action could not, by virtue of this Act, be brought, or*
>
> *(b) a complaint to the Garda Síochána was made by or on behalf of such person in respect of the act to which the action relates.*

(4) Subsection (3) shall not apply to an action referred to in subsection (1) where final judgment has been given in respect of the action.

(5) This section is in addition to and not in substitution for section 48 of this Act.

(6) For the purposes of this section, a judgment shall be deemed to be a final judgment where –

(a) the time within which an appeal against the judgment may be brought has expired and no such appeal has been brought,

(b) there is no provision for an appeal from such judgment, or

(c) an appeal against the judgment has been withdrawn.

(7) In this section –

'an act of sexual abuse' includes –

(a) any act of causing, inducing or coercing a person to participate in any sexual activity,

(b) any act of causing, inducing or coercing the person to observe any other person engaging in any sexual activity, or

(c) any act committed against, or in the presence of, a person that any reasonable person would, in all the circumstances, regard as misconduct of a sexual nature:

Provided that the doing or commission of the act concerned is recognised by law as giving rise to a cause of action;

'full age' means –

(a) in relation to a person against whom an act of sexual abuse was committed before the commencement of the Age of Majority Act, 1985, 21 years, and

(b) in relation to a person against whom an act of sexual abuse was committed after such commencement, full age within the meaning of that Act;

'professional legal advice' means advice given by a practising barrister or solicitor in circumstances where the person to whom the advice was given sought such advice for the purpose of bringing or prosecuting an action to which subsection (1) applies, whether such an action was brought or not."

ii. Summary account of s.48A

16. There is a lot to s.48A, but what, in essence, does it provide?

17. Section 48A(1) provides that a person bringing an action founded on tort in respect of an act of sexual abuse committed against him, during minority (an "Action"), falls to be treated as being under a disability while he is suffering from any psychological injury caused by that act or any other act of the transgressor and the psychological injury is of such significance that his will or his ability to make a reasoned decision to bring that action is substantially impaired. Notably, the legislation does not define what is meant by a "*psychological injury*".

18. Section 48A(2) makes clear that s.48A applies to an Action, whether the cause of action accrued before or after the Act of 2000, including actions pending upon the Act passing.

19. Section 48A(3) provides that a plaintiff who had been sexually abused while a minor but who had ceased being under a disability for a period in excess of the applicable limitation period had, subject to certain criteria being satisfied, an additional period of one year after the passing of the Act of 2000 to bring proceedings. Fifteen years on, any actions which relied on s.48A(3) will presumably have concluded.

20. Section 48A(4)–(6) make certain ancillary provisions that are not of relevance to the within judgment.

21. Section 48A(7) defines the terms "*an act of sexual abuse", "full age"* and "*professional legal advice"*.

iii. Some points of note about s.48A

22. There are a few points worth noting about s. 48A before the court proceeds to applying it to the facts now presenting.

23. First, as regards the definition of an "*act of sexual abuse"* it is clear from s.48A that the conduct involved must constitute a tort. However, physical contact is not required. There is no reason apparent from the wording of the Act, and certainly no reason in principle, as to why, for example, an assault or the intentional infliction of emotional distress would not come within the ambit of an "*act of sexual abuse*".

24. Second, of particular relevance to the within proceedings, s.48A applies not just to claims against alleged abusers but also, as s.48A(1)(b) makes clear, against third parties. *i.e. "a person…other than the person who committed* [the abuse]"and against whom some form of vicarious liability is alleged, as in the within proceedings.

25. Third, one possible oddity presenting in s.48A is that, if one looks to s.48A(1)(i), it refers to the presence of "*any psychological injury that…is caused….".* An ostensible difficulty that arises with this wording is that it might seem to require the court to conclude, even in the context of the within application, that there is a psychological injury that has been caused by the alleged abuser. That clearly is something that cannot be finally determined in an application such as that now presenting. Yet the application of the Statute of Limitations is something that has been pressed upon the court and which requires to be addressed; and no-one's interests would be served by allowing this matter to proceed to a full hearing only for the court of trial to conclude at the end of the day that the Statute of Limitations applies. It seems to this Court that the correct way to approach matters, so as to arrive at a reasoned assessment of the justice of the case, is for it to form a provisional view as to the end-outcome but, to borrow from the wording of Clarke J. in *O'Tuama v. Casey* [2008] IEHC 49 at para. 4.2, to "*refrain from expressing any view on the merits or otherwise of the competing arguments save such as is necessary to determine the application before* [it]".

26. Fourth, more generally, it is clear, and notable, that s.48A reflects an approach by our elected lawmakers that broadly favours the bringing of actions in respect of historical child sexual abuse.

iv. Application of s.48A to the facts now presenting

27. Turning to s.48A, the court concludes that (i) the type of action now presenting is a type of action contemplated by s.48A(1), (ii) the evidence of Dr McCormack, quoted above, points decidedly to the presence of some form of psychological injury of the type, and with the effects, contemplated by s.48A(1), (iii) the within proceedings come within s.48A(2), (iv) the action now presenting is not one affected by s.48A(3), (v) s.48A(4) is not relevant to the within application, (vi) s.48A(5) does not have any implications for the within application, and (vii) s.48A(6) is not relevant to the within application. In reaching the foregoing conclusions, the court has had regard to the definitions in s.48A(7). Having regard to the foregoing, the court considers that the bringing of Mr Y's proceedings is not precluded by s.48A of the Act of 1957. Of course, having reached this conclusion the court is mindful of the observation of Hogan J. in I v. J [2012] IEHC 327, para.[4] that: "*It is not enough…for the plaintiff to show that the action is not statute-barred….The real question…is whether…proceedings should be struck out on grounds of undue delay, independently of the Statute of Limitations.*" For all of the reasons elaborated upon previously above, the court does not consider that the within proceedings should be struck out on grounds of undue delay, independently of the Statute of Limitations.

Part 8: Conclusion

28. For all of the reasons stated above, insofar as Mr Y's proceedings relate to alleged sexual abuse, the court declines to strike out these proceedings on any of the grounds identified by the defendant religious order.

29. It would be wrong for this Court to express any view of its own on whether or not Mr Y has suffered the sexual abuse that he claims; that will be for the court of trial to decide. But if he has suffered such abuse, whether in the manner alleged in these proceedings or otherwise, this Court would express the respectful hope that in time he will find that peace of mind to which he stands ever entitled.