Neutral Citation Number: [2008] IEHC 407

THE HIGH COURT

2003 4074 P

BETWEEN

P.K.

PLAINTIFF

AND
STEPHEN DEIGNAN, MATHEW GAFFNEY AND THE MINISTER FOR EDUCATION

DEFENDANTS

Judgment delivered by Ms. Justice Dunne on the 2nd day of December, 2008

1. This is an application on behalf of the first named defendant herein to have these proceedings dismissed against the first named defendant on the grounds of inordinate and inexcusable delay in instituting and prosecuting these proceedings. The first named defendant herein is sued in a representative capacity, on behalf of the De la Salle Order of Brothers, (the Order).

2. The plaintiff attended a national school run by the Order between 1953 - 1960. It is alleged that during that period, he was subjected to systematic and frequent physical, psychological and sexual assaults by the Brothers of the Order. As a result, it is alleged that the plaintiff suffered severe personal injuries, loss, damage, psychological trauma and distress.

3. The proceedings herein were commenced by plenary summons issued on the 31st March, 2003. A statement of claim was delivered on the 9th March, 2005. A notice for particulars was raised on behalf of the first named defendant on the 16th May, 2005. Replies to particulars were furnished in response dated 26th July, 2006. A defence was delivered on the 28th May, 2007. The notice of motion in respect of this application is dated the 7th August, 2007, and is grounded upon an affidavit of Brother Pius McCarthy and a replying affidavit was sworn herein by the plaintiff on the 29th November, 2007.

4. The particulars of assault and sexual assault set out in the statement of claim in respect of the order were in general terms. It was alleged:-

> 1. The plaintiff was regularly psychologically demeaned by the Brothers of the Order by instilling in him a feeling of worthlessness and inadequacy;
>
> 2. He was frequently slapped and strapped. On one occasion, his hands were strapped so severely he believed he was about to pass out. His hand became numb and swollen;
>
> 3. He was sexually assaulted on a regular basis by touching and interfering with the plaintiff's genitals.

5. No detail was given in the statement of claim as to the identity of the perpetrator or perpetrators of these acts.

6. In the replies to particulars, the plaintiff gave more detail as to the nature of the assaults and named the individuals alleged to have carried them out.

> Brother V. is alleged to have physically assaulted the plaintiff.
>
> Brother J. is alleged to have denigrated his intelligence.
>
> Brother M. is alleged to have subjected the plaintiff to psychological assaults.
>
> Brother F. is alleged to have neglected him.

Finally Brother C. is alleged to have sexually assaulted the plaintiff during class by inappropriately touching him.

7. At the time of the matters complained of by the plaintiff, he was aged between six and twelve years approximately. It appears from the affidavit of Brother Pius McCarthy that the first complaint received by the Order from the plaintiff as to these matters was by way of a solicitor's letter in June 2002.

8. The first named defendant has in the defence delivered herein, pleaded, *inter alia*, as follows:-

> "Consequent upon the inordinate and inexcusable delay in the intuition of the within proceedings the first named defendant has been prejudiced in connection with its defence of same. The first named defendant reserves the right to apply at or before the hearing hereof to strike out the within proceedings consequent upon the said delay."

9. In the affidavit grounding this application Brother Pius McCarthy deals with the issue of inordinate and inexcusable and the issue of prejudice. I now want to refer to the matters relied on in the grounding affidavit in the context of delay. It should be noted that this is a case in which the first named defendant relies on pre-commencement delay and delay since the issue of the proceedings.

Pre-commencement delay

10. The plaintiff apparently commenced school in 1953. In the plenary summons it was stated that abuse commenced in the years 1957 - 1959. In the statement of claim it is alleged that the abuse occurred between the years 1953 - 1959. In replies to particulars it is clear that the abuse is alleged to have continued up to the year 1960. Accordingly, the earliest date of which complaint is made appears to be in 1953, some 50 years prior to the issue of the plenary summons herein and the latest complaint appears to be related to the final school year of the plaintiff with the Order commencing in August 1959 and presumably concluding in July 1960, some 43 years prior to the commencement of these proceedings.

11. One other aspect of pre-commencement delay referred to in the grounding affidavit relates to the period after the receipt of the letter from the plaintiff's solicitors of the 27th June, 2002, in which complaint was first made. That letter was in very general terms and did not identify the nature of the abuse alleged or the alleged perpetrators of that abuse. The first named defendant's solicitors responded asking:-

> "With regard to the allegations contained in your letter we would be obliged to receive full and detailed particulars of the

serious physical and sexual abuse of which your client complains and also to learn the identity of the person who committed such acts."

12. By way of reply, the first named defendant's solicitors were informed that papers had been sent to counsel to draft a plenary summons and statement of claim and that full details would be set out in the statement of claim.

Post-commencement delay
13. The plenary summons as mentioned before was issued on the 31st March, 2003. The first named defendant's solicitors had sought details of the allegations being made by the plaintiff in letters both before and after the issue of proceedings. (7th August, 2002, 24th February, 2003 and 16th March, 2004.) No details were forthcoming. Delay in the delivery of a statement of claim led the solicitors for the first named defendant to write by letter dated the 29th July, 2004, advising of the intention to bring an application to strike out for want of prosecution. A further reminder was sent by letter dated the 18th February, 2005. Ultimately the statement of claim was delivered in March 2005.

14. Particulars were raised on the 16th May, 2005 to which replies were furnished by replies to particulars dated the 26th July, 2006. The defence herein was delivered on the 28th May, 2007. This notice of motion was issued and a replying affidavit of the plaintiff was filed in March 2008. Thus, complaint is made of the delay in delivering a statement of claim and in furnishing particulars of the plaintiff's claim.

Prejudice
15. Three of the Brothers named by the plaintiff as having been responsible for the alleged physical and sexual abuse complained of, were dead by June 2002, when complaint was first made by the plaintiff. They were not in any event named until 2006. One of the Brothers, Brother V. was still alive in 2006 but was unfit to give instructions. He died in April 2007. When the allegations were first made and while the perpetrators remained unidentified, he was approached with regard to the plaintiff's allegations. He did not recall the plaintiff and denied ever having abused any boy or having heard of any allegations of abuse by any Brother or teacher in the school. By the time he was identified as one of those alleged to have abused the plaintiff, his health had deteriorated and he was unable to give instructions in respect of those allegations.

16. Only one of those alleged to have been involved is alive, Brother M., and he is now 76 years of age approximately and is unwell. He was shocked at being named as one of those who abused the plaintiff.

17. The contention on the part of the first named defendant is that as a result of the delay in making any complaint, it has not been possible to conduct any proper investigation into the complaint. Three of those concerned were dead prior to the making of the complaint, one had died as long as 17 years prior to the furnishing of particulars of the complaint. One has died since the making of the complaint. Of the five brothers working at the school at the relevant time, only one is available and he denies the allegations against him and is unable to assist in dealing with the allegations against the other Brothers. It is the view of the Order that by reason of the delay, they are not in a position to defend this claim. Particular concern is expressed that although the plaintiff apparently first disclosed the allegations to a Dr. Donald D. St. Louis in 2000, it was not until 2002, that he first notified the Order of his complaint and did not identify the alleged perpetrators until 2006.

The plaintiff's replying affidavit
18. The first point on which the plaintiff takes issue relates to the correspondence which was exchanged between the parties prior to the issue of proceedings. He notes that there was no denial of his complaints; rather there was a request for the basis on which it was contended that the Order was under any liability to the plaintiff. Therefore, it was his contention that there was no meaningful response in the course of correspondence. He also asserted that the first named defendant was aware of the issue of delay and their right to apply to strike out the proceedings at an early stage. (See the letter of 24th February, 2003, from the solicitors for the Order to the solicitors for the plaintiff).

19. Secondly the plaintiff is critical of the investigation carried out by the first named defendant following the receipt of the complaint in June 2002. Given that two of the five Brothers who taught at the school at the relevant time were alive in 2002, he complained that no effort was made to interview them and indeed it was not until 2005, that an effort was made to interview Brother V.

20. The plaintiff notes that there is a denial by Brother V. of having abused any boy or of having heard of any abuse. However, the plaintiff stated that he does not accept that this is a true account. He refutes the suggestion that the first named defendant was in any way hindered in conducting any inquiry or investigation.

21. The plaintiff then referred at length to the effects of the abuse and described his manner of dealing with this in the course of his life and work. He indicated that he had attended counselling and therapy since 1992. Further, he stated that his ability to confront his abusers was impaired by his psychological and psychiatric condition. He exhibited a report of the psychotherapist, Donald D. St. Louis, in this regard.

22. He accepted that there had been delay on his part in bringing the proceedings but said that the wrongful acts of the defendants including the first named defendant are the cause of the delay. He added that the balance of justice lay in favour of the proceedings being allowed to continue.

Principles of law
23. There is a large volume of case law dealing with the issue of delay. The jurisdiction in respect of delay arises in a number of different contexts, e.g. the failure to deliver a statement of claim or other pleading by a plaintiff or to set down an action for trial; an application to extend time for delivery of a statement of claim or to renew a plenary summons; or cases such as this where proceedings are commenced long after the events complained of, to give but a few examples. There is some debate in the case law as to the appropriate test to be applied having regard to the circumstances applicable in the particular cases.

24. In the course of argument and in written submissions reference was made to a number of the leading cases in the area of delay. Among the cases referred to were *O'Domhnaill v. Merrick* [1984] I.R. 151, *Toal v. Duignan and Others (No. 1)* [1991] I.L.R.M. 135, *Toal v. Duignan and Others (No. 2)* [1991] I.L.R.M. 140 *and Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, the latter case being of particular assistance in regard to the principles set out therein.

25. Reliance was also placed on the cases of *Kelly v. O'Leary* [2001] 2 I.R. 256, *McH. v. M.* [2004] 3 I.R. 385, *Manning v. Benson and Hedges Limited* [2005] 1 I.L.R.M. 190, *Kearney v. McQuillan and NEHB*, (Unreported, High Court, Dunne J., 31st May, 2006), *Stevens v. Flynn Limited* [2005] I.E.H.C. 148 and *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290. The principles set out in the *Primor* case referred to above are now referred to in many cases in which the issue of delay is considered. I propose also to refer to those principles which

fall to be considered in this case also. Hamilton C.J. at p. 475 of his judgment stated as follows:-

> "The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:-
>
> (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
>
> (i) the implied constitutional principles of basic fairness of procedures,
>
> (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
>
> (iii) any delay on the part of the defendant - because litigation is a two party operation, the conduct of both parties should be looked at,
>
> (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
>
> (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
>
> (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
>
> (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

26. As I have said the principles set out in Primor are frequently cited in cases involving applications to strike out for want of prosecution on the grounds of delay. Delay as pointed out above can occur in different ways. There may be delays in the actual prosecution of a case or the case may be one which was not commenced for many years after the cause of action concerned accrued. It is possible to see some different approaches emerging in some of the decisions of the High Court in regard to the latter type of case. I think it might be helpful to look at the decision of the court in case of *Kelly v. O'Leary* referred to above. That was a case in which the plaintiff sought damages in negligence in respect of physical and mental injuries arising from events alleged to have occurred between 1934 and 1947. That action commenced on the 26th March, 1998, in excess of 50 years from the date of the last alleged wrongful act. The defendant sought to invoke the inherent jurisdiction of the court to dismiss the action due to the remove in time between the alleged wrongful acts and the commencement of proceedings. It was held *inter alia* by Kelly J. that an inordinate and inexcusable time had elapsed between the alleged acts and the commencement of proceedings, giving rise to a real and serious risk of an unfair trial. It was also held the courts had an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice requires them to do so, even where proceedings had been instituted within the relevant limitation period and this jurisdiction was expressly recognised in the Statute of Limitations (Amendment) Act 2000. It was further held that in the instant case the test to be adopted in considering the issue of delay was whether (a) there had been an inordinate and inexcusable delay; (b) if so, whether, on the facts, the balance of justice was in favour of or against the proceeding of the case. Finally it was held that constitutional principles of fairness of procedure required dismissal of an action in circumstances where there was a clear and patent unfairness in asking the defendant to defend the action after the lapse of time involved. In the instant case actual prejudice had occurred and the defendant had not contributed to the delay.

27. Kelly J. noted at p. 538:-

> "In *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135 Finlay C.J. delivering the judgment of the Supreme Court said at p. 139:-
>
> 'In the High Court it was held by Keane J. that the case was governed by the decision of this Court in *Ó Dómhnaill v. Merrick* [1984] I.R. 151. I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this Court in that case, but they may be summarised in their application to the present appeal as being that where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action.'"

28. Kelly J. then went on to set out the principles summarised by Hamilton C.J. in the *Primor* case to which I have already referred. He then continued at p. 539 of his judgment as follows:-

> "Counsel for the defendant suggests that this case was principally concerned with delays which had taken place in the conduct of proceedings which were instituted within the normal limitation period. He says that the court was dealing with delays which took place in the conduct of those proceedings post initiation. In the other cases which I have cited the court was concerned with delays which occurred between the events complained of and the commencement of proceedings. He suggested that this case more closely resembled those and that, therefore, the threefold test adumbrated by Hamilton C.J. in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 was not applicable but rather the arguably broader approach succinctly summarised by Finlay C.J. in *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135.

He submitted that there are in fact two quite separate tests. One is that suggested in *Ó Dómhnaill v. Merrick* [1984] I.R. 151 and *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135 which deals with delays between the acts complained of and the commencement of proceedings. The other is the *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 test which deals with delays post the institution of proceedings.

Counsel for the plaintiff accepts that *Ó Dómhnaill v. Merrick* and *Toal v. Duignan,* did not require the establishment of both inordinate and inexcusable delay before considering the balance of justice. But he contends that in accordance with *Primor Plc. v. Stokes Kennedy Crowley* the defendant here must satisfy the more stringent threefold test there prescribed before the order sought could be granted.

I do not propose to answer the interesting question as to whether or not there are two different tests. Rather I will for the purpose of this case apply the *Primor Plc. v. Stokes Kennedy Crowley* test which is the more demanding of the defendant and the more favourable to the plaintiff. It was the test urged by counsel for the plaintiff and is in ease of her. The issue of principle, if there is one, will have to be left to another day."

29. A somewhat different approach appears to be discernable from the decision in the case of *McH. v. M.*, a decision of Peart J. In that case the plaintiff sought damages for personal injuries sustained in the 1940s as a result of alleged acts of sexual abuse perpetrated by the first named defendant whilst the plaintiff was a pupil at national school. Proceedings issued on the 28th June, 2001, 57 years after the last alleged incident of abuse. By notice of motion, the third defendant who had been sued in his capacity as a trustee of the said school, applied to the High Court for an order dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay and/or an order striking out the plaintiff's plea in respect of fraudulent concealment. On behalf of the plaintiff it was submitted that her delay in issuing proceedings was excusable having regard to her medical history as set out in the affidavit sworn on her behalf by her medical advisers. It was argued that the third defendant could not succeed as the plaintiff's delay was not therefore inordinate and inexcusable. Without prejudice to this contention, it was further submitted that the third defendant had suffered no prejudice as a result of the plaintiff's delay as his principle defence was based on a legal argument that vicarious liability did not attach to the actions of the first defendant. In that case Peart J. refused to dismiss the plaintiff's claim in its entirety, but did dismiss her claim in respect of fraudulent concealment. He found that whereas the delay on the part of the plaintiff was inordinate, it was not inexcusable having regard to the medical evidence adduced on behalf of the plaintiff. He also found that the prejudice to the third defendant, if any, did not outweigh the prejudice to the plaintiff in the event of her claim being dismissed on the grounds of delay. In the course of his judgment at p. 395, he stated:-

"I am of the view that there are two separate and distinct tests, one, the test set out *in Primor Plc v Stokes Kennedy Crowley* in respect of post-commencement delay, and the other, the *Toal v. Duignan (No. 2)* [1991] I.L.R.M 140 test, if I can so describe it, in respect of pre-commencement delay. First of all, the distinction reflects the different and respective contexts in which the delay took place in each case. But besides that, I am of the view that there are sound and logical reasons why the test in each instance ought to be different.

In the case of post-commencement delay, it is usually the case that the proceedings have been commenced within the period permitted by the Statutes of Limitations, although that fact of itself does not preclude a court from regarding the delay as inordinate. That would be the case, most often, with a case commenced by a plaintiff who has reached his or her majority, and within three years thereof, institutes proceedings in respect of a claim which arose sometime during his or her minority. But in most cases, the proceedings would be commenced within three years of the event giving rise to the claim, and again in most cases, a defendant would have notice of the likelihood that proceedings will be commenced before commencement. The delay giving rise to a motion to dismiss arises only out of delay in the actual prosecution of the case to trial. In the case of inordinate delay, there can be some reasons which are regarded as excusable, and others which are not. Even in the case of reasons which do not excuse or justify the delay, there will in many cases be no real or significant prejudice to the defendant. For example, in a claim for damages for personal injuries arising out of a traffic accident, there could easily be, and probably often is, a delay of six months since the entry of an appearance by the defendant and the delivery of the plaintiff's statement of claim. The reason for that delay might be simply be that the plaintiff's solicitor never got round to doing it. That is an inordinate and inexcusable delay, but the court would go on and consider the balance of justice issue, and might well decide that to dismiss the plaintiff's claim would be an unnecessarily draconian consequence of that type of delay. If, on the other hand, there was a justifiable excuse for not delivering the statement of claim, it would make no sense if the court could nevertheless consider the balance of justice and perhaps dismiss the claim, in circumstances where (1) the delay was inordinate in the sense of abnormal or out of the ordinary, and (2) was excusable.

Different considerations, I suggest, arise in relation to pre-commencement delay which is inordinate and yet excusable. There can easily be circumstances in which, in such a case, the balance of justice would be in favour of dismissing the claim. For example, even if Kelly J. had in *Kelly v. O'Leary* [2001] 2 I.R. 526, found that the delay of 50 years was excusable, he could well have reached the conclusion based on the facts and circumstances of that case, that the defendant was so prejudiced as to her ability to defend the proceedings after such a passage of time, that the claim ought not to be allowed to proceed. That inordinate and excusable delay is of such a completely different category to the type of delay outlined *in Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, that it is perfectly understandable that a different rule should apply as to how the courts should assess the significance of the delay. In my view it must follow that the principles enunciation (sic) in *Primor Plc v. Stokes Kennedy Crowley* must be confined to post-commencement delay, and that the wider discretion based on general fairness regardless of whether the delay is excusable or not, should be confined to pre-commencement delay."

30. It is clear therefore that inordinate delay whether it is excusable or not can result in a court dismissing proceedings having regard to the requirements of fairness. In this regard it was submitted on behalf of the first named defendant that it was not therefore necessary to demonstrate both that the delay is inexcusable and results in prejudice. The fact of prejudice by reason of the passage of time requires in and of itself, without regard to the reasons for the delay that proceedings should be dismissed.

31. It is also helpful to look at the decision in the case of *Manning v. Benson and Hedges Limited* [2005] 1 I.L.R.M. 190. The decision in that case related to a claim by a number of plaintiffs for damages for injuries allegedly suffered by reason of the negligence of the defendant. In the cases concerned the injuries alleged included emphysema and lung cancer. Each plaintiff alleged that by reason of the wrongful acts by the defendant, they commenced smoking, became addicted, continued to smoke and by reason of smoking had contracted the relevant disease or illness. The defendants sought orders pursuant to the inherent jurisdiction of the court that the plaintiffs' claims be dismissed. Essentially the grounds of the application were as follows:-

(1) That the plaintiffs' claims be dismissed for want of prosecution on the grounds of inordinate and inexcusable delay on

the part of the plaintiffs in the commencement and prosecution of the proceedings which delay has prejudiced the defendants such that the balance of justice requires that the claims be dismissed.

(2) That the plaintiffs' claims be dismissed in the interests of justice in defence of the defendants' rights under the Constitution including the right to fair procedures and a fair trial.

(3) That the plaintiffs' claims be dismissed as it would be contrary to the defendants' rights to a trial within a reasonable time under Article 6 of the European Convention for the Protection of Fundamental Freedoms and Human Rights (ECHR) to require the defendants to defend themselves against the plaintiffs' claims.

32. Having referred to the decision in the case of *Primor Plc v. Stokes Kennedy Crowley* and the decision in the case of *O'Domhnaill v. Merrick* referred to above, Finlay Geoghegan J. at p. 197 of her judgment stated:-

"In each of the above cases, the Court considered the period between the accrual of cause of action and issue of the plenary summons. Accordingly, it appears to me that the Supreme Court has determined that in considering an application to dismiss for want of prosecution, the court should, in general, consider the period starting with the accrual of the cause of action for the purpose of determining whether there has been a delay by the plaintiff. I say 'in general' as neither of the above cases concerned a personal injuries claim with a 'date of knowledge' within the meaning of s. 3 of the Statute of Limitations (Amendment) Act 1991 which was later than the date of accrual of the cause of action. In such a case it may be that court should only consider the period from the date of knowledge."

33. She went on to say at p. 198:-

"It follows from this conclusion that in considering the application to dismiss for want of prosecution the court should not consider prejudice caused to the defendants or the risk that it is not possible to have a fair trial by reason of lapse of time between the wrongful acts and accrual of cause of action. The fact that there was such a lapse of time may however be relevant when considering the relevant factors to the balance of justice issues. The Courts should not ignore the fact that the alleged wrongful acts took place a long time ago. At minimum where there is a long lapse of time between wrongful acts and accrual of a cause of action it may mean that the claim is already difficult for the defendant to deal with and prejudice caused by subsequent delay may have to be more critically examined. Also, such a long lapse of time places a special onus on a plaintiff to proceed with due expedition after the accrual of the cause of action."

34. She went on to consider in the course of her judgment the decisions in *O'Domhnaill v. Merrick, Toal v. Duignan (No. 1)* and *Toal v. Duignan (No. 2), J.O'C v. Director of Public Prosecutions* [2003] I.R. 478 and *Kelly v. O'Leary* [2001] 2 I.R. 526. Having reviewed those judgments and in particular the decision of Kelly J. she noted as follows at p. 202:-

"The decision of Kelly J. in *Kelly v. O'Leary* [2001] 2 I.R. 526 is also of assistance in attempting to analyse the principles according to which the court should exercise such inherent jurisdiction. That was an application to dismiss for want of prosecution. There was a very long delay between the accrual of the cause of action and commencement of the proceedings which Kelly J. found to be inordinate and inexcusable. He referred to the possibility of there being two different tests in a claim to dismiss for want of prosecution and a claim to dismiss in the interests of justice by reason of significant lapse of time but left that question open. He determined the application by applying the principles in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in relation to dismiss for want of prosecution referred to above. However in considering the balance of justice question as proposed by the Supreme Court he ultimately reached his conclusion by answering the same two fundamental questions which appear to be raised by the judgments of the Supreme Court in *Toal v. Duignan (No. 1), Toal v. Duignan (No. 2)* and *O'Domhnaill v. Merrick*. These are:

(1) Is there, by reason of the lapse of time (or delay) a real and serious risk of an unfair trial; and

(2) Is there by reason of the lapse of time (or delay) a clear and patent unfairness in asking the defendant to defend the action.

. . .

The factors to be considered by the court in relation to each question may overlap. It appears to me that these may include:-

1. Has the defendant contributed to the lapse of time?

2. The nature of the claims.

3. The probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues.

4. The nature of the principle evidence; in particular whether there will be oral evidence.

5. The availability of relevant witnesses.

6. The length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and probable trial date."

35. The final case to which I wish to refer is the decision of the House of Lords in the case of *Birkett v. James* [1978] A.C. 297 and the well known passage from that decision of Lord Diplock. He stated:-

"It follows a fortiori from what I have already said in relation to the effect of statutes of limitation on the power of the court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of his potential witnesses, their death or their untraceability. To justify dismissal of an action for want of prosecution the delay relied on must relate to the time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent

> on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

36. It seems from the authorities to which reference has been made above that two lines of authority appear to be emerging in relation to dismissal on grounds of delay. The approach has differed depending on whether the application is based on pre-commencement delay or post-commencement delay. As can be seen from the passages to which reference has been made above, Kelly J. in the decision in *Kelly v. O'Leary* expressly declined to answer the question as to whether or not two different tests apply, being on the one hand the *O'Domhnaill v. Merrick* and *Toal v. Duignan* test and the other being the *Primor Plc v. Stokes Kennedy Crowley* test. Undoubtedly the test enunciated by Hamilton C.J. in the Primor Plc v. Stokes Kennedy Crowley case was formulated in a case which concerned only post-commencement delay as the application before the court was an application to dismiss for want of prosecution. It is interesting to note that in the course of argument in this case, counsel on behalf of the plaintiff urged that the approach of Peart J. in *McH v. M.* was the proper course to follow in a case such as this, rather than the approach of Kelly J. in Kelly v. O'Leary.

37. If the approach of Kelly J. is followed then the court must consider the following questions:-

> Is the delay inordinate?
>
> Is the delay inexcusable?
>
> Where does the balance of justice lie?

38. It is nonetheless important to bear in mind that Kelly J. in dealing with the question of the balance of justice did so as Finlay Geoghegan J. pointed out by posing "the same two fundamental questions which appear to be raised by the judgments of the Supreme Court in *Toal v. Duignan (No. 1), Toal v. Duignan (No. 2)* and *O'Domhnaill v. Merrick*".

39. The approach of Peart J. as set out in the case of *McH. v. M*. and referred to above is clearly somewhat different. He concluded that the principles set out in *Primor* did not apply so far as pre-commencement delay is concerned. The test he applied was the broader test to be derived from the judgments of the Supreme Court in *Toal v. Duignan (No. 1), Toal v. Duignan (No. 2)* and *O'Domhnaill v. Merrick* or as he put it at p. 396:

> "the wider discretion based on general fairness regardless of whether the delay is excusable or not, should be confined to pre-commencement delay."

40. Given the divergence of approach apparent from those decisions, it is interesting to note that in the *Primor* case, Hamilton C.J. in the course of his judgment referred with approval to the decision in the case of *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, *O'Domhnaill v. Merrick* and *Birkett v. James*. The principles enunciated by him in *Primor* are in part derived from those cases. It has to be emphasised once again that *Primor* was a case which was concerned only with post-commencement delay.

41. In this context, I should note the provisions of s. 3 of the Statute of Limitations (Amendment) Act, which having provided for an amendment of the Statute of Limitations 1957, to provide for circumstances relating to the disability of certain persons for the purpose of bringing actions arising out of acts of sexual abuse goes on to provide in s. 3 as follows:-

> "Nothing in s. 48(a) of the Statute of Limitations 1957 (inserted by s. 2 of this Act), shall be construed as affecting any power of a court to dismiss an action on the ground of their being such delay between the accrual of the cause of action and the bringing of the action as, in the interest of justice, would warrant its dismissal."

42. Finally, I want to refer briefly again to the decision in the case of *Manning v. Benson and Hedges Limited*. Finlay Geoghegan J. in that case dealt with the application before the court, *inter alia*, to dismiss for want of prosecution. She commented at p. 198 of the judgment:-

> "It follows from this conclusion that in considering the application to dismiss for want of prosecution the court should not consider prejudice caused to the defendants or the risk that it is not possible to have a fair trial by reason of lapse of time between the alleged wrongful acts and accrual of cause of action. The fact that there was such a lapse of time may however be relevant when considering the relevant factors to the balance of justice issues. The Courts should not ignore the fact that the alleged wrongful acts took place a long time ago. At minimum where there is a long lapse of time between wrongful acts and accrual of a cause of action it may mean that the claim is already difficult for the defendant to deal with and prejudice caused by subsequent delay may have to be more critically examined. Also, such a long lapse of time places a special onus on a plaintiff to proceed with due expedition after the accrual of the cause of action."

43. It is interesting to note that in the course of her judgment in that case, she referred to the fact that "want of prosecution" included the obligation to commence proceedings. She also referred to the situation that can arise in a case where there is a lapse of time between the wrongful acts complained of and the accrual of the cause of action such as existed on the facts of the case before her. In this case, there is no lapse of time between the wrongful acts alleged and the accrual of the cause of action.

44. Having considered the various authorities opened to me, it seems to me that somewhat different considerations apply to cases in which there is lengthy pre-commencement delay and cases where the delay at issue is delay post-commencement of proceedings. It has long been a feature of the jurisprudence derived from cases such as *O'Domhnaill v. Merrick* and *Toal v. Duignan*, that even in the absence of culpable delay on the part of a plaintiff it may be necessary to dismiss an action where there is clear and patent unfairness in requiring a defendant to defend the action. Hardiman J., in the case *of J.O'C v. D.P.P.* [2000] 3 I.R. 478 at 499, a case in respect of the right to a fair trial in criminal proceedings, summarised the principles relating to delay in civil litigation as follows:-

> "Examples of the application of these principles in civil cases can be multiplied. Enough, however, has been said to indicate that it has consistently been held:-
>
> > (a) that a lengthy lapse of time between an event giving rise to litigation, and a trial creates a risk of injustice: 'the chances of the courts being able to find out what really happened are progressively reduced as time goes on';
> >
> > (b) that the lapse of time may be so great as to deprive the party against whom an allegation is made of his 'capacity . . . to be effectively heard';

(c) that such lapse of time may be so great as it would be 'contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial which (he or) she would have to try to defeat an allegation of negligence on her part in an accident that would taken place 24 years before the trial ...';

(d) that, having regard to the above matters the court may dismiss a claim against a defendant by reason of the delay in bringing it 'whether culpable or not', because a long lapse of time will 'necessarily' create 'inequity or injustice', amount to 'an absolute and obvious injustice' or even 'a parody of justice';

(e) that the foregoing principles apply with particular force in a case where 'disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past . . .', as opposed presumably cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony."

45. Bearing in mind those comments and the approach of Peart J. as set out in *McH.*, I am of the view that the correct approach to follow in this case is the application of the somewhat broader test to be found in the judgments of the Supreme Court in *Toal v. Duignan (No. 1), Toal v. Duignan (No. 2)* and *O'Domhnaill v. Merrick* when the delay complained of takes place principally between the events complained of and the commencement of proceedings.

46. In the circumstances I propose to adopt that approach.

Application of the principles to the facts
47. The first question to be considered therefore in this case is whether the delay between the matters complained of herein and the trial of this action is inordinate. I do not think that there could be any dispute on the facts of this case that the matters complained of took place between 43 and 50 years prior to the issue of the plenary summons herein. It is now between 48 and 55 years since the alleged incidents occurred. In my view there can be no doubt but that this constitutes inordinate delay.

Inexcusable delay
48. In the event that I am mistaken in my view as to the correct approach to be taken in a case such as this, it seems to me that I should consider the issue as to whether or not the delay in the course of the proceedings themselves could be described as excusable or inexcusable delay. Following the plaintiff's attendance at the school run by the Order of the first named defendant, the plaintiff attended secondary school between the years 1960 to 1965 and was apparently physically, psychologically and sexually assaulted at the school run by the Order of which the second named defendant is the nominee. Subsequently he was ordained a priest and worked in the USA and on the missions and he is presently outside the jurisdiction of this country. In his affidavit, he stated that he was unable to confront his abusers as a result of the psychological injury he suffered. He stated that it was only in 2002 that he developed the psychological and emotional strength to take the steps necessary to bring this action. His solicitors wrote the initiating letter to the first named defendant on the 27th June, 2002. As mentioned previously he exhibited a report of Donald D. S. Louis, a Psychotherapist. That report dated the 28th October, 2003 indicates that from August 1992, he worked with the plaintiff in weekly outpatient psychotherapy and in group psychotherapy. He described the plaintiff as suffering from post traumatic stress disorder, chronic dysthymia and intermittent episodes of acute anxiety. It appears that the plaintiff has now taken early retirement from active ministry. He is now developing a career as a psychotherapist. It does appear that the psychotherapy provided by Donald D. St. Louis ended in 2000. It also appears from the affidavit of the plaintiff, that he contacted his legal advisers in 2002. There is nothing in the papers before me to explain why the plaintiff having concluded his psychotherapy in 2000, did not contact his legal advisers until 2002, save that he stated in his affidavit that the decision to institute the proceedings had not come easily and had caused him considerable distress and anxiety. He also indicated that he had extreme difficulty in articulating his feelings, recounting his experiences and providing instructions to his legal advisers.

49. Having instructed his legal advisers, it is apparent that further delay has taken place. It is not clear exactly when the plaintiff consulted his legal advisers in 2002, but the initiating letter was sent in June 2002, but notwithstanding that, the plenary summons was not issued until 31st March, 2003. There was a period of almost two years between the service of the plenary summons and the delivery of the statement of claim. As an appearance was entered on behalf of the first named defendant within a month of the service of the plenary summons, it is clear that the first named defendant did not cause any delay which might have caused the late delivery of the statement of claim. There is no explanation given by the plaintiff in his affidavit for that delay. Within two months of delivery of the statement of claim, a notice for particulars was raised in May 2005, to which a response was received over fourteen months later. Finally, defence was delivered on behalf of the first named defendant on the 28th May, 2007. So far as that period of time is concerned, it is difficult to see why so much time was taken to deliver the defence, a period of some ten months. Nonetheless, it could hardly be said that the plaintiff moved expeditiously following the commencement of the proceedings. There is simply no explanation proffered for the delay on the part of the plaintiff in taking various steps outlined above. I have referred previously in the course of this judgment to the words of Diplock L.J. in the case of *Birkett v. James*. Those words have frequently been reiterated in judgments of the Supreme Court and the High Court when dealing with the issue of delay. I think it goes without saying that there is an additional onus on a person who is bringing proceedings after a lengthy period of time since the accrual of a cause of action, to expedite the hearing of that action.

50. I accept that the Plaintiff was not in a position to commence proceedings against the first named defendant until he had completed psychotherapy in 2000. However, as I have set out above, there is simply no adequate explanation for the delays which took place thereafter. In my view, the delays following the commencement of proceedings with the initiating letter in June 2002 are inexcusable.

The balance/interests of justice
51. I have already referred to a passage from the decision in *Manning v. Benson and Hedges* in which the court was considering both an application to dismiss for want of prosecution and an application to dismiss in the interest of justice. Having dealt with the different considerations in relation to both applications, Finlay Geoghegan J. at p. 198 stated:-

"It follows from this conclusion that in considering the application to dismiss for want of prosecution the court should not consider prejudice caused to the defendants or the risk that it is not possible to have a fair trial by reason of lapse of time between the alleged wrongful acts and accrual of cause of action. The fact that there was such a lapse of time may however be relevant when considering the relevant factors to the balance of justice issues. The Court should not ignore the fact that the alleged wrongful acts took place a long time ago. At minimum where there is a long lapse of time between wrongful acts and accrual of a cause of action it may mean that the claim is already difficult for the defendant to deal with and prejudice caused by the subsequent delay may have to be more critically examined. Also, such a long lapse of time places a special onus on a plaintiff to proceed with due expedition after the accrual of the cause of action."

52. In the context in which that statement was made by Finlay Geoghegan J. she was considering the *Primor* principles. If one applied that approach to the facts and circumstances of this case, one of the matters that one would have to take into account is the fact that since the complaint was originally made and the proceedings commenced, one of those alleged to have been involved in the abuse of the plaintiff has since died, namely Brother V. Because of the delay in identifying the perpetrators it was not possible to obtain instructions from Brother V. As was pointed out in the affidavit of Brother Pius McCarthy,

> "Had these details been provided, even at the time of the original complaint in 2002, instead of 2006, it may have been possible for the Order to acquire information from Brother V. regarding the matters complained of. Due to his ill health he was not in a position to give such instructions when the claim was first particularised in replies to particulars. He has since died."

53. It was also pointed out in that affidavit that when the complaint was first received, a search was conducted of archival materials that were available. It was indicated that this had been extremely difficult given the passage of time and the death, illness and lapse of memory of persons who might otherwise have been in a position to be of some assistance. It was also pointed out that the Order is no longer involved in the school concerned and no longer has access to records. Very little other information is available to the first named defendant and to the Order as a whole.

54. It is true to say that one Brother survives. The allegations made against that Brother is that the plaintiff suffered a psychological assault as a result of the conduct of that Brother in the course of a class. In the particulars it is stated as follows:-

> "LM, who was in a class ahead of the plaintiff, who had a stutter, was subjected when unable to answer questions to Brother M. stuffing glass marbles into his mouth. LM, whilst standing by his desk, painfully struggled with repetition and prolongations of sounds. Forcing him to talk without a stammer, Brother popped one marble after another into mouth (sic) and onto his tongue. His mouth was full and witnessing what Brother M. was doing scared the plaintiff. He was terrified L. would swallow the marbles and choke. He was terrified for L. and was terrified for himself."

55. Brother M. who is now 75 years of age and is unwell, recollects the plaintiff and giving him advice as to his future in 1967. At no stage during that meeting was any reference made to abuse. He denies that he ever abused the plaintiff or any boy in his care and is shocked at being named as one of those alleged to have abused the plaintiff.

56. It does not follow that every case that comes before the courts in respect of a complaint as to events that occurred many, many years ago will necessarily result in a situation where the balance or interests of justice will favour the defendant. There will be cases where there may well be witnesses available to deal with the allegations; there may be appropriate records available to deal with the allegations and there may be no actual prejudice caused to a defendant by the lapse of time. In the present case, however, it appears that the first named defendant herein has suffered actual prejudice in circumstances where Brother V. has died since the complaint was first made. Thus, if I considered the post-commencement period alone, there is actual prejudice caused to the first named defendant during that period by the delay in prosecuting this claim. Since the commencement of the proceedings, including the period from the time when the original letter of complaint was first sent, the plaintiff has not proceeded with the action with the degree of expedition which is appropriate having regard to the extreme lapse of time involved in this case. On that basis, I am satisfied that the balance of justice in this case lies in the dismissal of the action against the first named defendant. As I have indicated above, I think the broader test referred to in the line of authorities commencing with *O'Domhnaill v. Merrick* and *Toal v. Duignan (No. 1)* and *Toal v. Duignan (No. 2)* is applicable to the facts of this case. At the heart of the principles in those cases, the underlying principle is whether, by reason of the lapse of time there is a real and serious risk of an unfair trial. Finlay C.J. in *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140, at p. 142 noted:-

> "I have carefully reconsidered the principle laid down in that judgment [*O'Domhnaill v. Merrick*] on the question as to the jurisdiction of this Court in the interest of justice to dismiss a claim where the length of time which has elapsed between the events out of which it arises and the time when it comes for hearing is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself or herself against the claim made."

57. It therefore seems to me, to be essential to consider on the facts of this case whether in all the circumstances it would be unjust to call upon the first named defendant to defend himself against the claim made.

58. In considering that issue in the case of *Manning v. Benson and Hedges*, Finlay Geoghegan J. set out a number of factors at p. 203 of her judgment to be considered in reaching a conclusion on that issue. She stated as follows:-

> "It appears to me that these may include:-
>
> 1. Has the defendant contributed to the lapse of time?
>
> 2. The nature of the claims.
>
> 3. The probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues.
>
> 4. The nature of the principal evidence; in particular whether there will be oral evidence.
>
> 5. The availability of relevant witnesses.
>
> 6. The length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and probable trial date."

59. She also referred to the need to consider actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time. It goes without saying that one must also consider the prejudice to the plaintiff. A decision to dismiss the proceedings undeniably has an adverse effect on the plaintiff who will never have the chance to air his case against the first-named defendant.

60. Without reiterating all of the facts of this case, as set out in the affidavits and pleadings before me, certain things are clear. First, this is a case which will proceed on the basis of oral testimony. The court in considering the nature of the plaintiff's claim will have to determine factual issues together with certain legal issues. It is clear that the first named defendant will not have a number of relevant witnesses available, given that four of the five Brothers who taught at the school at the relevant period have now died. Finally, it is clear that a very significant period of time has elapsed since the matters complained of and the time when this case is

likely to be given a trial date.

61. Having considered the facts and circumstances of this case and having considered the legal issues as to the interests of justice, I have reached the conclusion that by reason of the time which has elapsed between the alleged wrongful acts, starting in 1953 and concluding in 1960 and the date when this case is likely to be heard, that there is a real and serious risk of an unfair trial. That being so it is also clear that there would be a clear and patent unfairness in asking the first named defendant to continue to defend this action. I am therefore satisfied that the prejudice to the first named defendant outweighs the undeniable prejudice to the plaintiff.

62. In the circumstances, I will dismiss the plaintiff's claim.