THE HIGH COURT

2015 No. 6753P

BETWEEN

PATRICIA BREADEN

PLAINTIFF

AND

CÚNAMH

ADOPTION AUTHORITY OF IRELAND

DEFENDANTS

Judgmeny of Mr. Justice Garrett Simons delivered on 5 September 2019.

Summary

1. This judgment is delivered in respect of an application to dismiss the within proceedings (i) on the basis that the claim is statute barred, and (ii) on the grounds of inordinate and inexcusable delay. The application is made by the second named defendant, the Adoption Authority of Ireland ("*the Adoption Authority*"). The proceedings arise out of events which occurred in 1979 and 1980. The Plaintiff had given birth to a daughter in July 1979. The Plaintiff was sixteen years old at that time. The Plaintiff claims that the circumstances surrounding the subsequent adoption of her daughter entailed a breach of her rights. The gravamen of the claim made against the Adoption Authority is that the Authority failed to ensure that the Plaintiff was in a position to give informed consent to the adoption of her daughter.

2. It should be emphasised that this judgment is confined to the two delay-related issues identified above, and has nothing to say in relation to the underlying merits of the case. In assessing the effect of the lapse of time, however, it is relevant to note that the claim as pleaded is inconsistent with the contemporaneous documentation. This documentation includes an affidavit sworn by the Plaintiff herself on 5 October 1980 wherein she expressly waived her right to be heard before the making of the adoption order, and confirmed that she consented to the adoption. This inconsistency between the claim as pleaded and the contemporaneous documents has the consequence that a trial judge could only make a fair adjudication on the Plaintiff's claim if there were evidence available to the court from individuals directly involved in the key events of 1979 and 1980. The Adoption Authority submits that a fair trial is not possible at a remove of some thirty-five to forty years, in circumstances where a number of potential witnesses are unavailable or do not have any specific recollection of the relevant events.

3. The Plaintiff seeks to resist the application to dismiss the proceedings on the basis that she had been suffering from post-traumatic stress disorder. A report has been exhibited from a consultant psychiatrist which expresses the opinion that, up until when the Plaintiff began attending a psychotherapist in more recent years, it would not have been possible for her to bring the events of 1979 and 1980 to mind in a way which would have allowed her to make decisions or to consider legal action. The Plaintiff's counsel goes further and suggests that the Plaintiff had been of "unsound mind", and thus labouring under a "disability" for the purposes of section 48 of the Statute of Limitations.

4. The application before the court presents an important issue of principle: to what extent, if any, is it appropriate to attempt to resolve disputed issues of fact on an application to dismiss proceedings.

5. For the reasons set out herein, I have concluded that the objection that the proceedings are statute barred cannot be determined on an interlocutory application heard on affidavit only. Whereas the evidential basis for the argument that the Plaintiff has been labouring under a "disability" is scant, it would be inappropriate to rule on this issue without the benefit of oral evidence and cross-examination.

6. I have, however, been able to form a definitive view on the application to dismiss the proceedings on the grounds of inordinate and inexcusable delay. The delay both prior to and post the commencement of the proceedings is inordinate. Even if one assumes for the purposes of argument that the pre-commencement delay might have been excusable on the basis that the Plaintiff was incapable of instituting proceedings any earlier, the post-commencement delay is inexcusable. Given the late start to the proceedings, it behoved the Plaintiff and her legal representatives to pursue the litigation with expedition. The ongoing failure to reply to the notice for particulars served on behalf of the Adoption Authority on 26 November 2015 is inexcusable. The notice for particulars raised issues which are critical to a fair adjudication of the proceedings, and it should have been replied to years ago.

7. I have also been able to reach a definitive view on the separate question of whether it would be unjust to allow the trial to proceed. Having regard to the principles set out in the judgment of the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74, I am satisfied that there is a real and serious risk of an unfair trial and/or an unjust result.

8. Accordingly, I propose to make an order dismissing the proceedings as against the Adoption Authority.

Events said to give Rise to the Claim

9. In order to put the arguments of the parties into context, it is necessary first to provide a brief overview of the events said to give rise to the Plaintiff's claim in these proceedings. This exercise is not straightforward in that (i) the Plaintiff has not yet provided a detailed account of her version of events (the Plaintiff has failed to reply to a notice for particulars served on behalf of the Adoption Authority), and (ii) the Adoption Authority asserts that—as a consequence of the significant lapse of time—it is unable to adduce evidence as to the relevant events. Indeed, it is precisely because of this (asserted) inability that the Adoption Authority has brought the application to dismiss the proceedings.

10. The chronology which follows is confined to events and dates which are not in dispute, such as, for example, the date upon which the Plaintiff's daughter was born and the date upon which the adoption order was made. Reference will also be made to the content of some of the contemporaneous documentation. It appears to be acknowledged on the part of the

Plaintiff that she did sign certain documents at the relevant time, but the Plaintiff's case as pleaded is to the effect that she did not understand the content, import or consequences of the documents.

11. It bears emphasising that, in referring to this contemporaneous documentation, the court is not expressing any view as to the legal effect of this documentation nor as to the underlying merits of the Plaintiff's case. Rather, the sole purpose of referring to the documentation is to seek to identify the nature of the issues which would be in dispute were the case to proceed to full hearing.

12. The Plaintiff became pregnant in or about October 1978. At that time, the Plaintiff would have been fifteen years old. It is pleaded in the Personal Injuries Summons that the Plaintiff attended at the premises of the Catholic Protection and Rescue Society of Ireland in about 1979 seeking help, assistance and advice in relation to her pregnancy and her accommodation needs. It is further pleaded that the Plaintiff was only advised that the Society was an adoption service at a subsequent visit.

13. The Catholic Protection and Rescue Society of Ireland is now known as Cúnamh. For consistency, I propose to refer to the Society throughout this judgment by its current name, i.e. Cúnamh. Cúnamh is the first named defendant to the proceedings.

14. The principal social worker employed by Cúnamh who had dealings with the Plaintiff was Ms Hilda Cassidy. Ms Cassidy passed away in August 2008, i.e. several years prior to the institution of the within proceedings on 19 August 2015. (See Affidavit of Sheila Fagan sworn on 15 February 2016).

15. The Plaintiff gave birth to a daughter on 29 July 1979. It appears that the Plaintiff subsequently signed a form consenting to the placement of her daughter for adoption on 24 August 1979. The Plaintiff's signature on the form had been witnessed by Ms Éilis Burke. Ms Burke had been employed as a social worker by Cúnamh. Ms Burke has since retired, and has advised Cúnamh that she has no independent recollection of meeting with the Plaintiff at all, due to the passage of time, and therefore cannot put matters any further than her notes from that time. (See Affidavit of Sheila Fagan sworn on 15 February 2016).

16. The first significant interaction between the Plaintiff and An Bord Uchtála appears to have taken place in February 1980. (The Adoption Authority is the statutory successor to An Bord Uchtála). The Plaintiff signed a Consent to Adoption on 11 February 1980. This took the form of a sworn affidavit. Relevantly, the Consent to Adoption included the following clauses.

> "6. I understand that the nature and effect of an adoption order is that I shall lose all parental rights and that I shall be freed from all parental duties with respect to the child and that these rights and duties shall be transferred to the adopter or adopters.

7. I have been informed and I understand that An Bord Uchtála (Adoption Board) may make an adoption order in respect of the child referred to in paragraph 1 at any time after the signing of the consent.

8. I hereby freely give my consent to the making of an adoption order in pursuance of the application referred to above.

9. I have been informed and I understand that this consent may be withdrawn at any time before the making of the adoption order, by informing An Bord Uchtála, 65 Merrion Square, Dublin 2, and that on the making of the adoption order my consent becomes irrevocable.

10. I have been informed and I understand that I am entitled to be heard in person or to be represented by counsel or solicitor on the application for the adoption order or to be consulted again in relation to the application and that I should indicate my wishes in this respect in writing."

17. The Plaintiff also indicated that she wished to be further consulted and to be heard on the application for the adoption order. As explained presently, the Plaintiff subsequently confirmed to An Bord Uchtála that she did not wish to be heard.

18. On the same date upon which she swore the Consent to Adoption (11 February 1980), the Plaintiff also completed and signed a questionnaire. This questionnaire set out a series of questions which sought confirmation from the Plaintiff, as the child's natural mother, that she understood the nature and effect of an adoption order, and the implications of her having consented to the adoption of her daughter. The Plaintiff's signature was witnessed by Anne McCarthy, a social worker employed by An Bord Uchtála. Ms McCarthy also swore an affidavit in the following terms.

"1. I believe that an application has been made or is about to be made for the adoption of the said [NAME REDACTED] and that the said Patricia Breaden is the natural mother of the said child.

2. I have been requested and authorised by the Adoption Board to make the enquiries set out and numbered 1 to 13 in the Questionnaire overleaf and to report thereon to the Adoption Board for the purposes of enabling the Adoption Board to comply with the requirements of the Adoption Acts, 1952 to 1976, in the making of an adoption order for the said child.

3. In pursuance of such request and authorisation I have made the said enquiries and I was present when the said Patricia Breaden answered the questions overleaf and appended her name thereto and I say, that to the best of my knowledge and belief, the said questions were understood by her and that her replies were freely given and were understood by her."

19. Ms McCarthy has recently informed the Adoption Authority that she has no recollection of any of her dealings with the Plaintiff. (See affidavit of Patricia Carey sworn on 12 July 2018).

20. An Bord Uchtála wrote to the Plaintiff on 6 August 1980 inviting her to attend at their offices on 27 August 1980 to be consulted in respect of the proposed adoption. (It will be recalled that the Plaintiff had indicated, as part of the Consent to Adoption, that she wished to be consulted further in respect of the application to make the adoption order).

21. In the event, the Plaintiff responded to the letter of 6 August 1980 by indicating that she would rather not keep this appointment. Her letter indicated that she was now "very settled again".

22. An Bord Uchtála replied by letter dated 21 August 1980 indicating that it would be necessary for the Plaintiff to swear a further affidavit.

> "We have therefore cancelled the appointment which the Adoption Board gave you for August the 27th, but as you originally made this request under oath in your consent form, it will now be necessary for you to make another affidavit, that is a sworn statement that you do not wish to be consulted again. I know this may seem rather ridiculous and complicated to you but unfortunately the Adoption Board stick very rigidly to the legal process involved, and your letter to me in itself is not sufficient proof to fulfil the legal requirements involved.
>
> There is therefore another form which you will now have to complete in the presence of a Commissioner for Oaths. I could send this form to you in Roscommon if you would be prepared to consult a solicitor there. If not, I am afraid we will have to ask you to come to Dublin to sign this. Any weekday will suit us provided we know when to expect you. We will then arrange an appointment for you with our own Solicitor here. Please let me know by return which arrangement you would prefer – that is that we send the form to you in Roscommon and you find your own Solicitor there, or alternatively, you come up to see our Solicitor."

23. The Plaintiff duly swore another affidavit in Longford on 5 October 1980. This affidavit indicated that she did not wish to be consulted again in relation to the application for the adoption order. The affidavit stated that, in every other respect, the Plaintiff confirmed her consent to the adoption.

24. The adoption order was ultimately made on 5 December 1980. As of this date, the Plaintiff would have been seventeen years old. The judge who signed the adoption order, Justice A. Cassidy, has since deceased. (See affidavit of Patricia Carey sworn on 12 July 2018).

Engagement between plaintiff and adoption authority

25. The Adoption Authority has, as part of its application to dismiss the proceedings, exhibited certain additional documentation which appears to evidence engagement between the

Plaintiff and the Authority in the year 2000. It appears that the Plaintiff had written to the Adoption Authority on 6 May 2000 and had requested a copy of her Consent to Adoption. The letter indicates that the Plaintiff had previously spoken to an official of the Authority by way of telephone.

26. This letter appears to have been responded to by a letter dated 19 June 2000 which enclosed the following documents said to have been signed by the Plaintiff: (i) Form 10 (permission to place a child for adoption); (ii) Consent to Adoption; (iii) questionnaire/affidavit; and (iv) correcting affidavit.

27. As discussed presently, counsel on behalf of the Adoption Authority seeks to rely upon this documentation (i) to establish that, at the very latest, the date of knowledge for the purposes of the Statute of Limitations was June 2000; and (ii) to rebut any suggestion that the Plaintiff had been under a "disability" for the purposes of the Statute of Limitations.

28. The Adoption Authority has also exhibited a letter which purports to have been written by a clinical psychologist with the Midland Health Board. This letter is dated 6 September 1989. In brief outline, the letter indicates that the clinical psychologist had been seeing the Plaintiff as a client. The letter expresses the opinion that many of the Plaintiff's problems were rooted in an unresolved adoption. The letter then requests that a photograph of the Plaintiff's daughter be provided. The letter from the clinical psychologist purports to be accompanied by a letter of consent signed by the Plaintiff.

29. Counsel for the Adoption Authority has invited the court to draw certain inferences from the content of this letter. I have concluded, however, that the letter is inadmissible as evidence of the truth of the contents thereof for the following two reasons.

30. First, the contents of the letter are inadmissible by reference to the rule against hearsay. The letter represents a form of documentary hearsay. Whereas Order 40, rule 4 of the Rules of the Superior Courts does allow for hearsay affidavit evidence in certain circumstances, this exception does not apply. Order 40, rule 4 reads as follows.

> "4. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, *except on interlocutory motions*,* on which statements as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed."
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> *Emphasis (italics) added.

31. The relevance of Order 40, rule 4 to an application to dismiss proceedings had been considered in *Byrne v. Heffernan* [2014] IEHC 424 (which has been cited in the Adoption Authority's written submissions). The High Court held that an application to dismiss represented an interlocutory motion for the purposes of Order 40, rule 4. On this basis, the

court was prepared to rely on excerpts from medical records for the purposes of establishing the timeline of events.

32. The correctness of this approach is now in doubt. The Court of Appeal in *O'Dwyer v. Daughters of Charity of St. Vincent de Paul* [2015] IECA 226; [2015] 1 I.R. 328 has since held, albeit in the context of deciding the approach to be taken to an application to admit new evidence, that an application to dismiss is for a final rather than an interlocutory order. This rationale would appear to apply equally to Order 40, rule 4. Therefore, notwithstanding that the present application comes before the court by way of what might be described as an interim or interlocutory motion, i.e. a motion to be heard and determined *prior to* a full hearing of the proceedings, I am satisfied that for the purposes of the above rule, the application is for final orders. In any event, the letter is an exhibit to an affidavit rather than affidavit evidence *per se*.

33. Secondly, were the court to rely on the contents of the letter from the clinical psychologist, this would offend against the principles governing the use of documents recently set out by the Supreme Court in *RAS Medical Ltd. v. The Royal College of Surgeons in Ireland* [2019] IESC 4.

> "7.6 But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.
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> 7.7 A similar principle applies where it is suggested that there is documentary evidence, properly before the court, which might cast doubt on the reliability of sworn testimony. It is not permissible to invite a court to reject sworn testimony either on the basis that there is sworn testimony to the contrary or that the testimony might be said to be either lacking in credibility or unreliable (on the basis of, for example, a documentary record) without giving the witness concerned an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to credibility or reliability."

34. Whereas the provenance of the letter from the clinical psychologist does not appear to be disputed by the Plaintiff's legal representatives, the court knows next to nothing about the

circumstances in which the letter came to be written nor as to the extent of the engagement between the Plaintiff and the clinical psychologist. It would be unfair to draw inferences from the letter without affording an opportunity to the Plaintiff of responding to same by way of oral evidence. This is not something which can be properly explored on an interim or interlocutory application to be heard on affidavit.

Procedural history

35. The within proceedings were instituted by way of Personal Injury Summons on 19 August 2015. The Plaintiff swore an Affidavit of Verification in September 2015.

36. It has to be said that the precise nature of the claim being made against the Adoption Authority is unclear. It seems that the only particulars referable to the Adoption Authority *alone* (as opposed to referable to Cúnamh or to both defendants) are those set out at paragraph 8 as follows.

> "8. In about February 1980 the Plaintiff was visited by an employee of the second named Defendant and was caused to sign additional documents. The Plaintiff was 16 years of age. In the premises the second named Defendant owed the Plaintiff a duty of care to ensure *inter alia* that she understood the content, import and consequences of the said documents. The Plaintiff was never advised that she could or should obtain independent legal advice."

37. It is also pleaded that the Plaintiff does not wish to have the adoption order declared invalid.

> "10. The Plaintiff does not wish to have the adoption order declared invalid however to the extent that it is necessary to examine the validity of the adoption order within the context with the (*sic*) within proceedings the Plaintiff will, if necessary, rely upon the provisions of section 50(1) of the Adoption Act 2010 to ensure that the adoption order is not declared invalid."

38. A notice for particulars had been served on behalf of the Adoption Authority on 26 November 2015. To date, no replies to particulars have been received. Both defendants have delivered Personal Injuries Defences.

39. The first named defendant, Cúnamh, issued a notice of motion to dismiss the proceedings on 17 February 2016. It seems, however, that this motion was subsequently adjourned generally.

40. The Adoption Authority issued its motion to dismiss the proceedings on 29 November 2017. The motion came on for hearing before me on 17 May 2019.

Detailed Discussion

(1) Statute of Limitations

Submissions of the parties

41. Counsel on behalf of the Adoption Authority, Mr Paul Gallagher, SC, submits that the proceedings are statute barred. The claim against the Adoption Authority relates to events in 1979 and 1980. The Plaintiff reached the age of majority in 1984. Time began to run for the purposes of the Statute of Limitations from that date. Irrespective of whether one applies the three-year limitation period under the original legislation or the two-year limitation period introduced by the Civil Liability and Courts Act 2004, the limitation period had long since expired by the time the within proceedings were instituted on 19 August 2015. It is submitted that, at the very latest, the date of knowledge for the purposes of the Statute of Limitations was June 2000. It will be recalled that as of that date, the Plaintiff had received copies of all the relevant affidavits and orders from the Adoption Authority. (See paragraph 25 above). The judgment in *Gough v. Neary* [2003] IESC 39; [2003] 3 I.R. 92 is cited in support of the argument that the Plaintiff's state of knowledge was such as to allow her to institute proceedings. It is not necessary that the Plaintiff have known as of that date whether the acts or omissions complained of did or did not, *as a matter of law*, involve negligence, nuisance or breach of duty.

42. The judgment in *O'Dwyer v. Daughters of Charity of St. Vincent de Paul* [2015] IECA 226; [2015] 1 I.R. 328 is cited as an example of a case where the court determined that proceedings were statute barred on an application to dismiss, i.e. in the absence of a formal order directing the trial of a preliminary issue.

43. Counsel submits that there is no basis for suggesting that the Plaintiff had been under a "disability" for the purposes of the Statute of Limitations. Emphasis is again placed on the fact that the Plaintiff had been able to engage directly with the Adoption Authority in the year 2000, and had sought and obtained documentation in respect of her daughter's adoption.

44. Counsel also draws attention to the content of the letter from the clinical psychologist dated 6 September 1989, and to the affidavit and exhibits filed on behalf of Cúnamh in support of its application to dismiss the proceedings. These indicate that there was ongoing contact between the Plaintiff and Cúnamh during the period 1987 to 1997, and that a meeting between the Plaintiff and her daughter was arranged in 1997.

45. In response, counsel on behalf of the Plaintiff, Mr Ciarán Lawlor, BL, makes an overarching submission to the effect that the question of whether the proceedings are statute barred cannot be resolved on an application to dismiss in the absence of an agreed statement of facts. Counsel cites, by analogy, the judgment of the Supreme Court in *L.M. v. Commissioner of An Garda Síochána* [2015] IESC 81; [2015] 2 I.R. 45; [2016] 1 I.L.R.M. 35.

> "[36] However, I also consider that a court is entitled, on the hearing of the preliminary issue, to consider if it is an appropriate case for determination by this procedure. If, for example, the court proceeded to hear and seek to determine the preliminary issue after a full and elaborate argument, it would, as I conceive it, still be open to the court

to conclude that in the light of the arguments and the matters advanced, that it was not possible to give the sort of clear and unequivocal answer to the issue which would dispose of the case or any issues in the case. Therefore, the case should proceed to trial to have issues of law determined in the concrete and precise circumstances of an individual case. Indeed, counsel for the defendants in these cases conceded that this could be done in an appropriate case, but I do not wish to rest this decision, particularly in the context of this case, on any such concession. In my view, a court retains power to refuse to determine a preliminary issue if, after careful analysis, it becomes apparent that some aspect of the issue was heavily fact-dependent, or that a possible outcome would be so contingent or qualified as to require almost a form of advisory opinion."

46. Turning then to the specific issues, counsel submits that the Plaintiff had been suffering from post-traumatic stress disorder. This, it is argued, represented a "disability" for the purposes of section 48 of the Statute of Limitations. The section reads as follows.

"48.(1) For the purposes of this Act, a person shall be under a disability while—

(a) he is an infant, or
(b) he is of unsound mind,

(2) For the purposes of subsection (1) of this section but without prejudice to the generality thereof, a person shall be conclusively presumed to be of unsound mind while he is detained in pursuance of any enactment authorising the detention of persons of unsound mind or criminal lunatics."

47. Counsel relies on extracts from Canny, *Limitation of Actions*, (2nd edition, Round Hall, Dublin), §6–11 to §6–14 ("*Canny*") as a guide to the interpretation of the phrase "unsound mind".

48. On this argument, time did not begin to run against the Plaintiff until the (unspecified) date upon which she was first able to make a decision to institute legal action.

49. It has to be said that there are a number of obvious difficulties with this line of argument. First, in order to succeed it would necessitate this court making a finding that the Plaintiff had been of "unsound mind" for a significant part of her adult life. Whereas there is no specific definition of "unsound mind" provided for under the Statute of Limitations, it seems from the case law discussed in Canny (*op. cit.*) that, at a minimum, it would connote an inability to manage one's own affairs. There is nothing in the evidence before the court on this application which indicates that the Plaintiff was ever unable to manage her own affairs, still less that she was unable to do so for a significant part of her adult life. On the contrary, the evidence indicates that she has been happily married since the age of 19, and has successfully reared two children.

50. Secondly, no explanation has been offered as to how the supposed inability of the Plaintiff to call to mind the events of 1979 and 1980 can be reconciled with the documentary evidence which appears to suggest that, first, she had undergone therapy with a clinical psychologist as early as 1989, and, secondly, she had been capable of engaging with the Adoption Authority in 2000, to the extent of seeking the disclosure of documentation which would be relevant to any legal proceedings. This apparent contradiction is simply not addressed. There is no reference, for example, in the consultant psychiatrist's report in 2016 to the earlier therapy in 1989.

51. Thirdly, as a matter of statutory interpretation, it must be doubtful whether a person suffering from a psychological disorder, such as post-traumatic stress disorder, could be regarded as being of "unsound mind". The Statute of Limitations distinguishes between a person of "unsound mind" and a person who is suffering from a "psychological injury". The latter term is used in section 48A, which section introduces special rules for the calculation of the limitation period applicable to legal actions in respect of sexual abuse. A person is treated as being under a disability if they are suffering from a psychological injury of such significance that his or her will, or his or her ability to make a reasoned decision to bring a legal action in respect of sexual abuse, is substantially impaired. The fact that the Oireachtas made separate provision for "psychological injury" under the Statute of Limitations tends to undermine any argument that the term "unsound mind" should be interpreted broadly as including "psychological injury".

52. The position in which it is now contended that the Plaintiff had found herself until 2015, whereby she was allegedly unable to institute proceedings in respect of the adoption of her daughter, appears to approximate more closely to the type of situation addressed under section 48A ("psychological injury") than that addressed under section 48 ("unsound mind").

Findings of the court

53. One can readily understand why a defendant, such as the Adoption Authority, who considers that proceedings taken against it are inadmissible by reason of delay should seek to have those proceedings dismissed at an early stage. Such a defendant will wish to have the proceedings dismissed without the necessity of having to incur the further delay and costs inherent in a full hearing. I have concluded, however, that where a question arises as to whether proceedings are statute barred, then—save in the most straightforward cases—this question may only be determined in advance of a full hearing where the court has directed the trial of a preliminary issue.

54. This conclusion is based on two reasons, one principled and one pragmatic. First, it seems to me that in circumstances where the Rules of the Superior Courts have laid down a specific procedure for determining issues of law in advance of a full hearing, then this procedure must be availed of. The determination of whether proceedings are statute barred is often cited as the classic or textbook example of an issue which can properly be tried as a preliminary issue. If the Adoption Authority wished to have the case disposed of on this basis, then it was open to it to apply for an order directing the trial of a preliminary issue.

55. A party is not entitled to by-pass the prescribed procedure and to invoke instead the inherent jurisdiction of the court. See, by analogy, *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21; [2014] 2 I.R. 301.

> "[15] Applications to dismiss at an early stage of proceedings are, when brought, frequently based alternatively on the provisions of O. 19, r. 28 of the Rules of the Superior Courts 1986 ('RSC') and the inherent jurisdiction of the court. It is important to emphasise that the inherent jurisdiction of the court should not be used as a substitute for, or means of getting round, legitimate provisions of procedural law. That constitutionally established courts have an inherent jurisdiction cannot be disputed. That the way in which the ordinary jurisdiction of those courts is to be exercised is by means of established procedural law including the rules of the relevant court is also clear. The purpose of any asserted inherent jurisdiction must, therefore, necessarily, involve a situation where the court enjoys that inherent jurisdiction to supplement procedural law in cases not covered, or adequately covered, by procedural law itself. An inherent jurisdiction should not be invoked where there is a satisfactory and existing regime available for dealing with the issue under procedural law, for to do so would set procedural law at nought."

56. Whereas these comments were made in the context of a different type of application, namely an application to dismiss proceedings as an abuse of process, it occurs to me that similar sentiments apply to an application to dismiss on the basis that the proceedings are said to be statute barred.

57. Secondly, the rules governing the trial of a preliminary issue are especially apposite to the determination of whether proceedings are statute barred. The trial of a preliminary issue will only be directed where there is an agreed set of facts or where the moving party agrees to accept the other party's case at its height for the purposes of the preliminary issue. See *Nyembo v. Refugee Appeals Tribunal* [2007] IESC 25; [2008] 1 I.L.R.M. 289.

58. The determination of whether proceedings are statute barred will, save in the most straightforward of cases, require a careful consideration of the factual circumstances. The rules governing the trial of a preliminary issue and, in particular, the requirement that there either be an agreed or accepted set of facts will ensure that the court has a factual matrix against which to make the decision. If the facts cannot be agreed or accepted, then the determination of whether the proceedings are statute barred can only be made in the context of a full hearing, involving oral evidence and cross-examination.

59. In the present case the court is confronted with a significant dispute on the facts. The Plaintiff has exhibited on affidavit a copy of the consultant psychiatrist's report and has averred that insofar as it records a narrative provided by her, same is accurate and correct. It would, of course, have been more satisfactory had the consultant psychiatrist sworn an affidavit in the proceedings himself, and had offered an opinion on the ability of the Plaintiff to manage her own affairs.

60. In response, the Adoption Authority submits that the argument that the Plaintiff was of "unsound mind" is inconsistent with the documentary evidence before the court. The Authority relies, in particular, on the content of the documentation from 1989 and 2000 to suggest that the Plaintiff was capable of addressing her mind to the circumstances surrounding the adoption of her daughter, and would have been capable of instituting proceedings at that time.

61. It is not possible for me to resolve this dispute on the basis of the limited material before the court on this application. Whereas the evidence that the Plaintiff had been under a disability, i.e. of "unsound mind", is scant, a final determination of this issue would require oral evidence and cross-examination. The court would, for example, require to hear evidence from the consultant psychiatrist.

62. The documents relied upon by the Adoption Authority do not prove themselves, and cannot be relied upon without more to contradict the affidavit evidence and exhibits filed on behalf of the Plaintiff. See *RAS Medical Ltd. v. The Royal College of Surgeons in Ireland* [2019] IESC 4 (discussed at paragraph 33 above). Of course, were the matter to go to full hearing, then the content of this documentation could, in principle, be put to the Plaintiff and/or the consultant psychiatrist in cross-examination.

63. It is also telling that, as part of the affidavit grounding the application to dismiss the proceedings, the Adoption Authority itself had expressly signalled an intention to seek independent medical evidence. See paragraphs 17 and 18 of Patricia Carey's affidavit of 27 November 2017.

> "17. The Statement of Claim and the affidavit of 9 December 2016 contain no clear account of the facts upon which it is alleged the proceedings were issued within time. The affidavit of 9 December 2016* contains an extract from a report from a Dr. Brendan McCormack, consultant psychiatrist, which is exhibited to the affidavit and in which it is stated that:
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> > *For [the Plaintiff], the only way to carry on was to shut down these memories. It is only in recent times with the help of psychotherapy that she has developed the capacity to engage in thinking about and remembering these events. Up until this point, it has not been possible for her to bring these events to mind in a way that would allow her to make decisions, or to consider any action regarding Cunamh.*
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> 18. It seems, although it is not clearly stated, that this is regarded as relevant to the issue of time limits. While the implications of any such evidence in law are a matter for legal submission, any evidence to this effect offered on behalf of the Plaintiff requires to be tested; and the Authority intends to seek independent medical evidence in this regard at the earliest opportunity."

* This is a reference to the affidavit filed by the Plaintiff in response to the earlier application brought by Cúnamh to dismiss the proceedings against it.

64. The fact that the first named defendant, Cúnamh, had issued its motion to dismiss the proceedings in February 2016 meant that by the time the Adoption Authority came to issue its own motion in November 2017, the Authority had the benefit of sight of the affidavit which the Plaintiff had filed in response to Cúnamh's application to dismiss the proceedings. This earlier application had been adjourned generally in January 2017.

65. The Plaintiff had confirmed, in her affidavit of 30 April 2018, that she was willing to be examined by any medical practitioners as requested. The Adoption Authority does not appear to have taken any further steps in this regard.

66. Finally, for the sake of completeness, it is necessary to refer briefly to *O'Dwyer v. Daughters of Charity of St. Vincent de Paul* [2015] IECA 226; [2015] 1 I.R. 328 ("*O'Dwyer*"). It appears that in that case both the High Court (Kearns P.) and the Court of Appeal were prepared to determine the question of whether proceedings were statute barred on the basis of an interlocutory application, notwithstanding that a trial of a preliminary issue had not been directed.

67. As in the present case, *O'Dwyer* concerned the legality of an adoption of a child. The proceedings had been commenced some forty-four years after the events complained of had occurred. The central issue before the Court of Appeal was whether the limitation period had been postponed as a result of concealed fraud on the part of the defendant. This required a consideration of section 71 of the Statute of Limitations.

68. I am satisfied that *O'Dwyer* is distinguishable from the present case for a number of reasons. First, the outcome of the appeal in *O'Dwyer* turned principally on a question of *statutory interpretation* rather than on the resolution of disputed facts. The Court of Appeal held that whereas the failure of the defendant to inform the plaintiff of her rights under the Adoption Acts may well have amounted to a breach of duty, there was no concealment of either (i) actions taken by or on behalf of the defendant, or (ii) facts known only to it. By contrast, the legal and factual issues in the present case are far more enmeshed. Secondly, the Court of Appeal was prepared to assume certain facts in favour of the plaintiff. See paragraph [30] of the judgment. Thirdly, no objection appears to have been raised by the plaintiff to the question in respect of the Statute of Limitations being determined without a formal trial of a preliminary issue having been directed.

69. In summary, therefore, the dispute in the present case as to whether the proceedings are statute barred cannot be resolved without oral evidence and cross-examination, and cannot be determined on an interim or interlocutory application heard on affidavit. This is in marked contrast to *O'Dwyer*.

(2). inordinate and inexcusable delay

Legal principles governing application to dismiss

70. The principles governing an application to dismiss proceedings on the basis of inexcusable and inordinate delay are well established. The leading judgment remains that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 (at 475/76) ("*Primor*").

> "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."

71. As appears, a court must consider three issues in sequence: (i) has there been inordinate delay; (ii) has the delay been inexcusable; and (iii) if the answer to the first two questions is

positive, it then becomes necessary to consider whether the balance of justice is in favour of or against allowing the case to proceed.

72. The application of the first of these considerations to the facts of the present case is straightforward. Counsel for the Plaintiff concedes that the delay has been inordinate. (17 May 2019, 3.10 pm). This concession was properly made, and it would have been difficult to argue convincingly to the contrary. There had been a lapse of some thirty-five years between the date of the events complained of, and the institution of the within proceedings on 19 August 2015. There has also been ongoing delay in responding to the notice for particulars served on behalf of the Adoption Authority on 26 November 2015. The combination of the delay pre- and post-commencement of the proceedings is inordinate. Whereas the traditional view had been that delay had to be assessed by reference to delay in the prosecution of the proceedings, i.e. by reference to delay *subsequent* to the institution of the proceedings, the more recent case law indicates that both pre- and post-commencement delay can be considered. See, for example, *Cassidy v. The Provincialate* [2015] IECA 74, [32].

73. The application of the second consideration under the *Primor* test, i.e. whether or not the delay is inexcusable, to the facts of the present case is more problematic. It is contended on behalf of the Plaintiff that she had been under a disability ("unsound mind") for many years, and that given the existence of this disability, the delay was excusable.

74. Approaching the matter from first principles, it is at least arguable that if an individual had been unable to institute proceedings for a number of years because of a disability caused by the wrongdoing of the prospective defendant, then this might well excuse pre-commencement delay. The difficulty in the present case, of course, is that it is simply not possible to determine, on the basis of an interlocutory application heard on affidavit, whether the Plaintiff did, in fact, suffer from a disability, still less whether this was caused by any wrongdoing on the part of the Adoption Authority. The evidence before the court is incomplete. There is no affidavit evidence from a consultant psychiatrist; there is merely a report which has purportedly been verified in part by the Plaintiff in her affidavit of 30 April 2018. There has been no cross-examination of any witness.

75. Ultimately, the onus of proof of establishing that the delay has been inexcusable lies with the Adoption Authority as the moving party, i.e. the party seeking to have the proceedings dismissed. The moving party must first satisfy the court that the delay has been both inordinate and inexcusable before the court can move on to consider whether the balance of justice lies in allowing the case to proceed or not. It is only at that stage that the onus of proof shifts to a plaintiff. See *Sweeney v. Keating* [2019] IECA 43, [19].

76. The moving party is not, however, required to meet an unrealistic standard of proof but is instead entitled to ask the court to draw reasonable inferences from the evidence before the court. See, for example*, O'Connor v. John Player and Sons Ltd.* [2004] 2 I.L.R.M. 321 (at 332).

"Although the onus of establishing that the delay complained of has been inexcusable clearly rests upon the party so alleging, the onus may be discharged by way of evidence and argument demonstrating that no reasonable or credible explanation has been offered, or can reasonably be said to exist, which would account for, or excuse, the delay."

Findings of the court

(i) Pre-commencement delay

77. With some hesitation, I have concluded that it is not possible, on the basis of the limited material before the court at this time, to reach a definitive view on whether the *pre-commencement* delay is inexcusable or not. The Plaintiff's side, by exhibiting the report of the consultant psychiatrist, has done just enough to ground an argument based on an alleged disability on her part. Whereas the Adoption Authority has highlighted what appear to be glaring inconsistencies between (i) the claim that the Plaintiff was of "unsound mind" and (ii) the documentary evidence—which appears to indicate that she had engaged with the Adoption Authority in the year 2000 and would have been capable of instituting proceedings at that time—none of this has been tested by way of cross-examination as of yet. Further, insofar as it had initially identified a requirement to have independent medical evidence in this regard, the Adoption Authority tacitly accepted that further evidence is required before this issue could be resolved. (See paragraph 63 above).

78. None of this is intended to suggest for a moment that the Plaintiff would succeed, at a full hearing, in establishing that she had been under a disability or that the alleged disability had been caused by any wrongdoing on the part of the Adoption Authority. This judgment does not express any definitive view on either of these issues precisely because it is not possible to do so on the limited evidence before the court.

79. Finally, for the sake of completeness, I should record that I gave careful consideration to the judgment of the Court of Appeal in *Cassidy v. The Provincialate* in deciding whether or not there was sufficient evidence before the court to ground an argument that the Plaintiff was under a disability. The judgment of the High Court at first instance in *Cassidy* had been to the effect that the delay in that case was excusable in circumstances where the High Court found that the many social, physical and psychological difficulties described by the plaintiff in her pleadings had impacted on her ability to pursue the litigation. The Court of Appeal, in overturning the High Court, was not satisfied that there was a sound evidential basis for this finding. Irvine J. noted that no psychological or psychiatric evidence had been put before the High Court to support what was otherwise a bald assertion on the part of the plaintiff.

"47. As to the conclusion of the trial judge that the 'myriad of miseries' which the plaintiff had allegedly experienced in her lifetime could excuse the delay, there was again next to no evidence to support such a finding. Unlike most cases were a plaintiff will seek to excuse delay of the type involved in these proceedings, no psychological or psychiatric evidence was put before the court to support what is otherwise a bald assertion on her part, namely that she suffers/suffered from the many difficulties

referred to in the personal injuries summons. Further, there was no evidence to support the assertion at para. 18 of the summons that these had affected her ability to advance her proceedings. Indeed, insofar as the plaintiff relied upon a psychological condition to excuse her delay, there were no facts pleaded to show for what part, or parts, of the thirty year period of delay she was under such a disability. When asked by the defendant, in its notice for particulars dated 21st May, 2012, to state when she developed the post-traumatic stress disorder upon which she relied to contend that she had been disabled in her ability to advance the proceedings, she said in her reply of 10th August, 2012, that this 'was a matter for evidence'.

48. Having reviewed all of the evidence that was before the learned High Court judge, I am satisfied that there was insufficient evidence to excuse the plaintiff's delay in the issuing of these proceedings. This is particularly so in circumstances, where, during that period of delay, she married, reared a family and held down a number of positions of employment.

49. In all of these circumstances, I am quite satisfied that the plaintiff has been guilty of inordinate and inexcusable delay within the meaning of the *Primor* test."

80. The facts of the present case are distinguishable from those at issue in *Cassidy* for the following reasons. First, the Plaintiff has exhibited a report from a consultant psychiatrist and has purported to verify the factual content of that report in part. Whereas this evidence is not sufficient to allow the court to make a definitive determination on the question of whether the delay was inexcusable, it does appear that the Plaintiff has gone further than had been done in *Cassidy*. Put otherwise, this is not a case where there is no evidence before the court which might support a finding that the Plaintiff was under a disability. Given that the onus of proof lies with the moving party, it seems to me that the Plaintiff has done just enough to ground an argument that the delay was excusable because of an alleged disability on her part.

81. Secondly, in contrast to the trial judge in *Cassidy*, I am not purporting to make a finding of fact based on insufficient evidence. Rather, it is precisely because I consider the evidence to be insufficient that I have been unable to reach a finding of fact on this issue.

(ii) Post-commencement delay

82. The legal position in respect of post-commencement delay is different. Even if one assumes for the purposes of argument that the pre-commencement delay might have been excusable on the basis that the Plaintiff was incapable of instituting proceedings any earlier than 19 August 2015, the post-commencement delay is inexcusable. Given the late start to the proceedings, it behoved the Plaintiff and her legal representatives to pursue the litigation with expedition. The ongoing failure to reply to the notice for particulars served on behalf of the Adoption Authority on 26 November 2015 is inexcusable. The notice for particulars raised issues which are critical to a fair adjudication of the proceedings, and it should have been replied to years ago.

83. It is no answer to suggest—as counsel for the Plaintiff did—that the notice for particulars had been overtaken by the subsequent motion to dismiss the proceedings. The Adoption Authority's motion issued on 29 November 2017, that is, more than *two years* after the notice for particulars had been served. Put otherwise, the Plaintiff was already in serious default before the motion issued. If anything, the issuing of the motion—far from justifying further inaction on the part of the Plaintiff—made it all the more urgent to reply to the notice for particulars. Certain of the particulars sought were directly relevant to issues arising on this application. Particulars had been expressly sought in respect of the reasons for the Plaintiff's delay in instituting proceedings.

84. Nor can the Plaintiff rely on the fact that the first named defendant, Cúnamh, had issued its own motion to dismiss in February 2016 to excuse the delay. That motion only addressed the position of Cúnamh, and even if it had been heard and determined in favour of Cúnamh, that would not affect the continuation of the proceedings as against the Adoption Authority. In any event, it appears that Cúnamh's application had been adjourned generally in January 2017.

Balance of justice

85. Given my finding that there has been inordinate and inexcusable delay in the prosecution of these proceedings, it is necessary to consider next whether the balance of justice is in favour of or against allowing the proceedings to go to full trial. The factors to be considered in this regard have been enumerated by the Supreme Court in the passage from *Primor* cited at paragraph 70 above.

86. One of the principal factors to be considered in the present case is whether the ability of the Adoption Authority to defend the proceedings has been prejudiced as a result of the delay. The nature of the consideration to be carried out is described as follows in *Primor*. The court must consider:

> "(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".

87. As it happens, it is necessary to carry out a similar exercise in the context of the application of the overlapping jurisdiction to dismiss proceedings which is discussed under the next heading below. As explained presently, the threshold to be met for the purposes of this overlapping jurisdiction is more demanding than that under the *Primor* test. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. Proof of moderate prejudice will not suffice.

88. For the reasons set out under the next heading, I have concluded that this *higher* threshold has been met on the facts of the present case. On the principle that the greater includes the lesser, it follows from this conclusion that the lower threshold under the *Primor* test must also have been met. To avoid unnecessary duplication, therefore, the analysis of the

prejudicial effect of the delay set out under the next heading below should be read as applying *mutatis mutandis* to the application of the *Primor* test under the instant heading.

89. It remains then simply to determine whether any of the *other* considerations identified under the *Primor* test arise on the facts the present case.

90. Counsel for the Plaintiff has been critical of the omission on the part the Adoption Authority to issue a motion seeking to compel replies to the notice for particulars of 26 November 2015. With respect, this criticism overlooks the distinction drawn in the case law between acquiescence and mere inaction on the part of a defendant. The distinction is explained as follows by the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206.

> "38. Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?
>
> 39. For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."

91. Similar sentiments have been expressed in the more recent judgment of the Court of Appeal in *Sweeney v. Keating* [2019] IECA 43, [25].

> "There is no obligation on a defendant to progress proceedings or to take steps to pressurise a plaintiff to pursue an action with diligence. Every step taken by a defendant is one which is financially costly and a defendant may never recover that expenditure even if the action is successfully defended."

92. Applying these principles to the facts of the present case, I am satisfied that the Adoption Authority has not been guilty of delay or acquiescence. The Authority entered an appearance to the proceedings promptly, and served a notice for particulars within three

months (26 November 2015). Notwithstanding that the Plaintiff never replied to this notice for particulars, the Authority delivered a defence to the proceedings on 12 December 2017. There was no obligation on the Authority to issue a motion seeking to compel replies to the notice for particulars.

93. In all the circumstances, I am satisfied that the balance of justice lies in favour of dismissing the proceedings as against the Adoption Authority.

(3). real and serious risk of an unfair trial or unjust result

94. The delay on the part of the Plaintiff has been analysed under the previous heading by reference to what are often described as the *Primor* principles. These principles are, however, complemented by a separate but overlapping jurisdiction to dismiss proceedings where there is a real and serious risk of an unfair trial and/or an unjust result. This complementary jurisdiction had first been considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151.

95. As explained by the High Court (Finlay Geoghegan J.) in *Manning v. Benson and Hedges Ltd.* [2004] 3 I.R. 556, this jurisdiction gives effect to constitutional requirements.

> "32. The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial. This, as was submitted, is required by Article 34 of the Constitution. Accordingly, if a defendant can on the facts establish that having regard to a lapse of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss.
>
> 33. Also, if a defendant can establish that a lapse of time for which he is not to blame is such that there is a clear and patent unfairness in asking him now to defend the claim then he may also be entitled to an order to dismiss. This entitlement derives principally from the constitutional guarantee to fair procedures in Article 40.3 of the Constitution.
>
> 34. Whilst in some of the cases the judgments have referred to matters under both these headings, they appear to be potentially separate grounds upon which the inherent jurisdiction to dismiss may be exercised.
>
> 35. The factor 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 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 the probable trial date.

Further, on the second question it will be relevant to consider any actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time."

96. The difference between the legal tests governing these two complementary jurisdictions has been explained with admirable clarity by the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74, [33] to [38]. As appears from that judgment, the two principal distinctions are as follows. (For ease of exposition, I propose to adopt the same shorthand as employed by the Court of Appeal in *Cassidy*, and will describe the tests as "the *Primor* test" and "the *O'Domhnaill* test", respectively.)

97. First, whereas it is a necessary ingredient of the *Primor* test to establish that the delay is "inexcusable", the *O'Domhnaill* test does not require that there have been culpable delay on the part of a plaintiff. Secondly, whereas both tests require that some consideration be given to whether the delay has prejudiced the defendant in the defence of the proceedings, the degree of prejudice required differs between the two tests. Under the *O'Domhnaill* test, nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. The rationale for this distinction is described as follows in *Cassidy v. The Provincialate*.

"37. Clearly a defendant, such as the defendant in the present case, can seek to invoke both the *Primor* and the *O'Domhnaill jurisprudence*. If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the *Primor* test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceedings if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend the claim?

38. Considering its jurisdiction having regard to the test in *O'Domhnaill,* a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant

such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result."

98. The claim in *Cassidy* had been for damages for personal injuries allegedly suffered by the plaintiff by reason of assault, abuse, rape and false imprisonment on the part of a male assailant. This individual is referred to in the judgment simply by the initials "P.D.".

99. It was alleged that P.D. had been an employee of the Religious Sisters of Charity, the defendant to the proceedings. The alleged abuse was said to have taken place between the years 1977 and 1980. The religious order had no record of P.D. having been employed by them, and, in any event, it appeared likely that P.D. was dead although an ongoing Garda investigation had not yet established that fact with certainty.

100. The Court of Appeal, in applying the *Primor* test, described the death of P.D. as of such prejudicial magnitude that it warranted the court determining the balance of justice issue against the plaintiff. The Court of Appeal also analysed the case in terms of the *O'Domhnaill* test, and concluded that there was a real or serious risk of an unfair trial or unjust result. Relevantly, the Court of Appeal rejected an argument on behalf of the plaintiff that the application to dismiss should fail because the defendant had taken insufficient steps to establish the whereabouts of other potential witnesses. The Court of Appeal described these witnesses as peripheral in the context of the "enormous prejudice" caused by the death of P.D.

> "64. I reject the submission made by counsel on behalf of the plaintiff that the defendant's application should fail because it has taken insufficient steps to establish the whereabouts of four of the potential twenty nine witnesses that might have been available to the defendant in these proceedings. That type of criticism might be valid in a case where it is alleged that something occurred in the presence of a particular individual and the defendant had not sought to track that person down. However, the witnesses whom the plaintiff complains the defendant should have more hotly pursued are so peripheral in the content of the enormous prejudice caused by the death of PD that such an argument is unsustainable.
>
> 65. Having considered the evidence that was before the High Court, I am quite satisfied that to allow this action proceed would, to use the words of Henchy J., 'put justice to the hazard', given that I am fully convinced that the issues between the parties are now long 'beyond the reach of fair litigation'. The defendant would not only be at risk of an unfair trial but to my mind would enjoy no prospect whatsoever of a fair hearing or a just result. Any trial as might take place would, as Kelly J. stated in *Kelly v. O'Leary* [2001] 2 I.R. 526 at p.544, 'be far removed from the form of forensic enquiry which is envisaged in the notion of a fair trial in accordance with the law of this State' and would amount to what was described in *O'Keeffe v. Commissioners of Public Works* (Unreported, Supreme Court, 24th March, 1980) as a 'parody of justice'.

Further, the Court itself would be unable in the circumstances to fulfil its constitutional mandate under Article 34 of the Constitution, given that this can only be met by the provision of a fair trial based on procedures which are fair and just for both parties.

In the aforementioned circumstances, I have come to the conclusion that the defendant is also entitled to have this action dismissed in the exercise by the Court of its jurisdiction as per the *O'Domhnaill* test."

Findings of the court

101. Applying these principles to the facts of the present case, I am satisfied that the lapse of time since the date upon which the events said to constitute wrongdoing on the part of the Adoption Authority occurred is such that there is a real and serious risk of an unfair trial or an unjust result if this action were permitted to proceed to trial. The initial placement of the Plaintiff's daughter for adoption, and the subsequent making of an adoption order, took place over a period of eighteen months in the years 1979 and 1980. A period of more than thirty-five years had elapsed prior to the institution of these proceedings on 19 August 2015. The court is entitled to take judicial notice of the fact that the ability of potential witnesses to recollect events at this remove will have greatly diminished.

102. The nature of the claim made in these proceedings gives rise to specific prejudice. Insofar as can be ascertained from the sparse pleadings to date, the claim as against the Adoption Authority is to the effect that the Authority failed to ensure that the Plaintiff gave informed consent to the adoption of her daughter. In order to adjudicate properly on this claim, the trial judge would have to consider the circumstances in which the Plaintiff came to swear not one but two affidavits expressly consenting to the adoption. Further, as set out at paragraphs 16 *et seq.* above, the documentary evidence indicates that the Adoption Authority had taken the precaution of having an authorised person question the Plaintiff to ensure her understanding of the adoption process, and for that authorised person to swear an affidavit to that effect. The authorised person in this case was Anne McCarthy. Ms McCarthy has informed the Adoption Authority that she has no specific recollection of her dealings with the Plaintiff. This is entirely unsurprising in circumstances where, as explained on affidavit, Ms McCarthy would have been involved in numerous adoptions. It would be unrealistic to expect that she would have a specific recollection of an individual adoption some thirty-five to forty years after the event. (It matters not for the purposes of this finding whether one reckons the delay up to the date of the institution of the proceedings (some thirty-five years) or to today's date, i.e. to include the post-commencement delay (forty years).)

103. It seems that it will not be possible to adduce evidence on the part of two other potentially significant witnesses. These are the two social workers from Cúnamh who had been dealing with the Plaintiff. The principal social worker has, unfortunately, since died. The other social worker, Ms Éilis Burke, has indicated to Cúnamh that she has no specific recollection of the events. See paragraphs 14 to 19 above.

104. The fact that neither of the two defendants will be in a position to lead evidence from the three individuals who had the most dealings with the Plaintiff during 1979 and 1980 has the consequence that a fair trial is not now possible. The nature of the claim in this case is such that it could only ever be properly determined on the basis of oral evidence from the principal participants.

105. One of the striking features of this case is that the Plaintiff's claim is entirely inconsistent with the contemporaneous documents. These documents indicate that the Plaintiff made an informed decision to consent to the adoption. Presumably, were the matter to proceed to trial, the Plaintiff intends to provide oral evidence of her own recollection of the events of 1979 and 1980 to contradict the content of the contemporaneous documents. One of the central issues for the trial judge to determine would be whether the Plaintiff's version of events is credible. This is a case, more than most, where a fair trial necessitates that the defendants have an opportunity to test the credibility of the principal witness on the plaintiff's side.

106. As a consequence of the delay of more than thirty-five years, however, the Adoption Authority will not be in a position to challenge the Plaintiff's version of events in a meaningful manner. The Authority will not now be able to call witnesses who could have provided direct evidence as to their dealings with the Plaintiff. The Authority's ability to cross-examine the Plaintiff will also be undermined. A successful cross-examination requires that counsel be able to put his or her client's version of events to the witness. This is dependent on the ability of the client to provide detailed instructions. The death of some of the potential witnesses, and the faded memories of others, means that the instructions will not be as complete as they would have been had the proceedings been brought promptly.

107. It is also relevant to this analysis to note that witnesses who might otherwise have been in a position to give meaningful evidence in relation to the events in the year 2000 are not now in a position to do so. See affidavit of Patricia Carey sworn on 12 July 2018, at paragraph 15 thereof.

108. All of this has the consequence that, were this action to be allowed to proceed to full hearing, there is a real risk that the trial would be one-sided. Such a trial would fall far short of the standards of fairness required under the Constitution of Ireland and would increase the risk of an unjust result.

109. Counsel on behalf of the Plaintiff sought to criticise what he characterised as a failure on the part of the Adoption Authority to track down potential witnesses. With respect, the nature of the claim made against the Adoption Authority is such that there are, in truth, only three principal witnesses other than the Plaintiff herself. The other employees of the Adoption Authority, such as the clerical officers whose names appear on the file, do not seem to have had any meaningful interaction with the Plaintiff, and certainly not in relation to the issue of her informed consent. Again, there is a parallel with the judgment in *Cassidy* where the

Court of Appeal rejected an argument that what were, in effect, peripheral witnesses should have been sought out. See paragraph 100 above.

110. The criticism made on behalf of the Plaintiff rings hollow in circumstances where the Plaintiff has failed to set out proper particulars of her claim as against the Adoption Authority in the Personal Injuries Summons, and has failed to reply to a notice for particulars served on behalf of the Authority on 26 November 2015. A plaintiff who has failed to provide particulars cannot be heard to criticise a defendant for failing to seek out witnesses in circumstances where it is entirely unclear on the basis of the pleadings as to who it is that the plaintiff says she dealt with from the Adoption Authority.

Conclusion and form of order

111. Having regard to the principles set out in the judgment of the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74, I am satisfied that were these proceedings to be allowed to go to full hearing there would be a real and serious risk of an unfair trial and/or an unjust result. By the time these proceedings were instituted on 19 August 2015, a period of some thirty-five years had elapsed since the date of the events said to give rise to the Plaintiff's claim. The ability of the Adoption Authority to defend these proceedings has been seriously prejudiced by this delay. In particular, it will be unable to adduce evidence of the key events in 1980 in circumstances where the principal participants are either deceased or have no specific recollection of the events.

112. The nature of the claim advanced by the Plaintiff and, in particular, her seeming intention to contradict the content of the contemporaneous documentation means that a fair trial of this action would necessitate all relevant witnesses being available. The absence of testimony from relevant witnesses on behalf of the Adoption Authority and Cúnamh would have the effect that a trial would be one-sided and would not meet the constitutional requirements for a fair trial. There is also a real risk that the trial judge would be unable to reach a just result in circumstances where he or she would not have the benefit of all relevant evidence.

113. I am also satisfied that the proceedings should be dismissed on the separate ground that there has been inordinate and inexcusable delay on the part of the Plaintiff and her legal representatives in prosecuting same, i.e. post-commencement delay. The ongoing failure to reply to the notice for particulars served on behalf of the Adoption Authority on 26 November 2015 is inexcusable. The notice for particulars raised issues which are critical to a fair adjudication of the proceedings, and it should have been replied to years ago.

114. Accordingly, I propose to make an order dismissing the proceedings as against the Adoption Authority.

Appearances

Ciarán Lawlor for the plaintiff instructed by Carl O'Mahony & Co Solicitors.

Paul Gallagher, SC and Eoin Carolan for the second named defendant instructed by Matheson.