

THE HIGH COURT**Record Number: 2001 No. 9906 P****BETWEEN****L. L.****PLAINTIFF****AND**

**F.X.I.S., B.A., THE MINISTER FOR EDUCATION AND SCIENCE,
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
C. D.A., T.F., L.C., IRELAND AND THE ATTORNEY GENERAL**

DEFENDANTS**Judgment of Mr Justice Michael Peart delivered on the 16th day of May 2007**

1. By order dated 6th May 2006 the Master of the High Court refused an application by the plaintiff for an enlargement of time for the delivery of a Statement of Claim on the 6th named defendant, Thomas Flynn. By that time the plaintiff had served a Notice of Discontinuance of these proceedings on the 1st, 2nd, 3rd, 4th, 8th and 9th defendants, and judgment in default of appearance had been obtained by her against the 7th named defendant.

2. These proceedings seek damages for personal injuries, physical abuse, sexual abuse, false imprisonment, mental distress, nervous shock, loss, damage, inconvenience and expense suffered by the plaintiff as a result of alleged actions of the 7th defendant who was a Catholic priest, who was the chaplain and Catholic curate while she was a resident at B.A. during the years 1971 and 1977, and she alleges that these actions on the part of the 7th defendant continued after she left that institution in 1977. It is relevant that the claim related both to before she left that institution and after she left, because she has pursued a claim in respect of injuries before the Residential Institutions Redress Board and has received an award from that body in respect of the period between 1971 and 1977. That award resulted in these proceedings being discontinued against the parties already mentioned, and the claim which she is anxious to pursue by the delivery of a Statement of Claim is restricted now to the period after 1977 when she had left B.A..

3. The 5th and 6th defendants are sued on the basis of having vicarious liability for the actions of the 7th defendant, who, it is alleged had dominion over her to the extent that her mind was overborne by him, so that the abuse continued after she left B.A. and was living in various locations in Dublin from time to time thereafter, despite her protestations. Such protestations are alleged by her to have resulted in harassment, beatings and threats by the 7th defendant. The said actions of the 7th defendant are said to have continued until 1981 when she became pregnant. At that point she states that the abuse ceased. But she alleges that by this time she was suicidal and was admitted as an in-patient at a hospital where she was diagnosed as being suicidal and suffering from depression. She had a number of such admissions between 1981 and 1983. This background has impacted adversely on her employment over many years, and she has ongoing symptoms.

4. These proceedings were commenced by plenary summons which issued on the 15th June 2001, but because same had not been served within twelve months after issue, an application was made for renewal under Order 8, rule 1 of the Rules of the Superior Courts. This application was granted on the 29th July 2002, and the proceedings were served on all defendants within that period of six months, with the exception of the seventh named defendant.

5. It appears that after the issue and service of these proceedings the plaintiff commenced her claim through the Residential Institutions Redress Board on or about the 23rd April 2003, and an award was made by that body on the 7th May 2004. As I have already referred to, following the making of this award the plaintiff waived her right of action against the 1st, 2nd, 3rd, 4th, 8th and 9th defendants on the 9th May 2004.

6. On the 12th July 2004 a further application to renew the plenary summons as against the seventh named defendant was made, and which was granted. Thereafter the seventh named defendant was served personally with the summons on the 24th August 2004. There had been efforts in 2002 to serve this defendant through a firm of solicitors who had informed the plaintiff's solicitors that they were instructed by the seventh named defendant, but those instructions did not extend to having instructions to accept service of the Plenary Summons on his behalf at that time. Correspondence during the summer of 2002 with those solicitors, and to the seventh named defendant directly had contained details of the allegations being made against him. No appearance was entered by him or on his behalf, and ultimately the plaintiff obtained judgment in default of appearance against the seventh named defendant.

7. The plaintiff's solicitor, Stephanie McCarthy, avers in her affidavit sworn on the 21st December 2005, which grounded the application to the Master of the High Court for an enlargement of the time for delivery of the Statement of Claim on the 6th named defendants, that following the commencement of the plaintiff's claim to the Redress board in April 2003, no step was taken to progress the plenary summons proceedings since she had encountered difficulty in serving those proceedings on the 7th named defendant. Those difficulties are said to have given rise to the need to make the application to further renew the summons on the 12th July 2004 already referred to. She goes on to state that in an effort to inform the solicitors for the sixth named defendant of the plaintiff's wish to proceed, she served a Notice of Intention to Proceed on those solicitors by letter dated 3rd November 2005.

8. By further letter dated 8th December 2005 she delivered a Statement of Claim to those solicitors. Those solicitors responded to the effect that they did not consent to the late delivery of this Statement of Claim. That response has led to the application to the Master and now to this court for an order extending time for such delivery.

9. She proceeds in her grounding affidavit to aver as follows:

"10. I further say that due to the nature of the proceedings and the nature of the harmful events complained of and the effects which the said events have had and continue to have on the plaintiff, your deponent intermittently has difficulty in seeking instructions from the plaintiff.

11. I say and believe that it was at all material times and remains the bona fide intention of the plaintiff that her claim would be prosecuted with all due diligence....."

10. A replying affidavit was sworn by the solicitor for the sixth named defendant, Diarmuid Ó Catháin. He asserts that the plaintiff has been guilty of inordinate and inexcusable delay in the commencement and prosecution of these proceedings, and that this delay is such that, if the plaintiff was permitted to proceed at this stage, the rights of the sixth named defendant and the State's obligations under Article 6 of the European Convention on Human Rights would not be respected and would be breached. He makes the point that four and a half years passed before the plaintiff brought the present application for enlargement of time for delivery of the Statement

of Claim.

11. He makes the point also that prior to issuing these proceedings, the 6th named defendant, who is sued in his capacity as the representative of the diocese of ----- with responsibility over the placement of curates in that diocese, including of chaplains to institutions such as that in which the plaintiff resided at times relevant to this case, was never notified of or given any details of the allegations being made against the 7th named defendant by the plaintiff, and that the first letter received was one dated 9th May 2002, which was almost one year after the proceedings had been commenced. He states that his firm then wrote to the plaintiff's solicitors stating that it was not proper that the sixth named defendant should be joined and any liability was denied. Nevertheless the letter asked for details of what complaints were being alleged against the 7th named defendant, stating also that no complaint had ever been made about him to the 6th named defendant. The plaintiff's solicitor responded to that letter by letter dated 18th July 2002 in which some further details were provided, and asked if those solicitors had authority to accept service of the proceedings on behalf of the 6th named defendant. By further letter dated 23rd August 2002, the 6th named defendant's solicitors took issue with certain legal issues raised by the plaintiff's solicitors, denied any liability on behalf of their client, but nevertheless concluded by stating that they had at that time authority to accept service of the plenary summons on behalf of their client. They did so in due course, and entered an appearance on the 10th December 2002.

12. I have already referred to the fact that the plaintiff's solicitor has stated in her affidavit that she served a Notice of Intention to Proceed on the solicitors on the 3rd November 2005. In his replying affidavit, Mr Ó Catháin states that this Notice served on him is in fact one dated 24th June 2005 and stated therein that "on the expiration of one month from the date of the within notice the plaintiff intends to pursuing [the action]....", and that since it was not delivered to him until the 3rd November 2005 it was out of date and ineffective, and that he brought this to the intention of the plaintiff's solicitor by letter dated 30th November 2005. A perusal of the Notice of Intention to Proceed dated 24th June 2005 indicates by reference to the Central Office filing stamp that the document was filed in the Central Office on that date also. His letter dated 30th November 2005 went on to protest at the inordinate and inexcusable delay which was therein characterised as "extraordinary" and to the prejudice to their client as a result. The prejudice alleged is not specified.

13. By letter dated 8th December 2005 the plaintiff's solicitor delivered by letter the Statement of Claim to Messrs. Ó Catháin & Co. By letter dated 15th December 2005 they responded by stating again that they did not accept the validity of the Notice of Intention to Proceed and stating that they did not consent to late delivery of the Statement of Claim and requested that the proceedings be discontinued against their client.

14. In support of the allegation of prejudice there was another affidavit filed on this application, namely one by Patrick O'Connor, solicitor., who at one time was instructed by the 7th named defendant but not to the point of being instructed to accept service of proceedings on behalf of that defendant at that time. Mr O'Connor outlines the history of his involvement and as to what he knows of interaction between the plaintiff's solicitors and the 7th named defendant directly, since that defendant was at the time of swearing of Mr O'Connor's affidavit residing in a convalescent home having suffered a stroke on the 24th December 2005.

15. It appears from his affidavit that following the service of the Notice of Intention to Proceed on the 7th defendant directly on the 3rd November 2005 they also sent a copy to Mr O'Connor, and that in February 2006 the plaintiff's solicitors also served a Notice of Motion upon the 7th defendant in which they sought judgment against him in default of appearance. Mr O'Connor became aware of the service of this Notice of Motion after he was contacted by a sister of the 7th named defendant who had simply seen the document and other such as the Plenary Summons, while visiting her brother there on the 18th February 2006. The 7th named defendant due to the effects of his stroke was incapable of bringing the documents to her attention. It appears that the said defendant first went to live in this convalescent home in July 2003. Mr O'Connor goes on to give details of the state of health of the 7th named defendant as of March 2006 and to the fact that he suffered a severe stroke on the 24th December 2005 following which he was admitted to Hospital for five weeks after which he returned to the convalescent home. By February 2006 he was extremely ill, and could not at the time of swearing of Mr O'Connor's affidavit speak or otherwise communicate. In addition he was incontinent and being fed by artificial means.

16. Mr O'Connor states in his affidavit that he visited the said defendant with the defendant's sister on the 4th March 2006 and spent about twenty five minutes with him. He wanted to establish what capacity the defendant had in order to give instructions to him and deal with these proceedings, since he had not met him since 2002. It appears that while in 2002 the defendant would have known Mr O'Connor by sight and identified him immediately, on this occasion he was simply slumped in a wheel-chair beside his bed, and appeared almost lifeless, and while he looked up he gave no indication that he recognised Mr O'Connor, and was unable to speak. He was also paralysed on his right side. Mr O'Connor, an extremely experienced solicitor formed the view that he was incapable of conducting any business whatsoever.

17. As a postscript to this part of the background, the court was informed by Counsel on the hearing of this motion before me recently that the 7th named defendant was now deceased, having passed away in very recent times.

18. The final affidavit filed in this matter is a second affidavit sworn by Stephanie McCarthy, the plaintiff's solicitor on the 3rd April 2006. She avers that the 6th named defendant is not prejudiced in any material way by the delay in these proceedings, and refers to the fact that at no time has the said defendant taken any step which he may have been entitled to, such as by way of motion to dismiss for want of prosecution. She then expands somewhat on the reasons she had given in her first affidavit for this delay, and believes that it is referable to what she calls "a multiplicity of factors" and that in the circumstances the delay is both explicable and excusable. She states that the medical advice shows that the reason for the delay by the plaintiff in formulating her claim against her abuser arose wholly or in part from the effects on her mind and person which the dominion exercised over her had caused. She states that the plaintiff for many years was in denial and confided in no one, and that it was only through many in-patient psychiatric treatments and sessions of counselling that she gained sufficient confidence to discuss and relate her life history, and the resolve to assert her rights and to seek redress. Ms. McCarthy states also that proceedings were commenced as soon as it became apparent that an action lay against the defendants, but that her complaints against many of the defendants was subsequently dealt with under the Residential Institutions Redress Board scheme. She states that the processing of that claim took a considerable amount of time, and that this was partly because of the extremely fragile state of the plaintiff's health. That factor made it difficult to obtain instructions which were both reliable and comprehensive. Ms. McCarthy states that during the currency of the Redress Board claim, it was felt by her advisers that to task the plaintiff with the additional complaints which lay outside the redress scheme claim would be excessive and would present a risk of pushing the plaintiff beyond what she was capable of dealing with. She states that the hearing before the Redress Board was both stressful and traumatic and took a considerable toll on the plaintiff, requiring constant and careful attention on the part of her advisers, and that even at the present time the plaintiff remains extremely fragile and subject to worrying fluctuations in health which are spontaneous and directly attributable to identifiable events which have affected her life. She says at paragraph 4(h) of this affidavit:

"(h) proper and prudent professional considerations dictated that further steps to prosecute this action ought not to be taken until such time as the plaintiff was in a position to proceed. To this extent, following the completion of the application process to RIRB, the plaintiff required time and attention to galvanise herself to seek the redress which she intends against the remaining defendants, including the defendant herein. In that regard the plaintiff obtained judgment against the seventh named defendant herein on the 20th March 2006..."

19. The 6th named defendant submits that the delay in the delivery of the Statement of Claim is both inordinate and inexcusable, and that he is prejudiced by reason of the fact that the 7th named defendant is now deceased and unavailable to give any evidence, and that if the plaintiff had delivered her Statement of Claim within a reasonable time after appearance was entered the 6th named defendant would have been able to contact and speak with the 7th named defendant and prepare any defence in the light of what he would have been told. He submits that he is now in the position that the only person who could deny the plaintiff's allegations is dead, and this prejudice would have existed to an equal extent following the stroke which the 7th named defendant suffered on the 24th December 2005, given the effects of that stroke on his mental and physical capacity as averred to by Patrick O'Connor, solicitor.

20. The plaintiff on the other hand submits that while the delay might reasonably be considered to be inordinate, it is excusable on the basis stated by Ms. McCarthy in her affidavits, namely because it arose due to the pursuit of the RIRB claim, and the stress that this caused to the plaintiff, to the extent that a second set of proceedings to deal with during that period would have been more than she could have coped with. I should add that in her second affidavit Ms. McCarthy accepts that with the benefit of hindsight it would have been preferable if she had communicated with the solicitors for the 6th named defendant and appraised them of the reasons why the decision was taken not to deliver a Statement of Claim at that stage. Mr Butler characterises that delay as one taken by a conscious decision on the part of the plaintiff's solicitor, and that she ought not to be criticised in that regard to the point where the plaintiff's claim should not be permitted to proceed.

21. The plaintiff also submits that another reason which excuses the delay arises from the fact that as part of the RIRB award it is a requirement that all other proceedings be discontinued in respect of the period covered by that scheme, and that in the present case it was reasonable to await the result of the RIRB claim, so that as few as possible defendants were proceeded against in the plenary summons proceedings. Indeed Counsel on her behalf, Nicholas Butler SC has suggested during submissions that it might have been perceived as an abuse of process to be pursuing both claims simultaneously.

22. A further ground relied upon is that prior to service of the proceedings eventually on the 7th defendant, there had been great difficulty in serving that defendant as the plaintiff was unaware of where he was residing, and an application to renew the summons had had to be made, so that even if the 6th defendant had been served with the Statement of Claim at some reasonable point in 2003, the action could not have properly proceeded against all defendants before the 7th defendant had been served.

23. Mr Butler submits that time began to run for the purpose of this motion to enlarge time for the Statement of Claim following the entry of appearance by the 6th named defendant on the 10th December 2002. Under the Rules of the Superior Courts that document ought to have been delivered sometime before the end of January 2003. The RIRB claim was being prepared at that time given that it was lodged in April 2003. That award was made in May 2004. He points to the fact that after that time, efforts were made to have the 7th defendant served with the proceedings.

24. Finally, Mr Butler has submitted that given that this application is simply one to enlarge the time for delivery of the Statement of Claim, the 6th defendant cannot rely on any delay pre-commencement, but only on delay following the entry of appearance.

25. I shall leave for the moment the submissions made by him in relation to prejudice.

26. Mr Maddox BL for the 6th defendant on the other hand submits that the delay is inexcusable and that none of the matters put forward by the plaintiff as excusing the delay, and that this Court when coming to the question of balancing the justice of the case between the parties can take account also of the delay by the plaintiff in commencing these proceedings, and that post-commencement delay should be considered only in relation to whether the delay in delivering the Statement of Claim was inordinate and inexcusable.

27. Mr Maddox seeks to draw attention to the fact that when the first grounding affidavit was sworn by Ms. McCarthy she explained the delay by reference to the difficulties in serving the 7th named defendant. He makes the point also that the first time the 6th defendant was aware of the claims being made by the plaintiff was after the plenary summons was issued, and that little detailed information was contained in the plaintiff's solicitor's first letter to them in June 2002, and that during the three years which passed following the entry of appearance on the 10th December 2002 there was no obligation upon them to bring any application to dismiss for want of prosecution, and that their failure to do so is not something which should benefit the plaintiff. He does not accept that the pursuit of the claim under the Redress Board scheme entitled the plaintiff to sit back and do nothing further to prosecute these proceedings until after the award made to her under that scheme. He submits that the plaintiff's solicitors would have had sufficient information to prepare a Statement of Claim based upon the instructions which the plaintiff was clearly in a position to give to her solicitors in relation to the Redress Board claim.

28. Mr Maddox also characterises the second affidavit by Ms. McCarthy as hearsay evidence in relation to the fragility of the plaintiff's state of mind during and after the Redress Board claim, and highlights that this information was not contained in the first grounding affidavit, but rather was contained only in the second affidavit sworn by her in response to that of Mr Ó Catháin, and that there is no medical evidence to support her opinions in this regard.

29. He also submits that it is not the case that if the plaintiff is unsuccessful in this application that she is without redress in relation to the balance of her claim in relation to post-1977 abuse. It was suggested that she might pursue a claim against her solicitor if that solicitor ought to have proceeded to deliver a Statement of Claim rather than delay as she did, and also that she could recover any damages she may be awarded from the estate of the now late 7th named defendant. He submits that there is a particular onus on a plaintiff who has already delayed in commencing proceedings to proceed promptly thereafter, and that she has failed to do so.

The law

30. Both Mr Butler and Mr Maddox are in agreement that the principles which the Court should apply are those contained in the judgment of Finlay P. (as he then was) in *Rainsford v. Limerick Corporation* [1995] 2 ILRM. 561. In that case the defendant had sought an order dismissing the plaintiff's claim for want of prosecution. Those principles are stated in the judgment of the learned then President of the High Court at p. 567 thereof, and include that on an application to dismiss a claim for want of prosecution or the permitting of an extension of time for a pleading, inquiry should first be made as to whether the delay has been inordinate, and even if found to be inordinate, whether it is inexcusable, the onus being on the part of the person seeking the dismissal or opposing the

enlargement of time for pleading, and further that even where the delay has not been both inordinate and inexcusable "there are no real grounds for dismissing the proceeding". In addition, where the delay has been found to have been both inordinate and inexcusable, the Court must nevertheless go further and 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.

31. There is no doubt in the present case that the delay between the entry of the appearance by the 6th named defendant and the attempted delivery of the Statement of Claim almost three years later is inordinate. As to this delay being inexcusable, I am satisfied that it is not.

32. If the sole ground on which it was sought to justify the delay in serving a Statement of Claim on the 6th defendant was the difficulty which the plaintiff's solicitor states she had in serving the 7th named defendant, and the need to seek a renewal of the summons for that purpose, I would not be so satisfied, given that there is no evidence of any real effort made to locate him, and of course, it must be borne in mind that the Rules of the Superior Courts provide for the making of an application for substituted service. In the present case it is clear that up to a certain point in time Messrs. P. O'Connor & Son were acting for the 7th named defendant, but unfortunately at that time their instructions did not extend to being in a position at that time to accept service on his behalf. But there would seem to have been every prospect of a successful application for substituted service on him through that firm, without excluding other possible methods.

33. But the principal reason, or the more worthy reason given is the state of mind of the plaintiff throughout the period from early 2003 and 2004 during and in the aftermath of the claim processed on her behalf through the Residential Institutions Redress Board. The plaintiff's solicitor has explained in considerable detail in her second affidavit the nature of that difficulty. Mr Maddox has submitted in effect that this reason has been put forward only in the second affidavit sworn by Ms. McCarthy. But I feel that this would not represent the reality. It is true that far more detail is given in relation to this reason than was contained in her first affidavit, but in the first affidavit it is certainly adverted to, although briefly. She explained therein that she experienced intermittent difficulty in seeking instructions from the plaintiff.

34. It was reasonable in my view that in the light of Mr Ó Cathain's replying affidavit that she should expand upon this reason in the way that she did. I have no reason to doubt in any way the bona fides of what she states in this regard having regard to the nature of the injuries complained of by the plaintiff as a result of the type of abuse which she alleges against the 7th named defendant. It has been for some time recognised by Courts dealing with applications to prohibit the criminal trial of such offences that the actions of such perpetrators can result in delays in a victim coming forward with complaints, and while such applications are in the context of pre-complaint delay, there is no reason for this Court to conclude that the effects of the alleged actions of the 7th named defendants did not include a difficulty in instructing her solicitor in relation to these civil proceedings during and after the claim being processed through the Redress Board. It is readily understood that it might be so. I respect the professional judgment made by Ms. McCarthy in this regard, and I cannot regard the making of such a judgment in the interests of her mentally fragile client as an act of negligence or one which should now result in that client being prevented from proceeding against the 6th defendant. In my view it excuses the delay between the entry of appearance and the time at which an attempt was made to deliver the Statement of Claim, even given the passage of three years.

35. I would not be prepared to hold that the prospect of the plaintiff being able to seek alternative redress against her solicitor in these circumstances is one which should be given any weight.

36. Having so found, and in accordance with the principles in *Rainsford v. Limerick Corporation* [supra] it is not strictly necessary to address the question of prejudice asserted on behalf of the 6th named defendant. But I will nevertheless make some comment in relation to that issue. There is no doubt that the death of the 7th named defendant means that he is not available to the 6th named defendant at any hearing of this case. But it must also be recalled that the 7th named defendant suffered a severe stroke on the 24th December 2005, and I am satisfied that at the least from that date, the same defendant would not have been available to give evidence which could assist the 6th named defendant. It is also a fact that for some time prior to the onset of that stroke and the resultant disability he had been resident in a convalescent home. While that of itself does not mean that prior to his stroke he may not have been able to give evidence, the Court is entitled to question the significance of any evidence he may have given. The 6th named exposure to liability results from an alleged vicarious liability for his actions. Whether the 6th named defendant is or is not vicariously liable will depend not so much on any evidence which the 7th named defendant might have given, but rather on the factual issue as to whether he was or was not appointed to certain positions by the 6th named defendant or his predecessors. That is evidence which the 6th named defendant can still adduce.

37. I am satisfied for the purpose of this application that even if this plaintiff had acted with reasonable dispatch following the conclusion of her claim through the Redress Board, the 7th named defendant would in all likelihood not have been of any real assistance to the 6th named defendant, and even allowing for the possibility that he may have been of some assistance, the justice of the case would lie in favour of allowing an enlargement of time for delivery of the Statement of Claim to the solicitors for the 6th named defendant. But as I have said already, my disposal of this application is on the basis that the delay was excusable in the circumstances outlined by Ms. McCarthy in her replying affidavits, and the question of prejudice does not strictly speaking have to be addressed by me at all.

38. I will therefore enlarge the time for delivery of this Statement of Claim for a period of 21 days from this date.