

THE HIGH COURT

[2012 No. 4295 P]

BETWEEN

M.C.

PLAINTIFF

AND

THE PROVINCIALATE

DEFENDANT

JUDGMENT of Mr. Justice Barrett delivered the 28th day of February, 2014.

1. The plaintiff alleges that as a child she suffered various forms of physical and sexual abuse on the grounds of the Magdalene Laundry in Donnybrook, at the hands of a man whom she claims was an employee of the Laundry. The plaintiff has commenced a personal injuries action against the Sisters of Charity in which she contends that they are responsible and vicariously liable for the actions of the man whom she claims repeatedly assaulted, abused and raped her. The Sisters are seeking an order dismissing the proceedings on the grounds of inordinate and inexcusable delay in the commencement and/or prosecution of the plaintiff's proceedings having regard to the balance of justice, including prejudice to the defendant and the defendant's rights under natural and common law, the European Convention on Human Rights and *Bunreacht na hÉireann*, including the right to fair procedures and a fair trial.

2. There are two key lines of authority governing the present application. They arise respectively from the Supreme Court decisions in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and *O'Domhnaill v. Merrick* [1984] I.R. 151.

3. In *Primor*, Hamilton C.J., at p. 475, summarises the principles to be applied in an application such as that now before the court. The *Primor* principles have since been recited with approval in a number of later cases and the court does not propose to repeat them here. In essence, the *Primor* case establishes a three-limb test to be applied in cases of delay: (1) is the delay inordinate? (2) is the delay inexcusable? (3) even if inordinate and inexcusable, is the balance of justice in favour of or against a case proceeding?

4. There is suggestion in recent case-law, such as *JMCH v. JM* [2004] IEHC 112, [2004] 3 I.R. 385, that the *Primor* case ought to be viewed as concerned with post-commencement delay only and it is true that on its facts *Primor* was an application to dismiss based on post-commencement delay. However, there are other cases such as *Guerin v. Guerin* [1993] 2 I.R. 287, which pre-date but appear consistent with *Primor*, in which regard has been had to the full backdrop of delay arising. If one accepts that *Primor* is concerned with post-commencement delay only, then the defendant's application in these proceedings fails to meet the requirement in *Primor* as to inordinate delay. This is because there is no suggestion that there has been any delay in the prosecution of the plaintiff's case since her proceedings against the Sisters were commenced. Taking this approach to *Primor*, the sole relevance of the plaintiff's significant pre-commencement delay is in determining where the balance of justice lies in deciding whether or not these proceedings should be allowed to continue. However, this Court considers that it is both consistent with *Primor* and also yields a result that is more instinctively correct to adopt the approach taken by Costello J. in *Guerin* and to have regard to the full back-drop of delay arising. Using this approach the court concludes that the totality of the delay that arises in this case is inordinate. Be that as it may, any interpretation of *Primor* requires the court to consider also whether inordinate delay, if such there is, is also inexcusable.

5. In this case the alleged abuse of the plaintiff took place between 1977 and 1980. The plaintiff claims that she first disclosed the alleged abuse to a third party in November, 2009 and six months later she disclosed it to her husband for the first time. So it was about 29 years from the last instance of alleged abuse that the plaintiff initiated a process of events that has led ultimately to these proceedings. The court has been referred to a number of cases concerning delay in the context of alleged historical sexual abuse. Perhaps the most pertinent of these is *Kelly v. O'Leary* [2001] 2 I.R. 526. In that case Kelly J. found that a delay of more than 51 years between the last occasion of alleged abuse and the commencement of proceedings was inexcusable. Kelly J. refers, at p. 540 and again at p. 542, to the fact that the plaintiff in those proceedings had been free of the "dominion" of her alleged abusers for 50 years, if there was any such dominion. Kelly J. also distinguished the case before him from *Guerin* in which Costello J. had particular regard to the plaintiff's socio-economic background when deciding whether the delay in that case had been inexcusable. In the present case, to borrow the phraseology employed by Kelly J., the court is not satisfied that the plaintiff can be said ever to have escaped the 'dominion' of her alleged abuser. Her indorsement of claim, the veracity of which was not challenged for the purposes of the present application only, suggests a sorry picture of a long-suffering woman who has lived her life in the shadow of what she claims was done repeatedly to her in Donnybrook between 1977 and 1980. Although there has been little evidence of the plaintiff's background placed before the court it does not appear from such details as appear in the replies to particulars that she hails from what Costello J. referred to in *Guerin*, at p. 293, as "the world so familiar to lawyers in which people sue and are sued". She is not, in short, the kind of person who might perhaps be expected to commence court proceedings lightly or swiftly. The court finds much in the evidence presented to it, including the manifold misfortunes described in the plaintiff's indorsement of claim, which excuses the delay in bringing the present proceedings. Having regard to the myriad miseries that the plaintiff in this case has suffered since 1980, which in many respects she continues to suffer, and which appear on their face to be connected ultimately to the alleged abuse that she suffered as a child, the court finds that the delay arising in this case is far from inexcusable. Notably, therefore, regardless of whether or not one views *Primor* as confined to post-commencement delay, the delay in this case, being excusable, cannot be both 'inordinate' and 'inexcusable'.

6. Only when delay is inordinate and inexcusable does one move to the third limb of the *Primor* test and consider whether the balance of justice is in favour of or against a case proceeding. However, in all cases one must have regard to the second line of authorities referred to at the outset of this judgment, namely those arising from the decision of the Supreme Court in *O'Domhnaill v. Merrick*. In that case, Henchy J. referred, at p. 157, to the need:-

"to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend".

7. It might perhaps be queried, given that the *Primor* test, when inordinate and inexcusable delay are established, boils down ultimately to a decision based on the balance of justice, and the *O'Domhnaill* approach requires the court in all instances to discharge the balancing act referred to immediately above, whether there is in truth much if any practical distinction between the two approaches, at least as regards the ultimate outcomes that they both yield. Be that as it may the interaction and concurrent validity of both lines of authority has been approved recently by the Supreme Court in *McBrearty v. North Western Health Board & Others* [2010] IESC 27. Thus, having tested the proceedings by reference to the *Primor* principles, it falls to the court to consider the present application specifically by reference to the standard established in *O'Domhnaill*. In passing, it is perhaps worth noting that both lines of authorities appear consistent with the constitutional imperative, referred to by Hogan J. in *Donnellan v. Westport Textiles Limited* [2011] IEHC 11 at para. 24, that the courts put an end to stale claims so as to ensure the effective administration of justice and basic fairness of procedures. And they each seem consistent with Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms which states, *inter alia*, that:-

"In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

8. In the present case the Sisters of Charity contend that even if the plaintiff's delay is excusable, and the court considers that it is, the proceedings ought in any event to be dismissed on the basis that it would be patently unfair to ask the Sisters to defend the proceedings given the real and serious risk of an unfair trial. There is, it appears, a want of any written evidence in their control concerning the plaintiff's alleged abuser or his purported employment with the Sisters. The plaintiff has indicated in her indorsement of claim that her alleged abuser is dead. So too, it seems, are the majority of witnesses. However, in affidavit evidence furnished by the Sisters it is indicated that they have managed to identify one person who knows of a man by the same name as the plaintiff's alleged abuser who worked at the Donnybrook site around the time of the alleged abuse. The court attaches some significance to this last fact. It suggests that there is at least some wider recollection of the circumstances and events underlying the plaintiff's case, rendering these proceedings unlike those that arose in *Kelly v. O'Leary* when Kelly J., at p. 544, spoke of the "*probability [that] the trial may amount to an assertion countered by a bare denial*". As to the fact that the alleged abuser is dead, the court does not consider that this offers a solid basis on which the contention that there is a real and serious risk of an unfair trial can be constructed: the alleged abuser may be dead but his alleged employer remains extant and it would seem contrary to every principle of justice and fairness that the chance of his death should offer the Sisters the chance to escape liability, if such liability arises.

9. It appears to the court that the plaintiff has raised detailed allegations that are capable of being resolved by a tribunal of fact. There is at least one witness whom the Sisters have identified who has some recollection of the plaintiff's alleged abuser and his employment. The plaintiff will have to provide evidence, assemble her proofs, be tested by able counsel and establish her case on the balance of probabilities. The case may be difficult for the Sisters to defend successfully or indeed for the plaintiff to wage successfully. However, the court does not perceive any such difficulty or anything else to which reference has been made in the present proceedings to involve a real and serious risk of an unfair trial or to entail any unfairness of procedure. The plaintiff's claim is not, to paraphrase Henchy J. in *O'Domhnaill*, a claim that the Sisters of Charity cannot reasonably be expected to defend. It is in fact the opposite.

Conclusion

10. For the reasons stated above, the Court is not satisfied to dismiss the plaintiff's proceedings on the grounds of inordinate and inexcusable delay in the commencement and/or prosecution of same having regard to the balance of justice including prejudice to the defendant and the defendant's rights under natural and common law, the European Convention on Human Rights and *Bunreacht na hÉireann*.