Neutral Citation Number: [2011] IEHC 530

THE HIGH COURT

1999 9063 P

BETWEEN

TOM HAYES

PLAINTIFF

AND

ANTHONY MCDONNELL, COLLETTE CULLINANE,

THE MINISTER FOR EDUCATION AND SCIENCE,

THE MINISTER FOR HEALTH AND CHILDREN,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Hanna delivered the 15th day of December, 2011

This application is moved by the defendants by way of notice of motion. They seek the following reliefs by way of preliminary application:-

> 1. An Order pursuant to the inherent jurisdiction of the Court striking out or otherwise dismissing the plaintiff's claim wherein it is claimed that there has been inordinate and inexcusable delay on his part in prosecuting the claim, which delay has prejudiced the defendants and where the balance of justice is against allowing the claim to proceed.
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> 2. An Order pursuant to the inherent jurisdiction of the Court dismissing the plaintiff's claim due to the lapse of time, in the interests of justice and / or otherwise dismissing the claim of the plaintiff in accordance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms and the European Convention on Human Rights Act, 2003.
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> 3. Such further and other relief as is deemed just and appropriate on foot of the delay and want of prosecution on the part of the plaintiff, including in circumstances where the plenary summons is dated the 9th September, 1999, and the statement of claim was purported to be delivered on the 20th April, 2009, and/or where the matters in respect of which the plaintiff makes complaint are alleged to have occurred between in or about 1949 and 1962.

The application is grounded on the affidavit of […], who is assistant principal legal executive in the Chief State Solicitor's Office.

The Parties
The plaintiff is a retired civil servant and was born in 1946, and now resides in Northern Ireland.

The first named defendant is sued in his capacity as representative of a religious order. It is alleged that the first named defendant, his predecessors in title, their servants or agents, were the owners, occupiers and in control of an industrial school for boys in the southwest of the country and as such they owed a duty of care to the plaintiff whilst resident there from 1954 to 1962.

The second named defendant is sued in her capacity as representative of another religious order. It is alleged that the second named defendant, her predecessors in title, their servants or agents, were the owners, occupiers and in control of a convent in the southwest and as such they owed a duty of care to the plaintiff whilst resident there from 13th May, 1949, to 1st September, 1954.

The third, fourth, fifth and sixth named defendants join in this application. Paragraph 7 of the statement of claim sets the context of their purported liability to the plaintiff. It alleges that "…the second, third, fourth, and fifth, named defendants and each or either of them, their respective servants or agents, had statutory responsibility for the management, inspection, and certification of schools (including industrial schools) and orphanages and the plaintiff was in the care, custody and control of them at all material times hereto and as such they owed him a duty of care."

Background Facts
It is important, given the nature of this application, that I preface the outline of the facts alleged, both on affidavit and in the statement of claim. The proceedings before this Court are not a trial of the substantive issues in contest between the parties. No case is made on behalf of the defence of vexatiousness or scandalousness or frivolousness on the plaintiff's part. This application centres on the issue of delay by the plaintiff. He admits that that delay is inordinate. The impact and the consequences of that delay is what concerns us.

Thus, any recitation of facts alleged by either party or any observation therein is not intended to offer a definitive view of the substantive issues between the parties. It was agreed by counsel at the hearing that the applicant must take the applicant's case as set forth in the statement of claim and replying affidavits at its' height. Cross-examination at the substantive hearing, if such might materialise, would, in ordinary circumstances, provide the appropriate anvil upon which to forge the sword of probability.

At a tender age- two or three and a half years- it is not entirely clear - the plaintiff was placed into care at the convent school in 1949. At that time it was under the control and management of a religious order of nuns. The plaintiff alleges that on numerous dates between 1949 and 1954 whilst he was a resident at the convent school, he was subjected to severe physical and psychological abuse by the second named defendant, her servants and agents. Particulars of the alleged physical and mental abuse, negligence and breach of duty (including statutory duty) in that regard are set out in the statement of claim.

In 1954, the plaintiff was transferred at the age of eight years to the industrial school, which at that time was under the control and

management of another religious order of brothers. The plaintiff alleges that on numerous dates during 1954 and 1962 whilst he was a resident at the industrial school, the defendants, their servants or agents subjected him to sexual, physical and psychological abuse. Particulars of this abuse, torture, negligence and breach of duty (including statutory duty) in that regard are set out in the statement of claim. The particulars of personal injuries are also detailed in the statement of claim. A Consultant Psychiatrist examined the plaintiff and submitted three reports dated 12th February, 2003, 18th August, 2004, and 18th March, 2009 which were exhibited in the plaintiff's replying affidavit sworn on 3rd March, 2010. She has diagnosed the plaintiff with post traumatic stress disorder as a result of the alleged abuse. She reported also that he experiences depression and anxiety and finds it very distressing to recall the alleged events.

When the plaintiff left the industrial school, the religious order secured work for him as a farm labourer. He was extremely unhappy in this placement. He then secured work for himself in a hotel in the south of Ireland. After this he worked with a family in a neighbouring county. During this time he had all of his teeth removed because they were decayed which he alleges was due to malnutrition and poor dental hygiene over many years while at the convent and in the industrial school. The plaintiff then spent some time homeless. In 1964, he joined the British Army, serving for 22 years. He married in his late twenties. He enjoyed being in the army because he served overseas on many occasions and was able to maintain emotional distance from his wife and children. He left the British Army in 1986. He obtained work in Northern Ireland as a civil servant and is now retired. He is a founding member of a victim support group organised for and on behalf of survivors of institutional abuse and he was involved in the consultation process with respect to the setting up of the Residential Institutions Redress Board ("the Board") and also the Commission to Inquire into Child Abuse ("the Commission").

Pleadings and Proceedings
Given the nature of this application, it is important to set out a chronology of the pleadings. The plaintiff's intention to initiate proceedings was communicated by way of letter from the plaintiff's former solicitors to the Chief State Solicitor's Office and the Department of Health and Children on 6th August, 1999. A plenary summons issued on the 9th September, 1999, and served on the defendants on or about 16th September, 1999, which is, as the defendants point out, fifty years after the acts alleged to constitute the wrongdoing began and thirty seven years after they ceased. The general endorsement of claim states that the plaintiff's claim is for damages, including aggravated, exemplary and punitive damages for personal injuries, mental distress, nervous shock, anguish, physical illness, loss, damage, inconvenience and expense suffered and sustained by the plaintiff by reason of wilful assault and battery, trespass to the person, negligence and breach of duty including statutory duty, breach of fiduciary duty, breach of the plaintiff's constitutional rights to bodily integrity, breach of the plaintiff's constitutional right to education, breach of a dominant position, breach of trust, breach of the defendants' obligations and duties as being in loco parentis of the plaintiff on their part and each or any of them, their servants or agents.

Initially three separate appearances were entered. On 29th September, 1999, the Chief State Solicitor's Office entered an appearance on behalf of the third, fourth, fifth and sixth named defendants. On 16th December, 1999, a solicitors firm entered an appearance on behalf of the second named defendant. On 22nd December, 1999, a solicitors firm entered an appearance on behalf of the first named defendant. On 4th April, 2007, the Chief State Solicitor's Office filed a notice of change of solicitor on behalf of the first named defendant. On 13th July, 2009, another solicitors firm filed a notice of change of solicitors on behalf of the second named defendant. On the 24th July, 2009, the Chief State Solicitor's Office filed a notice of change of solicitors on behalf of the second named defendant. Consequently, the Chief State Solicitor's Office is now on record for all of the defendants.

Initially, a named Solicitors were on record for the plaintiff. A notice of change of solicitor was filed on 30th April, 2007 and a further notice of change of solicitor was filed on 22nd July, 2009.

Following the enactment of the Residential Institutions Redress Act, 2002, the plaintiff submitted an application to the Board in 2005 but subsequently withdrew his application in November, 2008. He averred in his replying affidavit of 3rd March, 2010, that he submitted his application in 2005 when all of his proofs were available and had an opportunity to finalise his application with his solicitor. His application was pending before the Board between 17th November, 2005, and 3rd November, 2008, and he states that he was proceeding with his claim in an expeditious manner during this period. On 27th October, 2008, he signed a consent authorising his solicitors to notify the Board of his intention to withdraw his application as he did not feel that the Board provided him with a remedy in respect of his detention at the industrial school. This consent was posted to the Board on the 3rd November, 2008, as exhibited in the plaintiff's replying affidavit. The plaintiff explains that he had lost faith in the "non court jurisdictions" and he became disillusioned and disenchanted with the manner in which the Board operated and the awards that were being made. He states that the main reason for his decision to proceed by way of court proceedings as opposed to continuing with his application with the Board was to have a "public airing of the systematic abuse and neglect that occurred" to him at the industrial school. He was also dissatisfied with the fact that the Commission did not invite any former resident of the industrial school to appear before it and he said that the evidence given by the religious order of brothers was very much at variance with his own experience at the industrial school. The plaintiff refers to correspondence in his replying affidavit which he submits shows that his solicitors kept the Chief State Solicitor's Office and the State Claims Agency informed of the status of his application before the Board.

A notice of intention to proceed was filed by the plaintiff's solicitors on 19th September, 2008. A statement of claim was delivered on the 20th April, 2009, along with further particulars of personal injury. On this application, the defendants have highlighted the fact that the statement of claim was delivered outside the time provided for by the Rules of the Superior Courts 1986 in accordance with Order 20, r.2 which provides that: -

> "Where the procedure is by plenary summons, the plaintiff may deliver a statement of claim with the plenary summons or notice in lieu thereof, or at any time within twenty-one days from the service thereof."

The plaintiff did not seek consent to the late delivery, nor did he apply to court for an extension of time for late delivery pursuant to Order 122, r.7, as substituted by r. 11 of the Rules of the Superior Courts (Personal Injuries) 2005, S.I. No. 248 of 2005, which provides that: -

> "(t)he Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed."

The defendants did not consent to the late delivery. The plaintiff in his replying affidavit states that at no stage in the correspondence at that time was there any mention of the Chief State Solicitor's Office objecting to the service of the statement of claim or that they were not consenting to the late delivery of the statement of claim. He now argues that the defendants should be estopped from taking issue with the service of the statement of claim because they did not take issue with it in April, 2009, when it

was served. The defendants argue in response that it is not for the defendants to draw procedural inadequacies to the plaintiff's attention, in circumstances where the plaintiff purported to reactivate proceedings over nine years and six months from the initial commencement. Consequently, the defendants should not be estopped from taking issue with the purported service of the statement of claim. I would agree. While the plaintiffs should have filed the statement of claim with the plenary summons or within 21 days from the date of service of same' or alternatively have brought an application under Order 122, r.7, this did not happen and I consider this as something to be added to the balance as a part of the inordinate delay. The defendants are not estopped from taking issue with this matter, in the same way they are not estopped from taking issue with the delay as a whole.

No defence has been delivered on behalf of the defendants to date and a motion seeking judgment in default of defence was issued on the 4th of November, 2009 returnable for 18th January, 2010. That motion was adjourned generally.

This application was initiated by way of notice of motion dated the 22nd December, 2009. It is grounded on the affidavit of a legal executive from the Chief State Solicitors' Office, which sets out the defendants' reasons as to why they believe the delay is inordinate, inexcusable and would justify a dismissal of the action at this juncture. The affidavit states that there are persons who are untraced or deceased who would have been potential witnesses for the defendants. Among the deceased is the school inspector for both schools during the relevant period. Memories of people that are still alive will have dimmed since the period between 1949 and 1962. The defendants submit that they will suffer a prejudice if this case is allowed to proceed.

The plaintiff's replying affidavit refers to the fact that he has been diagnosed with psychological and psychiatric problems including post traumatic stress disorder, which he states is an excusable explanation for the delay. He addresses other matters raised by the grounding affidavit, including his involvement with the victim support group and consultation processes.

A supplemental affidavit was sworn on the 23rd April, 2010, in response to the plaintiff's replying affidavit. In it she argues that the plaintiff's asserted psychological and psychiatric problems do not excuse his delay given his involvement with the consultation processes and his campaigning and that having application which was pending with the Board does not excuse the delay either.

The plaintiff's solicitors served a notice to cross examine on the 18th January, 2011, in relation to the two affidavits (dated the 22nd December, 2009, and 23rd April, 2010) but this was not pursued.

A second supplementary affidavit was sworn on 22nd March, 2011. In it, the deponent states that a former cook at the industrial school was located and if she is the individual against whom the plaintiff makes a complaint, she is suffering from Alzheimer's disease. The deponent exhibited a report from a private investigator stating that the cook suffers from Alzheimer's disease. The deponent concludes that it therefore seems that she will not be in a position to give evidence at the trial of this action. The deponent respectfully concludes in her affidavit that this Court "cannot fulfil its constitutional mandate of administering justice in this case particularly, in light of the insurmountable prejudice faced by the defendants at this juncture." I take the view that such an assertion in an affidavit is inappropriate. While evidence provided by the defendants as to the availability, or otherwise, of relevant witnesses for them in order to defend the claim and not be prejudiced is important, the Court will draw its own conclusion on whether or not it can fulfil its mandate based on this and other factors.

Further affidavits were sworn on behalf of the defendants as follows:

An affidavit of an individual from the Department of Education and Skills, sworn on the 21st March, 2011, gives an account of people who may still be alive who worked at the Department at the time. Only two people who worked in the Department are confirmed as still alive from that time and they are aged 87 and 97 years, others are deceased or were not traced. He also refers to the inspector of both schools at the relevant time who is now deceased.

An affidavit of an individual from the Department of Health and Children, sworn on the 23rd March, 2011, confirms that to the best of his knowledge a file relating to the plaintiff was opened in the context of the provision by the Department of personal counselling services to victims of abuse but the file has been mislaid. However, the deponent states that to the best of his belief the file does not contain any record of any contemporaneous complaint from the plaintiff or his family relating to the matters at issue in these proceedings. Counsel for the defendants told the Court that he understood that the file would not contain any investigative material in terms of either statements or any attempts or inquiries in relation to the truth or accuracy of any of the complaints that the plaintiff makes.

The affidavit of a convent nun on behalf of the second defendants confirms that some potential relevant witnesses are now deceased (death certificates were exhibited), and confirms that others are unwell due to old age.

The affidavit on behalf of the first defendant states that the three Brothers who the plaintiff has made allegations against are now deceased. It is claimed by the plaintiff that after he complained to the local priest he was ostracised and lost all of his privileges. No allegation is made against the priest but his traceability was at issue. The deponent states that the priest could not be traced and he would now be in his nineties. As regards the assertion in affidavits of the 19th January, 2011, and 9th February, 2011, that the Brothers have access to significant evidence, both oral and documentary, the deponent states that the Brothers do not have access to any documentary evidence nor do they have access to any material witnesses as to fact which would enable them to mount any type of meaningful defence to the allegations being made by the plaintiff at this remove.

The plaintiff swore a further affidavit on the 8th April, 2011, in reply to all of the issues raised in the above affidavits.

The plaintiff's solicitor swore an affidavit on the 18th April, 2011, and this responds to the averment that the Brothers do not have any documentary evidence nor access to any material witness as to fact regarding the plaintiff's experience, by stating that the congregation of the Brothers was given information about complaints since the establishment of the Commission and the Board.

The Relevant Law

The onus of establishing that a delay has been inordinate and inexcusable rests upon the applicants/defendants. At the beginning of the two-day hearing of this application, counsel for the plaintiff, very properly but not surprisingly, conceded that the delay has been inordinate, both in relation to the commencement of the proceedings and subsequently. It is noted that proceedings were issued by plenary summons issued on the 9th September, 1999, and served on the defendants in or about the 16th September, 1999, fifty years after the acts alleged to constitute the wrongdoing began and thirty seven years after they ceased. After the plenary summons issued, it took almost ten years for the statement of claim to be served.

I now must decide whether or not this inordinate delay has been proven by the defendants to be inexcusable, and if so, whether nevertheless the balance of justice should allow the claim to go to hearing or be dismissed. The balance of justice involves generally

an examination of issues of prejudice, both to the plaintiff and to the defendant.

The principles of *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 (Finlay P.) were upheld and applied by Hamilton C.J. in the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 who set out a number of principles as follows, at p. 475: -

> "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."

These principles were followed by Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 and more recently in *Donnellan v. Westport Textiles Limited (In Voluntary Liquidation) & Ors* [2011] IEHC 11 (Unreported, High Court, Hogan J., 18th January, 2011), among many other recent decisions. Delany & McGrath, *Civil Procedure in the Superior Courts,* (Thomson Round Hall, Second Ed., 2005) comment at para. 13.08 as follows:

> "These principles have been approved in numerous decisions and it is interesting to note that, despite recent developments including the enactment of the European Convention on Human Rights Act 2003, it has been acknowledged by Clarke J. in both *Stephens v Paul Flynn Ltd* and *Rodgers v Michelin Tyre plc* that the basic questions which the court has to address in such cases remain the same, i.e. whether there has been inordinate and inexcusable delay and if so, where does the balance of justice lie."

Inherent Jurisdiction in the Interests of Justice

The defendants submit that the test set down by Henchy J. in *O'Domhnaill v Merrick* [1984] IR 151, *Toal v Duignan (No. 1)* [1991] ILRM 135 and *Toal v Duignan (No. 2)* [1991] ILRM 140 represents a "second strand" of jurisprudence in relation to such applications, this being that even where there has been no inexcusable delay on the part of the plaintiff, the court has an inherent jurisdiction to hold that in certain cases it would be unfair in all the circumstances to force a defendant to defend a case where there is prejudice by reason of the lapse of time. In *Toal v Duignan (No. 2)* it was held by Finlay P. that the Courts have an inherent jurisdiction to dismiss a claim in the interests of justice where the length of time which has elapsed between the events out of which it arises and the time when it comes on for hearing is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself.

Geoghegan J. in *McBrearty v North Western Health Board* [2010] IESC 27, (Unreported, Supreme Court, 10th May, 2010) noted there to be an "important and partly overlapping jurisprudence deriving, in the main, from decisions" in those cases and said that the importance of this jurisprudence is that "even in a case where there has been no fault on the part of the plaintiff, the court, in certain circumstances, in the interest of justice may accede to a defendants' application to have the proceedings struck out."

Hogan J. in *Donnellan v. Westport Textiles Limited (In Voluntary Liquidation) & Ors* stated: -

> "This line of case-law stresses the inherent duty of the courts arising from the Constitution to put an end to stale claims in order to ensure the effective administration of justice and basis fairness of procedures and in order to secure compliance with the requirements of Article 6 ECHR."

Hogan J. in Donnellan quoted Geoghegan J. in *McBrearty* as follows:

> "While *McBrearty* confirms the primacy of the *Primor* test, the judgment of Geoghegan J. also makes it plain that there are, in fact, two separate - albeit overlapping - strands of jurisprudence in this area. As Geoghegan J. observed with particular reference to *O'Domhnaill v. Merrick:*

> 'I now turn to the other line of authorities to which I have referred starting with *O'Domhnaill v. Merrick* ….. The first observation I would make is that it is clear from this line of authorities and indeed from other cases that the inherent jurisdiction to strike out a case for delay in certain circumstances in the interests of a defendant may be exercised taking into account delay in the institution of proceedings. Notwithstanding that that is not a particular issue in this case, I mention it to emphasise the paramount inherent jurisdiction derived from the Constitution. ….Later cases would seem to indicate that even though it can form part of an application to dismiss for want of prosecution as indicated by Hamilton C.J. in *Primor, the inherent jurisdiction can be exercised independently of the Rainsford principles*.' (emphasis applied)

Having examined the Supreme Court judgments in *Toal v. Duignan (No. 1)* [1991] ILRM 135 and *Toal v. Duignan (No.2)* [1991] ILRM 140, Geoghegan J. concluded:

> 'If I am right in my view that there was not inordinate and inexcusable delay then the action must be allowed to proceed unless it would be fundamentally unfair to any particular defendant because of his special circumstances to have to defend the action thereby legitimately invoking the inherent jurisdiction of the court which can be exercised even in the absence of fault on the part of the plaintiff.'"

Hogan J. concluded that:

> "The Supreme Court's decision in *McBrearty* confirms that the *Primor* rules are not exhaustive and all-encompassing, but that the courts enjoy a separate and distinct constitutionally derived inherent jurisdiction to protect the proper administration of justice.
>
> Even if one assumes in the plaintiff's favour that no specific prejudice has been caused to the State defendants by this delay, the lapse of time between the events complained of and the present day is so enormous that the courts simply cannot fulfil their constitutional mandate of administering justice in a case such as this."

This point in relation to the *Primor* principles was reiterated by Hogan J. in *Quinn -v- Faulkner t/a Faulkner's Garage & Anor* [2011] IEHC 103 (Unreported, High Court, Hogan J., 14th March, 2011). Counsel for the defendants urged upon the Court that if the defendants had not satisfied all of the principles covered in the *Primor* test, to consider still the *McBrearty* decision. It is clear that the inherent jurisdiction of the Court may be exercised, even if the circumstances do not wholly accord with what is set down in *Primor*. The balance of justice is always to be the main concern. In *Hogan v Jones* [1994] 1 ILRM 512, Murphy J. cited a passage from an Australian case of *Calvart v. Stollznow* [1982] N.S.W.L.R. 749 as follows (also quoted by Geoghegan J. in *McBrearty*:

> "Considerations of justice transcend all other considerations in these matters. Of course justice is best done if an action is brought on while the memory of the witnesses is fresh. But surely imperfect justice is better than no justice."

In *K. v Deignan* [2008] IEHC 407, (Unreported, High Court, Dunne J., 2nd December, 2008), Dunne J. having reviewed the authorities, stated:

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

In that case, the Court decided that the prejudice to the defendant outweighed the undeniable prejudice to the plaintiff in the case in the circumstances and the plaintiff's claim was dismissed.

Recent Developments
The defendants, citing Hardiman J. in *Gilroy v Flynn,* argue that in relation to an application for dismissal for want of prosecution, the courts have become more conscious of unfairness and the increased possibility of injustice in allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued.

Kearns J. in the Supreme Court in *Stephens v Paul Flynn Ltd.* [2008] 4 IR 31 referred to the significant amendments to the Rules of the Superior Courts (i.e. the amendment to Order 27 by the Rules of the Superior Courts (Order 27 (Amendment) Rules), 2004 S.I. No. 63 of 2004). In addition, Hardiman J. in *Gilroy v Flynn* made reference to European Convention on Human Rights Act, 2003, stating that the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.

Counsel for the plaintiff agreed that the Supreme Court has made it clear in a number of recent cases that delays in procedural matters which may have been tolerable in previous times may no longer be tolerated, referring to the cases of *Gilroy v Flynn*, *Stephens v Paul Flynn Ltd.* and *Desmond v MGN Limited* [2009] 1 IR 737 all of which demonstrate an ever increasing reluctance on the part of the courts to condone delays in procedural matters. As Hogan J. in *Quinn -v- Faulkner t/a Faulkner's Garage & Anor* [2011] IEHC 103, (Unreported, High Court, Hogan J., 14th March, 2011) stated: -

> "While as Charleton J. pointed out in *Kelly v. Doyle* [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common: see, e.g., the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 ILRM 290 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Ltd.* [2010] IEHC 465."

Pre-Commencement and Post-Commencement Delay
The defendants submitted that there is a heavy onus on the plaintiff to proceed with extra diligence in progressing proceedings having regard to the delay prior to the issuing of the proceedings. While delay prior to the commencement of proceedings will not of itself be considered inordinate delay in the context of an application to dismiss for want of prosecution, may be a factor to be taken into account when considering where the balance of justice lies.

In *Stephens v Paul Flynn Ltd* [2005] 1.E.H.C. 148, (Unreported, High Court, Clarke J., 28th April, 2005) Clarke J. quoted Murphy J. in *Hogan v Jones,* who referred to *Rainsford* and quoted Lord Diplock in *Birkett v James* [1977] 2 All E.R. 801 as follows: -

> "It follows a *fortiori* from what I have already said in relation to the effect of statutes of limitation on the power of the

court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of his potential witnesses, their death or their untraceability. To justify dismissal of an action for want of prosecution the delay relied upon must relate to time which the Plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent upon the Plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

Kearns J. in the Supreme Court appeal of *Stephens v. Paul Flynn Ltd.* [2008] 4 IR 31 upheld the decision of Clarke J. in the High Court and reiterated what was recognised in that decision: -

> "…I believe for the purpose of the present application I need go no further than to refer to that passage in *Gilroy v. Flynn* in which Hardiman J., having identified the traditional jurisprudence in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, referred to the significant development represented by the change effected by the Rules of the Superior Courts (Order 27 Amendment) Rules 2004 to O. 27 of the Rules of the Superior Courts 1986, which provides that on the hearing of a second application to dismiss, the court "shall" order the action to be dismissed unless satisfied that "special circumstances" exist which explain and justify the failure. He then continued at p. 293:-
>
> 'Secondly, the courts have become ever more conscious of the unfairness and increased possibility of injustice which attached to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. Thirdly, following such cases as *McMullen v. Ireland* (ECHR 42297/98, 29th July, 2004) and the European Convention on Human Rights Act 2003 the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.'
>
> These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope."

Medical Diagnosis: Post Traumatic Stress Disorder

The defendants submit that the replying affidavits of the plaintiff of 3rd March, 2010, and 8th April, 2011, do not establish facts that excuse the extent of the delay in or about the commencement of the proceedings and the further inexcusable delay and/or want of prosecution in or about the prosecution of the case. They submit that the contents of the medical reports do not display evidence of the plaintiff being medically unfit to bring the proceedings or pursue the proceedings. Counsel for the defendant urged the Court to consider "what [the psychiatrist] doesn't say", and said that the psychiatrist does not say that the plaintiff is incapable of dealing with his affairs.

The plaintiff argues that the failure on his part to bring proceedings against the defendants at a much earlier point in time is directly related to the abuse perpetrated by the defendants and the effects of that abuse on him and that the delay is excusable having regard to the medical evidence adduced on behalf of the plaintiff. The alleged effects of this abuse on the plaintiff are set out in the reports of the consultant psychiatrist's medical dated respectively the 12th February, 2003, 18th August, 2004, and 18th March, 2009. The reports state, *inter alia*, that he suffers from post traumatic stress disorder, depression and that he is traumatised by his experiences. He dislikes discussing his own abuse and gets extremely upset when he does.

Albeit untempered by the fire of cross-examination, there is substance in the plaintiff's assertion of impairment of his faculties to the extent of of shying confrontation with his alleged abusers in the white heat of litigious conflict. A monstrous injustice could ensue were an alleged wrongdoer to find shelter and succour in the impediment spawned by its' alleged malefaction in order to ward off consequential proceedings.

I find sufficient material, gleaned from the plaintiff's evidence, including the plaintiff's medical reports, to excuse the inordinate delay in relation to the period of time pre-commencement and post-commencement of the proceedings. Given the particular nature of the claim in this case, and the plaintiff's disillusionment with the Board and subsequent withdrawal of his application from the Board, I find that the delay has been explained and is excused. It is unfortunate that the plaintiff became disillusioned with the Board, but I have no reason to believe, given the exercise in which I am presently engaged, that this disillusionment is anything other than genuine.

If I am wrong on my finding that the delay is excusable, in any event I find later that the balance of justice favours the trial of the action proceeding based on an evaluation of any prejudices faced by both parties on the balance of justice test.

Campaigning / Engaging in Consultation Processes

The defendants submitted that the reliance on the contents of the plaintiff's medical reports to explain the delay is at odds with his averment that the plaintiff was in a position actively to campaign for the rights of others during that period of delay. In a supplemental affidavit submitted on behalf of the defendant dated 23rd April, 2010, she submits that in circumstances where the plaintiff has averred that he actively campaigned for his own rights and the rights of others throughout the period post commencement of the within proceedings, the asserted psychological and psychiatric problems referred to do not excuse the delay.

The plaintiff submitted that the delay is excusable in the circumstances as he was a founding member of a group which campaigns on behalf of victims of institutional abuse. The plaintiff was also involved in the consultation process surrounding the Board and also the Commission and met with various ministers for Education and Science and civil servants between 1999 and 2010 to discuss the rights and needs of survivors of institutional child abuse. Letters were exhibited in his replying affidavit which clearly show that he took an active role in the consultation processes and was well respected because of his significant input. Counsel for the plaintiff submitted that the plaintiff distracted himself by immersing himself in this work, and this is referred to by the psychiatrist in her reports. It is understandable that a person who is suffering from what the plaintiff is diagnosed of might be capable of taking care of certain affairs in their life but not of others for whatever reason. Therefore, the plaintiff's activities outlined above have no bearing, in my view, on how he proceeded or failed to proceed expeditiously with his High Court action, but what is reported by the psychiatrist that the plaintiff immersed himself in other work to avoid dealing with the past would appear to explain the plaintiff engaging in these activities yet neglecting his own action.

Withdrawal from the Board and s. 13(10) of the Residential Institutions Redress Act, 2002

The plaintiff chose to withdraw his application from the Board in 2008. In his replying affidavit sworn on the 3rd March, 2010, he states that the main reason for his decision to proceed by way of court proceedings as opposed to the Board was to have a public airing of the systematic abuse and neglect that occurred to him at the industrial school. The courts are primarily a forum, *inter alia*, for the identification of and, where appropriate, the vindication of the rights of the citizen. Other forae exist for the airing of views. Nonetheless, for the purposes of this application I will assume that the plaintiff decided to withdraw from the Board based on his strongly and genuinely held views. After this withdrawal was made, after proceeding with his High Court claim, he was unfortunately, for him, faced with this application.

The plaintiff submits that pursuant to the provisions of s. 13(10) of the Residential Institutions Redress Act, 2002, the court is obliged to disregard the period of time that the application of the plaintiff was before the Board for the purposes of the Statute of Limitations. In light of the wording of that subsection, the plaintiff submitted that it is appropriate in the circumstances for the Court to disregard the period during which the plaintiff's application was pending before the Board when considering whether the post commencement delay of the plaintiff is inexcusable in all the circumstances of the case. Section 13(10) states: -

> "Where an applicant does not accept an award within the time and in the manner provided for in this section and proceeds with any right of action that he or she may have arising out of the same, or substantially the same, acts complained of in an application, the Minister, a public body or any other person, will not in such proceedings to which it is a party rely for the purposes of the Statutes of Limitations, on the period between -
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> (a) the date of the application to the Board by that applicant, and
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> (b) the date on which the applicant—
>
> (i) abandoned his or her application,
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> (ii) was adjudged not entitled to an award under this Act,
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> (iii) rejected an award in accordance with subsection (4)(a) or subsection (5), or
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> (iv) rejected a decision of the Review Committee in accordance with section 15 (7) or section 15 (8),
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> whichever of such dates is the later, in bar of any right of recovery under such proceedings."

The defendants submit that the plaintiff should not be able to rely on the withdrawal of his application or the alleged basis of the withdrawal of his application as grounds for not dismissing his claim, particularly in light of the very real and specific prejudice they will suffer. The defendants submit that given that the alleged wrongful acts occurred so long ago, the plaintiff was obliged to have addressed the proceedings with expedition regardless of alternative means of redress which the plaintiff elected to pursue. The defendants, in a supplementary affidavit, submit that dissatisfaction with the Board or the Commission should not be used to excuse the delay and should not be used to weigh against the real, significant and specific prejudice that the defendants face at this stage in defending the action.

The defendants further argue that the plaintiff's reliance on s. 13(10) of the Residential Institutions Redress Act, 2002 to excuse the delay relating to the period of time between 2005 and 2008 is misguided because this provision relates to any plea under the Statutes of Limitations and it therefore does not provide any protection in the context of the application before this Court. In a supplemental affidavit sworn on the 23rd April, 2010, it is stated that this application is in respect of the delay and want of prosecution and is not pursuant to the Statutes of Limitations. She also says that, in any event, s. 13(10) is not a bar to the defence raising the statute of limitations or more particularly, pleading (inordinate and) inexcusable delay and the resultant prejudice suffered as a result thereof.

The defendants further submit that the limited amount of time, between 2005 and 2008, when the plaintiff had his application pending before the Board does not excuse the extent of the delay particularly where the actions complained of date back to the period from 1949 to 1962. Counsel for the defendant in his submissions stated that the only explanation the plaintiff gives at its height from the plenary summons in 1999 to 2005 is just a statement that he was waiting on all of his proofs until 2005. Counsel submitted that the Court should have regard to the obligation on a plaintiff to prosecute proceedings with expedition where there has already been a long delay prior to the inception of proceedings.

S. 13(10) applies to a claim that might be barred under the Statutes of Limitations. It therefore does not provide for the disregarding of the period between 2005 and 2008 when assessing the delay and whether or not it is inexcusable. I therefore look at the time post-commencement of the proceedings as a whole, and as stated above, I find that the contents of the medical reports excuse the delay.

Prejudice suffered by the defendants
The defendants argue that the balance of justice lies in favour of dismissing the plaintiff's claim and that therefore if the Court finds the plaintiff's delay excusable (not inexcusable), the Court has a separate and distinct inherent jurisdiction to dismiss the claim by reason of the lapse of time in the interests of justice due to the prejudice suffered by the defendants. The defendants state that they suffer a presumed prejudice by reason of lapse of time as well as a specific and real (actual) prejudice by reason of the death and untraceability of witnesses and the old age of any witnesses that may be available.

A presumed prejudice exists, it is argued, because of the nature of the allegations made out in the statement of claim and the alleged vicarious liability and particularly because the nature of the claims made mean that the case will be presented on the basis of oral testimony and would be defended on the basis of oral testimony if it were available. Counsel for the defendants submitted that being sued under the doctrine of vicarious liability rather than in terms of a specific act of an inappropriate kind or an inappropriate omission on their part is significant in terms of assessing the delay that has occurred in this case. He said that it would be different if the specific allegations were made against specific defendants cited in the proceedings and they were still alive.

The relevant Department of Education inspector for both the industrial school and the convent during the relevant period of time is deceased and counsel for the defendant called this a "joint prejudice." Only two people who worked in the Department are still alive from that time and they are aged 87 and 97. The defendants state that because of this they face a significant level of specific prejudice in defending the within proceedings and that this prejudice is of the kind that establishes a clear and patent unfairness in expecting the defendants to defend the claim after such a substantial time lapse. They therefore submit that the court should exercise its inherent jurisdiction to dismiss the proceedings herein by reason of the want of prosecution on the part of the plaintiff and or alternatively in the interests of justice by reason of the lapse of time and the resultant insurmountable prejudice suffered by

the defendants.

Prejudice: The Industrial School, 1949 - 1954
In relation to the industrial school, the defendants state that they are prejudiced by the death of potential relevant witnesses named on affidavit. Also listed on the grounding affidavit are names of potentially relevant persons who have not been traced. The defendants submit that because the industrial school closed in 1967 and was demolished in 1984, written records have been difficult and/or impossible to identify and trace and that limited records have been identified but these do not shed any light on the allegations made by the plaintiff. Other named individuals in the medical reports have been found to be either deceased or suffering from ill health and in any case it is argued that memories will have inevitably dimmed over the period of time that elapsed since 1949. The defendants submit that regardless of whether the traced people could give evidence at the hearing of the action their presence alone could not cure the prejudice that the congregation would face if the proceedings are allowed to proceed.

Prejudice: The Convent School, 1954 – 1962
The plaintiff makes allegations against three Brothers who are now deceased. Counsel also submitted that the Court has essentially, before it, a statement of claim that makes no specific allegations in relation to the time in the convent school and then confines to the industrial school in respect of three Brothers that have been identified, all deceased. However, a specific complaint is made against the cook at the industrial school. The cook, it appears, has been traced but the defendants report that she suffers from Alzheimer's. It is claimed, also, in the statement of claim that after the plaintiff complained to the local priest, he was ostracised and lost all of his privileges. The defendants state that this person could not be traced and he would be now in his nineties. No allegation is made against the priest but his traceability was at issue. As regards the generality of allegations in the statement of claim in relation to the industrial school, counsel for the plaintiff submitted that the defendants could have served a notice for particulars in that regard.

The resident managers and superiors of the industrial school during the period 1954 - 1962 are deceased. There are two brothers who are alive from that time. They are both now elderly, one resides in a nursing home and the other in a care facility. The defendants submit that their relevance to the proceedings is questionable in circumstances where no allegations are made against them.

The plaintiff addressed the issue of prejudice to the defendants caused by the alleged delays. The plaintiff submits that the defendants bear the onus of proof in establishing that there is a "clear and patent unfairness" in asking them to defend the action at this point. As outlined above, the defendants filed numerous affidavits referring to the lack of relevant witnesses due to death, illness or infirmity, stating that they do not have access to sufficient or any documentation and/ or any material witnesses as to fact which would enable them to deal with the allegations made. In response to this, the plaintiff submits that there are some witnesses available. He states that there are a number of witnesses, albeit in poor health, who can confirm his experiences in the convent. He is also of the view that individuals who were working in the industrial school, while he was there are alive and would be of assistance to the defendants in defending the plaintiff's claim. The plaintiff further submits that former pupils and residents could be traced from school records and from documentary evidence disclosed to the congregation by the Board as outlined above. Counsel for the plaintiff submitted that the complaint in relation to sexual abuse at the industrial school in the main, relates to older boys who abused younger boys and the failure of the relevant defendants to stop this – the argument being that former residents who were witnesses to this abuse may still be available.

Prejudice to the defendants – the availability of documents
In an affidavit sworn on the 9th February, 2011, it is asserted that given chapter 11 of the Report of the Commission, there is a significant amount of evidence (oral and documentary) available to the Brothers in respect of the relevant time frame of the within proceedings. In a subsequent affidavit dated 18th April, 2011, he again asserts that it is clear from the Report of the Commission that significant documentary evidence was disclosed to the Commission. He states that it is extraordinary for the Brother to indicate that the congregation does not have access to any documentary evidence or access to any material witness as to fact regarding the plaintiff's experience. In his affidavit of the 19th January, 2011, he refers to the Commission's Final Report, particularly chapters which deal with the Brothers' congregation and the industrial school, which show that there is a significant amount of evidence (oral and documentary) available to the Brothers' congregation in respect of the time frame relevant to the proceedings. Further, the Dunleavy Report and the McCormack report which were referred to in the Commission's Report (Vol I) were made available to the Brothers' congregation.

In a supplemental affidavit filed on behalf of the defendants by the Chief State Solicitor's Office, the deponent states she is unclear what the plaintiff means in his replying affidavit when he states that the State Claims Agency have access to copious amounts of material. She states that certain records and documentation were obtained on foot of investigations undertaken by the Department of Education and Science and the Department of Health and Children in the context of the within proceedings, but this material does not alter the defendants' position in terms of the very real and significant prejudice faced by the defendants in dealing with the within proceedings. Counsel for the defendants reiterated this point in submissions, saying that it is still not clear, notwithstanding the exchange of affidavits, what the "copious material" referred to by the plaintiff is. Counsel for the defendants submitted that the plaintiff has not said that there is anything in chapter 11 of the Commission's report referable to his case.

The defendants state that a number of written records from the industrial school have not survived. The register for the industrial school is the only document that the first named defendant has in its possession. The only document that the first named defendant has is an entry on the register dated 14th May, 1961, stating that the plaintiff received a very good primary certificate in 1960. Therefore, the defendants submit that they do not have access to any documentary evidence or material witnesses that would enable them to mount any type of meaningful defence to the allegations.

It is a fact that some potential witnesses for the defendants are deceased or are elderly. However, as the plaintiff submits, there are some witnesses available. The plaintiff also submits that the nature of the abuse that he suffered generally did not take place behind "closed doors", and former residents could give evidence on this. I find that given the circumstances of the case, the nature of prejudice suffered by the defendants does not outweigh the prejudice that might be suffered by the plaintiff if this claim were not allowed to proceed at this juncture.

The question of public interest

The defendants submit that the Court can strike out a claim on the grounds of inordinate and inexcusable delay in the absence of established prejudice so far as the defendants are concerned, because of the prejudice to the public interest. They cited the cases of *Donnellan v. Westport Textiles Limited (In Voluntary Liquidation) & Ors* [2011] IEHC 11, (Unreported, High Court, Hogan J., 18th January, 2011) and *Byrne v Minister for Defence* [2005] 1 I.R. 577 (Peart J.). The defendants state that in this case the Court should have regard to the plaintiff's unilateral decision to withdraw his application from the Board.

The plaintiff submits that the court may take into account the particular circumstances of the case when considering whether there has been inexcusable delay coupled with the balance of justice test to find that if the delay was excusable and that it may be in the public interest to permit such a case to hearing, given that it relates to a plaintiff's right to bodily integrity as a child.

In Donnellan, Hogan J. stated:

> "Moreover, quite apart from any considerations of the personal rights contained in Article 40 and *Re Haughey*-style basic fairness of procedures, the speedy and efficient dispatch of civil litigation is of necessity an inherent feature of the court's jurisdiction under Article 34.1. As I ventured to suggest in my own judgment in *O'Connor v. Neurendale Ltd.* [2010] IEHC 387, this constitutional imperative means that the courts have a jurisdiction (and, in (sic) appropriate cases, a duty) to exercise their powers in a way which will best ensure that a litigant's right to a hearing within a reasonable time is best vouchsafed. In any event, and for good measure, the same right is guaranteed by Article 6 ECHR: see *Gilroy v. Flynn* [2005] 1 ILRM 290 and *McFarlane v. Ireland* [2010] ECHR 1272. One might add that this duty also extends to protecting the public interest in ensuring the timely and effective administration of justice, a consideration to which we may now turn."

Hogan J. then quoted Peart J. in *Byrne inter alia* as follows:

> "The Court's jurisdiction to dismiss such an old claim is an important power in the public interest, regardless of prejudice to the defendant, yet one which must be used sparingly lest a plaintiff might unreasonably be deprived of a remedy to which he is entitled. If the Court were never to invoke that power it would send the wrong message, namely that the Courts will tolerate and indulge unreasonable delay in the bringing of claims where a defendant cannot show prejudice. That consideration must exist regardless of the existence of a defendant's right to plead the Statute of Limitations by way of defence pleading. That Statute has the capacity to protect the defendant's rights which I have identified, but it serves no purpose in the protection of the public interest to which I have referred."

Hogan J. concluded:

> "I respectfully agree with this analysis. If the courts were compelled to entertain claims of this antiquity in the absence of clear prejudice to the private interests of other litigants, it would not only set at naught the constitutional and ECHR considerations to which I have referred, but the courts would be failing in their duty to protect the public interest in the manner outlined by Peart J."

Different considerations arise here than arose in *Donnellan* and *Byrne*. This is because the allegations made are said to have caused the plaintiff's medical condition which resulted in the delay. Considerations of public interest of course still apply, and given my findings above on the prejudice suffered by the defendants, I am satisfied that it is in the public interest that the plaintiff's claim proceeds to hearing.

Alleged delay on the part of the defendants
It was stated in *Rainsford* by Finlay P. at p. 567 that:

> "Delay on the part of a defendant seeking a dismiss of the action, and to some extent a failure on his part to exercise his right to apply at any given time for the dismiss(al) of an action for want of prosecution, may be an ingredient in the exercise by the court of its discretion."

The plaintiff submits in his replying affidavit that the defendants are guilty of delay in bringing this application. During the hearing of the application, counsel for the plaintiff submitted that there is an element of acquiescence on the part of the State in the delay, because of the correspondence between the plaintiff's solicitor and the State Claims Agency, and the State Claims Agency was being updated on the status of the application with the Board.

This application was brought on the 22nd of December, 2009. However, given that the plenary summons was delivered on the 9th September, 1999, but the statement of claim was purportedly delivered on the 20th April, 2009, (and the Chief State Solicitor's Office came on record for the second named defendant in July, 2009), it was only then that the defendants were possessed of information they needed in order to investigate how to defend the action. A second affidavit at para. 10 states that certain investigations were undertaken on behalf of the defendants prior to issuing the within application and that the defendants cannot be criticised for taking a relatively short period of time to do this. It is stated in a supplemental affidavit at para. 18 that "it was not until receipt of the statement of claim that the defendants could undertake any meaningful enquiry in respect of the allegations being made by the plaintiff", and that the lack of detail contained in the plenary summons precluded any meaningful enquiries. Enquiries after service of the statement of claim and after the plaintiff's replying affidavit were conducted and persons mentioned in the medical reports have been identified as being alive.

The period of eight months between the service of the statement of claim and the making of this application should not be seen as excessive. I accept that the investigations which had to be undertaken by the defendants took some months and this was not a delay on their part.

Summary of various findings
I find that the delay has been excused. Many unfortunate factors led to the High Court proceedings being delayed in both their commencement and their conduct post-commencement. These factors, the medical reports submitted on behalf of the plaintiff and the circumstances surrounding his disillusionment with and subsequent withdrawal from the Board process, excuse the delay in this case. As regards the public interest, I find no reason why the public interest would be served in striking out the proceedings at this stage. The prejudice which the defendants assert that they suffer can be dealt with again by the trial judge if and as appropriate.

Conclusion
In all of the circumstances of the case I am satisfied that this is a case where the Court should not exercise its inherent jurisdiction to dismiss the proceedings on the grounds of inexcusable delay, the inordinate delay having been conceded. The onus is still on the plaintiff to prove his case at the hearing of the action and given the particular circumstances of this case, the balance of justice lies in favour of allowing the matter to proceed and proceed expeditiously.