THE HIGH COURT

RECORD NUMBER: 2019 3700 P

BETWEEN

KENNETH GRACE

PLAINTIFF

AND

PAUL HENDRICK AND EDMUND GARVEY

DEFENDANTS

JUDGMENT of Ms. Justice Niamh Hyland delivered 10 May 2021

Background

1. On 10 May 2019 Kenneth Grace ("the plaintiff") brought a claim seeking damages *inter alia* for personal injuries, psychological injuries and mental distress sustained by him by reason of the alleged wilful assault, battery and trespass to the person perpetrated on him by Paul Hendrick ("the first named defendant"), and by the negligence and breach of duty (including statutory duty) of Edmund Garvey ("the second named defendant"). The first named defendant is a member of the Congregation of Christian Brothers and the second named defendant is the Province leader of the Congregation of Christian Brothers, European Province. It is alleged that the plaintiff was the victim of several incidents of sexual assault perpetrated on him by the first named defendant when he was a minor, over a period of years from 1979-1984, both at the school the plaintiff attended and where the first defendant taught, being CBS Westland Row, and at other properties under the control of the Congregation of Christian Brothers.

Motion for disclosure of the names and addresses of Christian Brothers

2. Following the issuing of proceedings, the plaintiff's solicitors requested the solicitors for the second named defendant to identify a legal nominee for the Congregation of Christian Brothers and/or to furnish the names and addresses of members of the Congregation who are currently alive and were members at the time the alleged assaults occurred. The second named defendant declined to take either of those steps. Accordingly, on 16 August 2019, a Notice of Motion was issued seeking the following reliefs:

> "*1. An order pursuant to the inherent jurisdiction of the court directing that the second named respondent disclose the full names and addresses of the persons who were members of the Congregation of Christian Brothers in Ireland during the period from 1 August 1979 to 31 December 1984, and who are currently members of the Congregation of Christian Brothers.*
>
> *2. Further or in the alternative, an order pursuant to O. 15, r.9 of the Rules of the Superior Courts or pursuant to the inherent jurisdiction of the court authorising or directing the respondent to defend the applicant's intended proceedings on behalf of all living members of the Congregation of Christian Brothers who were members of the order during the period from 1 August 1979 to 31 December 1984".*

3. The grounding affidavit of the plaintiff was sworn on 21 June 2019 by Phillip Treacy, solicitor for the plaintiff. It avers to the fact he first requested the Congregation to nominate a person to defend proceedings on its behalf, and then requested the Congregation to furnish the names and addresses of living persons who were members of the Congregation during 1 August 1979 to 31 December 1984. Correspondence from the plaintiff's solicitors to the second named defendant seeking information regarding members of the Congregation was exhibited to Mr Treacy's affidavit. None of the replies were exhibited. An affidavit was filed on behalf of the second named defendant by Ms. Emma Leahy, solicitor exhibiting those replies, being three short letters of 20 February 2019, 16 May 2019 and 6 June 2019.

4. In the letter of 20 February 2019, it is stated as follows:

> "*Edmund Garvey has confirmed that he has not authorised the use of his name in the above proceedings as a nominee on behalf of the Christian Brothers. Please note that it is a matter for the Plaintiff to take proceedings against the appropriate Defendant or Defendants who is/are identified by the Plaintiff as being responsible for the wrongs alleged by the Plaintiff against any such Defendant or Defendants*".

The letter of 16 May was in similar terms. The letter of 6 June simply referred back to the letter of 20 February 2019 but included the following statement: "*For the avoidance of doubt, we confirm that we are instructed by Edmund Garvey in his personal capacity only*". No explicit refusal to provide the names and addresses of the Christian Brothers is contained in the correspondence but equally it is clear that no names and addresses will be forthcoming. It is in those circumstances that the motion was brought.

Hearing of the motion

5. The motion came on for hearing on 1 February 2021. The first named defendant, who is separately represented, did not appear on the motion as no relief was sought against him. Although one of the reliefs sought was based exclusively on the inherent jurisdiction of the court i.e. the direction that the names and addresses of members of the Congregation of Christian Brothers in Ireland be disclosed, no cases were opened in respect of the inherent jurisdiction of the court and the parameters of that jurisdiction. In the circumstances, I directed that the parties submit written submissions identifying relevant case law and the application of same. Both parties submitted very helpful written submissions and I have taken same into account in coming to my decision.

Summary of Issues raised

6. This application raises a deceptively simple issue: can a court direct a member of a religious organisation, sued as being vicariously liable as a member of a congregation for

sexual abuse allegedly perpetrated by another member, to disclose the identities of other members of the congregation during the time of the alleged sexual abuse so that they may be joined in the proceedings?

7. It also raises the less taxing question as to whether, by way of O. 15, r. 9 of the RSC, a court can designate a defendant as a representative defendant where there is no agreement to such designation.

8. The core facts relevant to the determination of this application seem to me to be the following:

- there is no consent by the second named defendant to him acting in a representative capacity on behalf of the other members of the Congregation at the relevant time;
- the second named defendant has refused to provide the plaintiff with the names of the Brothers who were part of the Congregation at the relevant time on the basis that it is a matter for the plaintiff to identify the persons responsible for the wrongs alleged;
- the plaintiff's solicitor has averred on affidavit that the plaintiff is being frustrated in his endeavour to issue proceedings by the second named defendant's refusal to furnish the information sought. No affidavit was sworn by or on behalf of the second defendant controverting that averment. Counsel for the plaintiff has submitted that he has no other way of obtaining the names of the Congregation at the relevant time. No submissions to the contrary were made by the second named defendant, who was represented by solicitor and counsel at the hearing of the motion. I will therefore proceed on the basis that the plaintiff is not able to obtain the names of the Congregation members at the relevant time absent the Orders sought.

Order 15 Rule 9

9. The plaintiff seeks an order pursuant to O.15, r.9 of the RSC authorising or directing the second named defendant to defend the plaintiff's intended proceedings on behalf of all

living members of the Congregation of Christian Brothers members during the period 1 August 1979 to 31 December 1984.

10. Order 15 r. 9 provides as follows:

> *Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested*.

11. The plaintiff asserts that this rule provides the legal basis for an order either authorising or directing the second named defendant to defend the proceedings on behalf of the Congregation at the relevant time. Because the second named defendant has made it perfectly clear in the correspondence exhibited to the affidavit of Ms. Leahy summarised above that he is not defending the proceedings in a representative capacity and is not willing to do so, it seems to me the application is in truth one for a direction rather than an authorisation.

12. Counsel for the defendant submits that O.15 r. 9 may only be invoked where a plaintiff or defendant is willing to act in a representative capacity and relies upon case law in that respect. Counsel for the plaintiff submits that, were the defendant's interpretation of O. 15, r.9 to be adopted, it would make the wording of the rule "meaningless" and relies in that respect on the words "*may be authorised by the court to defend*".

13. It seems clear to me that the rule in question is permissive rather than mandatory. In other words, it makes clear that it is permissible, where a number of persons are suing or being sued, for one or more of those persons to sue or defend the proceedings on behalf of all persons having the same interest in the cause. The rule is significant in the absence of any other general provision in the RSC or in statute authorising parties to act on behalf of other parties. The Law Reform Consultation Paper on Multi-Party Litigation (LRC CP 25-2003) described O. 15 r.9 as facilitating "*a rudimentary form of class action known as a "representative action"*" [paragraph 1-01].

14. However, what the plaintiff is contending for is quite different. He argues that it permits the court to direct a defendant to defend the proceedings on behalf of a group of persons where the defendant does not wish to act in a representative capacity. The case law opened to me is against this proposition, as is the wording of O. 15 r.9.

15. Considering the wording of O.15, r. 9 first, the word "authorisation" connotes permission or clearance being given by person A for a course of action that is desired by person B. Order 15, r.9 does not provide for the court to "direct" the defence of proceedings on behalf of all interested persons. It only provides that a court may authorise same. *Prima facie*, the rule does not give the court a power to direct a defendant to act on behalf of others.

16. Case law on this point supports that approach. In *Firth Finance and General Ltd. v. McNarry* [1987] N.I. 125 was a Northern Irish case that considered whether a person could be appointed as a representative defendant against their will. O. 15 r. 16(4) of the Rules of the Supreme Court provided that in an action against the estate of a deceased person, the plaintiff shall apply for an order appointing a person to represent the deceased's estate. The Court found that there was nothing in O. 15 r. 16(4) to suggest that a person could be appointed as a representative defendant against his/her will. That case involved an allegation that the deceased had misappropriated funds from his employer, the plaintiff, who then wished to take a claim against the deceased's estate. The deceased's widow did not wish to engage in or take any action in her husband's estate. The plaintiff made an application to appoint the deceased's wife as a representative defendant without her consent under O. 15 r. 16(4), and this application was granted.

17. On appeal it was argued that the Master had no power to grant such an application and that only a willing person could become a representative defendant. It was further argued that such an interpretation of the rule would enable the deceased's widow to effectively block a legitimate claim. Counsel cited case law which he said identified a long-standing rule that only

a willing person may be appointed as a representative defendant, citing *Pratt v. London Passenger Transport Board* [1937] 1 All ER 473 and *In re Curtis & Betts* [1897] W.N. 127.

18. The Court observed there was nothing in the wording of the Rule that suggested that a person could be appointed under it as a representative defendant and that such an order would expose a defendant to the risk of having to incur costs. It concluded such an approach would be objectionable and could not be ordered.

19. I find that, despite the rule at issue in *Firth Finance* being quite different to O.15, r.9, the rationale expressed by the court in that case is one that applies equally in the circumstances of this case.

20. Similarly, in my judgment in *Merriman v. Burke & Ors* [2020] IEHC 118, I refused to treat a defendant as a representative defendant in proceedings concerning alleged sexual abuse in circumstances where the first defendant in those proceedings consistently denied he was a representative of the Christian Brothers and refused to identify a nominated representative. In that decision, I held that (a) given the lack of agreement on the part of the first defendant and the Congregation and (b) the failure to identify the members of the Congregation who the first defendant allegedly represented, the first defendant had not been sued in an agreed representative capacity.

21. In summary then, O. 15 r. 9 cannot be interpreted to mean that a court may order an unwilling defendant to act in a representative capacity on behalf of other unnamed and unidentified defendants.

22. The plaintiff also seeks an order directing representation by the second named defendant pursuant to the inherent jurisdiction of the court. This relief was not pressed at the hearing and no authorities were opened to support it. It is well established that where the jurisdiction of the courts is expressly and completely delineated by statute law it must as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of

an implied or inherent nature (see page 27 of Murray J. in *G Mc G v. DW (no. 2) (Joinder of Attorney General)* [2000] 4 I.R. 1). Here, it appears to me that the jurisdiction of the courts in respect of representative actions has been delineated by the relevant rule of court i.e. O. 15 r. 9. Accordingly, it is not appropriate that the inherent jurisdiction of the court should be relied upon.

23. There is a further potential difficulty for the plaintiff in seeking this Order, in that he cannot identify to the court the list of potential defendants who should, on his case, be mandatorily represented by the second named defendant. In *Madigan v. Attorney General* [1986] I.L.R.M. 136, one of the plaintiffs sought to challenge the constitutionality of the residential property tax on her own behalf and on behalf of all assessable persons within the meaning of s. 95 of the Finance Act 1983. O'Hanlon J. refused the application for a representative action because no evidence had been adduced to suggest that any other persons had authorised the said plaintiff to sue on their behalf and the court had no knowledge of the number of persons who wished to challenge the statute. A somewhat more flexible approach was taken in *Greene v. Minister for Agriculture* [1990] 2 I.R. 17, where it was held to be sufficient by way of identification of parties represented by a small number of plaintiffs that a list of 1,392 farmers had been provided to the defendants, although those farmers had not signed the necessary documentation. On the facts, Murphy J. concluded that the representative plaintiffs were authorised to act on behalf of the 1,392 farmers. However, in that case the names of those farmers were available, unlike the present situation.

24. Accordingly, were I to make an order in the terms sought by the plaintiff in relation to representation by the second named defendant, I would still have to engage with the issue of the disclosure of the names and addresses of the Congregation at the time of the alleged abuse as any such order would require an identification of the parties to be represented by the second named defendant.

25. For the foregoing reasons, I therefore refuse the relief sought at paragraph 2 of the Notice of Motion.

Disclosure pursuant to inherent jurisdiction of Court

Arguments of the parties

26. The plaintiff focused on the fact that there were no rules of court or legislative provisions in place in respect of the provision of names of potential parties and that therefore no preclusion on the use of inherent jurisdiction of the sort discussed by *McG v. DW*, *Mavior v. Zerko Limited* [2013] 3 I.R. 268 and *In the matter of FD* [2015] 1 I.R. 741, arose in this case.

27. He identified that by way of analogy, the court could look to the types of discovery orders made under the jurisdiction identified in *Norwich Pharmacal v. Customs and Excise Commissioners* [1974] A.C. 133, followed in Ireland by *Megaleasing UK Limited v. Barrett* [1993] IL.R.M. 496. He relied upon the decision in *Holloway v. Belenos Publications Ltd (no. 2)* [1988] I.R. 494, whereby Barron J. observed that the power to order discovery was part of the inherent jurisdiction of the court. He submitted that the court had an inherent jurisdiction recognised by the Constitution to control its own procedures and to administer justice appropriately and that it should exercise its inherent jurisdiction in the circumstances of this case to direct production of the names and addresses of the Congregation at the relevant time.

28. The second named defendant made two key points, the first being that the jurisprudence on inherent jurisdiction indicates that it is a power which should only be used sparingly, and on extreme, rare, and exceptional occasions. He identified that no such exceptional occasion has been established by the plaintiff here such as to justify the invocation of the court's inherent jurisdiction.

29. Second, in response to the reference by the plaintiff to the *Norwich Pharmacal* jurisdiction, the second named defendant stressed that the courts will only direct the disclosure of the identity of alleged wrongdoers if the plaintiff can demonstrate a very clear and

unambiguous establishment of wrongdoing, relying on *Megaleasing*, as well as subsequent decisions, including *O'Brien v. Red Flag Consulting* [2015] IEHC 867, and *Parcel Connect v. Twitter International Company* [2020] IEHC 279. The second named defendant stressed that here, only a plenary summons has issued, the plaintiff has not made out a *prima facie* case and has not established the alleged wrongdoing to a high degree of certainty as required by the case law. Because the plaintiff is seeking an order that has all the characteristics of a *Norwich Pharmacal* order, he should not be entitled to obtain a similar order by the "back door" of inherent jurisdiction where the requisite threshold has not been met. Similarly, the second named defendant cautioned against the invocation of a "vague" inherent jurisdiction.

The nature of inherent jurisdiction

30. Article 34.3.1 of the Constitution provides as follows:

> *3.1 The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.*

31. There is little discussion of Article 34.3.1 as the source of the inherent jurisdiction of the courts, although the decision in *FD* does refer to it. Other decisions make it clear that the inherent jurisdiction of the courts, particularly as relied upon to provide for discovery, significantly pre-dates the Constitution.

32. The source, nature and limitations of this jurisdiction has been variously explained as follows:

- "*The court has an inherent jurisdiction to stay proceedings … This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice …*" (Costello J. in *Barry v. Buckley* [1981] I.R. 306 page 308);

- "*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*" (Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 p. 475);
- "*It is part of the court's function to vindicate and defend the rights guaranteed by Article 40, section 3. If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all things necessary to vindicate such rights*." (Hamilton C.J. in *DG v. Eastern Health Board* [1997] 3 I.R. 511, page 522);
- That a court possesses inherent jurisdiction implicitly "*whether owing to the very nature of its judicial function or its constitutional role in the administration of justice*" (Murray J. in *G Mc G* page 26);
- That there is "*a jurisdiction inherent in the court which enables it to exercise control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process. It is a residual source of power which the court may draw upon as necessary wherever it is just or equitable to do so*". (Kelly J. in *PJ Carroll and Company v. Minister for Health (no. 2*) [2005] 3 I.R. 457 page 466);
- "*If an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure, and even if there was a rule applicable the court is not necessarily hidebound by it"* (Geoghegan J. in *Dome Telecom Ltd v. Eircom Ltd* [2008] 2 I.R. 726 paragraph 12);
- "*The court's inherent jurisdiction stems from the nature of the court's judicial function or the court's constitutional role in the administration of justice*" (Clarke J. (following Murray J. in *McG*) in *Mavior*);

- "*It has been established that there is an inherent jurisdiction to set aside a final order in exceptional circumstances such as on the basis of bias or fraud or where there has been a breach of constitutional rights…"*(Dunne J. in *Nolan v. Carrick* [2013] IEHC 523);
- "*The inherent jurisdiction of the court is not to be confused with a right to change the law at whim*." (Cross J. in *Re Depuy International Ltd* [2017] IEHC 101, paragraph 30);
- "*… it is exercised only where necessary and … it has the overriding objective of avoiding injustice*" (Barrett J. in *Bank of Scotland v. McDermott* [2017] IEHC 77 page 5).

33. Given that this application seeks an order directing disclosure of information, the cases on the relationship between discovery and the inherent jurisdiction of the court are particularly apposite.

34. In *Holloway*, Barron J. observed that:

"*A rule relating to orders for discovery is a rule regulating the exercise of the inherent jurisdiction of the court…. The power to order discovery is part of the inherent jurisdiction of the court and the rule is one giving altered effect to that inherent jurisdiction*".

35. In *Nolan v. Dildar* [2020] IEHC 614, page 15, Barniville J. noted that:

"*The court has an inherent jurisdiction to direct further and better discovery where the discovery made on foot of an order or agreement for discovery is inadequate or deficient. I accept the submission advanced by the plaintiffs that the court's inherent jurisdiction in that regard is extensive and can include, in very exceptional cases, an order directing cross-examination of a deponent on an affidavit of discovery (Duncan v. Governor of Portlaoise Prison [1997] 1 IR 558)".*

36. The case law above demonstrates that inherent jurisdiction may be used as the legal basis for a wide variety of orders, including case management, directing further and better discovery, directing discovery of the identity of third parties for the purposes of suing them, staying proceedings, setting aside a final order, granting bail and detaining a young person not charged or convicted of any crime in a penal institution and/or child care institution.

37. At this point, I should address the second named defendant's argument that the inherent jurisdiction of the court should only be used on "extreme and rare occasions". Those words come from the decision of Hamilton C.J. in *DG v. Eastern Health Board* where he stated at p. 524:

> *"The jurisdiction, which I have held, is vested in the High Court is a jurisdiction which should be exercised only in extreme and rare occasions, when the Court is satisfied that it is required, for a short period in the interests of the welfare of the child and there is, at the time, no other suitable facility."*

38. Carefully read, it seems to me that Hamilton C.J. was commenting, not on the use of inherent jurisdiction in general but rather on the use of it to justify detention of a child not charged or convicted with any criminal offence in a penal institution. Similarly, read in context, the comment of MacMenamin J. in *HSE v. AM* [2019] 2 I.R. 115 to the effect that "*Applications invoking an inherent jurisdiction may, therefore, be made, but only in exceptional cases … As was made entirely clear by the judgment in D.G. v. Eastern Health Board [1997] 3 I.R. 511, inherent jurisdiction must not be used as a first port of call, when, by legislation, the Oireachtas has spoken on the matter*" (paragraph 90), appears to me to have been made in the context of cases involving fundamental principles of constitutional stature i.e. as demonstrated by his observations later in the case: "… *where rights to life and liberty under Article 40.3 of the Constitution did arise, and where this court has held that there is an inherent jurisdiction,*

albeit one to be used sparingly, and only as a "backstop" when statutes do not govern the situation" (paragraph 92).

39. The overall tenor of the case law is, in my view, not that the inherent jurisdiction of the courts should only be used in extreme/rare and exceptional cases but rather that it should be used sparingly, where there is no other alternative and where the issue is not already addressed by legislation and/or rules of court (see, *inter alia, FD*).

Disclosure of the names of third parties

40. The nature of the order sought is naturally a critical factor to be considered when parties invoke the inherent jurisdiction of the courts. Happily, in this case, I do not have to decide as a matter of principle whether courts have an inherent jurisdiction to order a defendant to disclose names of suspected wrongdoers for the purpose of issuing proceedings against them, as it has long been accepted that courts have the power to do so in the context of *Norwich Pharmacal* orders and also in other contexts. This is clear from the following passage from the judgment of Lord Reid in *Norwich Pharmacal*:

> *"Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a party in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage. Such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought. Indeed, in some cases it would seem that the main object in seeking discovery was to find the identity of possible other defendants*". (p. 173*)*

41. That passage makes clear that the original power of the courts to order discovery derived from equity. The cases discussed in the judgments of the five judges of the House of Lords in *Norwich Pharmacal* suggest that this power to order discovery may have existed for

more than two centuries. Finlay C.J. in *Megaleasing* observed that the jurisdiction had been traced back to *Orr v. Diaper* (1876) 4 Ch. D. 92. McCarthy J. in the same case traced the origins of the power back to the Supreme Court of Judicature (Ireland) Act 1877.

42. As interpreted in the Supreme Court decision of *Megaleasing*, *Norwich Pharmacal* orders may be made where the plaintiff seeks discovery exclusively for the purposes of discovering the identity of wrongdoers and has no independent cause of action against the defendant, although it is a condition of such discovery that (a) the defendant must in some way be mixed up with the wrongdoing and (b) a very clear proof of a wrongdoing exists. Neither in *Megaleasing*, nor in the discussion of that case by the High Court and Supreme Court in *Doyle v. Commissioner of An Garda Siochana* [1999] 1 I.R. 249, is the question as to whether clear proof of the existence of wrongdoing is required if the application is not made in the context of proceedings for sole discovery.

43. I agree with the second defendant's submission that the plaintiff does not come under the existing *Norwich Pharmacal* jurisdiction as applied in Ireland. No clear evidence of wrongdoing or even *prima facie* evidence of wrongdoing has been established as would be necessary to obtain a traditional *Norwich Pharmacal* type order. The pleadings have not gone beyond the issuing of a plenary summons. No wrongdoing can be assumed on the part of either defendant at this point in the proceedings. The burden of proof rests on the plaintiff, to be discharged on the balance of probabilities.

44. However, there is another reason that this application is not a typical *Norwich Pharmacal* type application. It is not an action for sole discovery. The defendants have not been joined simply for the purposes of obtaining discovery. The first named defendant is accused of very serious torts, namely wilful assault, battery and trespass to the person. The second named defendant is sued for negligence and breach of duty, presumably on the basis of the doctrine of vicarious liability, although that is not pleaded in the endorsement of claim.

45. The defendant says that that is the end of the matter since the plaintiff cannot circumvent the requirement to establish a threshold of wrongdoing by invoking the inherent jurisdiction of the court. That approach seems to assume that even where the action is not for "*sole discovery*" as described by Finlay P. in *Megaleasing*, the plaintiff must establish *prima facie* wrongdoing. The second named defendant has cited the decision of MacEochaidh J. in *O'Brien v. Red Flag Consulting* [2015] IEHC 867 in support of that proposition. I discuss same below.

46. It seems to me that, subject to the *Red Flag* line of authority discussed below, in principle the flexibility of the inherent jurisdiction of the court and the wide range of situations in which it can be deployed (as discussed above) would permit an order for disclosure of the identity of potential parties even where the traditional *Norwich Pharmacal* requirement of establishment of *prima facie* wrongdoing is not met.

47. Moreover, that argument ignores the case law cited in *Norwich Pharmacal* which lends support to the notion that discovery was traditionally available to a plaintiff against a defendant to discover the names of other potential wrongdoers, even without proof of wrongdoing. The issue that the House of Lords struggled with in *Norwich Pharmacal* was whether such a remedy was available where the plaintiff had no cause of action against the defendant. But the question as to whether discovery of information in respect of potential wrongdoers was available where the plaintiff was proceeding against the defendant did not appear to trouble it.

48. In the five judgments delivered by the House of Lords in *Norwich Pharmacal*, a wide range of case law as to the entitlement of a court to order discovery of the identity of suspected wrongdoers was discussed. From that, it is possible to deduce the following principles: that such a jurisdiction exists, is of considerable antiquity, likely derives from equitable principles and does not appear to be necessarily conditional on *prima facie* proof of wrongdoing. For example, in the submissions made to the House of Lords in the *Norwich Pharmacal* case,

recorded in the law report, counsel referred to US law, relying *inter alia* on the decision of Judge Learned Hand in *Pressed Steel Car Company v. Union Pacific Railway Co* (1917) 240 F 135 where he held at p.136:

> "*the jurisdiction of this court to entertain a bill in equity for discovery… will still be exercised even in aid of an action at law, if the plaintiff cannot without it find out whom he should sue … the jurisdiction will not be exercised, if the legal remedies are sufficient; like any other equitable remedy, it is exceptional, and the plaintiff must bring himself within the exception*".

Discussing the purposes of a bill in equity for discovery and noting that in most cases the law has rendered it obsolete, Judge Learned Hand observed that "*if … the plaintiff cannot adequately present his case by subpoena and especially if he needs a preliminary inspection of documents, then there is every reason to assert so ancient a source of equitable jurisdiction*".

49. In the textbook, *Bray on Discovery* (1885), referred to by a number of the Law Lords in *Norwich Pharmacal*, the author identifies that a party might file a bill of discovery before he commenced his action, in order *inter alia* to ascertain the proper person against whom to bring the action (*Moodalay v. Morton* (1785) 1 Bro C.C. 469) (in that case, against a company and a secretary to ascertain whether the persons who had done the act complained of were acting by the company's authority) (see page 61 of Book 3, Chapter X).

50. Lord Kilbrandon in *Norwich Pharmacal* quotes the *dicta* in the South African case, *In Colonial Government v. Tatham* (1902) 23 Natal L.R. 153, where Bale C.J. and Finnemore J. observe:

> "*Before granting such an application we must be satisfied that the applicant believes that he has a bona fide claim against some person or persons whose names he seeks to discover, and whose name can be supplied by the respondent, and that he has no other appropriate remedy*".

and Beaumont A.J. in the same judgment says, at p. 158:

> "*The principle which underlies the jurisdiction which the law gives to courts of equity in cases of this nature, is that where discovery is absolutely necessary in order to enable a party to proceed with a bona fide claim, it is the duty of the court to assist with the administration of justice by granting an order for discovery, unless some well-founded objection exists against the exercise of such jurisdiction*."

51. The requirement for *prima facie* wrongdoing, which does not feature prominently in the decision of the House of Lords in *Norwich Parmacal* but is writ large in *Megaleasing* (which was of course only concerned with sole discovery) appears to largely derive, in my view, from the fact that the action is one for sole discovery i.e. there is no independent claim of wrongdoing against the defendant. Therefore, before putting a defendant against whom no claim is made to the trouble of making discovery, a court must be satisfied *inter alia* that there is clear evidence of wrongdoing. (That is also why a court will not make an order for sole discovery against a defendant unless the defendant is in some way "mixed up in the wrongdoing").

52. However, the situation is quite different where the defendant is one against whom substantive wrongdoing is alleged in the proceedings i.e. a concurrent wrongdoer, and who has not been joined simply to provide information in relation to the identity of wrongdoers. In such a case, the defendant is already enmeshed in the legal process and is likely to face discovery requests later in the proceedings. In such a situation, the rationale for the necessity for *prima facie* evidence of wrongdoing to justify an order for discovery of the identity of wrongdoers is less obvious. That is not to say that, in an appropriate case, a court might refuse to order disclosure of the identity of wrongdoers by a concurrent wrongdoer without *prima facie* evidence of wrongdoing. But in my view, it is inappropriate to treat the establishment of *prima*

facie wrongdoing as an absolute requirement, the absence of which must operate to bar any applicant from obtaining an order, even where the interests of justice require it.

53. I should add that the necessity for *prima facie* wrongdoing is not without its own difficulties and there are occasions where it might not be appropriate to require it. In this respect, I note the observations of Laffoy J. in *Doyle v. Commissioner of An Garda Siochana* where she observed, in the context of an application for *Norwich Pharmacal* relief as follows:

> *"For the Court to make a finding of very clear proof of wrongdoing by an identified alleged wrongdoer in proceedings in which the identified alleged wrongdoer is not a party would constitute a breach of one of the fundamental rules of natural justice – audi alteram partem" (p. 16).*

54. Finally, I am aware that there is recent U.K. authority where the requirement for *prima facie* evidence of wrongdoing has been dispensed with when ordering a defendant to provide the names of alleged wrongdoers. However, given that same was not identified by either party, I have not considered that line of authority in this judgment.

The decisions in *O'Brien v. Red Flag Consulting Ltd.*

55. I turn now to consider whether the decisions of the High Court and the Court of Appeal in *O'Brien v. Red Flag Consulting Ltd.* mean that, despite my observations above, I am not entitled to make an order for discovery of the identity of wrongdoers absent evidence of *prima facie* wrongdoing, even where the defendant is itself accused of wrongdoing.

56. The first decision is an *ex tempore* decision of MacEochaidh J. in *O'Brien v. Red Flag Consulting & Ors*. [2015] IEHC 867. The plaintiff had sought an order requiring the defendants or the appropriate defendant to reveal the name of one of their clients. The plaintiff said he had become aware of a campaign against him and that he instigated an investigation to discover who might be behind the campaign. He received a memory stick from an anonymous person and launched proceedings against the defendants. Having referred to the decision in *Norwich*

Pharmacal and more recent UK case law (*Rugby Football Union v. Consolidated Information Services* [2012] 1 WLR 3333), MacEochaidh J. observed as follows:

> "*It is also clear from an examination of Irish jurisprudence that whereas historically such orders were made against an innocently involved defendant, it is clear that disclosure orders can be made against actual wrongdoers and whether one calls those Norwich Pharmacal orders or disclosure orders or discovery orders, such orders, are available to the High Court and have been made in the past*" (paragraph 13).

57. In response to an argument by the defendant that the orders should not be made because it would breach their duty of confidentiality to their client, the plaintiff argued that the right of the defendants to protect the confidentiality of their clients must be balanced against the degree to which wrongdoing has been established by the plaintiff. Having reviewed *inter alia* the Irish authorities, MacEochaidh J. observed that "*one feature stands out, and that is that in all of them … wrongdoing by unidentified persons, to a very high degree of probability, had been made out by the plaintiffs … It seems to me the law does require that a plaintiff establishes to a high degree of certainty that an unknown person has engaged in unlawful activity before disclosure orders will be made*" (paragraph 22).

58. He concluded that wrongdoing had not been made out to the degree necessary to justify the making of the orders sought and that, given the confidentiality concerns, there would have to be a very strong case indeed about the alleged wrongdoing to the point of almost certainty before a court could so order. (It should be observed that in this case, no confidentiality concerns arise for the reasons I discuss later).

59. That decision was not appealed. In 2016, an application for what might be described as "ordinary" discovery was made in the same proceedings, and the various categories sought required documents that would reveal the identity of the unnamed client i.e. the same material that had been refused in the judgment described above. The defendants agreed to make

voluntary discovery save for anything that would reveal the identity of their client. Reference was made to the previous decision of MacEochaidh J. on 21 December 2015. In *O'Brien v. Red Flag Consulting* [2016] IEHC 719 MacEochaidh J. – who was again adjudicating upon the application - observed as follows:

> "*The fact that disclosure has been refused on a Norwich Pharmacal application could not prevent a party from seeking discovery in the ordinary way … Disclosure of the defendants' client's name to enable the plaintiff to sue him or her has been refused. That application cannot be repeated in this discovery application but that is not to say the plaintiff is prohibited from seeking the name of the defendant's client on the basis that the information is relevant in these proceedings - as opposed to needed for intended proceedings*" (paragraph 7).

60. He concluded that knowing the defendants' client's identity would not advance the plaintiff's plea and was therefore not relevant and refused discovery.

61. That decision was appealed to the Court of Appeal and judgment was delivered by Ryan P. on 13 October 2017 in *O'Brien v. Red Flag Consulting* [2017] IECA 258. The President agreed that material identifying the defendants' client was not relevant. However, the plaintiff also sought discovery on the basis that there was an entitlement to same under the *Norwich Pharmacal* jurisdiction. The defendant noted the plaintiff had not appealed the original 2015 decision refusing disclosure of the identity of the client and could not re-visit a claim previously made and rejected by the court.

62. At paragraph 37, the President upheld the conclusions of the High Court, holding *inter alia* there was no new basis advanced by the plaintiff to produce a different result from the previous unsuccessful application, there was no case made out on the facts that entitled the plaintiff to the order sought, and this was a case of *res judicata*. At paragraph 38, the President observed that there was substance to the submission by the defendants that the previous

decision was binding and that the application, insofar as it relied upon Lord Reid's identification of an appropriate circumstance for discovery, represented a return to previously trodden territory. At paragraph 42, he concluded that the trial judge was correct to refuse the ground of application based on the *Norwich Pharmacal* jurisdiction, and that he "*ought indeed to have held that the matter was res judicata by reason of the previous decision of the court. But on the footing that the judge employed in considering the matter, it was also correct to rule out relief because the factual ground had advanced no further*".

63. Finally, at paragraph 80, he notes that counsel for the plaintiff accepts that he put up the case in a quasi-*Norwich Pharmacal* application to MacEochaidh J. in the High Court in the previous application but that the issue was not the subject of *res judicata* or issue estoppel because the test the court applied on that application was different and the issue was not precisely the same, and that MacEochaidh J. in the 2016 decision was wrong to say that the *Norwich Pharmacal* application could not be renewed. The President rejected those arguments.

64. The above summary of the findings of the President is necessary to contextualise the observations the President made on the *Norwich Pharmacal* jurisdiction, summarised below, and to explain why I have reached the conclusion that his observations on that jurisdiction were *obiter* such that I am not bound by them in reaching my decision in this matter.

65. Turning now to those observations, the plaintiff had put forward an argument that the *Norwich Pharmacal* jurisdiction differs, depending on whether one is considering an innocent party (albeit one who is mixed up with the wrongdoing) or an actual defendant. In response to this argument, the President observed as follows:

> "*In my judgment, the appellant plaintiff is not correct as a matter of law in proposing two separate Norwich Pharmacal jurisdictions, one for an innocent party and one for an actual defendant. There is only one, which has been exercised in cases (a) in which the requested party is a defendant or alleged wrongdoer where the applicant achieves*

a relatively high standard of proof on a provisional basis, that is, a strong case and (b) where the party in possession of the information is involved in the wrongful conduct in significant degree but is itself innocent of liability to the applicant seeking the disclosure, again provided the applicant makes out a strong prima facie case. The standards of evidence or proof are not different; it would make no sense to hold otherwise" (p.28, para. 41 (x)).

66. That statement suggests that a plaintiff seeking the identity of an alleged concurrent wrongdoer must identify a *prima facie* case, just as it would be required to do if the action was one for sole discovery. However, I note that in a later passage the President focuses on the interests of justice rather than prescriptive requirements: at paragraph 44, he says "*Mr. O'Brien has gone no further than to make the allegations which if they were founded in fact at a sufficient level could justify the court in making the order he seeks if it was satisfied that it was in the interests of justice to do so. I should say that this last point is not to be overlooked: the fact that the jurisdiction exists for the court to make an order does not mean that it will do so; the court must be satisfied that the application is in all the circumstances a deserving one*".

67. Despite these observations, for the reasons set out above, I have concluded there is no binding authority from the Court of Appeal to the effect that a plaintiff seeking discovery of the names of third parties from a concurrent wrongdoer is, in every case, required to demonstrate the existence of a *prima facie* case of wrongdoing.

68. Insofar as the 2015 decision of MacEochaidh J. is concerned, the position is different. He squarely concludes that *prime facie* evidence of wrongdoing is required even where the defendant is a concurrent wrongdoer, as opposed to a person mixed up in the wrongdoing in an application for sole discovery. However, applying the doctrine of *stare decisis*, as identified in *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976] ILRM 50 and *Re Worldport Ireland Ltd.* [2005] IEHC 189, I have concluded that I should depart from his decision and come to a

different view on this question as the decision in *O'Brien* was not based upon a review of significant relevant authority. I am conscious that a High Court judge should be slow to depart from another decision of the High Court, bearing in mind the importance of consistency. However, for the reasons I explain below, I find it appropriate to do so in this case.

69. The decision in *O'Brien* was a short, *ex tempore* decision. Presumably because of the necessity of delivering the decision on an urgent basis, there was no detailed consideration by reference to decided case law of this discrete and novel question i.e. the necessity for proof of *prima facie* wrongdoing where the defendant is a concurrent wrongdoer. The majority of authorities relied upon by MacEochaidh J. were concerned with applications for sole discovery – *Norwich Pharmacal*, *Megaleasing*, and *EMI Records (Ireland) Ltd. v. Eircom Ltd* [2005] I.R. 148. The only one that concerned concurrent wrongdoers, *Ryanair v. Unister* [2011] IEHC 167 did not discuss potential differences between innocent parties mixed up in wrongdoing and concurrent wrongdoers at all. Indeed, the Supreme Court decision, *Ryanair v. Unister* [2013] I.E.S.C. 14, was largely concerned with jurisdictional issues. However, as I identify above, there is a line of much older U.K., U.S. and South African case law that suggests that the necessity for proof of *prima facie* wrongdoing is not invariably required when the defendant is a concurrent wrongdoer. That case law was not considered.

70. Equally, for understandable reasons of urgency, nor was there any consideration of the difference between sole discovery and discovery sought against concurrent wrongdoers insofar as evidence of *prima facie* wrongdoing is concerned. Nor was there a consideration of the potential for the inherent jurisdiction of court to accommodate such an order, even where no *prima facie* proof of wrongdoing was demonstrated, where the interests of justice require it.

71. In the circumstances, I have concluded that the High Court decision on *O'Brien* should not be considered an authoritative statement on the law on this discrete point, and it is appropriate that I should depart from it.

Backdoor/vague jurisdiction

72. Before turning to a consideration of whether, in the circumstances of this case, the jurisdiction should be exercised, I must address the defendant's argument that the plaintiff is circumventing the requirements of a *Norwich Pharmacal* order and using a "backdoor" of "vague" inherent jurisdiction. For the reasons identified above, I have concluded there is a jurisdiction to make orders directing the disclosure of the identity of potential third parties against concurrent defendants. As such, the jurisdiction in question is not "backdoor" merely because it differs from the *Norwich Pharmacal* jurisdiction.

73. In respect of the charge of "vagueness", this seems to be a reference to Clarke J.'s statement in *Mavior* as follows: "*If in a constitutionally permissible way, the Oireachtas have defined the limits of a particular jurisdiction then it is not for the courts to extend those limits by invoking a vague "inherent jurisdiction*" (paragraph 17). However, the issue he was concerned with was whether there was effectively an ouster of the inherent jurisdiction of the courts in circumstances where the area had been delineated and addressed by statute or rules of court. That is not an issue in this application.

Application of principles to instant case

74. In *Barry v. Buckley*, Costello J. noted that the inherent jurisdiction to stay proceedings enabled the court to avoid injustice. In *Primor*, Hamilton C.J. referred to the courts having an inherent jurisdiction to dismiss a claim when the interests of justice required them to do so. Finlay C.J. observed in *Megaleasing* that the power to order discovery in the circumstances of the case "*was a power which must be sparingly used, though where appropriate it may be of very considerable value towards the attainment of justice*". O'Flaherty J. observed in the same case that the action for discovery might prove to be a valuable instrument in the search for justice.

75. Having regard to the above, it seems to me that the paramount consideration that should guide my decision is whether making the order sought serves the interests of justice. I am conscious that the jurisdiction I propose to exercise is similar in nature to that exercised in the context of a *Norwich Pharmacal* order and I adopt the approach of Finlay C.J. that the jurisdiction is one that must be exercised sparingly. Equally, I have followed the approach identified by Dunne J. in *Nolan* to the effect that: "*This exceptional jurisdiction [to set aside an appeal pursuant to the inherent jurisdiction of the court] is not to be exercised in circumstances where there is another remedy available such as an appeal*".

76. Having applied these principles, I am satisfied that plaintiff's application should be granted for the following reasons:

- ***The plaintiff requires the information sought to prosecute his claim***

77. As identified above, Dunne J. in *Nolan* has indicated that inherent jurisdiction should only be relied upon where there is no alternative. Here, it flows from the decision of *Hickey v. McGowan and Cosgrove* [2017] 2 I.R. 196, described below, that the plaintiff cannot sue the Christian Brothers as they are an unincorporated body and that individually, the members of the Congregation are capable of vicarious liability for any wrongdoing of another member of the Congregation, if they were members during the relevant period. One or more Brothers could act as representatives for the Congregation in these proceedings but have declined to do so. In those circumstances, if the plaintiff wishes to sue the Congregation for the wrongs he claims to have suffered, the only way he can do so is to sue the Brothers individually under the doctrine of vicarious liability. To do so he must have their names and addresses.

78. In *Hickey*, the plaintiff alleged that he been sexually abused by the second defendant, a teacher in a national school run by the Marist Order. The first defendant was the head of the Marist Order and was sued as being vicariously liable for the acts of the second defendant. The defence of the first defendant was straightforward. It was that members of an unincorporated

association, such as the Marist Order, were not vicariously liable for the acts of another member.

79. The Supreme Court found that a party running a school could be vicariously liable for a teacher who sexually assaulted a child if there was sufficient evidence that such a party was in control of the activities of such a teacher; that religious orders were unincorporated associations, lacking in legal personality and therefore not capable of suing or being sued; that the members of an order could be vicariously liable for acts of abuse that were sufficiently closely connected to the object and mission of the order; that members of unincorporated associations who were members at the time of the tortious acts being committed by another member could be liable for such tortious acts but members who joined afterwards could not; and that as the first defendant did not plead or adduce any evidence that he was not a member of the religious order at the time of occurrence of the abuse of the plaintiff, the imposition of vicarious liability on him for the acts of the second defendant was justified. *Hickey* makes it clear that if a plaintiff seeks to impose vicarious liability on a religious order for the acts of a member of the order, he or she must sue the members of the order individually unless there is a representative defendant.

80. Further, for the reasons identified at the start of this judgment, I accept the submissions of the plaintiff that he has no other way of identifying the relevant persons who were Brothers at the relevant time – now some 40 years ago – except than by seeking them from the second named defendant who is the Province leader.

- ***Prejudice to the plaintiff absent the Order sought***

81. The plaintiff has identified one member of the Congregation against whom he can allege vicarious liability – the second named defendant - but wishes to obtain the identities of the remainder of the Congregation at the relevant time. However, without identifying all or at

least the majority of the Congregation at the relevant time, the plaintiff may be disadvantaged in realising any judgment he may obtain for the following reasons.

82. First, as discussed in some detail in *Hickey*, the question of recovery of any award of damages is a complex one, particularly where the alleged actions may have taken place many years before. In the present case, the abuse is alleged to have taken place over 40 years ago. As O'Donnell J. observed, in the context of a discussion about O.15 r.9:

> *"The appropriate course in such a case is to write to the order or provincial threatening to sue all individual members of the order unless a defendant is nominated. If that course is not taken, then all members who can be identified can be joined as defendants. If however any judgment is obtained against those defendants, the judgments are individual and whether or not such judgments will be met by insurance, or from assets which may be held for the benefit of the order more generally, may depend upon the terms of the insurance, and indeed the terms upon which such assets are held, and perhaps the willingness and ability of the order to make funds available to satisfy any judgment against an individual*".

83. In my view, it is probable that the plaintiff will have improved prospects of recovery if he obtains judgment against multiple members of the Congregation rather than one or two.

84. There is another, more technical reason, why the plaintiff may be seriously disadvantaged if he is ultimately successful but only as against the existing two defendants. This arises out s.35(1) of the Civil Liability Act 1961 (as amended). This provides: –

> *35. (1) for the purpose of determining contributory negligence –…*
>
> *(i) where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer…*

85. As identified in *Hickey*, the reason for this section is to incentivise plaintiffs to sue all potential concurrent wrongdoers as otherwise, a plaintiff may simply throw all the loss upon one defendant. O'Donnell J. observes that the section has the capacity to operate harshly in certain circumstances, including where there are a large number of defendants who may be concurrent wrongdoers on the grounds of vicarious liability but whom it may be very difficult to identify and whom the plaintiff may not have the capacity to identify. In such a situation he notes it may be unfair to reduce the plaintiff's award for failure to join all potential parties (paragraph 67). O'Donnell J. notes that s.35(1)(i) might benefit from further detailed scrutiny and observes that it might be inappropriate to permit a defendant to rely on the failure of the plaintiff to sue other members of the religious order when knowledge as to the identity of such members was more clearly within the power and control of the defendant. However, that issue was not raised in *Hickey* and therefore not decided.

86. That discussion serves to show that any reliance upon s. 35(1)(i) by the second named defendant to reduce any award the plaintiff might obtain could be problematic. But the position would not necessarily be the same if the first named defendant sought to rely on s. 35(1)(i) given that no request has been made to him for the requisite information. Moreover, it is not possible to be sure as to how any such argument would ultimately be resolved. The plaintiff is in my view potentially at a significant disadvantage in knowing that there are (on his case) concurrent wrongdoers whom he would like to sue but cannot because of the refusal of the second named defendant to provide the names of same.

- ***No reason given for decision to withhold names***

87. The second named defendant has failed to give any reason for his refusal to provide the names of his fellow Congregation members. The second named defendant has been identified by the plaintiff's solicitor in the affidavit grounding this motion as the Province leader of the Congregation of Christian Brothers, European Province and it is averred that he is uniquely

positioned as the person with knowledge of the membership of the Congregation of Christian Brothers in Ireland (paragraph 5). This averment has not been denied. The second named defendant is entitled to stand on his rights and is not obliged to facilitate the plaintiff by providing the names of his fellow Brothers during the relevant years; however, his decision not to engage substantively with the request means that I must proceed on the basis that he is in a position to provide the relevant information. Moreover, it means that I cannot consider any matters that he might have put forward mitigating against the information being provided.

88. I recited at the start of this judgment the letter of 8 June 2019, where the second named defendant's solicitors confirmed they were instructed by Mr. Garvey in his personal capacity only. Submissions were also made to this effect by counsel on his behalf. As identified above, the second named defendant is entitled to decline to act in a representative capacity. However, he cannot distance himself from his identity and/or occupation in this way. He does not deny that he is the Province leader of the Congregation or that he is a Christian Brother. He does not deny he has access to the information sought. In those circumstances, this curious submission cannot provide a basis for declining to provide the relief sought.

- ***Interests of the Brothers whose names are sought***

89. As identified by McCarthy J. in *Megaleasing*, a *Norwich Pharmacal* order "*requires a balancing of the requirements of justice and the requirements of privacy*" [para. 58]. Although this is not a *Norwich Pharmacal* order as such, a similar approach is apposite here.

90. In considering the requirements of privacy, it is undisputed that there were a significant number of Christian Brothers who were members of the Congregation in Ireland at the relevant time. Moreover, the identity of the Brothers now sought to be identified was known at the relevant time. In other words, the order sought will not make known anything that was unknown during the time period at issue. The collective nature of the Christian Brothers is relevant here. As observed in *Hickey*, the court is:

"*entitled to take cognisance of the fact that members of religious orders at that time normally wore habits of standard design, identifying them as members of orders, and indeed correspondingly reducing their individuality, while emphasising their part in a collective*" [para. 37].

It is not as if the Brothers were part of some secret society, whose members never expected to have their identity disclosed. On the contrary, at the relevant time, it would have been clear to all who interacted with members of the Congregation that they were Christian Brothers. Accordingly, the order will not impact upon the Brothers' right to privacy since their identity as Brothers was not a private matter.

91. Moreover, the interests of the Brothers are protected in that the information obtained by this order can only be used by the plaintiff for the purposes of issuing proceedings against them and for no other purpose and this will be a condition of the order when drawn up.

Conclusion

92. In the circumstances, I have no doubt in concluding that the order sought here may, in the words of Finlay C.J., "*be of very considerable value towards the attainment of justice*". Conversely, it seems to me that to allow the second named defendant, who has the relevant information in his possession, to withhold it with the possible effect of stymying the plaintiff in his ability to recover (if he succeeds), without providing any reason for such withholding, would be contrary to the interests of justice. The Supreme Court held in *Hickey* that individual members of a congregation may be vicariously liable for sexual abuse carried out by one of their members: to permit religious orders to withhold the names of their congregations without justification would allow them to subvert the reasoning in *Hickey* and would be unfair on a plaintiff who has no other means of recourse against a congregation.

93. As I observe above, the thrust of the case law appears to be that inherent jurisdiction, certainly in the context of discovery, should be used sparingly but not necessarily exclusively

on “extreme” or “rare” occasions. Adopting a parsimonious stance towards the grant of this type of relief, the circumstances of this case appear to me to warrant the relief sought for the reasons set out above i.e. the plaintiff requires the information sought to prosecute his claim, he is likely to be prejudiced absent the information, no argument is made that the information is not within the procurement of the second named defendant, no reason has been given to justify a withholding of the information and the interests of the Brothers whose names are sought will not be adversely affected.

94. Equally, I see no alternative to making the Order sought as the plaintiff has no other way of obtaining the names and addresses of the members of the Congregation at the relevant time.

95. If I am wrong about this and the jurisdiction to direct a concurrent wrongdoer to disclose the names and addresses of other potential wrongdoers should only be exercised in extreme or rare circumstances, it seems to me that a situation such as that of the present, where the Province leader of the Congregation of Christian Brothers in Ireland is refusing to identify his fellow members of the Congregation during a particular time period, despite the fact that during that period they were clearly identifiable as Christian Brothers, is rare indeed. Thus, it remains an appropriate case in which to exercise the jurisdiction.

96. Accordingly, I order that the second named defendant be ordered to disclose the full names and addresses of the persons who were members of the Congregation of Christian Brothers in Ireland from 1 August 1979 to 31 December 1984 and are currently members of the Congregation of Christian Brothers.

Costs

97. I propose that the costs of the motion should be borne by the second named defendant given that he has been unsuccessful, with a stay upon same pending the determination of these proceedings.

98. If either of the parties wish to argue for a different decision on costs, submissions of no more than 1,000 words should be filed within one week of the date of delivery of this judgment identifying the reasons for same. If no submissions are received I will make an order in the terms proposed.