THE HIGH COURT

[2019] IEHC 640
[2001 No. 10146 P.]

BETWEEN

MICHAEL ANTHONY O'BRIEN

PLAINTIFF

AND

THOMAS MURPHY, CHRISTOPHER CUMMINS, THE MINISTER FOR EDUCATION AND SCIENCE, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 4th day of September, 2019

1. This is a decision on an application brought by the first named defendant whereby he seeks an order pursuant to O. 122, r. 11 of the Rules of the Superior Courts dismissing the plaintiff's claim for want of prosecution, or, alternatively, an order pursuant to the inherent jurisdiction of the court to dismiss the proceedings on the grounds of want of prosecution and/or inordinate and inexcusable delay, and/or on grounds that it would be contrary to natural and constitutional justice to allow the proceedings to continue given the extent of the delay on the part of the plaintiff in progressing the proceedings.

2. In the proceedings, the plaintiff claims damages, *inter alia*, for assault, battery and trespass to the person. He alleges that he was subjected to episodes of sexual assault on divers dates from in or about 1952/1953 until approximately 1960. He claims that these assaults were inflicted upon him by a Father Bernard L., an Oblate priest in a Dublin parish. While there was some confusion about the identity or the correct first name of Father L., it was established, subsequent to the issue of proceedings, and almost as a matter of certainty, that the said Father L. died in 1989. In any case, he was not named as a party to the proceedings and instead the first named defendant was joined to the proceedings in a representative capacity as nominee of the Oblate Fathers in Ireland. In effect, the plaintiff seeks to hold the first named defendant vicariously liable for the actions of Father L. Before the conclusion of this application, the current provincial of the order, Father Gerald Oliver Barry, was substituted for the first named defendant, who has died since the proceedings commenced.

3. The chronology of events, insofar as is relevant to this application, may be summarised as follows:-

- Dates of alleged assaults: 1952-1960.
- Date of issue of plenary summons: 20th June, 2001.
- Date of service of plenary summons on first named defendant: 14th June, 2002.
- Appearance entered on behalf of first named defendant: 18th June, 2002.
- Plenary summons renewed for six months: 19th June, 2002.
- Notice of discontinuance of proceedings against second named defendant: 5th July, 2004.
- Notice of intention to proceed issued against first, third, fourth, fifth and sixth named defendants: 5th July, 2004.
- Statement of claim delivered: 11th November, 2004.
- Notice for particulars of third, fourth, fifth and sixth named defendants: 15th June, 2005.
- Notice for particulars of first named defendant: 10th August, 2005.
- Notice of discontinuance issued in respect of fourth named defendant: 18th July, 2006.
- Replies to notice for particulars of first named defendant, 8th February 2007.
- Defence of first named defendant delivered: 28th February, 2007
- Notice of discontinuance issued in respect of third, fifth and sixth named defendants: 2nd April, 2009.
- Notice of intention to proceed issued against first named defendant: 22nd February, 2017.
- Notice of motion to dismiss proceedings issued: 23rd May, 2017.

4. There is no need to describe the nature of the assaults alleged by the plaintiff for the purposes of this application. Suffice to say that it is clear from the allegations made in the statement of claim and the replies to particulars, that the alleged assaults are of the most appalling kind, and, if proven, and if the first named defendant was found to be vicariously liable for the same, then it is very likely that the plaintiff would succeed in obtaining an award of substantial damages.

5. The defence of the first named defendant denies each and every allegation of the plaintiff, and puts the plaintiff on full proof of the same. In addition, it is pleaded that the

plaintiff's claim is statute barred, and that the plaintiff has been guilty of inordinate and inexcusable delay in bringing these proceedings.

6. The application of the first named defendant is grounded upon an affidavit sworn by a Father Ray Warren, dated 22nd May, 2017, at which point in time Father Warren was Provincial of the Oblate Fathers. He avers that over the preceding ten years the plaintiff had failed to take any substantive steps to advance his claim, and that the plaintiff could have done so, and further that he was not precluded or hampered from doing so by any fault on the part of the first named defendant. He avers that that ten year delay is further exacerbated by the 40/50 year delay from the date of the alleged events to the institution of the proceedings.

7. In regard to the identity/first name of the alleged abuser, whom the plaintiff identified as Father Bernard L., Father Warren avers that there was no Father Bernard L. who was a member of the Oblate community in the parish concerned during the years referred to by the plaintiff, but there was another Father L. in the said parish during that period, who passed away in 1989.

8. The plaintiff responded to the affidavit of Father Warren by an affidavit of 4th October, 2017. In this affidavit, while the plaintiff acknowledges that there has been delay, he avers that the delay was not inordinate and inexcusable. Moreover, he avers that since Father L. died in 1989, before the institution of these proceedings, the first named defendant has suffered no prejudice by reason of the delay, and although Father Warren claims that the first named defendant is also prejudiced by the absence of any relevant witnesses, the plaintiff avers that no details were given as to the steps taken by the first named defendant to identify any such witnesses. In any case, there were no such witnesses to the alleged abuse. Accordingly, the plaintiff avers, there is no real and serious risk of an unfair trial as claimed by Father Warren.

9. Additionally, in response to a statement published on behalf of the first named defendant in 2011, the plaintiff avers that he tried to make an appointment to speak with the Oblate Fathers' protection officer for the purposes of obtaining therapeutic help, but he was informed that this was not possible because the plaintiff was engaged in litigation against the first named defendant. The plaintiff was advised to make the request through his solicitors, which he did, but following correspondence between the plaintiff's solicitors and the solicitors for the first named defendant, the first named defendant failed to respond positively to the plaintiff's request, by providing an appointment. The plaintiff claims that this was a contributory factor in the delay in progressing the proceedings, but acknowledges that nothing at all was done in the period between the date of the filing of the defence, in May, 2007, and the date on

which he made a request for therapeutic help, in early 2011. The plaintiff also places some reliance on a further statement published by the Oblate Fathers in 2015 in which they offered help and counselling services to victims of abuse, but he does not suggest that he further requested such assistance at that time. He avers however that he was not afforded any facility to meet the child protection officer of the Oblate Fathers for therapeutic purposes, in spite of their promises to provide such services.

10. In his affidavit, the plaintiff also notes that Father Warren, in his grounding affidavit, did not give any information about the efforts made on the part of the first named defendant to locate any person who could be of assistance in giving evidence in relation to the plaintiff's allegations, and nor did Father Warren aver that there had never been any allegations of abuse made against Father L., but instead stated simply that there was "no record of any complaint being made at the time regarding the abuse".

11. A further affidavit was then sworn on behalf of the first named defendant by Father Gerald Oliver Barry, on 26th June, 2018. In this affidavit, Father Barry affirms that there was a Father L. in the parish concerned during the period relevant to the plaintiff's complaints, although his first name was Henry or Harry, and not Bernard as the plaintiff thought. Father Barry confirms that this Father L. died in 1989 and exhibits a copy of his death certificate. He further affirms that there is no record of any complaint of abuse being made by the plaintiff against Father L. He avers that he checked to see if there were any other allegations by other parties and found evidence of one such allegation made in 2006, but that complaint (which was referred by the Order to the Gardai) was not progressed by the complainant.

12. Father Barry further avers that having investigated the matter further, he identified two other members of the Oblate community who were in the parish concerned during the relevant period and he enquired of them if they were aware of any allegations against Father L. and they confirmed that they had no knowledge of such allegations. He avers that neither of these men could be of any assistance or give any evidence of relevance in relation to the allegations the subject matter of these proceedings. Neither of them had any recall of the plaintiff or any interaction he had with the Oblate community during the period concerned. Both of these men are aged in their mid-80s.

13. In relation to the request of the plaintiff to meet with the Oblate Fathers protection officer, in 2011, Father Barry says that this was considered, and initially the plaintiff was given an appointment.. However, the order then realised that the plaintiff was also engaged in litigation with the first named respondent, and the plaintiff was advised to make his solicitors

aware of his request, and this resulted correspondence as between the solicitors. He says that it "was considered that any such meeting or direct contact with the plaintiff in person would be somewhat circumscribed given that the plaintiff was at that time suing the Order". He avers however that no final decision was taken in the matter, and that since the plaintiff did not pursue it further after the correspondence between solicitors, no further contact was made with the plaintiff in relation to the issue *i.e.* in effect, Father Barry said that this request was left in abeyance.

14. Father Barry's affidavit gave rise to a further replying affidavit from the plaintiff dated the 29th June, 2018. In this affidavit, the plaintiff blames the first named defendant for failing to provide the plaintiff with the therapeutic support that he requested in 2011, and avers that the first named defendant (through his solicitors) failed to respond to a request from the plaintiff's solicitors for a meeting between the plaintiff and the representative of the defendant, for therapeutic purposes. The plaintiff avers that Father Barry did not portray the facts in this regard fairly in his affidavit.

15. The plaintiff also takes issue with the fact that it was only in the affidavit of Father Barry that it was disclosed, for the first time, that there had been another complaint against Father L., and he avers that it is clear that at all times since 2007 the first named defendant knew the correct identity of the Father L. concerned. The plaintiff claims that he has been prejudiced in his ability to make enquiries to assist him with his claim by reason of the failure on the part of the first named defendant to be candid in the manner in which he has dealt with the proceedings.

The Delay

16. In neither of his affidavits does the plaintiff advance any substantive excuse or reason for his delay either in the issue of proceedings or for his subsequent delay in progressing the proceedings following upon the filing of the defence by the first named defendant in May, 2007. In particular, he does not assert that he was in any way impaired, psychologically or otherwise from issuing or progressing the proceedings.

17. The plaintiff accepts that there has been some delay on his part in progressing the proceedings. The minimum period of this delay is almost four years *i.e.* from the date of filing of the defence in May, 2007 up to the date on which the plaintiff sought therapeutic assistance in response to a statement published on behalf of the Oblate community. This was in early 2011. No explanation at all is forthcoming for this delay. As regards the delay from that time onwards, the only explanation given is that the first named defendant did not respond to the

plaintiff's request for therapeutic assistance. While it is true that the correspondence as between solicitors regarding this request rests with a letter, dated 15th February, 2011 from the plaintiff's solicitors to those of the first named defendant, the plaintiff does not go so far as to claim that he was intending to put the proceedings on hold pending a reply to this letter or pending engagement with the therapeutic services to be provided by the Oblate community. But even if that was his intention, he should not have delayed the progression of these proceedings indefinitely pending the provision of such assistance, or, at a minimum, he should not have done so without corresponding with the solicitors for the first named defendant in these terms.

18. Insofar as the plaintiff has raised issues concerning the correct identity/first name of Father L., and whether or not there were any other complaints made about Father L., these are distractions and not relevant to the question of delay. They arose for the first time in the course of the exchange of affidavits for the purposes of this application. The fact is that there was nothing at all to prevent the plaintiff from serving notice of trial and setting the proceedings down for hearing after the delivery of the defence of the first named defendant. The plaintiff was not seeking discovery of documentation or awaiting any other information or replies to correspondence from the solicitors for the first named defendant. I think it is clear beyond any doubt that there was a delay on the part of the plaintiff in progressing these proceedings from the date of filing of the defence on behalf of the first named defendant on 28th February, 2007 up until 22nd February, 2017, a delay of almost exactly ten years.

19. To the extent that any excuse has been offered for the delay that is of relevance to this application, it is that the plaintiff sought the therapeutic assistance referred to above in early 2011. Taking a generous view of it, this request might serve to excuse inactivity for a period of up to six months at around this time, but no more than that because the onus was on the plaintiff to bring that issue to a head if he was deliberately refraining from progressing these proceedings while awaiting a response to that request. The plaintiff had been made aware that the meeting that he had requested, and which had initially been scheduled, had been cancelled for the very reason that these proceedings were in being. That is recorded in an attendance note of the plaintiff's solicitor of 1st February, 2011, exhibited by the plaintiff.

20. It follows from the above that the plaintiff has been guilty of inordinate and inexcusable delay both in the commencement of and in the subsequent progression of these proceedings. The delay in the commencement of proceedings, if measured from the year in which the plaintiff attained the age of majority (1964) is 37 years. The delay in the progression of the proceedings

is a delay of ten years in respect of which an excuse has been proffered for a period of at most six months, and that period commenced almost four years into the delay.

21. There was also a delay of almost three years and five months between the date of issue of the plenary summons and the date of delivery of the statement of claim. No great emphasis was placed on this period by the first named defendant other than that it is submitted that the totality of the period that has elapsed since the date that the accrual of the cause of action first arose (in or about 1952) and the date on which these proceedings might come on for hearing (if permitted), is 67 years, and 59 years if measured from the estimated date on which the assaults ceased (1960).

Discussion

22. The principles governing applications of this kind are well settled, and are set forth in the seminal cases of *O'Domhnaill v. Merrick* [1984] I.R. 151 and *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. In addition, I was referred to five more recent authorities by counsel for the applicant in which those principles have been considered and applied in the specific context of cases concerned with allegations of sexual abuse. While in all of the cases to which I was referred there were substantial delays involved, none of them comes close to the substantial pre-commencement of proceedings delay in this case, and the delay post commencement of proceedings in this case is at least as long as the longest delay in any of the cases to which I was referred.

23. The applicant places heavy reliance upon the decision of the Court of Appeal, (Irvine J.), in the case of *Cassidy v. The Provincialate* [2015] IECA 74. In that case, the plaintiff claimed damages for personal injuries alleged to have been suffered by the plaintiff by reason of sexual assaults, which were alleged to have occurred between the years 1977 and 1980. A personal injuries summons issued in May, 2012. The defence filed on behalf of the plaintiff pleaded that the claim was statute barred by reason of the Statute of Limitations 1957, but also reserved the right of the defendant to bring an interlocutory application to have the proceedings dismissed on the grounds of inordinate and inexcusable delay. The allegations of the plaintiff in those proceedings were also denied in full. Although there was some uncertainty about it, the Court was satisfied that the alleged abuser had died, as had some 18 other potential witnesses.

24. It is apparent that in *Cassidy*, the delay with which the Court was concerned was the delay in the issue of the proceedings. And indeed Irvine J. states in her judgment that it was not disputed by the plaintiff that she had been guilty of inordinate delay in instituting the proceedings.

25. Irvine J., in considering the jurisdiction of the court in applying the *Primor* test on the one hand and the *O'Domhnaill* test on the other stated, at para. 32:-

> "While the *Primor* jurisdiction is usually exercised in proceedings where there has been post-commencement delay or a combination of pre- and post-commencement delay, the *O'Domhnaill* jurisdiction is most usually employed where, at the time the application to dismiss is brought, such a significant length of time has elapsed between the events giving rise to the claim and the likely trial date that the defendant can maintain that, regardless of the absence of blame of the part of the plaintiff for that delay, it would be unjust to ask to the defendant to defend the claim. The question most commonly considered by the court when exercising its *O'Domhnaill* jurisdiction is whether, by reason of the passage of time, there is a real or substantial risk of an unfair trial or an unjust result."

26. Later, at para. 37, Irvine J. stated:-

> "Clearly a defendant, such as the defendant in the present case, can seek to invoke both the *Primor* and the *O'Domhnaill* jurisprudence. If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the *Primor* test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice."

27. Irvine J. held that there was insufficient evidence to excuse the plaintiff's delay in the issue of the proceedings, particularly in circumstances where, during that period of delay, the plaintiff had married, reared a family and held down a number of positions of employment. The same may be said of the plaintiff in this case. The plaintiff married when he was 21 years of age (1967) and he and his wife had four children together. The marriage broke down some 25 years later, and the plaintiff subsequently remarried. It appears he has at all times been self-employed.

28. Irvine J. then went on to hold that "it would be hard for a defendant to demonstrate greater prejudice than that which arises for the defendant in this case, by reason of the fact that PD [the alleged abuser] is believed to be dead." She referred to the decision of Hardiman J. in the Supreme Court in the case of *Whelan v. Bridget Lawn & others* [2014] IESC wherein Hardiman J. stated, at para. 9:-

"Of course, the grossest form of prejudice in civil proceedings is the death of the defendant himself, so that he is not able to deny what is alleged against him in evidence, or of witnesses who might have been available to the defence at an earlier stage."

29. In *Cassidy* Irvine J. also noted that it had to be remembered that the defendant in that case (as in this case) was sued on the grounds that it was vicariously liable for the wrongdoing of the alleged abuser. Had the abuser been alive, he might well have denied the allegations made against him and the defendant would have the benefit of his evidence in that regard. Irvine J. went on to say at para. 58:-

"An action in which the defendant can call no evidence at all on the central issue, as would occur if this case were allowed to proceed to trial, would clearly lack the concepts of mutuality and fairness which are essential for the administration of justice."

30. While Irvine J. also took into account the death of other witnesses, it was her opinion that the death of the alleged abuser alone was "of such prejudicial magnitude that it warrants the court determining the balance of justice issue against the plaintiff".

31. In *Whelan v. Bridget Lawn and others* the original defendant was the plaintiff's grandfather. The plaintiff alleged against him various episodes of sexual assault which it was claimed had taken place at the defendant's and his wife's home between 1989 and 1992. Before the proceedings were issued, the plaintiff's grandmother, who had always resided with the defendant, died. The proceedings were issued on 7th September, 2008. The defendant brought a motion to dismiss the proceedings on grounds of delay and prejudice, in August, 2009. The High Court held in favour of the defendant on that motion, in December, 2009. The plaintiff appealed that decision to the Supreme Court, and before the appeal was heard, the defendant died in 2011. The proceedings were then reconstituted and the plaintiff pursued her appeal against the estate of the defendant.

32. Subsequent to the passage in his judgment quoted at para. 28 above, Hardiman J. referred to s. 3 of the Statute of Limitations (Amendment) Act 2000 (the "Act of 2000") at para. 10 which provides:-

""Nothing in s.48A of the Statute of Limitations 1957, (inserted by s.2 of this Act) shall be construed as affecting any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant dismissal".

33. In referring to this section, Hardiman J. did so for the purpose of noting that the inherent power of the court to dismiss proceedings on the grounds of delay between the accrual of the cause of action and the bringing of the action is recognised in statute. He then went on to refer to the prejudice that the defendant would suffer if the case were to be allowed to proceed to trial. At para. 14 he stated:

> "The prejudice is indeed dramatic. The principal defence witness, the plaintiff's grandmother died before the proceedings were issued. This event in itself was sufficient to cause the learned High Court Judge to dismiss the action. Subsequently, in 2011, the defendant died. The Per Rep is thus left in a position where she will have to defend the action without witnesses and where her side of the case cannot be heard at all in denial of the plaintiff's claim in evidence.
>
> In my view, this action should be dismissed because it has become afflicted with difficulties and prejudice to the defendant 'so… as to be beyond the reach of fair litigation' in the phrase of Henchy J. giving the judgment of the Court in *Sheehan v. Amond* [1982] IR 235, at 239."

34. Hardiman J. also referred to the decision of the Supreme Court in the case of *O'Keeffe v. Commissioners of Public Works* (Supreme Court, unreported, 24th March, 1980) wherein that Court regarded as "a parody of justice" a hearing which would take place 23 years after an industrial accident in which the plaintiff had lost an eye in circumstances where one witness had died and the memory of another had "been all but obliterated by the passage of time". The Court held that a hearing in these circumstances "would come at a time when the defendants through no fault of theirs had been deprived of a true opportunity of meeting the plaintiff's case" and this, in turn, was because:

> "[The reason is that] a hearing in those circumstances would lack the mutuality and fairness which are essential for the administration of justice".

35. Hardiman J. then went on to state at para. 17 that:-

> "The term 'mutuality' in my view connotes that both sides, and not merely one side, have a chance to make their case. There has been a total loss of this quality of mutuality in this case because the defendant, the alleged perpetrator, and the person who generated the estate which is the paying party if the plaintiff succeeds, cannot be heard at all."

36. Hardiman J. also referred to the decision of Kelly J. (as he then was) in the case of *Kelly v. O'Leary* [2001] 2 I.R. 526. In that case, the plaintiff sought damages from the defendant, who, as in this case, was a representative defendant, in respect of physical and mental injuries allegedly inflicted upon her by two named nuns while the plaintiff was in the care of an institution run by an order of nuns between 1934 and 1947. The plaintiff's proceedings were commenced in March, 1998, over 50 years from the last alleged wrongful act. One of the alleged perpetrators of the abuse had died in 1990, and the other was very elderly and had difficulty in remembering individual children in her care. The defendant invoked the inherent jurisdiction of the court to dismiss the action. Kelly J. held that:-

> "I am satisfied that there is here a clear and patent unfairness in asking this defendant to defend this action after the lapse of time involved. Actual prejudice has occurred to the defendant by reason of the delay. The defendant has not contributed to this delay.
>
> There is here a real and serious risk of an unfair trial. As a matter of probability the trial may amount to an assertion countered by a bare denial. Indeed, even the ability of this defendant to make a denial is doubtful in respect of a number of allegations. Such an exercise would be far removed from the form of forensic enquiry which is envisaged in the notion of a fair trial in accordance with the law of this State.
>
> Constitutional principles of fairness of procedure require that the action not proceed. To allow the action to go on would put justice to the hazard."

37. The first named defendant further relies upon the decision of Twomey J. in the case of *McDonagh v. O'Shea & ors* [2016] IEHC 428. This was another case whereby a plaintiff claimed damages in respect of alleged sexual abuse by a member of a religious order. The abuse was alleged to have occurred between 1974 and 1980. The alleged perpetrator died on 2nd September, 2011. Proceedings were issued on 18th June, 2001. A statement of claim was delivered by the plaintiff on 23rd July, 2001, and a defence was filed in response thereto on 7th April, 2004. A notice for particulars was served by the solicitors for the defendant on 5th April, 2004 and replied to by the plaintiff on 20th April, 2004. There was then no relevant activity until 3rd September, 2013, when the plaintiff sent a letter seeking voluntary discovery to the defendants. So there was a delay of in excess of nine years on the part of the plaintiff, between 20th April, 2004 and 3rd September, 2013.

38. Twomey J. considered the application by applying the test in *O'Domhnaill v. Merrick*, and in doing so he placed emphasis on the decisions in *Whelan v. Bridget Lawn and ors* and in

Cassidy, and relied on some of the passages quoted above. Having regard to the passage of time, the death of the alleged abuser and the delay in progressing the proceedings, once commenced, he considered that there was a substantial risk that the defendant could not get a fair trial and that to allow the trial to proceed would, in the words of Hardiman J., be the "grossest imaginable prejudice".

39. Every authority to which I was referred on this application resulted in the dismissal of the proceedings. Only in the case of *Kelly v. O'Leary* was the delay in the issue of proceedings comparable to the delay in this case. Moreover, the delay subsequent to the issue of proceedings in this case is at least as long as or longer than any equivalent delay in the authorities to which I was referred. It was argued on behalf of the plaintiff that since there were no witnesses to the incidents of alleged abuse, and the first named defendant had failed to identify any relevant witnesses who might not be available, that the delay following the delivery of the defence has caused the first named defendant no prejudice. That may or may not be so, but it cannot be certain, and it is well-established that in cases where there was a long delay in the issue of proceedings in the first place, there is an onus upon a plaintiff to avoid any unnecessary delays following the issue of proceedings, and to progress the proceedings as expeditiously as possible. The plaintiff clearly failed to do so in this case.

40. The plaintiff has offered no explanation at all as to why there was such a long delay prior to commencement of proceedings, other than to offer, through his counsel, that the reason that proceedings were issued in 2001 was because of changes introduced by the Act of 2000 to the Statute of Limitations 1957, to enable the advancement of claims in cases of historic sexual abuse. While it may well be the case that the plaintiff was reluctant to issue or felt in some way impaired from issuing proceedings within the period originally permitted by the Statute of Limitations 1957, he has not made any case to this effect and the court cannot proceed on the basis of a case not made.

41. Other arguments were advanced on behalf of the plaintiff that really had no bearing on the central issue with which the court is concerned in this application. In the interests of completeness however I will address those arguments:-

1. The first named defendant has known, since the time of filing of the defence, the correct name of the priest against whom the allegations are made. However, since there was no plea in the defence to the effect that there was no member of the Oblate community of the name given by the plaintiff in the proceedings, it is difficult to see how this can be of any relevance.

2. There was a lack of candour on the part of the first named defendant in failing to disclose correct first name of Father L. and also in failing to disclose the fact that a complaint concerning Father L had been made by another person. I have already addressed the relevance of Father L.'s first name above. Insofar as the first named defendant became aware, in 2006, of another allegation concerning Father L., it is difficult to see how that in any way prevented the plaintiff from advancing his proceedings. Had he advanced his proceedings, and had he sought discovery, this might well be something that would have surfaced on discovery. Whether or not it would have helped his case is another matter altogether but it is no answer at all to the failure on the part of the plaintiff to issue proceedings in a timely manner or to progress the same in a timely fashion, once issued.

3. It was suggested that the first named defendant has delayed in the issue of this motion. The plaintiff contrasted this case with *Cassidy* in which the motion to dismiss the proceedings was brought within 18 months of commencement of the proceedings, whereas in this case the motion was not brought for more than 16 years. This is in spite of the plea on the part of the first named defendant, in his defence, that the plaintiff's claim was statute barred and that there had been inordinate and inexcusable delay on the part of the plaintiff in bringing the proceedings. However, it is clear that there is no obligation on a defendant to bring a motion to dismiss proceedings for want of prosecution. This is well established and in this regard the first named defendant relies specifically on the case of *Leech v. Independent Newspapers (Ireland) Limited* [2017] IECA 8, a decision of the Court of Appeal (Irvine J.) in which she stated, at para. 61, in the context of considering whether or not a defendant, who brings an application to dismiss proceedings on the grounds of the inordinate and inexcusable delay on the part of the plaintiff, has himself been guilty of culpable delay in the proceedings:

   "To fail to bring an application to strike out the proceedings cannot be weighed in the balance against the defendant"

4. The plaintiff sought therapeutic help which was advertised on two occasions, in 2011 and in 2015 by the Oblate community, but this was not forthcoming. However, it is not difficult to see how a party to litigation, who was offering therapy services for those who had suffered abuse at the hands of members of

the community concerned, would be reluctant to provide such services to a party whilst in litigation with that party. There would surely be a reasonable concern that the provision of such services might of itself constitute some form of admission of liability, not to mention the possibility that something might be said in the course of such therapeutic engagement that might compromise the litigation. But regardless of any of this, I agree with counsel for the first named defendant that the promise of therapeutic help is at most a parallel exercise that has no bearing at all, one way or another, on these proceedings and the fact that the first named defendant did not engage positively with the plaintiff's request, and failed to reply to the last letter from the plaintiff's solicitor on this issue, can have no bearing upon the application before the Court, which has to be decided in accordance with the established principles.

Conclusion

42. These proceedings are concerned with incidents of abuse the last of which is alleged to have occurred in or around 1960. The plaintiff does not claim that he was subject to any disability of any kind, including psychological disability, whether by reason of the abuse or otherwise. The plaintiff has advanced no reason at all for the delay in the issue of the proceedings.

43. While the proceedings were almost certainly issued in response to the changes made to the Statute of Limitations 1957, pursuant to the Act of 2000, regrettably, the alleged perpetrator of the abuse had died some 12 years previously, in 1989. Since the plaintiff himself says that there were no witnesses to the alleged abuse there can be no doubt but that the first named defendant, if forced to go on with these proceedings, would be forced to do so without the benefit of any evidence from the person most critical to the defence of the proceedings, and quite probably without the benefit of any evidence at all.

44. Following upon the issue of the proceedings, the plaintiff caused another delay of 10 years to lapse from the time the first named defendant filed his defence, and while some of that period may be excused while the plaintiff sought to avail of the therapeutic services offered by the Oblate community, this further delay must, to some degree at least, make it more difficult for the first named defendant to defend the proceedings.

45. The first named defendant did not contribute in any way, by his conduct, to the delays in the proceedings. The delays were caused solely by the inaction of the plaintiff.

46. It could not be more clear that the first named defendant is entitled to succeed with this application, and that the proceedings must be dismissed. Each and every one of the passages which I have cited from the authorities referred to me are apposite. I say this with no small degree of reluctance, because, as Hardiman J. noted in *Whelan v. Lawn* this conclusion means that the plaintiff is deprived of redress for what is alleged to be a very grave wrong. But, as Hardiman J. concluded in that case:-

> "… if the action were to proceed in the present circumstances it would be merely a 'parody of justice' as this Court put it in *O'Keeffe v. Commissioners of Public Works* … The action cannot proceed because of lapse of time and the death of the defendant himself and of the principle defence witness have meant that the issues are 'beyond the reach of fair litigation' in Mr. Justice Henchy's phrase. An action in which the defendant could call no evidence at all on the central issue would totally 'lack that mutuality and fairness which are essential for the administration of justice'"