

THE HIGH COURT

[2022] IEHC 609

[Record No. 2021 5611 P]

**IN THE MATTER OF THE CONSTITUTION OF IRELAND AND THE EUROPEAN CONVENTION
OF HUMAN RIGHTS ACT 2003**

Between

DEREK LEINSTER

PLAINTIFF

-v-

**MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, THE
GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL**

DEFENDANT

Judgment of Mr. Justice Dignam delivered on the 11th day of October 2022.

Introduction

1. This matter comes before the Court by way of two motions: a motion for discovery brought by the plaintiff and a motion brought by the defendants seeking an order directing the trial of a preliminary issue as to whether an element of the plaintiff's claim is time-barred.
2. The plaintiff's motion for discovery was brought first in time (the motion was issued on the 28th April 2022). Indeed, the plaintiff is of the view that the defendants' motion seeking the trial of a preliminary issue was a response to that discovery motion. The defendants' motion was issued on the 30th May 2022.
3. The starting point is that the plaintiff's motion for discovery, having been issued first, should be determined first. However, this does not seem to be an efficient way to deal with matters in circumstances where the defendants' position is that if the Court

directs the trial of the preliminary issue (i) discovery should be put on hold pending determination of that issue and (ii) if the Court holds with the defendants in respect of the substance of that preliminary issue then the discovery which is sought by the plaintiff will not be relevant or necessary. I express no view on whether this is correct or not this at this stage because it is discussed in further detail below but for present purposes it seems to me that where this is a central part of the defendants' case it makes more sense to determine the defendants' motion first. If they are correct in relation to discovery there would be little point in my first determining the motion for discovery and then directing that a preliminary issue should be tried where the ultimate effect of that may be to narrow the scope of the case and therefore, possibly, the discovery that is required.

4. I will therefore consider the defendants' motion first. Of course, the two motions can not be treated as entirely separate from each other in circumstances where the burden of having to make discovery is part of the defendants' case in relation to their motion.

5. In order to place the two motions in context it may be helpful to set out the background. I draw the following summary from the Statement of Claim. The defendants have delivered a very comprehensive Defence and if the case were to proceed to trial there are likely to be substantial disputes and conflicts on the facts. I do not have to resolve any issues of fact at this stage – indeed, the defendants have accepted (as they must do) for the purpose of their motion that the facts pleaded by the plaintiff are true and correct. In those circumstances, I can base this summary on the Statement of Claim as though uncontested.

6. The plaintiff was born in July 1941 so is 81 years of age. He was born in Bethany Home, Rathgar, in Dublin. Bethany Home is described in the Statement of Claim as having been "*founded in or about May 1922 as a place of residence for unmarried Protestant women and their children*" and as a "*Mother and Baby Institution and...a children's home and a place of detention for Protestant women and children.*"

7. The plaintiff's mother left Bethany Home when he was seven and half months old and he was placed with a foster family, an arrangement which is referred to in the Statement of Claim as him being "nursed out/boarded". This placement lasted until the plaintiff was approximately two and half years of age when he was returned to Bethany Home. Some months later he became ill with a number of conditions and was admitted to hospital for four and a half months and was then returned to Bethany Home. At age

three years and ten months the plaintiff was "adopted" informally by a family with whom he remained until the age of 15. He alleges that during his time with this family he was subjected to physical abuse, sexual violence and emotional neglect.

8. The plaintiff claims the defendants owed a common law, statutory and constitutional duty of care to him to take reasonable steps and precautions to prevent him from being exposed to ongoing and enduring physical, sexual and emotional abuse as a vulnerable minor in the State care system which included Bethany Home and that those duties were breached by the defendants.

9. Under the Residential Institutions Redress Act 2002 ("the 2002 Act") the Residential Institutions Redress Scheme ("the Scheme") was established. That scheme was available to individuals who could demonstrate that they were resident during their childhood in one of the institutions listed in the Schedule to the 2002 Act. The Act allowed further institutions to be added to that Schedule by way of statutory instrument and seventeen further institutions were added by statutory instruments in 2004-2005. Bethany Home was not included in the original Schedule and was not one of the institutions added by statutory instrument in 2004-2005. Section 1 of the 2002 Act fixed the 17th September 2011 as being the last date upon which an application for redress could be made to the Redress Board established by the 2002 Act so even if further institutions were added applications from former residents had to be made on or before the 17th September 2011.

10. On the 20th February 2015 the Commission of Investigation into Mother and Baby Homes and Related Matters was established by SI 57/2015. This Commission was tasked under its terms of reference with investigating various circumstances surrounding the operation of fourteen institutions, described as "Mother and Baby Homes", listed at Appendix 1 to SI 57/2015. Bethany Home was listed as one of the fourteen institutions in Appendix 1. In September 2016 the Commission submitted its Second Interim Report and made a number of comments relevant to the non-inclusion of Bethany Home in the Scheme under the 2002 Act. These included querying why various Mother and Baby Homes and County Homes which were under investigation by the Commission, including Bethany Home, had been excluded from the Scheme, stating that the explanation given by the Department of Education and Skills to the Commission as to why requests to include some Mother and Baby Homes were refused may have been provided without full information being available to the Department, that the exclusion from the Scheme of various named Mother and Baby Homes and County Homes from the Scheme should be re-examined by the first-named defendant, that former Bethany Home residents had a

strong case for inclusion in the Residential Institutions Redress Scheme, and that while the Redress Board had almost completed its work, it would be possible for the Oireachtas to enact legislation to allow the Board to hear further applications or that the Government would consider other redress options.

11. On the 28th February 2021 the Commission of Investigation was dissolved pursuant to section 7(1) of the Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records and Another Matter Act 2020. Prior its dissolution, in its Final Report, the Commission acknowledged that any decision on financial redress was a matter for government but concluded that children resident in Mother and Baby Institutions, such as Bethany Home, without their mothers had a strong case for being considered for redress.

12. There followed a public consultation on the development of a Restorative Recognition Scheme for former residents of Mother and Baby Homes and County Homes. That consultation process closed on the 31st March 2021. It was indicated by the first-named defendant that a Mother and Baby Home Redress Scheme would not open until 2022. It is pleaded in the Statement of Claim that no redress scheme has been published and no indicative date has been provided as to when survivors could expect to receive payments under such a scheme. It is not admitted in the Defence that a scheme has not been published and it is pleaded on behalf of the defendants that the first-named defendant published the details of the scheme and it was approved by the Government on the 16th November 2021.

13. It was in that context that the plaintiff issued these proceedings. The Plenary Summons was issued on the 30th September 2021 and the Statement of Claim was delivered on the 6th October 2021. The defendants delivered their Defence on the 4th February 2022. The plaintiff sought voluntary discovery by letter dated the 9th March 2022 and issued the motion for discovery on the 28th April 2022. The defendants issued their motion on the 30th May 2022.

14. In summary, the plaintiff's claim includes that the defendants have a duty to the plaintiff to provide an effective remedy in respect of the abuse suffered by him in the course of his childhood arising from this residence in Bethany Home, the defendants have failed to provide such an effective remedy by failing to include Bethany Home under the Scheme or in another scheme, and include Bethany Home in the Scheme and to include it in a subsequent scheme is unlawful, arbitrary and discriminatory with reference to the plaintiff's rights under Articles 40.1, 40.3 and 44 of the Constitution. It

will be necessary to examine the Statement of Claim in greater detail due to the basis for the application by the defendants.

Defendants' Motion for Trial of a Preliminary Issue

15. The Order that is sought by the defendants is:

"1. An Order pursuant to Order 25 rule 1 directing the trial of a preliminary issue as to whether the Plaintiff's claim in respect of the exclusion of the Bethany Home from the Residential Institutions Redress Scheme is time-barred by the provisions of section 3(2) of the Statute of Limitations (Amendment) Act 1991 and section 3(5)(a) of the European Convention on Human Rights Act 2003.

2. In the alternative an order pursuant to Order 34 rule 2 directing the trial of a preliminary issue as to whether the Plaintiff's claim in respect of the exclusion of the Bethany Home from the Residential Institutions Redress Scheme is time-barred by the provisions of section 3(2) of the Statute of Limitations (Amendment) Act 1991 and section 3(5)(a) of the European Convention on Human Rights Act 2003."

Legal Framework

16. Order 25 provides:

"(1). Any party shall be entitled to raise by his pleading any point of law and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

(2) If, in the opinion of the court, the decision of such point of law substantially disposes of the whole action or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the court may thereupon dismiss the action or make such other order therein as may be just."

17. Order 34 rule 2 provides:

"If it appears to the court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the court may make an order accordingly, and may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

18. Section 11(2)(a) of the Statute of Limitations, 1957 (as amended by section 3(2) of the Statute of Limitations (Amendment) Act, 1991 provides:

"Subject to paragraph (c) of this subsection and to section 3(1) of the Statute of Limitations (Amendment) Act 1991, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

19. Section 3(5) of the European Convention on Human Rights Act 2003 provides:

"(a) Proceedings under this section shall not be brought in respect of any contravention of subsection (1) which arose more than 1 year before the commencement of the proceedings.

(b) The period referred to in paragraph (a) may be extended by order made by the Court if it considers it appropriate to do so in the interests of justice."

20. There was no discussion during the hearing of any difference between Order 25 and Order 34 and the parties agreed that the well-known summary of the legal position before Order 25 can be successfully invoked set out by McKechnie J in *Campion v South Tipperary County Council* [2015] IESC 79, [2015] 1 IR 716 contained the applicable principles:

- "• There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.*
- There must exist a question of law which is discrete and which can be distilled from the factual matrix as presented.*
 - There must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.*
 - The greater the impact which a decision on the preliminary issue(s) is likely to have, on the entire case, the stronger will be the argument for making the requested order.*
 - Conversely if irrespective of the courts decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order.*
 - Exceptionally however, even if the follow-on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.*
 - As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate.*

- *It must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful, to retain the traditional separation of such matters.*
- *'Convenience' therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation.*
- *The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties.*
- *The court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally*
- *Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."*

21. The application of the principles encompassed in that summary must be informed by a number of overarching principles identified by McKechnie J.

22. Firstly, the default position is that there should be a unitary trial and the Court should approach an application to depart from that default position with caution. McKechnie J acknowledges the significant value of measures in "*more modern times*" to avoid the consequences of litigation becoming more complex, costly and lengthy but states that "*[Despite] the undoubted advantages of such insightful moves, it remains the position that at primary level, a unitary trial is the starting point. Experience throughout many decades of litigation has shown that in the vast majority of cases this is the best*

mechanism by which justiciable issues can be determined, not only so as to achieve justice, but also as representing the most expeditious and cost-effective way of doing so. Therefore, whilst I greatly favour all suggestions which curtail the possibility of having diffuse and lengthy trial, one must be sure however that what is provided for in that regard will in fact achieve, the intended end." (paras. 21-22).

23. Charleton J in *O'Sullivan v Ireland, the Attorney General, Minister for Health and Children* [2019] IESC stated:

*"The general principle in litigation in this jurisdiction centres around the concept of the unitary trial; see *Weaving Macro Fixed Income Fund Ltd (In liquidation) v PNC Global Servicing (Europe) Ltd* [2012] 4 IR 681, where at pages 699-700 Clarke J identified the fundamental principles in which there should be any departure from the unitary trial principle thus:*

"As is clear from those authorities the trial of a preliminary issue under the rules is concerned with circumstances where it is possible to separate out a legal issue which can be determined on the basis of facts agreed either generally or for the purposes of the preliminary issue. It is also possible, under O. 35 to have an issue of fact tried where the case will almost certainly completely depend on a resolution of that factual question. What is, however, clear from all of the authorities is that the trial of an issue, formally separated out as a preliminary issue in the sense in which that term is used in the rules, is a practice which is to be adopted with great care by virtue of the experience of the courts that 'the longest way round is often the shortest way home ..."

24. Secondly, the decision as to whether to direct the trial of a preliminary issue must, of course, depend on the particular circumstances of each case. As McKechnie J put it in *Campion*:

"There has been a good deal of recent case law touching on the various methods by which litigation may best be conducted and disposed of and the jurisdictional basis for the courts so providing...Split or modular trials have increased greatly with the making of orders in respect thereof now being governed by fairly well established principles...However as always, there must be added to these general principles any individual factor of relevance

which emerges from the circumstances of any given case. Thus, the assessment as to whether or not some modification of a unitary trial is appropriate, will have to be considered having regard to all of the circumstances of each individual case."

25. Related to this is that even if the Court is satisfied on the facts of the case that the trial of a preliminary issue may or even will lead to greater convenience and savings in time and costs, the Court retains a discretion to decline to direct the trial of the preliminary issue if it is satisfied that do so would not serve the interests of justice. McKechnie J stated at paragraph 28:

"Whatever may be the precise contours of either or both Order 25(1) and Order 34(2) of RSC, it is clear that each has a common purpose namely, to save time and cost, when the preliminary process is compared with any other suggested method of hearing, including a full trial of the issues raised. (Duffy v. News Group Newspapers Limited (No.2) [1994] 3 I.R. 63, and Croke v. Waterford Crystal Limited (Unreported, High Court, Smyth J., 26th June 2003). Convenience will also be a consideration and whilst there is no express reference to such in Order 25, as there is in Order 34, r.2, nonetheless this matter has equal application to both rules. In this regard it is of interest to note what O'Higgins C.J. had to say on this particular point in Tara Exploration & Development Limited v. Minister for Industry and Commerce [1975] 1 I.R. 242 ('Tara Exploration') where at p. 256 the learned Chief Justice said:-

'In addition, it must appear to the court to be convenient to try such question of law before any evidence is given. This will involve a consideration of the effect on other issues in the case and whether its resolution will reduce these significantly, or shorten the hearing. Convenience in this respect must also be considered in the light of what appears fair, proper and just in the circumstances.'

Whilst the factors most frequently referred to in the case law are time, costs, convenience and the potential impact which any decision on the preliminary issue may have for the case as a whole, it is important to bear in mind, as Tara Exploration discloses, that such are not exclusive of other factors and that rules of court are always the servants of justice. If they aid and assist

that end, as they are designed to, they are apt, fitting and pertinent: where they are at odds with that purpose, they are stood down. Simply put, the overall requirements of justice are, as a matter of constitutional jurisprudence, intrinsic to all such rules which must be both read and applied accordingly.” (para. 29)

26. At paragraph 39, he said:

*“Secondly, one must look at what savings in time and costs would be likely to result from adopting this preliminary process as well as having regard to the question of convenience. Furthermore, and of particular significance in this case, is the impact or effect which a ruling would have, even one fully in favour of the appellant, on the entirety of the case so as to determine what issues (if any), would still require a court decision; and also to that end, to see what evidence would have to be called on those issues. **Finally, an overview of all of the circumstances must be taken so as to decide on what course best serves the interests of justice.**” [emphasis added]*

27. Thirdly, while it is not expressly stated by McKechnie J, it follows from the fact that the starting point is a unitary trial that the burden of proof rests on the party asking the Court to depart from the starting point.

28. Fourthly, the Court, when dealing with an application for the trial of a preliminary issue must not express any real opinion on the merits of the substantive action *“or even on how the causes of action or the reliefs therein claimed, have been formulated or structured.”* (para 40 of *Campion*) The defendants rely on this to submit that the Court should not consider whether or not the six-year limitation period for actions founded on torts which is provided for by section 11(2)(a) of the 1957 Act applies or whether an extension of time under section 3(5)(b) of the 2003 Act might be granted because to do so would trespass *“into the merit of the Defendants’ claim that the proceedings are statute-barred and is therefore irrelevant to the determination of whether a preliminary issue should be tried.”*

Application of the *Campion* principles

29. Before turning to the application of the factors encapsulated in McKechnie J's twelve points, as informed by those overarching principles, it may be useful to deal with two general points.

30. One matter which is at the heart of the defendants' case on this application (and will be at the heart of any argument in respect of whether "the Plaintiff's claim in respect of the exclusion of Bethany Home from the [Scheme]" (what is described by the defendants as the "*Historic Claim*") is statute-barred is the point that this claim is "*an action founded on tort*". Put simply, the defendants contend that the "*Historic Claim*" is an "*an action founded on tort*" and is therefore caught by section 11(2)(a) of the Statute of Limitations. The plaintiff vigorously rejects that his claim is "*an action founded on tort*". A considerable amount of the written and oral submissions by both parties dealt with this point, including in response to questions from the Court. The parties referred the Court to *Clarke v O'Gorman* [2014] 3 IR 340, *McDonnell v Ireland* [1998] 1 IR 134, *McD v L* [2010] 2 IR 199, *McMahon & Binchy on the Law of Torts*, *RAAP v Phonographic Performance (Ireland) Limited v The Minister for Jobs, Enterprise and Innovation, Ireland and the Attorney General* [2022] IECA, *Transport Salaried Staffs' Association & Ors v CIE* [1965] 1 IR 180, *Mount Carmel Medical Group (South Dublin) Ltd (In liquidation)* [2015] IEHC 450, and *Blehein v The Minister for Health and Children, Ireland and the Attorney General* [2018] IESC 40.

31. However, it seems to me that this is not an issue which should be resolved at this stage. It is a matter which will have to be considered in great detail when considering whether or not the "*Historic Claim*" is indeed statute-barred, whether that is dealt with as a preliminary issue or at the full trial. As noted above, at paragraph 28, the defendants rely on the principle that the Court, when dealing with an application for the trial of a preliminary issue must not express any real opinion on the merits of the substantive action "*or even on how the causes of action or the reliefs therein claimed, have been formulated or structured.*" (para 40 of *Campion*). They argued that a consideration by the Court of whether section 11(2)(a) had any application would amount to a "*trespass into the merits of the Defendants' claim that the proceedings are statute-barred and is therefore irrelevant to the determination of whether a preliminary issue should be tried.*" The plaintiff's response to this (para 57-58 of the Plaintiff's submissions) is that:

"In error, the State in its own motion suggest that the position in law as set out by the Supreme Court [in Blehein] is somehow pronouncing on the merits of the application, but this is not correct..."

The Court is required when considering the application to identify to what extent will the issue dispose of the Plaintiff's claim, and the point being made is s.11(2) cannot capture the claim made by Mr. Leinster. The Court is entitled – indeed must - have regard to the pleadings to identify to what extent will the preliminary issue actually determine the claims pleaded by the Plaintiff. The Court is not thereby determining the merits of the Plaintiff's claim, it is the Court properly identifying what the Plaintiff's claims are and then assessing to what extent the preliminary issue concerns the claims in the proceedings.”

32. I do not believe that the prohibition on the Court expressing any real opinion on the merits of the substantive action precludes the Court from considering whether there is a sufficient basis for the argument that the claim is statute-barred for the purpose of deciding whether or not to direct a preliminary trial of the issue. Indeed, I think such a consideration is required because otherwise the Court would potentially be directing a trial of a preliminary issue which would have the effect of departing from the unitary trial principle without satisfying itself that there is any or any sufficient basis to do so. If, for example, I was satisfied that there was simply no basis to the defendants' contention that the plaintiff's claim is time-barred then it seems to me that I could not properly direct the trial of it as a preliminary issue. How could it be suggested, in those circumstances, that the interests of justice, convenience or savings of time and cost would be served by directing the trial of a preliminary issue. I therefore do have to give the question some consideration.

33. However, I do accept that the Court should go no further than to satisfy itself that there is a sufficient basis for the point that is sought to be tried as a preliminary issue to justify directing a preliminary trial, subject to all the other considerations such as convenience and the interests of justice. To go further would, indeed, risk the Court straying into determining the very point which will be tried either as a preliminary point or at the full trial.

34. That begs the question of what the appropriate threshold is. That was not the subject of argument in this case and I do not think it is necessary to resolve it in the circumstances of this case as I am satisfied from a consideration of the submissions made and the authorities to which I was directed that that there is considerable weight to the arguments which will be advanced by both sides in relation to this issue. I am

satisfied, therefore, (without expressing any view as to the respective merits of the parties' positions) that there is a sufficient basis to the defendants' arguments that the Plaintiff's claim is an "*action founded on tort*" and, indeed, that he is not entitled to an extension of time under section 3(5)(b) of the 2003 Act, to justify considering directing a preliminary trial.

35. Turning then to the *Campion* criteria in that context.

Cannot exist any dispute about the material facts as asserted by the relevant party

36. The defendants make clear in paragraph 14(1) of Ms. Fitzgibbon's grounding affidavit that the "*Defendants are prepared to accept that the facts are as pleaded by the Plaintiff for the purpose of the trial of the time-bar issue*". They also make clear in paragraph 23 of their written submissions that for the purpose of this application they accept the material facts pleaded. While the plaintiff contends that there is no such agreement as to the facts, it seems to me that these statements on behalf of the defendants – by the deponent swearing the grounding affidavit and by counsel in their written submissions – put the matter beyond argument. The defendants have expressly stated that, for the purpose of the application, they accept the facts as pleaded by the plaintiff. The defendants are stuck with those and it seems to me that point 1 of *Campion* is satisfied.

Must exist a question of law which is discrete, and which can be distilled from the factual matrix

37. As will be discussed in the next section (para 38 et seq), there is a dispute between the parties as to whether there is in fact a separate "*Historic Claim*". As further discussed (para 46 below), I am proceeding for the purpose of this judgment on the basis that there is an "*Historic Claim*" but ultimately the question of whether there is an "*Historic Claim*" will be part of the dispute when the defendants' plea that the "*Historic Claim*" is time-barred comes to be determined. On that basis, this criteria is satisfied in the circumstances of the case. The Court has all the facts necessary to determine the question of whether or not there is an "*Historic Claim*", as described by the defendants, and whether it is time-barred.

Convenience, must be a saving of time and cost, impact on the entire case, issues remaining for determination

38. While McKechnie J notes in *Campion* that the 'convenience' consideration at one level can be said to incorporate all other factors but that it is, for the purpose of clarity, more helpful to retain the 'traditional separation' of all matters, I think it is appropriate to consider points 3-6, 8 and 9 together in the particular circumstances of this case.

39. The essence of the defendants' case is that there are two entirely separate and distinct elements to the plaintiff's claim: what is described by the defendants as the "*Historic Claim*" and the "*Ongoing Claim*".

40. At paragraph 2 and 3 of their written submissions the defendants submit:

"2. The Plaintiff further complains:

*(1) In his "**Historic Claim**", that the Defendants wrongfully excluded the Plaintiff from the Residential Institutions Redress Scheme ("**the Scheme**") established by the Residential Institutions Institution Redress Act 2002 ("**the 2002 Act**") (e.g., Statement of Claim, §23); and*

(2) In his "Ongoing Claim", that the Defendants continue to fail to include the Plaintiff in any redress scheme (e.g. Statement of Claim, §24).

*3. The Plaintiff contends that the Defendants' failures have breached and continue to breach the Plaintiff's constitutional rights and his rights under the European Convention on Human Rights Act 2003 ("**the ECHR Act**")."*

41. They expand on these points at paragraphs 14-17 of their written submissions where they state:

"14. Turning to the application for trial of a preliminary issue, as noted above, the Plaintiff's claim of wrongful exclusion from eligibility has two components.

15. The Historic Claim is based only on the exclusion of the Bethany Home from the Scheme, which the Plaintiff asserts constituted direct or indirect discrimination of the Plaintiff contrary to Article 44.2.3 of the Constitution and unequal treatment contrary to Article 40.1 (Statement of Claim, §§28-29).

The Bethany Home was not listed in the original schedule of institutions to which the 2002 Act applied and was not added to the schedule either in 2004 or 2005 when other institutions were added.

16. By virtue of section 1 of the Residential Institutions Redress (Amendment) Act 2011, the date by which applications to the Residential Institutions Redress Board was fixed at 17th September 2011. This is the last date upon which an application to the board could be made without legislative change. Therefore, even if further institutions were capable of being added by Ministerial order after 2005, no further applications could be made after 17th September 2011, without legislative amendment of the Scheme.

17. The second component of the action is the Ongoing Claim of continuing failure to provide an avenue for redress to survivors of the Bethany Home. The Plaintiff relies on alleged representations by the Defendants that the Plaintiff would, subject to State responsibility for the operation of the Bethany Home being established through the work of the Commission of Investigation into the Mother and Baby Homes, be entitled to redress in like manner with other survivors of institutional abuse and that he had a legitimate expectation of the establishment of a redress scheme (Statement of Claim, §§48)."

42. This core point that there are two separate and distinct limbs to the plaintiff's case which are capable of being distilled entirely from each other permeates all of the points which the defendants make by reference to the principles set out in *Campion*, particularly in relation to the questions of convenience and savings of time and cost. Fundamentally, the defendants make the point that if the "*Historic Claim*" is determined to be time-barred then the plaintiff's claim would be narrowed to the "*Ongoing Claim*" and this would eliminate the need for any consideration of the exclusion of Bethany Home from the Scheme and the reasons for it which would, in turn, obviate the need for discovery of "*a large volume of documentary evidence, regarding the criteria for inclusion of institutions in the Scheme*" and for witness evidence and would, therefore, greatly shorten the full trial. It is submitted that the "*Ongoing Claim*" does not require any consideration of the Scheme or the basis for inclusion in or exclusion from the Scheme (para 26 of the defendants' written submissions).

43. Thus, it is submitted, the determination of the time-bar arguments in favour of the defendants by way of a preliminary trial would lead to a saving in time and cost and "*clearly benefit the action in an overall sense.*"

44. The plaintiff vehemently rejects the characterisation of his claim as consisting of two entirely separate and distinct claims and therefore rejects the premise underlying the defendants' submission that there would be a considerable saving of time and cost. At paragraphs 95 and 97 of the plaintiff's written submissions it is stated, inter alia:

"95. Despite the Defendants' contentions, the Plaintiff's claim cannot be artificially divided into historic and ongoing complaints. This cannot be the case when the Plaintiff's core complaint – State's failure to provide an effective remedy to survivors of Bethany Home – has continued in the same form for many years without action on the part of the Defendants. Fundamentally, a harm cannot become statute barred where it continues to reoccur each day. Were it otherwise, this would create impunity for longer-standing State failures..."

97. It should be added that the Plaintiff disagrees with the Defendants conception of the Plaintiff's claim as being made of two separable claims, the "Historic claim" and the "Ongoing claim". This is not the case. The ongoing failure of the State to the elderly survivors of the Bethany Home, and the ongoing breaches of the Plaintiff's Constitutional and ECHR rights, is in no way an "historic" issue and cannot be artificially severed into separate claims. The Defendants' application for trial on a preliminary issue will fundamentally serve to increase time and expense, rather than cutting down on the issues to be determined. Instead, the Court ought to look at the pleaded case and proceed on the basis that the Plaintiff will succeed in the claims made."

45. In my view, for the reasons given below, the questions of whether there are two entirely separate claims and whether the determination of one would eliminate the need for any consideration of the facts underlying that claim is not determinative of the question of whether the trial of a preliminary issue should be directed. Nonetheless, it is most certainly a relevant consideration. Furthermore, given that it was the core premise of the defendants' arguments it is only right that I should consider it in detail.

46. As noted above, there is a clear dispute between the parties in relation to whether the proceedings contain a separate "*Historic Claim*" or whether what is described by the defendants as the "*Historic Claim*" is actually part of the alleged ongoing failure to provide an effective remedy. For the purpose of this application and

judgment, I propose to proceed on the basis that the plaintiff's claim does in part comprise an "*Historic Claim*". However, to the extent that this argument is relevant to the question which I have to decide, i.e., whether a preliminary trial should be directed, this does not seem to me to be the real issue. The real issue for the purpose of this application, arising from what counsel for the defendants describe as the "dichotomy" in the plaintiff's case, is not whether there is an "*Historic Claim*" as part of the plaintiff's case but whether the "*Historic Claim*", or more properly the facts underlying the "*Historic Claim*", and the "*Ongoing Claim*" are entirely separate and distinct from each other such that a determination of the former would eliminate the need for any consideration of the underlying facts of that claim, i.e. the exclusion of Bethany Home from the Scheme and the reasons for it.

47. It is, of course, correct to say (as the plaintiff says in paragraph 97 of his written submissions quoted above) that the Court must look to the pleaded case. The contours and parameters of the plaintiff's claim are set by the pleadings and it is to the Statement of Claim that we must turn to identify those contours and parameters.

48. The defendants point to certain features of the structure, language and grammar of the Statement of Claim in submitting that there is an "*Historic Claim*" which can be distilled from the "*Ongoing Claim*" and whose determination in favour of the defendants as a preliminary issue would eliminate the need for any consideration of the non-inclusion of the Bethany Home from the Scheme and the reasons for it:

49. These include paragraphs 25 – 29 which refer directly and exclusively (other than the second sentence in paragraph 28) to the Scheme. It is worth quoting these paragraphs in full:

"25. The Residential Institutions Redress Act 2002 established the Residential Institutions Redress Scheme, a scheme of redress for survivors of residential institutional abuse, in response to the conclusions of the Report of the Commission to Inquire into Child Abuse, the Schedule to the Residential Institutions Redress Scheme listed a number of industrial schools, reformatory schools, children's homes, special hospitals and similar institutions. The Act allowed further institutions to be added to the Schedule by way of SI in 2004-2005, 17 other institutions were added by SI.

26. The Residential Institutions Redress Scheme was limited to former residents of institutions who could demonstrate that they were resident during their childhood in one of the institutions listed in the Schedule to the Residential Institutions Redress Act 2002.

27. For reasons that have never been explained adequately or at all by the Defendants, Bethany Home was excluded as one of the initial institutions listed in the Schedule to the Residential Institutions Redress Scheme, and was not added to the Schedule by way of SI at a later date, despite considerable efforts on the part of the Plaintiff to bring the omission to national attention.

28. As a result, the Plaintiff was excluded from accessing redress under the Residential Institutions Redress Scheme and has been the subject of unequal treatment contrary to the provision of Article 40.1 of the Constitution. The Plaintiff's personal rights under Article 40.3 and/or 41 and/or 42 have not been vindicated through the provision for an effective scheme of redress for the breach of his rights.

29. Further, the exclusion of Bethany Home from the redress schemes constituted a direct or indirect discrimination of the Plaintiff contrary to Article 44.2.3 of the Constitution which is intended to ensure that the State would not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."

50. By contrast, the paragraphs which immediately follow paragraph 29 are concerned solely or primarily with the establishment of the Commission of Investigation into Mother and Baby Homes and Related Matters in 2015, the contents of the Commission's Second Interim Report and Final Report, its dissolution, the launch by the first-named defendant of a public consultation on the development of a Restorative Recognition Scheme and the failure of the defendants to launch that or some other scheme of redress (although it must be noted that these paragraphs do contain reference to the Commission's comments in relation to the exclusion of, inter alia, Bethany Home, from the Scheme). Then in paragraph 46 - 48 it is pleaded:

"46. In addition, the Plaintiff has a right to a remedy in respect of a breach of Constitutional rights protected under Article 40.3 of the Constitution of Ireland, 1937, and in respect of breaches of the European Convention of

Human Rights. The ongoing failure to provide the Plaintiff with such a remedy, in the form of a fast-track redress scheme or otherwise, represents a continuing breach of his right to an effective remedy pursuant to Article 40.3 of the Constitution and/or Article 13 of the Convention (or Article 13 in conjunction with Articles 3 and/or 8 and/or 14). This ongoing failure is therefore in breach of the State's duties under section 3 of the European Convention on Human Rights Act, 2003 which provides for a right to an effective remedy in respect of Convention breaches.

47. Furthermore, the ongoing delay in establishing a Redress Scheme in respect of former residents of Bethany Home breaches the Plaintiff's right to constitutional and/or natural justice, pursuant to Article 40.3 of the Constitution, and/or the Plaintiff's right to a remedy within a reasonable time, pursuant to Article 13 of the Convention (or Article 13 in conjunction with Articles 3 and/or 8 and/or 14).

48. The Defendants represented and/or adopted a position, such as amounted to promises or representations, express or implied, that the Plaintiff would, subject to State responsibility for the operation of the Bethany Home being established through the work of the Commission of Investigation, be entitled to redress in like manner with other survivors of institutional abuse. The Plaintiff has relied on the Defendant's representations and a relationship between the Plaintiff and the Defendants, such as created an expectation, as was intended by the Defendants, has been reasonably entertained by the Plaintiff, that the Defendants, and each of them, would abide by the said representations and promises and of such an extent that it is unjust to permit the Defendants to resile from the same. The Plaintiff has a legitimate expectation that upon it being established through the work of the Commission of Investigation that the Defendants were in a position of authority or control vis a vis the care of children including the Plaintiff within the Bethany Home, that a scheme of redress directed to ensuring the provision of an effective remedy for the victims of institutional abuse within that home would be established without delay."

51. The point is that paragraphs 25-29 refer almost exclusively to the failure to include Bethany Home in the Scheme while paragraphs 46-48, following, as they do, a long narrative section dealing with the Commission's report, refer exclusively or primarily to the failure by the State to establish a redress scheme following the Commission of

Investigation's reports, thereby drawing a distinction, it is submitted, between two separate elements, the "*Historic*" and the "*Ongoing*".

52. The defendants also pointed to the fact that paragraph 23 of the Statement of Claim is expressed in the past tense, that "*The Plaintiff and residents of Bethany Homes were wrongfully excluded from eligibility for redress for the wrongs he suffered during the course of childhood, arising from his residence in Bethany Home.*"

53. Paragraph 28 (quoted above) also appears to draw a distinction between the exclusion from the Scheme and the ongoing failure to vindicate the Plaintiff's rights through the provision of an effective scheme of redress for the breach of his rights.

54. Reference was also made to paragraph 45 in which what was described by the defendants as the dichotomy between historic breaches and ongoing breaches is, it was submitted, evident.

55. The defendants also referred to the Prayer for Relief. On one reading of paragraph 2 of the Prayer it also appears to draw a distinction between two elements of the Plaintiff's case. It seeks a declaration "*that the exclusion of Bethany Home from the Residential Institutions Redress Scheme, and the ongoing failure on the part of the First and Second Defendants to re-open the scheme for applications following the conclusions of the Commissioner's Second Interim Report, was unlawful and/or arbitrary and/or discriminatory with reference to the Plaintiff's rights pursuant to Article 40.1, 40.3 and/or Article 44 of the Constitution of Ireland, 1937.*" The reference to the exclusion of Bethany Home from the Scheme and an ongoing failure point to there being two limbs to the case, one historic and one ongoing.

56. However, notwithstanding these features of the Statement of Claim, I am not satisfied that when the Statement of Claim is read as a whole the determination of the "*Historic Claim*" would eliminate all need to consider the non-inclusion of Bethany Home in the Scheme and the reasons for that non-inclusion. Even if there is an "*Historic Claim*", the Statement of Claim clearly advances the case that the alleged non-inclusion in the Scheme in the past (ie. the facts underlying the "*Historic Claim*") and the failure to extend the Scheme or to establish a new scheme post the Commission's Report are part of a continuum of ongoing failure to provide an effective remedy. This is described by the plaintiff as his "*core complaint*"). I express no view whatsoever as to the merits of

this case. I could not do so at this stage but there is, it seems to me, a significant degree of interlinking between the historic and ongoing elements of the claim(s).

57. For example, paragraph 45 of the Statement of Claim reads:

*"The ongoing failure and/or refusal on the part of the First and Second Named Defendants to provide an avenue for redress to survivors of Bethany Home, such as the Plaintiff, constitutes an ongoing breach of the Plaintiff's rights pursuant to the Constitution of Ireland, 1937 and/or the European Convention on Human Rights. **In particular**, the exclusion of Bethany Home from the Residential Institutions Redress Scheme, **and** the subsequent failure on the part of the First and Second Defendants to re-open the scheme for applications following the conclusions of the Commission's Second Interim Report, was unlawful and/or arbitrary and/or discriminatory with reference to the Plaintiff's rights pursuant to Article 40.1, 40.3 and/or Article 44 of the Constitution, in circumstances where Bethany Home was a primarily Protestant institution."* [emphasis added]

58. The references to "the exclusion of Bethany Home from the Residential Institution Redress Scheme" and the "subsequent failure on the part of the First and Second-Defendants to re-open the scheme for applications following the conclusions of the Commission's Second Interim Report" in the second sentence of paragraph 45 can be read disjunctively to suggest that the two claims are entirely separate. However, the first sentence of the paragraph explicitly pleads that the "ongoing failure and/or refusal...to provide an avenue for redress to survivors of Bethany Home such as the Plaintiff, constitutes an ongoing breach of the Plaintiff's rights" and the second sentence gives particulars of that ongoing failure. It explicitly refers to both the exclusion of Bethany Home from the Scheme and the subsequent failure to re-open the Scheme for application following the conclusions of the Commission's Second Interim Report as particulars of the ongoing claim.

59. Even some of the paragraphs quoted above which refer separately to alleged past breaches and alleged ongoing breaches also link the two. For example, while I have discussed the contrast between paragraphs 25 – 29 and paragraphs 30-48 as indicating that there are two entirely separate and distinct claims, all of those paragraphs are under the heading "Particulars" in a paragraph which reads "Despite assurances of the Defendants, the Defendants have failed refused or neglected to include the Plaintiff and

other residents of Bethany Home in any redress scheme or otherwise provide any redress to the Plaintiff." This is in fact the "Ongoing Claim" and therefore the contents of paragraphs 25-48 (which obviously includes paragraphs 25-29) under the heading "Particulars" can be read as particulars of the ongoing claim.

60. There is no separate Prayer for Relief in respect of the "Historic Claim". Various declarations are sought: that the defendants have a duty to the Plaintiff to provide an effective remedy (para. 1), that the ongoing failure to provide an effective remedy is unlawful (para. 3), that the defendants acted unlawfully in failing to provide a fast-track redress scheme (para. 4), that the ongoing delay in establishing a redress scheme is in breach of the plaintiff's rights (para. 5), and that the defendants failed to exercise their powers under the Children Act 1908 and Children Act 1934 adequately or at all (para. 6), but none of them are specific to the alleged failure to include the Bethany Home in the Scheme and do not even make express reference to it. The only relief which refers to this is paragraph 2 (which is discussed above). It seeks a declaration that "*exclusion of Bethany Home from the Residential Institutions Redress Scheme, and the ongoing failure on the part of the First and Second Defendants to re-open the scheme for applications following the conclusions of the Commission's Second Interim Report, was unlawful and/or arbitrary and/or discriminatory with reference to the Plaintiff's rights pursuant to Article 40.1, 40.3 and/or Article 44 of the Constitution of Ireland, 1937.*" This is certainly ambiguous. It can be read as in effect seeking two declarations: one that "*the exclusion of Bethany Home from the Residential Institutions Redress Scheme was unlawful*" (i.e. as a standalone prayer for relief in respect of the alleged historic breach); and the other a declaration that the ongoing failure to re-open the scheme for applications following the conclusions of the Commission's Report was unlawful. But it can also be read as seeking a declaration that the exclusion from the Scheme and the failure to re-open the scheme read conjunctively was unlawful and/or arbitrary and/or discriminatory. This makes sense when one considers that the heart of the plaintiff's case is that the State has failed in its obligation to provide an effective remedy.

61. The historic and ongoing elements are interlinked in another way which is relevant to the application of the *Campion* principles. It is alleged that both the exclusion from the Scheme and the subsequent failure following the conclusion of the Commission's Second Interim Report to "*re-open the scheme for applications*" (whether they are to be taken together or separately), are unlawful as being in breach of, inter alia, Article 40.1 and 44 of the Constitution (paragraph 45 of the Statement of Claim). The plaintiff makes the case that the exclusion of the residents of the Bethany Home from redress starting with the exclusion from the Scheme and following through to the

failure in recent years to reopen the Scheme or to establish a scheme was discriminatory and in breach of, inter alia, Article 40.1 and 44 of the Constitution. In light of this it seems to me that it can not be said with any certainty that even if the "*Historic Claim*" as described by the defendants were held to be time-barred the need for discovery would be fully eliminated. While full argument will be required and I can express nothing more than a preliminary view subject to such argument it seems likely that even if a preliminary trial is directed and the "*Historic Claim*" per se is held to be time-barred, discovery of the reasons for the decision to not include Bethany Home in 2002-2005 may be sought and may be held to be relevant to the reasons for the alleged failure to put a scheme in place more recently. If that is the case and discovery were ordered then the trial and determination of the preliminary issue would not have reduced the burden of discovery. It is, of course, important to note that in the current discovery application the reasons given by the Plaintiff do not refer to what is described by the defendants as the "*Ongoing Claim*". I do not think this is in any way determinative. At the time of seeking that discovery, the "*Historic Claim*" was, of course, part of the case so there was no need for the plaintiff to make any reference to the "*Ongoing Claim*". When this question was raised during the hearing, Counsel for the plaintiff confirmed that their position is that discovery would also be relevant to the "*Ongoing Claim*". Of course, it may also be recalled that the plaintiff does not recognise the dichotomy relied upon by the defendants so one would not expect a reference to an "*Historic Claim*" or "*Ongoing Claim*". Furthermore, it would seem to me that it would have to be open to the plaintiff to re-cast the discovery sought and the reasons for it in the event that the case was re-cast by the dismissal of part of it.

62. Thus, taking all of these into account, even proceeding on the basis that the claim comprises an "*Historic Claim*", I am not satisfied that the two limbs or aspects of the plaintiff's claim, described by the defendants as the "*Historic Claim*" and the "*Ongoing Claim*", can be distilled entirely from each other to such an extent that the dismissal of the former would, with any certainty, eliminate the need for consideration of the non-inclusion of Bethany Home in the Scheme and the reasons for that non-inclusion.

63. This, of course, has a bearing on the likely saving of time and cost and the likely impact which a decision on the preliminary issue is likely to have on the entire case. If I am correct then it seems to me that, while a decision on the preliminary issue in the defendants' favour would lead to some shortening of the full trial in that the Court would not have to decide liability for the exclusion from the Scheme per se, it can not be said with any degree of confidence that the savings in time and cost would be as significant

as suggested by the defendants. This leans heavily against directing the trial of the time-bar points as a preliminary issue.

64. As mentioned above, I do not in any event believe that this question is determinative. Even if the determination of the preliminary issue in the defendants' favour would in fact eliminate the need for any consideration of the non-inclusion of the Bethany Home in the Scheme and the reasons for that (including the need for discovery or various witnesses), and thereby give rise to a significant saving in time and costs, it would not terminate the entirety of the proceedings. There would remain a substantial part of the Plaintiff's case to be tried.

65. There was discussion in the written submissions and during the course of the hearing about the suitability of Statute of Limitations points for determination as preliminary issues. As it was put by the defendants in their written submissions (para 24) "[T]he issue of whether proceedings are time-barred is a classic instance of a discrete issue of law which can be distilled from the facts, as was acknowledged by Judge Hardiman in *BTF v Director of Public Prosecutions* [2005] 2 ILRM, cited in the *Campion* decision (pp731-732)." The plaintiff in his written submissions (paras 71-72) stated:

*"Statute of Limitation claims may be suitable for a preliminary hearing. The Defendants make that point and at paragraph 24 of their submissions cite Judge Hardiman in *BTF v Director of Public Prosecutions* [2005] 2 ILRM 367, cited in the *Campion* decision (pp731-732), but unfortunately the quotation has been truncated which obscures the full sense of what Hardiman J, said:-*

*"It is often a difficult and delicate decision as to whether to try a particular issue as a preliminary matter. In a case where a point is raised **which in and of itself and without regard to anything else may terminate the whole proceedings**, clearly a strong case can be made for its trial as a preliminary issue. **The classic example is whether the statute of limitations is pleaded**. In other cases, however, the position may be much less clear."*

*In addition to failing to identify that the reason why it may be attractive from a time and cost point of view to deal with a statute point on a preliminary basis, is because (often) the whole proceedings may be statute barred, the State fail to observe what the Supreme Court said in *Campion* which make it*

*clear that it is far from the case that statute points ought to be dealt with as preliminary issues: "The most frequent example given of the type of issue which confidentially (sic) can be disposed of in this way, is one arising under the Statute of Limitations (Delaney & McGrath: 3rd Ed., para. 14.13). **Even then however such may be problematic, if for example, some controversy exists** with regard to a person's date of knowledge. Whilst undoubtedly there are certain issues which appropriately can be disposed of in this way, nonetheless **there will be many others which cannot be.** Therefore, **careful consideration** must be given to each such issue, as raised." [emphasis in the original]*

66. Thus, while it is relevant that the issue which is sought to be tried is a time point without any complexity in relation to matters such as date of knowledge and, if successful, would terminate part of the proceedings, it is also significant that there would remain a substantial part of the proceedings to be tried.

67. McKechnie J at point 5 of *Campion* expressly noted that if there "*should remain for determination a number of other substantial issue or issue(s) of a substantial nature, the less convincing will be the argument for directing of a preliminary trial*" but in what was described by counsel for the plaintiff as an exception to an exception, McKechnie J also said at point 6 that "*even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where the determination will clearly benefit the action in an overall sense.*"

68. Point 6 is of little relevance if I am correct in my assessment of the Statement of Claim because any savings would be relatively minor but these points are clearly relevant if I am incorrect in my assessment of the overlap between the two aspects of the claim. In that event the determination of the preliminary issue in the defendants' would terminate a substantial part of the claim and would terminate the need for a consideration of the exclusion of Bethany Home from the Scheme but would leave the "*Ongoing Claim*" to be determined. This is a substantial part of the case. Thus, the position would be that a substantial part of the case would be terminated and a substantial part would remain to be tried. The fact that the preliminary issue is "*substantial in its own right*" and its disposal may be of benefit in an overall sense means that the Court could direct the preliminary trial of that issue notwithstanding that another substantial issue will remain to be tried. Therefore, lest I am wrong in my assessment of the nature of the plaintiff's claim consideration has to be given to whether the preliminary trial should be directed notwithstanding that it would not dispose of the

entire proceedings. It seems to me that in the circumstances of this case this is best considered as part of my consideration of factors 10 and 11 in *Campion*.

Making of an order must be consistent with the overall justice of the case and Court's discretion

69. Criteria 10 – that the making of an order must be consistent with the overall justice of the case including the fair procedures for all parties - reflects the overarching principles discussed above that the purpose of the Court's jurisdiction is to ensure that the interests of justice are served.

70. In considering this factor the Court must have regard to the criteria identified by McKechnie J and balance them with any other relevant matters. The particular facts of this case include the plaintiff's age and the probability, if not certainty, that any decision on the proposed preliminary issue would be appealed. I am satisfied that I must have particular regard to both of these factors and particularly the interplay between the two of them.

71. Both parties have very clearly informed the court that if a preliminary issue were directed and they were to lose that issue they would appeal. The possibility of an appeal is in general not a particularly weighty consideration because that possibility arises in every case. However, the weight to be attached to each factor must depend on the facts of the particular case. The Court can not disregard the plaintiff's age and the risk that any significant passage of time in the conclusion of the proceedings may unfortunately mean that he would not see the outcome of the case – whichever way it is determined.

72. If the Court directs that the time issue be tried as a preliminary issue a date will have to be found for that hearing in the coming months. Having had a flavour of the arguments to be made in relation to whether there is a separate "*Historic Claim*", whether section 11 of the Statute of Limitations applies at all and in relation to the operation of section 3 of the European Convention on Human Rights Act, it is very likely that judgment will be reserved. When judgment is given, there would then be an appeal because that is what the parties have told the Court. Even if that is treated as an expedited appeal it will be a number of months before it is heard and determined and there must be a strong possibility that the Court of Appeal would reserve its judgment for the reasons discussed above. There would then be the possibility of an appeal to the Supreme Court (particularly in light of the relevance of *Blehein v Minister for Health and*

Children, Ireland & The Attorney General) though this can be put as no more than a possibility. I therefore do not put much weight on it. Irrespective of the outcome of the preliminary issue, there will still have to be a trial because the determination of the preliminary issue in the defendants' favour will not determine all issues. On the defendants' case, if the defendants succeeded on the preliminary issue discovery would not be required and the matter could simply proceed to hearing, though for the reasons set out above there may be an argument about whether the defendants are correct in their analysis in relation to discovery. If the defendants were unsuccessful on the preliminary issue, discovery would then have to be made (the defendants having urged that discovery should be put on hold pending the outcome of the preliminary issue) before a hearing date for the trial could be given (or at least sufficient time would have to be allowed for discovery before the actual hearing date). Judgment is likely to be reserved following the trial and then there is a possibility of an appeal in relation to the substantive matter.

73. In all of the circumstances, I do not believe that it is appropriate to depart from the default position of a unitary trial by directing the trial of a preliminary issue. I am satisfied that whether one proceeds on the basis that the determination of the "*Historic Claim*" would eliminate the need for any consideration of the facts underlying that claim (ie. the exclusion from the Scheme and the reasons for it) or on the basis that such consideration would be necessary even if the "*Historic Claim*" is held to be time-barred the balance and interests of justice do not favour an order directing a preliminary trial in light of the combined factors of the plaintiff's age and the certainty of an appeal. In the first scenario, while a substantial part of the case would be terminated, a substantial part would remain to be tried and in the second case there would only be relatively minor savings in terms of time and costs. As mentioned above, the possibility of an appeal from a decision on a preliminary issue can not be determinative or even of significant weight in its own right because the possibility of an appeal exists in all cases and that possibility could in theory defeat any application for the trial of a preliminary issue. However, it does have a particular significance and weight in the circumstances of this case where both sides have expressly stated that they will appeal (so it goes beyond a possibility) and where the plaintiff is of advanced age. I have no evidence that the plaintiff's health is compromised in any way but the Court is entitled to and must have regard to the inevitable march of nature. The Court must have regard to the fact that, given the plaintiff's advanced age, the probability of the passage of significant additional time described above caused by directing a preliminary issue and the stated certainty of an appeal, there is a risk that the plaintiff would be denied the opportunity to see the outcome of his proceedings, whatever that outcome is at the end of the day. It seems to

me that part of the right of access to the courts is the right to see one's proceedings to a conclusion. There must, of course, be practical limitations on such a right but it seems to me that given the plaintiff's age that right must weigh in the balance. There is, of course, the risk of injustice that the State will have to make discovery even though it may turn out not to be relevant or necessary but it seems to me that this risk of injustice is outweighed by the risk of injustice to the plaintiff.

74. Taking all of those factors into account I must conclude that whether or not a decision on the "*Historic Claim*" would eliminate the need for any consideration of the non-inclusion of Bethany Home in the Scheme, the defendants have not established that it is an appropriate case to direct the trial of a preliminary issue.

DISCOVERY

75. Having decided that I should not direct the trial of a preliminary issue, it is necessary to determine the plaintiff's application for discovery. Voluntary discovery was sought by the plaintiff by letter of the 9th March 2022. This sought two categories of discovery and provided the reasons why discovery was being sought. It seems there was no reply to the request for voluntary discovery within the time provided for in the request and the plaintiff issued his motion on the 28th April 2022 seeking an order for discovery in terms of the request, returnable for the 30th May 2022.

76. Prior to the hearing of these motions there were discussions between the parties and the plaintiff set out a revised request for discovery in response to some of the points which the defendants had made about the original categories and the revised categories which had been proposed by the defendants. It was agreed by the parties that the Court should consider the discovery motion on the basis of the plaintiff's revised request and the defendants' proposal. These must be considered in the context of the original request and the reasons given.

77. The discovery that was originally sought was:

"a. Copies of any and all communications, correspondence and/or submissions made by Protestant institutions (including but not limited to the Protestant Adoption Society, the Irish Church Missions, the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland and/or the Plymouth Brethren) to the Department of Education, the Department of Health, the Minister for Education and/or the Minister for Health, relating to

the Residential Institutions Redress scheme, from the period of June 2001 – July 2005 inclusive.

b. All correspondence between the Department of Education and the Department of Health related to the inclusion or exclusion of institutions to the Schedule of the Residential Institutions Redress Act, from the period of April 2002 – July 2005 inclusive.”

78. In summary, the reasons given for seeking discovery of category A were that it is denied in the Defence that the exclusion of Bethany Home from any redress schemes was on the basis that it was a Protestant institution or on grounds of religious profession, belief or status; that the Commission in its Second Interim Report concluded that the Department of Health and Children seemed to “*lack basic information about Mother and Baby Homes*” and considered that the decision to exclude institutions such as Bethany Home from the Scheme might have been made in the absence of full and relevant information and that irrelevant factors appear to have been taken into account by the Department in determining inclusion in the Scheme. The reasons given for seeking category B were, in summary, that the decision not to include Bethany Home in the Scheme, and in particular the decision not to add it to the schedule to the Act by statutory instrument, was wrongful and discriminatory. The Commission, in its Second Interim Report, noted “*...extensive correspondence between the Department of Education and the Department of Health about adding other institutions to the Schedule*” and the Commission confirmed that Bethany Home was among the list of institutions considered for inclusion in the Schedule, along with a number of other Mother and Baby Homes and that this correspondence relating to the inclusion or exclusion of various additional institutions, including Bethany Home, is relevant to the proper determination of the Plaintiff’s claim. The documents that are sought in category B are for the time period between the commencement of the Act in April 2004 and the addition of the final set of institutions to the Schedule by way of ministerial order of the 1st July 2005 (SI 924 of 2005).

79. Following the issuing of the motion, the defendants set out their position in a letter from the Office of the Chief State Solicitor of the 8th June 2022.

80. In respect of category A the CSSO stated (i) documents from the named institutions cannot be probative of any grounds of exclusion of the Bethany Home from the Scheme because the documents originate with the institutions and not the

defendants so will not assist the Court in determining the basis for any decisions made by the defendants to either include or exclude particular institutions because the documents, by their nature, will not record the defendants' approach to the inclusion or exclusion of any particular institution, and (ii) the category is unnecessarily broad in that it extends to all submissions by all Protestant institutions and is not limited to documents concerning the Bethany Home.

81. In respect of category B the CSSO stated that the category was too broad because it encompasses all documents between the departments in relation to the exclusion or inclusion of all institutions and the only ones that could be considered relevant to the plaintiff's claim are those relating to the inclusion or exclusion of the Bethany Home. The defendants suggested an alternative wording for category B which focused on the Bethany Home rather than relating to all institutions:

"All correspondence between the Department of Education and the Department of Health related to the inclusion or exclusion of the Bethany Home to the Schedule of the Residential Institutions Redress Act, from the period of April 2002 to July 2005 inclusive."

82. During the course of the hearing, counsel on behalf of the plaintiff, accepted the defendants' first point in relation to category A, ie. that documents **from** the institutions were not probative of the reasons for the defendants' decision, and in fact by letter of the 20th July 2022 the plaintiff's solicitor had proposed an amended wording "to address this point..." The wording that was proposed was:

~~"Copies of any and all Documents relating to communication, correspondence and/or submissions made by Protestant institutions (including but not limited to the Protestant Adoption Society, the Irish Church Missions, the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland and/or the Plymouth Brethren) to the Department of Education, the Department of Health, the Minister for Education and/or the Minister for Health, relating to the Residential Institutions Redress scheme, from the period of June 2001 – July 2005 inclusive."~~

83. In relation to category B, in the same letter of the 20th July, the plaintiff's solicitor noted that the defendants' concern was that the category was not focused on the Bethany Home and that the defendants did not wish to have to discover every document in the category for every institution included in the Scheme. They proposed an amended version to take account of this but explained that the plaintiff's concern was (a) that there may be documents which make no reference to Bethany Home or any specific institution at all, but do concern the criteria for inclusion or exclusion of institutions generally and (b) given the emphasis in the plaintiff's case on equal treatment, how Bethany Home was treated was only one side of the evidential proofs required. They proposed the following alternative wording:

"All documents: -

related to the inclusion or exclusion of the Bethany Home to the Schedule of the Residential Institutions Redress Act, from the period of April 2002 to July 2005 inclusive

concerning the criteria or basis generally for the inclusion or exclusion of institutions to the Schedule of the Residential Institutions Redress Act, from the period of April 2002 to July 2005 inclusive."

84. They also stated that this would leave the concern regarding proving unequal treatment regarding the institutions selected for inclusion and suggested that this could be addressed by discovery being agreed with liberty to the plaintiff to seek further and better discovery.

85. The defendants replied by letter of the 21st July 2022 from the CSSO. The overarching point made on behalf of the defendants was that the proposed revised categories were actually broader than the original categories. They also made the point that the discovery sought was potentially burdensome and disproportionate but because the revised categories had been suggested at the last minute the defendants had not had an opportunity to consider what would be involved in making discovery in accordance with those terms. I return to this below. In relation to category A specifically, the defendants stated that the reasons given did not support either the original formulation or the revised formulation. In respect of category B, it was stated that the reformulation was in fact an entirely new category of documents.

86. In the defendants' affidavit Ms. Fitzgibbon had addressed the burden of discovery and how that burden would be alleviated by category A being refused in its entirety and category B being narrowed. She said:

"12...the two categories of documents sought, if granted in their current form, would require the Defendants to review a large volume of documents across multiple government departments, covering a period of four years and three years respectively in order to determine whether those documents fall within the categories sought. This task is likely to be time-consuming and expensive and I am advised and believe is likely to take approximately 18 weeks to perform in light of the limited availability of staff in relevant departments to identify documents which fall within the relevant categories. This task would impose a significant burden on the Defendants, which burden would be alleviated significantly by the refusal of the first category and the narrowing of the second category to correspondence concerning the Bethany Home only.

13. In particular in this regard, the burden of discovery would be significantly reduced by the refusal of the first category and the narrowing of the second category, as detailed scrutiny of individual documents would be reduced if it was not necessary to identify whether the documents related to "Protestant institutions" generally, as opposed to the Bethany Home specifically. Moreover, I anticipate that the various documents would not use the term "Protestant institution", but rather would refer to a particular institution, and if the categories of discovery are not refined, it would be necessary to constantly verify whether an institution named in the documents was a "Protestant institution". Further, if the scope of discovery is refined, as proposed above, the burden of scheduling, pagination and any redaction of personal information of others would be significantly reduced."

87. When the matter came on for hearing, counsel for the defendants referred to the concerns expressed in the letter of the 21st July about the potentially very onerous and disproportionate nature of the discovery and the fact that the defendants had not had an "opportunity to consider the nature or extent of the documents which may be captured by the [revised categories]" and that the defendants could therefore not "properly address the issue of the burden which would be imposed by the requirement to make discovery of the [amended categories]." On that basis the defendants were given an

opportunity to file a further affidavit and the matter was put in for any submissions which might be required following delivery of any such affidavit.

88. By affidavit of the 28th July 2022 Ms. Fitzgibbon set out in detail what she estimates would be involved in making discovery of the reformulated categories.

89. As noted above, the parties were agreed that the Court should proceed on the basis that what is being sought are the categories as defined in the plaintiff's letter of the 20th July 2022 and that what the defendants are prepared to agree to is the category B as proposed by them.

90. Thus, the current position in relation to discovery is that the plaintiff seeks the following:

"A. Copies of any and all documents relating to communication, correspondence and/or submissions made by Protestant institutions (including but not limited to the Protestant Adoption Society, the Irish Church Missions, the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland and/or the Plymouth Brethren) to the Department of Education, the Department of Health, the Minister for Education and/or the Minister for Health, relating to the Residential Institutions Redress scheme, from the period of June 2001 – July 2005 inclusive.

B. All documents: -

related to the inclusion or exclusion of the Bethany Home to the Schedule of the Residential Institutions Redress Act, from the period of April 2002 to July 2005 inclusive

concerning the criteria or basis generally for the inclusion or exclusion of institutions to the Schedule of the Residential Institutions Redress Act, from the period of April 2002 to July 2005 inclusive."

91. The defendants object to making discovery of category A (in its original or reformulated versions). They are agreeable to making discovery in the following terms in respect of category B:

"All correspondence between the Department of Education and the Department of Health related to the inclusion or exclusion of the Bethany Home to the Schedule of the Residential Institutions Redress Act, from the period of April 2002 to July 2005 inclusive."

92. Both parties agreed that the Court can, in determining whether to direct discovery, reformulate the categories. It seems to me that it is necessary and appropriate to do so.

93. The tests by which discovery is to be determined are well-established and I do not propose to rehearse them in this judgment.

94. As discussed at length above, a central plank of the plaintiff's case is that the failure of the defendants to put in place a redress scheme for former residents of Bethany Home – either by inclusion in the Scheme originally or by extension of that Scheme or by the establishment of a new scheme – was discriminatory and in breach of Articles 40.1 and 44 of the Constitution. Put simply, it is alleged that the non-inclusion was because Bethany Home was a Protestant institution. Whether or not there is merit to this case, it is through this prism that the relevance and necessity of discovery must be assessed.

95. The Court must also have regard to the question of proportionality when considering discovery.

96. The plaintiff has accepted that "*communication, correspondence and/or submissions*" **from** the institutions, i.e. made **to** the defendants, are not discoverable on the basis that they are not probative of the basis of the defendants' decision not to include the Bethany Home in the Scheme. That being the plaintiff's position I think I am constrained to consider the discovery on that basis and I could not order discovery in terms of the original category A. The reformulated category A was an attempt to address this point but it seems to me that the defendants are correct to say that, rather than addressing the point, the reformulation actually makes the category broader because it would encompass the documents in the original category A and additional documents. In those circumstances, I could not order discovery in those terms in light of the position adopted by the plaintiff.

97. In addition to this the defendants also make the point that discovery should be focused on or limited to Bethany Home rather than all Protestant institutions. This is made in respect of category A and B. This contention is based on questions of relevance and necessity and on the burden of having to make discovery. I have to say that I do not entirely see the point that focusing or limiting the discovery to Bethany Home (or as put in the defendants' suggested category B "*related to the inclusion or exclusion of the Bethany Home...*") will assist the defendants greatly in relation to the "burden" of making discovery because documents may relate to the non-inclusion of Bethany Home even if they do not expressly refer to the Home. However, the defendants are satisfied that the "burden" of making discovery will be eased and there is no need for me to second-guess that. In those circumstances, the first basis is of greater importance for the Court. The plaintiff does seem to accept the logic that discovery should primarily be limited to documents relating to Bethany Home. This is evident from his reformulation of category B and, in particular, from his suggested wording for category B(a). However, the point is made on behalf of the plaintiff, and it is evident in the suggested terms of category B(b), that discovery which is solely limited to the Bethany Home may not encompass all documents which go to the plaintiff's inequality argument.

98. I am satisfied that the defendants are correct that the discovery should be focused on the Bethany Home, though, as noted above, this does not mean that only documents which make explicit reference to Bethany Home by name would be discoverable. In order to succeed in the proceedings, the plaintiff has to establish that the non-inclusion of Bethany Home in a redress scheme was unlawful so discovery must be directed towards that case. However, discovery would be unduly restricted if it was limited solely and exclusively to documents which relate directly to Bethany Home because the allegation that Bethany Home was not included is based entirely on the more general case that it was not included because it was a Protestant institution. It is necessary to draw a balance in this regard. Category A could not be ordered in its current form both because of the plaintiff's acceptance that documents from the institutions are not probative and because the balance between the documents having to be focused on Bethany Home (which is accepted by the plaintiff) and documents of more general application is wrong.

99. What is in fact being sought by the plaintiff are the reasons why certain institutions, including the Bethany Home, were not included in the Scheme because the plaintiff makes the case that they were not included because they were Protestant institutions. The plaintiff believes that the documents will support that case.

100. Taking all of this into account it seems to me that it is appropriate to order discovery in the following terms:

- (i) *All documents containing or referring to the reasons for the non-inclusion of the Bethany Home in the Schedule of the Residential Institutions Redress Act, from the period of June 2001 – July 2005 including but not limited to, all correspondence between the Department of Education and the Department of Health related to the inclusion or exclusion of Bethany Home from the Schedule from the period of April 2002-July 2005*
- (ii) *All documents containing the criteria for the inclusion or exclusion of institutions in the Schedule of the Residential Institutions Redress Act, from the period of April 2002- July 2005 insofar as they relate to Bethany Home.*

101. Category (i) is concerned with the documents containing the reasons for the non-inclusion. The category as a whole is concerned with the period between June 2001 and July 2005 because the defendants' position in relation to the inclusion or exclusion from the original Schedule is relevant to the claim made in the proceedings (although the plaintiff will have to address the point that the non-inclusion in the Schedule was a decision of the Oireachtas). The category includes correspondence between the Departments in respect of the possible addition of Bethany Home to the Scheme (formerly category (b)) but that must, by definition, be limited to the period April 2002 to July 2005. There is clearly sufficient basis to include these documents in light of the Second Interim Report of the Commission.

102. I am entirely satisfied that it is appropriate that discovery should be directed in terms of paragraph (ii). As discussed above, a central part of the case made by the plaintiff is that Bethany Home was not included because it was a Protestant institution and so, while decisions about other institutions may not be directly relevant, the criteria and the application of any such criteria to Bethany Home will be relevant. It is possible that there may be duplication between category (i) and (ii) but it is impossible to rule out the possibility that documents containing the reasons for the non-inclusion of Bethany Home may not refer to generally applicable criteria, if any.

103. The plaintiff suggested, when presenting the reformulated categories of discovery, that there should be agreement to the plaintiff seeking further and better discovery. I do not believe that I should make this part of the order at this stage. The

test for an application for further and better particulars is well-established and an application should be considered according to that test at the appropriate time.

104. My decision in relation to these terms of discovery has also been informed by considerations of proportionality. For example, while it can not be said that discovery of documents relating to other institutions are wholly irrelevant given the nature of the case, on balance it would be disproportionate to order discovery of documents whose relevance will be limited. I have also considered whether discovery in the terms set out above would be unduly burdensome or disproportionate. I accept fully that directing discovery will place a burden on the defendants but I do not think that it will be an undue burden or that it could be described as disproportionate in circumstances where the discovery has been carefully tailored and where the documents that are sought are peculiarly within the possession of the defendants and are necessary for the plaintiff to make his case. Furthermore, it seems to me that the burden can be mitigated by an appropriate time period being permitted for discovery.

105. Ms. Fitzgibbon sets out the amount of time which she estimates would be required for discovery of the plaintiff's reformulated categories. Different time estimates are given for different departments. The longest estimate is 20 weeks for the Department of Education. The categories which I am ordering are narrower and it seems to me that 20 weeks would be an inordinately and unnecessarily long period of time. While it will take different departments different amounts of time to make discovery, the longest other period estimated is fifteen weeks. I am surprised that it will take that period, particularly where the defendants presumably collated their files when engaging with the Commission. However, Ms. Fitzgibbon does explain the basis upon which she gives the time estimates. Of course, if further personnel were assigned to the task, it could be done sooner. This, however, would mean that staff would have to be taken away from other important work. I am also conscious that personnel in the department will presumably be engaged in rolling out the scheme which is referred to in the pleadings. Thus, it seems to me that I should allow 15 weeks for the making of discovery. I should make it clear that this seems to me to be a generous time period. As discussed in the earlier section of the judgment, the plaintiff is entitled to get his case on for hearing and therefore discovery must be completed within that period.

