



THE HIGH COURT

[2019 / 3700 P]

BETWEEN

KENNETH GRACE

PLAINTIFF

V.

**PAUL HENDRICK AND EDMUND GARVEY JOHN PAUL AHERNE JOHN ALLEN
JEREMIAH AMBROSE SEAN BECKETT DONAL BLAKE JOHN BOURKE JAMES
GREGORY BOWE PATRICK BOWLER PATRICK BOYHAN BRENDAN
BRADSHAW MICHAEL BRENNAN PATRICK BROGAN DESMOND BROWN
DENIS BURKE MARTIN BYRNE JOHN J. CASEY JOHN P. CASEY JOHN
CEASER OLIVER COFFEY JAMES COSTELLO THOMAS COSTELLO SEAMUS
CROWE FRANCIS CRUMMEY MICHAEL CUNNINGHAM MARTIN BRENDAN
CUSACK GARRETT DE BARRA OLIVER DE PAOR LIAM DE ROISTE DANIEL
DOHENY TIMOTHY DOHERTY MICHAEL DONLON MORGAN DONNELLY
JAMES DONOVAN JOHN DOOLEY JAMES DORMER JOHN DUNDON JAMES**

**DUNNE RAYMOND ENGLISH LAURENCE ENNIS DANIEL FITZGERALD
FREDERICK FOX THOMAS FURLONG FRANCIS GAVIN DAVID GIBSON JOHN
GIBSON SEAMUS GILL DENIS GLEESON PEADAR GLEESON THOMAS
GOUGH COLM GRIFFEY EDWARD HAYDEN DANIEL HEALY DANIEL HEALY
JOHN HEARNE MICHAEL HEFFERNAN PATRICK HEGARTY THOMAS
HICKEY DENIS HURLEY PATRICK JACOB LEO JUDGE MICHAEL
KAVANAGH MICHAEL KEANE MICHAEL KEARNEY WILLIAM KELLY
EAMONN KINSELLA DONAL LEADER JOHN LEDWIDGE JOHN JOE LINNANE
SEAMUS MACCORMAIC EAMONN MACLOCHLAINN PATRICK MADIGAN
HUGH MAYNES THOMAS MCCARRY JOHN MCCOURT DENIS MCCROHAN
ANTHONY MCDONNELL PATRICK NYRA MCDONNELL DANIEL MCFADDEN
BERNARD MCGETTRICK DENIS MCGOVERN PATRICK MCMAHON SEAN
MCNAMARA WILLIAM MOIFEID BRIAN MOLLOY BERNARD MONAGHAN
WILLIAM MOLOUGHNEY JOHN MULLAN MICHAEL MURRAY EUGENE
NAUGHTON THOMAS NEVIN WILLIAM NOLAN MICHAEL O CATHAIN
RISTEARD O CEALLAIGH BRENDAN O CIABHAIN SEAN O DUGAIN THOMAS
O CARROLL DAITHI O CONNELL JAMES O CONNELL ROGER O DONOGHUE
MARTIN O FLAHERTY JAMES O HAGAN WILLIAM O MEARA PATRICK
PAYNE DECLAN POWER BRENDAN PRIOR ALAN ROCHFORD DAVID RYAN
PHILIP RYAN WILLIAM RYAN HUGH SMIDDY KEVIN TREACY PATRICK
TURNER EUGENE TWOMEY DENIS VAUGHAN EDMOND WALSH SEAMUS C.
WHELAN SEAMUS K. WHELAN JOHN WRIGHT**

DEFENDANTS

Ex Tempore Judgment delivered on Tuesday 18 July 2023 by Mr. Justice Tony

O'Connor

1. Before the Court is a notice of motion seeking an order pursuant to s. 15 (b) of the Civil Liability and Courts Act 2004, (“**the 2004 Act**”), directing that the plaintiff, the second and 46th named defendants meet to discuss and attempt to settle all issues arising in the plaintiff’s action by way of mediation conference.

Statement of claim

2. Para. 123 of the statement of claim delivered on 17 May 2023 alleges that all of the 120 named “... defendants their respective servants or agents, were responsible for the management, supervision, education, appointment of staff, care and control of C.B.S. Westland Row, Westland Row, Dublin 2 and owed a duty of care and/or fiduciary duty to the plaintiff which included a duty to ensure that the plaintiff was educated and cared for in an environment which was free from abuse, sexual abuse, assault or degrading treatment”.

3. Para. 124 alleges that the defendants were “... vicariously liable for the acts and omissions of the staff at C.B.S. Westland Row ... and the members of the Congregation of Christian Brothers in Ireland ...” who worked therein.

4. Para. 125 pleads that in or around September 1979 the plaintiff aged 12 years old started at C.B.S. Westland Row, and that while a pupil, he “suffered severe physical and psychological injury as a result of repeated sexual assaults, batteries, trespasses to the persons, inflictions of emotional suffering and abuses and false imprisonment perpetrated on him by the first named defendant”.

5. The statement of claim ultimately claims damages for personal injuries and loss suffered by reason of the wilful assaults of the first named defendant. The claim in the prayer of the statement of claim refers to the breach of trust, breach of duty and breach of constitutional rights owed by the second to the 120 named defendants to the plaintiff.

Appearances / judgment in default

6. Judgment in default of appearances has been granted against 90 of the defendants to date. 15 if not 16 of the named defendants have passed away. The Court will hear from counsel after delivery of this judgment about proposals in respect of motions against those defendants who reside outside the European Union. To date appearances have been entered and notified in respect of the first, second and 46th named defendant only. At the hearing of the plaintiff's motion on 27 March 2023 to join 118 additional defendants, counsel for the second named defendant informed the Court that the 46th named defendant had succeeded the second named defendant as "province leader of the congregation of Christian Brothers". The solicitors for the second named defendant by letter dated 24 March 2023 to the plaintiff's solicitors, had merely advised that the second named defendant "is not the current province leader".

7. The parties already have a typed-up copy of my ex tempore ruling delivered on 31 March 2023 concerning the mode of service on the additional named defendants, other than the 46th named defendant who is represented by the same solicitors and counsel as represented the second named defendant. It may be an understatement to describe the paperwork and processes undertaken for the various applications since these proceedings first came before me as voluminous and time consuming. However, I commend the presentations on behalf of the parties before the Court today.

Request for the plaintiff to attend mediation

8. By letter dated 3 May 2023, the solicitors for the second and 46th named defendants wrote to the plaintiffs' solicitors inviting the plaintiff to attend mediation and to propose three mediators for consideration. The letter advised that those defendants intended to rely on s. 169 (f) and (g) of the Legal Services Regulation Act 2015, should it be necessary. That section provides that a successful party in civil proceedings is entitled to an award of costs

against a party who is not successful unless the court orders otherwise having regard to the particular circumstances including: -

“(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation”.

9. That invitation was preceded by without prejudice communications over which privilege has been waived by the plaintiff and the 46th named defendant. A letter of 30 March 2023 disclosed that the plaintiff’s solicitors were going to take instructions in that regard. Curiously, without having taken instructions, the plaintiff’s solicitor wrote that: -

“We are only prepared to do so by way of formal mediation. Please further note that mediation would be contingent on your client undertaking now to pay for all mediation costs regardless of the outcome. Please further note that we would also require a separate undertaking to confirm that the head of the order will act as nominee in all such existing and future similar proceedings of this nature so as not to re-traumatise any other victims of childhood sexual abuse at the hands of the members of the order in the same way that our client already has been”.

10. The tenor of the correspondence between the solicitors for the plaintiff and the 46th named defendant after that, including particularly the open reply of 8 May 2023 to the mediation request of 3 May 2023 reveals a rather adversarial if not antagonistic stance. An air of distrust emerges from the correspondence. It would be improper for this Court to attribute blame for the antagonism or to identify the cause of all that discord. The Court at this stage of the proceedings confines itself to the legal principles which apply to the discrete application

made on foot of the notice of motion. It may be for another court in future to assess the reasonableness or otherwise of one or other of the parties between 3 May 2023, the date of the open offer for mediation, and the issue of the notice of motion before this Court dated 22 May 2023. It may be worth noting in this regard that the solicitors for the second and 46th named defendants confirmed by letter received by the plaintiff's solicitors on 14 June 2023 that they had received confirmation that the first named defendant was willing to engage in any mediation that may take place.

11. The plaintiff's solicitor in his replying affidavit sworn on 14 June 2023, commented that the approach taken by the congregation of Christian Brothers in these proceedings is in marked contrast to its application to Newcastle District Court in October 2019 for an order authorising a named individual to be a representative and nominee of the European Congregation of the Christian Brothers to recover and secure records for Glin Industrial School which had operated between 1875 and 1966.

12. The written reply and submissions dated 16 June 2023 for the plaintiff reiterates the plaintiff's position that the proposed mediation between the limited number of parties cannot resolve all issues between the parties. Counsel for the plaintiff has outlined concerns about implementation and enforcement of any settlement arising from a mediation or otherwise.

Submissions for the 46th named defendant

13. Submissions for the 46th named defendant include the following points: -

- (i) this is a "personal injuries action" within the meaning of the 2004 Act;
- (ii) the inclusion of an action for trespass to the person against the first named defendant with the action arising from a breach of duty against all defendants does not exclude these proceedings from the ambit of s. 15 of the 2004 Act. The submissions distinguish the words "action" used in s. 2 (1) of the 2004 Act and the word "proceedings" which is not used in the definition;

(iii) Section 2 of the Statute of Limitations (Amendment) Act 2000 extended the limitation period in respect of claims for trespass to the person in the form of child sexual abuse until reaching full age, provided a specific disability is established. The submissions referred to this statutory intervention to support the distinction between claims against the first named defendant and those against the other defendants and consequently how this application comes within the 2004 Act;

(iv) Kelly J. in *Ryan v. Walls Construction Ltd.* [2015] 2 IR 558 noted how personal injury litigation often settles without mediation and how the court ought to engage with s. 15 of the 2004 Act after considering realities and identifying the interests of the parties;

(v) the most recent supplemental affidavit sworn by the solicitor for the second and 46th named defendants on 13 July 2023 takes issue with the averments about shielding assets made by the plaintiff solicitor in his affidavit of 6 July 2023.

Overview

14. The antagonism mentioned earlier seeps through to this application. Unless and until the parties summarise their positions vis a vis potential inability or failure to implement what may be achieved in mediation or settlement talks, there is little point in this Court issuing a direction or invitation for mediation. The Court readily understands how a mediator can defuse rancour and discord. However, the longer that there is delay in implementing the thrust of the judgment and order of Hyland J. in May 2021, the longer it will take for these proceedings to be finalised at mediation or through a Court determination. The submissions for the plaintiff that the 46th named defendant by maintaining his personal as opposed to his representative capacity are well made. Section 15 envisages “the parties to the action meet”. Even if I was to hold with the submissions for the 46th named defendant about the claim against the 46th named defendant being a personal injury action within the meaning of s. 2 (1)

of the 2004 Act, there is this overarching problem of the requirement for “the parties to the action meet”.

15. There is an imperative for an applicant relying on s. 15 of the 2004 Act to satisfy the court that mediation will assist in reaching a settlement. Kelly J. in *Ryan v. Walls Construction Ltd.* [2015] IECA 214 and [2015] 2 IR 558 outlined how s. 15 of the 2004 Act can rather uniquely foist mediation on parties. He cited the seminal judgment on mediation, *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA CIV 576 and [2004] 1 WLR 3002. Kelly J. allowed the appeal from the order to direct a mediation and stated: -

“... no realistic attempt at settlement on a face-to-face basis had been attempted”.

16. In this application the 46th named defendant points to an offer to have settlement negotiations. That offer in the circumstances of the delays in bringing the plaintiff’s claim to a conclusion for whatever reasons, coupled with the uncertainty about an ability to implement a settlement with so many defendants not participating in the mediation demands scrutiny. The Court has not been satisfied by the 46th named defendant that mediation “will assist in reaching a settlement”.

17. I considered the submissions for the 46th named defendant that mediation may be able to facilitate the plaintiff and the 46th named defendant, now joined by the first named defendant, in arriving at a method to assure the plaintiff of an ability to implement any settlement. The Court rhetorically asks why the 46th named defendant does not allay the concerns expressed on behalf of the plaintiff even on a without prejudice basis. The latest replying affidavit of the solicitor for the 46th named defendant sworn last Thursday, 14 July 2023, which speculates about the advice given to the plaintiff, does not assist this Court in deciding on whether a settlement of the entire proceedings could be reached if it made an order under s. 15 of the 2004 Act.

18. This judgment is delivered on an *ex tempore* basis, or in common speech terms, on the same day as the application was made, in order that the proceedings can be brought to a conclusion, whether by way of a court hearing or otherwise. The Court is conscious of the obligation to provide for a fair and public hearing within a reasonable time. The procedural issues since the proceedings came before this Court in March 2023 have been addressed as efficiently as possible. The time to deliver a detailed written judgment on each and every submission made would detract from the Court's intention to advance matters. Nothing addressed in this judgment should discourage the parties from entering into mediation or seeking a direction at some later stage pursuant to s. 16 of the Mediation Act 2017.

Personal Injuries Action

19. In regard to the submissions made about whether the action of the plaintiff for recovery of damages from the second and 46th named defendants fall within the definition of a personal injury action within the meaning of s. 2 of the 2004 Act, the Court is persuaded by the submissions made on behalf of the plaintiff. The plain meaning of the definition in the context of this application might read as follows :- Personal injuries action "... shall not include ... an action where the damages claimed include damages for false imprisonment or trespass to the person".

20. Counsel for the 46th named defendant pointed out that proceedings may have different causes of action and that the plaintiff is only seeking damages for personal injuries arising from a breach of duty. However, the statement of claim pleads that the second and 46th named defendants are vicariously liable for the first named defendant's actions. The Court cannot determine at this stage whether vicarious liability will be established.

21. I take the plaintiff's claim at its height. The plaintiff claims that all of the defendants are vicariously liable for the causes of action pleaded. Therefore, the Court finds in favour of the plaintiff on both substantive grounds for resisting the application.

22. It is not necessary for the Court to address Order 56(A) of the Rules of the Superior Courts and the judgments cited with a non – exhaustive list of factors which the Court could take into account. I have considered the submissions for the plaintiff which rely on the fundamental right to access justice and more particularly that arising under Article 6 of the European Convention on Human Rights. In view of the ruling already made about the non – applicability and application of s. 15 of the 2004 Act, the Court considers that the plaintiff’s said fundamental right has not been affected by this ruling. The Court concludes by urging the parties before the Court now to maintain the recent momentum by moving to close the pleadings before or during the Long Vacation and I will hear from counsel with a suggested return date for anticipated motions and further case management.

Solicitors for the plaintiff: Coleman Legal

Counsel for the plaintiff: - John Gordon SC, Gabriel Gavigan SC and Andrew Nugent BL

Solicitors for the 2nd and 46th named defendants: Frank Buttimer & Company

Counsel for the 2nd and 46th named defendants Karl Finnegan BL and Conor Rubalcava BL