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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 11/01/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

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Plaintiff/Appellant;

-and-

THE SUPERIOR GENERAL OF THE SISTERS OF NAZARETH

First Defendant/Respondent;

-and-

THE BISHOP OF DIOCESE OF DOWN AND CONNOR

Second Defendant;

-and-

FATHER SEAN CAHILL

Third Defendant.

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MAGUIRE J

Introduction

[1] This is an appeal on the part of the plaintiff against an order of Master Bell dated 17 September 2018. The order states:

> "Upon application [by the first defendant] for an order pursuant to Order 18 Rule 19 … it is ordered that … the issues of abuse of process and limitation shall be dealt with as preliminary issues before the trial judge."

[2] On 24 October 2018 a Notice of Appeal in respect of this Order was served by the plaintiff.

[3] By way of background, it may be stated that the plaintiff's case as a whole is concerned with periods of time in 1972 and 1973 and, later, in 1976. In 1972-1973 it is alleged that the plaintiff was living at Nazareth Lodge Belfast, which was under the control of the first defendant. During this period he claims (in his Statement of Claim) that he was regularly subjected to acts of physical and psychological abuse both by sisters and priests associated with Nazareth Lodge. It is these actions which engage the involvement of the first defendant. However, in addition the plaintiff claims to have been abused during a later period ending in 1976 by a particular priest. That priest is the third defendant. He, it is alleged, was under the control of the second defendant.

[4] The plaintiff's causes of action relate to alleged negligence on the part of the first and second defendants as well as trespass to the person and assault and battery on the part of all defendants.

[5] The case, therefore, can be said to be one of historical sex abuse at the hands of the defendants and their servants or agents.

[6] To date no defence has been served by any of the defendants but Mr Purvis BL made it clear to the court that the position of his client was a complete denial of the events upon which the plaintiff relies. For the purposes of the appeal before the court, the effective parties are the plaintiff (who is the appellant) and the first defendant (which is the respondent). Mr Ronan Lavery QC and Mr Malachy McGowan BL appeared for the appellant and Mr Gareth Purvis BL for the respondent. While the court has considered the extensive submissions it has received, in the interests of brevity, it does not propose to set out every point or authority in detail.

[7] The procedural background to the case is important and may be summarised as follows:

(a) The plaintiff first raised any complaint about these matters in February 2010 to the Bishop of Down and Connor (the second defendant).

(b) The police were informed of the complaint at or about the same time.

(c) A police investigation ensued but, ultimately, no prosecution was mounted.

(d) A writ was taken out by the plaintiff against the defendants on 9 October 2014 ("the first writ").

(e) However, the first writ was not served until 21 October 2015, outside its one year validity period.

(f) On 14 June 2016 the plaintiff took out a second writ.

(g) By this time the first defendant had taken action to strike out the first writ.

(h) The second writ was served on 15 August 2016.

(i) The service of the second writ followed the first writ being struck out on 17 June 2016 by consent.

(j) A statement of claim connected to the second writ was served in May 2017.

(k) This led to the first defendant applying to strike it out for abuse of process on 29 May 2018.

(l) It follows from the above that the only extant proceedings at this time are based on the second writ now accompanied by a statement of claim filed in connection with it. It is this set of proceedings which was the subject of the Master's Order of 17 September 2018.

Proceedings before the Master

[8] It is useful to set out the terms of the Notice of Motion which led to the Master's Order aforesaid. The notice was grounded in Order 18 Rule 19 and Order 33 and claimed that the second writ "and the plaintiff's conduct in the proceedings as a whole are an abuse of process … and should be struck out". Moreover it went on to claim that "the said issue [should] be tried as a preliminary issue".

[9] In an affidavit supporting the defendant's application, Finton John Cavanan, the defendant's solicitor, *inter alia* averred that after the defendant's appearance to the second writ (on 12 September 2016) "the plaintiff failed to take any further steps until the statement of claim was purportedly served on 4 May 2017". Moreover "in contravention of the rules, no medical evidence was served with the statement of claim and none has been furnished to date", though that omission has, it appears, now been attended to as a medical report from Dr Mangan has recently been provided to the first defendant on 5 August 2018.

[10] Furthermore, Mr Cavanan at paragraph [6] of his affidavit has stated that "there is an issue of law as to whether the bringing of the second set of proceedings … is an abuse of process. This is a clear issue of law to be tried between the parties". At paragraph [8] of the same affidavit he goes on to say:

> "… the plaintiff has been guilty of both cumulative and contumelious delay before the commencement of these proceedings. The plaintiff says that he recalled his alleged abuse as a result of attending his father's funeral in October 2009…However the plaintiff's first writ was not served until 21 October 2015, approximately five years later."

He then recites items from the chronology as set out above.

[11] A replying affidavit has been filed by Kevin Winters, solicitor, in response to Mr Cavanan's affidavit. He, it appears, had not been dealing with the case himself but a colleague, who has now left the firm, had been. She had been written to to provide "an explanation for the decisions during the period in question".

[12] At paragraph [4] Mr Winters states:

> "My understanding is that there were two principal reasons for the late service of the first writ. Firstly, I understood from the correspondence at the time that there had been a decision to delay service until legal aid was in place, but that it had not been appreciated that the one year time limit had expired. Secondly, the client was extremely unwell during this period, having suffered from a deterioration of his mental state…This contributed to the oversight that the writ had not been served."

[13] Mr Winters also sought to explain delay in providing a medical report which the court considers need not be described here.

The relevant rules of court

[14] Order 18 Rule 19 states:

> "The court may at any stage of the proceedings order to be struck out… any pleading… on the ground that:
>
> (d) It is otherwise an abuse of process."

[15] It seems clear that where an application is made on ground (d), evidence is admissible on the application.

[16] Order 33 Rule 3 states as follows:

> "The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of law, to be tried before, or at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

Legal principles

[17] It is worthwhile to draw attention to the case of *Miller v Peeples* [1995] NI 6 which establishes the approach to be taken by a court when invited to use the powers conferred on it by Order 33 Rule 3.

[18] In that case Carswell LJ in the Court of Appeal approved views of the England and Wales Court of Appeal in a case called *Coenen v Payne* [1974] 2 AER 1109. In that case Lord Denning had said that "the normal practice should still be that liability and damages should be tried together. But the courts should be ready to order separate trials whenever it is just and convenient to do so" (see page 1112).

[19] Carswell LJ, referring to the phenomenon of "split trials", went on to say that they had been ordered or agreed between the parties with relative frequency in recent years and "if the power is used properly it is an effective means of saving unnecessary expense and hearing time".

[20] At page 10 of the report Carswell LJ continued:

> "The court should in our view take a broad and realistic view of what is just and convenient, which should include the avoidance of unnecessary expense and the need to make effective use of court time …
>
> In weighing up what is just and convenient the court should balance the advantages or disadvantages to each party and take into account the public interest that unnecessary expenditure of time and money in a lengthy hearing should not be incurred."

[21] As regards abuse of process, this is a broad concept which is capable of being applied flexibly but, on the basis of the authorities opened to the court, it would appear that there is little support for the proposition that it will necessarily be an abuse of process for a plaintiff to issue a second set of proceedings in order to cure a defect in a first set of proceedings where the first set have not gone to trial.

[22] In particular, the court has read *Horton v Sadler* [2007] 1 AC 307 and *Leeson v Marsden and Another* [2008] EWHC 1011 (QB) both effectively involving second writs.

In those cases the emphasis is clearly slanted towards the issue of the court deciding simply whether the limitation period should be disapplied rather than the issue of whether the second set of proceedings constitute an abuse of process. In these circumstances, it is not easy to accept the proposition found in the respondent's skeleton argument that *in this case* there would be no need to for the court to consider at a split trial the factors outlined in Article 50 of the Limitation (Northern Ireland) Order 1989. In effect, the respondent appears to be submitting that there is a form of abuse of process *in this case* which justifies a split trial which is free standing of the limitation issue.

The court's assessment

[23] The court in an appeal of this nature must make its own decision *de novo*. While it will take into account the outcome of the proceedings in the Master's court, in the absence of a written judgment, as here, it will not know what precise weight the Master gave to the various relevant factors. But, in any event, on an appeal of this sort, it is not a matter of whether the Master erred in law or acted unreasonably. What is of paramount importance is how this court assesses where the balance as between the various relevant factors lies – which is, of course, a matter upon which reasonable judges may differ.

[24] It seems to the court that the factors in favour of the position adopted by the Master, in broad terms, are:

(i) It enables an issue or issues which plainly arise to be isolated and dealt with.

(ii) By doing so, it may bring the litigation to an end and so will save the costs of a full hearing.

(iii) It will likely, therefore, save some court time as probably the resolution of the preliminary issue will take a shorter time to hear than would be the case if the proceedings were dealt with in the ordinary way.

(iv) There is a basis for believing that in cases of this *genre* time may not be extended and so the proceedings may be brought to an end more speedily if preliminary issues are heard in advance of the substantive hearing.

(v) In any event, the abuse of process which could be dealt with as a preliminary issue can be viewed as freestanding of the limitation issue – due to the plaintiff's delays in dealing with the matter since 2009 – so that it should be possible for the scope of the inquiry at a split trial to be kept narrow.

[25] On the other hand, the main factors going in the other direction, against the trial of preliminary issues, in broad terms, are:

(i) The *status quo* in favour of a single trial remains the normative position though it is right to say that deviation from it is no longer rare or exceptional and the court should be ready and willing to order a split form of trial where this is just and convenient.

(ii) It is not always the case that the splitting of the trial or the trial of preliminary issues will, in fact, create a shortening of the proceedings or a shortening which is worthwhile. In the present case, it is likely that a significant period of time would probably be required to hear the preliminary issues which have been identified. This is because the consideration of the factors relevant to the court's decision in respect of determining the Article 50 disapplication of the limitation period issue probably would be substantial as the court would probably have to hear from the plaintiff and might also have to hear from medical witnesses he may wish to call, who might be able to address factors relevant to his inaction at different times. In addition, it may be the case that there would also be other witnesses called such as one or more of the plaintiff's legal advisors.

(iii) In order to counter the force of factor (ii) above, the defendant has argued that it would be possible to limit the extent of the court's enquiry into past events by indicating that it would not rely on pre-2009 events. Thus, the suggestion seems to be that the shortening of the proceedings would be considerable if the option of identifying preliminary issues is taken by the court. However this suggestion, the plaintiff says, involves an element of speculation. It also involves the use of an artificial cut off point which the plaintiff says will scarcely be practicable.

(iv) There is also to be taken into account the fact that a preliminary issue strategy must not ignore the possibility of appeals which, if sought by either side, will be likely to involve delay and further costs.

(v) An objection to the course proposed is that it may be likely to bring about a situation where there is at least a potential for duplication of effort and, in particular, a risk that key witnesses may end up giving the same or similar evidence twice. This, it is argued, might be the position in relation to the plaintiff who, it is claimed is a vulnerable person, and it also may be the position in relation to some medical witnesses.

The court's conclusion

[26] The court must decide which course is, in its judgment, the more just and convenient. There is plainly a respectable argument both for and against the Master's outcome.

[27] The court is entitled to bear in mind its own experience of litigation in order to reach a conclusion. Doing so, the court is of the view that the plaintiff's appeal should be allowed and that the better course is to permit the case to proceed to an un-split trial. Its principal reasons for this view are:

(a) The court doubts whether the defendant's strategy of avoiding altogether or curtailing the scope of any Article 50 enquiry is viable. The court has a healthy scepticism as to whether it is possible in this case to separate the alleged abuse of process from the issue of limitation. If it is not, the court would have to deal with the question of dis-applying the limitation period and it is difficult to see how the court could properly limit the plaintiff in the way in which he presents his case on this point. It is evident, moreover, from the terms of Article 50 and from the jurisprudence in respect of it, that the court's discretion in this area is very wide and the scope of the inquiry, therefore, will often be substantial.

(b) The practicalities of the defendant's strategy as described above also seem to the court to be suspect. For example, it is difficult to see how the court could limit the plaintiff himself or his medical advisors from introducing evidence on issues which pre-date the defendant's putative cut-off date provided the evidence proposed to be given is relevant to a factor which the court is required to consider as part of the process of reaching a balanced decision.

(c) The court does recognise that to expect the plaintiff potentially to have to give evidence twice is unattractive as the giving of evidence in a case of this nature is bound to be a difficult and taxing task - involving matters of high sensitivity relating to the plaintiff's private life[1]. The court also is willing to accept that there is material before it (from Dr Mangan) which is suggestive of the fact that the plaintiff may be a person of some vulnerability for whom the task of giving evidence once, never mind, twice may be especially stressful.

(d) While it is possible that the hearing of the preliminary issues could effect a shortening of the proceedings, and thereby a saving of costs,

[1] A fact acknowledged by Morgan J (as he then was) at paragraph [18] of his judgment in Larkin v De La Salle Provincialate [2011] NIQB 129.

the court remains guarded about whether the extent of such benefits would be sufficiently great to make the exercise worthwhile.

(e) There are also risks that the effect of going down the preliminary issue road may, in the end, prove to be an expensive attempted shortcut if it proves not to end the litigation or ends up promoting even further litigation by virtue of appeals[2].

(f) All of the cases of this particular *genre* to which the court was referred involving historical sexual abuse in institutions have proceeded to an un-split hearing: see, Irvine v Sisters of Nazareth [2015] NIQB 94; Larkin v De La Salle Provincialate (*supra footnote 1*); and McKee v Sisters of Nazareth [2017] NIJB 324, upon which the respondent relied. Taken together these suggest to the court that separating out issues for a split trial in a case of this sort may be fraught.

[28] At the end of the day each case has to be determined on the particular facts and circumstances surrounding it. Having regard to the totality of the factual matrix as exposed to the court in this case, the court will allow the plaintiff's appeal and vacate the Master's Order.

[2] As Lord Scarman put it in Tilling v Whiteman [1980] AC 1 at 25: "Preliminary points of law are too often treacherous shortcuts. Their price can be, as here, delay, anxiety and expense" (quoted by Deeny J (as he then was) in Glen Water Limited v Northern Ireland Water [2016] NIQB 55 at [24]).