AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Appeal Number: S:AP:IE:2025:000074
[2026] IESC 37

O'Donnell C.J.
O'Malley J.
Hogan J.
Murray J.
Donnelly J.

BETWEEN/

STEPHEN BEATTY

PLAINTIFF/RESPONDENT

– AND –

ROBERT BEATTY AND FRANK BEATTY (AS REPRESENTATIVES OF THE ESTATE OF WALTER BEATTY FOR THE PURPOSES OF THE PROCEEDINGS HEREIN PENDING THE APPOINTMENT OF LEGAL PERSONAL REPRESENTATIVES FOR THE SAID ESTATE)

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Brian Murray delivered this 2nd day of July 2026

Introduction

1. In this action the plaintiff seeks to recover damages for injuries suffered by him as a result of a sexual assault he alleges was perpetrated by his father, Walter Beatty Snr. The assault is said to have occurred in 1981, when the plaintiff was approximately 15. The proceedings were instituted in September 2022.

2. At the time of the commencement of the action, the plaintiff's father was 89 and was suffering from a serious impairment of his cognitive function. His guardian *ad litem* (one of the plaintiff's brothers) issued a motion to dismiss the proceedings. He said that in circumstances where his father was unable to give either evidence or instructions – and in which two other persons who might have given evidence relevant to the plaintiff's claims had passed away – the plaintiff's father was prejudiced in his defence of the proceedings by reason of the passage of time between the alleged assault and the initiation of the case. In those circumstances it was, he argued, unfair and an abuse of the process of the court for the action to proceed.

3. The High Court (Phelan J. [2024] IEHC 71) dismissed the proceedings on these grounds. That decision was appealed to the Court of Appeal. After oral argument before that court, but before the delivery of its judgment, Walter Beatty Sr. passed away. The proceedings were thereafter reconstituted with the substitution of two representatives of his estate (who are also brothers of the plaintiff), as defendants to the action.

4. The Court of Appeal (Woulfe, Noonan and Burns JJ. [2025] IECA 64) reversed the decision of the High Court. In granting leave to appeal against that decision ([2025] IESCDET 113), this court noted that the application raised issues as to the role of defendant culpability for delay in the assessment of such a motion, as well as to the potential relationship between the power to dismiss an action because of prejudicial delay, and relevant provisions of the Statute of Limitations 1957, as amended ("*the Statute*").

The issues

5. Over the course of the past 40 years, the courts have developed a power to dismiss proceedings duly commenced within the period permitted by the Statute where (a) a lengthy period has elapsed since the events said to give rise to the proceedings and the point in time at which the proceedings are likely to be tried, and (b) the defendant can identify a consequent prejudice to their interests. One of the important features of the power is that it can be exercised even though the plaintiff was not to blame for the fact that the proceedings were not commenced sooner than they were.

6. It is this power that is invoked by the defendants in their application to dismiss these proceedings. The power is usually related to the decision of this court in which it was first suggested, *O'Domhnaill v. Merrick* [1984] IR 151 ("*O'Domhnaill*"). I will refer to the power throughout by reference to the name of that case (although as I explain, *O'Domhnaill* itself was a decision in which that power as it is now understood was neither actually applied nor comprehensively formulated).

7. The observations in *O'Domhnaill* from which that power evolved were a by-product of the fact that, in certain circumstances, the Statute enables the bringing of legal proceedings many years after the commission of a wrong. This may happen in cases where a plaintiff is a minor when their cause of action accrues, or where they are under a disability, or in certain cases where a plaintiff might not have been aware that they had been wronged at the time the cause of action accrued.

8. One of the situations in which the Oireachtas has determined that it is appropriate to '*toll*' the Statute in this way is where a person seeks to recover damages in respect of an act of sexual abuse committed against them when they had not reached full age. In that situation, s. 48A of the Statute (inserted by s. 2 of the Statute of Limitations (Amendment) Act 2000 ("*the 2000 Act*")) provides that such a person is deemed to be under a disability while he or she is suffering from any psychological injury where that injury:

> *(i) is caused, in whole or in part, by that act, or any other act, of the person who committed the first-mentioned act, and*
>
> *(ii) is of such significance that his or her will, or his or her ability to make a reasoned decision, to bring such action is substantially impaired.*

9. The consequence of thus deeming a person to be under a '*disability*' for the purposes of the Statute, is that, generally, they have a period of six years from the point at which they ceased to suffer from the disability to institute proceedings for the wrong in question (s. 49(1)(a)). Specific provision is made in the Statute reducing this period for

certain claims (see, for example, s. 5(1) of the Statute of Limitations (Amendment) Act 1991).

10. In this case the plaintiff says that he was, because of the abuse he alleges, suffering from post-traumatic stress disorder that impaired him to the extent that he was unable to commence this litigation until some point in 2017. This was approximately 36 years after the alleged assault (the action being commenced five years later again). Section 3 of the 2000 Act expressly preserves the power of the court to dismiss an action in these circumstances notwithstanding that the plaintiff was so impaired:

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

11. The central point of law in the appeal arose from the relevance of the alleged culpability of the plaintiff's father for the delay in the commencement of the action, to the exercise of this power. The plaintiff says that the assault caused him to suffer a psychological trauma, and that that trauma so impaired him that he could not make a reasoned decision to bring the proceedings earlier than he did. Therefore, the lapse of time was, he argues, caused by his father. Accordingly, the plaintiff contends, the defendants (as representatives of their deceased father) ought not be permitted to invoke the *O'Domhnaill* power to strike out his claim based upon a delay for which their father was thus responsible.

12. The High Court rejected this contention, while the Court of Appeal agreed with it. In resolving which was correct, it is necessary to consider why, exactly, the courts have decided that it is appropriate to allow the dismissal of proceedings as a result of a passage of time for which the plaintiff bears no blame. It is also necessary to consider some other specific questions arising from the power, in particular: (a) the degree of prejudice required to justify the exercise of the power, and (b) when it is appropriate to dismiss proceedings on this basis by way of a pre-trial order on foot of affidavit evidence, rather than allowing the case to come to trial where the judge hearing the action can take whatever steps are necessary to protect the defendant's rights to a fair hearing. If a plaintiff is to see their case – although stateable and instituted within the period allowed by the Oireachtas – dismissed *in limine* by reason of a passage of time that was not merely beyond their control but was potentially caused by the defendant seeking its dismissal, one would expect that the requisite prejudice would need to be overwhelming, and that the circumstances in which the courts would resort to the power would be extreme, wholly exceptional, and justified by an imperative that transcends the immediate interests of the parties to the suit.

The facts

13. The critical reference points in the chronology are the alleged assault (said to have occurred in or around May 1981), the sending by the plaintiff of a letter to each of his siblings describing the alleged events (8 April 2003), the making by the plaintiff of a complaint in respect of the alleged assault to the Gardaí (on an unspecified date in 2017), the bringing of a criminal charge for indecent assault against the plaintiff's father

(October 2019), the incapacitation of the plaintiff's father (December 2019), the decision of the Director of Public Prosecutions to enter a *nolle prosequi* in respect of the charge (July 2020**)**, the institution of these proceedings (September 2022), this application (issued in March 2023), and the death of the plaintiff's father (September 2024). Two other persons whom it has been suggested were witnesses to the alleged events are also deceased – one of the plaintiff's seven siblings, John, who died in June 2020 and the plaintiff's mother, who died in July 2021.

14. The plaintiff says that the assault occurred late at night in the bedroom he shared with his brother John, at their family home in Dublin. It is his case that on the night in question his father, who had been drinking, visited the plaintiff in that bedroom. He alleges that his father sat on his bed and initiated a conversation about sex and the plaintiff's anatomy, before proceeding to touch the plaintiff in a sexually inappropriate, unwelcome and abusive manner, before finally falling asleep on the plaintiff's bed.

15. The plaintiff has suggested at various points that John may have witnessed some or all of the alleged assault. He has also contended that comments made by his mother the day after the alleged incident show that she had become aware of what occurred at the time of, or shortly after, the event itself (it has been hypothesised by the plaintiff at various stages that his mother may have seen the incident because the bedroom door was slightly ajar, or that she may have been outside and summoned her husband from the room and/or may have been told by her husband shortly afterwards what had happened). John, the plaintiff's mother and Walter Beatty Snr. being now deceased, the plaintiff is the only person who can give a first-hand account of what transpired on the occasion in question. That forms the core of the defendants' application to dismiss

the proceedings. Both John and the plaintiff's mother had at various points denied witnessing or otherwise being aware of any incident of the kind alleged by the plaintiff (although the plaintiff and John's partner have asserted that John told them otherwise). Walter Beatty Snr., in a statement he made to the Gardaí during their investigation of the plaintiff's complaint, said that he had never behaved inappropriately with the plaintiff, or with any of his children.

The information before the court

16. That said, throughout the statement of claim, the affidavits delivered by the parties for the purposes of the defendants' application to dismiss the proceedings, and the statements made by a number of persons to the Gardaí in the course of their investigation of the plaintiff's criminal complaint, there are various assertions that may, or may not, be capable of constituting admissible evidence at the trial, and that may be found to support, or for that matter to undermine, the allegations made by the plaintiff. For present purposes, five features of the material before the court are relevant. In detailing these, I am not expressing any view as to whether any of the information I set out below could constitute admissible evidence at the trial of the action. That is a matter for the judge at the full hearing, if there is a full hearing.

17. First, the plaintiff says that he disclosed the incident to several persons in the years immediately following it. He says that he told four of his brothers, including Walter Beatty Jnr. and Louie Beatty. While Walter Jnr. denies this, Louie advised the Gardaí that the plaintiff informed him of the alleged assault at some point in 1981 or 1982. A

school friend of the plaintiff also advised the Gardaí that the plaintiff told him of the incident during the summer of 1984.

18. Second, the plaintiff also says that all of his siblings were aware of the alleged assault by the mid to late 1980s. Louie has corroborated this, advising the Gardaí that in the period between 1983 and 1989 '*it would have been known by all of us*'. The fact (as the plaintiff alleges) that this was known to all members of the family is presented by the plaintiff as an important part of the narrative: what he describes as '*the family omerta*' is said to have exacerbated his injuries, but it is also closely related to the suggestion that the plaintiff's father in some way admitted the abuse to some or all of his children.

19. The plaintiff in part relates that alleged '*family*' knowledge to an event that he says occurred on 26 December 1986. That morning, he alleges, his father woke him early and drove him to various churches in the city looking for a mass. They attended together what the plaintiff has described as '*the tail-end of mass*'. He says that his father told him that in the preceding five years, while he had attended mass, he had not taken communion. The plaintiff says that his father said that he had confessed his assault on the plaintiff to a priest two days previously and that he now wished to go to mass with the plaintiff and take communion. The plaintiff has said (in reference to these events) that his father informed some of his siblings of this confession.

20. Third, there is thus specific information presented in the papers which, the plaintiff says, shows that his father made admissions that are consistent with the wrongdoing he alleges. The most direct (if arguably ambiguous) evidence of this comes from Louie who said in his statement to the Gardaí that around Christmas 1983 his father discussed

with him an interaction he had with the plaintiff in the latter's bedroom some years previously. According to Louie's statement to the Gardaí, his father described an episode between himself and the plaintiff in which his father had asked the plaintiff if he could touch his genitals and in which the plaintiff said no, that this was wrong and that his father said '*ok and he didn't*' (touch him). Louie says that his father, in the course of this conversation, asked him if the plaintiff had '*ever mentioned anything*' to him, to which Louie says he – falsely – replied in the negative.

21. The plaintiff also makes specific reference to an admission he alleges was made to another brother, Walter Jr. The plaintiff avers that he told Walter Jnr. of the incident in 1984. The plaintiff says in his affidavit that Walter Jnr. '*said that he knew because the Defendant had confessed to him. His words to me were "Yeah I know"*'. This is strongly denied by Walter Jnr. in his replying affidavit. He states that '*[n]o such discussion took place*' and that the first time he became aware of the allegation was when he received the letter sent by the plaintiff to his siblings on 8 April 2003.

22. The fourth feature of the material before the court arises from that letter. The plaintiff says that he sent it following a dinner he attended with his wife, a friend of his, and his parents. He says that at that dinner, he had an argument with his father. The letter records the details of the alleged assault (although it describes the event as having taken place in the summer of 1980), and the attendance at mass that the plaintiff alleges took place on 26 December 1986. In the course of that letter, the plaintiff alleged that his other siblings ('*everyone else*') had '*knowledge, at least in part, of what happened*'. He sought his siblings' support. He also said the following of his father's alleged confession of the sexual assault to a priest in December 1986:

'*Walter Beatty Snr. also expressed his satisfaction with this new state of affairs to Walter Jnr. and Louie, and must have told them that he 'had interfered' with Stephen, or some such. Indeed, he even told Louie that "in fairness to Stephen he never told anyone". Several days later, on a separate issue relating to Louie, I had a run-in with Walter Beatty Snr. Walter Beatty Snr. said, after I had gone, that my behaviour was unforgivable. Louie replied: "But you were just saying how good Stephen was for not telling anyone about…" "I will not have that used against me!!", Walter Beatty Snr. shouted back.*'

23. It is not apparent that this letter was responded to in writing by any of the plaintiff's siblings. However, Walter Beatty Jnr. has averred that when the letter arrived each of the plaintiff's siblings contacted the plaintiff to confirm that they would support him. He says that the plaintiff made further contact by his siblings with him conditional on each of his siblings accepting that the alleged incident occurred (which, he says, none but Louie were prepared to do: Louie did support the plaintiff, saying in his statement to the Gardaí: '*I felt how could I not given what my father had said to me in 1983*'). The plaintiff has alleged that John subsequently informed him that following this letter, Walter Jnr. had taken him aside '*as some kind of internal inquiry*'. The plaintiff has also averred that another brother phoned him – seemingly following receipt of the letter – and said while their mother denied knowledge of the alleged abuse, he (the brother) '*knew she … was lying*'. The plaintiff has further alleged that in response to the letter another sibling disclosed an occasion when he and a fellow teenage boy were swimming in Belgium, when their father insisted that they remove their trunks and proceeded to hose their genitals. At about this time, the plaintiff says that he attended a counsellor

who advised him not to report the abuse as, she said, this would further retraumatise him. Walter Jnr., in his statement to the Gardaí, stated that when he received the plaintiff's letter, he read it to his father, who denied the allegation.

24. Fifth and finally, the plaintiff exhibits in his first replying affidavit the report of a psychiatrist. The report was not prepared for the purposes of resisting the application to dismiss – it is dated May 2022. The author has not sworn an affidavit. The report states that it was prepared on the instructions of the plaintiff's solicitor. The report concludes that the plaintiff presented with symptoms consistent with post-traumatic stress disorder and expresses the view that these symptoms impaired the plaintiff to the extent that he was unable to report the abuse until such time as he did report it. The plaintiff's symptoms are described in the report as '*not severe and in the mild-moderate range*'. It says that there is no evidence of fabrication of symptoms, and that the plaintiff clearly denied symptoms that were not present. It records that the plaintiff used natural language to describe symptoms as opposed to language that was technical or rehearsed. There was, it is said, no evidence of any attempt to exaggerate or embellish symptoms. That report records that some of the plaintiff's symptoms began immediately after the abuse and that others such as flashbacks and unwanted remembering occurred two years after the abuse. The psychiatrist concluded that '*the symptoms of post-traumatic stress disorder experienced by Mr. Beatty were caused by abuse*'. The symptoms, it is said, have been present for most of the plaintiff's life '*with some reduction in symptoms in the past 6 years*'. The report continues:

> '*there have been enough symptoms present consistently and over the time when Mr. Beatty could have reported the abuse to state that symptoms of PTSD*

impaired Mr. Beatty to the point where he did not report the abuse until 2017 ...

...These symptoms impaired Mr. Beatty to the extent that he was unable to report the abuse until the time he did.'

The proceedings

25. On 11 December 2023 (and following the issue of the motion to dismiss the proceedings) Phelan J. made an Order for non-party discovery against the Commissioner of An Garda Síochána. That resulted in the disclosure of various statements made in the course of the Garda investigation, to some of which I have just referred. Phelan J. delivered her judgment on the application to dismiss in February 2024; the Court of Appeal hearing followed in July of that year. Walter Beatty Snr. passed away in September 2024, the proceedings were then reconstituted in their present form, and the Court of Appeal delivered its judgment on 19 March 2025.

26. The passage of time between the assault alleged in the proceedings and their institution is stressed in the affidavit sworn by Walter Beatty Jnr. grounding the application for the dismissal. The defendants have, they say, been prejudiced in their defence of the proceedings accordingly. They emphasise that their mother, and brother John, are both dead, and that Walter Beatty Snr. was not at the time of the commencement of the action in a position to give evidence or instructions. The inability of the defendants to defend the matter, they say, is a consequence of delay and the prejudice they face is such as to make it unfair to allow the action to proceed. They emphasise that during the Garda investigation, Walter Beatty Snr., John and their mother all rejected the allegations

made by the plaintiff, noting that their mother had refuted the claim that she had known of any assault of the plaintiff at or shortly after the time thereof. Walter Beatty Jnr. says that he did not know anything of the plaintiff's allegations until he received the plaintiff's letter of April 2003. The defendants highlight various alleged inconsistencies in the plaintiff's account, and further say that '*many of the Plaintiff's actions over the last several decades are inconsistent with the allegations he makes*' (seemingly a reference, at least in part, to the claim that the plaintiff had reconciled with his parents for a period between 2009 and 2017). They strongly dispute the plaintiff's claims that admissions were made to them by the deceased, or of the existence of a '*family omerta*', or that the alleged abuse was an '*open family secret*'. To permit the action to proceed in these circumstances, they say, would be unfair and an abuse of the process of the court. They say that the claim is statute-barred and therefore bound to fail, reserving the right to bring an application to have that issue separately determined.

The legal framework

27. The Statute should be the first point of reference for those who claim that they have been unfairly prejudiced by a lengthy passage of time between an allegedly wrongful act, and the institution of proceedings. If a claim is clearly outside the relevant limitation period, and if that period is invoked by the defendant, the action may be dismissed. If there is a dispute between the parties as to whether the claim is, in fact, statute-barred, the law enables the determination of issues around the Statute by way of a trial directed solely to that question. If the question of whether the Statute applies in a case is itself so intimately connected with whether the defendant committed the alleged wrong (as may often be the case where the 2000 Act is engaged), the wrong can

be conceded for the purposes of the trial of the issue only. Absent very good reason, a defendant who seeks relief from the court based on a prejudicial delay in the bringing of the case but who also claims that the action is statute-barred should be expected to seek a determination of whether the claim is so barred – at the very least as an alternative to any other form of relief.

28. Where a claim is, in fact, brought within the relevant limitation period, the presumption must be that the plaintiff is entitled to bring their case to trial. A plaintiff who postpones the institution of proceedings to the end of that limitation period will not, usually, be properly viewed as having acted '*culpably*' in so doing. That is the essential guarantee underpinned by the right of access to the courts – the right to bring a stateable claim duly initiated within the period permitted by the Oireachtas to trial before a judge administering justice in accordance with Article 34 of the Constitution. Where the Oireachtas has determined that a plaintiff should be permitted the period specified in the Statute within which to bring their claim, the starting point must be that the courts will defer to that legislative judgement. While some provisions of the Statute of Limitations may be difficult to apply to particular categories of case, it affords a relatively certain and objective benchmark by reference to which it can be decided whether a case is of such antiquity that it should not be entertained by a court. It is because of the potential for stale claims to cause an injustice that the Statute was enacted and it should, accordingly, be viewed as the primary legal response to such claims. As explained by Lord Sumption in *Abdulla v. Birmingham City Council* [2012] UKSC 47, [2013] 1 All ER 649 (at para. 41):

'*[l]imitation reflects a fundamental and all but universal legal policy that the litigation of stale claims is potentially a significant injustice. Delay impoverishes the evidence available to determine the claim, prolongs uncertainty, impedes the definitive settlement of the parties' mutual affairs and consumes scarce judicial resources in dealing with claims that should have been brought long ago or not at all.*'

29. That said, it is now clear that there are three particular circumstances in which a plaintiff may lose the right to bring a stateable claim duly commenced within the applicable limitation period to trial (that right can be forfeited in other ways which are not germane here, including by conduct that is contemptuous of the court and/or by a failure to comply with orders of the court). While the various powers of the court to dismiss proceedings in these situations all fit under the general principle that courts administering justice must have the implied authority to take steps that prevent the misuse of their processes and oppression of other litigants, the conditions under which those powers will be exercised differ, depending as they do on the specific objective of the rules in question as they have evolved in the case law. Because of their common root of title, the distinctions between these powers have sometimes been overlooked in the case law, and the criteria applied to one, carried over into another. It might be thought that some of the confusion that has crept into this aspect of the law has been caused by the failure to separate each of the following three powers, from each other.

30. The first power arises where, having brought proceedings that are not statute-barred, a plaintiff then fails to prosecute their action. Where this happens, the court may dismiss the proceedings because of that failure on the part of the plaintiff to advance their claim.

Until recently, that power was most authoritatively described in the decision of this court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 ("*Primor*") resulting in its being widely identified with the name of that case. While the approach outlined in *Primor* has recently been overhauled by the decision of the court in *Kirwan v. Connors* [2025] IESC 21 ("*Kirwan*"), the majority there confirmed that the courts continue to enjoy an inherent power to dismiss proceedings where a plaintiff has engaged in an inexcusable delay in the prosecution of their action. However, this is a power addressed to a failure to duly advance the proceedings, not simply to the consequences for obtaining a fair trial of the passage of time between the events complained of and the institution of the suit. In considering whether to dismiss the proceedings on this basis, the court may have regard to the fact that the events said to give rise to the action occurred many years previously and the court will, of course, in exercising that power, take into account the prejudice caused to the defendant by the passage of time since the wrongful act alleged (see *Kirwan*, at para. 17 of the judgment of the Chief Justice and para. 64 of my judgment). However, it is critical that what triggers the power is not the late commencement of an action, but lassitude in its prosecution once instituted.

31. There is, it should be observed, necessarily a culpability on the part of the plaintiff where proceedings are struck out on this basis; it is because they failed to prosecute the case as they ought to have done once they commenced it that they forfeit the right to bring their claim to trial. Indeed, in many of the decisions this ground of relief is related to '*culpable*' delay, so as to distinguish it from the facility to dismiss proceedings enabled by *O'Domhnaill,* where the delay may be '*non-culpable*'. As formulated in *Kirwan*, the principles governing the exercise of this power now enable the striking out of proceedings on this basis where there has been a lengthy period of inactivity on the

part of the plaintiff even if the prejudice sustained by the defendant is mild or moderate or, in very extreme circumstances, where there is no proven prejudice at all. It is not necessary for the defendant to establish that they cannot obtain a fair or proper trial.

32. Second, the court has an undoubted power to dismiss an action where one party to an action has engaged in an abusive manipulation of the court process to the prejudice of the other. It is (as I explained in my judgment in *McCool v. Honeywell Control Systems* [2024] IESC 5 at para. 33) a wrongful abuse of process for a party to deliberately orchestrate a stratagem in which '*the process of the Court is not being fairly or honestly used but is employed for an ulterior or improper purpose or in an improper way*'. To take one example suggested in another jurisdiction, a lengthy but intentional delay in bringing proceedings in order to obtain a forensic advantage might give rise to the dismissal of the proceedings even if the ultimate prejudicial effect of the delay on the conduct of the trial was limited (see the comments of Edelman J. in *Willmot v. Queensland* [2024] HCA 42 at para. 93). No one could seriously question but that the postponement of the commencement of an action relating to events occurring decades previously to the very cusp of the applicable limitation period for the specific purpose of impairing the defendant's ability to defend it would, if that stratagem did indeed result in the desired prejudice, constitute such a wrongful affront to the processes of the court as to merit a drastic response. It would follow that a plaintiff who is competent to sue and who deliberately postpones bringing proceedings that relate to events occurring many years earlier for the specific purpose of obtaining such an advantage could similarly find their action falling foul of this test even if that action is ultimately brought within the applicable limitation period and even if it is duly prosecuted. In this

extreme situation there is also necessarily culpability on the part of the plaintiff by reason of their wilful and prejudicial manipulation of the court's process.

O'Domhnaill

33. That was the general context in which the court in *O'Domhnaill* suggested a third power. It is in one respect broader, and in others considerably narrower, than the other two. The proceedings in that case involved a claim arising from an accident in 1961, when the plaintiff was a minor. Any trial of the case was unlikely to come for hearing before 1985. There had been substantial periods of inactivity in the prosecution of the action – while it was commenced in 1977, as of May 1982 no statement of claim had yet been delivered. In upholding an order of the High Court dismissing the proceedings for want of prosecution, the court emphasised the length of time that had elapsed since the wrongful acts, and the fact that that this was attributable to the fault of the plaintiff and/or of her legal representatives. The delay was described by Henchy J. as '*virtually entirely the fault of the plaintiff or her advisors*' (at p. 159). Indeed, in his dissent in *Toal v. Duignan (No. 2)* [1991] ILRM 140 ("*Toal No. 2*") McCarthy J. (who also dissented in *O'Domhnaill*) described the plaintiff in *O'Domhnaill* as having been '*guilty of gross and culpable delay*' (at p. 157). *O'Domhnaill* was thus not, in fact, '*an O'Domhnaill case*' in the way that power is now generally viewed. It was actually decided on the basis of what later became known as the *Primor* power.

34. Yet some of the observations of Henchy J. in the course of the majority judgment in *O'Domhnaill* assumed a life of their own, generating the juridical basis for a power to dismiss proceedings characterised by a lengthy period between the alleged wrong and

trial, irrespective of any personal or vicarious blame on the part of the plaintiff. At one point in his judgment (at p. 158) he said that it '*puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial*'. Such a trial '*would be apt to give an unjust or wrong result*'. He concluded (at p. 159) that '*implied constitutional principles of basic fairness of procedures … may be invoked to justify the termination of a claim which places an inexcusable and unfair burden on the person sued.*' The power was rationalised thus:

> '*it would be contrary to natural justice and an abuse of the process of the Courts if the defendant had to face a trial in which she would have to try to defeat an allegation of negligence on her part in an accident that would have taken place 24 years before the trial, and a claim for damages of which she first learned 16 years after the accident*'.

35. These comments expressed an important counterbalance to the extraordinarily long limitation periods enabled by some provisions of the Statute. The presumption (to which I have earlier referred) that a plaintiff who brings their claim within the period fixed by the Statute should be permitted to bring it to trial, weakens as one progresses from the 3 (and now 2) year period generally allowed for personal injury actions and the 6 years permitted for other claims in tort and contract, to limitation periods that may permit claims to be brought decades after the wrongful acts alleged. *O'Domhnaill* itself was a case that could be instituted so long after the alleged accident only because this court in *O'Brien v. Keogh* [1972] IR 144 ("*O'Brien*") had declared s. 49(2)(a)(ii) of the Statute to be inconsistent with the Constitution, thereby enabling personal injury claims accruing to an infant to be commenced three years after they reached their majority

(then 21). Section 49(2)(a)(ii) had excluded those who were in the custody of a parent at the time when the right of action accrued from the extended limitation period applied to minors. The court concluded that this provision was invalid because it restricted the limitation period for those injured by the act of their parents. The effect of the decision of the court to strike the provision down was to create by default an extended limitation period for all claims by minors.

36. From there, four important reference points can be charted in the evolution of this power. First, in *Toal v. Duignan (No. 1)* [1991] ILRM 135 ("*Toal No. 1*"), this court applied these *dicta* of Henchy J. in *O'Domhnaill* to strike out proceedings against the estates of two medical consultants arising from alleged professional negligence said to have occurred shortly after the birth of the plaintiff in 1961. The proceedings were commenced in 1984. The court made clear that this power could be exercised even if the plaintiff was not himself to blame for the fact that the institution of the action had been so delayed. As part of the same application, a claim against a general practitioner arising from her treatment of the plaintiff in 1971 was similarly dismissed. In *Toal No. 2*, the power was reconsidered, confirmed and restated by the court, being applied to dismiss proceedings against a second general practitioner for her treatment of the plaintiff in 1971 and 1977. The power was, thereafter, applied by this court to strike out proceedings in two other actions – *McBrearty v. North Western Health Board* [2010] IESC 27 and *Whelan v. Lawn* [2014] IESC 75 ("*Whelan*"). It has been invoked in many decisions of the High Court and of the Court of Appeal.

37. *Whelan* is particularly important for present purposes. It comprised an action for damages arising from a sexual assault. The allegations of assault were first made almost

20 years after the incident. By the time the plaintiff's appeal to this court against a decision of the High Court striking out the proceedings came for hearing, the alleged wrongdoer was dead, while his wife (a potential witness) had died before the action was commenced. There is nothing in the judgment to suggest that the deceased was at any point advised of the allegations prior to the proceedings (it is recorded that a complaint was made to the Gardaí but that no meaningful action was taken on foot of it), nothing to indicate that the defendant (the deceased's personal representative) had anything to propose by way of defence, and nothing to suggest that any other parties had any probative evidence to offer in the case. Instead, Hardiman J. said (at para. 27), '*the defendant could call no evidence at all on the central issue*'. The trial he said, were it to have taken place, would have been '*beyond the reach of fair litigation*', and the decision of the High Court was upheld on that basis.

38. Second, and at much the same time, in a sequence of judgments starting with the decision in *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50 ("*Comcast*") (where the court refused to strike out proceedings on this basis), some members of this court have sought to define – with progressively increasing rigour – the conditions that must be met before the power will be exercised. There, McKechnie J. (at para. 40) isolated three tests from the decisions: whether there is a real and serious risk of an unfair trial and/or unjust result, whether there is a clear and patent injustice in asking the defendant to defend the case, and whether it places an inexcusable and unfair burden on the defendant to do so. The power, he said, '*should be sparsely used and little availed of*' (para. 42). Clarke J. (as he then was) in his judgment in the same case asked whether there is '*a high degree of*

assurance that the relevant defendant will not be able to get a fair trial or will suffer serious unfairness' (at para. 4.2).

39. In *Nash v. Director of Public Prosecutions* [2015] IESC 32 ("*Nash*") Clarke J. (at least on one view) restricted the power further, framing the test by reference to whether '*no true trial on the merits is capable of being conducted*' (at para. 2.21) and referring in his judgment to a situation in which '*the lapse of time may be so great and the divergence from any semblance of a real trial on the merits so substantial, that … the conduct of the trial would be nothing more than that in name*' (at para. 2.13). He distinguished this situation from that in which the lapse of time may have diminished but not denied justice, in which event a trial should not, at least without the plaintiff being in some way responsible for the delay, be halted (see para. 2.15).

40. Third, the recognition in *Nash* that the courts would permit the continuation of an '*imperfect*' trial even though a lengthy period had elapsed since the acts complained of, and even though the defendant may have been prejudiced in consequence, was accompanied by the acknowledgement in that case that a trial judge had the power to address any such unfairness at the full hearing of the case, and that in many cases it was preferable that they did so, rather than the matter being disposed of by way of pre-trial motion supported by affidavit evidence. In *Nash*, Clarke J. referred to the '*growing tendency for the courts, when asked to prohibit or otherwise prevent a trial from going ahead … to consider whether it might be more appropriate to leave the final decision to the trial judge*' (at para. 2.21). Consigning the question of unfairness to the trial judge should be the normal course ('*it is preferable, except in clear cases, that the issue*

be left to the trial judge' (at para. 2.22). These comments were made by Clarke J. in reference to delay for which the plaintiff was culpable.

41. However, in *Irish Bank Resolution Corporation Limited v. Fingleton* [2024] IESC 59 ("*Fingleton*"), Woulfe J. said that this reasoning applies equally to the *O'Domhnaill* power. That case (judgment in which was delivered after the decision of the High Court in the instant proceedings) represents the fourth and most significant staging post in the refinement of *O'Domhnaill*. There, the court was faced with a case involving claims which extended back over many years, but in which the defendant was, by the time of the application to dismiss, mentally incapacitated to the extent that he could neither give instructions, nor evidence in the case. The court decided that notwithstanding the defendant's incapacity, the trial should proceed. The question of whether there could be a fair trial involved a consideration of more than just the incapacity of the defendant. It was also necessary to consider whether the evidence to be adduced by the plaintiff could be countered by those representing the defendant without the necessity for instructions or evidence from him.

42. Although Woulfe J. in his judgment described the power as one based on '*unfairness*', and although at points he referred to the power as being directed to the avoidance of '*serious unfairness*', in fact the decision subordinated tests based on abstract and general concepts of what was '*fair*' or '*an unfair burden*' or '*in the interests of justice*' to a more focussed consideration of the impact of the delay on the integrity of the trial process. Clearly, a defendant who has, over a lengthy period between an alleged wrong and legal proceedings seeking to recover damages for that wrong, lost their mental capacity to testify on their own behalf or to instruct counsel in the defence of those

proceedings, has suffered a prejudice that might plausibly be described as a '*serious unfairness*'. They have, after all, lost both the basic entitlement to confront their accusers by means of a cross-examination informed by proper instructions, as well as the ability to give evidence in their own defence. Indeed, Hardiman J. in *Whelan* had said (at para. 9) that '*the grossest form of prejudice in civil proceedings is the death of the defendant himself, so that he is not able to deny what is alleged against him*'. *Fingleton*, however, makes it clear that incapacity is not in and of itself enough to halt the trial in all cases and, to that extent, necessarily qualified the apparent breadth of some of what had been said in some of the earlier cases (including *Whelan* itself). The question is not whether the defendant is less equipped to address the allegations against them than they would have been had the action been commenced timeously, but whether the detriment they have thus suffered is of such a kind as to convert the ultimate trial of the action from an '*imperfect*' one, to the hearing of a complaint that is '*beyond the reach of fair litigation*'.

43. Woulfe J., in the course of his judgment in that case reduced the law to six propositions, which I will take the liberty of paraphrasing in part (paras. 75-80 of his judgment, with which Dunne, O'Malley, Hogan and Donnelly JJ agreed):

(i) Where a person brings civil proceedings, there is a strong presumption in favour of a trial on the merits. In order to displace that presumption, a defendant must clearly establish a sufficiently weighty countervailing factor. The burden is on the person asserting such a factor, to prove it (at para. 75-76).

(ii) This will happen where the defendant establishes that it will not be possible to have a fair trial because of the lapse of time. This is '*an exceptional jurisdiction which must be used rarely*' (at para. 76).

(iii) The power can be exercised '*irrespective of whether blame can be attached to any person*' (at para. 76).

(iv) In exercising this power, it is necessary to distinguish between an imperfect trial and an unfair trial. While many trials may be imperfect because potential evidence is unavailable, that does not necessarily mean that the trial will be unfair. However, '*at some point the absence of evidence, coupled with the effect of lapse of time on the ability of the Court to assess other evidence <u>may</u> lead to a stage being reached where the case has gone beyond the reach of fair litigation*' (at para. 77, emphasis in original).

(v) Moreover, the court should consider *inter alia*:

> '*the nature of the claims and the defences raised; the nature of the evidence to be adduced in the context of the issues to be determined; the role of documents and whether such documents exist; the extent to which oral evidence from a particular witness is likely to be required; the prejudice which the defendant asserts and the evidence he or she adduces to support that assertion*' (at para. 78).

(vi) It will normally be preferable except in very clear cases that any exercise of this exceptional power be left to the trial judge. That judge will:

> '*be better able to assess, in the light of the evidence which is actually tendered and in the light of having a much better ability to assess the kind of evidence which might have been tendered were it not for the lapse of time (and the relevance and importance of such evidence in practice), and whether the extent of departure from the idea of a perfect trial is sufficiently significant to warrant interfering with the constitutional imperative that proceedings should be tried on their merits*' (at para. 79).

The judgments of the High Court and Court of Appeal

44. The defendants' application was agitated before (and considered by) the High Court pursuant to both the *Primor* and the *O'Domhnaill* powers. The effect of the subsequent decision in *Kirwan* is to put beyond doubt that the *Primor* power (as it then stood) was not relevant to this case: there was no question of the proceedings not being prosecuted with reasonable diligence once they had been instituted (although had a failure to diligently prosecute the action once commenced been established, the court was certainly entitled to have regard to the period that had elapsed between the allegedly wrongful act and the commencement of the action in assessing whether to dismiss pursuant to that power). The only question was – as the Court of Appeal correctly concluded – whether the requirements of the *O'Domhnaill* power as subsequently developed in the cases were met, and that is the only aspect of the decisions of the High

Court and Court of Appeal relevant here. The short summary of those decisions that follows should not detract from the fact that the judgments in both courts (Phelan J. in the High Court, and Woulfe and Noonan JJ in the Court of Appeal) contain detailed, impressive and careful analyses of the authorities addressing that power.

45. As I have earlier observed, an important part of the plaintiff's response to the defendants' contention that they could not obtain a fair trial by reason of the incapacity, and thereafter passing, of Walter Beatty Snr., and the deaths of John Beatty and the plaintiff's mother, focussed on what was said to have been Walter Beatty Snr.'s own culpability. Because, the plaintiff contended, the delay in bringing the claim was occasioned by the alleged abuse, the *O'Domhnaill* power could not be exercised in his favour. This argument was rejected by Phelan J. following a review of the authorities and, in particular, the decisions in *Whelan* and *Nash*. This led her to conclude that where this power is engaged '*[d]ismissal is a consequence of unfairness in the process resulting from delay, irrespective of where the fault for delay lies*' (at para. 73).

46. From there, Phelan J. quoted from the judgment of Clarke J. in *Nash*, framing the test she had to apply by reference to whether a '*true trial on the merits is capable of being conducted*' (para. 78). Applying that test, she explained that the central issue in the case was not whether the plaintiff's siblings were aware of allegations of abuse and supported the plaintiff, or whether there was a '*family omerta*', but whether the defendant abused the plaintiff. She returned to this aspect of the plaintiff's argument later in her judgment; surviving defence witnesses can only say whether the plaintiff told them he was abused, and they can only be examined as to whether the defendant made admissions to them or denied the allegations. They could not be examined as to

the truth of any admission or denial in a manner that cured any prejudice arising from the unavailability of Walter Beatty Snr. or other witnesses (para. 90).

47. Central to her conclusion were the deaths of Walter Beatty Snr., the plaintiff's mother and John Beatty. Phelan J. cited the comments of Hardiman J. in *Whelan* to which I have earlier referred: '*the grossest imaginable prejudice is the death of the defendant himself in a case where the basic facts are disputed by one person's word against another's*' (at para. 83 of the judgment of Phelan J.). This led her to the conclusion that the incapacity of the defendant – which she described as '*a real prejudice*' and a '*significant and gross prejudice*' – was compounded by the death of John and the plaintiff's mother. These were, Phelan J. said, '*the two witnesses of primary fact identified by the Plaintiff in his complaint*' (at para. 84). In her view, the core facts could not be fairly and properly determined by reason of the unavailability of crucial evidence due to the lapse of time. The unavailability of the three witnesses alleged by the plaintiff to have had direct knowledge of the incident (Walter Beatty Snr., the plaintiff's mother and John Beatty) represented an '*irretrievable prejudice*' to the defence of the proceedings and meant that it was no longer possible to hold a fair trial on the merits (para. 89). As the defendant was not able to call evidence on the issue of whether the abuse occurred, Phelan J. was satisfied '*that any hearing would lack that mutuality and fairness which have been found to be essential for the administration of justice*' (para. 95).

48. The critical difference between the High Court and the Court of Appeal (the principal judgment of which was delivered by Noonan J.) arose from the latter's conclusion that a defendant who was alleged on credible evidence to have been the cause of the delay

in instituting legal proceedings could not invoke the *O'Domhnaill* power. Having conducted a careful analysis of observations in *O'Domhnaill* itself, the decisions in *Toal No. 1* and *Toal No. 2,* and the judgment of Clarke J in *Nash,* Noonan J. concluded that the *O'Domhnaill* jurisprudence was predicated in significant measure on the presence or absence of fault or contribution on the part of the defendant. Where culpability was found to exist, the question was whether it would be unjust to ask the defendant to defend the case. He felt it was not correct in principle that where wrongdoing of the defendant has caused the plaintiff to delay in instituting proceedings, the defendant could then rely on that delay to have the action dismissed. He concluded that there was nothing in the decision in *Whelan* (where the point was not raised) that was inconsistent with this conclusion.

49. Further, while it was accepted that the fact that Walter Beatty Snr. could no longer refute the allegation was an important prejudice, the court did not see his position in this case as being equivalent to that of the defendant in *Whelan*, where the proposed personal representative defendant would not have been able to call any evidence at all. In the instant case, there was a substantial body of evidence on the core issues around the reporting of the abuse and the claimed impairment of the plaintiff. Challenges to his credibility on these issues could also significantly affect credibility on the central question as to whether the assault occurred and would also be relevant to any issue around the Statute, if that was pleaded. It might be that the trial would be less than perfect, but that was not sufficient to justify dismissal of the proceedings.

50. Woulfe J. delivered a short concurring judgment. He expressed his agreement with the view of Noonan J. that it was not correct in principle to hold that where the wrongdoing

of the defendant has allegedly resulted in a delay by the plaintiff in bringing a claim, the defendant is then entitled to rely on that delay in having the claim dismissed. It was, he said, difficult to see how such an approach could be regarded as fair or just. Here, Woulfe J. stressed that the court on an application of this kind must take the plaintiff's case at its height. This included the medical evidence he had adduced to the effect that he was unable to pursue his claim until 2017 because of the impairment caused by the abuse complained of. Woulfe J. noted (at para. 6) that in the course of his judgment in *Fingleton* he had referred to the requirement in acceding to an application of the kind in issue for a defendant to establish that it will not be possible to have a fair trial because of the lapse of time '*irrespective of whether blame can be attached to any person*'. In this regard, Woulfe J. said (at para. 7), he was '*simply stating that the lapse of time jurisdiction could arise in principle because of the absence of any blame attaching to any party, and in particular without any blame attaching to the plaintiff*'. He was, he said, not suggesting that culpability on the part of the defendant is irrelevant in such circumstances. Any such suggestion would, he said, run counter to the authorities.

51. Finally, it is to be noted that while the matter was pending before the Court of Appeal, the plaintiff issued a motion seeking to adduce additional evidence in the form of an affidavit from John Beatty's partner. She said that she was told by John about an incident occurring in the bedroom he had shared with the plaintiff. She has averred that John told her that the incident stopped when the plaintiff's mother called from outside the bedroom for the plaintiff's father to come out. She said that John had said that Walter Beatty Snr. addressed the family sometime after the incident and said that he had gone to a priest to seek forgiveness. She also said that John told her that he was

pressurised into giving a false account of what had happened to the Gardaí. That motion was heard by the Court of Appeal but was not resolved having regard to its decision to allow the substantive appeal. The contents of this affidavit are recited in the judgment of Noonan J., and the relevant papers were provided jointly by the parties to this court as part of this appeal, although the motion to admit the evidence was not agitated before this court.

52. It has been said that the judgments delivered in the Court of Appeal, if correct, have effected a significant change to the law. The point was observed by Barr J. in *D v. D* [2025] IEHC 434 when he suggested that the decision '*marks a radical addition to the principles which had been applied heretofore to cases such as the present*' (at para. 57). He continued:

> '*Based on that decision, the present law would appear to be that when an allegation of sexual abuse has been made against a person and where the plaintiff can produce medical evidence that due to having suffered that sexual abuse they were impaired until a particular date in making a formal complaint about the alleged abuse, the period between the date of the alleged sexual abuse and the date of the first formal reporting of it, will not be reckonable in any application that may be brought by a defendant that due to the lapse of time, he cannot get a fair trial, be that in civil or criminal proceedings.*'

The conditions for the exercise of the O'Domhnaill power

53. Some of the comments in *Comcast* and *Nash* as reflected in the decision in *Fingleton* represented – at least on one interpretation of the pre-existing law – a significant reset of the power to dismiss proceedings against a non-culpable plaintiff due to a prejudicial lapse of time. This was necessary. Presumably because *O'Domhnaill* was actually a case about dismissal for want of prosecution, some of the earlier decisions conflated the power to dismiss a case that was not being prosecuted with the power to dismiss a case because the passage of time since the alleged wrong was such that the defendant could not obtain a true trial on the merits at all. There are decisions questioning whether there was in fact any difference between the power to dismiss for want of prosecution, and the power to dismiss a case where it was no longer possible to have a fair trial. There have been cases in which the court viewed the '*inherent jurisdiction*' recognised in *Primor* as allowing the dismissal of a case because the plaintiff had taken a long time to commence it – even if once commenced the action is rapidly progressed. Some judgments (including that in *Toal No. 2*) present the power as involving some form of balancing test whereby the prejudice to the defendant as a consequence of the passage of time was matched against the reasons for that delay in order to decide whether, in all the circumstances, it was '*just*' to dismiss the claim.

54. While much of this was understandable, all of it should now be viewed as misplaced. Clearly, the courts have not been invested with a general authority to dismiss proceedings before they have come to trial simply because it is in all the circumstances '*just*' to do so, or because a court concludes that, looking at a case in the round, '*the interests of justice*' demand that an otherwise stateable claim duly instituted within the applicable limitation period, be halted. While these labels may broadly describe the reason for the *O'Domhnaill* power (indeed the latter is specifically referenced in s. 3 of

the 2000 Act), they do not identify the criteria that must be met before it can be exercised. The power to dismiss a claim *in limine* should only exist within clear and defined parameters. The power to do so where an action is not being prosecuted and the power to dismiss proceedings because the lapse of time has made it impossible to conduct a true trial on the merits, are two examples of when an action may be dismissed in this way. They can be resorted to only where certain strict criteria are met. And while they may enjoy a shared origin in the function of the courts in protecting their own processes, as they have been developed and refined with the benefit of experience, they should now be understood as quite different.

55. The power to dismiss for want of prosecution arises – by definition – only where there has been fault by the claimant, and while it usually involves some prejudice to a defendant, it does not require them to establish that they cannot obtain a fair and proper trial. The *O'Domhnaill* power, conversely, does not require fault by the plaintiff in the commencement or prosecution of the action, but as *Fingleton* suggests, it falls to be exercised where the effect of that delay is so severe that no true trial on the merits can be conducted. Nor does the *O'Domhnaill* power as properly now understood involve the court engaging in any balancing exercise. The balance is struck within the rule itself: if there has been a lengthy passage of time and if in consequence any trial would lack the basic core attributes of the administration of justice envisaged by Article 34 of the Constitution, the case must be dismissed. The inability to convene a constitutionally recognisable trial outweighs the interests of the plaintiff in bringing their action to final hearing. The court must appraise, of course, whether the defendant can obtain a true trial on the merits, but that does not involve any exercise in balancing. The decision whether the defendant can obtain such a trial may involve consideration of a range of

different factors, but there is only one question to be answered: the defendant either can, or cannot, obtain a true trial on the merits.

56. Because the consequence for the plaintiff of it not being possible to conduct a proper trial – the dismissal of their proceedings without a full hearing on the merits – is of such severity, the criteria by reference to which it is decided whether a true trial on the merits is possible must therefore be tightly defined and constrained. While, of course, the fairness of the ultimate trial process is central to answering that question, simply asking whether a given state of affairs is '*unfair*', or whether '*the interests of justice*' are better served by dismissing a claim than by allowing it to proceed to trial, invites consideration of a spectrum that runs from a potentially remediable procedural disadvantage to a complete inability to meet a claim. Thus, it is not surprising that over the 40 years since its inception, the conditions for the exercise of the *O'Domhnaill* power have been defined in diverse – and sometimes loose – ways. Some of the earlier cases – notably *O'Domhnaill* itself and *Toal No. 1* and *Toal No. 2* – resort at points to broad invocations of '*unfair burden*', or '*unjust and unfair*' or of what '*the balance of justice*' required. It is not difficult to see that such language lent itself to the exercise by some judges of what they might be forgiven for understanding was a flexible power, not least of all when it was elided with the *Primor* power. Nor is it difficult to see how it might be thought that concepts of '*unfairness*' or the '*balance of justice*' will, if unmoored from any clearly defined standard, introduce an unacceptable level of subjectivity into the question of whether a stateable case should be permitted to go to trial.

57. The later cases cite with approval somewhat stronger language of Henchy J. (albeit used in a different context) in *O'Keeffe v. Commissioners of Public Works and ors* (Unreported, Supreme Court, 24 March 1980). There, he referred to a hearing in which

there were but two witnesses to an event, one of whom was deceased and the other had no recollection of the matter 23 years after it had occurred (the locus of the accident having also changed beyond recognition) as '*a parody of justice*' because '*the defendants, through no fault of theirs had been deprived of any true opportunity of meeting the plaintiff's case*' (at p. 8). He decried a situation in which one party could not '*be effectively heard*', and the hearing '*would lack the mutuality and fairness which are necessary for the due administration of justice*' (at p. 10). In other cases, remarks (also of Henchy J.) in a case concerned with the power to dismiss proceedings for want of prosecution have been harnessed in describing the *O'Domhnaill* power. In *Sheehan v. Amond* [1982] IR 235 (at p. 239) he acknowledged with approval the language of counsel: whether the action has become so afflicted with difficulties and prejudice to the defendant '*so ... as to be beyond the reach of fair litigation*'. In *Toal No. 1* the defence of the claims in question was found by the court to be '*wholly impossible*', and the unfairness was '*clear and patent*' (at p. 139). Hardiman J. in his dissenting judgment in *J. O'C v. Director of Public Prosecutions* [2000] 3 IR 478 observed of cases in which there had been a loss of evidence caused by the passage of time and the material available to a court to adjudicate, unfairly reduced in consequence: '*[t]he more nearly a serious trial consists of mere assertion countered by bare denial, the less it resembles a forensic inquiry at all*' (at p. 504). In *Kelly v. O'Leary* [2001] 2 IR 526, Kelly J. (as he then was) required that the trial of the action it was sought to dismiss be '*far removed from the form of forensic inquiry which is envisaged in the notion of a fair trial in accordance with the law of this State*' (at p. 544). It was formulations of this kind that led Clarke J. in *Nash* to the criteria I have cited earlier – whether '*no true trial on the merits is capable of being conducted*' (at para. 2.21), and '*the lapse of time may be so great and the divergence from any semblance of a real trial on the merits so*

substantial, that … the conduct of the trial would be nothing more than that in name' (at para. 2.13). In my own judgment in *Kirwan*, I summarised the power in the light of these statements as arising where there is '*a real and substantial risk not merely that the defendant will be prejudiced, but that the trial to which it is proposed they should be subjected will not be a proper trial at all*' (at para. 6).

58. It is those formulations directed to whether it is possible for there to be any recognisable trial ('*no true trial on the merits is capable of being conducted*'), rather than a more general benchmark of '*fairness*' or of '*oppression'* or of '*the interests of justice*' or '*the balance of justice*' *per se* that should now be viewed as defining the conditions for the *O'Domhnaill* power. It is not wrong to say that the *O'Domhnaill* power requires the establishment of any of these things. But what must be understood is that it is only a particular form of '*unfairness*' that triggers that power, and only one situation in which '*the interests of justice*' will require the halting of a plaintiff's claim by reason of a lapse of time where neither the power to dismiss for want of prosecution nor the power to dismiss a claim by reason of a deliberate abuse of process of the kind I have described earlier are engaged. In circumstances in which the *O'Domhnaill* power operates without any requirement of culpability on the part of the plaintiff, anything short of a negation of the ability of the courts to hold a constitutionally acceptable trial will disproportionately penalise the plaintiff. If a defendant is permitted to arrest a stateable case duly commenced within the limitation period simply because an event has occurred that renders the trial less fair than it might otherwise have been, that will itself cause an injustice to the plaintiff. The unfairness that, on foot of this power, can justify depriving the plaintiff of their right to bring their case to trial must therefore be one that goes to the very root of the ability of the courts to administer justice at all and, as the

law has developed, it is operative only where that inability can be related to the passage of an identified and lengthy period of time. It is the passage of time that creates the environment in which the administration of justice ceases to be possible (see for example the comments of Clarke J. in *Nash* at para. 2.13).

59. In the course of their submissions to this court, the parties referred to three decisions of the Australian courts in which some consideration was given to the powers of the courts in that jurisdiction to permanently stay proceedings where their continuation would, by reason of the passage of time, be unfair. These all involved claims for damages for historic sexual assault – *Connellan v. Murphy* [2017] VSCA 116 ("*Connellan*"), *Moubarak by his tutor Coorey v. Holt* [2019] NSWCA 102, (2019) 100 NSWLR 218 ("*Moubarak*"), and *GLJ v. Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 ("*GLJ*"). Those decisions were subsequently considered in two other cases decided by the High Court of Australia in 2024 (also in the context of civil claims arising from alleged child sexual abuse) – *Willmot v. Queensland* [2024] HCA 42 ("*Willmot*") and *RC v. The Salvation Army (Western Australia) Property Trust* [2024] HCA 43 ("*RC*"). Although not referred to in the Irish cases, these decisions explain – and delimit – this power in terms that are strikingly similar to those expressed by Clarke J. in *Nash* and applied by this court in *Fingleton.*

60. In *GLJ* (at para. 3) the majority explained the need for caution in applying that power as follows:

> '*the grant of a permanent stay to prevent an abuse of process involves an ultimate decision that permitting a matter to go to trial and the rendering of a*

verdict following trial would be irreconcilable with the administration of justice through the adversarial system. That ultimate decision must be one of last resort on the basis that no other option is available. This is why only an exceptional case justifies the exercise of the power of a court to permanently stay proceedings. If a court refuses to exercise its jurisdiction to hear and decide cases in other than exceptional circumstances and as a last resort to protect the administration of justice through the operation of the adversarial system, that refusal itself will both work injustice and bring the administration of justice into disrepute.'

61. For these purposes, an '*exceptional case*' is one '*in which it is impossible for the irreducible minimum necessary for a fair trial to be satisfied*' (*Willmot* at para. 26). Key to that is whether there has been, by reason of the passage of time, '*an impoverishment of evidence*' which may justify a stay '*if such impoverishment, in the circumstances, would (not might) prevent a fair trial irrespective of the potential application of the range of principles and techniques of the common law*' (*id.* at para. 28). The rationale for the *O'Domhnaill* power demands that precisely the same limitations apply in this jurisdiction. As I explain later in this judgment, this court in *Toal No. 2* grounded the power to dismiss proceedings against a plaintiff who was not responsible for the delay in their initiation, who had commenced the action within the period permitted by the Statute and where as a result of the passage of time it was impossible to secure a proper trial, in the separation of powers and the role of the courts in the administration of justice.

62. The power thus assumes that there is a core entitlement of a defendant to due process, the denial of which takes a case beyond '*imperfect justice*' and so debilitates that defendant in their defence of a claim that the trial of the plaintiff's action is not a trial at all, but a charade in which such a one-sided version of events is acted out as to effectively amount to *ex parte* justice: the '*mere assertion countered by bare denial*' decried by Hardiman J. in *J. O'C* (at p. 504). Without limiting the concept, that irreducible minimum would clearly be absent where a long period of time has passed between the alleged wrong and the institution of proceedings, and as a result the defendant has been disadvantaged in all of the following respects: (i) the defendant cannot cross-examine the plaintiff because their counsel have neither instructions nor the means of divining them, (ii) the defendant themselves cannot give evidence, (iii) there are no other witnesses to, or evidence of, the events giving rise to the claim, *and* (iv) there is no part of the case made by the plaintiff that the defendant can meaningfully controvert. That, as it happens, was precisely the situation in *Whelan*. Conversely, in *Fingleton*, even though the defendant was not able to give instructions or evidence, it was possible for the defendant's representatives to meet much of the case against him (a great deal of which was documentary in nature), and the trial was permitted to proceed.

Powers of a trial court, and their relevance to the power of dismissal

63. The distinction between a permissible (if less than desirable) '*imperfect*' trial, and a constitutionally impermissible process in which one party has been so disadvantaged in their defence of the claim that the hearing cannot properly be called '*a trial*' at all will clearly depend on the circumstances. Central to the inquiry is the nature of the function

discharged by a civil court when it determines a case, together with the extent of the trial judge's power to ensure that the proceedings are fair. If a court may be able to achieve a just result in a particular case while taking into account deficiencies in the evidence before it, the plaintiff should be permitted to bring his action to trial.

64. Here, several principles – the '*principles and techniques of the common law*' referred to in *Willmot* (at para. 28) – assume importance. Most importantly, a judge in deciding issues of fact in a civil case is not simply pronouncing an outcome dictated by the respective weight of each side's evidence. The judge must also decide whether the material before the court affords a proper basis for making *any* decision: '*the court of trial is not under an obligation in all cases to positively find in favour of one version over another*' (*James Elliott Construction Ltd. v. Irish Asphalt Ltd.* [2011] IEHC 269 per Charleton J. at para. 20). As Collins J. explained in *RGRE Grafton Ltd. v. Bewley's Café Grafton Street Ltd. and anor* [2026] IESC 10 at para. 82:

> '*Determining whether the party bearing the burden of proof of establishing proposition A, has discharged its burden may involve more than simply considering whether, on the available evidence, it appears that A is somewhat more probable than not. The court may have to consider whether the available evidence is <u>adequate</u> to permit any reliable finding to be made that A was or was not the case.*'
>
> (emphasis in original)

65. This obligation may be implemented in various ways. Even if uncontradicted, a court may decide not to accept a party's evidence (*Betty Martin Financial Services Ltd. v. ESB DAC* [2019] IECA 327 at para. 17 (per Collins J.)). It may decide not to accept that evidence because the witness is unconvincing, or the account inherently unlikely, or where the court is otherwise not satisfied to act on it. In that regard, it is appropriate for the judge to have regard not only to the evidence the parties produce, but the process of adjudication must also take account of the evidence that could – and could not – have been adduced: '*all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted*' (*Blatch v. Archer* (1774) 1 Cowp. 63, 65, per Lord Mansfield). In making such findings, a court must have regard to the fact that the civil standard of proof may demand particular attention where allegations are grave (*Georgopolous v. Beaumont Hospital Board* [1998] 3 IR 132), that it is entitled to take into account of the fact that human memory becomes more fallible with the passage of time (see *Superwood Holdings plc v. Scully* (Unreported, Supreme Court, 4 November 1998)), and that where evidence relates to the actions of a person who is, by the time of the trial, deceased, account should be taken of that fact (see *K v. K* [2018] IEHC 615, [2019] 2 ILRM 23) (and see, generally, paras. 58-61 of the judgment in *GLJ* and para. 30 of the judgment in *Willmot*).

66. All of these considerations enable a judge, when hearing a case in which a substantial period has elapsed since the events complained of and where the defendant has been deprived by the passage of time of the benefit of evidence that may have countered the plaintiff's case, to decide that it is simply not possible based on the evidence that has been adduced by the plaintiff to find in their favour, even if the plaintiff's evidence is not contradicted. This was the point alluded to by Clarke J. in *Nash* (at para. 2.22):

'*it remains one of the most important duties of the trial judge to assess, if the issue is raised, whether any of the lapse of time issues which emerge render it appropriate to reach a determination other than on the merits in all the circumstances of the case.*'

67. In these various ways, even where a defendant establishes potentially significant prejudice as a result of the passing of time between the allegedly wrongful act and the institution of proceedings, a judge may well be able to adjudicate on the case fairly notwithstanding, but at the same time having regard to, that fact. How this unfolds in a specific case will depend on the circumstances, but where a plaintiff gives evidence of the wrongful actions of a defendant who has died over the course of the lengthy period that has elapsed since those actions are alleged to have occurred, where the case made by the plaintiff depends solely on their interaction with that deceased defendant, where there is no other admissible evidence of the alleged wrongdoing, where the defendant can accordingly call no evidence as to the question of whether or not the wrongful act occurred, and where the defendant's representatives have been prevented from conducting an effective cross-examination by reason of that passage of time, the court may have no option but to refuse to make any findings. That necessarily follows from the decision of this court in *Whelan*, the rationale of which applies, of course, not merely to a pre-trial dismissal application, but also to the conduct of a trial. That a trial court has that power was not questioned in this appeal, and indeed is beyond question (see, for example, *McNamee v. Boyce* [2017] IESC 24, [2017] 2 ILRM 168, in particular at para. 48, per Denham CJ).

68. That plaintiffs should normally be permitted to take their cases to trial even where a defendant alleges a significant prejudice as a consequence of the passage of time, reflects a principle that is ubiquitous in different parts of our procedural law. A plaintiff under our system of justice has the right to bring their claim to a full hearing, and to present their evidence in accordance with the rules of procedure governing their claim: '*there is a significant constitutional weight to be placed on the side of credible cases ... going to trial and being determined on the merits in accordance with the law and the evidence'* (*Nash* per Clarke J. at para. 2.6). Usually, a plaintiff is entitled to bring their claim to trial *unless* it can be shown that their case is vexatious and/or bound to fail to the extent that its maintenance is an abuse of the process of the court. The same principle should condition an application to dismiss proceedings because the defendant cannot, by reason of the passage of time since the alleged wrong, obtain a fair trial.

69. This takes the analysis to the following point of conclusion. The *O'Domhnaill* power should now be viewed as arising only where a defendant establishes that as a result of a substantial lapse of time since the wrong the subject of proceedings, the evidence available to them has been so diminished that no true and fair trial on the merits as envisaged by Article 34 of the Constitution is capable of being conducted. This is an exceptional power, not merely as to the extreme circumstances that would have to exist before this could be said of a plaintiff's action, but also to the extent that, generally, claims to this effect should be determined by the trial judge in the light of all of the evidence and having regard to the extensive powers enjoyed by that judge to guard against any unfairness in the trial. Therefore, such an *O'Domhnaill* application should only be acceded to on foot of pre-trial applications of the kind in issue in this appeal where the court has no doubt but that based on the evidence before it, a trial judge could

only conclude that no true trial on the merits is capable of being conducted, *and* where the court is satisfied that nothing is likely to occur between the hearing of the application and the trial that might change the answer to that question. Any lower threshold risks damaging the administration of justice by disproportionately penalising plaintiffs resulting in their cases – potentially for reasons outside their control – being terminated not because a proper trial cannot be conducted, but because of a misfortune resulting in the loss of evidence that can occur to any litigant, at any time.

Culpability

70. It is, as I have noted, firmly settled that proceedings can be dismissed consequent upon the prejudicial effect of a lengthy lapse of time following the alleged wrong, although the plaintiff was not to blame for the delay in the commencement of the action. This has been a central feature of the power since its formulation: Clarke J. put the matter in the course of his judgment in *Comcast* in terms that '*there will be some cases where the degree of unfairness to a defendant (whether because of severe impairment in the ability to mount a defence or other factors) may be so great the* [sic] *even a blameless plaintiff may have to suffer their proceedings being dismissed*' (at para. 4.3). The power, it was said by Clarke J. in *Nash*, operates '*irrespective of whether blame can be attached to any person*' (at para. 2.19). As my earlier summary of the judgment of Woulfe J. in *Fingleton* shows, it was also restated there.

71. When the scope of, and rationale for, the *O'Domhnaill* power is properly understood, this makes sense. In a balancing exercise where unfairness to a defendant if a case proceeds is matched against the injustice to a plaintiff if it does not, the culpability of

the plaintiff for the lapse of time said to have brought about that prejudice is critically relevant. Where, as here, there is no balancing exercise and the only question is whether it is possible to conduct a constitutionally compliant trial, the reason this has happened is not in focus at all. The court is giving effect to a constitutional mandate in which the community as a whole, and not just the parties to a particular suit, have an interest. An accused cannot be convicted on foot of a criminal charge if they cannot give instructions or comprehend the proceedings, and indeed even if the impairment was the result of the accused's own conduct in absconding or otherwise. Irrespective of the reason for the impairment, the conviction of a person who cannot meet the charge against them has always been viewed as an affront to justice, and any verdict of guilt produced by such a process as lacking in credibility or legitimacy. Similarly, a court cannot pronounce judgment in a civil trial if it is not possible to put in place the minimum constitutional requirements of such a trial in the first place. The reason for this in a particular case must be secondary to that constitutional value: as Murray CJ put it in *SH v. Director of Public Prosecutions* [2006] IESC 55, [2006] 3 IR 575 ("*SH*") (at para. 38), '*it is the consequences of delay rather than delay itself which has concerned the court*'. All of this is defensible because the hurdle to be surmounted by a defendant seeking to halt a trial is so high. It will most usually arise because of the death or mental incapacity of the defendant, and *Fingleton* shows that in civil litigation even incapacity of that kind will not always result in dismissal. When that is understood, there is nothing particularly surprising in a rule that disregards fault in deciding whether a fair trial can be had.

72. At para. 95 of his judgment in the Court of Appeal, Noonan J. said the following:

‘ *…it cannot be correct in principle to hold that where the wrongdoing of the defendant has resulted in a delay by the plaintiff in bringing a claim, the defendant is then entitled to rely on that delay to have the claim dismissed. It is difficult to see how such an approach could be regarded as fair or just.*’

73. While this seems, at first glance, intuitively correct, and while these comments may have some force if the wrongdoing that is said to have caused the delay can be proven in a constitutionally fair trial, it has both a surprising consequence and brings into question what has been a fundamental aspect of the power since its inception. If the Court of Appeal is right, it means that in a case such as this one – where the action of the defendant said to have prevented the plaintiff from suing earlier is the very wrong for which damages are sought – that defendant may have to suffer a fundamentally unfair and constitutionally deficient trial at which it would be unfairly decided whether they were the cause of the unfairness. It would mean that in any case in which the wrong alleged against the defendant is said to have been the cause of the passing of time before the plaintiff initiated their claim (and this might be so not merely in claims for sexual assault, but also in proceedings where it is said that the effect of the alleged tort was to prevent the plaintiff from realising that they had been wronged), the *O’Domhnaill* power could not be applied.

74. But more fundamentally, if it is wrong to deny a plaintiff a trial where the defendant was the cause of the delay in the institution of legal proceedings, then it begs the question why it is the law that the plaintiff can be denied a trial even though he was *not* the cause of the delay. Both can be described as ‘*unfair*’ and in some cases (and indeed in this case) will be just different ways of saying the same thing. If the position adopted

in the Court of Appeal were correct, it is difficult to see why it would not mean, logically, that there must also be a requirement that the plaintiff be culpably responsible for the passage of time before the *O'Domhnaill* power could be invoked by a defendant. Any other conclusion, it must similarly follow, would be neither '*just*' nor '*fair*'. This, indeed, is precisely what McCarthy J. proposed in his judgment in *Toal No. 2*. It is an account of the law that was emphatically rejected by the majority in that case. That decision, accordingly, merits careful attention. When examined closely it shows that the court, necessarily, rejected the precise argument underlying this aspect of the plaintiff's case.

Toal

75. Across *Toal No. 1* and *Toal No. 2* (as I have outlined above) the court dismissed claims commenced in 1984 against the estates of two medical consultants and two general practitioners for alleged negligence in 1961, 1971 and 1977. Included in the claims made against the defendants was the allegation that they had each wrongfully failed to advise the plaintiff's mother and/or the plaintiff that he had an undescended testicle and to recommend appropriate treatment for that condition. The plaintiff did not discover that he suffered from that condition until 1983, whereupon he took legal advice, commencing his action a year later. Thus, on the plaintiff's case, it was in part because of the very wrong alleged by him that he could not have brought his claim earlier. Had the argument advanced by the plaintiff in these proceedings been well-placed, the court in *Toal* simply could not have dismissed the action. But it did.

76. This aspect of *Toal* cannot be dispensed with on the basis that a '*point not argued is a point not decided*'. The very issue was live before the court. In fact, McCarthy J. in his dissent in *Toal No. 2* made the point urged by the Court of Appeal judgment in this case. He observed that the effect of the majority decision was to prevent the plaintiff from complaining about conduct that he said contributed to his inability to sue earlier:

> '*I find it impossible to accept that justice requires of the courts that an injured plaintiff, innocent of any responsibility for delay, and unaware of the existence of his cause of action at least in part because of the very failure of communication of which he complains in the substantive action itself, should lose his case without a trial on the merits because the doctor whom he sues is less adequately equipped to defend the case because she has lost or destroyed contemporaneous records which may or may not be relevant to the case itself.* ***In short, the very negligence alleged is, itself, a direct cause of the delay because of which, it is said, the plaintiff is to lose his case.*** *It is a variation of Joseph Heller's "Catch 22".*'
>
> (emphasis added).

77. The problem with this analysis is that while acceding to the argument that where the cause of the failure to bring proceedings earlier is alleged to be the wrong itself the proceedings should not be dismissed may avoid one '*Catch 22*', it creates another. As I have earlier observed, on this basis, a defendant who says that a trial will be unfair because of prejudice resulting from the lapse of time would be forced to undergo a fundamentally unfair and constitutionally deficient trial, at which it would be unfairly

decided whether they were the cause of the unfairness. That is entirely circular. The court has decided where that circle should be broken, it has rooted that decision in a constitutional imperative, and it is has done so by consistently proposing a power of dismissal that operates independently of fault. The excision of fault from the test for the exercise of the power is justified by the demands of the administration of justice, just as the demands of the administration of justice may result in defendants facing trials in which, as a result of the passage of time, their ability to confront a claim is significantly compromised. Finlay CJ thus explained the position in *Toal No. 2* in terms that to deprive the courts of that power would '*give to the Oireachtas a supremacy over the courts which is inconsistent with the Constitution*' (at p. 142). He continued:

> '*If the courts were to be deprived of the right to secure to a party in litigation before them justice by dismissing against him or her a claim which by reason of the delay in bringing it, whether culpable or not, would probably lead to an unjust trial and an unjust result merely by reason of the fact that the Oireachtas has provided a time limit which in the particular case has not been breached would be to accept a legislative intervention in what is one of the most fundamental rights and obligations of a court to do ultimate justice between the parties before it.*'

78. It follows that this court would have to, if not dislodge, then significantly modify the *Toal* decisions in order to accede to this part of the plaintiff's argument. Irvine J. was thus correct to reject such an argument in *Cassidy v. The Provincialate* [2015] IECA 74 at paras. 32-34, just as Phelan J. was correct to do so in this case. Indeed, the same conclusion has been reached in the Australian cases: the point was made by Bell P. in

the course of his judgment in *Moubarak* (at para. 53): '*whether or not the plaintiff fully appreciated the significance of the alleged conduct or its effect on her until relatively recent times does not appear to me logically to be capable of bearing upon whether the defendant will get a fair trial*'.

79. Some significance was attached throughout this appeal to a statement made by Finlay CJ in *Toal No. 1*. At one point in his judgment, he referenced the principle enabling the dismissal to the decision in *O'Domhnaill* saying the following (at p. 139):

> '*where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then* ***if that defendant has not himself contributed to the delay,*** *irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action.*'
>
> (emphasis added)

80. The words I have highlighted need to be understood in context. They arose from the judgment of the High Court (Keane J.) in that case who, noting the decision in *O'Domhnaill*, said the power should be exercised '*particularly when it was not alleged*' that the defendant had contributed to the delay. However, the comments to this effect in *O'Domhnaill* were addressed to the exercise of what later became the *Primor* power, the view being generally adopted in such applications at the time that a defendant who had delayed in taking steps to advance its defence of a case should not be permitted to complain of a failure of the plaintiff to prosecute it. Indeed, and perhaps curiously, the

court in *Toal No. 1* viewed the cases as '*governed by*' the decision in *O'Domhnaill,* although *O'Domhnaill* was a case in which the plaintiff *was* at fault, and in which the claim was dismissed for want of prosecution, not because no proper trial could be conducted. That statement was, thus, one directed to a process of balancing of interests. That, however, is not how the *O'Domhnaill* power is properly understood today. As I have explained, there is no '*balancing*' involved.

81. But aside from this, it is one thing to say that a defendant who has '*contributed to*' delay can be precluded from invoking the *O'Domhnaill* power when that contribution can be objectively and fairly proven such as, for example, where it can be shown that they deliberately destroyed critically relevant evidence. It is another matter entirely to say (and this is the corollary of the plaintiff's essential argument) that a constitutionally deficient trial must proceed in order to determine whether an incapacitated or deceased defendant committed a wrong many years after it is said to have occurred because it is alleged by the plaintiff that the wrong, if so established, was the cause of the lapse of time. If the *O'Domhnaill* power is properly applied, issues arising from the defendant's own destruction of evidence will not arise. The destruction of evidence by a party to a case gives rise to a presumption that the evidence is adverse to the party who destroys it (*Williamson v. Rover Cycle Company Ltd.* [1901] 2 IR 615). If it is possible to prove such destruction fairly (and of course destruction is something that could occur independently of the wrong being litigated) then it would follow that a court applying that presumption is conducting a constitutionally compliant trial. In any event, the degree of impairment required to activate the *O'Domhnaill* power will generally arise only where there has been a combination of a long lapse of time, and the death or serious incapacitation of the defendant.

82. As I have explained, it is clear from the actual outcome in *Toal* that the court was *not* saying that a defendant was precluded from seeking the dismissal of an action where the wrong alleged against them was said to have been of such a nature that, if the defendant had in fact acted as alleged, that wrong prevented the plaintiff from suing earlier. If that had been the position of the court, it could not have dismissed the claims against any of the defendants in that case. While, as I have explained, some aspects of the approach adopted in *Toal* – in particular general appeals to '*fairness*' or the notion that a claim might be dismissed based on a '*balance of justice*' – have been superseded as the case law has developed, to accede to this aspect of the plaintiff's case would have involved the overturning of a fundamental aspect of the test applied in that case, the reversal of the actual outcome of the decision, and the extraction of an aspect of the *O'Domhnaill* power that has been deeply embedded in the case law for 40 years.

83. There is one final point which, while it should not be overstated, merits observation. Attempts to draw any analogies between principles underlying civil and criminal litigation are hazardous – the critical interests engaged by a criminal prosecution obviously differ from those in play in private law civil proceedings. That said, it is not without some significance that courts exercising a criminal jurisdiction have adopted the very theory rejected by the Court of Appeal in this case. It is now firmly established that when determining whether a criminal trial should be halted on the basis of prejudice caused to an accused by reason of the absence of evidence where there has been no culpable prosecutorial delay, the contribution of the accused to the passage of time between the allegedly criminal act and the making of a complaint does not form part of the analysis. At one point in the development of this aspect of the law, in cases where

there had been a lengthy passage of time between the alleged offence and the initiation of a prosecution, an accused was entitled to have a trial prohibited in the absence of specific prejudice unless the complainant could establish that the delay was attributable to some action of the accused. Since the decision in *SH*, the only question with which the court is concerned is whether there is '*a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay*' (para. 47 per Murray CJ). In the context of civil proceedings, s. 3 of the 2000 Act proceeds on this very assumption. There, the Oireachtas has acknowledged that there may be cases in which a plaintiff has been prevented from litigating his claim by the sequalae of the alleged wrong, but in which the passage of time has nonetheless made it impossible for a proper trial to be conducted. The combined effect of the provisions of the 2000 Act is that claims may be initiated many years after the alleged acts of abuse, but they also may be dismissed by the courts on the grounds invoked by the defendants here.

The correct approach

84. I have earlier noted that the decision in *Fingleton* shows that the fact that a defendant may be so incapacitated as to be unable to give either evidence or instructions, does not mean that a civil claim arising from events many years previously cannot be fairly tried. The approach adopted by the court in that case is important in understanding the exercise in which a judge must engage where it is alleged in a pre-trial application of the kind in issue here, that proceedings should be halted because it is said that the passage of time has rendered it unfair to proceed with the action.

85. There, the defendant was the former chief executive of the Irish Nationwide Building Society. He was sued for losses sustained as a consequence of alleged mismanagement in the discharge of that function. The alleged wrongs extended back over at least two decades. By the time of the application to dismiss, the defendant was so incapacitated that he could not give either evidence or instructions. The application to dismiss the proceedings by reason of prejudicial delay was refused by the High Court, its decision being upheld by the Court of Appeal and by this court.

86. In a judgment with which all members of this court agreed, Woulfe J. accepted that not only was the fact of incapacitation not in itself sufficient to justify the dismissal of a claim *in limine*, but that the case should be permitted to proceed to trial because '*much of the evidence to be adduced in defence of these proceedings will not depend on the appellant's personal evidence and … there must be relevant witnesses other than the appellant who could give evidence in relation to the factual matters at issue*' (at para. 98). The trial judge, he said, would be in a better position to assess the extent of any possible prejudice arising from the inability of the defendant to give oral evidence himself, which would explain and supplement the documentary evidence actually adduced at the trial. Woulfe J. (at para. 101) approved the observations of the High Court judge, Hunt J. who had stated that '*monitoring this issue will be a continuing obligation of the trial judge, who will have a duty to ensure fairness with the benefit of the clarity that comes with a trial in progress*' (*id.*).

87. The point in *Fingleton* was that it was possible to conduct a recognisable trial, with the plaintiff's evidence being subject to informed cross-examination, with the defendant's representatives having available to them pools of information from which documentary

and oral evidence relevant to the allegations made by the plaintiff might be drawn, and with the trial judge being equipped to identify claims in respect of which, by reason of prejudice caused to the defendant by the passage of time, it would be fundamentally unfair to make adverse findings against him. The conclusion reflects a distinction addressed by Hardiman J. in the course of his judgment in *J. O'C*: while assertion countered by bare denial bore little resemblance to a forensic inquiry, the existence of other evidence that can be countered and challenged changes this: '*[t]he effect of documentary physical or forensic evidence, where it exists, is to provide some basis on which the part of the case which depends on mere assertion can be assessed and tested*' (at p. 504).

88. This contrasts with those sexual assault cases in which it has been found that proceedings should be halted. I have referred earlier to *Whelan,* where the action was by reason of the death of the defendant and his wife, reduced to allegations made by the plaintiff relating to events that had occurred almost two decades previously, to which the defendant was powerless to respond in any way. The Australian cases in which claims were stayed present a similar pattern. In *Connellan*, the allegations made against the 62 year old defendant related to events said to have taken place when he was 13, were in significant part vague, and were said to have comprised acts of sexual abuse occurring when the plaintiff stayed with the defendant's family for a week to ten days, all the principal witnesses who were adults at the time being deceased (the defendant denied meeting the plaintiff before the allegations were made in 2015). Thus, the case was one in which neither side was in a position to investigate or call evidence about relevant surrounding circumstances and events, in which the plaintiff's own recollection of the alleged incidents was vague, where the claim arose without

forewarning and where because of the domestic and private setting of the claims, there was neither relevant documentary evidence, nor any realistic prospect of same emerging.

89. *Moubarak* presented many of these same characteristics. There, the claimant sought damages arising from a sexual assault allegedly perpetrated by her uncle some 40 years previously. Her uncle had advanced dementia and was unable to participate in the trial or give instructions. He had never been confronted with the allegations prior to the onset of that disease; he was suffering from dementia at the time the matter was reported to the police and therefore there was no meaningful record of his response. As it was put by Bell P. in his judgment '*the defendant was, because of his mental condition, at all relevant times utterly in the dark about the allegations made against him*' (at para. 158).

90. In *Willmot*, the High Court of Australia was faced with proceedings against the State of Queensland arising from its alleged responsibility for four separate allegations of abuse made by a former '*State Child*' for whose care the State had been responsible. One set of the claims was stayed: they related to alleged physical abuse by one foster carer alleged to have occurred 40 years earlier. The alleged abuser (D) had died in 1962, and his wife had passed away in 1965. The allegations were vague, and, it was found, could never have been meaningfully contradicted. A separate allegation of sexual assault by a relative in 1967 was also stayed: the relative was presumed dead in 2020, there were no witnesses, and the State's participation in any trial would be limited to cross-examining the plaintiff about apparent inconsistencies in her statement.

91. Each of these decisions share certain features. In all of them, the defendant's likely role at any trial was going to be limited to a cross-examination of the claimants, that questioning and the presentation of the case in defence being conducted without instructions, other witnesses, or any meaningful information pertaining to the circumstances in which the claimants alleged abuse. *Fingleton* shows, in contrast, that if the plaintiff's claim can in a concrete way stand on evidence that can be questioned, contradicted or challenged by (or by reference to) witnesses or documents that are available to the defence, the fact that the defendant is unavailable to give evidence or instructions will not, in itself, justify arresting the trial - although the trial judge must exercise caution in acting only on evidence that cannot, by reason of the passage of time, be contradicted.

92. This general distinction is also evident in some of the other Australian cases in which such applications were unsuccessful: *GLJ, RC* and part of the claim in *Willmot.* While these actions were brought against institutional defendants whose liability for the alleged wrongdoing was vicarious or indirect and, to that extent, different from this case, *Connellan* or *Moubarak*, in each case the allegations extended back over decades, and the alleged abuser, together with other witnesses, was long dead. The applications to permanently stay the proceedings were nonetheless determined to be ill-founded because the defendants had either other evidence at their disposal, or because they were, having regard to the nature of the claims made in those cases, sufficiently equipped to conduct effective cross-examinations of the claimants.

This case

93. The defendants in these proceedings face a significant disadvantage in defending the action because Walter Beatty Snr. is deceased, and because the persons said to have been witnesses to what is alleged to have occurred – the plaintiff's mother and his brother John – are also dead. Had the case been one in which the testimony of these three persons and the plaintiff was the only admissible evidence of the alleged wrongdoing that could ever have been in play, in which there was no prospect of any other evidence coming to light, and in which the only information available to those tasked with cross-examining the plaintiff was what he himself alleged in the course of the proceedings, the decision in *Whelan* would bind this court to dismiss these proceedings. For the same reason, if the case were in fact to run to trial and the plaintiff were to present his case by simply giving evidence of the assault and to adduce no other admissible evidence whatsoever, it is hard to see that a trial judge would have any option but to dismiss it. The trial would, in that situation, nonetheless represent the '*mere assertion countered by bare denial*' condemned by Hardiman J. in *J. O'C* (at p. 504), resulting from the passage of a lengthy period of time and the death of the defendant and of all persons said to have been possible witnesses to the alleged assault.

94. However, the case as the plaintiff has suggested he will seek to present it, is considerably more complex. Three particular features of that case viewed in the light of the material before the court combine to render it one in which it cannot be said with the confidence required to dismiss it at this point in time, that the action will, necessarily, lack the irreducible minimum requirements of a constitutionally recognisable trial.

95. First, the defendants will in no sense be cross-examining the plaintiff in a vacuum. The plaintiff has set out in detail the precise allegations he makes. They know what their deceased father's response to those allegations was. They have a wide range of material on the basis of which they can test the plaintiff's credibility. That extends beyond (but includes) the details of the specific allegation he makes. Depending on how the plaintiff decides to present his case and any other evidence he chooses to call, questions may arise around the allegations of knowledge of the alleged event on the part of his siblings, and these may be susceptible to contradiction by direct evidence of witnesses available to the defendants. The plaintiff may be exposed to cross-examination as to his claim that he was unable to prosecute the action until 2017 but yet was able to record the details of the event in correspondence to his siblings. He may be tested on his claims that he was able to maintain a relationship of some kind with his parents (but not with the majority of his siblings) from 2009 until 2017; indeed it is clear that at least one of the siblings adopts the position that there are questions around why, precisely, the plaintiff's relationship with his parents terminated in 2017, and as to whether the making of the criminal complaint then was related to the circumstances of the termination of that relationship. I am not, to be clear, suggesting that these aspects of the events are or are not inconsistent with the inability to proceed to litigation or with the trauma he alleges. They are, however, matters that the defendants have proposed in their affidavits and submissions that they believe arise, and on which they will inevitably wish to consider whether they will cross-examine the plaintiff. The point is that this is not a case in which – to revert to the phrase used by Bell P. (at para. 158) in *Moubarak* – it could be said that the defendants were '*utterly in the dark*' about the allegations, the circumstances in which it was said the alleged abuse occurred, or the plaintiff's contentions as to the knowledge of his family of those allegations. Nor is

this a situation in which every aspect of the case the plaintiff might agitate is incapable of testing by way of cross-examination, or contradiction by evidence that might be available to the defendants at any eventual trial.

96. Second, it follows from what I have earlier said that if the plaintiff is to seek to avoid the consequence of the decision in *Whelan*, he may wish to seek to adduce evidence from third parties that independently corroborates his allegation of abuse. While noting my earlier comments about the undesirability of this court making advance determinations as to the admissibility of evidence at the trial, it is difficult to see that the plaintiff can do this by simply giving evidence himself that one or other of his siblings told him that their father had admitted the abuse. However, direct evidence by one of those siblings of such an admission might be different and (while in no sense to be understood as expressing a concluded view as to the issue of admissibility thus arising) it cannot be out-ruled that if construed by the judge as an actual admission, it might be viewed by a trial court as admissible evidence of the truth of the allegation. The material before the court suggests that one sibling – Louie – believes that an admission of some kind was made to him.

97. That is, of course, not equivalent to '*real*' documentary evidence the existence of which caused the court in *Fingleton* to refuse a dismissal application. It is, in particular, evidence the direct contradiction of which would depend on what Walter Beatty Snr. would say. This was the point well made by Phelan J. in the course of her judgment: persons who claim that admissions were made to them can only be cross-examined as to whether the admissions were made, not as to whether they were true (at para. 90). However, Phelan J. when delivering her judgment in this case did not have the benefit

of the decision of this court in *Fingleton.* The judgment of Woulfe J. in that case makes it clear that the proper inquiry in an application of this kind is not, simply, whether it can be said that there is an unfairness in the conduct of the trial arising from the passage of time. It makes it clear that the trenchant observations of Hardiman J. in *Whelan* as to the effect of the death of a defendant, and upon which Phelan J. relied in her judgment (at para. 83), cannot be treated without qualification. It makes it clear that the real question is whether the establishment of the facts, determined by an analysis of evidence that can be properly tested, is possible. That question cannot necessarily be answered in all cases by simply looking to the fact that the defendant himself cannot give evidence. The question, instead, is what other evidence there is or might be.

98. It may well turn out that in this case it is not possible to properly or fairly establish the facts. However, this court cannot at this point predict what facts can and cannot be established in evidence. A case in which the only evidence is of one person alleging an act of abuse is quite different from one in which that evidence is supplemented by evidence from another witness of an independent admission by the alleged wrongdoer of that same abuse. That witness themselves can be cross-examined and, insofar as their knowledge is presented in a context in which they say that others were privy to the same admissions, their evidence countered by those others. It is impossible to my mind to say that the process of adducing and testing that evidence is other than a trial as generally understood, albeit one in which the defendants labour under a disadvantage. But more importantly at this point, it simply cannot be said that it will not be possible for the judge to analyse properly tested evidence and reach just conclusions. It may be that the trial judge might decide that the extent of the disadvantage is such that such evidence of an admission cannot be reliably acted on.

But the evidence should be heard and tested, before any such conclusion is pre-empted in an application of the kind presently before the court.

99. This leads to a third, and critical, feature of this action. The very fact that the plaintiff's allegations were known within his family from at least 2003, and according to the plaintiff the mid-to-late 1980s, makes it particularly dangerous to out-rule at this point the prospect that other evidence will emerge that significantly changes the shape of any ultimate trial. It would be quite wrong in that highly unusual context to dismiss the plaintiff's proceedings today on the basis of an assumption that all of the plaintiff's siblings will testify on oath in any particular way. What those who have not sworn affidavits in this application are likely to actually say when under oath is unknown. Indeed, two siblings do not appear to have made any statement to the Gardaí, and the position of one of those siblings in response to the allegations does not appear to be directly recorded in the affidavits.

100. To take one example, there is information in the application to admit additional evidence suggesting that the plaintiff's father advised a number of the siblings in the presence of each other that he had confessed an incident of some kind involving the plaintiff to a priest. If others join Louie in saying that their father admitted the plaintiff's allegations, then not only would any such admissions be similarly potentially admissible as to the truth of their contents, but the defendants would also be in a position to cross-examine witnesses giving that evidence, having regard to the emphatic denial of any such '*family knowledge*' as presented by the defendants in their evidence in this application. The potential for interactions within a family over a lengthy period of time in regard to allegations in which all would have had, one presumes, an acute interest, is

such that this case is one in which no court could assess today with the confidence necessary to dismiss proceedings at this point in time, the eventual parameters of a plenary hearing of the plaintiff's complaints.

101. The strongest point in response to this is that made by Phelan J. in the course of her judgment: the issue in this case is whether the abuse alleged by the plaintiff occurred, not whether the plaintiff's siblings were aware of his claims, and the defendants are by reason of the passage of time denied the benefit of the possibility of adducing the only evidence that can address that one true issue (at para. 82). However, to conclude that in consequence the defendants will face into a hearing that is constitutionally deficient is to disregard the powers of a trial court in hearing a case of this kind. If, for example, the plaintiff gives evidence that is found to be credible of the abuse he alleges, and if one of his siblings gives credible evidence that their father made an admission in the presence of other siblings, if that evidence is found admissible as to the truth of the contents of that admission, and if those other siblings do not deny, or are found not to credibly deny such an admission, a trial judge would have to decide whether this is sufficient evidence to reach a fair and correct result in the absence of the defendant's father. The answer to that abstract question is not sufficiently clear as to justify precluding the plaintiff now from pursuing all evidence that might ultimately be available to him at a full trial.

102. There are, in addition, some collateral issues that render the defendants' position even further from the prejudice that has been identified in the other cases. In particular, the plaintiff's claim is, on its face, long out of time. If he is to bring his case within s. 48A of the Statute, he must establish the constituents of that provision (and the defendants

are, of course, entitled to ask the trial judge to determine that issue at the outset of the trial). The evidence he has adduced to date does not necessarily do this. While noting that the report of the psychiatrist upon which he relies was not, it seems, prepared for the purposes of this application, it is open to question whether a court in adjudicating on the application of s. 48A could act on the basis of the – in some places very general – assertions in this report, in particular in a context in which obvious questions arise if the plaintiff was, as alleged, unable by reason of his trauma to proceed with this litigation until 2017. Those questions extend from the fact of the 2003 letter, the apparent relationship the plaintiff had with his parents for an eight-year period commencing in 2008 or 2009, to the exact date at which he ceased to suffer from the effects of that trauma, and the precise reason the expert has concluded that it is that date (whatever it might be) that is the operative one. As I have been at pains to point out earlier, I am not saying that these matters are inconsistent with the plaintiff being in a position to proceed with litigation earlier, merely that a question will arise as to whether the evidence the plaintiff adduces adequately addresses them.

103. All of that being said, there is one further and particular aspect of the judgment of the Court of Appeal with which I disagree. On the plaintiff's case, it was open to him in 2017 to commence this action. He did not do so for five years. It is to my mind difficult to see why a plaintiff suing four decades after an alleged wrong in proceedings eventually brought against an 89 year old, would postpone issuing proceedings until five years after – as he claims is the case – he became able so to do. This is all the more difficult to explain given that one of the alleged witnesses to the event – the plaintiff's mother – was 81 years of age when the plaintiff made his complaint to the Gardaí. The criminal prosecution was never going to prevent the commencement of the action, or

necessarily, its procedural progress; it was primarily relevant to the timing of the trial of any civil case. In the meantime had the action been commenced timeously once the plaintiff became able to proceed with his claim, the defendants could have at least considered whether they wanted to have the plaintiff assessed by an appropriate expert for the purposes of determining whether to agitate the Statute of Limitations, and such an expert would have had the benefit of proximity to the point at which the plaintiff contends he ceased to suffer the effects of the trauma. They might also have considered taking evidence on commission. Whatever the likelihood of their embarking on that course when there was a criminal charge either looming or pending against their father, they were denied the opportunity to even consider it.

104. A plaintiff is generally *prima facie* entitled to await the near expiry of the statutory limitation period before proceeding to institute legal proceedings. As I have earlier observed, a plaintiff is not *culpable* simply because they do not commence proceedings until close to the end of the applicable limitation period. The Statute, by definition, gives him that general right. However, it follows from what I have said earlier in this judgment that aside entirely from the *O'Domhnaill* application that dominated this appeal, the court's power to dismiss proceedings that in their institution or maintenance constitute abusive manipulation of the court process to the prejudice of the other is apt to capture some situations in which a plaintiff decides for their own strategic reasons not to institute proceedings that they are legally capable of pursuing, relating to events occurring many years earlier. This could, in particular, arise if the reason a plaintiff decided to postpone the institution of the proceedings was to obtain an improper advantage at the expense of the defendant. That power might intrude even if the actual prejudice to the defendants as a result of the late institution of the proceedings was

limited. However, no case was made that the plaintiff deliberately withheld the proceedings in order to obtain an advantage in such a way as to constitute a manipulation of the court process, and indeed if that case had been made it is hard to see how it could have been adjudicated upon without the plaintiff being cross-examined on the question. The issue – if there is one – is at this stage for the trial. The comments in the Court of Appeal judgment should not, however, be understood as necessarily rendering irrelevant the fact that these proceedings were not commenced until 2022, when the plaintiff was (on his account) in a position to commence them in 2017.

Conclusion

105. The power of the courts to dismiss proceedings where, by reason of a lapse of time between the wrongful acts alleged to give rise to the action and the institution of the proceedings, the defendant has been prejudiced in their defence of the claim, has evolved significantly since it was first suggested over 40 years ago in *O'Domhnaill.* That evolution leads to the following conclusions as to the legal issues arising in this appeal:

(i) Where a stateable claim is brought within the relevant limitation period, the presumption must be that the plaintiff is entitled to bring their case to trial, and they will not usually be acting '*culpably*' when they institute legal proceedings near the end of the applicable limitation period.

(ii) A plaintiff who brings their proceedings within that time may find their claim dismissed if they fail to prosecute it, or if the maintenance of the

action is, in all of the circumstances, a wrongful manipulation of the processes of the court. There may be cases in which it might be such a wrongful use of the process of the court for a plaintiff to engage in a lengthy but intentional delay in bringing proceedings in order to improperly obtain a forensic advantage at the expense of the defendant.

(iii) Aside from these two situations, the only power relevant to these proceedings to dismiss *in limine* stateable proceedings that have been instituted within the applicable limitation period arises where it is established that as a result of the effluxion of a substantial period of time since the alleged wrong the subject of the proceedings the evidence available to the defendant has been so diminished that '*no true trial on the merits is capable of being conducted*'.

(iv) The power of a court to dismiss an action on this basis is an exceptional one, not merely as to the extreme circumstances that would have to exist before this could be said of a plaintiff's action, but also to the extent that, generally, claims to this effect should be determined by the trial judge in the light of all of the evidence and having regard to the extensive powers enjoyed by a judge to guard against any unfairness in the action they hear.

(v) Therefore, such an *O'Domhnaill* application should only be acceded to on foot of pre-trial motions of the kind in issue in this appeal where the court has no doubt but that based on the evidence before it, a trial judge

could only conclude that no true trial on the merits is capable of being conducted, *and* where the court is satisfied that nothing is likely to occur between the hearing of the application and the trial that might change the answer to that question.

(vi) Because the *O'Domhnaill* power exists – and intervenes only most exceptionally – to protect the integrity of the civil trial envisaged by Article 34 of the Constitution, the power operates independently of '*fault*' of either party. This follows from well-established case law. In particular, it is not the law that a defendant is precluded from seeking the dismissal of an action where the wrong alleged against them was said to have been of such a nature that, if the defendant had in fact acted as alleged, that wrong prevented the plaintiff from suing earlier. The excision of fault from the test for the exercise of the power is justified by the demands of the administration of justice, just as the demands of the administration of justice may result in defendants facing trials in which, as a result of the passage of time, their ability to confront a claim is significantly compromised.

(vii) It cannot be said at this point in time that this is, necessarily, a case in which it will not be possible to conduct a constitutionally acceptable trial. This is because of the combined effect of three considerations.

(viii) First, the defendants are aware of the detail of the claims made by the plaintiff and have been so aware for at least over 20 years. It is

inconceivable that they will not be in a position to cross-examine the plaintiff by reference to the position adopted by their father in response to the allegations when he was alive, and it is clear that there are many aspects of the plaintiff's claim (including his claim that his action is not statute-barred) that can be contested, some of which are relevant to his ability to maintain this claim, and others to his credibility.

(ix) It is, moreover and second, a case in which it is possible that the plaintiff will be able to adduce admissible evidence of admissions made by the deceased to at least one of his siblings.

(x) Third, the very fact that the plaintiff's allegations were known within his family from at least 2003, and according to the plaintiff since the mid to late 1980s, makes it particularly dangerous to out-rule at this point the prospect that other evidence will emerge that significantly changes the shape of any ultimate trial. The potential for interactions within the family over a lengthy period of time in regard to allegations of the kind in issue here is such that this case is one in which a court could not assess now with the confidence necessary to dismiss the proceedings at this point the eventual parameters of a plenary hearing of the plaintiff's claims.

(xi) In that regard it is critical that it be remembered that a trial court has extensive powers that enable it to ensure that a defendant who is disadvantaged by a significant lapse of time since the events complained

of in an action, will not suffer an unjust result. If a trial court ultimately decides taking account of those powers that it cannot justly decide this case because of the degree of prejudice facing the defendants in their defence of the claim as a result of the passage of time since the events in issue, the judge is fully entitled to dismiss the claim on that ground alone. If, at the hearing of this case it transpires that the only admissible evidence of the alleged wrongdoing is the plaintiff's own assertions as to what occurred, then by reason of the passage of time and the death of Walter Beatty Sr. and any other possible witness to the alleged events, it is hard to see that the trial judge would have any option but to dismiss the action. It is not, at this point, clear that this will be the case.

106. In summary I have, accordingly, concluded that the defendants' appeal against the judgment and order of the Court of Appeal should be dismissed. This case cannot at this point be dismissed *in limine* because it cannot be said now that it is sufficiently clear that no proper trial of the plaintiff's claim can be conducted. This in no sense outrules the prospect that the High Court could decide this claim to be statute-barred, or that on the evidence ultimately available by the time of any trial that such a trial cannot be conducted. However, in finding that the Court of Appeal correctly reversed the decision of the High Court judge in this case, I would approach the case somewhat differently than the Court of Appeal did. Phelan J. was entirely correct when she decided that dismissal of proceedings on foot of the *O'Domhnaill* power is a consequence of unfairness in the trial process resulting from delay irrespective of where the fault for the delay lies. However, Phelan J. fell into error in concluding that this was a case in which it was appropriate to dismiss these proceedings by reason of

prejudicial delay. It cannot be said at this point with the clarity required by law, that no true trial on the merits is capable of being conducted.