

THE HIGH COURT

[RECORD NO. 2018/2066 P]

BETWEEN

BRIAN MERRIMAN

PLAINTIFF

AND

**JOHN BURKE, THE MINISTER FOR EDUCATION AND SKILLS, IRELAND AND THE
ATTORNEY GENERAL**

DEFENDANTS

JUDGMENT of Ms. Justice Hyland delivered on 4 March 2020

Introduction

1. This is an application under Order 15, rule 13 of the Rules of the Superior Courts ("RSC") to direct the removal of the first defendant. It is brought in circumstances where the plaintiff claims damages for personal injury that he alleges were sustained by sexual abuse during the years 1976-1978 while a pupil at CBS Crumlin school, Dublin 12. He has issued a personal injury summons against various defendants, including John Burke (the "first defendant"), a member of the Congregation of Christian Brothers.
2. At paragraph 2 of the Amended Personal Injury Summons, it is stated that John Burke is sued in his capacity as the agreed nominated representative of the Christian Brothers, as the person in whose care CBS Crumlin School was entrusted and the person responsible at law for the supervision of all ecclesiastical and governance matters within the school, and for the acts of a teacher, namely Brother Bowyers (now deceased) who is alleged to have carried out the abuse.

Application to remove first defendant

3. Frank Buttimer Solicitors entered an appearance for the first defendant on 30th May 2018 in his personal capacity. A motion was brought on 3rd July 2019 to remove the first defendant on the basis that, as averred to by Mr. Burke in his affidavit of 21st June 2019, it is completely incorrect that he is the agreed nominated representative of the Christian Brothers. He agrees that he is a member of the European province of the Congregation of Christian Brothers but says that he never nominated himself nor agreed to be the nominated representative on behalf of the Congregation of Christian Brothers in the within proceedings. He further says that he never had any involvement in a personal capacity with CBS Crumlin school and never taught there at any time. He says he made this clear in pre-litigation correspondence with the solicitors for the plaintiff and the Personal Injuries Assessment Board. He notes that subsequent to the proceedings issuing, two additional defendants were joined, being the Congregation of Christian Brothers and Edmund Garvey, the Province Leader of the Congregation of Christian Brothers. In submissions made at the hearing of the motion on 17 February 2020, counsel for the first defendant submitted in addition that he was not a necessary party to maintain, that the plaintiff had joined the two additional defendants identified above and that it would be unjust to retain him as a defendant.
4. By way of replying affidavit of Norman Spicer, solicitor, sworn 31st October 2019 on behalf of the plaintiff, he avers that his firm made extensive inquiries in relation to the

legal nominee of the Congregation of Christian Brothers. He says that a phone call was made to the head office of the Christian Brothers, being the European Province Centre, Griffith Avenue, Marino, Dublin 9 on 11th December 2017, to ascertain the legal nominee (if any) for the purpose of issuing the within proceedings. He avers that during that phone call, Brother John Burke, the first defendant, was identified as the appropriate legal nominee and that prior to that phone call, the solicitors for the plaintiff were not aware of Mr. Burke prior to the call and only became aware of him as a result of the call.

5. There was considerable dispute on affidavit between the parties as to that phone call, with the first defendant criticising the plaintiff for not indicating the identity of the person in head office who provided his name and for failing to have any note of the conversation.
6. In my view, the factual controversies relating to that call are not material to the issue to be decided. Taking the plaintiff's case at its highest, and assuming that Mr. Burke's name was indeed provided during the call of 11th December 2017 as the agreed nominated representative of the Congregation of the Christian Brothers, it has been clear to the plaintiff since before these proceedings were instituted that the first defendant is not the agreed nominated representative of the Christian Brothers. There is clearly no agreement either by him to act, or by the Christian Brothers for him to so act.

Applicable Legal Principles

7. Order 15, rule 13 provides, inter alia:

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

8. As noted in *Raymond & ors. v. Moyles & ors.* [2017] IEHC 688, Judgment of Baker J. of 10 November 2017, the jurisdiction under Order 15, rule 13 was explained by Henchy J. giving the judgment of the Supreme Court in *Fuller v. Dublin County Council & Anor* [1976] IR 20, where the Court allowed the application of the second defendant that it be discharged from the action as its presence in the proceedings was not justifiable for the proper prosecution of the claim. In *Fuller*, an application was made by a defendant, the Minister for Local Government, for an order pursuant to O. 15, rule 13, striking him out of the proceedings on the ground that he had been improperly joined. Henchy J. observed that the answer to the question whether the Minister may properly be joined as a defendant will depend on the particular illegality alleged (page 27). In that case, it was alleged that a CPO was unlawful because the County Council, having granted a planning permission in respect of the property compulsorily acquired, were estopped or debarred from acquiring it compulsorily so the CPO as confirmed by the Minister was invalid. Henchy J. noted that the test was whether the presence of the Minister as a defendant

was justifiable by the plaintiffs as necessary for the proper prosecution of their claim. It was held that the fact that the Minister had confirmed the CPO was merely a consequence and not a cause of the illegality alleged. Irrespective of whose standpoint one considered the question from, the participation of the Minister as a party could not be said to be necessary (page 28). Accordingly, the Minister was struck out as a defendant.

9. In *Raymond*, Baker J. noted that the jurisdiction under O.15, r.13, by which a court may remove a party “improperly” joined or a party who was not a necessary party, was not one engaged in the case before her, in that the defendants seeking to be removed might not be true contracting parties but could not be said not to be necessary parties to the claim as pleaded. She observed that the provisions of O.15 were more applicable to a case where it could be readily ascertained from the proceedings from the nature of the relief claimed or the statutory or other basis of that relief that a party is not a necessary party in the true sense to the proceedings (paragraph 26).

Suing a Religious Order or its Members

10. To decide upon this application, it is necessary to consider the context in which the first defendant has been identified as a defendant. The plaintiff does not make the case that the first defendant was involved in the abuse. Rather the plaintiff seeks to join him as a way of imposing liability on the Congregation of the Christian Brothers. Although neither the Personal Injury Summons nor the Amended version of it pleads vicarious liability on the part of the Congregation or the first defendant (although same is explicitly pleaded against the Minister for Education and Ireland and the Attorney General, the second and third defendants), that is presumably the basis upon which the plaintiff seeks to impose liability. That may be seen from the description of the first defendant referred to above, being “*the person in whose care CBS Crumlin School was entrusted and the person responsible at law for the supervision of all ecclesiastical and governance matters within the school, and for the acts of ... Brother Bowyers*”. Similar (though not identical) pleas are made against the Congregation and Edmund Garvey in the Amended Summons.
11. The question as to the liability of a religious order for acts of its congregation is one that has recently been considered in some detail by the Supreme Court in *Hickey v. McGowan and Cosgrove* [2017] 2 IR 196. There, the plaintiff alleged that he been sexually abused by the second defendant, a teacher in a national school run by the Marist Order. The first defendant was the head of the Marist Order and was sued as being vicariously liable for the acts of the second defendant. It was also separately contended that he was a representative defendant. The defence of the first defendant was straightforward. It was that members of an unincorporated association, such as the Marist Order, were not vicariously liable for the acts of another member.
12. The Supreme Court found that a party running a school could be vicariously liable for a teacher who sexually assaulted a child if there was sufficient evidence that such a party was in control of the activities of such a teacher; that religious orders were unincorporated associations, lacking in legal personality and therefore not capable of suing or being sued; that the members of an order could be vicariously liable for acts of abuse that were sufficiently closely connected to the object and mission of the order; that

members of unincorporated associations who were members at the time of the tortious acts being committed by another member could be liable for such tortious acts but members who joined afterwards could not; that as the first defendant did not plead or adduce any evidence that he was not a member of the religious order at the time of occurrence of the abuse of the plaintiff, the imposition of vicarious liability on him for the acts of the second defendant was justified. However, such liability was personal to the first defendant and there was no basis to conclude that the first defendant was sued in a representative capacity.

13. Considering the question as to the first defendant's vicarious liability for the acts of the second named defendant, O'Donnell J. found as follows:

"Therefore, the plaintiff has in my view established that he was abused by the second defendant who was a member of the Marist Order and that he has pleaded that the first defendant is a member of the Marist Order and indeed a provincial and this is not denied. It has neither been pleaded nor proved by the second defendant that he was not a member during the period of the wrongdoing established in this case. That in my view is just enough to justify judgment against the first defendant, although it remains to be seen what benefit such judgment against the individual will be to the plaintiff. This might appear a narrow and somewhat technical approach, which nevertheless has decisive consequences in this case. After all, the first defendant may have been able to prove that he was not a member of the Order at the relevant time. However, he neither sought to plead, or prove, such a state of affairs. Instead he took up a position – that members of an unincorporated association were not vicariously liable for any of the acts of another member – which in the event failed as a matter of law."

14. Discussing the question as to which members of an order may potentially be vicariously liable, O'Donnell J. observes as follows:

"The paragraph goes on to assert, correctly in my view, that any current member of the association is not vicariously liable for acts of a member prior to the defendant becoming a member of the association. In my view, the members for the time being at the time the act is committed are liable rather than the members, for example at the time the proceedings are commenced" (paragraph 57).

15. Discussing the representative defendant, O'Donnell J. notes:

"Order 15, r. 9 of the Rules of the Superior Courts 1986 does permit a person to sue, or be sued, on behalf of all persons having the same interest in the cause of matter. However, Kennedy C.J. stated bluntly in Moore & Ors. v. Attorney-General and Others [1930] I.R. 471 at p. 499, that the almost identical provisions of Order XVI, r. IX of the Rules of the Supreme Court (Ir.) 1905 did not apply to an action in tort. I am not sure that that is necessarily correct in all circumstances and in particular where a claim is made for the same vicarious liability against a number of parties (something that might not have been conceived possible in 1930). In any

event I think that no sufficient attempt was made here to endorse the plenary summons with a claim that the first defendant was sued in a representative capacity, or to identify the persons alleged to be represented. The appropriate course in such a case is to write to the order or provincial threatening to sue all individual members of the order unless a defendant is nominated. If that course is not taken, then all members who can be identified can be joined as defendants. If however any judgment is obtained against those defendants, the judgments are individual and whether or not such judgments will be met by insurance, or from assets which may be held for the benefit of the order more generally, may depend upon the terms of the insurance, and indeed the terms upon which such assets are held, and perhaps the willingness and ability of the order to make funds available to satisfy any judgment against an individual”.

16. In my view, the following principles flow from the decision in *Hickey*:

- There is some doubt as to whether a plaintiff is entitled to sue one person as the nominated representative of a larger group in respect of a claim in tort, despite the wording of Order 15, rule 9.
- A religious order is not usually a company or other legal entity. It cannot be identified as a defendant to proceedings unless it is a recognised legal entity.
- If an order is not a recognised legal entity, and a plaintiff seeks to impose vicarious liability on a religious order for the acts of a member of the order, it must therefore do so by identifying the members of the order and suing them individually unless a defendant is nominated who may be sued on behalf of identified members of the order.
- Whether sued individually by naming each as defendants, or whether there is a nominated representative who can be sued on behalf of identified members, the members of the order must have been members at the time at which the wrongdoing is alleged to have been committed.

Application of *Hickey* principles to the instant case

17. The plaintiff objected to the application on the basis, *inter alia*, that any objection as to the capacity in which the first defendant was sued ought to have been taken in the defence (which has not yet been filed) and that the motion ought not to have been brought. However, Order 15, rule 14 says that any application pursuant to same can be brought at any time before trial. I do not therefore consider this objection well founded.

18. In respect of the substantive issue, the plaintiff says that the first defendant was the person identified by the head office of the Christian Brothers, that the solicitors for the first defendant have consistently refused to nominate who they say is the correct legal nominee of the Christian Brothers and that if the relief sought is granted, it will be necessary to name all members of the Congregation thus incurring unnecessary time and cost.

19. The first defendant contests the circumstances in which his name was provided by the office, says he is not the agreed representative of the Congregation and says that he never had any personal involvement in the school and never taught in it. He says that accordingly he should be removed from the proceedings.
20. Here, the first defendant has been sued in a representative capacity rather than as an individual defendant having vicarious liability for the acts of Brother Bowyers, although it is pleaded that he is responsible at law, *inter alia*, for the acts of Brother Bowyers. The Amended Personal Injuries Summons identifies him as being "*the agreed nominated representative of the Christian Brothers*". As noted above, the first defendant consistently denies he is a representative of the Christian Brothers. He has not been nominated by the Christian Brothers and cannot be described as the agreed nominated representative. The circumstances in which his name was provided to the plaintiff's solicitors, even accepting all the averments of the plaintiff in this respect and taking his case at its height, do not amount to a nomination by the Brothers. Nor has there been any attempt by the plaintiff to identify those persons whom he is alleged to represent i.e. by naming all members of the Congregation either now or at the time of the alleged abuse. Counsel for the first defendant submits there is no obligation to identify a nominated representative. That submission appears correct to me, though such a decision may have implications as to what steps a plaintiff will take in respect of the conduct of the proceedings, as discussed below.
21. In those circumstances, even if there is an entitlement to sue a person as a representative defendant on behalf of all members of the Congregation (and there is some considerable doubt about this in the case of an action based on tort given the existence of the Supreme Court decision in *Moore v Attorney General & Ors. (No. 3)* [1930] I.R 471), given (a) the lack of agreement on the part of the first defendant and the Congregation and (b) the failure to identify the members of the Congregation whom the first defendant represents, the first defendant is not a representative defendant being sued in an agreed representative capacity on behalf of other defendants. This has obvious, and undesirable, implications for the plaintiff in these proceedings.
22. The findings in *Hickey* have established that the first defendant, either individually or with other members of the Congregation, can be sued on the basis he is vicariously liable for the acts of Brother Bowyers *qua* member of the Congregation. In the affidavit grounding this motion, the first defendant accepts he is a member of the European Province of the Congregation of Christian Brothers (paragraph 4). In *Hickey*, the defendant sued as being vicariously liable was the Provincial of the order. Here, the first defendant is not alleged to have held any position of responsibility with the Congregation. In the affidavit grounding the motion, the first defendant avers at paragraph 5 that he never had any involvement in a personal capacity with CBS Crumlin school, the scene of alleged abuse, and never taught there at any time. It will be a matter for the trial judge as to how those factors impact on the liability of the first defendant. However, the plaintiff has not sued the first defendant on this basis but rather on a representative basis (save for the somewhat

oblique reference in the Amended Personal Injuries Summons to the first defendant being responsible for the acts of Brother Bowyers).

23. This situation necessitates a closer look at the purpose of O.15, r. 13. Is it to allow the Court, *inter alia*, to strike out a defendant where the description of that defendant is misconceived such that the relief sought by the plaintiff (or at least the majority of that relief) against that defendant cannot be granted? This is one reading of Fuller, where Henchy J. said that "*whether the Minister may properly be joined as a defendant will depend on the particular illegality alleged*". Or should O.15 r.13 be interpreted such that it should only be used to exclude parties whom, even if pleadings were amended, could not in the circumstances of the case, ever be necessary to enable the court to adjudicate upon the questions before it? The quote from Fuller above may provide some assistance. It refers to "*the particular illegality alleged*". Here, the "particular illegality" alleged is the sexual abuse of the plaintiff. The first defendant, being a member of the Congregation is thus capable in principle (depending of course on the facts of this case) of being found vicariously liable for the acts of another member of the Congregation. It may be of course that the first defendant may adduce evidence to show he was not a member of the Congregation at the relevant time. However, no evidence has been adduced to that effect and I cannot therefore conclude that he is not a necessary defendant on that basis. It follows that his presence is necessary to allow the court to effectually settle all the questions involved in the matter.
24. In my view, similarly to the position in *Raymond*, it can be readily ascertained from the nature of the relief claimed that the first defendant is a necessary party in the true sense to the proceedings. In those circumstances it is just that he should remain as a defendant. Accordingly, I am of the view that to allow the Court effectually and completely to adjudicate upon and settle all the questions involved in this matter, it is necessary that I refuse the application to remove the first defendant. For the sake of completeness, I should add that the plaintiff is at risk of being refused any relief as against the first defendant (assuming the plaintiff otherwise makes out a case against the first defendant) if the capacity in which he has been sued remains unchanged given my findings above that he is not the agreed nominated representative of the Christian Brothers.
25. I wish to emphasise that I am not ruling on the sufficiency of any one defendant when seeking to establish vicarious liability. The plaintiff may wish to consider, having regard to the dicta in *Hickey*, contacting the Congregation to seek consent to the identification of a nominated representative and the joinder of additional appropriate members of the Congregation should same not be forthcoming. That is entirely a matter for him.
26. Finally, I should add that, if the court ultimately hearing this case is charged with deciding whether the first defendant is vicariously liable, the question as to whether he was a member of the Brothers at the time of the alleged abuse will require to be decided by the trial judge. The comments of O'Donnell J. at paragraph 69 of *Hickey*, albeit in the context

of the application of s. 35(1)(ii) of the Civil Liability Act, may be of relevance in this respect:

"It follows from all the foregoing that in theory all members of the Marist Order, at least those who are members at the time of the alleged abuse, are vicariously liable, but only the first defendant has been sued. There was some discussion therefore as to whether s.35(1)(i) (of the Civil Liability Act) applied in this context as well. I do not necessarily accept that it would be appropriate to permit a party such as the first defendant in this case to rely on the failure of the plaintiff to sue other members of a religious order when knowledge as to the identity of such members was something much more clearly within the power and control of the first defendant rather than the plaintiff".

27. Accordingly, for the reasons set out in this judgment, I refuse the relief sought in the Notice of Motion.