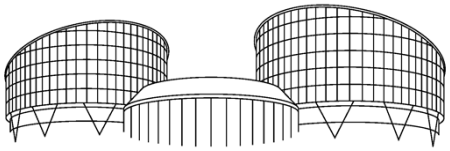

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KEANEY v. IRELAND

(Application no. 72060/17)

JUDGMENT

Art 6 § 1 • Reasonable time • Excessive length of civil proceedings Art 13 and Art 6 § 1 • Effective remedy in respect of Length of proceedings cases • Effectiveness of compensatory action for breach of constitutional right to timely trial still needing clarification in practice

STRASBOURG

30 April 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Keaney v. Ireland,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Gabriele Kucsko-Stadlmayer, *President,*
Síofra O'Leary,
André Potocki,
Yonko Grozev,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 17 March 2020,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 72060/17) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mr Vincent Keaney ("the applicant"), on 2 October 2017.

2. The applicant was represented by P. O'Sullivan of Paul O'Sullivan & Co. Solicitors, a lawyer practising in Dublin. The Irish Government ("the Government") were represented by their Agent, Mr P. White of the Department of Foreign Affairs and Trade.

3. The applicant complained, in particular, under Article 6 § 1 of the Convention that the delay of eleven years between the institution of his civil proceedings and delivery of the final judgment in the proceedings was incompatible with the "reasonable time" requirement of that Article.

4. The remainder of the application was declared inadmissible by a single judge pursuant to Rule 54 § 3 of the Rules of Court.

5. On 28 August 2018 the application was communicated to the Government in conjunction with three other applications raising similar complaints in relation to delay in civil and criminal proceedings. A specific question was addressed to the latter regarding Article 13 of the Convention and whether the applicants had had at their disposal an effective domestic remedy for their complaints under Article 6 § 1.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1955 and lives in Cobh, County Cork.

A. Background

7. In 1996, the applicant, having won money in the national lottery, purchased the Scotts Building ("the premises") in Cobh. The building had previously served as the Cunard White Star terminal when, on 11 April 1912, the newly built Titanic had called to the port of Cobh (then called Queenstown) on her maiden voyage, in order to allow 123 passengers to embark.

8. The applicant's intention was to operate the premises as a theme bar to be known as The Titanic Bar and Restaurant ("the business"). To that end, the applicant purchased an intoxicating liquor licence and expended a considerable sum of money renovating the premises.

9. Due to unexpected structural defects in the premises, the applicant ran out of money before the project was completed. As a result, he borrowed money from a bank to complete the renovation; however, the sum borrowed proved insufficient.

10. The applicant approached J.S., a financial and management consultant, for professional advice regarding the completion of the project, including the identification and evaluation of potential investors. J.S. introduced the applicant to M.N., the owner and manager of a public house, with whom J.S. had a previous business relationship.

11. Around that time, the applicant identified another viable investor who ultimately withdrew his interest.

12. Following the withdrawal of the other investor, the applicant and M.N. entered into an agreement together with a series of subsequent transactions pursuant thereto. They included a deed of assignment of 20 October 2000 by the applicant to himself and M.N. as tenants in common in equal shares of the premises. The Titanic Queenstown Trading Company Limited ("TQTC") was incorporated on 11 August 2000 with the applicant taking a 49% share, and M.N. taking a 51% share, in the company. A lease of the premises was then granted to TQTC, and the intoxicating liquor licence was transferred thereto. It was agreed that business would be operated and run by TQTC.

13. Relations between the applicant and M.N. and J.S. deteriorated. The TQTC, which traded until December 2002, was not viable. In July 2003, the applicant and M.N. entered into "heads of agreement legally binding" and, pursuant thereto, entered into a further series of agreements, deeds and share transfers with the purpose of separating the business and property interests of the applicant and M.N.

14. The re-leasing arrangement failed and M.N. took possession of the premises.

II. THE DOMESTIC PROCEEDINGS

A. The High Court

15. With the benefit of legal representation, the applicant commenced High Court proceedings by plenary summons dated 8 February 2006. He made various claims, including deceit, fraud, misrepresentation or undue influence, against eighteen named defendants arising out of the business transactions between the years 2000-2003, referred to above. In his proceedings, the applicant sought to set aside all transactions entered into between himself and several parties during that time-period.

16. On 3 April 2006, on the application of the fourth, seventeenth and eighteenth named defendants, the proceedings were admitted to the Commercial List of the High Court (see paragraph 52 below). On the same date, an order was made requiring the applicant to deliver a statement of claim on or before 13 April 2006. On 24 April 2006, at a hearing for directions in the High Court, and following an application by a number of the defendants regarding the form of the statement of claim, that court (Kelly J.) further ordered that the applicant deliver a "properly drafted, in the proper form and properly particularised" amended statement of claim by 8 May 2006.

17. The applicant delivered an amended statement of claim as directed. A number of defendants then brought motions before the High Court seeking orders striking out all or part of the applicant's pleadings and/or proceedings against certain defendants. Those motions, which were set down for hearing on 25 July 2006, primarily arose from the poorly particularised nature of the applicant's claim. On 24 July 2006, the applicant, without leave of the High Court, purported to deliver a further amended statement of claim and, at the hearing of the motions on the following day, it was accepted that the High Court should take into account the further proposed amendments contained in that statement of claim. The hearing of the motions continued over the following three days.

18. On 16 January 2007, the High Court (Finlay Geoghegan J.) delivered judgment striking out all claims against the third, eight, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth named defendants and limiting the claims against the first, fourth and eighteenth named defendants (see *Keaney v. Sullivan & Ors* [2007] IEHC 8) ("the first High Court judgment"). An order, which was perfected on 26 January 2007, required the applicant to deliver an amended statement of claim in relation to the surviving causes of action. No relief was sought by the fifth, sixth and seventh defendants at the time of the aforementioned motions; however, on 26 March 2007, the High Court (Kelly J.) made an order striking out all claims against the fifth, sixth and seventh defendants. By early 2007, therefore, the claims against fourteen of the eighteen

defendants against whom the applicant had instituted proceedings a year earlier had been struck out.

19. On 15 February 2007, the applicant delivered a further amended statement of claim in purported compliance with the order of the High Court of 26 January 2007. A further motion was heard in relation to a claim that the purported amended statement of claim was not in compliance with the order of 26 January 2007 and the High Court duly determined, by order of 26 February 2007, that the amended statement of claim delivered did not make sense and did not comply with the order at issue. The High Court indicated that it was prepared to afford the applicant one final opportunity to deliver an amended statement of claim in a proper, appropriate and acceptable form.

20. Two further amended statements of claim were delivered. On 11 June 2007, an application was made on behalf of the first named defendant to strike out the remaining claims for failure to comply with the order of 26 January 2007. The High Court made an order that the applicant "do have leave to amend for the eighth time the statement of claim herein".

21. On 18 June 2007, a further motion came before the High Court claiming that the applicant had failed and refused to comply with the order of 26 January 2007 and having read the re-amended statement of claim, the High Court deemed it to be the final one.

22. On 18 April 2008, a motion was brought on behalf of the fourth and eighteenth named defendants seeking to strike out the applicant's statement of claim for failure to comply with the order of 26 January 2007. The High Court duly ordered the applicant to deliver an amended statement of claim, precisely in accordance with the order of the High Court, pleading the surviving causes of action and no further additional matters.

23. On 2 May 2008, the applicant delivered a further statement of claim in purported compliance with the order of 18 April 2008. A motion returnable for 20 June 2008 was brought claiming that the statement of claim delivered on 2 May 2008 was not in compliance with the order of the High Court of 18 April 2008.

24. On 26 June 2008, the High Court made an order directing that portions of the statement of claim be excised so as to ensure compliance with the order of the High Court made on 26 February 2007 and a statement of claim in compliance with that order was delivered on 1 July 2008.

25. The claims set out in the final statement of claim delivered on 1 July 2008 were determined by the High Court (Feeney J.) on 19 December 2008 (see *Keaney v. Sullivan & Ors* [2008] IEHC 372) ("the second High Court judgment"). At the hearing, the applicant did not proceed against the second named defendant. The High Court determined that he had failed in all of his claims and his proceedings were dismissed. The High Court judge noted that aspects of the applicant's case, taken together with the manner in which

he and his advisers sought to circumvent a previous High Court order, bordered on an abuse of process.

B. The Supreme Court

26. Between February 2007 and February 2009, the applicant issued notices of appeal against various defendants with the intention of appealing the first High Court judgment of 16 January 2007, together with the order perfected on 26 January 2007, the Order of Kelly J. dated 26 March 2007, and the second High Court judgment of 19 December 2008 to the Supreme Court.

27. In respect of the first High Court judgment, the respondents brought a motion to dismiss the appeal in light of the applicant's failure to lodge the requisite appeal documentation. No information is provided in the case file regarding the date of this motion.

28. On 14 February 2014, the Supreme Court directed the applicant to file books of appeal within four weeks and books of appeal were so filed on 14 March 2014. At a directions hearing on 13 March 2015, the respondents stated the books of appeal filed by the applicant on 14 March 2014 were incomplete. The Supreme Court issued a peremptory order, fixing a hearing date and limiting time for bringing a motion to adduce additional evidence by the applicant

29. The applicant filed the requisite documentation on 19 March 2015. On 21 April 2015, the Supreme Court directed the applicant to file legal submissions within three weeks. The applicant filed his submissions on 4 June 2015.

30. The hearing for the appeal of the first High Court judgment and the order perfected on 26 January 2007 took place on 24 June 2015 and judgment was delivered on 23 July 2015 (see *Keaney v. Sullivan & Ors* [2015] IESC 75). The Supreme Court held the applicant's appeal was misconceived and upheld the judgment of the High Court to strike out aspects of the applicant's claim. When coming to this conclusion that court noted that "the use of written submissions by the Appellant to make [...] unsubstantiated allegations against other parties to the proceedings is in my view nothing short of an abuse of process and is something to be strongly deprecated".

31. In respect of the second High Court judgment, the respondents also brought a motion to dismiss in view of the applicant's failure to lodge the requisite appeal documentation. Once again, there is no indication in the case file regarding the date of this motion. On 29 September 2014, the Supreme Court directed that books of appeal must be filed within four weeks or the appeal would be dismissed. The books of appeal were then filed. On 4 March 2016, the Supreme Court directed the applicant to file legal submissions within six weeks, in respect of one of the appeals, and

eight weeks in respect of the others; however, the applicant did not file the requisite documentation until 7 and 21 February 2017, respectively.

32. The Supreme Court heard the appeal on 28 February 2017 and delivered its judgment on 5 April 2017 finding that there was no basis for overturning the decision of the High Court (see *Keaney v. Sullivan & Ors* [2017] IESC 23). A third appeal against the removal of the liquidating companies was not pursued given the judgments in the first two appeals.

III. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional right to a trial with reasonable expedition

33. Article 40.3 of Bunreacht na hÉireann ("the Constitution") provides:

> "1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."
>
> "2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

34. The Constitution does not contain an express right to a speedy trial; however, for many years the Irish Courts have interpreted Articles 38.1 and 40.3.1 to encompass such a right in criminal cases (see, among others, *State (Healy) v. Donoghue* [1976] 1 IR 325 and *State (O'Connell) v. Fawsitt* [1986] IR 362). That constitutional right to a trial with due expedition is separate from, and in addition to, the right to a fair trial (see *BF v. DPP* [2001] 1 IR 656).

35. The right to a speedy trial in civil cases derives from the constitutional right to fair procedures contained in Article 40.3 (see *O'Domhnaill v. Merrick* [1984] IR 151, *Toal v. Duignan & Ors (No.1)* [1991] ILRM 135; *Toal v. Duignan & Ors (No.2)* [1991] ILRM 140). In *KM v. Minister for Justice* [2007] IEHC 234 the High Court affirmed:

> "... that the entitlement to a prompt decision is an aspect of constitutional justice. Moreover, quite aside from constitutional justice it is clear from the authorities that the idea of substantive fairness includes a duty not to delay in the making of a decision to the prejudice of fundamental rights."

36. In *Nash v. DPP* [2015] IESC 32 the Supreme Court (Clarke J.) observed:

> "Much of the jurisprudence in respect of lapse of time both in relation to criminal trials and civil proceedings focuses on the risk to a fair trial. I do not at all disagree with the proposition that fundamental constitutional concepts of fairness in the legal process are, quite properly, at the heart of this jurisprudence. At least since *State (Healy) v. Donoghue* [1976] I.R. 325, it has been recognised that the guarantee provided by the Constitution of a criminal trial in due course of law brings with it an obligation that the trial is conducted not only in accordance with the technical requirements of the criminal law for the time being in force but also in accordance with fundamental principles of fairness. It also seems to me that like considerations

apply in respect of civil proceedings even though the precise requirements which the Constitution may demand may not necessarily be the same in the context of such cases.

... it must be acknowledged that persons who may be the subject of adverse findings as a result of a court process (criminal convictions or adverse orders in civil claims) have a general constitutional entitlement (similar to the rights established under the European Convention on Human Rights) to have those rights, obligations or liabilities (including criminal liabilities) determined in a timely fashion (see further, *I.I. v. J.J.* [2012] IEHC 327). That is an entitlement which is, in my view, independent of the entitlement to a fair trial."

B. Right to damages for breach of constitutional rights

37. It is well-established in Irish law that a person whose constitutional rights have been infringed can, in principle, sue for breach of those rights and obtain damages (see *Meskell v. Córas Iompair Éireann* [1973] IR 121, *Kearney v Minister for Justice* [1986] IR 116, *Kennedy v. Ireland* [1987] IR 587, *Hanrahan v. Merck, Sharpe & Dohme Ltd* [1988] ILRM 629, and *Grant v. Roche Products Ltd* [2008] 4 IR 679).

38. In *Simpson v. Governor of Mountjoy Prison & Ors* [2019] IESC 81, the Supreme Court recently reiterated that if the general law provides an adequate cause of action to vindicate a constitutional right, an injured party cannot ask a court to devise a different and new cause of action. However, absent any other legal remedy, the question of damages or remedy must be resolved within the words of the Constitution itself (see *Simpson v. Governor of Mountjoy Prison*, cited above, paragraphs 121-123).

39. In cases concerning prosecutorial delay, the Irish Superior Courts have discussed the availability of a claim for damages for breach of the right to a trial with reasonable expedition (see *McFarlane v. DPP* [2008] 4 IR 117, *GC v. DPP* [2012] IEHC 430, and *Nash v. DPP* [2017] IR 320). Although the present case concerns civil and not criminal proceedings, those decisions are explained below to the extent that a general constitutional right to damages for undue delay was discussed.

40. In *McFarlane v. DPP* (cited above), the Supreme Court noted that an order of prohibition of a trial may not be the only constitutional remedy available in circumstances of prosecutorial delay; a claim for damages may also be available. Fennelly J. stated:

"... (in the present case), no claim for damages had been made. Nor, so far as I am aware, has any such claim ever been made in such a case. In every such case, the accused person, in practice, seeks the remedy of prohibition of his trial. It is clearly not possible for this court, having an appellate function only, to pronounce in the abstract on whether damages would be available as a remedy, if they were claimed. Any such claim would have to be made in the High Court in the first instance."

41. In the same case, Kearns J. in holding that prohibition of trial due to delay is a remedy which, in the absence of actual prejudice, should only be granted where a serious breach of either the applicant's rights under Article 38.1 of the Constitution or Article 6 § 1 of the Convention is established, went on to say:

> "(a distinction may) require to be drawn between breaches of the right which give rise to an entitlement to obtain prohibition and lesser transgressions which may conceivably give rise to some other remedy, such as one in damages. However, any entitlement to a remedy in damages for breach of a constitutional right to an expeditious trial is a matter that will require very full and careful consideration in an appropriate case. This is not such a case."

42. In *GC v. DPP* (cited above), Hogan J. in the High Court reviewed the relevant case law in the area and pointed out that, in the vast majority of cases, the focus of the claimant had been to seek to prohibit a criminal trial and, for that reason, it may well have been the case that few were anxious to focus on a claim for damages due to a breach of a right to timely trial. He added, however, that he saw no reason at all why the court should not be able to make an award of damages in appropriate cases as a remedy for such a breach.

43. *Nash v. DPP* (cited above) concerned proceedings brought by the applicant seeking both to prohibit a criminal trial then pending and to claim constitutional damages for delay in those proceedings. In its judgment on damages delivered on 24 October 2016, the Supreme Court stated:

> "...it is clear that, in an appropriate case, damages for breach of constitutional rights by the State can be awarded (see for example, *Kearney v. Minister for Justice* [1986] I.R. 116 *and Kennedy v. Ireland* [1987] I.R. 587). That position has, therefore, long since been clarified by this Court. It is again clear that the Constitution recognises the right to a timely trial and that this also has long since been recognised by the courts."

44. The Supreme Court noted in *Nash v. DPP* (cited above), however, that the precise parameters of the circumstances in which it may be appropriate to award such damages required very careful consideration in the light of a proper analysis of all material facts connected with the litigation in question. Clarke J. stated that the question of whether damages for breach of the constitutional right to a timely trial should be awarded is not a matter which can be considered in a vacuum, but is highly dependent on all the circumstances of the case. In the criminal context, the Supreme Court noted that such consideration might encompass analysis of the reasons for the lapse of time between the beginning of the criminal process and the trial of the accused. It suggested that it would be necessary to have evidence to demonstrate a sufficient level of culpability on the part of the State or persons or entities for whom the State might be regarded as answerable.

45. Aside from questions over culpability for delay, the Supreme Court added there may well be a range of further considerations which may be appropriate for the court to take into account. Clarke J. stated that it may be necessary to have regard to a range of rights, including the right of the community in respect of the prosecution of criminal offences but also, importantly, the rights of victims of crime or those who assert that they are victims. Additionally, the Supreme Court suggested it may also be necessary to consider in detail the precise level of delay which might legitimately give rise to a claim in damages and the extent to which it might be necessary to establish significant consequences of the delay for the accused in question in order that damages would be considered to be a necessary remedy. It stated:

> "While the parameters will require to be worked out on a case by case basis it may well be that the circumstances in which damages can actually be recovered may turn out to be relatively rare although it is impossible at this stage to give any true assessment on that question."

46. In circumstances where it had determined on the facts of the case that there had been no culpable delay on the part of the State, the Supreme Court stated:

> "... I have come to the conclusion that, at least at the level of general principle, it is clear that damages may be available for the breach of a right to a timely trial under either the 2003 Act or the Constitution. However, I have sought to explore at least some of the complex issues which will need to be resolved in order that the precise parameters of any such claims may be defined. Many, if not most, of those issues will be at least in part specific to the facts of the case in question. It would not, in those circumstances, be appropriate to attempt to define those parameters with any precision outside the context of the facts of a particular case."

C. European Convention on Human Rights Act 2003

47. Section 2(1) of the European Convention on Human Rights Act 2003 ("the ECHR Act") provides that, in interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

48. While, section 3(2) of the Act of 2003 provides that a person who suffers loss or damage as a result of a failure by an organ of the State to perform its functions in a manner compatible with the Convention may, if no other remedy in damages is available, obtain damages from a court of competent jurisdiction, a "court" is specifically excluded from the definition of "organ of the State".

49. Emphasising that damages for breach of rights guaranteed by the Convention can only be awarded under the Act of 2003 where no other remedy in damages is available, the Supreme Court, in *Nash v. DPP* (cited above) stated:

> "... as damages for breach of rights guaranteed by the ECHR can only be awarded under the 2003 Act where no other remedy in damages is available, it is necessary to ascertain if damages under the Constitution may be awarded before going on to consider a claim in damages under the 2003 Act [...] it may well be important to determine whether, and if so to what extent, damages can be awarded for breach of rights guaranteed by the Irish Constitution in particular circumstances even though the relevant claimant might also potentially have a claim to damages for breach of the ECHR."

50. In *Nash*, the Supreme Court was examining the question of prosecutorial delay and did not address the exclusion of "court" from the definition of "organ of the State".

51. This interpretation of section 3 of the ECHR Act was reiterated recently in *Simpson v. Governor of Mountjoy Prison & Ors*, cited above, albeit that case did not concern the specific question of damages for undue delay:

> "... since the coming into force of the [ECHR Act] it is possible to claim damages for breach by the State of its obligation under section 3 to perform its function in a manner compatible with the State's obligations under the Convention provisions (subject to any statutory provision or rule of law) if no other remedy in damages is available."

D. Rules of the Superior Courts

52. Order 19, rules 27 and 28 of the Rules of the Superior Courts 1986 provide for pleadings to be struck out or amended as follows:

> "27. The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client.
>
> 28. The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

Order 63A of the Rules of the Superior Courts 1986 provides for the hearing of certain high-value cases in the Commercial List of the High Court. Cases accepted into the Commercial List of the High Court are subject to a fast-track procedure.

53. Order 122, rule 11 of the Rules of the Superior Courts 1986 provides for the dismissal of cases for want of prosecution as follows:

> "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule."

E. Inherent jurisdiction of the Courts

54. The Courts have an inherent jurisdiction to control their own procedures. In *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140, Finlay C.J. stated that the Court has an inherent jurisdiction in the interests of justice to dismiss a claim where the length of time which has elapsed between the events out of which it arises, and the time when it comes on for hearing, is, in all the circumstances, so great that it would be unjust to call on the defendant to defend himself against the claim made (see also *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, *Primor plc v. Stokes Kennedy Crowlev* [1996] 2 IR 459, *McBrearty v. North Western Health Board & Ors* [2010] IESC 27).

F. Establishment and enlargement of the Court of Appeal

55. In order to address a backlog which had developed at Supreme Court level, a 2009 working group report had proposed the creation of a Court of Appeal as the best option. The working group had also given consideration to simply increasing the number of judges on the Supreme Court, but had concluded that the idea was inherently problematic. It was felt that the creation of additional judicial formations in the Supreme Court could lead to judicial inconsistency and would also obscure the true role of a court of last resort. The Government of the day accepted the report, which necessitated the organisation of a referendum to amend the Constitution, and subsequently the enactment of legislation establishing the new court. It was the first such reform in the history of the Irish State and took time to complete. The Court of Appeal Act 2014 was signed into law on 20 July 2014. It provided for a new Court of Appeal comprising a President and up to nine ordinary judges. The Court of Appeal was thereafter established on 28 October 2014. Section 1A of the Courts (Establishment and Constitution) Act 1961 was further amended in 2019 to provide for the enlargement of the Court of Appeal to fifteen ordinary judges. In November 2019, seven judges

were appointed to the Court of Appeal to fill vacancies then arising and bringing the composition of that court to its full capacity.

G. General Scheme of the European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill 2018

56. In May 2013 the Expert Group on Article 13 of the European Convention on Human Rights, which had been established following the judgment of the Court in *McFarlane v. Ireland*, reviewed the scope, operation and appropriateness of the remedies currently available in Irish law and under the provisions of the ECHR Act to deal with unreasonable delay.

57. On 3 October 2018, the Minister for Justice and Equality referred the draft General Scheme of the European Convention on Human Rights (Compensation for delays in Court Proceedings) Bill to the Oireachtas (Irish Parliament) Joint Committee on Justice and Equality ('the Oireachtas Committee') for pre-legislative scrutiny ("PLS").

58. The Oireachtas Committee heard evidence from witnesses and stake-holders in public session on 16 January 2019 and published its PLS report on 11 June 2019. The Oireachtas Committee recognised the very serious problem of delays within the Irish courts system and welcomed any attempt to provide parties to proceedings with an adequate remedy in the event of unreasonable delays (see *Joint Committee on Justice and Equality Report on pre-legislative scrutiny of the General Scheme of the European Convention on Human Rights (compensation for delays in court proceedings) Bill (May 2019)* page 18).

59. The Oireachtas Committee remained to be persuaded that the non-courts-based model set out in the draft General Scheme was the most efficient means of providing such a remedy. It found it questionable whether delay claims can be fairly and properly adjudicated upon through an informal process in which an assessor considers reports and court files and where there is no provision for the giving of oral evidence or making of legal submissions. The Oireachtas Committee found the absence of cost implications for a failed application for compensation may have the unintended consequence of encouraging litigants to bring claims all too readily, thus causing the assessor model itself to become overburdened and beset by delays. The Oireachtas Committee recommended that the Government give further consideration to whether it may be preferable to instead provide for a statutory, courts-based model along the lines of s.3 of the ECHR Act.

IV. EXECUTION OF JUDGMENT IN *MCFARLANE v. IRELAND*

A. Judgment in *McFarlane v. Ireland*

60. In *McFarlane v. Ireland* ([GC], no. 31333/06, 10 September 2010), which concerned a criminal prosecution which lasted for ten years and six months from the time the applicant was charged to the completion of the criminal proceedings, this Court held that the overall length of the criminal proceedings against the applicant was excessive and failed to meet the "reasonable time" requirement of Article 6 § 1 of the Convention (see §§ 140-156).

61. In response to the applicant's complaint that he did not have an available domestic remedy for the breach of his right under Article 6 § 1 of the Convention, the Government submitted an expert opinion addressing the remedy of damages for breach of the constitutional right to a trial with reasonable expedition. The Court observed:

> "It is undisputed that no accused has ever requested damages for a breach of the constitutional right to reasonable expedition in criminal proceedings, either in a separate action or as alternative relief to a prohibition order. The proposed remedy has therefore been available in theory for almost 25 years but has never been invoked and recent judicial dicta (paragraphs 38, 41 and 62 above) would indicate that the availability of this remedy remains an open question." (§ 117)

62. The Court continued:

> "The Court recognises the importance, underlined by the Government, of allowing remedies to develop in a constitutional system and, more importantly, in the particular situation of Ireland namely, a common law system with a written Constitution (*D. v. Ireland,* [no. 26499/02, 27 June 2006]). However, having regard to the principles outlined at paragraphs 111-114 above and in the absence of a specifically introduced remedy for delay, it remains the case that the development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case law (*Šoć v. Croatia*, no. 47863/99, 9 May 2003; and *Apostol v. Georgia*, cited above, § 38), even in the context of a common law inspired system with a written constitution providing an implicit right to trial within a reasonable period of time (*Paroutis v. Cyprus*, no. 20435/02, § 27, 19 January 2006)." (§ 120)

63. The Court, in finding a violation of Article 13, in conjunction with Article 6 § 1 of the Convention, thus concluded that the Government had not demonstrated that the remedies proposed constituted effective remedies available to the applicant in theory and in practice at the relevant time (§§ 128-129).

B. Supervision of the execution of the Court's judgment in *McFarlane v. Ireland*

64. The implementation of the judgment in *McFarlane*, together with four other cases, fell under the enhanced supervision procedure of the Committee of Ministers of the Council of Europe ("the Committee of Ministers"). At its 1288th meeting of 6-7 June 2017, the Committee of Ministers noted with interest the work undertaken by Ireland, including the report and recommendations of the Expert Group (see paragraph 56 above).

65. The Committee of Ministers also noted the Irish Supreme Court's judgment of 24 October 2016 in *Nash v. DPP* (see paragraphs 43-46 above) where it confirmed that, in principle, damages may be awarded for excessive length of proceedings. The Committee of Ministers considered this judgment alone did not demonstrate the existence of an effective remedy for the purposes of Article 13 of the Convention. At that meeting, the Committee of Ministers made the following decision:

"*As regards general measures*

2. as concerns the violation of Article 6 § 1, recalled that the Committee closed its supervision of the issue of excessive length of proceedings in the Doran group of cases (see Final Resolution CM/ResDH(2011)224); noted with interest the additional general measures taken to improve further the efficiency of criminal and civil proceedings;

3. as concerns the violation of Article 13, noted with interest the work undertaken by the authorities so far, including the report and recommendations of the Expert Group established in 2011 in response to the judgments of the Court in the *McFarlane* group, to explore various alternatives for putting in place an effective remedy for excessive length of proceedings;

4. noted also the Supreme Court's judgment of 24 October 2016 in the case of *Nash v. DPP* where it held that, in principle, damages may be awarded for excessive length of proceedings, but considered that this judgment alone does not demonstrate the existence of an effective remedy for the purposes of Article 13 of the Convention;

5. regretted that the authorities have not yet established such an effective remedy, even though the oldest judgment in this group of cases has been pending before the Committee for more than six years;

6. strongly encouraged the authorities to take all necessary measures to finalise rapidly the adoption of an effective remedy for excessive length of proceedings in line with Convention principles as established in the Court's case law;

7. in light of the above and to avoid any further delay, decided to transfer this group of cases from the standard to the enhanced supervision procedure;

8. invited the authorities to submit an updated action plan with all developments and an estimated timetable for the establishment of an effective remedy by 1 December 2017." (see CM/Del/Dec(2017)1288/H46-40)

66. At its 1324th meeting on 18-20 September 2018, the Committee of Ministers, as regards general measures:

> "2. noted with regret that the national authorities have not yet established an effective remedy for excessive length of proceedings in civil and criminal cases in line with the Convention principles as laid down in the Court's case-law, despite the fact that the oldest case in this group has been pending before the Committee for over seven years;
>
> 3. noted with interest that the Irish authorities have, after consultations with key domestic stakeholders, decided to introduce a non-court based remedy for excessive length of both civil and criminal proceedings; regretted however that the authorities have not yet submitted sufficiently detailed information to enable a comprehensive assessment of the proposed remedy;
>
> 4. strongly encouraged the authorities to act expeditiously to establish the proposed remedy in line with Convention principles as laid down in the Court's case law and to submit, by 1 December 2018, an updated action plan containing detailed information on the key features of the proposed remedy as well as a timeline for its establishment." (see CM/Del/Dec(2018)1324/10)

67. In its most recent action plan submitted on 30 November 2018, the Government explained that the 2018 Bill would be published in the summer of 2019 and that it hoped that it would be enacted by the end of 2019.

68. In a communication dated 28 June 2019, the Government indicated that the conclusions and recommendations of the Joint Oireachtas Committee on Justice and Equality (see paragraphs 57 to 59 above) must be considered by the Government before the legislation can be taken forward. It indicated that a new Action Plan will be furnished as soon as possible.

69. At its 1362nd meeting on 3-5 December 2019, the Committee of Ministers, as regards general measures:

> "3. expressed their profound concern that the authorities have not yet established an effective remedy for excessive length of proceedings in line with the Court's case-law, despite the fact that the oldest case in this group has been pending before the Committee for over nine years;
>
> 4. noted the general scheme of the European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill and the issues raised in by the parliamentary Joint Committee on Justice and Equality; regretted that no final consensus has been achieved among the different domestic stakeholders as to the model of the remedy to be adopted and that progress seems to have reached a standstill;
>
> 5. strongly urged the authorities to decide on next steps, speed up the legislative process and provide a revised calendar for its completion; called on them to pursue their close cooperation with the Secretariat while drafting the legislation to resolve the outstanding issues, and to ensure that the new legislation complies with the requirements of the Convention and the Court's case-law;
>
> 6. decided to resume examination of the *McFarlane* case at their 1383rd meeting (September 2020) (DH) and, should no tangible progress be reported by 30 June 2020, instructed the Secretariat to prepare a draft interim resolution for consideration at that meeting."

V. RELEVANT INTERNATIONAL LAW AND PRACTICE

Council of Europe

70. At the 1077th meeting of the Ministers' Deputies on 24 February 2010, the Committee of Ministers adopted Recommendation of the Committee of Ministers to member states on effective remedies for excessive length of proceedings (see CM/Rec(2010)3). In the Recommendation, the Committee of Ministers recommended that governments of Member States:

> "1. take all necessary steps to ensure that all stages of domestic proceedings, irrespective of their domestic characterisation, in which there may be determination of civil rights and obligations or of any criminal charge, are determined within a reasonable time;
>
> 2. to this end, ensure that mechanisms exist to identify proceedings that risk becoming excessively lengthy as well as the underlying causes, with a view also to preventing future violations of Article 6;
>
> 3. recognise that when an underlying systemic problem is causing excessive length of proceedings, measures are required to address this problem, as well as its effects in individual cases;
>
> 4. ensure that there are means to expedite proceedings that risk becoming excessively lengthy in order to prevent them from becoming so;
>
> 5. take all necessary steps to ensure that effective remedies before national authorities exist for all arguable claims of violation of the right to trial within a reasonable time;
>
> 6. ascertain that such remedies exist in respect of all stages of proceedings in which there may be determination of civil rights and obligations or of any criminal charge;
>
> 7. to this end, where proceedings have become excessively lengthy, ensure that the violation is acknowledged either expressly or in substance and that:
>
> a. the proceedings are expedited, where possible; or
>
> b. redress is afforded to the victims for any disadvantage they have suffered; or, preferably,
>
> c. allowance is made for a combination of the two measures;
>
> 8. ensure that requests for expediting proceedings or affording redress will be dealt with rapidly by the competent authority and that they represent an effective, adequate and accessible remedy;
>
> 9. ensure that amounts of compensation that may be awarded are reasonable and compatible with the case law of the Court and recognise, in this context, a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage;
>
> 10. consider providing for specific forms of non-monetary redress, such as reduction of sanctions or discontinuance of proceedings, as appropriate, in criminal or administrative proceedings that have been excessively lengthy;

11. where appropriate, provide for the retroactivity of new measures taken to address the problem of excessive length of proceedings, so that applications pending before the Court may be resolved at national level;

12. take inspiration and guidance from the Guide to Good Practice accompanying this recommendation when implementing its provisions and, to this end, ensure that the text of this recommendation and of the Guide to Good Practice, where necessary in the language(s) of the country, is published and disseminated in such a manner that it can be effectively known and that the national authorities can take account of it."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

71. The applicant complained that the length of the proceedings violated his right to have his proceedings determined within a reasonable time as laid down in Article 6 § 1 of the Convention, which reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

72. The Government contested that argument.

A. Admissibility

73. The Court notes that the Government did not object to the admissibility of the applicant's application on the grounds of non-exhaustion of domestic remedies. His complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The Parties' submissions

74. The applicant submitted that fundamental responsibility lies with the legal system to keep control of its own proceedings. He stated that he had been met with delay at all stages of the procedure which was contributed to by a shortage of judges, staff, facilities and resources, etc., at the courts. He also pointed out that, at various stages in the High Court, three different judges dealt with the case and, in the Supreme Court, two three judge divisions, comprising four different judges, heard the matter. He argued that the excessive workloads of the High Court and the Supreme Court should not be taken into consideration to justify the delay.

75. Regarding the complexity of the case, the applicant stated that, while initially there had been eighteen defendants, the number of defendants was reduced to four and the grounds of the cases were substantially curtailed by the High Court.

76. With regard to his own conduct, the applicant emphasised that he was only required to show diligence in carrying out the procedural steps relating to him, to refrain from delaying tactics, and to avail of domestic measures for shortening proceedings. The applicant submitted that he dealt as best he could with the demands of the High Court and the Supreme Court and complied with all court orders. The applicant submitted that any delay initially arose from the complexity of the case and the number of parties initially involved.

77. Regarding the conduct of the competent authorities, the applicant submitted that courts must prioritise cases in accordance with their urgency and not per the date of registration of the case. In that regard, he submitted that the admission of the case to the Commercial List arose as a consequence of the High Court's acceptance of its urgency.

78. The Government submitted that there had been no breach of Article 6 § 1 of the Convention in the applicant's case. They stated that the reasonableness of the length of proceedings must be assessed on a case-by-case basis, depending on the circumstances at issue and that it ought to be assessed according to the criteria set out in the Court's case law. They stated that, while applicants are entitled to make use of all relevant domestic procedural steps, they "should do so with diligence and must bear the consequences when such procedural steps result in delay". They observed that the primary obligation for progressing civil proceedings lies on the parties themselves, who have a duty to take the relevant procedural steps.

79. Regarding the High Court proceedings, the Government pointed out that the applicant's claim had been actively case managed in the Commercial List of the High Court. It was listed in the High Court on thirty six occasions, during a period in which ten separate motions were heard and thirty orders made. They stated that the applicant's proceedings were complex and involved a large number of defendants and argued that a significant portion of the time taken for the High Court to decide the matter had stemmed from the applicant's failure to plead his case properly, resulting in a number of motions being brought by various defendants, and the striking out of part of his claim.

80. Regarding the portion of the claim which had not been struck out, the Government pointed to the fact that the applicant failed to amend his pleadings as directed and a number of opportunities were afforded to him to prepare a statement of claim that was in compliance with the Rules. In total, the statement of claim was amended eight times.

81. Regarding the appeals before the Supreme Court, the Government submitted that it was open to the applicant to seek a priority hearing but he did not avail of that option. They stated that, ultimately and in respect of both appeals, the defendants brought a motion seeking to dismiss the appeals because the applicant failed to lodge the requisite books of documents on time. Further, when books were lodged, they were not complete which resulted in a further application to court. The applicant also failed to file his legal submissions on time as directed and, when they were filed, they did not comply with the requirements of the Court.

82. The Government submitted that Ireland should not be held responsible for the repeated failure of the applicant, despite numerous orders of the Supreme Court, to comply with that court's requirements. The Government also emphasised that the applicant was legally represented by a solicitor and counsel at all relevant times and it was not a case where the applicant may not have been aware of the significance of the Supreme Court's orders or documentary requirements. They stated that, when the applicant complied with the directions of the Court, the matter was determined expeditiously and without delay.

83. The Government stated that the applicant had failed to address the fundamental point made in its observations: that the proceedings were found by both the High Court and the Supreme Court to be an abuse of process. It stated that, allowing the applicant to succeed in his claim would amount to a perverse incentive to applicants to pursue cases in an abusive manner with the ultimate aim of securing a violation of Article 6 § 1 of the Convention.

84. The Government submitted that the hearing of cases by multiple judges is normal in the Irish legal system where interlocutory applications are heard by the judge in charge of a particular list, whereby the main proceedings may be heard by a different judge. It stated that this procedure did not contribute to the delay and pointed out that judges in charge of particular lists are accustomed to dealing with the various forms of interlocutory motions.

2. The Court's assessment

(a) General principles

85. According to the case-law of the Court on Article 6 § 1 of the Convention, the "reasonableness" of the length of proceedings must be assessed in light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what is at stake for the applicant in the dispute (see, among other authorities, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 143, 29 November 2016, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII,

Comingersoll S.A. v. Portugal [GC], no. 35382/97, § 19, ECHR 2000-IV and *Sürmeli v. Germany* [GC], no. 75529/01, § 128, ECHR 2006‑VII).

86. In requiring cases to be heard within a "reasonable time", Article 6 § 1 underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 224, ECHR 2006-V).

87. As the Court has often stated, it is for the Contracting States to organise their judicial systems in such a way that their courts are able to guarantee the right of everyone to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time (see, among many other authorities, *Frydlender v. France* [GC], cited above, § 43; *McFarlane v. Ireland*, cited above, § 152; *Superwood Holdings Plc and Others v. Ireland*, no. 7812/04, § 38, 8 September 2011, and *Healy v. Ireland,* no. 27291/16, § 49, 18 January 2018).

88. A temporary backlog of court business does not entail a Contracting State's international liability if it takes appropriate remedial action with the requisite promptness. However, a chronic overload of cases within the domestic system cannot justify an excessive length of proceedings (*Probstmeier v. Germany*, 1 July 1997, § 64, Reports of Judgments and Decisions 1997‑IV), nor can the fact that backlog situations have become commonplace (*Unión Alimentaria Sanders S.A. v. Spain*, 7 July 1989, § 40, Series A no. 157).

89. The Court has recognised that in civil proceedings the principal obligation for progressing proceedings lies on the parties themselves, who have a duty to diligently carry out the relevant procedural steps (see *Unión Alimentaria Sanders S.A. v. Spain*, cited above, § 35, and *Healy v. Ireland*, cited above, § 55).

90. However, a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings does not dispense the State from complying with the requirement to deal with cases in a reasonable time (see, for example, *McMullen v. Ireland*, no. 42297/98, § 38, 29 July 2004, with further references).

91. In addition, the Court has repeatedly stated that even if a system allows a party to apply to expedite proceedings, this does not exempt the courts from ensuring that the reasonable time requirement of Article 6 is complied with, as the duty to administer justice expeditiously is incumbent in the first place on the relevant authorities (see *Philis v. Greece* (no. 2), judgment of 27 June 1997, Reports 1997-IV, § 49; *Mitchell and Holloway v. the United Kingdom*, no. 44808/98, § 56, 17 December 2002, *Doroshenko v. Ukraine*, no. 1328/04, § 41, 26 May 2011).

(b) Application of the general principles to the present case

92. The Court notes that the period to be taken into consideration began on 8 February 2006, when the applicant commenced High Court proceedings, and ended on 5 April 2017, when the Supreme Court handed down its judgment in the applicant's appeal against the second of two High Court judgments (see paragraphs 15 and 32 above). The proceedings thus took over eleven years to be determined through two levels of jurisdiction.

93. The Court does not call into question what was at stake for the applicant or the potentially complex nature of some of the factual and legal questions in dispute. However, on the basis of the material before it, it considers that the applicant's litigation took on a scale incommensurate with the nature of the underlying legal claim (see, in a similar vein, *McNamara v. the United Kingdom*, [Committee], no. 22510/13, § 60, 12 January 2017, and *Brennan v. Ireland*, [Committee] no. 44360/15, § 57, 2 November 2017). The applicant and his legal representatives instituted proceedings against eighteen defendants and much of the initial work of the High Court in 2006 and 2007 was devoted to deciding which of the many claims had to be struck out.

94. While the applicant submitted that delays in the case were caused by the organisation of the Irish legal system, including the number of judges tasked with hearing various applications in the case, the Court considers that the applicant has not made out that the hearing of interlocutory applications by a judge other than the judge(s) who presided over the final High Court hearing, contributed to the delay in this case. Furthermore, it is clear that by admitting the applicant's case to the Commercial List, an attempt was being made to subject it to a fast-track procedure.

95. The Court will examine next whether, as submitted by the Government, the length of the proceedings was attributable solely to the applicant's conduct. It is clear from the material before the Court that the applicant's conduct throughout had a critical impact on the progress of the case. The Court finds that the failure of the applicant, who was represented by a solicitor and counsel, to properly plead and advance his litigation contributed decisively to the delay in the proceedings at the level of the High Court. The applicant was required to amend his statement of claim on multiple occasions before it was suitably pleaded in accordance with domestic requirements. The multiple occasions on which the applicant's failure to comply with court orders clearly resulted in further delays in the case. The Court concludes that the applicant cannot rely on the periods during which his actions caused the delay (see, *mutatis mutandis*, *Vayiç v. Turkey*, no. 18078/02, § 44, ECHR 2006-VIII (extracts); and *Uysal and Osal v. Turkey*, no. 1206/03, § 30, 13 December 2007).

96. The High Court proceedings concluded two years and ten months from their date of issue and the applicant's conduct contributed wholly to their length. Once the applicant pleaded his case in accordance with domestic procedural requirements, the High Court proceedings concluded within five months. It is thus the Court's view that the High Court proceedings were determined within a reasonable amount of time.

97. At Supreme Court level, the Court recognises that problems persisted regarding the manner in which the applicant pleaded his two appeals. He failed in both cases to lodge his books of appeal in a timely manner. However, the applicant's conduct alone cannot justify the entire length of the proceedings. Certain stages of the appeal proceedings were unreasonably protracted and the applicant's inaction in prosecuting his appeals before the Supreme Court appears to have persisted without repercussions until such time as the defendants took action seeking to dismiss them (see paragraphs 27 and 31 above). The Government indicated a failure by the applicant to respect the applicable Supreme Court Practice Direction but no action taken by the relevant court in response to this.

98. The applicant had appealed the first and second High Court judgments between 2007 and 2009 but the motion to dismiss the appeals based on the applicant's failure to lodge his books of appeal were only heard in February and September 2014. In addition, further delays of between one and two years followed until the applicant was ordered to file submissions in April 2015 and March 2016, respectively (see paragraphs 29 and 31 above). The Court recognises the principle on which the respondent Government sought to rely, namely that the principal obligation for progressing civil proceedings lies on the parties. However, no adequate explanation has been given for the significant periods of between five and seven years when the appeals were allowed to lie dormant.

99. The Supreme Court delivered its final judgment on 5 April 2017, eight years after the last notice of appeal to that court was issued.

100. The Court finds that, despite the conduct of the applicant, who clearly contributed to delay before both the High and Supreme Courts, the overall length of proceedings was excessive and failed to meet the reasonable-time requirement. Accordingly, there has been a breach of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13, IN CONJUNCTION WITH ARTICLE 6 § 1, OF THE CONVENTION

A. Admissibility

101. As indicated previously, a question concerning Article 13 of the Convention was communicated to the respondent Government in conjunction with the complaint under Article 6 § 1. The Court observes that

this complaint concerning the lack of a domestic remedy in relation to unreasonable delay under Article 6 § is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. As it is not inadmissible on any other grounds, it must therefore be declared admissible.

B. Merits

1. The parties' submissions

102. The applicant submitted that the adequacy or otherwise of the domestic remedies introduced by a Member State in order to prevent or provide redress for the problem of excessively long proceedings must be assessed in light of the principles of the Court in *Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-V.

103. The applicant stated that there is no effective comprehensive provision in Irish law that provides for an effective remedy in relation to the excessive length of the proceedings and that, in violation of Article 13 of the Convention, there is no provision for a mechanism of compensation for such delays.

104. With regard to the availability of an effective domestic remedy for breach of Article 6 § 1 of the Convention, the Government drew attention to the recommendation of the Expert Group (see paragraph 56 above) that a court-based remedy should be provided for but emphasised the complexity of, and time required by, the proposal due to the particular nature of Ireland's Constitution and the role of the formal court system therein. It also highlighted the 2018 Bill referred to in its action plan submitted to the Committee of Ministers in November 2018 (see paragraphs 64-67 above).

105. The Government observed that the Court, in *McFarlane v. Ireland* (cited above) held that the remedy of constitutional damages for delay as not an effective remedy as there was insufficient proof that it was available in practice even though it had been available "in theory" for almost twenty five years (see paragraphs 60-63 above). It stated that the judgment of the Supreme Court in *Nash v. DPP* (cited above) represents an important clarification of the conditions under which constitutional damages for delay in criminal procedure will be granted (see paragraphs 43-46 above).

106. In relation to the Committee of Minister's comments that the *Nash* judgment alone does not demonstrate the existence of an effective remedy for the purposes of Article 13 of the Convention, the Government observed that the Committee of Ministers also noted favourably the work done on exploring alternatives for putting in place an effective remedy for excessive length of proceedings (see paragraphs 64-67 above).

2. The Court's assessment

(a) General principles

107. Article 13 of the Convention guarantees the availability at national level of a remedy by which to complain of a breach of Convention rights and freedoms. Therefore, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, there must be a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention, but the remedy must in any event be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State (see *De Tommaso v. Italy* [GC], no. 43395/09, § 179, 23 February 2017 and the authorities referred to therein).

108. The obligation under Article 35 requires only that an applicant should have normal recourse to the remedies likely to be effective, adequate and accessible. In particular, the only remedies which the Convention requires to be exhausted are those that relate to the breaches alleged and are at the same time available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Sejdovic v. Italy* [GC], no. 56581/00, § 45, ECHR 2006-II and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 142, ECHR 2006-V).

109. As regards the "effectiveness" of remedies in length of proceedings cases, the Court has held that the best solution in absolute terms is indisputably, as in many spheres, prevention. Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time (see case-law referred to in paragraph 87 above). Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy. Hence, this type of remedy is "effective" in so far as it hastens the decision by the court concerned. At the same time, a remedy designed to expedite the proceedings may not be adequate to redress a situation in which the proceedings have clearly already been excessively long. In such situations, different types of remedy may redress the violation appropriately, including a compensatory remedy. Furthermore, the Court has repeatedly held that States may choose to

combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation, although they may also choose to introduce only a compensatory remedy without such remedy being regarded as ineffective (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 183-187, ECHR 2006-V, and *Cocchiarella v. Italy* [GC], no. 64886/01, §§ 74-78, ECHR 2006-V, *Fil LLC v. Armenia*, no. 18526/13, § 47, 31 January 2019).

110. The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees are relevant in determining whether the remedy before it is effective. In addition, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may, in principle, do so (see, among many other authorities, *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61, § 113, and *Doran v. Ireland*, no. 50389/99, § 58, ECHR 2003-X (extracts)).

111. Finally, the Court has held that particular attention should be paid, *inter alia*, to the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration (see *Doran v. Ireland*, cited above, § 57-58, *Tomé Mota v. Portugal* (dec.), no. 32082/96, ECHR 1999-IX, *Paulino Tomas v. Portugal* (dec.), no. 58698/00, ECHR 2003-VIII).

(b) Application of the general principles to the present case

112. The Court has already had occasion to stress the difficulties which result from Ireland's failure to provide an effective domestic remedy in respect of complaints under Article 6 § 1 of the Convention. In *Healy v. Ireland*, decided in 2018 and cited above, § 69, it stated:

> "The Court recalls that as from its judgment in *Doran v. Ireland*, no. 50389/99, ECHR 2003‑X (extracts) it has consistently found the domestic legal system to lack a remedy for complaints of excessive length of proceedings. The objection of non-exhaustion of domestic remedies could not therefore be raised in such cases, and the Court found a violation of Article 13 each time such a complaint was raised in conjunction with Article 6 § 1 (see as the most recent example involving civil proceedings *Rooney v. Ireland*, no. 32614/10, 31 October 2013). More recently again, the Court struck out an application in light of the respondent Government's acceptance, in a unilateral declaration dated 19 January 2017, that "the length of the proceedings and the lack of an effective remedy in that regard was incompatible with the reasonable time requirement contained in Article 6(1) and Article 13 of the Convention" (see *Blehein v. Ireland* (dec.) [Committee], no. 14704/16, 25 April 2017)."

113. It is recalled that in *McFarlane v. Ireland,* the Court considered that the Government had failed to demonstrate that an action for damages for a breach of the constitutional right to reasonable expedition constituted an effective remedy available to the applicant in theory and in practice at the relevant time (see *McFarlane*, cited above, §§ 107-128).

114. Since then, the Supreme Court in *Nash v. DPP* (see paragraphs 43-46 above) has sought to clarify that the constitutional right to a timely trial is well-established in Irish law and that in an appropriate case an Irish Court may award damages for breach of that right (see the extract from the Supreme Court judgment in paragraph 43 above).

115. In *Healy v. Ireland*, in which judgment was delivered after the judgment of the Supreme Court in *Nash v. DPP*, the Court took note:

> "... of this first example brought to its attention of an action in damages for excessive length of proceedings, and of the Supreme Court's analysis of this issue in light of the relevant principles of the Constitution and the Convention."

116. In the present case, the Government were requested by the Court to address whether the applicant had had at his disposal an effective domestic remedy, the shortcomings in the constitutional remedy identified in the judgment in *McFarlane v. Ireland*, cited above, and whether and how the *Nash* judgment addressed those shortcomings.

117. The principal remedy proposed by the Government continues to be one in damages for breach of the constitutional right to a timely trial. The Government submitted that the 2016 *Nash* judgment represents an important clarification by the Supreme Court of the conditions under which constitutional damages for delay in criminal proceedings will be granted.

118. In the present case, the Court observes that the applicant's first appeal was dismissed by the Supreme Court before the *Nash* judgment was handed down, while the second appeal was dismissed following that judgment.

119. The Court notes that the remedy of damages for breach of the constitutional right to a trial with reasonable expedition was assessed by the Committee of Ministers in execution of Irish judgments involving excessive length of judicial proceedings (see paragraphs 64 to 67 above). The Committee of Ministers considered that the *Nash* judgment alone did not demonstrate the existence of an effective remedy for the purposes of Article 46 of the Convention (see paragraph 65 above).

120. For its part, the Court identifies the following difficulties with the Government's response.

121. Firstly, while helpfully confirming the existence of a remedy in damages for breach of the constitutional right to a timely trial in *Nash v. DPP*, the Supreme Court held back on defining the parameters of such a claim in circumstances where it had decided on the facts of that case that there had been no culpable delay on the part of the State. Since the factual basis to define the appropriate parameters of any claim were found not to exist in that case, their development was left for another case and another day (see the extract from the Supreme Court judgment in paragraph 46 above). The Court observes that the *Nash* case involved criminal proceedings but that the respondent Government relies on it in relation to the confirmation generally of a right to damages for breach of the Constitutional right to reasonable expedition.

122. This reticence by a common law court to develop the necessary parameters in the abstract and not in the context of a suitable, concrete case, is understandable. The Court reiterates the point it made in *McFarlane v. Ireland*, cited above, § 120, namely that the development of the constitutional remedy relied on, as well its scope and application, has to be sufficiently clearly set out for it to be considered effective. There seems no doubt that the Supreme Court was seeking, in response to an accused finally seeking damages for breach of the constitutional right to reasonable expedition, to dissipate the doubts previously expressed in *McFarlane v. Ireland*, cited above. However, the *Nash* judgment highlights the fact that development of the constitutional remedy, whose existence is now confirmed, is likely to remain legally and procedurally complex at least for a period of time. The Court recognises, as previously, the importance of allowing remedies to develop in a constitutional system and, more importantly, in the particular situation of a common law system with a written Constitution like Ireland (see *McFarlane*, cited above, § 120). However, problems regarding the existence of an effective remedy for unreasonable delay have been signalled since 2003 (see *Doran v. Ireland*, no. 50389/99, ECHR 2003-X (extracts)) and reiterated in cases involving civil and criminal proceedings since then (see paragraph 112 above).

123. A second concern expressed by the Court in *McFarlane,* cited above, related to the speediness of the remedial action itself. The adequate nature of a remedy under Article 13 of the Convention can be undermined by its excessive duration (see the case-law cited in paragraph 111 above). In *Nash v. D.P.P.*, the appellant introduced his damages claim for unreasonable delay in his criminal proceedings in March 2010. This ancillary relief fell to be considered after the refusal of his request for prohibition in 2012 but was only rejected by the Supreme Court in October 2016. While it should be emphasised that that case concerned delay in criminal proceedings and raised questions of a very specific nature in relation to cold cases, the damages proceedings lasted more than six and a half years. At present, cases seeking to develop the parameters of the

constitutional action for damages for unreasonable delay might be initiated in the High Court (according to the Expert Group, paragraph 5.31 c), by means of judicial review proceedings) and might be appealed to the Court of Appeal or pass, by virtue of a leapfrog appeal, to the Supreme Court. However, as indicated in that Report, "This route is itself, ..., at risk of delays particularly in light of current waiting times in the Supreme Court".

124. It is not contested by the respondent Government that the Supreme Court waiting times referred to by the Expert Group in 2013 have since been displaced, only to emerge in important waiting times before the Court of Appeal, including for ordinary civil appeals. The Courts Service Annual Report 2018, published in July 2019, indicated that in 2018 the waiting time for ordinary civil appeals to the Court of Appeal was twenty months. With regard to the Supreme Court, the Report indicated that there was a six week waiting time from the filing of a notice seeking leave to appeal to that court to the issuing of a determination on leave. Thereafter, the waiting time from the date of the determination to delivery of judgment was sixty-eight weeks. The Supreme Court Annual Report for 2019 indicates a very significant improvement in this regard, albeit in relation to a period not the subject of the present application.

125. The Government also relied on proposals emanating from the Expert Group, referred to above, which addressed the question of the existence of an effective domestic remedy (see paragraph 56 above). However, in terms of the "specific and streamlined procedures" to which reference was made by the Court in *McFarlane*, § 122, the Court observes that the draft general scheme of the 2018 Bill, which seeks to provide a compensatory remedy, remains, according to the information available to the Court, at pre-legislative stage (see paragraphs 56-59 and 68 above) and requires further consideration at Government level before it can be progressed.

126. Finally, an application for damages under the ECHR Act is only possible where no other remedy in damages is available (see paragraphs 48-49 above and *McFarlane*, cited above, § 125). As indicated previously, notwithstanding the clarification provided by the Supreme Court judgment in *Nash v. DPP*, considerable legal effort, time and even expense by potential applicants and the State will still be required to establish how the right to expedition may apply in practice. Furthermore, in *McFarlane*, cited above, the Court referred to the exclusion of the courts from the definition of "organs of the State" under Article 1 of the ECHR Act. In their submissions before the Court in the present case, the respondent Government remained silent regarding the ancillary possibility of a claim for damages under the ECHR Act and the question of the availability of such a remedy in relation to unreasonable delay given the aforementioned exclusion.

127. In these circumstances, the Court finds that there has been a violation of Article 13, in conjunction with Article 6 § 1, of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

128. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damages

129. The applicant claimed EUR 10,000-15,000 (ten to fifteen thousand euros) in respect of the stress suffered as a result of the prolonged duration of the proceedings and the time and effort put into attending court hearings in Dublin.

130. The Government rejected the applicant's contention that his complaints fell to be considered at the higher end of the Court's scale.

131. The Court recognises that the protracted length of proceedings may cause applicants distress. There is a strong, although rebuttable, presumption in favour of non-pecuniary damage being occasioned by the excessive length of proceedings. However, there may also be situations where no such damage, or only minimal damage, has been ascertained (see *McNamara*, cited above, § 66 and the authorities cited therein).

132. In this case, the finding of a violation under Article 6 § 1 of the Convention is based on the unnecessarily protracted nature of the proceedings at Supreme Court level. The violation under Article 13 confirms the absence of an effective remedy in the respondent State in cases of unreasonable delay, in this case in the context of civil proceedings. However, as indicated previously, the applicant's conduct throughout had a critical impact on the progress of his case, with the domestic courts at both levels indicating that his actions and the manner in which he had conducted his case bordered on an abuse of process. In finding, in particular, a violation of Articles 6 and 13 § 1 combined in the present case, the Court does not seek to provide a perverse incentive to applicants to pursue cases in an abusive manner at domestic level only to seek to secure a violation of Article 6 § 1 thereafter. The Court's criteria for assessing the reasonableness of proceedings (see paragraph 85 above) should operate to prevent this.

133. Having regard to the particular circumstances of the present case, the Court does not consider that it is "necessary", in the terms of Article 41 of the Convention, to afford the applicant any financial compensation by way of just satisfaction. The Court accordingly holds that the finding of violations of Article 6 § 1 and Article 13 in itself constitutes adequate just satisfaction for the purposes of the Convention.

B. Costs

134. The applicant detailed and claimed EUR 10,000 (ten thousand euros) for costs as regards the costs and expenses in bringing his application before this Court.

135. As to the domestic proceedings, he did not submit a claim for costs.

136. The Government did not comment on the claim for costs.

137. In accordance with the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Vardanyan v. Armenia* (just satisfaction), 8001/07, § 48, 25 July 2019).

138. As to the costs of the present proceedings, the Court observes that the issues in the application were not particularly novel. The Court considers it reasonable to award the sum of EUR 3,000 (three thousand euros) plus any tax that may be chargeable to the applicant in respect of the costs of the Convention proceedings.

C. Default interest

139. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 13, in conjunction with Article 6 § 1 of the Convention;

4. *Holds* that the finding of violation is sufficient just satisfaction for any non-pecuniary damage suffered by the applicant;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 30 April 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Gabriele Kucsko-Stadlmayer
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge S. O'Leary is annexed to this judgment.

G.K.S.
C.W.

CONCURRING OPINION OF JUDGE O'LEARY

1. I fully subscribe to the unanimous judgment of the Chamber, finding violations of Articles 6 § 1 and 13 of the Convention in the present case due to the excessive length of the applicant's civil proceedings and the absence of an effective domestic remedy in cases of unreasonable delay.

2. There are several reasons for writing, exceptionally, a concurring opinion in the present case:

- Firstly, this judgment forms part of a relatively long line of cases on Article 6 § 1 and 13 of the Convention in relation to Ireland over a period of almost twenty years. Its significance resides in that fact alone.

- Secondly, the judgment in *Keaney* follows on from a 2010 Grand Chamber judgment, handed down in *McFarlane v. Ireland*, in which the Court joined to the merits the Government's objection regarding a failure to exhaust the constitutional remedy in damages for delay in breach of constitutional and Convention rights. The Court then declared that remedy ineffective, *inter alia*, for want of concrete examples of it having been successfully tried. As the constitutional remedy had not been attempted by the applicant in that case and, at that time, in any other, it is worth reflecting on the consequences of the decision of the Grand Chamber in this regard.

- Thirdly, while the judgment in *McFarlane* case may have contributed to the finding of a violation of Article 13 in the instant case, so too did the failure of the respondent State to tackle definitively the question of effective remedies in unreasonable delay cases in the ten years following *McFarlane*.

- Finally, finding a violation of Article 6 § 1 of the Convention in a case such as this when the manner in which an applicant has conducted his or her case at domestic level has undoubtedly contributed to the excessive length of the proceedings is in need of explanation to avoid, at best, confusion and, at worst, undue criticism.

I. CASES AGAINST IRELAND RELATING TO UNREASONABLE DELAY IN CIVIL AND CRIMINAL PROCEEDINGS

3. As indicated in the Chamber judgment, pursuant to Article 6 § 1 of the Convention, the Court assesses whether or not there is excessive delay in a given case with reference to the complexity of the case, the conduct of the applicant and the relevant authorities and what is or was at stake for the applicant in the dispute.[1]

[1] See the authorities cited in §§ 85 - 91 of the Chamber judgment in *Keaney*.

4. It has found a violation of Article 6 § 1 of the Convention in a number of cases against Ireland involving both civil and criminal proceedings. In some of those cases it has found, in addition, a violation of Article 13 of the Convention due to the lack of an effective remedy to which applicants could have had recourse at domestic level.[2]

5. No violation of Article 6 § 1 has been found in other cases as a result either of the complexity of the case, the conduct of the applicant or a combination of both.[3]

6. Some previous cases relating to excessive length of proceedings have been concluded by means of friendly settlements[4] and a unilateral declaration in respect of Article 6 § 1 was made in one previous Irish case.[5]

7. This relatively small but, as regards Ireland, significant body of cases are signs of a systemic problem in the respondent State, a point made by the Court in several previous judgments, not least *Healy v. Ireland*.[6]

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[2] See variously *Doran v. Ireland*, no. 50389/99, ECHR 2003 X (extracts) (civil; plus Article 13); *McMullen v. Ireland*, no. 42297/98, 29 July 2004 (civil); *O'Reilly and Others v. Ireland*, no. 54725/00, 29 July 2004 (civil; plus Article 13); *Barry v. Ireland*, no. 18273/04, 15 December 2005 (criminal; plus Article 13); *McFarlane v. Ireland* [GC], no. 31333/06, 10 September 2010 (criminal; plus Article 13); *Superwood Holdings Plc and Others v. Ireland*, no. 7812/04, 8 September 2011 (civil); *T.H. v. Ireland*, no. 37868/06, 8 December 2011 (criminal; plus Article 13); *O. v. Ireland*, no. 43838/07, 19 January 2012 (criminal); *C. v. Ireland*, no. 24643/08, 1 March 2012 (criminal); *Rooney v. Ireland*, no. 32614/10, 31 October 2013 (civil; plus Article 13); *Healy v. Ireland*, no. 27291/16, 18 January 2018 (civil; plus Article 13); *O'Leary v. Ireland*, no. 45580/16, 14 February 2019 (civil; plus Article 13).

[3] See, for example, *Brennan v. Ireland*, no. 44360/15, 2 November 2017 (civil); *O'Sullivan McCarthy Mussel Developments Ltd. v. Ireland*, no. 44460/16, 7 June 2018 (civil).

[4] See variously, for examples of the friendly settlement procedure governed by Article 39 of the Convention and Rule 62 of the Rules of Court, *Flattery v. Ireland*, no. 28995/95, 8 July 1998 (civil); *White and Woulfe v. Ireland*, no. 19595/04, 24 November 2005 (civil; plus Article 13); *JB v. Ireland*, no. 9519/07, 21 June 2011 (criminal; plus Article 13); *Enright v. Ireland*, no. 61138/08, 21 June 2011 (criminal; plus Article 13); *Delaney v. Ireland*, no. 23662/06, 29 November 2011 (civil; plus Article 13); *O'Keeffe v. Ireland*, no. 35810/09, 26 June 2012 (civil; plus Article 13); *Kieran v. Ireland*, no. 73886/11, 28 May 2013 (civil); *M.D. v. Ireland*, no. 40619/12, 11 June 2013 (civil; plus Article 13); *E. v. Ireland*, no. 42734/09, 1 October 2013 (civil).

[5] See *Blehein v. Ireland*, no 14704/16, 25 April 2017 (civil; plus Article 13) and Rule 62 A on the unilateral declaration procedure which was initially a creation of case-law.

[6] See *Healy*, cited above, § 60: "The appellate stage included a lengthy period of inactivity that lasted for more than four years […] due to the logjam of cases pending before the Supreme Court in those years. As the Government recognised in its submissions, during those years the domestic system lacked the capacity to deal with appeals from the High Court within a reasonable timeframe. […] the Supreme Court was effectively unable to deal with the applicant's case for a prolonged period […]". See also the general reflections in the Council of Europe, *Guide to good practice in respect of domestic remedies*, 2013, p.8, where it reiterates that "Repetitive cases generally reveal a failure to implement effective domestic remedies where judgments given by the Court […] have given indications as to the general measures needed to avoid future violations". At present, of the 47 Council of Europe States at appears that only Ireland, Hungary and Poland remain under

8. Over the years, the Court has recognized measures adopted by the respondent State seeking to resolve the structural problem of delay and judicial efforts to develop the remedy (damages for breach of the constitutional right to expedition) principally relied on by the respondent State when complaints have been lodged under Article 6 § 1 combined with Article 13.[7]

9. The judgment in *Keaney v. Ireland* will come as no surprise, however, to those who have followed the development of Convention case-law in this field. The fact that the judgment was rendered by a Chamber of seven judges rather than, in this field, the now more usual Committee formation of three judges is further recognition of the importance of the issues raised in relation to Ireland specifically.

II. THE (IN)EFFECTIVENESS OF AN ACTION FOR DAMAGES FOR BREACH OF THE CONSTITUTIONAL RIGHT TO A TRIAL WITH REASONABLE EXPEDITION

10. The judgment in *Keaney* follows the 2018 judgment of the Supreme Court in *Nash v. D.P.P.* in which the latter confirmed the possibility for applicants to seek damages for breach of their constitutional right to reasonable expedition. The *Nash* case, the subject of a Committee inadmissibility decision (examined on the same day as the present case), which concerned alleged delay in the context of criminal proceedings and thus raised other issues not of relevance to civil proceedings, followed the first attempt by a domestic complainant to seek such damages following the *McFarlane* judgment.

11. I must admit that, had I been a member of the Grand Chamber in the *McFarlane* case I would, like the minority at that time, have rejected the applicant's complaint due to his failure to exhaust domestic remedies at that time. The reasons supporting the minority position can be found both in the Court's well-established case-law, then and now, reproduced in the *McFarlane* judgment as follows:

> "it is an established principle, that in a legal system providing constitutional protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection and, in a common law system, to allow the domestic courts to develop those rights by way of interpretation [...]".[8]

12. While several judgments finding violations of Article 6 § 1 due to undue delay had already been handed down in 2010 when the Grand

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supervision by the Committee of Ministers in relation to the execution of judgments relating to the absence of an effective remedy in cases of unreasonable delay.

[7] *Healy*, cited above, §§ 60 and 69 on the creation of the Court of Appeal and the Supreme Court judgment confirming the existence of a constitutional remedy in *Nash*.

[8] See *D. v. Ireland* (dec.), no. 26499/02, § 85, 28 June 2006, cited at §§ 120 and 3 of the judgment and separate opinion in *McFarlane*, cited above, respectively.

Chamber delivered its judgment in *McFarlane*, the respondent State had repeatedly pointed to the availability of a remedy which, it said, complainants could and should have tried. It was uncontested that the applicant in *McFarlane*, who had sought prohibition of his criminal trial on grounds of delay, had not sought damages for breach of his right to reasonable expedition. However, the Grand Chamber in that case considered that there was "significant uncertainty as to the proposed constitutional remedy".[9] The door was ostensibly left ajar in *McFarlane* on the effectiveness of the constitutional remedy for damages following alleged delay in civil proceedings.[10] That door seems in reality to have been shut both before and since that Grand Chamber judgment in a succession of cases in relation to delay in civil proceedings.[11]

13. A number of factors worked against the effectiveness of the constitutional remedy in the Grand Chamber's view – the fact that no applicant had ever requested damages for a breach of the constitutional right to reasonable expedition either in a separate action or as alternative relief (*McFarlane*, cited above, § 117); the absence of clarity regarding whether the constitutional remedy would cover instances of a judge's delay in delivering a judgment (ibid, § 121) and the legally and procedurally complex nature of the remedy given its novelty, which led in turn to possible delays in the remedial action requested and cost and expense when testing its existence and scope (ibid, §§ 122 - 123). It was recognized in theory, in accordance with the principles of subsidiarity and exhaustion, that in a common law constitutional system available remedies had to be tested and, in that way, developed. In practice, however, the novelty and uncertainty surrounding the proposed remedy in delay cases were relied on to defeat both principles.

14. The *McFarlane* judgment was undoubtedly an important one. It confirmed the likely systemic nature of the unreasonable delay of which that applicant complained; examples of which in civil and criminal proceedings had been mounting at domestic and Strasbourg levels. However, behind the reasoning of the Grand Chamber majority lay two, if not three, fault lines. Firstly, an objection on grounds of non-exhaustion could be joined to the merits of a complaint under Article 13 of the Convention relating to the absence of an effective domestic remedy worth exhausting. However, a joinder of this nature seemed indicative of the Court's direction of travel as the latter rarely backtracks once examining Article 13 of the Convention in order to conclude that the unexhausted remedy is in fact effective. Joining a

[9] *McFarlane*, cited above, § 117 and §§ 118 – 120.

[10] Ibid, § 118, referring to the respondent Government's response to a 2006 questionnaire by the Venice Commission on the effectiveness of national remedies in respect of excessive length of proceedings, reproduced at § 70 of *McFarlane v. Ireland*.

[11] See, prior to *McFarlane*, *Doran*, cited above, §§ 62 – 68 and *O'Reilly*, cited above, § 36 and, subsequently, *Superwood Holdings*, cited above, § 32 or *Rooney*, cited above, § 29.

question relating to exhaustion to the merits of a complaint under Article 13 is something therefore which should be done with great care. Secondly, in order to prove a domestic remedy is effective a respondent Government will need to point to cases in which domestic courts have heard applications and delivered and published a judgment, or judgments, on the merits. However, particularly in common law systems – which depend on the development of the law through litigation – this risks creating a vicious circle when or if applicants fail to rely on allegedly available but untested remedies. As indicated by the minority in *McFarlane*, if the relevant question was whether the applicant had done everything that could reasonably have been expected of him to exhaust domestic remedies, the answer in that case was undoubtedly no.[12]

15. I will return below to the questions of time and cost on which the Grand Chamber conclusion as to the ineffectiveness of the constitutional remedy was also partly based in *McFarlane*. Suffice it, for the time being, to underline two consequences of the *McFarlane* judgment. On the one hand, few if any applicants were thereafter likely to seek to test the constitutional remedy for damages in cases of delay given the existence of a Strasbourg Court judgment declaring it ineffective for the purposes of Article 13 of the Convention. By declaring the untested remedy ineffective the majority of the Grand Chamber thus risked ensuring that it would remain so. On the other hand, advertently or inadvertently, the judgment in the *McFarlane*

[12] See § 4 of the dissenting opinion in *McFarlane* and, further, § 7: «The mere fact that damages for an alleged breach of one specific aspect (reasonable time) of one Constitutional right (fair trial) have not been claimed by any litigant is not sufficient to displace the fact that damages are available, domestically, for breaches of Constitutional rights, including, in circumstances where they have not previously been awarded *for want of being sought*». (emphasis added) In McFarlane's case the applicant could have included in his domestic prohibition pleadings an alternative claim in damages, although in other cases where systemic delay in the court system as distinct from prosecutorial delay was being alleged, the legal work involved given the novelty of the question could not have been denied.

The third possible fault line in *McFarlane* stemmed from the Court's reliance on *Barry v. Ireland*. The latter was a 2005 Chamber judgment relating to criminal proceedings in which the Court had found violations of both Articles 6 and 13, rejecting the Government's argument that damages for breach of the constitutional right to expedition might have been awarded if requested. In *McFarlane* the respondent Government had argued that the conclusion in *Barry* regarding the ineffectiveness of the remedy had been wrong (see *McFarlane*, cited above, § 109). While the Grand Chamber accepted that the extract of a Supreme Court judgment on which it had relied in *Barry* was not directly relevant to the assessment of any constitutional action for damages for delay (ibid, § 110), the majority in *McFarlane* nevertheless pointed to the fact that the respondent State had not sought to refer the *Barry* case to the Grand Chamber (ibid, § 74). Furthermore, when emphasising the uncertainty surrounding the constitutional remedy which the Government argued the applicant should have exhausted, the Court pointed to «the Government's relatively brief submissions about this constitutional remedy for damages» in *Barry* (ibid, § 118). In other words, *Barry* was accepted as wrong at least in part but the error was of no consequence.

case appeared to point to the legislative nature of the (only) remedy which the Court appeared willing to consider as effective:

> "*in the absence of a specifically introduced remedy for delay*, it remains the case that the development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case-law".[13]

16. The judgment in *Keaney* must be viewed against the background of *McFarlane* in terms of the renewed declaration of the ineffectiveness of the constitutional remedy, to which the Court, as I explained, may have contributed. However, it must also be viewed in terms of the failure of the respondent State to put in place a mechanism in one form or another guaranteeing such an effective remedy despite a decade of discussion and attempted reform.

III. REMEDYING A SYSTEMIC PROBLEM OF EXCESSIVE DELAY

17. In a common law system such as Ireland's, as the respondent Government has repeatedly sought to explain in Article 6 delay cases, the primary responsibility for progressing civil proceedings lies on the parties themselves.[14] However, while the Court's case-law may sometimes have underestimated the importance and consequences of this basic principle of a common law adversarial system, not least when assessing the conduct of certain applicants, its case-law for over two decades has been based on the legitimate expectation, to borrow the words of the minority judges in *McFarlane*, that it is nevertheless up to the State to erect the appropriate

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[13] See *McFarlane*, cited above, §§ 120 and 122: «the proposed constitutional remedy would form part of the High Court and Supreme Court body of civil litigation *for which no specific and streamlined procedures have been developed*» (emphasis added); the early preference expressed in *Doran v. Ireland*, cited above, §§ 62 and 66 for a «specific legal avenue conceived of as a separate remedy» or for proof of a «domestic legal provision for an award of damages following a successful constitutional action », and the apparent preference for a legislative solution to the systemic delay problem identified by the Committee of Ministers during the execution process – see the material reproduced in §§ 64 – 69 of the Chamber judgment in *Keaney*. See also the Venice Commission, «Report on the effectiveness of national remedies in respect of excessive length of proceedings, Council of Europe», 2008, which indicated that in the absence of specific case-law «a remedy may be considered 'effective' *when the wording of the legislation in question* clearly indicates that it is specifically designed to address the issue of the excessive length of court proceedings» (emphasis added). This preference for a certain type of remedy may appear at odds with States' margin of discretion regarding how to comply with their Article 13 obligations but it is perhaps explained by the repetitive nature of the cases at issue and the systemic nature of the underlying problem from which this repetition derives.

[14] See, for example, the 2005 judgment of the Court in *O'Reilly v. Ireland*, cited above, § 32 or the Supreme Court in *Nash v. D.P.P.* cited above, § 5.1: «In the party led courts system which applies in common law countries, the principal obligation for progressing proceedings lies on the parties themselves».

"scaffolding" to support the efficient administration of justice.[15] Furthermore, even in civil law systems, where there may be a "juge de la mise en état" empowered to expedite matters, the conduct of civil proceedings is and remains largely a matter for the litigating parties.

18. Numerous "scaffolding" measures have been adopted by and for the domestic courts in the respondent State in recent years – greater resort to case management tools, including the appointment of a case management judge; an increase in the number of High Court judges; the establishment of the Court of Appeal following a referendum and Constitutional amendment and the recent doubling of its size; the amendment of rules of court relating to judicial review; the creation of a register of reserved judgments, greater use of "call-over" lists; the adoption of new rules of court since 2016 relating to the conduct of civil cases as well as others relating to pre-trial procedures in chancery and non-jury actions and an ongoing review of the administration of civil justice chaired by the President of the High Court. The question which has been repeatedly asked at domestic level is whether the appointment of new judges and the available "scaffolding" is sufficient if the *system* itself remains, if not delay friendly, delay tolerant.[16]

19. The clarification which the Supreme Court sought to provide in *Nash v. D.P.P.* regarding the availability of constitutional damages has to be considered in this broader context. Leaving aside the aspects of that judgment peculiar to criminal proceedings, could that clarification have remedied the supposed defects of the remedy identified in *McFarlane*? Given the nature of those defects (not least the cost of litigation, the likely time it would take and uncertainty as to the outcome), the continued flow and the reasons for Article 6 delay complaints, the lapse of time since *McFarlane* and the parameters of the constitutional remedy which remained to be established, the likely answer to that question in 2020 was no.

20. As stated previously, the reason for this is partly to be found in the Court's rendering ineffective in *McFarlane* a potentially effective constitutional remedy; but it is only partly to be found there. Ten years have passed since *McFarlane*. The judgment on damages in *Nash v. D.P.P.*, like other judgments in which the Supreme Court has engaged thoughtfully and extensively with Convention case-law, was an important and welcome milestone. It is perfectly understandable, as the Chamber judgment in *Keaney* recognizes, that the Supreme Court reserved for future appropriate cases careful consideration of the circumstances in which it might be appropriate to award damages in the light of the material facts of those

[15] See § 16 of the minority opinion in *McFarlane*, citing the High Court judgment in *Kemmy v. Ireland and the Attorney General* [2009] IEHC 178.

[16] See M. McDowell, «The Future of Ireland's Legal System», Law Reform Commission Annual Conference, November 2017. Criticising a previous culture characterised by what he regarded as almost endless indulgence in terms of litigation delays see Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98.

individual cases. However, it remains the case that the scope of a damages action, the circumstances in which a complainant is likely to recover damages following delay and questions of quantum all remain unclear and in need of development through practice and case-law.

21. The *Keaney* judgment is not a basis for considering as ineffective remedies afforded by the Constitution in the respondent State nor does it fail to recognize the wide discretion enjoyed by the domestic courts to fashion remedies where constitutional rights are concerned. It should not either be regarded as abandonment of the crucial principles of exhaustion and subsidiarity cited in *D. v. Ireland* and indeed in *McFarlane.*[17] It reflects the following proposition which, after twenty years of repetitive cases on excessive delay, is a reasonable one: where an applicant complains of excessive delay within the general court system, sending that applicant back into the general court system the subject of the delay complaint in order to craft and/or develop his or her own remedy is unlikely for the time being to meet the requirements of Articles 35 § 1 and 13 of the Convention.[18]

22. It should be stressed that the fact that the *Nash* damages claim was unsuccessful is not the relevant consideration, as the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant.[19] What is more telling for present purposes is the fact that those proceedings took over six years.

23. As highlighted in the Chamber judgment, Article 13 does not require any specific form of remedy. The respondent State enjoys a margin of discretion regarding how to comply with their obligation.[20] Given the fact that the *McFarlane* judgment is now the subject of enhanced supervision, it is to be presumed that developments in relation to an effective remedy – whether judicial or legislative – will be speedier post-*Keaney* than they were post-*McFarlane*. One point is certainly worth clarifying since, as the Chamber judgment highlights, the respondent Government did not assist the Court in this regard. Since the remedies provided under the ECHR Act only

[17] See the key extract from *McFarlane* reproduced above.

[18] See also S. Wallace, «Tackling Jarndyce and Jarndyce: Delay, *McFarlane v. Ireland* and the European Court of Human Rights – Part II» [2011] 21 *Irish Criminal Law Journal* 54-58: "[…] there is something fundamentally counterintuitive about a State acknowledging it has a problem with delays in its legal system and suggesting further litigation to resolve the issue". In the *Keaney* case, in response to the questions posed by the Court, the respondent State observed that it fully acknowledged the Court's conclusions in *McFarlane* and noted that since then it had kept the Committee of Ministers fully informed of the steps taken to implement the judgment.

[19] See, for example, *Kudła v. Poland*, no. 30210/96, 26 October 2000, § 157.

[20] Quite apart from the extensive work undertaken at domestic level by the Expert group on Article 13 of the ECHR, numerous international reports are available detailing the wide variety of remedies developed in other Council of Europe States to combat, prevent and compensate unreasonable delay. See, for example, the report for the CEPEJ, «Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights», CEPEJ (2018) 26.

come into play in those cases where the Constitution does not already supply litigants with a remedy,[21] what role, if any, remains for section 3(2) of that Act in cases of unreasonable judicial and not merely prosecutorial delay.

IV. CONCLUSION

24. The obligation which flows from Article 6 of the Convention is one to ensure that proceedings, both criminal and civil, are concluded within a reasonable time. This has long been understood by courts in the respondent State, whether they have based their reasoning on their inherent entitlement to control their own business, or on the Constitution, the Convention or the general public interest in expeditious litigation, with the possibility of dismissing a claim on grounds of inordinate and inexcusable delay[22] Whether they have been able to meet their obligations under Article 6 § 1 in individual cases is a different matter.

25. It can be hoped that the finding of a violation of Articles 6 § 1 and 13 of the Convention in the *Keaney* case will constitute one of the final steps in a relatively long legal saga in the respondent State in relation to questions of unreasonable delay and, in the immediate future, the existence of an effective domestic remedy to tackle the latter at the appropriate domestic level.

26. Given the manner and degree to which the applicant in the present case contributed to the protracted and at times dormant nature of his civil proceedings, the outcome may seem unfair. As highlighted in the Chamber judgment, there was no question of excessive delay at High Court level, the applicant having failed to properly plead his case, which in turn led to multiple interim applications and court orders. At Supreme Court level the applicant again failed to comply with his procedural obligations. Nevertheless, the system, characterized by what one Supreme Court judge had described a few years previously as permitting "comfortable assumptions on the part of a minority of litigants of almost endless indulgence" allowed the passage of six to seven years before that court acted on a motion to dismiss. Even after that time, and despite the applicant's prolonged inaction, he was allowed to bring a motion to adduce additional evidence and still did not comply with the requisite practice direction.[23] The conduct of the case by the applicant, highlighted by judges

[21] Two different scenarios present themselves – where the proposed Constitutional remedy is ineffective and where, albeit potentially effective, a complainant is unsuccessful.

[22] See, variously, *K. v. Deignan* [2008] IEHC 407; *Donnellan v. Westport Textiles, Minister for Defence and Others* [2011] IEHC 11; *Gilroy v. Flynn*, cited above, or *Stephens v. Paul Flynn Ltd* [2005] IEHC 148. A change over time in domestic judicial attitude to delay is well-documented by N. Cox, «Dismissal of Action on Grounds of Delay or Want of Prosecution: Recent Developments» [2012] *Dublin University Law Journal* 121-147.

at both High and Supreme Court levels, has been noted and addressed by the Chamber. The judgment is not a victory for the applicant. It is, for the reasons explained therein, accompanied by no just satisfaction award due to the manner in which his case was conducted.[24] It is instead a judgment of principle identifying a systemic problem of delay which in relation to some levels of the domestic court system may have since been remedied. It is also a judgment which requires the respondent State to act in relation to the provision of an effective domestic remedy in cases of delay. Not all sound legal principles find the appropriate champion.

27. The *Keaney* case highlights a public interest which over the years several domestic judges have emphasized in delay cases before them:

> "[...] there is a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up the valuable and important time of the Courts, and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their litigation, as well as increase the cost to the Courts Service, and through that body to the taxpayers, of providing a service of access to the Courts which serves best the public interest".[25]

28. The case also reflects the daily reality which faces courts in jurisdictions where the ratio of judges to population is low, where the volume of litigation is substantially greater than the number of judges made available to deal with it, where commensurate resources are lacking and where procedural rules may need an overhaul to protect the courts and other litigants from those who waste time.[26] The European Court of Human Rights, which is often unable to meet its own Article 6 standards on unreasonable delay, is well aware of those realities.

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[23] See Hardiman J., cited above.

[24] See §§ 95 – 97 and 132, where the Court emphasised that the applicant's conduct had a critical impact on the progress of the case.

[25] See Peart J in *Byrne v. Minister for Defence, Ireland and the Attorney General* [2005] IEHC and some years later the overview by Hogan J. in *Donnellan v. Westport Textiles, Minister for Defence and Others* [2011] IEHC 11, paragraph 37.

[26] For discussion of the resources problem see the debate held by the Oireachtas (Parliamentary) Joint Committee on Justice and Equality on debate on 16 January 2019 on the General Scheme of European Convention on Human Rights (compensation for delays in court proceedings) Bill 2019. According to the Chairman of the Bar Council: «the root cause of court delays is the fact that our courts are not properly resourced. There are not enough appointed judges, registrars or support for the judges».