THE COURT OF APPEAL

APPROVED

Record No: 2022/175

High Court Record No: 2019/571A

Haughton J. **Neutral Citation Number [2023] IECA 44**

Binchy J.

Butler J.

BETWEEN/

NEIL REIDY

PLAINTIFF/APPELLANT

-AND-

CZESLAW PASEK

DEFENDANT/RESPONDENT

Judgment of Mr. Justice Haughton delivered *ex tempore* the 16th day of February, 2023

1. This is an appeal by Mr. Reidy, who at all times has not been legally represented, from a judgment of the High Court (Phelan J.) delivered on 1 June 2022 and her order made on 15 June 2022 refusing Mr. Reidy's application to extend time for to bring defamation proceedings under s.11(2)(c) of the Statute of Limitations 1957 (as amended).

2. Section 11(2)(c) reads: -

"A defamation action within the meaning of the Defamation Act, 2009 shall not be brought after the expiration of –

(i) One year, or

(ii) Such longer period as the court may direct not exceeding two years, from the date on which the cause of action accrued."

3. Also relevant is s.11(3A) which gives the following guidance in relation to the exercise of the court's jurisdiction: -

"the court shall not give a direction under sub section 2(c)(ii) (inserted by section 38(1)(a) of the Defamation Act 2009) unless it is satisfied that –

(a) The interests of justice require the giving of the direction

(b) the prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that the defendant would suffer if the direction were given, and the court shall, in deciding whether to give such a direction, have regard to the reason for the failure to bring the action within the period specified in subparagraph (i) of the said subsection (2)(c) and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.*"*

4. The Rules of the Superior Courts 1986 govern the procedure for applying for an extension of time: -

"(1) An application for leave under s. 11(2) may be brought by originating motion ex parte, grounded upon an affidavit sworn by or on behalf of the moving party. The court may, on hearing such an application, give such directions, if any, as to the giving of notice of the application or otherwise, as it considers just and convenient.

(2) Where a defamation action has not been brought before the Court in respect of the statement in question, an application to the Court for a direction under section 11(2)(c) of the Statute of Limitations 1957 shall be brought by originating notice of motion, in which the intending plaintiff shall be named as applicant and the intended defendant as respondent. The application shall be grounded upon an affidavit sworn by or on behalf of the moving party. "

5. The essential background facts are as follows:

6. By letter dated 12 December 2017 Mr. Pasek wrote to Mr. Reidy – he wrote it in Polish and had it translated to English and does not dispute that he sent it to Mr. Reidy.

7. This prompted Mr Reidy to institute defamation proceedings against Mr. Pasek by plenary summons issued on 1 February 2018, record no. 2018/873 ("**the 2018 proceedings**"). The plenary summons did not allege any publication of the alleged defamation in Ireland – only publication to the Polish translator and other unspecified third parties. A conditional appearance was entered on behalf of Mr. Pasek, to contest jurisdiction.

8. On 11 March 2018 an email was sent to the Wexford Court Office making a complaint of fraud and criminal activity against Mr. Reidy, and enclosing a copy of Mr. Pasek's letter of 12 December 2017 translated to English. Mr. Reidy alleges this email was sent by Mr. Pasek. Mr.

Pasek denies sending it. According to Mr. Pasek the question of who sent it has been investigated by the Polish police, but that investigation was inconclusive, and the question of who sent it remains a live one.

9. Mr. Pasek applied by motion to strike out the 2018 proceedings for want of jurisdiction. Mr. Reidy brought cross motions for judgment in default of defence, to cross examine on affidavits, and to amend the statement of claim to plead a further defamation arising out from the 11 March 2018 email.

10. These motions were listed and heard together by O'Regan J. on 7 May 2019. She found that there was a want of jurisdiction and she declined the amendment sought by Mr. Reidy on the basis that it was an entirely new cause of action. She indicated that Mr. Reidy had an entitlement to apply to court to extend the one year limitation period for bringing a new defamation claim. Mr. Reidy seeks to rely on what was said by O'Regan J. as amounting to an order or direction to bring such a motion, but having read the transcript this is not tenable: O'Regan J. emphasised that it was not her function to advise him. Her order was perfected on 11 September 2019.

11. Mr. Reidy attempted to appeal the order of O'Regan J., but his appeal was late in time, and on 20 June 2022 the Court of Appeal refused to extend time. An application had been required to amend the order of O'Regan J., and the amended order was perfected on 24 November 2021; Mr. Reidy appealed the order as amended, but that appeal was dismissed by the Court of Appeal on 12 July 2022. It may be said therefore that the 2018 proceedings are at an end.

12. On 1 July 2019 Mr. Reidy issued a notice of motion seeking an extension of time for bringing defamation proceedings in respect of the 11 March 2018 email. The first return date was 10 October 2019, and over the ensuing months affidavits were exchanged. On 10 October 2019, Mr. Reidy appeared and furnished to Mr. Pasek's solicitors some of the papers which had not been served and the matter was adjourned to 20 January 2020 for a replying affidavit. Mr. Reidy does not appear to have attended on that date, or on the next date to which it was adjourned, 3 February 2020 (although he says that on one of these dates he tried to attend but the bus from Wexford was late). This court was informed that Mr. Pasek's solicitors notified Mr. Reidy of each of these adjournments.

13. Critically, by 10 March 2020, two years after the alleged defamation, Mr. Reidy had not caused a plenary summons to be issued by the Central Office instituting proceedings for defamation arising out of the 11 March 2018 email; nor has he instituted any such proceedings since then. It appears that at no stage after issuing the notice of motion to extend time did it occur to Mr. Reidy to ask the High Court to hear his motion as a matter of urgency, or at any rate to hear it prior to 10 March 2020.

14. Accordingly for the purposes of s.11(2)(c) Mr. Reidy has not brought a defamation action arising out of the 11 March 2018 email and attached letter within the maximum period of two years that may be permitted by way of extension from the date of accrual of alleged cause of action.

15. Following argument before Phelan J. in the High Court, Mr. Reidy was permitted to file a further affidavit, affirmed by him on 20 May 2022. In this he suggests that he did bring fresh defamation

proceedings under record No. 2019/40 IA, and exhibits certain documents. In this affidavit he also claims to have posted a plenary summons and statement of claim to Mr. Pasek's solicitors on 28 May 2019, and exhibits certain documents and a Certificate of Posting.

16. However the document exhibited as a 'Notice of Summons/Plenary Summons', which does refer to a claim arising out of alleged defamation on 11 March 2018, does not bear a stamp and does not bear any record number, and does not appear to have been issued out of the Central Office. Nor does it bear the usual issuing signature of the Chief Justice. Oddly it does purport to be issued by order of the Chief Justice Frank Clarke "*the 1st day of February two thousand and eighteen"*, i.e. several weeks before the alleged defamation on 11 March 2018. Mr. Reidy offered no explanation for this. There is therefore no evidence that Mr. Reidy ever issued fresh proceedings arising out of the alleged defamation on 11 March 2018.

17. Mr. Reidy also avers that he posted "*a plenary summons and statement of claim to the defendant on 28 May 2019*" and, as I have said, he exhibits a certificate of posting to Hoban Boino, Mr. Pasek's solicitors, in Dublin.

18. Mr. Boino, solicitor for Mr. Pasek, in a replying affidavit avers that he never received any plenary summons or statement of claim on or after 28 May 2019, and most importantly stated that *"...I was never asked if I had authority to accept service of such proceedings on behalf of Mr. Czeslaw Pasek*" and never confirmed that he had such authority and that *"...in fact, I did not have such authority*".

19. Mr. Boino also exhibits a High Court Search under record number 2019/40 IA which is illuminating. It shows that all that Mr. Reidy issued on 8 May 2019 was an affidavit; that the matter was listed before Meenan J. on 20 May 2019 and adjourned to 24 June 2019; and an entry under 'Order Details' for 24 June 2019 stating as the 'Result' "Common Law Interim' and an order perfected on 25 June 2019. It seems reasonably clear that the letters 'IA' in the record number denote "*intended application*". Mr. Boino also exhibits a note to his office from Mr. Ciaran Murphy BL who attended the Common Law *ex parte* motion list on 24 June 2019 and records that all Meenan J. did on that day was grant liberty to Mr. Reidy to bring a motion pursuant to Order 1 B Rule 3 to extend time for issuing defamation proceedings, which motion should be on notice to the Mr. Pasek.

20. It seems therefore that Mr Reidy's application to Meenan J. on 24 June 2019 was made *ex parte* pursuant to O. 1B r. 3(1), but Mr Reidy was then required to bring a motion on notice, as required by O. 1B r. 3(2), seeking a direction under s.11(2)(c) extending time.

21. What is clear from all of this is that Mr. Reidy never instituted proceedings in relation to the alleged defamation on 11 March 2018.

The High Court

22. The trial judge correctly identified the issue that was before her, in para. 26 of her judgment: -

> "In this case the application in an intended action was issued in July, 2019. This was within two years of the date upon which the defamatory statement was published. By that time the Appellant's cause of action was plainly statute barred — save and except if he were in a

position to successfully invoke the exercise of discretion of the Court to make a direction pursuant to s.11(2)(c)(ii). The question which arises is whether this application may be made when no proceedings have been brought within the two-year period but an application for a direction has been whilst having regard to the "s*hall not be brought*" language appearing in s. 11(2)(c). As apparent from the summary of the background given above, on the date of hearing before me, more than four years had expired from the alleged defamatory publication in March, 2018."

23. The trial judge then reviewed caselaw in relation to s.11(2)(c) addressing the question whether the application to extend time must be made before the proceedings are issued, or whether it can be made after issue and after the two years has expired. She accepted as correct the reasoning of Butler J. in *McKenna v. Kerry County Council & McAllen* [2020] IEHC 687, that the issue was one that goes to the jurisdiction of the court to make an order at all. Butler J. in *McKenna* in large part accepted the reasoning of Barton J. in *Quinn v. Reserve Defence Forces Representative Association* [2018] IEHC 684. In *Quinn*, Barton J. addressed whether the extension application could be brought *after* proceedings had been issued during the second year. He stated: -

"11. Accordingly, the Court determines the first question in the affirmative and finds on a proper construction of s. 11(2) c), that after the expiry of the one year limitation period proceedings maybe issued without an order having to be obtained extending the time within which the proceedings maybe brought; the necessity for such application arises only if and when a statute barred plea is raised by way of defence. No such plea having been raised in the

Defence as originally delivered, it follows that so much of the claim as appeared on the face of the Statement of Claim to be statute barred would not have been in issue; rather the case would have proceeded to trial on the merits.

12. It was only when the statute was pleaded in the Defence as amended that the limitation period became an issue at all and gave rise to the necessity for the application and the relief sought if the portion of the claim to which the plea refers is not to be defeated. Finally, to place the construction on the provision contended for by the Defendants would not only bear on the Plaintiff's right to a remedy but, more fundamentally, on his right to sue, a proposition which I am satisfied is neither sound in principle or law."

24. Butler J. in *McKenna* stated: -

"(24) Subject to one proviso I am satisfied that Barton J.'s analysis in these paragraphs is correct. Given the very long pedigree the phrase "shall not be brought" has in limitation statutes and the consistent interpretation given to that phrase both in the common law and in this jurisdiction, if the legislature had intended by s. 11(2)(c)(ii) to impose an obligation on intending litigants in defamation proceedings who had not brought their claim within the initial one-year period to obtain a direction from the court as a condition precedent to being entitled to issue proceedings then that should – and would - have been clearly stated in the provision in question. Instead, the use of commonplace statutory language must have been understood by the legislature as having its longstanding and accepted effect."

“(27) Whilst I completely accept that the effect of a statutory limitation period is not to bar an intending plaintiff's right to sue, I am hesitant to conclude that it necessarily follows that an intending litigant who wishes to bring defamation proceedings and knows that they are outside the first year of the limitation period for doing so must issue proceedings and await the Statute of Limitations being pleaded against them before they can take any step to seek the direction of the court regarding their own proceedings. Were it not for the special meaning attaching to the phrase “shall not be brought”, the language used in s. 11(2)(c) and s. 11(3)(A) in terms of the court giving a direction and identifying “such longer period” would normally suggest that the direction is to be sought in advance of rather than subsequent to issuing the proceedings. There are also practical reasons why a plaintiff might wish to ascertain at the outset and before any substantial costs are incurred that they will in fact be permitted to seek the remedy they wish to pursue.

28. Therefore, in my view the key element of s. 11(2)(c) is that if a plaintiff is seeking to avail of the extended limitation period, proceedings must be issued within that period but the plaintiff is neither required to, nor precluded from seeking a direction extending the time for bringing the proceedings either prior to or simultaneously with the issuing of proceedings or, as here, retrospectively, provided the proceedings themselves are issued within the relevant period. I am not certain that Barton J.'s judgment is to be correctly read as precluding an application being made in advance of the issuing of proceedings as that issue did not arise on the facts before him. Equally of course it does not arise on the facts before me and indeed my

observations in this regard might be regarded as obiter were it not for the subsequent judgment of Simons J. in *Oakes v Spar (Ireland) Ltd* [2019] IEHC 642 in which he disagreed with Barton J.'s analysis and held that an application for a direction under s.11(2)(c) must be made prior to the institution of proceedings."

25. The trial judge therefore gave her primary reason for refusing Mr. Reidy's extension application as follows: -

"47. It seems that the position may not yet be fully settled but I find the clear reasoning adopted by Butler J. in *McKenna* most compelling. It seems to me that the Plaintiff is entitled to make an application retrospectively for a direction extending the time for bringing proceedings under s. 11(2)(c) but only where the Plaintiff has in fact issued those proceedings within the extendable period. Alternatively, an application may be made in advance of the issue of proceedings but such an application will be ineffective unless it is determined before the expiry of the extendable two-year period. Where no proceedings have issued within the extendable two-year period or that period has already passed without the issue of proceedings when the application is determined notwithstanding that it was brought before the expiry of two years, in my view it follows that the Court has no jurisdiction to extend time.

48. Having afforded the Plaintiff an opportunity to exhibit such proceedings as he claimed had issued within two years, other than the proceedings which have been struck out and which had issued before the alleged publication in this jurisdiction, I am satisfied based on the additional material produced and the court record that no proceedings issued out of the Central

Office in the two-year period post-dating the alleged defamation in March, 2018. It follows for the reasons set out above that I have no jurisdiction to make the order sought. It is my view that an application for an extension of time at this remove can only be entertained where it relates to proceedings properly instituted within the two-year limitation period."

26. The trial judge went on give to reasons why, even if she did have jurisdiction, she would not exercise her discretion to grant the extension sought by Mr. Reidy having regard to the considerations set out in s.11(3A).

Grounds of Appeal and Mr. Reidy's submissions

27. The Grounds of Appeal do not set out why Mr Reidy says the trial judge was wrong in her reasoning on the primary issue. Further Mr. Reidy does not set out any substantive grounds whatsoever suggesting that the trial judge erred in the exercise of her discretion (if she had jurisdiction), or how she might have erred. In these circumstances it is not surprising that the Respondent's Notice asks the court to dismiss the appeal *in limine*.

28. Mr. Reidy's written submissions also do not assist the court. The most that he could suggest was that the word "*shall*" in s.11(2)(c) does not mean "must", and that therefore it was not obligatory to issue proceedings within the second year, and that issuing the motion was sufficient. Of course that submission is not correct, as "*shall*", unlike its counterpart "*may*", denotes in law that something must be done.

29. Mr. Reidy made no submission, written or oral, to suggest that the trial judge's exercise of her discretion (if she did have jurisdiction) was in error; he merely observed that she could have exercised it differently.

Submissions on behalf of Mr. Pasek

30. Counsel for Mr. Pasek made written and oral submissions in support of the position taken by the trial judge. He very fairly brought to the court's attention the judgment of Ní Raifeartaigh J. in *O'Brien v O'Brien* [2019] IEHC 591 as a judgment that might be regarded as against the proposition that the proceedings must be issued within the two years. There the court was concerned with 2 alleged defamatory statements, one made in March 2017 (to An Garda Siochana) and the other made in July 2017 (to a company). A motion was issued on 28 June 2017 seeking an extension of time to bring a defamation action, even though the one year period had not expired in relation to the July 2017 publication. Noting that Barton J had only recently held that the appropriate procedure is to issue the proceedings and seek an extension thereafter if the defence of the Statute is raised, Ní Raifeartaigh stated, in para. 2: -

> "The latter judgment post-dated the Notice of Motion in the present case and I do not think that it would be fair to criticise the plaintiff for adopting the procedure he did, and *I will take the clock as having stopped running on the day of the issue of the Notice of Motion (June 2018)".* [emphasis added]

Decision

31. I accept counsel's submission that *O'Brien* is not an authority that could be relied upon for the proposition that issuing the motion within the 2 years is enough to stop the clock running. That argument does not appear to have been pursued by defence counsel in that case, and beyond the brief mention in para. 2 it is not the subject of any discussion or analysis in the thirty-six paragraphs of the judgment. It is clear that the entire focus of the judgment was whether the court should exercise the discretion under s.11(3A) in favour of extending time. There is no discussion, presumably because it was not raised, of whether the court had jurisdiction to permit an extension which would have the effect of allowing the issuing of proceedings outside the extended 2 year period. I note that Ni Raifeartaigh J. gave her ruling to the parties in advance of her judgment on a date which was within that two year period insofar as the second of the two alleged defamations was concerned.

32. I also accept counsel's core submission that the plain wording of s.11(2)(c) is such that the defamation proceedings must be issued within the second year, absent which the court does not have jurisdiction to extend time. In this regard I accept as correct the reasoning of Barton J. in *Quinn*, of Butler J. in *McKenna*, and the trial judge in the present case. Counsel also submitted that there is no statutory basis for any suggestion that initiating the application for an extension of time pursuant to s.11(2)(c) has the effect of pausing time. He pointed to examples where the Oireachtas has expressly provided for the pausing of the running of the limitation period: s.18 of the Mediation Act 2007, and s.11 of the Personal Injuries Assessment Board Act 2003. I also note the Statute of Limitations itself prevents time running in certain circumstances e.g. s.71

provides that in cases of fraudulent concealment the accrual of a cause of action is deferred until the point in time when the fraud is discovered or could with reasonable diligence have been discovered.

33. I am persuaded that absent an express provision in the Statute of Limitations as amended in respect of s.11(2)(c) the mere issue of the motion seeking to extend time does not have the effect of stopping time running for issue of the defamation proceedings.

Conclusion

34. Because of the absence from the Notice of Appeal, and from Mr. Reidy's submissions, of any grounds for overturning the trial judge, whether on the issue of jurisdiction to extend time in this instance, or on the issue of discretion, I would dismiss this appeal *in limine*.

35. In any event I would hold with the trial judge that the failure of Mr. Reidy to issue defamation proceedings within the period of two years from the alleged defamatory publication on 11 March 2018 means that the High Court and this court has no jurisdiction to extend time under s.11, and that is fatal to his application and appeal.

36. That being the case it is not necessary to consider whether the trial judge erred in her further reasoning for refusing to exercise her discretion under s.11(3A) in favour of Mr. Reidy. I would merely comment that O'Regan J. made it clear to Mr. Reidy on 7 May 2019 that he faced a Statute of Limitation issue as one year had passed, and he could apply for "*a possible extension of that one-year*", but he would need to apply to court "*as quickly as you ever can*". Despite not having the benefit of legal advice or representation Mr. Reidy ought to have been aware that he needed

to move quickly, and it is notable that he failed at any point to push for an early hearing of his application to extend – as he could have done on 14 October 2019, 20 January 2020 or 3 February 2020.

37. I would accordingly dismiss this appeal.

Binchy and Butler JJ. agreed with the judgment of Haughton J.