THE HIGH COURT

[2023] IEHC 314
[Record No. 2020 3625 P]

Between

PLAINTIFF

PAUL MCALLISTER

-V-

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

DEFENDANT

Judgment of Mr. Justice Dignam delivered on the 9th day of June 2023.

INTRODUCTION

1. The plaintiff seeks a direction pursuant to section 11(2)(c) of the Statute of Limitations 1957, as inserted by section 38(1)(a) of the Defamation Act 2009, which provides:

> *"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 2 years,*
>
> *from the date on which the cause of action accrued."*

2. The application gives rise to two issues: whether, on the correct interpretation of section 11(2)(c), an application for a direction must be made prior to the institution of the proceedings or whether it may be made after the proceedings have issued ("the interpretation issue"); and, if it may be made after the institution of the proceedings (as it was in this case), whether the Court should, in the exercise of its power under s.11(2)(c), grant such a direction.

3. As the application in this case was made after the institution of the proceedings the second question only arises if the first one is decided in favour of the plaintiff.

4. In *Morris v Ryan [2019] IECA 86* Whelan J considered this second issue first. However, Whelan J dealt with the matter in this fashion because of how it had been approached by the trial judge. Whelan J said:

> "*in circumstances where the said anterior issue* [as to whether an application for a direction pursuant to section 11(2)(c)(ii) can be entertained by the court after the expiration of period of two years from the accrual of the cause of action] *was not comprehensively contested by the appellant – who was a litigant in person – with any degree of rigour it is proposed to consider in the first instance whether the trial judge correctly exercised his statutory discretion in refusing to extend the limitation period. Thereafter the antecedent question will be addressed should the need arise."*

That approach was not urged on me in this case. Indeed, the parties highlighted the fact that a divergence of opinion as to the correct interpretation of the section has arisen in three High Court decisions and their approach was that this issue had to be decided.

5. I think it is appropriate in those circumstances that I should first determine the interpretation issue. If I am satisfied that the section permits an application to be made after the commencement of the proceedings, I will then consider whether I should exercise the discretion in section 11(2)(c).

BACKGROUND

6. These questions arise against the following background.

7. On the 13th December 2019, the plaintiff, who is a pharmacist, first learned that the defendant had previously provided a Garda vetting report which contained incorrect information about his record of criminal conviction to the Irish Pharmacy Union and the Union had then published this report to various pharmacies whenever the plaintiff was seeking to take up employment.

8. Essentially the vetting report ascribed the plaintiff's brother's criminal convictions to him.

9. Prior to this discovery the plaintiff did not know that the defendant had published this material about him.

10. In the Defence it is pleaded that the report was first published by the defendant on the 22nd June 2018. Section 11(3B) of the Statute of Limitations, as inserted by section 38 of the 2009 Act, provides *that:*

> *"For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium."*

11. Thus, on the basis of the plea in the Defence, the date of the accrual of the cause of action was the 22nd June 2018 and this is not disputed by the plaintiff. The claim was statute-barred as of the 21st June 2019 unless the Court made (or makes) a direction under section 11(2)(c) and would be absolutely statute-barred on the 21st June 2020.

12. Solicitors acting on behalf of the plaintiff wrote to the defendant on the 19th March 2020 pointing out that the plaintiff had not been aware of the publication when it occurred and that he first became aware of it in December 2019. They also requested compensation and that the defendant write to all former employees of the plaintiff in certain terms. It seems there was no response to this and the plaintiff then issued proceedings by Plenary Summons on the 20th May 2020 and delivered a Statement of Claim on the 13th October 2020. A Defence was delivered on the 9th June 2021 in which it was pleaded that the plaintiff's claim was statute-barred on the basis that the alleged

cause of action accrued on the 22nd June 2018 and no proceedings were instituted by the plaintiff until the 20th May 2020.

13. The plaintiff then brought this motion on the 21st September 2021.

THE PARTIES' POSITIONS

14. It is the defendant's position that the correct interpretation of section 11(2)(c) is that if proceedings are not instituted within one year of the date of accrual of the cause of action they may only be issued if the Court first gives a direction under section 11(2)(c). Put simply, it is the defendant's case that a claim can not be brought until after a direction has been granted, that a direction was not granted (or sought) within two years of the accrual of the cause of action in this case and the claim is therefore absolutely statute barred.

15. The plaintiff, on the other hand, takes the position that section 11(2)(c), on its proper interpretation, permits the institution of proceedings within two years of the accrual of the cause of action and permits an application for a direction to be made after the proceedings have been instituted, and that these proceedings were instituted within two years and will only be statute-barred if the Court does not give a direction.

16. I was referred to a number of cases*: Quinn v Reserve Defence Forces Representative Association & Ors [2018] IEHC 684, Oakes v Spar (Ireland) Limited [2019] IEHC 642, McKenna v Kerry County Council & anor [2020] IEHC 687, Morris v Ryan [2019] IECA 86, O'Brien v O'Brien [2019] IEHC 591* and *O'Sullivan v Irish Examiner Limited [2018] IEHC 625*. The first three of these – *Quinn*, *Oakes* and *McKenna* are most directly on point.

DISCUSSION AND CONCLUSION ON INTERPRETATION

17. The parties acknowledged that there was a difference of opinion evidenced in these three judgments. Barton J and Butler J held in *Quinn* and *McKenna* respectively that a retrospective application after the institution of proceedings could be made. Simons J, on the other hand, held in *Oakes* that an application for a prolongation of the limitation period has to be made before the institution of the proceedings. The courts in *Morris* and *O'Brien* made some comments of relevance to the interpretation issue in this

case which were largely in accordance with the conclusion reached by Simons J but, in fact the issue was only really considered and decided in *Quinn*, *Oakes* and *McKenna*.

18. I am satisfied for the following reasons that the correct interpretation of the section permits the institution of proceedings and a subsequent application for a direction.

19. I therefore find myself in agreement with the conclusion reached by Barton J and Butler J. Those sections of Simons J's judgment in *Oakes* in relation to whether an application may be made after the institution of the proceedings are *obiter* in circumstances where the application in that case was made before the proceedings were instituted. Separate proceedings had been issued in the Circuit Court but it was accepted that those earlier proceedings were issued against the wrong defendant and it was intended that if Simons J gave a direction, then fresh proceedings would be issued in the High Court and remitted to the Circuit Court. In both *Quinn* and *McKenna* the application for a direction was made after the institution of the proceedings. Furthermore, Simons J was presented with an ex parte application. This means that Simons J had to determine the issue without the matter having been fully argued before him. In particular, no argument appears to have been made to him in relation to what I consider to be the determining point, i.e., the fact that an interpretation which requires the application to be made in advance of the institution of the proceedings, would lead to the shortening of the limitation period (I return to this in detail below). This is understandable in circumstances where the application was being made in advance of the institution of the proceedings or the expiry of the two year period so this issue simply did not have to be argued.

20. Section 11(2) provides for a very short limitation period of one year with the possibility of an extension or prolongation of that period by one further year. Whether one sees the statutory scheme as providing for a one year or two year two limitation period, it is undoubtedly a short period. The uniqueness of this limitation period has previously been noted by this Court. Simons J in *Oakes* noted the *"uniquely short limitation period applicable to defamation actions"*. Butler J in *McKenna* also observed that the maximum two-year period is relatively short when compared to other limitation periods. This is particularly so when one factors in the effect of sub-section (3B) which provides that the date of accrual of the cause of action is the date of first publication (rather than the date of knowledge). That is of particular significance in the context of defamation because an allegedly defamatory statement may be made about a person, causing that person damage, without that person being aware of it. At its extreme, the

person may only become aware of the statement after the expiry of two years from the date of publication and they will be absolutely statute barred at that stage. At its less extreme, the person may become aware of it immediately before the expiry of the two year period and only have an extremely short period prior to the expiry of the maximum limitation period, so the reality is that it is entirely possible that a claimant would not even have the entire period or even a significant portion of it. He may be completely unaware of any ingredient of the tort until after the limitation period has expired or until shortly before its expiry. That is, of course, a matter for the Oireachtas. Of course, the facility for the Court to extend or prolong the limitation period is a unique feature of this statutory scheme (per Simons J in *Oakes*) and would seem to be a recognition by the Oireachtas of the particularly short nature of the one year period as a limitation period.

21. Of central importance to the interpretation of section 11(2)(c) is that the effect of an interpretation which requires an application to be made in advance of the institution of proceedings is that this already uniquely short limitation period would be rendered even shorter than that nominated by the Oireachtas in the express terms of the section. This interpretation requires the claimant (the intended plaintiff) to obtain a direction before instituting proceedings. The application for a direction must be on notice to the defendant. This follows from the principles of fair procedures and specifically from the requirement in sub-section (3A) that the Court consider the prejudice that the defendant would suffer if the direction were given. Sub-section (3A) provides:

> "*(3A) The court shall not give a direction under subsection (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."*

Any such prejudice to the defendant will be peculiarly within the defendant's own knowledge and therefore if the Court is to consider the prejudice to the defendant they must be on notice of the application.

22. The effect of the combination of these provisions is that the application must be brought (on notice to the proposed or intended defendant) and determined and the proceedings issued within the two year maximum limitation period. In many instances (and perhaps very many instances) this will present no insurmountable difficulty though it may cause some inconvenience. However, in some cases the effect of this will be to shorten the limitation period because, as noted, the claimant will have to bring the application on notice in sufficient time to have it heard and determined and the proceedings issued before the expiry of the two year period. There will be times when this will be extremely challenging, if not impossible, through no fault of the claimant: for example, where the claimant learns of the allegedly defamatory statement very shortly before the expiry of the period. It may also present serious difficulties for the potential defendant. They may legitimately require time to deliver an affidavit to deal with, for example, the question of prejudice. If there is insufficient time they may have to be denied the opportunity to deliver a full response or alternatively if sufficient time is given then the claimant risks being denied the opportunity to secure a decision in time to issue the proceedings. As Butler J put it in *McKenna*:

> *"…Either the proceedings themselves or the motion seeking directions must be issued within the two-year period and once the litigant has allowed the first year to elapse without issuing proceedings they are then at risk of not being permitted to pursue their claim. It is, as Simons J held, essential that an application for directions be made on notice to the defendant as, without the defendant being present, the court cannot properly conduct the balancing exercise under s.11(3)(A).* ***Requiring the direction extending the limitation period to have been applied for and granted inter partes before the proceedings can be issued and the proceedings themselves to be issued within two years, builds into the process a level of procedural delay which necessarily reduces the two year period which the Oireachtas intended should be available to a litigant, subject to the discretion of the court, to bring such proceedings…"*** [emphasis added]

23. It was submitted on behalf of the defendant that the making of an application would have the effect of stopping the clock. That would undoubtedly address the

problem because the issue of the application having to be heard and determined before the expiry of the two year period and the claim thereby becoming statute barred would not arise. However, I see no basis in the section for this contention. Indeed, in *Oakes,* Simons J said "*Counsel for the Applicant – correctly in my view – pursued the application for an extension of the limitation period on the assumption that it was necessary to obtain a direction from the court prior to the institution of a defamation action outside the one-year limitation period*". As noted in the quote above, Butler J in *McKenna* also proceeded on the basis that if the section meant that the direction could not be sought retrospectively (i.e., the interpretation being advanced by the defendant in this case) then the direction would have to be applied for and obtained and the proceedings issued within the two year period. In any event, that seems to me to have to follow logically from the interpretation being advanced by the defendant, i.e., that the direction must be obtained before the proceedings can issue.

24. Thus, it seems to me that while the legislative policy is clearly to ensure that defamation proceedings are brought with expedition (see *Morris v Ryan* and *Oakes*), the Oireachtas could not be taken to have intended to shorten an already short limitation period in the absence of clear and express language to that effect.

25. In my view there is no clear and express language to that effect. In fact, the language of the section reinforces the conclusion that a claimant does not have to obtain an extension in advance of issuing the proceedings.

26. Barton J considered the language of section 11(2)(c) in *Quinn* in which he had to consider "*whether the plaintiff was required to apply for an order extending the limitation period before the issuance of proceedings or may do so retrospectively."*

27. He determined this issue by reference to the use of the phrase "*shall not be brought*" in section 11(2)(c) and held:

> *"8. When viewed in this context there was nothing differentiating about the wording of sub. sec. (2) (c) to warrant a departure from the established procedure whereby an application for relief was moved only if and when a statute barred defence was raised in the proceedings, furthermore, the meaning of the phrase "shall not be brought" had long since been construed by the Supreme Court. In O'Domhnaill v. Merrick [1984] I.R. 151 at 158, Henchy J. delivered the following exposition on the meaning to be attributed to those words in a limitation statute:*

"Although the statute states that an action "shall not be brought" after the expiration of the period of limitation, such a statutory embargo has always been interpreted by the Courts as doing no more than barring a claim instituted after the expiration of the period of limitation if, and only if, a defendant pleads the statute in his defence. It is only when a defendant elects to rely on the statute as a defence that the statutory bar operates. Consequently, although a claim may be plainly, and on the face of the claim, brought after the expiry of the relevant period of limitation, the action will not be held to be statute barred unless the defendant elects by a plea in his defence to have it so treated. Thus, although the statute says that the action "shall not be brought" after the statutory period, such a prohibition in a statute of limitations has been construed not as barring a right to sue but as vesting in a defendant a right to elect, by pleading the statute, to defeat the remedy sought by the plaintiff. So construed, the statute does not bear on a plaintiff's right to sue, either within or after the period of limitation. What it affects is a plaintiff's right to succeed if the action is brought after the relevant period of limitation has passed and if a defendant pleads the statute as a defence. In such circumstances the statute provides an absolute defence to that particular action."

9. It was also submitted on behalf of the Plaintiff that a clear distinction had to be drawn between the effect of the expiration of the limitation period in causes of action relating, for example, to real property or chattels where the expiration of the limitation period for bringing an action results in the extinguishment of the legal right upon which the action is based and actions such as those in tort where the expiration of the limitation period raised in a defence, if successful, has the effect of barring the remedy rather than the right of action. In this regard the attention of the Court was drawn to the very helpful commentary at Chapter 1-11 et seq in Mr Canny's work Limitation of Actions Conclusion; Appropriate Procedure

10. I accept the submissions with regard to the construction which the Plaintiff contends should be placed on the wording of the subsection; indeed, it is difficult to envisage a clearer or more concise exposition of the meaning of the phrase "shall not be brought" in a limitation statute than that set out by Henchy J. in O'Domhnaill. I find the observations regarding the appropriate procedure made obiter in Rooney and Watson, to be of little assistance on this issue; the point was either not argued or, where it was, O'Domhnaill and subsequent decisions were not apparently opened.

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…"

28. Butler J in *McKenna* (paragraph 24) largely agreed with Barton J:

"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."

29. I agree with Butler J's assessment of the significance of the Oireachtas' use of language which has a well-established meaning and effect in limitation statutes. This is particularly so, it seems to me, where the limitation period is already short (even allowing for the ability to prolong or extend that period) and where the effect of the interpretation being contended for would be to shorten it further.

30. I agree with Simons J in *Oakes* that the wording of the section must be considered in its entirety. I also agree with his view in paragraph 28 of his judgment that the use of the term "*direct*" in the section is significant. Its use is more indicative of the court having a role prior to the bringing of proceedings. The term "*direct*" or "*directions*" is typically used in relation to a step which must be taken before another or by a certain date, i.e. where the court directs a party to take a step or makes directions as to what steps must be taken and when. Thus, the use of this language is indicative of an intention that the "*extension of time*" must be obtained in advance of the institution of

proceedings. However, taking the wording of the section in its entirety it seems to me that while the use of the term "*direct*" is undoubtedly significant it is not sufficient to outweigh the significance of the use by the legislature of the phrase "*shall not be brought*" against the backdrop of previous Supreme Court authority interpreting the meaning and effect of that phrase in limitation statutes. As Butler J put it: "*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."*

31. Even if one approaches the interpretation task from a legislative policy point of view rather than a strictly linguistic approach I do not believe that a different conclusion is arrived at. I am not convinced that an interpretation that a claimant may institute proceedings in advance of obtaining a direction is necessarily inconsistent with the legislative policy of ensuring that defamation proceedings are dealt with expeditiously. It will still be open to the defendant to plead the Statute of Limitations and will still be open to the Court to dismiss the claim on the grounds that it is statute-barred. This will, of course, as noted by Simons J, put the defendant to the trouble and expense of having to defend the proceedings, or more particularly perhaps, of having to plead the statute and that issue being determined either in response to an application under section 11(2)(c)(ii) or as a preliminary issue, but that does not mean that this interpretation is inconsistent with the legislative policy. Indeed, if that were the case, then logic must mean that the *O'Domhnaill v Merrick* line of authorities (including *Clarke v O'Gorman [2014] IESC 72*, discussed in *Morris v Ryan*) must be inconsistent with the policy of a limitation period because those authorities make it clear that the effect of a limitation period expressed in the "*shall not be brought*" terms is to bar the remedy and not to extinguish the right, and that a plaintiff may issue proceedings which are plainly and unambiguously outside the relevant limitation period and it is a matter for the defendant to plead the statute. This also puts the defendant to the trouble and expense of having to defend the proceedings. Of course, this is not entirely analogous because typically other limitation provisions do not provide for the possibility of an extension or prolongation of the limitation period in the way that section 11(2)(c) does.

32. It is also worth reflecting on what the other effects of the interpretation being advanced by the defendant would be in the context of this line of authorities. It is clear that the effect of section 11(2)(c) is to bar the remedy, unless the Court grants a direction, rather than to extinguish the right (see *Oakes*, *Quinn*, and *McKenna*). This has long been understood to mean that the statute bar does not operate until pleaded. This

seems to give rise to the rather strange possibility that even if a plaintiff applied for a direction in advance of instituting proceedings and was refused he could still issue the proceedings. Simons J said in *Oakes* that *"[i]n the event that the application for an extension is refused, an intended plaintiff suffers prejudice in that any proceedings instituted by him or her are on hazard of being dismissed on the grounds that same are statute barred. (It will be recalled that the refusal of a direction does not actually preclude the plaintiff from issuing proceedings, but same are vulnerable to being dismissed)..."* If the defendant did not plead the statute the plaintiff could maintain the proceedings notwithstanding that he had been refused the direction. Even if the defendant did plead the statute, there would have to be a determination as to whether the claim is statute barred (though one would anticipate that this question would be straightforward in those circumstances). I find it difficult to conclude that the Oireachtas would have intended to put in place such an arrangement.

33. Order 1B rule 3(2) of the Rules of the Superior Courts is clearly also relevant. It provides:

> "*Where 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.*"

34. On one reading this rule does appear to be based on the interpretation of section 11(2)(c) which requires the application to be made before the proceedings are brought. However, the Rules can not be determinative of the correct interpretation of section 11(2)(c)(ii). If the correct interpretation of the section is that it permits an application to be made after the institution of proceedings then Order 1B could not restrict the period that is thereby provided for by the section. But it seems to me that there is no inconsistency between the interpretation of section 11(2)(c) which permits an application to be made after the institution of proceedings and Order 1B of the Rules. Order 1B is capable of being understood as simply providing for the procedure for those cases in which an application is being made before the proceedings are issued but not necessarily precluding an application being made retrospectively. As Barrett J notes in *Watson v Campos & anor [2016] IEHC 18*:

"Strictly speaking, it seems to the court from the foregoing that once a plaintiff is outside the standard one-year limitation period, a direction ought to be sought for the extension of the limitation period so that – assuming the extension is granted – a defamation action may commence, rather than a defamation action commencing and a direction then being sought. It is true that O.1B, r.3(2) appears implicitly to acknowledge that either approach is possible. Thus it refers to the process to be adopted "[w]here a defamation action has not been brought …" and so appears to contemplate that a situation may arise 'where a defamation action has been brought…', notwithstanding that, as mentioned above, s.11(2)(c) appears to contemplate that no defamation action can be brought after one year, absent the previous issuance of a direction under s.11(2)(c)(ii)."

35. Of course, there would be an inconsistency between the section and Order 1B if the section precluded an application being made before the institution of proceedings. But it does not do so. This is the point upon which Butler J said she may not be ad idem with Barton J. She said:

"25. The point on which I may not be ad idem with Barton J is the following. It is not clear whether Barton J intended to lay down a general principle precluding the bringing of an application for a direction in advance of issuing proceedings as he did not need to do this in order to decide the case before him. However, the subsequent judgment of Ní Raifeartaigh J. in O'Brien v O'Brien [2019] IEHC 591 suggests he may actually have done this…

26. …

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… 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."

36. It is necessary to note the comments of Ní Raifeartaigh J in *Rooney v Shell E&P Ireland Limited [2017] IEHC 63* and *O'Brien v O'Brien* and those of and Barrett J in *Watson v Campos [2016] IEHC 18*. In *Watson v Campos* Barrett J expressed quite a strong view that the direction should be sought in advance of commencing proceedings but also observed that Order 1B Rule 3(2) is ambiguous and appeared to contemplate both an application being made in advance and after the commencement of the proceedings. In any event, he decided the case on a different basis and, indeed, left open the possibility that either procedure may be appropriate. In *Rooney,* Ní Raifeartaigh J commented that it seemed that the appropriate procedure might be to first issue a motion seeking the Court's direction. However, she also made clear that as the Court was deciding the case on the basis of the Court's discretion it was not necessary to rule on this issue and there was no argument on the point. In *O'Brien v O'Brien* the applicant had applied in advance of issuing proceedings, exhibiting a draft civil bill in respect of the intended action and Ní Raifeartaigh J noted that the "*procedure adopted was in accordance with that envisaged in obiter comments of the Court*" in *Watson* and *Rooney*. Ní Raifeartaigh J also noted, however, that Barton J had more recently held that the appropriate procedure would be to issue the proceedings and seek an extension if the defendant raised the issue of the time limit (*Quinn*). In the circumstances Ní Raifeartaigh J did not have to determine the correct interpretation of section 11(2)(c). Therefore, the issue was not decided in those cases, or at their height, those parts of the judgments dealing with the interpretation and procedure were *obiter*.

37. Thus, for all of the those reasons I am of the view that the proper interpretation of section 11(2)(c)(ii) is that a claimant may issue proceedings and subsequently apply for a direction extending the limitation period. That interpretation does not preclude an application being made in advance of the institution of the proceedings. There will be many cases where the claimant or intended plaintiff has ample time to bring such an application and obtain a determination from the court and to institute the proceedings within the two year period. A plaintiff may wish to obtain certainty in advance of instituting the proceedings with the attached costs consequences. But the plaintiff is not compelled to do so by the proper interpretation of section 11(2)(c)(ii).

EXERCISE OF THE DISCRETION

38. As noted section 11(2)(c)(3A) provides:

> *"(3A) The court shall not give a direction under subsection (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."*

39. The onus of proof is on the plaintiff (*Taheny v Honeyman [2015] IEHC 883*, *O'Brien*, and *McKenna*) and the test which must be satisfied is two-fold.. The Court must be satisfied that the interests of justice require the giving of the direction. The requirement for the Court to be satisfied that the interests of justice require the giving of a direction seems to me to import a higher test than a simple balancing of the interests of justice. The court must also be satisfied that the prejudice to the plaintiff in not

obtaining the direction must significantly outweigh the prejudice to the defendant. Thus, it is not sufficient for the court to simply be satisfied that the prejudice to the plaintiff outweighs the prejudice to the defendant. It must significantly outweigh it.

40. The Court is specifically required to have regard to the reason for the failure to bring the action within the period specified in subsection 2(c)(i). This is the one-year period from the date of accrual of the cause of action. The Court is not specifically required to have regard to the reason for the failure to bring the action at an earlier point during the second year, though it seems to me that any such failure or delay during the second year and the reasons for it can be part of the consideration of the interests of justice and the balance of respective prejudices. The second matter that the Court is expressly required to have regard to is the extent to which any evidence is no longer available because of the delay. This 'delay' must refer to the delay in not bringing the action within the period specified in sub-section (2)(c)(i), i.e., the one-year period. Thus, the Court is only expressly required to have regard to the extent to which evidence has become unavailable by virtue of the proceedings not having been commenced during the one-year limitation period, but again, it seems to me that the Court can, when considering the interests of justice, have regard to the extent to which evidence has become unavailable during the second year.

41. The reason given for the plaintiff's failure to institute proceedings within the initial one year period is that he was not aware of the making of the alleged defamatory statements until six months ***after*** the expiry of that period. This is not disputed by the defendant and there is no suggestion that the plaintiff's lack of knowledge came about through any fault on his part. I am satisfied that this is a good reason for his failure to bring his claim within the one-year period and, indeed, for his failure to bring his claim until at least December 2019.

42. There is no evidence that any evidence relevant to the matter is incapable of being adduced as a result of this, or indeed any delay, and the defendant has not sought to suggest that to be the case.

43. In the assessment of where the interests of justice lie, regard may be had to any delay on the part of the plaintiff and the reasons for it. There can not be said to be any culpable delay between the 22nd June 2018 and the 13th December 2019. Thus, it seems to me that the only period of delay which can be treated as directly relevant is the period between 13th December 2019 and the 20th May 2020. This does not mean that the period up to the 13th December is entirely irrelevant. Regard can be had to that period when assessing the plaintiff's actions post the 13th December 2019. Delay must be considered

in the context of the long-standing common law position that defamation proceedings must be brought and progressed with expedition and the legislative policy disclosed in the 2009 Act (see Whelan J in *Morris v Ryan* para 54-60). At para 54 Whelan J said "*It is a clear policy of the Statute of Limitations that an action for defamation must be commenced within one year from the date upon which the cause of action accrued."* At para 56 she said "*In considering an application for a direction pursuant to s.11(2)(c)(ii), the court must have regard for the policy of the legislature in bringing about significant changes to the limitation period for defamation in 2009."* She said at para 60 "*It is accordingly clear that long before the legislature intervened in 2009 to reduce the period of limitation for defamation claims from six years to one year, there was well-established jurisprudence supporting the proposition that defamation proceedings are required to be instituted and prosecuted with expedition."* Thus, it seems to me that the plaintiff's failure to commence proceedings between 13th December and the 20th May 2020 must be considered against the context and the passage of time between 22nd June and the 19th December. Where there is a general obligation to progress proceedings with expedition then there will be an obligation on the plaintiff to move with even greater dispatch when he does become aware of the alleged defamation. This carries with it an obligation to fully explain any relevant period of delay.

44. Whelan J approved the test as set out by the High Court *in Rooney v Shell E & P Ltd [2017] IEHC 63*:

> *"…a person seeking to persuade the court to exercise its discretion in his favour must provide full and adequate information as to the particular reasons for delay that he relies upon to support his application."*

45. It was also stated in *Rooney* that:

> *"…the onus is on the plaintiff to explain the delay, and that the evidence offered in support of the explanation must reach an appropriate level of detail and cogency."*

46. I do have some concern about the level of detail given in respect of the failure to institute proceedings between 19th December 2019 and the 20th May 2020. This is particularly the case in relation to the grounding affidavit. It offers no explanation as to why the proceedings were not commenced until May 2020. Nor is there any explanation as to why the plaintiff did not swear an affidavit specifically in relation to the motion. If

the application had to be determined on the basis of the grounding affidavit I would be compelled to conclude that the plaintiff had failed to discharge the onus of proof. However, the contents of the Statement of Claim are verified by an affidavit of verification sworn on the 19th October 2020 and I can therefore have regard to the matters contained therein, particularly where they are not disputed by the defendant and where the parties engaged with the matters contained in the Statement of Claim at the hearing. The plaintiff explains certain periods between December 2019 and May 2020 but these do not fully explain the entire period. He says that in the initial period he engaged with the defendant to secure correction of the vetting record. The defendant confirmed on the 13th January that the record had been corrected, that the disputed convictions had been removed and that an amended vetting report was issued to the Irish Pharmacy Union and that the defendant had apologised to the Union. The plaintiff also says that he initially contacted former employers to explain the situation to them. It is absolutely understandable that these would have been his first steps and I am satisfied that they provide a good explanation for the period up to the 13th January 2020. However, there is no evidence as to what occurred between the 13th January and the 19th March 2020 when solicitors on the plaintiff's behalf wrote to the defendant seeking redress. The plaintiff says that he was ill over the Christmas period with stress and anxiety and had stomach problems of such severity that he lost two stone in weight and had to be investigated for underlying health problems. There is no evidence (even from the plaintiff himself) that this weight loss or stomach problems were related to the discovery of the alleged defamation. However, the cause of the illness is of less relevance than its existence. Such illness is a good reason for some delay in bringing the claim. However, there is no evidence of when the plaintiff recovered sufficiently from this illness to be able to give his attention to the question of bringing a claim. Given the nature of the illness and the significant weight loss it is likely that the plaintiff was unwell for some time but one would expect that if it was for a significant period this would have been specifically stated on affidavit so I do not think that the Court can treat this as an explanation for much more than a few weeks into January. So, the period between 13th January (or shortly thereafter) and the 19th March is unexplained. It is, of course, reasonable to assume that at least some part of that period was taken up with the plaintiff engaging and consulting with his solicitor and the preparation of the letter that was ultimately sent on the 19th March.

47. That letter did not fix a period for a reply. In any event, no reply was received from the defendant and the plaintiff issued these proceedings on the 20th May 2022. It is reasonable that the plaintiff would not take steps for a period of perhaps 2-3 weeks in order to give the defendant an opportunity to respond. This explains part of the period

between 19th March and 20th May but there is no explanation on affidavit for the rest of this period. Counsel pointed to the emergence of Covid and the related public health restrictions. I do not believe that I need affidavit evidence of the practical difficulties caused by Covid in that specific period and I accept that goes some way to explaining the period between 19th March and 20th May.

48. Thus, I feel the affidavit evidence could and should be more complete and does not fully explain why the proceedings were not issued sooner after the 13th December 2019. Nonetheless, it is important to note that the periods of unexplained delay are relatively short. I am also not entirely convinced that a relatively short period of 6 months can be fruitfully parsed in this way. It is more properly taken in the round.

49. It was also pointed out that there was a delay in bringing this motion when the defendant pleaded the statute in his Defence and subsequently confirmed that he would not consent to a direction. The plaintiff's solicitor sought this consent by letter of the 9th July 2021 and the defendant's solicitor advised that the defendant did not consent by letter of the 15th July 2021. The Defence was delivered on the 9th June 2021. I am satisfied that it was reasonable for the plaintiff's solicitor to seek the defendant's consent to an extension of time following receipt of the Defence. This was done reasonably promptly. I am also satisfied that the delay following receipt of the letter of the 15th July 2021 was not culpable having regard to the fact that the annual vacation commenced shortly thereafter and the motion was issued during that period.

50. The court must also consider the respective prejudice to the parties. Section 11(2)(3A)(b) give no guidance as to how the prejudice to the parties should be weighed. This is perhaps understandable where the specific prejudice or types of prejudice may differ from case to case.

51. Simons J said in *Oakes* J:

> "*This aspect of the statutory test is somewhat difficult to understand in that, in a sense, the prejudice which each party will suffer if an application for a prolongation of the limitation period is inversely proportionate to that which the other party will suffer. Put otherwise, there is a symmetry to the prejudice. In the event that the application for an extension is refused, an intended plaintiff suffers prejudice in that any proceedings instituted by him or her are on hazard of being dismissed on the grounds that same are statute barred... In the event that the application for an extension is granted, an intended defendant will be denied a defence which he or she would otherwise have had. The legislation*

does not provide any guidance as how these respective prejudices are to be weighed in the balance."

52. Useful guidance was given by Ní Raifeartaigh J in *O'Brien* in which she made clear that the Court should not engage in a "*simple counting of pros and cons*" but rather should conduct "*a qualitative assessment of all the relevant factors."*

53. In *Morris v Ryan* Whelan J held in respect of prejudice that:

"In evaluating prejudice, it is appropriate to consider the nature of the alleged defamation in general and the circumstances surrounding the disputed event that forms the basis of the claim."

54. She went on to assess the seriousness of the alleged defamation (that the plaintiff had a criminal record) and the small number of persons to whom it was published and contrasted that with the prejudice to the defendant caused by the delay and the "*deleterious impact of delay*". In that case the only two witnesses who were known to the defendant had ceased their employment with him many years earlier and that the delay was "*overwhelming".*

55. The factors in this case which I consider to be important in the assessment of whether the interests of justice and the respective prejudices require me to grant a direction are the nature and gravity of the alleged defamation, the fact that the defendant has not claimed any specific prejudice, the prejudice to the plaintiff, and the fact that there are short periods of unexplained delay even after the plaintiff became aware of the alleged defamation.

56. The alleged defamation in this case is of a very serious nature. The Garda vetting report stated that the plaintiff had a conviction from 2009 of "aggravated vehicle taking, causing damage to a vehicle" with associated offences of leaving the scene of an accident, no insurance and drink-driving, a conviction in 2011 for an unauthorised taking of a motor vehicle and that suspended prison sentences were imposed in relation to both sets of offences. It also recorded that he was convicted of drink-driving in 2018. These are potentially very grave for any individual but are potentially even more damaging for a professional person when it is published to his professional body. It is made even more serious by its transmission to employers. Of course, issues such as whether the statement was made on an occasion of qualified privilege and whether the defendant is

liable for any damage caused by the onward publication to employers will have to be argued and determined at trial. They are not relevant to an assessment of the nature and gravity of the alleged defamation.

57. In this case, the defendant has not claimed any particular prejudice. However, that is not to say that the defendant would not suffer prejudice if the direction is granted. The prejudice to the defendant of the court making the direction would be that the defendant would lose the freedom from being sued in respect of a defamatory allegation, which usually arises after the expiry of one year from the publication if no claim has been brought (*O'Brien v O'Brien*). This is, of course, significant because the defendant is entitled to certainty and protection from 'stale claims' and will be put to the trouble and expense of dealing with the proceedings. However, as against that the prejudice to the plaintiff of the direction not being given is that he would lose the right to seek a remedy for the alleged defamation. This is, of course, also significant but is particularly significant given the nature and gravity of the alleged defamation. I am satisfied that the prejudice to the plaintiff significantly outweighs the prejudice to the defendant.

58. I have previously expressed some concern about the delay and the absence of an explanation for some periods. However, as noted, the overall period is relatively short and the unexplained periods are shorter again. I believe that when this is weighed along with the gravity of the defamation and the prejudice for the plaintiff against the legislative policy and the prejudice to the defendant if the direction is given the prejudice to the plaintiff far outweighs the prejudice to the defendant and the interests of just require the direction to be given.

59. I therefore propose to make a direction under section 11(2)(c) and I will hear the parties on the precise terms of that direction.