THE HIGH COURT

[2024] IEHC 76

[2019 No. 8793 P]

BETWEEN:

DARREN FAGAN

PLAINTIFF

-AND-

MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION, IRELAND, THE ATTORNEY GENERAL, AND JOHN F. SMYTH

DEFENDANTS

JUDGMENT of Mr. Justice Barry O'Donnell (*ex tempore*) delivered on the 9th day of February, 2024.

1. The plaintiff in this application seeks a direction pursuant to section 11(2)(c)(ii) of the Statute of Limitations 1957, as amended, extending the time within which he may bring what is described as the intended action against the defendants. The application was contested fully by the defendants. For the reasons I am about to set out I have concluded that the direction should be refused.

BACKGROUND

2. The proceedings were commenced by a Plenary Summons dated the 15 November 2019. Following the entry of an appearance, the plaintiff delivered a Statement of Claim on the 16 December 2020. The plaintiff's claim is for damages for defamation and negligence. The plaintiff claims that there was an incident in a private room at an Intreo (the Public Employment Service) office at King's Inns Street on the 19 September 2018. On or about the 7 October 2018 the plaintiff was contacted by the Child and Family Agency, who informed him that it had received a written complaint concerning the welfare and safety of his children and that the complaint arose from an incident at an Intreo office at King's Inns Street. The complaint was set out in a written communication that stated:

> *"I wish to communicate concerns regarding aggressive and threatening behaviour, both in his previous employment and in Parnell St. Intreo, by the above person who states he overnights with his children."*

3. The written communication was followed by a phone call where the fourth-named defendant was reported to have said:

> *"[his] main concerns are in relation to Darren's children ... his aggressive and violent behaviour and the fact that he might be too preoccupied with the victimisation of their institution to provide the necessary care for his kids".*

4. According to the Statement of Claim, the plaintiff learned through a Freedom of Information request that the complaint was made by the fourth-named defendant, who had written to the Agency on the 28 September 2018 and followed up his letter with a phone call on the 12 October 2018. The plaintiff pleads that the complaints were untrue and actuated by malice. He pleads that the words meant or were understood to mean,

inter alia, that the plaintiff was a violent and aggressive person and that the nature and extent of his violent and aggressive behaviour was of such a degree as to warrant intervention and investigation by the Child and Family Agency.

5. A Defence was delivered by the defendants on 7 March 2022, following a motion for judgment in default of defence. The defence was delivered approximately 15 months after the delivery of the Statement of Claim. The defendants raised a preliminary objection that the claim was statute barred, on the basis that the cause of action accrued on the 28 September 2018 and/or the 12 October 2018, over a year prior to the commencement of the proceedings on the 15 November 2019.

6. For the purposes of this application, the Defence accepts that the fourth-named defendant made a report to the Agency. The defendants plead, among other points of defence and denials, that the making of the report was warranted by reference to the *Children First: National Guidelines for the Protection and Welfare of Children*, and that the publication to the Agency of the words complained of occurred on an occasion of qualified privilege and/or benefitted from an immunity from civil liability by virtue of section 3 of the *Protection for Persons Reporting Child Abuse Act, 1998*.

7. This motion issued on 14 February 2023 – over 11 months after the delivery of the Defence. The motion was grounded on two affidavits sworn by the plaintiff, dated the 4 February 2023 and the 24 September 2023; an affidavit on behalf of the defendants on the 19 June 2023; and an affidavit sworn by the solicitor for the plaintiff on the 1 February 2024.

THE EVIDENCE

8. In his affidavit of the 14 February 2023, the plaintiff explains his reaction to receiving a phone call from the Child and Family Agency on the 7 October 2018. The plaintiff made a Freedom of Information request on the 12 November 2018, which was refused at first instance on the 4 December 2018. The plaintiff sought a review of the decision, and on the 18 December 2018, the plaintiff was informed of the identity of the complainant – the fourth-named defendant – and was provided with a copy of a note of the telephone conversation of the 12 October 2018. It appears that the final document sought by the plaintiff was obtained on the 9 January 2019. Hence, by the 9 January 2019, at the latest, the plaintiff was equipped with the information that he required to commence proceedings.

9. The plaintiff then seeks to explain why he did not commence proceedings until November of 2019. In his first affidavit, the plaintiff explained that over the relevant period he was attempting to deal with his severe financial hardship and the consequences of that situation on his family life. He had separated from his partner and was trying to maintain his relationship with his children. At the same time, he was trying to address a situation in which his statutory payments and assistance required him to live in a one-bedroom apartment, which meant his children could not enjoy overnight access. In that regard, the plaintiff was involved in litigation with Dublin City Council in which he challenged the implementation of the Housing Assistance Payment ("HAP") rules to his situation. That litigation was concluded successfully from his point of view in the Supreme Court in December 2019.

10. The plaintiff stated that he was "*struggling with severe stress, anxiety and depression*" for which he saw his GP. In that regard the plaintiff exhibited three letters from GPs; these date from March and May 2019, together with an undated letter. All three letters

refer to the plaintiff suffering from stress and anxiety, but there is no reference to depression. The clear tenor of the reports was that the plaintiff's stress related to the pressure of caring for his children while being accommodated in a one-bedroom apartment. It would be fair to say that the GP letters appear directed towards assisting the plaintiff in obtaining more suitable accommodation.

11. The plaintiff suggests that he had contacted his solicitor about the communication from the Child and Family Agency. He does not state when this first was raised with his solicitor, but he avers that:

> *"I say that there were a number of occasions in the summer of 2019 when my solicitor tried to contact your deponent. I always tried to answer the phone when my solicitor rang but I was simply not in a position to instruct my solicitor to initiate defamation proceedings against the Defendants until September 2019 as I was in such poor mental health."*

12. The plaintiff did note that his solicitor commenced correspondence with the defendants on 12 August 2019. The plaintiff states that he "*hoped that the matter could be dealt (sic) without the need for Court proceedings but my solicitor was not able to make any progress with the Chief State Solicitors Office and so I instructed that proceedings be issued in later October 2019.*" Ultimately, the proceedings were not commenced until the 15 November 2019.

13. The affidavit on behalf of the defendants was sworn on the 19 June 2023 by a solicitor in the Office of the Chief State Solicitor. The affidavit takes issue with the reasons given by the plaintiff for his delay.

14. First, issue was taken with the averment by the plaintiff that he did not become aware of the publication of the complaint until the 18 December 2018. The defendants state that the plaintiff has pleaded that he was informed by the Child and Family Agency of the existence of a written complaint on the 7 October 2018, and that the essence of the complaint was that he had behaved in an aggressive and threatening manner at meeting in the Intreo office at Kings Inns St, Dublin. As such, the defendants state that the plaintiff must have been aware that the complaint was made by an official of the first defendant. The defendants make the point that it was not necessary for the plaintiff to issue proceedings against a civil servant personally, and that it was open to the plaintiff to issue proceedings against the other defendants prior to obtaining the fourth defendant's name.

15. In relation to the reasons for the delay, the defendants state that the letters from the plaintiff's GPs do not support the contention that he suffered from mental health problems and the letters appear to be written in aid of the plaintiff's requests for better accommodation. The defendants dispute the contention that the plaintiff was not in a position to instruct a solicitor to initiate proceedings until September 2019, in light of the plaintiff's own averments that his solicitor had tried to contact him on a number of occasions in the summer of 2019. The defendants also note that while the plaintiff claims to have been unable to instruct a solicitor, he had been in a position to make Freedom of Information requests and engage in litigation in the High Court in relation to his accommodation and "*instituting other proceedings against the first respondent*".

16. In that regard, the defendants emphasise that the plaintiff failed to refer to the fact that he issued judicial review proceedings against the first defendant on the 8 April 2019, in

which he sought orders quashing the decision of the first defendant from March 2019 refusing a supplementary welfare payment application.

17. Finally, with regard to delay, the defendants noted that even if the plaintiff only began to provide instructions to solicitors in September 2019 (despite the fact that the initial letters were written in August 2019), the fact that he was engaging in pre-litigation correspondence does not justify deferring the commencement of the proceedings until after the expiration of the one-year limitation period.

18. With regard to the question of prejudice, the defendants argued that, in their view, the publication in this case was extremely limited and that there is a defence of qualified privilege. On the other hand, the defendants note that the plaintiff has chosen to sue an official of the first defendant in person, and that a strain is placed on a personal defendant who has been the subject of defamation proceedings for a considerable time after the events to which the proceedings relate.

19. The defendants finally highlight that the plaintiff also has waited almost a year from the date of the delivery of the defence before bringing this motion .

20. The plaintiff swore a supplemental affidavit on the 29 September 2023. The plaintiff makes the point that up to December 2018 his inquiries were directed not just at identifying the person who made the complaint but also discovering the precise words of the complaint. He explained that he pursued his own Freedom of Information requests with the assistance of the Citizens Information Centre rather than his solicitor. The plaintiff asserted that it was "*entirely reasonable that I could not prioritise defamation proceedings over my housing needs at a time when he was facing potential homelessness*".

21. In terms of prejudice, the plaintiff contends that the defendants will suffer no real prejudice if the proceedings are permitted to continue and he highlights that the defendants added to the delay in this case, particularly by reference to the delay in delivering a defence. The plaintiff highlights the very serious nature of the published statements, and the importance to him of being permitted to continue these proceedings.

22. The plaintiff's solicitor swore an affidavit on the 1 February 2024 for the purpose of exhibiting correspondence. That affidavit does not comment on the other proceedings brought by the plaintiff (in which that solicitor was instructed) or on the plaintiff's averments about his solicitor's attempts to discuss this case with him over the summer of 2019.

23. The correspondence demonstrates that an undated letter was sent to Intreo by the solicitor for the plaintiff, and that it was received on or about the 12 August 2019. That letter sets out the essential elements of the claim as it eventually appeared in the Statement of Claim. It was clear, at that point, that the material facts essential to the claim were the same facts that the plaintiff had established by the 9 January 2019: the content of the communications and the identity of the person from whom the communications issued. An undertaking to preserve physical evidence was sought. The remaining correspondence effectively showed that the undertaking that had been sought was given, and that, in early October 2019 the solicitor was informed that the matter was being dealt with by an identified solicitor in the Office of the Chief State Solicitor. It is significant that at no point did the correspondence suggest that the matter was being conceded or that the defendants wished to engage in negotiations.

LEGAL PRINCIPLES

24. Section 11(2)(c) of the Statute of Limitations 1957, as inserted by section 38(1)(a) of the Defamation Act 2009, provides:

> "*A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of —*
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> *(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 .*"

25. Section 11(2)(c)(3A) provides:

> "*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,*
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> *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."*

26. Before analysing the evidence, it is necessary to re-iterate the task of the court as set out in the legislation and as discussed in the case law. In that regard, both parties were satisfied that the proper approach to an application such as this has been summarised by Ferriter J. in *Hughes v. Iconic Newspapers Limited* [2023] IEHC 635. It is helpful to quote from that judgment as follows: -

> "*32. Applications under s.11(2)(c)(ii) have generated a considerable number of judgments to date. As a result, the applicable legal principles are reasonably settled.*

33. It is clear that the onus of proof is on the plaintiff (Taheny v Honeyman [2015] IEHC 883).

34. 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 and that the prejudice to the plaintiff in not obtaining the direction must significantly outweigh the prejudice to the defendant if the direction were given. 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 also specifically required to have regard to 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. (McAllister v An Garda Siochana [2023] IEHC 314 para 41)

35. Significant regard should be given to the "clear policy " of the legislature in introducing a reduction to the limitation period for defamation proceedings and delay must be considered in the context of the long-standing common law position that defamation proceedings must be brought and progressed with expedition: see Whelan J in Morris v. Ryan [2019] IECA 86 ("Morris v Ryan"), paras. 54 to 60.

36. In Morris v Ryan, Whelan J approved the test as set out by the High Court in Rooney v Shell E & P Ltd [2017] IEHC 63 ("Rooney"): "… 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 ." 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." As Whelan J puts it in Morris v Ryan (at para 61) " the onus rests on the [applicant] to advance clear and cogent evidence for the granting of an extension of time for the institution of defamation proceedings ".

37. In O'Brien v O'Brien [2019] IEHC 591, Ní Raifeartaigh J 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." (at para 29).

38. In Goldsmith v O'Hara [2022] IEHC 67, Simons J. held that, in considering whether the balance of justice requires the giving of a direction to extend time, the Court has a wide discretion and can have regard to " a broad range of matters" (at para 28).

39. In Morris v Ryan, Whelan J held (at para 80) in relation to the question 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 ."

40. Cox and McCullough, Defamation: Law and Practice (2022, 2nd ed.), at para 13-344 ("Cox and McCullough") comment that: "The statutory criteria appear to be weighted against the grant of an extension. They suggest it will only be in exceptional cases that such an extension will be granted. This perception is borne out by the authorities.""

27. The parties also agreed that although the primary task of the court was to consider the criteria as they apply to the period prior to the commencement of the proceedings, the court also was entitled to consider the overall level of delay in the case. In that regard, the court notes the approach adopted by the Court of Appeal in *Morris v. Ryan* [2019] IECA 86, where Whelan J. stated the following at paragraph 63:

> *"In the context of the statutory regime under the Statute of Limitations s.11(2)(c) and (3A) the lack of vigour in instituting these proceedings and in prosecuting them calls for an explanation. In particular, the lack of any credible explanation for the failure to take any step to apply for a direction pursuant to s.11(2)(c)(ii) between August 2010, or indeed November 2010, and February 2011 when the limitation period of one year expired is significant. No coherent explanation was offered by the appellant for the aggregate of delays in applying to court between the expiry of the limitation period in February 2011 and the 11th December, 2015, a period of four years and nine months."* [emphasis added]

DISCUSSION

28. There is no issue in this case regarding the effect of any delay on the ability of the parties to adduce evidence. Hence, in applying the tests set out in the legislation, the court first must consider the explanations proffered by the plaintiff. These should be full and adequate and should reach an appropriate level of detail and cogency. The explanations should be considered with regard to the underlying policy of the legislation, the general need for expedition in defamation cases, and the fact that the plaintiff bears the burden of proof. In carrying out this aspect of the task, the court must conduct a qualitative assessment of the relevant factors.

29. The parties have agreed that the cause of action accrued on the 28 September 2018. The proceedings were commenced on the 15 November 2019. The defendants contend with some merit that the plaintiff had sufficient information to commence the proceedings shortly after he was contacted by the Child and Family Agency. However, on any analysis, the court is satisfied that the plaintiff was in full possession of the material facts necessary to initiate proceedings by the 9 January 2019, at the latest. This was the date when, pursuant to his Freedom of Information requests, the plaintiff knew both the words that had been published and the person who published the words. What then does the plaintiff say to explain why he did not initiate the proceedings in the period of the 9 January 2019 to the 27 September 2019?

30. The plaintiff explains that he was under considerable financial strain and hardship and was struggling to cope, particularly in light of his efforts to access accommodation that would be suitable for access with his children. In addition, the plaintiff states that he was struggling with severe, stress anxiety and depression and that he did not have the mental fortitude to focus on the defamation issue. Both of those factors were said to justify his decision to prioritise addressing his immediate needs over the defamation issue.

31. The court has immense sympathy for this position and does not doubt that the plaintiff was dealing with an extremely stressful situation. However, when scrutinised the explanations do not really answer the critical questions.

32. First, with regard to financial hardship, there is no suggestion in the papers that the plaintiff was unable to access legal advice because of his financial difficulties. In fact, it was clear that the plaintiff had access to a solicitor who already was engaged in litigation on his behalf and who was endeavouring to have him engage with the defamation issue over the summer of 2019.

33. Second, the medical evidence confirms that the plaintiff was suffering from stress and anxiety from around March 2019 until at least May 2019, but it does not support his contention that he was suffering from depression. There is no medical evidence that the difficulties experienced by the plaintiff were such that they prevented him from focusing on the defamation case. As noted above, the clear inference is that the letters were written to assist the plaintiff in securing better quality accommodation.

34. Third, the plaintiff was able to engage with the Child and Family Agency and Intreo to determine what occurred in relation to the referral to the Agency. The plaintiff was able to progress Freedom of Information requests and to press for a review or appeal when his initial request was refused.

35. Fourth, the plaintiff was in a position to instruct his lawyers to appeal to the Supreme Court when he received the High Court judgment in his case against Dublin City Council in November 2018.

36. Fifth, the plaintiff was able to instruct his lawyers to commence separate judicial review proceedings in April 2019 seeking to quash a refusal of supplementary welfare allowance. It can be observed generally that far more input is required from an applicant commencing judicial review proceedings than is required to issue a plenary summons. In assessing the overall application, I find it significant that the plaintiff did not disclose the existence of the second set of judicial review proceedings in his initial affidavit grounding this application. Coincidentally, the defendants in this case were the respondents in the second set of judicial review proceedings, so they were in a position to draw this to the attention of the court. Without that coincidence this relevant matter would not have been brought to the court's attention. No real explanation was provided by the plaintiff for this serious omission. Clearly where a plaintiff is seeking to persuade a court, *inter alia*, that he lacked mental fortitude to commence proceedings at a

particular time, it is plainly relevant that he was in fact capable of commencing and prosecuting separate proceedings at the same time.

37. Sixth, without in any sense diminishing the difficulties faced by the plaintiff, there is something of a false dichotomy in the assertion that the plaintiff prioritised addressing his housing needs over addressing his defamation case. It is clear that the plaintiff had managed to obtain the essential facts necessary to allow his solicitor to write a comprehensive pre-action letter in early August 2019. As it happens, those facts were available to the plaintiff since the 9 January 2019. The plaintiff's solicitor was willing to progress both sets of proceedings, as is evident from the averment that she was trying to contact him over the summer of 2019. In those circumstances it is not at all clear how the plaintiff's focus on his housing situation actually impacted on providing an instruction to issue a plenary summons before the expiration of the limitation period.

38. Seventh, even if the plaintiff waited until August 2019 to instruct his solicitor to send pre-action correspondence, there was no reason to postpone the commencement of proceedings when the expiry of the limitation period was imminent. It was not suggested or argued that the plaintiff or his solicitor was unaware of the limitation period or somehow taken by surprise. It is well established that engaging in pre-action correspondence is not a basis for ignoring a time limit. The reality is that while care is required in drafting all legal proceedings, preparing an Indorsement of Claim for a plenary summons is relatively straightforward, and issuing a plenary summons does not prevent the parties from seeking to achieve an early resolution of disputes if that is desired by both sides.

39. In the premises, having considered the affidavit evidence and exhibits I am not satisfied that the plaintiff has provided adequate or persuasive reasons for his failure to bring the proceedings within the limitation period. The medical evidence does not support the contention that the plaintiff was unable to instruct his lawyers due to mental health pressures. The plaintiff was able to instruct the same solicitor to prosecute a judicial review action in the same period. From January 2019 to the expiration of one year from the date when the cause of action accrued, there was no good reason why the plenary summons could not have issued. This is copper fastened by the contents of the letter sent by his solicitor in early August 2019.

40. The position in relation to prejudice is less straightforward; however I am not satisfied that the prejudice suffered by the plaintiff if the direction is not granted would significantly outweigh the prejudice to the defendants if the application was granted. The basic paradigm was described by Phelan J. in *Reidy v. Pasek* [2022] IEHC 366 at paragraph 69: -

> "Turning to the question of prejudice, I must consider whether the prejudice which the Plaintiff would suffer if the direction were not given "*significantly outweigh*" any prejudice which the Defendant would suffer were the direction to be given. Simons J. observed in *Oakes*, that there is a certain symmetry between the prejudice suffered depending on the outcome. Either the Plaintiff is prevented from maintaining proceedings or the Defendant is precluded from relying on a defence in reliance on the Statute. Some greater prejudice is required to tip the balance so that the prejudice to the Plaintiff significantly outweighs that to the Defendant. The primary prejudice to the Plaintiff is potentially very significant where an application of this nature is refused because the refusal of a direction has the effect of precluding access to the court to seek a legal remedy in vindication of personal rights, including the right to a good name. This prejudice arises in every case, however, so something more is required particular to the facts and circumstances of the case. As confirmed by the Court of Appeal in *Morris v. Ryan* (para. 80):
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> > *"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."*""

41. I am conscious that in considering the underlying proceedings the court does not have the benefit of full evidence and must rely in large part on the pleadings and the affidavit evidence. Bearing in mind those constraints, I am taking into account that from the perspective of the plaintiff the statements complained of concerned his ability to parent his children safely, and as such must be treated as serious. Against that, I was informed at the hearing of the application that the queries raised by the Child and Family Agency were resolved in early course, and the Agency took no further action. Further, this is not a case involving a plea of justification or truth, and as such there will be no allegation "left hanging" if the direction is not granted.

42. From the perspective of the defendants, they say that this is not a case in which an allegation of abuse was made, but that instead their official merely raised concerns. I am not convinced that this distinction assists very much. The fact is that a civil servant has contacted the State agency charged with child protection to suggest that they may wish to look into the behaviour of the plaintiff. That is a serious matter, even if it is not a direct allegation of abuse. In addition, aside from the child protection issue, the referral to the Agency directly accused the plaintiff of having engaged in aggressive behaviour.

43. On a more compelling line, the defendants contend (a) that publication here was to a very limited audience, being officials in the Child and Family Agency, (b) that the referral to the Agency was required by the Children First Guidelines, (c) that the publication was an occasion of qualified privilege, and (d) that in any event the referral to the Agency is subject to a statutory immunity from civil liability pursuant to s.3 of the Protection for Persons Reporting Child Abuse Act, 1998.

44. I consider that I should attach weight to the fact that the referral to the Agency involved very limited publication, and the publication was to officials who have particular expertise in receiving and addressing reports of child safety concerns. That is very different to a publication to the general public or a non-professional audience.

45. I note that the defendants have asserted that the fourth-named defendant will be exposed to the stress of having to contemplate and face High Court proceedings for a protracted period. There is some validity to this assertion, but I have not attached much weight to it because there is no averment that the fourth-named defendant actually is experiencing stress because of the proceedings.

46. Finally, it is accepted that the proceedings were commenced outside the limitation period. Given that fact, and the general need for defamation proceedings to be progressed with expedition, it is striking that the proceedings continued to be marked by delays. The Statement of Claim was delivered on the 16 December 2020, 13 months after the plenary summons. That delay was not explained. The court notes that it occurred during Covid lockdowns, but that however cannot explain such an extensive delay, when what was required was the preparation of a written document. It is true that the delivery of the Defence was extremely delayed. However, even in that situation, the

plaintiff did not issue a motion to compel the defence until late July 2021. The Defence was delivered on 7 March 2022, which was very late indeed. However, this motion did not issue until February 2023.

47. While on one level the plaintiff could opt to wait and see if the defendants raised any limitation issue, this involved some serious risk. It seems to me that this application could and should have been brought sooner. Certainly, waiting for almost a year from the issue of the Defence to issue the motion is not acceptable. In all the circumstances, I am not satisfied that the prejudice to the plaintiff in not granting the direction sought will significantly outweigh the prejudice to the defendants were it to be granted.

48. For the reasons set out above, I am not satisfied that the plaintiff has established an entitlement to the direction sought and I am refusing the application. I will hear the parties in relation to final orders.