

THE HIGH COURT

[2022] IEHC 366
[Record No. 2019/57IA]

BETWEEN:

NEIL REIDY

PLAINTIFF

AND

CZESLAW PASEK

DEFENDANT

RULING of Ms. Justice Siobhán Phelan delivered on 1st day of June, 2022

INTRODUCTION

- 1.** This matter comes before the Court on the Intended Plaintiff's [hereinafter "the Plaintiff"] application for an extension of time in respect of defamation proceedings. The Plaintiff is a lay litigant and the Defendant is a Polish businessman.
- 2.** On the face of the Motion, the application to the Court is for an order for an extension of time to initiate defamation proceedings rather than to extend time in respect of proceedings already in being.
- 3.** An issue arose during the hearing of the application as to whether proceedings had in fact already been initiated. This is because proceedings between the Plaintiff and the Defendant are recorded under three different record numbers in court records, namely record number 2019/40IA, record number 2019/57IA and record number 2018/873P. When the application came on for hearing no proceedings had been exhibited or averred to as having been instituted other than the original 2018/873P proceedings which then stood struck out by court order made in May, 2019 (under appeal). In response to questions from the Court, however, the Plaintiff maintained that further proceedings had issued. As this was an issue with potential jurisdictional consequences, in view of the fact that the Plaintiff did not have the benefit of legal representation, exceptionally, a short adjournment was allowed at the conclusion of the hearing to permit the Plaintiff to file a supplemental affidavit.

4. Further affidavit evidence was adduced by the Plaintiff (sworn under record number 2019/40IA and not that of the application before the Court) in which he claimed to have started defamation proceedings under record number 2019/40IA. It appears from the exhibits to this affidavit that defamation proceedings had not in fact been issued out of the Central Office in respect of the publication of an alleged defamatory email and letter in March, 2018 by sending them to the Wexford District Court. No such proceedings are in being. The summons exhibited by the Plaintiff was neither stamped nor filed. The Defendants solicitor denies both authority to accept service of the summons and that the summons was in fact served. A review of the Court record confirms that insofar as an application was made in separate intended proceedings under record number 2019/40IA, that application culminated in an Order (Meenan J.) made *ex parte* on the 24th of June, 2019 in which the Plaintiff was given liberty to issue a Notice of Motion in proceedings bearing record number 2018/873P on notice to the Respondent seeking orders extending time to amend the plenary summons and statement of claim to include a claim for defamation in the said proceedings. It appears that instead of pursuing that application (perhaps in circumstances where proceedings bearing record number 2018/873P stood struck out) the Plaintiff proceeded instead to bring the application which is now before this Court.

5. On this application I must determine whether the Court has jurisdiction to make an order extending the time for the bringing of proceedings where the application is heard outside the two-year extended limitation period fixed by statute but was issued within that two-year period and where no proceedings issued within the said two year period.

BACKGROUND

6. The background to this application is fully set out on affidavit and will not be rehearsed again here. Suffice to say that there is a history of previous litigation between the parties both in this jurisdiction and in Poland and the parties have been involved in a long running dispute with complaints and countercomplaints being made, many of which are vexatious and malicious, at least from the Plaintiff's perspective.

7. Most relevant to this application is the fact that the Plaintiff issued previous defamation proceedings against the Defendant in this jurisdiction bearing record number 2018/873P [hereinafter "the 2018 proceedings"]. The 2018 proceedings were initiated following receipt by the Plaintiff of a letter described as "*highly defamatory*" dated the 12th of December, 2017.

The Defendant claims that this letter was itself in response to a letter from the Plaintiff to the Defendant in which he sought payment of compensation for property damage. The Plaintiff denies sending any such letter. The 2018 proceedings were issued on the 1st of February, 2018. A conditional appearance was entered on behalf of the Defendant on the 7th of March, 2018.

8. The Plaintiff avers on affidavit grounding this application that the 2018 proceedings were commenced in anticipation that the Defendant would make good on a threat contained in the letter of the 12th of December, 2017 to repeat the allegations therein contained to parties in Ireland and other jurisdictions because he had prior form in this regard. Subsequent to the issue of these proceedings the Plaintiff became aware that a letter had in fact been forwarded to Wexford Court Office on the 11th of March, 2018. In the email sending on the letter, the sender is identified as the Defendant and it is stated that he wishes to “*make complaint for fraud and criminal activity against Neil Reidy*” stating his address and adding that the writer was “*sending you my complaint for attention of police and other authority in your county*”.

9. The letter which accompanied this email was a copy of the letter dated the 12th of December, 2017 which had already been sent directly to the Plaintiff prompting the issue of the 2018 proceedings. The thrust of the letter was to dispute the legitimacy of a judgment obtained in default by the Plaintiff in earlier proceedings brought against the Defendant in Wexford District Court. The Plaintiff was accused of “*fraud and cheating in Court*”. In the letter, which was translated by a Polish translator and signed by the Defendant, the Defendant said that he intended to notify the Court in Wexford as well as “*Polish and Irish authorities*”.

10. On the 27th of April, 2018 the Defendant issued a motion to strike out the 2018 proceedings for want of jurisdiction on the basis that the letter sent to the Plaintiff had not been published in this jurisdiction, the only publication being to the translator who was based in Poland.

11. Following receipt of the letter from the Wexford Court office in April, 2018 the Plaintiff brought an application to amend his 2018 proceedings to include the additional publication within this jurisdiction. This application was given a return date of the 25th of February, 2019 (seemingly issuing in January, 2019 per paragraph 7 of the grounding affidavit). On the face of the motion the Plaintiff also sought an order for cross-examination of the Defendant, his solicitor and a translator who had sworn an affidavit in the proceedings.

12. It appears from a chronology prepared by the Defendant's solicitor and exhibited in a replying affidavit that further steps were taken including an application for judgment in default of defence. Affidavits were exchanged through 2018 and 2019. Of particular relevance is the fact that it seems that both the strike out motion and the application to amend the 2018 proceedings travelled together and were finally listed for hearing before O'Regan J. on the 7th of May, 2019. If the Defendant's chronology is correct the hearing date for both motions was fixed on the 3rd of December, 2019. While the Plaintiff objects that the applications travelled together at the behest of the Defendant, it remains the case that when O'Regan J. dealt with the applications in May, 2019, it was still well within the two years of the alleged defamatory statement in March, 2018.

13. In the event, O'Regan J. refused the application to amend and ordered that the 2018 proceedings be struck out for want of jurisdiction. Although no written judgment is available it appears that she took the view that separate proceedings were required if the Plaintiff wished to pursue a defamation claim in respect of publication in this jurisdiction based on the letter sent to the Wexford Court Office in March, 2018. She made an order for costs against the Plaintiff. She put a stay of execution on that order for a period of 3 months. This was to afford the Plaintiff an opportunity to issue fresh proceedings in respect of the defamation occurring in Wexford with the stay to continue in the event that within the three-month period the Plaintiff brought an application for an extension of time within which to bring proceedings in respect of the alleged defamation on the 11th of March, 2018. In such an eventuality it seems from the terms of the order made that O'Regan J. envisaged that the stay would be continued until the final conclusion of such further proceedings, provided the proceedings were instituted within time and benefitted from a court direction extending time.

14. The Plaintiff advised me in oral submission that he has appealed against the orders of O'Regan J. He attaches a lot of importance to his appeal and he continues to argue that he was correct in seeking to amend his 2018 proceedings and that had his application to amend been successful there would be no necessity for the current application.

15. He further complained that there were delays in the perfection of Court orders following on from the ruling of O'Regan J. and this is a complaint for which there appears to be some justification. Be that as it may, the delay in the perfection of the orders did not prevent the

bringing of this application as the orders had not yet been perfected when the Plaintiff brought this application by motion issued on the 1st of July, 2019 and would not have prevented the issue of further proceedings. The motion which issued in July, 2019 and on foot of which the present application is before the Court has an intended application record number and issued within three months of the spoken order of O'Regan J. and well within two years of the alleged defamation occurring in March, 2018.

16. In the papers grounding the application which came on for hearing before me on the 18th of May, 2022 (some three years later) no reference was made to further proceedings having issued. In his replying affidavit the Defendant states that notwithstanding that the Plaintiff was well aware of the necessity of bringing an application to extend time, he did not do so until July, 2019 and he failed to issue the proposed defamation proceedings within the time allowed. The Plaintiff appeared to dispute that he had not issued further proceedings and was afforded an opportunity by me to file a late supplemental affidavit to address the evidential deficit in respect of the further proceedings he claimed to have instituted, it is clear from the affidavit subsequently filed that the only defamation proceedings which have actually been issued by the Plaintiff are the 2018 proceedings, being the proceedings which stand struck out.

17. On affidavit the Plaintiff seeks to explain his delay by referring to a medical condition affecting his wife and a mistake on his part that he could amend his 2018 proceedings and thereby avoid the necessity to institute separate proceedings following the March, 2018 publication. He continues to maintain that he was correct in this regard and his appeal against the order of O'Regan J. appears to not have been determined yet.

18. While the current application seeking an extension of time travelled in the JR/Non Jury list it did so without great dispatch. Affidavits have been exchanged back and forth. Despite having issued the motion the previous July, 2019, a date for hearing did not appear to have been sought when the COVID-19 restrictions temporarily interrupted Court business in March, 2020. The motion appears to have been allowed to languish thereafter. Counsel for the Defendant advises the Court that it was only on application on the part of the Defendant that the motion was re-listed and I understand a date for hearing on the 18th of May, 2022 was given in October, 2021, following the re-listing procured on behalf of the Defendant.

19. In grounding this application and explaining the prejudice to him caused by a refusal of the order sought extending time for the bringing of proceedings, the Plaintiff says that the Defendant has a history of making false allegations against him. He claims that an extension of time within which to pursue his proceedings is necessary to cause the Defendant to desist from his wrongful actions.

20. For his part, in his affidavit sworn in these proceedings the Defendant denies sending the allegedly defamatory letter to Wexford Court which he claims originates from an email account which is not his, notwithstanding that on the face of the email it gives his name. He claims to have sought to investigate the true ownership of the email account. He has pointed to the coincidence in timing between the bringing of an application to strike out the 2018 proceedings for want of jurisdiction (April, 2018) following upon a conditional appearance (7th of March, 2018) and the sending of the letter to Wexford Court Office (11th of March, 2018). He also points to the limited extent and nature of the alleged publication. He indicates that he will suffer prejudice if the Plaintiff is granted an extension of time because he does not live in the jurisdiction or speak English well and that this will impact on the costs associated with defence. He refers to the stay on the cost order obtained in the 2018 proceedings as an aspect of prejudice to him of the grant of an order. He denies in bare terms allegations of prior misconduct made by the Plaintiff. He has not engaged with the further detailed allegations made by the Plaintiff in his Affidavit sworn on the 12th of February, 2020.

21. In a separate replying affidavit sworn by the Defendant's solicitor, reference is made to the fact that the Central Office records suggest that proceedings bearing record no. 2019/40IA issued on the 8th of May, 2019. The point is made that whatever these proceedings are, paperwork was filed with the Central Office within a day of O'Regan J's order suggesting that there was little impediment to him issuing proceedings at that stage and progressing a timely application for an extension of time. It was in fact this record which prompted questions from the Court, as to what papers were lodged in May, 2019 and whether proceedings had ever issued subsequent to the ruling of O'Regan J. in May, 2019.

22. The Plaintiff did not give clear answers to the Court as to what the Central Office records reflected. While he initially said that further defamation proceedings had not issued, he then appeared to change his position to suggest that proceedings had issued in 2019. When queried as regards service he suggested that he had certificates of postage in respect of matters

sent to the Defendant. The suggestion that further proceedings had issued did not seem to be consistent with details ascertainable from a search of the Court's website but, as noted above, the Plaintiff was given an opportunity to put evidence before the Court that he had in fact issued a further set of defamation proceedings in 2019 and that these proceedings had been served or to otherwise clarify the position. The Court took the unusual step of permitting such a late affidavit because the Plaintiff is a lay litigant and correct factual position with regard to the date of issue of proceedings and their status is relevant to the question of the Court's jurisdiction in this matter. It is clear from the terms of the further affidavit evidence adduced by the Plaintiff and from a review of the Court record that no further proceedings have issued but the Plaintiff appears to have pursued the question of an extension of time in two separate intended applications but without securing the determination of the application within two years of the alleged defamatory statement.

STATUTORY PROVISIONS

23. At issue in this case is the operation of the Statute of Limitations Act, 1957 (as amended) and the manner in which it imposes a statutory time bar on civil proceedings seeking remedies in respect of defamation.

24. The statutory limitation period for defamation proceedings was introduced following the enactment of the Defamation Act, 2009 and is to be found in Part 2 of the Statute of Limitations Act, 1957 (as amended). Section 11(2)(c), the relevant provision dealing with the limitation period for defamation suits 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 two years, from the date on which the cause of action accrued.”

25. The date of accrual of the cause of action in the instant case, as defined in s. 11(3B) of the Statute of Limitations, 1957, as amended, was the 7th of March, 2018, being the “*date upon which the defamatory statement is first published*”.

26. 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 “*shall 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.

27. Section 11(3A) of the Statute of Limitations provides guidance in relation to the exercise of the Court’s jurisdiction stating: -

“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 sub paragraph (i) of the said sub section (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.”

28. These amendments reflect a significant change to the pre-existing law where, notwithstanding a common law rule that proceedings brought to vindicate a person's reputation should be issued promptly and prosecuted expeditiously, the Statute of Limitations allowed a six-year period for the bringing of defamation proceedings. That period has now been reduced to one year with the possibility that time may be extended by a Court for up to a further year. On the expiration of the two-year period such proceedings become absolutely statute barred.

29. Order 1B, rule 3(1) & (2) of the Rules of the Superior Courts 1986 provide:

“(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.”

30. As observed by Butler J. in *McKenna v. Kerry County Council & McAllen* [2020] IEHC 687, the procedural mechanism through which the Court may be called upon to exercise its statutory discretion under s. 11(2)(c) is not entirely clear cut. Certainly, in *Oakes v. Spar Limited* [2020] 3 IR 337 Simons J. considered that a party could not simply issue proceedings and make an application *ex post facto* but rather an application for an extension of time required to be made prior to the institution of such proceedings.

31. In his judgment in *Oakes*, Simons J. referred to *obiter dicta* in *Watson v. Campos* [2016] IEHC 18 and *Rooney v. Shell E & P Ireland Ltd* [2017] IEHC 63 which suggested that the application should be made prior to the institution of proceedings and that draft proceedings should be exhibited as part of the affidavit grounding the application. Simons J. came to the view (at para. 22) that s. 11(2)(c) of the 1957 Act, on its correct interpretation, requires an application for a direction to be made prior to the institution of proceedings outside the initial one-year limitation period. In his view it would be contrary to the legislative policy that defamation proceedings be instituted and prosecuted with expedition were an intended litigant, who has failed to institute proceedings within the one-year limitation period, to be entitled to institute proceedings belatedly without reference to the Court.

32. This view is not shared by others, however, most notably Barton J. in *Quinn v. Reserve Defence Forces Representative Association* [2018] IEHC 684 and Butler J. in *McKenna v. Kerry County Council & McAllen McAllen* [2020] IEHC 687. For reasons set out below, as

between the different approaches apparent in the case-law, I prefer the reasoning of Butler J. I conclude that while an application may be brought in advance of the issue of the proceedings, an application may also be brought outside the two year period in respect of proceedings which have already issued after the expiry of one year and before the expiry of two years from the accrual of the cause of action. It seems to me that this is not merely a procedural issue but also has jurisdictional implications where the Court invited to make an order extending time may only do so in respect of proceedings which were brought within two years of the accrual of the cause of action.

DISCUSSION AND DECISION

33. The Court has been referred to a number of authorities including *Quinn v. Reserve Defence Forces Representative Association* [2018] IEHC 684, *Morris v. Ryan* [2019] IECA 86, *McKenna v Kerry County Council and Angela McAllen* [2020] IEHC 687 and *Oakes v. Spar* [2020] 3 I.R. 337.

34. A question which has troubled the Courts since the enactment of the amendment, as reflected in some of the authorities identified by the parties, is whether and when a jurisdiction to make an order exists outside the two-year period prescribed under s. 11(2).

35. Notably, the question as to whether an application by a Plaintiff in a defamation suit for direction pursuant to s.11(2)(c)(ii) can, in the first place, be entertained by the Court after the expiration of a period of two years from the accrual of the cause of action was not considered by the Court of Appeal in *Morris* because that Court decided the case on the basis that the Plaintiff was not entitled to a direction under s. 11(2)(c)(ii) on the discretionary grounds as set out. The Court of Appeal approached the appeal on the basis that it was only where the Appellant established circumstances which rendered it appropriate to make the direction that he sought pursuant to s.11(3A) of the Statute of Limitations 1957, that it would then be necessary to consider what it described as (para. 53):

“the antecedent question as to whether such an application can be entertained after the two-year period specified in s.11(2)(c)(ii) of the Statute of Limitations 1957, had expired”.

36. I agree with the analysis of Butler J. in *McKenna* where she identifies the question which arises with respect of s. 11(2)(c)(ii) as a jurisdictional one. Given that this antecedent question goes to the jurisdiction of the Court to make an order at all, it seems to me likely that the Court of Appeal adopted this approach to mirror what had been directly considered in the Court below rather than as an indication that this was the appropriate or preferred order in which to approach the questions.

37. If, properly construed, the Court lacks jurisdiction under that section to entertain an application for an extension of time made by the Plaintiff after the expiration of the period for which an extension might be permitted, then the Court has no discretion to exercise. Logically therefore this question falls to be determined before the Court considers how to exercise that discretion rather than afterwards and in the absence of a jurisdiction, it should not be necessary to proceed to consider the exercise of discretion. Therefore, I will first consider whether the Court has jurisdiction on the facts and circumstances of this case to make an order extending time at this stage, more than four years after the alleged defamatory publication.

Whether the Court has a Jurisdiction to Extend Time

38. In *McKenna v. Kerry County Council and Angela McAllen* [2020] IEHC 687 Butler J., considered whether an application for an extension of time under s. 11(2)(c) can be made retrospectively outside the permitted extension period in respect of proceedings which have already been issued within the period and, if so, whether the power to make a direction should be exercised in the circumstances of that case.

39. In *McKenna* the proceedings were issued within two years of the alleged defamation. It is notable that by the time the defence was delivered the two-year period under s. 11(2)(c) of the Statute of Limitations 1957 had expired. It was pleaded by way of preliminary objection in the defence as no motion or application had been brought, within the two year period, to extend the time allowed for bringing a defamation action, the claim was statute barred, and the period for issuing fresh proceedings could not be extended.

40. Thus, the Defendant claimed that the Plaintiff was out of time to make any application for an extension once the two-year time limit has passed, relying on the fact that s. 11(2)(c)(ii) limits the Court's jurisdiction to grant a direction to “*such longer period... not exceeding two*

years”. Consequently, on the Defendant's case, the application to extend time had been made outside the relevant statutory period. The Plaintiff on the other hand contended that the phrase “*shall not be brought*” in the context of a limitation provision, had a special meaning. In view of this position, . Butler J. ruled as follows (para. 16):

“I think it is incumbent on the court to determine whether it has the discretionary jurisdiction which the plaintiff seeks to invoke before deciding on the facts how that discretion should be exercised.”

41. In considering the respective positions of the parties, Butler J. acknowledged that whilst the language of the provision in using terms “*shall not be brought*” itself suggested a prohibition *simpliciter* on the bringing of proceedings, in fact centuries of common law precedent and authoritative statements from the Supreme Court made it clear that the effect of any provision in the Statute of Limitations framed in this manner is to bar the remedy and not the claim itself.

42. While acknowledging this, however, Butler J. identified that the particular issue in the *McKenna* case, as in this case, arose because of the very unusual formulation of s. 11(2)(c) under which a limitation period is set; a further period is set within which the original limitation period may be extended and only thereafter a defence to any proceedings issued outside the extended period become absolute. In deciding the question, Butler J. considered the earlier decision of Barton J. in *Quinn v. Reserve Defence Forces Representative Association* [2018] IEHC 684. In that case Barton J. identified the issues for determination as follows (para. 2):

“Two issues fall for determination and are as follows: (a) Having regard to the provisions of s. 11 (2) (c) of the 1957 Act, whether the plaintiff was required to apply for an order extending the limitation period before the issuance of proceedings or may do so retrospectively and if so entitled (b) whether the court should exercise its discretion to extend the period.”

43. It was argued in *Quinn* that in circumstances where the one-year limitation period had expired, on a proper construction of the subsection, the Plaintiff was required to obtain an order extending the time before proceedings could be issued and that having failed to do so he was

not entitled to apply for the order retrospectively. Barton J. proceeded to determine this issue as follows (para. 11):-

“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.”

44. At para. 24 of her judgment in *McKenna*, Butler J. expressed agreement with this approach in the following terms:

“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.”

45. The point which she identified on which Butler J. might not have been *ad idem* with Barton J. was to the extent that his judgment could be construed as laying down a general principle precluding the bringing of an application for a direction in advance of issuing proceedings (albeit it is not clear that he intended or did in fact lay down such a principle).

46. From a procedural perspective, it is clear from Barrett J. in *Watson v. Campos* [2016] IEHC 18 and Ní Raifeartaigh in *Rooney v. Shell E&P Ireland Limited* [2017] IEHC 63 that their preferred approach was that a direction be sought in advance of commencing proceeding, but the relevant Rules of Court (Order 1B, Rule 3(2) RSC) are ambiguous and appear to contemplate an application subsequent to the issue of proceedings also. Offering her view on this issue in *McKenna*, Butler J. stated at para. 27:

“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.

29. The circumstances on Oakes v. Spar (Ireland) Ltd were exceptional. The alleged defamation arose out of an incident at a Spar shop. The plaintiff had issued circuit court proceedings within time against the named defendant but had subsequently accepted that those proceedings were issued against the incorrect defendant. she then sought to institute proceedings against the proprietor of the shop in question but did not take any practical steps to do so until two days before the two-year period was about to expire. As the expiration date fell within the legal vacation there were no scheduled sittings of the dublin circuit court, so the plaintiff's lawyers moved the application for a direction on an ex parte basis before the high court and in the context of the extant proceedings against the incorrect defendant. The application was refused largely on the basis that it was not correctly made on an ex parte basis but also because the delay was "inexcusable" and the prejudice caused to the plaintiff did not outweigh that caused to the defendant.

30. I note and agree with Simon J.'s observations that s. 11(2)(c) is unique in affording the court a statutory discretion to extend a limitation period. However, the statutory provision also fixes a temporal limit to that discretion and the maximum two-year period thereby fixed is itself relatively short when compared to other limitation periods contained in the Statute of Limitations. Allowing an application for a direction to be made retrospectively in respect of proceedings which have already been issued within that two-year period is not, in my view, inconsistent with the legislative policy underlying such a short limitation period. It is also consistent with the jurisprudential understanding of a limitation period barring the remedy but not the action or the plaintiff's right to sue. 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. Consequently, notwithstanding simons j.'s rejection of barton j.'s analysis in quinn, i am persuaded that that analysis is correct and that therefore the application made by the plaintiff was properly made under s. 11(2)(c) and the court has jurisdiction to determine it.”

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.

The Exercise of Discretion to Extend Time

49. Given that the law may not yet be fully settled on this question and this case is perhaps distinguishable from others on the basis that an application for an extension of time was brought

within the two-year period but not progressed to conclusion within that period, I will now nonetheless proceed to consider whether in the circumstances of this case it would be appropriate to grant an extension of time presuming a jurisdiction to do so. This was the approach taken in *Morris v. Ryan* where the Court of Appeal proceeded to consider the exercise of a discretion in the circumstances of that case without determining whether a jurisdiction to extend time existed in the first place.

50. The statutory criteria guiding the exercise of this power are set out in s. 11(3A) from which it is clear that the overriding considerations are the interests of justice and the relative prejudice to each party if a direction is granted or refused. Specific regard is to be had to the reason for the failure to bring the action within the one-year period and to the extent to which relevant evidence is no longer available because of the delay. The requirements in s.11(3A)(a) and (b) appear to be cumulative such that prejudice must be considered separately and in addition to the interests of justice and not merely as part of a global consideration of what the interests of justice require. The Court does not simply balance the potential prejudice to the parties: it must be satisfied that the prejudice of not granting a direction to the Plaintiff significantly outweighs that which might be caused to the Defendants by granting it. Indeed, in *McKenna*, Butler J. ruled (para. 53) that:

“In circumstances where the respective prejudice is finely balanced, it seems to follow that the direction should in principle be refused.”

51. The general approach the Court should take to these provisions has been set out by Peart J. in *Taheny v. Honeyman* [2015] IEHC 883 where, when looking at the question of delay generally, he stated at paras. 22 and 23:-

“22. If the plaintiff was not time-barred for the reasons which I have just stated, he would in any event have had to satisfy the court in relation to his reasons for delaying the commencement of his proceedings beyond one year and until the 10th March 2014. The section provides that the court shall not give the direction sought under subsection (2) unless, firstly, it is satisfied that it is in the interests of justice to give the direction, and secondly, that the prejudice that the plaintiff will suffer by not giving the direction, will significantly outweigh the prejudice that the defendant would suffer if the direction is given.

23. That onus is discharged in my view firstly by providing an explanation which excuses the delay so that the court could be satisfied that the interests of justice are best served by allowing the case to proceed, and by satisfying the court additionally that the prejudice which the plaintiff will suffer by being refused a direction outweighs the prejudice which the defendants will suffer if the direction is granted. It is insufficient in my view that there is a reason simpliciter for the delay. The court must consider the quality and justifying nature of the reason or reasons put forward, and also weigh the respective prejudices. These requirements are evident from the words used in section 11, subsection 3A of the Act of 1957.”

52. The Court of Appeal also considered the proper exercise of the discretion in *Morris v. Ryan* which was a defamation action in which a plenary summons issued one year and eleven months following the incident in question. An appearance was entered promptly, also within the two years, and by letter of the same date the Defendant’s solicitors wrote advising that the action was statute barred and inviting the Plaintiff to file a Notice of Discontinuance. Although this letter was written in advance of the second anniversary of the incident in question, the defence was delivered following the expiry of the second anniversary and pleaded that the claim was statute barred pursuant to s. 11(2)(c) of the Statute of Limitations (as inserted by s. 38(1)(a) of the Defamation Act 2009) since the proceedings were commenced more than one year after the date on which the cause of action was alleged to have accrued. In a subsequent directions application to the Court, the Plaintiff asserted that the proceedings were instituted within the two-year time limit and it was submitted that he should be permitted to proceed with the action for reasons which included the respective prejudice to the parties and the reasons for the delay.

53. In determining an application brought to have the proceedings struck out as statute barred, Gilligan J. noted at para. 6 in the judgment of the High Court in *Morris v Ryan* that:-

“It is quite clear that the plaintiff’s claim has not been brought within one year of the date when the cause of action allegedly accrued. Thus, the Appellant is in breach of s.11 of the Act of 1957, as amended, in that action shall not be brought after the expiration of one year from the date on which the cause of action accrued.”

54. The High Court observed that it had:-

“jurisdiction to direct such longer period as the Court may consider appropriate not exceeding two years and in this regard as the proceedings were instituted on 25th January, 2012, they are issued within a two-year period.”

55. The High Court then turned to a consideration of whether to give a direction in respect of the institution of proceedings between one and two years after the date of accrual of the cause of action and expressed the view at para. 10:-

“The plaintiff does not set out any cogent or sustainable reason as to why the proceedings were not issued within one year of the date of the accrual of the action.”

56. Considering the action of Mr. Morris as a vendetta against the Defendant and his business interests and insofar as the interests of justice are concerned, the High Court was of the view that the interests of justice in that case did not require the giving of the direction that the Plaintiff should be entitled to institute the proceedings after the elapse of one year from the date of the accrual of the alleged cause of action. The Court further stated:

“In any event, no application was made by the plaintiff for a direction with regard to the issue of these proceedings after the one-year time period had elapsed and to simply ask the Court in 2016 to grant a direction for a cause of action that accrued in 2010, without any cogent explanation for the delay involved, is unstateable and an abuse of the Courts process.”

57. In considering whether the Plaintiff/Appellant was entitled to a direction under s.11(2)(c)(ii), the Court of Appeal stated (para. 54):

“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”

58. The Court of Appeal added (para. 56):

“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.”

59. The Court of Appeal considered caselaw in which the importance of expedition in defamation proceedings has been stressed including *Ewins v. Independent Newspapers (Ireland) Ltd.* [2003] 1 I.R. 583 (Keane C.J.) and *Desmond v MGN* [2009] 1 I.R. 737 (Kearns J.). It was clear from this case law 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.

60. In *Morris*, the Court of Appeal confirmed (para. 61) that the onus of proof is on the Plaintiff to advance clear and cogent evidence for the granting by the Court of an extension of time for the institution of defamation proceedings.

61. The Court of Appeal concluded in *Morris* (para. 74) that in determining whether to grant a direction pursuant to s. 11(2)(c)(ii) the Court must be satisfied that it is necessary to provide a fair and just outcome for the Plaintiff in all the circumstances.

62. Applying the principles developed in *Morris* and earlier cases such as *Rooney v Shell E&P Ireland Ltd.*, *Watson v. Campos and Anor.* and *Oakes v. Spar Ltd.*, I must proceed to consider the interests of justice, the delay and reasons for it, the respective prejudice to the parties and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced. I must do so in a manner which has due cognisance to the fact that the Oireachtas have provided as standard a one year limitation period, and more than one year as exceptional in line with the dicta of Barrett J. in *Watson v Campos and Anor* [2016] IEHC 18 where he stated at para. 6 of his judgment:-

“... when it comes to bringing a defamation action, as defined, a one-year limitation period is standard, more than one year is exceptional.”

63. He further noted the tenor of the language in ss. (3A): -

“the Court shall not give a direction... unless it is satisfied...”

64. Considering first the question of delay, I am required to consider the length of the delay itself and the reason for it. On the basis of the available evidence in this case it is clear that the Plaintiff acted neither promptly nor reasonably with regards to the institution of the

proceedings or with regards to seeking a direction pursuant to the statutory scheme. The application for a direction is only being heard by me more than four years after the alleged defamatory event. To permit the bringing of proceedings after such a period of delay is clearly contrary to the policy of the Act and something compelling in terms of the reason for the delay and the interests of justice would be required to justify a Court in making an order at such a remove. As stated by Ní Raifeartaigh J. in *Rooney v Shell E&P Ireland Ltd.* [2017] IEHC 63 at para. 21:-

“...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.”

65. She reiterated at para. 22:-

“...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.”

66. In this case the explanations for delay included the Plaintiff’s belief that the refusal to amend his proceedings was in error with his focus remaining on the appeal against that decision. He also referred in general terms to the ill-health of his wife and work and family commitments. These work and family issues are asserted but not substantiated in any real way. The bare assertion of difficulties of this nature are simply not sufficient in my view to warrant an exception from the Statute of Limitations generally applied to defamation proceedings being made for this case in view of the onus of proof on the Plaintiff.

67. It seems to me in addressing the question of delay that it is relevant to recall that the Plaintiff knew that his 2018 proceedings were on hazard of being struck out for want of jurisdiction from March, 2018 when the allegedly defamatory event occurred because the Defendant was already pursuing the jurisdictional issue. From May, 2019, the Defendant’s position had been endorsed by the High Court (O’Regan J.) and she had expressly referenced the requirement for him to seek an extension of time should he wish to pursue separate proceedings in respect of the alleged defamation occurring in March, 2018 which was then more than one year previously but still well within two years. In those circumstances, it was not open to the Plaintiff to adopt a leisurely approach to the issue of a motion which would then languish in the list allowing the two-year time limit to pass without being heard. The

excuse offered in reliance on the non-perfection of Court orders is not accepted as this clearly did not impede either the bringing on of fresh proceedings or the making of an application for an extension. Similarly, while it is accepted that there were some delays in the hearing of motions occasioned by the COVID-19 pandemic and associated restrictions, more than two years had already passed from the date of the offending statement when restrictions associated with COVID-19 were introduced. Furthermore, these restrictions quickly eased such that it was open to the Plaintiff to seek to secure a date for the hearing of this motion at a much earlier date. Given that the Plaintiff is a lay litigant a more lenient approach might, however, be taken to this delay but for the fact that the Plaintiff was out of time ever before any confusion caused by COVID-19 restrictions impacted on the progress of the application.

68. I am not satisfied on the evidence that the Plaintiff has made out a sufficiently clear and cogent case or has provided the Court with all relevant information, including information as regards his own actions during the relevant period, for the Court to be satisfied that there existed a reason which would justify imposing on the Defendant the obligation to defend these proceedings at this remove. While it is clear that the Plaintiff laboured under the belief that he had proceedings in being until the Court determined his amendment application against him in May, 2019 and struck out his previous proceedings for want of jurisdiction, there is no real explanation for the failure to proceed at that stage to regularise the position through the early issue of proceedings. In my view, the delay in this case is sufficient on its own to justify a refusal of the application for a direction in view of the explanations tendered for same.

69. Turning then to consider the question of prejudice, I must consider whether the prejudice which the Plaintiff would suffer if the direction were not given would “*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 defamation 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):

“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.”

70. In considering the question of respective prejudice I also therefore have regard to the merits of the defamation action and the nature of the defamation alleged. While no doubt a matter of grave concern to the Plaintiff, the only publication established in evidence in this case is a letter to the Wexford Court office. I take judicial notice of the fact that Court office staff, like judges, will not be unfamiliar with correspondence of the type in question and are unlikely to attach weight to the unproven contents of such a letter. Accordingly, to the extent that it has been established in evidence, there has been very limited publication of the offending correspondence. Further, on its face, this correspondence has the appearance of correspondence not likely to be considered reliable by court staff. To this extent, I consider any damage to the Plaintiff’s reputation attributable to this correspondence to be minimal. That is not to say that persons who are liable to be considered cranks or otherwise unreliable are free to defame at will because no one takes them seriously but it is nonetheless proper to take a common-sense approach to this type of correspondence when considering the nature of the alleged defamation and the circumstances surrounding it.

71. Although the Plaintiff contends that he requires to bring these proceedings to prevent the recurrence of issues with the Defendant, it seems to me that where in fact there is a recurrence which constitutes an actionable unlawful act, the Plaintiff will at that time enjoy a remedy at law should he wish to pursue it. While the Plaintiff bears a penalty in costs arising from the earlier 2018 proceedings which would otherwise stand stayed, it is recalled that the stay is little more than a postponement. I accept that potentially were the Plaintiff to succeed in newly instituted proceedings a set-off situation might arise but the prejudice to the Plaintiff as regards costs balances against the prejudice to the Defendant in causing further costs to accrue and does not outweigh the prejudice to the Defendant in light of the increased costs which he incurs through the requirement for translation and through defending the proceedings from outside the jurisdiction.

72. Accordingly, I am not satisfied that the Plaintiff has established that the prejudice to him in not granting the direction significantly outweighs that to the Defendant were I to allow the action to proceed. Further, such prejudice as arises is a direct result of the Plaintiff's own failure to pursue his proceedings appropriately and expeditiously.

73. As for the extent to which evidence may no longer be available, no evidence of specific evidence being unavailable was led in this regard but counsel for the Defendant referred in submissions to the nature of defamation proceedings and the fact that oral evidence would be required. That said, it is clear that the alleged defamation in this case is of a documentary nature and does not rely centrally on the recollection of witnesses. Therefore, I do not see evidence no longer available because of the delay as being a particular consideration in this case which might persuade me to refuse an extension, were I otherwise minded to grant one, which I am not.

74. Finally, having regard to the interests of justice, I am not satisfied having regard to all of the circumstances of this case including the extent of the delay, the failure of the Plaintiff to actively pursue the regularization of proceedings or explain same and the nature of the defamation that interests of justice have been identified in a manner which would justify this Court making the exceptional order to permit proceedings in defamation to be taken more than four years after the alleged defamatory event. I am satisfied that it would not be in the interests of justice to visit the Defendant with the consequences of the Plaintiff's failure of expedition by requiring him to defend proceedings which have not been properly commenced.

CONCLUSION

75. It appears clear from s. 11(2)(c) that this Court's jurisdiction to make an order extending time is limited to extending time for the bringing of an action before the expiry of two years from the date on which the cause of action accrued. The Court has no authority to give an extension of time in respect of proceedings which were not brought within two years.

76. Even if the Court had jurisdiction to make an order extending time, I am not satisfied having regard to the policy of the legislation and the burden on the Plaintiff to satisfy the court to exercise a discretion that this is a case in which it would be proper to exercise my discretion (presuming I had such a discretion) to grant the direction sought having regard to the interests

of justice including in particular the reason for the delay and the failure to institute proceedings earlier and the respective prejudice (with due regard to the merits of the proceedings) to the parties of the making or refusal of the direction.

77. In all of the circumstances I will refuse the direction sought under s. 11(2)(c) of the 2009 Act and dismiss this application.