

THE HIGH COURT

[2023] IEHC 635

Record No. 2022/5176P

Between

DYLAN HUGHES

Plaintiff

and

ICONIC NEWSPAPERS LIMITED trading as LEINSTER LEADER

Defendant

Judgment of Mr Justice Cian Ferriter delivered this 16th day of October 2023

Introduction

1. The Plaintiff seeks an order pursuant to s.11(2)(c)(ii), Statute of Limitations 1957 (“s.11(2)(c)(ii)”) and/or Order 1B, Rule 3(2) of the Rules of the Superior Courts 1986 (“Rule 3(2)”) directing that the Plaintiff can issue and serve defamation proceedings on Formpress Publishing Limited (“Formpress”). This is sought to be done by way of adding Formpress as a second defendant to these proceedings.
2. The proceedings arise out of an article published in both the print and online editions of the Leinster Leader newspaper on 19 October 2021 which the plaintiff claims was defamatory of him. The article was headed “*‘I broke bail because I was in fear for my life’, man claims.*” The plaintiff was wrongly identified in the article as the man in question, by both name and specific home address.
3. The application is brought by way of motion in the existing proceedings against the defendant, Iconic Newspapers Limited (“Iconic”) rather than by way of originating notice of motion against Formpress, as envisaged by Rule 3(2). The plaintiff adopted

this procedural route on the basis that he seeks to join Formpress as an additional defendant to the existing proceedings. Formpress contends by way of preliminary objection that this procedural irregularity is fatal to the application. Before dealing with this preliminary objection, it is necessary to set out the material factual background.

Background

4. As noted, the article that appeared the print and online editions of the Leinster Leader newspaper on 19 October 202. The online edition of the newspaper is published on the website www.leinsterleader. The article was headed “*I broke bail because I was in fear for my life’, man claims.*” This appeared under a page heading “*personal safety*”. The first sentence in the article stated “*a 19-year-old man told Naas District Court that he did not turn up at a Garda station to sign on as part of his bail terms as he feared for his own personal safety.*” The second paragraph of the article specifically named the plaintiff, Dylan Hughes, by his name and precise address, and stated that he had been previously ordered to stay at that address. The article made reference to the Gardaí raiding Mr Hughes’ partner’s home in Finglas after they found out that he broke his bail conditions and detailed the plaintiff’s attempts to evade arrest by the Gardaí. The article stated that there was evidence that Mr Hughes had not been complying with his bail conditions including by being “in contact with someone he was ordered not to be in contact with”. The article makes reference to Mr Hughes, claiming that he had not signed on at Ballymun Garda station as he “always saw people out to get him” waiting outside the station. The article then reported that the District Judge decided to retract Mr Hughes’ bail saying it was “beyond reasonable doubt” that he would break bail conditions again and that Mr. Hughes had been remanded in custody while the court awaited directions of the DPP.
5. It is common case that the plaintiff was wrongfully identified in the article as the person before the District Court.
6. The plaintiff, through his sister, contacted the newspaper shortly after the publication of the article complaining of the fact it incorrectly identified him as being the person the subject of the article and requesting an apology and correction. This led the newspaper to publish a “clarification” in its next edition of the Leinster Leader on 26

October 2021. The plaintiff complains that this clarification did not contain an apology and failed to distance the plaintiff from the false allegations contained in the article.

7. The plaintiff averred in the context of this application that the identity of the entity that publishes the Leinster Leader does not appear anywhere in the print edition of the newspaper but that there is a detailed privacy policy on the www.leinsterleader website which clearly and repeatedly states that “Iconic Newspapers Limited” is the publisher of both the print and online editions of the newspaper. The plaintiff’s solicitor also commissioned research against the business name the Leinster Leader which showed that that business name was owned by Iconic. Based on this research, the Plaintiff wrote to Iconic Newspapers Limited on 10 August 2022, almost ten months after the article was published, outlining in detail how the article was defamatory. The letter set out a list of the defamatory meanings and innuendos arising from the contents of the article including meanings to the effect that the plaintiff was a criminal, disobeyed court directions, attempted to evade Gardai, was imprisoned for breach of bail conditions and was involved in criminal activity and/or reprisals. The letter called for damages and/or an offer to make amends.
8. The letter also set out how the publication of the article had damaged the plaintiff including that friends, neighbours, his employer and colleagues had become aware of the content of the article which led to him been the subject of negative commentary including false rumours to the effect that he was involved in the burglary of houses in Dublin. It complained that the publication of his full address in the article led him to fear for his safety and that of his elderly mother with whom he lived on the basis that his address could become associated with the individual who was the subject of the criminal proceedings who had said, as reported in the article, that he feared for his life.
9. Iconic did not respond to this letter. The plaintiff then issued defamation proceedings against Iconic on 10 October 2022 by plenary summons. A copy of the proceedings was sent to the email address of the Leinster Leader on 11 October 2022.
10. The plaintiff’s solicitor wrote to Iconic on three occasions over November and December 2022 calling on Iconic to enter an appearance. No response was received to these letters. On 22 June 2023, the plaintiff issued a motion against Iconic for judgment

in default of appearance and served these motion papers on Iconic on 27 June 2023. The motion was returnable for Monday 24 July 2023. On Friday, 21 July 2023, Iconic's solicitors wrote to the plaintiff's solicitor asserting that the motion was defective because the plaintiff had not filed an affidavit of verification and consented to the delivery of such an affidavit. Separately, this letter stated that Iconic was not the publisher of the Leinster Leader but that the publisher was Formpress and called on the plaintiff to withdraw his proceedings against Iconic.

11. When the matter came before the court on 24 July 2023, the plaintiff was given liberty to issue a motion in the proceedings seeking a direction pursuant to section 11(2).
12. On 4 August 2023, the plaintiff's solicitors wrote to Formpress in a pre-action letter materially identical to the letter sent to Iconic on 10 August 2022, setting out the allegedly defamatory meanings in the article and the damage done to the plaintiff, and seeking an offer of amends.
13. The plaintiff then issued a motion seeking a s.11(2) direction (and related relief) on 29 August 2023 and served it on both Iconic and Formpress. Formpress filed replying affidavits and written submissions, and appeared and made oral submissions at the hearing of the application before me on 10 October 2023.

Preliminary Objection

14. Formpress maintained a preliminary objection to the plaintiff's application on the basis that the application did not comply with the procedural requirements of order 1B rule 3(2). In particular, it was said that Formpress did not in fact have standing to deal with the application where it was initiated by way of a notice of motion within the existing proceedings, when Formpress was not a party to the existing proceedings, and when the motion should have issued by way of originating notice of motion with Formpress as a respondent.
15. Order 1B rule 3(2) provides as follows:

“3.(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 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.”

16. Formpress contended that Rule 3(2) clearly requires that an application must be brought by way of originating notice of motion with the intended defendant as a respondent to the application, where proceedings have not already been instituted against that particular intended defendant. It submitted that a defamation action had not been brought before the court properly in respect of the statement in question as any such action would necessarily have had to have involved Formpress as a defendant and not Iconic.
17. Formpress relied on the decision of Simons J in *Oakes v. Spar (Ireland) Limited* [2020] 3 IR 337 (“*Oakes*”) where Simons J held that an application for a direction under s.11(2) failed for procedural irregularity where the plaintiff had failed to serve an originating notice of motion on the proposed defendant.
18. The plaintiff argued in response that Rule 3(2) was not applicable as a defamation action has already been brought before the Court in respect of the statements in question i.e. the existing action against Iconic.
19. It is certainly correct to say, as a matter of fact, that a defamation action has been brought before the court in respect of the statement in question, being the offending article, and that those proceedings remain in being. I take the point that it would not be appropriate to issue proceedings against an entity that had no connection with an allegedly defamatory statement with a view to circumventing the requirements of section 11 or order 1B. However, that is not the position here. There were existing proceedings in being in respect of the statement in question and the plaintiff is not dropping its claims in those proceedings.

20. The authorities to date have not addressed a situation where a direction is sought under section 11(2)(c)(ii) to institute claims against an alleged defamer by joining that party as a further defendant to existing proceedings where it is said that that party could be jointly and severally liable with an existing defendant.
21. Given that the applicability of Rule 3(2) to this case is not clearcut, it is useful to look at the matter from first principles.
22. Section 11 does not prescribe any particular procedure for the application for a direction under subsection 2(c)(ii). The key requirements enshrined in the rule are that a proposed defendant is on notice of the application for the direction and is in a position to respond to the direction application and put evidence before the Court that may assist in the determination of the application. These requirements flow from the terms of the section itself, which envisages questions of the interests of justice and the balance of prejudice between the parties being addressed in determining a direction application. Those requirements were met in substance here. The notice of motion seeking the direction was served on Formpress. The motion properly seeks a direction under s.11(2)(c)(ii). Formpress filed replying affidavits. Formpress filed two sets of written submissions and counsel on behalf of Formpress made able oral submissions at the hearing of the application.
23. *Oakes* is clearly distinguishable. There, the application for a direction was made *ex parte* very shortly before the expiry of the two-year period with no opportunity given to the proposed defendant to meet the application or have its position heard. While the plaintiff had previously issued proceedings in the Circuit Court those proceedings were accepted as being defective as having been issued against the wrong defendant. In contrast, Formpress was on notice here and fully participated in the application and the plaintiff seeks to maintain that Iconic remains a legitimate defendant on the basis that it has joint and several liability on the particular facts of this case, particularly in relation to the publication of the article on the website.
24. As regards the question of the effect of a direction under s.11(2)(c)(ii) for the bringing of a defamation action after 1 year but before the expiry of two years, there is no substantive difference between such action commencing by an order joining the party

as a further defendant to existing proceedings and proceedings being issued against such a party by a separate writ. The claim against an additional defendant joined pursuant to order 15 rule 13 will not be regarded as having been commenced until the order joining the additional defendant; order 15 rule 13 specifically provides that “*every party whose name is so added as defendant shall be served with a summons or notice... and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party.*”

25. The upshot of the argument made is that, where existing proceedings are legitimately in being, on the plaintiff’s case, the plaintiff would have to seek permission to issue separate proceedings and on being granted such a direction, would then have to consolidate the new proceedings with the existing proceedings. This would involve an undesirable duplication of time and costs.
26. Insofar as the rule does apply to the application before me (and I am not convinced that it does), the Court clearly has a power to waive non-compliance with the rule.
27. As made clear by Barrett J. in *Chambers v Rathcaled Developments Limited* [2021] IEHC 458, following a survey of authorities dealing with the question of the Court’s discretion to strike out proceedings for irregularity, the Court retains an inherent jurisdiction to correct an error in procedure, particularly where the procedural error causes no prejudice to the other party. This is reflected in the terms of Order 124 rule 1 of the Rules of the Superior Courts which provides that “*Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.*”
28. In the circumstances, I am not going to strike out or refuse the s.11(2)(c)(ii) application for alleged procedural irregularity. Insofar as necessary, I will exercise my jurisdiction to waive any non-compliance with the procedural requirements for the application. I am satisfied that no prejudice whatsoever has been suffered by Formpress as a result of any such non-compliance. I will proceed to deal with the substance of the application on its merits.

29. I will accordingly turn to deal with the substance of the application.

The s.11(2)(c)(ii) application

The law

30. 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 – (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.”

31. 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, 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.”

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.*”
41. I will address other authorities raised by the parties when analysing the parties’ submissions below.

Summary of parties’ positions

42. The plaintiff’s position was straightforward: he submitted that the reason he had not identified Formpress as an appropriate defendant was because the newspaper’s website misled him into believing that Iconic was the operator and publisher of the newspaper; that the defamation was a very serious one which had not been remedied; that Formpress was not prejudiced by any lapse of time and could mount any defence available to it (apart from the Statute defence which should not justly be available to it) and that he manifestly satisfied the statutory tests.
43. Formpress, for its part, contended, in summary, that it was not in the interests of justice that the direction be granted given that the direction application was not properly before the court; the reason for his delay was inadequate as proper research on the part of the plaintiff or his solicitor (such as a CRO search on Iconic and a general internet search) would have identified that Formpress and not Iconic was the publisher of the Leinster Leader; Iconic had no obligation to identify the correct publisher and the plaintiff could not explain his delay on the basis that Iconic did not identify the correct publisher until

July 2023. On the question of prejudice, Formpress contended that it would likely have a defence of qualified privilege and the plaintiff had pointed to no malice that could defeat such a defence; that any adverse effects from the publication had been negated by the publication of the clarification and the removal of the article from the website; and that its freedom of expression rights must be weighed in the balance.

Discussion

Interests of Justice

44. I believe the plaintiff has advanced a cogent reason for failing to bring his proposed action against Formpress within 12 months of the publication, in that the plaintiff relied on the representation made on the website for the Leinster Leader that the publisher and operator of the newspaper (for both the published edition and the online edition) was Iconic Newspapers Limited. It was accepted at the hearing that this information is incorrect; it must be said, fundamentally incorrect. No explanation was provided on affidavit in these proceedings by Formpress as to why it is that it is repeatedly asserted on the Leinster Leader website that Iconic is the publisher. These are not some passing references: the privacy policy in question is presented as a set of binding legal terms over some 28 pages which formally defines “the Publisher” as Iconic Newspapers Limited and which expressly states “*the websites listed in appendix A, along with publications in appendix B (“the publication”) are published and operated by Iconic Newspapers Limited.*” Appendix A lists www.leinsterleader.ie and appendix B specifically lists the Leinster Leader. Users of the Leinster Leader website agree to abide by the terms and conditions as to use imposed by Iconic Newspapers Limited as publisher. It is clear from the detail of the privacy policy document on the website that various legal obligations for users of the website are said to be owed in favour of Iconic as the publisher of both the website and the newspaper itself.
45. In reliance on the statements (and searches carried out with a commercial company registration and records service with access to CRO records, that revealed that the business name “Leinster Leader” was owned by Iconic Newspapers Limited), the plaintiff sued Iconic as publisher of the offending article. If the website had not contained misleading information as to the publisher of the newspaper, but had named

what it says is the correct legal entity responsible for publishing the newspaper i.e. Formpress, the plaintiff would have sued Formpress within 12 months and his current limitations difficulties would simply not have arisen. Simply put, but for the misleading information as to the publisher of the newspaper contained on the website, Formpress would have been added as a defendant and sued within 12 months. The Plaintiff was aware of the 12 month limit and issued proceedings against the entity advertised by the publisher of the newspaper as being the publisher and did so within the 12 month limit. Formpress would not be in a position to advance any statute defence if correct information had been published by it on the newspaper's website as these proceedings would have been issued against Formpress within the 12 month period. It is not in the interests of justice in my view to allow Formpress benefit from its own misleading publication as to the identity of the legal entity that publishes the Leinster Leader.

46. The authorities relied upon by Formpress to ground the contention that there was an onus on the plaintiff and his solicitor to perform deeper research into the legal identity of the publisher and that in effect he is the author of his own misfortune do not avail Formpress in my view as none of them involve a situation remotely comparable to the situation here.

47. The case is clearly distinguishable from that of *Scallan v. Independent News and Media Plc. Trading as The Irish Independent and Ors.* [2020] IEHC 472 ("*Scallon*"). (*Scallon*, it should be pointed out, did not involve an application pursuant to section 11(2)(c)(ii) but rather an application to have proceedings against Independent News and Media plc struck out as being bound to fail in circumstances where that entity was not the publisher of the newspapers the subject of allegedly defamatory articles.) In that case, the publishers of the publications in issue were named "in black-and-white in the offending publications as being the publishers, so even the most minimal research would have established the position" (para 13). Formpress relied on the next sentence of the judgment where Humphreys J points out that in addition to naming the publishers there are also references in the publications to "INM" "but that doesn't make Independent News and Media PLC the publisher in law of newspapers". He also points out that the fact that the INM website and other publications may describe INM as a publisher does not make them an appropriate defendant.

48. However, the facts here are materially different. Nowhere on the print edition of the Leinster Leader newspaper is the identity of the legal entity which operates and publishes the newspaper set out. Furthermore, as set out above, the identity of the legal entity which operates and publishes the newspaper and the website is set out in elaborate detail on the website. The references on the website to Iconic Newspapers Limited being the publisher of the Leinster Leader are not made in some passing or shorthand way but rather are contained in a privacy policy document drafted in formal legal terms which expressly defines “the Publisher” of *inter alia* the Leinster Leader and the website www.leinsterleader.ie as Iconic Newspapers Limited, and makes no reference to Formpress at all.
49. In *Watson v MGN* [2016] IEHC 18 (“*Watson*”) Barrett J did not accept as a good reason for delay the fact that the plaintiff had written without success to seek to establish the identity of the editor of the newspaper which had published an allegedly defamatory article, when the plaintiff had identified and was in a position to proceed within the 12 month limitation period against the publisher of the newspaper itself (see paras 4 and 25). Again, those facts are clearly distinguishable from the facts here.
50. In *Oakes*, Simons J observed that it would not have required much by way of inquiry to identify the fact that it is the individual franchisees/proprietors and not Spar (Ireland) Limited who are responsible for the operation of individual Spar shops (at para 42).
51. Here, the plaintiff and his solicitor made appropriate inquiries including of the publisher itself through its website and CRO searches on the ownership of the Leinster Leader’s business name. The results of those inquiries did not serve to put the plaintiff or his solicitor on notice that the information obtained by them was incorrect and I do not see on the facts that they can be faulted for not having done further CRO searches on Iconic or a general trawl of the internet for disparate publications that made reference to the publisher of the Leinster Leader.
52. The position adopted by Formpress proceeds on the premise that a diligent plaintiff or plaintiff’s solicitor would not accept at face value what is said in plain terms on the newspaper’s own website about the legal identity of the publisher but that, rather, detailed searches should have been conducted on the CRO in relation to Iconic which

would have disclosed that Iconic's accounts for 2022 describe Iconic as the holding company for Formpress and show that it was not a trading entity because it did not have revenue or any material number of employees. Such searches, it is said, would at least have led the plaintiff or his solicitor to make inquiries as to the true identity of the legal entity which published the article in issue. It is also said that internet searches would have unearthed various materials (such as a CCPC report summary and media articles on Formpress) which would have given information as to the fact that Formpress was the publisher of the Leinster Leader. It says that a CRO search on Formpress would have resulted in identifying particulars of a contract for the transfer of the business and assets of the Leinster Leader to Formpress in 2014, although that of course is to assume that Formpress had been identified as the relevant company in the first place.

53. However, in my view this is to proceed on the unrealistic basis that a potential plaintiff or his solicitor should assume that what is contained on the newspaper's own website (the website on which the offending article was published) as to the legal identity of the publisher should not be taken at face value, particularly when expressed repeatedly in a formal legal document on that website.
54. I also have regard to the fact that the plaintiff solicitor did arrange for a CRO search by reference to the business name the Leinster Leader which disclosed that the business name was registered to Iconic. While Formpress submitted that this did not mean in law that Iconic was the publisher, it did on the face of it corroborate what had been said on the newspaper's website. This was pointed out in a detailed pre-action letter sent to Iconic on 10 August 2022 complaining of the defamatory nature of the article, and the specific damage which its publication had caused the plaintiff. There was no reply at all to this letter.
55. Formpress submitted that Iconic as a separate legal entity which did not publish the newspaper had no obligation to respond to this letter or to clarify who the correct legal entity was. While this is correct as a matter of law, Iconic was able through its solicitors by letter of 21 July 2023 to state that "*Iconic Newspapers Limited is not the publisher of the Leinster Leader. The publisher of the Leinster Leader is Formpress Publishing Limited*". It is not explained why Iconic chose to give this information almost one year after the pre-action letter addressed to it on 10 August 2022 but not at any time before

then, despite the fact that the plaintiff's solicitors sent correspondence repeatedly through November and December 2022 seeking an appearance from Iconic and ultimately issued a motion for judgment in default of appearance in June 2022. None of this is pointed to by way of criticism of Formpress. Rather, it is relevant to the interests of justice: in circumstances where the plaintiff had good reason objectively to proceed against Iconic in October 2022 prior to the expiry of the 12 month limitation period, it does not seem to me that that he can be faulted thereafter for not becoming aware of the identity of the alleged true publisher of the article until July 2023.

56. This is not a situation where, as in some of the authorities (such as *Watson, Proudfoot v MGN* [2019] IEHC 871 and *Rooney*) the plaintiff would have an alternative remedy in negligence against his solicitor in the event that his application was not acceded to and his claims against Formpress could not be progressed.

57. In light of the foregoing circumstances, I am satisfied that the reason for the failure to bring the action against Formpress within the 12 month period is sufficiently good reason to explain and justify that failure and that it is in the interests of justice, in accordance with the first limb of the two limb test in the section, for the plaintiff to be permitted to proceed with its action against Formpress, subject to the question of prejudice, to which I now turn.

Prejudice

58. It is clear from the authorities that apart from considering the matter expressly identified in the section i.e. the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced, the court under this heading should look at the gravity of the alleged defamation and the circumstances surrounding it (*Morris v Ryan* at para 80).

59. Dealing first with the matter expressly identified in s.11(2)(c)(ii) as relevant to this heading there was no evidence of any evidence being unavailable as a result of the lapse of time. Formpress sought to contend that it was not in a position to identify such potential prejudice in the absence of a statement of claim. However, Formpress did have a detailed pre-action letter setting out the precise words complained of, their alleged

defamatory meanings and the damage claimed to have been suffered by the plaintiff as a result of the article. Notwithstanding the availability of this detailed and specific information, Formpress was not in a position to identify any prejudice to its ability to mount any available defence to it at this remove and I proceed on the basis that no such prejudice exists.

60. The plaintiff contended that this was a very serious defamation. In assessing the gravity of the defamation, I have had regard to the fact that despite following up on the matter very quickly through his sister shortly after the publication, the defendant did not move with alacrity thereafter notwithstanding the clear position in the authorities that parties claiming to be defamed should move with expedition. He did not send a pre-action letter until almost 10 months after the offending publication. He did, however, issue his proceedings within the limitation period. He did not act as if the defamation was as gravely serious as was portrayed on this application.
61. In terms of the degree of prejudice said to be suffered by him if he was not permitted to proceed against Formpress (who claim to be the only publisher of both the print and online editions of the newspaper) the plaintiff placed emphasis on the fact that the clarification did not contain any apology and did not therefore seek to ameliorate the damage caused by the publication of the article. Formpress relied on the clarification to say that, in the round, this could not be regarded as a serious defamation. It also relied on the fact that the offending article was removed shortly after publication from its online archive.
62. In my view, the defamation can be regarded as a reasonably serious defamation involving as it does the implication that the plaintiff was involved with criminal activity, had disobeyed court directions and bail conditions, had attempted to evade Gardai, was imprisoned for breach of bail conditions and was involved in criminal activity such that his life or well-being was at risk from attack and/or reprisals. The headline and emphasis in the article gave the clear impression that the plaintiff was justifiably in fear for his safety because of his involvement in criminality. His pre-action letters detail significant actual adverse consequences for him as a result of the publication.

63. A number of the authorities, on their facts, also have had regard to the potential availability and/or strength of any defence said to be available for the proposed defendant, quite apart from the statute defence.
64. Counsel for Formpress submitted that a defence of qualified privilege would be open to it, on the basis that there was a duty or interest on its part in publishing reports of court proceedings and a corresponding interest of the part of its readership in such material and that the plaintiff was not in a position to point to any malice which might defeat such a defence claim. It is difficult to form any assessment as to the likely strength of any qualified privilege claim in circumstances where Formpress did not set out on affidavit any evidence of a factual matrix which would lend support to the reasonable availability of such a defence on the facts; in particular it is not explained how such a serious error was made by it.
65. In any event, as pointed out by Cox and McCullough, one might reasonably question whether it is correct to assume that the defendant is materially prejudiced in losing a Statute defence if it otherwise has a good defence: “*The weaker the defendant’s defence on the merits, the more the defendant may be prejudiced by his/her inability to rely on the limitations defence.*” (Footnote 790, page 742, para [13-351]).
66. A more relevant consideration on the facts here may be the extent to which the lapse of time has prejudiced the marshalling or advance of any relevant defences apart from the statute defence; as noted earlier, there is no such prejudice to Formpress on the facts here.
67. Weighing the matters advanced by both sides on the question of prejudice, in my assessment, the potential prejudice to the plaintiff significantly outweighs that to the defendant.
68. Firstly, but for the misleading information as to the publisher of the newspaper contained on its website, Formpress would not be in a position to advance any statute defence because if the correct information had been published there, the proceedings would have been issued against Formpress within the 12 month period.

69. Secondly, the plaintiff was the subject of a reasonably serious defamation that had, on his case, very real adverse consequences for him in his personal and working life. Formpress relied on the fact that the article was no longer available on its online archive and that it had published a prompt clarification thereby largely negating any damage done. However, the plaintiff is clearly prejudiced in the event that he is not able to seek the vindication of a verdict of defamation (and any appropriate compensation) in light of the gravity of the impact of the defamation on him.
70. Thirdly, if the matter proceeds, Formpress will be able to put up such defences (apart from the statute defence) as it sees fit, including any defence of qualified privilege and will not be prejudiced through any absence of evidence in doing so.
71. Fourthly, while I have regard to the fact that the existence of a defamation action can impact on the freedom of expression of a newspaper publisher, I equally have regard to the plaintiff's constitutional right to a good name and the fact that freedom of expression does not extend to the freedom to defame; the plaintiff clearly has a perfectly stateable case in respect of a reasonably serious defamation.
72. I am conscious that the giving of a direction under s.11(2)(c)(ii) is necessarily an exceptional order given the criteria set out in the subsection and the applicable jurisprudence. However in my view the facts of this case are such as to justify the making of the direction sought.
73. In my view, for the reasons set out above, it is both in the interests of justice that I give the direction and the prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that Formpress would suffer if the direction were given.

Conclusion

74. In the circumstances, I propose to give a direction pursuant to section 11(2)(c)(ii) permitting the plaintiff to bring proceedings in defamation against Formpress in respect of the article published in the Leinster Leader on 19 October 2021. In practical terms, that direction should be given effect by permitting the joinder of Formpress to the

existing proceedings against Iconic, in circumstances where the plaintiff has indicated through counsel that he intends to maintain his claim jointly against Iconic and Formpress.

APPROVED by Mr. Justice Cian Ferriter 16th October 2023