THE HIGH COURT

[2023] IEHC 84

Record No. 2022/172MCA

Between

CAROLINE JOYCE

Applicant

And

MAYO TRAVELLERS SUPPORT GROUP AND EDITH GERAGHTY

Respondents

Judgment of Mr Justice Dignam delivered on the 10th day of February 2023.

Introduction

1. This is the applicant/intended plaintiff's application for an extension of time within which to bring a defamation claim against the respondents/intended defendants.

2. While the grounding affidavit sets out a considerable level of background detail, it is not necessary to deal with much of that background other than by way of summary.

3. The applicant was employed by the respondent as a Family Support Worker/Researcher on a fixed term contract between the 3rd December 2018 and the 26th January 2020. She worked closely with a colleague. As this colleague's real name is not directly relevant to this application, I will simply refer to her as "Ms. Murphy".

4. The second-named respondent was appointed as a temporary Family Support Coordinator in February 2019 and was the applicant's line manager. Serious difficulties

appear to have arisen between the applicant and the second-named respondent. It is not necessary to go into the details of those difficulties for the purpose of this application.

5. The applicant's employment with the first-named respondent concluded on the 26th January 2020 when the term of her contract ended.

6. In spring 2021, Ms. Murphy, who, it appears, continued to work with the first-named respondent but was out of work on health grounds, received a copy of her personnel file from the first-named respondent after making a data access request. This file contained four supervision reports of meetings purportedly conducted by the second-named respondent with Ms. Murphy. The reports are dated the 6th March 2019, 8th May 2019, 3rd September 2019 and 7th February 2020 and they record Ms. Murphy as having made comments about the applicant which the applicant claims are defamatory. The applicant deposes in her grounding affidavit that she was unaware of these reports until Ms. Murphy told her in a telephone call in March 2021 of the existence of these reports, that she told the applicant that these meetings never took place and that she never made the comments attributed to her in those reports. It is stated in the replying affidavit filed on behalf of the respondents, sworn by a director of the first-named respondent, that the documents were provided to Ms. Murphy on the 24th February 2021. This is not disputed by the applicant. A feature of the case is that neither Ms. Murphy nor the second-named respondent have sworn affidavits.

7. The applicant wishes to sue for defamation and, in circumstances where she did not issue proceedings within 12 months of the alleged publication, requires an extension of time to do so in light of the provisions of section 11(2)(c) of the Statute of Limitations.

8. By Order of the 20th June 2022 on foot of an ex parte docket of that date O'Moore J granted liberty to the applicant to amend the proposed Originating Notice of Motion and gave the applicant liberty to issue that Notice of Motion returnable for the 18th July 2022. The Originating Notice of Motion (as provided for under Order 1B rule 3 of the Rules of the Superior Courts) seeks that the applicant be granted leave to institute defamation proceedings against the respondents notwithstanding that over one year has passed since the accrual of the cause of action.

9. The evidence in the case consisted of the grounding affidavit of the applicant, a replying affidavit sworn by Mr. Jim Power, a board member of the first-named respondent, and a supplemental affidavit of the applicant. Mr. Power did not state on

whose behalf he was swearing the affidavit, though the filing clause stated that it was being filed on behalf of the "*Respondents".* However, when the matter came before me solicitor and counsel appeared for the first-named respondent and not the second-named respondent. I was satisfied as to service on the second-named respondent. I was informed that O' Moore J had been told by counsel for the first-named respondent that the second-named respondent had been in touch with them to say that she was still in hospital (I return to this below) and I was therefore satisfied that she was aware that the matter was on for hearing. There was, therefore, no evidence directly from the second-named respondent.

<u>Statutory Provisions</u>

10. Section 38 of the Defamation Act 2009 provides:

> *"38.— (1) Section 11 of the Act of 1957 is amended-*
>
> *(a) in subsection (2), by the substitution of the following paragraph for paragraph (c):*
>
> *"(c) 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.",*
>
> *and*
>
> *(b) the insertion of the following subsections:*
>
> *"(3A) The court shall not give a direction under subsection (2)(c)(ii) (inserted by section 38 (1) (a) of the Defamation Act 2009) unless it is satisfied that—*
>
> *(a) the interests of justice require the giving of the direction,*

(b) the prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that the defendant would suffer if the direction were given,

and the court shall, in deciding whether to give such a direction, have regard to the reason for the failure to bring the action within the period specified in subparagraph (i) of the said subsection (2)(c) and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.

(3B) For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium.".

(2) Section 49 of the Act of 1957 is amended by the substitution of the following subsection for subsection (3):

"(3) In the case of defamation actions within the meaning of the Defamation Act 2009, subsection (1) of this section shall have effect as if for the words 'six years' there were substituted the words 'one year or such longer period as the court may direct not exceeding two years'.".

11. The regime that is established by the section is that if a claim is not brought within one year of the date upon which the cause of action accrued (the date of accrual of the cause of action is the date upon which the defamatory statement is first published) it is statute barred unless the Court exercises its discretion to extend the time. If the Court does so, it may only extend the time for a period not exceeding two years from the date of accrual of the cause of action. A claim is absolutely statute-barred if not brought within two years of the date of the accrual of the cause of action. The Court may only exercise its discretion to extend the time if it is satisfied that the interests of justice require the giving of the direction and 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. In deciding whether to give such a direction, the Court shall have regard to the reason for the failure to bring the

action within the one year period and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.

12. The onus of proof in respect of each of these elements is on the applicant (*Taheny v Honeyman [2015] IEHC 883; O'Brien v O'Brien [2019] IEHC 591; Morris v Ryan [2019] IECA 86)* - including the date of accrual of cause of action which is of particular importance in this case. Some of the particular features of this statutory regime, including, for example, that there is a clear statutory policy of a strict limitation period, that the one year limitation period is the standard and the two years is exceptional, and that the prejudice to the applicant must not just be greater than the prejudice to the respondent but must "*significantly outweigh*" it have been noted in a number of judgments. I return to these below.

<u>Date of Accrual of Cause of Action</u>

13. The first-named respondent's opposition to the application is grounded squarely on the date of accrual of the cause of action. They submit, partly on the basis of section 11 of the Defamation Act 2009 (multiple publication) that the latest date of accrual of the cause of action is the 7th February 2020, i.e. the date of the latest report. The significance of this is, of course, that it is more than two years ago and was more than two years before the date of the ex parte application and, if the first-named respondent is correct, the applicant's claim (against both respondents) must be absolutely statute-barred. While the first-named respondent does not concede that the Court should or may extend the time even if it is satisfied that the cause of action accrued at a later date, their active opposition to the application is limited to the question of the date of the accrual of action - going so far as not to engage with the balancing exercise required by section 11(3A). However, it seems to me that even where a respondent has not raised specific points about the court's discretion, the Court must nonetheless be satisfied of the matters contained in section 11(3A) before making a direction under section 11(2)(c) before it can grant a direction.

14. The date of the accrual of the cause of action is defined in section 11(3B) as "*the date upon which the defamatory statement is first published…*"

15. O'Malley J in *Murray v Sheridan & Ors [2013] IEHC 303* held that the Act does not "*allow for any extension of time in a case where a plaintiff was unaware of the fact of a*

publication of a defamatory statement, such as where it is published to a specially limited audience of which the plaintiff is not part." The Act does not permit of an argument in relation to discoverability. The applicant has not sought to make out a case of fraudulent concealment.

16. Thus, the issue between the parties on the date of the accrual of the cause of action is therefore quite simple. The applicant submits that publication first occurred when the documents were provided to Ms. Murphy. While this is stated by the applicant to have occurred in March 2021, no specific date is given by her, and Mr. Power deposes that they were provided to Ms. Murphy on foot of her data access request "*in or around 24th February 2021*." For the purpose of this application, I am taking that as being the date on which they were provided to her. The first-named respondent, on the other hand, submits that the date of publication of each document is the date on that document, ie. the date "*they came into existence*". For example, in paragraph 8 of the replying affidavit Mr. Power says "*On the Applicant's deposed case, the last in time document was "first published" on the 7th February 2020 and while the Court has power to extend time from accrual (upon specifically balanced prescribed criteria) such "longer period" is alike specifically limited to "not exceeding 2 years" and so this opening ex parte Application has already missed the statutory long-stop by a number of months*."

17. The logic of the first-named respondent's case is that the mere completion of a document/report constitutes publication. In the absence of any authority to the contrary I can not accept this as a general principle. Publication requires communication to a third party. Section 6 of the Defamation Act, 2009 provides that "*The tort of defamation consists of the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person), and "defamation" shall be construed accordingly."* A person may complete and date a document and place it in their drawer where it remains. No publication occurs by the mere fact of completing and dating a document. Nor can I accept as a general proposition that placing a document on a file automatically constitutes publication. It is entirely possible for a document to be completed, dated and filed without anyone other than its author seeing it and that it would then sit on the file unseen. The respondents have adduced no evidence of the completion of the reports or of the first-named respondent's filing system and no evidence of any third party having seen the documents or even of the possibility or probability of them having been seen. Even if I accept that they were completed on the dates written on the reports and filed on those dates, there is no evidence of publication to a third party. The furthest the first-named respondent went was for counsel to submit that the filing system was presumably

electronic and therefore once the reports were on the first-named respondent's computer system they were available to be read and it is likely that they were. I do not accept that the mere fact that the documents were completed and dated on a certain date constitutes publication or that the filing of the documents even in the first-named respondent's filing system amounts to publication.

18. While this point was not made by the first-named respondent, it is entirely possible that another person in the first-named respondent saw the allegedly defamatory statements when preparing the response to the Data Access Request. That would, of course, amount to publication but the respondents have given no evidence that this is the case and, if so, when that occurred. In any event that is likely to have been very shortly before the 24th February 2021 so it is not likely to affect the question of whether the application was made within two years of any such publication.

19. The burden of proof is, of course, on the applicant. In circumstances where the only evidence of publication to a third party is the evidence that the documents were provided to Ms. Murphy – which occurred on the 24th February 2021 - it seems to me that the applicant has discharged that burden. If the documents were seen or likely to have been seen at an earlier stage that evidence could have been adduced by the respondents.

20. As noted above, it is a feature of this case that neither Ms. Murphy nor the second-named respondent have sworn affidavits in this case. I have considered whether the absence of an affidavit from Ms. Murphy means that the applicant has not discharged the burden of proof in respect of the date of publication. I am satisfied that it does not in circumstances where the only evidence of publication is the evidence that the documents were provided to Ms. Murphy and the respondents have confirmed that this occurred on the 24th February 2021.

21. I am therefore satisfied on the basis of the evidence that the date of first publication was the 24th February 2021, which, while more than a year before the ex parte application was made, was within two years and, indeed, is still within two years.

<u>Exercise of Discretion</u>

22. That being the case, I must consider whether to extend the time.

General Principles

23. There are a number of general principles in relation to the Court's exercise of its discretion.

24. Firstly, there is a clear legislative policy of a tight limitation period in respect of defamation actions and the Court must exercise its discretion in that context.

25. In *Quinn v Reserve Defence Forces Representative Association & Ors [2018] IEHC 684* Barton J said in relation to the exercise of the Court's discretion:

> *"14. The limitation period, including the statutory limit on the period of any extension as may be directed by the court, within which defamation proceedings must be brought if the claim is not to be defeated by a plea of statute bar reflects the rule at common law that proceedings to vindicate the reputation of a person such as defamation should be issued promptly and prosecuted with due diligence and expedition. See Ewins v Independent Newspapers (Ireland) Ltd [2003] 1 IR 583; Desmond v MGN Ltd [2009] 1 IR 737 and Doherty v Ryan [2015] IEHC 242. In the event all other requirements are satisfied, the discretion of the court in the exercise of the jurisdiction conferred on it by the subsection to extend the time within which proceedings may be brought, to include the one-year limitation period, is limited to a maximum of two years from the date of the accrual of the cause of action.*

26. In *Morris v Ryan [2019] IECA 86* Whelan J, on behalf of the Court of Appeal, held:

> *"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. In considering the overall approach to be adopted, the decision of the English Court of Appeal in Bewry Elsevier UK Ltd [2014] EWCA Civ 1411 at p.2568 is worthy of note where Sharp LJ stated:*
>
> > *"[I]t is clear that special considerations apply to libel actions which are relevant to the exercise of this discretion. In particular, the purpose of a libel action is vindication of the claimant's reputation. A claimant who wishes to*

achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications. These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why disapplication of the limitation period in libel actions is often described as exceptional."

55. The jurisprudence from the courts of England and Wales is of some assistance particularly insofar as the language of s.32(a) of the Limitation Act 1980, as amended - which reduced the limitation period for libel in that jurisdiction to one year - overlaps in a number of respects with the provisions of s.11(2)(a), (c) and s.11(3A) of the statute of limitations 1957, as amended.

56. In considering an application for a direction pursuant to s.11(2)(c)(iii), the court must have regard for the policy of the legislature in bringing about significant changes to the limitation period for defamation in 2009."

27. Whelan J went on to say:

"*67. In considering the limitation period now operative in regard to defamation Peart J.* [in Taheny v Honeyman] *stated:- "If a person wishes to bring proceedings to redress a perceived wrong, he is entitled to do so within the time limits provided by law. In most cases those limits are generous. In the case of defamation, the Oireachtas has considered that a period of one year should be allowed from the date on which the plaintiff first becomes aware of the statement complained of, unless the plaintiff can justify a delay beyond that one year, but under no circumstances can the proceedings be permitted beyond two years. These limits are less generous than for many other types of action, but nevertheless provide plenty of time for the taking of any legal advice the plaintiff wishes, and for such proceedings to be commenced".*

68. The decision of Barrett J. in Watson v Campos and anor [2016] I.E.H.C. 18 is of assistance for its comprehensive and succinct analysis of the legislative framework. He observes at para. 6:- "... when it comes to bringing a defamation action, as defined, a one-year limitation period is standard, more than one year is exceptional." He notes the tenor of the language in sub section (3A): - "the court shall not give a direction… unless it is satisfied…" Barrett J.'s approach of evaluating the reasons for the failure to bring the action within the statutory

time limit and the extent to which evidence relevant to the matter is by virtue of the delay no longer capable of being adduced has much to commend it.

28. At paragraph 74 she said:

"*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. There is a myriad of reasons why a plaintiff may find himself outside the primary limitation period in the first place. Balanced against that consideration is the long-standing principle that limitation periods provide certainty for respondents.*"

29. Phelan J said at paragraph 62 of her judgment in *Reidy v Pasek [2022] IEHC 366*:

"*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…"

30. Thus, there is a particular obligation to consider the application for an extension of time against the clear legislative policy that defamation proceedings must be

instituted and prosecuted with expedition and that the one year time limit is standard and the two year period is exceptional. This is also reflected in the burden on the applicant arising from the express terms of the section. For example, it is not sufficient that the Court should decide that the interests of justice favour an extension of time. It must be satisfied that they *require* that the direction be given. Similarly, it is not sufficient for the Court to be satisfied that the prejudice suffered by the applicant would be greater than that suffered by the respondents. It must be satisfied that the former would "*significantly outweigh*" the latter.

31. The second general principle is that the onus of satisfying the Court that it should exercise its discretion, having regard to the matters contained in section 11(3A) is on the applicant. Whelan J clearly stated in paragraph 64 of *Morris v Ryan* – "*The onus rests on the appellant to advance clear and cogent evidence for the granting by the court of an extension of time for the institution of defamation proceedings and to satisfy the court that it is in the interests of justice that he be permitted to commence or pursue proceedings outside the limitation period of one year from the date of the accrual of the cause of action and in addition that he has fulfilled the requirements specified in s.11(3A) of the Statute of Limitations, 1957. This is clear from the plain words of the Act.*). (See also *Taheny v Honeyman*).

32. Finally, Ní Raifeartaigh J in *O'Brien v O'Brien [2019] IEHC 591* considered the correct approach to the matters set out in section 11(3A) and made clear that the Court is not engaged in a "*simple counting of pros and cons*" but a "*qualitative assessment of all the relevant factors.*"

33. I gratefully adopt Ní Raifeartaigh J's approach. The Court must have regard to the matters set out in section 11(3A) but must not consider them as a simple checklist. They are all to be qualitatively assessed and weighed in the mix according to the particular circumstances of each case. Other authorities have also referred to the need for a qualitative assessment of the reason(s) offered for a delay.

Reasons for the Delay

34. In *Taheny v Honeyman [2015] IEHC 883*, Peart J that the applicant for an extension must provide "*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 the Court must consider "*the quality and justifying nature of the reason or reasons put forward by the applicant for the delay in instituting proceedings.*"

35. In *Quinn v Reserve Defence Forces Representative Association [2018] IEHC 684*, Barton J said:

> "*The wording of s.11(3A) imposes on the court a requirement to carry out a qualitative assessment of the reason or reasons proffered for the delay. This involves a consideration of the quality and nature of the reason or reasons advanced and weighing of the respective prejudices. The onus is discharged (a) by an explanation which amounts to a reasonable excuse for the delay sufficient to satisfy the court that the interests of justice are best served by granting the relief sought so as to permit the case to proceed and (b) by satisfying the court that the prejudice which the plaintiff will suffer if the direction is refused would be significantly greater than the prejudice which the defendant will suffer if the direction is granted. See the judgment of Peart J in Taheny v Honeyman, Fox v The Irish Prison Service and the Minister for Justice, Equality and Law Reform (Unreported, High Court, 6th February 2014), Steedman and others v BBC [2001] EWCA Civ 1534 and Rooney v Shell E&P Ireland Ltd [2017] IEHC 63*."

36. In *Morris v Ryan* Whelan J indorsed the views of Peart J quoted above (which are reflected in Barton J's judgment in *Quinn*).

37. The applicant provides two explanations for the delay in bringing the intended proceedings: that she did not have permission from Ms. Murphy to use the documents until March 2022; and that the applicant was suffering from and undergoing treatment for cancer for an extended period of time. She says at paragraph 38 of her grounding affidavit:

> *"I say that the delay in bringing the intended defamation action arose due to my illness from which I have not yet fully recovered. All of my focus and energy was focused on beating my cancer and I was simply unable to deal with such a significant issue. In addition, and as averred to above, the supervision reports are dated between March 2019 and February 2020, but I did not become aware of their existence until March 2021 when they were published to Ms. Murphy. I did not have permission from [*her*] to use these documents which came from her personnel file until March 2022…"*

38. I am not persuaded that the applicant's illness and the need for surgery and extended and debilitating treatment provides a sufficient explanation for the delay when one considers the chronology. The applicant was diagnosed with cancer on the 17th March, 2020 and had significant surgery on the 31st March 2020. She deposes to having further procedures on the 21st May 2020 and the 19th June 2020 and she began chemotherapy on the 15th June 2020 and radium therapy which ended in November 2020. She then started receiving injections which are ongoing. I fully accept that a diagnosis such as this, followed by surgery and treatment, are hugely traumatic and must be capable of constituting a reason for a delay in dealing with other matters and might justify an extension of time in some circumstances. However, in this case, the applicant became aware of the reports and the possible cause of action arising therefrom in March 2021. This was four months after completion of the intensive part of treatment. Thus, the immediate illness and treatment could not provide a sufficient explanation justifying an extension of time because it predated the applicant becoming aware of the material or that it had been published to Ms. Murphy. I accept that the treatments in question have a longer-term effect which extends beyond the active treatment phase and that there would be a recovery phase. I also accept that there was need for further medical consultations. I also note that the applicant was due to have a further surgical procedure in November 2022. I accept that all of this combined would have had an impact on the applicant's ability to deal with matters such as arose in this case. However, as noted above, I have to engage in a qualitative assessment of the explanation given against the background of the legislative policy and the respondents' interest in proceedings being brought on quickly. In the absence of any specific evidence of the applicant being particularly affected by the aftermath of her illness and the ongoing treatment I am not satisfied that this reason is qualitatively sufficient to justify a direction. I am reinforced in this view by the fact that the applicant also had her own business and carried on the business during this period – although the workload involved is likely to have been greatly reduced for at least part of the period in light of the Covid-19 public health restrictions. I must also have regard to the fact that throughout her illness and treatment the applicant was applying for other jobs (paragraph 8 of her supplemental affidavit).

39. The applicant deals with her second reason in paragraphs 28 and 29 of her grounding affidavit.

> *"28. I say that [Ms. Murphy] informed me of the existence of these reports by way of telephone call in March of 2021 but I only received copies of the reports from [*her*] in the summer of 2021. I did not have [*her*] permission take (sic) any action on foot of the reports until March 2022. When [*Ms. Murphy*] informed me of the content of her personnel file in March 2021 which contained the supervision reports she was in floods of tears. She informed me that there was distressing information on the file including personal information regarding herself and her family. She added that there was information about me, which was attributed to her, but which was entirely fabricated and that she had never said. I attempted to console her and advised her to contact the board of management of the First Respondent."*

40. It is not necessary to fully quote paragraph 29 of the applicant's affidavit but in summary it sets out specific reasons why Ms. Murphy did not want the information contained in her file to be disclosed or used by the applicant. They include fears for her continued employment (and the specific basis for those fears) and fears of consequences in her private life.

41. An affidavit was not sworn by Ms. Murphy. However, none of the factual matters contained in paragraph 29 were placed in issue or disputed by the respondents for the purpose of this application. Nor, indeed, did the respondents raise any issue in relation to the contents of the affidavit dealing with the interactions between the applicant and Ms. Murphy or the fact that an affidavit had not been sworn by Ms. Murphy.

42. I am satisfied that this explanation provides sufficient reason for the applicant's delay in instituting proceedings. It seems to me that it is appropriate that the applicant did not immediately use the information provided to her by Ms. Murphy without Ms. Murphy's permission. The information came from Ms. Murphy's personnel file. It was, in the first instance, her information. She was concerned that any use of the information by the applicant would cost her job and, perhaps more importantly given the nature of the consequences which the applicant says Ms. Murphy explained to her, could have serious consequences in her personal life. It seems to me to be appropriate that very serious regard would be had to Ms. Murphy's wishes, and more importantly, her concerns, before the information would be used. In my view, the common law and legislative policy of ensuring that defamation proceedings should be instituted and brought on with expedition could not have been intended to force an individual who is given information

to disregard and act directly contrary to the wishes and serious concerns of the person who gave them that information, particularly where the information is drawn from a confidential source such as a personnel file. On perhaps a more practical level, it seems likely that Ms. Murphy's evidence will be essential to the applicant's case. It is understandable that the applicant would wait for her permission to use her data as to do otherwise would risk having to prosecute the case without Ms. Murphy's evidence being available. I am satisfied that the explanation is a reasonable excuse for the applicant not to have issued proceedings within the one year period from the accrual of the cause of action. The need or desirability to have Ms. Murphy's permission would not necessarily excuse a longer period; for example, it may be the case that a different conclusion would be reached if the applicant had waited until the very last moment within the two years period.

43. It is then necessary to examine the period after Ms. Murphy gave her permission. The applicant deposes that Ms. Murphy gave her permission to the use of the information in March 2022. The chronology thereafter was that solicitors on behalf of the applicant wrote to the first-named respondent on the 16th March 2022. They replied on the 27th April 2022. The applicant's solicitors wrote to the second-named respondent on the 29th April 2022. The applicant's solicitors replied to the first-named respondent's solicitor on the 5th May 2022 stating, inter alia, that "*in default of confirmation from you within 7 days…that our client will receive a full apology (in form to be agreed), that the said records will be expunged from your records including our clients file, payment of reasonable damages and legal costs, the necessary proceedings will issue without further notice…*" and it seems no further reply was received from the respondents. The ex parte application was then made on the 20th June 2022. Thus, while matters could have been moved faster, the applicant moved reasonably promptly once she had received permission from the Applicant.

44. I am satisfied with the explanation given by the applicant. However, that is not sufficient, I must also consider the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.

Non-availability of Evidence

45. This is straightforward in the circumstances of this case. There is no evidence from the respondents that any relevant evidence is no longer capable of being adduced by virtue of the delay. Mr. Power, on behalf of the first-named respondent, does depose

to the fact that the second-named respondent was very unwell and hospitalised for some months in the period prior to the swearing of the respondents' replying affidavit. He exhibits a medical certificate which states that *"[S]he has provided us with a medical certificate which shows inter alia that she was admitted to hospital on the 24th May 2022 and has been confined there since."* A medical certificate dated the 29th August 2022 that was exhibited to the affidavit indicated that the second-named respondent was admitted to hospital on the 24th May 2022. It did not state whether she was still in hospital at the date of the certificate. However, I was informed at the hearing that O'Moore J had been told by counsel on behalf of the first-named respondent at the call-over on the day of the hearing that the second-named respondent was still in hospital. Nor did the medical certificate give any details of the nature of the illness or any prognosis other than stating that "*No date can yet be defined for return to work."* Even accepting that the applicant was still in hospital at the date of the swearing of the affidavit (and on the day of the hearing), that does not amount to evidence that the evidence of the second-named respondent is no longer capable of being adduced. Indeed, that point was not even expressly made by the first-named respondent. Of particular significance is that no up to date position was put before the Court before or at the hearing – other than that the second-named respondent was still in hospital. The matter was heard on the 16th November 2022, two and a half months after the date of medical certificate, and over two months after the replying affidavit was sworn. I have therefore had regard to the fact that the second-named respondent was (and perhaps is) suffering from an illness which on the face of it appears to be serious but it does not seem to me that there is an evidential basis upon which I could conclude that the second-named respondent's evidence will not be capable of being adduced.

Prejudice

46. I am also required to decide whether 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. As noted above, it is not sufficient that the prejudice to the applicant be greater than the prejudice to the respondent(s). Whelan J in *Morris v Ryan* said at paragraph 80 *"it is clear from the language of the statute that before the discretion to extend the time period is exercised in favour of a plaintiff the court must be satisfied, inter alia, that the prejudice which he would suffer if the direction were not given would "significantly outweigh" any prejudice which the defendant would suffer were the direction to be given. 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*."

47. Phelan J in *Reidy v Pasek [2022] IEHC 366* said:

> *"69. Turning then to 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…*"

48. The respondents have not given evidence of any prejudice. The Court was told that the reason no prejudice was asserted on behalf of the first-named respondent was because the applicant's claim was outside the two year period and therefore the balancing exercise in section 11 was not required to be conducted. I have already decided that the claim is within the two year period. There is, therefore, no evidence of any prejudice to the respondents. They will, of course, suffer the prejudice of having to defend proceedings which might otherwise be statute-barred but it seems to me that in accordance with the decisions in *Reidy v Pasek* and *Morris v Ryan* where it was held that

the prejudice to an applicant in not being able to prosecute their claim and the prejudice to the respondents in having to defend a claim is not sufficient and something more than that is required, even in circumstances where part of the defence will be that the statements were made on an occasion of qualified privilege.

49. In *O'Brien v O'Brien [2019] IEHC 591* Ní Raifeartaigh said:

> *"30. Regarding other matters which might prejudice the defendant if the case were to proceed, there is no doubt that he would lose (as would every defendant who loses an extension of time application) the freedom from being sued in respect of a defamatory allegation, which freedom usually arises after one year from the publication if no action has been taken by the plaintiff. On the other hand, I take into account that the period of time in question is three months (i.e. three months between the passing of the deadline in respect of the first defamatory communication and the issue of the present application), which is relatively short in the context of an overall period of 12 months within which a Court may grant an extension of time.*
>
> *…*
>
> *32. What would be the prejudice to the plaintiff if the case did not proceed? The first and most obvious prejudice would be the loss of the ability to litigate the (first) allegedly defamatory communication. The high gravity of the allegation is relevant here; it being a serious allegation that the plaintiff forged or was somehow involved in the forgery of documents which resulted in his having valuable lands belonging to his elderly mother transferred to him. Of course, the defendant pleads that the publication was during an occasion of qualified privilege and that it was a complaint made in good faith to An Garda Síochána. The plaintiff counters that the plea of qualified privilege will be contested on the grounds that the plaintiff acted with malice. Whether or not the claim of qualified privilege would succeed or would be defeated by proof of malice remains to be seen at the trial and the Court is not in a position to evaluate the strength or otherwise of these competing claims on the evidence available at present…"*

50. It is clear from these judgments that one of the factors to be considered when examining prejudice is the nature of the alleged defamation and its gravity. The

surrounding circumstances are also relevant. I have therefore had regard to the nature of the alleged defamation and the nature and extent of the potential damage and the particular allegations made by the applicant. I have also had regard to the nature of the defence.

51. Obviously, the Court makes no findings in respect of the substance of the case. For the purpose of this part of the part of the exercise I assume that the applicant will prove all aspects of the substantive case. The alleged defamation is potentially serious in the context of the applicant's area of work and, if it remained on her record uncorrected has the potential to do serious damage to her professional reputation and her ability to pursue her career in her chosen field. She has given evidence of a prolonged period of seeking alternative work and has expressed her belief that her difficulty in securing such work is due to these matters remaining on her record. Indeed, it is difficult to see how the first-named respondent could give the applicant a reference of any value while these statements remain on her record. In this regard, I note that the reference which the second-named respondent gave her on the first-named respondent's headed paper went no further than simply recording the fact that the applicant worked with the first-named respondent between the 3rd December 2018 and the 3rd December 2019. Regard must also be had to the allegation by the applicant that these reports were deliberately fabricated. This is a very serious allegation and I make absolutely no finding in relation to it. It does seem to me that I must have regard to the fact that where this is a central part of the applicant's case it would be a very significant prejudice to her were she not able to litigate that complaint. I have also had regard to the defence of qualified privilege which was raised in the respondents' solicitor's letter of the 27th April 2022. Of course, the applicant's complaint that the reports were fabricated are directly relevant to this proposed defence as well because it goes to the question of malice. However, it seems to me that a plea of qualified privilege is a matter for the Defence and the Court can not weigh up the respective merits of the parties' positions on this at this stage.

52. There is a potential prejudice for either party on any such application– if the Court refuses a direction the applicant will suffer prejudice in facing the risk of the claim being held to be statute-barred if she issues proceedings without a direction (*Oakes v Spar (Ireland) Limited*) and if the Court grants a direction the defendant will face a claim which would otherwise be statute-barred. Simons J described there being "*symmetry to the prejudice*" in *Oakes*. Thus, the Court must assess any other forms of prejudice that are relied upon or might arise. It seems to me that in this case, where the respondents have not pointed to any specific prejudice and the alleged defamation is potentially grave with serious consequences and the reports were allegedly fabricated, the prejudice

that would be suffered by the applicant significantly outweighs the prejudice to the respondents.

53. In all of those circumstances, I am satisfied that the interests of justice require the giving of a direction under section 11(2)(c)(ii) and that the prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that either of the defendants would suffer if the direction were given. I will, therefore, grant a direction to the applicant giving leave to institute proceedings in terms of the draft Plenary Summons contained at exhibit CJ1 of the grounding affidavit of the applicant. It seems to me that section 11 entitles me to set a time limit within which that must occur (section 11(2)(c)(ii) sets the outer limit). I therefore grant a period of 7 days from the date of this judgment within which those proceedings must issue.