THE HIGH COURT

[RECORD NO. 2018/458CA]

BETWEEN

JOHN O'BRIEN

PLAINTIFF

AND

CONOR O'BRIEN

DEFENDANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 4th day of July, 2019

Nature of the case

1. This case comes before the Court by way of appeal against an order of the Circuit Court dated the 5th November, 2018, which granted the applicant/intended plaintiff, Mr. John O'Brien, an extension of time within which to bring a defamation claim against the respondent/intended defendant, Mr. Conor O'Brien. For ease of reference, I will refer to the intended plaintiff and intended defendant as the plaintiff and defendant respectively. The claim concerns two allegedly defamatory statements made by one brother (the defendant) against another (the plaintiff). The first of the two alleged defamatory statements was made in March 2017 (to An Garda Síochána) and the second in July 2017 (to a company called Dolmen Securities).

2. The plaintiff issued a notice of motion on the 28th June, 2018 seeking an order for an extension of time within which to bring a defamation action in respect of both the March and July 2017 communications. Section 11(2) of the Statute of Limitations Act, 1957 - as amended by s. 38 of the Defamation Act, 2009 - provides that the time limit for bringing defamation actions is one year, which may be extended by the Court up to two years after the making of the allegedly defamatory statement. The grounding affidavit exhibited a draft civil bill in respect of the intended defamation action. The procedure adopted was in accordance with that envisaged in obiter comments of two decisions of the Court (*Watson v. Campos* [2016] IEHC 18 and *Rooney v. Shell E&P Ireland Ltd* [2017] IEHC 63), although the Court (Barton J.) more recently held that the appropriate procedure would be to issue the proceedings and seek an extension only if and after the defendant has raised the issue of the time-limit (*Quinn v Reserve Defence Forces* [2018] IEHC 684, 30th November 2018). The latter judgment post-dated the notice of motion in the present case and I do not think it would be fair to criticise the plaintiff for adopting the procedure he did, and I will take the clock as having stopped running on the day of the issue of the notice of motion (June 2018). Given that the first allegedly defamatory communication was in March 2017, the one-year time limit for bringing a defamation claim had expired in March 2018 i.e. three months before the notice of motion issued; but had not expired regarding the second allegedly defamatory communication (communication date July 2017, expiry date July 2018). Accordingly, the plaintiff is entitled to bring his defamation claim in respect of the second communication complained of and the issue herein is whether or not he should be given an extension of time within which to bring or maintain a claim in respect of the first communication complained of.

3. The notice of motion seeking an extension of time was grounded upon an affidavit sworn by the plaintiff. An affidavit of reply was sworn by the defendant's solicitor, Peter Lennon of Ronan Daly Jermyn solicitors, in which he set out the defendant's position. The defendant himself did not swear any affidavit. It is possible to construct a rudimentary chronology relevant to the case from the affidavits and exhibits before the Court. I emphasise that the sequence of events set out below is of a provisional nature only, due to the fact that the case is at a preliminary stage at this point in time.

4. I heard the case on 23rd May, 2019. On the 20th June, 2019, I indicated briefly that I would be ruling in favour of the plaintiff's application for an extension of time and that I would deliver a written judgment on 4th July, 2019.

The relevant statutory provision

5. Section 38 of the Defamation Act, 2009 provides:

> "Limitation of actions.
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> 38.— (1) Section 11 of the Act of 1957 is amended—
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> (a) in subsection (2), by the substitution of the following paragraph for paragraph (c):
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> "(c) A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of—
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> (i) one year, or
>
> (ii) such longer period as the court may direct not exceeding 2 years,
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> from the date on which the cause of action accrued.",
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> 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,
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> and the court shall, in deciding whether to give such a direction, have regard to the reason for

the failure to bring the action within the period specified in subparagraph (i) of the said subsection (2)(c) and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.

(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'.".

Background as set out in the affidavits
A family dispute in relation to the transfer of lands

6. The mother of both the plaintiff and the defendant, Mrs. O'Brien, owned certain lands at Clondalkin, County Dublin. Certain land transfers were made involving this land in the 1990s, and again in 2004. The plaintiff, Mr. John O'Brien, was the ultimate transferee and later sold the lands onwards for considerable value after obtaining planning permission. In 2008, the defendant Mr. Conor O'Brien issued proceedings relating to the transfer of the Clondalkin lands on the grounds of fraud, although it appears that the proceedings were discontinued that same year.

The defendant's letter of 30th May, 2014

7. On 30th May, 2014, Mr. Conor O'Brien sent a letter to his then 89-year old mother in which he again raised the issue of the Clondalkin land transfer. He asserted that he had recently acquired documents which showed that there had been fraud in connection with the transfer of documents in the 1990s and that he was instructing solicitors to issue proceedings against his mother and his brother, John, in connection with a "fraudulent transfer". Curiously, as we shall see, it appears that he told Dolmen Securities in 2017 that his mother had "full-blown dementia" in 2014, which was the year in which he wrote this letter to his mother.

The letter of 1st July, 2014

8. In a long letter of reply dated 1st July, 2014, Mrs. O'Brien referred to the shock caused by the defendant's letter and pleaded with her son not to issue legal proceedings. She reminded him of numerous instances in which she advanced substantial sums of monies to him between 1981 and 2003 as well as other steps she had taken to protect and increase her sons' inheritances. Referring to "the two acres at Clondalkin", she explained that she had originally intended for the lands to be left to the three brothers, but that it was clear by 1996 that it would be "a cause for dissention" and so she arranged for the lands to be transferred back to her, and then to Mr. John O'Brien (the plaintiff). She said she gifted a property in Florida to Mr. Dermot O'Brien, her third son, and offered a property in Lahinch to Mr. Conor O'Brien, which he refused. The letter went on to say:

> "Since then you have been obsessed with this as if I had preferred John over yourself and Dermot. Your suggestion that I and others conspired to defraud you out of a share in these two acres is complete nonsense and extremely hurtful. It is perfectly clear to me that this piece of land would never have become a bone of contention were it not for the fact that John achieved a good eventual sale price, having put a lot of his own time and money into it and taken considerable financial risk himself. I am quite satisfied that my record of treating you fairly will speak for itself. I cannot put into words how hurt I am by your threat and the thought of having to spend the last phase of my life dealing with a legal action by one of my own sons is just horrendous, especially as I approach the milestone of my 90th birthday next October… Lastly I am making this appeal to you as your mother. Please do not do this to me. I never did you any wrong and most certainly did not conspire with anyone to do you wrong."

Letter of 8th October, 2014

9. By letter dated 8th October, 2014, the solicitors for Mr. Conor O'Brien wrote to Mrs. O'Brien repeating the threat of legal proceedings but also asking whether Mrs. O'Brien would be prepared to enter into a mediation agreement, suggesting that it was probable that the Commercial Court would direct that the matter be referred to mediation in any event.

Letter of 15th June, 2015

10. By letter dated 15th June, 2015, the solicitors for Mr. Conor O'Brien wrote to the other brother of the parties, Mr. Dermot O'Brien, seeking confirmation that he would be prepared to enter into mediation regarding the transfer and subsequent sale of the Clondalkin Lands by Mr. John O'Brien. The letter also made reference to proceedings which had previously been issued by Mr. Dermot O'Brien in connection with the matter and which had "been compromised to [Mr. Dermot O'Brien's] satisfaction".

Complaint to An Garda Síochána in March 2017

11. In March 2017, Mr. John O'Brien (the plaintiff) became aware that his brother Conor (the defendant) had made a complaint to An Garda Síochána to the effect that he (John) had forged the transfer of the Clondalkin lands in 1996. This communication between Mr. Conor O'Brien and An Garda Síochána is the first communication in respect of which Mr. John O'Brien wishes to commence his defamation action. On 17th May, 2019, he and his solicitor met with members of An Garda Síochána. There was further correspondence from his solicitor to the Gardaí. It seems that a file was then sent to the Director of Public Prosecutions who directed that no prosecution be brought.

Communication with Dolmen Securities Limited on 31st July, 2017

12. On or about the 31st July, 2017, the defendant, Mr. Conor O'Brien, contacted a company by the name of Dolmen Securities Limited in relation to Mrs. O'Brien's account with them. The account was administered by Mr. John O'Brien on her behalf pursuant to a power of attorney. During this phone call, certain statements were made including a reference to "irregularities" concerning the power of attorney in favour of the plaintiff and a suggestion that she had "full blown dementia" at the time the power of attorney was obtained (2014), and two references to the "fraud squad" were made. The Court has seen a transcript of this conversation. A

defamation claim has issued by the plaintiff in respect of this communication, claiming that the defendant had thereby implied that the plaintiff had committed a fraud by wrongly securing his own appointment as attorney and that he had coerced his mother, when she had dementia, into appointing him as her attorney.

Letter of 13th December, 2017

13. By letter dated 13th December, 2017, solicitors for Mr. John O'Brien wrote to Mr. Conor O'Brien alleging defamation and demanding that he furnish an undertaking, in writing, that he would cease making "grossly defamatory allegations about [Mr. John O'Brien]" within 7 days of the date of the letter. It stated that while their client had tried to ignore the "grossly defamatory allegations" made against him in relation to the Clondalkin Lands as long as they had remained within the family, this was "no longer tenable" as "grossly defamatory remarks" had now been made to various third clients. The letter set out that Mr. Conor O'Brien had now also accused Mr. John O'Brien of stealing monies from Mrs. O'Brien as well as monies that were intended to be invested on her behalf with Dolmen Securities Limited. It went on to say:

> "You have made these allegations to various third parties including but not limited to An Garda Síochána, Dolmen Securities Limited, Irish Life, BCP Asset Management and Mr Brian Whittaker. As a result of the foregoing these grossly defamatory allegations are now widely known amongst our client's friends, social acquaintances and business acquaintances. The entire of these allegations are untrue and grossly defamatory of our client. You have made them maliciously on foot of your undoubted hostility towards our client which now apparently knows no bounds and it now appears that you are intent on destroying our client's reputation."

14. The letter finally sought an apology from Mr. Conor O'Brien in "an agreed and written form which can then be relied upon by [their] client, as he requires." It provided that the matter would not be taken any further if the undertaking and apology were forthcoming; however in default of either, Mr. John O'Brien would "immediately commence proceedings seeking an injunction to restrain any further publication of these damaging allegations as well as damages for defamation."

Letter dated 16th January, 2018

15. The solicitors for Mr. Conor O'Brien replied by letter dated 16th January, 2018 asserting that their client "has not been involved in any defamation of [Mr. John O'Brien] whatsoever" and that there would be "no apology by him in relation to matters to which you refer". The letter indicated that Mr. Conor O'Brien would not be providing the undertaking sought. The letter went on to address several matters which included making allegations of defamation and assault against the plaintiff. Finally, it suggested mediation between the parties "if your client is genuinely interested in resolving the issues…" but indicated that any defamation proceedings would be fully defended.

16. The mother of the plaintiff and the defendant has died since the issuing of the present proceedings.

17. Some months following her death, the Circuit Court (Judge Linnane) made an order dated 5th November, 2018 granting an extension of time to Mr. John O'Brien to bring his defamation claim against Mr. Conor O'Brien.

18. The Notice of Appeal issued and was served on Mr. John O'Brien on 13th November, 2018. An Ordinary Civil Bill issued on 15th November, 2018.

Some Points made in the affidavits

19. The plaintiff averred that the reason for his delay in issuing the proceedings was due to his reluctance to sue his own brother. He said that he had tried to ignore his brother's actions and allegations but that it was "clear he is never going to stop" and that the allegations were "extremely damaging". He said that the intended action was being taken "as a last resort", that the situation had become "intolerable", and that there appeared to be no other way to stop his brother from "maliciously making extremely damaging and false allegations" against him.

20. In the affidavit sworn by the defendant's solicitor, Peter Lennon of Ronan Daly Jermyn, it was stated *inter alia* that a defamation action would result in a bitter and acrimonious family dispute being played out in open court. Mr. Lennon said that he was instructed to defend any such claim in full, asserted that the two communications complained of were made on occasions of qualified privilege, and said that malice would be denied. He also said that defending the action would place a financial demand on their deceased mother's estate. However, I do not see how that could be so as the case is being brought against the defendant personally. Therefore, I will disregard this latter suggestion.

Submissions

21. Counsel for the defendant submitted that the onus of proof falls upon the plaintiff to justify the extension of time, and this is undoubtedly correct (see for example *Taheny v. Honeyman* [2015] IEHC 883).

22. Counsel on both sides made submissions that were learned, succinct and thorough. The following is merely a brief summary of certain points which were amplified with eloquence both in their oral and written submissions. Counsel on behalf of the plaintiff relied primarily upon the following factors in favour of an extension of time:

> a. The gravity of the allegations (in essence, an allegation of forgery of land transfer documents and the coercion of an elderly mother for personal gain);
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> b. The reason for the delay which was, it was said, due to an understandable reluctance to bring proceedings against a sibling and to ventilate a bitter family dispute in open court;
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> c. The fact that, because the second of the communications was within the time limit and the plaintiff was entitled to proceed with regard to that allegedly defamatory communication as a matter of right, there would now be an airing of the family dispute in open court whether or not the extension of time were granted in respect of the first communication;
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> d. The fact that the period of time from the expiry of the time limit was relatively short, namely three months;
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> e. The fact that the defendant had not suggested that any prejudice arose by reason of the failure to commence the proceedings within the one-year time limit;
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> f. That there was, it was said, a need to prevent a repetition of the alleged defamation(s); and

g. The fact that the defendant could have avoided the proceedings by giving an apology and an undertaking that there would be no repetition.

23. Counsel on behalf of the defendant relied upon the following submissions in opposing the grant of an extension of time:

a. That the reason given by the plaintiff was inadequate, particularly having regard to the fact that he had engaged the services of a solicitor by the time his letter of December 2017 was written and therefore was clearly aware of the time limit. It was further submitted on the basis of *O'Sullivan v. Irish Examiner* [2018] IEHC 625 that if the Court deemed the reason given by the plaintiff to be inadequate, this was fatal to the application for extension of time;

b. That the plaintiff had behaved unreasonably in failing to engage with the defendant's offer of mediation;

c. That qualified privilege was clearly a defence;

d. That there was no evidence from which a risk of repetition could be inferred, in circumstances where (the first) communication was by way of formal complaint to An Garda Síochána only; and

e. That the absence of asserted prejudice if the extension were granted should be considered neutral rather than a factor which favoured the other side.

Discussion

The Reason for the Delay

24. There was some debate before me as to the precise relationship between the reason for delay offered by an applicant in an application of the present kind and the overall test as set out in the statutory provision (s. 11(2) of the Statute of Limitations Act, 1975 as amended). In *O'Sullivan v. Irish Examiner Ltd* [2018] IEHC 625, Pilkington J. placed considerable emphasis on what she considered to be the inadequacy of the reason given by former Garda Commissioner Nóirín O'Sullivan to justify her failure to comply with the one-year time limit before reaching a conclusion that the application for an extension of time should be refused, and said (at paragraph 44 of her judgment):

> "44. The applicant's counsel contended that, even if the court were to find that the reason for the delay is inexcusable, it could nevertheless hold for the applicant upon the two statutory criteria, namely (a) the interests of justice and (b) the balance of prejudice. In my view, the reasons advanced by the applicant on the facts of this case are integral to and directly impact upon an assessment as to whether a direction should be given in all the circumstances. The reasons for the delay and the court's consideration of the validity or otherwise of those reasons is inextricably bound up with any decision it must then make as to where the interests of justice and the balance of prejudice lie. In none of the cases opened to the court was there a finding by a court of inexcusable delay but nevertheless a determination that the interest of justice and the balancing of the respective prejudices could nevertheless result in a direction to disapply the one-year statutory time limit."

25. Counsel submitted that this supported the proposition that if the Court were to find the reason offered to be inadequate, this would bring the application to an end. However, I do not find particularly attractive an unduly binary or "black and white" approach to the Court's analysis of the reason given by an applicant for his delay in initiating proceedings, i.e. an approach which characterises the reason as 'valid' or 'invalid', or 'excusable or inexcusable'. I would conceive of the issue more in terms of a spectrum, where the reason offered by the plaintiff might range from (at one end of the spectrum) a poorly supported or highly implausible reason, to a very strong and well evidenced reason (at the other end of the spectrum), with various shades of persuasiveness and evidential support in-between the two extremes.

26. It seems to me that what Pilkington J. was saying in the passage quoted above was that if the reason offered was at such a low point on the spectrum or below a minimum threshold of either evidence or plausibility, the plaintiff might not, in a particular case, get out of the starting-blocks in his application. But in other cases, where the reason has at least some validity, it should then be factored into the analysis along with all the other factors. In any event, whatever about the precise theoretical nuances of how one conceives of reasons, in the present case I am satisfied that the reason offered by the plaintiff was valid, acceptable or whatever adjective one wishes to use to suggest that it had overcome any initial threshold there may be.

27. In the present case, the reason offered by the plaintiff was, in essence, that he was reluctant to commence proceedings because the allegedly defamatory allegations arose out of a bitter internal family dispute and that he had tried to ignore the allegations for as long as possible. This is not, therefore, the typical case where the plaintiff asserts that his or her reason for delay in the institution of proceedings was a lack of knowledge of the time-limit or a failure on the part of his or her solicitor. Rather, it is a case where he presumably knew of the time-limit but did not comply with it because he hoped it would not be necessary to institute proceedings. The defendant submitted that the solicitor's letter of 13th December, 2017 on behalf of the plaintiff undermined the plaintiff's position insofar as it made it clear that the plaintiff was well aware of the time-limit, had instructed lawyers, and would have been in a position to proceed before the expiry of the time limit as threatened in the letter. However, I am not persuaded that this argument is as strong as it would be in a case where the reason relied upon by the plaintiff is a lack of knowledge of the time limit or some allegation that the solicitor had fallen short in his duties to advance the case appropriately. Here, there is little or no doubt that the plaintiff knew of the time-limit and knew that he could proceed at any time following the grace period referenced in the letter itself; but his argument is grounded on an unwillingness to sue his brother rather than a lack of knowledge of the time-limit or diligence on the part of his solicitor. It seems to me that an unwillingness to litigate a sensitive family matter in public is a reason of considerable validity. I hesitate to use the language of 'excusable' or 'inexcusable' delay as this language comes from test applied in 'delay' cases and not from the statutory provision which I am required to apply. What is required, as was made clear by the Court in the Taheny case, is that I assess the reason offered in a qualitative sense.

28. By accepting the reason put forward as a valid one, I am not suggesting that there is a different time limit for intra-familial defamation cases. It falls to be assessed on a case-by-case basis. Further, the longer the delay, the less likely it is that an application for an extension of time would succeed; and of course, the statute itself places an outer limit of two years from the date of the allegedly defamatory communication. However, it is clear from the correspondence exhibited before me that the issue of the Clondalkin lands transfer has a long history in this particular family and has already generated a good deal of hurt and anger, and that it was not unreasonable for the plaintiff to consider that progressing the issue into the litigation arena will introduce a different and more serious dimension into the dispute and was a step to be taken only with considerable reluctance. Thus, I am persuaded that the

reason offered does reach a sufficient threshold of validity (whatever language one uses to express that) and that the Court should proceed to consider the other aspects in the case relevant to the application for extension of time.

Evidence no longer capable of being adduced

29. The next specific factor which the statutory provision mandates the Court to consider is "the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced". The simple position in this case is that the defendant has not asserted any such prejudice. There was some debate before me as to whether this should be considered a 'plus' for the plaintiff or a 'neutral' factor in the overall analysis, but this seems to me to be somewhat premised on a view of the exercise as a simple counting of pros and cons rather than what I consider the Court should be doing, namely, a qualitative assessment of all the relevant factors. It seems to me that the absence of any prejudice is something which is significant in terms of the real and practical impact on the potential defamation trial and should be put into the balance by the Court accordingly.

Other prejudice to the defendant

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.

31. Another point of prejudice (in the broadest sense) to the defendant would be that the litigation of the (first) allegedly defamatory allegation in public would cause damage to the family good name and/or individual members of the family in the public arena. This was emphasised on behalf of the defendant. However, this point is substantially diluted in the present case by the fact that there will be litigation in public one way or another about some of this family's dispute because the plaintiff is within the time-limit in respect of the second allegedly defamatory allegation and is entitled to proceed at least to that extent without the permission of the Court.

Prejudice to the plaintiff

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. However, I think it is interesting to consider the following: if the defamation claim in respect of the first communication were not allowed to proceed, would the evidence of the complaint to An Garda Síochána in March 2017 be allowed in evidence before the jury in the trial in respect of the second communication? Here, it seems to me that whichever way this question is answered, the answer favours the plaintiff in the present application. If the evidence is admissible, then it matters little from a publicity point of view whether the claim is formally in or out of the case because the evidence would all be admitted anyway. If the evidence is not admissible, then the plaintiff would suffer a prejudice by being unable to adduce this evidence which could be relevant to the issue of malice in the second case. I have noted the precise wording of the transcript of the telephone conversation which took place between the defendant and Dolmen Securities Limited, being the allegedly defamatory conversation. I note that it records the defendant as having used the words "Fraud Squad" twice during the conversation. Thus, the very terms of the second communication complained of contains a reference to the first communication from the defendant's own lips. This seems to me to create an important connection between the two allegedly defamatory communications and this connection is highly relevant to the present application.

33. In addition to the above-identified evidential interconnectedness between the two defamatory allegations, it seems to me that there is also a more general link between them. I am not persuaded by the submission on behalf of the defendant that these should be treated as entirely unconnected separate defamatory allegations. I can conceive of a case where the entirely separate nature of two or more separate communications might weigh against a plaintiff's application for an extension of time, but here we are dealing with a long-standing grievance within a family, and the broad nature of the allegations is similar, namely, that one family member has engaged in dishonest dealings and used influence with his mother in order to a secure personal financial benefit, even though one alleged incident of dishonesty concerned a 1996 land transfer and the other an alleged dishonest creation of a power of attorney in 2014.

34. I should say for completeness, because there was argument on the point, that I do not view this as a case where I should consider there to have been something akin to a plea of justification on the record. It was stated in *Desmond v. MGN* [2009] 1 IR 737 that leaving a plea of justification on the record in a case which would not proceed to litigation would be a serious injustice to a person seeking to vindicate his good name. That was a case where there was a motion to strike out the proceedings on the basis of inordinate and inexcusable delay, and where a defence had already been filed and clearly pleaded justification. In the present case, no defence has been filed and the affidavit of Mr. Lennon, solicitor on behalf of the defendant, goes no further than to say that the case would be fully defended, followed by the assertion that there would be a defence of qualified privilege. There is no clear evidence before me at this stage that truth will in fact be a defence and I will therefore not proceed as if there was.

Other Relevant Factors

35. I also wish to consider the issues of mediation and apology/undertaking which were raised on behalf of the defendant and plaintiff respectively. I note that the mediation suggestion emanating from the defendant in the correspondence referred to did not primarily concern the defamation proceedings; it concerned his own claim that there had been a fraudulent transfer and was directed at securing a financial arrangement in respect of the Clondalkin lands. When asked not to repeat the allegedly defamatory allegation about the plaintiff, however, he refused. The tone of the January 2018 letter on behalf of the defendant, in which mediation was suggested, was overall far from conciliatory and indeed contained counter-allegations of defamation and assault. It seems to me that while there might be cases where a defendant's reasonable approach to matters and suggestion of mediation might well lean heavily against the granting of an extension of time, this is not such a case. The submission to the Court that the defendant was behaving with restraint and reasonableness is difficult to reconcile with the language of the January 2018 letter written on his behalf. It would have been a relatively easy step to undertake not to repeat any of the alleged defamatory comments pending mediation, if that was his preferred route of resolution. However, it appears that he wanted to secure a mediated settlement of the financial issues without

being prepared to promise not to repeat the allegation of fraud. This does not weigh in his favour in the present application. It also seems to me to lend substance to the plaintiff's concern that there is some risk of repetition. It is somewhat disingenuous of the defendant to seek to emphasise to the Court that the complaint to the Gardaí was a once-off communication and therefore is unlikely to be repeated when he was explicitly asked to promise not to repeat it and refused.

36. Having regard to all of the above matters, including the reason given by the plaintiff for the failure to bring the action (in respect of the first allegedly defamatory allegation) within the one-year period and the absence of any averment that there is evidence relevant to the matter no longer capable of being adduced by reason of the delay, together with the various respective prejudices and additional factors discussed above, I am of the view that the interests of justice require the granting of the extension of time sought, and that 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.