[2017] IEHC 63

THE HIGH COURT

RECORD NO: 2015/8311P

NEIL ROONEY

Plaintiff

AND

SHELL E&P IRELAND LIMITED

Defendant

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on Friday 20th January, 2017

1. The issue in this case is whether the plaintiff should be permitted to bring defamation proceedings outside the statutory time limit of one year provided for by the Statute of Limitations Act, 1957, as amended by the Defamation Act, 2009. The Court has a discretion to permit the bringing of a defamation action after the expiration of one year within a further period not exceeding two years pursuant to section 11(2)(c) of the 1957 Act as inserted by section 38(1)(a) of the Defamation Act, 2009. The question arising is whether this discretion should be exercised in favour of the plaintiff in the particular circumstances of the present case.

2. 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—
>
> (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:
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> "(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—
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> (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.
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> (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.".
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> (2) Section 49 of the Act of 1957 is amended by the substitution of the following subsection for subsection (3):
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> "(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'."."

3. Accordingly, it is clear from the statutory provisions above that, if the discretion to extend the time period is to be exercised in favour of a plaintiff, the court must be satisfied of two separate matters: (a) that the interests of justice require the giving of the direction; and (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. The Court is specifically directed to have regard to two matters in particular, namely, 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.

4. The following events constitute the context in which this issue arises. The plaintiff through a company, OSSL, had provided goods and services to the defendant company in connection with its Corrib Gas project in County Mayo for a number of years from the year 2004 onwards. This relationship broke down for reasons which are not necessary to explore in this application. On the 5th September, 2014, the Plaintiff made a request pursuant to data protection legislation seeking information as to the data held by the defendant concerning him. By letter dated the 15th October 2014, he received a reply to this request by letter from a Mr. Paul Walsh on behalf of the defendant company, which stated, *inter alia*:

> "I confirm that Shell E&P Ireland Limited ('SEPIL') and other companies within the Shell Group of companies processed personal data about you for the purposes of business execution, including concluding and executing agreements with customers, suppliers and business partners, organisation and management of the business, health safety and security of Shell assets and individuals and for legal and regulatory compliance.

I can also confirm that:

> • the source of your personal data is yourself, OSSL and companies within the Shell Group, a number of media sources which are referred to in the attached document and Mr John Donovan.
>
> • the categories of data are your contact details (name, address and email address) details of the work that you were involved in on behalf of OSSL Company and disputes between OSSL Company and SEPIL (insofar as they involved your personal data).
>
> • the recipients of your personal data were SEPIL, other companies within the Shell Group and those third party organizations providing administration or other services to the Shell Group."

A document was enclosed with this letter and this set out a number of data entries. One of these was an entry dated the 7th March, 2014, stating that the plaintiff had been prosecuted by the Northern Ireland Environment Agency for illegal transportation and dumping of toxic waste, in respect of which he received a conviction and a substantial fine. The entry contained a link to a webpage of the Northern Ireland Department of Environment website, which contained further details of the illegal dumping case. In fact, the plaintiff had never been convicted of any such offence. The person who had been convicted of the offence in question was not the plaintiff, but another person of the same name. The core of the defamation case that the plaintiff wishes to bring is based upon the publication of this particular entry.

5. As the letter of 15th October, 2014, made clear, the recipients of the information in question were "SEPIL, other companies within the Shell Group, and those third party organizations providing administration or other services to the Shell Group." From the affidavits sworn for the purposes of the present application, there would appear to be a factual conflict as to whether the information was additionally published to parties other than those identified in the letter of the 15th October, 2014, but it is not necessary to resolve that conflict for present purposes. It is not entirely clear in what format the information was published, but my understanding is that it was in some sort of electronic format such as an electronic database to which the recipients had access. At the hearing, complaint was made by the plaintiff that the date of publication was not in fact clear, and might have been later than the 7th March, 2014, but counsel for the applicant ultimately confirmed that this was the date of publication. If this is so, the cause of action accrued on that date in accordance with the statute, and the one year deadline for the bringing of defamation proceedings expired on or about the 7th March, 2015. However, the plaintiff did not issue defamation proceedings until October, 2015, six months after the expiry of the deadline, and further, did not serve those proceedings until January, 2016.

6. It was a most unsatisfactory feature of the plaintiff's approach to this case that his grounding affidavit made no reference to some important correspondence that followed between him and the defendant company in the months following his receipt of the data. His first affidavit merely exhibited two emails dated the 23rd and 24th October, 2014, and even those two emails appear to be in edited form. It was not until a replying affidavit was sworn on behalf of the defendant company that the relevant correspondence was exhibited. Further emails were subsequently exhibited by the plaintiff in a second affidavit, again in edited form. Given that the onus is on the plaintiff to satisfy the Court that the circumstances warrant an extension of time, this less than comprehensive approach to the facts is to be deprecated.

7. Reconstructing the chronology of communications following the letter of the 15th October, 2014, as best I can from the various exhibits laid before the Court, what transpired between the plaintiff and defendant after that date appears to be as follows.

8. At 9.10am on the 23rd October, 2014, the plaintiff sent an email containing the following: "Are you aware there was a Shell headed letter sent to my family home containing claims of criminal activity which have shocked myself and my family, what on earth is going on…. I need clarification on this immediately…". At 2.13pm on the same date, he sent another email, saying:

> "I have exhausted every avenue… To get an answer to the damming lies that have been printed and transmitted by Shell reference toxic waste…
>
> can you provide any assistance or point me in the right direction so I may get to the root of this within Shell….
>
> My family has read the fabricated toxic waste story…. my elderly parents are in shock and i require immediate assistance to resolve this matter…
>
> I have travelled to Dublin today to seek assistance. But I have been told by reception that none of the persons I have asked for are there.. And in any case no one will speak with me…..
>
> The matter is urgent… Please help.."
>
> The references above to his family appear to arise from the fact that the letter, addressed to the plaintiff, was sent to his family home and that the plaintiff either showed the letter to family members or it otherwise came to their attention.

9. In the exhibit to his grounding affidavit the plaintiff provided details of another email dated the 24th October, 2014, which he referred to as "An email from 3rd Party (OSSL) to SEPIL and Royal Dutch Shell" and which stated:

> *"It is reported to me that you have communicated a Shell document indicating that Mr Neil Rooney has been involve in criminal activity resulting in a prosecution.*
>
> *You state as a fact that Rooney is or was involved in the illegal transportation of toxic waste from the Republic of Ireland across the border to Northern Ireland.*
>
> *Mr Rooney has an exemplary record of outstanding service to the Corrib both for Enterprise Energy and later for Shell ….until your CEO called to his office and demanded that he falsify a freely and honestly given account of an incident at Pollathomish Pier in which Shell and the Irish police were involved."*

10. On the 3rd November, 2014, according to the affidavit sworn on behalf of the defendant company, a telephone conversation took place between the plaintiff and Mr. Paul Walsh, the IT Service and Operations Manager of Shell for the UK and Ireland, during which Mr. Walsh told the plaintiff that the data had not been circulated outside of the Shell Group and that the defendant would write to the plaintiff explaining his options if he was unhappy with any of the data being held. The plaintiff has not given any account of this

conversation in either of his affidavits.

11. By letter dated the 4th November, 2014, Mr. Walsh wrote to the plaintiff in the following terms:

> "I refer to your recent email to me and others within the Shell group of companies ('Shell Group'), in relation to the response to your subject access request of 5 September 2014.
>
> I understand that you consider that some of the personal data processed about you by SEPIL and/or its affiliates within the Shell Group is inaccurate.
>
> Please note that you have the right under the applicable law (the Data Protection Acts 1988 & 2003) to request that personal data is rectified, blocked or deleted if it is inaccurate or incomplete and also to object, on compelling legitimate grounds, to the processing of your personal data.
>
> I would be grateful if you would confirm which specific data item you are referring to and what steps you are requesting SEPIL and/or its affiliates takes in relation to the personal data.
>
> We will rectify, delete or cease processing such personal data (as appropriate) in response to the request unless we are satisfied there is a legitimate basis for continuing to process such personal data."

Thus, the defendant company's approach at this stage was to invite the plaintiff to make a request via a data protection avenue. The letter does not show any clear awareness on the part of the defendant company that they had made a mistake with regard to the data entry of the 7th March, 2014, concerning the environmental pollution offence. On the contrary, the letter asks the plaintiff to confirm "which specific data item you are referring to". It was at all times submitted on behalf of the plaintiff that he told the defendant that he was not convicted of any environmental offence, but in my view, a close reading of the emails set out above does not lead to the conclusion that his emails, at least, had made this clear. Insofar as there were telephone calls in which this was made clear by the plaintiff, he has not provided any evidence of these in his affidavits.

12. A further email from the plaintiff, exhibited in the case, was dated the 25th November, 2014, and stated:

> "I have written to you and spoke with you on the telephone regarding your grotesque circulation of a Shell generated document indicating criminal activity on my behalf.
>
> You have been made aware that your claims regarding my involvement in toxic waste dumping are a complete falsehood.
>
> You have failed to respond to my requests to rectify and apologise for this damnable situation.
>
> Why?"

This email appears to me to go further than the previous emails insofar as it clearly identifies his complaint that the assertion that he was involved in toxic waste dumping was false.

13. Mr. Walsh, by letter dated 10 December, 2014, wrote as follows:

> "Further to your phone call of the 3rd November, our correspondence to you of the same date, and your recent email, we have as yet received no letter from you.
>
> You will recall from our conversation that we need you to state exactly in writing any issue under the Data Protection Acts you may have with our response to your Data Subject Access Request."

14. By letter dated the 27th January, 2015, the plaintiff wrote to Mr. Walsh at the defendant company as follows:

> "In your covering letter of 15/10/2014 you 'confirm'; allude to, and intimate, that the above-mentioned data-file was instantiated and processed by Shell E&P Ireland Limited (SEPIL). Furthermore, you also confirm that the 'recipients' of said data-file 'were SEPIL and 'other companies' within the Shell Group and other 'third party organisations providing administration or other services to the Shell Group'.
>
> The collection and dissemination of erroneous and counter-factual data/information concerning my 'character' and my reputation, constitutes a gross violation of my human rights vis HRA (acts 1998/2003) and overarching European Convention on Human Rights.
>
> Some of the information included in the data-file is patently not attributable to me and is therefore libellous and causative of harm and detriment to myself; my family and my extended social circle. I also believe that the false (criminal) attribution contained within the data-file has and will continue to constrain my prospects for future employment in general and specifically in the petrochemical industry.
>
> I consider this mis-appropriation of erroneous information to my person as an act of 'defamation'. Ex-post-facto; it is not possible to assuage the harm done to my person by any remedial action including: 'rectification'; 'blocking'; 'deletion', or any other means.
>
> I have taken legal advice on the foregoing and have instructed my legal team to pursue above matters with due diligence.
>
> The data-file and other pertinent/relevant materials will be forwarded to the Office of the Data Commissioner for their perusal and consideration. I am of the opinion that the findings and ultimate decision of said organisation will corroborate my position vis the application of 'false information' to my good name and character."

A number of points may be made about this letter. First, it is clear from this letter that by this stage, January, 2015, the plaintiff had engaged legal advice. Further, the language for the first time specifically invokes the concept of defamation, although it could not be said to constitute a 'warning letter' of the usual type in defamation proceedings. On the contrary, the indications from the plaintiff are that he will make a complaint to the Data Protection Commissioner. Thirdly, at no point does the plaintiff request the defendant to delete the information, despite the fact that he had been asked several times whether this is what he wants. In fact, he seems to

reject this remedy, saying that "it is not possible to assuage the harm done to my person by any remedial action including rectification, blocking, deletion, or any other means".

15. On the 14th October, 2015, a plenary summons issued, seeking damages for defamation. It was not until three months later that proceedings were served, on the 12th January, 2016. An appearance was entered on behalf of the defendant on the 21st January, 2016. An application was made for an extension of time within which to bring the proceedings by notice of motion dated the 10th February, 2016, grounded on an affidavit sworn by the plaintiff on the 2nd February, 2016. A statement of claim was delivered on the 17th February, 2016, notwithstanding that no order of the Court had been obtained.

The reason for the delay

16. As noted earlier, section 38 of the Defamation Act, 2009, specifically requires the Court to have regard, *inter alia*, to the "reason for the failure to bring the action within the period specified". In this regard, the plaintiff, in an affidavit sworn on the 2nd February, 2016, said as follows:

> "I say that in or around early January 2015 I contacted solicitors and was advised that I had until 15 October 2015 to initiate proceedings. I instructed them that I wished to initiate proceedings immediately.
>
> I say that I was unhappy with the speed at which my case was progressing and on 31 July 2015 I met with my current solicitors to discuss this case and other related matters. I say that my file was transferred to my current solicitors on 1 September 2015; I say and believe that when my solicitors received my file and on advice from counsel, they noted that the date of publication of the statement in issue was in fact 7 March 2014. I further say that the plenary summons then issued in early October 2015."

In the affidavit sworn on behalf of the defendant company, criticism was made at paragraph 55, in particular, as to: the lack of clarity and precision on the part of the plaintiff as to the instructions he gave to his original solicitors; the absence of any explanation of the further delays that occurred; the absence of a letter of claim; and the three month delay before the plenary summons was served. In his second affidavit, the plaintiff did not respond to these criticisms in any way and there is, accordingly, no further explanation as to the delay other than what is set out above.

17. A number of Irish and English authorities have dealt with explanations for delay in issuing defamation proceedings in other cases. In *Watson v Campos and MGN Limited trading as Irish Mirror*, [2016] IEHC 18, Barrett J. refused to exercise his discretion in favour of a plaintiff who sought to bring defamation proceedings outside of the one-year time limit. The case arose out of a newspaper's coverage of a particular criminal trial, which allegedly impugned the reputation of a person who was not the subject of the trial but was effectively described as someone who had condoned the criminal activity in question. Barrett J's refusal of the application to extend time arose in circumstances where he found, *inter alia*, that the plaintiff's delay remained 'completely unexplained'. The reason for delay which had been put forward on behalf of the plaintiff was that there had been repeated efforts to get the name of the Sunday Mirror editor before proceedings could be launched. This quest for the editor's name was described by Barrett J. as a "red herring" and not a valid reason for failing to initiate proceedings against the newspaper. Barrett J also discussed the long-established principle of the 'need for speed' in issuing defamation proceedings, and said: "to put matters succinctly, when it comes to bringing a defamation action, as defined, a one-year limitation period is standard, more than one year is exceptional."

18. In *Taheny v. Honeyman, Fox, the Irish Prison Service and the Minister for Justice, Equality and Law Reform* (Unreported, High Court, 6th February, 2014), Peart J. also refused to exercise his discretion in favour of a plaintiff who sought an extension of time within which to bring defamation proceedings. The plaintiff was a prison officer who wished to bring proceedings concerning allegations that he and another officer were party to the smuggling of contraband, including drugs, into the prison in which he worked. An issue arose in the case as to when he became aware of the defamatory allegations; whether on the 16th March, 2012, or an earlier date. A letter sent on his behalf by his solicitor, dated the 16th March, 2012, referred to his having become aware of the allegations on the 10th March, 2012. The plaintiff sought to argue that this was an error on the part of his then solicitor and that the correct date of knowledge was the 16th March, 2012, the date of the letter itself. This was rejected by Peart J. who commented in the following passage:

> "In relation to that issue, it is the plaintiff who bears the burden of proving that this two year 'long stop' limit had not been exceeded by the 10th March 2014. To do that he must establish, on the basis of a probability, that he became aware of the allegations for the first time on the 16th March 2012. He does not contend for any other date between the 10th and the 16th March 2012. He says it was the 16th March 2012, being the same date on which he wrote his letter to the Governor to which I have referred. As I have already set forth, the defendants have produced his solicitor's letter which refers to Saturday the 10th March 2012 as the date on which he first learned of the allegations. The plaintiff must rebut that evidence not by mere assertion of an error on the part of his solicitor but by something more. He has not sought to do so. He has not sought to adduce any evidence from his former solicitor which might acknowledge the error. He has not exhibited any notes or memoranda which his then solicitor may have put on his file recording what the plaintiff said to him at what must have been a lengthy consultation leading to that very detailed letter to the Governor. The plaintiff has not deposed that he has attempted to get his file or a copy of any such note or memorandum which may be on that file, and that his solicitor has refused to hand it over. All he states is that his then solicitor made an error."

These comments are of assistance in the context of the present case, where the plaintiff seeks to blame his solicitor for the delay in bringing proceedings within the one-year time limit, albeit that the alleged error in the Taheny case was as to the date of knowledge of the plaintiff and not an error as to the time-limit for issuing proceedings, as is alleged in the present case. In my view, the relevance of the comments of Peart J is that a plaintiff who seeks to blame a former solicitor for an error which is relevant to his explanation for delay must do more than make a generalised assertion if he wishes the court to be satisfied of the validity of the complaint against his solicitor.

19. In the course of delivering his judgment, Peart J. also made the following comments as to the proper approach to an application for an extension of time in the present context:

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

I agree with the view that the court should conduct a qualitative assessment of the reason offered for the delay, and that the mere proferring of a reason is not necessarily sufficient in and of itself.

20. In *Steedman and others v. BBC*, [2001] EWCA Civ 1534, the Court of Appeal considered a similar legislative provision in the United Kingdom providing for a one-year limitation period in defamation actions as well as for a discretion for the period to be extended by a court. This arose in the context of a defamation action which eight police officers wished to bring in connection with a television broadcast about the death of a man which took place following his interaction with police officers. The death of the man took place on the 11th January, 1999. A firm of solicitors were instructed by the Police Federation in early course with regard to any disciplinary or criminal charges against the police officers. The broadcast complained of took place in April 1999, on the date of the man's funeral. A transcript of the broadcast was sent to the firm of solicitors within a week. The Court described what subsequently happened as 'entirely obscure'. The police officers sought to issue their defamation claim on the 26th June 2000, some 15 months after the broadcast. The Court was critical of the paucity of information put before it as to why the defamation matter was not addressed sooner by the solicitors, saying:

> "10. It is notable that this evidence fails to furnish either directly or indirectly any information from the claimants, or their former solicitors, as to the instructions given by the claimants following the broadcast, the purpose of obtaining the transcript or even any indication as to whether there were any discussions between the solicitors and their clients about notification of a complaint to the BBC.
>
> 11. What is certain is that no communication, let alone complaint, was ever made at any stage to the defendants. The file remained in the charge of a member of the firm who was concerned with the criminal and disciplinary aspects of the case. We were told that, at a later and unidentified stage, the file was transferred in unspecified circumstances to a person with defamation experience. Even then no complaint was made, let alone proceedings commenced."

On this point, Steel J said, in its conclusions,

> "The statute expressly requires that there be consideration of the length and reasons for the delay. The delay in terms of time is significant and it is almost wholly unexplained. Certainly no good reason for the delay has been advanced. Given the terms of the particulars of claim as to the alleged impact of the broadcast on the claimants and on the administration of justice, it may properly be surmised either that there was no contemporary concern about the terms of the broadcast (at least as regards defamation) or that there was some tactical reason for not complaining."

21. The case of *Reed Elsevier Limited (t/a Lexis Nexis) & Anor v. Bewry* [2014] EWCA Civ 1411, concerned the electronic publication of information about a court case in respect of which the plaintiff, a foster carer of young boys, wished to bring defamation proceedings on the basis that the report suggested that he had engaged in sexual impropriety with the boys. He sought an extension of time within which to bring the proceedings and in the course of its judgment, the Court said:

> "The onus is on the claimant to make out a case for disapplication: per Hale LJ in Steedman at para 33. Unexplained or inadequately explained delay deprives the court of the material it needs to determine the reasons for the delay and to arrive at a conclusion that is fair to both sides in the litigation. A claimant who does not "get on with it" and provides vague and unsatisfactory evidence to explain his or her delay, or "place[s] as little information before the court when inviting a section 32A discretion to be exercised in their favour …should not be surprised if the court is unwilling to find that it is equitable to grant them their request." per Brooke LJ in Steedman at para 45."

The Court also examined a particular claim made by the man that he did not know of the limitation period until a certain date and said;

> "The relevant paragraph of the claimant's witness statement did not state when he took legal advice; indeed it seems to have been deliberately couched in vague language, which obscured rather than clarified what was (on the claimant's case at least) this important factual issue. Nor did the witness statement say that the claimant was not aware of the relevant limitation period before he took legal advice. I mention this point because the claimant is no stranger to the civil courts as the judge himself observed and has been involved in a considerable amount of litigation in the last 15 years. It is not necessary to refer to any of that litigation, except to say that it has involved proceedings for judicial review and employment claims with much shorter time limits (strictly applied) than are involved here. I think Mr Rushbrooke is entitled to say that this should have led to a sceptical rather than a benevolent interpretation of the claimant's evidence."

This again makes it clear that 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.

22. The authorities, therefore, make it clear 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. In the present case, the plaintiff has provided minimal explanation and very little detail as to the reason for not issuing before 7th March, 2015, which he blames on an error made by his former solicitor as to the date from which the period of one year is to run. He fails to explain why, having instructed new solicitors in July, 2015, proceedings did not issue until October, 2015. He also fails to explain, at all, the delay between October, 2015, and January, 2016, in serving the proceedings which were issued. All of this sits uneasily with his assertions concerning the grave nature of the defamation and the serious impact it had upon him. I am not satisfied that the entirety of the delay has been satisfactorily explained or that the explanation offered for some of the delay has been sufficiently substantiated.

The extent to which any evidence relevant to the matter is, by virtue of the delay, no longer capable of being adduced.

23. A second factor to which the Court is required by the statute to have regard is the extent to which any evidence relevant to the matter is, by virtue of the delay, no longer capable of being adduced. In the present case, the defendant company did not seek to rely on this factor in order to resist the application.

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.

24. As regards the issue of prejudice, the plaintiff relies in particular on the grave nature of the defamation, involving as it does, an incorrect assertion that he had been convicted by a Court of an environmental pollution offence for which he received a large fine, in circumstances where he is a businessman. He also relies on the potentially large group of people to whom the defamation was published, given the size of the Shell company. The prejudice to the plaintiff if he were refused the extension of time, taken at its

height, would be his being deprived of the opportunity to pursue a defamation claim involving allegations of serious criminality to a wide audience.

25. As regards the prejudice to the defendant if the extension of time were granted, this concept of prejudice is wider than the concept of lost evidence. Not only must this be so by reason of the words of the statutory provisions, which provide separately that the loss of evidence to be considered by the Court is a discrete factor, but this is also the interpretation adopted in the authorities referred to.

26. The defendant relies upon a number of matters in respect of the potential relative prejudice of the plaintiff and defendant. First, it is argued that if, as the plaintiff asserts, the reason for the delay was his former solicitor's failure to issue proceedings within one year from the date of publication because the solicitor made an error of law, he will have a cause of action against the solicitor, and this alternative remedy is relevant to the question of prejudice. Secondly, the defendant argues that the defamation claim is a weak claim because the publication in question is covered by the defence of qualified privilege. Thirdly, the defendant argues that it is relevant that the material was taken down from the website, and that there is no plea of justification 'left hanging', as there was, for example, in the case of *Desmond v. MGN Limited* [2009] 1 I.R. 737.

27. The issue of how a potential claim against a former solicitor should be considered in the present context was discussed in *Steedman and others v. BBC*, [2001] EWCA Civ 1534. Steel J. said:

> "24 I turn now to the complaint that the learned judge should not have taken account of the claimants' ability to sue their own solicitors or at least that he placed excessive weight on that aspect. Given the absence of any explanation for the delay, it is not easy to determine whether they are justified in placing the blame upon their legal advisors. But since that was indeed the claimants' case, in my judgment the judge was fully entitled to take some account of it.
>
> 25 The suggestion that it is a wholly irrelevant consideration was rejected by this court in *Firman v Ellis* [1978] QB 886 . The argument that the judge accorded excessive weight to the issue is not a promising line of attack on an exercise of discretion. The fact remains that the existence of the claim against the solicitors ameliorates to some extent such prejudice as flows from the impact of the limitation period. The extent of that prejudice in turn depends upon the strength or otherwise of the claim.
>
> 26 It has to be remembered that none of the officers were named in the broadcast or, indeed, in any of the contemporary newspaper reports. The defendants contend, with some force, that a particular difficulty about the claim is the apparent need in those circumstances for the claimants to rely upon relatives, friends and colleagues to establish that they were being referred to. Of course it is wholly inappropriate to make any determination of the merits of the claim. But its nature and form suggest that the prejudice of not being able to pursue it is of a low order.
>
> 27 In this connection, it is instructive to focus upon the complaint that, if the claimants were left to their claim against the solicitors, they would not thereby be able to vindicate themselves appropriately. But as was submitted on behalf of the defendants, it is very difficult to see how the claimants can seriously suggest that they have any expectation of vindication as a result of the pursuit of the defamation proceedings. That would only be achieved, if at all, in the light of the outcome of the inquest when it is resumed. Absent any contemporary complaint, the pursuit of vindication as a result of a claim to an apology some 15 months or more after the event, strikes me as an entirely empty gesture.
>
> 28 The appellants sought to suggest that this approach had the effect of visiting the faults of the claimants' lawyers on the claimants. I readily accept that, on the assumption that the delay was the solicitors' fault, such would be impermissible: see *Corbin v. Penfold Metallising Company Ltd* [2000] Lloyd's Rep Med 247 and the cases there cited. But that is to confuse two quite separate considerations. As Lord Diplock observed in Thompson v. Brown ,supra:—
>
> 'If he has acted promptly and reasonably it is not to be counted against him, when it comes to weighing conduct, that his lawyers have been dilatory and allowed the primary limitation to expire without issuing a writ. Nevertheless, when weighing what degree of prejudice the plaintiff has suffered, the fact that he will have a claim over against his solicitor for the full damages that he could have recovered against the defendant if the action had proceeded must be a highly relevant consideration.'"

He went on to say,

> "To some extent the prejudice is counter-balanced by prejudice to the claimants in not having the time-bar lifted. But the claim would not appear to be a strong one, certainly if vindication is the aim. If it is stronger than it appears, the prejudice is ameliorated by the ability to claim against the former solicitors."

28. It seems to me that it is correct to say that the potential availability of a remedy against his solicitor on the part of the plaintiff is relevant to the court's discretion. It is also relevant in this regard that the only relief sought in the defamation proceedings which the plaintiff seeks to bring is the remedy of compensation.

29. As regards the strength or otherwise of the plaintiff's claim, it was argued on behalf of the plaintiff that the issue of malice, which would defeat a claim of qualified privilege, was in the case, at the very least, from mid-November, 2014, onwards, because by this time the plaintiff had notified the defendant company that the information was false and yet the information was not removed from the database for another 14 months. To this the defendant replied that malice had not been pleaded in the Statement of Claim. There was also the factual issue, to which I made a brief reference earlier, as to whether or not the defendant had published the information outside of the company. It is not necessary for the court to enter upon a detailed analysis of these matters for present purposes. For the present, I am prepared to take the plaintiff's case at its height and to accept that that it would not necessarily be an 'open and shut' case where a defence of qualified privilege would apply to the entire claim. Nonetheless, I am also prepared to accept that it is likely that qualified privilege will apply as a defence to at least some of the plaintiff's claim.

30. It is certainly true, however, that there is no plea of justification and that the material has now in fact been removed from the database, albeit that this was only done in January 2016. In *Desmond v. MGN Limited* [2009] 1 I.R. 737, the Court pointed out that a plea of justification would be a factor which could weigh heavily in the balance against allowing proceedings to be struck out for inordinate and inexcusable delay. Obviously the present case, being an application for extension of time within which to bring proceedings, is an application of a different type but the logic of the proposition would seem to me to apply with similar force.

The interests of justice

31. As regards the overall interests of justice, the plaintiff relies upon the fact that the underlying right which he seeks to vindicate in his defamation action is a right explicitly protected by Article 40.3.2 of the Constitution, namely his right to a good name. I am willing to take this into account, although this may be unduly generous to the plaintiff as it must be presumed that the Oireachtas was well aware of the constitutional status of the right to a good name underlying defamation proceedings when it crafted the regime in the Defamation Act, 2009, combining the one-year time limit with the Court's discretion to extend it up to two years. To put the constitutional right to a good name into the balance again may be a form of 'double-counting', but I am prepared to do so for present purposes.

32. It is also argued on behalf of the plaintiff that no press freedom issue arises in the present case, unlike the *Watson* case, where the issue of press freedom was referenced at paragraph 28 of the judgment of Barrett J. I am not convinced that the issue of press freedom necessarily alters the balance in a case such as this. Article 40.6.1(i) guarantees the right of freedom of expression to 'citizens' and there seems to be no reason to view the policy underlying the one-year limitation period in defamation actions as being linked to press-related publications as distinct from other forms of publication or non-media authors.

33. The plaintiff also relied heavily on the fact that the defendant company knew from mid-November, 2014, that the information published was false and chose not to take it down from the database until January, 2016, after the proceedings were served. I am not entirely convinced, having regard to the content of the emails sent by the plaintiff to the defendant laid before the Court, that it was crystal clear to the defendant company by mid-November of the specific nature of the problem, namely, that they had made an error in assuming that the person convicted of the environmental offence was the plaintiff, but I am prepared to take the view that the defendant company was at least on notice that something might be amiss with regard to this particular piece of information. On the other hand, they expressly invited the plaintiff several times to indicate whether he wished certain information to be deleted, and he indicated by letter dated January 2015 that he did not, and that he wished instead to pursue a complaint to the Data Protection Commissioner. This may explain the failure of the defendant to remove the material until proceedings issued, although it would obviously have been more prudent if they had removed it immediately and investigated the circumstances more thoroughly. In all the circumstances, I do not consider the defendant company’s behaviour to have been so egregious as to tilt the balance of justice decisively in favour of the plaintiff.

Conclusions

34. To summarise my views as set out above, the factors weighing in the balance in favour of the plaintiff are:

(a) the constitutional nature of the right to a good name which underlies the defamation proceedings he wishes to bring;

(b) the gravity of the defamation;

(c) the large number of persons to whom it appears to have been circulated; and

(d) the failure of the defendant company to remove the material from its database from mid-November 2014 or investigate the accuracy of the material, when it had been put on notice, at the very least, of the fact that something was wrong.

35. The factors weighing in favour of the defendant are:

(a) the failure of the plaintiff satisfactorily to explain the delay;

(b) the existence of a defence of qualified privilege which appears to me likely to apply to at least some of the period, but not necessarily all, and at least some, although again not necessarily all, of the recipients of the defamatory material;

(c) the fact that plaintiff has an alternative remedy against the solicitor who misadvised him as to the time limit, if what he avers in this regard is true;

(d) that the material is no longer on the database and there is no plea of justification in the case.

While I consider the matter to be rather finely balanced, particularly by reason of the mid-November response of the defendant company to the plaintiff's complaints, I am of the view that the Court's discretion should be exercised so as to refuse the plaintiff's application. His failure to satisfactorily explain the delays in issuing and serving proceedings, together with the availability of an alternative remedy against his former solicitor, if what he says is true about their error as to the time limit, are important factors in my view. I do not think that the interests of justice require that the Court exercise its discretion in favour of the plaintiff. Nor do I consider that the prejudice to the plaintiff in being prevented from bringing these proceedings would significantly outweigh the prejudice to the defendant in losing its statute of limitations defence.

36. I note that in the present case, the proceedings were issued and a motion then served seeking an extension of time, rather than seeking the leave of the Court before issuing proceedings. As the Court is exercising its discretion against the plaintiff, it does not appear necessary to rule on what the appropriate procedure is, but I would have thought that the appropriate procedure might be to issue a motion seeking the Court’s leave, with a grounding affidavit exhibiting a draft plenary summons and statement of claim. I say this in passing, because there was no argument on the point and nothing turns on it in the present case.

37. I refuse the relief sought by the plaintiff.