

THE HIGH COURT

Record Number: 2014 No. 3045P

Between:

Ronan Taheny

Plaintiff

And

Henry Honeyman, Olivia Fox, The Irish Prison Service,

The Minister for Justice Equality and Law Reform

Defendants

Judgment of Mr Justice Michael Peart delivered on the 6th day of February 2015:

1. On the 10th day of March 2014 the plaintiff applied for an order under section 11(2)(c)(ii) of the Statute of Limitations, 1957 (*"the Act of 1957"*), as substituted by section 38(1) of the Defamation Act, 2009 (*"the Act of 2009"*), giving him leave to commence defamation proceedings outside the period of one year from the date of accrual of his cause of action, as provided in section 11(2)(c)(i) of that Act. Section 11, subsection (3B) defines the date of accrual for the purpose of the present case as being *"the date upon which the defamatory statement is first published"*.

2. The plaintiff's said application was made *ex parte*, whereas under Order 1B, rule 3(2) RSC such an application must be brought on notice to the proposed defendants. The plaintiff's error in this regard was brought to the Court's attention by his Counsel on the 14th March 2014. The Court allowed the order to stand, but subject to any application that might be made by the defendants to set aside that order once they were served with the proceedings.

3. The present application to set aside the *ex parte* order has been brought by the defendants, and the Court is satisfied that the correct approach to that application in all the circumstances is to deal with the matter now as if the application was being made for the first time, and correctly on notice to the defendants, rather than to treat it as an application to set an order properly made *ex parte*, such as for example an application under Order 8, rule 2 RSC where a defendant may seek to set aside an order to renew an originating summons on the basis that in the light of facts not disclosed on the *ex parte* application, or in the light of legal submissions made by the party seeking to set aside the *ex parte* order, the Court is satisfied that had those facts and submissions been before the Court at *ex parte* stage it would not have made the order.

4. The significance of this approach to the present application is that it is not the defendants on whom the onus rests to satisfy the Court that the *ex parte* order ought not to have been made, but rather on the plaintiff to satisfy the Court now that it is in the interests of justice that he be permitted to commence his proceedings outside the period of one year from the date of the accrual of his cause of action, and generally that he fulfils the requirements of section 11 (3A) of the Act of 1957. In this particular case, it is necessary that the plaintiff establishes on the basis of a probability that the date of accrual of his cause of action is the 16th March 2012, being the date on which he says he first learned of the publication of the statement which he claims is defamatory of him. In addition, and in so far as the plaintiff relies on publication of defamatory statements about him which were published prior to the 16th March 2012, but which he did not know about until the 16th March 2012, he must satisfy the Court that he comes within section 71 of the Act of 1957, namely that by reason of a fraudulent concealment of his cause of action by the defendants, or at least some of them, the date of accrual of his cause of action is postponed until the 16th March 2012.

5. In his first affidavit the plaintiff has stated that he first became aware of the defamatory allegations on the 16th March 2012, and that the gravamen of those allegations was that he and another prison officer were party to the smuggling of contraband, including drugs, into the prison where he worked. He denies such allegations categorically, but says that the allegations have had a very serious effect on his reputation and standing within the prison service, and on his personal health and well-being.

6. He says that the first and second named defendants are the source of the allegations, and that he will rely also on allegations of a similar kind which pre-date the 16th March 2012, but of which he became aware only on the 16th March 2012, and it is in that regard that he seeks to rely on what he considers to be the *'fraudulent concealment'* on the part of the first named defendant for the purposes of section 71 of the Act of 1957 so that the limitation period ought not to be considered to run until the 16th March 2012 in respect of those earlier statements.

7. With regard to the allegation of fraudulent concealment, the plaintiff states at para. 5 of his grounding affidavit:

"In particular the first named defendant published to another officer of ACO rank at various times prior to March 2012 that I was under suspicion for smuggling and that he 'knew I was doing it'. These earlier publications were made in a covert manner in circumstances which I am advised and believe amounted to concealed fraud on the part of the first named defendant."

8. In relation to the third and fourth named defendants, he states that these allegations about him became known generally in the prison *"and for the first time to me, due to publication in or about 16th March 2012"* and that to the best of his knowledge *"this was by virtue of publication by the second named defendant of the views of the first named defendant that I was involved in such activity which spread rapidly through the prison on the same day"*.

9. The date on which he first learned of the publication of the defamatory statements is critical, because if he learned of these allegations on, say, the 10th March 2012 as the defendants allege is the case, then regardless of any reason put forward by him for his delay in commencement this Court has no power to permit the commencement of these proceedings under section 11 of the Act of 1957, because of the outer limit of two years provided in the section.

10. In his grounding affidavit he exhibited just one letter, namely a reply dated 22nd May 2012 which he received from the Governor of the prison to his letter to the Governor dated 16th March 2012. He did not exhibit a copy of his own letter to the Governor. However, same has now been produced to the Court by the defendants, without objection by the plaintiff. In his own letter dated 16th March 2012 he did not state the date on which he first learned of the allegations. Having stated the nature of the allegations and the fact that they are *"having a severe effect on his personal and professional life"* and that he is *"becoming a target for jovial*

remarks and gestures which make my life extremely difficult and has been noted during night duty on the above date", he simply requested that the Governor would carry out "an immediate and open investigation".

11. The Governor's reply dated 22nd May 2012 stated that following an investigation he was satisfied that there is no evidence available to him up as of that date to support any suspicion that the plaintiff was bringing or attempting to bring contraband into the prison. The Governor expressed the hope that his conclusions would bring closure to the plaintiff's issues.

12. I have come to the view that the language of the plaintiff's letter dated 16th March 2012 indicates a continuum up to the 16th March 2012 rather than that he heard these allegations for the first time on that date. By that I mean that in his letter he is stating that the allegations are "*having a severe effect on his personal and professional life*", and that he is "*becoming a target*". It is improbable that he could express himself in those terms if he was writing that letter in the immediate aftermath, indeed on the very same day, as he found out about the allegations. The words "*having a severe effect*" and "*becoming a target*" clearly suggest some period over which those effects have developed and become manifest. It appears also from a subsequent letter written by his solicitor that by the end of the 16th March 2012 (he having been on night duty) he had become too unwell to work the next day, and took a day's uncertified sick leave on the 17th March 2012.

13. My view is corroborated by a letter to the Governor on the 28th June 2012 which was written by the solicitor then acting for the plaintiff. It runs to some three full pages, and was clearly written following one or more consultations and the taking of very detailed instructions. It states near the commencement thereof:

"We are instructed that on Saturday the 10th March 2012 our client became aware from a conversation with a colleague that an allegation had been made against him and at least one other colleague that our client and at least four other officers had been engaged in smuggling contraband into the prison" [emphasis added]

In fact, there is no mention of a threat of defamation proceedings at all in this letter. Apart from calling for a further investigation into allegations, and for some disciplinary action to be taken against certain other prison officers, this letter formally reserves the plaintiff's right "*to sue for damages for personal injury arising from the failure of the [prison] service to take any steps to protect him given the serious consequences of the unfounded allegations having been made against him, as the service as our client's employer did not take any effective steps to protect our client's health and wellbeing from the damage which has been occasioned to him as a result of this failure.*"

14. However, the important aspect of this letter is not so much its general content, but the fact that it clearly states that the plaintiff first heard of the allegations on "*Saturday the 10th March 2012*". That is very specific. The other significance of the letter of course is that the plaintiff never referred to it in his grounding affidavit when making his *ex parte* application to this Court on the 10th March 2014, and it was not until the defendants exhibited it in their affidavit that he now states that the reference to the 10th March 2012 is an error on the part of his then solicitor. I consider that to be highly improbable given the careful and detailed nature of this letter. All the plaintiff can say is that while he saw drafts of that letter before it was sent he never saw the final version. I am satisfied that the date stated therein is consistent with what I have referred to as a continuum in relation to the effect upon him of hearing of the allegations and rumours which led him to feel so unwell by the end of the 16th March 2012 (the very date on which he says that he first heard of the allegations) that he took a day's uncertified leave on the 17th March 2012.

15. Where a plaintiff seeks to have time extended under section 11 of the Act of 1957 he bears the burden of proving an entitlement to that extension. I will come shortly to the reasons he puts forward for not having commenced proceedings within a year of the accrual of his action. For the moment I am dealing only with the point raised by the defendants that the Court has no power to extend time beyond two years from that accrual, because on the evidence of the plaintiff's own solicitor's letter to the Governor dated 28th June 2012 that date of accrual must be taken as being the 10th March 2012, and the Court may in no circumstances permit the issue of proceedings beyond a two year period from the date of accrual of the plaintiff's cause of action.

16. 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 has made an error.

17. In a matter of such critical importance, it is insufficient for the plaintiff to simply make the bare and unsupported assertion on affidavit that his solicitor has made an error in order to displace the *prima facie* evidence of the date of accrual contained in the letter from his own solicitor. In addition, I have already referred to what I consider to be '*the continuum*' evident in his own letter to the Governor dated 16th March 2012 which in my view is consistent with a discovery of the allegations on some date prior to the 16th March 2012, and would certainly be consistent with a discovery on the 10th March 2012 as stated by his solicitor. I note also that in his second affidavit at paragraph 8 thereof the plaintiff states he has always been "*clear ... that I found out on the 16th March 2012*". If that be so, it is surprising that he gives absolutely no detail of the circumstances of how he found out about the allegations. The letter dated 28th June 2012 from his then solicitor refers to him having learned of the allegations "*from a conversation with a colleague*". I presume that means that he found out about it while he was at work that day, but he does not say who told him, or where and at what time he was told about these rumours. If, as he states in his second affidavit he was always "*clear... that [he] found out on the 16th March 2012*" one would expect that he would be able to say with precision precisely where he was, the time the conversation took place, and who he was speaking to.

18. In my view the plaintiff has not discharged the onus of satisfying this Court that it was only on the 16th March 2012 that he first learned of these allegations. I am satisfied that on the basis of probability he learned of the allegations on the 10th March 2012 as stated in his own solicitor's letter. Therefore on his own case he is a day outside the '*long stop*' date for commencement, and the clear statutory provision in section 11 (2)(c) of the Act of 1957 permits of no '*de minimis*' exceptions, even one day. The Court has no discretion beyond that two year limit.

19. Barra Faughnan BL has argued that what the Court has to decide is simply whether the plaintiff should be entitled to an opportunity to argue at trial that the date on which he first heard of the allegations was the 16th March 2012, and that this Court

does not have to conclusively determine that issue on the present application. He submits that even if the plaintiff is permitted to commence these proceedings, the defendants can still raise the statute by way of defence in the normal way, and it can be dealt with by way of preliminary issue if necessary when the plaintiff will be able to call all available evidence in support of his contention that the date on which he first learned of the allegations was the 16th March 2012, and also that the reference to the 10th March 2012 in his solicitor's letter was simply an error.

20. Mr Shanley for the defendants on the other hand submits that if this Court makes the order sought now, it can only do so on the basis of a finding that the date of first knowledge was the 16th March 2012, since otherwise it has no jurisdiction to make the order at all. In such circumstances, he submits, the defendants will be precluded from pleading the statute of limitations by way of defence by virtue of 'res judicata'. He submits that the intention of the legislature is plain from the terms of section 11 of the Act of 1957, and that it is clear that where proceedings have not been commenced within one year from the date of accrual (i.e. where no order is required), the date of accrual of the plaintiff's action is crucial and must be decided on the application for a direction under section 11, subsection (2) of the Act of 1957. I agree with that submission. The scheme of the Act is clear. First of all, a plaintiff who seeks damages for defamation may without any leave commence his proceedings not later than one year from the date of the accrual of his action, being the date of first publication. Secondly, if he fails to do so within one year thereof, he must seek a direction that allows him to do so outside that period of one year, but the Court may not give such a direction where more than two years has passed from first publication. Thirdly, the date of accrual may be considered to have been postponed if the plaintiff can come within section 71 of the Act of 1957 by showing that there has been fraudulent concealment on the part of the defendant, in which case the limitation period will not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

21. There is nothing within that scheme to suggest that a plaintiff has merely to demonstrate that it is arguable that he is not outside the limitation period provided for. There is nothing to suggest that the threshold which the plaintiff must overcome is comparable to that applicable to seeking leave to seek reliefs by way of judicial review where a final determination must await a full hearing once arguability has been established for the purposes of leave. In my view, on an application for a direction under section 11 of the Act of 1957, the Court must make a determination as to the date of accrual of the plaintiff's action. That is the occasion on which the plaintiff must discharge the onus upon him in that regard, and the Court must reach its conclusion on the basis of a probability.

Delay generally:

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

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

24. The plaintiff's grounding affidavit seeks to explain and justify his delay by the following averments in paragraph 8 of his affidavit, which I will set out in full:

"8. I say that I did not pursue an action in relation to this defamation prior to this date for a number of reasons:

(i) I was actively engaged in trying to have the matter resolved both through my union, with the Prison Officers' Association, and with the aid of solicitors in the weeks and months thereafter. I say that the intended third named Defendant, Irish Prison Service, through its servants or agents, my direct superiors in employment, purported to investigate the said allegations. I was provided with correspondence which purported to exonerate me and indicated that there was no basis for the rumours being spread but simultaneously purported to deny that the said rumours had spread at all. I beg to refer to a true copy of a letter dated 22nd May 2012 from the Governor of the prison to me upon which marked with the letters "RT2" I have signed my name prior to the swearing hereof.

(ii) I say that the approach taken by the Prison Service, while it removed the possibility of internal disciplinary action being taken against me in relation to the wholly false allegations, did nothing whatsoever to clear my name. Further, the approach taken in relation to the fact of the allegations spreading throughout the prison service was to purport to investigate same on the one hand and to deny wrongdoing by any prison officer on the other.

(iii) I say that the correspondence entered into between the Prison Service and my solicitors went in tandem with attempts to resolve the issue pursuant to HR channels within the Prison Service and in that regard I was assisted by my union representative. This approach appeared to be moving forward and meetings were scheduled, but towards the end of 2012 the Prison Service unilaterally withdrew its involvement in that process.

(iv) while the possibility of a defamation action was being discussed with my former solicitors, I say that I was in the process of seeking to get clarification in relation to the causes of action which may have accrued to me and what steps I might then take. During this process I had no knowledge whatsoever in relation to the one-year time limit for bringing an action in defamation.

(v) I was waiting for such clarification and/or trying to get my solicitors to respond to the matter when, unbeknownst to me, the year within which I could have brought these proceedings without leave of the Court expired. I beg to refer to a true copy of an email sent to my former solicitors expressing my frustration at the lack of a response upon which marked with the letters "RT3" I have signed my name prior to swearing.

(vi) I was able to retain alternative solicitors at the end of last year. There followed consultations and enquiries and discussions with some officers who were directly involved in some of the matters complained of (of which fact I had been unaware). Thereafter the views of junior and senior counsel were obtained leading to the within application.

(vii) while this is a separate matter, I say that the process and the manner in which I have been dealt with following the allegations being spread throughout the Prison Service has taken a very serious toll on my personal

health, one that I did not immediately."

25. In addition to these averments, the plaintiff relies on fraudulent concealment to permit him to rely upon allegations which were published prior to the 16th March 2012, and which he says he did not discover until 16th March 2012.

26. In relation to fraudulent concealment, I am not satisfied that it has any application in this case. That principle, and the provisions of section 71, must not be confused with a state of knowledge provision such as that which the Oireachtas has made provision for in relation to certain personal injuries actions, for example in the Statute of Limitations (Amendment) Act, 1991. The Defamation Act, 2009 itself makes no provision for a date of knowledge test for the accrual of a cause of action. It has made very specific provision for periods of limitation in section 11(3B) of the Act of 1957 (as inserted by section 38 of the Defamation Act, 2009). The plaintiff may of course attempt to avail of the provisions of section 71 of the Act of 1957, but on the basis of facts which he must establish if that section is to avail him. The onus is on the plaintiff to adduce some facts to bring him within the section. The plaintiff has not asserted any facts to establish that some unconscionable act on the part of any of the defendants to conceal the act from the plaintiff. The furthest he has gone is to assert as a bald statement that those earlier statements were made in a covert manner amounting to fraudulent concealment. He gives no other detail as to the person to whom those statements were made, and has adduced no evidence from any such person. The mere fact that a defamatory statement was made to another person about the plaintiff prior to the 16th March 2012, and the person who made the statement did not tell the plaintiff that he/she had done so, does not in my view come within the sort of unconscionable behaviour that is contemplated by the concept of 'fraudulent concealment' for the purpose of section 71. To conclude otherwise would be to set at nought the clear long stop provision of two years provided for in the section 11 (2)(c), as inserted.

27. However, even if I am wrong about that, the most that section 71 can avail the plaintiff is to postpone the running of the limitation period in respect of a cause of action arising from those statements until the plaintiff discovered them, and that is in the plaintiff's view the 16th March 2012, but in my view more probably the 10th March 2012.

28. I now return to the reasons offered by the plaintiff for his delay from March 2012 until 10th March 2014, in case I am incorrect in my conclusion that as a matter of probability the plaintiff first learned of the publication of these statements on the 10th March 2012 and not the 16th March 2012.

29. The reasons which I have set out in full above from paragraph 8 of his grounding affidavit are essentially that at first he sought to have an investigation of the allegations carried out by the Governor, which was done. That investigation concluded with the Governor's letter to the plaintiff dated 22nd May 2012, by which date the plaintiff was still within one year from the date he learned of these allegations. He goes on to say then that with the help of his union he had tried to have the matter dealt with through Human Resource channels within the prison service in tandem with his efforts to have the matter investigated by the Governor. That process through HR channels came to an end, according to his grounding affidavit "towards the end of 2012 [when] *the prison service unilaterally withdrew its involvement in the process*" (emphasis added), whereas I note from his solicitor's letter to the CSSO dated 17th April 2014 at paragraph 5(iv) thereof that he states:

"A potential HR resolution to the situation was mooted over several months but ultimately a proposed meeting in this regard was unilaterally cancelled by the Prison Service in or about the end of April 2012". [emphasis added]

Whichever date is correct as to the withdrawal of the Prison Service from whatever HR process was sought to be engaged in by the plaintiff, it concluded well within the year permitted for the commencement of proceedings. Neither that unsuccessful effort nor the investigation by the Governor can properly explaining, let alone justify, the delay up to the 10th March 2010. They are simply not relevant to excusing that delay, since, regardless of what date is the correct date for the withdrawal from the HR process by the Prison Service, the plaintiff had more than sufficient time to get his proceedings underway before either the 10th March 2013 or the 16th March 2013 without the need to apply for any order in that regard.

30. Thereafter, be it the end of April 2012 or the end of December 2012, the plaintiff seeks to blame his then solicitor, who on the plaintiff's case, failed to respond to the plaintiff's urgings for advice and progress in the matter. He has exhibited one email which indicates that in July 2013 he had failed to have some ten phone calls returned by that solicitor. He explains that it was not until the end of 2013 that he was able to retain his present solicitors. He also explains that he was never made aware that there was a one year time limit for the commencement of proceedings.

31. The delay from either April 2012 when on one account the HR process ended, or May 2012 when the Governor's investigation concluded, or from the end of 2012 when, on another version of events, the HR process ended, is not explained adequately by simply saying that he had problems getting his then solicitor to return his phone calls, and further delay in retaining another solicitor. That is all the plaintiff has said about the delay throughout 2013. Section 11(3A) of the Act of 1957 requires this Court "to have regard to the reason for the failure to bring the action within the period specified ...". I consider that this requires this Court to evaluate the reason and to consider if the reasons offered objectively justify the delay. In my view the reasons offered by the plaintiff do not do so. They explain the delay, but that is a different consideration to whether they justify the delay.

32. In my view, no good reason has been demonstrated by the plaintiff for the delay in the commencement of these proceedings. His ignorance of the law as to the time limit does not of itself excuse him. The fact that he may have been reliant on legal advice in relation to such a matter is no excuse. Furthermore, there is no explanation given for any difficulty which he had in seeking advice from another firm of solicitors. He simply states that "I was able to retain alternative solicitors at the end of last year". That matter is referred to briefly in his solicitor's letter dated 17th April 2014 to the CSSO when it states on the final page at (c):

"Having dispensed with his initial solicitors our client made contact with David Fagan (consultant to this firm) at the end of 2013 and an initial consultation was held just before the Christmas vacation".

33. 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. The plaintiff in the present case has been tardy in his pursuit of redress through the courts. He has not explained adequately, or indeed properly at all, why it took him until March 2014 to bring an application to the Court to be permitted to proceed with his action, or indeed to explain why such an application was needed at all.

34. I am satisfied that the order made by this Court on foot of an *ex parte* application should be set aside. Accordingly, the plaintiff's

proceedings should be struck out as they ought never to have been permitted to have been issued, and would not have been permitted had the application for a direction been made on notice as it ought to have been under Order 1B RSC.