THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 86
Record Number: 2017 92

Whelan J.
Baker J.
Costello J.

BETWEEN/

CHRISTIAN MORRIS

PLAINTIFF/APPELLANT

- AND -

ALOYSIUS RYAN

DEFENDANT/RESPONDENT

JUDGMENT of the Court delivered on the 22nd day of March 2019 by Ms. Justice Máire Whelan

1. This is an appeal against the judgment delivered 7th February, 2017 and consequential orders made on the 1st March, 2017 by Mr. Justice Gilligan in the High Court wherein he refused the appellant's motion for a direction pursuant to s.11(2)(c)(ii) of the Statute of Limitations, 1957, as amended, that he be permitted to proceed with defamation proceedings issued outside the one-year period of limitation specified in the said Act. The appellant also appeals orders made on the same date dismissing the said defamation suit on the grounds that same was statute barred pursuant to s.11(2)(c) of the Statute of Limitations, 1957 (as inserted by s.38(1) of the Defamation Act, 2009). He further appeals an order, in the nature of an Isaac Wunder Order, restraining him from instituting any further proceedings whatsoever, whether by summons or notice of motion, by application in court or by appearing or applying in court or otherwise, against the respondent or any parties or companies associated in any way with the respondent or his business interests or in relation to the Marine Hotel Sutton and the Grand Hotel Malahide, without leave of the President of the High Court.

Background
2. There had been a history of conflict between the appellant and respondent's hotel companies which apparently had its origins in 2007, resulting in the appellant in November 2007 objecting to the renewal of hotel licences at the annual District Court licensing hearing. Those objections were dismissed by the District Court as being "frivolous and vexatious". The appellant's appeal of that determination was dismissed in the Circuit Court in 2008.

3. The claim in defamation arises out of an alleged incident which occurred some years later on the 22nd February, 2010 at the Marine Hotel in Sutton, County Dublin. The appellant is a resident in the area. The respondent is the managing director of the company which beneficially owns and runs the hotel.

4. A plenary summons issued on the 25th January, 2012, one year and eleven months following the incident in question. It pleads as follows:-

> "The Plaintiff's claim is that, on the morning of Monday 22nd February, 2010, among other possible occasions both before and afterwards, you, Aloysius Ryan (hereafter entitled "the Defendant") did, in a public place harass the plaintiff and did repeatedly defame the plaintiff and did, in a public place, repeatedly insult and humiliate the Plaintiff and, above and beyond anything aforesaid, at times including but not confined to Monday 22nd February, 2010, have disseminated untrue statements about the Plaintiff to third parties…"

5. An appearance was entered promptly on the 1st February, 2012. By letter of the same date Orpen Franks, solicitors for the respondent, stated:

> "It would appear to us that your actions against both The Marine Hotel (Sutton) Limited and Mr Aloysius Ryan are statute barred. We would invite you to file a Notice of Discontinuance in relation to each case and should you discontinue the said proceedings, we can confirm that neither The Marine Hotel (Sutton) Limited nor Aloysius Ryan will pursue you in relation to the costs of those proceedings. If you elect to proceed with both actions, you will immediately have a significant exposure in respect of costs and that exposure will increase significantly if our clients are put to the expense of entering a Defence. We do suggest you give this matter your full consideration before any further legal expenses are unnecessarily incurred."

6. It is significant that the said letter was written well in advance of the second anniversary of the incident in question.

7. No further step was taken to prosecute the claim until the 21st January, 2013 when, on foot of a motion brought by the respondent, Mr. Justice Gilligan made an order in the High Court directing the appellant to serve a statement of claim on the respondent not later than three weeks from the date of the said order. The appellant, a litigant in person, delivered a statement of claim dated the 8th February 2013. It included the following assertion;-

> "Section 38 of the 2009 Government of Ireland Defamation Act sets a statutory bar of one year for such litigation but is silent about whether a Plaintiff should proceed with a Statement of Claim in the event of it being arguable that such a statutory bar might apply. It is construed by the Plaintiff that the Defendant's demand for service of this Statement of Claim is a waiver of their right to relief under Section 38 of the 2009 Government of Ireland Defamation Act."

8. At para. 1 it is pleaded that:-

> "The plaintiff is a law-abiding and respectable citizen who is of excellent character notwithstanding the uncontested existence of two minor traffic convictions against him (for driving without due care and consideration, and for crossing a

continuous white line)".

9. The statement of claim pleads that "on 22nd February, 2010 an incident (hereafter "the incident of 22nd February, 2010") happened at the Marine Hotel, Sutton, Dublin 13". It further recounts that on the 4th May, 2010 and the 3rd June 2010 the appellant made statements to the Gardaí arising from the said incident. It is pleaded at para. 5 that on the 9th August, 2010 the appellant got a letter from a Garda Superintendent telling him "that Supt. O'Connor had pardoned Aloysius Ryan from his criminal behaviour towards the Plaintiff as specified in the Garda statements at (3) and (4) above".

10. It is pleaded that on the 22nd November, 2010 the appellant served on the respondent's solicitors a "detailed claim letter". The statement of claim incorporates a series of ten photographs which are pleaded to constitute still images from a video recorded by the appellant in the course of the incident on the 22nd February, 2010.

11. The statement of claim, in addition to making allegations against the respondent, also alleges or imputes misconduct to the Marine Hotel Sutton Limited, the Grand Hotel Malahide Limited, Matthew Ryan Senior, Matthew Ryan Junior, Gillian Butler and John Walsh. All are entities or individuals connected with Mr Ryan or one or other of his businesses. It is pleaded that the video created by the appellant constitutes evidence of "the pursuit of an active and malicious smear campaign" against him by the aforementioned parties in addition to the respondent. The reliefs sought include €4m. by way of punitive and exemplary compensation "or alternative sum as might eventually be agreed", to be paid to the appellant by the respondent. In addition, he seeks a public apology.

12. The defence was delivered on the 1st March 2013. It pleads that the appellant's claim is statute barred pursuant to s.11(2)(c) of the Statute of Limitations (as inserted by s.38(1)(a) of the Defamation Act 2009) since the proceedings were commenced more than one year after the date on which the appellant's cause of action is alleged to have accrued.

13. The defence also pleads that the statement of claim discloses no reasonable cause of action against the respondent. In particular, it is pleaded that the appellant had failed to identify either in the plenary summons or statement of claim any allegedly defamatory statement concerning him which is alleged to have been published by the respondent to one or more persons.

14. On the 11th December, 2015 the appellant issued a notice of motion seeking a direction of the court. The said notice of motion seeks, *inter alia*, an order pursuant to s.38 of the Defamation Act "whereby the Court gives leave for the case herein to continue to a full plenary hearing under a Judge and jury". In his grounding affidavit sworn the 11th December 2015 in support of his application he deposed;-

> "I believe that there are no appreciable grounds to claim laches on my part or other undue delay in my having brought these proceedings, even though same happened after one year elapsed from the initial trespass".

He further deposed; -

> "I will, very soon, submit an affidavit more explicit than herein which will be an exhaustive testimony of my position in support of the application".

15. A further affidavit was sworn by the appellant on the 26th October, 2016 which alluded to a wide variety of litigation in which he was involved as against the respondent and members of the respondent's family, persons connected with him and his business, and the two hotel companies. Key points of relevance in the said affidavit include the following:-

> (a) He had great difficulty in ascertaining that the name of the managing director of the hotel was Aloysius Ryan;
>
> (b) It took solicitors for the Marine Hotel over two years to acknowledge his claim letter; and
>
> (c) That he had kept away from the Marine Hotel following the events of the 22nd February, 2010 and this exacerbated his difficulty in identifying the defendant "and the nature of the defendant."

16. At para.19 the appellant deposes "[t]o my great distress, dismay and anger... the Defamation Act 2009 applies a statutory bar of one year to defamation proceedings, while allowing a plaintiff to make an application to the Court... for leave to continue with such a case but only if such a case has been started within two years of the initial defamatory publication".

17. The appellant asserts that the proceedings were instituted within the two year time limit and deposes that he should be permitted to proceed for the following reasons:-

> (a) It would be unjust for him to deprived of a chance to ask the Court to affirm his good name; and
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> (b) The prejudice he would suffer would "hugely outweigh" that of the respondent.
>
> (c) The reasons for the delay he explained as follows:
>
> > (i) The appellant was "waiting to see if a criminal charge would arise against Aloysius Ryan arising from the 2010 incident and, as soon as it did not, I immediately (that is, I stress, on the same day) issued the Claim Letter".
> >
> > (ii) The appellant wanted to give the respondent "good time to respond as he might want to before I started proceedings." He asserts that "the one-year statutory bar, in its everyday application" is "oppressive".
> >
> > (iii) The appellant avers that he was unable to identify the respondent by name until he received a letter which he dates the 1st February, 2012.
> >
> > (iv) That there were no grounds to suggest that his evidence was inferior compared to how it was at the time of the 2010 incident.

18. The appellant avers that he did not believe "that there are any grounds to suggest that I slept on the substantive matter of this Case". He also raised the "Defendant's failure, from the 2010 Incident to date, to exercise his right to invoke the right of the Court to dismiss this Case, either as allowed for by the Defamation Act or as is generally permissible through the invocation of the inherent rights of the jurisdiction to dismiss a case that is without merit and/or bound to fail". He contended that the respondent had slept on

any rights which he might have.

19. On the 11th March, 2016, over six years after the alleged incident, more than four years after delivery of the plenary summons and some three years following delivering of the statement of claim, the respondent brought a motion to dismiss the proceedings by reason that same were statute barred.

20. Regarding the averments in the respondent's affidavit grounding the motion to dismiss the proceedings by reason that he would be prejudiced in his ability to defend the claim due to (a) the passage of time rendering the recollection of witnesses less reliable and (b) that a number of the witnesses who were employees of the hotel at the time have since left their employment, the appellant's response was that "this is an absolute red herring". He characterises the limitation period for defamation specified in s.11(2)(c) of the Statute of Limitations, as amended, as being a "harsh statutory bar of one year".

Hearing in the High Court

21. The matter came on for hearing in October 2016 and judgment was reserved. In his judgment dated the 7th February, 2017 Mr. Justice Gilligan held at para. 3:-

> "It is of significance, for the purpose of the application before the court, that the incident in question is alleged to have occurred on Monday, 22nd February, 2010 and the plaintiff knew as of the 22nd November, 2010, that there was going to be no prosecution of the defendant as a result of any of the statements as furnished by the plaintiff to An Garda Síochána."

22. The court notes at para. 6 that:-

> "It is quite clear that the plaintiff's claim has not been brought within one year of the date when the cause of action allegedly accrued. Thus, the appellant is in breach of s.11 of the Act of 1957, as amended, in that action shall not be brought after the expiration of one year from the date on which the cause of action accrued."

23. The court observed that it had:-

> "jurisdiction to direct such longer period as the court may consider appropriate not exceeding two years and in this regard as the proceedings were instituted on 25th January, 2012, they are issued within a two-year period."

24. The court then turned to a consideration of whether to give a direction in respect of the institution of proceedings between one and two years after the date of accrual of the cause of action and expressed the view at para. 10:-

> "The plaintiff does not set out any cogent or sustainable reason as to why the proceedings were not issued within one year of the date of the accrual of the action."

25. The judgment continued:-

> "It is clear from a consideration of the papers that the plaintiff literally bombards the respondent with legal proceedings."

26. The court went on to note at para. 13:-

> "This Court regards the action of Mr. Morris as a vendetta against the defendant and his business interests and insofar as the interests of justice are concerned, this Court is of the view that the interest [sic] of justice in this particular case do not require the giving of the direction that the plaintiff should be entitled to institute these proceedings after the elapse of one year from the date of the accrual of the alleged cause of action. In any event, no application was made by the plaintiff for a direction with regard to the issue of these proceedings after the one-year time period had elapsed and to simply ask the court in 2016 to grant a direction for a cause of action that accrued in 2010, without any cogent explanation for the delay involved, is unstateable and an abuse of the courts process."

27. The judge concluded at para. 14 that he had taken the view that:-

> "the defendant will be prejudiced by the abuse of the court's process if the plaintiff is not prevented from continuing to [pursue] the defendant through the courts."

28. The court noted that the defendant had:-

> "no prospect of recovering any award of costs made in his favour from the plaintiff".

29. The court determined at para. 17 that:-

> "In order to protect the administration of justice and the use of the court's resources against groundless and vexatious litigation, it is ordered that the plaintiff be prohibited from taking any proceedings whatsoever whether by summons or notice of motion or by way of appearance in court against the defendant or any persons associated with him or with any companies associated in any way with his various business interests or with any matters relevant in any way to the Marine Hotel, Sutton and the Grand Hotel, Malahide without leave of the President of the High Court."

30. The court further concluded:-

> "pursuant to the inherent jurisdiction of the court, the plaintiff's claim is statute barred... and has no prospect of success". The proceedings were dismissed.

Grounds of appeal

31. The notice of appeal contends that the determination of the High Court was a "miscarriage of justice" based on "findings which are fundamentally wrong" and that the judge had failed to consider "the entire evidence as available before the Court". It was further contended that the determination of the High Court resulted in the appellant having "an unresolved grievance" and that there remained an outstanding "total dispute" between the parties. He also contended that it had the "collateral effect of injuring" his inalienable rights under Bunreacht na hÉireann and that the order was "excessive, oppressive and unenforceable". He contended that

"the balance of justice favoured allowing the appeal."

32. The respondent fully contested the grounds of appeal, disputing the characterisation of the decision as a miscarriage of justice, and asserted that the findings of fact made by the High Court were supported by affidavit evidence which was before the court and which was correct. Further, it was argued that the appellant had failed to identify any finding as being wrong - either factually or as a matter of law. It was asserted that the decision was a proper application of the law to the facts proved before it by the High Court. Further, it is contended that the issue for determination is whether the High Court was correct in determining that the appellant's proceedings are statute barred and have no reasonable chance of success.

33. The respondent advances three grounds on which the decision of the High Court ought to be affirmed additional to those relied upon by the High Court: -

> (a) That the appellant had failed to obtain a direction pursuant to s.11(2)(c)(i) of the Statute of Limitations 1957, as amended, prior to bringing the said proceedings, notwithstanding the fact that they were brought in excess of one year after his cause of action had accrued;
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> (b) A direction, it was argued, cannot be granted under the said provision so as to cure a defect in proceedings which have already been instituted; and
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> (c) Such an application for a direction must, in any event, be made within two years of the applicant's cause of action accruing and no such application has been made by the appellant within the said period.

34. In his submissions before this Court the appellant emphasised that he took umbrage at the characterisation of him in the judgment as waging "a vendetta" against the respondent. He contended that the issue before this Court pertains to the Statute of Limitations in general and that it was not necessary for him to bring a motion to proceed pursuant to s.38 of the Defamation Act 2009 simultaneously with the initiation of the plenary proceedings. He argued that since the Defamation Act 2009 is silent on the matter, "the only proper construction that I see is that a plaintiff is automatically at liberty to bring a s.38 motion either simultaneously to or after the initiation of the proceedings and, furthermore, not even with a two-year time limit of first trespass, so long as the originating plenary summons was brought within two years."

35. He asserted that the respondent has not acted in any way to make amends in regard to the matters alleged: "Aloysius Ryan has not withdrawn any of the defamatory remarks that he has made about me." In his oral arguments he indicated that he wished to vindicate his good name and asserted his constitutional right to do so.

36. The respondent contended, as had been done before the High Court, that an application for a direction in a defamation suit pursuant to s.11(2)(c)(ii) had to be made in advance of instituting proceedings and so necessarily had to be made prior to the expiry of two years from the date of the accrual of the cause of action. The application could not be made at a later date. In particular, it was contended that such an application could not be made so as to retrospectively validate proceedings which had been instituted outside the one-year period specified in s.11(2)(c)(i) without first obtaining such a direction pursuant to 11(3A) of the Statute of Limitations, 1957, as amended.

37. It was contended further that the trial judge in his judgment had approached his consideration of the issues in the reverse order:-

> "determining that the interests of justice did not require the giving of a direction that the appellant should be entitled to institute proceedings in respect of the alleged defamation in excess of one year after the date of publication of the statement of which he complained."

Having reached the conclusion he did "the learned high court judge did not consider it necessary to address the submission made on behalf of the Defendant that such an application could only be entertained within the second year after the publication of an alleged defamatory statement".

38. The respondent contended that there was no cogent explanation for the appellant's failure to issue the proceedings until the 25th January, 2012, particularly in circumstances where within six days of receipt of same the respondent's solicitors had written indicating that the claim was statute barred. Therefore, the appellant was on notice ahead of the expiry of two years from the date of accrual of the cause of action that the statute was being invoked and accordingly could have taken steps up until the 22nd February, 2012 to bring the appropriate application for a direction to extend the period of limitation in accordance with s.11(3A) of the Statute of Limitations 1957, as amended.

39. It was submitted on behalf of the respondent that for the High Court judge to have acceded to the application over six and a half years after the publication in question, more than four and half years after the appellant had been informed that the proceedings were statute barred, and more than three and a half years after a defence pleading the statute had been delivered would have been to subvert the legislature's intention as expressed in s.38 of the Defamation Act, 2009.

40. The respondent further contended that if this court is of the view that the appellant has established circumstances which would render it appropriate to make a direction which the appellant seeks, it would be necessary to consider the antecedent question – whether such an application can be entertained after the two-year period has expired. It was argued that the wording of the statutory provision is clear and unambiguous and that an application for a direction extending time must be made in advance of the institution of proceedings against the proposed respondent and cannot be made with a view to curing proceedings which have already been issued.

The law

41. At issue is the operation of the Statue of Limitations and the manner in which it imposes a statutory time bar on civil proceedings seeking remedies in respect of defamation. There were no limitation periods for actions unrelated to the recovery of real property until the Limitation Act 1623 which governed the limitation of "common law actions". The operation of that Act was confined to the jurisdiction of England and Wales. Broadly similar provisions to those in the 1623 Act were introduced in this jurisdiction in 1634 by virtue of An Act for Limitation of Actions and for avoiding of Suits in Law 1634 (10 Car.1. sess. 2, c. 6 Ir.). The 1634 Act was consolidated and repealed in this jurisdiction by the provisions of the Common Law Procedure Amendment (Ireland) Act 1853. The latter Act remained in force in this jurisdiction until the Statute of Limitations, 1957, came into operation on the 1st January 1959.

42. From the 17th century onwards, and particularly following the decisions in *Stile v. Finch* (1634) Cro. Car. 381 and *Hawkings v Billhead* (1635) Cro. Car. 404, the legal position was clear that a statute of limitation bars the remedy but not the claim itself. From

the earliest times the jurisprudence made clear that in an action founded on contract or tort the effect of the expiration of the limitation period was that the remedy was barred but the plaintiff's right was not extinguished. Several significant consequences follow from that legal principle. It has been accepted since *Stile v. Finch* (1634) Cro. Car. 381 that limitation is a matter which must be specifically pleaded by a defendant if it is sought to be availed of. The plaintiff's cause of action is not regarded in law as time barred until the plea is made and the defence delivered encompassing the plea.

43. The common law historically recognised a distinct cohort of cases where the expiry of the period of limitation extinguished the appellant's right entirely. Foremost among the class of cases where the expiration of the limitation period extinguished rights were those relating to land. Such claims were governed by the Real Property Limitation Acts 1833-1874 which operated to bar both the remedy and the right. However, only the 1874 Act applied in this jurisdiction. Its terms governed both actions relating to land and money charged upon land.

44. Defamation suits fall clearly within the category of cases where the operation of the Statute of Limitations extinguishes only the remedy leaving the right of action otherwise untouched. Accordingly, a limitation period will normally operate to bar a claim in defamation only if successfully raised by way of defence. A defendant is required to raise expressly in his defence the contention of a limitation bar in order for the limitation period to operate. Earl Cairns stated the position thus in *Dawkins v Lord Penrhyn* [1878] 4 App. Cas. 51 at 59 where he stated:-

> "It cannot be predicted that the Defendant will appeal to the Statute of Limitations for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the Defendant whether he desires to avail himself of the defence of the Statue of Limitations or not."

In the later case of *Ketteman v. Hansel Properties Ltd.* [1987] A.C. 189, a judgment concerning a late application to amend a defence to plead the Statute of Limitations, Lord Griffiths observed:-

> "A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and it may prefer to contest the issue on the merits."

Since the Statute of Limitations was specifically pleaded in the defence delivered on behalf of the respondent in the present case that plea falls to be considered in this appeal.

The limitation period

45. The statutory limitation period for defamation proceedings is to be found in Part 2 of the Statute of Limitations, 1957. Section 11(2)(c), the relevant provision dealing with the limitation period for defamation suits provides:-

> "A defamation action within the meaning of the Defamation Act, 2009 shall not be brought after the expiration of –
>
> (i) One year, or
>
> (ii) Such longer period as the court may direct not exceeding two years, from the date on which the cause of action accrued."

The law prior to the coming into operation of the amendment on the 1st January, 2010 provided a limitation period of three years for slander and six years for libel. Section 6 of the Defamation Act 2009 abolished the libel/slander distinction, providing that the torts of libel and slander be henceforth collectively described as the tort of "defamation". The date of accrual of the cause of action in the instant case, as defined in s.11(3B) of the Statute of Limitations, 1957, as amended, was the 22nd February, 2010, being the "date upon which the defamatory statement is first published".

The effect of the statutory restriction on the bringing of an action

46. Mr Justice O'Donnell delivering the judgment of the Supreme Court in *Clarke v O'Gorman* [2014] IESC 72 considered the language of s. 12 of the Personal Injuries Assessment Board Act, 2003. Of particular relevance in that case is the passage where the said judge considered s.3(1) of the Statute of Limitations (Amendment) Act, 1991 in the context of a plea that a claim was statute barred. The judge stated at para. 37: -

> "The defendant can only succeed here, given the manner in which the application was made and its timing, if the Act deprives the court of jurisdiction to hear and determine the claim."

The court embarked on a comparison of various provisions of the Statute of Limitations including, *inter alia*, s.11, noting the use in that section of the words "shall not be brought". Referencing s.11, the court stated the following:-

> "Section 11(1) of the Statute of Limitations Act 1957 as amended is still perhaps the basic provision creating limitation periods and provides that '[t]he following actions *shall not be brought* after the expiration of six years from the date …'. Section 11(2) as inserted by the 1991 Act dealing with the general limitation period in respect of tort claims provides again that action '*shall not be brought*'. The same verb is used in s.2(c) in respect of an action for defamation, in s.11(2)(d) for a claim under the Sale of Goods and Supply of Services Act 1980, in s.11(4) for an action for an account and in s.11(5) providing a 12 year limitation period in respect of various causes of action. The significance of this statutory language is considerable. It is well established that the provisions of the Statute of Limitations, framed in this way for over a century, operate to bar the remedy and not to extinguish the right. Thus, as set out in Brady and Kerr, *The Limitation of Actions* (Dublin; Incorporated Law Society of Ireland; 2nd Edition; 1994) it is well established that the Limitations Acts in most cases go only to the conduct of the suit leaving the claimants rights otherwise untouched."

47. O'Donnell J. noted that in *O'Reilly v. Granville* [1971] I.R. 90 Budd J. had stated:-

> "[I]t has long been settled that the effect of these statutes [of limitation] is to bar the remedy and not to extinguish the right. It was then further submitted in the cases where the statute in question only bars the remedy and does not extinguish the right, the relief or defence given by the statute does not operate until pleaded. … I agree with these submissions and take the view that the point as to the applicability of the statute was taken prematurely in the court below."

O'Donnell J. observed: -

> "[I]t is notable that Order 19, Rule 15 of the Rules of the Superior Courts speaks of a necessity to plead 'all matters which show the action … not to be maintainable'. In this case as already noted, the defendant raised two such matters in his defence, that the action was barred by the provisions of the Statute of Limitations, and also that the appellant had been guilty of inordinate and inexcusable delay, but did not raise this issue".

48. In the earlier decision of *O'Domhnaill v Merrick* [1984] I.R. 151, the majority decision of the Supreme Court delivered by Henchy J. at p.158 had this to say regarding the operation of the Statute:-

> "Although the statute states that an action "shall not be brought" after the expiration of the period of limitation, such a statutory embargo has always been interpreted by the Courts as doing no more than barring a claim instituted after the expiration of the period of limitation if, and only if, a defendant pleads the statute in his defence. It is only when the defendant elects to rely on the statute as a defence that the statutory bar operates. Consequently, although a claim may be plainly, and on the face of the claim, brought after the expiry of the relevant period of limitation, the action will not be held to be statute barred unless the defendant elects by a plea in his defence to have it so treated. Thus, although the statute says that the action "shall not be brought" after the statutory period, such a prohibition in a statute of limitations has been construed not as barring a right to sue but as vesting in a defendant a right to elect, by pleading the statute, to defeat the remedy sought by the plaintiff.
>
> So construed, the statute does not bear on the plaintiff's right to sue, either within or after the period of limitation. What it affects is a plaintiff's right to succeed if the action is brought after the relevant period of limitation has passed and if a defendant pleads the statute as a defence. In such circumstances the statute provides an absolute defence to that particular action."

Discussion

49. Arising from the above, and having due regard to the oral and written submissions of the parties, the following conclusions can be drawn:-

(a) The appellant's cause of action accrued on the 22nd February, 2010. Under s.11(2)(c) the Statute of Limitations, 1957 the appellant had in the first instance "one year or such longer period as the court may direct not exceeding two years from the date on which the cause of action accrued" within which to commence proceedings.

(b) The language of the subsection provides that a defamation action "shall not be brought after the expiration of..." a formulation that appears on eight separate occasions within s.11 alone of the 1957 Statute.

(c) The plenary summons issued on the 25th January 2012 outside the one-year period but within the two year period.

(d) The appellant's state of knowledge regarding the possibility of any criminal proceedings being brought is identified in the Statement of Claim he eventually served where it is stated at para. 5:-

> "On 9th August 2010, the Plaintiff got a letter, dated 8th August 2010, from Joseph O'Connor, Garda Superintendent ("Supt. O'Connor") in charge of the Dublin Metropolitan Region, Northern Division, J District, telling the Plaintiff that Supt. O'Connor had pardoned Aloysius Ryan for his criminal behaviour towards the Plaintiff as specified in the Garda statements at (3) and (4) above".

Thus on the appellant's own version of events as pleaded by him he had no grounds to refrain from instituting proceedings after the 9th August, 2010 on the basis that he considered criminal prosecution might take place. That was well within the statutory period of limitation.

(e) There could have been no doubt in the appellant's mind at the latest by the month of November, 2010 but that no prosecution was in contemplation. By then he still had 3 months to institute any claim in defamation.

(f) The appellant identified no basis in law for delaying the institution of defamation proceedings in the expectation that a criminal prosecution might occur.

(g) The respondent had clearly signalled in correspondence sent on the 1st February, 2012 an intention to rely on the Statute of Limitations by way of defence.

(h) That communication was fair and conscientious in that it put the appellant on clear notice that the limitation period was being relied on and did so within six days of service of the plenary summons. The appellant thus had several weeks remaining within which to bring an application to extend time under the statute. He elected to make no such application.

(i) In the defence delivered on the 1st March, 2013 the statute of limitations point is formally pleaded.

50. As of the latter date over three years had elapsed from the accrual of the cause of action in question. The appellant's cause of action was plainly statute barred - save and except if he were in a position to successfully invoke the exercise of discretion of the court to make a direction pursuant to s.11(2)(c)(ii).

51. Section 11(3A) of the Statute of Limitations provides: -

> "The court shall not give a direction under sub section 2(c)(ii) (inserted by section 38(1)(a) of the Defamation Act 2009) unless it is satisfied that –
>
> (a) The interests of justice require the giving of the direction
>
> (b) The prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the

> prejudice that the defendant would suffer if the direction were given, and the court shall, in deciding whether to give such a direction, have regard to the reason for the failure to bring the action within the period specified in sub paragraph (i) of the said sub section (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."

52. The antecedent question, as identified by the respondent, as to whether an application by a plaintiff in a defamation suit for direction pursuant to s.11(2)(c)(ii) can, in the first place, be entertained by the court after the expiration of a period of two years from the accrual of the cause of action, was not determined by the High Court judge as is clear form para. 15 of the judgment. Given the approach of the trial judge and in circumstances where the said anterior issue was not comprehensively contested by the appellant-who was a litigant in person –with any degree of rigour it is proposed to consider in the first instance whether the trial judge correctly exercised his statutory discretion in refusing to extend the limitation period. Thereafter the antecedent question will be addressed should the need arise.

53. In general issues which have not been decided by the High Court do not arise for determination in an appellate court. As the Supreme Court stated in decisions such as *Fitzwilton Ltd. and others v. Mahon* [2007] IESC 27:-

> "It is only in exceptional circumstances that this court will exercise its discretion and entertain an issue not determined in the High Court. This is done on rare occasions in the interests of justice."

Hence, the approach proposed by the respondent's counsel commends itself. If the appellant establishes circumstances which render it appropriate to make the direction he seeks pursuant to s.11(3A) of the Statute of Limitations 1957, it will then be necessary to consider the antecedent question as to whether such an application can be entertained *after* the two-year period specified in s.11(2)(c)(ii) of the Statute of Limitations 1957, has expired. For that reason, I propose to consider the application in its merits which may be dispositive of this aspect of the appeal.

Was the appellant entitled to a direction under s.11(2)(c)(ii)?

54. It is a clear policy of the Statute of Limitations that an action for defamation must be commenced within one year from the date upon which the cause of action accrued. In considering the overall approach to be adopted, the decision of the English Court of Appeal in *Bewry v Reid Elsevier UK Ltd.* [2014] EWCA Civ 1411 at p. 2568 is worthy of note where Sharp L.J. stated:-

> "[I]t is clear that special considerations apply to libel actions which are relevant to the exercise of this discretion. In particular, the purpose of a libel action is vindication of a claimant's reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications. These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why the disapplication of the limitation period in libel actions is often described as exceptional."

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

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

57. An analogous approach was adopted by Eady J. in the case of *Zinda v ARK Academies* [2011] E.W.H.C. 3394 in considering the equivalent English legislative measure: -

> "It is for the applicant to make out a case for the court to exercise its jurisdiction under s.32A, since parliament decided in the Defamation Act 1996 that the limitation period for defamation claims should be reduced to twelve months… [t]here must, therefore, be some solid reason for overriding that legislative policy."

58. In the case of *Ewins v Independent Newspapers (Ireland) Ltd.* [2003] 1 I.R. 583, Keane C.J. stated that there is a particular onus on an appellant to institute proceedings in defamation expeditiously. At p.590 he stated:-

> "A plaintiff in defamation proceedings, as opposed to many other forms of proceedings, is under a particular onus to institute his proceedings instantly and without delay and, of course, not simply because he will be otherwise met with the response that it cannot have been of such significance to his reputation if he delayed so long to bring the proceedings but also in his own interest in order, at once, to restore the damage that he sees to have been done to his reputation by the offending publication."

59. That view of the importance of expedition on the part of a plaintiff in defamation proceedings was reiterated by Kearns J. in Desmond v MGN [2009] 1 I.R 737 wherein he stated at p. 746:-

> "Of course, the primary onus rests on the plaintiff in pursuing his or her proceedings, and more particularly so in defamation cases where any waiting around may be prejudicial. There is an onus to proceed with speed."

Kearns J. also expressed the view that "I see no distinction between a requirement to institute proceedings speedily and to prosecute them vigorously and expeditiously." Earlier in the judgment Kearns J. stated:-

> "…there is a particular onus on a plaintiff who brings defamation proceedings to advance those proceedings without delay to restore any alleged damage to his reputation caused by an offending publication. This requirement was underlined by this Court in *Ewins v. Independent Newspapers (Ireland) Ltd.*"

60. Whilst the issue before the Supreme Court both in *Ewins and Desmond v MGN Ltd* concerned the exercise by the court of its inherent jurisdiction to strike out a claim for want of prosecution where delays in prosecuting the action were "inordinate and inexcusable", the dicta of the court in regard to the obligations on a plaintiff in a defamation suit to prosecute the claim with expedition are of importance and are relevant to the issue that falls to be determined in these proceedings. That view of the importance of expedition on the part of a plaintiff in defamation proceedings was reiterated by Kearns J. in *Desmond v MGN* [2009] 1 I.R 737 wherein he stated at p. 746:-

> "Of course, the primary onus rests on the plaintiff in pursuing his or her proceedings, and more particularly so in

defamation cases where any waiting around may be prejudicial. There is an onus to proceed with speed."

The jurisprudence is helpfully analysed in Delaney and McGrath on *Civil Procedure*, 4th Edition at para. 15-29. It is accordingly clear that long before the legislature intervened in 2009 to reduce the period of limitation for defamation claims from six years to one year, there was well-established jurisprudence supporting the proposition that defamation proceedings are required to be instituted and prosecuted with expedition.

Onus of proof
61. The onus rests on the appellant to advance clear and cogent evidence for the granting by the court of an extension of time for the institution of defamation proceedings.

The delay in question
62. In considering the principles to be applied to the exercise of discretion it is appropriate in the first instance to consider the delays that have accrued prior to the application being brought before the High Court. The key dates include the following :-

(i) On the 22nd February, 2010 an altercation took place at the respondent's Marine Hotel premises in Sutton Cross at 10.30am when the appellant entered the premises for the purposes of using the toilet facilities. In May and June 2010 the appellant made a number of cautioned statements to the Gardaí in relation to the incident.

(ii) By the 9th August, 2010 the appellant was aware that the Gardaí did not intend to bring any prosecution arising from the incident.

(iii) On the 22nd November, 2010 the appellant wrote a formal letter of complaint to the respondent relating to the incident.

(iv) In December, 2010 a further copy of the same letter was sent to the respondent.

(v) On the 25th January 2012 a plenary summons was issued.

(vi) On the 1st February, 2012 an appearance was entered.

(vii) On the same date the respondent's solicitors wrote asserting that the claim was statute barred.

(viii) No step was taken by the appellant to bring an application pursuant to the Statute to extend time to the 21st February, 2012.

(ix) On the 18th October, 2012 the respondent brought a motion to strike out the proceedings for failure to deliver a statement of claim.

(x) On the 21st January, 2013 the High Court ordered the appellant to serve a statement of claim not later than three weeks from the said date.

(xi) On the 8th February, 2013 the appellant served the statement of claim.

(xii) On the 1st March, 2013 the respondent delivered a defence pleading the Statute.

(xiii) Thereafter no step was taken by the appellant to set the matter down for trial.

(xiv) On the 11th December, 2015, the appellant issued a motion returnable for the 18th January 2016 seeking, *inter alia*, leave pursuant to s.38 of the Defamation Act for his case to continue to a full plenary hearing.

63. Even by the standards that obtain in ordinary litigation, the delays were very substantial up to the date of issue of the said motion. In the context of the statutory regime under the Statute of Limitations s.11(2)(c) and (3A) the lack of vigour in instituting these proceedings and in prosecuting them calls for an explanation. In particular, the lack of any credible explanation for the failure to take any step to apply for a direction pursuant to s.11(2)(c)(ii) between August 2010, or indeed November 2010, and February 2011 when the limitation period of one year expired is significant. No coherent explanation was offered by the appellant for the aggregate of delays in applying to court between the expiry of the limitation period in February 2011 and the 11th December, 2015, a period of four years and nine months.

Existing jurisprudence on the operation of s.11(2)(c)(ii) of the Statute of Limitations, 1957
64. The onus rests on the appellant to advance clear and cogent evidence for the granting by the court of an extension of time for the institution of defamation proceedings and to satisfy the court that it is in the interests of justice that he be permitted to commence or pursue proceedings outside the limitation period of one year from the date of the accrual of the cause of action and in addition that he has fulfilled the requirements specified in s.11(3A) of the Statute of Limitations, 1957. This is clear from the plain words of the Act.

65. As is noted by Martin Canny in *Limitation of Actions* (2nd Edition) at p. 231:-

"It will immediately be noticed that the court is given little guidance in how it should approach the issue of determining what 'the interests of justice' require."

He suggests at 12-41 that:-

"The discretion granted to the judge hearing an application to extend time is unfettered."

He observes that the approach of the English courts towards applications under a broadly equivalent measure in the Limitation Act, 1980 has been informed by the "sea change" in attitude towards delay which is recognised as in itself contrary to the public interest.

66. The proceedings were instituted eleven months *after* the expiration of the limitation period of one year, a factor which requires to be addressed only in the circumstances of this case if the appellant demonstrates that the trial judge erred in refusing to give a direction pursuant to s.11(2)(c)(ii). However, it is appropriate to consider the jurisprudence and the principles to be taken into

account when determining whether to grant or refuse a statutory direction. In the decision of *Taheny v Honeyman & Ors* [2015] I.E.H.C. 883, Peart J. expressed the following view with regard to delay in general:-

> "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… [t]he 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.
>
> 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."

67. In considering the limitation period now operative in regard to defamation Peart J. stated:-

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

68. The decision of Barrett J. in *Watson v Campos and anor* [2016] I.E.H.C. 18 is of assistance for its comprehensive and succinct analysis of the legislative framework. He observes at para. 6:-

> "... when it comes to bringing a defamation action, as defined, a one-year limitation period is standard, more than one year is exceptional."

He notes the tenor of the language in sub section (3A): -

> "the court shall not give a direction… unless it is satisfied…"

Barrett J.'s approach of evaluating the reasons for the failure to bring the action within the statutory time limit and the extent to which evidence relevant to the matter is by virtue of the delay no longer capable of being adduced has much to commend it.

Reasons identified by the appellant

69. The first reason advanced by the appellant for the delay in an affidavit sworn by him on the 26th October, 2016 is that "I was waiting to see if a criminal charge would arise against Aloysius Ryan". The appellant had made cautioned statements to the Gardaí in the months of May and June 2010. In the first instance there does not appear to have been any good reason why there was a deferral in the institution of proceedings pending a decision of An Garda Síochána as to whether to institute criminal proceedings or not. The maintainability of civil proceedings in defamation by the appellant was not contingent upon the outcome of a decision by An Garda Síochána as to whether there was sufficient evidence to warrant a prosecution or not. From the appellant's own statement of claim delivered on the 8th February, 2013, it would appear from para. 5, as noted above, that he may have been aware as early as the month of August 2010 that a prosecution of the respondent was not in contemplation.

70. At all events there can be no doubt but that as of the 22nd November, 2010 when the appellant wrote to solicitors for the respondent he was fully aware that no prosecution was pending. The letter stated: -

> "An Garda Síochána has told me that the Director of Public Prosecutions have advised that no prosecution should arise from (3) and (4) above [statements made by the appellant to An Garda Síochána]".

Hence it is demonstrable that there was no stateable or rational basis for a "wait and see" approach from November 2010 onward. The appellant delayed a further fourteen months before instituting proceedings.

71. The second ground advanced by the appellant was that, albeit that he was aware of the one-year statutory limitation on the institution of proceedings, he wished to afford the respondent "good time to respond as he might want to before I start the proceedings". The appellant delayed many months before disclosing to the respondent his intention to institute proceedings. He clearly had formed the intention to institute the proceedings at least three months before expiry of the statutory period of limitation expired. The appellant failed to identify any rational basis for electing to delay beyond the statutory period which was expiring on the 21st February, 2011. The assertion that beyond the statutory period in instituting the proceedings was necessary to afford the respondent "good time to respond" does not withstand scrutiny. The respondent had never signified any intention to engage in a compromise. In the circumstances the decision not to institute proceedings prior to expiry of the statutory period of one year was both incautious and deliberate.

72. The appellant also contends that he was unable to identify the respondent's correct name. At one point he had, apparently, instituted proceedings against "Alan Ryan". There is no evidence that he took any step – either by inquiry from the respondent's solicitors or otherwise to establish this basic fact. The respondent was first alerted to the error when the plenary summons was served. The within proceedings were instituted on the 8th April 2011 after the statutory time limit had elapsed. The respondent's solicitors, Orpen Franks, responded expeditiously by letter dated the 19th April, 2011 writing to the appellant clearly identifying the correct name of their client. The letter stated, *inter alia*:-

> "If it is your intention to sue one of the directors of the Marine Hotel (Sutton) Limited and, in particular, Mr Aloysius Ryan, then we will facilitate you by endorsing acceptance of service on the back of the original Summons provided same is correctly addressed and is complete. This will avoid you having to attend the Marine Hotel (Sutton) Limited to personally serve Aloysius Ryan with a Summons which is correctly addressed to him."

The appellant does not deny receipt of this letter. Notwithstanding receipt of same no step was taken by him to amend the title of the respondent in the proceedings. Instead, he simply abandoned the proceedings it would appear and took no further step in regard to same. He delayed over nine months further until the 25th January, 2012 to issue the writ in the current proceedings against Aloysius Ryan.

73. The appellant does not appear to have taken any reasonable steps to ascertain the correct name of the proposed respondent. Immediately upon service of the proceedings, the respondent's solicitors wrote and twice in the said letter identified their client by his full name. There is no basis for the contention advanced by the appellant in his affidavit of the 26th October, 2016 that, in regard to the respondent, his solicitors were "refusing to identify the culprit until it was too late." This significantly mischaracterises the sequence of events and does not accord with the facts.

Conclusion

74. In determining whether to grant a direction pursuant to s.11(2)(c)(ii) the court must be satisfied that it is necessary to provide a fair and just outcome for the plaintiff in all the circumstances. There is a myriad of reasons why a plaintiff may find himself outside the primary limitation period in the first place. Balanced against that consideration is the long-standing principle that limitation periods provide certainty for respondents.

75. I am satisfied on the basis on the available information that the quest to find the forename of the respondent was not a valid reason for failing to institute proceedings within the limitation period in the instant case. There is no evidence to suggest that the appellant made any effort or took any step to ascertain the correct name of the respondent within the limitation period. When the initial proceedings were issued in April 2011, the respondent through his solicitors responded both by post and email informing the appellant immediately of the respondent's full and correct name as outlined above.

76. In the instant case the length of the delay is very extensive. At each step the appellant adopted a leisurely approach in full knowledge of the statutory limitation. He simply took a view that he would proceed at his own pace both in connection with the institution of the proceedings, the application for a direction and in regard to the prosecution of the proceedings. He disagrees with the statutory limitation period of one year in connection with a defamation claim. However, as with all litigants he is bound by the statute unless he can demonstrate a valid reason for the delay such as would warrant the granting of a direction pursuant to s.11(2)(c)(ii). The appellant rails against what he describes as a "harsh statutory bar of one year", however, he failed to offer in the High Court any cogent reasons for the following aspects of the delay: -

> (a) Between the 10th August, 2010 when the Gardaí wrote to advise him that there would be no prosecution and 21st February, 2011.
>
> (b) Between the 10th November, 2010 and the 21st February, 2011 being the period of time when he knew that no criminal proceedings were in contemplation and the date when the statute of limitations expired.
>
> (c) Between November 2010 and the 25th January, 2012 when he issued proceedings.
>
> (d) Between the 25th January, 2012 and the 11th December, 2015 when a motion was brought seeking leave "for the case to continue".

77. Tellingly in his statement of claim the appellant asserts:-

> "Section 38 of the … Defamation Act sets a statutory bar of one year for such litigation but is silent about whether a plaintiff should proceed with a statement of claim in the event of it being arguable that such a statutory bar might apply."

This tends to demonstrate that the appellant was well aware at all material times from the institution of the proceedings in January 2012 that they had been issued out of time and that it was incumbent upon him to bring an application for a statutory direction. The crucial delays were in the first instance in instituting the proceedings and thereafter in failing to seek a direction until December 2015 over five years and nine months after the incident the subject matter of the defamation claim.

78. The trial judge correctly applied the law in reaching his conclusions that the interests of justice did not require the giving of the direction to the appellant that he should be entitled to institute proceedings after the elapse of one year from the date of accrual of the alleged cause of action, as he held at para. 13 of his judgment.

79. I am satisfied that the appellant has failed to meet the test which was correctly identified by Ní Raifeartaigh J. in *Rooney v Shell E&P Ireland Ltd.* [2017] IEHC 63 at para. 21 as follows:-

> "...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."

She reiterates at para. 22:-

> "...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."

On the basis of the available evidence, the appellant acted neither promptly nor reasonably in regard to the institution of the proceedings or in regard to seeking a direction pursuant to the statutory scheme. He was gratuitously dilatory in allowing the primary limitation period to expire without issuing a plenary summons.

Respective prejudice

80. It is clear from the language of the statute that before the discretion to extend the time period is exercised in favour of a plaintiff the court must be satisfied, *inter alia*, that the prejudice which he would suffer if the direction were not given would "significantly outweigh" any prejudice which the defendant would suffer were the direction to be given. In evaluating prejudice, it is appropriate to consider the nature of the alleged defamation in general and the circumstances surrounding the disputed event that forms the basis of the claim.

81. The appellant's claim in defamation derives from an incident which occurred on the morning of the 22nd February, 2010 after the appellant had attended the Marine Hotel for the purposes of using their toilet facilities. Whilst the appellant has indicated that this event occurred in the presence of two members of staff, the respondent has indicated that both have long since ceased to be in the

employ of the company. Beyond the individuals who were directly present for all or part of the brief exchange, there was no legally relevant publication identified albeit that the appellant recorded part of the incident on his mobile phone. At its height, the alleged publication occurred to a relatively small number of persons. The prejudice to the appellant if he is refused an extension of time is that he would be deprived of the opportunity to pursue his defamation claim involving, on his interpretation of events, an allegation that he had a criminal record.

82. By contrast, the prejudice to the respondent, were the extension of time to be granted now - nine years having elapsed since the incident in question – would be very significant. A defendant is entitled not to have to defend stale proceedings. The deleterious impact of delay was noted by Clarke J. (as he then was) in *Molloy v Reid* [2014] IESC 4 where he stated:-

> "Time, it is said, waits for no man. Time can be important in many aspects of the law… time is important in the bringing and conduct of litigation. Old cases run their own risk of injustice. For that reason there have always been limitations on the ability of parties to commence litigation at too great a remove from the events which give rise to the claim".

This observation mirrors the view expressed by the UK Supreme Court in *Abdulla v Birmingham City Council* [2013] 1 All E.R. 649 where at para. 41 Lord Sumption stated: -

> "Limitation in English law is generally procedural. But it is not a technicality, nor is it necessarily unmeritorious. It has been part of English Statute law for nearly four centuries…. it has been accepted in principle in the jurisprudence of both the Court of Justice of the European Union and the European Court of Human Rights. Limitation reflects a fundamental and all but universal legal policy that the litigation of stale claims is potentially a significant injustice. Delay impoverishes the evidence available to determine the claim, prolongs uncertainty, impedes the definitive settlement of the parties' mutual affairs and consumes scarce judicial resources in dealing with claims that should have been brought long ago or not at all."

83. I am satisfied that the fact that the appellant may have captured part of the incident in question on his mobile phone does not outweigh or negative the reality of the prejudice with which the respondent is confronted. In particular, the only two individuals known to him who were present during the incident ceased many years ago to be in his employment. He is not clear as to their current whereabouts or whether they could be traced and what recollections, if any, they would now have of events which occurred almost a decade ago.

84. In the instant case, the delay on the part of the appellant is overwhelming. Ultimately, there is significant weight to be attached to the submission of the respondent that "for the learned High Court judge to have acceded to the application made by the Plaintiff more than 6.5 years after the publication in question, more than 4.5 years after he had been told that the proceedings were statute barred and more than 3.5 years after a Defence pleading the Statute had been delivered would have been to subvert the legislature's intention as expressed in section 38 of the Defamation Act 2009."

85. It is clear that the incident which occurred on the 22nd February, 2010 has greatly preoccupied the appellant and has preoccupied him very substantially - and to a point of near obsession - over the ensuing nine years or so. To the extent that the appellant perceived or believed that the respondent made an allegation that he had a criminal record, it was incumbent on him to institute proceedings with all due expedition within the time limit specified in the Statute of Limitations, 1957, as amended, namely one year from the date of the accrual of the cause of action. Failing this, the onus was on the appellant to make out a case for disapplication of the strict limitation period.

86. The failure to move such an application before the High Court until almost five years after the limitation period had expired called for a cogent explanation and coherent reasons. No such explanation or reasons have been forthcoming as the trial judge correctly determined. The interests of justice in the particular circumstance of this case required that the direction be refused.

87. The claim was clearly statute barred and accordingly the trial judge was correct to dismiss the claim on that basis. Accordingly, the antecedent question referred to at 40, 50 and 51 above does not fall to be considered as this appeal can be disposed of on the basis that the application for a direction was devoid of merit, in the manner in which the issue was addressed in the High Court.

Isaac Wunder order

88. With regard to the appellant's appeal against the making of the Isaac Wunder order, the constitutional right of access to the courts is not an absolute one. There was evidence that the appellant habitually and persistently instituted proceedings of a frivolous or vexatious nature against Mr Ryan and entities, persons and companies connected with him. The judge was entitled to look at the entire history of the matter which he did. The judge had evidence before him that applications were made and litigation commenced, including appeals brought, without any reasonable ground or any reasonable prospect of success. This state of affairs has continued with varying degrees of intensity from 2007. It is a serious injustice to this respondent and the parties and companies associated with him to be subjected to litigation and claims habitually and persistently brought by the appellant without reasonable ground. The respondent has incurred substantial and unnecessary legal costs. The appellant has advised this court that he has no funds and it follows that he is unconcerned about orders for costs being made against him. The trial judge was correct in making the Isaac Wunder order as there was ample evidence before him to support his conclusions that such an order was warranted. The public has an entitlement to a court system which operates with all due efficiency. On its true construction the said order does not prohibit the appellant from litigating further but rather puts in place a necessary and proportionate safeguard for the respondent in requiring the authorisation of the relevant court's President before proceedings can be instituted.

89. That limitation is both proportionate and necessary in my view.

90. Accordingly, I would dismiss this appeal on all grounds.