THE HIGH COURT

Record No. 2015/4949P

Between/

CAROLINE WATSON

Applicant

– and –
ADELINA CAMPOS
– and –
MGN LIMITED trading as IRISH SUNDAY MIRROR

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 14th January, 2016.

Part I: Background.

1. The awfulness of Mr Durran's crime was such that it attracted a blaze of publicity. After he was convicted of rape, the victim,his daughter, waived her right to anonymity and gave an interview to the *Sunday Mirror* newspaper. The article that followed that interview explained how immediately after the crime occurred, the daughter complained to a "*female occupant of the house"* where the rape occurred.This "*female occupant*",the article indicates, was at first somewhat incredulous regarding the daughter's claim.

2. Ms Watson claims that she is the "*female occupant*" in question and that she has been defamed by the article in that it suggests, to borrow from her affidavit evidence, "*that I was sympathetic to a rapist or somehow complicit in a rape or the cover up of the crime or/and that I declined assistance to a victim of rape"*.

3. The difficulty that Ms Watson faces in continuing her claim at this time is that she is outside the standard one year limitation period that, pursuant to s.38 of the Defamation Act 2009, normally applies to the commencement of defamation claims. So Ms Watson comes now to court seeking that pursuant to the same provision, it now extendthe limitation period in order that Ms Watson may continue these proceedings.

Part II: Chronology.

4. A summary chronology of the pertinent background facts follows:

16.02.2014. Article appears in the Sunday Mirror. On what seems to be the back page of the newspaper, the required publisher details are stated as follows: "*Published by MGN Ltd. at One Canada Square, Canary Wharf, London, E14 5AP (020 7293 3000) and printed at […]…Registered as a newspaper at the Post Office Serial No. 2538."* [1]

08.07.2014 Ms Watson's solicitor issues letter to *Sunday Mirror* complaining of alleged defamation***.[2]***

03.12.2014 Ms Watson's solicitor issues letter to *Sunday Mirror* seeking confirmation of identities of appropriate defendants and name of editor or person nominated to defend***.[3]*** Notably, this letter includes the following text:

> "*We now have High Court proceedings drafted and settled by Senior Counsel and which we are ready to issue and perhaps you would first of all provide is with the name of your editor, who we intend naming in the proceedings together with the journalist in question and responsible for the article". **[4]***

06.02.2015 Ms Watson's solicitor issues further letter to *Sunday Mirror* seeking confirmation of identity of editor***.[5]***

09.06.2015 Ms Watson's solicitor issues further letter to *Sunday Mirror* seeking confirmation of identity of editor***.[6]***

18.06.2015. Defamation summons issues***.[7]***

> ***[1]*** At the hearing of the within application, it was sought to make some play of the fact that the address given is a United Kingdom address. The court sees no significance to this. There is no reason why a summons cannot be served readily on a corporate party at its registered address in another European Union member state.
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> ***[2]*** By this date, less than five months after the *Sunday Mirror* article was published and seven months before a year elapsed from the date of publication, Ms Watson had professional legal advice. Her advisors would doubtless have been aware of the standard one-year timeframe arising for a defamation claim.
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> ***[3]*** Although there was no harm in Ms Watson's solicitor sending this letter, there was and is no obligation on the *Sunday Mirror* to assist Ms Watson in her quest to sue the *Sunday Mirror*.
>
> ***[4]*** By this date, still well within the standard one-year timeframe, all was ready to go. The quest for the editor's name is a 'red herring'. First, it was not necessary for the bringing of proceedings. Second, MGN had been stated in the *Sunday Mirror* of 16th February to be the publisher and could have been (as it has been) sued. As publisher, it was vicariously liable for the editor's actions. Third, even if the name of the editor was required and unavailable, the proceedings could have been commenced and his name added at a later stage, following production of the correspondence that sought unsuccessfully to discover the editor's identity. Fourth, the court must admit to some mystification as to why no-one just called ++ 44 20 7293 3000, the contact telephone number for the Sunday Mirror that was published in the Sunday Mirror of 16th February, and asked the Sunday Mirrorreceptionist, the editor's PA, or someone in the Legal Department for the name of the Sunday Mirror'seditor. Even a Google search would have yielded the relevant detail.
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> ***[5], [6]*** Again, for the reasons stated at ***[4],*** this quest for the editor's name is a 'red herring'.
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> ***[7]*** This date is 16 months after the date of publication, four months outside the standard one-year timeframe.

Part III: Some relevant legislation.

5. Section 38(1)(a) of the Defamation Act 2009 introduces a new s.11(2)(c) into the Statute of Limitations 1957. This new sub-section (c) provides as follows:

> *"(c)A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of –*

(i) one year, or

(ii) such longer period as the court may direct not exceeding 2 years,

from the date on which the cause of action accrued."

6. So, to put matters succinctly, when it comes to bringing a defamation action, as defined, a one-year limitation period is standard, more than one yearis exceptional.

7. Section 38(1)(b) of the Defamation Act 2009 introduces a new s.11(3A) into the Act of 1957. This prohibits the court from granting the direction referred to in the new s.11(2)(c)(ii) unless certain criteria are satisfied. Thus, per s.11(3A) of the Act of 1957:

"(3A) The court shall not give a direction under subsection (2)(c)(ii)…unless it is satisfied that –

(a) the interests of justice require the giving of the direction, and

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

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

8. The court notes the use of the mandatory form 'shall'; the court must not give a direction unless (1) (a) and (b) are satisfied; and (2) it has had regard to ***[c]*** and ***[d]***. As a process, it seems appropriate logically to deal with matters backwards, i.e. by dealing with ***[d],*** then ***[c],*** then (b) and then (a) in that order.

Part IV. Order 1B of the Rules of the Superior Courts (1986), as amended.

9. The court must admit to some sense that there has been a touch of 'cart before horse' about the within application. It is clear from the new s.11(2)(c) of the Act of 1957 that a defamation action"*shall not be brought*" after (i) one year or (ii) such longer period as the court may direct, not exceeding two years.

10. Strictly speaking, it seems to the court from the foregoing that once a plaintiff is outside the standard one-year limitation period, a direction ought to be sought for the extension of the limitation period so that – assuming the extension is granted – a defamation action may then commence, rather than a defamation action commencing and a direction then being sought. It is true that O.1B, r.3(2) appears implicitly to acknowledge that either approach is possible. Thus it refers to the process to be adopted *"[w]here a defamation action has not been brought…*" and so appears to contemplate that a situation may arise 'where a defamation action *has* been brought…', notwithstanding that, as mentioned above, s.11(2)(c) appears to contemplate that no defamation action can be brought after one year, absent the previous issuance of a direction under s.11(2)(c)(ii). Not a lot may ride on the foregoing in substance, save for the not-so-minor fact that, absent a determination of unconstitutionality, it is necessary for the courts, and the rules of court, to conform with what our elected lawmakers prescribe in statute. In the within application, the issue is perhaps met by the fact that here the application made by the plaintiff has in any event failed and so any issue arising in this regard is therefore rendered largely moot.

Part V. Some applicable case-law.

i. Overview.

11. Counsel for MGN has referred the court to a helpful trio of cases. These are briefly considered hereafter and point respectively to (i) what might be called the 'need for speed' in the pursuit of defamation actions, and (ii) the need for an adequate explanation to be provided by a plaintiff as to why a direction is being sought under a s.11.(2)(c)(ii) of the Act of 1957.

ii. Ewins v. Independent Newspapers (Ireland) Limited

[2003] 1 I.R.583.

12. This was a libel action in which the impugned article had been published in April 1995, a plenary summons issued in December 1995, a notice of intention to proceed was served in November 2000, and a statement of claim was delivered in February 2001. An application was made to strike out the proceedings for want of prosecution. This failed in the High Court but was successful on appeal to the Supreme Court. In his judgment in that case, Keane C.J. observed, at 590, that:

"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 otherwise be 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 interests in order, at once, to restore the damage that he sees to have been done to his reputation by the offending publication. Therefore, I do not think that an issue such as arose in this case is to be tested by what would be extraordinarily unlikely conduct for a plaintiff bringing anything in the nature of bona fide proceedings for defamation, namely, that he would wait until close to the expiration of the limitation period."

13. This is a judgment that is doubtlessmuch beloved of newspaper proprietors for obvious reasons. However, it is also perhaps a judgment that has been somewhat overtaken by subsequent events, in particular by the enactment of the Act of 2009. That Act, and the remarkably short timeframe for defamation actions established thereby, represents an even greater level of protection to newspaper proprietors than the learned observations of Keane C.J in *Ewins*.Moreover, that Actwould appear also to have the effect that *Ewins* must be viewed as a creature of its time and, to some extent, redundant in our time. In particular, the court would note the following:

(i) Keane C.J.'s judgment was fashioned in the context of a six-year limitation period and the factors to which he makes reference in that case seem to be less pressing in the context of the standard one-year limitation period (and, exceptionally, up to two-year limitation period) now applicable pursuant to s.38 of the Act of 2009.

(ii) if one is to meet that one-year limitation period and not to be reliant on the grace-and-favour of the High Court pursuant to a s.11.(2)(c)(ii) direction application, then one is effectively obliged to act "*instantly and without delay*".

> Indeed the notion that a person who meets the one-year period could ever convincingly be accused to have acted with such sluggishness as to have implicitly conceded the insignificance of a publication vis-à-vis her reputation seems a mite fantastic. Of course, if a person does not act within the one-year period, particularly where she has the benefit of legal advice, then this is an argument that could still convincingly be made in the context of any s.11(2)(c)(ii) application that might follow.
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> (iii) as to the notion of delay prior to the end of a limitation period, it seems to this Court that (ignoring precedent for a moment) as a matter of principle it is an inappropriate intrusion by the courts into the province of our elected lawmakers ever to have regard to delay within a limitation period. If our elected lawmakers set a limitation period of Date A to Date B, then it seems to this Court that one has until the last second on Date B to proceed, and that it impinges upon and constrains that freedom of action which our elected lawmakers contemplate as arising between these two dates for the courts to have negative regard to a person's actions or inactionwithin that period, for example in an application for strike-out based on inordinate and inexcusable delay. The court is conscious that there is an abundance of precedent to suggest otherwise…and yet an inconsistency between precedent and principle appears to arise in this regard. Of course, in the within application a rather different scenario presents. Here the plaintiff has acted outside the limitation period, and that immediately places her on the back-foot: she must apply for an extension of the limitation period and, per s.11(3A) of the Act of 1957, "*[t]he court shall not give a direction*" unless it is satisfied as to some matters and had regard to other matters (which matters are identified in Part III above).

14. In short, there is no doubt that the general 'need for speed' identified in Ewins remains extant. However, the practical significance of that judgment seems lessened by the fact that the Oireachtas has since 'waded in' via the medium of the Act of 2009 and required an even more accelerated process than could have been contemplated in 2003, in the context of the limitation period then pertaining.

iii. Desmond v. MGN Limited

[2009] 1 I.R. 737.
15. Mr Desmond, a prominent businessman, instituted certain libel proceedings in May 1998 concerning alleged payments to a politician. In February, 2005 a letter was sent to MGN indicating that a notice of intention to proceed would issue. Mr Desmond indicated that he had delayed acting because of legal advice that he should not proceed during the currency of a then extant tribunal of inquiry. MGN sought dismissal of the proceedings on grounds of inordinate and inexcusable delay by Mr Desmond. It failed in the High Court and, on appeal, in the Supreme Court.

16. In the within proceedings, the court's attention has been drawn by counsel for MGN to the observation of Macken J., at 759, that "*It is…axiomatic that in the case of a claim to vindicate the reputation of a person, the rule is that proceedings such as those for defamation must be progressed with extra diligence*."(One also finds reference to this axiom in the judgment of Dunne J. in *Desmond v. Times Newspapers Ltd* [2009] IEHC 271 at 23 *et seq*).

17. The Supreme Court decision in *Desmond* was handed down in October 2008. (The decision of Dunne J. was handed down in June 2009). The Act of 2009 was enacted in July2009. So although the axiom identified by Macken J. and later echoed by Dunne J., as with the 'need for speed' identified in *Ewins* clearly remain extant, it seems to the court that they will invariably be satisfied if a plaintiff moves in such a manner as to satisfy the incredibly short but still standard one-year timeframe established by the Act of 2009. It is when an extension of that timeframe is sought, by way of application for a direction under s.11(2)(c)(ii) of the Act of 1957, that allegations of sluggishness appear to acquire real potency.

18. In this last regard, the court notes that s.11(3A) of the Act of 1957 expressly requires that "*the court shall [i.e. must], in deciding whether to give such a direction, have regard to the reason for the failure to bring the action within the* [standard one-year] *period specified* in [s.11(2)(c)(i) of the Act of 1957]". So this is a situation where our elected lawmakers expressly require of the courts that they have regard to behaviour (delay) within a limitation period in deciding whether or not an extension of same should be allowed. Indeed the fact that our lawmakers expressly make such provision might be construed as support for the general proposition that our lawmakers otherwise perceive the norm to be that, absent such provision, delay within a statutorily prescribed limitation period ought not to yield an adverse effect.

iv. Reed Elsevier UK Limited (t/a LexisNexis) v. Berry

[2014] EWCA Cv.1411.
19. There appear to be no previous written judgments of the Irish courts on the seeking of a direction under s.11(2)(c)(i) of the Act of 1957. Counsel for MGN indicated at the hearing that he is aware anecdotally of one such application that was brought and refused. However, while the court naturally accepts the truthfulness of what counsel had to say in this regard and appreciates his bid to be of assistance, the court cannot have regard to an ex tempore decision of uncertain vintage, of which there appears to be no written record, which seems unlikely by its very nature to have involved any meaningful consideration of the applicable law and principle, and of which, ultimately, only the final outcome appears to be known.

20. More helpful was counsel's reference to *Reed Elsevier*, a decision of the English Court of Appeal concerning whether or not the limitation period applicable to libel actions under the United Kingdom's Limitation Act 1980 ought to have been dis-applied by a lower court.

21. Almost a century on from Independence, this Court must admit to some scepticism as to the general persuasiveness of contemporary United Kingdom precedent concerning specific points of statute-law (as opposed to questions solely concerned with common law matters), (I)save in circumstances where (1) the court is looking at (i) pre-Independence legislation, (ii)Irish legislation directly modelled on United Kingdom legislation (now a rare species), or (iii)Irish legislation that derives from a common source, such as a requirement of European Union law, or (2) a United Kingdom judge opines on a question of principle which sits somewhat apart from the specific statutory point arising before her or him and can be transmuted via the ether of the common law into a principle of our separate but similar Irish legal system, and (II)subject always to viewing such precedent through the filter of the very different cultural and social circumstances and outlook that present in Ireland (there is, after all, a reason why, as a nation, our forebears elected that we should strike out on our own and form an independent state, notwithstanding the commonalities, friendship and shared interests that so often present when it comes to our nearest neighbour).

22. The point of relevance to the within proceedings that falls to be drawn from *Reed Elsevier* sits within category (I)(2) above. Thus at p.3 of her judgment in that case, Sharp L.J. observes as follows:

> "*8.The onus is on the claimant to make out a case for disapplication….Unexplained or inadequately explained delay*

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

23. It seems to this Court that this observation applies, *mutatis mutandis*, with equal vigour in the context of an application made for a direction under s.11.(2)(c)(ii) of the Act of 1957.

Part VI: Application of law to facts presenting.

(i) Evidence no longer capable of being adduced?
24. Parties obviously want to 'put the best foot forward' in proceedings. However, the court must admit to reading with a degree of incredulity the averment in the affidavit by MGN's solicitor that "[MGN] *is prejudiced by the passage of time and its effect on the recollection of witnesses. The passage of time means that the evidence required to make that argument becomes increasingly difficult, if not altogether impossible, to adduce and [MGN]…will be significantly prejudiced in its defence of the claim as result.*" The impugned article was published in February of 2014. It was in effect an account by a crime victim of an awful crime that had been perpetrated upon her in a quiet Dublin suburb. The court would hazard with some confidence that many people in or fromthat suburb remember entirely well the crime, the ensuing prosecution, the parties involved, the article that resulted, and their reaction thereto. If one has regard to the specific wording of s.11(3A) of the Act of 1957, the court does not accept as credible the notion that any evidence relevant to Ms Watson's defamation action is by virtue of the delay presenting no longer capable of being adduced.

(ii) What is the reason for the delay in bringing the action?
25. The reason for Ms Watson's delay remains completely unexplained. The repeated efforts to get the name of the *Sunday Mirror* editor offer, for the reasons stated above, no basis or justification for the delay presenting. Moreover, Ms Watson had the benefit from an early stage of legal advice and, by her solicitor's letter of 3rd December, 2014, was 'ready to roll' in terms of commencing litigation well within the standard one-year limitation period, apart from the (spurious) need to obtain the details of the editor of the *Sunday Mirror* before proceeding further. In this regard, the court cannot but recall the above-quoted observation of Sharp L.J. in *Reed Elsevier* as to the onus on a claimant in the analogous situation where a disapplication of a limitation period is sought under the United Kingdom's Limitation Act 1980 – and to the likely conclusion that such a claimant can generally anticipate where she does not 'get on with' proceedings and then provides an inadequate explanation as to why she did not.

(iii) The balance of prejudice arising.
26. What is the prejudice that Ms Watson will suffer if the direction is not given? She will not be able to bring a defamation action that, with the benefit of legal advice, she was ready to commence within the standard one-year limitation period and, for no identified reason, did not. What is the prejudice that MGN will suffer if the direction is given? It will be required to defend a defamation action that was eminently capable of being commenced within the one-year limitation period and, for no identified reason, was not. Even on this analysis, there is no good reason presenting – and none has been presented by Ms Watson – as to why MGN should suffer for Ms Watson's unexplained inaction. This is not a case, for example, where Ms Watson was prevented by want of legal advice from bringing her proceedings in a timely manner. Nor, for example, has she suffered from a bout of serious ill-health, or some other such factor that prevented her from learning of the alleged defamation and/or bringing her action in a timely manner. Though it is not stated in the statute, the court considers that it is these types of factor – incidents where delay is either blameless or where delay ought because of some mitigating reason to be excused – that would justify the issuance of a direction under s.11(2)(c)(ii) of the Act of 1957. No such factor or incident presents here. Thus the court considers that the balance of prejudice that Ms Watson would suffer if the direction is not given does not "*significantly outweigh*" (indeed the court considers it is significantly less than) the prejudice that MGN would suffer if the direction were now given.

(iv) The interests of justice.
27. As the court reaches the end of writing this judgment, it looks to the portrait of the late President Kennedyon the wall opposite. A flawed man but a great man, Kennedycontinues to raise our eyes to a vision of our better selves. It was he who observed, in a speech to the American Newspaper Publishers Association back in 1961, that:

"Without debate, without criticism, no Administration and no country can succeed – and no republic can survive. That is why the Athenian lawmaker Solon decreed it a crime for any citizen to shrink from controversy. And that is why our press was protected by the First Amendment – the only business in America specifically protected by the Constitution – not primarily to amuse and entertain, not to emphasise the trivial and the sentimental, not to simply 'give the public what it wants' – but to inform, to arouse, to reflect, to state our dangers and our opportunities, to indicate our crises and our choices, to lead, mould, educate and sometimes even anger public opinion."

28. That is the great public interest to which s.38 of the Defamation Act 2009 is directed. The Act recognises that the liberty of our nation is inextricably linked to the freeness of speech, that individuals must enjoy the right to vindicate their good name when the press gets it wrong, but that journalists and editors must not in the process be condemned to a Janus-like existence in which they must ever look backwards, while seeking to move forwards. It sets a one-year limitation period as standard. It implicitly acknowledges the challenges that such a short limitation period may sometimes present by allowing the court to direct an extension of that period up to two years when circumstances so require. But there is nothing in the facts of this case which would require such an extension. Ms Watson dallied in the commencement of her proceedings. No good reason has been offered as to why she did so. The interests of justice in her case, and the wider public interest in a responsible but free press, do not justify the exceptional extension of the standard one-year limitation period in her defamation proceedings to some longer timeframe. The court must therefore decline her application for the direction sought.