THE HIGH COURT

[2012 13171 P.]

BETWEEN

JOHN QUINN

PLAINTIFF

AND

RESERVE DEFENCE FORCES REPRESENTATIVE ASSOCIATION, CHARLES BRADLEY, BRIAN O'KEEFFE AND JASON MCKEVITT

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 30th day of November, 2018

1. This matter comes before the Court by way of motion on notice in defamation proceedings whereby the Plaintiff seeks an order for an extension of time pursuant to s. 11 (2) (c) of the Statute of Limitations Act, 1957, (the 1957 Act) as inserted by s. 38 (1) (a) of the Defamation Act, 2009 (the 2009 Act), in circumstances where the proceedings have been issued outside the one year limitation period which in the circumstances of the case commenced on the 9th September, 2011.

2. Two issues fall for determination and are as follows: (a) Having regard to the provisions of s. 11 (2) (c) of the 1957 Act, whether the Plaintiff was required to apply for an order extending the limitation period before the issuance of proceedings or may do so retrospectively and if so entitled (b) whether the Court should exercise its discretion to extend the period.

Statutory Provisions

3. The determination of the first issue necessarily involves a construction of s.11 (2) (c) of the 1957 Act as inserted by Section 38 (1) (a) of the 2009 Act which provides for the limitation of actions in defamation proceedings as follows:

> *"(1) Section 11 of the Act of 1957 is amended—*
>
> *(a) in subsection (2), by the substitution of the following paragraph for paragraph (c):*
>
> *"(c) A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of—*
>
> *(i) one year, or*
>
> *(ii) such longer period as the court may direct not exceeding 2 years,*
>
> *from the date on which the cause of action accrued."*
>
> *and*
>
> *(b) the insertion of the following subsections:*
>
> *"(3A) The court shall not give a direction under subsection (2) (c) (ii) (inserted by section 38 (1) (a) of the Defamation Act 2009) unless it is satisfied that—*
>
> *(a) the interests of justice require the giving of the direction,*
>
> *(b) the prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that the defendant would suffer if the direction were given,*
>
> *and the court shall, in deciding whether to give such a direction, have regard to the reason for the failure to bring the action within the period specified in subparagraph (i) of the said subsection (2) (c) and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.*
>
> *(3B) For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium.".*
>
> *(2) Section 49 of the Act of 1957 is amended by the substitution of the following subsection for subsection (3):*
>
> *"(3) In the case of defamation actions within the meaning of the Defamation Act 2009, subsection (1) of this section shall have effect as if for the words 'six years' there were substituted the words 'one year or such longer period as the court may direct not exceeding two years'."*

4. It is evident from these provisions that, if the discretion to extend time is to be exercised in favour of a plaintiff, the Court must be satisfied about two distinct matters; (a) that the interests of justice require the giving of the direction; and (b) the prejudice which the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice which the defendant would suffer if the direction were given. In arriving at its decision the Court is also required to have regard to (i) the reason why the proceedings were not brought within the one year limitation period and (ii) the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.

Background

5. The allegedly defamatory statements giving rise to the complaint in these proceedings were first published at the annual delegate conference of the first Defendant on the 9th and 10th September, 2011, and culminated at the annual delegate conference of the association on the 7th and 8th September, 2012. It follows that the date on which the Plaintiff's cause of action first accrued was

the 9th September, 2011, accordingly, the one year limitation period began to run from that date. The timeline for the delivery of pleadings in the case is as follows:

> (i) The Plenary Summons was issued the 21st December, 2012, more than one year after the allegedly defamatory statements were first published;
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> (ii) The Statement of Claim was delivered on the 20th October, 2014,
>
> (iii) A notice for particulars was raised on the 26th January, 2015, and replied to on the 4th November, 2015.
>
> (iv) A full defence was not delivered until the 18th July, 2016.
>
> (v) A further seventeen month delay occurred before the matter was set down and notice of trial dated the 1st of February, 2018, was served.
>
> (vi) The Defendants filed a motion on notice returnable to the 23rd April, 2018, to amend the Defence by pleading that the Plaintiff's claim was statute barred in relation to all matters about which complaint was made prior to the 21st December, 2011. The application to amend the Defence was successful.

Application to Extend Time; Appropriate Procedure

6. In circumstances where the one year limitation period had expired, it was submitted on behalf of the Defendants that on a proper construction of the subsection the Plaintiff was required to obtain an order extending the time before proceedings could be issued and that having failed to do so he was not entitled to apply for the order retrospectively. The gravamen of this submission is that where the limitation period has expired the permission of the Court has to be obtained before the Plaintiff can sue the Defendants. In this regard it was urged on the Court that the words in the subsection '*shall not be brought'* were clearly mandatory and thus prohibited the bringing of proceedings after the expiry of the one year limitation period or after such longer period, not exceeding two years, as might be directed by the court.

5. In support of this proposition the Defendants relied on the obiter dicta contained in recent judgements of the court delivered in defamation proceedings where the plaintiffs had sought an extension of the one year limitation period. See *Watson v. Campos & Anor* [2016] IEHC 18 and *Rooney v. Shell E & P Ireland Ltd* [2017] IEHC 63. In *Watson* Barrett J., commenting on the wording of s. 11 (2) (c) of the Act of 1957 as inserted by the Act of 2009, and having observed that the application had a touch of the "*cart before the horse*" about it, stated at para. 10 of the judgment:

> *"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)."*

In the event the court did not decide the issue as the plaintiff's application failed on another ground.

6. In *Rooney* the application to extend time was also brought after proceedings had issued. Having decided to exercise the court's discretion against the plaintiff on another ground Ní Raifeartaigh J. considered it unnecessary to rule on the issue but went on to observe:

> *"… I would have thought that the appropriate procedure might be to issue a motion seeking the Court's leave, with a grounding affidavit exhibiting a draft plenary summons and statement of claim. I say this in passing, because there was no argument on the point and nothing turns on it in the present case."*

Accepting the observations were clearly obiter the Defendants submitted nevertheless that they were consistent with and lent force to the construction which they contended should be given to the wording of the subsection.

7. In response counsel for the Plaintiff, Mr. Hogan SC, argued that the Defendant's submissions were misconceived and that the *obiter dicta* had to be viewed in context; the applications in both cases had been refused on other grounds. He argued that there was nothing unusual or novel about the wording employed in the subsection, quite the contrary. It was self evident from the section as amended that identical wording was utilised throughout in respect of other causes of action, including actions in tort.

8. When viewed in this context there was nothing differentiating about the wording of sub. sec. (2) (c) to warrant a departure from the established procedure whereby an application for relief was moved only if and when a statute barred defence was raised in the proceedings, furthermore, the meaning of the phrase "*shall not be brought*" had long since been construed by the Supreme Court. In *O'Domhnaill v. Merrick* [1984] I.R. 151 at 158, Henchy J. delivered the following exposition on the meaning to be attributed to those words in a limitation 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 a 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 a 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."

9. It was also submitted on behalf of the Plaintiff that a clear distinction had to be drawn between the effect of the expiration of the limitation period in causes of action relating, for example, to real property or chattels where the expiration of the limitation period for bringing an action results in the extinguishment of the legal right upon which the action is based and actions such as those in tort where the expiration of the limitation period raised in a defence, if successful, has the effect of barring the remedy rather than the right of action. In this regard the attention of the Court was drawn to the very helpful commentary at Chapter 1-11 et seq in Mr Canny's work *Limitation of Actions*

Conclusion; Appropriate Procedure
10. I accept the submissions with regard to the construction which the Plaintiff contends should be placed on the wording of the subsection; indeed, it is difficult to envisage a clearer or more concise exposition of the meaning of the phrase "*shall not be brought*" in a limitation statute than that set out by Henchy J. in *O'Domhnaill*. I find the observations regarding the appropriate procedure made *obiter* in *Rooney* and *Watson*, to be of little assistance on this issue; the point was either not argued or, where it was, *O'Domhnaill* and subsequent decisions were not apparently opened.

11. Accordingly, the Court determines the first question in the affirmative and finds on a proper construction of s. 11 (2) (c), that after the expiry of the one year limitation period proceedings maybe issued without an order having to be obtained extending the time within which the proceedings maybe brought; the necessity for such application arises only if and when a statute barred plea is raised by way of defence. No such plea having been raised in the Defence as originally delivered, it follows that so much of the claim as appeared on the face of the Statement of Claim to be statute barred would not have been in issue; rather the case would have proceeded to trial on the merits.

12. It was only when the statute was pleaded in the Defence as amended that the limitation period became an issue at all and gave rise to the necessity for the application and the relief sought if the portion of the claim to which the plea refers is not to be defeated. Finally, to place the construction on the provision contended for by the Defendants would not only bear on the Plaintiff's right to a remedy but, more fundamentally, on his right to sue, a proposition which I am satisfied is neither sound in principle or law.

Exercise of Discretion; the Law
13. The wording of s. 11 (3A) imposes on the Court a requirement to carry out a qualitative assessment of the reason or reasons proffered for the delay. This involves a consideration of the quality and nature of the reason or reasons advanced and a weighing of the respective prejudices. The onus is discharged (a) by an explanation which amounts to a reasonable excuse for the delay sufficient to satisfy the Court that the interests of justice are best served by granting the relief sought so as to permit the case to proceed and (b) by satisfying the Court that the prejudice which the Plaintiff will suffer if the direction is refused would be significantly greater than the prejudice which the Defendant will suffer if the direction is granted. See the judgement of Peart J, in *Taheny v. Honeyman, Fox, The Irish Prison Service and The Minister for Justice, Equality, and Law Reform* (Unreported, High Court, 6th February 2014); *Steedman and others v. BBC* [2001] EWCA Civ. 1534 and *Rooney v. Shell E&P Ireland Ltd* [2017] IEHC 63.

14. The limitation period, including the statutory limit on the period of any extension as maybe directed by the court, within which defamation proceedings must be brought if the claim is not to be defeated by a plea of statute bar reflects the rule at common law that proceedings to vindicate the reputation of a person such as defamation should be issued promptly and prosecuted with due diligence and expedition. See *Ewins v. Independent Newspapers (Ireland) Ltd* [2003] 1 I.R. 583; *Desmond v. M.G.N Ltd* [2009] 1 I.R. 737 and *Doherty v. Ryan* [2015] IEHC 242. In the event all other requirements are satisfied, the discretion of the court in the exercise of the jurisdiction conferred on it by the subsection to extend the time within which proceedings maybe brought, to include the one year limitation period, is limited to a maximum of two years from the date of the accrual of the cause of action.

15. It became apparent from a reading of the affidavits that there was a conflict of fact on matters germane to the exercise of the Court's discretion which could not be resolved satisfactorily without being tested at trial. In the event and in the interest of having the matter disposed of summarily the parties agreed that the Court should approach the matter on the basis of taking the Plaintiff's case at its high water mark.

Inability to Adduce Relevant Evidence by Reason of Delay; Conclusion
16. Of the requirements to be satisfied before the discretion of the Court can be exercised in favour of the Plaintiff, the requirement concerned with the extent to which any evidence relevant to the matter may no longer be adduced as a consequence of the delay may conveniently be disposed of without difficulty. Whatever the reason for the delay in the institution of proceedings, it is not apparent from the materials before the Court nor was it seriously suggested in argument that evidence relevant to the matters in issue between the parties can no longer be adduced by virtue of the delay; accordingly, this is not a factor which arises on this application.

Issue of Proceedings; Explanation for Delay
17. Cathal Clarke is a member of the National Executive (the Executive) of the first Defendant. He made serious complaints in relation to a number of allegedly defamatory statements as well as the conduct of certain individuals at the annual conference on the 9th and 10th September, 2011, in respect which he subsequently issued proceedings. The conduct and statements of the same individuals is also the subject matter of these proceedings. It is not without significance to the outcome of the application that if the relief sought is granted there will be a commonality of evidence to both suits.

18. The explanation advanced by the Plaintiff for the failure to institute proceedings within the one year limitation period is that he was awaiting the outcome of an independent investigation which the Executive had initiated on the 18th February, 2012, in response to the complaints made by Cathal Clarke, complaints about which he was fully informed. The Plaintiff claims that the impugned statements were also understood by those present at the annual conference to refer to him.

19. The Executive appointed a solicitor, Colm Bellew, to conduct the investigation with a direction that he report back to a meeting of the Executive scheduled for March, 2012. As it transpired the investigative process was not ultimately completed until January, 2013 and even then was inconclusive. The minutes of the Executive meeting at which it was decided to hold an independent investigation and appoint Colm Bellew also record that the officers and members of the executive concerned recused themselves during the formal taking of proposals and votes on the matter. Furthermore, at the following Executive meeting on the 10th March, 2012, the Plaintiff excused himself from the room while a discussion took place concerning the content of a letter received from Cathal Clarke's solicitor relevant to the matters into which the investigation had been ordered.

20. It is quite clear from the minutes of these meetings, exhibited in the replying affidavit of Eugene Gargan, principal risk analyst,

sworn on behalf of the first Defendant, that from the very outset the members of the Executive who were the subject matter of the complaints generally either absented themselves or did not participate in discussions or votes in relation to the complaints. Moreover, when discussions took place or votes were cast on actions to be taken on foot of such discussions, the Plaintiff also generally did not take part or absented himself from the room, a fact to which he also deposed on affidavit.

21. In these circumstances an averment at paragraph 15 of Eugene Gargan's supplemental affidavit, where he described as 'untrue' the Plaintiff assertion that he normally absented himself from meetings when the complaints were being discussed is as extraordinary as it is astonishing. The averment that the Plaintiff never absented himself from any meeting of the Executive in connection with the matter up until the issue of legal proceedings is manifestly incorrect and calls the reliability of Mr Gargan as a witness into question, particularly as it was he who exhibited the minutes in which the absences or non participation of the Plaintiff and others from the meetings are recorded. Averments made by him in a subsequent supplemental affidavit highlighting occasions where it appears the Plaintiff did not absent himself or was not recorded as having recused himself, do not excuse or explain the initial wholly incorrect averment that never did so.

The Complaints

22. Cathal Clarke wrote a letter, dated 17th January, 2012, addressed to the president of the first Defendant to which he attached a number of annexes detailing his complaints. Amongst these which were several relating to speeches made on the 10th September, 2011, by the third and fourth Defendants at the annual delegate conference in the course of which it was stated that Cathal Clarke and the Plaintiff had organised a secret meeting of the Western Brigade Committee in Mullingar, that those Defendants had been invited to the meeting by the Plaintiff , that the votes of the Western Command had been offered for sale at the meeting and that they were "gangsters" and "crooks" who should be 'got rid of'.

23. Cathal Clarke was the chairman of the Western Brigade Reserve Defence Forces Representative Association and was the senior commissioned officer representative from the West; the Plaintiff was the association secretary. Understanding this command structure and the respective military positions of both of these men is key to unlocking what may appear to be something of a conundrum to an outsider and upon which heavy emphasis was laid by the Defendants.

24. They contended that if there had been any substance to the suggestion that the subject matter of the complaints referred to the Plaintiff as well as to Cathal Clarke he would have followed the same course of action and made his own complaints; simply put the explanation advanced for not doing so was without merit or substance, rather, the Plaintiff's inaction was consistent with his knowledge that the complaints and subsequent investigation had nothing to do with him.

25. In August, 2012 Colm Bellew furnished a thorough and detailed interim report on his investigations. Amongst the conclusions reached he found that valid reason existed for complaint in respect of the remarks to relating to the sale of the Western Brigade vote at the Mullingar meeting. He found that the remedies sought, including a full retraction of the impugned comments were not inappropriate to the nature of the complaints made. In this regard a number of recommendations were set out for consideration by the Executive as appropriate, including apologies.

26. When the report is read in the context of the Plaintiff's military relationship with Cathal Clarke, the contention by the Defendants that the complaints and the subsequent investigation had nothing to do with the Plaintiff is, in my judgment, disingenuous at best. In this regard I pause to observe that the Defendants have not sought to set up by way of defence a plea of truth in these proceedings or for that matter in the proceedings brought by Cathal Clarke. This approach to the defence of the claims, it may fairly be observed, is hardly surprising having regard to certain conclusions reached by Mr. Bellew and from which it is also evident that as secretary of the Western Command Committee the Plaintiff was identifiable as one of the 'crooks' and 'gangsters' on the Executive whom the delegates were being invited 'to

Conclusion; Issue of Proceedings; Explanation for Delay

27. The senior commissioned officer having made complaints, the detail of which the Plaintiff was aware and the first Defendant having decided to appoint a solicitor to carry out an independent investigation into the complaints it is, in my judgment, hardly surprising and not unreasonable that the Plaintiff should have taken the view and should have chosen to follow the course that he did. On the face of it an arm's length investigation had been established on foot of which there was a reasonable prospect that proposals capable of resolving the complaints would emerge.

28. In the event matters dragged on well beyond the anticipated investigation period, a delay no doubt contributed to by Cathal Clarke's decision in Spring 2012, not to continue to engage with the investigation process once he had sourced and obtained legal advice. As to that Mr. Bellew expressly acknowledged the right of Cathal Clarke to adopt a non participatory approach to the investigation once advised by his solicitor albeit that this made his task in reaching definitive conclusions more difficult, a consequence upon which the Defendants laid heavy emphasis at the hearing.

29. Noting that the Plaintiff was also requested but failed to furnish information, the Defendants submitted that his failure to co-operate was significant in circumstances where he was advancing the existence and continuance of the investigation as an explanation for the delay in bringing proceedings. The Plaintiff took exception to this assertion. While it is clear from the report that he had not made a general statement for the purposes of assisting Mr Bellew with his enquiries, his un contradicted testimony on affidavit was that he had furnished a briefing note on the critical meeting at Mullingar, despite not having been invited to do so.

30. The report was furnished to the Executive in August, 2012; as a member the Plaintiff received a copy. Thereafter he appears to have harboured an expectation that the subject matter of the complaints might yet be resolved at the annual delegate conference scheduled for the following month. The same cannot be said for Cathal Clarke. He appears to have had less confidence in the potential outcome of the conference than the Plaintiff; he took legal advice and, ultimately, instructed his solicitors to issue but, it appears, not to serve proceedings at that time. Both sets of proceedings were subsequently served together after the statute had run.

31. For reasons set out on affidavit, which it must be acknowledged were disputed by the Defendants, the opportunity presented by the conference in September, 2012 to deal conclusively with the complaints came and went leaving the Plaintiff disappointed in its wake. The Plaintiff candidly accepts that he should perhaps have acted earlier in seeking legal advice and in issuing proceedings; had he done so the necessity for this application might never have arisen.

32. It was not until after the conference that he sought such advice by which time the limitation period had already run in respect of part of his claim. As to that I am satisfied the Plaintiff's admitted realization that the extended investigative period ran the risk of the claim becoming statute barred is consistent with having sought and obtained legal advice, which in his case was after the conference.

33. The Defendants contend that the prejudice they will suffer if the relief sought is granted will result in the loss of a defence the effect of which, in the event that the Defendants were to be found liable, would have resulted in a saving both as to damages and costs. On the other hand the prejudice the Plaintiff will suffer if the relief is refused will not be significantly greater than that which the Defendants will suffer if the relief is refused.

34. In this regard, it was submitted that as the Plaintiff's claim extends and continues to the events of the annual conference in 2012, and the plea is confined to events about which complaint is made more than one year prior to the issue of proceedings, in the event relief is refused the Plaintiff's claim in relation to those matters occurring within the limitation period about which he complains will be unaffected and he will be free to pursue his claim for damages with regard to those matters.

35. In response, the Plaintiff contends that apart altogether from the impact which refusal of relief would have on his right to a good name which he seeks to vindicate through these proceedings, a right explicitly protected by Article 40.3.2 of the Constitution, the substance or as it was put in argument 'the meat' of his complaints and therefore the case relates to events which occurred at the conference in 2011 rather than at the conference the following year. Furthermore, there was little or no prejudice to the Defendant by granting relief in circumstances where the Defendant will have to meet what is essentially the same case in the proceedings brought by Cathal Clarke. Finally, there is no evidence relevant to the matter which can no longer be adduced by virtue of the delay in the issue of the proceedings.

Conclusion; Respective Prejudices
36. When all of these factors are weighed and taken into account together with the conclusion reached on the explanation advanced for the delay in the issue of the proceedings, an explanation which, in my judgment, excuses the delay, I am satisfied that the prejudice which the Plaintiff will suffer if the relief sought is refused will be significantly greater than the prejudice which the Defendants will suffer if the direction sought is granted.

Ruling
37. In all the circumstances of the case and in light of the forgoing it follows that the interests of justice are best served by acceding to the application. Accordingly, the Court will exercise its discretion by granting a direction extending the limitation period by not more than two years from the date of the accrual of the cause of action. And the Court will so order.