

APPROVED

[2022] IEHC 67



THE HIGH COURT
CIRCUIT APPEAL

2021 No. 116 CA

IN THE MATTER OF AN APPLICATION FOR A DIRECTION UNDER
SECTION 11(2)(C) OF THE STATUTE OF LIMITATIONS 1957

BETWEEN

CAROLINE GOLDSMITH

APPLICANT

AND

MARY O'HARA

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 16 February 2022

INTRODUCTION

1. This judgment is delivered in respect of an application to extend the time for the bringing of a defamation action. The normal limitation period applicable to defamation actions is one year, but the relevant court has a statutory discretion, under the Statute of Limitations 1957, to direct that the proceedings may be brought within a longer period, not exceeding two years.

NO REDACTION REQUIRED

2. The matter comes before the High Court by way of an appeal against an order of the Circuit Court granting an extension of time. The appeal has been made by the respondent. The appeal was heard on 7 February 2022. This court has had the benefit of the comprehensive written legal submissions filed in the Circuit Court, together with supplemental written submissions on the appeal filed on behalf of the applicant.

STATUTORY PROVISIONS AND CASE LAW

3. The limitation period applicable to a defamation action was reduced under section 38 of the Defamation Act 2009. The limitation period is stated as follows under an amended section 11(2)(c) of the Statute of Limitations 1957:

“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.”

4. The date of accrual is defined as follows under section 11(3B) of the Statute of Limitations 1957:

“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.”

5. The rationale for the reduction in the limitation period has been explained as follows in Cox and McCullough, *Defamation Law and Practice* (Clarus Press, 2nd ed, 2022) at §13–329:

“Under s 38 of the Defamation Act 2009 (amending s 11 of the Statute of Limitations 1957) the limitation period for defamation cases is one year from the date of accrual of the action, or such longer period as the court may direct, not exceeding two years.

This represented a significant reduction from the previous dispensation, where there had been a six-year period in which to issue proceedings for libel and a three-year period in which to issue proceedings for slander. The change is in accordance with the tenor of various decisions prior to 2009 highlighting the need for expedition in proceeding with defamation claims. The logic is that if a plaintiff is seriously concerned about his/her good name in the face of publication of the allegedly defamatory statement, s/he can be expected to move with all haste to remedy any harm caused.”

6. There is also a constitutional dimension: the potential of defamation proceedings being instituted years after publication could have a chilling effect on freedom of expression.
7. The matters to which the court is to have regard in deciding whether to grant an extension of time are prescribed as follows under section 11(3A) of the Statute of Limitations 1957:

“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.”

8. As appears, the statutory test consists of two limbs. The first requires consideration of the interests of justice; the second, an assessment of the balance of prejudice.
9. The legislation also identifies two specific matters to which the court must have regard: (i) the reason for the failure to bring the action within time; and (ii) the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.
10. The approach to be taken to the exercise of this statutory discretion has been summarised as follows by the Court of Appeal in *Morris v. Ryan* [2019] IECA 86 (at paragraph 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.”

11. The Court of Appeal approved of the following test as set out by the High Court (Ní Raifeartaigh J.) in *Rooney v. Shell E & P Ireland Ltd* [2017] IEHC 63 (at paragraphs 21 and 22):

“[...] 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.

The authorities, therefore, make it clear that the onus is on the plaintiff to explain the delay, and that the evidence offered in support of the explanation must reach an appropriate level of detail and cogency.”

12. There has been some discussion in the case law as to whether a finding of inexcusable delay is sufficient, on its own, to dispose of an application for an extension of time. The judgment of the High Court (Pilkington J.) in

O'Sullivan v. Irish Examiner Ltd [2018] IEHC 625 suggests that it might be. See paragraph 44 of the judgment as follows:

“The applicant’s counsel contended that, even if the court were to find that the reason for the delay is inexcusable, it could nevertheless hold for the applicant upon the two statutory criteria, namely (a) the interests of justice and (b) the balance of prejudice. In my view, the reasons advanced by the applicant on the facts of this case are integral to and directly impact upon an assessment as to whether a direction should be given in all the circumstances. The reasons for the delay and the court’s consideration of the validity or otherwise of those reasons is inextricably bound up with any decision it must then make as to where the interests of justice and the balance of prejudice lie. In none of the cases opened to the court was there a finding by a court of inexcusable delay but nevertheless a determination that the interest of justice and the balancing of the respective prejudices could nevertheless result in a direction to disapply the one-year statutory time limit.”

13. The subsequent judgment of the High Court (Ní Raifeartaigh J.) in *O'Brien v. O'Brien* [2019] IEHC 591 suggests that it is only if the reason for the delay fails to meet a minimum threshold that that factor on its own could be sufficient to dispose of the proceedings. See paragraphs 25 and 26 of the judgment as follows:

“Counsel submitted that this supported the proposition that if the Court were to find the reason offered to be inadequate, this would bring the application to an end. However, I do not find particularly attractive an unduly binary or ‘black and white’ approach to the Court’s analysis of the reason given by an applicant for his delay in initiating proceedings, i.e. an approach which characterises the reason as ‘valid’ or ‘invalid’, or ‘excusable or inexcusable’. I would conceive of the issue more in terms of a spectrum, where the reason offered by the plaintiff might range from (at one end of the spectrum) a poorly supported or highly implausible reason, to a very strong and well evidenced reason (at the other end of the spectrum), with various shades of persuasiveness and evidential support in-between the two extremes.

It seems to me that what Pilkington J. was saying in the passage quoted above was that if the reason offered was at such a low point on the spectrum or below a minimum

threshold of either evidence or plausibility, the plaintiff might not, in a particular case, get out of the starting-blocks in his application. But in other cases, where the reason has at least some validity, it should then be factored into the analysis along with all the other factors. In any event, whatever about the precise theoretical nuances of how one conceives of reasons, in the present case I am satisfied that the reason offered by the plaintiff was valid, acceptable or whatever adjective one wishes to use to suggest that it had overcome any initial threshold there may be.”

14. The approach to be taken to the balancing of the prejudice caused to a plaintiff and defendant, respectively, has been explained as follows by the High Court (Butler J.) in *McKenna v. Kerry County Council* [2020] IEHC 687 (at paragraph 53):

“[...] If the section required only that the court consider the interests of justice, the court could reasonably exercise its discretion either way. However, the requirements in s.11(3A)(a) and (b) appear to be cumulative such that prejudice must be considered separately and in addition to the interests of justice and not merely as part of a global consideration of what the interests of justice require. Significantly, the court does not simply balance the potential prejudice to the parties: it must be satisfied that the prejudice of not granting a direction to the plaintiff significantly outweighs that which might be caused to the defendants by granting it. In circumstances where the respective prejudice is finely balanced, it seems to follow that the direction should in principle be refused.”

15. Finally, the approach to be taken to the question of missing evidence has been put as follows in *O'Brien v. O'Brien* [2019] IEHC 591 (at paragraph 29):

“The next specific factor which the statutory provision mandates the Court to consider is ‘the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced’. The simple position in this case is that the defendant has not asserted any such prejudice. There was some debate before me as to whether this should be considered a ‘plus’ for the plaintiff or a ‘neutral’ factor in the overall analysis, but this seems to me to be somewhat premised on a view of the exercise as a simple counting of pros and cons rather than what I consider the Court should be doing, namely, a qualitative assessment of all the relevant factors. It seems to me that the absence of

any prejudice is something which is significant in terms of the real and practical impact on the potential defamation trial and should be put into the balance by the Court accordingly.”

PROCEDURAL HISTORY

16. The applicant contends that she has been defamed by the respondent. More specifically, it is alleged that the respondent published certain comments on the Facebook platform which are defamatory of the applicant. The comments are alleged to have been posted to the web page of a Facebook group entitled “*Irish Autism Mammies*”. It appears from the affidavit evidence that this web page would only be accessible by members of that Facebook group.
17. The precise text of the allegedly defamatory statement the subject-matter of the application for an extension of time is set out at paragraph 43 below. For present purposes, it is sufficient to observe that the comments attributed to the respondent concern the professional qualifications of the applicant, and, in particular, whether her qualifications permit her to diagnose children as having autism.
18. The comments are said to have been published at two different times. The first comment is said to have been published on 9 June 2018. A second set of comments are said to have been published on 20 May and 22 May 2019. The application for an extension of time relates to the first comment only. This is because, as explained below, the applicant issued proceedings within time in respect of the second set of comments.
19. The date of accrual of the cause of action in respect of the first comment is 9 June 2018, i.e. the date on which it was first capable of being viewed through the medium of the internet (section 11(3B) of the Statute of Limitations 1957). Any

claim for defamation relating to the first comment should, therefore, have been brought within one year of the date of publication, i.e. proceedings should have issued by 8 June 2019. In the event, no proceedings were brought within that time period. However, some five months after the one-year limitation period had expired, the applicant issued a motion on 4 November 2019 before the Circuit Court seeking an extension of time within which to bring an intended action for defamation.

20. The motion took the form of an originating notice of motion, i.e. the application was brought on a standalone basis, not within the context of substantive proceedings issued by way of Civil Bill. This is the procedure prescribed under Order 5C, rule 4(3) of the Circuit Court Rules:

“Where a defamation action has not been brought before the Court in respect of the statement in question, an application to the Court for a direction under section 11(2)(c) of the Statute of Limitations 1957 shall be brought by originating notice of motion, in which the intending plaintiff shall be named as applicant and the intended defendant as respondent. The application shall be grounded upon an affidavit sworn by or on behalf of the moving party.”

21. The application for an extension of time was grounded on an affidavit sworn by the applicant. As part of her affidavit, the applicant exhibited the Civil Bill which she intended to issue. The claim as pleaded is predicated on the publications in June 2018, and May 2019, respectively.
22. The intention seems to have been that—assuming an extension of time were granted—the applicant would then issue a Civil Bill in the form exhibited in her grounding affidavit. In the event, however, the motion seeking an extension of time did not come on for hearing before the Circuit Court until 29 July 2021. It seems that the delay in obtaining a hearing date was related to the restrictions on sittings of the Circuit Court introduced in response to the coronavirus pandemic.

23. In the interim, the applicant arranged to have the Civil Bill formally issued by the Circuit Court Office on 5 May 2020. This seems to have been done so as to ensure that the claim in respect of the second set of comments was brought within time. The Civil Bill, as issued, has been allocated a different record number than the proceedings in which the motion had been brought.
24. (At the hearing before me, counsel for the applicant mistakenly suggested that the Civil Bill had been lodged with the Circuit Court Office in September 2019, and that there had been a delay of some eight months on the part of the Office in formally issuing same. This is not correct and is inconsistent with the position as recorded in the written legal submissions filed before the Circuit Court by the applicant).
25. Unless an extension of time is granted, it would appear that that part of the claim pleaded in the Civil Bill which is predicated on the publication on 9 June 2018 is statute-barred. Of course, a limitation period will normally operate to bar a claim in defamation only if expressly pleaded by way of defence: *Morris v. Ryan* [2019] IECA 86 (at paragraph 44).
26. For completeness, it should be explained that the applicant has issued parallel proceedings before the Circuit Court, in other venues, against two other individuals who are alleged to have published defamatory statements on the Facebook group's page: *Goldsmith v. Moran* 342/2019 and *Goldsmith v. Pullen* 387/2019. An application for an extension of time has been made in each of these two parallel proceedings. The existence of these other proceedings should have been—but was not—disclosed by the applicant in her grounding affidavit.

CHRONOLOGY

27. The chronology of events is summarised in tabular form below:

9 June 2018	Respondent posts comment on Facebook group's page
	Applicant contacts Facebook group administrator to demand removal of posts
12 May 2019	Complaint from Applicant to Respondent
20 and 22 May 2019	Respondent posts further comments
8 June 2019	Statute of Limitations expires
23 September 2019	Civil Bill stamped
4 November 2019	Motion issued seeking an extension of time
5 May 2020	Civil Bill issued from Circuit Court, Eastern Circuit
29 July 2021	Circuit Court order extending time
30 July 2021	Notice of Appeal to High Court
16 September 2021	Order perfected
7 February 2022	Hearing of appeal before High Court

DISCUSSION AND DECISION

(A) INTERESTS OF JUSTICE

28. The first limb of the statutory test mandates the court to consider whether the interests of justice require an extension of time. The use of the phrase “*the interests of justice*” indicates that the Oireachtas intended to confer a wide discretion on the court, and allows for the consideration of a broad range of matters. One specific matter to which the court is directed to have regard is “*the reason for the failure to bring the action within*” the one-year limitation period.

This is expressly provided for under section 11(3A)(b) of the Statute of Limitations 1957.

29. In the present case, the applicant has proffered two contradictory explanations for her delay. The reason initially advanced had been that the applicant had only become aware of the respondent's allegedly defamatory comments a "*number of months*" prior to October 2019, and had therefore been unable to bring proceedings within the one-year limitation period. See paragraph 9 of the applicant's affidavit of 25 October 2019 as follows:

"I say that I am not a member of the 'Irish Autism Mammies' Facebook Group as I have been blocked from accessing this Facebook Page. I have only become aware of this posting in the last number of months when other members of the 'Irish Autism Mammies' Facebook Group brought these comments to my attention. I was therefore not able to bring these proceedings within the normal limitation period applicable to Defamation actions of one year in respect of the first comment, but the Court has a statutory discretion to direct an extended period not exceeding two years."

30. It has since been accepted by the applicant on affidavit that she had, in fact, been aware of the posting of the comments on 9 June 2018 at the time. The applicant now offers an entirely different reason for her delay. It is now said that the applicant did not pursue defamation proceedings at the time because she considered the matter to have been resolved. More specifically, it is said that the administrator of the Facebook group had agreed to remove the (allegedly) defamatory comments. See paragraph 6 of the applicant's affidavit of 5 June 2020 as follows:

"In response to Ms O'Hara's objection – that I was aware of the defamatory comments that she made about me at that time, and that I chose to do nothing – I say that at the time the Facebook Group's Administrator (Ms Vicky Pullen) agreed to remove the defamatory comments, and I thought that was the end of the matter, however Ms Pullen did not remove the defamatory comments neither did she delete the

post, and furthermore as an administrator of the Facebook Group, Ms Pullen allowed the post to be constantly refreshed and brought back to the top of the Facebook Group's timeline. Ms O'Hara then made subsequent and further defamatory comments about me a year later, and as can be seen from paragraph 12 of Ms O'Hara's affidavit, Ms O'Hara is refusing to retract these further defamatory comments as she rejects my view of her defamatory comments. She has therefore continued to make such defamatory comments after her initial defamatory comment was made, and is therefore prepared to continue to make such comments unless restrained by this Honourable Court."

31. The asserted "*agreement*" to remove the defamatory comments is supposedly to be found in an exchange of messages between the applicant and the administrator of the Facebook group (Ms. Pullen) on the evening of 9 June 2018. These messages have been exhibited by the respondent as part of her response to the application for an extension of time. The content of same does not bear out the applicant's assertion that there had been an agreement to withdraw the (allegedly) defamatory comments. The administrator of the Facebook group had only agreed to remove part of her own comment, not that of the respondent:

"I will remove your name from my comment and from the main post... only as a professional courtesy... i can not nor will try to force others to remove it from their personal experience stories".

32. As correctly observed by counsel for the respondent, this statement involves no commitment to remove Ms. Pullen's comment in its entirety, and no commitment whatsoever in relation to comments made by others, including, relevantly, the respondent to these proceedings.
33. The respondent has also exhibited an exchange of messages between her and the applicant directly on 12 May and 16 May 2019. The content of same again confirms that the applicant had been aware, within the one-year limitation period, of the allegedly defamatory comments posted on 9 June 2018. It is also

apparent that the applicant had made at threat on 12 May 2019 to issue legal proceedings, i.e. at a time which was still within the one-year limitation period.

See the following message from the applicant:

“As there are defamatory statements in the post referring to myself as a ‘Fake Psychologist’ and someone who has issued and taken money for ‘Fake reports’ can you please retract what has been said and issue a public apology for the statements as they are untrue and damaging. I have been to the High Court to defend my reputation and will have no issue with going again if this is necessary.”

34. The respondent expressly stated that she did not intend to retract her posted comments, by message dated 16 May 2019 as follows:

“Do not threaten me. I have no intention of retracting anything I say and issuing you with an apology. You are not a Doctor, and your qualifications do not qualify you to assess children for autism. Know as my husband is a Psychologist. Stop taking advantage of vulnerable parents.”

35. The affidavit evidence before the court thus establishes that the applicant had actual notice of the allegedly defamatory comments on the very day same were posted on the Facebook group’s page (9 June 2018). Not only that, the applicant had contacted the administrator that evening and had threatened legal proceedings. The applicant expressly stated in her message to the administrator that “*I have the whole thread*”.
36. Thereafter, the applicant made direct contact with the respondent in May 2019, during the currency of the one-year limitation period, and again threatened to pursue legal proceedings. In the event, however, no steps were taken until November 2019.
37. It is apparent, therefore, that the applicant would have been in a position to institute legal proceedings within the one-year limitation period. The applicant has signally failed to provide any cogent reason for her failure to do so. The

initial reason offered involves an untruth, namely that the applicant had only recently become aware of the publication of the (allegedly) defamatory statements. The second reason offered is highly implausible. The suggestion that the applicant considered the matter to be resolved because of a supposed “*agreement*” to remove the comment made by the respondent is not borne out by the actual content of the exchange of messages (above). There is nothing therein to indicate that the respondent had even been asked to remove her comment by Ms. Pullen, still less that she had actually agreed to do so.

38. Counsel on behalf of the applicant had sought to argue that the circumstances of the present case are analogous with *O’Brien v. O’Brien* [2019] IEHC 591. It is suggested that in both cases the delay had been attributable to an attempt by the defamed party to resolve the matter amicably. With respect, the latter case is distinguishable on the facts. There, the principal reason for the delay had been an understandable unwillingness to litigate a sensitive family matter in public. There is no equivalent factor in the present case, and, as explained above, the evidence does not bear out the suggestion that the applicant could have thought that an agreement to delete the comments had been reached.
39. Even if one assumes—contrary to the evidence—that the applicant had thought an agreement had been reached in June 2018, it would have been apparent to her from the events of May 2019 that the complained of posts remained online. These events occurred prior to the expiration of the one-year limitation period. No explanation has been provided as to why proceedings were not issued within time.
40. The case law establishes that there is an onus upon a person who seeks an extension of time to provide full and adequate information as to the particular

reasons for delay, and that the evidence offered in support of the explanation must reach an appropriate level of detail and cogency. The applicant has failed to discharge this onus. Moreover, the applicant has not complied with her duty of candour to the court. It is a cause of concern that any deponent would swear an affidavit which contains an untruth, especially in respect of a matter which is central to the merits of the application. Notwithstanding that she has filed two supplemental affidavits, the applicant has made no attempt to apologise for, still less explain, the false averment in her first affidavit.

41. More generally, the applicant has presented her evidence in a self-serving and incomplete manner. The applicant, in her first affidavit, failed entirely to disclose the existence of the messages exchanged between her and the administrator of the Facebook group on 9 June 2018, and between her and the respondent in May 2019. The applicant also failed to disclose the existence of the parallel proceedings which she has taken against the administrators of the Facebook group. Those parallel proceedings relate to the same thread on the Facebook page and are inextricably linked with the defamation alleged in the within proceedings.
42. A failure on the part of an intended plaintiff to provide an adequate reason for their delay is not necessarily determinative of an application for an extension of time. This is because the Statute of Limitations 1957 does not posit a test of “*good and sufficient*” reason, such as that found in other legislative contexts. Rather, the first limb of the statutory test mandates consideration of the interests of justice. This is a much broader concept. In principle, therefore, there might be cases where an extension of time should be granted notwithstanding the absence of an adequate reason for the delay. The interests of justice might favour

the grant of an extension of time in a case alleging a very serious defamation or in a case where there is no apparent defence, notwithstanding unexplained delay on the part of the intended plaintiff.

43. No such considerations arise in the present case. The alleged defamation does not lie at the “*serious*” or “*grave*” end of the spectrum, and the respondent appears to have a stateable defence. The application for an extension of time is confined to the following statement posted on 9 June 2018.

“Thanks Jacqueline Moran for posting this. We as parents are very vulnerable. No Joanne Hyde O’Sullivan there is a regulatory body of Psychologists in Ireland called the PSI (Psychological Society of Ireland), this woman was claiming she was a Psychologist and an autism expert trained outside of Ireland, she of course never registered herself with the PSI however she was found out to have been a fake. Parents did lose money to her fake reports. She now aligns herself with Vaxxed and anti-vaccine rhetoric.”

44. The sting of the alleged defamation is that the applicant is not a registered psychologist and that she does not possess the requisite professional qualifications to diagnose children as having autism. As appears from the exchange of messages between the applicant and the respondent in May 2019, and the subsequent comments posted, the respondent maintains the position that the applicant is not a doctor of clinical psychology, and that her qualifications do not qualify her to assess children for autism.
45. The respondent has also averred that the Facebook group is what is known as a “*closed*” group, meaning that any posts that are placed on the page are not visible to the general public but only to the members of the group itself. It is further averred that would-be members must apply to an administrator in order to be admitted to membership, and that membership is restricted to mothers of autistic children.

46. Against this background, it cannot be said that this is an “*open and shut*” case of a serious defamation. Had the applicant brought proceedings within the one-year period allowed, then it would have been open, in principle, to the respondent to seek to defend the proceedings on the basis of truth, honest opinion or qualified privilege. The respondent might, for example, have been able to establish that reports which have not been prepared by a doctor of clinical psychology carry a lesser status with public authorities such as the Health Service Executive or the Department of Education. There might also be an issue as to whether the applicant is identifiable from the content of the post: it will be noted that the applicant is not expressly named in the post the subject-matter of the application for an extension of time.
47. None of this is to say that any of these defences would necessarily succeed. For present purposes, the point is simply that this is not a case of a serious defamation to which there is obviously no answer, such as to justify the grant of an extension of time notwithstanding the absence of any adequate explanation for the delay.
48. For completeness, it should be explained that no extension of time has been sought in respect of the *subsequent* statements posted in May 2019, presumably on the basis that the applicant is satisfied that the proceedings in respect of same have been brought within time.

(B) BALANCE OF PREJUDICE

49. Section 11(3A)(b) of the Statute of Limitations 1957 requires the court to be satisfied that the prejudice that the applicant would suffer if the direction extending time were not given would “*significantly outweigh*” the prejudice that the respondent would suffer if the direction were given.

50. This aspect of the statutory test is somewhat difficult to understand in that, in a sense, the prejudice which one party will suffer, if an application for an extension of the limitation period goes against them, is inversely proportionate to that which the other party will suffer if the outcome goes the other way. Put otherwise, there is symmetry to the prejudice. In the event that the application for an extension of time is *refused*, an intended plaintiff suffers prejudice in that any proceedings instituted by him or her are on hazard of being dismissed on the grounds that same are statute-barred. In the event that the application for an extension of time is *granted*, an intended defendant will be denied a complete defence which he or she would otherwise have had.
51. In some instances, of course, there will be specific factors at play which heighten the prejudice suffered by one or other of the parties. In the case of a plaintiff, these factors will include the gravity of the defamation. The prejudice suffered by a putative plaintiff who had been the victim of a very serious defamation to which there does not appear to be any plausible defence will be especially acute. The refusal of an extension of time would result in an otherwise unanswerable case in defamation failing because the limitation period, if pleaded, represents a complete answer to the claim. This might be thought to confer an unjustified windfall upon the egregious defamer.
52. In the case of a putative defendant, prejudice may be caused by the unavailability of evidence. One of the statutory criteria to which a court must have regard is the extent to which any evidence relevant to the matter is, by virtue of the delay, no longer capable of being adduced.
53. No such factors arise in the present case. As discussed at paragraphs 43 to 47 above, this is not an “*open and shut*” case of a serious defamation. As to

evidence, there is no suggestion that the delay has resulted in specific evidence becoming unavailable.

54. There is, however, one factor peculiar to the present case which is of relevance to the assessment of the balance of prejudice, as follows. The applicant has issued proceedings within time in respect of the statements said to have been published on 20 May and 22 May 2019. It will be recalled that the applicant issued a Civil Bill on 5 May 2020 which pleads that defamatory statements were published on 9 June 2018, and on 20 May and 22 May 2019. The applicant does not require an extension of time in respect of the latter.
55. It follows, therefore, that even if the present application is refused, the applicant will nevertheless be able to pursue the Circuit Court proceedings insofar as the publications in May 2019 are concerned. This lessens any prejudice which might otherwise be suffered as the result of the refusal of an extension of time. If the applicant is correct in claiming that the comments made as to her professional qualifications are defamatory, then she will have an opportunity to vindicate her good name, albeit without reliance upon the comments said to have been published on 9 June 2018. It would also appear that the applicant's parallel proceedings against the two administrators of the Facebook group are within time insofar as the statements said to have been published on 20 May and 22 May 2019 are concerned.
56. As explained by the High Court (Butler J.) in *McKenna v. Kerry County Council* [2020] IEHC 687 (at paragraph 53), the court does not simply balance the potential prejudice to the parties: it must be satisfied that the prejudice of not granting an extension of time to the intended plaintiff significantly outweighs that which might be caused to the intended defendant by granting it. In

circumstances where the respective prejudice is finely balanced, an extension of time should in principle be refused.

57. On the facts of the present case, the applicant has failed to establish that the prejudice that she would suffer if the extension of time is not granted would “*significantly outweigh*” the prejudice that the respondent would suffer if the extension were granted. The applicant continues to enjoy a right to pursue an action for defamation. The inability to pursue the stale claim in respect of the comments published in June 2018 does not “*significantly outweigh*” the prejudice which would be suffered by the respondent were she to be denied the right to rely on the one-year limitation period.

CONCLUSION

58. For the reasons explained in detail above, the applicant has failed to satisfy either limb of the statutory test for an extension of time for the bringing of a defamation action. It would not be in the “*interests of justice*” to extend the limitation period having regard, in particular, to the absence of any cogent explanation for the delay; the applicant’s lack of candour with the court; the middling nature of the alleged defamation; and the existence of a stateable defence. The applicant has also failed to establish that any prejudice that she would suffer if the extension of time is not granted would “*significantly outweigh*” the prejudice that the respondent would suffer if the extension were granted.
59. As to costs, my provisional view is that the respondent, having succeeded in resisting the application for an extension of time, is entitled to recover her legal costs against the unsuccessful applicant. Such costs would include the costs

above and below, i.e. the costs before the Circuit Court and the costs of the appeal to the High Court.

60. If either party wishes to contend for a different form of costs order, they should file written legal submissions within fourteen days. The appeal will be listed before me, remotely, for final orders on 9 March 2022 at 10.45 am.

Appearances

Tim Dixon for the applicant instructed by PB Cunningham & Co
Andrew Walker, SC and Robert McGarr for the respondent instructed by Lavelle Partners LLP

Approved
Gareth S. Mans