[2020] IEHC 687

THE HIGH COURT
CIRCUIT APPEAL

[2019/283CA]

BETWEEN

KEITH MCKENNA

PLAINTIFF

AND

KERRY COUNTY COUNCIL AND ANGELA MCALLEN

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 15th day of December, 2020

1. This matter comes before the court as the defendant's appeal against an order made by Judge O'Donnell at the Circuit Court in Tralee, Co. Kerry on 25th June, 2019 granting the plaintiff an extension of time under s. 11(2)(c) of the Statute of Limitations 1957 as inserted by s. 38(1)(a) of the Defamation Act, 2009. That section sets a limitation period of one year for the bringing of defamation proceedings but permits a court to extend that period for a further year if certain statutory criteria are satisfied. The main issue raised on the appeal is whether an application for an extension of time under that section can be made retrospectively outside the permitted extension period in respect of proceedings which have already been issued within the period. If so, it is then necessary to consider whether a direction should issue in the circumstances of the case.

Factual background

2. The plaintiff is employed by the first defendant, Kerry County Council, as a clerical officer and wishes to pursue defamation proceedings against the Council and the second defendant who is the Finance Officer of the Council. Unfortunately, it seems that this employment relationship is not entirely harmonious and these proceedings are but one of three sets of proceedings which the plaintiff currently has extant against the Council.

3. The alleged defamation concerns comments made by the second defendant at a social function held on the evening of 6th December, 2013 (and running into the morning of 7th December, 2013) to mark the retirement of another employee. The pleaded comments relate to the cost of an item of office equipment which both parties agree refers to a printer purchased on behalf of the Council in 2004. The plaintiff pleads that the comments made suggest that he was dishonestly involved in this transaction and had acted in breach of the financial controls and procedures in place within the Council and in breach of his duty to his employer.

4. The plaintiff was clearly exercised by these comments and later in the same month consulted the solicitor who was already acting on his behalf in his employment proceedings. Notwithstanding the speed with which the plaintiff moved to take legal advice and the holding of a consultation with the counsel already acting in his employment proceedings in January 2014, a letter of claim was not issued to the defendants until 3 months later on 31st March, 2014. It is not clear from the papers before the court whether that letter was ever replied to, but in any event the defendants did not provide the requested offer of amends under s. 22 of the Defamation Act, 2009 within the 14 day period stipulated in the letter.

5. Thereafter in June 2014 the solicitor instructed counsel to draft defamation proceedings but the counsel in question was unable to deal with the matter due to family circumstances including a bereavement. Given that the alleged defamation was closely related to the plaintiff's employment, it is understandable that the solicitor would wish to instruct the counsel who was already familiar with the history of that employment relationship but, for reasons which are not explained, the solicitor did not move to instruct another counsel when his counsel of choice was clearly not going to be able to complete the work within the statutory time limit. Instead, alternate counsel was instructed on 8th December, 2014 when the one year time limit for bringing defamation proceedings had already elapsed. That alternate counsel acted with commendable alacrity in turning the papers around and drafting complex defamation proceedings notwithstanding his lack of familiarity with the history between the parties. The proceedings were issued on 10th December, 2014.

6. There followed exchanges of correspondence between the parties in which clarity was sought as to whether the solicitors instructed on behalf of the Council were going to come on record on behalf of both defendants. Ultimately, on 14th July, 2015 an appearance was entered on behalf of both defendants and on 28th January, 2016 a defence was delivered. It is notable that by the time the defence was delivered the two-year period under s. 11(2)(c) of the Statute of Limitations 1957 had expired. The following plea was made by way of preliminary objection at para. 2(viii) of the defence: -

> "Pursuant to the statutory provisions, the said limitation period could have been extended, on application, to either the 5th or 6th December 2015 for the purposes of issuing fresh proceedings within the newly extended limitation period. No motion or application has been brought, within the two year period, before this Honourable Court to extend the time allowed for bringing a defamation action arising out of the said incident. Pursuant to the said statutory provisions, the claim is now statute barred, and the period for issuing fresh proceedings cannot be extended."

Thus, from the outset the Council's position has been that once the one-year period for bringing defamation proceedings has expired it is necessary for the court to extend the time limit before proceedings can be issued within the second year. On the Council's case the proceedings issued on behalf of the plaintiff on 10th December, 2014 were out of time and by January 2015 the plaintiff was out of time to seek an extension of time in respect of those proceedings.

7. Although this matter came before the High Court by way of an appeal from the Circuit Court, because that appeal is by way of full re-hearing it was necessary for the plaintiff to move his application in full. The legal issue identified above was the main basis upon which the defendants opposed the plaintiff's application for an extension of time.

The statutory provisions

8. The plaintiff's application is made under s. 11(2)(c) of the Statute of Limitations 1957 as inserted by s. 38(1)(a) of the Defamation Act, 2009 which provides as follows: -

"38.— (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."

The balance of the newly introduced provisions are not relevant for present purposes.

9. These amendments reflect a significant change to the pre-existing law where, notwithstanding a common law rule that proceedings brought to vindicate a person's reputation should be issued promptly and prosecuted expeditiously, the Statute of Limitations allowed a six year period for the bringing of defamation proceedings. That period has now been reduced to one year with the possibility that time may be extended by a court for up to a further year. On the expiration of the two-year period such proceedings become absolutely statute barred. Unfortunately, for reasons which are considered in more detail below, the procedural mechanism through which the court may be called upon to exercise its statutory discretion under s. 11(2)(c) is not entirely clear cut.

Arguments of the parties

10. The plaintiff in bringing this application contends that there are two issues before the court. These are firstly whether the court should exercise its discretion and uphold the decision of the Circuit Court permitting the plaintiff to bring defamation proceedings outside the initial statutory limitation period and, secondly, what the plaintiff characterises as the procedural issue raised by the defendants as to whether it is

permissible to apply for that extension after the expiration of the two-year period. The plaintiff also suggests that the issues should be determined in that sequence so that it would be unnecessary to determine the procedural issue unless the court was satisfied that its discretion should be exercised in the plaintiff's favour. The plaintiff relies on the decision of the Court of Appeal in *Morris v. Ryan* [2019] IECA 86 as supporting this suggestion. Finally, the plaintiff complains that in circumstances where his proceedings were issued merely days outside the initial statutory time limit, the defendants should not be allowed to rely on their own delay in filing a defence which meant that the plea under the Statute of Limitations was not raised until the two year period within which the defendants argue the plaintiff had to make an application to extend time had already expired.

11. The defendants contend that the only issue on the appeal is the legal basis for the plaintiff's application under s. 11(2)(c) and whether that application can be made retrospectively after the expiration of the two-year period. However, the defendants also raise a number of additional issues. By way of preliminary objection, the defendants contest the admissibility of a supplemental affidavit of the plaintiff's original solicitors sworn on 21st August 2020, that is after the date of the Circuit Court decision appealed from. In this regard the defendants point to s. 37(2) of Courts of Justice Act, 1936 which provides as follows: -

> "Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal."

I do not propose to deal with this argument in any detail for two reasons. Firstly, although the defendants are correct as regards the applicability of that section to this appeal, it is a section which allows the judge hearing the appeal to grant special leave to adduce new evidence. If necessary I am prepared to grant such leave. Secondly, although the second affidavit of the solicitor sets out the history of the proceedings throughout 2014 in some more detail than he did in his first affidavit, there is actually very little in the second affidavit which goes beyond the evidence that was before the Circuit Court when it heard the application or indeed which bears materially on the issues which the court has to determine.

12. The other argument made by the defendants is linked to their central argument and contends that the proceedings were not properly before the Circuit Court at the time it made the order extending time because the plaintiff had not filed an affidavit of verification which is required by s. 8(1) of the Defamation Act, 2009 to be sworn and filed within two months of service of the proceedings. At first blush this argument might be disposed of in a similar manner to that made under s. 37(2) of the 1936 Act as s. 8(1) of the 2009 Act allows an apparently unlimited extension of the period for filing a verifying

affidavit to be agreed between the parties or directed by the court. However, as the argument is specifically made as part of a broader argument concerning the correct interpretation and application of s. 11(2)(c) it will be dealt with in that context.

13. What is striking about the defendant's approach is that notwithstanding that the appeal is by way of a full rehearing, the focus was almost exclusively on the jurisdiction of the court to grant an extension under s. 11(2)(c) if an application for a direction in that regard is not made within the two-year period. Consequently, very little was said on the issue of the balance of justice and the question of prejudice to the parties in the event that the court finds that it has jurisdiction to make the order applied for. The consequences of this are considered further below.

Sequencing of issues

14. I do not accept the defendant's suggestion that the court deal firstly with the question of how its discretion under s. 11(2)(c) should be exercised and only if that discretion is to be exercised in favour of the plaintiff, should it then proceed to consider whether an application can be properly made outside the two-year period. In passing, I do not regard this latter issue as a purely procedural one as, if the defendants are correct, then their complaint is not merely that the plaintiff has failed to comply with the relevant procedures but that the court lacks jurisdiction to entertain an application for an extension made by the plaintiff after the expiration of the period for which an extension might be permitted. As this is a jurisdictional issue it is fundamental to whether the court has a discretion to exercise and logically falls to be determined before the court considers how to exercise that discretion rather than afterwards.

15. The plaintiff points to the decision of the Court of Appeal, Whelan J. in *Morris v Ryan* [2019] IECA 86 as authority for the proposition that the court can or should look firstly at whether it is minded to grant an extension. It is correct that the defendant in *Morris v Ryan* contended before both the High Court and the Court of Appeal than an application for a direction under s. 11(2)(c) had to be made in advance of instituting proceedings and so necessarily had to be made prior to the expiration of two years from the date of accrual of the cause of action. However, factual merits in the defendant's favour persuaded the High Court judge that an extension should not be granted regardless of whether the application had been correctly made. Whelan J., on behalf of the Court of Appeal, adopted a similar approach. In doing so she acknowledged that the jurisdictional issue was "antecedent", but in the particular circumstances where it has not been decided by the High Court at first instance it would only be decided on appeal if it were necessary to do so. It is evident that she did not regard her judgment as a binding determination as to the correct sequence in which the issues should be approached: -

> "52. The antecedent question, as identified by the respondent, as to whether an application by a plaintiff in a defamation suit for direction pursuant to s.11(2)(c)(ii) can, in the first place, be entertained by the court after the expiration of a period of two years from the accrual of the cause of action, was not determined by the High Court judge as is clear form [sic] para. 15 of the judgment. Given the approach of the trial judge and in circumstances where the said anterior issue was not

> comprehensively contested by the appellant-who was a litigant in person –with any degree of rigour it is proposed to consider in the first instance whether the trial judge correctly exercised his statutory discretion in refusing to extend the limitation period. Thereafter the antecedent question will be addressed should the need arise."

As it happened, the Court of Appeal agreed with the High Court judge's assessment of the merits of the application and, therefore, did not proceed to determine the antecedent question.

16. In my view there is an important distinction between a court deciding on the facts before it that it would emphatically decline to exercise a discretionary jurisdiction without conclusively determining whether that jurisdiction exists and a court being asked to decide positively to exercise a discretion in a litigant's favour and only then consider whether it has jurisdiction to do so. Deciding positively to exercise a discretion in circumstances such as these where the relative merits are finely balanced might impact on a court's perception as to whether it has jurisdiction as regards the discretion it has decided to exercise. It is notable that in treating the reasons for his delay offered by the appellant in *Morris v Ryan*, the Court of Appeal described the first reason as having "no stateable or rational basis", the second did "not withstand scrutiny" and there being no evidence that the applicant took any step to establish the factual basis on which the third was premised. As the explanation proffered by the plaintiff in this case for a shorter delay cannot be readily disposed of in that fashion, I think it is incumbent on the court to determine whether it has the discretionary jurisdiction which the plaintiff seeks to invoke before deciding on the facts how that discretion should be exercised.

Retrospective application for an extension of time

17. The central issue in this case concerns the correct interpretation and application of s. 11(2)(c)(ii) of the 2009 Act. The defendants who claim that the plaintiff is out of time to make any application for an extension once the two-year time limit has passed, rely on the fact that s. 11(2)(c)(ii) limits the court's jurisdiction to grant a direction to "such longer period... not exceeding two years". Consequently, on the defendant's case the application to extend time has been made outside the relevant statutory period.

18. The plaintiff on the other hand contends that the phrase "shall not be brought" in the context of a limitation provision has a special meaning. Whilst the language itself suggests a prohibition simpliciter on the bringing of proceedings, in fact centuries of common law precedent and authoritative statements from the Supreme Court make it clear that the effect of any provision in the Statute of Limitations framed in this manner is to bar the remedy and not the claim itself. The common law history of this type of statutory provision is discussed by Whelan J. in *Morris v Ryan* at paras. 41 to 44 inclusive. The legal significance of the distinction between barring the remedy and barring the claim is set out by Henchy J. in *O'Domhnaill v. Merrick* [1984] IR 151 at 158 as follows: -

> "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 expiration of the relevant period of limitation, the action will not be held to be statute barred unless the defendant elects by a plea in his defence to have it so treated. Thus, although the statute says that the action 'shall not be brought' after the statutory period, such a prohibition in a statute of limitations has been construed, not as barring a right to sue, but as vesting in a defendant a right to elect, by pleading the statute, to defeat the remedy sought by the plaintiff.
>
> So construed, the statute does not bear on the plaintiff's right to sue, either within or after the period of limitation. What it affects is a plaintiff's right to succeed if the action is brought after the relevant period of limitation has passed and if the defendant pleads the statute as a defence. In such circumstances the statute provides an absolute defence to that particular action."

The general principle that a statutory prohibition of this nature bars the remedy but does not extinguish the plaintiff's right to sue has been affirmed more recently by O'Donnell J. in *Clarke v O'Gorman* [2014] IESC 72.

19. It follows that at the time when the plaintiff's proceedings were instituted on 10th December, 2014 although the plaintiff was outside the initial one-year period applicable to the issue of defamation proceedings, he was still entitled to issue these proceedings. Indeed, he would have remained so entitled even if the proceedings had been issued a year later on 10th December, 2015 when the two-year period allowed for under s. 11(2)(c) had expired. Instead, the Statute of Limitations operates so as to create a defence, and in certain circumstances an absolute defence, to the plaintiff's claim where it was not brought within the relevant limitation period. The particular issue in this case arises because of the very unusual formulation of s. 11(2)(c) under which a limitation period is set; a further period is set within which the original limitation period may be extended and only thereafter defence to any proceedings issued outside the extended period become absolute. Thus, the dispute between the parties relates to the nature of the limitation period itself and the nature of the defendant's potential right to bar the plaintiff's remedy in respect of proceedings issued during the time when the limitation period can be extended. As this statutory formulation is unique to defamation actions no guidance can be obtained by looking at the operation of other provisions of the Statute of Limitations.

20. There are three judgments which have been brought to the attention of the court in which this issue is addressed. One of those, *Morris v Ryan*, has been discussed above. Because the plaintiff's application was regarded as distinctly unmeritorious the High Court had not determined the jurisdictional issue, as a result of which the Court of Appeal also decided the appeal without determining the jurisdictional issue.

21. The second judgment is the decision of Barton J. in *Quinn v Reserve Defence Forces Representative Association* [2018] IEHC 684. Barton J.'s decision in *Quinn* was delivered on 30th November, 2018 but is not mentioned in the subsequent judgment of the Court of Appeal delivered on 22nd March, 2019. Thus, while the issue remains "open" at Court of Appeal level, nothing said in *Morris v Ryan* casts any doubt on Barton J.'s analysis in *Quinn*.

22. In attempting to distinguish *Quinn* from the facts of this case, counsel for the defendants pointed to the very striking facts of *Quinn* in which the Statute of Limitation had not originally been pleaded by the defendants and was first raised by way of an application to amend the defence very shortly before the trial was due to proceed. Whilst Barton J. certainly decided very comprehensively in favour of the plaintiff on the facts before him, it is not correct to suggest that the legal issue now raised by the defendants in this appeal was not squarely addressed and decided by Barton J. as an antecedent issue. At the very outset of his judgment Barton J. notes the two issues the court has to decide, setting them out at para. 2 as follows: -

> "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."

Thereafter it is evident from para. 6 of the judgment that the argument made by the defendants in that case was identical to the argument now made by the defendants in this: -

> "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 judgment also records the argument made on behalf of the plaintiff relying heavily on the special meaning to be attributed to the phrase "shall not be brought" in s. 11(2)(c) of the 1957 Act based on the jurisprudence already discussed above.

23. Barton J. proceeded to determine this issue as follows: -

> "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."

Having decided that the plaintiff's right to sue was not restricted by s. 11(2)(c) and consequently that the plaintiff was not required to bring an application for an extension of time before being permitted to institute proceedings, Barton J. went on to consider the merits of the application before him.

24. Subject to one proviso I am satisfied that Barton J.'s analysis in these paragraphs is correct. Given the very long pedigree the phrase "shall not be brought" has in limitation statutes and the consistent interpretation given to that phrase both in the common law and in this jurisdiction, if the legislature had intended by s. 11(2)(c)(ii) to impose an obligation on intending litigants in defamation proceedings who had not brought their claim within the initial one-year period to obtain a direction from the court as a condition precedent to being entitled to issue proceedings then that should – and would - have been clearly stated in the provision in question. Instead, the use of commonplace statutory language must have been understood by the legislature as having its longstanding and accepted effect.

25. The point on which I may not be *ad idem* with Barton J is the following. It is not clear whether Barton J intended to lay down a general principle precluding the bringing of an application for a direction in advance of issuing proceedings as he did not need to do this in order to decide the case before him. However, the subsequent judgment of Ní Raifeartaigh J. in *O'Brien v O'Brien* [2019] IEHC 591 suggests he may actually have done this. Ní Raifeartaigh J. was dealing with an application in which the plaintiff had issued a notice of motion seeking a direction extending the time within which to bring a defamation action prior to the bringing of such proceedings. The grounding affidavit exhibited a draft Civil Bill in respect of the intended defamation action, which procedure she noted was consistent with the obiter comments of Barratt J. in *Watson v Campos* [2016] IEHC 18 and her own comments in *Rooney v Shell E&P Ireland Limited* [2017] IEHC 63. Barrett J. felt the direction ought to be sought in advance of commencing proceeding, but had observed that the relevant Rules of Court (Order 1B, Rule 3(2)) are ambiguous appearing to contemplate both possibilities.

26. However, Ní Raifeartaigh J. goes on to observe that Barton J. had "more recently held that the appropriate procedure would be to issue the proceedings and seek an extension only if and after the defendant has raised the issue of the time limit". As the application in *O'Brien* had been made before the judgment in *Quinn* had been delivered, Ní

Raifeartaigh J. did not consider that it would be fair to criticise the plaintiff for adopting the procedure that he did. She proceeded to determine the application before her notwithstanding that because proceedings had not yet been issued, it followed that no plea based on the statute had been raised in defence of them.

27. Whilst I completely accept that the effect of a statutory limitation period is not to bar an intending plaintiff's right to sue, I am hesitant to conclude that it necessarily follows that an intending litigant who wishes to bring defamation proceedings and knows that they are outside the first year of the limitation period for doing so must issue proceedings and await the Statute of Limitations being pleaded against them before they can take any step to seek the direction of the court regarding their own proceedings. Were it not for the special meaning attaching to the phrase "shall not be brought", the language used in s. 11(2)(c) and s. 11(3)(A) in terms of the court giving a direction and identifying "such longer period" would normally suggest that the direction is to be sought in advance of rather than subsequent to issuing the proceedings. There are also practical reasons why a plaintiff might wish to ascertain at the outset and before any substantial costs are incurred that they will in fact be permitted to seek the remedy they wish to pursue.

28. Therefore, in my view the key element of s. 11(2)(c) is that if a plaintiff is seeking to avail of the extended limitation period, proceedings must be issued within that period but the plaintiff is neither required to, nor precluded from seeking a direction extending the time for bringing the proceedings either prior to or simultaneously with the issuing of proceedings or, as here, retrospectively, provided the proceedings themselves are issued within the relevant period. I am not certain that Barton J.'s judgment is to be correctly read as precluding an application being made in advance of the issuing of proceedings as that issue did not arise on the facts before him. Equally of course it does not arise on the facts before me and indeed my observations in this regard might be regarded as obiter were it not for the subsequent judgment of Simons J. in *Oakes v Spar (Ireland) Ltd* [2019] IEHC 642 in which he disagreed with Barton J.'s analysis and held that an application for a direction under s.11(2)(c) must be made prior to the institution of proceedings.

29. The circumstances on *Oakes v Spar (Ireland) Ltd* were exceptional. The alleged defamation arose out of an incident at a Spar shop. The plaintiff had issued Circuit Court proceedings within time against the named defendant but had subsequently accepted that those proceedings were issued against the incorrect defendant. She then sought to institute proceedings against the proprietor of the shop in question but did not take any practical steps to do so until two days before the two-year period was about to expire. As the expiration date fell within the legal vacation there were no scheduled sittings of the Dublin Circuit Court, so the plaintiff's lawyers moved the application for a direction on an *ex parte* basis before the High Court and in the context of the extant proceedings against the incorrect defendant. The application was refused largely on the basis that it was not correctly made on an *ex parte* basis but also because the delay was "inexcusable" and the prejudice caused to the plaintiff did not outweigh that caused to the defendant.

30. I note and agree with Simon J.'s observations that s. 11(2)(c) is unique in affording the court a statutory discretion to extend a limitation period. However, the statutory provision also fixes a temporal limit to that discretion and the maximum two-year period thereby fixed is itself relatively short when compared to other limitation periods contained in the Statute of Limitations. Allowing an application for a direction to be made retrospectively in respect of proceedings which have already been issued within that two-year period is not, in my view, inconsistent with the legislative policy underlying such a short limitation period. It is also consistent with the jurisprudential understanding of a limitation period barring the remedy but not the action or the plaintiff's right to sue. Either the proceedings themselves or the motion seeking directions must be issued within the two-year period and once the litigant has allowed the first year to elapse without issuing proceedings they are then at risk of not being permitted to pursue their claim. It is, as Simons J. held, essential that an application for directions be made on notice to the defendant as, without the defendant being present, the court cannot properly conduct the balancing exercise under s. 11(3)(A). Requiring the direction extending the limitation period to have been applied for and granted *inter partes* before the proceedings can be issued and the proceedings themselves to be issued within two years, builds into the process a level of procedural delay which necessarily reduces the two year period which the Oireachtas intended should be available to a litigant, subject to the discretion of the court, to bring such proceedings. Consequently, notwithstanding Simons J.'s rejection of Barton J.'s analysis in Quinn, I am persuaded that that analysis is correct and that therefore the application made by the plaintiff was properly made under s. 11(2)(c) and the court has jurisdiction to determine it.

31. Although not central to my conclusions two further arguments made by the parties related to this issue require to be addressed and can be dealt with together. Firstly, the defendants contended that as the plaintiff had not served the verifying affidavit required under s. 8(1) of the Defamation Act, 2009 within two months of the proceedings being issued, the proceedings were not properly before the Circuit Court when that court made its order directing an extension of time on 25th June, 2019. There was a further disagreement between the parties as to why that affidavit was not before the court with the plaintiff pointing out that the defendants had refused to agree an extension of time for the purpose of filing the verifying affidavit which was otherwise sworn and ready to be filed. Presumably the plaintiff took the view that it could not bring a motion in the proceedings under s.8(5) of the 2009 Act seeking the direction of the court extending the period for filing the verifying affidavit until a direction under s.11(2)(c) had been made by the court.

32. Whilst it is undoubtedly the case that s. 8(1) of the 2009 Act requires a verifying affidavit to be sworn, I have some difficulty in linking compliance with that requirement with the entitlement to seek a direction under s. 11(2)(c) of the Statute of Limitations. The defendants place significant emphasis on this non-compliance describing the plaintiff's proceedings as "irregular" and complaining that he remains "in default", the clear inference being that these are factors which either preclude the court from making a direction extending time or, alternatively, which should be weighed in the balance of

justice (although the emphasis on behalf of the defendants was entirely on the former rather than the latter). The defendants also point to s. 8(10) of the Defamation Act, 2009 which allows the court to make an order, including an order dismissing the defamation action where there has been a failure to comply with s. 8(1). There is however, no such application currently pending before the court and in my view, it would be premature to make such an order whilst an application under s. 11(2)(c) is awaiting resolution.

33. To a certain extent the argument was linked to the complaint made by the plaintiff that the defence asserting that the plaintiff was out of time for seeking a direction was not filed until after the two-year period had expired. The plaintiff contrasted the defendants' behaviour with that of the defendants in *Morris v Ryan* where Whelan J. noted the prompt raising of the time issue in correspondence before the two-year period had expired. The defendants also point out that O. 5C, r. 3(4) of the Circuit Court Rules provides that where a verifying affidavit is delivered subsequent to the delivery of pleadings, the time prescribed for the delivery of any replying proceedings runs from the date of delivery of the verifying affidavit and not the original pleading. Thus, the defendants maintain that even though their defence was filed some considerable period after the plaintiff's Civil Bill and outside the two-year period, they were not in fact under an obligation to deliver a defence at all by reason of the plaintiff's prior failure to file a verifying affidavit.

34. I do not think that any of these issues have a material bearing on the central issue which I have just decided. In circumstances where the court has held that the plaintiff is entitled to make an application retrospectively for a direction extending the time for bringing proceedings under s. 11(2)(c), and where the plaintiff had in fact issued those proceedings well within the extendable period, complaints about the timing of the defence are largely irrelevant. Equally, given the very wide discretion given to either the parties by agreement or the court to extend the time for filing a verifying affidavit under s. 8(5) of the 2009 Act, I am not prepared to treat the absence of such affidavit as an irregularity which fundamentally undermines the plaintiff's proceedings or is fatal to this application.

Interests of justice

35. The remaining issue in this appeal is how the court's discretion under s. 11(2)(c) should be exercised. The statutory criteria guiding the exercise of this power are set out in s. 11(3A) from which it is clear that the overriding considerations are the interests of justice and the relative prejudice to each party if a direction is granted or refused. Specific regard is to be had to the reason for the failure to bring the action within the one-year period and to the extent to which relevant evidence is no longer available because of the delay.

36. The latter element can be readily disposed of. Although in applications to strike out proceedings for lengthy delay, the availability or lack of availability of witnesses and evidence is generally a central complaint, given that the time limit for bringing defamation actions is relatively short even if extended to the full two years, it is perhaps unlikely that evidence will become unavailable because of the delay in issuing proceedings. No specific complaint in that regard was made in this case. The defendants did point to the fact that the underlying issue about which the allegedly defamatory comments were made was the

purchase of office equipment in 2004. The plaintiff responded by saying, not unreasonably, that as the second defendant was discussing these issues in public in 2013 the defendants could not complain about the length of the period between 2004 and 2013. In any event, as I have noted there was no specific complaint as regards the non-availability of evidence.

37. The general approach the court should take to these provisions has been set out by Peart J. in *Taheny v. Honeyman* [2015] IEHC 883 where, when looking at the question of delay generally, he stated at paras 22 and 23: -

> "22. If the plaintiff was not time-barred for the reasons which I have just stated, he would in any event have had to satisfy the Court in relation to his reasons for delaying the commencement of his proceedings beyond one year and until the 10th March 2014. The section provides that the Court shall not give the direction sought under subsection (2) unless, firstly, it is satisfied that it is in the interests of justice to give the direction, and secondly, that the prejudice that the plaintiff will suffer by not giving the direction, will significantly outweigh the prejudice that the defendant would suffer if the direction is given.
>
> 23. That onus is discharged in my view firstly by providing an explanation which excuses the delay so that the Court could be satisfied that the interests of justice are best served by allowing the case to proceed, and by satisfying the Court additionally that the prejudice which the plaintiff will suffer by being refused a direction outweighs the prejudice which the defendants will suffer if the direction is granted. It is insufficient in my view that there is a reason *simpliciter* for the delay. The Court must consider the quality and justifying nature of the reason or reasons put forward, and also weigh the respective prejudices. These requirements are evident from the words used in section 11, subsection 3A of the Act of 1957."

38. Whilst Peart J. refers to "an explanation which excuses the delay" the subsequent judgment of Ní Raifeartaigh J. in *O'Brien v O'Brien* [2019] IEHC 591 makes it clear that the statutory criteria under s. 11(2)(c) do not import the concept of "inexcusable" delay familiar from the case law dealing with the striking out of proceedings because of delay in prosecuting them. This distinction is important as under this latter line of authority if delay itself is excusable, then the court does not have jurisdiction to strike out proceedings by reason of that delay no matter how long the delay nor the prejudice it may have caused to the defendant. It is only where the delay is inexcusable that the court proceeds to consider where the balance of justice lies. However, under s.11(2)(c) and s.11(3)(A) in every application for a direction the court must consider where the interests of justice lie and the respective prejudice as between the parties and the reason for the delay is but a factor to be taken into account in that overall consideration.

39. Ní Raifeartaigh J. was considering the issue because it had been argued that if the court were to find the reason offered to be inadequate this would bring the application to an end. This argument was premised on an extract from a judgment of Pilkington J. in *O'Sullivan v Irish Examiner Limited* [2018] IEHC 625 which she stated as follows: -

"44. 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."

The observation by Pilkington J. that the authorities open to the court did not involve findings being made of inexcusable delay is of course entirely apt in circumstances where the statutory scheme requires the interests of justice and a balancing of the respective prejudices to be considered regardless of whether the delay is to be characterised as inexcusable or not. A consideration of the reason for the failure to bring proceedings in time (i.e. the excuse) as part of a consideration of the interests of justice and of prejudice is a materially different exercise to determining, as a threshold issue, whether the delay is excusable. In any event Ní Raifeartaigh J. rejected the suggestion of a black and white approach to the court's analysis of the reasons for delay stating instead that she saw the issue more in terms of a spectrum "where the reason offered by the plaintiff might range from (at one end of the spectrum) 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 in evidential support in between the two extremes." In those circumstances a reason proffered which fell below a minimum threshold of either evidence or plausibility might not "get out of the starting blocks" whereas a reason with at least some validity would have to be factored into the overall balance.

Reason: Solicitor's Negligence

40. The relevance of all of this to the present application is that the plaintiff has offered a single reason in respect of his delay in issuing the proceedings namely the negligence of the solicitor who acted for him at the material time. The only evidence which the plaintiff has placed before the court are two affidavits of the solicitor whom it is alleged was negligent. That solicitor is not a party to these proceedings and is not in a position to contest those allegations. For reasons which were not explained to the court, the plaintiff himself has chosen not to swear an affidavit explaining his part in the instructing of that solicitor (which it is clear he did promptly after the events giving rise to the alleged defamation) nor the extent to which he followed up with the solicitor over the course of 2014 in relation to his proceedings. It may seem fairly straightforward to point to a solicitor who did not issue proceedings in time but other factors, such as the giving of instructions by the plaintiff, may have affected the solicitor's capacity to do so. In this case the solicitor wished to instruct a barrister who was already familiar with the plaintiff and the circumstances of his employment by reason of having been instructed by that solicitor in employment law proceedings taken by the plaintiff against the first defendant. The court does not know whether there was any communication between the solicitor and the plaintiff in relation to that counsel's non-availability to do the work nor whether the

plaintiff was aware of or instrumental in the instruction of an alternate counsel. In short, it is unsatisfactory that the plaintiff relies on an allegation of solicitor's negligence based solely on the evidence of that solicitor who does not in terms admit to having been negligent.

41. Whilst the position is unsatisfactory, it could not be said based on the material before the court that there is no evidential basis for the allegation. The plaintiff had instructed his solicitor within three or four weeks of the alleged defamation and a consultation had been held with his barrister within a few weeks after that. However, there is a stark contrast between the speed with which the plaintiff moved at that stage and the very lengthy periods of delay thereafter.

42. The defendants make three arguments in response concerning this reason. Firstly, they complain that there has been no finding of professional negligence made against the solicitor in question. Secondly, they complain that the evidence which the plaintiff has put before the court is vague and incomplete and does not reach the required level of specificity which the jurisprudence suggests is required. Thirdly, and most importantly they contend that reliance on solicitor's negligence as a reason for failure to institute proceedings within one year is, in principle, impermissible.

43. The defendants rely on the recent decision of Barr J. in *Proudfoot v MGN Limited* [2019] IEHC 871 in this regard. In *Proudfoot* the plaintiff wished to institute proceedings in respect of a newspaper article which had been published by the defendant suggesting that he was a drug dealer and under surveillance by An Garda Síochána. At the time the article was published the plaintiff was serving a prison sentence in France and he did not become aware of it for a number of months. On release from prison he returned to Ireland. A number of weeks after that and over nine months after the date of the offending publication he instructed a solicitor. That solicitor indicated that he was unwilling to act for the plaintiff around the time the limitation period expired. The plaintiff claimed to have been unaware of the limitation period and instructed a second solicitor who brought the application for a direction under s. 11(2)(c).

44. Significantly, Barr J. found that in principle a client could not rely on the negligence of his own solicitor who was in law the client's agent. His analysis of the issue is as follows:

> "40. Where a person instructs a solicitor, they are deemed to know the relevant limitation period, because the solicitor, who becomes their agent, is clearly aware of the relevant limitation period. It seems to me that where a person consults with a solicitor within the one-year period in relation to an allegedly defamatory statement, where the making of the statement is clear because it is in written form; the date of publication of this statement is clear because it is stated at the top of the page of the newspaper, and the identity of the defendant is clear because, even if the name of the reporter is not given, the publisher of the newspaper is well known or easily ascertainable. In such circumstances, it seems to me that a person cannot plead the negligence of their own solicitor in failing to issue proceedings within time, as a means of defeating the primary limitation period.

41. That is not to say that in all cases where a person consults with a solicitor within the one-year period they must always manage to issue proceedings within that period. There may be occasions where either the date of the making of the statement, or the identity of the person who made or published the statement, may not be readily ascertainable. …

42. However, where a person instructs his solicitor in relation to a defamatory statement where the making of the statement, the identity of the maker of the statement or publisher, and the date on which it was made, are easily ascertainable, and such instructions are given well within the one-year limitation period, it seems to me that the client cannot deprive the defendant of the benefit of the limitation period by pleading the negligence of their solicitor in failing to issue proceedings within the appropriate period. In this case, when the applicant gave his "*detailed instructions*" to Mr. A in October 2018, there was still three months within which to issue the necessary proceedings. The applicant cannot rely on the inaction of his solicitor in this regard to defeat the entitlement of the defendant to rely on the primary limitation period.

43. I am satisfied that were the Court to allow the applicant to defeat the defendant's entitlement to rely on the limitation period on this basis, this would not be acting in the interests of justice. There is no good reason why the alleged inaction on the part of Mr. A should deprive the defendant of a legitimate litigious advantage, which it has gained due to the fact that the primary limitation period was allowed to expire.

44. Support for this proposition is to be found in the judgment of the English House of Lords in *Horton v Sadler* [2006] UKHL 27, where Carswell L.J. stated:

> *'In Das v. Ganju [1999] Lloyd's Rep Med 198 at 204 and Corbin v. Penfold Metallising Co Ltd [2000] Lloyd's Rep Med 247 at 251 the Court of Appeal expressed the view that there was no rule that the claimant must suffer for his solicitor's default. If this is interpreted, as it was in Corbin, as meaning that the court is not entitled to take into account against a party the failings of his solicitors who let the action go out of time, that could not in my view be sustained and the criticism voiced in the notes to the reports of Das and Corbin would be justified. The claimant must bear responsibility, as against the defendant, for delays which have occurred, whether caused by his own default or that of his solicitors and in numerous cases that has been accepted: see e.g. Firman v. Ellis [1978] QB 886, Thompson v. Brown [1981] 1 WLR 744 and Donovan v. Gwentoys Ltd[1990] 1 WLR 472.'*

45. When a client retains the services of a solicitor, the solicitor becomes the agent of the client. It would be an astonishing proposition that when that client sues a defendant, he could plead the negligent inaction of his own agent as an answer to the defendant's assertion that the action against him is statute barred. To enable that to happen would run completely contrary to well established principles of the law of agency. The Court is satisfied that the discretion given to it under section 11(2)(c) of the 1957 Act, was not for the purpose of affecting such a fundamental change in the law, but was designed to cater for circumstances such as those

adverted to by Barrett J. in *Watson v. Campos* and for the circumstances that could be encountered with defamatory statements on the Internet, as outlined earlier in this judgement. Accordingly, for this reason, the Court is of the view that the interests of justice are not in favour of permitting the plaintiff to institute defamation proceedings at this stage against the defendant."

The plaintiff has invited the court to depart from this authority on the basis that it is incorrectly decided. The plaintiff also points to a separate decision of Ní Raiferataigh J. in *Rooney v. Shell E&P Ireland Ltd* [2017] IEHC 63 in which solicitor's negligence was also in issue. Although the judge decided the application against granting the direction she did so taking into account all of the factors including the allegation of solicitor's negligence. In fact, she found that this allegation had not been properly made out stating, *inter alia,* "a plaintiff who seeks to blame a former solicitor for an error which is relevant to his explanation for delay must do more than make a generalised assertion if he wishes the court to be satisfied of the validity of the complaint against his solicitor". The plaintiff infers from these comments that in certain circumstances it would be open to a court to take into account the allegedly negligent failure of a solicitor properly instructed by the plaintiff to institute the relevant proceedings within the appropriate period. However, the fact that Ní Raifeartaigh J. felt that there was not a sufficient evidential basis for the reason proffered by the plaintiff meant that she did not have to make a principled decision as to whether such an excuse, if made out, would be acceptable. Barr J's judgment squarely deals with that issue.

45. It is well established that a court should not readily depart from the decision of a court of equal jurisdiction. The rationale for this approach and circumstances in which it will nonetheless be appropriate to so depart are set out in the judgment of Clarke J. in *In re. Worldport Ireland Limited* [2005] IEHC 189 where he stated as follows: -

"17. I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in Industrial Services. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority v- Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced

argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered."

46. I note that this passage refers to a judge of first instance. In this case the High Court is an appellate court, the court of first instance being the Circuit Court. However, as I understand the passage the reference to judges of first instance is to make it clear that an appellate court is, of course, not bound by similar judicial comity when considering the judgments of judges of inferior courts. I do not regard the fact that I am exercising appellate jurisdiction while Barr J. was acting as a judge of first instance as having any material bearing on the applicability of the principle of judicial comity as between two High Court judges.

47. The arguments made by the plaintiff as to why *Proudfoot* should not be followed do not fall within any of the general categories outlined by Clarke J., even accepting that these categories may not be exhaustive. No clear error is identified in the judgment and, given that the judgment was delivered less than a year ago, it is not a case where the jurisprudence has changed materially in the intervening period. Instead, the approach in *Proudfoot* is described by the plaintiff as "unnecessarily prescriptive and capable of leading to harsh results".

48. This argument focuses on the fact that the defendants have included a plea of truth in their defence and the plaintiff contends that this plea should not be allowed to go unchallenged simply because of the delay in issuing the proceedings. I note in passing that the plea of truth is somewhat oddly phrased by the defendants pleading to the truth of facts which are not actually coincident with those pleaded by the plaintiff as constituting the alleged defamation. That observation aside, the plea is squarely one of truth and s. 16 of the Defamation Act, 2009 is expressly invoked. This begs the question as to whether the making of such a plea in a defence changes the parameters of the balancing exercise the court must conduct under s. 11(3)(A). More specifically, does the making of a plea of truth mean that a plaintiff who would not otherwise be able to rely on the alleged negligence of his solicitor as the reason for delay in instituting the proceedings should be permitted to do so?

49. I accept that the making of a plea of truth is a relevant factor which must be taken into account when the court is assessing the interests of justice. It is a factor which almost invariably is likely to add to the level of prejudice that a plaintiff will suffer if a direction is not given and the proceedings cannot be pursued. The plaintiff's counsel was careful to say that a plea of truth would not be dispositive of the issue in his client's favour; nonetheless the emphasis placed on it by the plaintiff meant that the court was being asked to treat it as the predominant factor and one which should, in effect, outweigh all others. I would be hesitant to accord a plea under s. 16 of the 2009 Act such singularity in the context of s. 11(3)(A) of the 1957 Act not least because it could lead to an inference that a defendant raising a plea of truth was thereby waiving any entitlement it

might have to rely on the Statute of Limitations. Manifestly, this is not the way in which this section is intended to operate.

50. Lest it be thought that the application of *Proudfoot* in these circumstances is unduly prescriptive or harsh, it is appropriate to indicate also that I am not satisfied that the plaintiff has discharged the evidential burden which lies on him in seeking a direction under s. 11(2)(c). As was observed by Ní Raifeartaigh J. in *Rooney v Shell E&P Ireland* Limited [2017] IEHC 63: -

> "… 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.
>
> 22. 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. In the present case, the plaintiff has provided minimal explanation and very little detail as to the reason for not issuing before 7th March, 2015, which he blames on an error made by his former solicitor as to the date from which the period of one year is to run."

As Ní Raifeartaigh J. observed in the same case, the plaintiff's failure to explain to the court his interactions with the solicitor whom he had instructed to bring proceedings on his behalf during the period of the delay "sits uneasily with his assertions concerning the grave nature of the defamation and the serious impact it had upon him". Likewise, in this case there is a singular absence of information before the court as to how a plaintiff who moved very quickly to instruct his solicitor in the immediate aftermath of the alleged defamation managed to allow almost a complete year to elapse thereafter before proceedings were issued. The court has no knowledge at all of the extent of the interactions, if any, between the plaintiff and his solicitor after January 2014. It may be that there is an explanation, but it is not one of which there is evidence before the court.

Prejudice:

51. Finally, the defendant points out that if there was in fact negligence on the part of the solicitor, then the plaintiff has a cause of action against the solicitor which reduces any potential prejudice to the plaintiff. The plaintiff disagrees on the basis that a claim in negligence against the solicitor is fundamentally different to a claim in defamation against the defendants and would not serve to vindicate the plaintiff's reputation in the same manner. It is also suggested that the solicitor, having acted on behalf of the plaintiff, would be aware of the weaknesses in the plaintiff's claim and thereby in a better position to defend it. I am not convinced of the plaintiff's position in this regard. In order to succeed in an action for negligence against a solicitor who has failed to institute proceedings within the relevant limitation period, a litigant must establish on the balance of probabilities that the original proceedings would have been successful. The tort of negligence is not established just because the deadline for issuing proceedings has been missed; damage must be sustained as a consequence. Therefore, in order for the plaintiff to succeed in an action for professional negligence against the solicitor in respect of whom

he makes that complaint, he must establish on the balance of probabilities that the words complained of were defamatory. I accept that an action in defamation is not solely or even mainly about compensation, but I do think that the requirement in the negligence proceedings to establish the likelihood of the defamation proceedings succeeding provides a significant measure of vindication for the plaintiff's reputation.

52. The prejudice identified by the defendants is limited to two matters. The first is to contrast the availability of an alternate remedy to the plaintiff with the "all or nothing" situation in which the defendants find themselves. As counsel for the defendants put it rather pithily – the plaintiff has an alternate remedy, the defendants do not. The second is to point to the personal nature of the second defendant and the strain on her of being subject to defamation proceedings some considerable time after the exchanges to which the proceedings relate. In this regard a contrast is drawn with the prejudice to the plaintiff of comments made orally to a limited group of people and without widespread publication. The court queried whether it was open to it to adopt an approach similar to that taken by the Supreme Court in *McBrearty v North Western Health Board* [2010] IESC 27 where, in an application to strike out proceedings for delay, a distinction was drawn between the position of the personal defendants and that of the institutional defendant and the plaintiff was allowed to proceed against the latter but not the former. However, neither party was enthusiastic about the adoption of such an approach here, so the court will not proceed to consider whether s.11(2)(c) allows a direction to be given which permits the proceedings to be brought or to be proceeded with against some but not all of the intended defendants.

53. Overall, and apart altogether from the issue of whether a plaintiff can rely on his own solicitor's negligence, I find the question of prejudice relatively finely balanced as between the parties. 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.

Conclusion:

54. The upshot of all of this is as follows. Firstly, I regard myself in principle as bound by *Proudfoot* to hold that the plaintiff cannot rely on an allegation of negligence as against his own solicitor as the reason for his failure to institute proceedings in time. Secondly, even if I did not regard myself so bound, I am not satisfied on the evidence that the plaintiff has made out a sufficiently clear and cogent case or has provided the court with all relevant information, including information as regards his own actions during the relevant period, for the court to be satisfied that the allegation of solicitor's negligence

has been made out to a degree which would justify imposing on the defendant the obligation to defend the proceedings. Thirdly, if the plaintiff is correct as regards his former solicitor, then he has a cause of action against that solicitor which, whilst not on all fours with his intended proceedings against the defendants, does provide him with a potential remedy. Consequently, I am not satisfied that the plaintiff has established that the prejudice to him in not granting the direction significantly outweigh that to the defendants in allowing the action to proceed.

55. In all of the circumstances I will refuse the direction under s. 11(2)(c), allow the defendant's appeal and set aside the order of the Circuit Court.