Unapproved

THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 273
Record Number: 2019/400

Faherty J.
Ní Raifeartaigh J.
Power J.

BETWEEN/

CIARA GANNON MAGUIRE

PLAINTIFF/APPELLANT

- AND -

EILEEN O'CALLAGHAN

DEFENDANT/RESPONDENT

- AND -

THE ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Ms. Justice Power delivered on the 6th day of October 2020

1. This appeal raises the interesting question of whether there is a bar to a court ordering the trial of a preliminary issue in circumstances where the constitutional validity of legislation will be raised in the proceedings. In cases where the trial court will have to consider the constitutional principle of avoidance of declarations of invalidity, the question to be addressed is whether such matters must be determined only in the context of a unitary trial and not by way of the trial of a preliminary issue.

2. In the High Court, Noonan J. heard and determined the respondent's application for the trial of a preliminary issue as to whether the appellant's claim was statute barred by reason

of s. 9(2)(b) of the Civil Liability Act 1961 (hereinafter 'the Act') and, if so, whether that provision of law was repugnant to the Constitution. In a judgment delivered on 28 June 2019, he ruled that the interests of justice favoured the granting of the respondent's application. It is against that judgment that the appellant brings this appeal.

Background

3. The background facts are set out in the judgment of Noonan J. and may be summarised as follows. The appellant was born on 11 October 1997. When she was 15 years old, she attended Dr. O'Callaghan on 5 March 2013 complaining of a lump in her neck. She alleges that Dr. O'Callaghan indicated that it was just tissue and nothing to worry about and that he referred her to Temple Street Hospital for a blood test. She attended for the blood test and claims that, thereafter, she heard nothing further. Later that year, on 30 September 2013, Dr. O'Callaghan died. When the appellant was seen by another general practitioner ('GP') on 25 April 2015, still complaining of the lump in her neck, she was referred for an urgent appointment to the Mater Hospital. A biopsy was taken, and the appellant was diagnosed with papillary thyroid cancer which had spread to her lymph nodes. She was admitted, immediately, for urgent surgery and, thereafter, she underwent radiotherapy.

4. The respondent is the widow of the late Dr. O'Callaghan and is the executrix of his estate. In defending the proceedings, the respondent pleads that the appellant's claim is statute barred by reason of the operation of s. 9(2)(b) of the Act. Section 9(2)(b) provides that no proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless they were commenced '*within the relevant period or within the period of two years after his death, whichever period first expires'.*

5. The significant dates in terms of the legal issue raised in the defence are as follows. The second anniversary of Dr. O'Callaghan's death was 30 September 2015. On 11 October

2015 the appellant attained her majority. She claims that summer 2016 constitutes her date of knowledge for the purposes of the Statute of Limitations (Amendment) Act 1991. On 13 April 2017 she issued a personal injury summons against the respondent. She, therefore, issued these proceedings within two years of her stated date of knowledge and within two years of attaining her majority but *not* within two years of the date of the death of Dr. O'Callaghan.

6. In her reply to the defence raised, the appellant denies that the claim is statute barred. She further claims that it is unconscionable on the part of the respondent to rely on the limitation period contained in s. 9(2)(b) of the Act and that the respondent is estopped from so doing. Interpreting s. 9(2)(b) in a manner that is neither repugnant to the Constitution nor incompatible with the State's obligations under the European Convention on Human Rights ('the Convention'), she argues, obliges the court to find that this section is inapplicable to the appellant's claim and/or does not bar that claim as her 'date of knowledge' within the meaning of the Statute of Limitations (Amendment) Act 1991 came on a date more than two years after the death of Dr. O'Callaghan. In the alternative, the appellant pleads that if s. 9(2)(b) of the Act bars her right of action, then the said statutory provision is invalid having regard to the provisions of the Constitution and is, therefore, void and has no application to the defence of the proceedings. Furthermore, she pleads that if s. 9(2)(b) of the Act bars her right of action and if the section is not found to be repugnant to and/or incompatible with the Constitution, then the appellant seeks a declaration under s. 5 of the European Convention on Human Rights Act 2003 that s. 9(2)(b) of the Act is incompatible with the State's obligations under the Convention and she seeks damages and ancillary reliefs pursuant to the 2003 Act by virtue of the alleged breach and incompatibility.

High Court

7. In view of her defence to the claim, namely, that the proceedings are statute barred, the respondent brought an application before the High Court pursuant to O. 25 of the Rules of the Superior Courts ('RSC'). Order 25 provides: -

> *"1. Any party shall be entitled to raise by his pleading any point of law, and any points so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.*
>
> *2. If, in the opinion of the Court, the decision of such points of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court may thereupon dismiss the action or make such other order therein as may be just."*

8. Before the High Court the respondent submitted that since the proceedings were issued more than two years after Dr. O'Callaghan's death, they were statute barred by virtue of s. 9(2)(b) of the Act. She argued that the constitutionality of that section had previously been upheld by the Supreme Court in *Moynihan v. Greensmyth* [1977] I.R. 55. Consequently, the appellant's case was, *prima facie,* statute barred. This was a discrete issue of law which, in the respondent's view, could be conveniently tried by the court as a preliminary issue without her being exposed to the cost and inconvenience of a far lengthier medical negligence trial.

9. The appellant objected and contended that s. 9(2)(b) of the Act was unconstitutional and that such a constitutional issue could only be tried after a trial on the facts of the case and based on oral evidence. In her view, it would be unconscionable and an abuse of process for the respondent – who is, in reality, an insurance company – to rely upon s. 9(2)(b) in circumstances where there was, in fact, no contest between the appellant and the estate of the late Dr. O'Callaghan. The real contest, she argued, was with an insurance company and, consequently, the issue sought to be agitated on foot of the respondent's motion was moot. The appellant

further argued that a constitutional interpretation of the relevant section requires that it be read as being subject to the date of knowledge provisions contained in the Statute of Limitations (Amendment) Act 1991. She further contended that if the section is, in fact, constitutionally valid then it is incompatible with the State's obligations under the Convention. It was agreed between the parties that the Convention point was an issue which could only be considered after the exhaustion of other remedies and that it did not fall to be determined as part of the preliminary issue.

10. The trial judge considered ss. 8 and 9 of the Act and he reviewed the relevant authorities. He noted that in *Moynihan v. Greensmyth*, both the High Court and the Supreme Court had upheld the validity of s. 9(2)(b) of the Act. In *Moynihan*, the plaintiff was a sixteen-year old passenger in a car driven by William Greensmyth which collided with a bridge on 6 August 1966. The driver was killed in the accident and the defendant was his personal representative. On 5 August 1969 proceedings were issued by way of a plenary summons. The plaintiff obtained her majority on 16 April 1971 (the age of majority was then twenty-one years). The defendant pleaded that the claim was statute barred pursuant to s. 9(2)(b) of the Act, having been instituted more than two years after Mr. Greensmyth's death. In reply, the plaintiff claimed that s. 9(2)(b) was invalid having regard to the provisions of the Constitution. The case was determined by way of trial on a preliminary point of law arising in advance of the plenary hearing. Before the Supreme Court the plaintiff had contended that, as a person suffering from a disability (which, under the Statute of Limitations 1957, included infancy) at the date of the accident, s. 9(2)(b), in its effect, constituted an unjust attack on her property rights. The Supreme Court rejected this argument with O'Higgins C.J. (at p. 72) noting that if the period of infancy were to form part of the period of limitation then the danger of stale claims being brought would be very real and could constitute a serious threat to the rights of beneficiaries of an estate. The alternative was to apply a period of limitation which would have general application. It had to be either one

or the other—a compromise was not possible. The Supreme Court held that it has not been shown that s. 9 of the Civil Liability Act, 1961 was repugnant to Article 40, s. 3, sub-s. 2 of the Constitution. The plaintiff thus failed in her claim.

11. Whilst not arguing that *Moynihan* was wrongly decided, the appellant submitted that in the intervening years since *Moynihan* (42 in total), judicial thinking had advanced, considerably, particularly on the question of the trial of a constitutional issue by way of a preliminary point of law. She argued that *Moynihan* was not consistent with later authorities such as *Murphy v. Roche* [1987] I.R. 106 and *McDaid v. Sheehy* [1991] 1 I.R. 1.

12. In *Murphy v. Roche*, the plaintiff was a member of an unincorporated club and whilst on its premises, on to which he had paid an admission fee, he suffered an injury. He sued the club for negligence and was met with the defence of estoppel based on his membership of that club. In reply, he denied that he was so estopped, and he pleaded further that if he were so estopped at common law, then such estoppel was repugnant to the Constitution. He brought an application to the High Court pursuant to O. 25 RSC. The High Court directed that the estoppel issue and, if necessary, the second special (constitutional) issue be tried by a judge before the trial of the action. The Attorney General, having been served with the High Court motion, appealed against that order and objected on the grounds that it was inappropriate to have a question of constitutional law determined in this way when it might ultimately prove to be moot if the plaintiff failed on the issue of negligence.

13. The Supreme Court, in varying the order of the High Court, held that the issue of estoppel should first be determined by a judge prior to the trial of the action. However, it would adjourn until the final determination of the first issue, the hearing of the appeal on the constitutional issue. Finlay C.J., who delivered the judgment of the Supreme Court, held that the Court should decline to decide any question of law in the form of a moot. Where the issues between the parties could be disposed of by the resolution of an issue of law (other than

constitutional law), then the Court should consider the legal issue first and, if that proved to be decisive, it should decline to express any view on the constitutional one. This principle whereby the constitutional issue should always be the last issue falling for determination has been characterised as 'the principle of avoidance'.

14. The principle was considered again by the Supreme Court in *McDaid v. Sheehy* in which the court declined to follow its earlier judgment in *McDonald v. Bord na gCon* [1964] I.R. 350. In *McDonald* the Supreme Court had held that the constitutional validity of the Greyhound Industry Act 1958 *was* a matter that could be tried, appropriately, as a preliminary issue without evidence. Having so tried the issue, it found in its subsequent decision in *McDonald v. Bord na gCon (No. 2)* [1965] I.R. 217 that s. 47 of the 1958 Act was constitutional. This left the plaintiff's other allegation that even if the statutory provision was constitutional the procedures adopted by Bord na gCon were unlawful, to be determined, subsequently, by the trial judge. The Supreme Court in *McDaid v. Sheehy* noted, in effect, that this approach entailed putting the proverbial cart before the horse. The facts, however, in each case were different. Finlay C.J. in *McDaid* noted that the judgment of the majority in *McDonald* appeared to be directed entirely towards questions of convenience in the procedures and not to the question of the appropriateness of trying the constitutional validity of an Act as a moot point. If the plaintiff in *McDonald* had succeeded on the constitutional invalidity claim, then he would have succeeded in the entirety of his action because it would then have been unnecessary to have any trial of the issue as to whether the procedures under the 1958 Act were improper. In that sense, it was more convenient to try the constitutional point before the trial. In *McDaid,* however, Finlay C.J. observed that the *McDonald* case constituted something of '*a break in what otherwise appears to be a relatively consistent attitude*' of the Supreme Court to the question under consideration and he felt obliged to refuse to follow it. Particular reliance was placed by the appellant upon the *McDaid* judgment

to support her position that since the constitutional validity of statutory provisions could arise in her case then that issue should only fall to be determined after the trial of the issues.

15. Noonan J. did not accept the appellant's contention that *Moynihan* (which had tried the question of constitutional validity as a preliminary issue) was overruled, expressly or implicitly, in later cases, particularly, in *McDaid*. In his view, the principle which the court was enunciating in each of those subsequent cases was that the constitutional issue should be considered only after the non-constitutional issues had been determined as the latter might be dispositive of the matters. It appeared to him that this was the conclusion of both *Murphy* and *McDaid*, the court in the latter having declined to follow *McDonald* for that very reason. He saw no incompatibility between *Moynihan* and the later cases relied upon by the appellant and noted that *Moynihan* was consistently followed in a number of subsequent judgments, including, *McCullough v. Ireland* [1989] I.R. 484; *Keane v. Western Health Board* [2006] IEHC 283 and [2006] IEHC 370, [2007] 2 I.R. 555; and *Prendergast v. McLaughlin* [2009] IEHC 250, [2011] 1 I.R. 102.

16. On the question of the necessity of having facts agreed in advance of the trial of a preliminary issue, Noonan J. accepted that since *McCabe v. Ireland* [1999] 4 I.R. 151 it has been held that preliminary issues of law cannot be tried *in vacuo* and must be tried in the context of established or agreed facts. The appellant had argued that since her date of knowledge was not agreed or was only agreed for the purposes of the preliminary issue, the respondent's application to the High Court ought not to be allowed. Noonan J. did not consider that the appellant's date of knowledge was relevant because if the two-year limitation period from the date of Dr. O'Callaghan's death did not apply, then she had issued proceedings in time, that is, within two years of obtaining her majority. Even if her date of knowledge was relevant then, having regard to the principles enunciated by Lynch J. in *McCabe*, it was open to a defendant to agree facts for

the purpose of the preliminary issue only, without prejudice to its right to contest them at trial. The respondent had agreed the date of knowledge for the purpose of the preliminary issue.

17. Noonan J. also rejected an argument canvassed by the appellant to the effect that the court should not order a trial on a point of law which is, in effect, moot—the mootness allegedly arising from the fact that the estate of Dr. O'Callaghan had no real interest in the proceedings and that the real contest was with his insurers. The trial judge considered that this was an issue yet to be decided and, at a minimum, it was arguable that the matter was not moot.

18. In the light of his findings, Noonan J. was satisfied that there was no impediment to the determination of the preliminary issue as sought by the respondent. He considered the principles summarised by McKechnie J. in *Campion v. South Tipperary County Council* [2015] IESC 79, [2015] 1 I.R. 716 as '*helpful guidance*' on the relevant criteria to be applied in considering applications for trials of preliminary points of law under O. 25, noting that in subsequent decisions of the Supreme Court those principles had been applied. In *O'Sullivan v. Ireland* [2019] IESC 33 Charleton J. had endorsed the principle that a unitary trial would, in the normal way, be the default option and he approved the judgment of Clarke J. (as he then was) in *Weavering Macro Fixed Income v. PNC Global Investment* [2012] IESC 60, [2012] 4 I.R. 681 where Clarke J. had stated (at pp. 699 to 700): -

> *"As is clear from those authorities the trial of a preliminary issue under the rules is concerned with circumstances where it is possible to separate out a legal issue which can be determined on the basis of facts agreed either generally or for the purposes of the preliminary issue. It is also possible, under O.35, to have an issue of fact tried where the case will almost completely depend on a resolution of that factual question. What is, however, clear from all the authorities is that the trial of an issue, formally separated out as a preliminary issue in the sense in which that term is used in the Rules, is a practice which is to be adopted with great care by virtue of the experience of the courts that 'the longest round is often the shortest way home'."*

19. Noting that the respondent was facing what was likely to be a relatively lengthy trial of a medical negligence action that would probably involve issues of liability, causation and

quantum, Noonan J. considered that very significant costs were likely to be involved. If the issues around the statutory defence were dealt with by way of a trial of a preliminary issue, such a procedure was likely to be of a very limited duration. In circumstances where the respondent claimed that the matter is statute barred, on its face, based on a provision which has already been found by the Supreme Court to be constitutionally valid and where the statutory point, if decided in the respondent's favour, would be decisive for the outcome of the case, Noonan J. found that the interests of justice must favour the granting of the application. Accordingly, he directed that a preliminary issue be tried, the question of such issue to be:

(i) whether s. 9(2)(b) of the Act operates to bar the appellant's claim; and

(ii) if so, whether that section is unconstitutional.

He further ordered that the issue identified at (i) be determined before the issue identified at (ii) and that the issues be tried on the statement of facts as agreed between the parties. Before the High Court the Attorney General had indicated that he did not propose participating in the trial of the first issue.

Grounds of Appeal

20. Extensive grounds of appeal were set out in the Notice of Appeal, many of which overlap. In summary, the appellant claims that the trial judge erred in fact and in law by: -

- ordering the trial of a preliminary issue in proceedings raising an issue over whether s. 9(2)(b) of the Act is invalid having regard to the provisions of the Constitution (ground 1) and failing to have any or adequate regard to the necessity for the hearing of a constitutional challenge to the validity of legislation to go to trial as a plenary hearing, based on *viva voce* admissible evidence with the Attorney General as a notice party (grounds 2, 12, 23, 31 and 32);

- finding that the decision in *Campion*, which involved no constitutional challenge to legislation, is applicable to circumstances where a trial of a preliminary issue involving a constitutional challenge to legislation is directed (grounds 3, 5, and 6);
- failing to have regard to the fact that having litigation concerning the constitutional validity of legislation determined in this manner goes against public policy (grounds 4, 7, 9);
- failing to have regard to the fact that the trial of the preliminary issues will complicate the appellant's ability to have her proceedings tried in a satisfactory manner, in circumstances where the issues of alleged invalidity of the impugned provision would have to be tried with no defendant and just the Attorney General as a notice party (who would not be bound by the statement of core facts agreed between the parties), thereby compromising the appellant's ability to establish facts, including, by way of cross-examination of the respondent as the opposing party (grounds 8, 10, 11, 13, 19, 20 and 28);
- failing to have any regard to the fact that the Attorney General had indicated that he would not participate in the trial of the first preliminary issue concerning the applicability of s. 9(2)(b) (ground 15);
- finding that the first preliminary issue could be determined without the court having before it arguments about whether the respondent's interpretation of s.9(2)(b) was in breach of the Constitution and without the Attorney General's presence (which is required to deal with the O. 60, r. 2 Notice), in circumstances where the court's constitutional interpretation may be informed by its 'judicial creativity' and/or application of principles of interpretation (grounds 14, 16 and 17);
- failing to find that the time bar argument advanced by the respondent in substance is a *jus tertii* claim, in circumstances where the assets of the professional indemnity insurer are at risk rather than the assets of the estate (grounds 18 and 19);

- wrongly interpreting *McDaid v. Sheehy*, where the dissenting judgement of Ó Dálaigh C.J. in *McDonald v. Bord na gCon*, permitting an action to proceed in the ordinary way as a unitary trial with *viva voce* evidence, was approved (ground 21) and the procedure adopted in *Moynihan v. Greensmyth* was expressly or by implication or *de facto* overruled (grounds 26 and 30);
- finding that the approach adopted in *Moynihan v. Greensmyth* ought to be followed or was correct and failing to note that such was not followed in subsequent challenges to the constitutional validity of legislation (grounds 22 and 25);
- failing to have regard to the fact that the three decisions following *Moynihan v. Greensmyth* (namely, *McCullough v. Ireland*, *Keane v. Western Health Board* and *Prendergast v. McLaughlin*) did not raise a constitutional challenge nor have the Attorney General as a notice party and contradictor in reply to an O. 60, r. 1 Notice (ground 24);
- failing to have regard to the practice of the superior courts in reaching a constitutional issue last (ground 27);
- failing to have regard to the fact that a constitutional challenge in plenary proceedings can only take place after the sworn evidence of the parties has been received and failing to apply the decision of the Supreme Court in *RAS Medical Ltd. v. The Royal College of Surgeons in Ireland* [2019] IESC 4 requiring a trial to occur on admissible evidence (ground 29); and,
- taking into account the duration of other medical negligence actions rather than the appropriate evidential procedures to determine a challenge to the constitutional validity of legislation (ground 33).

Parties' Submissions

Appellant's Submissions

21. The appellant submits that the issue in this appeal concerns the mode and manner in which a constitutional challenge should come before the superior courts and the application, in that context, of O. 60, rr. 1 and 2 RSC. Her submissions (including additional submissions filed in response to the Attorney General's position) may be summarised as follows.

22. Prior to the addition of O. 60, r. 2 to the RSC 1986 there was no equivalent provision in the RSC 1962. Before this, a question of constitutional interpretation, short of an invalidity challenge, could be raised in litigation without the presence of the Attorney General, as *per Murtagh Properties v. Cleary* [1972] I.R. 330. In the instant case, the re-amended O. 60, rr. 1 and 2 Notice, filed on 9 May 2019, was served on the Attorney General but not served further to the direction of the High Court.

23. The preliminary issue procedure applied by the High Court was incorrect. Based only on brief facts, which may be disavowed if the respondent were successful and then departed from the proceedings, the appellant could be left with an impossible evidential burden. The assets engaged in this action are those of the insurers and re-insurers indemnifying Dr. O'Callaghan's former medical practice and are not the family assets in the estate of Dr. O'Callaghan.

24. The correct procedural approach that should be taken in constitutional challenges was correctly identified in *McDaid v. Sheehy* and this precludes the preliminary trial of a constitutional issue. The consequences of this decision, which overrules the majority decision in *McDonald v. Bord na gCon*, have yet to be fully considered. Insufficient notice was paid to this by the trial judge. The dissenting judgment of Ó Dálaigh C.J. in *McDonald* should now be followed. It was expressly approved of in *McDaid v. Sheehy* which explicitly preferred a plenary hearing rather than a preliminary hearing of a constitutional issue. The dissenting judgment of Ó Dálaigh C.J. in *McDonald* has, therefore, been revived as the determining judgment on how a

court should approach a constitutional challenge. Insofar as the Attorney General as the *legitimus contradictor* is concerned, the closure of the pleadings requires the service of a reply to the O. 60 Notice and a reply to the O. 60A Notice and, if this Court should so direct, his participation in any preliminary issue.

25. Furthermore, the appellant submits that the practice and procedure adopted in *Moynihan v. Greensmyth* is no longer good law. The facts upon which the court made its decision in *Moynihan* are unsatisfactory. The judgment was made at a time when there were very few of the validity challenges to legislation which are now often before the superior courts. Further, the issue of *locus standi* was not addressed by the Supreme Court until its decision of *Cahill v. Sutton* [1980] I.R. 269.

26. The appellant cannot identify any constitutional challenge to the validity of legislation in the manner described in *Moynihan,* based upon brief, agreed facts and without *viva voce* evidence. The judgments relied upon by the respondent do not involve a constitutional validity challenge. The recent judgment of the Supreme Court in *RAS Medical Ltd. v. The Royal College of Surgeons in Ireland* emphasises the importance of the standard of the evidence that is before the courts on which findings of facts may be made.

27. The appellant was concerned that although the Attorney General is the *legitimus contradictor* on all issues concerning constitutional interpretation, the indications were that he would not engage with the preliminary issue unless the claim was found to be statute barred. While the High Court did not direct that an O. 60, r. 2 Notice be served on the Attorney General, such an order was being sought in this appeal, if necessary, along with an order directing the service of a Reply on the part of the Attorney General.

28. Determining the preliminary issue will disadvantage the appellant in trying to establish evidence if the Attorney General is a stranger to the factual matrix in the hearing of the constitutional issue. The absence of recent constitutional challenges which adopt the *Moynihan*

v. Greensmyth approach is, therefore, significant. *Murphy v. Roche* and *McDaid v. Sheehy* were recently relied upon in *Pharmaceutical Assistants Association v. The Pharmaceutical Society of Ireland* [2019] IEHC 663 wherein the court refused to direct the hearing of a preliminary issue in judicial review proceedings.

29. The constitutional challenge could be avoided if s. 9(2)(b) of the Act were to be interpreted in a constitutional manner. A comparable claim on the facts of the appellant's case could be initiated before the courts of England and Wales. The absence of a statutory equivalent to s. 9(2)(b) in other common law jurisdictions evidences a lack of justification for this arbitrary time limit.

30. The real issue between the parties is a claim against the insurers who indemnify the medical practice of the late Dr. O'Callaghan. The solicitors on record for the respondent specialise in medical insurance litigation. The assets engaged in this action are those of the insurers / re-insurers and are not the family assets of Dr. O'Callaghan's estate. Therefore, the preliminary issue on a point of law is moot. The appellant submitted that the respondent does not have the standing to plead that the funds of the insurer are not engaged. If successful in this action, any compensation and costs would be paid by an insurer and not by Dr. O'Callaghan's estate.

31. The insurance aspect in *Moynihan* has not been sufficiently considered. The effect of the enactment of s. 9(2)(b) was to impose a shorter limitation period for causes of action which survive against the estate of deceased person. Earlier mandatory insurance provisions for third party liability in road traffic cases continue to apply subject to s.9(2)(b) of the Act. The failure to take account of the insurance position of the deceased and the indemnity provisions in place was an oversight on the part of the trial judge. The replacement of the common law maxim *actio personalis moritur cum persona*, which prevented a personal representative from suing on behalf of the estate, should not vicariously deprive a plaintiff of the benefit of professional indemnity

insurance, the purpose of which is to indemnify a medical negligence claim against a doctor who has died.

32. The Attorney General should engage with the issue of a constitutional challenge under O. 60, r. 2. If the first preliminary issue is decided against the appellant, she will face impossible evidential issues if obliged to litigate the constitutional challenge against the Attorney General without a defendant present. The trial judge's ruling that the Attorney General does not have to deliver a Reply to the O. 60, rr. 1 and 2 Notice unless the appellant's claim is time barred allows the Attorney to argue that the appellant must establish that she has *locus standi* by proving that clinical negligence caused her personal injuries. It is inappropriate for the Attorney to agree facts for the purpose of a constitutional challenge. There is every likelihood that he will disavow the facts agreed between the respondent and appellant.

33. The issue to be determined is a constitutional interpretation of Part II of the Act and the abolition of the common law maxim *actio personalis moritur cum persona*. The question which should arise is how s. 9(2)(b) can be interpreted in a constitutional sense so as to avoid reaching a validity challenge. It is a question of interpretation on which the Attorney General as the *legitimus contractor* should be heard under O. 60, r. 2. Further, the matrix of facts proposed for the preliminary issue cannot be treated as a true matrix of facts for a constitutional challenge and it is against public policy to determine such an issue on facts which may turn out to be a moot. The appellant's reliance on her date of knowledge under the Statute of Limitations (Amendment) Act 1991 raises an issue of general importance as a question of statutory interpretation.

34. The principles set out by the Supreme Court in *Campion v. South Tipperary County Council* regarding the relevant considerations that arise when determining whether it is appropriate to direct the trial of a preliminary issue are not applicable to litigation involving issues of constitutional interpretation and a constitutional challenge. Further, the instant tripartite

situation is very different to the situation in *Campion* which involved complicated litigation concerning planning permission. If the respondent succeeds in the first preliminary issue, this action will continue in a piecemeal fashion. The preliminary issue ordered to be tried in this case will lengthen the trial and will lead to duplication of hearings rather than simplification or efficiency. Gross prejudice will be caused to the appellant in her attempt to achieve just compensation for her misdiagnosis.

35. The preferred approach was the one taken in *Reid v. Industrial Development Agency* [2015] IESC 82, [2015] 4 I.R. 494, wherein all legal issues were heard in a unitary trial and a constitutional challenge was unnecessary as the matter was determined on administrative law grounds. *Riordan v. An Taoiseach (No. 2)* [1999] 4 I.R. 343 demonstrates that the Supreme Court has repeatedly held that a challenge to the validity of legislation is preferable when presented to the court in plenary proceedings. In *O'Sullivan v. Ireland,* [2019] IESC 33 Charleton J. considered that case to be illustrative of how a departure from the unitary trial principle had not aided the administration of justice.

36. The double construction rule of *McDonald v. Bord na gCon (No. 2)* is engaged and mandates the court to review the legislation and the words used to see if a constitutional interpretation may be given to the legislation, thereby avoiding a constitutional challenge. In the instant case, if the respondent were successful on the preliminary issue, she would then depart from the proceedings leaving the evidential burden on the appellant to make her claim against the Attorney General. Procedurally, this would be unfair. The order of the trial judge puts '*the cart before the horse*' as the court will decide whether a constitutional interpretation of a statutory provision is possible without first deciding whether the impugned section is, in fact, repugnant to the Constitution. Due to the Attorney General's non-participation in the first hearing, the court will thus be deprived of his views on whether an innovative interpretation of the impugned provision was possible thus obviating the necessity for a determination on the second issue. The

appellant's hands will then be tied by the doctrine of *res judicata.* The flawed trial of a preliminary issue will mean the appellant cannot truly obtain a fair trial. The Attorney General should participate in any hearing where the court will be asked to interpret legislation in a manner departing from its plain meaning. It is not appropriate that this hearing should precede the plenary constitutional challenge.

37. The appellant's constitutional validity challenge to s. 9(2)(b) of the Act is limited to the words '*or within the period of two years after his death, whichever period first expires*'. These words:

(i) infringe the appellant's right of access to the courts in breach of Article 40.3.1° and 40.3.2° of the Constitution;

(ii) restrict, disproportionately, her right of access to the courts to litigate a claim which she commenced within her 'date of knowledge' in breach of Article 40.3.1° and 40.3.2° of the Constitution;

(iii) fail to repeal the common law doctrine of *actio personalis moritur cum persona* in a proportionate manner, that respects the original abolition of the doctrine, in breach of fair procedures and natural and constitutional justice; and,

(iv) fail to respect the appellant's property rights in breach of Article 15.4.1°, Article 40.3.1° and 40.3.2° and Article 43 of the Constitution.

38. If necessary, the appellant also seeks a declaration of incompatibility regarding s. 9(2)(b) of the Act under s. 5 of the European Convention on Human Rights Act 2003 under the amended O. 60A Notice.

39. The administration of estates does not require a non-extendable period of two years from the date of death. The executrix, under s. 49 of the Succession Act 1965, could have published a statutory notice identifying a time limit, after which claims not brought to her attention could not be pursued. The actual effect of the time limit in s. 9(2)(b) serves no

legitimate purpose but only precludes the appellant from her right of access to the courts in circumstances where she was a minor when events originally occurred and had no knowledge of her claim in negligence until after s. 9(2)(b) purported to bar her claim.

40. Moreover, the newly enacted s. 21 of the Consumer Insurance Contracts Act 2019 (not yet commenced into law) provides for the direct right of action against an insurer in a case where the wrongdoer is deceased. In the appellant's view, to allow an interpretation of the impugned provision which would permit an insurer to invoke a time bar designed specifically to deal with a (phantom) problem to delay concluding the administration of an estate, would be absurd and would confer a windfall benefit on an insurance company.

41. The appellant seeks the following orders:

(a) an order joining the Attorney General as a Notice Party to the appellant's appeal, whether by way of the Court directing the service of an O. 60, rr. 1 and 2 Notice, or within the inherent jurisdiction of the Court;

(b) an order directing the Attorney General to deliver a reply to the O. 60 Notice and a reply to the O. 60A Notice already served so the pleadings may close;

(c) an order allowing the appellant's appeal and directing the plenary hearing of her claim against the respondent with the Attorney General as Notice Party; and

(d) an order granting the appellant the costs of the appeal before this Court and the costs of the motion before the trial judge.

The Respondent's Submissions

42. The respondent's submissions may be summarised as follows. She contends that the appellant has blurred the dividing line between arguments as to whether a preliminary issue should be directed to be tried and the merits of her claim with regard to the validity of s. 9(2)(b) of the Act. The appellant has failed to engage with how this Court should approach the

appropriateness or otherwise of interfering with an exercise of discretion on the part of the trial judge. Her contentions as to the alleged errors of law on the part of the trial judge are misconceived. The High Court order in question is an interlocutory order made in the exercise of the trial judge's discretion. There is a high threshold to be reached before this Court should interfere with this discretion. *Thomas v. Commissioner of An Garda Síochána* [2016] IECA 203, confirms the preliminary issue procedure is an '*order made in the ordinary course of the management of litigation'* with which the appellate court should be slow to interfere. Due deference should be afforded to the decision of a trial judge when exercising a discretion in this regard (*Farrell v. Bank of Ireland* [2012] IESC 42, [2013] 2 I.L.R.M. 183; *Dowling v. Minister for Finance* [2012] IESC 32).

43. The procedure for mounting a constitutional challenge is not prescribed by the Constitution and a court may entertain such a challenge '*in any procedure admissible before it'*.[1] Whereas *Riordan v. An Taoiseach (No.2)* suggests that when raising a constitutional challenge to the validity of legislation it may be more appropriate to proceed by way of a plenary action than judicial review, there are, in fact, no constraints on the procedural vehicle employed. Several cases may be cited in which recourse has been had to the preliminary trial procedure or a variant thereof in the context of challenges to the validity of legislation.[2]

44. The appellant's action is *prima facie* statute barred. The impugned provision benefits from the presumption of constitutionality and has already withstood a constitutional challenge in *Moynihan v. Greensmyth*. The appellant must reach a very high bar in order to distinguish the present case from that precedent. Insofar as she relies on the existence of a policy of professional indemnity insurance to distinguish her case from *Moynihan,* it may be presumed that the estate sued in *Moynihan* enjoyed a similar benefit in respect of the tort alleged therein.

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[1] GW Hogan, GF Whyte, D Kenny, R Walsh, *Kelly: The Irish Constitution* (5th edn., Bloomsbury Professional, 2018) at para. 6.2.72, p. 917.

[2] See *Garvey v. Ireland* [1981] IR 75; *Cahill v Sutton* [1980] IR 269 and other cases cited in Collins and O'Reilly, *Civil Proceedings and the State* (3rd ed. 2019) at para. 8-64.

45. The approach of the courts to constitutional challenges of limitation provisions tends to be restrictive. In *Tuohy v. Courtney* [1994] 3 I.R. 1 (in which the constitutional issue was determined by way of the trial of a preliminary issue) Finlay C.J. upheld the constitutionality of s. 11(2)(a) of the Statute of Limitations 1957 noting that the courts' role was '*not to impose their view of the correct or desirable balance in substitution for the view of the legislature'* but to determine, objectively, whether the legislation is such as to constitute '*an unjust attack on some individual's constitutional rights'.* Further, the applicability of s. 9(2)(b) was also determined in trials of preliminary issues in the cases of *McCullough v. Ireland*, *Keane v. Western Health Board*, and *Prendergast v. McLaughlin.*[3]

46. In this case, the requirements for ordering the trial of a preliminary issue are fulfilled: - the issues herein are discrete and precise, and the decisions thereon will determine the proceedings. The trial judge was correct in his consideration of the relevant criteria, including, the guidance outlined in the Supreme Court decision of *Campion v. South Tipperary County Council.* It is unclear on what basis the appellant claims that these criteria are inapplicable to constitutional actions.

47. The appellant is incorrect in arguing that *McDaid v. Sheehy* overrules the finding in *McDonald v. Bord na gCon*. In *McDaid*, the Supreme Court endorsed the approach that the court should not determine the constitutional validity of legislation unless it is necessary for it to do so. It did not preclude the trial of a constitutional issue as a preliminary issue, if necessary. Noonan J. was correct in rejecting the appellant's interpretation of *McDaid* on this point.

48. In *Pharmaceutical Assistants Association v. The Pharmaceutical Society of Ireland* (a case relied upon by the appellant) Barr J. declined to order a split trial. However, the circumstances of that case were vastly different from these proceedings. Barr J. merely re-stated the avoidance principle, namely, that constitutional issues should not be determined unless it is

[3] For citations see para. 15 above.

necessary so to do. *Reid v. Industrial Development Agency* (also cited by the appellant) is but another example of the application of the avoidance principle. When the issue of whether the appellant's claim is statute-barred is determined, the only avenue remaining to the appellant will be a constitutional challenge. If she defeats the plea on the statute, then the second preliminary issue will fall away. Therefore, the trial judge's order respects the principle of avoidance.

49. The issues to be determined can be tried with reference to the statement of core facts as agreed by the parties. This will not give rise to any risk of procedural unfairness or irremediable prejudice. It would be unjust and unfair to compel the respondent to prepare for and defend one unitary trial which would include these issues along with the entirety of the appellant's medical negligence claim.

50. Insofar as the appellant is dissatisfied with the Attorney General's decision not to be involved in the trial of the first preliminary issue, that is a matter for the Attorney General. In circumstances where the High Court has not directed the Attorney General's involvement, this Court should be slow to interfere with that decision. Further, the Attorney General cannot be compelled to be represented whenever any issue of constitutional interpretation is raised.

51. The appellant has submitted that the point of law is moot because the assets of the estate are not, in fact, involved given the existence of a professional indemnity policy in respect of the late Dr. O'Callaghan's medical practice. However, the appellant's claim in these proceedings is brought against Dr. O'Callaghan's widow as executrix of the estate and thus the point of law is not, in fact, moot. The insurance aspect which the appellant believes was overlooked in *Moynihan* is a matter of law. It may be raised at the trial of the preliminary issues and no procedural unfairness thus arises.

52. The judgment of the High Court was in accordance with established practice and case law. This Court should decline to interfere therewith.

The Attorney General's Submissions

53. The submissions of the Attorney General may be summarised thus. It would not be appropriate to determine whether a claim is statute barred by way of trial of a preliminary issue where disputed questions of fact relevant to the resolution of the limitations question are in issue. However, the facts which are relevant to the limitations issue and, in particular, the appellant's date of knowledge, have been agreed between the appellant and respondent. As there is no dispute on facts relevant to the limitations issue and as the determination of that issue in the respondent's favour would have the effect of disposing of the proceedings, Noonan J. was correct in identifying the limitations issue as one suitable for determination by way of trial of a preliminary issue.

54. Whereas the usual approach of the courts is to determine a constitutional issue by way of plenary hearing, there are many examples of constitutional issues having been decided by way of trial of a preliminary issue *(*see *Carway v. The Attorney General* [1996] 3 I.R. 300, *Molyneux v Ireland* [1997] 2 I.L.R.M. 241).

55. The impugned provision has already been challenged in *Moynihan v. Greensmyth* and the plea that s. 9(2)(b) was unconstitutional was rejected. In *Murphy v. Roche* the estoppel issue which arose was directed to be determined as a preliminary issue, and it was only in the event that the plaintiff was estopped that the constitutional issue fell to be determined. Noonan J. was correct in directing that the limitations issue be determined first, and the constitutional issue be determined afterwards and only in the event of the limitations issue being determined in the respondent's favour. Furthermore, whereas *Murphy v. Roche* suggests that the Attorney General must be heard in relation to the constitutional issue, he need not be heard on the limitations issue.

56. The only facts which will be considered in determining the limitation issue will be the facts as agreed between the appellant and respondent. It is well established that, where the

facts are not agreed when a preliminary question falls to be determined, the moving party must accept the facts as pleaded by the other side. Therefore, it will be assumed for the purpose of determining the issue of the validity of s. 9(2)(b) of the Act that the underlying facts are as pleaded. There is, therefore, no risk of the appellant being required to prove her case in negligence prior to the resolution of the issue of s. 9(2)(b).

57. No form of factual or legal mootness arises. The determination of the validity of s. 9(2)(b) does not involve any determination as to the facts of the underlying negligence claim, which are not relevant at this stage. The validity of s. 9(2)(b) will remain a live legal issue between the parties until the determination of its constitutionality, if necessary, which determination would not involve the court adjudicating on a moot.

58. On the validity of s. 9(2)(b) of the Act and the issue of indemnity cover, the specific details of the insurance available to the respondent are not relevant to the argument which the appellant wishes to make. The facts available are sufficient to permit the insurance aspect of the appellant's constitutional claim to be determined without extensive inquiry into the precise form of the insurance cover available.

59. By virtue of the approach adopted by Noonan J., in the event that s. 9(2)(b) is found not to bar the appellant's claim, the court will have avoided unnecessarily determining the constitutional validity of that section, thus observing the rule of avoidance. Further, the disposal of the proceedings in this way would enhance the efficient, timely, and cost-effective disposal of the litigation and this is a factor which should be taken into account. The *locus classicus* as to the rule of avoidance is as determined in *Murphy v. Roche*, which approach of determining the constitutional issue secondly is consistent with the directions of Noonan J.

60. The Attorney General does not have to be involved in the determination of the statutory issue. It is appropriate that the Attorney General may be heard in connection with the constitutional arguments which the appellant advances in the context of the trial of the limitation

issue. The Attorney General may exercise that right depending on what those constitutional arguments are. If that first preliminary issue is determined against the appellant, then the Attorney General is entitled to be heard in relation to the constitutional issue.

Legal Principles

Statutory Provisions

61. Order 25, r. 1 RSC[4] provides that, by the consent of the parties, or by order of the court, on the application of either party, a point of law may be set down for hearing and disposed of at any time before the trial. Order 25, r. 2 provides that if, in the opinion of the court, a decision on this point substantially disposes of the action or any distinct cause of action, ground of defence, counterclaim or reply, the court may dismiss the claim or make such other order as may be just.

The procedure provided for by O. 25 was described by Ó Dálaigh C.J. in *Kilty v. Hayden* [1969] I.R. 261 as follows (at p. 265): -

> *"...Order 25 is not providing for the separate trial of issues which are partly of fact and partly of law, but for the separate trial of a net point of law dissociated from issues of fact, that is to say, the point of law must arise on the basis of the facts being as the opposing party in his pleadings alleges them to be."*

62. On the limitation period applicable to claims against the estate of a deceased person, Sections 8 and 9 of the Act provide as follows: -

> *"**8**. (1) On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate.*
>
> *[...]*
>
> *(2) Where damage has been suffered by reason of any act in respect of which a cause of action would have subsisted against any person if he had not died before or at the same time as the*

[4] See para. 7 above.

damage was suffered, there shall be deemed, for the purposes of subsection (1) of this section, to have been subsisting against him before his death such cause of action in respect of that act as would have subsisted if he had died after the damage was suffered.

***9**.(1) In this section 'the relevant period' means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.*

(2) No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either—

(a) proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or

(b) proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires."

Trial of a Preliminary Issue

63. The authors of *Delany and McGrath on Civil Procedure* have observed that: -

*"**14-15** The trial of a preliminary issue will only be ordered in limited circumstances where a discrete and precise issue or issues arise in proceedings that can be conveniently tried by reference to agreed facts and the determination of which may dispose or substantially dispose of the entire action or otherwise be likely to lead to a substantial saving in time and costs. **The classic example of where that test may be met is where a defendant pleads that the proceedings are statute barred** although the trial of the issue as to whether the proceedings are statute barred will not be ordered if it would involve the determination of contested facts as where the plaintiff alleges fraudulent concealment."*[5] (Emphasis added.)

64. Collins and O'Reilly consider that relatively infrequent use is made of the preliminary trial procedure in the context of constitutional litigation and, in their view, this is principally a consequence of the general rule of avoidance *'whereby the Superior Courts do not determine constitutional issues when the case can be decided on a non-constitutional point'.*[6] They underscore the fact that the preliminary issue procedure, when available and appropriate,

[5] H Biehler, D McGrath, E Egan McGrath, *Delany and McGrath on Civil Procedure* (4th edn, Round Hall, 2018).
[6] A Collins, J O'Reilly, *Civil Proceedings and the State* (3rd edn., Round Hall, 2019) at para. 8-61, p. 284.

may be of '*considerable benefit in saving court time and in reducing the costs of litigation'.*[7] However, they emphasise the fact that the decision as to whether use is to be made of such a procedure is a matter for the trial judge.

65. In *Tara Mines v. Minister for Industry and Commerce* [1975] I.R. 242, the Supreme Court, in commenting on the use of the preliminary trial procedure, stated (at p. 256) that: -

> *"The infrequent use of this procedure may be explained by the restricted field in which it can operate. First of all, there must be a question of law which can be identified amongst the issues in the action. Further, this question of law must be such that it can be decided before any evidence is given. If special facts have to be proved or if facts are in dispute, the rule does not apply. In addition, it must appear to the court to be convenient to try such question of law before any evidence is given. This will involve a consideration of the effect on other issues in the case and whether its resolution will reduce these significantly, or shorten the hearing. Convenience in this respect must also be considered in the light of what appears fair, proper and just in the circumstances."*

66. That a preliminary issue of law cannot be tried *in vacuo* was confirmed by the Supreme Court in *McCabe v. Ireland*. Lynch J. (at p.157) held that such an issue: -

> *"*[. . .] *must be tried in the context of established or agreed facts. The facts relevant to the preliminary issue must not be in dispute, but they may be agreed for the purposes of the preliminary issue of law only without prejudice to the right to contest the facts if the actual determination of the preliminary issue should not dispose of the matter at issue."*

In refusing to allow a claim of constitutional breach to be determined by way of preliminary hearing, Laffoy J. in *Dempsey v. Minister for Education* [2006] IEHC 183 reiterated the principle observing (at para. 45) that *"if the relevant facts are not agreed, the moving party must accept, for the purpose of the trial of the preliminary issue, the facts as alleged by the opposing party."*

67. The fundamental issues to be considered before departing from the unitary trial principle were identified by Clarke J. (as he then was) in *Weavering Macro Fixed Income v. PNC*

[7] *ibid.*

Global Investment (see para. 18 above). He noted that what is clear from all the authorities is that the trial of an issue, formally separated out as a preliminary issue in the sense in which that term is used in the Rules, is a practice which is to be adopted '*with great care*'.

68. The accepted principles relevant to the direction of a preliminary trial were set out by McKechnie J. in *Campion v. South Tipperary County Council*. The plaintiffs' claim was for, *inter alia*, misfeasance in public office, breach of legitimate expectation, breach of duty, and breach of statutory duty. The defendant sought the trial of preliminary issues, principally to determine whether a senior planner had the capacity to make decisions which were binding on the defendant. McKechnie J. set out the circumstances in which it would be appropriate to order the trial of preliminary issue at pp. 732 to 733, in the following terms:

> *"• there cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application;*
>
> *• there must exist a question of law which is discrete and which can be distilled from the factual matrix as presented;*
>
> *• there must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be will not be sufficient;*
>
> *• the greater the impact which a decision on the preliminary issue(s) is likely to have on the entire case, the stronger will be the argument for making the requested order;*
>
> *• conversely if irrespective of the court's decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order;*
>
> *• exceptionally however, even if the follow-on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense;*
>
> *• as an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate;*

• it must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful to retain the traditional separation of such matters;

•'convenience' therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation;

• the making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties;

• the court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally

• subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."

In view of the significant conflicts of fact which had arisen between the parties in *Campion*, McKechnie J. declined to order the question be tried by way of preliminary hearing.

69. As a general principle, it is important that the point sought to be tried as a preliminary issue should have the possibility of either resolving the claim altogether or at least resulting in a clear saving in terms of costs and time due to a reduction of the issues to be tried. This was confirmed in *L.M. v. Commissioner of an Garda Síochána* [2015] IESC 81, [2015] 2 I.R. 45. A point should also raise a clear issue to which it is possible to give a clear answer. O'Donnell J. observed (at p. 64):

"[34] The more qualified and contingent the possible answers, the less likely that the court will be able to provide a clear and decisive disposition of the case and a clarification of the law. The decision to direct a trial of a preliminary issue is therefore one which requires careful consideration by trial judges. It is important that judges do not too readily accept a respondent's protestations of complexity, impossibility or inconvenience in trying a preliminary issue, while at the same time interrogating with some scepticism a moving party's claim that the point is clear and potentially dispositive of the litigation or some significant portion of it."

70. Where the trial of a preliminary issue has been directed, the trial judge hearing the issue may, nevertheless, decide against proceeding in that fashion. *O'Sullivan v. Rogan & Moran* [2009] IEHC 456 involved an action against a firm of solicitors for damages for negligence, misrepresentation, breach of contract, breach of duty, and fraudulent concealment in relation to a transaction which took place in 1999. Owing to the defendants' plea that the claim was statute-barred, Ryan J. had directed that the issue be determined by way of preliminary hearing. However, the plaintiff was also alleging fraudulent concealment on the part of the defendant. Under s. 71 of the Statute of Limitations 1957, the time limit will not begin to run until the plaintiff has discovered the fraud. Owing to the '*most unusual facts'* of the case and '*the inevitable conflicts'* in relation to relevant events, Hedigan J. remitted the matter for plenary hearing being unable, at a preliminary stage, to come to any conclusion as to whether s. 71 applied.

71. That a unitary trial is '*the preferred mode to dispose of cases, unless special circumstances enable the trial of a preliminary issue*' was confirmed recently in *Mungovan v. Clare County Council* [2020] IESC 17. Charleton J. emphasised (at para. 4) that a unitary trial was '*the default position unless a court is convinced that some aspect of the case may safely be tried on its own'*.

Pleas on the Statute of Limitations

72. In *B.T.F. v. Director of Public Prosecutions* [2005] IESC 37, [2005] 2 I.R. 559, the Supreme Court allowed an appeal from a High Court direction that the issue of the applicant's delay in bringing an application for judicial review be tried by way of preliminary issue. Hardiman J. observed (at para. 20, p. 565) that a strong case can be made for directing the trial of a preliminary issue where an issue is raised which, in and of itself and without regard to anything else, may terminate the entire proceedings. He considered that the *'classic example'*

of a case in which it is appropriate to direct the trial of a preliminary issue is one '*where the Statute of Limitations is pleaded'.*

73. Such an example arose in *Croke v. Waterford Crystal Ltd.* [2006] IEHC 266 and Murphy J. directed that the question of whether the plaintiff's claim was statute-barred be tried as a preliminary issue. He observed (at p. 20) that: -

> *"While there are, of course, disputes in relation to many issues, there are basic facts which are agreed as between the parties.*
>
> *[...]*
>
> *The court accepts that one of the objects of case management includes the narrowing of issues. It would seem to follow that the trial of the discrete separate issues pursuant to Order 25 is appropriate."*

The Constitutionality of Legislation and the Rule of Avoidance

74. As already noted, the constitutionality of s. 9(2)(b) of the Act was upheld by the Supreme Court, in a trial on a preliminary point of law, in *Moynihan v Greensmyth* (see para. 10 above). In rejecting the plaintiff's argument that the section was unconstitutional O'Higgins C.J. articulated the court's approach in this way: -

> *"When it was decided to provide generally for the survival of causes of action, a general limitation period of two years was provided in the impugned provisions of s. 9, sub-s. 2(b), of the Civil Liability Act, 1961. It was conceded in argument that this could not be regarded as an unjust attack on those not suffering from incapacity and that, in such circumstances, the period was reasonable and fair. In relation to those (such as the plaintiff) who at the time of the accrual of the cause of action are under 21 years of age, is a two-year period from the death of the wrongdoer so unreasonably short as to constitute an unjust attack on their rights? Bearing in mind the State's duty to others—in particular those who represent the estate of the deceased, and beneficiaries—some reasonable limitation on actions against the estate was obviously required. If the period of infancy were to form part of the period of limitation, as was formerly the case, then the danger of stale claims being brought would be very real and could constitute a serious threat to the rights of beneficiaries of the estate of a deceased. The alternative was to apply a period of limitation*

which would have general application. It had to be either one or the other; and it does not appear that any compromise was possible."

75. The principle of avoidance whereby the constitutional validity of legislation will not be tested unless absolutely necessary, has been articulated by the superior courts on many occasions (see, in particular, *Murphy v Roche* at para. 12 and 13 above). Applying the avoidance principle to the circumstances that arose in *Murphy*, Finlay C.J. stated (at p. 112) as follows: -

"I would adjourn the other issue arising in this appeal, namely, the timing of any preliminary issue or constitutional question until such time as this first issue of law has been finally determined either in the High Court or, if there is an appeal, in this Court. Depending on the result of that determination, an issue on the constitutional law will either become unnecessary or, if it is necessary, can then be directed by this Court to be heard as a separate preliminary issue before the High Court to which the Attorney General would be a notice party."

76. The articulation of the same principle is also to be found in *McDaid v. Sheehy* which involved a challenge to the constitutionality of s. 1 of the Imposition of Duties Act 1957. This provision empowered the government, by order, to impose a customs duty of such amount as it considered proper on any particular good imported into the State. Any order made under s. 1 was deemed to have statutory effect unless it was confirmed by an Act of the Oireachtas passed not later than the end of the year following that in which the order was made. The applicant challenged this statutory instrument on the basis that Article 15.2.1° of the Constitution was infringed by effecting an excessive delegation of legislative power. However, the relevant statutory instrument had later been affirmed in the Finance Act 1976.

77. In the High Court, Blayney J. held that s. 1 of the 1957 Act was unconstitutional. However, on appeal, the Supreme Court set aside the order in relation to the constitutional invalidity of the 1957 Act. It held that the High Court had been correct in holding that s. 46 of the Act of 1976 gave validity to the order of 1975 as from the end of 1976 and, therefore, at all times material in question, the order of 1975 was in full force and had effect. In the light of this,

it had not been necessary for the High Court to pronounce on the constitutional validity of s. 1 of the 1957 Act. Delivering the majority judgment, Finlay C.J. identified the question for resolution in the case on appeal as follows (at p. 16): -

> *"…whether it is appropriate on appeal for this Court to pronounce on the constitutional validity of this legislation when such pronouncement can be of no benefit to the applicant, having regard to the finding that the actual order under which he was prosecuted is constitutionally valid by virtue of the intervening statutory provision of s.46 of the Finance Act, 1976."*

Citing *Buckley and Ors. (Sinn Fein) v. Attorney General* [1950] I.R. 67 he noted that the presumption of constitutionality enjoyed by post-constitutional Acts of the Oireachtas *'springs from, and is necessitated by, that respect which one great organ of the State owes to another'*. He considered it clear from the jurisprudence of the courts that the court should not engage in the question of the possible invalidity of an Act of the Oireachtas unless it is necessary for its decision to do so. In this regard, the Supreme Court in *McDaid* departed from the approach taken by the majority in *McDonald* whereby it had directed that the constitutional issue should be tried by way of a preliminary issue and decided first (see para. 14 above).

78. In coming to his view, Finlay C.J. had considered *Roche v. Minister for Industry and Commerce* [1978] I.R. 149 in which the court had been concerned with orders made by the Minister under the Minerals Development Act 1940. It deemed those orders invalid. Unanimously, the court held that it was not necessary to pronounce any opinion upon the questions raised as to the constitutional validity of s. 14 of the 1940 Act. Reference was also made to the judgment of O'Higgins C.J. in *M v. An Bord Uchtála* [1977] I.R. 287 wherein it was stated (at p. 293): -

> *"Where the relief which a plaintiff seeks rests on two such distinct grounds, as a general rule the court should consider first whether the relief sought can be granted on the ground which does not raise a question of constitutional validity. If it can, then the court ought not to rule on the larger question of the constitutional validity of the law in question. Normally, such a law as a statute of the Oireachtas will enjoy a presumption of constitutionality which ought not to be put to the test unnecessarily. However, there may be circumstances of an exceptional nature where the*

requirement of justice and the protection of constitutional rights make the larger enquiry necessary."

Reviewing the Exercise of Judicial Discretion

79. It is a well settled principle of law that a margin of appreciation should be afforded to a trial judge in the making of case management orders. In *Dowling v. Minister for Finance* Clarke J. (as he then was) noted (at para. 3.1) '*the undoubted jurisprudence of this Court to the effect that an appellate court should be slow to interfere with case management directions made by the court of first instance'.* It was held (at para. 3.5) that a trial judge must retain considerable discretion when making appropriate case management directions and that appellate court should only intervene where '*a degree of irremediable prejudice'* has been created and where therefore, '*the safer course of action would be for this Court to intervene immediately to alter the case management directions'.*

80. The point was further emphasised by Clarke J. (as he was then) in *Farrell v. Bank of Ireland* where he held that the court should only intervene with procedural directions where it appeared that that the measures under appeal created '*a substantial risk of significant procedural unfairness coupled with the likelihood that no remedial action could be put in place either by the trial judge or by this court on appeal which would have the effect of significantly remedying any unfairness which might be demonstrated to have occurred'* (at para. 6.3). On the question of the parties' right of access to the court, the learned judge noted (at para. 4.5) that this right: -

"...does not carry with it an entitlement to have all issues decided at a full trial or to conduct the relevant litigation in whatever way the party concerned wishes. A distinction needs to be drawn between, on the one hand, restrictions imposed by law on the right of access to the courts as such and decisions made as part of the administration of justice which may have an effect on how litigation is to progress on the other."

81. In *Thomas v. Commissioner of An Garda Síochána,* Mahon J. dismissed the appeal of a High Court order which had directed a preliminary trial of certain issues, holding that an

appellate court should accord due deference to the decision of a trial judge made in the exercise of his or her discretion in the ordinary course of the management of litigation. He held (at para. 31) that: -

> *"A direction to try a particular matter by way of the preliminary issue procedure is an order made in the ordinary course of the management of litigation. While an appellate court retains the jurisdiction to review such directions and orders, it is, in general terms, slow to do so, and will only do so in the face of compelling reasons."*

The same approach was taken in *Rice v. Muddiman* [2018] IECA 402 wherein this Court (Irvine, J.) confirmed (at para. 31) that '*an appellate court will only set aside what was, . . . , effectively a case management decision if the appellant can demonstrate that to fail to do so would call into question the proper administration of justice'.*

82. That an appellate court should be slow to interfere with decisions that, essentially, involve case management was confirmed again by this Court in *Defender Ltd. v. HSBC Institutional Trust Services (Ireland) Ltd.* [2019] IECA 337. Costello J. noted (at para. 39) that the decision of the trial judge to adjourn a recusal motion, generally, with liberty to re-enter fell within the margin of appreciation afforded to the trial judge and, importantly, that the decision in question did not give rise to any '*real, manifest or potential prejudice'* for the appellant.

Discussion

83. The starting point to be adopted in any consideration of whether the trial of a preliminary issue should be directed is that, in principle, the conduct of a case ought to be by way of a unitary trial. It is clear from the decision in *Campion* that when departing from this principle a cautious approach must be taken (see also *Weavering Macro*). A preliminary trial will only be ordered in particular circumstances which are carefully considered by the trial judge. A court, however, should not refrain from making the order where, in the interests of justice, it is appropriate so to do. The authorities make it clear that the trial of a preliminary issue may be

directed in circumstances where it is possible to separate out a distinct legal issue which can be determined either on the basis of generally agreed facts or facts which have been agreed for the purpose of determining the preliminary issue.

84. In these proceedings, Noonan J. has directed that two matters be determined by way of trial of a preliminary issue: (i) whether s. 9(2)(b) of the Act operates to bar the appellant's claim; and (ii) if so, whether that section is unconstitutional. For ease of reference I shall refer to the first matter as 'the limitations issue' and to the second as 'the constitutional issue'.

The Limitations Issue

85. The appellant argues that the trial judge erred in law and in fact in directing the trial of those preliminary issues. The question of whether s. 9(2)(b) of the Act could be interpreted so to avoid the constitutional issue arising is one which, in her view, should be considered only in the context of a unitary hearing. The respondent's position is that she is entitled to rely on the full defence afforded to her by reason of s. 9(2)(b) of the Act which renders the appellant's claim, *prima facie*, statute barred. The primary objective of the respondent in bringing the application for trial of a preliminary issue was to avoid a lengthy and costly trial of an action in such circumstances.

The Court's Assessment

86. McKechnie J. in *Campion* observed that when deciding whether to order the trial of a preliminary issue *'the court will always be obliged to have regard to the issues involved, to the contextual setting in which these issues are pleaded and to the overall evidential footprint in which they are, at that point in the case, then positioned'.* The limitations issue in this case is clear. The respondent's argument that by virtue of s. 9(2)(b) of the Act the claim against the

estate is statute barred carries an obvious weight since the proceedings herein were not commenced within two years of Dr. O'Callaghan's death in September 2013.

87. As has already been noted, there are several cases in which a limitations question has been determined by way of trial of a preliminary issue (see, for example, *Ryan v. Connolly* [2001] 1 I.R. 627; *Devlin v. Minister for Justice* (Unreported, High Court, Morris J., 4 April 2001); *Shell E & P Ireland Ltd. v. McGrath* [2006] IEHC 99, [2006] 2 I.L.R.M. 299; and *Prendergast v. McLaughlin*). The case law thus supports the view that, generally, it will be appropriate to determine limitation questions as a preliminary issue, including, the limitation question arising under s. 9(2)(b) of the Act.

88. It is well settled that a preliminary issue of law cannot be tried *in vacuo.* It must be tried in the context of established or agreed facts and, if the relevant facts are not agreed, then the moving party must accept, for the purpose of the trial of the preliminary issue, the facts as alleged by the opposing party (*McCabe v. Ireland).* It seems to me that the recent Supreme Court decision in *O'Sullivan*, which the appellant says supports her position that the court should decline to determine the matters identified by Noonan J. by way of trial of a preliminary issue, does not assist her, greatly. Admittedly, Charleton J. regarded *O'Sullivan* as an illustration of how a departure from the unitary trial principle had not aided the administration of justice. However, the facts were altogether different. Considerable time had elapsed between the events giving rise to the plaintiff's claim and the Supreme Court's determination on whether the case was statute barred. Charleton J. recalled the responsibility of trial judges in every case to ensure that steps proposed to the court actually facilitate the move towards a final decision with the overriding obligation to use the resources of the courts to efficient purpose. To my mind, it was precisely with that obligation in mind, that Noonan J. directed the trial of preliminary issues in this case.

89. As in *O'Sullivan*, the appellant here raises her date of knowledge as a fact which she claims has not yet been established. The respondent, however, (and I think correctly), characterises this point as something of a '*red herring*'. It difficult to see how reliance upon her date of knowledge takes the appellant's case any further in circumstances where *but for* the impugned provision, she issued proceedings on time and thus, clearly, had the requisite knowledge in order so to do. Dr. O'Callaghan died on 30 September 2013. The appellant attained her majority in October 2015, which meant that *but for* s. 9(2)(b) of the Act she would have had until October 2017 to commence proceedings. She, in fact, commenced proceedings in April 2017. Thus, it seems to me that the appellant does not need to rely upon her date of knowledge to extend what would otherwise have been the applicable limitation period. These matters were taken into account by the trial judge. Having considered the competing arguments carefully, he proceeded to make the order on the basis that the '*overriding consideration*' must be the doing of justice between the parties (*Murphy v. Roche*).

90. The reality is that the preliminary issue on the limitations point will not be tried *in vacuo* because the facts that are relevant to the limitations issue have been agreed between the parties in the core statement of facts. If a dispute on the facts does arise, then it is open to the trial judge to decide that limited evidence is necessary. The Supreme Court's judgment in *O'Sullivan* supports the view that the limitation period '*is capable of being established with limited evidence*' (see Finlay Geoghegan J. at para. 88). Moreover, the High Court judgment in *O'Sullivan v. Rogan* illustrates what may transpire should the trial judge consider that there is a significant conflict on the essential facts. The judge conducting the trial will be in a position to hear arguments on whether, having regard to the core facts as agreed (or to limited evidence if necessary), the appellant's claim is statute barred by reason of s. 9(2)(b) of the Act. The respondent and moving party will set out her position on the law and the implications thereof as it applies to the agreed facts. The appellant, likewise, will be in a position to advance the many

arguments on the 'merits' that she has canvassed before this court. She will be entitled to raise the issues which, in her counsel's view, were not properly considered in *Moynihan* and she will be free to argue for an interpretation of s. 9(2)(b) of the Act that would make it possible for her to have her constitutional rights vindicated. It will be for the trial judge to determine the success or failure of the appellant's arguments. If she succeeds and the legal issue is determined in her favour, then the trial of the main issue will proceed and there will be no need for the court to consider the constitutional question concerning the validity of the legislation. If, on the other hand, the appellant fails, and the court finds that her claim is statute barred, then and only then, will the constitutional issue arise for determination.

91. It seems to me that determining whether s. 9(2)(b) of the Act would bar the appellant's case *is* a discrete legal issue capable of determination on the basis of the facts, as agreed. The appellant's date of knowledge does not feature for the purpose of the preliminary issue because, as the trial judge recognised, *but for* the impugned provision, the proceedings were issued on time. The present circumstances give rise to a particularly appropriate net issue to be determined namely, whether s. 9(2)(b) works to bar the appellant's claim. There being no dispute as to the facts relevant to the limitation issue and since the determination of that issue in the respondent's favour would have the effect of disposing of the proceedings against her, I am led to conclude that the first question identified by Noonan J. is one that is suitable for determination by way of trial of a preliminary issue.

The Constitutional Issue

92. The appellant's objection to the limitations issue being determined by way of an O. 25 procedure is inextricably linked to her objection in respect of the constitutional issue being determined in the same manner. Referring to the Supreme Court's decision in *O'Brien v. Keogh* [1972] IR 144, 157-58, she argued that the constitutional issue should not be determined in '*an*

evidential vacuum'. The question which should arise is how the provisions of s. 9(2)(b) can be interpreted in such a way as to avoid reaching a constitutional challenge to the validity thereof. She cited a number of cases which illustrate, in her view, that the preferred approach of the courts is to have a unitary hearing where issues of constitutionality arise. *Moynihan* has been superseded by later decisions and the correct procedural approach was identified in *McDaid.* The *Campion* criteria do not apply in circumstances where there is a constitutional challenge.

93. The respondent agreed that a determination on a constitutional issue should not be reached unless it is necessary to do so. The constitutional validity of s. 9(2)(b) of the Act has been upheld and confirmed by the Supreme Court. It is entirely appropriate to apply the *Campion* principles, there being no suggestion that the trial of a preliminary issue is inapplicable to constitutional actions.

The Court's Assessment

94. There was some overlap in the appellant's submissions in relation to an alleged 'evidential vacuum' that would arise at the preliminary hearing of both the limitations issue and the constitutional issue. Reference has already been made to the settled legal principle that a case should not be heard *in vacuo*. In *Sweeney v. Ireland and Ors.* [2019] IESC 39 Charleton J. stated (at para. 5) that those who seek to claim that legislation is unconstitutional are required to make such a challenge not simply by way of abstract legal reasoning but by *evidence* so as to enable a court to look at the particular circumstances of a case as part of its analysis. In this regard, he considered, that *'[p]articular facts thus matter'.*

95. Whilst, ostensibly, *Sweeney* may support the appellant's position, it must be recalled that the learned judge's comments were made in the context of an application arising from *criminal* proceedings in which a book of evidence against an accused is usually prepared and served. It must also be observed and has already been noted that an evidential vacuum does not

exist in circumstances where critical evidence has been agreed by the parties for the purpose of the trial of the preliminary issues. The Attorney General has submitted that he will not be challenging what was agreed between the appellant and the respondent when it comes to defending the constitutionality of the impugned provision. Admittedly, the agreement on core facts was reached on a contingency basis but, since the relevant facts on the limitations point relate to specific dates upon which certain events occurred, it is difficult to accept the appellant's apprehension that the respondent may, subsequently, seek to resile from her agreement. This is all the more so in circumstances where the dates in question—namely, the date of Dr. O'Callaghan death, the date of the second anniversary thereof, the date when the appellant reached her majority and the date of the institution of these proceedings—are capable of objective verification. Insofar as any potential dispute may arise as to the appellant's date of knowledge, it has already been noted by the trial judge that this is not in issue because it is accepted that - *but for* the impugned provision - the proceedings were issued on time.

96. Bearing all of the foregoing in mind, if, in the final analysis, the appellant remains of the view that, for the purpose of the constitutional issue, evidence over and above that which has already been agreed will be required, then that is a matter which she will be entitled to raise with the trial judge at the preliminary trial. It will then be for that judge to review and determine the matter—he or she by then having taken seisin of the case. In this way, a *'via media*' remains possible.

97. It is true that in *O'Brien v Keogh* the Supreme Court struck down legislation which, in its view, failed to safeguard, sufficiently, the minor plaintiff's interests. He had been injured in a motor accident whilst travelling as a passenger in his father's vehicle. The defendants (one of whom was his father) raised the statute. The Supreme Court found s. 49(2)(a)(ii) of the Statute of Limitations, 1957, which operated to deny the minor an extension of time because he was in the custody of his parents, to be repugnant to the Constitution because it failed to '*match up'* to

the guarantee contained in Article 40.3. Counsel for the appellant referred to the impact which *O'Brien* had on the insurance industry in Ireland but it is clear that the critical question upon which the Supreme Court was focused was: '*What adequate safeguards are made for the infant's rights*?' A similar question is being asked by the appellant in this case. However, one cannot fail to observe that some five years after its decision in *O'Brien*, the Supreme Court in *Moynihan* upheld the constitutionality of s. 9(2)(b) of the Act, the very provision which the appellant in these proceedings seeks to impugn. A critical factor in *Moynihan* was the additional duty on the part of the State to citizens interested in the early completion of the administration of estates.

98. Whereas, in principle, the usual approach of the courts is to determine issues relating to the constitutionality of legislation by way of plenary hearing (*Damache v. Director of Public Prosecutions* [2012] IESC 11, [2012] 2 IR 266), no authority has been opened to the Court to support the contention that it is impermissible to determine such issues in the manner directed by Noonan J. In *Murphy v. Ireland* [2014] IESC 19, [2014] 1 IR 198, O'Donnell J. stated (at para. 9) that: -

> *"It is not necessary that every challenge to the constitutional validity of an Act of the Oireachtas be commenced by plenary summons. Such a course is preferable where it is anticipated that a significant amount of oral evidence will be necessary…"*

99. Moreover, there are many cases in which constitutional challenges have proceeded by way of the trial of a preliminary issue (see para. 43). In *Tuohy v. Courtney*, for example, the court upheld the constitutionality of s. 11(2)(a) of the Statute of Limitations 1957 in the face of an argument that the plaintiff's cause of action against his solicitor was statute barred before he was ever aware of the fact that he had suffered a loss. The cases relied upon by the appellant illustrate only the fact that it is always a matter for the trial judge to determine whether a point should be determined by way of trial of a preliminary issue or not. A case involving a plea on

the Statute represents a 'classic example' of where it is appropriate to direct such a trial (*B.T.F. v. Director of Public Prosecutions*).

100. There is, therefore, established precedent to support the view that *both* the limitations issue and the constitutional issue in this case may be determined by way of the procedure permitted under O. 25. All considerations are subject *'to the overriding consideration of doing justice between the parties'* (*Murphy v. Roche*). In terms of the provision in issue in this case, it must be noted that not only has s. 9(2)(b) of the Act been declared constitutional by the Supreme Court but it has been invoked and its applicability determined in a number of cases by way of trial of preliminary issue (see para. 15). In *Lannegrand v. National University of Ireland Galway* [2016] IEHC 518, Binchy J. agreed to direct the trial of several preliminary issues, including, the application of the Statute because, in his view, the issues were really issues of law. It is difficult to escape a similar conclusion in this case.

101. I am not persuaded by the appellant's contention that *McDaid v. Sheehy* supports the proposition that the trial of a constitutional issue is precluded from determination by way of trial of a preliminary issue. Nor do I accept that *McDaid* is authority for the proposition that the procedure adopted in *Moynihan v* was expressly or implicitly overruled by later cases. What the Supreme Court in *McDaid* did was to put in place what the respondent aptly describes as *'a rule of judicial self-restraint or avoidance'* which means that a court should not proceed to determine the constitutional validity of legislation unless it is necessary for it so to do. Admittedly, in *McDaid* the Supreme Court declined to follow the earlier approach it had adopted in *McDonald v. Bord na gCon*. However, this fact alone does not permit one to conclude that *McDaid* articulated a principle that a constitutional issue may never be determined by way of trial of a preliminary issue. What *McDaid* is concerned about is the order in which issues, as a rule, are to be determined and insofar as a case raises an issue of constitutional importance that issue must fall to be determined 'last in the list'.

102. At times, there appeared in the appellant's submissions a slight tendency to intermingle the principles governing trial by preliminary issue with those governing the question of when a constitutional challenge to legislation may be made. The law on how and when a court may determine to direct a trial of a preliminary issue is clear and the principles set out in *Campion* have not been set aside. Equally settled is the law in relation to the principle of avoidance. There is no conflict or inconsistency between that principle and the principles governing an application for trial by preliminary issue. Merely because a constitutional matter must be the last of a number of matters to be determined at trial, that does not mean that it cannot be determined in a trial of a preliminary issue.

103. Whilst the appellant relies on *Murphy v. Roche* in support of her appeal there is, as noted in the Attorney General's submission, a remarkable similarity between the directions provided by the court in that case and the directions of the trial judge in this one. The order of Noonan J. directed that the limitations issue be determined first and that the constitutional issue be determined afterwards but only in the event of the limitations issue being determined in the respondent's favour. In so doing, he applied the principles governing the trial of a preliminary issue without in any way compromising the obligation to observe the rule of avoidance.

The insurance argument

104. A central pillar of the appellant's argument was that her case is different from *Moynihan* because of the existence of a professional indemnity policy of insurance. The true defendant, she argued, is not Dr. O'Callaghan's wife and the real assets in issue are not those of the estate but rather those funds held for the indemnification of medical negligence claims against the deceased. Throughout the appeal the appellant advanced the argument that s. 9(2)(b) of the Act was never intended to protect insurance companies from claims made in respect of deceased persons whose acts or omissions were indemnified under a policy of insurance. The appellant

wants the trial court to 'test' whether s. 9(2)(b) of the Act could be read in such a way as to conclude that because the 'assets of the estate' are not, in fact, in issue that provision does not, in fact, apply to the facts of this case.

105. The respondent's objection to this argument is based upon the well-established principle that an insured's right to an indemnity in respect of third-party liability under a policy of insurance does not arise until the existence and the extent of such liability have been established, whether by action, arbitration or agreement (as *per* Kearns P. in *McCarron v. Modern Timber Homes Ltd. (in liquidation)* [2012] IEHC 530, [2013] 1 I.R. 169). The nub of her position is that any liability which the insurer may have will only arise if and when Dr. O'Callaghan's liability to a third party has been determined whether by settlement, award or judgment.

106. It must be observed that when addressing this point, the trial judge was careful not to make any finding. He approached the issue in this way: -

> *"21. Another argument advanced on behalf of the plaintiff is that the court should not order a trial on a point of law which is in effect moot. The mootness allegedly arises from the fact that there is no issue between the plaintiff and the estate of Dr. O'Callaghan but rather with his insurers. Since the estate in reality has no interest in these proceedings, it is said that the insurers cannot in conscience rely on the statutory provision.*
>
> *22. Whether that is correct or not is of course an issue yet to be decided. It is certainly at a minimum arguable that it is not moot. The defendant is expressly sued in her capacity as personal representative of her husband's estate so that as a matter of law, the estate is the defendant, not the insurance company. It might be argued that the estate does in fact have a stake in the matters in issue whether from the perspective of Dr. O'Callaghan's reputation or the fact that if at any time in the future indemnity was to be declined for any reason, a scenario not unheard of, the estate would become directly liable. The point is however that I do not think it can be said that the issue is so clear cut as to be beyond argument."*

107. No fault can be found with the approach adopted by Noonan J. Interesting as the indemnification issue may be, it is not a matter that falls to be determined on an application for

an order directing the trial of a preliminary issue. Moreover, the arguments canvassed on the indemnification issue before this Court are not arguments to be ventilated in the context of this appeal. The matter calls for a decision on the merits at the hearing of the preliminary issue. That is the appropriate forum in which the appellant may advance her argument on the unintended over-reach of the impugned provision and thereafter the defendant will be afforded an opportunity to reply.

108. The unintended 'over-reach' of s. 9(2)(b) of the Act was but one of a number of interesting and scholarly issues raised by counsel for the appellant during the course of the appeal. Equally erudite arguments were canvassed on other points, including,

- the interface between O. 60, r. 1 when a challenge to the validity of the Constitution is raised and O. 60, r. 2 when a question concerning the interpretation of the Constitution arises;
- the appropriate standard of evidence before the courts on which the trial judge must make findings of fact to which the law is then applied (*RAS Medical Ltd. v. The Royal College of Surgeons in Ireland*); and
- the abolition of the common law maxim *actio personalis moritur cum persona* – with counsel for the appellant contending that the question which should arise is how the provisions of s. 9(2)(b) of the Act can be interpreted constitutionally thus avoiding a validity challenge.

Interesting and erudite as such matters may be, they are not germane to the matter which this Court is obliged to consider. They 'blur the dividing line' between arguments on whether a preliminary trial should be directed and the issues that may fall to be decided at such a preliminary trial, if so directed. All of these matters may be ventilated in the context of the trial of the preliminary issues yet to be determined by the High Court. Two issues raised by the appellant which are relevant to this appeal are: (i) whether the summary procedure set out in

Moynihan v. Greensmyth is still good law when raising a constitutional challenge to legislation by way of preliminary issue; and (ii) whether the Supreme Court's overruling of *McDonald v. Bord na gCon* in its judgment in *McDaid v. Sheedy* has the consequences advanced by the appellant. These issues were analysed by the trial judge in the High Court and have been considered by this Court on appeal. The principal question which this appeal must address is whether the trial judge fell into error in ordering the trial of the two preliminary issues set out in his order of 23 July 2019.

Discretion of the Trial Judge

109. The order made by Noonan J. directing the trial of a preliminary issue was an interlocutory order made in the ordinary course of the case management of litigation. Such a direction can be of considerable benefit in saving court time and in reducing legal costs. His decision to direct the trial of a preliminary issue fell, squarely, within his discretion. This Court affords a significant margin of appreciation to decisions that touch upon the management of the court's scarce resources (*Rice v. Muddiman*) and it will only interfere with the trial judge's discretion in the face of compelling reasons (*Thomas*).

110. An appellate court's reluctance to interfere with case management directions is based upon the rationale that the proper conduct of litigation requires parties to engage with the process in the High Court and to comply with procedural directions given by that court. They should only invoke the appellant jurisdiction of this Court '*either at the end of the process or in the very limited circumstances where the jurisprudence of this Court permits a review of individual procedural and case management directions'* (*Farrell v. Bank of Ireland*). For an appellate Court to interfere with a judicial decision of the type in issue in this appeal it must be satisfied that the measure under appeal would create a significant procedural unfairness together with the

likelihood that no remedial action could be taken thereafter which would remedy the effect of any unfairness (*Farrell*).

111. This Court has to ask whether the appellant has demonstrated that there exists a degree of irremediable prejudice created by the decision of Noonan J. such that it could not reasonably be expected to be remedied by a trial judge and where therefore, *'the safer course of action'* would be for this Court to alter the case management direction. There is nothing in the trial judge's judgment to suggest, let alone establish, that his discretion was exercised in such a manner as to imperil the administration of justice such that this Court is compelled to intervene. On the contrary, the evidence establishes that the trial judge considered each of the arguments raised by the parties and reviewed, carefully, the appropriate authorities before coming to a decision on that matter. Judiciously and appropriately, he refrained from making any finding on the merits of the issues to be determined. Whereas the costs of a unitary trial cannot be the sole factor for consideration, the significant savings in terms of court time and resources and the expense of potentially lengthy litigation were matters to which he was entitled to have regard. His judgment recognises that where possible, the court should lean against a wasteful use of resources—both those of litigants and the judicial system—so long as the interests of justice are not compromised. Balancing all relevant considerations and guided by the principles set out by the Supreme Court in *Campion*, he came to the view that the interests of justice favour the granting of the respondent's application.

112. The relevant authorities before this Court do not support the proposition that, on the facts of this case, the trial judge has erred in directing a trial of two preliminary issues. The issues he identified are "*susceptible of determination as discrete 'stand alone' issues of law"* (*Dempsey*) based on agreed facts. Noonan J. was careful to identify and order the sequence in which the two issues were to be heard. In this regard, the principle of avoidance was accorded full respect. Moreover, I am satisfied that his decision does not constitute a ban on the right of access to court

nor does it give rise to any prejudice on the part of the appellant. The right of access to court does not carry with it an entitlement to have all issues decided at a full trial or to conduct the relevant litigation in whatever way the party concerned wishes (*Farrell*). The appellant will have an opportunity to canvass her all arguments on the merits at the trial of the preliminary issues.

113. Neither the case law nor the practice of the superior courts supports the contention that the trial judge erred in directing the trial of a preliminary issue in this case. If, as the appellant contends, a constitutional question should not be determined in such a manner, then I am inclined to the view that the Supreme Court in *Campion* would have said so. There is nothing in the principles identified in *Campion* to suggest that special provision must be made in relation to matters involving a constitutional challenge such that they are immune from any direction that they be determined by way of trial of a preliminary issue.

114. In the light of all the matters considered by Noonan J. in his judgment, I have come to the view he acted fairly and with due regard to the interests of all the parties and I see no reason for this Court to interfere with the order made.

Remaining Issues

115. For the sake of completeness, two further questions which arose during the appeal should be addressed. The first concerns the question of the participation of the Attorney General in the trial of the first preliminary issue and the second concerns the potential absence of the respondent from the trial of the constitutional issue.

116. One of the appellant's principal concerns was that if she fails on the limitations issue and the respondent steps out of the proceedings, then it would be open to the Attorney General to insist that she prove her claim in negligence before the second issue be determined. She claimed that she would then find herself in a position of trying to establish evidence in circumstances where the Attorney General would be a stranger to the factual matrix or background to the dispute between her and the late Dr. O'Callaghan. She feared that the Attorney

General may disavow the agreed facts. Although the Attorney General would be a *legitimus contradictor* on all issues concerning constitutional interpretation, she was concerned that he had indicated that he would not engage with the first issue that would be determined by way of preliminary trial.

117. Having considered, carefully, both the written and oral submissions of the Attorney General in this appeal, it seems to me that the appellant's concerns are not well founded. Her complaint that the Attorney General had not, prior to the appeal, indicated his intention to be involved in the trial of the first preliminary issue was addressed during the hearing of the appeal. Counsel for the Attorney General informed this Court that his client will be represented at the hearing of the limitations issue. This confirmation is an important step in the proceedings and it may, perhaps, have a bearing on costs at a later stage in the proceedings.

118. As to the orders sought by the appellant in respect of the Attorney General, I am satisfied that, in view of his stated intention to participate in the trial of the preliminary issues, it is now open to the appellant to apply, in advance of the trial, for directions in respect of the filing of whatever pleadings remain outstanding and to do so in sufficient time for the hearing of the preliminary issues. Moreover, one should not lose sight of the fact that confidence must be placed in the trial judge to make such orders and to issue such directions as she or he may consider necessary to ensure that justice between the parties is administered. If, for example, the appellant persuades the trial judge that an evidential deficiency does, in fact, arise or that some obstacle to justice exists, then it will be for that judge to decide how best to deal with such a claim.

119. As to the potential departure of the respondent from the trial of the second preliminary issue, the appellant's position was that it would be preferable for the respondent to remain for the duration of the proceedings. During the hearing of the appeal and in reply to a question raised by the Court, counsel for the respondent indicated that she would need to take instructions from her client as to whether the appellant's fears were well founded. Not

surprisingly, she sought to reserve her client's position in this regard. It cannot be excluded that a situation could arise wherein the respondent, having succeeded on the first issue, would seek to withdraw having no further part to play in the proceedings. Were that to happen, it would, of course, be for the trial judge to decide whether the respondent would be required to stay for the trial of the second preliminary issue in the event that she were to succeed on the first.

120. I am inclined to think that it would be preferable if the two issues were to be considered within the context of one preliminary trial at which all parties were represented—whilst, of course, adhering to the sequence directed by Noonan J. in his order of 23 July 2019. Whatever may transpire, these are not matters for this Court to determine on this appeal. The trial judge is the one who will be best placed to direct the parties on matters arising within the trial of the preliminary issues. The trial judge may decide to hear submissions only. Alternatively, she or he may decide to take evidence should that be considered necessary. The only observation that I might venture to make is that the same judge who hears the parties at the trial of the preliminary issues should retain seisin of the case in the event that the matter were to proceed to a full substantive hearing. If the trial judge decides the first issue in the appellant's favour, then the matter would proceed to a full hearing. If he or she decides it in the respondent's favour and strikes out the appellant's claim on the basis that it is statute barred, the court would then proceed to hear the constitutional issue. If the trial judge upholds the constitutionality of the provision, that will be the end of the case.

121. If, however, the trial judge accepts the appellant's submissions that s. 9(2)(b) of the Act is unconstitutional then a legitimate question may arise as to the position in which the appellant would then find herself. If such a scenario were to transpire I can see no reason, in principle, why an application for the reinstatement of proceedings against the respondent could not be brought with the respondent being at liberty to apply to amend her defence so that the impugned provisions might be excised therefrom, and the case proceed to trial. All such

scenarios involve a degree of speculation and, of course, I reiterate that it is not for this Court to direct how the trial court should conduct its business. I venture to contemplate such scenarios only for the purpose of satisfying myself that no irremediable injustice will be done by upholding the order made by Noonan J.

Conclusion

122. At the opening of this appeal, counsel for the appellant indicated that he was asking this Court to rule on whether or not there is an absolute bar to a court ordering the determination of an issue by way of preliminary trial in circumstances where the constitutional validity of legislation will be determined. The need to ascertain the answer to this question, it was argued, was based upon the importance of the principle of avoidance and of this Court having regard to the fact that certain factual matters would not be heard which would thus leave the trial court with an evidential deficiency.

123. I am satisfied that the answer to the question raised by the appellant is that there is no such absolute bar to a court directing the determination of an issue by way of preliminary trial, including, an issue that involves the constitutional validity of legislation. The principle of avoidance is not breached by the fact that a constitutional issue may be directed to be determined by way of trial of a preliminary issue provided, as the trial judge in this case directed, that the constitutional issue is the last issue that falls to be determined. Once that is so, there is no reason, in principle, why a constitutional issue cannot be the subject of a direction for trial of a preliminary issue. Whether it is appropriate to do so, in practice, will depend upon the facts—including the agreed facts—of each individual case and the overriding consideration at all times must be whether the interests of justice require the adoption of such a procedure.

124. On the facts of this case, I am satisfied that the limitations issue and the constitutional issue are sufficiently precise and capable of a clear answer and that Noonan J.

did not err in finding that they were appropriate for determination by way of trial of a preliminary issue.

125. For the reasons set out above, I would dismiss the appeal.

126. I would adjourn the question of costs and permit the parties to deliver written submissions thereon. Submissions should not exceed 1,500 words and should be filed within 28 days of the delivery of this judgment. Thereafter, any party who wishes to deliver a reply to submissions made by another party will have 28 days within which so to do.

127. As this judgment is being delivered remotely, Faherty and Ní Raifeartaigh JJ. have indicated their agreement with the reasoning and conclusions reached in respect of this appeal.