Approved
No redactions required

THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 266

Record No 2021/134

Noonan J

Collins J

Binchy J

BETWEEN

ANN-MARIE CAWLEY

Plaintiff/Appellant

AND

DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

Defendant/Respondent

Judgment of Mr Justice Maurice Collins delivered on 15 October 2021

BACKGROUND

1. This judgment addresses this appeal and a related appeal, *John Lynch v Dún Laoghaire Rathdown County Council* (Appeal 2021/138). The issues raised by the two appeals are, the parties agree, materially identical.

2. The proceedings and these appeals arise from a terrible tragedy that occurred on the night of 10 October 2015 when a fierce fire broke out in a prefabricated cabin/mobile home at a halting site located at Glenamuck Road South, Carrickmines, Dublin occupied by Thomas Connors and his wife, Sylvia Lynch Connors. A number of visitors were staying with the Connors that night. The fire had devastating consequences, resulting in the death of 10 people, including a number of young children. Amongst those who died were Mr Connors and Ms Lynch Connors, as well as two brothers of Ms Lynch Connors.

3. Ms Cawley was a sister of Ms Lynch Connors and she brings wrongful death proceedings on her own behalf and on behalf of the other "*dependents*" of the late Ms Lynch Connors in accordance with the provisions of Part IV of the Civil Liability Act 1961 ("*the 1961 Act*"). The sole defendant in those proceedings is Dún Laoghaire Rathdown County Council ("*the Council*"). The proceedings were commenced on 27 March 2018.

4. The plaintiff in the related proceedings, Mr John Lynch, was also a sibling of Ms Lynch Connors. He claims damages for personal injuries/mental distress suffered by him in the aftermath of the fire, which claimed the lives of his sister and two of his brothers. Those proceedings were also issued on 27 March 2018 and once again the Council was the sole defendant sued.

5. While the actions differ in form, the substantive case against the Council is pleaded in substantially identical terms. The Personal Injuries Summons in each action alleges that

the Council was the owner of the accommodation at the halting site and was responsible for its maintenance, upkeep, repair, general condition and safe operation and that the Council was negligent and in breach of duty (including statutory duty) in multiple respects which are set out in some detail in the Summons but which it is unnecessary to recite here. The gist of the case against the Council is that the accommodation provided and maintained – which, it is said, was intended for and suitable for temporary use only but which was in fact used for a prolonged period - presented a significant danger to its occupants and their visitors by reason of the risk of fire and the failure to comply with fire safety regulations, including the absence of fire detection equipment, the absence of fire retardant, the absence of fire extinguishers and the absence of any ready escape in the event of fire. It is also said that the Council ignored complaints from various quarters regarding the suitability and safety of the accommodation.

6. The proceedings have progressed rather slowly. In each case particulars were raised by the Council and replies were provided on behalf of the respective plaintiffs. That was in the course of 2018. Other than applications to the Personal Injuries Assessment Board ("*PIAB*") to which I shall refer, nothing further appears to have occurred until April 2021 when each of the plaintiffs served notice of intention to proceed. No defences have yet been delivered by the Council and it is unclear how it proposes to defend the claims against it.

7. On 19 April 2021**,** Ms Cawley issued a motion seeking an order pursuant to Order 15,

Rule 37 RSC[1] appointing Mary Connors (the mother of the late Thomas Connors) to represent the estate of the late Mr Connors ("*the Estate*") for the purpose of these proceedings, an order pursuant to Order 15, Rule 13 RSC[2] joining Ms Connors (in that representative capacity) as a co-Defendant to the proceedings and an order pursuant to Order 28, Rule 1 RSC[3] granting liberty to serve an amended Personal Injuries Summons. A motion seeking the same reliefs was issued in the Lynch proceedings on 30 April 2021**.**

8. Each of these motions was grounded on an affidavit sworn by Bernadette Goff, the principal in the firm of solicitors acting for Ms Cawley and Mr Lynch. Ms Goff

[1] Which provides that "*If in any cause, matter, or other proceeding it shall appear to the Court that any deceased person who was interested in the matter in question has no legal personal representative, the Court may proceed in the absence of any person representing the estate of the deceased person or may appoint some person to represent his estate for all the purposes of the cause, matter or other proceeding on such notice to such persons, if any, as the Court shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased person had been a party to the cause, matter or proceeding.*"

[2] Which in material part provides that "*The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that … the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.*"

[3] "*The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*"

explained that, at the time that the proceedings were issued, the available information suggested that the fire (in terms both of causation and spread) had been the responsibility of the Council. However, Ms Goff continued, as a result of reviewing the depositions taken by the Coroner (which had been provided in advance of the inquest) and as a result in particular of the inquest hearing itself (which had taken place in January 2019), it became clear that there was expert evidence to suggest that the initial cause of fire had been an unattended chip-pan and that the person who had consumed the chips was Thomas Connors. If that evidence was accepted by the court (and, Ms Goff said, the plaintiff was "*neutral*" about such evidence), "*potentially a finding could be made that the late Thomas Connors was also a concurrent wrongdoer with the local authority, thereby making it appropriate that his estate be joined as a co-Defendant to the proceedings in order to enable this Honourable Court to adjudicate upon and settle all questions involved in the proceedings.*" Ms Goff went on to exhibit a draft amended Personal Injuries Summons in anticipation of the joinder of Mary Connors as representative of the late Mr Connors which, in material part, pleads that if the Council was not solely responsible for the fire, the fire was also caused and/or allowed to spread by reason of the negligence and breach of duty on the part of the late Mr Connors. Finally, Ms Goff exhibited in each case a PIAB authorisation authorising proceedings to be brought against the Estate of the late Mr Connors. In the *Cawley* proceedings, that authorisation issued on 29 October 2020. In the *Lynch* proceedings, it issued on 19 November 2020**.**

THE DECISION OF THE HIGH COURT

9. The two motions came on before Cross J in the High Court on 23 April 2021. At that point, there was a pressing urgency about the motions because the plaintiffs were about to lose the protection of section 50 of the Personal Injuries Assessment Board Act 2003 (as amended), which excludes from the reckoning of time for the purposes of (*inter alia*) the Statute of Limitations Act 1957 ("*the 1957 Act*") and section 9(2) of the 1961 Act the period beginning on the making of an application for authorisation and ending six months from the date that authorisation issues.

10. The Council (the only party on notice of the applications) did not file any affidavit but opposed the joinder of the additional defendant on the basis that any claim against the Estate was statute-barred by virtue of section 9(2) of the 1961 Act and that, in the circumstances, no useful purpose would be served in permitting its joinder. The Council had already deployed the same argument in successfully opposing the joinder of the estates of Mr Connors and Ms Lynch Connors as additional defendants in other proceedings against it arising from the Glenamuck fire. I shall refer to those proceedings as the *Gilbert* proceedings. In *Gilbert*, Cross J had refused to join the estates but the plaintiffs had appealed such refusal and those appeals had been listed for hearing in this Court on 25 June 2021.

11. Having heard submissions, the Judge gave his ruling *ex tempore*. He observed that the basis for the joinder application was an apprehension on the part of the plaintiffs that

the Council would otherwise invoke section 35(1)(i) of the 1961 Act .[4] He then went on to consider and reject the submissions of the plaintiffs that the applicable limitation period was to be found in the Statute of Limitations (Amendment) Act 1991 and/or that the date of knowledge provisions in that Act qualified the effect of section 9(2) of the 1961 Act . He also rejected the submission that, even if section 9(2) was the relevant limitation provision, it did not go to jurisdiction but simply provided a potential defence which the Estate would have to raise if it wished to rely on it. The Judge considered that section 9(2) of the 1961 Act was different to the "*normal provisions*" of the 1957 Act and appears to have taken the view (though he did not express himself in these terms) that section 9(2) operated to extinguish any cause of action against the estate of a deceased where proceedings were not brought within the period provided by it.[5]

12. The Judge therefore concluded that the joinder applications should be dismissed. He was, understandably, concerned to ensure that the plaintiffs would not be prejudiced in the event that this Court were to uphold the appeals in *Gilbert*. After some discussion,

[4] Section 35(1)(i) provides that, for the purpose of determining contributory negligence, "*where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer.*"

[5] The distinction between limitation provisions that bar the remedy and those that extinguish the underlying right is well-established at the level of principle and is discussed in (*inter alia*) *O' Reilly v Granville* [1971] IR 90 and *O' Domhnaill v Merrick* [1984] IR 151. The distinction is also expressed in terms of limitation provisions which are merely "*procedural*" and those which are "*substantive*": see the discussion in Canny, *Limitation of Actions* (2nd ed; 2016) at para 1-11.

the Council gave an undertaking that in the event that this Court ruled in favour of the appellants in *Gilbert*, the Estate could be joined (and the High Court's order varied to that extent) and the Council would not raise any issue that the joinder occurred outside the period of six months after the issue of PIAB authorisation, provided that the joinder occurred within 21 days of the decision in *Gilbert*.

13. In the event, the appeals in *Gilbert* were withdrawn on the day. However, in the course of the hearing of this appeal, the Council very fairly indicated that it would take the same approach to this appeal i.e. in the event that this Court allowed the appeal and permitted the joinder of the Estate, the Council would not raise any issue that the joinder occurred outside the period of six months after the issue of PIAB authorisation, subject to the joinder being effected within 21 days of this Court's decision. The Council's position does not, of course, bind the Estate in any way.

THE APPEALS

14. The plaintiffs advanced a number of arguments to the effect that their respective claims against the Estate are not, in fact, statute-barred. The thrust of their oral submissions, however, was to the effect that it is premature and inappropriate to address this issue on a joinder application. The plaintiffs say that, even if section 9(2) of the 1961 Act is the applicable limitation provision – which they dispute – it does not operate as a bar to a claim being made against the Estate. Rather, section 9(2) operates only to bar their entitlement to a remedy against the Estate (assuming that they are otherwise entitled to such a remedy) in the event that the Estate elects to rely on it in answer to their claim. Here, it is said, the attitude of the Estate is unknown. It may or may not defend the claims against it (if those claims are permitted to be made). In the event that it defends the claims, it may or may not rely on section 9(2). In these circumstances, the plaintiffs argue that it cannot be said that the joinder of the Estate is clearly "*futile*" and the correct course is to allow the Estate to be joined, without prejudice to any limitation issues which may subsequently be raised. Any such issues can and should be determined in the ordinary way. The plaintiffs rely on the decisions of the Supreme Court in *O' Reilly v Granville* [1971] IR 90, *O' Domhnaill v Merrick* [1984] IR 151 and *O' Connell v The Building and Allied Trades Union* [2012] IESC 36, [2012] 2 IR 371 and that of the High Court in *Hynes v Western Health Board* [2006] IEHC 55 in support of these submissions.

15. According to the Council, the "*nub of the issue*" is whether section 9(2) extinguishes

the right or whether it simply bars the remedy. In its submission, section 9(2) extinguishes the right and, it follows (so the Council say) that it is not required to be pleaded. Therefore – so the argument goes – it is irrelevant whether or not the Estate might seek to rely on it if joined. Whether that conclusion follows from the premise was not really explored in argument (and I express no view on it): instead, the correctness of the premise was the focus of the debate. The Council relies on *Moynihan v Greensmyth* [1977] IR 55 ("*Moynihan*"), another decision of the Supreme Court, in support of its argument that section 9(2) operates differently to the ordinary provisions of the 1957 Act, though it acknowledges that *Moynihan* was concerned with a different issue, namely the constitutional validity of section 9(2) having regard to the absence of any provision extending the limitation period where the claimant is an infant at the time of injury. The Council lays particular emphasis on the Supreme Court's characterisation of the section 9(2) limitation period as "*an absolute bar of 2 years.*" Separately, the Council says that the authorities recognise that, at the joinder stage, the court has a discretion to refuse to permit joinder where it is clear that the claim against the additional party or parties is statute-barred. Such is the case here, in the Council's submission.

DECISION

The appropriate approach where issues of limitation are raised on an application to join a Defendant

17. The issue with which this Court is concerned on these appeals is whether the Estate of the late Mr Connors should be joined as an additional Defendant in the *Cawley* and *Lynch* actions at this stage, in circumstances where the Council contends that the claims against the Estate are statute-barred by section 9(2) of the 1961 Act . No other basis for opposing the applications is advanced.

18. The parties appear to agree that, at the level of principle, the appropriate approach to this question is as set out by Clarke J (as he then was) in *Hynes v Western Health Board* [2006] IEHC 55. In his judgment, Clarke J noted that there were two conflicting approaches evident from the authorities. The first regarded the Statute of Limitations strictly as a matter of defence. On that basis, a defendant should be joined even where the claim against them might seem to be statute-barred and it would then be a matter for that defendant to plead the statute and that issue could then be tried by way of preliminary issue or otherwise. The second approach took the view that it was pointless to join a party against whom any claim was clearly statute-barred and joinder should be refused where that was the position.

19. After a detailed review of the authorities, including the Supreme Court decision in *O' Reilly v Granville* [1971] IR 90, Clarke J sought to reconcile these conflicting

approaches in the following terms:

> *"3.2 In those circumstances I have come to the view that the general proposition, to the effect that a defendant can be joined in proceedings notwithstanding there being issues as to the applicability of the statute to his case, is subject to an exception that the court retains a discretion not to join a defendant where the statute would clearly apply and where, in the words of Budd J., the joining of such a defendant, would be "futile".*
>
> *3.3 It would, it seems to me, be inappropriate for a court to impose upon parties (and indeed the court itself) the burden of dealing, in a wholly unnecessary way, with a number of applications and hearings where the end result of all such applications would necessarily mean that the case against the individual concerned would be dismissed as being manifestly statute barred. A contrary view would, it seems to me, be inconsistent with the policy inherent in the jurisdiction of the court to dismiss a manifestly ill-founded cause of action as identified in Barry v. Buckley [1981] I.R. 306.*
>
> *3.4 I am, therefore, satisfied that the court should not, in a clear case, join a defendant where it is manifest that the case as against that defendant is statute barred and where it is also clear that that defendant concerned intends to rely upon the statute."*

The court should not, Clarke J added by way of emphasis, "*enter into an inquiry as to*

whether a claim may or may not be statute barred" on a joinder motion (or a motion to set aside a joinder order). The court should confine itself to asking whether the claim against the proposed defendant was "*clearly statute-barred*". If there is "*any doubt whatsoever*", the defendant should be joined and the limitation issue determined in the ordinary way (at para 3.5).

20. In *Hynes*, an order joining the additional defendant had been made in his absence (the defendant had sought leave to issue third party proceedings against him and the plaintiff had expressed a wish that he be joined as a co-defendant) and the decision of Clarke J was given on his application to have the joinder order set aside. It was evident in the circumstances that the additional defendant intended to rely on the statute by way of defence to the claim against him. That was an important aspect of *Hynes*.

21. *Hynes* was considered by the Supreme Court in *O' Connell v The Building and Allied Trades Union* [2012] IESC 36, [2012] 2 IR 371. In his judgment (Denham CJ and Fennelly J concurring) MacMenamin J noted that when time runs, certain types of action are actually extinguished, whereas in other cases the right of action subsists but the action is liable to be defeated by successful reliance on the statute. MacMenamin J referred in this context to the observations of Henchy J in *O' Domhnaill v Merrick* [1984] IR 151 to the effect that, notwithstanding that the Statute of Limitations states that an action "*shall not be brought*" after the expiration of the limitation period, such a "*statutory embargo*" has always been interpreted as barring a claim "*if, and only if, a defendant pleads the statute in his defence*". So construed, the statute does not bear on a plaintiff's right to sue; what it affects is a plaintiff's right to succeed (at paras 25-26).

MacMenamin J regarded the analysis of Henchy J as "*helpful and authoritative*" (para 28).

22. MacMenamin J then proceeded to consider the question of *when* decisions on a limitation issue should be made. He referred with approval to *Hynes*, observing (at para 40):

> *"However, like Clarke J. in Hynes, I see O'Reilly v. Granville as authority for the proposition that a court of first instance should be very slow to enter into an inquiry as to whether a claim may or may not be statute barred when hearing a procedural motion seeking merely to join that defendant. In such a situation, the only questions which a court might then ask itself, are: as to (i) whether the claim as against the intended defendant is clearly and manifestly statute barred; and (ii) whether: there are no circumstances in which the intended defendant would be debarred either in law or in equity from relying upon the statute? If there is any real doubt on the limitation question, then the defendant should be joined: and whether or not the claim is actually statute barred may be dealt with in the ordinary way under the Rules, perhaps by means of a preliminary issue on notice"* (emphasis in the original).

23. Having noted that the proposed additional defendant was not on notice of the joinder application, MacMenamin J concluded that the court was not "*in a position to express a concluded view as to whether the joinder of this intended defendant would be futile, or if inevitably, a time bar plea will be pleaded, or would succeed*" (para 50). The

intended defendant should therefore be joined, though they would be entitled to rely on the statute and, if appropriate, seek the determination of a preliminary issue on it.

The Position Here

Applying the approach in Hynes and O' Connell

24. The starting point – emphasised both in *Hynes* and *O' Connell* – is that the default rule is that it is inappropriate to determine questions of limitation on a joinder application. Even where it is said that the claim against a proposed additional defendant is statute-barred, a court should generally permit the joinder of that defendant, leaving the limitation issue to be dealt with at trial or by way of preliminary issue.

25. By way of limited derogation from that default position, a court should not join a defendant where it is clear that it would be "*futile*" to do so. As explained in *Hynes,* it is futile to join a defendant "*where it is manifest that the case as against that defendant is statute barred and where it is also clear that that defendant concerned intends to rely upon the statute*" (my emphasis) (para 3.4). In *Hynes*, the defendant had actually been joined and was seeking to have the joinder order set aside. It was clear, therefore, that the defendant intended to rely on the statute (though his application did not succeed in any event).

26. Similarly, in *O' Connell,* MacMenamin J identified as separate elements whether a time bar plea would be relied on and whether it would succeed: para 50. There, as noted

above, the absence of any evidence from the proposed defendant meant that the court could not conclude that its joinder would be futile.

27. Here the proposed additional defendant, the Estate of the late Mr Connors, is not before the Court and there is no evidence whatever as to whether, in the event that it is joined, it will rely on section 9(2) of the 1961 Act (or any other limitation provision) by way of defence. It is not "*inevitable*" that it would do so. The Estate may elect not to defend the claim against it and/or may lack the resources to do so. Even if the Estate participates in the proceedings, having regard to the family ties between the parties, it is at least possible that the Estate might elect not to rely on a limitation defence, precisely to avoid triggering the potential application of section 35(1)(i) of the 1961 Act to the detriment of the plaintiffs.

28. While the Council has an interest in the limitation issue having regard to the provisions of section 35(1)(i), that provision does not entitle it to assert a limitation defence on behalf of the Estate or stand in its shoes in the applications for joinder.

29. That being so, but subject to the Council's argument that section 9(2) operates to extinguish the right and not merely to bar the remedy – which argument is considered below - it follows that there is no basis on which, at this stage, this Court could properly conclude that the joinder of the proposed additional defendant would be futile and accordingly there is no basis on which this Court should exercise its discretion under Order 15, Rule 13 to refuse joinder.

30. Given the submissions made on behalf of the Council, I would add that I do not accept that the judgment of Clarke J in *Hynes* can properly be read as suggesting that a court determining an application for joinder has a discretion to refuse joinder where it considers that the claim against the additional defendant is statute-barred, even in the absence of evidence that such defendant actually intends to rely on the Statute. *Hynes* accepts that, exceptionally and "*in a clear case*", a court may decline to join a defendant where it would be "*futile*" to do so having regard to the Statute of Limitations. That represents a limited departure from the general principle articulated in *O' Reilly v Granville* that it is premature to address the issue of limitation in a joinder application and that such issues should be addressed only after joinder and when a limitation defence is pleaded. However, Clarke J goes on to identify the two essential pre-conditions for the exercise of that discretion at para 3.4 of his judgment. The first is that it must be "*manifest that the case as against that defendant is statute barred*"; the second is that "*it is also clear that that defendant concerned intends to rely upon the statute.*" These conditions are cumulative and, unless both are satisfied, the discretion to refuse joinder is not properly exercisable. The second condition is not incidental to, or of any lesser importance than, the first. Rather, it reflects the fundamental fact that limitation is generally a matter of defence. In circumstances where a defendant cannot point to any formal pleading of a limitation defence (because no defence has been delivered), there must be some other material before the court capable of demonstrating that such defendant intends to rely on the Statute. There is no such material here.

31. The decisions of the Supreme Court in *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd* [1997] IESC 11, [1998] 2 IR 519and of the High Court (Shanley

J) in *Southern Mineral Oil Ltd v Cooney (No. 2)* [1999] 1 IR 237 do not, in my opinion, assist the Council. *Allied Irish Coal Supplies Ltd* was considered in detail in *O' Connell v Building and Allied Trades Union*, where MacMenamin J considered that it must be read as confined to its facts. In *Hynes*, Clarke J considered that it was "*a clear case*". Given that the application in *Allied Irish Coal Supplies Ltd* was to join the parent company of the existing defendant as a further defendant, it seems reasonable to assume that the Supreme Court was satisfied as a matter of fact that, if joined, the parent would rely on the Statute. *Southern Mineral Oil* was concerned with the substitution of a new party (the liquidator of the companies) as applicant in fraudulent trading proceedings which had been brought by the companies in liquidation. The defendants opposed the application for substitution on the basis that any claim by the liquidator was statute-barred. There was therefore no doubt about the defendant's position on the Statute.

Section 9(2) of the 1961 Act – A bar to the right or a bar to the remedy?

32. There remains to be considered the Council's argument that section 9(2) of the 1961 Act absolutely excludes the plaintiff's right to make a claim against the Estate and therefore compels the Court to decline to make the orders sought.

33. Section 9(2) provides as follows:

> *"(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."

34. The Judge appears to have taken the view that this provision operates to exclude the bringing of an action outside the limitation period and was unlike the provisions of the Statute of Limitations that are a matter of defence and require to be pleaded. That is certainly the Council's position and, according to it, this is "*the nub of the issue*" on these appeals.

35. It is for the Council to persuade the Court that section 9(2) clearly has the effect contended for and that, as a result, the joinder of the Estate would be "*futile*". If there is scope for dispute as to the effect of section 9(2), then the objection to joinder falls away.

36. The Council has not persuaded me that section 9(2) has the effect of extinguishing any claims of the plaintiffs against the Estate, so that the plaintiffs are precluded from even seeking the joinder of the Estate at this stage. There are a number of factors which appear to weigh against the Council's position:

- The Council acknowledges that it cannot point to any direct authority on this issue. Its argument therefore raises a novel point.

- While there are differences in language between section 9(2) ("*No proceedings shall be maintainable ...*") and the equivalent language in section 11 of the Statute of Limitations ("*[t]he following actions shall not be brought ...*") which was considered in *O' Domhnaill v Merrick*, it is not obvious that the differences are such as to have any substantive effect.

- As for the use of the term "*maintainable*" it is notable that, from at least as far back as the Rules of the Supreme Court of Ireland 1905, parties are required to raise by their pleadings "*all matters which show the action or counterclaim not to be maintainable*", such as the Statute of Limitations (Order XIX, Rule 16 of the 1905 Rules; now Order 19, Rule 15 RSC). In this usage, a claim barred by a provision such as section 11 of the 1957 Act (or sections 3 or 6 of the Statute of Limitations (Amendment) Act 1991) is "*not ... maintainable*" which appears to cut across the argument of the Council here.

- The 1957 Act contains a number of limitation provisions which clearly operate to extinguish rights. For instance, section 24 provides that "*at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished*". The same statutory formula – "*shall be extinguished*" – is also to be found in many other provisions of the 1957 Act. If the Oireachtas had intended that the section 9(2) of the 1961

Act time-limit should operate to extinguish any right of action or claim not brought within that period, one might have expected it to have used that familiar formula. It is, however, notable for its absence from section 9(2).

37. As I have indicated, the burden of establishing that it would be futile to join the Estate as a co-defendant is on the Council. Insofar as the Council points to section 9(2) of the 1961 Act as having that effect, it is incumbent on the Council to satisfy the Court that its construction of section 9(2) is clearly correct. In my view, it has not succeeded in doing so. Having regard to the factors identified above, it is clear that there is significant scope for dispute as to the effect of section 9(2). It is not necessary, and would not be appropriate, for this Court to express any definitive view on the effect of section 9(2). That is particularly so given that the Estate is not before the Court. If that issue arises further in the proceedings, it can be determined at that stage.

Discretion

38. Even if I was persuaded that this Court had some broader discretion to allow or disallow the applications here – and, for the reasons set out above, that is not my view – I would not exercise such discretion in favour of the Council. It is a notice party to the applications and it is entitled to be heard on them. It is notable, however, that – in contrast to the position in *Allied Irish Coal Supplies Limited* - the Council does not make the case that the joinder of the Estate would cause delay or add unnecessarily to the costs of the proceedings or would otherwise cause any direct prejudice to the Council in its defence of the proceedings. That is unsurprising. If the Estate is joined,

the issue of whether the late Mr Connors was a wrongdoer *vis a vis* the plaintiffs will obviously be an issue in the proceedings. But it will also be an issue even if the Estate is *not* joined, given the Council's stated intention to rely on section 35(1)(i) of the 1961 Act .

39. The objection that the Council has made effectively involves the assertion of a *ius tertii.* Its purpose in doing so is to obtain an incidental or collateral advantage arising from the provisions of section 35(1)(i). However, the joinder of the Estate does not foreclose the Council from invoking section 35(1)(i), if a proper basis for doing so can be demonstrated. In the event that the Estate asserts and establishes that any claim against it is statute-barred, the Council may then rely on section 35(1)(i) and will be entitled to whatever benefit may arise from its operation. It may be that the Council can otherwise establish that the claims against the Estate are statute-barred and that it is entitled to rely on section 35(1)(i). These are matters for debate in due course. Joinder of the Estate will therefore cause no real prejudice to the Council (or at least no prejudice that the Council can legitimately complain of). On the other hand, were the joinder of the Estate to be refused, it would give rise to an immediate and significant prejudice to the plaintiffs. The Court would effectively be determining that the plaintiffs' intended claims against the Estate are statute-barred, in the absence of any limitation defence being invoked by the only party entitled in law to do so, the Estate. That would involve a significant and unwarranted abridgment of the plaintiffs' right of access to the courts which in turn could have very serious consequences for them in terms of the effect of section 35(1)(i) of the 1961 Act . As O' Donnell J explained in his judgment in *Hickey v McGowan* [2017] IESC 6, [2017] 2 IR 196, at para 67, section 35(1)(i) has the

capacity to operate harshly. Its capacity to do so in the circumstances here is all too obvious. In my view, this Court should not compound those harsh effects by making an entirely premature adjudication on the limitation issues here.

40. The balance of justice thus weighs strongly in favour of making the orders sought.

CONCLUSIONS AND ORDER

41. The jurisprudence makes it clear that the general rule is that limitation issues should not be decided in an application for joinder.

42. As an exception to that general rule, "*the court should not, in a clear case, join a defendant where it is manifest that the case as against that defendant is statute barred and where it is also clear that that defendant concerned intends to rely upon the statute*" (Clarke J at para 3.4 in *Hynes*).

43. Here, it is not "*clear*" that, in the event that it is joined, the Estate will rely on a limitation defence. It cannot therefore be said that this is a "*clear case*" or that the joinder of the Estate would be "*futile*".

44. Insofar as the Council has argued that the position here is different from the position in *Hynes* and *O' Connell* on the basis that section 9(2) of the 1961 Act operates to extinguish the right, and does not simply bar the remedy, the Council has failed to establish that section 9(2) is clearly to that effect. That issue remains open and can, if necessary, be addressed by the High Court in due course.

45. In light of these conclusions, it is not necessary or appropriate to address the question of whether the intended claims against the Estate are governed by section 9(2) of the 1961 Act (as the Council contends) or by sections 3 and 6 of the Statute of Limitations (Amendment) Act 1991 (as the plaintiffs contend) or whether, in any event, they are

statute-barred. If, following on its joinder, the Estate wishes to assert that the claims against it are statute-barred, it will be free to join that issue by way of defence and the question can be determined in the ordinary way, whether by way of preliminary issue or at trial. It may also be open to the Estate, in advance of delivering a defence, to apply to set aside the joinder orders, as was done in *Hynes.* However, as Clarke J made clear in *Hynes*, that procedure will not be appropriate for the resolution of "*potentially contestable issues*" regarding limitation.

46. For the foregoing reasons, I would allow the appeals and in each of the actions I would make the orders sought by the plaintiffs. Those orders are being made without hearing Ms Connors or the Estate and if Ms Connors objects to being appointed to represent the Estate (or if any other person interested in the Estate objects to her appointment) an application can be made on notice to the plaintiffs to set aside or vary the order for her appointment.

47. The amended Personal Injuries Summons should be served within 14 days.

48. The High Court made no order for costs. My provisional view is that there is no basis for interfering with that order. As regards the costs of the appeals, the plaintiffs have been "*entirely successful*" and it appears to follow that the costs of the appeals should be borne by the Council. However, I would be inclined to put a stay on any orders for costs pending the determination of the proceedings in the High Court. If either party wishes to contend for a different costs order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs.

If such hearing is requested and results in an order in the terms I have suggested, the party requesting such hearing may be liable for the additional costs of it. In default of receipt of such application, an order in the terms proposed will be made.

Noonan and Binchy JJ have authorised me to record their agreement with this judgment and the orders proposed.