APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Record Number: 2024/174
High Court Record Number: 2018/5903P
Neutral Citation Number: [2025] IECA 42

Noonan J.

MacGrath J.

McDonald J.

BETWEEN/

BERNARD GILROY (OTHERWISE BEN) GILROY

& VINCENT BYRNE

PLAINTIFFS/APPELLANTS

-AND-

FIONA O'LEARY

DEFENDANT

-AND-

GOOGLE IRELAND LIMITED

RESPONDENT

JUDGMENT of Mr. Justice McDonald delivered on the 24th day of February, 2025

Introduction

1. This is an appeal from an order and judgment of the High Court refusing the application made by the plaintiffs/appellants (who I shall refer to as *"the appellants"*) under O. 15, r. 4 (RSC) to join Google Ireland Limited (who I shall refer to as *"Google"*) as a defendant to these proceedings. The claim which is advanced by the appellants in these proceedings is that they have been grossly defamed by a video posted by the existing defendant on the YouTube platform on 23 June 2018. The YouTube platform is hosted by Google but, when these proceedings were commenced by the appellants on 29th June 2018, Google was not named as a defendant. As discussed in more detail below, the application to join Google was not brought until 12th December 2022.

2. Although an application to join an additional defendant under O. 15, r. 4 does not require to be served on that party, the application to the High Court was, nonetheless, served by the appellants on Google and Google subsequently appeared at the hearing of the application before the High Court to oppose the application on the ground that the action as against it was manifestly statute barred by virtue of the combined effect of s. 11(2)(c) and s. 11(3B) of the Statute of Limitations 1957 as inserted by ss. 38(1)(a) and 38(1)(b) of the Defamation Act 2009 (*"the 2009 Act"*). For this purpose, Google contended that the plaintiff's cause of action accrued on 23rd June, 2018 when the offending video was first posted on the YouTube platform such that any action against Google would require to have been commenced, at the latest, by 22nd June 2020. As noted above, the application to join Google as a defendant was not made until long after that date.

3. In order to understand the argument made by Google in the High Court, it is necessary to have regard to the language used in the statutory provisions mentioned in para. 2 above.

Section 11(2)(c) of the Statute of Limitations (as inserted by s. 38(1)(a) of the 2009 Act) provides that:

> *"A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of—*
>
> *(i) one year, or*
>
> *(ii) such longer period as the court may direct not exceeding 2 years,*
>
> *from the date on which the cause of action accrued.".*

4. Section 11(2)(c) of the Statute of Limitations must be read in conjunction with section 11(3B) (as inserted by s. 38(1)(b) of the 2009 Act) which provides that: -

> *"For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium."*

5. Essentially, the argument made by Google before the High Court was that, whether one took the minimum 1 year limitation period or the maximum 2 year limitation period under s. 11(2)(c) of the Statute of Limitations, the claim against it was manifestly statute barred in circumstances where the application to join it as a defendant was made more than 2 years after the offending video was first capable of being viewed or listened to through the medium of the internet on 23rd June 2018.

6. At the hearing before the High Court, the appellants contested the position advanced by Google but the High Court ultimately came to the conclusion that, by reason of the operation of s. 11(3B) of the Statute of Limitations, the plaintiffs' claim against Google accrued on 23rd June 2018 when the defendant posted the video on the YouTube platform and was, therefore, manifestly statute barred. On that basis, the High Court judge concluded

that this was one of those rare occasions where it was appropriate to refuse the plaintiffs' application under O. 15, r. 4.

7. In reaching that view, the High Court judge very carefully analysed the legal position and identified the relevant test that applies on an application of this kind. The applicable principles were very succinctly summarised in paras. 6 and 7 of the judgment under appeal in which the High Court judge said:

> *"6. While a court will generally grant an application to join a party to proceedings, the court retains a discretion to refuse to join a party to proceedings where the Statute of Limitations clearly applies. In Hynes v. Western Health Board [2006] IEHC 55, Clarke J. discussed case law that he described as lending 'support to two conflicting approaches to the question of joinder of a defendant which may be outside the limitation period'. Having considered those cases in detail, he concluded that the general proposition that a defendant can be joined in proceedings notwithstanding issues as to the applicability of the Statute is subject to an exception that the court retains a discretion not to join a defendant where the Statute would clearly apply and where the joining of such a defendant would be futile. He concluded as follows:*
>
> > *'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'".*
>
> 7. *The issue arose again in in O'Connell v Building and Allied Trades Union and Others [2012] IESC 36. Ultimately the Supreme Court acceded to the application on the basis that the proposed co-defendant had not been on notice of the application and had not filed an affidavit and therefore the Court could not express a concluded*

view as to whether the joinder of the intended defendant would be futile. He summarised the approach of the court as follows:

> *'1. A court of first instance should not generally enter into an enquiry as to whether a claim may or may not be statute barred on the hearing of a procedural motion seeking to join a defendant.*
>
> *2. In general, on such an application, the only question which a court will ask itself is whether, on the facts before it, the claim against the intended defendant is clearly or manifestly statute barred: and if there are no circumstances in which an intended defendant would be debarred, either in law or in equity, from relying upon the Statute.*
>
> *3. If there is doubt upon the question, then the defendant should be joined, and whether or not the claim is in fact statute barred may be dealt with in the ordinary way, if necessary by means of a preliminary issue.*
>
> *4. Prior to acceding to an application to dismiss such a co-defendant out of proceedings because a claim is statute barred, a court will, naturally, ensure that there is evidence before it so that all the circumstances, and any issue as to the conduct of all the parties prior such joinder, may be considered.*
>
> *5. However a court of first instance must always retain the discretion to dismiss an application to join as co-defendants if the application itself is evidently futile, would serve no purpose, is founded on insufficient evidence or if it is vexatious or an abuse of court process.'"*

8. In my view, that is an entirely correct summary of the applicable legal principles. However, the issue on this appeal is whether the High Court judge correctly applied those

principles. The appellants argue that it cannot be said that it is manifestly clear that their case against Google is statute barred. They argue that, while their cause of action against the defendant accrued on the date the video was accessible on the internet – namely 23rd June 2018 – their cause of action as against Google did not accrue until Google failed to take down the video within a reasonable time from the date of a letter which they sent to Google on 18th October 2022 in which they provided detailed reasons to Google as to why they claim the video is defamatory of them. They say that Google was not a publisher of the video at the time it was posted on the YouTube website by the defendant and that Google only became a publisher of the video after it failed to remove the video within a reasonable time after receipt of their October 2022 letter. They say that their application to join Google was made within the limitation period prescribed by s. 11(2)(c) of the Statute of Limitations in that it was made within one year of the date of publication by Google. As noted above, their application to join Google was filed on 12th December 2022. The date of service on Google has not been identified but the application must have been served prior to June 2023 as a replying affidavit was sworn by Nicholas Cole solicitor on behalf of the defendant on 19th June 2023.

9. A number of other arguments were also raised by the appellants but, for present purposes, it is unnecessary to deal with all of them. There is, however, one additional argument that should be addressed. In the course of his oral submissions to the court, the first named appellant, Mr. Gilroy, sought to rely on material contained in the Dáil debates as an aid to the interpretation of the 2009 Act. Such an approach is clearly impermissible in light of the decision of the Supreme Court in *Crilly v T & J Farrington Ltd* [2001] 3 I.R. 251.

10. Google rejects the appellants' arguments and contends that it is very clear from s. 11(3B) of the Statute of Limitations that, in the case of publication on the internet, the

Oireachtas has explicitly provided that the date of accrual of the cause of action is the date when the defamatory statement is first capable of being viewed or listened to through the medium of the internet which in this case was June 2018 and they highlight that no attempt was made by the plaintiffs within the one to two year period after June 2018 to join Google as a defendant. They argue that, if the plaintiffs are right, there would, in effect, be no limitation period for the bringing of an action against a service provider such as Google and they submit that this cannot have been the intention of the Oireachtas in enacting those provisions of the 2009 Act which amend the Statute of Limitations.

The relevant sequence of events

11. For the purposes of this judgment the following dates are relevant: -

(a) As outlined above, the appellants allege that the defendant posted the relevant video on the YouTube platform on 23rd June 2018;

(b) The plenary summons naming a single defendant, Ms. O'Leary, was issued on 29th June 2018;

(c) An appearance was entered on behalf of Ms. O'Leary on 6th July, 2018;

(d) Although it appears that there must have been an earlier version of this document, an amended statement of claim was delivered to the defendant on 24th October 2018. The Court was not provided with a copy of the earlier version of the statement of claim;

(e) The defence of the defendant to the amended statement of claim was delivered on 9th November 2018;

(f) An application was made for an interlocutory injunction against the defendant to remove the video from the YouTube platform on 30th November 2018;

(g) On 1st February 2019, the High Court delivered judgment in respect of the application for an injunction in which the High Court refused the relief sought;

(h) On the basis of the evidence before the court, the first time the appellants made any direct approach to Google was on 12th March 2021. The appellants wrote to a director of Google on that date requesting Google to remove the video from the YouTube platform and threatening that, failing such removal, they would apply to join Google as a defendant to the proceedings. Although the appellants described the video as an egregious and defamatory video, they did not provide any detail in that letter of the aspects of the video which they alleged were defamatory of them. It should be noted that, the appellants also say that, at some point (which has not been identified in the evidence before the Court), they sought to use an online YouTube process for resolving disputes about material posted on the platform but no details of this have been provided;

(i) On 16th April 2021, the appellants issued their first motion to join Google as a defendant to the proceedings. That motion was given a return date of 12th July 2021 but the motion did not ultimately proceed in circumstances where more than 12 months had passed since the last step taken in the proceedings such that the appellants were required to file a notice of intention to proceed;

(j) A notice of intention to proceed was filed on behalf of the appellants on 10th August, 2021 but no motion was brought after the expiry of the one month notice period specified in the notice;

(k) The appellants again wrote to a director of Google on 7th February 2022 requesting that Google should remove the video from the YouTube platform

and threatening that, if Google did not do so, they would apply to join Google as a defendant to the proceedings. This letter did not provide any detail of the nature of the concerns which the appellants had in relation to the video;

(l) Google replied to the letter on 24th February 2022 in which they referred to earlier correspondence. With reference to the earlier correspondence, the letter stated that *"it was noted that we were unable to determine the merits of your defamation claim and, accordingly, the content of the URL was not removed"*. The letter asked the appellants to provide additional information in relation to the specific statements made in the video which they allege to constitute defamatory material.

(m) On 8th March 2022, the appellants again wrote to Google complaining about the failure to remove the video from the YouTube platform and reiterating their contention that it suggested that the appellants were involved in depraved acts. However, again, the letter did not go into detail as to the nature of the depraved acts in question or as to the precise respects in which it is alleged that the video was defamatory of the appellants;

(n) This provoked a further letter from Google on 1st April 2022 in which it was stated that, absent the information sought in the letter of 24th February 2022, Google would not be in a position to revisit its position on the appellants' request for the removal of the video;

(o) A further letter was sent by the appellant to Google on 18th October 2022 repeating the request to remove the video. In contrast to the previous correspondence, this letter (which is five and a half pages long) provided a significant level of detail in relation to the concerns of the appellants in relation to the specific content of the video. The letter identified (by reference

to timestamps in the video) the specific words used by the defendant which the appellants claim are defamatory of them. The letter also set out a transcript of the offending words and highlighted those which were of particular concern to the appellants. Having done so, the letter then provided a detailed explanation (which runs for 14 paragraphs) of the basis on which the appellants claim the material is defamatory of them.

(p) A further notice of intention to proceed was filed on 1st November 2022 by the appellants;

(q) The application to join Google (which has led to the order under appeal) was issued on 12th December 2022. That application came on for hearing before the High Court on 21st March 2024 and judgment was delivered on 5th June 2024.

Discussion and analysis

12. In considering the arguments of the parties, it is important to keep in mind the principles which govern an application under O. 15, r. 4 as summarised by the High Court in its judgment. As the case law makes clear, it is usually inappropriate to determine questions of limitation on an application to join additional defendants. The only exception to that approach is where it is very clear that the action against the proposed defendant is statute barred and that the proposed defendant intends to rely on the statute as a defence to the claim. The relevant approach was succinctly described by Collins J in *Cawley v. Dun Laoghaire Co. Co.* [2021] IECA 266 where he said at paras. 24 - 25:

> *"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.'"

13. Thus, if there is an arguable case to be made that the claim against the proposed defendant is not statute barred, it would not be appropriate to refuse the application to join that party as a defendant. If a court is to refuse the application on Statute of Limitation grounds, it has to be very clear that the case is statute barred.

14. In this case, I am of the view that it is arguable that the appellants' claim against Google is not statute barred. In particular, it is arguable that the cause of action did not accrue until sometime after Google's receipt of the appellants' letter of 18th October 2022. It is important to stress that, in expressing that view, I go no further than finding that the appellants have an argument to make to that effect. This should not be construed as suggesting that the appellants' argument is likely to succeed. There are arguments to make to the opposite effect as illustrated by the very able and clear submissions made by counsel for Google both orally and in writing. As the case law (discussed above) illustrates, it is inappropriate, on an application of this kind, to resolve competing arguments as to whether a plaintiff's claim against a proposed defendant is or is not statute barred. The resolution of those arguments should be left to determination either at the trial or by means of a preliminary issue.

15. In reaching the view that it is arguable that the appellants' claim is not statute barred, I have had regard to a number of considerations. In the first place, I draw attention to the definition of the tort of *"defamation"* in s. 6(2) of the 2009 Act where it is said to consist of: *"**the publication**, by any means, of a defamatory statement concerning a person to one or more than one person …"* (emphasis added). Thus, it is clear from the statutory definition of this statutory tort, that publication is an inherent and necessary element of the tort. The appellants have cited English and Australian authority to the effect that, in the case of a service provider such as Google, it does not become a publisher of material posted on its platforms unless and until, at minimum, it is given notice of the material in question and is asked to take it down. That case law suggests that it is not regarded as a publisher merely by reason of the fact that the material was made available on its platform and became capable of being viewed there by anyone accessing the platform on the internet.

16. It is sufficient to refer to two authorities in this context. The first is the decision of the Court of Appeal of England and Wales in *Tamiz v Google Inc.* [2013] 1 WLR 2151. In that case the claimant sought to bring a libel action against Google in the High Court in London in respect of eight comments which were posted anonymously on a blog hosted on a blogging platform provided by Google. The platform in question allowed any internet user to create an independent blog but the service was subject to Google's terms and conditions under which Google could remove or block access to material failing to comply with those terms, once its attention was drawn to it. Google's attention was drawn to the blogs in question by a letter of complaint from the claimant which was sent approximately two months after the comments were posted. An issue arose as to whether Google could be said to have been a publisher of the comments. In the High Court, the view was taken that Google was not a publisher of the words either before or after notification of the complaint. The Court of Appeal took a different view insofar as the period after notification of the complaint was

concerned. Richards LJ explained why the position is different after notification of the complaint in para. 27 of his judgment as follows: -

> *"27 In relation to the position after notification of the complaint, however, additional considerations arise, and it is in relation to this period that I take a different view from that of Eady J on the issue of publication. I am led to do so primarily by the decision of the Court of Appeal in Byrne v Deane [1937] 1 KB 818. That case concerned an allegedly defamatory verse which someone had posted on the wall of a golf club and which was then allowed to remain there for some days. The defendants, who had not been involved in the initial publication, were the proprietors of the golf club, and one of them was also the club secretary. One of the rules of the club provided that 'no notice or placard shall be posted in the club premises without the consent of the secretary'. The court held by a majority that the words of the verse were not capable of a defamatory meaning, but all three members of the court agreed that there was evidence of publication by one or both of the defendants. Greer LJ expressed the point in this way, at p 830:*
>
> > *'In my judgment the two proprietors of this establishment by allowing the defamatory statement, if it be defamatory, to rest upon their wall and not to remove it, with the knowledge that they must have had that by not removing it it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it.' "*

17. In the High Court, Eady J. had taken the view that the posting of the comments on the blogging platform was equivalent to inscribing graffiti on the wall of a property for which the owner would not be responsible. Richards LJ disagreed and held that, while Google could not be held to be a publisher by merely hosting the blogging platform, that position changed after the offending material was brought to its attention and it failed to remove it.

He held that, in such circumstances, Google was in a very similar position to the owner of a notice board who is made aware of defamatory material on that notice board. He said at paras. 33 – 35 as follows: -

> *"33 ... I have to say that I find the notice board analogy far more apposite and useful than the graffiti analogy. The provision of a platform for the blogs is equivalent to the provision of a notice board; and Google Inc goes further than this by providing tools to help a blogger design the layout of his part of the notice board and by providing a service that enables a blogger to display advertisements alongside the notices on his part of the notice board. Most importantly, it makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms.*
>
> *34 Those features bring the case in my view within the scope of the reasoning in Byrne v Deane [1937] 1 KB 818. Thus, if Google Inc allows defamatory material to remain on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material. Mr White QC submitted that the vast difference in scale between the Blogger set-up and the small club-room in Byrne v Deane makes such an inference unrealistic and that nobody would view a comment on a blog as something with which Google Inc had associated itself or for which it had made itself responsible by taking no action to remove it after notification of a complaint. Those are certainly matters for argument but they are not decisive in Google Inc's favour at this stage of proceedings, where we are concerned only with whether the claimant has an arguable case against it as a publisher of the comments in issue.*

35 I do not consider that such an inference could properly be drawn until Google Inc had had a reasonable time within which to act to remove the defamatory comments. ..."

18. Thus, the approach taken by the Court of Appeal of England and Wales in *Tamiz v Google* is that a hosting platform **may** become liable as a publisher if notified of the presence of offending material on a platform hosted by it but that it will not be regarded as a publisher until it has had a reasonable time, after notification of the presence of the offending material within which to act to remove allegedly defamatory comments. It remains to be seen whether that decision will be followed in Ireland. For present purposes, it is sufficient to say that it plainly provides useful material to support the appellants' case that there was no publication by Google in June 2018 and that Google did not become a publisher of the offending material until sometime after the receipt of the letter of 18th October 2022. If Google did not become a publisher until 2022, then there is clearly an argument to make that Google could not have any liability in respect of the tort of defamation until 2022. On the same basis, it would be arguable that, logically, the cause of action against Google in respect of that tort could not have accrued until the tort had been committed.

19. The appellants also rely on the judgment of Kourakis C. J. in the Full Court of the Supreme Court of South Australia in *Google Inc v Duffy* [2017] SASCFC 130. That case was concerned with whether Google was responsible as a publisher for online material about the plaintiff, Dr. Duffy, in which she was described as a *"psychic stalker"*. The Chief Justice took the view that Google did not become liable as a publisher until after it was put on notice of the existence of the offending material. Kourakis CJ explained the position as follows in paragraphs 181 to 185 of his judgment where he said: -

"181 Google's search results are published when a person making a search sees them on the screen of their computer or other device. The display of the search result

is only possible because Google has developed, established and maintained the information technology capable of almost instantaneously trawling the World Wide Web and extracting the data searched for. Even though the search results are readable abstracts of material maintained electronically on the World Wide Web by others, Google's conduct is an indispensable, proximate step in its publication to the searcher. It is Google which designs the program which authors the words of the snippet paragraph. Google's conduct is the substantial cause of the display of the search results on the screen of the searcher's device. The first element necessary for Google to be a publisher is therefore established.

182 Google does not have any practical ability to review the content of those paragraphs before they are displayed. It is not reasonably practicable to constrict the speed and universality of search engines by requiring the operator of the search engine to review the search results prior to publishing them in order to avoid the publication of some defamatory material. To do so would unreasonably restrict the great utility of search engines. Internet search engines provide a reference service to a virtual library which dwarfs even the largest of the hard copy libraries human civilisation has ever produced.

183 It is impossible in any meaningful way to attribute to Google advance knowledge of the contents of the search results published by use of its search engines. By virtue of the extraordinary amount of material on the World Wide Web, the inordinate number of searches which are conducted and the close to infinite variations therein, it is unrealistic to attribute to Google knowledge of the contents of its paragraphs, let alone to prove that knowledge.

184 For that reason Google should be regarded as a secondary publisher of its search results and knowledge of their defamatory contents should not be attributed

to it until notice is given. Moreover, given the nature of the internet it is necessary to further modify the innocent dissemination rule to allow a reasonable time in which to alter and modify the results obtained Google's search engine before imposing liability on Google for the publication of the paragraphs.

185 The Judge was right to limit Google's liability as a publisher to the results of searches made only after it was put on notice. Once notified Google can only be put on notice for prospective publications. Google then can reasonably be attributed with knowledge of the subsequent publications its search engine is likely to produce if it does not take steps to block the offending URL."

20. While it is not entirely clear that the other two members of the Court fully agreed the views expressed by the Chief Justice in the passage quoted above, the appellants in these proceedings would be entitled in this jurisdiction to rely on the observations of the Chief Justice (even if he was in the minority) in support of the argument they seek to make that Google did not become a publisher of material until, at the earliest, it was notified of the offending material and of its offending nature. In further support of that argument, the appellants would also be entitled to seek to rely on the fact that Google itself said that it was unable to understand or address their complaint until appropriate particulars had been provided to it of the basis on which the appellant said the material in question was defamatory of them. On that basis, the appellants have, at the least, an argument to make that Google did not become a publisher until either (a) receipt of the letter of 18th October 2022 or (b) the expiration of a reasonable time thereafter in which to remove the offending material. On either basis, it appears clear that there is an argument to make that publication did not occur until sometime after October 2022 rather than in June 2018.

21. If the approach suggested in the English and South Australian case law is followed in this jurisdiction, the result may be that Google could not be said to have a liability to the

appellants in respect of the alleged defamation as of the date when the video first became available on YouTube in June 2018. A cause of action in tort does not usually accrue until each ingredient of the tort has occurred. As outlined above, s. 6(2) of the 2009 Act makes clear that publication is one of the ingredients of the tort of defamation. It can therefore be argued by the appellants that, in the case of the tort of defamation committed by a hosting service such as Google, one would normally expect that, in the absence of clear words in a limitation statute to the contrary, the cause of action would not accrue until the hosting service can be said to have published the offending material.

22. Of course, Google argues, in this case, that s. 11(3B) is crystal clear and that, in the case of publication on the internet, the cause of action is expressly stated to accrue on the date when the offending material was first capable of being viewed or listened to through the medium of the internet. That is the argument which was accepted by the High Court judge and which, it must be said, is plainly available to Google on the basis of the words used in s. 11(3B).

23. It may well, ultimately, be the case that Google will be found to have been right on that issue. However, there are contrary arguments that can be advanced. For the reasons identified in paras. 18 and 21 above, it is counterintuitive to think that a cause of action in defamation could accrue before the date of commission of the tort. Yet, if the appellants are right that Google could have no liability as a publisher until after the offending material is brought to its attention, the interpretation of s. 11(3B) advanced by Google would have that effect. Against that backdrop, the appellants argue that the publication by Google (which, as outlined above, they argue did not occur until sometime after 18th October 2022) was a separate and distinct occasion when it can be said that the offending material was made available on the internet. They submit that s. 11(3B) must be read in a manner that takes account of what they contend are two separate publications, first by the defendant in June

2018 and the second, more than 4 years subsequently, by Google at some time after 18th October 2022. In my view, one cannot readily dismiss that argument as wholly unsustainable. The 2009 Act must be read as a whole and in its proper context. This is clear from the decision of the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43. There is therefore an argument to make that this requires a Court to consider the meaning of s. 11(3B) in a manner that takes adequate account of the provisions of s. 6(2) of the 2009 Act which makes publication an inherent element of the tort of defamation such that no liability for that tort can be incurred until there is publication of the defamatory material by the person sought to be made liable for the tort. While the Supreme Court has indicated, in the judgment of Murray J. in the *Heather Hill* case, that the plain meaning of words used in a statutory provision should be the start of any analysis of the meaning of the provision, the Court also stressed that the statute must be read as a whole and in context. Given that s. 11(3B) of the Statute of Limitations was inserted into the Statute by virtue of s. 38(1)(b) of the 2009 Act, there is an argument to be made that s. 6(2) of the latter Act forms an important element of the context against which s. 11(3B) should be construed.

24. Keeping that approach in mind, it seems to me that it is open to argument that the latter words of s. 11(3B) i.e. *"where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium"* should be construed as not capturing publication by Google which, on the basis of the English and Australian authorities, would have no liability for defamation on the date when the offending video was first capable of being viewed through the medium of the internet.

25. Google argues that this would mean that there would be no limitation period for actions against it or other hosting service operators. However, if the latter words in s. 11(3B) quoted above could not be said to capture publication by Google, the earlier part of the sub-section

would be engaged and the cause of action would accrue on the date when Google can be said to have *"first published"* the video. There would thus be a definite limitation period. Google has argued that, if this were so, plaintiffs could delay making a complaint to a provider such as Google for many years after the offending material had first been made available on a particular platform and that this cannot have been the intention of the Oireachtas. That is a significant argument that would require careful consideration by a court but, in my view, it would be wrong to attempt to undertake such an exercise on a motion under O. 15, r. 4. As the authorities make clear, once there is a basis to argue that the claim against the proposed defendant is not statute barred, the Court should generally permit the joinder of the defendant and leave any argument on the limitation issue to be resolved either at the trial or, if appropriate, by way of a preliminary issue.

26. In all of the circumstances, I do not believe that one can say, at this stage of the proceedings, that it is clear that the appellants' claim against Google is manifestly statute barred. There are a variety of dates which might potentially be said to be the date of accrual including the following:

(a) The date contended for by the applicants – namely sometime after receipt of their detailed letter of 18th October 2022 (when they identified, with some precision, the basis on which they claim they are defamed by what is said in the video);

(b) The date could be earlier because the appellants had written a number of letters of complaint to Google before October 2022 – namely on 12th March 2021, 7th February 2021 and 8th March 2022;

(c) It also appears to be the case that, prior to writing those letters, the appellants had also used an online process available from YouTube to seek to resolve the issue. There is nothing in the evidence before the Court to indicate when

that process was used or to form a view as to whether that process could be said to be a sufficient notification to Google to trigger its potential liability but all of that may well have to be explored in due course.

(d) Or, of course, the date could be – as Google contend and as the High Court judge held – the date on which the video was first accessible on YouTube in June 2018. That is the date which the plain words of s. 11(3B) point towards.

Conclusion

27. The issues discussed above are all matters that will fall to be decided in due course. It would be wrong at this point in the proceedings for this Court to express any view as to what the ultimate outcome might be. The case law is clear that, save in very clear cases, the Court should not attempt to resolve issues of this kind on a motion to join an additional defendant. For the reasons just outlined, there are arguments open to the appellant as to why their case against Google is not statute barred. While there are also arguments that go the other way and while the High Court may ultimately be found to have reached the correct view of the law, I am of the view that the matter is not so clear cut as to allow a court to hold, at this stage of the proceedings, that the claim against Google is manifestly statute barred. For that reason, I believe that the appeal of the appellants should be allowed and the order of the High Court refusing to join Google as a defendant should be reversed.

The orders to be made

28. Accordingly, the following orders should be made on foot of this judgment:

(a) As outlined in para. 27 above, there should be an order allowing the appeal, setting aside the order of the High Court (both in relation to the relief claimed and costs) and directing instead that, pursuant to Order 15, rule 4, Google Ireland Limited, having its registered office at Gordon House, Barrow St., Dublin 4, be joined as a defendant to these proceedings;

(b) In order to give effect to the order at (a) above, there should also be an order pursuant to Order 15, rule 15 giving the plaintiffs liberty, within a period of 28 days from the date of perfection of the order made on foot of this judgment, to issue an amended plenary summons naming Google Ireland Limited as an additional defendant, such summons (once issued) to be served on Google Ireland Limited by sending a copy thereof by ordinary prepaid post addressed to its solicitors, A & L Goodbody LLP of 3 Dublin Landings, North Wall Quay, Dublin 1;

(c) In addition, there will be an order pursuant to Order 15, rule 15 that the plaintiffs shall deliver an amended statement of claim (to be amended in such manner as the addition of Google Ireland Limited shall render necessary) within 28 days from the date of service of the amended plenary summons;

(d) Finally, there will be an order that Google Ireland Limited, in accordance with Order 8, rule 2, shall have a period of 8 days after service of the amended summons in which to enter an appearance and, in accordance with Order 21, rule 1(b) shall have a period of 8 weeks from the date of delivery of the amended statement of claim in which to deliver its defence.

29. Having succeeded in their appeal, my preliminary view is that the applicants should be entitled to recover the expenses and outlay properly incurred by them both in respect of their application to join Google as a defendant in the High Court and in respect of their appeal to this Court, such expenses and outlay to be adjudicated in default of agreement. In this context, it is clear from the decision of the Supreme Court in *Tracey v. McDowell* [2021] IESC 38 that the entitlement of the appellants, as lay litigants, is limited to expenses and outlay. If Google wishes to contend for any other order in relation to costs, it is at liberty, within 14 days from the date of electronic delivery of this judgment, to file and serve a short written submission, limited to not more than 1,500 words, setting out the order sought by it

and the basis for it, in which event the appellants will have a further period of 14 days thereafter in which to file and serve replying submissions, again limited to not more than 1,500 words.

30. As this judgment is being delivered electronically, Noonan and MacGrath JJ. have authorised me to say that they agree with it and with the orders proposed above.