THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 305
Record Number: 2018/262
High Court Record Number: 2016/11419P

Donnelly J.
Noonan J.
Binchy J.

BETWEEN/

VINCENT BYRNE AND VINCENT BYRNE JUNIOR
PLAINTIFFS/RESPONDENTS

-AND-

NATIONAL ASSET MANAGEMENT AGENCY
DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 11th day of November, 2020

1. This appeal is brought from the judgment of the High Court (MacGrath J.) delivered on the 23rd March, 2018 and the subsequent order of the court made on the 1st May, 2018. The High Court acceded to the application of the appellant ("NAMA") to strike out or dismiss the claim of the respondents (respectively "Mr. Byrne Snr. and Mr. Byrne Jnr.") but in part only. NAMA appeals against the refusal of the trial judge to strike out the Byrnes' claim in its entirety and the Byrnes have cross-appealed against the striking out of parts of their claim. The Byrnes are father and son.

Background facts

2. In July 2006, Mr. Byrne Jnr. together with another party, Mark Carroll, entered into a loan agreement with Allied Irish Banks whereby AIB advanced the sums of €5.55M and €715,000 respectively for the purpose of funding the purchase and development of a property at Parnell Road in Dublin 12. While this is described as a "site", it was in fact a fuel filling station. A charge over the property was provided by way of security for the loan together with additional security which comprised a charge over two apartments owned by Mr. Byrne Snr. and Mr. Byrne Jnr. known as 8 and 9 Doreen House, Blackhorse Avenue, Dublin together with a charge over a third apartment at No. 9 Doreen House owned by Mr. Byrne Jnr. Mr. Byrne Snr. also executed a guarantee for of the borrowing up to a maximum of €700,000. Unfortunately, the project got into difficulty and the development was not proceeded with. The loans fell into arrears. Ultimately, on the 17th December, 2010, the loans were transferred to NAMA.

3. In a lengthy memorandum sent by Mr. Byrne Jnr. to NAMA which was received on the 19th November, 2013, Mr. Byrne Jnr. deals with, *inter alia*, the history of his dealings with AIB prior to the NAMA acquisition. He notes that in July, 2008, he and Mark Carroll met with AIB together with their solicitor to put proposals to the bank concerning the Parnell Road site, suggesting that the borrowing was at that stage in difficulty. On the first page of this memorandum, Mr. Byrne Jnr. says:

> "In August 2010 Tony Cunningham of AIB informed me that the facility had been transferred to NAMA due to Mark Carroll's involvement with Elm Properties…"

On the fifth page of the same document, Mr. Byrne Jnr. says:

> "NAMA have never disclosed to me when exactly the transfer of the facility took place, the first I heard of it was August 2010 through a phone call from Tony Cunningham of AIB…"

It therefore appears that Mr. Byrne Jnr. was well aware of the transfer or proposed transfer of the assets comprising the loan and the securities some four months before the formal transfer took place on the 17th December, 2010.

4. As noted in the judgment of the trial judge, the Byrnes have sought to maintain that they were unaware of the decision that the assets had been acquired by NAMA until they received a letter from NAMA dated the 28th April, 2011 in early May of that year. As will become apparent, that date assumes significance in the context of the limitation issues that arises in these proceedings.

5. Ultimately, letters of demand were served on the Byrnes on the 20th December, 2013 and the 2nd January, 2014. When these were not satisfied, NAMA appointed receivers over the apartments on the 13th January, 2014 and over the Parnell Road premises on the 3rd February, 2014. The Byrnes sought to prevent the receivers from selling the properties and instituted proceedings in 2014 seeking to restrain the sale. Those proceedings named only the receivers as defendants and when they came on for hearing in the High Court before White J., he afforded the Byrnes the opportunity to join NAMA and AIB as co-defendants, which they declined. The proceedings were dismissed on the 27th February, 2014. As noted by MacGrath J., prior to the institution of those proceedings, no application for leave was made under s. 182 of the National Asset Management Agency Act, 2009, referred to further below.

6. Following the dismissal of the proceedings against the receivers, it would appear that proceedings were issued by "Vincent Byrne" on the 5th June, 2005 in the High Court naming NAMA as defendant. Those proceedings were never served and it is unclear whether the plaintiff was Mr. Byrne Snr. or Mr. Byrne Jnr.

7. A second set of proceedings was issued by Mr. Byrne Snr. against NAMA on the 5th August, 2015. A statement of claim was served on the 13th November, 2015. In that statement of claim, Mr. Byrne Snr. pleaded that NAMA breached his rights under the

Constitution and Article 1, Protocol 1 of the European Charter (sic) of Human Rights by, *inter alia*, the confiscation of his private property, depriving him of his livelihood and access to his pension and depriving him of his good name, dignity and respect. The reliefs claimed included a declaration that the sanction letter of loan and guarantee is void and that he is entitled to the return of his property, which appears to relate to the apartments, together with a claim for damages under various headings.

8. Mr. Byrne Snr. subsequently applied *ex parte* to the Master of the High Court to amend his summons by claiming additional reliefs including an order compelling NAMA to return possession of the apartments to him, compelling NAMA to reimburse him for the rent collected from these properties, presumably by the receivers, and an order prohibiting the sale of the Parnell Road site. Mr. Byrne Snr. issued a motion seeking interlocutory relief in these terms. When this motion was issued, the receivers were in the process of selling the apartments by way of auction due to take place on the 9th December, 2015.

9. NAMA issued its own motion on the 3rd December, 2015 seeking to have the proceedings by Mr. Byrne Snr. dismissed as being, *inter alia*, frivolous and vexatious on various grounds, including a breach of s. 182 of the 2009 Act. This motion came before the High Court (O'Connor J.) on the 4th December, 2015 when Mr. Byrne Jnr. sought to address the court on his father's behalf. The court refused this application, instead permitting Mr. Byrne Jnr. to act as his father's McKenzie Friend. The High Court struck out Mr. Byrne Snr's motion and the related paragraphs of the amended summons. At a subsequent hearing on the 14th December, 2015, O'Connor J. struck out the entirety of the proceedings. These orders were not appealed.

10. The current proceedings were issued on the 22nd December, 2016. A statement of claim (described as a draft statement of claim) was served on the 15th February, 2017. A perusal of this document discloses that the gravamen of the complaint therein concerns an alleged failure on NAMA's part to afford the Byrnes fair procedures during the decision making and acquisition process that led to their loans and associated securities being acquired by NAMA. They also complain that they did not receive clear and unequivocal reasons for the acquisition in breach of their legal rights. All of the allegations in the statement of claim appear to relate to the events that occurred prior to the acquisition of the loans by NAMA.

11. Although it is implicit in all of the claims pleaded in the statement of claim that the acquisition was invalid, this is clearly spelled out in para. 11:

> "11. We say that the decision to acquire our facility and security assets by means of the irregular procedures adopted by the National Assets Management Agency in or about May 2010 are contrary to the conditions provided for by law or the principles of international law and that said decision is null and void in accordance with the settled case law of the European Court of Justice."

12. The within motion was issued by NAMA on the 28th March, 2017 seeking a number of reliefs, the primary one being an order dismissing or striking out the proceedings on the grounds:

    (a) that the proceedings are frivolous and vexatious;

    (b) that they disclose no cause of action;

    (c) that the Byrnes have failed to comply with s. 182 of the NAMA Act, 2009;

    (d) that the claim has no reasonable prospect of success;

    (e) the proceedings constitute an abuse of process having regard to the earlier proceedings; and

    (f) the proceedings are statute barred.

Judgment of the High Court

13. The trial judge first set out the court's jurisdiction on an application of this nature noting that it is a jurisdiction to be exercised sparingly, consistent with the constitutional right of access to the court. He placed particular reliance on the judgment of the High Court in *Wilkinson & Ors v. Ardbrook Homes & Ors*. [2016] IEHC 434 where Baker J. considered the jurisdiction in detail. At para. 18 of the judgment, the trial judge set out a summary of the nature of the claim with which NAMA agree and which is not challenged by the Byrnes:

    "18. The gravamen of the respondent's complaint is that during the decision making and acquisition process, the applicant (and its group entities) failed to comply with necessary conditions and procedures which it is alleged are mandated by law. They contend that such right arises under the Constitution, and pursuant to the charter and treaties. They claim that the applicant should have communicated with them before the assets were acquired and, in particular, during the decision making process. They allege that they should have been afforded the opportunity to provide the applicant with information and documents relating to the nature of the bank assets being transferred, which would have informed the decision making process. It is contended that the procedures and protocols adopted by the applicant effectively prohibited them from making representations. That was in breach of what is claimed to be a right to submit observations pertaining to their personal circumstances, contrary to Art. 41 (2) (a) and Art. 47 of the Charter [*of Fundamental Rights of the European Union*], Arts. 6 and 13 of the European Convention on Human Rights and was also in breach of the constitutional right of fair procedures. It is alleged that the applicant also failed to comply with an obligation to provide a clear and unequivocal statement of reasons for the decision, that it failed to ensure judicial protection, impartiality and legal certainty and that the procedures adopted precluded them from exercising their right, *inter alia*, to make representations pertaining to their circumstances and those surrounding the assets."

14. The trial judge then turned to consider NAMA's submissions on the application. NAMA contended that on any view, the claim was statute barred as the outer limit for bringing the claim was six years from the date of acquisition, being the 17th December, 2010 and as the proceedings were instituted after that date, the six year limitation period provided for by s. 11 (2) (a) of the Statute of Limitations Act, 1957 had expired prior to the institution of the proceedings, assuming that a shorter limitation period did not in any event apply. He noted that Mr. Byrne Jnr. in response submitted that the limitation period did not commence until receipt of notification of the decision in May 2011.

15. NAMA also placed reliance on s. 103 of the 2009 Act which provides that no cause of action is maintainable against NAMA or any NAMA group entity by reason solely of the acquisition of the bank asset. However, the trial judge considered that the claim for damages herein relates significantly to the alleged failure on the part of NAMA to comply with procedures prior to the acquisition and felt therefore it was potentially arguable that s. 103 did not constitute a bar.

16. NAMA also placed reliance on s. 96 of the 2009 Act which provides that the participating institution, in this case AIB, are required to make reasonable efforts to notify the debtor within 60 days of the acquisition of the bank asset by NAMA and that a failure to do so does not give rise to any liability on the part of NAMA or invalidate the acquisition. NAMA have no such obligation.

17. Apart from the issue arising under the Statute of Limitations, NAMA contended that an even shorter limitation period applies to claims under the European Convention on Human Rights Act, 2003, s. 3 of which provides that a one year limitation period applies to claims involving contraventions of the Act by organs of the State, which arguably include NAMA. NAMA also more fundamentally placed significant reliance on the provisions of s. 182 of the 2009 Act which provides:

> "(1) Subject to subsection (2), a claim to which this Chapter applies gives rise only to a remedy in damages or other relief that does not in any way affect the bank asset, its acquisition, or the interest of NAMA or the NAMA group entity or (for the avoidance of doubt) any property the subject of any security that is part of such a bank asset.
>
> (2) A person may apply for an order that the person may apply for a remedy other than or in addition to that permitted by subsection (1) in relation to a claim to which this Chapter applies.
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> (3) An application for an order mentioned in subsection (2) shall be made only by leave of the Court. An application for such leave may be made ex parte.
>
> (4) Leave shall not be granted to apply for an order under subsection (2) unless the Court is satisfied that the application raises a substantial issue for the Court's determination and that:

(a) the application for leave is made to the Court within 30 days after the later of –

(i) a notification by the participating institution to the relevant debtor, associated debtor, guarantee or surety under section 96, and

(ii) the accrual of the cause of action in respect of which the legal proceedings arose,

or,

(b) the Court is satisfied that –

(i) there are substantial reasons why the application was not made within that period, and

(ii) it is just and equitable in all the circumstances to grant leave having regard to the interests of any affected person…

(6) The Court shall make an order under subsection (2) if and only if the Court is satisfied that if the applicant's claim were established, damages would not be an adequate remedy."

18. The judge noted that s. 182 appears not to require leave of the court for a claim based solely on damages. He then addressed in some detail the nature of the right alleged to have been infringed in this case which he described as "constitutionalisation" of the right to fair procedures. Having analysed relevant authorities, he concluded that if the Byrnes are persons affected by the decision to acquire the assets, then the potential exists for the rights described to be triggered. He felt that the Byrnes were persons potentially at least who could be said to be affected by the decision and then went on to discuss whether the right to be consulted could be said to be negated in the case of non-performing loans, as a distinguishing factor from *Dellway v. NAMA* [2011] 4 IR 1 where the loans were performing loans. He was of the opinion that at least on a *prima facie* basis, the right to fair procedures claimed by the Byrnes was capable of being triggered. NAMA does not cavil with that finding and has not appealed it, always of course without prejudice to its right to argue otherwise at a full hearing.

19. In a passage that is centrally relevant to the main appeal herein, under the heading "Is the Claim Statute Barred?", the trial judge analysed the applicability of s. 11 (2) (a) of the Statute of Limitations. He noted that although NAMA argued that time ran from the date of acquisition and not the date of notification, in the light of observations by Hardiman J. in *Dellway* at para. 361 concerning the right to notification, the trial judge said (at para. 53):

> "Nevertheless, the limitation period, including the date from which time begins to run, is not, in this court's view, certain at this stage of the proceedings. … It does not appear to the court to be appropriate at this stage of the proceedings and without further evidence or argument to arrive at any conclusion as to the date of the accrual of the cause of action. There are a number of possibilities. If the court

were now to conclude without further hearing or argument, that time began to run as of the certified date of the transfer, on the face of it, that would involve a potential negation of respect for any potential rights to be informed or to make representations. This is yet another issue which requires to be addressed further, before it could be concluded that the defence pursuant to the Statute of Limitations will succeed, and thus the claim is bound to fail."

20. The trial judge then analysed in turn each of the claims advanced by the Byrnes. Dealing with their claim pursuant to the treaties of the European Union, the judge noted that the Byrnes were claiming certain rights such as the right of defence and the right to have reasons stated which were not dissimilar to those arising under domestic law in cases such as *Dellway*. The judge felt it was not necessary to express any definitive view other than there was at least an argument to be made in this regard.

21. With regard to the claim pursuant to the Charter of Fundamental Rights, he noted the Byrnes' argument that the passing of the 2009 Act involved the implementation of European law insofar as the legislation was notified to the European Commission having regard to its potential contravention of relevant state aid provisions. Because, on the Byrnes' case, the NAMA Act thus implements EU law, the Charter thus applies. The trial judge rejected that argument and accepted NAMA's contention that the 2009 Act did not involve any implementation of European law. Any claim based on this premise was therefore bound to fail.

22. The judge then considered whether the damages claim by the Byrnes in this case is effectively a challenge to the validity of the acquisition of the assets by NAMA. He noted in that respect that the Byrnes have expressly claimed that the decision is null and void. He was of opinion that the claim for damages herein has the potential to be a collateral attack on the validity of the acquisition decision. It appeared to him that the decision was one amenable to judicial review and the issue arose whether the Byrnes were confined to that remedy in circumstances where the time for making such a claim was clearly long past when these proceedings were instituted. He felt the point was arguable and there was no clear authority which suggested that a claim for damages can only be pursued by way of judicial review in a case such as the present. His conclusion in this regard was that while the Byrnes had many hurdles to overcome, it was not possible to definitively say that the case was bound to fail on this ground alone.

23. On the issue of abuse of process, the trial judge noted the various proceedings to which I have already referred and he reached the conclusion, not without hesitation, that this is not an appropriate case in which to exercise the court's jurisdiction to strike out the claim on the grounds of abuse of process.

24. In the light of all these findings, the trial judge struck out the Byrnes' claims for relief at paras. 3, 4 and 5 of the plenary summons but allowed paras. 1 and 2 to stand. Paragraphs 3, 4 and 5 of the summons claim damages for breach of the Charter, the Treaty on the Functioning of the European Union and for failing to comply with the

regulations governing state aid. Paragraphs 1 and 2 claim damages for breach of the constitutional right to fair procedures and the ECHR.

Grounds of appeal

25. NAMA has confined its appeal to two grounds, first that the trial judge was wrong to hold that the claim was not statute barred and secondly, in holding that the cause of action, if any, might have accrued later than the 17th December, 2010, being the date of acquisition. The Byrnes in their respondents' notice seek to uphold the trial judge's findings on the limitation issue and cross-appeal against the determination of the trial judge to strike out the relevant parts of their claim.

The Limitation Issue

26. As already noted, it is clear from a perusal of the statement of claim that the Byrnes' claim is solely and exclusively confined to complaints of unfairness in the procedures adopted by NAMA which led up to the acquisition of the bank assets. They make various complaints that they were not afforded fair procedures or given a right to be heard. They further complain that no, or no adequate, reasons were furnished to them for the acquisition decision. These are classic judicial review grounds.

27. However, on any analysis of the matter, it is clear in my opinion that the cause of action in this case could not have accrued later than the 17th December, 2010. These proceedings were issued on the 22nd December, 2016, more than six years later. Section 11 (2) of the Statute of Limitations 1957 limits the time within which an action founded on tort may be instituted by a plaintiff to six years from the date on which the cause of action accrued. The question thus arises in the present proceedings whether that section applies to the Byrnes' claim, being as it is a claim for breach of constitutional and convention rights.

28. This issue was considered by the Supreme Court in *McDonnell v. Ireland* [1998] 1 IR 134. The plaintiff was a civil servant working in the postal service who was convicted of membership of a proscribed organisation in 1974. As a result, he forfeited his position by virtue of s. 34 of the Offences Against the State Act, 1939. That section was subsequently held by the Supreme Court to be unconstitutional in 1991. In the same year, the plaintiff instituted proceedings claiming damages and a declaration that his dismissal was unconstitutional.

29. The High Court held that breach of a constitutional right was a tort and thus the provisions of the Statute of Limitations applied to it with the effect that the plaintiff's claim was barred. In her judgment, Carroll J. stated (at p. 139):

> "Counsel for the first three defendants claims that the plaintiff's claim is statute barred. He claims that even though breach of a constitutional right is not expressly referred to in the Statute of Limitations, it is nevertheless a tort, i.e. a civil wrong for which the normal remedy is an action for unliquidated damages. He cites *Tate v. the Minister for Social Welfare* [1995] 1 IR 418, in which I held that the meaning of the word 'tort' in the Statute of Limitations, which is not defined and which was sufficiently wide to include breaches of statutory duty, was sufficiently wide to

cover breaches of obligation of the State under Community law. I also said such a breach approximates to a breach of constitutional duty.

I see no reason to change the views I expressed in that judgment. In my opinion, it flows logically that s. 11 (2) of the Statute of Limitations applies to breach of a constitutional right in the nature of a tort as it does to breaches of obligations of the State under Community law."

30. This judgment was upheld by the Supreme Court who dismissed the plaintiff's appeal.

31. It is clear therefore that the Byrnes' claim for damages in this case, whether it is couched in terms of a breach of constitutional rights or of European law, is one to which s. 11 (2) of the Statute of Limitations applies. It logically follows therefore that the claim became statute barred no later than the 17th December, 2016, unless it can be demonstrated that the limitation period was postponed. I did not understand the Byrnes to contend otherwise in their submissions to this court. What they do contend however is that the limitation period should only run from May 2011 when they first received formal notification from NAMA of the decision. They have suggested that they did not have any knowledge of the decision prior to that date and have expressly pleaded that in their grounds of opposition at para. 2(b):

> "The significance of the date of the 17th December, 2010 may well have relevance for the appellant in its defence of the action. However, that date has no relevance for the respondent as at that date and up until the 28th April, 2011 the respondent did not have any knowledge of the appellant in terms of their mutual dealings whatsoever."

32. This plea cannot of course be correct in the light of Mr. Byrne Jnr.'s own document that I have quoted above. However, leaving that point to one side, the trial judge correctly accepted that the limitation period cannot be postponed by reference to any "date of knowledge" test such as might arise in a claim for damages for personal injuries where the provisions of the Statute of Limitations (Amendment) Act, 1991 apply. I have already quoted from para. 53 of the judgment above, where the trial judge concluded that there were a number of possibilities as to when the cause of action accrued.

33. However, those possibilities were in the view of the trial judge capable of including a date post the 17th December, 2010 having regard to the potential right to be notified of the decision and the trial judge held that it would be a potential negation of that right were he to decide that the claim was statute barred under s.11 (2). In that respect, I am of the view that the trial judge fell into error. First, there is no authority for the proposition that the limitation period can be postponed in circumstances where the cause of action relates to a decision which carries with it a right to be notified. It is of course correct to say that Hardiman J. in *Dellway* did suggest that, in the circumstances of that case involving the acquisition by NAMA of Mr. McKillen's loans, he had a right to be notified of the proposed decision in advance so that he could make representations before it was made. That is the logical consequence of the right to be heard.

34. Secondly, it seems to me that in the present case, even if one were to assume that there was a right to be notified in the context of the Byrnes' claim, it was a right to be notified in advance of the taking of the decision to afford them an opportunity to argue against it. Of course, it is not in that context that the Byrnes raise the notification issue but solely in the context that it would be unfair that their cause of action should be deemed to have accrued before they knew about it. That again is no more than arguing that the cause of action should be postponed on a date of knowledge basis, which is not the law.

35. This does not result in any unfairness to the Byrnes who on one view, still had some five and a half years to institute proceedings and of course it cannot be said that they had any reticence about doing so when one looks at the litigation history here. The suggestion of any unfairness is in any event without foundation in the circumstances to which I have already alluded, namely that Mr. Byrne Jnr. was fully apprised of NAMA's involvement long before the acquisition decision. Further, there is no pleaded claim, or reference of any kind in the statement of claim, which concerns the date of notification nor could there be, in circumstances where s. 96 of the 2009 Act expressly absolves NAMA from any duty to notify, or any liability in respect thereof. It is accordingly clear in my view that the conclusion of the trial judge on this point was erroneous.

36. The Byrnes contend that such a construction of the Statute of Limitations is not consistent with the jurisprudence of the European Court of Human Rights and rely in that respect on *Escolano v Spain* (Judgment of the ECtHR of 25 January 2000). The claimants sought to sue the Spanish State for compensation for losses they suffered as a result of a ministerial order which was subsequently quashed by the Spanish Supreme Court. The time limit for such claims was one year but the order of the Supreme Court was not made public for four months after it was made.

37. The claimant's claim was two days outside the one year period and was dismissed by the Spanish Court as being time barred. The ECtHR held that this constituted a breach of the claimant's rights under Art. 6 of the ECHR. The court's rationale for the decision is set out at para. 37: -

> "The parties must be able to avail themselves of the right to bring an action or lodge an appeal from the moment they can effectively apprise themselves of court decisions imposing a burden on them or which may infringe their legitimate rights or interests. Otherwise, the courts could substantially reduce the time for lodging an appeal or even render an appeal impossible by delaying service of their decisions."

38. The Byrnes here claim that NAMA in effect reduced their lawful time for bringing a claim by late notification which they allege breaches Art. 6 of the Convention on the basis of *Escolano*. That argument is of course premised on the Byrnes being unaware of NAMA's involvement prior to May 2011, a premise which is, as I have explained, unsound. The facts of *Escolano* are strikingly different to those that arise here. The claimant pharmacists were entirely unaware of the decision when it was made, and by the time it became public had less than eight months to bring their claims. Here the Byrnes had, at

minimum five and a half years, and as already noted, cannot plausibly suggest that there was any inhibition on them issuing proceedings where they had done so in three previous instances.

39. As has been held in a number of cases, the ECHR does not have direct effect in our domestic law save to the extent that it is incorporated by the European Convention on Human Rights Act 2003. S. 3 (5) of that Act provides that a claim for damages for breach of Convention rights must be brought within 1 year of the contravention although that period may be extended by the court if it considers it appropriate to do so in the interests of justice. Although the Byrnes here submit that the effect of *Escolano* is to invalidate the statutory time limit, they have not sought a declaration of incompatibility in these proceedings but even had they successfully done so, s. 5 (2) (a) provides that a declaration of incompatibility shall not affect the validity, continuing operation or enforcement of the statutory provision in question.

40. The Byrnes also claim that the barring of their claim by statute is contrary to their rights under articles 47 and 52(3) of the Charter. The former provision relates to the right to an effective remedy, and the latter provides that where Convention and Charter rights correspond, the meaning and scope of the Charter rights shall be the same as those laid down by the Convention. There are two problems with this claim. First, as will become apparent from para. 43 below, the Charter is not engaged at all, because the matters giving rise to these proceedings do not involve the implementation of EU law. Secondly, even if EU law were engaged, limitation periods are a matter for domestic law as is apparent from the judgment of the CJEU in *Willy Kempter KG (Case C-2/06)* where the court said:

> "[57] It should nevertheless be pointed out that, in accordance with settled case law, in the absence of Community rules in the field it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render practically impossible or excessively difficult the exercise of rights conferred by community law (principle of effectiveness)…
>
> [58] The court has thus recognised that it is compatible with Community law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty… Such time limits are not liable to render practically impossible or excessively difficult the exercise of rights conferred by community law…"

41. In the absence of any relevant EU limitation legislation, the relevant limitation period falls to be determined by Irish law. The Byrnes do not point to any lack of either equivalence or effectiveness in Irish law regarding the limitation issue here. Even if the Charter were to be regarded as applicable, a point strongly disputed by NAMA, the limitation periods for an action for breach of its provisions are no longer than those governing an action for

damages under the Irish Constitution. Nor can there be any suggestion that Irish law renders it practically impossible or excessively difficult to exercise their rights.

42. It is clear therefore in my view that on any analysis, these proceedings were instituted after the expiration of the longest limitation period that could be applicable to this claim, being more than six years after the 17th December, 2010. The proceedings are accordingly bound to fail.

Other Issues

43. Although that appears to me to be dispositive of this appeal, for completeness I propose to briefly address the other issues raised by the Byrnes by way of cross-appeal. The Byrnes claim that their rights under a number of Articles of the Charter have been infringed by the actions of NAMA. As the trial judge noted, Art. 51 is critically important to this claim because it provides that the Charter is applicable to Member States only when they are implementing Union law. The Byrnes contend that the 2009 Act constitutes the implementation of EU law. It does not. This submission seems to derive from the fact that the legislation was notified to the European Commission having regard to the fact that it had the potential to contravene state aid rules. It clearly does not implement any Union law. I agree with the trial judge's conclusion on this point. Indeed, the Byrnes have never explained how the 2009 Act constitutes an implementation of European Law.

44. In this appeal, the Byrnes have sought to argue that the 2009 Act is incompatible with EU law which they describe as "the fundamental issue". They argue that s. 96, for example, concerning the obligation of the participating institution (here AIB) to notify the debtor of the acquisition of the bank asset, and exempting NAMA from any liability in that regard, is contrary to European law. I do not think it necessary to dwell on this argument because it is quite clear that it forms no part of the claim advanced in the pleadings. That claim is purely one for damages arising from the allegedly unlawful acts of NAMA in the lead up to the acquisition of the bank assets in this case. No declaratory relief is claimed.

45. Insofar as the Byrnes advance claims pursuant to the treaties of the European Union, these are in substance *Dellway* type claims of rights to be consulted and heard prior to the acquisition of the bank assets which I have already dealt with.

46. NAMA contends that the failure of the Byrnes to bring an application under s. 182 of the 2009 Act is fatal to the claim. Although a claim for damages *simpliciter* does not appear to be caught by the requirement to obtain leave of the court to institute proceedings, NAMA argues in this case that the claim is predicated on an assertion that the acquisition is null and void. As I have previously noted, that is expressly pleaded at para. 11 of the statement of claim. NAMA thus argues that the claim for damages in the present case is in substance and effect a collateral attack on its acquisition of the bank assets.

47. Were it necessary for me to express a view on this point, I agree with NAMA's submission in this regard. It is clear that the only conceivable basis upon which the Byrnes' claim for damages could ever have succeeded was on foot of a finding that the acquisition was

invalid. Subsection 182 (1) applies to claims for damages or other relief that do not in any way affect the bank asset, its acquisition, or the interests of NAMA. The claim made here thus falls clearly outside subs. (1), as a finding of invalidity grounding a claim for damages would clearly affect the bank asset, its acquisition and the interest of NAMA therein. It must follow therefore, in my view, that this claim cannot be maintained in the absence of leave from the court and is thus bound to fail on this additional ground. I would therefore respectfully disagree with the view of the trial judge on this issue.

48. In exchanges with the court, counsel for NAMA was asked whether the fact that the security properties have now been sold meant that, arguably, it could be said that the damages claim here, even if it amounted to a collateral attack on the asset, could not be considered to affect an asset which has now been disposed of. In response, counsel correctly pointed to the fact that the bank asset in the present case includes not only the security properties but of course the loan itself which remains substantially unsatisfied so that it remains the position that these proceedings continue to constitute a collateral attack on that asset.

49. Finally, counsel also referred the court to the provisions of s. 193 of the 2009 Act which provides as follows:

> "(1) Leave shall not be granted for judicial review of a decision under this act unless –
>
> "(a) either –
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> (i) the application for leave to seek judicial review is made to the court within one month after the decision is notified to the person concerned, or
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> (ii) the court is satisfied that –
>
> (I) there are substantial reasons why the application was not made within that period, and
>
> (II) it is just, in all the circumstances, to grant leave, having regard to the interests of other affected persons and the public interest,
>
> and
>
> (b) the court is satisfied that the application raises a substantial issue for the court's determination."

50. Counsel submitted that the Byrnes' claim herein was in reality a claim that ought to have been pursued by way of judicial review insofar as it seeks to impugn the decision to acquire the assets on grounds that, as I have already indicated, would be regarded as classic judicial review grounds. In that regard, counsel relied on a number of authorities involving NAMA and related entities. One such was *NALM v. Barden* [2013] IEHC 32 where Charleton J. noted that the defendant in that case sought to argue that his loans had been unlawfully acquired. Charleton J. observed that "that plea is classically the invocation of a public law remedy" (at p. 11). In *NALM v. Cullen* [2013] IEHC 121, Kelly J. (as he then was) considered a claim by the defendant that the acquisition of his assets

was invalidated by, as here, an alleged failure by NAMA to allow him to make representations prior to the acquisition decision. Kelly J. noted (at para. 75) that this line of argument could only in effect be a challenge to the decision to acquire the facilities and he held that s. 193 was directly applicable.

51. In *Morrissey v. NAMA* [2019] IEHC 576, Ní Raifeartaigh J. dealt with a claim by the plaintiffs that the enforcement of the security underlying their loans was carried out in breach of their constitutional rights. They sought damages for breach of those rights and other alleged wrongs and they sought an order that certain sections of the 2009 Act, including s. 182, were in violation of certain articles of the ECHR. The court in that case said that it would be inclined to the view that the plaintiffs' claim was based on public law issues and accordingly s. 193 applied. Having analysed the plaintiffs' complaints, Ni Raifeartaigh J. said (at para. 103):

> "What is clear from the matters listed is that the essence of the complaint centred on what would be regarded in law as a public law type of claim i.e. a claim for damages based upon the alleged unlawfulness of the NAMA decision."

52. That applies with equal force to the present case and I am satisfied that even if there was any basis for suggesting that leave of the court in these proceedings is not required under s. 182, which as explained I do not accept, section 193 would in any event operate as a bar to the pursuit of these proceedings without the leave of the court obtained within the stipulated time. The time limit for bringing judicial review proceedings in respect of public bodies is, even in "normal" cases, relatively short i.e. three months under O. 84 of the RSC. Such time limits have been rationalised in the public law sphere on well settled public policy grounds. As has been noted in the past, the special time limits applicable to public law proceedings would be rendered entirely nugatory if they could be circumvented by the simple expedient of issuing plenary proceedings claiming damages and declarations on the basis of an alleged infirmity in the actions of the public body under challenge. Those considerations obviously apply equally in this case.

53. Even construing the provisions of the 2009 Act narrowly given the limitations they impose on the right of access to the court, as the trial judge did, it is clear to my mind that these proceedings cannot be viewed as other than an attempt to pursue a claim that can only be pursued by way of judicial review.

Conclusion

54. I readily accept, as did the trial judge at the outset of his judgment, that the jurisdiction invoked in this case by NAMA is one to be exercised sparingly and with considerable caution, being as it is a significant limitation on the right of access to the court. It is however well recognised that such right of access is not absolute. In clear cases, and this is one such, the court should not shrink from exercising the jurisdiction. Defendants also have constitutional rights which include the right to the protection of the court from abusive litigation. Such litigation is not infrequently pursued by persons who are not a mark for costs against parties who incur, sometimes very substantial, expense in defending unmeritorious claims where such costs will never be recovered. That is

potentially a source of significant injustice. The courts are vigilant to ensure that the rights of defendants are accorded equal respect to the rights of plaintiffs in considering necessary limitations on the right of access in the interests of justice.

55. For these reasons therefore, I would allow NAMA's appeal and dismiss the Byrnes' cross-appeal. I would substitute for the order of the High Court an order striking out the Byrnes' claim in its entirety. As NAMA has been entirely successful in this appeal, my provisional view is that it is entitled to its costs both in this court and the High Court, such costs to include the costs of the motion and the proceedings. If the Byrnes wish to contend for an alternative form of 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 already proposed by the court, the Byrnes may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

56. As this judgment is being delivered electronically, Donnelly and Binchy JJ. have indicated their agreement with it.