



**THE COURT OF APPEAL**

Neutral Citation: [2022] IECA 103

**Record No.: 2014/1051**

**Donnelly J.  
Ní Raifeartaigh J.  
Collins J.**

**BETWEEN/**

**PATRICK JOSEPH KENNY**

**APPELLANT**

**-AND-**

**MINISTER FOR AGRICULTURE AND FOOD, IRELAND,  
AND THE ATTORNEY GENERAL**

**RESPONDENT**

**JUDGMENT of Ms. Justice Donnelly delivered this 5th day of May, 2022**

**Introduction**

1. In July 2010, the plaintiff issued plenary proceedings that:-

*"[i]n very broad terms, ... are about the operation by the first named defendant (the Minister) of the Diseases of Animals Act 1966 (the Act of 1966) and schemes made by the Minister for the eradication of bovine tuberculosis (TB Scheme) and bovine brucellosis (Brucellosis Scheme) and, in particular, the absence of a statutory scheme of compensation in relation to the compulsory slaughter of reactor animals, and the operation of Community Aid payment schemes for payment to farmers." (From para. 4 of the High Court judgment, Kenny v. Minister for Agriculture [2013] IEHC 520).*

2. The majority of the claims made by the plaintiff refer to matters concerning his animals alleged to have occurred in the 1990s or in the year 2000. Laffoy J. dismissed the entirety of the plaintiff's claims on foot of the defendants/respondents' (hereinafter "the State") motion because a) the bulk of the claims (paras. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 16A, 17, 17A, 18, 19, 20, 21, 22, 23, 24, 25 and 26) were statute barred and b) the balance of the claims were public law claims that had not been brought promptly or within the time limits provided in Order 84, rule 21 of the Rules of the Superior Courts, 1986 (as amended) ("RSC"). Laffoy J. also held in her judgment, although did not so order, that certain claims

of the plaintiff could also be dismissed on other grounds such as that the pleadings did not plead any known cause of action.

### **The Appeal Process**

3. The plaintiff now appeals against the judgment and order of the High Court. The passage of time since that judgment is explained by the following events. The plaintiff was represented by solicitor and counsel at all times in the High Court. In December 2013, an appeal was made to the Supreme Court in the ordinary manner and a Book of Appeal was filed in April 2014. In June 2014, the solicitors for the plaintiff sought further time for filing a certificate of readiness as counsel was unable to continue in the case. In December 2014, it was indicated that this appeal fell within the class of appeals to be heard and determined by the Court of Appeal in accordance with Article 64 on the establishment of this Court. In January 2015, the Chief State Solicitor's Office ("the CSSO") on behalf of the defendants/respondents (hereinafter "the State") wrote to the plaintiff's then solicitors seeking a certificate of readiness and submissions. A notice of change of solicitors was received.
4. In May 2018, directions were given by the Court of Appeal permitting 10 weeks for the filing of the plaintiff's submissions and a date in November 2018 was set to fix a hearing, which date was vacated; no submissions had been received by that date. In July 2019, the Court indicated that the matter would be listed in a call over of all pending Article 64 cases. In that month, the new solicitors wrote to say that they would be coming off record. At the hearing the plaintiff's son appeared at the call over and said his father had been ill and that they were having difficulties with the solicitor on record. The plaintiff was given 20 weeks to file submissions. In November 2019 there was a notice of discharge of solicitor filed in the Court of Appeal. In December 2019 the plaintiff filed submissions which were personally signed by him. On the 20th December, 2019 the plaintiff's son appeared on behalf of the plaintiff and said he would be acting as a MacKenzie friend. The matter was put back to the 17th January, 2020 to confirm the length of the appeal. The State were given 10 weeks to file submissions. In January 2020 a date for hearing of the 18th June 2020 was fixed.
5. In February 2020 the plaintiff brought a motion seeking leave to adduce new evidence. This was refused.
6. In a call over in May 2020 it was indicated that the case would proceed remotely but that if the plaintiff wished, he could make contact with the Court of Appeal office with a view to applying to change that. The plaintiff did not appear but was informed of this. The plaintiff's son informed the CSSO by telephone that he did not wish to have a remote hearing. The CSSO informed the Court office and the appeal date was vacated.
7. In February 2021, a new hearing date for the 13th May, 2021 was fixed. At the call over in March 2021 the Court was informed by the CSSO that the plaintiff's son had emailed the CSSO to say that the day before he had been sent by his GP to the hospital. The Court gave directions for the hearing, including the filing of books by the CSSO. The Court directed that the plaintiff may apply for a hybrid hearing. In April 2021, the CSSO sent

appeal books electronically to the plaintiff (and hardcopies in May 2021) and filed a copy with the Court of Appeal in April 2021.

8. A series of emails between the Court office and the plaintiff and the Court and both parties followed. Initially the plaintiff sought to apply for an adjournment on the basis of a medical report which was not to be disclosed to the CSSO. The Court indicated this was not appropriate. In due course, on foot of a further medical report disclosed to the CSSO the plaintiff sought a further adjournment. The plaintiff sought a physical hearing due to his hearing issues and lack of knowledge around technology. The Minister left the matter of the adjournment to the Court and the Court decided in view of the report and the attitude of the Minister that it would adjourn the matter but would do so on the basis that there would be no further adjournment save in exceptional circumstances which were fully evidenced. The Court then fixed the earliest date which was the 12th January, 2022 for hearing.
9. At the call over in November 2021 there was no appearance by the plaintiff or his son. On the 4th January, 2022, the plaintiff's son sent an email saying that neither he nor his father could attend due to Covid-19 and were seeking an adjournment. The CSSO consented to the adjournment but asked for the earliest hearing date to be fixed. This was fixed for the 10th March, 2022.
10. On the 22nd February, 2022 the plaintiff's son sent another email saying that he was unable to attend on the basis of his own health issues. The plaintiff's son sent a report to the Court. The Court listed the hearing of the application for an adjournment on the 3rd March, 2022. The plaintiff's son said that he was unable to attend and requested the Court to grant an adjournment and enclosed a medical report. The Court of Appeal heard the application and the State opposed an adjournment. This was refused by the Court. The Court indicated it would permit the plaintiff's son to appear for his father in the particular circumstances that presented. The State made no objection to that course of action.
11. In due course, the hearing on the 10th March, 2022 proceeded. The plaintiff's son appeared in person and presented the plaintiff's appeal without difficulty. He displayed a huge degree of familiarity with the facts of the case. He also informed the Court that his father would be in a condition to give evidence if the matter was remitted to the High Court for hearing. Given that he was appearing for his father, I will refer to the arguments made by him as the plaintiff's arguments.

#### **The Claims made in the High Court Proceedings**

12. In her judgment, Laffoy J. outlines the factual and legal bases of the plaintiff's claims and it is unnecessary to repeat in detail the nature of those claims. In brief, the Statement of Claim commences with claims that the Minister for Agriculture and Food ("The Minister") wrongfully withheld the plaintiff's full entitlement to monies under various Community Aid payment schemes (headage payments) between 1991 to 1997. From paragraph 7 up to paragraph 12, the claims concern matters dating from the 1990s. Paragraphs 15,16 and 17 deal with claims related to statements in the Dáil in 1965 by the then Minister with responsibility for the Diseases of Animals Bill, regarding the nature of the compensation

provisions on the control of bovine tuberculosis and bovine brucellosis. It is claimed that this amounted to a promise giving rise to a legitimate expectation on behalf of the plaintiff. Paragraphs 18, 19, 20, 21, 22 and 23 deal with the claims relating to alleged breaches of EU Directives but all the underlying factual matters are events which occurred in the 1990s or the year 2000. Paragraphs 13 and 14 contain alleged breaches by the Minister of two aspects of "the purposes of" the Act of 1966 regarding both a compensation scheme and an alleged prohibition on other charges related to inspections.

13. Paragraph 14 (as amended) specially pleads that on the 28th September, 2009, the Minister deducted from the payments due to the plaintiff under the Single Farm Payment/Disadvantaged Areas Scheme monies the sum of €155.32, in respect of "Department testing fees". Paragraph 24 concerns the issuing of a District Court summons against the plaintiff in respect of the TB scheme and the brucellosis scheme in June 2007. Paragraph 24A (as inserted by amendment) concerns a claim that the Minister "unlawfully deducted the sum of €518 from the plaintiff's 2009 Single Farm Payment/Disadvantaged Areas Scheme payment on a wrongful basis." Paragraphs 25 and 26 asserted in general terms the claims based upon what was set out in the earlier paragraphs.

#### **The Proceedings before the High Court**

14. The plaintiff issued his plenary summons on the 16th July, 2010 and a statement of claim was delivered on the 11th August, 2010. Ultimately, a third Statement of Claim was served on the 14th October, 2011, consent to delivery of which was given on the 23rd January, 2012. An amended defence was filed on the 19th October, 2012, raising *inter alia*, claims of delay and in particular because this was a public law challenge, a failure to comply with Order 84, rule 21 time limits which applied by analogy, and that it was time barred pursuant to the Statute of Limitations. There were further denials that the pleas amount to causes of action, of lack of *locus standi* and that the pleadings are a collateral challenge to the outcome of criminal proceedings.
15. The plaintiff filed a reply joining issues with the amended defence. The plaintiff pleaded that certain material facts relevant to the plaintiff's right of action were deliberately concealed by the Minister or his servants or agents and that the relevant facts could not have been discovered with reasonable diligence until in or about 2009 following the determination of certain District Court proceedings against the plaintiff taken by the Minister and "having received certain legal advices".
16. The particulars of this plea related to the decision in *Lucey and Madigan v. Minister for Agriculture and Food* (Unreported, High Court, Lardner J., delivered on the 19th December, 1990) ("*Lucey and Madigan*"). The plaintiff alleged that this case struck down the Minister's reactor grant scheme/movement permit based direction to slaughter scheme on the 19th December, 1990. The plaintiff alleged that the said scheme was continued notwithstanding the decision. It was alleged that there was a failure to bring this decision to the attention of the Superior Courts. It was said that the fact that the said scheme had been struck down was only brought to the attention of the plaintiff in 2009. Other denials of the claims set out in the defence were denied. The decision that this Court must make on this motion does not involve any consideration of whether the plaintiff is correct in his analysis of the

decision in *Lucey and Madigan*. It is however appropriate to record that the State disagrees with the interpretation of the plaintiff and the weight he attaches to the findings therein.

17. The State brought a motion seeking dismissal of the proceedings on a number of grounds, including the Statute of Limitations, 1957 (as amended) and on the basis that, as the proceedings raised public law matters, it was an abuse of process to permit them to be brought given the delay that had occurred. This motion was grounded upon the affidavit of Jevon Alcock, solicitor, of the Chief State Solicitor's Office. Mr. Peter H. Jones, the plaintiff's solicitor, swore an affidavit which formed the plaintiff's evidential response to the claims set out in Mr. Alcock's affidavit.
18. The State's case was that most of the plaintiff's claims were, on their face, statute barred; the causes of action, being claims in tort (whether based on breach of statutory duty, breaches of obligations under EU law or breach of the plaintiff's constitutional rights), accrued more than six years prior to the issue of proceedings and were thus outside the limitation period set out in s. 11 of the Statute of Limitations, 1957 (as amended). Counsel for the plaintiff's answer in the High Court to the claim that it was statute barred was that the plaintiff could not be denied a remedy where the Minister had "deliberately concealed the gross offending of Article 15.2.1 of the Constitution inherent in non-statutory reactor grants." This was based upon the claim that the Minister was aware, in particular since the decision in *Lucey and Madigan* (Lardner J.), that bringing into place non-statutory reactor grants was an unpermitted exercise of the law-making powers by the Minister.
19. In the plaintiff's High Court written submissions, much emphasis was placed upon what occurred in the Circuit Court during the 1993 appeal from the District Court's conviction of the plaintiff on foot of three summonses for failing to move a reactor animal in accordance with the terms of movement permissions served on him. Mr. Alcock's affidavit had made reference to the 1992/1993 criminal proceedings in asserting that the present proceedings were a collateral attack on the outcome of those proceedings. The exhibited order of the Circuit Court records that the plaintiff entered a plea of guilty to one summons for which offence the Probation Act, 1907 was applied and that the Minister entered a *nolle prosequi* in respect of the two other summonses. It is noted that the Conviction Order from the District Court records that the Director of Public Prosecutions was the prosecutor whereas the Order that issued after the appeal to the Circuit Court lists the Minister as the prosecutor. For the purposes of this appeal I do not think that anything turns on that distinction. Furthermore, strictly speaking a *nolle prosequi* can only be entered where the trial is one on indictment. Again for the purposes of this appeal, the form in which the prosecutor chose to end the case is not at issue; the plaintiff was not convicted on those two offences and in relation to the third offence he was given the benefit of the Probation Act which meant that he had no conviction recorded against him on that matter either.
20. It was alleged in the plaintiff's written submissions to the High Court, but never substantiated by any evidence, that counsel for the Minister (as prosecutor) made certain wrongful claims. In particular, it is said that counsel for the Minister relied upon the decision of the Supreme Court in *Rooney v. Minister for Agriculture & Food* [1991] 2 I.R. 539 as

authority for the proposition that the constitutionality of all aspects of the TB scheme and the Brucellosis scheme (including non-statutory reactor grants) had been exhaustively and conclusively confirmed. Mr. Jones averred in his affidavit that the then Minister or her servants or agents “deliberately ensnared [the] Plaintiff into participating in constitutionally prohibited prosecutorial/judicial plea bargaining” but provided no evidential basis for that averment. Mr. Jones was not the solicitor who acted for the plaintiff in the summons proceedings and was therefore not in a position to give admissible evidence of what occurred in those proceedings in any event. As Laffoy J. noted, this averment was made without identifying any source for such a serious allegation and she held that it could not be treated as factually supporting the proposition advanced by the plaintiff. I would agree and would also comment that no solicitor should make such serious allegations without the most careful consideration of all the available evidence; in this case, evidence of what had occurred during the appeal in the Circuit Court was singularly lacking.

***The nature of the hearing before Laffoy J.***

21. On the 19th November, 2012, the return date of the motion, the parties agreed by consent that a preliminary issue be tried before a judge without a jury as to whether certain of the plaintiff’s claims were statute barred, namely paras 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 16A, 17, 17A, 18, 19, 20, 21, 22, 23, 24A(b), 25 and 26. The High Court (Murphy J.) made an order on that basis. Subsequent to the return date of the motion, the plaintiff’s solicitor, Mr. Jones, swore his replying affidavit. In that affidavit he responded to the various points raised in the motion and affidavit filed on behalf of the State. In due course, the State filed written submissions dealing with all the grounds on which they sought the dismissal of the plaintiff’s claims. Replying submissions on behalf of the plaintiff were filed. Those replying submissions of the plaintiff addressed all grounds upon which dismissal was sought.
22. At the hearing of the motion before Laffoy J., the full extent of the motion was heard by her. In her judgment she made express reference to “*considering the issues which have arisen on the application*” under the headings set out in the State’s submissions which headings were adopted by counsel for the plaintiff. Laffoy J. makes express reference in her judgment to the written submissions and to the headings of the claims.
23. On foot of the State’s motion, Laffoy J. dismissed the bulk of the claims made by the plaintiff on the basis that they were statute barred pursuant to the provisions of the Statute of Limitations. Pursuant to the inherent jurisdiction of the court, she dismissed the balance of the plaintiff’s claims on the basis that, given the public law nature of the claims, they should have been, but were not, brought promptly and within the time limit provided in Order 84, rule 21 RSC, which applied by analogy to these plenary proceedings. In the course of her judgment, Laffoy J. also held, *inter alia*, that the defendants had established both inordinate and inexcusable delay and that the delay was prejudicial to the public interest. In relation to specific pleadings such as paragraph 24A, Laffoy J. held that no recognisable cause of action had been pleaded.
24. The reason I have referred to the history of the application before Laffoy J. is because one of the issues raised in the plaintiff’s written submissions to this Court (which he prepared himself) is a claim that Laffoy J. erred in extending the scope of her application from that

directed by Murphy J. in his order of 19th November, 2012. That issue was not raised in the notice of appeal which was filed on behalf of the plaintiff by his original solicitor.

25. In oral submissions by the plaintiff's son, this was the basis for his contention that the appeal ought to be allowed in respect of those aspects of the claim dismissed on the basis of a failure to comply with Order 84, rule 21 of the Rules of the Superior Courts. Regardless of whether this ground had been raised in the notice of appeal or not, it is a ground without any merit. It may be that the raising of this ground is based upon a misunderstanding by a lay litigant (and his son) as to the procedural rules that lay behind the granting of the Order.
26. In their motion, the first relief sought by the State was an Order pursuant to Order 25, rule 1 and/or Order 34, rule 2 directing the trial of the preliminary issue of law, namely whether the claims were statute barred. Rule 25(1) provides that by consent of the parties or by order of the court on the application of either party, a pleading on a point of law may be set down for hearing and disposed of at any time before the trial. Thus, even though this ended up being by consent, the respondents had to seek an order of the court for the trial of the preliminary issue, in the absence of prior consent. The other reliefs in the motion did not require a specific order of the Court and were simply sought as part of the motion. The manner in which the motion was dealt with on behalf of the plaintiff - the filing of the affidavit and submissions responding to all the reliefs claimed - demonstrates that the plaintiff's legal representatives were fully aware of the nature of the hearing that would take place before Laffoy J. The plaintiff's case on all these reliefs were addressed by him in the High Court and were dealt with by the High Court judge in the course of her judgment. This submission is therefore rejected.

### **The High Court Judgment**

27. In her judgment, Laffoy J. outlined the factual and legal basis of the claims made in the proceedings. She referred in detail to the facts pleaded by the plaintiff in his amended statement of claim and in his reply to the amended defence. Laffoy J. had noted that the pleading was somewhat confusing and lacked clarity at times. She noted that the factual situation was hardly elaborated upon in the affidavit of Mr. Jones. When she came to deal with the legal issues in the case, she followed the headings which the State had utilised in its submissions, which headings were also utilised by the plaintiff in his replying submissions.
28. The primary reason for dismissing the vast bulk of the plaintiff's claims was on the basis that they were statute barred in accordance with the provisions of the Statute of Limitations. Laffoy J. specifically rejected that there had been any "concealment" by the Minister that non-statutory grants by the Minister offended Article 15.2.1° of the Constitution (that sole and exclusive law-making powers lay with the Oireachtas). She held that certain claims in the affidavit of Mr. Jones did not factually support the proposition of deliberate ensnarement of the plaintiff in participating in unconstitutional activity. She rejected the plaintiff's contention that because of the conduct of the Minister his servants or agents the provisions of the Statute of Limitations could be disapplied.

29. In relation to the remaining claims she held that they were time barred by the provisions of Order 84, rule 21 as they were public law claims. She held on the facts that there was no good reason to extend time.
30. Although Laffoy J. stated that the Order being made would reflect the above findings, she also found that:
- a) In so far as the plaintiff was seeking equitable relief on foot of claims based on decisions, action or inaction dating from 1965 to 2000, which are not otherwise barred, that the lapse of time was substantial and it would be inequitable to enforce the claims by granting equity based forms of relief,
  - b) The plaintiff was barred by acquiescence from seeking equitable relief in respect of the claims predicated on some form of wrongdoing by the State in initiating, conducting and prosecuting the disposal of prosecutions in 1992 and 1993,
  - c) The State had established both inordinate and inexcusable delay in the commencement of the proceedings by the plaintiff and prejudice, and
  - d) The plaintiff had not established a cause of action arising from para. 14 of the amended statement of claim that the sum of €155.52 was wrongfully withheld in respect of testing fees and no recognisable cause of action had been properly pleaded in respect of the second element of paragraph 24A.
31. At para. 40 of her judgment, Laffoy J. said that she was satisfied that every element of the claim pleaded in the amended statement of claim which arose out of actions by the Minister or his Department earlier than July 2004 is statute barred. She then answered the question posed in the Order of Murphy J. by repeating the paragraph numbers referred therein when asking the question as to whether these claims were statute barred. This included a reference to para. 24A(b) which reflected what had been claimed in the State's motion to dismiss. At para. 60 of her judgment however, she answered the question as to whether the claims were statute barred by referring to para. 24 *simpliciter*. This is reflected in the Order that was made by the High Court. Thus, the Order reflects the position that the claims made in paragraph 24A were time barred because of the failure to comply with the provisions of Order 84, rule 21 which applied by analogy to these public law claims. Neither the plaintiff nor the State have referred expressly to this discrepancy. The State continued to make submissions that the claim under para. 24A(b) had been dismissed as time barred. They also submitted in so far as the claims amounted to public law claims that the respondent had failed to comply with the time limits in Order 84, rule 21 by analogy. They also submitted that para. 14 and 24A(b) were correctly held to disclose no reasonable cause of action. The plaintiff on the other hand made general assertions in submissions to the effect that the State could not rely upon time limits, that the claims were not statute barred, not time barred, were not public law claims, disclosed a reasonable cause of action and were not frivolous or vexatious nor was he guilty of *laches*, he had *locus standi* and had an entitlement to access to the court to vindicate his rights.



### **The Grounds of Appeal**

32. The grounds of appeal numbered 7 paragraphs in total. The final one dealt with the issue of costs. The six substantive grounds are general in nature and mainly assert that the motion judge erred in the findings she made without identifying any specific error of law.
33. There is a claim that the trial judge erred in relying on facts other than those pleaded. That ground is not really explained any further in the written submissions on behalf of the plaintiff. I am satisfied however that the judge mostly referred to dates in the pleadings or referred to dates in Mr. Alcock's affidavit where he had sought to provide a timeline in circumstances where there was a lack of clarity at times in the pleadings. Those dates were not the subject matter of any particular objection in the affidavit of Mr. Jones and therefore it cannot be said that the timelines had been objected to in the High Court. It is also noteworthy that a chronology of dates relevant to the pleadings compiled from the affidavit of Mr. Alcock was placed before this Court without demur (as to those dates) from the plaintiff. I therefore reject this ground of appeal.
34. The two issues that are primarily addressed in the written submissions before this Court are the alleged misrepresentation by counsel for the Minister in the criminal proceedings against the plaintiff before the Circuit Court and that Order 84, rule 21 should not have been applied and/or if it did, it should have been extended. In the written submissions, the representation point is addressed under various headings, such as estoppel, equitable estoppel and fraudulent misrepresentation. Some specific aspects of the findings of Laffoy J. are also highlighted such as the claim that para. 24 amounted to a plea of malicious prosecution and that para. 24A in total disclosed a reasonable cause of action or, by an amendment, could have been saved from being so dismissed.
35. In the oral hearing in the Court of Appeal, the plaintiff, in addition to those grounds, submitted that the first element of para. 24A was in effect an appeal from a decision of an appeals officer to deduct this payment. This ground had never been raised before the High Court.
36. I will address these matters by looking at the allegation of misrepresentation in the first place and by then addressing the submission that because of this the matter was not statute barred under the Statute of Limitations or that, in the alternative, it amounted to an estoppel which prevented the State from relying on a plea under the Statute of Limitations. I will then address the appeal against the finding that the balance of the plaintiff's claim was time barred for failure to comply with Order 84, rule 21 which applied by analogy to the claims here, which were public law claims. I will then address the claims in paragraphs 14, 24 and 24A and the findings made in the High Court in respect of these matters. Finally, I will consider whether some or part of the plaintiff's claims might have been saved from dismissal by the amendment of the pleadings in the amended statement of claim.

### **The Allegations of Misrepresentation**

37. There is no disagreement between the plaintiff and the State that the plaintiff's claims were subject to a six year time limit from the date of accrual of the cause of action. Save for those pleas which I will address below, the plaintiff's written submissions do not take

issue with the fact that the date of accrual for many of the claims was, *prima facie*, earlier than six years prior to the issue of proceedings. This was the position with respect to the plaintiff's claims which concern decisions or actions taken by the Minister against the plaintiff such as various orders under the schemes at issue and the issue of criminal proceedings (save for the 2007 proceedings), wrongful withholding of EU Community aid monies (save for that claimed in 2009) and fee and charges (save for that referred to in para. 14 as it relates to 2010 and para. 24A as it relates to 2010) and failure to compensate the plaintiff and breaching mandatory requirements in EU Directives concerning animal testing procedures. The plaintiff's submission is however that the date of accrual was either postponed or was somehow "disapplied" in this case. The term *disapply* is used in the affidavit of Mr. Jones.

38. The plaintiff's claim for a postponement is based upon the claim of deliberate concealment as set out in his reply to the State's defence. This is a claim that the effect of the decision in *Lucey and Madigan* was to strike-down the Minister's movement permit based "direction to slaughter" scheme. The second aspect was based upon an assertion, made obliquely in the affidavit of Mr. Jones and subsequently in the High Court written submissions, that the Minister's counsel in the 1993 criminal proceedings relied (wrongfully) upon *Rooney v. Minister for Agriculture and Food* for the proposition that those schemes had been found to be constitutionally sound by the Supreme Court. That assertion, together with the alleged deliberate concealment of the decision of *Lucey and Madigan* as set out in the reply to the defence, forms the basis for the argument that the Statute of Limitations ought to be *disapplied* due to representation, equitable estoppel and alleged fraudulent concealment under s. 71 of the Statute of Limitations. Of course, as Laffoy J. correctly pointed out, the Statute of Limitations must be applied by the Court as a statute which carries with it a presumption of constitutionality. The plaintiff must therefore as a matter of law establish that the accrual date was postponed in accordance with s. 71 of the Statute of Limitations or that the circumstances are such that the State is not entitled to rely upon the provisions of the said Statute.
39. It must be noted at the outset that there is a total absence of any factual basis for the plaintiff's proposition as regards the alleged representation made by counsel on behalf of the Minister. There is a) no pleading as to the alleged 1993 misrepresentation b) no averment on affidavit from the person to whom it was allegedly made, c) no averment as to all the surrounding circumstances in which it was made or d) no averment as to the terms of the misrepresentation. The terms of the alleged misrepresentation are set out in the written submissions to this Court that the plaintiff was informed that he "was bound to lose the appeal because the defendant's requests were perfectly legal in accordance with a recent judgment of the Supreme Court" namely *Rooney v. Minister for Agriculture and Food*. The reliance that the plaintiff is alleged to have placed on that misrepresentation is set out for the first time in the written submissions to this Court, namely that he agreed not to defend the criminal proceedings and to enter a settlement with the defendant. A submission that something happened is not evidence that it happened. Nowhere is it averred to, or set out in pleadings or submissions, what the plaintiff's lawyers said in relation to this or what subsequent steps the plaintiff took to investigate the matter. Moreover, there is no

explanation as to when or where the plaintiff “discovered” the alleged concealment. It is to be noted that in the written submissions to this court it is said that the accrual of the cause of action ought to be postponed until 2010 because it was not until that time when he was advised by a different counsel with knowledge of the matter that he discovered that the statement made to him in the criminal proceedings in 1992 was untrue. In the High Court it was alleged that the date of discovery was 2009.

***The Statute of Limitations, 1957, as amended***

40. In *O’Dwyer v. Daughters of Charity of St. Vincent de Paul* [2015] 1 I.R. 328 (“O’Dwyer”), this Court addressed the proofs required where concealment of fraud is alleged. Hogan J. (for the Court) stated that there must be concealment:-

*“either of wrongful conduct which gives rise to the cause of action or a failure by the defendant or his agent to disclose facts known only to the defendant which, if disclosed, would found a cause of action such that it would be inequitable to permit the defendant to rely upon the Statute of Limitations.”*

41. The facts of *O’Dwyer* are instructive. The plaintiff’s substantive claim was that her infant son had been taken away from her and given up for adoption without her consent some 44 years prior to the institution of proceedings. She sought to rely upon s. 71 to postpone the relevant statutory period. Her claim was that the first defendant concealed details of an informal system which operated in breach of the requirements of the Adoption Act, 1952 in order to obtain consent prematurely from mothers for the adoption of their children. Hogan J., having found that the plaintiff was aware of the critical facts necessary to found a cause of action, went on to say, “[i]t is equally true that the first named defendant did not disclose that their conduct was or might have been illegal, but,... this in itself does not amount to fraudulent concealment within the meaning of s. 71(1) of the 1957 Act.” The plaintiff’s submission in this appeal that “fraud” in the Act is not that used in the criminal law sense or one that requires bad faith is therefore correct. It is “fraud” in the equitable sense that denotes conduct by a defendant or its agent such that it would be “against conscience” for the defendant to avail of the lapse of time.
42. Laffoy J. found no case of concealment on the facts before her. I am satisfied that there was no error of law or of fact in so finding. In the first place, the decisions in *Lucey and Madigan* and in *Rooney v. Minister for Agriculture and Food* were matters of law and not fact. They were decisions pronounced in open court and at all times were in the public domain. There is no evidence that any matter was concealed.
43. There is no evidence that there was a failure to disclose relevant facts known only to the Minister. These legal decisions were openly available so in relation to the alleged failure to inform Superior Courts of the *Lucey and Madigan* decision, this alleged failure, even if accepted, was not in relation to a matter known only to the Minister. Similarly, with respect to the alleged misrepresentation by counsel for the Minister in 1993, even if there was evidence that the alleged representation was made (and there is none), it was not of a fact known only to the Minister (indeed, strictly speaking, it was not a representation of fact at all). The decision in *Rooney v. Minister for Agriculture and Food* was publicly known and

available. The plaintiff must be taken to be aware of these decisions. That deals with the matter as pleaded in the reply.

44. Even if one accepts that the plaintiff is entitled to rely upon his claim of misrepresentation by counsel for the Minister without having pleaded it or provided any evidence of it on affidavit, his claim under this heading must also fail, for the reasons set out above. The representation concerned matters in the public domain and there was no concealment. Moreover, even if one accepts that the alleged misrepresentation was one which amounted to a misrepresentation of the plaintiff's rights, or at least a failure to advise him of his rights to such an extent that it could be alleged to be a breach of duty amounting to a cause of action, this is not a ground, that of itself, postpones the cause of action. There must be a concealment and here there was none.
45. Furthermore, s. 71 only operates to postpone the date of accrual until such time as the fraud has been discovered or could with reasonable diligence have been discovered. The plaintiff's solicitor swore in his affidavit that with respect to the time span of the relevant dates that the plaintiff was aware "that what was being perpetuated upon him was grossly unfair and unjust". Despite that averment, the plaintiff has never set out that he could not obtain legal advice from the solicitor and counsel who represented him in the 1993 proceedings or could not seek advice from others subsequent to that. He has not established, even on an arguable basis much less on the balance of probabilities, that he could not with reasonable diligence have discovered the alleged fraud.

### ***Estoppel***

46. The plaintiff claims that there has been an estoppel by representation and that the Court ought not to allow the State to act in a manner inconsistent with it. The plaintiff relies on the case of *Kennedy v. Health Service Executive* [2016] IEHC 696. In that case the plaintiff claimed the estoppel arose from the failure to inform the plaintiff of the fact that there was no necessity to operate. It was therefore an allegation of a positive duty to inform. The plaintiff's submissions quote in part from para. 28 of the judgment where White J. stated:-

*"There is no allegation of concealment or fraud in these proceedings [...]. There is no suggestion that any record was withheld or any difficulty in procuring same, although the court accepts that the plaintiff did not procure the records from South Tipperary Hospital until 8th February, 2012. There is no suggestion that the delay is the first Defendant's responsibility."*

47. The plaintiff relies upon that quotation to say that it was clear that estoppel by representation was therefore accepted as the type of estoppel that could, but did not on its facts, postpone the Statute of Limitations. It is instructive that the missing element of the quote, and it is not suggested that this was intentional, is as follows:-

*"The first time the first Defendant had notice of the Plaintiff's claim was the service of the Personal Injury Summons on 14th November, 2012. There is no suggestion that the Plaintiff invoked any complaints procedure directly against the first named Defendant. There was never an acknowledgement by the first Defendant of the*

*Plaintiff's claim prior to the issue of the proceedings. The first Defendant contests liability and has served a full defence."*

White J. goes on to say that if the first defendant contends that the surgery was properly carried out, there was no onus on it to advise the plaintiff that the surgery was unnecessary or excessive. While J. held that estoppel did not arise.

48. The plaintiff's submission appears to suggest that any misrepresentation on behalf of a defendant has the result of in some way *disapplying* the Statute of Limitations beyond the bounds of the principles of the estoppel jurisdiction. Even if one interprets the term "disapply" to encompass the submission that the State cannot, in the circumstances, rely on the Statute of Limitations, I do not read *Kennedy v. Health Service Executive* as authority for that proposition. I see the judgment of White J. as supporting the view that there was a requirement to satisfy known criteria if a plea of estoppel by representation is to succeed in preventing a defendant from relying on the Statute of Limitations.
49. In the present case there has been a finding by the trial judge, which has not been displaced on appeal, that there was no concealment or fraud. The plaintiff's claim of estoppel by representation cannot succeed on the basis of a claim of concealment or fraud.
50. In so far as the plaintiff has gone on to plead equitable estoppel, none of the principles established in those cases bear any relationship to the facts alleged here. In *Murphy v. Grealish* [2009] 3 I.R. 366, there was an initial acceptance of liability by the defendant's insurance company and the plaintiff did not issue proceedings within the (then) required three year time limit. Geoghegan J. in the Supreme Court held at para. 30 that:-

*"[t]he classic legal estoppel involving a clear statement made by one party on which the other party relied does not seem to be relevant here. This case history involves a combination of conduct which can reasonably be construed as an implied representation combined with a consequence that in all the circumstances it would be unconscionable to resile from the implied representation arising from the conduct."*

In the present case there is no orthodox legal estoppel. I will discuss the course of conduct further below. It is to be noted that Geoghegan J. expressly did not decide whether a plea that "unconscionable conduct" *of itself* could defeat the Statute of Limitations but I will deal with the question of whether the allegation here is of conduct which, even if true, could be said to be unconscionable.

51. Both the plaintiff and the State referred to the decision in *Doran v. Thompson Ltd.* [1978] I.R. 223. The plaintiff relies upon the following *dicta* of Henchy J. at para. 3:-

*"Where in a claim for damages such as this a defendant has engaged in words or conduct from which it was reasonable to infer, and from which it was in fact inferred, that liability would be admitted, and on foot of that representation the plaintiff has refrained from instituting proceedings within the period prescribed by the statute of limitations, the defendant will be held estopped from escaping liability by pleading*

*the statute. The reason is that it would be dishonest and unconscionable for the defendant, having misled the plaintiff into a feeling of security on the issue of liability, and thereby into a justifiable belief that the statute of limitations would not be used to defeat his claim, to escape liability by pleading the statute. The representation necessary to support this kind of estoppel need not be clear and unambiguous in the sense of being susceptible of only one interpretation. It is sufficient if, despite possible ambiguity or lack of certainty, on its true construction it bore the meaning that was drawn from it. Nor is it necessary to give evidence of an express intention to deceive the plaintiff."*

52. The State relies upon Griffin J. in *Doran v. Thompson Ltd.* but also on the subsequent *dicta* of Keane C.J. in *Ryan v. Connolly* [2001] 1 I.R. 627 where he stated that the fact that there has been an express and unambiguous concession of liability may not necessarily be determinative. However, Geoghegan J. explains that in neither *Doran v. Thompson Ltd.* nor *Ryan v. Connolly* had there been an admission of liability. In *Murphy v. Grealish* there had been such express admission.
53. In my view the plaintiff's reliance on the principle of estoppel to defeat the Statute of Limitations is fundamentally misconceived. In order to defeat reliance on the Statute of Limitations by a defendant the plaintiff can rely upon a factual promise or representation such as an admission of liability (as in *Murphy v. Grealish*) or where there has been a representation that the Statute of Limitations would not be pleaded. In the present case there was no representation at all concerning the Statute of Limitations and thus the plea of estoppel is not advanced by reference to an express representation with regard to the Statute of Limitations.
54. The plaintiff's argument in the present case is indeed different. I agree with the State's submission that he has conflated the creation of an estoppel upon which he can rely against the State in legal proceedings with an argument that the State had a duty to give legal advice to the plaintiff or that the plaintiff was entitled to rely upon an alleged representation as to law. Such a claim does not amount to an estoppel that would prevent the State from relying on a plea that the case was statute barred. For the avoidance of any doubt, I do not accept that the nature of the alleged misrepresentation by counsel for the Minister in 1993, could, even if accepted as having been made, amount to the kind of unconscionable conduct that on its own or together with the consequence as alleged by this plaintiff, that would prevent a plea of the Statute of Limitations being effective having regard to the nature and extent of the claims made by the plaintiff in the present proceedings. It was, at its height, the expression during the course of legal proceedings of counsel's understanding (and the understanding of his client, the Minister) of the scope and effect of a particular Supreme Court decision. In circumstances where the matter was before a trial court, and in particular where the plaintiff was represented by solicitor and counsel, such a representation cannot constitute unconscionable conduct, at least in the absence of some exceptional factor or circumstance. More specifically however, it is not the kind of unconscionable conduct that would result in the State being unable to plead the Statute of Limitations in its defence to claims which not only concern the outcome of these criminal

proceedings (incidentally favourable to the plaintiff) but a myriad of claims made in respect of other matters occurring both before and after this representation.

55. For the multiple reasons set out above, I therefore dismiss the plaintiff's appeal in so far as it concerns the findings of the trial judge that the claims made in the paragraphs of the amended statement of claim as set out in the Order are statute barred.

**Order 84, Rule 21 RSC**

56. At para. 41 of her judgment, Laffoy J. stated that most of the reliefs claimed in the prayer in the amended statement of claim involve public law challenges to decisions, actions or inactions on the part of the State. She identified them as assertions that:-

- a) The EU directives had not been validly transposed into Irish law;
- b) The Minister has breached or failed to comply with EU law by decisions, actions or inaction;
- c) The non-statutory system of reactor grants is repugnant to the Constitution;
- d) Certain Statutory Instruments made by the Minister are *ultra vires* the Act of 1966; and
- e) The Minister breached or failed to comply with the Act of 1966 by decisions, action or inaction.

57. In her judgment, Laffoy J. relied upon the decision of *Shell E & P. Ireland Ltd. v. McGrath and Others* [2013] IESC 1 which affirmed that the approach of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 represented the correct approach and that the time limit in Order 84, rule 21 applies by analogy to claims which had as their substance the seeking of the types of relief ordinarily obtained by judicial review even though framed in another fashion such as declaratory proceedings. The plaintiff's written submissions to this Court did not address the *Shell E & P Ireland Ltd.* decision at all but proceeded on the basis that *O'Donnell v. Dun Laoghaire Corporation* still applied. Having said that, the reliance placed on *O'Donnell v. Dun Laoghaire Corporation* was twofold. The first was that it could be distinguished because the plaintiff was seeking a number of different remedies many of which arise from private law claims against a public official and these had their own discrete time limit. The second was that to the extent the claims were governed by Order 84 by analogy, the explanations offered by the plaintiff for his delay were similar and go beyond those accepted by Costello J..

58. *Shell E & P Ireland Ltd.* represents the law and the time limits set out in Order 84, rule 21 apply by analogy to challenges brought in respect of public law measures no matter what way, as a matter of procedure, that challenge is brought. The identification by Laffoy J. in para. 41 of the nature of the claims made in these proceedings is entirely correct. I reject the plaintiff's contention that the fact that a number of remedies have been sought means that Order 84, rule 21 should not apply to any of them. In so far as the plaintiff asserts that his claims are private law claims because they allege loss and damage to his private

business by public officials and are governed by the law of torts, I reject these suggestions subject to a number of issues that I will address further below. The manner in which the claims are pleaded are clearly claims related to public law matters as Laffoy J. correctly addressed in her judgment. The nature of the reliefs sought as indicated in para. 41 of that judgment could not be anything other than public law claims.

59. I will return to the plaintiff's suggestion in his written submissions on appeal, but not in the High Court, that the claim relating to the 2007 criminal proceedings as set out in para. 24A were not public law matters because the claim amounted to a claim of malicious prosecution which is an established private law remedy with a limitation period of 6 years.
60. In so far as the plaintiff sought to explain the delay, he relied, in the High Court, upon the averment set in para. 14 of the averment of Mr. Jones. These were a) a lack of finance because of the "stranglehold" the State had over him due to the withholding of the Community Aid payments and other matters, b) he was dissuaded (sic) by what he heard in 1992/1993 that the Rooney case in the Supreme Court would be used against him to render any future challenge futile and he was "unable to access clear legal advice on the predicament he found himself in", c) that he had an innate sense that what was perpetrated against him was grossly unfair and unjust and he pursued justice by other means such as with the Ombudsman and the European Commission, d) his wife's sudden and untimely death in 2001 from which he and his family took a long time to recover, e) it was not until June 2009 that he was fully apprised that there was a viable case open to him and he sets out various aspects of that case including concealment of the *ratio decidendi* in *Lucey and Madigan* by the Minister and his servants or agents since December 1990.
61. Laffoy J. paraphrased the principal reasons at para. 46. She noted that the only factual matter relied upon was the sudden and untimely death of the plaintiff's wife in 2001 which was a set back from which he and his family took a long time to recover. Laffoy J. characterised his claims as being that, although he was the subject matter of various criminal proceedings, he did not receive legal advice that he had a cause of action against the defendants over an almost twenty-year timespan. She rejected his submissions that these amounted to good reason for extending the period in which such an application could be made. She rejected in particular his claim that there was a uniqueness because of the concealment of the wrongdoing, because she had held no concealment had been established.
62. In his submissions to this Court, the plaintiff claims that the High Court judge failed to engage with the factors offered by way of explanation. That is patently incorrect. The motion judge did engage with them as set out above. Even if the motion judge could be said not to have so engaged, I am satisfied that there is nothing in the reasons set out by or on behalf of the plaintiff either in Mr. Jones's affidavit (and, again, Mr. Jones was not in a position to give any direct evidence on this issue) or in his written submissions that amount to good reason to set aside the time limits. On the contrary there is a yawning deficit of evidence as to any good reason for the gross delay in taking these proceedings. There is nothing by way of detail as to his claim of financial impecuniosity or his attempts



to obtain legal advice. He does not address the legal advice that he clearly had during the proceedings. His claims demonstrate that he sought "justice" elsewhere and was thus well aware that he had a claim. The untimely and sad death of his wife had occurred many years prior to the issue of proceedings and could not justify the type of delay at issue here. I therefore reject this as a ground of appeal.

**Paragraph 14**

63. The plaintiff claimed in paragraph 14 that by seeking to make the plaintiff liable in respect of the costs of bovine TB testing and bovine brucellosis testing, the Minister had acted contrary to the purposes of the Diseases of Animals Act, 1966 in relation to the operation of the TB scheme and Brucellosis scheme. This referred to a letter sent in April 2010 threatening to deduct the sum of €77.66 for alleged "Department testing fees for 2005/2006 Round Test" from the next payment due to the plaintiff. The amended statement of claim contained a plea that the Minister deducted from the plaintiff's single farm payment the sum of €155.32 in respect of "Department Testing Fees" on the 28th September, 2010. Part (B) claimed that by his conduct in failing or refusing to place a statutory system of compensation with an independent assessment mechanism, the Minister was acting contrary to the purposes of the Act of 1966.
64. Furthermore, para. 14 part (C) in the amended statement of claim pleaded as a particular to the claim that the Minister was acting contrary to the purposes of the 1966 Act in respect of the operation of the schemes in respect of the plaintiff's cattle and goat herds and his sheep flock "[i]n permitting and/or authorising third party commercial entities to impose a charge upon flock owners/herdowners in respect of the purchasing costs of first Defendant authorised sheep/goat identification tags".
65. The State pleaded that para. 14 of the amended statement of claim did not disclose or plead an actionable wrong. The State claimed that by virtue of s. 6 of the Act of 1966 the legislation was clear that no stamp duty would be payable and that "save as otherwise prescribed" no fee or charge was demanded in relation to matters specified. The State submitted that the fees/charges had been prescribed by law, relying upon various Statutory Instruments made by the Minister since 1996 where, under certain conditions, it was prescribed that where an owner failed to comply with a requirement of the Minister to have each animal in the herd tested in accordance with the provisions of that SI, a veterinary inspector would be entitled to test each animal in the herd and the cost could be recovered as a simple contract debt. The Minister claimed that the plaintiff's prayer relating to para. 14 (item xiii(a) in the amended statement of claim) for a declaration that the Minister is precluded by the provisions of s. 6 from imposing a charge or causing a charge to be levied in respect of costs relating to the schemes, had no reasonable chance of success and ought to be dismissed.
66. Laffoy J. held that the plaintiff's claims under para. 14 were caught by the time bar. Laffoy J. then went on to hold specifically that the plaintiff had not established that he had a cause of action in respect of the claim made at para. 14 of the amended statement of claim, accepting the submissions of the State. The plaintiff's submissions to this Court do not specifically address this latter issue. The plaintiff sought to address the issue of *locus standi*

but the motion judge had made no finding on that issue but had specifically stated that an amendment to the pleadings may have disclosed such an interest. The judge correctly identified relief xiii(a) as the relief linked to this matter, this was specifically related to s. 6 precluding any charge. *Prima facie*, s. 6 did not make such a preclusion and the trial judge was entitled to have regard to the legal instruments (statutory instruments) which provided for the charge. I am satisfied that the motion judge was correct in holding that the plaintiff had not established a cause of action in light of the specific wording of s. 6 of the Act of 1966 from the alleged withholding. This was a finding open to her and was based upon a consideration of the legal position as regards the express provisions of s. 6 of the Act of 1966.

67. Laffoy J. made a link in her judgment between para. 14 and that part of para. 24A which also referred to "third party commercial enterprises". In so far as Laffoy J. held that it was impossible to identify a sustainable cause of action at the suit of the plaintiff in what has been pleaded regarding "third party commercial entities" imposing a charge upon flock owners and herd owners, I can find no error in principle in what she has found. This plea was contained in the third statement of claim served by the plaintiff, who was legally represented throughout. This is a claim that the Minister acted contrary to the purpose of the Act of 1966 in permitting third party commercial entities to impose a charge. There is no claim of specific illegality made or any attempt to link this charge to the plaintiff.
68. The Order of the High Court finding that this claim was statute barred is not perhaps readily understandable on its face. It is necessary to give a more detailed explanation of the reason why this provision was held to be statute barred. The State defendants had claimed that although September 2010 had been referred to, the balance of the paragraph was not time specific and relates to the failure to put in place a statutory scheme of compensation. It was claimed in the plaintiff's affidavit that because of what had been pleaded it was far from clear that the September date was the operative date of accrual. Mr. Alcock stated that the balance of the later pleadings meant that it could relate to the time the State joined the EEC or the date the allegedly relevant Directive came into force.
69. In her judgment, Laffoy J. links paras. 13 and 14 and says that she understands the purposes of the Act as meaning that there was a statutory requirement for a compensation scheme and no stamp duty fee or charge could be made. She viewed para. 13 as being subsumed into para. 15 which made reference to a promise allegedly made by the then Minister to the Dáil in 1965 and to the legitimate expectation created therein. It is readily understandable that a legitimate expectation dating back to 1965 was statute barred. In relation to para. 14, Laffoy J. made reference to the Brucellosis in Cattle (General Provisions) (Amendment) Order, 1996 (S.I No. 86 of 1996). It was this order that had provided the basis for the charge made. In so far as the plaintiff's claim in para. 14 was based upon a general attack on this statutory instrument it was statute barred.
70. In so far as the claim relates to a threatening letter sent on the 19th April, 2010 and to the deduction of the payment in September 2010 different considerations may apply. I have already identified those considerations and for those added reasons the specific claim in

para. 14 as regards these payments are dismissed on the basis that it discloses no reasonable cause of action.

**Paragraph 24**

71. In this paragraph the plaintiff claimed that in or about the 25th June, 2007, the Minister, his servants or agents unlawfully and without justification (considering the constitutional defects inherent in the schemes) caused the criminal process to be invoked against the plaintiff in respect of those schemes. Details of the summons are given.
72. In the manner this claim was pleaded in para. 24, it was a clear public law claim. Laffoy J., for the reasons set out above, was correct in holding that it should have been made within the time limits set out in Order 84, rule 21. She was also correct in finding that there was no good reason to extend the claim.
73. In the written submissions to this Court, the plaintiff submits that this claim amounted to a claim for malicious prosecution governed by the law of tort and the specific time limit. I do not accept that this was such a claim or that the motion judge erred in finding it was a public law claim.
74. The plaintiff had claimed the following in the prayer for relief at item (xx): "A declaration that first named Defendant his servants or agents maliciously and without reasonable cause procured the bringing of criminal proceedings against Plaintiff under a TB scheme and a Brucellosis Scheme each tainted with illegality under Irish law and further tainted with illegality under European Union law." No claims for damages related to malicious prosecution is made. Damages are claimed for breach of constitutional rights and for trespass.
75. In his affidavit Mr. Jones appears to relate the claim in item (xx) to para. 10 of the amended statement of claim which refers to the 1992/1993 proceedings. Laffoy J. noted that if it did relate to para. 10 it was a claim that was being made 17 years later and clearly statute barred. She did note that it was only in the prayer that the word malice had been used and she noted that the position adopted by the State that the plaintiff had not pleaded a basis for the relief at item (xx) was understandable.
76. In para. 21 of her judgment, Laffoy J. turned to para. 24 of the amended statement of claim and noted that it did not refer to the outcome of the proceedings. She noted that it may be that the declaratory relief sought in item (xx) related to what was contained in para. 24 as well, perhaps, to para. 10. She made specific reference to the only basis pleaded for the alleged unlawfulness of the prosecutions, when one reads the plea in para. 24 is that the schemes were each tainted with illegality under Irish law and tainted with illegality under EU law. At para. 32 Laffoy J. said again that the outcome of those proceedings had not been clearly put before the court. Laffoy J. did note that the plaintiff's written submissions addressed proceedings in the District Court in 2008 and 2009 in the context of responding to the plea of *laches* and made reference to a request for a consultative case stated and to the subsequent application by the Director of Public Prosecutions to dismiss the criminal proceedings against the plaintiff so that the case stated

did not proceed. She emphasised that the factual position had not been proven on affidavit that the 2007 proceedings did not proceed to a judicial determination.

77. As I have said at para. 56 above, Laffoy J. commenced her discussion of the time bar in Order 84, rule 21 by stating, at para. 41, that most of the reliefs claimed were based upon the public law challenges to decisions, actions or inactions on behalf of the State defendants. She had in para. 21 already described the claims in para. 24 as being claims that the schemes were tainted with illegality under both Irish and EU law. It was therefore clear that she was also dismissing this claim on the basis that there was a failure to abide by the time limits in Order 84, rule 21 which applied by analogy to public law claims. It was therefore clear that she was rejecting the claim that this amounted to a claim for malicious prosecution.
78. In my view that finding was correct. It is noteworthy that the plaintiff's counsel whose name appears on the plaintiff's pleadings in the High Court (including the amended statement of claim) also signed the written submissions on behalf of the plaintiff in the High Court and appeared for him at the motion. This is important because it confirms that there was no linkage between the plea in para. 24 and a claim for malicious prosecution. Counsel had not pleaded it as such and that can only be why the claim was phrased as it was and did not address many of the issues that must be established in a claim for malicious prosecution.
79. The plaintiff's claim was clearly never intended to be a claim for malicious prosecution and this is reflected in how the claim was pleaded. The result is that it is a claim that does not address the required elements of a claim for malicious prosecution. Even leaving aside that the word "malice" does not appear in the pleading proper, other than in the prayer (and see the reference in *Croke v. Waterford Crystal Ltd.* [2005] 2 I.R. 383 to it being trite law that a cause of action merely mentioned in the prayer does not and cannot constitute the pleading of such a cause of action), there are other deficiencies in the pleading. A claim for malicious prosecution must, in addition to malice, make a claim, *inter alia*, that the proceedings were unsuccessful, that there was a lack of reasonable or probable cause and that the plaintiff sustained damage. Those matters are not pleaded to in para 24. The claim that "unlawfully and without justification" the criminal process was invoked against the plaintiff was, as Laffoy J. held, a reference to the claimed illegality of the Bovine TB and Brucellosis schemes.
80. I am therefore satisfied that Laffoy J. was entirely correct in holding that this was a claim that was a public law claim which did not satisfy the time requirements in Order 84, rule 21. This was not a case where an amendment to the pleadings was claimed but even if the submissions of the plaintiff can be construed as an application for an amendment of the pleadings, I do not accept, for reasons set out more fully below, that it would be appropriate to make such an amendment at this time. In short, this was not a claim for malicious prosecution.

**Paragraph 24A**

81. Paragraph 24A commences with a plea that the Minister breached the provisions of Council Regulation (EC) No. 21/2004 in respect of the plaintiff's farming livelihood. The particulars of the claim are that the Minister unlawfully deducted the sum of €518 from the plaintiff's 2009 Single Farm Payment/Disadvantaged Areas Scheme payment on the wrongful basis that the plaintiff failed to comply with the provisions of Article 3, 4 and 5 of the Regulation in respect of the management of his goat herd and sheep flock. There is then a further particular at (b) which reads "[i]n permitting and/or authorising third party commercial entities to impose a charge upon flock owners/herdowners in respect of the purchasing costs of first Defendant authorised sheep/goat identification tags."
82. In the High Court, counsel for the defendant submitted that this was *prima facie* a claim that was made outside the time limit under Order 84, rule 21 being made in proceedings issued in July 2010 in relation to a claim for a deduction in 2009. Neither Mr. Jones's affidavit nor the plaintiff's High Court written submissions addressed this point specifically, although it must be acknowledged that there was a more general submission that all matters were not statute barred nor governed by Order 84, rule 21.
83. In relation to the second element (b) of para. 24A, counsel for the Minister submitted that no recognisable cause of action had been pleaded and that it should be dismissed as frivolous and vexatious. Laffoy J. accepted that submission as correct and held that no recognisable cause of action had been pleaded.
84. In the plaintiff's written proceedings to this Court, he makes general assertions that the pleadings were not time barred by Order 84 and that the pleadings did disclose a reasonable cause of action and were not frivolous and vexatious. In relation to para. 24A, the plaintiff submits that Laffoy J. penalised the plaintiff for defects in pleadings which could have been easily remedied by an amendment to the pleadings. He claimed in those proceedings that the claim pursuant to para. 24A was that the Minister breached its obligations under European law by (a) deducting the sum of €518 from grant monies owed to the plaintiff on the erroneous basis that the plaintiff was in breach of his obligations in the management of his flock and (b) allowing third parties to charge the plaintiff for tagging the plaintiff's animals when said tagging was exclusively for the benefit of the Minister carrying out his statutory duty. I will deal with the claim for amendment to the pleadings below. It is however also important to refer to what was submitted at the oral hearing in further explanation of the pleading in this paragraph.
85. At the oral hearing, the plaintiff referred to the deduction referred to in the first element of para. 24A as having been appealed to an appeals officer. He submitted that this pleading amounts to an appeal against that finding of the appeals officer. That pleading is nowhere to be found in the amended statement of claim, nor in the affidavit of the plaintiff's solicitor. Even if that were the case however it does not assist the plaintiff. Such an appeal (presumably under the Agriculture Appeals Act, 2001) would have to comply with the procedural requirements of such a statutory appeal to the High Court. The plaintiff has not established that he is within the time limit for such an appeal. Such an appeal would have to comply with the provisions of Order 84C of the RSC and be commenced by originating

notice of motion and be brought within 21 days of the decision challenged (see generally *O'Connor v. Minister for Agriculture* [2016] IEHC 336). Most importantly however, it would be unfair to the State defendants and not in the interests of justice to permit such an amendment to the statement of claim, as an amendment would be required, to bring such a claim over 8 years after the delivery of judgment in the High Court and close to 12 years since the bringing of these proceedings. It is also fair to say that this explanation of the claim does no more than confirm the position that this was at all times a public law claim.

86. In relation to the claim made under the first element of para. 24A I am satisfied that there was no error in principle in the finding by Laffoy J. that this was a public law claim which did not comply with the requirements of Order 84, rule 21 and that the plaintiff had not established good reason as to why that time limit ought to be extended. None of the explanations put forward give any explanation for why this claim was not made promptly nor within the time limit.
87. In relation to the second element (b) of para. 24A I am also satisfied that there was no error in principle by the motion judge in ruling that this too was time barred by virtue of the provisions of Order 84, rule 21 and that there was no good reason for extending the time for taking those proceedings. I am also satisfied, that the manner in which this sub-paragraph is pleaded, disclosed no reasonable cause of action. Laffoy J. correctly observed that there seemed to be a link between that element of the paragraph and paragraph 14. The pleadings themselves amount to bald statements that do not disclose a cause of action.

#### **Amendment of the Pleadings**

88. In his written submissions to this Court the plaintiff emphasised that the facts as pleaded had to be accepted as true for the purposes of the motion (a point accepted by the State). The plaintiff submits that if the statement of claim admits to an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed. This point was accepted by Laffoy J. when she referred with approval to the Supreme Court decision in *Sun Fat Chan v. Osseous Ltd* [1992] 1 I.R. 425. The plaintiff's written submissions to this Court do not make the allegation, as made orally at hearing, that this deduction had been appealed through the usual channels.
89. In the pleadings before the High Court, despite being prepared and filed by his legal representatives, the plaintiff's claims were numerous, diffuse, covered a broad timespan most of which was on its face statute barred, opaque and lacked clarity. It was in truth a scattergun approach to litigation. In the affidavit sworn by the plaintiff's solicitor, there was little attempt to explain specific claims or even to provide detail as to the grounds for resisting the plea that the claims were statute barred or were outside the Order 84, rule 21 time limits. Explanations for certain matters varied as between the pleadings, the affidavit, the High Court submissions, the written submissions to this Court and the oral explanation by the plaintiff.
90. The High Court judge was alive to the possibility of amending the pleadings, and indeed in respect of matters such as the failure to plead that the plaintiff had a goat herd or a sheep flock, she was aware that to strike out proceedings on that basis would be a "*fairly drastic*

*remedy*". She specifically stated that with respect to certain of the State's more generic arguments that it may be that a further amendment of the statement of claim would disclose that the plaintiff had standing and a sufficient interest to pursue the matters. She did not think it was necessary or appropriate to make orders under the heading lack of *locus standi*. She confirmed that she was making these orders that they were time barred by the Statute of Limitations or Order 84, rule 21. In para. 54 of her judgment she was dealing with the claims made in respect of para. 13 to 22 of the amended statement of claim. She had earlier ruled that para. 24A (and para. 14) were time barred in relation to Order 84, rule 21. No amendment to those paragraphs were sought which could bring them within the time limit. It was not for the judge to propose or put forward amendments unless they are based upon clear arguments that have been urged upon her.

91. The pleading of the cause of action was a separate matter. I am satisfied however that similar considerations apply. It was not for the judge to propose amendments that might "explain" a cause of action. Even in *Sun Fat Chan v. Osseous Ltd.* the Supreme Court was presented with the argument that this involved an estoppel. There is simply nothing here to indicate that the trial judge was presented with the type of argument that is now being put forward to explain this pleading. Laffoy J. therefore made no error in principle and she correctly held that para. 24A did not disclose a reasonable cause of action as is required by Order 19, rule 28 of the Rules of the Superior Courts.
92. The issue arises as to whether this Court ought to allow the amendment as suggested by the plaintiff in his written and oral submissions. In my view this becomes an entirely irrelevant issue where neither of the suggested amendments deals with the obstacle presented by Order 84, rule 21. This would be an amendment to a claim permitted 13 years after the alleged deduction was made and over eight years after the High Court judgment was made. There is no explanation for the delay in seeking these amendments. It would be entirely unfair to the State defendants and would be inimical to public interest in the efficient administration of justice to permit this amendment at such a late stage.
93. I would apply the above reasoning to the claim for malicious prosecution. I would also add that no amendment was put before the Court which would satisfy the facts which must be proven for the purpose of a claim for malicious prosecution. In particular, no indication was given as to how the plaintiff alleges he suffered damage because of the alleged malicious prosecution. In all the circumstances, there are no grounds for amending the statement of claim to include a claim for malicious prosecution in order to "save" the plaintiff's claim.

#### **Conclusion**

94. The plaintiff's appeal must be dismissed. He has not established that there was any error on the part of the High Court judge in dismissing his claims in their entirety. In particular the bulk of his claims are statute barred. His plea of estoppel by representation, equitable estoppel and concealment of fraud (s. 71 of the Statute of Limitations) have all been rejected.
95. The remainder of his claims were dismissed as being public law claims not made within the time limits set down by Order 84, rule 21 which apply to claims which are public claims in

substance even if brought by way of plenary proceedings. There was no error in law in so finding and there was no error on the part of the High Court judge in holding that there were no good reasons for extending the time limit in which to seek these public law remedies.

96. In so far as specific paragraphs of the plaintiff's claims are concerned (paras. 14, 24 and 24A) these did not disclose a reasonable cause of action. Paragraph 24 and the first part of para. 24A were correctly dismissed on the basis that they did not comply with the time limits in Order 84, rule 21 which apply by analogy. In terms of paragraph (b) of para. 24A this was a claim similar to para. 14 and did not disclose a reasonable cause of action. The motion judge did not err in failing to amend the paragraphs to permit of a cause of action. At this point on appeal, it would be inimical to the interests of the administration of justice and prejudicial to the State to permit an amendment at such a late stage.
97. I would dismiss the plaintiff's appeal.
98. As regards costs, given that the plaintiff has been entirely unsuccessful in his appeal, it would appear to follow that the State defendants (the respondents to this appeal) are entitled to their costs of this appeal, those costs to be adjudicated in default of agreement. If the plaintiff wishes to contend for a different form of costs order, he will have liberty to apply to the Court of Appeal Office within 14 days of the delivery of this judgment, for a brief supplemental hearing. If such hearing is requested and results in an order in the terms I have provisionally indicated above, the plaintiff may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

*In circumstances where this judgment is being delivered electronically, Ní Raifeartaigh and Collins J.J. have authorised me to record their agreement with it.*