THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 321

Appeal No. 2016/233

Ryan P.
Peart J.
Whelan J.

BETWEEN/

JOHN JAMES MUNGOVAN

PLAINTIFF/APPELLANT

- AND -

CLARE COUNTY COUNCIL

DEFENDANT/RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 13TH DAY OF DECEMBER 2017

1. By its Order dated the 30th May 2014 the High Court (Gilligan J.) with the consent of the parties ordered that in advance of any hearing of the substantive issues raised by the plaintiff in these proceedings, a preliminary issue raised by the defendant at para. 35 of its defence be heard and determined on the basis of a Statement of Agreed Facts (appended to the said order). That issue essentially is whether the plaintiff's claims are time-barred.

2. At para. 35 of the defence, the defendant stated those issues to be as to:

> "(1) the entitlement of the plaintiff to the equitable reliefs sought, having regard to the doctrine of laches, and/or
>
> (2) whether any of the plaintiff's claims for the public law and other reliefs as sort at paragraphs 17 and 18 of the statement of claim in respect of the validity of the defendant's measure as sought to be challenged in the proceedings, are time-barred, pursuant to either the Statute of Limitations 1957 as amended, or were sought promptly, as required by Order 84, Rule 21 of the Rules of the Superior Courts and/or ss. 50 and 50A of the Planning and Development Act, 2000 as amended, within the time limits prescribed thereby, and/or by analogy with the provisions thereof."

3. In both courts the arguments were principally addressed by reference to, firstly, the applicability of s. 50 of the Planning and Development Act 2000, as amended ("the PDA") and therefore the time limit of eight weeks therein provided, and/or, secondly, whether the time limit provided for in Ord.84 of the Rules of the Superior Courts for judicial review proceedings applied by analogy to the plaintiff's claims given their nature.

4. The trial judge concluded firstly that the plaintiff's claims as set forth at. 17 and 18 of his statement of claim were caught by s. 50 of the PDA (as amended), and were out of time, given the date of commencement of these proceedings by the issue of a plenary summons on the 4th November 2011, and, secondly, in the event that he was incorrect in relation to that, the nature of the reliefs being sought by the plaintiff were such that the rules as to time provided for in Ord.84, r. 21 of the Rules of the Superior Courts for judicial review claims were applicable by analogy, and that the proceedings had not been commenced within the time provided in that rule. Having so concluded, the trial judge further ordered that the plaintiff's claim to be dismissed. The plaintiff appeals to this Court against the dismissal of his claims.

5. To better understand the nature of the claims made and reliefs sought by the plaintiff in his statement of claim, it is helpful to set out a brief background to the proceedings. It is convenient, and indeed appropriate, to do so by reference to the Statement of Agreed Facts.

6. The plaintiff is an environmental engineering consultant with a number of professional qualifications including an Honours Degree in Environmental Engineering (NUIG), specialising in wastewater treatment. The defendant is the planning authority for the County of Clare. From November 2004 until the 7th March 2013 the defendant established and maintained a "Register of Independent Suitably Qualified Agents/Consultants for Waste Water Treatment" ("the Register") in conjunction with the requirement for applications to the defendant on or after the 15th November 2004 for planning permission for development in its functional area involving the proposed use of a septic tank, or other non-site treatment system. All applications in writing were to be accompanied by site suitability assessment tests specified in Appendix A of the Environmental Protection Agency (2000) Manual (or any updated document). Such assessments and tests were required to be carried out only by persons who were on the Register, who were required to have professional indemnity insurance.

7. The defendant required such tests and assessments in the interests of public health and environmental protection so as to ensure the safe disposal of wastewater from a development, and had invoked the provisions of s. 10 of the PDA and the relevant purposes as set out in Parts I, II and IV of the First Schedule thereto in respect of the provision and maintenance of the Register, and provided and maintained the Register as conducive to the performance of its statutory powers and functions.

8. On the 22nd August 2005 the plaintiff wrote to the defendant requesting that his name be included on the Register. By letter dated the 8th September 2005 the defendant requested the plaintiff to submit certain information in the event that he wished to be considered for the next round of interviews for inclusion on the Register. The plaintiff submitted such information to the defendant in November 2005.

9. The defendant attended for interview for inclusion on the panel on the 14th February 2006. However, by letter dated the 7th March 2006 he was informed that he had not been placed on the Register, but was advised that the panel was a rolling panel and that he could, if he felt it appropriate, submit a further application for inclusion in the future.

10. By letter dated the 26th November 2008 the plaintiff again requested that his name be added to the panel, and indicated that if the defendant failed to do so, he would be forced to take action to protect his constitutional right to work at his profession in his native county. The defendant responded by letter dated 10th December 2008 advising the plaintiff that in order to be included on the Register, he would have to successfully undertake another interview in early 2009 and submit copies of all relevant qualifications.

11. By letter dated 20th May 2009 an elected member of the defendant council, at the request of the plaintiff, sent in a Certificate of Course Completion, and made a request that the defendant respond to him regarding the plaintiff's chances of getting onto the Register. By letter dated the 25th May 2009 the defendant advised that elected member that further interviews would be undertaken in 2009, and that it would notify the plaintiff of the date and time for interview.

12. By letter dated the 11th February 2010 the plaintiff was notified of an interview scheduled for the 8th March 2010. He attended for that interview, but by letter dated the 16th March 2010 he was again informed that on the basis of the information available to the defendant, he had not been placed on the recommended panel of agents to carry out site assessments, and once more was provided with a copy of his interview assessment form for his information. He was also once again advised that the panel was a rolling panel, and that he could in future, if he wished, submit a further application for inclusion.

13. The site characterisation assessments which the plaintiff had submitted at interview were considered to be unsatisfactory by the defendant, and not to meet the requisite standard. The plaintiff was requested to provide additional reports in support of his application for inclusion, to enable a full consideration by the defendant of the tests which had been undertaken by the plaintiff. On the 18th March 2010 these additional reports were received from the plaintiff, and were referred to the defendant's Senior Executive Chemist and an Environmental Scientist in the defendant's Environment Section for review. The conclusion reached was not to recommend the inclusion of the plaintiff on the panel, and by letter dated the 28th May 2010, the plaintiff was so informed.

14. By letter dated the 9th June 2010, the Minister for Defence wrote on the plaintiff's behalf to the defendant's Senior Planner to make representations on his behalf, following which by letter dated the 6th August 2010 the plaintiff was invited to submit to new site characterisation reports to the defendant so that these could be reviewed, and if considered appropriate, would entail an invitation to the plaintiff to attend for interview to discuss same. Such further reports were submitted by the plaintiff on the 16th August 2010. A review of those reports highlighted areas which were considered to require further clarification. Such clarification was sought from the plaintiff by letter dated the 16th September 2010. The plaintiff responded to that request by letter dated the 22nd September 2010. Yet further information was sought by the defendant by letter dated the 7th October 2010, to which the plaintiff responded by letter dated the 5th November 2010.

15. At this point, the defendant considered that the details which had been provided precluded it from accurately determining the location of the sites in question, and that in order to progress the matter an inspection of one site should be undertaken in conjunction with the plaintiff. This was communicated to him by letter dated the 6th December 2010, and by email of the same date.

16. In order to respond thereto, the plaintiff instructed his solicitor to write to the defendant on the 17th December 2010 requiring the defendant to issue a confirmation comprising a decision as to whether the defendant was or was not immediately adding the plaintiff's name to the site assessment panel, and in the event of his name not being added, judicial review proceedings would be commenced. On receipt of this letter, the defendant attempted to resolve the issues by facilitating a further site visit with an independent qualified person accompanying the plaintiff. Following on from that site visit, the independent qualified person, as agreed between the parties, submitted a report with regard to the site inspection and the plaintiff's site report arising out of same.

17. By letter dated the 11th April 2011 to the plaintiff's solicitor the defendant's solicitors set out a number of serious deficiencies and concerns which the defendant had regarding the plaintiff's site report, and noted that it was the defendant's recommendation that the plaintiff should not be included on the Register of independent suitably qualified agents/consultants for wastewater treatment.

18. The plaintiff's solicitor responded by letter dated the 12th of May 2011 to advise that the plaintiff was proceeding with his High Court proceedings, and was treating the defendant solicitors' letter of the 11th April 2011 as a decision to exclude the plaintiff from the Register. Such proceedings were not commenced until almost seven months later on the 4th November 2011.

19. However, it can be noted from the Agreed Statement of Facts that on the 20th September 2011, prior to the institution of proceedings, the plaintiff's solicitor wrote to the defendant's solicitors requesting that the defendant state the provenance and putative legislative origin of the Register and questioned the lawfulness of same, and the legality of its continued operation, and requested confirmation that its operation would be withdrawn. A period of 21 days was allowed from the date of that letter for the defendant to withdraw the operation of the Register, and the letter went on to threaten that in the event that the operation of the Register was not withdrawn, the plaintiff would have no option but to issue High Court proceedings to protect his rights and entitlements.

20. Upon receipt of that letter, the defendant replied stating that in circumstances where litigation was being threatened challenging the basis on which the Register was being operated, it was considered inappropriate to request the defendant to furnish the plaintiff with the legal basis for same.

21. The defendant suspended its operation of the Register on the 7th March 2013.

The plaintiff's claims at paras. 17 and 18 of his Statement of Claim

22. In his statement of claim the plaintiff seeks the following reliefs at para. 17 thereof:

> (a) A Declaration that the purported Register of Independent, Suitably Qualified Agents/Consultants for Wastewater Treatment lately commenced and operated by the defendant is *ultra vires* the defendant and otherwise unlawful.
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> (b) A Declaration that the Register of Independent, Suitably Qualified Agents/Consultants for Wastewater Treatment as operated by the defendant, its servants or agents is without a legal or statutory basis.
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> (c) If necessary a Declaration that the continued operation of the said Register of Independent, Suitably Qualified Agents/Consultants for Wastewater Treatment by the defendant is *ultra vires*, void and of no effect.
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> (d) If necessary a Declaration that the actual operation of any purported Register of Independent, Suitably Qualified Agents/Consultants for Wastewater Treatment by the defendant, its servants or agents constitutes an unjust attack on the property rights of the plaintiff contrary to the provisions of Article 40.3 and/or Article 43 of the Constitution of Ireland.

(e) Such interim or interlocutory reliefs as may be required.

23. Further reliefs are sought at para.18 as follows:

(a) Damages for all financial loss and damage caused or occasioned to the plaintiff consultant arising from his exclusion from the said Register of Independent, Suitably Qualified Agents/Consultants for Wastewater Treatment unlawfully operated and wrongfully executed by the defendant, its servants or agents.

(b) Damages for malicious falsehood by [sic] s. 42 of the Defamation Act, 2009.

(c) Interest pursuant to the provisions of the Courts Act, 1981.

24. One may conveniently note at this stage that absent from any of the reliefs being claimed by the plaintiff is any which seeks to quash or otherwise challenge any of the four separate negative decisions made on foot of four separate applications by the defendant to have his name included on the Register. Apart from his claim for damages for economic losses, he seeks only declarations that the operation and maintenance of the Register is *ultra vires*, unlawful and without any legal or statutory basis, and that it constitutes an unjust attack upon his constitutional right to earn a livelihood. In reality the claim for damages is not free-standing. It is entirely dependent upon a finding of unlawfulness in respect of the operation and maintenance of the Register. The proceedings are a challenge to the lawfulness of the Register, and not an attack upon any decision made by the defendant not to include the plaintiff's name on it, the first of which was communicated to him by letter dated the 7th March 2006.

25. As recorded by the trial judge at para. 11 of his judgment, it was agreed by the plaintiff that the preliminary issue as directed could be addressed "on the basis that the single overarching issue to be determined is whether the Council's plea that a significant part of the plaintiff's claim is out of time must succeed or fail". The defendant urged the High Court that the plaintiff's claims were time-barred on two separate bases.

26. Firstly, the defendant argued that the policy adopted by it to operate and maintain the Register, and to require that only persons whose names were on that Register could be used by applicants for planning permissions for the purpose of complying with its requirement that a site suitability report accompany such applications, was a decision made, or *act done* … by a planning authority … in the performance or purported performance of its statutory function" [emphasis provided], as provided in s. 50 of the PDA , as amended ("function" to include its powers and duties), and that therefore any challenge to same had to be brought by way of judicial review under Ord. 84 of the Rules of the Superior Courts, as provided by s. 50(2) of the PDA as substituted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, and that this required a leave application under Ors. 84, r.1 of the Rules of the Superior Courts, and that such leave must be sought as provided for in s. 50(6) of the Act "within a period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority …".

27. It was argued that since the plaintiff's proceedings were commenced by way of plenary summons, there had been a failure to obtain the required leave, and consequently that they were an abuse of process. It was submitted that the proceedings should be dismissed on that ground alone, but in any event, that even if not found to be an abuse of process as such, nevertheless the time limit of eight weeks provided for under s. 50(6) of the PDA applied, and had clearly been exceeded given firstly the date on which he first applied to have his name put on the Register i.e. the 22nd August 2005, and secondly the date of the letter informing the plaintiff that his first such application was refused i.e. the 7th March 2006.

28. The second or alternative basis put forward by the defendant for a dismissal of the proceedings was that even if such procedural exclusivity by way of judicial review did not arise from s. 50 of the PDA, as amended, the Ord. 84 judicial review time limits nevertheless applied by analogy given the judicial review nature of the reliefs sought, as found by Costello J. (as he then was) in *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301, and as confirmed by the Supreme Court in *Shell E&P Irl. Ltd v. McGrath & ors* [2013] IESC 1.

29. In this regard, the defendant relied upon Ord.84, r. 21 of the Rules of the Superior Courts which mandated, at the relevant time (i.e. prior to the amendments to 0rs.84 of the Rules of the Superior Courts effected by S.I. 691/2011 from 1st January 2012), that "an application for leave must be made *promptly* and in any event within three months from the date when grounds for the application first arose …" [Emphasis provided]. The defendant pointed to the fact that by the date on which he first applied to the defendant to place his name on the Register by letter dated the 22nd August 2005 he must be taken to have been aware of its existence, and therefore this is the date on which the ground to challenge the lawfulness of the Register first arose, should he have wished to do so. Consequently, it was submitted, he neither moved "promptly" nor within the period of three months provided for in the then Ord.84, r. 21(1) of the Rules of the Superior Courts, and was therefore hopelessly out of time by the 4th November 2011 when he issued his plenary summons. It was submitted that by proceeding by way of plenary summons the plaintiff was making a late attempt to avoid the time issue which he would otherwise face had he commenced by way of a judicial review leave application.

30. In response, the plaintiff characterised his claim as being a claim for damages in tort, namely for breach of a constitutional right and malicious falsehood, and submitted accordingly that under s. 11(2)(a) of the Statute of Limitations Act, 1957 a six year limitation period applied, and that he had commenced within time. The plaintiff argued that he was not obliged to bring his claim by way of judicial review, and relied also upon aspects of the judgment of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* for his entitlement to seek declaratory reliefs by way of plenary proceedings. At the same time he sought to distinguish *O'Donnell* on its facts from the present case on the basis that in *O'Donnell* there was no claim for damages for malicious falsehood as is claimed by the plaintiff herein, and that in *O'Donnell* no tort at all was alleged against Dun Laoghaire Corporation arising from the manner in which the water supply had been cut off.

31. In answer to the defendant's submission based on s. 50 of the PDA, as amended, the plaintiff submitted that the operation and maintenance of the Register is not a planning function for the purposes of the section and the PDA generally, that he is not seeking to challenge a decision in relation to the performance of a planning function, and that the plaintiff's argument is directed solely against the operation and maintenance of the Register on vires grounds, and as being an unjust attack upon his property rights.

32. In answer to the defendant's argument that his plenary proceedings are caught by analogy by the provisions of the then Ord.84 of the Rules of the Superior Courts, the plaintiff again relied upon the tortious nature of his claim for damages for malicious falsehood and breach of constitutional rights which, it was submitted, distinguished them from judicial review type proceedings such that the time limit provided for in Ord.84, r. 21(1) of the Rules of the Superior Courts was not applicable.

33. By way of further answer to the time issues raised under s. 50 of the PDA and Ord.84 of the Rules of the Superior Courts whether by analogy or otherwise, and to the more general argument made against him that he is guilty of laches in the commencement of his

proceedings where he was claiming what the plaintiff characterised as mainly equitable reliefs in the form of declarations, and that the proceedings should be dismissed on that ground, the plaintiff argued that the operation and maintenance of the impugned Register was a rolling or ongoing event, such that there was a fresh daily accrual of the cause of action for so long as the Register continued to be operated.

The trial judge's conclusions

The s. 50 PDA 2000 issue

34. Before expressing his conclusions, the trial judge provided a summary of what he considered to be the defendant's submission under s. 50 in the following terms:

> "30. … the Council's submissions in relation to the applicability of the eight week time limit set out in s. 50 of the Act of 2000 (as amended) may be summarised as follows: where it is proposed to dispose of wastewater from a proposed development, other than to a public sewer, the Regulations of 2001 (as amended) require applicants for planning permission under s. 34 of the Act of 2000 to provide information relating to the on-site treatment system proposed and evidence as to the suitability of the site for the system proposed; s. 34 of the Act of 2000, in turn, requires local authorities to have regard to government policy and administrative guidelines in making decisions in respect of planning applications under that section; the 2003 circular and the 2010 circular issued by the Department of the Environment, Heritage and Local Government each require local authorities to ensure that qualified personnel are used in carrying out site assessments in relation to on-site treatment systems; and, therefore, the establishment and maintenance of a "Register of Independent Suitably Qualified Agents/Consultants for Waste Water Treatment", by the Council, constituted the performance or purported performance of a function (that is to say, a power or duty) of the Council within the meaning of s. 50 (2) of the Act of 2000 (as amended), such that any challenge to it must be brought by way of application for judicial review, which must be brought within the eight week time limit set out in s. 50 (6) thereof."

35. The trial judge went on to refer to the reliance placed by the defendant upon the decision of Kearns J. (as he then was) in the Supreme Court in *Harding v. Cork County Council* [2008] 4 I.R. 318 in which the purpose of s. 50 of the PDA was described in the following terms:

> "It is impossible to conceive of these legislative provisions as being intended for any purpose other than to restrict the entitlement to bring court proceedings to challenge decisions of planning authorities. There is an obvious public policy consideration driving this restrictive statutory code. Where court proceedings are permitted to be brought, they may have amongst their outcomes not merely the quashing or upholding of decisions of planning authorities but also the undesirable consequences of expense and delay for all concerned in the development project as the court process works its way to resolution. The Act of 2000 may thus be seen as expressly underscoring the public and community interest in having duly authorised development projects completed as expeditiously as possible."

36. The trial judge then set out the submissions made on behalf of the plaintiff, to which I have already referred. He referred to the submission that the introduction and operation of the Register did not amount to "a decision made or act done … in the performance or purported performance of a function under s. 50(2)" when properly construed, and that a challenge to it therefore did not attract the limited time period for any such challenge provided for in s. 50(6) of the PDA.

37. He referred to the plaintiff's submission that while undoubtedly the new s. 50 provision substituted by s. 13 of the Act of 2006, widened the scope of the limiting effect of that provision, the additional scope should nevertheless be widened no more than is strictly necessary. In this respect, the plaintiff had relied upon certain observations to this effect in Simons, *Planning and Development Law*, 2nd ed. (Dublin, 2007) (at para. 11.23).

38. The trial judge referred also to the plaintiff's submission that the phrase "or other act done" as it is used in the amended section must be seen as being subordinate to the term which immediately precedes it, namely "decision", and that any such "other act done" must relate to a decision in the planning process, and in this regard it was noted that s. 50 is located in Part III of the Act which, according to its title, is concerned with "Control of Development".

39. Finally, the trial judge referred to a submission made by the defendant in response to the submission made by the plaintiff as to the correct interpretation of the new substituted s. 50 and to the reliance placed upon the judgment of Charleton J. in *MacMahon v. An Bord Pleanala* [2010] IEHC 431 and to the following passage:

> "6. The Act of 2000 as first promulgated, and prior to its amendment as aforesaid, prohibited the questioning outside the relevant time limits of any application for planning permission, which included an application on appeal to the Board, or any procedure by a local authority in respect of its own development under s. 179 or any confirmation of a compulsory purchase order under section 216. These, basically, are all planning permission decisions, as opposed to administrative steps that lead to such decisions. The amendment introduced by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, in force since 17th October 2006, extends the remit of judicial review to "any decision made or any other act done by", and in the following subsection "a decision or other act" of the planning authority, or the Board on appeal. Previously, it was clear that a final decision had to be reached before a judicial review could be commenced. Finlay Geoghegan J. in Linehan v. Cork County Council [2008] IEHC 76 (Unreported, High Court, 19th February 2008) offered a view, in respect of the amendment to the Act as it now stands, that it might no longer be safe for an applicant to await a final planning decision before commencing judicial review proceedings. She queried as to whether decisions of a procedural kind during the course of an application might have to be challenged as they occur.
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> 7. The view is expressed by Finlay Geoghegan J. is correct. In passing s. 50, and then amending it so as to extend its strictures to administrative steps, the Oireachtas clearly intended to impose strict time limits for the challenging of decisions in the planning process by way of judicial review."

40. Having referred to the above submissions, the trial judge then stated his conclusion in relation to s. 50 succinctly as follows:

> "38. Having considered the issue carefully, I am satisfied that the relevant limitation provision is sufficiently broad to capture the introduction and maintenance of the Register by the Council in the purported performance of a function (to include a power or duty) under the Act of 2000."

41. Nevertheless, the trial judge proceeded to consider and reached a conclusion on whether the plaintiff's public law claim for declaratory relief's was otherwise caught by the time limits applicable to judicial review applications under Ord. 84, r.21 of the Rules of

the Superior Courts.

42. The trial judge was referred to the judgment of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* to which I have referred already, to the effect that where essentially judicial review type reliefs are claimed, but by way of plenary proceedings, the same judicial review time limit for commencement will apply, as will the jurisdiction of the Court to extend the time. He considered also the judgment in *Shell E&P Irl. Ltd v. McGrath* [2013] 1 I.R. 247 where Clarke J. (as he then was) confirmed that *O'Donnell* was correctly decided. *Inter alia*, the trial judge referred to a passage at para. 63 of the judgment of Clarke J. therein where he stated:

> " … Either there is a binding time limit in place (subject to extension by the court) or there is not. It is hard to see how there could be any justification for requiring a person who wished simply to set aside a public measure to act within the time limits provided for in the rules for judicial review applications (either because the proceedings were judicial review proceedings or because judicial review time limits applied by analogy in the case of plenary proceedings), but not to apply the same time limits to a challenge which sought to go beyond seeking to have the public law measures concerned rendered invalid by seeking to use that invalidity as a basis for claiming damages against the party who placed reliance on the measures concerned … ".

43. As to the plaintiff's submission that *Shell E&P* should be distinguished from the present case on the basis that in the High Court, Laffoy J. had found that the defendants (who were counterclaiming) had adopted a "wait and see" approach , allowing significant funds to be expended in the development before commencing a challenge to the decision of the Minister to give his consent, whereas in the present case there was never any acquiescence by the plaintiff to the maintenance of the Register, or to the decision to exclude him from it, the trial judge concluded by stating at para. 46 of his judgment:

> "46. … whatever about acquiescence, the plaintiff in this case did, perhaps entirely understandably, sit on his hands for a considerable period of time in relation to the claim he now wishes to maintain that the Register was *ultra vires* the Council at all material times. The plaintiff must have been aware of (and in a position to take legal advice concerning) the introduction and maintenance of the Register at least as far back as the 22ndAugust 2005 when he wrote to the Council to apply for inclusion in it. As already noted, the present proceedings were not issued until the 4th November 2011.
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> 47. I accept that, if the relevant portion of the plaintiff's claim was not captured by the provisions of s. 50 (6) of the Act of 2000 (as amended), it would, in any event, be caught by the time limits applicable to judicial review applications under O.84, r. 21 of the Rules, which time-limits do apply by analogy in the circumstances of the present case."

44. The trial judge then went on to consider whether the Ord.84 time limits were complied with, and concluded in particular that the claims were time-barred because the proceedings had not been commenced "promptly" as was required under Ors. 84, r. 21 of the Rules of the Superior Courts in its unamended form. In this regard he referred to cases to which the parties had drawn his attention, such as that of Denham J. (as she then was) in *De Roiste v. Minister for Defence* [2001] 1 I.R. 190, that of Henchy J. in *The State (Cussen) v. Brennan* [1981] I.R. 181, and that of Fennelly J. in *O'Brien v. Moriarty* [2006] 2 I.R. 221. He concluded thus because he considered that "the plaintiff must have been aware of (and in a position to take legal advice concerning) the introduction and maintenance of the Register at least as far back as 22nd August 2005, yet did not commence the present proceedings seeking to challenge its lawfulness until 4th November 2011". He went on to note that the plaintiff had not sought to establish any good reason for his failure to move promptly in order to seek the declaratory reliefs, and concluded that there was no good reason to extend the time for doing so.

45. The grounds of appeal contained in the appellant's notice of appeal can be summarised as follows:

> 1. The trial judge erred in failing to determine that the plaintiff's challenge to the operation of the Register was within time where there was a fresh daily accrual for time purposes of his cause of action alleging ultra vires in respect of the Register;
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> 2. the trial judge erred in determining that the plaintiff's claim for reliefs in his statement of claim were time-barred in circumstances where as of the date of issue of the proceedings on the 4th November 2011 the defendant continued to operate the Register, and accordingly there was a fresh daily accrual of action for so long as the operation of the Register continued;
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> 3. The trial judge erred in determining that the introduction and maintenance of the Register was an act done by the defendant in performance or purported performance of a function under the PDA, as amended, within the meaning of s. 50 thereof;
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> 4. The trial judge erred in determining that the limitation period prescribed in s. 50 of the PDA as amended was sufficiently broad to capture the introduction and maintenance of the Register in the purported performance of a function under the PDA;
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> 5. The trial judge erred in determining that the plaintiff's public law claim for declaratory relief's was caught by the time limits applicable to judicial review applications under Ord. 84, r. 21 of the Rules of the Superior Courts;
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> 6. the trial judge, having determined that the plaintiff's public law claim for declaratory relief's was caught by the time limits under Ord. 84, r.21 by analogy, erred in determining that the plaintiff's claim was not made promptly, and/or in time;
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> 7. the trial judge, having determined that the plaintiff's public law claim for declaratory reliefs was caught by the set time limits, heard in determining that there was no good reason to extend the time for bringing the challenge;
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> 8. the trial judge erred by failing judicial notice of the decision of the High Court (Cooke J.) in *Duffy v. Sligo County Council* (469JR/2012) and in according the Register the benefit of a presumption of validity when the operation of such a Register had been condemned and declared ultra vires the powers of the local authority by the High Court.

46. To set out in detail the appellant's submissions to this Court on appeal would in large part be to repeat the summary of the submissions to which I have already referred which were made in the High Court as recorded in the trial judge's judgment.

Conclusions

47. I am firstly satisfied that the trial judge was correct to conclude that the fact that the plaintiff seeks damages for malicious falsehood and for breach of his constitutionally protected property rights (specifically the right to earn a livelihood) does not provide a

means of escape from the undoubted fact that the reliefs which he seeks are essentially judicial review reliefs. They are declaratory reliefs, and if he fails to obtain such declarations he cannot succeed in obtaining an award of damages. They are fundamental to, and underpin, that claim for damages. What was stated by Clarke J. in his judgment in the Supreme Court in *Shell E&P Irl. Ltd v. McGrath* to which I have referred to in para. 40 above is entirely apposite. A litigant may not simply bolt onto his otherwise judicial review type reliefs a claim for damages so as to escape the time limits and other judicial review requirements of Ord.84 of the Rules of the Superior Courts which were not observed for whatever reason.

48. As for the trial judge's conclusion that the plaintiff's cause of action for the declaratory reliefs which he seeks first accrued on the 22nd August 2005 being the date on which he first applied to the council to have his name placed on the Register, I would respectively disagree, preferring to set that date as the date on which he received the letter dated 7th March 2006 from the council informing him that his application to be included on the Register was refused. In my view that is the date on which he was adversely affected by the requirement to be on the Register, and therefore the date from which he had standing to challenge its legality. He was from that date a person affected adversely by the requirement to be on the Register if he wished to be eligible to carry out the assessment and tests in relation to waste water treatment for applicants who seek planning permission involving the proposed use of a septic tank or other onsite waste water treatment system. As will be seen, my preference for the 7th March 2006 as the date on which time started to run against the plaintiff does not affect the trial judge's overall conclusion of the time issue.

49. The plaintiff may not rely on a fresh daily accrual of his cause of action for so however long the Register continues to be maintained and operated by the defendant. In that regard it is important to repeat that in his proceedings he makes no challenge to any of the four negative decisions that he received back from the defendant on foot of any of his four applications to have his name included on the Register. Clearly if he had sought to challenge any individual negative decision his time for doing so would be considered to run from the date of the particular decision, and it would not be necessary that he should have challenged any previous such decision.

50. This case is factually, and significantly so, different to the case which came before Hogan J. to which reference was made in argument, namely that of *Duffy v. Laois County Council* [2014] IEHC 469 where a similar Register was challenged by reason of the fact that only authorised personnel of the defendant council were eligible to have their names included on the Register to carry out these types of site inspections and assessments for applications for development permission in the defendant council's functional area. Hogan J. concluded that since the applicant in that case was suitably qualified to do the assessments in question, and had an interest in doing so, he had standing to bring his challenge. While he held also that there was a fresh daily accrual of the cause of action because the council's policy was a general policy, and the applicant was therefore in time, it was nevertheless a case where the applicant was simply ineligible to apply to have his name included on that Register at all. That is in my view to be distinguished from a case such as the present one, where the plaintiff was eligible to apply, and did so albeit unsuccessfully. As I have already stated, in my view in such a case his standing to challenge the lawfulness of the Register commenced when he received his first refusal by letter dated the 7th March 2006.

51. Having so concluded, it is necessary to reach a conclusion as to whether the trial judge was correct to decide that the plaintiff's claims come within the ambit of s. 50 of the PDA, *as substituted by s. 13 of the 2006 Act*. I believe that he was incorrect to rest his decision upon that section. This is so because of something to which, it would appear, the trial judge's attention does not appear to have been drawn. The amendment to s. 50 of the PDA was effected by way of substitution by s. 13 of the 2006 Act. That section, as well as a number of other sections of the 2006 Act, were commenced on the 13th October 2006 by the Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) Order 2006 (S.I. No. 525 of 2006). While the new section would have had relevance to any challenge based on an accrual of action which postdates that commencement date, the conclusion of the trial judge that the plaintiff's cause of action accrued on the 22nd August 2006 (and my conclusion on this appeal that the applicable date is, instead, the 7th March 2006) must mean that if the cause of action is caught by s. 50 of the PDA, it is by reference to that section as originally enacted, since the substituted section cannot operate retrospectively – see for example the judgment of Costello J. (as he then was) in *Child v. Wicklow County Council* [1995] 2 I.R. 447 at p. 451. As originally enacted s. 50 (2) provided:

> "50.(1) …
>
> (2) A person shall not question the validity of:
>
> (a) *a decision of a planning authority*:-
> (i) *on an application for a permission under this Part*, or
>
> (ii) under section 179 [local authority own application]
>
> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986)("the Order") [Emphasis provided].

52. It is manifest that the impugned Register or the policy by which the defendant council operated and maintained the Register is not a decision on an application for a permission. It is equally manifest that the substituted provision considerably expanded the scope of the matters to which the restrictions provided for in s. 50 should apply, above and beyond such planning decisions, so that they would thereafter apply to challenges to "any decision made *or other act done* by … a planning authority … in the performance or in purported performance of a function under this Act". [Emphasis provided]

53. Given the conclusion that the plaintiff's cause of action accrued on the 7th March 2006, it is unnecessary to express any view as to whether the operation and maintenance to the Register amounts to either a decision made, or any other act done, in the performance or purported performance of any of the council's functions under the PDA. I deliberately refrain from so doing.

54. For this reason, I would not uphold the trial judge's conclusion that the challenge to the lawfulness of the Register falls within s. 50 of the PDA, as amended, and that they are therefore caught by the 8 week time limit provided for in s. 50(6) of the PDA.

55. I would however uphold the trial judge's conclusion that by analogy Ord.84, r. 21 of the Rules of the Superior Courts applies to the claims brought by the plaintiff by way of his plenary proceedings. I do so for the reasons so clearly stated by the trial judge by reference to the judgment of Costello J. (as he then was) in *O'Donnell v. Dun Laoghaire Corporation* [*supra*], and as reiterated by Clarke J. in *Shell E & P Ltd v. McGrath* to which reference has already been made. I reject the submission that the 6 year limit applicable to all claims in tort (save negligence causing personal injuries) under s. 11 of the Statute of Limitations 1957, as amended, applies so that the time rules under Ord. 84, r. 21 of the Rules of the Superior Courts do not apply.

56. Since the plaintiff did not commence his plenary proceedings until the 4th November 2011, and since the date of accrual of his cause of action is the 7th March 2006, I am satisfied that the plaintiff did not commence his proceedings promptly, and in any event outside the period of three months provided for in Ord.84, r.21 of the Rules of the Superior Courts as it existed in March 2006. I uphold the trial judge's conclusion in that regard.

57. It is not necessary to express any view on the relevance or otherwise of the decision of Cooke J. in *Duffy v. Sligo County Council* (469 JR/2012) given the basis for my conclusions for the disposition of this appeal, or on the fact that within a short time after that decision the defendant in the present case withdrew the Register. It does not affect one way or another whether or not the plaintiff commenced his challenge promptly or within three months from when his cause of action accrued. The fact that I have not done so should not be taken as any view by me on what the trial judge stated in relation to that *Duffy* decision one way or another, as the question simply does not arise in any for consideration on this appeal.

58. Finally, I would affirm the trial judge's conclusion that there was no reason to extend the time for the commencement of these proceedings. Indeed, no such reason was advanced by the plaintiff.

59. For these reasons I would dismiss this appeal, and affirm the order of the High court dated the 14th October 2014 on the preliminary issue directed by Gilligan J. to be tried in advance of any substantive hearing of the issues raised in the proceedings.