Neutral Citation: [2015] IEHC 561

THE HIGH COURT

[2011 No. 9930P]

BETWEEN

JOHN JAMES MUNGOVAN

PLAINTIFF

AND

CLARE COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice David Keane delivered on the 17th day of August, 2015.

Introduction

1. By Order of the Court made on the 30th May, 2014, on consent between the parties, Gilligan J. directed the determination of certain preliminary issues in this case by way of a modular trial based upon a Statement of Agreed Facts appended to that Order.

2. The preliminary issue, which it is sought to have determined is, essentially, whether a significant part of the plaintiff's claim should be held to be vitiated by his delay in commencing these proceedings, whether by application of the doctrine of *laches* in respect of the equitable reliefs that he claims or for failure to comply with either the statutory time-limit under s.50 of the Planning and Development Act 2000, as substituted by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006, or the requirement to move within the applicable time limits and, in any event, promptly in seeking declaratory orders in public law proceedings by analogy with the requirements of Order 84, rule 21 of the Rules of the Superior Courts governing applications for judicial review.

The plaintiff's claim

3. The plaintiff has a degree in environmental engineering and is, and was at all material times, an environmental engineering consultant. In these proceedings, instituted by plenary summons issued on the 4th November, 2011, he seeks to challenge the lawfulness of a Register of Independent Suitably Qualified Agents/Consultants for Waste Water Treatment ("the Register"), which Clare County Council ("the Council") introduced in November 2004 and operated until withdrawing it in March 2013.

4. In his statement of claim, delivered on the 30th of January, 2012, the plaintiff seeks a declaration that the Register lacked any legal or statutory basis and that, in consequence, the maintenance of the Register was *ultra vires* the Council and its operation constituted an unjust attack on the property rights of the plaintiff contrary to the provisions of Article 40.3 and Article 43 of the Constitution.

5. The plaintiff further claims damages for the financial loss caused to him by his exclusion from the Register and, significantly, damages for malicious falsehood, together with interest pursuant to statute.

6. In its defence, delivered on the 10th June, 2013, the Council admits the introduction and operation of the Register, as alleged, but otherwise denies the plaintiff's claims.

Background

7. According to the Statement of Agreed Facts, the Register was established in conjunction with the imposition by the Council of a requirement upon applicants for planning permission, on or after the 15th November, 2004, where the application involved the proposed use of a septic tank or other on-site treatment system, to include with their application the results of the appropriate site suitability assessment tests specified in Appendix A of the Environmental Protection Agency (2000) *Wastewater Treatment Manual: Treatment Systems for Single Houses.* In establishing the Register, the Council gave notice that, subject to limited exceptions, any application for a single house lodged on or after the 15th November, 2004, must include such test results and that only persons on the recommended panel contained in the Register should be used for the purpose of carrying out such tests. All panel members were required by the Council to have current professional indemnity insurance, which applicants were advised to check before engaging a panel member.

8. The Council introduced the requirements just described in the interests of public health and environmental protection so as to ensure the safe disposal of wastewater from a development and having regard to the Council's development objectives, *inter alia*, for:-

(i) the provision, or facilitation of the provision, of water supplies, waste water services and ancillary facilities, and

(ii) the conservation and protection of the environment.

In doing so, the Council invoked the provisions of s.20 of the Planning and Development Act 2000 (as amended) and the relevant purposes set out in Parts I, II and IV of the First Schedule to that Act, and the Council asserts that it maintained the Register as conducive to the performance of such powers and functions.

9. The key interactions between the plaintiff and the Council in connection with the operation of the Register as it affected the plaintiff may be summarised as follows:-

> (a) On the 22nd August, 2005, the plaintiff wrote to apply for inclusion on the Register. The plaintiff was asked to provide further information and, subsequently, to attend for interview.
>
> (b) On the 7th March, 2005, the Council wrote to inform the plaintiff that he had not been successful but that, as the Council was operating a rolling panel, he was free to apply again in the future, by reference to whatever additional

training, experience or qualifications he might have accumulated in the interim.

(c) On the 26th November, 2008, the plaintiff again wrote seeking inclusion on the panel failing which, he stated, he would have no alternative but to take action to protect his constitutional right to work.

(d) On the 10th December, 2008, the Council replied that a further interview would be necessary. That interview was ultimately scheduled to take place on the 8th March, 2010, and the plaintiff attended it.

(e) On the 16th March, 2010, the plaintiff was again informed that he had not been successful in his application. The plaintiff was informed that the "site characterisation assessments" that he had submitted in advance of interview were considered to be unsatisfactory and below the requisite standard and the plaintiff was requested to provide additional reports in support of his application to enable it to be fully or properly considered.

(f) On the 18th March, 2010, the Council received the additional reports it had requested from the plaintiff and they were furnished to its Senior Executive Chemist and its Environment Section for review.

(g) On the 28th May, 2010, the Council wrote to inform the plaintiff that the result of the review was to uphold the decision not to include his name on the Register.

(h) On the 6th August, 2010, the Council wrote once again to the plaintiff inviting him to submit two new reports for review if he wished to make a further application for inclusion on the Register.

(i) On the 16th August, 2010, the plaintiff submitted two new reports as requested.

(j) On the 16th September, 2010, the Council invited the plaintiff to provide clarification of certain aspects of those reports at the request of its Environment Section.

(k) On the 7th October, 2010, further queries were raised concerning the precise location of the sites, which were the subject of the relevant reports.

(l) On the 5th November, 2010, the plaintiff provided a response to those queries.

(m) On the 6th December, 2010, the Council e-mailed the plaintiff (fearing that postal deliveries might face weather disruption) to inform him that it considered it necessary to conduct a site inspection of one of the subject sites in the presence of the plaintiff and seeking to arrange one.

(n) On the 17th December, 2010, the plaintiff's solicitors wrote to the Council on the plaintiff's behalf, requiring confirmation within seven days that the plaintiff would be added to the Register, failing which they would immediately apply to the High Court for leave to seek judicial review. It is common case that no such confirmation was provided and that no such application was made. Rather, the parties agreed to the conduct of a joint site inspection of one of the subject sites by an independent site assessor in the presence of the plaintiff.

(o) On the 11th April, 2011, the Council's solicitors wrote to the plaintiff's solicitors identifying a number of continuing concerns in relation to identified aspects of the plaintiff's site test report, subsequent to the joint site inspection and communicating the Council's decision that the plaintiff's name would not be added to the Register.

(p) On the 12th May, 2011, the plaintiff's solicitors wrote to rebut the criticisms of the relevant site report implicit in the various concerns expressed by the Council and informing the Council that High Court proceedings would be instituted.

(q) On the 30th May, 2011, the plaintiff's solicitors wrote to seek a reply to their letter of the 12th May, 2011.

(r) On the 21st June, 2011, the Council's solicitors provided a substantive reply and confirmed their authority to accept service of proceedings.

(s) On the 20th September, 2011, the plaintiff's solicitors wrote again requesting the Council to state the provenance of the Register and its legislative basis, if any.

(t) On the 26th September, 2011, the Council's solicitors wrote, declining to respond to that request in correspondence in light of the plaintiff's threat of litigation and the Council's intention to fully defend any such proceedings.

(u) As mentioned, the present proceedings commenced by way of a plenary summons issued on the 4th November, 2011.

(v) The Council discontinued operation of the Register on the 7th March, 2013.

The preliminary issues to be tried

10. As mentioned, the Order made by Gilligan J. on the 30th May, 2014, directed that the issue of whether the plaintiff's public law claims for equitable relief are out of time should be tried as a preliminary issue. That Order also directed that the plaintiff's application to have those paragraphs of the Council's defence in which the time bar issue is pleaded struck out, pursuant to either the terms of Order 19, rule 28 of the Rules or the inherent jurisdiction of the Court, should also be determined as a preliminary issue.

11. Although the latter application was issued (marginally) first in time, it is my understanding that it was conceded at the outset of the hearing before me that Order 19, rule 28 only applies where it is sought to strike out an entire pleading and not simply a portion of one; *Aer Rianta c.p.t. v. Ryanair Ltd* [2004] 1 I.R. 506. Moreover, while there plainly exists - in parallel to the jurisdiction recognised under that rule - a broader inherent jurisdiction to strike out a pleading in whole or in part where, for example, it is bound to fail and its maintenance would therefore amount to an abuse of the process of the courts, I believe it was not seriously contested that, in the words of McCarthy J. in *Sun Fat Chan v Osseous Ltd* [1992] 1 I.R. 425, such an application is one that this Court should be "slow to entertain" in anything other than the clearest of cases. In any event, having acknowledged the thrust of the applicable jurisprudence, Counsel for the plaintiff confirmed that his client was content to address the preliminary issues presented 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.

Mootness
12. The plaintiff has raised what, on one view, might be described as a preliminary objection to the determination of the preliminary issue just mentioned. The plaintiff argues that his claim for each of the declaratory reliefs he seeks is now moot because it is common case that the Register was discontinued on the 7th March, 2013, some sixteen months after the proceedings issued. Accordingly, Counsel for the plaintiff indicates that he would be willing to withdraw his claim for those public law declaratory reliefs and proceed to trial solely with his claim to damages for the financial loss and damage caused to him by the Council's tort of malicious (or injurious) falsehood (and, presumably, its breach of his constitutional property rights), thereby obviating the need for any determination on whether he is, in any event, out of time to pursue the public law aspects of his claim.

13. In response, the Council submits that the preliminary issue now before the Court is not moot.

14. The Council points to the decision of the Supreme Court in *Glencar Explorations p.l.c. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 and, in particular, that portion of the judgment of Keane C.J. (at p. 127 of the report), which notes the authoritative statement of Finlay C.J. in *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23 where he cited with approval the following statement of the law in Wade, *Administrative Law*, 5th Ed., (Oxford, 1982) at p. 673:-

> "The present position seems to be that administrative action which is *ultra vires* but not actionable merely as a breach of duty will found an action [for] damages in any of the following situations:
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> 1. if it involve[s] the commission of a recognised tort such as trespass, false imprisonment or negligence;
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> 2. if it is actuated by malice, e.g. personal spite or [a] desire to injure for improper reasons;
>
> 3. if the authority knows that it does not possess the power which it purports to exercise."

Keane C.J. goes on to note that Finlay C.J. added that he was satisfied that there would not be liability for damages arising under any other heading.

15. It is noteworthy that no breach of duty is pleaded in the present case.

16. Accordingly, the Council submits that, if any claim is to be maintained against it for damages in tort, not actionable merely as a breach of duty, such claim must necessarily involve establishing an administrative action which is *ultra vires*. In that context, Mr. Connolly for the Council enquired rhetorically whether the plaintiff would be prepared to consent to an Order dismissing, rather than striking out, his claims for declaratory relief, suggesting that he would not, since he must maintain his claim that the introduction and maintenance of the Register was *ultra vires* the Council as a fundamental plank of his claim against the Council for damages for malicious falsehood.

17. In my view, the submission made on behalf of the Council that I have just described is, at least, an arguable one. Differently expressed, there is some force to the submission that the issue now before the Court is not whether the plaintiff is entitled to a declaration that a Register, such as the discontinued one at issue here, lacks (or lacked) any legal or statutory basis, whether its maintenance is (or was) *ultra vires* the Council, or whether its operation constitutes (or constituted) an unjust attack on the property rights of the plaintiff; rather, the issue is whether those claims were barred at the time these proceedings were instituted – and that is an issue the determination of which is at least arguably material to the resolution of the plaintiff's claim for damages for the tort of malicious falsehood and for breach of his constitutional property rights.

18. In order to make his claim in malicious falsehood, the plaintiff will have to establish that the maintenance of the Register at issue by the Council was *ultra vires* the Council and, in accordance with the provisions of s.42 of the Defamation Act 2009, will then have to prove that his omission from that Register amounted to a statement that was untrue; that was published maliciously; that referred, inter alia, to him or his profession or business; and that was calculated to cause, and was likely to cause, him financial loss, *inter alia*, in his profession or business. But, as the Council (in my view, quite rightly) acknowledges, that is all a matter for another day.

19. For the reasons I have just given, I am satisfied that I should now determine the preliminary issue on its merits. However, in coming to that conclusion (on the basis of arguability), it should not be taken that I have reached or expressed any view, beyond one of arguability, in respect of the facts and law referable to the plaintiff's claim for damages in tort. Any and all such issues fall to be determined at the second stage of the present modular trial.

Are the public law claims for declaratory relief time barred?
20. The Council contends that the plaintiff's public law claims for declaratory relief are captured by the eight week time limit laid down by s.50 of the Act of 2000 (as amended), or, in the alternative, that the three month time limit laid down by O. 84, r. 21 of the Rules in respect of an application for judicial review must be applied by analogy to such claims. The plaintiff's case is that neither such time limit applies and that the only time limit applicable to the bringing of his claim is that of six years laid down by s.11 (2) (a) of the Statute of Limitations Act 1957.

21. Section 50 of the Act of 2000 (as amended) provides, in relevant part, as follows:-

> "50. – (2) A person shall not question the validity of any decision made or other act done by-
>
> (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act
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> …
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> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts
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> …
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> (6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the 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, the local authority or the

Board, as appropriate.

…

(8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

22. The Council submits that the establishment and operation of the Register were acts done in the performance or purported performance of a function under the Act of 2000 (as amended), within the meaning of s.50 thereof. The Council points to the following legal provisions and departmental circulars in support of that submission.

23. Section 2(1) of the Planning and Development Act 2000 defines "functions" to include "powers and duties."

24. Article 22 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) ("the Regulations of 2001"), as amended by article 8 of the Planning and Development Regulations 2006 (S.I. No. 685 of 2006), provides in relevant part as follows:-

"22. (1) A planning application under section 34 of the Act shall be in the form set out at Form No. 2 of Schedule 3, or a form substantially to the like effect.

(2) A planning application referred to in sub-article (1) shall be accompanied by -

…

(c) *Where it is proposed to dispose of waste water from the proposed development other than to a public sewer, information on the on-site treatment system proposed and evidence as to the suitability of the site for the system proposed."* (emphasis supplied)

25. Section 34 of the Act of 2000 provides in relevant part as follows:-

"34 (2) (a) When making its decision in relation to an application under this section, the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to—

…

(iv) where relevant, the policy of the Government, the Minister or any other Minister of the Government." (emphasis supplied)

26. Thus, s.34 (2) (a) (iv) of the Act of 2000 makes it plain that planning authorities must take government policy into account in deciding whether to grant or refuse applications for planning permission. The Council submits that government policy obliges it to ensure that qualified personnel be retained to prepare the wastewater treatment reports, which article 22(2)(c) of the Regulations of 2001 (as amended) requires applicants for planning permissions to submit along with their applications, and that it established the Register in an attempt to discharge that obligation. The Council relies upon a number of administrative manuals and departmental circulars in support of that submission.

27. As noted above, in the year 2000, the Environmental Protection Agency (E.P.A.) published a manual on treatment systems for single houses ("the 2000 manual"), which was designed to assist planning authorities and others to deal with the complexities of on-site systems for domestic effluent treatment and disposal in respect of single dwelling houses. On the 31st July, 2003, the Department of the Environment, Heritage and Local Government issued a circular letter, Circular SP5/03 ("the 2003 circular"), to city and county managers across the country, which dealt with the development of effective regimes for the proper assessment of site conditions, as well as the design, installation, and maintenance of on-site wastewater treatment and disposal facilities.

28. The 2003 circular states in relevant part as follows:-

"The assessment of site conditions is critical to ensuring that new development does not adversely affect water quality generally and groundwater quality specifically. *In particular, site assessors need specific training. A new training course provided by FAS: "Site Suitability Assessment of On-Site Wastewater Management" and which is run jointly by the GSI and EPA is strengthening the availability of personnel specifically trained to make detailed site assessments and recommendations regarding wastewater treatment and disposal options. Consideration might be given by planning authorities to using a standard site characterisation form along the lines of the model included at Appendix A in the EPA manual and encouraging the use of such qualified personnel in carrying out site assessments."* (emphasis supplied)

29. On the 5th of January, 2010, the Department of the Environment, Heritage and Local Government issued another circular letter, Circular PSSP 1/10 ("the 2010 circular"). The 2010 circular related to on-site wastewater disposal systems for single houses. It begins by noting that the E.P.A. had published a new *Code of Practice on Wastewater Treatment and Disposal System Serving Single Houses* in October 2009 ("the E.P.A. Code of Practice"), which replaced the 2000 manual, and incorporated "new European standards, E.P.A. research findings, and feedback on previous E.P.A. guidance and research reports." The 2010 circular states in relevant part as follows, at pp. 3-4 thereof:-

"[p]lanning authorities must also ensure that proper arrangements are in place to ensure that every individual dwelling that is granted planning permission in an unsewered area has first undergone site suitability assessment using the methodology set out in the Code of Practice and the site assessment has fully met the required standards, as overseen by a (sic) appropriately trained, qualified and accountable assessor and designer…*Furthermore, planning authorities must not, in any circumstances, approve development subject to conditions requiring compliance with the Code of Practice, without first satisfying themselves that the provisions within the Code can be complied with and on the basis of expert and verifiable evidence including a positive site suitability assessment by a (sic) appropriately trained and qualified*

assessor." (emphasis supplied)

30. Thus, 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.

31. The Council submits that the purpose of the s.50 time limit is to ensure that authorised development projects will be completed without undue delay. In this connection the Council relies upon the decision of the Supreme Court in *Harding v. Cork County Council* [2008] 4 I.R. 318. In that case Kearns J. (as he then was) described the purpose of s.50 in the following terms (at p. 345 of the report):-

> "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."

32. Counsel for the plaintiff submitted that the introduction and operation of the Register by the Council did not amount to a decision made or act done by the Council in the performance or purported performance of a function under s.50 (2) of the Act of 2000 (as amended), properly construed, and, therefore, did not attract the limitation of s.50 (6) whereby it could only be challenged by way of application for judicial review brought within the period of eight weeks beginning on the date of any such decision or the doing of any such act.

33. In advancing that contention, Counsel for the plaintiff relied on a number of propositions. First, the Court was invited to consider the significance of the substitution of a new s.50 of the Act of 2000 by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006. While Mr. Molloy for the plaintiff was obliged to acknowledge that the scope of the limiting effect of that provision was widened under its new terms, extending it to cover *"any decision made, or act done…in the performance or purported performance of a function under [the] Act",* he sought to argue that the observation in Simons, *Planning and Development Law*, 2nd Ed., (Dublin, 2007) (at para. 11-23) that the relevant amendment "has the benefit of removing certain anomalies" under the section as it previously stood, should inform a construction of the section cutting down the words used so that the scope of the relevant limitation is widened no more than is strictly necessary to address those anomalies (described at paras. 11-23 and 11-24, op. cit.).

34. Second, Mr. Molloy submitted that the phrase "or other act done," used in s.50 (2) of the Act of 2000 (as amended), is subordinate to the term which immediately precedes it, namely "decision" and, thus, that the phrase "other act done" must relate to a decision in a planning process. In support of that argument, the Court was asked to note that s.50 of the Act of 2000 is located in Part III thereof, which, according to its title, is concerned with "Control of Development." Thus, Counsel for the plaintiff submits that the phrase "other act done" in s.50 of the amended Act must be interpreted as meaning "other act done in connection with the control of development."

35. Expanding on that argument, Mr. Molloy pointed to the fact that s.50 (3) of the Act of 2000 (as amended) expressly provides that an approval or consent referred to in Chapters I and II of Part VI thereof is excluded from the definition of "a decision made or other act done … in the performance or purported performance of a function under this Act" in s.50 (2). Chapters I and II of Part VI deal respectively with the establishment and constitution of An Board Pleanála and with its organisation and staffing. Thus, Mr. Molloy submits, it is clear that not all acts done and decisions made in the planning area are governed by that limitation period.

36. In reply to the plaintiff's submissions on the proper construction of s.50 (2) of the 2000 Act (as amended), Mr. Connolly drew the Court's attention to the decision of Charleton J. in *MacMahon v. An Bord Pleanála* [2010] I.E.H.C. 431 and, specifically the following passage in it:-

> "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.
>
> 7. The view as 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."

37. Mr. Connolly submits that it is thus clear that the 2006 amendment is not loose drafting but, rather, is an intended expansion of the restriction of judicial review applications brought in the context of the planning code. Similarly, Simons is not criticising the wording of s.50 of the Act or arguing for any narrowing of its interpretation.

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.

39. Lest I am mistaken in that conclusion, I will proceed to consider the second argument advanced on behalf of the Council, namely, that the plaintiff's public law claim for declaratory reliefs is otherwise caught by the time limits applicable to judicial review applications under O. 84, r. 21 of the Rules, which time limits must apply by analogy in the circumstances of the present case.

40. Order. 84, rule. 21 of the Rules provides as follows:-

> "(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made.
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> …
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> (3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

41. In *O'Donnell v. Dún Laoghaire Corporation* [1991] I.L.R.M. 301, Costello J. considered the principles relating to delay as they apply to proceedings in which a decision of a public authority is challenged by way of plenary action seeking declaratory relief, rather than by way of application for judicial review pursuant to the provisions of O. 84, r. 21 just quoted. Costello J. stated (at pp. 314-315 of the report):

> "A declaratory order is a discretionary order arising from the wording of statute which conferred jurisdiction on the courts to make such orders (see Wade, *Administrative Law* 5th ed., p. 523) and it is well established that a plaintiff's delay in instituting plenary proceedings may, in the opinion of the court, disentitle the plaintiff to relief. It seems to me that in considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in O. 84, r. 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under O. 84 time would have been extended. The rules committee considered that there were good reasons why public authorities should be protected in the manner afforded by O. 84, r. 21 when claims for declaratory relief were made in applications for judicial review and I think exactly the same considerations apply when the same form of relief is sought in a plenary action. Furthermore, it is not desirable that the form of action should determine the relief to be granted and this might well be the result in a significant number of cases if one set of principles on the question of delay was applied in applications for judicial review and another in plenary actions claiming the same remedy. And in plenary actions the effect of delay can in many cases be determined on the trial of a preliminary issue and as speedily as if the issue fell to be determined in an application for judicial review."

42. The principle articulated in *O'Donnell* was reiterated more recently by the Supreme Court in the case of *Shell E & P Ireland Ltd. v. McGrath* [2013] 1 I.R. 247, where Clarke J. stated as follows (at p. 269 of the report):-

> "***[60]*** At the relevant time when *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 was decided there was no primary legislative time limit applicable in planning cases. For the reasons already analysed I am satisfied that *O'Donnell v. Dun Laoghaire Corporation* was correctly decided. It follows that the difference between rules and primary legislation is not material. It further follows, therefore, that the rules can be taken to apply by analogy to claims which have, as their substance, the seeking of the types of relief ordinarily obtained by judicial review even though framed in another fashion, such as in declaratory proceedings. If, therefore, a party is debarred, by reference to judicial review time limits, from maintaining declaratory proceedings to the same end, what is the logic of allowing such a party to achieve the same end by including a similar challenge in a declaration to be found in a counterclaim?"

43. Clarke J. continued (at p. 270 of the report):-

> "***[63]*** I cannot see that it makes any difference that *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 involved a direct challenge to a public authority whereas the challenge which the defendants seek to mount in this case is against both a public authority (insofar as that authority is a necessary defendant to any claim which asserts the invalidity of an action taken by the authority concerned) and also a private entity which sought to place reliance for the lawfulness of its actions on the validity of a measure taken by the relevant public authority. 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 a party who placed reliance on the measures concerned. For the reasons already analysed it does not seem to me to make a difference that the claim in which the challenge is brought is formulated as a counterclaim particularly where the counterclaim is not merely a necessary part of the defence but goes further and seeks to make a substantive claim, in this case in damages, which goes beyond the repetition of the substance of the defence."

44. Thus, on the basis of the authority represented by the decisions in *O'Donnell* and *Shell*, the Council submits that the time limits laid down by O. 84, r. 21 must be applied by analogy to the plaintiff's case, notwithstanding the fact that these proceedings were commenced by way of plenary summons rather than by way of an application for judicial review.

45. Counsel for the plaintiff sought to distinguish *O'Donnell* and *Shell* on the basis that in those cases the impugned decisions of the bodies concerned – respectively, the decision of the county manager of Dún Laoghaire Corporation to impose water rates within the defendant's administrative area, and the decision of the Minister for Communications, Marine and Natural Resources to provide his consent, pursuant to s.40 of the Gas Act 1976, to the construction of an on-shore pipeline in County Mayo – were still operative at the time that the issues in each of those sets of proceedings fell to be determined, whereas in this case the decision impugned – namely, the decision of the Council to introduce and maintain a Register of the kind already described – has ceased to have any prospective force or effect, due to the discontinuance of the said Register in March 2013. But that distinction, while perfectly valid in so far as it goes, seems to me to make no difference as regards the question I have to answer on this aspect of the case, namely,

was the plaintiff within time to challenge the relevant decision(s) or act(s) of the Council in establishing and maintaining the Register (then extant) when he issued his proceedings seeking, *inter alia*, public law declaratory reliefs on the 4th November, 2011?

46. Counsel for the plaintiff also sought to distinguish the *Shell* case on the basis that, whereas Laffoy J. in the High Court in that case had found that the defendants (who were counterclaiming) had adopted a "wait and see" approach, allowing significant funds to be expended in the development of the pipeline before challenging the decision of the Minister to give his consent to that development, the plaintiff in this case has in no way acquiesced in the maintenance of the Register or in the decision to exclude him from it, as evidenced by the long train of correspondence between the parties, which has been summarised above. However it seems to me that, whatever about acquiesence, 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 22nd August, 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.

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.

48. The next question that logically arises is whether the plaintiff has complied with those time limits.

49. In the case of *De Róiste v. Minister for Defence* [2001] 1 I.R. 190 Denham J. (as she then was) made the following statement (at p. 204 of the report):-

> "Judicial review is an important legal remedy, developed to review decision-making in the public law domain. As the arena of public law decision-making has expanded so too has the volume of judicial review. It is a great remedy modernized by the Rules of the Superior Courts, 1986, and by precedent (sic). However, there is no absolute right to its use, there are limitations to its application. The granting of leave to apply for judicial review and the determination to grant judicial review are discretionary decisions for the court. This has been set out clearly in precedent. The first condition as to time is that the application be brought promptly. As to whether the application is prompt will depend on the circumstances. In some circumstances even if the application is brought within months of the decision being challenged it may not be sufficiently prompt. Thus in *The State (Cussen) v. Brennan* [1981] I.R. 181, an application made within four months of a decision was refused. Henchy J. stated, at p.196:-
>
> > "What particular period of inactivity will debar a person from getting an order such as *mandamus* or *certiorari* will depend on the circumstances of the case. I have no doubt that in this case it would be unjust to grant either *mandamus* or *certiorari*."
>
> This concept of delay is analysed from both the procedural and substantive aspect. The court in exercising its discretion goes further than a merely procedural analysis. In this case there are no statutory limitations and the court exercises its full discretion.
>
> The analysis commences with the obligation to bring the application 'promptly'. It is the key word which is the foundation of the process. As to whether the application is prompt will depend on all the circumstances of the case."

50. The Council also drew the Court's attention to the decision of the Supreme Court in *O'Brien v. Moriarty* [2006] 2 I.R. 221. In that case Fennelly J. (at p. 244 of the report) quoted with approval the following statement of Ackner L.J. in *R. v. Stratford-on-Avon D.C. ex parte Jackson* [1985] 1 W.L.R. 1319, who observed (at pp. 1322 to 1323 of the report):-

> "The essential requirement of the rule is that the application must be made 'promptly'. The fact that an application has been made within three months from the date when the grounds for the application first arose does not necessarily mean that it has been made promptly. Thus there can well be cases where a court may have to consider whether or not to extend the time for making the application, even though the application has been made within the three month period."

51. In the circumstances that I have already described, whereby 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 22nd August, 2005, yet did not commence the present proceedings seeking to challenge its lawfulness until the 4th November, 2011, I have concluded that the relevant claim was not made promptly.

52. It is, perhaps, important to bear in mind that the public law claim for declaratory relief in these proceedings is not one challenging the exclusion of the plaintiff's name from the Register at issue; rather, it is one challenging the *vires* of the Council to create and maintain the Register in the first place. Accordingly, while there was some argument between the parties concerning the relevant date by reference to which time began to run, it does not seem to me correct to link that date to any of the decisions made to decline the plaintiff's various applications for inclusion in the Register. At all material times from its inception he stood excluded from a Register of approved persons the creation and maintenance of which he seeks to contend was unlawful. For the same reason, I do not believe that I have to consider the issue of the extent, if at all, to which the effective date of any relevant decision might have been modified or altered by any subsequent demand for clarification or confirmation in correspondence from the plaintiff's solicitors, such as arose in *Weldon v. Minister for Health and Children* [2010] IEHC 444 or *Fotooh v. Minister for Justice, Equality and Law Reform* [2011] IEHC 166.

53. In *De Róiste*, Denham J. went on to consider the factors which the court would take into account in determining whether or not to accede to an application to extend time or to allow judicial review, concluding (at p. 208 of the report):-

> "In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject of the application; (ii) the conduct of the applicant; (iii) the conduct of the respondents; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive."

54. In this case, I accept, as the plaintiff submits, that any finding as to the lawfulness or otherwise of the Register has no obvious implications or effects for any third parties. However, by reference to the application of the other factors identified in the passage

from the judgment of Denham J. that I have just quoted, and bearing in mind also that no argument has been advanced on behalf of the plaintiff to establish good reason for his failure to move promptly in seeking the declaratory reliefs now at issue, I have come to the conclusion that there is no good reason to extend the time in which the proposed challenge to the lawfulness of the Register may be brought.

55. In consequence, I am satisfied that the plaintiff's public law claim for declaratory relief is also barred as having been brought outside the time limit applicable to judicial review applications under O. 84, r. 21 of the Rules, which time limits must apply by analogy in the circumstances of the present case, in the absence of any good reason to extend that time limit.

56. There is one final matter that requires to be addressed. It concerns the suggestion in argument, if indeed such a suggestion was being made, that it is necessary or, at least, somehow appropriate for the Court to form a provisional or tentative view of the merits of the plaintiff's claim that the introduction and maintenance of the Register at issue was *ultra vires* the Council.

57. In that regard, Counsel for the plaintiff referred the Court to an Order made in this Court by Cooke J. on the 21st January, 2013, in proceedings entitled *Duffy v. Sligo County Council*, with the record number 469 J.R. of 2012. Counsel informed me that no written judgment was delivered in that case and no agreed or approved note is available of the *ex tempore* judgment that was given. The Order records that the applicant in that case had sought Orders, *inter alia*, quashing the refusal of the respondent to include him on a "panel of Consultants to carry out Site Suitability Assessments, Design and Certification of On-Site Wastewater Treatment Systems in County Sligo" and a declaration that the policy of operating that panel was unconstitutional and illegal. The operative part of that Order recites:-

> "An[d] in lieu of the Relief sought [by way of the declaration just described]
>
> The Court doth Declare that the operation of the panel of approved assessors of development sites suitability for on site waste water treatments for the purpose of an application for planning permission made in accordance with Regulation 22 of the Planning and Development Regulations 2006 is Ultra Vires the powers of the Respondent as a Planning Authority under the Planning and Development Act 2000 as amended and the said Planning and Development Regulations 2006."

58. On behalf of the plaintiff, Mr. Molloy asked the Court to have particular regard to the fact that the said Order was made in those proceedings on the 21st January, 2013, just weeks prior to the discontinuation by the Council of the separate Register that it had introduced and maintained.

59. However, Mr. Connolly made two points in response to that submission, both of which seem to me to be well taken.

60. The first is that the Order of Cooke J. in the *Duffy* case recites that the decision of Sligo County Council refusing to include the applicant in that case on the panel concerned was made on the 14th March, 2012, and that application for Judicial Review was made on the 31st May, 2012, thereby establishing that no possible issue of time limits could have arisen in that case.

61. The second is that, even if it were appropriate in principle to have regard to the merits of the plaintiff's claim in considering the time bar issue, the Order relied upon, in the absence of a judgment or of any detail concerning the specific nature or scope of the panel or register at issue in that case, does nothing to displace the presumption of validity which attaches to the introduction and maintenance of the Register in this case. In the High Court decision of *Weston Ltd v. An Bord Pleanála* [2010] IEHC 255, Charleton J. stated:-

> "In *Lancefort Ltd v. An Bord Pleanála* (Unreported, High Court, McGuinness J., 12th March, 1998) the following passage on the burden of proof, at pp. 21-22, which applies as much to a planning authority as An Bord Pleanála appears:-
>
> > "Counsel for the Notice Party also submitted that where the evidence as to whether a statutory body entrusted by the legislator with a particular function did not exercise its statutory duties, there is presumption of validity in favour of the decision under attack. Finlay P. in *re Comhaltas Ceoltoirí Éireann* (High Court, unreported, 14th December, 1977) said (at pages 3-4 of the transcript of his Judgment):
> >
> > > 'A planning authority is a public authority with a decision making capacity acting in accordance with statutory powers and duties. In my view, there is a rebuttable presumption that its acts are valid.'
> >
> > It appears to me that this submission is well-founded."

62. In the circumstances, it seems to me that the Order of Cooke J. in the proceedings concerned does not affect the questions that I have had to consider or the conclusions that I have reached on the preliminary issue in this case.

Conclusion

63. For the reasons that I have set out above, I am satisfied that the public law declarations sought by the plaintiff are time barred and I rule accordingly. It follows that the plaintiff's application to strike out the relevant portion of the Council's defence must fail.