AN CHÚIRT UACHTARACH
THE SUPREME COURT

Clarke CJ
MacMenamin J
Dunne J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2019:000075
[2020] IESC 000
Court of Appeal record number 2016/233
[2017] IECA 321
High Court record number 2011/9930P
[2015] IEHC 561; [2018] IEHC 267

BETWEEN

JOHN JAMES MUNGOVAN

PLAINTIFF/APPELLANT

- AND -

CLARE COUNTY COUNCIL

DEFENDANT/RESPONDENT

Judgment of Mr Justice Peter Charleton delivered on Friday, April 24th 2020

1. Where an administrative body, here Clare County Council, decides and implements a fixed policy directly affecting those interacting with it, is a person on receipt of an adverse decision founded on that policy required, by statute or the Rules of the Superior Courts, to bring a challenge within the time limits fixed for judicial review or, instead, is that person entitled to seek judicial condemnation of the policy at any time while it is in force and hence liable to affect them afresh? This is the question which arises for decision on this direct appeal from the judgment of Costello J in the High Court, [2018] IEHC 267. Leave to appear before this Court was given on 6 September 2019, [2019] IESCDET 203, to determine questions relating to the validity of several refusals of Clare County Council to accept John James Mungovan as a qualified water treatment engineer for planning purposes by entering his name on a list of such experts who would be acceptable to the local authority. Regrettably, only the time aspect of the case has so far been decided.

Background

2. Mr Mungovan attended the National University of Ireland, Galway and graduated with an honours degree in environmental engineering, specialising in wastewater treatment. Returning to Clare, he sought work in that area. With the proliferation of one-off houses in the countryside being an aspect of the general trend of planning decisions in much of our country over the last three decades, very few of which are linked to a local authority sewage system, inspecting and certifying the percolation systems of septic tanks became a likely profitable way in which to occupy himself. These individual human waste disposal systems operate on the basis of piping sewage from toilets into a tank which will percolate faecal sludge. A primary outlet to a first tank allows solids to settle and become anaerobically digested. Scum rises on the liquid component which then flows through a permeable barrier into a second chamber, where further settlement takes place. Fluid, which it is hoped, will now be less dangerous to human and animal health, drains from this secondary tank into a leachate area. What is important in the context of safety from pathogens is design and testing so that the soil enables evaporation and absorption, killing viruses and biotically active microorganisms, rather than pathogens destroying the water table on which the entire community depends for clean water.

3. In that context, it is essential for local authorities to ensure that applications for houses unconnected to sewage systems are consistent with proper planning and sustainable development principles. With that in mind, no other inference appears reasonable on the face of the papers, Clare County Council initiated a policy from November 2004 that only particular qualified environmental engineers would be accepted for certifying, in the context of the planning process, that one-off housing with septic tanks conformed to appropriate environmental-protection standards. Shortly after that policy was initiated and was announced on the local authority website, Mr Mungovan applied to be admitted to what was called the "Register of Independent Suitably Qualified Agents/Consultants Wastewater Treatment". He was refused by letter from the local authority dated 7 March 2005. As a result, an important line of work was closed to him. He again applied on 26 November 2008 but was again informed by letter dated 16 March 2010 that he was not to be admitted. This was based, or so it was asserted, on information available to the local authority. He protested this refusal. The local authority again reviewed his suitability in the light of further documentation proffered by him, but this was stated to be insufficient for admission; letter dated 28 May 2010. On 11 April 2011, his solicitors became involved and wrote to the local authority protesting their claim that there had been deficiencies in a site report he had submitted and protesting

the decision not to admit him onto the register. Thus, there were four separate refusals for his inclusion onto the register: 7 March 2006, 16 March 2010, 28 May 2010 by way of a review of the prior decision, and 11 April 2011. By plenary summons dated 4 November 2011, seven months later, these proceedings were commenced. These claimed damages for tort, defamation and misfeasance in public office, and for public law declarations condemning the policy and the decisions.

History of proceedings

4. The subsequent history of these proceedings illustrates why a unitary trial is the preferred mode to dispose of cases, unless special circumstances enable the trial of a preliminary issue. That is the default position unless a court is convinced that some aspect of the case may safely be tried on its own. It should be born in mind that preliminary issue trials can risk leading to the kind of decision where a court has not had the chance to see all of the issues in a case in the round and in the light of each other. In principle there should be a unitary trial; *O'Sullivan v Ireland* [2019] IESC 33. That is especially so where the determination of one fact, such as the passage of time, is considered in isolation from facts which might impact on a court's discretion or where the issue to be tried, such as the interpretation of a contract, may depend on the background against which an agreement was set. In *Weavering Macro Fixed Income Fund Ltd (In Liquidation) v PNC Global Investment Servicing (Europe) Ltd* [2012] 4 IR 681, at pages 699-700 Clarke J identified the fundamental principles to be considered before there should be any departure from the unitary trial principle:

> As is clear from those authorities the trial of a preliminary issue under the rules is concerned with circumstances where it is possible to separate out a legal issue which can be determined on the basis of facts agreed either generally or for the purposes of the preliminary issue. It is also possible, under O.35, to have an issue of fact tried where the case will almost completely depend on a resolution of that factual question. What is, however, clear from all of the authorities is that the trial of an issue, formally separated out as a preliminary issue in the sense in which that term is used in the rules, is a practice which is to be adopted with great care by virtue of the experience of the courts that "the longest round is often the shortest way home". Where issues, such as the question of liability and/or causation, are tried first in a modular trial then the court is simply hearing all matters relevant to those issues, be it fact or law, and coming first to a conclusion on those issues. It is, of course, the case that if, while hearing such a module, the court comes to the view that it cannot safely reach a final conclusion on some or all of the issues to be

determined in that module without also entering into evidence and legal argument relevant to some issue originally intended to be tried at a later stage, then the court can act in an appropriate way to ensure that no injustice is caused.

5. To some extent, the pleading of the case made an application to split up the issues attractive. As mentioned, the issues raised by the plenary summons included judicial review points as to the validity of the register in question, defamation of character and misfeasance in public office. Hence, tort proceedings for damages were mixed in with public law claims. There was a defence filed to all these issues and the question of whether the proceedings on the public law element had been started in time was also raised. To date, only the question of whether the proceedings were started in time has been decided. Hence, supposing there to be any issue on which time is not dependant, this case could not be disposed of on a preliminary issue, unless all the tort claims were inextricably bound up with the public law claims. Instead, a hearing could remain necessary as to the applicability of s 42 of the Defamation Act 2009 and in the event that it remains the claim, which is uncertain in the light of submissions in this Court, that the local authority abused its public office, a finding of malice or improper purpose for that tort to potentially succeed would be necessary; *Cromane Seafoods v Minister for Agriculture, Fisheries and Food* [2016] IESC 6, *Glencar Explorations plc v Mayo County Council (No 2)* [2002] 1 IR 84, *Pine Valley Developments v Minister for the Environment* [1987] IR 23. This would require an oral hearing of witnesses, whereas judicial review is generally based on affidavit evidence.

6. Upon completion of the pleadings, pursuant to a motion brought by the local authority, Gilligan J directed the trial of a preliminary issue in the High Court but solely related to whether the proceedings had been commenced in time. This severed from the litigation any issue as to the authority of the county council to form policy in order to protect against serious risks to the environment, whether there had been an unlawful exclusion from the panel of Mr Mungovan and whether there had been a wilful, as opposed to mistaken or reckless, illegality leading to tort liability. What became solely the question in the preliminary issue trial was whether the delay in initiating this claim had vitiated any entitlement to relief on the public law issues. On 17 August 2015, Keane J decided that the delay in commencing the proceedings had resulted in the public law declarations sought in the pleadings, but only these, being time barred; [2015] IEHC 561. That judgment was strongly based on the Planning and Development (Strategic Infrastructure) Act 2006, s 13. By judgment of the Court of Appeal dated 13

December 2017, Peart J upheld that judgment on different grounds and ruled that any public law claim was barred through delay. In the wake of this modular decision, another issue was left, which was the extent to which, if at all, any of the claims made survived. If proceedings had not been commenced in time, then reliefs of a public law nature, or those dependent upon any public law finding of invalidity, would also be undermined as a finding as to illegality would be already have been decided. It followed that if the decision to exclude could not be litigated, any claim that it was not only illegal but had been pursued by the local authority for an improper purpose, or in knowledge of the absence of such power, would fail.

7. By judgment of the High Court, 11 May 2018, Costello J dismissed all of the claims, in tort and in public law. This decision was on foot of a motion originally brought by Clare County Council of 16 November 2015 asserting that all of the claims made were bound to fail following the earlier decision of Keane J. Dealing with the tort aspects, as to the claim for malicious falsehood under s 42 of the Defamation Act 2009, Costello J held that this had been particularised as economic loss arising from the operation of the register of suitable waste water engineers. As to the claim for misfeasance in public office, Costello J also regarded that as linked to whatever underlying illegality might be proven and since this had been already held to be time barred, that claim was also lost.

8. A further aspect of the case was that other persons affected by the creation in other local authorities of panels enabling only those chosen to fulfil water engineering tasks had taken judicial review proceedings. These entirely separate decision of other local authorities had been overturned in the High Court in judicial review proceedings; see *Duffy v Laois County Council* [2014] IEHC 469 and what was presented as an analogous decision in *Shell E&P Ireland Ltd v McGrath* [2013] 1 IR 247 as to time limits. These decisions as to policy and the need to avoid serious public health dangers are not under appeal and no comment is made as to the relevant judgments or the correctness thereof.

Applicable time limits

9. All of the argument on this appeal has centred around specific dates, as set out above at paragraph 3. The local authority claims that the time for litigation of any of the exclusion decisions has passed. Initially invoked in the High Court and Court of Appeal in aid of this assertion was s 50 of the Planning and Development Act 2000. Peart J in the Court of Appeal expressed no view as to the applicability of that section but also declined to uphold the decision of Keane J in the High Court that it undermined Mr Mungovan's case. Keane J had held s 50 to govern all aspects of planning, including the maintenance of any register

as to who was a suitably qualified person to undertake any necessary reports that might be used in the planning process. In *McMahon v An Bord Pleanála* [2010] IEHC 431, the High Court had held that all steps taken in the course of a planning application were subject to the strict time limits within which a challenge should be brought. This extended not only to decisions by a local authority or the Board whereby planning permission was granted or refused, but also to the steps leading to such ultimate decisions. The decision had nothing to do, however, with the maintenance of registers as to who was suitable to act as planning or other experts. Section 50(2) as substituted by s 13 of the Planning and Development (Strategic Infrastructure) Act 2006 provides that:

> 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,
>
> (b) the Board in the performance or purported performance of a function transferred under Part XIV, or
>
> (c) a local authority in the performance or purported performance of a function conferred by an enactment specified in section 214 relating to the compulsory acquisition of land,
>
> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (SI No. 15 of 1986).

10. Strict time limits, a feature of the planning code, are imposed by s 50(6) of the 2006 Act requiring an application for leave to apply for judicial review in respect of "a decision or other act to which" that subsection applies. While it is clear that the amendment to the legislation extends the strictures of time from decisions of planning bodies, such as the grant or refusal of planning permission, to any "other act" of such bodies, this has to be seen in context. In the *McMahon* case, the other act related to an integral step to the process whereby planning permission would either have been granted or refused; the decision or act was part of the process in that individual application. From that High Court decision, it is more than difficult to extrapolate a principle that a person, not applying for a planning permission as in *McMahon*, but rather an individual seeking to be admitted to a cadre of qualified persons to write reports on planning applications would be bound by s 50. Such a person is outside the planning process. Someone applying for planning permission is inside. Should a person in the planning process produce a report from an expert and submit it late, with the

consequence for the planning authority to refuse to admit it for consideration or to refuse planning permission ultimately on the basis that the report was essential but had not been submitted by a recognised expert, then s 50 would apply. Refusal to admit a report would be a decision as to the grant of planning permission or a step on the way; and thus caught by s 50. There is nothing in the terms of s 50 that would indicate that what are effectively employment opportunities for those seeking to work within the area of preparing planning applications comes within the legislative strictures as to time in the 2000 Act. Seeking to work as a person preparing reports is very different to the situation of being a person in the planning process and having a report rejected or permission refused based on that report. The two cannot be conflated.

11. Instead, having now abandoned s 50 as an argument on this preliminary issue, Clare County Council now rely on Order 84 rule 21 of the Rules of the Superior Courts which provide that any "application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first arose, or six months where the relief sought is certiorari", subject to the High Court extending time for "good reason". This has changed since the 2011 rules and now provides that there is a universal three-month time limit on all judicial review and, further, extension of time is only granted on demonstrating good and sufficient reason for doing so and that the failure to make the application within time was due to circumstances outside of the applicant's control or could not reasonable have been anticipated by him or her. Even on a six-month basis, therefore, the issue of the plenary summons was out of time on 4 November 2011, the last refusal being 11 April of that year. This argument was countered in the High Court on behalf of Mr Mungovan with a claim that what is involved in this action is tort law, immune from such time limits and subject only to the ordinary six-year limit for a non-personal injury claim; the tort claims here being injurious falsehood or some species of defamation, it is not clear, and misfeasance in public office. Central to the decision of Costello J terminating these proceedings, however, was that all such tort claims rested on the exclusion decision and that since that was a public law matter, it was subject to the same time limits as judicial review despite having been commenced by plenary summons. Further, since Mr Mungovan could not challenge the decision to exclude him from the register, since his public law application was late, his tort claim of falsehood would not be false and his claim of misfeasance would lack the necessary element of unlawfulness.

12. Judicial review remedies may be taken by plenary summons, but the time limits are those set out in Order 84. That Order does not govern tort law. Public law

requires that actions challenging administrative and quasi-judicial decisions be taken swiftly. It is not just the potential challenger who is affected by such decisions but also every person within the bailiwick of the administrative authority who may be in a similar position. Of their nature, such decisions have a continuing effect, though particular detriment may be claimed by those to whom these are addressed. Principles of legal certainty and of secure administration require that where there is a doubt to be expressed in litigation as to administrative decisions, any challenge should be within the constricted timeframe applicable to judicial review. Hence, there is no difference as to the requirement for swift reaction as between judicial review applications challenging validity and plenary actions invoking the equitable jurisdiction of a declaration of invalidity. Both are subject to the time limits in Order 84 rule 21, no matter how framed; *O'Donnell v Dún Laoghaire Corporation* [1991] ILRM 301 and *Shell E&P Ireland Ltd v McGrath* [2013] 1 IR 247 at para 60. Even if within the time limits of Order 84, a decision must also be made promptly and that can be an especial requirement where third party rights are affected; *O'Brien v Moriarty* [2006] 2 IR 221.

13. In summary, in the decision of the High Court, upheld by the Court of Appeal, Keane J held that the case, although taken by plenary summons and seeking declaratory relief and damages, was essentially one of public law and governed by the time strictures of judicial review. Following on that decision the High Court, Costello J, struck out the damages claims in tort since no underlying illegality on which those claims depended could any longer be found.

The register as a decision

14. What will be noticed about the saga of applications and re-applications in this case is that the register was maintained for nine years in consistent form over a period from November 2004 to March 2013. Within that span, as the facts disclose, there were four refusals to admit Mr Mungovan to the register. The register was discontinued, the Court was told on this appeal, due to doubts as to its validity following on the High Court decision in *Duffy v Laois County Council* [2014] IEHC 469. Rather than take a risk of acting outside its powers, according to the instructions to counsel during the hearing of the appeal, Clare County Council discontinued the register but instead scrutinised very closely, leading to many refusals of planning permission, any expert report asserting the proper and safe percolation of sewage sludge. As before stated, no comment is made on that decision.

15. Here, an analogy is helpful. Were a bye-law to be promulgated by a local authority, that would be an example of delegated legislation, where the nature of

the scope of legislative delegation would arise expressly from legislation and the limits of the valid inclusion of detailed rules dependant on statutory purpose would emerge from the text of the statute itself. Hence, in *Bederev v Ireland* [2016] IESC 64, the Oireachtas prohibited, by regulations made under the Misuse of Drugs Act 1977, a characteristic agglomeration of dangerous drugs, many merely for so-called recreation but many also having a potential medicinal use that required control. The regulations referred to within the text of the legislation were subject to change. Without the regulations, the legislation would have been an almost empty exercise and, on its express text, would merely have forbidden the smoking of opium and also would only have outlawed the opium dens last prevalent in Victorian London. From that list of forbidden drugs on which offences of importation, possession and supply depended, it was possible for the Minister to extend the prohibitions on possession, importation and supply to new and clearly akin dangerous drugs, but not to tobacco, which is separately legislated for by a large corpus of legislation, or to alcoholic drinks, a foodstuff which is similarly separately controlled. A bye-law created under statute by a local authority will similarly be governed as to validity by the text of the enabling legislation. What is the essence of such secondary legislation is that it is of general application, to those who use parks or propose to moor boats in harbours or avail of other local services or to seek licences or permissions. Of course, the geographical scope may be limited to that area over which there is authority and, consequently, such secondary legislation does not apply to everyone, but clearly only to those who seek to interact with the service or facility in question. But, it is of universal application in the sense of applying to any within the scope of its remit and, furthermore, such secondary legislation usually lasts for an indeterminate period. Hence, for example, regulations for the use of the Phoenix Park in Dublin may be traced back in certain respects over generations.

16. Where secondary legislation or a bye-law is to be challenged, it is axiomatic that an applicant for judicial review must have standing, in the sense of being the subject of an adverse decision or of being so closely connected to the subject matter of the delegated legislation as to come within the rubric of what it seeks to control. Here is a situation by way of illustration: someone is refused, because of a bye-law or regulation, some result to which they argue they would have been entitled but for its existence, for reasons such as an age limit on entering a park or applying for a licence. There are two ways of looking at the matter. The first is that the decision is made at a fixed point and judicial review must be taken within three months, or a plenary summons seeking declaratory issued relief within that timeframe. The second is that the bye-law continues and that

when a year passes and the proposed applicant for judicial review again proposes an action which is affected by the bye-law, for instance although older the age limit still bars them from a service, is it to be said that by reason of not challenging the first decision, they are forever shut out of challenging a continuing legislative measure? This cannot be so. By not making a challenge to a particular decision, time runs. That is beyond dispute. But, a decision generally leads to a result, for instance a licence is refused, or someone cannot use a facility or obtain a grant. Those decisions must be challenged in time. But where the matter is analogous to secondary legislation, it is difficult to reason that fixed and unalterable policies become immune to judicial scrutiny simply because there has been a particular refusal that remained without challenge. Despite the lack of challenge, the bye-law continues and affects the person who has been refused a desired result when that person returns a year later or when the time limit for judicial review expires. It cannot mean that a second refusal cannot be challenged because a first refusal is out of time. Furthermore, the law, or what is analogous to a law, continues and also continues in its effect on them. That is so whether they make a second application or not.

17. One of the central points here is that the register under which the decisions were made in respect of Mr Mungovan, like a bye-law or regulation, is liable to continue. The declaration of invalidity that might otherwise have been made does not affect the presumption of validity that attaches to administrative decisions. An administrative act which is valid on its face will continue to enjoy that presumption of validity, and consequently embody the force of law, until it is quashed. As Ó Néill J put the matter in *Q v Mental Health Commission* [2007] 3 IR 755 771:

> The principle that a legal or statutory provision which is subsequently found to be invalid may be sheltered from nullification and thus accorded the continuance of legal force and effect, where its invalidity is not asserted at the appropriate time, and where those affected by it and concerned with it, in good faith, treated it as valid and acted accordingly, is now well established in our jurisprudence.

18. Invalidity, however, is a relative concept and one which is fact-dependent; Administrative Law in Ireland (Hogan, Morgan and Daly, Dublin, 1919) 11.27. In general, a pragmatic approach is taken to the issue of validity in this jurisdiction with the courts alive to "the need to avoid practical absurdity"; Hogan, Morgan and Daly 11-30 and see *Harrington v Environmental Protection Agency* [2014] 2 IR 277 at 290 per Barrett J. All administrative decisions carry a presumption of validity and consequently will have legal consequences until set aside; *Re*

Comhaltas Ceolteorí Éireann (unreported, High Court, Finlay P, 14 December 1977). In administrative law, the courts should take account of the practical reality and the effect of their decisions on public administration.

19. Here, the tension between two principles becomes evident: on the one hand, ensuring that administrative law does not become undermined by chaos through unregulated legal challenge and, on the other, allowing challenges to continuing regulations. Chaos is avoided through time-limits designed to ensure both coherence in the administrative framework and the continuance of valid decisions. While that is a valid principle, the inappropriate application of a rule barring applications through delay may effectively confer legal validity, certainly as regards any particular applicant, on a measure which is apparently invalid, but which cannot be challenged due to the passage of time. The resolution of these competing aims of administrative law in enabling the removal of invalid but continuing measures and avoiding uncertainty and endless challenges to particular decisions by introducing a limitation period is not easy. It can be reasoned, however, that decisions leading to an actual result, the grant of some permission or the refusal of some sought-for benefit, must be challenged straightaway. These strictures apply to individual applications, that is to any course of administrative action that leads or may lead to a particular consequence. Where, in contrast, what underlies the decision is either delegated legislation or a policy which becomes equivalent to delegated legislation, in either including certain situations or excluding these from the remit of individual decision-making, or in ensuring that decisions based on the legislation or policy must all go the same way, the continuing nature of the underlying instrument must be part of the analysis in deciding whether a time limit is applicable due to any failure to challenge a particular decision.

20. This case fits within the category of administrative actions of continuing measure. Mr Mungovan, over a period of five or more years, was not just subject to individual decisions leading to a result, he was also categorised during all that time as being required to be refused entry onto this register by virtue of an underlying policy. On one decision being made refusing him, that policy did not change. Nor did it on the third or fourth occasion. On each, he could have made a challenge. But on each, he was also entitled to reapply and in doing so would have been met, and was in fact met, by the same policy. It was the policy that caused his exclusion. This became a rule akin to a piece of delegated legislation or a bye-law. The refusal on the first occasion did not remove his right to reapply, which it does in the vast majority of instances in administration, as where a planning process is brought to an end by a permission or a refusal, but

rather constituted the ongoing barrier to him seeking engagement in a particular area of work. In contrast, where people were refused on an application for planning permission because the expert reports attached to their paperwork were from those who the local authority were not prepared to accept, then any such individual was affected only by a particular decision and not by the general underlying policy or legal situation akin to a bye-law. Those individuals would have lost their right to act if they failed to move for judicial review inside the time limits applicable. The expert excluded from work, however, in writing reports on water percolation safety was excluded not just once but on a continuing basis as long as the policy or, by analogy, delegated legislative instrument continued.

Laches

21. It may be asked if this is to weaken and to undermine time limits for the challenge of administrative action? This is not so as the time limits continue and apply to each individual decision. Then, a vista may be conjured up of chaos whereby regulations, bye-laws and rigid policies that are their equivalent may at any time be the subject of challenge; perhaps years after an applicant first has clear notice of these. That cannot be right. Any person seeking to make such a challenge must have standing, firstly, and is required, secondly not to drowse away their legal entitlement or sleep on appropriate reaction. So considered, this decision is far from the introduction of uncertainty into administrative law. People are required to take a timely stand on their rights, even in any case where they are affected by an ongoing situation; meaning a stated policy or a bye-law or other delegated legislation. This would be akin to reversing the principle that choice of form, judicial review or plenary summons, does not bypass time restrictions. There is no such reversal in this judgment. In an ongoing situation, there remains an obligation to move with dispatch. The same principle of administrative law which seeks to calm allegations of invalidity in individual instances spilling over into general mistrust of administrative decision-making by ensuring swift judicial decision-making and which promulgates the validity of decisions apparently valid on their face until condemned, requires that people challenging an underlying legislative base or policy core for decisions do not neglect to move promptly on their rights. Further, since the remedy sought is a declaration, that should be sought swiftly. Removing references, this matter is explained in Halsbury (Laws of England, 4th edition) at 16.925 thus:

> A plaintiff in equity is bound to prosecute his claims without undue delay. This is in pursuance of the principle which has underlain the Statues of Limitation, *vigilantibus et non dormientibus lex succurit*. A court of equity refuses its aid to stale demands, where the plaintiff has slept upon his

rights and acquiesced for a great length of time. He is then said to be barred by his laches. The defence of laches is, however, allowed only where there is no statutory bar. If there is a statutory bar operating either expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable; and an injunction in aid of a legal right is not barred until the legal right is barred, although laches may be a bar to an interlocutory injunction.

21. In some instances, as well, delay may amount to acquiescence. That is the foundation of the doctrine of laches. This is not automatic since acquiescence implies that a person has been aware of their rights and has been in a position to complain about their infringement but has not done so. Laches thus depends upon the overall equity of the case and this requires a judge to take into account knowledge, capacity and the freedom which parties had to take action; Halsbury 16.927.

This case

22. In this case, it is right to wonder why reaction to the refusal took the shape of four individual requests for admission, one being a request for reconsideration. It is a matter of the balancing of the evidence in relation to that situation for a trial judge to determine why an alternative course of judicial review was not taken and why a situation was allowed to continue over years rather than being challenged. The precise facts are for the court of trial. It may be there are reasons, no comment is made in any sense.

23. It may also be that the county council is entitled to operate a policy in support of the environment, and the health of humans and animals, in the protection of the water table by ensuring that only those trusted as having real expertise and appropriate experience should be entitled to report on the percolation of pathogens in sewage sludge, rather than accept everyone with a qualification and thereby perhaps seriously endanger health. This issue is not before the Court for decision. Only the issue of time has been litigated. Nor is this Court pronouncing on the claim of misfeasance in public office or on any issue arising as to defamation. What is clear is that challenges to administrative and quasi-judicial actions are on the same footing whether damages or any other remedy in tort or contract is claimed and do not depend on the form of the action, whether Order 84 or plenary summons. Furthermore, decking out a judicial review as a tort claim does not remove applicable time limits. But in any issue as to time limits, a court must analyse what is in reality, and in terms of practicality, the question under consideration; a decision on an individual basis or a policy equivalent to delegated legislation by which someone continues to be

affected. In the latter case, not challenging does not necessarily remove the right to challenge where there genuinely is an ongoing policy or legislative base affecting an applicant. But, even then, sleeping on rights or acquiescence must be regarded as undermining the prospect of success. That is a matter, however, of assessment in individual cases.

Result

24. In the result, the plaintiff Mr Mungovan must succeed on the time point. The matter will be remitted to the High Court for a unitary trial to decide:

- The validity of the policy of Clare County Council in the context in which it was taken;
- Whether the plaintiff was validly excluded by that policy;
- What steps he took to assert his rights;
- Whether laches or acquiescence or any other principle of equity should bar the plenary action;
- If there is invalidity in the policy, was there malice by the county council such as to ground a tort action for misfeasance in public office; and
- Whether any aspect of defamation can validly be asserted; it seems to have been abandoned on the hearing of this appeal.