THE HIGH COURT

[2005 No. 840P]

BETWEEN

SHELL E & P IRELAND LIMITED

PLAINITFF

AND

PHILIP MCGRATH, JAMES B. PHILBIN, WILLIE CORDUFF, MONICA MULLER, BRID McGARRY AND PETER SWEETMAN

DEFENDANTS

AND

THE MINISTER FOR COMMUNICATIONS, MARINE AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS TO COUNTERCLAIM

Judgment of Miss Justice Laffoy delivered on the 4th day of March, 2010.

1. The background to the application

1.1 The history of these proceedings is outlined in judgments which I delivered previously, namely:

(a) on 23rd March, 2006 ([2006] IEHC 99; [2006] 2 ILRM 299),

(b) on 31st July, 2006 ([2006] IEHC 268), and

(c) on 18th April, 2007 ([2007] IEHC 144; [2007] 4 I.R. 277; and [2007] 2 ILRM 501).

Accordingly, I propose in this judgment to outline only what I consider to be the essential elements of the factual background to this application, which involves the defendants to the counterclaim of the second and fifth defendants (the State parties) as the moving party, supported by the plaintiff, and the second and fifth defendants (referred to collectively as "the defendants") as the respondents.

1.2 The essential elements of the factual background are as follows:-

(a) In 2002, on the application of the plaintiff and in the context of the proposed development by the plaintiff of the Corrib Gas Field, the predecessor of the Minister for Communications, Marine and Natural Resources (the Minister) made the following orders pursuant to the Gas Act 1976 (the Act of 1976), as amended:

(i) on 15th April, 2002, a pipeline consent pursuant to s. 40 of the Act of 1976 (the consent) for the proposed construction of a gas pipeline, offshore and onshore, to connect the sea-wells of the Corrib Gas Field with an onshore gas terminal, which the plaintiff proposed to construct in North Mayo; and

(ii) on 3rd May, 2002 and on 5th June, 2002, compulsory acquisition orders pursuant to s. 32 of the Act of 1976, as amended, in respect of ten plots owned by individuals, including the second defendant.

(b) On 22nd October, 2004, An Bord Pleanála granted planning permission for the onshore terminal.

(c) Following the grant of planning permission, the plaintiff notified the relevant landowners of its intention to exercise its rights of entry on the plots of land which were the subject of the compulsory acquisition orders pursuant to the Act of 1976 after 10th January, 2005.

(d) These proceedings, which were initiated by plenary summons which issued on 4th March, 2005, were the plaintiff's response to what were alleged to be wrongful actions on the part of the defendants in January, 2005 and on 1st March, 2005, in allegedly obstructing or interfering

with the plaintiff's entry on those plots and the carrying out of works thereon.

(e) On 4th November, 2005, the solicitors for the defendants, who had come on record on 28th September, 2005, delivered proposed amended defences and counterclaims to the plaintiff's solicitors in which it was proposed to join the State parties as defendants to the counterclaim. The Chief State Solicitor was subsequently served with the proposed defences and counterclaims, which raised a wide range of public law and constitutional issues, which are outlined in my judgment of 23rd March, 2006. In that judgment I dealt with an application on behalf of the defendants for liberty to deliver the amended defences and counterclaims. I acceded to the application.

(f) By letter dated 25th September, 2006 from the plaintiff's solicitors to the three firms of solicitors on record for all of the six parties who were defendants in these proceedings at the time (including the defendants' solicitors), the plaintiff notified all of the defendants that it intended to discontinue its claims against all of the defendants, either by agreement or by leave of the Court, in the changed circumstances which are outlined in my judgment of 18th April, 2007, namely, that the plaintiff intended to modify the onshore pipeline route in consultation with the local communities. That judgment dealt with an application by the plaintiff for leave to discontinue the proceedings against the defendants. The application was acceded to but (i) subject to the condition that the plaintiff pay the defendants' costs of the plaintiff's claim, save particular costs which were specified, and (ii) on the basis

of an undertaking which had been given by the plaintiff, which is recorded in the order of the Court dated 23rd April, 2007 perfected on foot of the judgment of 18th April, 2007. That was an undertaking by the plaintiff not to rely on the compulsory acquisition orders and, insofar as is necessary, to take the steps required to cancel the effect of the orders off the title of the defendants remaining in the proceedings. The position of the plaintiff in relation to the consent, as recorded in the judgment of 18th April, 2007, was that the plaintiff was continuing to rely on it pending the submission of an application for a new consent under the Act of 1976 once the modified pipeline route had been selected, because the consent also regulated the offshore section of the import gas pipeline.

(g) Following the making of the order of 23rd April, 2007, as regards the parties to this application, the position was that there remained extant the counterclaim of the defendants against the plaintiff and the State parties and the defence thereto by the plaintiff and the State parties.

(h) In my judgment of 18th April, 2007, I also dealt with a motion brought by the State parties seeking directions as to the mode of trial of the proceedings, in which the State parties, essentially, were seeking a modular approach. Arising out of that aspect of the judgment, it was provided in the order of 23rd April, 2007 that, pursuant to Order 36, rule 9 of the Rules of the Superior Courts 1986 (the Rules), the following public law issues be tried as between the defendants, as claimants, and the State parties, as respondents, before any other issues should be tried, namely:-

(i) all issues raised by the defendants in relation to the validity of the consent and the compulsory acquisition orders, and

(ii) all issues as to the justiciability of issues raised by the defendants as to the constitutionality of any Act impugned by the defendants on the grounds that the defendants do not have *locus standi* or of mootness.

Directions were given as to exchange of pleadings in what has become the public law issues module. It was also ordered that the issue as to whether, *inter alia*, the defendants are out of time to challenge the validity of the consent and/or compulsory acquisition orders by reason of Order 84, rule 21 of the Rules be tried as a preliminary issue within the public law issues module, the plaintiff and the State parties being at liberty to bring a motion for further directions as to the trial of the preliminary issue after close of pleadings.

2. Preliminary issue

2.1 The pleadings in the public law issues module having closed, by notice of motion dated 25th October, 2007, the State parties sought directions as to the sequence in which the public law issues should be tried. In particular they sought that the Court should first determine which, if any, of the issues directed to be tried in the public law issues module are time-barred pursuant to either the Statute of Limitations 1957, as amended, or the doctrine of laches, or whether the public law reliefs sought by the defendants were sought promptly as required by Order 84, rule 21 of the Rules.

2.2 On foot of the State parties' motion for directions, by order made on 17th December, 2007, the Court directed that the issue raised by the State parties as to

whether the defendants are out of time to raise public law issues should be tried first. This judgment is concerned with that issue.

2.3 On 17th December, 2007 the Court gave directions as to filing affidavits. The only evidence adduced on the hearing of the preliminary issue were affidavits of each of the defendants, each of which was sworn on 22nd January, 2008. The preliminary issue is being determined on the basis of that evidence.

2.4 The case made on behalf of the State parties, which was supported by the plaintiff, was that the public law issues arising out of the existence of the consent and the existence of the compulsory acquisition orders should have been litigated within the time prescribed in Order 84, rule 21, such time having commenced, in the case of the consent, on 15th April, 2002, and in the case of the compulsory acquisition orders on 3rd May, 2002 or 5th June, 2002, as the case may be. The State parties accepted that 4th November, 2005 be treated as the date on which the defendants actually moved on the public law issues.

3. The impugned instruments

3.1 It is necessary to consider briefly the nature and effect of the instruments which the defendants impugn.

3.2 The consent was in the form of a letter of 15th April, 2002 from the Minister to the managing director of the plaintiff, by its former name, approving the plaintiff's application "for consent to construct a pipeline in connection with the Corrib Gas Field developments" under s. 40 of the Act of 1976, as amended. The letter stated that the consent was subject to twenty four conditions which were set out, which were both technical and environmental. The consent was the statutory authority by virtue of which the plaintiff would have been empowered to construct and operate both the

onshore and offshore pipelines. The second defendant has averred in his affidavit that he did not become aware of what he referred to as "the purported Consent of 15th April, 2002" until some time in 2004 and that, when he did become aware of it, he did not believe that the document was the consent, presumably, meaning that he anticipated that a more formal document would issue. The consent was exhibited in an affidavit of Paul Gallagher, sworn on 4th March, 2005, to ground the plaintiff's application for an interlocutory injunction, which was sought contemporaneously with the initiation of these proceedings. However, counsel for the defendants informed the Court on the hearing of this application that it was not until issues arose in relation to discovery in 2006 that the Court was informed by the State parties and the plaintiff that the plaintiff was relying on the letter of consent of 15th April, 2002 and nothing else.

3.3 In relation to the compulsory acquisition orders, one of the orders made on 3rd May, 2002 is exhibited in the affidavit of the second defendant sworn on 22nd January, 2008, being an order which, on the face of it, affected a plot of ground of which the second defendant was the owner or reputed owner. The effect of the order was to give the plaintiffs the right, subject to the provisions thereof, to use the plot of ground to which it related for the construction, operation and maintenance of a pipeline and ancillary works. Presumably, the pipeline in question was the pipeline to which the consent of 15th April, 2002, related. The second defendant has averred in his affidavit that he was notified of the compulsory acquisition orders in or about November, 2001 by letter from the plaintiff's then solicitors, but he was not notified about them by the State parties. I assume that averment is not correct, because what is pleaded in the plaintiff's statement of claim is that the plaintiff submitted an application to the Minister for compulsory acquisition orders on 23rd November, 2001 and, following

the making of the orders by the Minister, the landowners whose lands were affected by the compulsory acquisition orders were notified by letters dated 7th May, 2002 and 6th June, 2002 and, at the same time, served with notices of entry pursuant to the Act of 1976.

3.4 In summary, as I understand the intended effect of the instruments which are impugned in the counterclaim of the defendants, it was that the consent would authorise the construction and operation of the onshore pipeline passing through the lands of third parties, including the second defendant, and that the relevant compulsory acquisition order would grant to the plaintiff the right to use the third party's lands for the construction, operation and maintenance of the pipeline. So the land of the second defendant was, and continues to be, subject to both the consent and the compulsory acquisition orders.

3.5 The position of the fifth defendant is different to that of the second defendant. She has averred in her affidavit of 22nd January, 2008 that she farms land which is the subject of a compulsory acquisition order. However, as I understand the position, it is her mother who is the owner of the land. As it is not clear under what type of arrangement the fifth defendant farms the land, I do not propose treating that difference as being material for present purposes.

4. Order 84

4.1 At the request of the Court, counsel for the State parties helpfully clarified the pleas and the reliefs claimed in the defendants' points of claim in the public law issues module which it is contended by the State parties are caught by the time limit prescribed in Order 84, rule 21 and are out of time, although being pursued in a plenary action.

4.2 Before summarising the State parties' position, it is convenient to outline the scope of Part V of Order 84, which deals with judicial review.

4.3 Rule 18(1) provides that an application for an order of *certiorari, mandamus, prohibition* or *quo warranto* "shall be made" by way of application for judicial review in accordance with the provisions of Order 84. In *The State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381, O'Higgins C.J. traced the source and the evolution of the remedy of *certiorari* as it exists to-day, concluding (at p. 392) as follows:-

> "To-day it is the great remedy available to citizens, on application to the High Court, when any body or tribunal (be it a court or otherwise), having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the Constitution, acts in excess of legal authority or contrary to its duty. Despite this development and extension, however, *certiorari* still retains its essential features. Its purpose is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of. In addition it remains a discretionary remedy."

4.4 Sub-rule (2) of rule 18 provides that an application for a declaration or an injunction "may be made" by way of an application for judicial review and goes on to provide:-

> "... on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to –

(a) the nature of the matters in respect of which relief may be granted by way of an order of *mandamus*, *prohibition, certiorari*, or *quo warranto*,

(b) the nature of the persons and bodies against whom relief may be granted by way of such order, and

(c) all the circumstances of the case,

it would be just and convenient for the declaration or injunction to be granted on an application for judicial review."

4.5 The source of the Court's jurisdiction to make a declaration is s. 155 of the Chancery (Ireland) Act 1867 (the Act of 1867), which provides that no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby. As Costello J. (as he then was) pointed out in *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301 (at p. 311), that section is now reflected in Order 19, rule 29 of the Rules, which provides that no action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby. The source of the Court's jurisdiction to grant an injunction is s. 28(8) of the Supreme Court of Judicature (Ireland) Act 1877 (cf. Delany and McGrath on *Civil Procedure in the Superior Courts*, 2nd ed., at para. 27-15). Declaratory and injunctive reliefs, like *certiorari*, are discretionary remedies. Declaratory relief and injunctive relief are usually sought in plenary proceedings initiated by plenary summons.

4.6 Rule 22(1) of Order 84 provides that an application for judicial review shall be made by originating notice of motion, unless the Court directs that it shall be made by plenary summons.

5. Pleading of public law issues by defendants

5.1 Counsel for the State parties made the following submissions in identifying the elements of the defendants' case, as pleaded in the points of claim, which the State parties contend are covered by Order 84, in the sense that they could have been pursued by way of judicial review, and, on the State parties' case, should have been initiated in compliance with Order 84, rule 21:

(a) The pleas in para. 7 to para. 10 inclusive, which relate to the consent, are covered by Order 84. These pleas are:

(i) that the "purported" consent is not a valid consent pursuant to s. 40;

(ii) that the document of 15th April, 2002 on its face does not amount to a consent and that the maxim *omnia praesumuntur* does not apply;

(iii) further, or in the alternative, that the consent was conditional upon a number of fundamental conditions being complied with, which are particularised, which have not been complied with, in consequence of which it is inoperative and of no effect; and

(iv) further, or in the alternative, that the consent is null and void and has no force or effect in that the procedures adopted in respect of the granting of it were in breach of the principles of basic fairness of procedures and of natural and constitutional justice and the Minister acted unreasonably, *ultra vires* his powers and in breach of the constitutional rights of the second defendant, all of which matters are particularised.

(b) The pleas in para. 11 to para. 14 inclusive, which relate to the compulsory acquisition orders, are covered by Order 84. These pleas are:

(i) that the compulsory acquisition orders are null and void and wrong on their face and that the maxim *omnia praesumuntur* does not apply;

(ii) that they are not valid and cannot be so on their face in circumstances where the Minister purported to grant the orders in the absence of any valid applications pursuant to s. 32(1A) of the Act of 1976, as substituted by s. 23 of the Gas (Interim) (Regulation) Act 2002;

(iii) that they are null and void and have no force or effect, in that the Minister purported to exercise his power to grant them in breach of the principles of basic fairness of procedures and of natural and constitutional justice and acted unreasonably, *ultra vires* his powers and in breach of the defendants' constitutional rights, all of which allegations are particularised.

(c) The pleas contained in para. 15 are covered by Order 84. In paragraph 15, which comes under the heading "Constitutional Issues", it is asserted that the decisions of the Minister to grant the consent and the compulsory acquisition orders are invalid having regard to certain provisions of the Constitution, namely, Article 40.3.1, Article 40.3.2, Article 43.2.1 and Article 43.2.2. These assertions are particularised in that, for instance, in sub-para. (iv) it is asserted that the decisions violate the right of the defendants to bodily integrity as guaranteed by Article 40.3 of the Constitution because, it is alleged, the pipeline, when constructed and

used, will result in the health and safety of the defendants being endangered. Counsel for the State parties distinguished a plea of invalidity of a decision, founded on a plea of infringement of constitutional norms, from a plea as to the unconstitutionality of the parent legislation. Counsel for the defendants took issue with that submission and contended that the pleas in particularised sub-paras. (i) to (vi) are not related to judicial review considerations.

(d) In relation to the pleas in para. 16, which is also headed "Constitutional Issues", in which it is alleged that sections 32 and 40 of the Act of 1976, as amended, are invalid having regard to the provisions of the Constitution and, in which it is pleaded that, if necessary, the defendants will seek a declaration of incompatibility under s. 5 of the European Convention on Human Rights Act 2003, counsel for the State parties dealt with each of the particulars pleaded. By way of general observation, counsel for the State parties submitted that, insofar as the pleas constituted "contrived pieces of pleading" which, in reality, are re-statements of criticisms of the fairness of the decisions of the Minister, they are covered by Order 84. If the Court finds that the defendants have not met the time requirement of Order 84, rule 21, they have no *locus standi* to challenge the constitutionality of the legislation, it was submitted. On this point, it was urged that the Court should follow the decision of this Court (O'Higgins J.) in *A.H.P. Manufacturing B.V. v. Director of Public Prosecutions, Environmental Protection Agency, Ireland and the Attorney General*, [2008] 2 ILRM 344, which I will consider in detail later.

(e) The specific observations of counsel for the State parties on the particularised pleas in para. 16 were as follows:-

(i) The complaints in sub-paras. (a) to (g) inclusive in relation to the absence of certain requirements in the Act of 1976 were characterised as complaints as to the absence of constitutional fairness and as being governed by Order 84, for example, the complaint as to the absence of a requirement to put the defendants on notice of the application by the plaintiff for the consent contained in sub-para. (a). In general, the complaints in these sub-paragraphs, it was submitted, constitute a collateral attack on the consent and the compulsory acquisition orders, in respect of which the approach adopted in the *A.H.P.* case should be followed. For instance, in relation to the complaint in sub-para. (f) that the Act of 1976 contains no specific requirement that, before granting a consent, the Minister ascertain and be in possession of all relevant material in relation to the danger from the pipeline to the health, safety and welfare of the local community, including the defendants, it was submitted that, in reality, that is a plea that the Minister, in granting the consent, failed to take account of the health, safety and welfare of the defendants. Therefore, it was submitted, it is a collateral attack on the consent and, as such, is covered by Order 84.

(ii) Counsel for the State parties distinguished the complaints set out in sub-paras. (h) to (n) from those set out in sub-paras. (a)

to (g) and did not contend that the former constitute a collateral attack on the ministerial decisions which led to the consent and the compulsory acquisition orders, because of their breadth. Examples of these complaints are allegations that the impugned sections of the Act of 1976 fail to protect the right to bodily integrity of the defendants as guaranteed by the Constitution and amount to an unjust attack of their property rights. However, it was submitted that at the hearing of the substantive public law issues module it would be incumbent on the defendants to establish *locus standi* to pursue these complaints.

5.2 In relation to the prayer in the points of claim, counsel for the State parties submitted that the reliefs claimed in paras. 1 to 7 inclusive and para. 10 are reliefs covered by Order 84 and should be struck out as having been sought too late. The declaration sought in each of those paragraphs, subject to the observations in relation to paras. 1 and 5 following, impugns the validity of the consent or the compulsory acquisition orders, as the case may be. In paragraph 1 what is sought is a declaration that the plaintiff did not obtain any valid consent. In paragraph 5 what is sought is a declaration as to the consequences of the compulsory acquisition orders - that the plaintiff did not obtain any estate or interest in the lands intended to be thereby affected. The remainder of the declarations sought impugn the constitutionality of the provisions of the Act of 1976 (paras. 8 and 9) and their compatibility with the European Convention on Human Rights (the Convention) (para. 11). Counsel for the State parties acknowledged that the claims for these reliefs cannot be struck out at this juncture as being out of time.

5.3 In summary, the position of the State parties is that paras. 7 to 15 inclusive and sub.-paras. (a) to (g) inclusive of para. 16 of the points of claim and paras. 1 to 7 inclusive and para. 10 of the prayer in the points of claim should be struck out as being out of time.

6. Finding on State parties' submissions on pleading of public law issues

6.1 I find that, with the exceptions of paras. 7 and 11, the pleas in paras. 7 to 15 of the points of claim are properly regarded as being within the scope of Order 84, whereas the pleas in sub-paras. (a) to (g) of para. 16 are not, for the following reasons.

6.2 The pleas in para. 7 and 11 are merely part of the narrative. The assertion that the Minister "purported" to grant the consent and the compulsory acquisition orders is consistent with the challenge to the constitutionality of the provisions of the Act of 1976.

6.3 While the reliefs sought on foot of the pleas contained in paras. 8 to 10 and 12 to 15 are primarily formulated as claims for declarations of invalidity in relation to the consent and the compulsory acquisition orders, in reality what is being sought are orders which are intended to have the same effect as orders quashing the ministerial decisions in making the consent and the compulsory acquisition orders and the instruments themselves, that is to say, orders of *certiorari*. As Costello J. pointed out in *O'Donnell v. Dun Laoghaire Corporation* (at p. 311), a declaratory judgment is one which declares the rights of the parties and because defendants, in particular public bodies, respect and obey such judgments they have the same legal consequences as if the Court were to make orders quashing the impugned order or decision. Such reliefs are reliefs which ordinarily are required to be pursued by way of application for judicial review under Order 84 and are within the scope of that order.

6.4 The reliefs sought in para. 1 and para. 5 of the prayer are open to the interpretation that they follow on from the pleas in the points of claim as to the proper construction and effect of the consent and the compulsory acquisition orders and the alleged inoperability of the consent for non-compliance with conditions, rather than from pleas as to their invalidity. On that basis they could be regarded as not coming within the scope of Order 84. However, because there is an overlap in the declarations sought, in that the instruments in issue are also alleged to be invalid and null and void, I consider it appropriate to treat them in the same manner as the pleas referred to at 6.3 above.

6.5 The matters pleaded in sub-paras. (a) to (g) of para. 16 are particulars of some of the bases on which the defendants contend that the impugned provisions of the Act of 1976 are inconsistent with the Constitution and incompatible with the Convention. In effect, they are asserting and particularising deficiencies in the legislative scheme when measured against constitutional imperatives. These pleas are, *prima facie*, arguable grounds for challenging the legislation. That the ministerial decisions made on the authority of the impugned provisions are also subject to attacks founded on like alleged deficiencies does not mean that these pleas are merely collateral attacks on the consent and the compulsory acquisition orders. They form part of the defendants' substantive claim that s. 32 and s. 40 of the Act of 1976 are invalid having regard to the provisions of the Constitution.

6.6 For the sake of completeness, although I consider it to be distinguishable, I will address the submission of the State parties on the basis of the decision in the *A.H.P.* case later.

7. The broader context

7.1 There is, of course, a broader context to the issues raised on the points of claim, two aspects of which are material.

7.2 The first is that the defendants' counterclaim, which originally was an adjunct to the defendants' defence of the plaintiff's claim, is primarily directed against the plaintiff, against whom they seek private law remedies. Lest it get lost in modularization, it is necessary to emphasise that the genesis of the public law issues module is a private law action by the plaintiff against the defendants claiming private law remedies, including injunctions restraining the defendants from obstructing the plaintiff's entry on the pipeline corridor and the deviation limits by reference to the consent and the compulsory acquisition orders. In their defence, the defendants denied the validity of the consent and the compulsory acquisition orders. In their counterclaim, in addition to challenging the validity of the consent and the compulsory acquisition orders, the defendants seek private law remedies, for example, in the case of the second defendant, injunctive relief in relation to his land the subject of a compulsory acquisition order and damages for trespass. For the avoidance of doubt, in referring to the public law/private law dichotomy throughout this judgment, I use the terms in a broad sense and not as terms of art.

7.3 The second is the existence of an entitlement on the part of the second defendant to the inquiry as to damages on foot of the undertaking given by the plaintiff on the application for the interlocutory injunction granted by this Court on 4th April, 2005, which, as I held in my judgment of 18th April, 2007, has survived the discontinuance of the plaintiff's claim.

7.4 The foundation of the plaintiff's joinder of issue on, and its defence of, both of those aspects of the proceedings (the defendants' counter-claim against it and the inquiry as to damages) is its past reliance on the validity of the consent and the compulsory acquisition orders as entitling it to enter on and use the defendants' lands for the construction of the gas pipeline and in its conduct of these proceedings, including the application to attach and commit the second defendant for contempt of court. Having regard to the fact that in September, 2006 the plaintiff notified the defendants that it did not intend to rely either on the consent or the compulsory acquisition orders in the future, insofar as the outcome of the defendants' private law counterclaims against the plaintiff is determinable by reference to the issue of the validity or otherwise of those instruments, subject to one qualification, that issue is of historic effect only. In other words, the issue as to validity will determine whether the plaintiff acted wrongfully in relation to the defendants, primarily in the period from 10th January, 2005 until the interlocutory injunction was discharged on 30th September, 2005 and, as regards some complaints, until discontinuance, so as to give the defendants an entitlement to common law and equitable remedies, in addition to an inquiry as to damages. The qualification is the current status of the compulsory acquisition orders.

7.5 On the hearing of this application considerable emphasis was laid by counsel for the defendants on the fact that the status of the compulsory acquisition orders has not changed since the order of 23rd April, 2007 was made. As I have stated, the order of 23rd April, 2007 records an undertaking given on behalf of the plaintiff not to rely on the compulsory acquisition orders and, insofar as is necessary, to take the steps required to cancel the effect of the compulsory acquisition orders off the title of the defendants remaining in these proceedings. At the hearing of this application, counsel

for the plaintiff stood over the undertaking and confirmed that the plaintiff will take whatever steps are necessary to clear the compulsory acquisition orders off the defendants' title. Counsel for the State parties' position was that the State parties believe that they cannot revoke the orders, they are valid orders on their face and will remain valid orders until struck down by the Court.

7.6 While the continued existence of the compulsory acquisition orders remains a factor in the proceedings, the reality is that, given the terms of the plaintiff's undertaking, irrespective of the position adopted by the State parties, the fact that the compulsory acquisition orders have not been formally revoked is not, and could not be, a source of significant prejudice to the landowners thereby affected. The rights granted in the compulsory acquisition orders, in para. 3 thereof, were granted to the plaintiff and its successors and assigns and to nobody else. Having said that, quite frankly, it is very difficult to understand why such rights as were created by the compulsory acquisition orders on the lands affected could not be terminated by some form of relinquishment or disclaimer by the plaintiff, which is formally accepted by the Minister, so as to definitively clear the titles affected and impose a cut-off on the second defendant's claim for remedies arising from the existence of the compulsory acquisition order on his land, for example, damages for slander of title. In any event, the fact is that, in giving the undertaking to the Court, the plaintiff has abjured the rights conferred by the compulsory acquisitions orders and it has done so in a manner which is enforceable by the defendants.

8. The issues

8.1 In broad terms, on the basis of the submissions made, there are two core issues to be determined by the Court on this application.

8.2 The first is whether, in the context of a plenary action, the provisions of Order 84, rule 21 are applicable by analogy to the pleas contained, and the reliefs claimed, in the points of claim of the defendants, which counsel for the State parties has identified as being, and the Court has found to be, within the scope of Order 84. Order 84, rule 21(1) provides:-

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when ground for the application first arose, or six months where the relief sought is *certiorari,* unless the Court considers there is good reason for extending the period within which the application shall be made."

8.3 The second is whether, if Order 84, rule 21 applies by analogy to those pleas and reliefs, in the context of a plenary action, given that the defendants patently did not seek those reliefs promptly, or within three or six months, in not seeking them until 4th November, 2005, although the consent was granted and the compulsory acquisition orders made in the first half of 2002, whether the Court should extend the period for bringing the counterclaim? Of course, as the question of extending time is inconsistent with their contention that Order 84, rule 21 does not apply, the defendants have not sought an extension of time. However, the case made on their behalf was that, even if it does apply, there is "good reason" for extending the time in accordance with the principles laid down by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* and subsequently approved of by the Supreme Court.

9. Preliminary observations

9.1 As I have stated, counsel for the State parties acknowledged that the defendants' challenge to the constitutionality of the impugned provisions of the Act of 1976 cannot be struck out on this application. On the basis of the findings I have

made, that means that para. 16 of the points of claim in its entirety survives this application. Of course, in due course, the defendants will have to demonstrate that they have standing to maintain the constitutional challenge. However, I think it is important at this juncture to emphasise that the jurisdiction of the High Court to review an Act of the Oireachtas is derived from the Constitution (Article 34.3.2) and, as such, it cannot be trenched on by legislation, not to say secondary legislation, such as rules of court.

9.2 If the impugned provisions are struck down in due course for invalidity having regard to the Constitution, the consent and the compulsory acquisition orders will fall with them. It seems to me that the practical effect of the State parties' strategy in seeking to have the claim for judicial review type reliefs struck out on this application is to accelerate the Court's consideration of the constitutional challenge, whether that is an intended consequence or not.

9.3 Given that, assuming the defendants surmount the *locus standi* hurdle, the State parties would have had to defend the challenge to the validity of the impugned sections of the Act of 1976 on the grounds set out in sub-paras. (h) to (n) of para. 16 of the points of claim, it is difficult to see that they would have gained much, in terms of time and expense, had they succeeded in having the challenge to the validity of those sections on the basis particularised in sub-paras. (a) to (g) of para. 16 struck out. In any event, as I have found, those latter grounds are part of the defendants' substantive claim that the impugned sections are invalid and it is not open to the Court to strike them out at this juncture.

10. The first core issue: does Order 84, rule 21 apply by analogy?

10.1 In determining whether Order 84, rule 21 applies by analogy, the starting point in addressing this question must be the decision of Costello J. in *O'Donnell v. Dun Laoghaire Corporation*, which was relied on by counsel for the State parties and counsel for the plaintiff and in which, for the first time, the interface between the judicial review procedure introduced in 1986 in Order 84 and the plenary procedure for litigating public law issues was analysed. It is necessary to consider that decision in detail. The bases on which it was submitted by counsel for the defendants that the decision in *O'Donnell v. Dun Laoghaire Corporation* should not be followed will then be addressed, before setting out the conclusions I have reached on the first core issue. As the argument based on the *A.H.P.* case goes to the first core issue, that argument will be addressed separately.

11. *O'Donnell v. Dun Laoghaire Corporation*

11.1 The context of the decision of Costello J. in the *O'Donnell* case was a plenary action by private citizens against the public body statutorily charged with the imposition of water rates. The issues in that case arose in circumstances in which the plaintiffs, in proceedings initiated in 1989, sought declarations declaring that managerial orders made in 1983, 1984 and 1985 imposing water rates were *ultra vires* and void and that a decision of 1988 to disconnect the plaintiffs' water supply for non-payment of the water rates in 1983, 1984 and 1985 was *ultra vires* and invalid. Having held that the orders and the decision were *ultra vires* and void, Costello J. dealt with arguments advanced on behalf of the defendant that the plaintiffs were barred from being granted declaratory relief on the grounds of abuse of process and delay.

11.2 Costello J. rejected the defendant's submission that, since the adoption of Order 84 in 1986, it is an abuse of process to claim declaratory relief in a plenary action, when relief in an application for judicial review is available. In advancing that argument, the defendant had relied on the decision of the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237. Costello J. summarised the unanimous opinion of the House of Lords, delivered by Lord Diplock, in that case as follows (at p. 313):-

> "It was pointed out that neither O. 53 nor s. 31 of the Supreme Court Act 1981 expressly provided that procedures by way of application for judicial review were to be exclusive remedies but nonetheless it would 'as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of O. 53 for protection of such authorities' (p. 285)."

11.3 In outlining his reasons for rejecting the argument advanced on behalf of the defendant, Costello J. stated as follows (at p. 314):-

> "Firstly, as a matter of construction, I cannot construe the new rules as meaning that in matters of public law O. 84 provides an exclusive remedy in cases where an aggrieved person wishes to obtain a declaratory order and that such a person abuses the courts' processes by applying for such an order by plenary action. Secondly, I do not think that the court is at liberty to apply policy considerations and conclude that the public interest requires that the court should construe its jurisdiction granted by the new rules in the restrictive way suggested, (a) because the jurisdiction it is

exercising is one conferred by statute (the 1867 Act) and it is not for the courts to decide that as a matter of public policy litigants who ask the court to exercise this jurisdiction abuse the courts' processes, and (b) because it is not necessary to call in aid the doctrine of public policy to avoid the mischief which would otherwise result."

11.4 The two passages from the judgment of Costello J. which I have quoted require some explanation. The reference to "O. 53" is a reference to Order 53 of the Rules of the Supreme Court of England and Wales, which were introduced in December 1977. Order 84 is the analogue in this jurisdiction of Order 53. In the United Kingdom, section 31 of the Supreme Court Act 1981 had dealt with the question of undue delay in making an application for judicial review and provided that, where the High Court considered that there had been such undue delay in making an application for judicial review, the Court might refuse to grant leave for the making of the application or any reliefs sought on the application, if it considered that the granting of the reliefs sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. Significantly, however, it was provided that that provision was "without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made". As regards its material aspects for present purposes, rule 4(1) of Order 53, when in force, was substantially the same as Order 84, rule 21(1), in that it required an application to be made "promptly and in any event within three months from the date when the grounds for the application first arose", subject to an extension of time being granted where there was good reason for so doing. An important difference between the position which prevailed in the United Kingdom when *O'Reilly v. Mackman* was decided and

the position which prevailed in this jurisdiction when the *O'Donnell* case was decided, and still prevails here, is that in the United Kingdom s. 31 gave parliamentary *imprimatur* to the time requirements of Order 53, rule 4(1), whereas in this jurisdiction the time requirements of Order 84, rule 21 were, and are, solely rule based.

11.5 In his judgment, Costello J. explained the last point in the second quotation above in the succeeding paragraphs of his judgment by pointing to the significant safeguards in favour of public authorities contained in Order 84: the requirement to obtain leave; and the requirement to show sufficient interest to be granted leave (rule 20); and the time limit for bringing the application (rule 21(1)). But he also pointed to the fact that, in a plenary action, similar safeguards are available because considerations of the kind which, on the application of Order 84, rule 20 will result in a refusal of leave, may be brought before the Court and determined on a motion to try a preliminary issue, for example, a motion to determine whether the plenary action should be dismissed for lack of standing on the part of the plaintiff.

11.6 It was also argued on behalf of the defendant in the *O'Donnell* case that the plaintiff was barred from claiming declaratory relief because of delay in initiating the plenary proceedings. In relation to that argument, Costello J. held (at p. 315) that he should exercise his discretionary powers in relation to the plaintiffs' delay by applying, by analogy, the rules and principles contained in Order 84, rule 21. He had given his reasons for adopting this approach earlier in the following passage in his judgment (at p. 314):-

> "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".

The underlying rationale of that passage seems to be the discretionary nature of declaratory relief, which assimilates it to relief which may be applied for by way of judicial review under Article 84, for example, *certiorari*, which is also discretionary in nature.

11.7 In considering the meaning of the phrase "good reason" in Order 84, rule 21, which is at the heart of the second core issue, Costello J. stated that it was a phrase of wide import, which it would be futile to attempt to define precisely. However, (at p. 315) he outlined the approach a Court should adopt in determining whether "good reason", as envisaged in Order 84, rule 21 exists in the following passage, which it is convenient to quote at this juncture although it is relevant in determining the second core issue, as follows:

> "However in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of the proceedings. What the plaintiff has to show (and I think the onus under O.84 r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. There may be cases, for example, where third parties had acquired rights under an administrative decision which is later challenged in a delayed action. Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights (*State (Cussen) v. Brennan* [1981] I.R. 181).
>
> Or again, the delay may unfairly prejudice the rights and interests of the public authority which had made the *ultra vires* decision in which event there would not be a good reason for extending the time, or a plaintiff may acquiesce in the situation arising from the *ultra vires* decision he later

challenges or the delay may have amounted to a waiver of his right to challenge it and so the court could not conclude that there were good reasons for excusing the delay in instituting the proceedings."

In applying those principles to the facts, Costello J. held that the plaintiffs' delay did not disentitle them to declaratory orders in relation to the managerial orders in 1983, 1984 and 1985. His rationale for so doing goes to the second core issue and will be considered later.

12. The defendants' arguments against the application of O. 84, r. 21 "by analogy" in outline

12.1 Counsel for the defendants submitted that the Court should not follow so much of the decision of Costello J. in the *O'Donnell* case as found that the rules and principles contained in Order 84, rule 21 should be applied by analogy in determining whether the defendants by way of defence initiated in time their public law challenges to the consent and the compulsory acquisition orders on a number of grounds. I am satisfied that, on an analysis of the grounds advanced, they can be subsumed under two broad headings. First, it was argued that this case is distinguishable from the *O'Donnell* case. Secondly, an alternative proposition – that this aspect of the decision in the *O'Donnell* case was wrongly decided – was advanced.

13. *O'Donnell* distinguishable?

13.1 In relation to the first broad heading – that the decision in *O'Donnell* is distinguishable – it was submitted on behalf of the defendants that the situation which arises in this case is unprecedented in this jurisdiction. There is no authority in this jurisdiction in which the application of Order 84, rule 21 was considered in a situation

where the public law issue first arose by way of defence. That situation has been considered in the United Kingdom by the House of Lords in *Wandsworth L.B.C. v. Winder* [1985] 1 A.C. 461. It was urged that this Court should take the same approach as was adopted by the House of Lords in that case.

13.2 Before considering the decision of the House of Lords, it is appropriate to record that counsel for the defendants submitted that, while the decision of Costello J. has been considered by the Supreme Court on a number of occasions, the Supreme Court had not endorsed the application by analogy of Order 84, rule 21 in plenary proceedings. That submission is correct. The analysis by Costello J. of the phrase "good reason" was approved of by the Supreme Court in at least three cases: *De Róiste v. Minister for Defence* [2001] 1 I.R. 190; *Slatterys Limited v. Commissioner of Valuation* [2001] 4 I.R. 91; and *Dekra Éireann Teo v. Minister for Environment* [2003] 2 I.R. 270. In each of those cases the issue of delay arose on an application for judicial review, in the first two cases under Order 84, and in the third case under Order 84A, rule 4, which relates to the review of decisions in the area of public procurement. In the *De Róiste* case, Fennelly J. observed (at p. 216) that Costello J. was applying the provisions of Order 84, rule 21 by analogy in a case commenced by plenary summons for a declaration in the *O'Donnell* case. I do not read that statement as an approval of the application of Order 84, rule 21 by analogy. In any event, the observation was *obiter*.

13.3 The defendant in the *Wandsworth* case was a tenant of premises let to him by the plaintiff public authority. In 1981 and 1982 the plaintiff, pursuant to its statutory powers, had resolved to increase rents and served the defendant with two notices of increase of rent. The defendant refused to pay the increase, while continuing to pay his original rent. The plaintiff brought proceedings in the County Court claiming

arrears of rent and possession of the premises. By his defence, the defendant contended that he was not liable to pay the arrears because the resolutions and notices of increase were *ultra vires* and void. He counterclaimed for a declaration that each notice of increase was *ultra vires* and void. The plaintiff applied to strike out the defence and counterclaim as an abuse of process in reliance on the decision of the House of Lords in *O'Reilly v. Mackman*. The House of Lords distinguished *O'Reilly v. Mackman* and held that the defendant was entitled to pursue his challenge by way of defence.

13.4 In essence, the House of Lords held that neither Order 53 nor the Supreme Court Act 1981 abolished the citizen's right to challenge the decision of a local authority by way of defence. In his speech, Lord Fraser, with whom the other Law Lords agreed, stated as follows (at p. 509):-

> "I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform. As ... Lord Scarman said in *Reg v. Inland Revenue Commissioners* ... [1982] A.C. 617, 647 G. 'The new R.S.C., Ord. 53 is a procedural reform of great importance in the field of public law, but it does not – indeed, cannot – either extend or diminish the substantive law. Its function is limited to ensuring '*ubi jus, ibi remedium*'.... Nor, in my opinion, did section 31 of the Supreme Court Act 1981 which refers only to 'an application' for judicial review have the effect of limiting the rights of a defendant *sub silentio*. I would adopt the words of Viscount Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260, 286 as follows:

> 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words'.
>
> The argument of the appellants in the present case would be directly in conflict with that observation.
>
> If the public interest requires that persons should not be entitled to defend actions brought against them by public authorities, where the defence rests on a challenge to a decision by the public authority, then it is for Parliament to change the law".

13.5 In the *Wandsworth* case the proceedings had been initiated in the County Court and were being defended in the County Court. On the basis of the decision of the House of Lords, the County Court was found to have jurisdiction to make determinations as to the validity of the rent increases. This aspect of the decision has come to the attention of the Supreme Court on two occasions.

13.6 The first occasion was when, in *Slatterys Limited v. Commissioner for Valuation*, the applicant for judicial review sought to establish good reason for delay in initiating judicial review proceedings to quash a decision of the Commissioner of Valuation granting only a partial remission of rates, when a total remission had been sought. District Court proceedings had been instituted by Dublin Corporation for recovery of rates from the applicant and the decision of the District Court was appealed to the Circuit Court. The applicant's excuse for the delay in initiating the judicial review proceedings was that it was reasonable for it to believe that it could achieve the result it wished by making its case in the District Court or the Circuit Court. In the Supreme Court, Keane C.J. stated that the decision in the *Wandsworth* case did not in any way support the contention of the applicant, because the

Commissioner was not before the District Court or the Circuit Court. On the next occasion on which *Wandsworth* was considered by the Supreme Court, in *Blanchfield v. Hartnett* referred to below, Keane C.J. (at p. 210) pointed out that there was an additional ground for distinguishing *Wandsworth* in that, on the basis of an authority dating from 1892, it was not open to the applicant to set up the invalidity of the rate by way of defence. The decision in the *Slatterys* case is not of assistance on the question whether the decision in the House of Lords in *Wandsworth* should be regarded as persuasive in this jurisdiction on the first core issue raised on this application.

13.7 The second occasion was in the judgment of Fennelly J. in *Blanchfield v. Hartnett* [2002] 3 I.R. 207. In that case, the applicant, who was awaiting trial in the Circuit Court on charges of forgery, initiated judicial review proceedings seeking an order of *certiorari* quashing orders made by the first respondent, a Judge of the District Court, under s. 7 of the Bankers' Books Evidence Act 1879 on foot of which the Gardaí had inspected a number of bank accounts belonging to the applicant. As is clear from the judgment of Fennelly J. (at p. 219), the applicant's objective was to secure the exclusion of the orders and the evidence at the trial. His argument was that he had to proceed by way of judicial review in the High Court because the Circuit Court would not have the requisite jurisdiction to rule that the orders were invalid before entering on the question of its discretion. The reference to the *Wandsworth* case arose in the judgment of Fennelly J. in the context of a general observation that there exists a body of law which suggests that there is no rigid universal rule prohibiting courts from entertaining arguments as to the invalidity of decisions or orders which have facilitated the obtaining of evidence. The first example given by Fennelly J. in support of that observation was that our courts have not taken the view

that the modern procedures for judicial review provide an exclusive remedy for complaints of infringements of public law rights, citing the *O'Donnell* case. He then dealt with the *Wandsworth* case (at p. 220) as follows:-

> "Secondly, there is a body of case law in England, even though in that jurisdiction a stricter view has been taken in that respect (see *O'Reilly v. Mackman* ...), to the effect that a collateral challenge may be made to an administrative decision at least where it is raised as a matter of defence and the defendant could not choose his forum. In *Wandsworth L.B.C. v. Winder* ..., the House of Lords decided a civil case which is of some interest. The council made decisions by resolution increasing rents for local authority tenants. The defendant disputed the increases and refused to pay. The council sued him for possession in the County Court. He pleaded by way of defence that the decisions increasing the rents were made *ultra vires*. The council applied to strike out this plea as an abuse of the process of the court and relied on *O'Reilly v. Mackman*. The House of Lords held that it was not an abuse for the defendant to raise such a challenge without resort to judicial review."

Later in his judgment, Fennelly J. emphasised that the authorities to which he had referred, which I assume included *Wandsworth*, had not been opened to the court and, for that reason, it was not desirable to pronounce conclusively on them. But he made the point that, where it appears that there are well-established cases in which alternative avenues may be pursued, the Court cannot close its eyes to their existence.

13.8 Counsel for the defendants pointed to the similarity between this case and the *Wandsworth* case, which it was submitted distinguishes it from the *O'Donnell* case – that the public law challenges arose originally by way of defence. As to the nature of

these proceedings, which I understand to mean the extant counter-claim of the defendants against the plaintiff and the State parties and, presumably, also the inquiry as to damages, counsel for the defendants invited the Court to characterise them as private law proceedings within which the resolution of private law rights depends upon findings in relation to public law. Broadly speaking, I think that is a correct characterisation of the nature of the proceedings, with the *caveat* that the terms public law and private law are not used as terms of art. The kernel of the defendants' position, both formerly by way of defence and currently by way of counterclaim and, presumably, if the second defendant pursues the inquiry as to damages, is that neither the consent nor the compulsory acquisition orders conferred on the plaintiff lawful authority to act as it purported to act in between January and September 2005. Therefore, the plaintiff was acting wrongfully against the defendants and in relation to their property and the defendants are entitled as of right to defend the plaintiff's claims of wrongdoing against them and to be afforded civil remedies for the wrongdoings they allege the plaintiff perpetrated against them provided they are not statute-barred, in the absence of a statutory provision which precludes them from so doing.

14. *O'Donnell* wrong?

14.1 Turning to the second broad heading in their attack on the application of Order 84, rule 21 by analogy, counsel for the defendants advanced an alternative argument that the Court should not follow the decision in the *O'Donnell* case insofar as it held that the time requirements stipulated in Order 84, rule 21 should be applied by analogy to public law challenges in plenary proceedings. It was submitted that, for the reasons set out by Costello J. in his judgment for concluding that Order 84 does

not provide exclusive jurisdiction, it must be the case that Order 84 does not provide procedural exclusivity in the conduct of litigation in relation to such matters. The thrust of the argument was that, if by reason of the nature of the Court's long-standing and independent jurisdiction, derived from the Act of 1867, to grant declaratory relief, it is wrong for the Court to decide, as a matter of public policy, that the jurisdiction can only be exercised by making an application to Court under Order 84, similarly, it is wrong for the Court, in the application of what it considers to be appropriate policy considerations, to invest in plenary actions the time requirements stipulated in Order 84 in relation to judicial review applications. The defendants' position was that such approach cannot be supported in law. The time limits prescribed in Order 84, rule 21, it was submitted, cannot be applied by analogy so as to deprive a litigant, who is entitled to proceed by way of plenary action, of the right to initiate an action which is not statute-barred. Insofar as the existence of the plenary process may provide an opportunity for abuse, the well-established jurisdiction of the Court to strike out proceedings for abuse of process affords adequate protection. It was further submitted that the application by analogy of Order 84, rule 21 to plenary actions is, in effect, re-writing the rules, which I understand to mean, purporting to re-write the law. Counsel for the State parties and the plaintiff rejected that proposition and submitted that the decision in the *O'Donnell* case amounted to no more than the Court identifying the criteria by reference to which a determination is made as to whether the proceedings are out of time.

14.2 It is appropriate to record that the decision of Costello J. in applying Order 84, rule 21 by analogy to plenary proceedings involving public law issues has been followed in the High Court, even if it has not been subject to appellate scrutiny. Three cases were referred to in which it has been followed: *Futac v. Dublin City*

Council (Unreported, High Court, 24th June, 2003); *McGrath v. Minister for Defence* [2004] 2 I.R. 386; and *Smart Mobile Limited v. Commission for Communication Regulation* [2006] IEHC 82. I have no doubt there have been many more.

15. Conclusions on whether Order 84 rule 21 applies by analogy

15.1 In reaching a conclusion as to whether Order 84, rule 21 applies by analogy, I find it unnecessary to express any definitive view on the submissions made on behalf of the defendants under the second broad heading – that the decision in *O'Donnell* is wrong – because I am satisfied that the decision is distinguishable.

15.2 In the *O'Donnell* case, Costello J. was concerned with the initiation of a plenary action in which public law issues were raised by the plaintiff against a public authority. It is clear that an important factor in his consideration of the interface between the equitable jurisdiction derived from the Act of 1867, which is discretionary in nature, and the jurisdiction to apply for relief under Order 84, which is also discretionary in nature, was the prospect of the initiation of a plenary action being used as a deliberate device to defeat the time strictures in Order 84. On this application the Court is not concerned with the initiation of proceedings, which could have been brought by way of judicial review under Order 84. The genesis of the public law issues module is the defence of private law proceedings initiated by a third party, the plaintiff, into which the defendants were drawn. The form of abuse of process which Costello J. anticipated and sought to avoid is not present in the very unusual circumstances of this case.

15.3 Where, as here, the defence of a claim is in issue, I am persuaded by the reasoning in the *Wandsworth* case that, in the absence of an express statutory provision, a defendant cannot be precluded from defending a plenary action brought

by a plaintiff in this Court, where the plaintiff seeks to enforce private law rights and obtain private law remedies based on statutory privileges granted by a public body pursuant to statutory powers, which purport to authorise interference with the defendant's private law rights, and where the defendant, in reliance on public law principles, contends that they are not valid privileges. I use the word "privilege" as an omnibus phrase to cover the type of rights conferred on the plaintiff by the consent and the compulsory acquisition orders.

15.4 In the *Wandsworth* case it was recognised that the defendant tenant had not selected the process of the Court in which he found himself, but was merely seeking to defend proceedings brought against him by the plaintiff public authority landlord. In so doing, as Lord Fraser put it in his speech, in a passage which precedes the passage which I have quoted earlier, he was "seeking only to exercise the ordinary right of any individual to defend an action against him" on the ground that he was not liable for the whole sum claimed by the plaintiff. He was putting forward his defence "as a matter of right", whereas, on an application for judicial review, as Lord Fraser put it, "success would require an exercise of the court's discretion in his favour". Apart from the provisions of Order 53 and s. 31 there would have been no question but that he would have been entitled to defend the action on the ground that the plaintiff's claim arose from a resolution which, on his view, was invalid. However, the House of Lords held that, as a matter of law, the defendant was entitled to pursue his defence challenging the validity of the plaintiff's rent increases in the County Court.

15.5 The position of the defendants here is different to that of the defendant in the *Wandsworth* case. The jurisdiction of the Court to entertain the defence is not in issue because in the *O'Donnell* case, Costello J. dismissed the argument that Order 84

creates exclusive jurisdiction to obtain declaratory relief in relation to public law decisions. What is in issue here is whether, at the time the defendants invoked the jurisdiction of the Court to defend the plaintiff's claim on the basis set out in their defence and to pursue their counter-claim, it was open to them, from a temporal perspective, to do so.

15.6 An analysis of the defendants' position in this case, in my view, while disclosing a more complex procedural matrix, is more compelling on the facts than the position of the defendant in the *Wandsworth* case. This action started out as a contest between the plaintiff, who sought to enforce its private rights, derived from the exercise by a public authority, the Minister, of statutory powers in granting the consent and the compulsory acquisition orders, which it asserts entitled it to act as it did vis-à-vis the defendants, on the one hand, and the defendants, whose answer was that the decisions of the Minister were invalid and the plaintiff's actions constituted a wrongful interference with their private rights, on the other hand. Because of discontinuance by the plaintiff, it has become a contest between the defendants and the plaintiff on the counterclaim, with, as regards the judicial review type relief, the Minister, as the decision maker in relation to the consent and the compulsory acquisition orders joined as a necessary co-defendant to the counterclaim. Therefore, while the matrix in which the judicial review type reliefs framed as declaratory reliefs, as well as common law remedies, which they are entitled to claim as of right, are sought now is the defendants' counterclaim against the plaintiff and the inquiry as to damages, that situation has been brought about by the decision of the plaintiff to discontinue, thus relieving the defendants of the necessity to defend, but nonetheless leaving the defendants with the historic claims in respect of which they claim to be entitled to a remedy.

15.7 Notwithstanding the difference between the two cases, I have come to the conclusion that the principle enunciated by the House of Lords in the *Wandsworth* case applies to this case. In the absence of an express statutory provision, which overrides the normal limitation period relevant to the cause of action involved in the contest between the defendants and the plaintiff, there is no legal basis on which this Court can curtail the entitlement of the defendants to defend their private law rights and, if necessary, enforce them or seek a remedy for breach thereof, on the ground that they have not mounted a challenge to the decisions and instruments on which the plaintiff relies to establish the lawfulness of its actions and conduct within the time limited in Order 84, rule 21. The fact that the defendants are no longer defending the plaintiff's claim, the plaintiff having discontinued, but are pursuing a counterclaim against the plaintiff, in my view, is irrelevant. The issues which remain between the defendants and the plaintiff are being litigated because of the actions of the plaintiff, and the course adopted by the plaintiff in prosecuting these proceedings in reliance on the contended for validity of the consent and the compulsory acquisition orders. The outcome of the defendants' historic claim and of the inquiry as to damages all turns on whether the consent and the compulsory acquisition orders are valid. So also does the current and future status of the compulsory acquisition orders, insofar as that remains unresolved, although, taking a pragmatic view, it has been resolved by the plaintiff's undertaking to the Court, even if the title to the lands affected needs to be tidied up.

15.8 Therefore, on the first core issue, I find that the provisions of Order 84, rule 21 do not apply by analogy to any of the pleas of the defendants or the reliefs claimed by them, which I have found as being within the scope of Order 84. In so finding, the Court is giving effect to the right of the individual at common law, under the rule of

law, to defend himself as a matter of right in civil proceedings, the position which has been adopted in the United Kingdom by the House of Lords (cf Wade on *Administrative Law*, 9th Ed., at p. 282). More importantly, having regard to the constitutional obligations of the State in this jurisdiction and its organs, the Court is giving effect to the unspecified right of the individual under Article 40.3 of the Constitution to litigate. Of course, it is well settled that the right to litigate must be read subject to the judicial power to strike out an action so as to prevent an abuse of the judicial process. The decision in the *O'Donnell* case may be rationalised on that basis. However, in my view, it cannot be an abuse of process for a defendant to respond within just over five months from the delivery of the plaintiff's statement of claim, as happened here, to a claim for trespass, nuisance and intimidation, on a basis which involves challenging public law decisions which the plaintiff relies on as rendering its actions against the defendant and his property lawful, as occurred here. While there is a public interest and a common good aspect to ensuring that the exercise of statutory powers by public bodies and administrative decisions are challenged promptly, it is for the Oireachtas to determine when that should be done in a manner which deprives an individual of his established rights at law.

15.9 There are situations in which the forum in which, the procedure by which, and the time within which a specific public law decision may be challenged is expressly prescribed by statute. The tendency in recent years, as is pointed out in the judgment of Kearns J. in *Noonan Services Limited v. Labour Court* [2004] IEHC 42, has been to provide strict cut-off periods for challenges to decisions which have significant consequences for the public, or significant sections thereof. Kearns J. set out a list of such provisions, which is not exhaustive. One such provision is s. 87(10) of the

Environmental Protection Agency Act 1992 (the Act of 1992), as amended, which provides as follows:-

> "A person shall not by any application for judicial review or in any other legal proceedings whatsoever question the validity of a decision of the Agency to grant or refuse a licence or revised licence ... unless the proceedings are instituted within the period of eight weeks beginning on the date on which the licence or revised licence is granted or the date on which the decision to refuse or not to grant the licence or revised licence is made." (Emphasis added)

Provided a provision of that type does not infringe some guaranteed constitutional right of a person affected (as happened in *White v. Dublin City Council* [2004] 1 I.R. 545), it lawfully imposes a time limit on a prospective litigant.

15.10 Since 1867, this Court has had an equitable jurisdiction to make declarations in relation to private rights and public rights in plenary actions. In order to oust or curtail that jurisdiction by limiting the time within which the jurisdiction may be invoked, so as to preclude a litigant, who needs to invoke that jurisdiction as a step in the process to defending his legal rights, from doing so, the Oireachtas must change the law. It may be that a provision on the lines of s. 87(10), including the words to which I have added emphasis in the quotation, would have precluded the defendants from raising the validity of the consent and of the compulsory acquisition orders by way of defence over three years after they were made. However, I express no view on whether a provision on the lines of s. 87(10) would have that effect. I have used it as an example because it was the time limit provision at issue in the *A.H.P.* case. Its constitutionality would have been in issue in that case, if the applicant's application to amend its statement of grounds had been allowed, but it was not.

16. The *A.H.P.* case argument

16.1 I now return to the submission made on behalf of the State parties that the allegations made by the defendants that ss. 32 and 40 of the Act of 1976, as amended, are invalid having regard to the provisions of the Constitution by reference to the matters pleaded in sub-paras. (a) to (g) of para. 16 of the points of claim are, in effect, merely collateral challenges to the consent and the compulsory acquisition orders. I have found against the State parties on that point. However, it was further submitted, on the basis that the State parties' submission was correct, that, if the defendants are out of time to challenge the validity of the consent and the compulsory acquisition orders, they have no *locus standi* to challenge the constitutionality of ss. 32 and 40. The State parties relied on the decision in the *A.H.P.* case in support of that submission.

16.2 The applicant in the *A.H.P.* case operated a pharmaceutical production facility pursuant to Integrated Pollution Control Licences, the most recent of which dated from 2002, which were subject to conditions. In November 2006 the applicant was charged with offences in relation to disposal of waste. Some of the offences alleged breach of conditions attached to the licences. In January 2007 the applicant was granted leave to apply for judicial review. Insofar as is relevant for present purposes, the applicant was granted leave, as against the Environmental Protection Agency (E.P.A.), to challenge the validity of some of the conditions attached to the licences. It was also granted leave to seek, against Ireland and the Attorney General, a declaration to the effect that the statutory provisions under which the licences were granted and the conditions attached thereto were unconstitutional. Both the E.P.A. and the Attorney General applied to have the grant of leave set aside. As regards the

reliefs sought against the E.P.A., the High Court (O'Higgins J.) held that the applicant was precluded from bringing the application for judicial review because it was brought many years outside the time limits set in s. 87(10) of the Act of 1992, which I have quoted earlier, and which it was held was applicable in the circumstances. It was further held that, if s. 87(10) was not applicable, so that the time for bringing an application for judicial review was governed by Order 84, rule 21, the application was still out of time.

16.3 The constitutional claim, in respect of which the applicant had been granted the leave, which the Attorney General was endeavouring to set aside, challenged the provisions of the Act of 1992 in issue on the grounds that they constituted an impermissible delegation of the sole and exclusive law-making power of the Oireachtas to the E.P.A. contrary to Article 15.2.1 of the Constitution. The case made on behalf of the Attorney General that the applicant should not be allowed to pursue that constitutional claim was based on the proposition that, on the authority of the decision of the Supreme Court in *Cahill v. Sutton* [1980] I.R. 269, the applicant did not have *locus standi*. It was argued that the applicant lacked standing because of the existence of the time limits in the Act of 1992, by reason of which it would be prevented from proceeding with the challenge to the validity of the licences and, accordingly, it could not show that its interest was in real and imminent danger of being adversely affected by the impugned provisions. In addressing that argument, O'Higgins J. stated as follows (at p. 357):-

> "In applying the principles set out in the authorities ... it is clear that it is necessary for the applicant to show that he is prejudiced by the existence of the sections of the legislation which he wishes to challenge or is in imminent danger of becoming a victim of them. In my view the applicant

> cannot show that he has been so prejudiced. In view of the finding of the Court that the time for taking these proceedings commenced at the time of the grant of the licences, the applicant is out of time by a period of many years .... In view of those findings, it follows that the applicant has no *locus standi* to argue the constitutional point concerning the conditions of the licence. He runs foul of both the statute and the Rules of the Superior Courts."

16.4 The question which arises from that dictum is whether the application of the principles enunciated by Henchy J. in *Cahill v. Sutton* to the circumstances of this case could justify a similar conclusion on the circumstances which prevail here. The rule in relation to *locus standi* to challenge the constitutionality of a statutory provision is set out in the following passage from the judgment of Henchy J. (at p. 286):-

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interest have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."

16.5 The context and the manner in which Henchy J. applied that principle to the circumstances of that case is instructive. It was an action in contract against a medical practitioner in which the defendant pleaded that the plaintiff's action was barred by s. 11(2)(b) of the Statute of Limitations 1957, which imposed a limitation period of three years from the date on which the cause of action accrued in the case of an action for damages for breach of contractual duty where the damages claimed by the plaintiff

consisted of or included damages for personal injuries. On the facts, the plaintiff's cause of action accrued in March 1968. The action was commenced in April 1972, outside the limitation period. The argument which it was sought to advance on behalf of the plaintiff was that s. 11(2)(b) was inconsistent with Article 40.3 of the Constitution, because its absolute and unqualified terms precluded any extension of the three year period of limitation where the would be plaintiff did not know, and could not have learned within that period, of the accrual of the cause of action. The plaintiff's argument was that the provision could only be compatible with the constitutional provision invoked, if it contained a saver linking the limitation period to knowledge of the facts necessary to make the claim. Henchy J. pointed out (at p. 280) that, even if there were such a saver, it would have availed the plaintiff nothing, because in 1968 she knew of the facts, which, according to her, constituted a breach of contract, and of their prejudicial effects on her.

16.6 In applying the primary rule to the plaintiff's situation, Henchy J. stated (at p. 286):-

> "On that test the plaintiff must be held to be disentitled to raise the allegation of unconstitutionality on which she relies. Even if the Act of 1957 contained the saving clause whose absence is said to amount to an unconstitutionality, she would still be barred by the statute from suing. So the alleged unconstitutionality cannot affect her adversely, nor can it affect anybody whose alter ego or surrogate she could be said to be. ... Therefore, her case has the insubstantiality of a pure hypothesis. While it is true that she herself would benefit, in a tangential or oblique way, from a declaration of unconstitutionality, in that the consequential statutory vacuum would enable her to sue, that is an immaterial consideration in

view of her failure to meet the threshold qualification of being in a position to argue, personally or vicariously, a live issue of prejudice in the sense indicated."

16.7 The challenge of the defendants to ss. 32 and 40 of the Act of 1976 on the grounds of repugnancy to the Constitution, founded as it is, *inter alia*, on the proposition that those provisions do not embody the requirements and safeguards which the defendants contend are necessary to render them consistent with Article 40.3, is not insubstantial or hypothetical. It is a real challenge, in the sense that the contention is that, if those requirements and safeguards were embodied in the impugned provisions and observed in making the decisions which affect the defendants, their rights would not have been infringed as they allege they were by the decisions to grant the consent and the compulsory acquisition orders and by the plaintiff's actions and conduct in reliance on them. If the impugned sections were to be struck down for repugnancy to the Constitution, it is not the case that the defendants would benefit only in a tangential or oblique way. The consent and the compulsory acquisition orders would fall with them. Striking down the impugned sections is the objective which the defendants are striving to achieve, which goes beyond merely challenging the validity of the decisions made thereunder. In my view, they have a live issue of prejudice on the basis of the alleged unconstitutionality of ss. 32 and 40 because of the manner in which the exercise of the powers in implementation of the sections has impacted on them. No rule of court prescribing time limits or exercise of judicial discretion by analogy to a rule of court can preclude them from invoking the Constitution based jurisdiction of this Court to review those provisions.

16.8 The entitlement to challenge the consent and the compulsory acquisition orders made under the impugned provisions is not temporarily circumscribed by any statutory provision of the type under consideration in the *A.H.P.* case. Even if it were the case that the defendants were time barred by virtue of, or by analogy to, Order 84, rule 21 from pursuing their claims for declarations as to the invalidity of the consent and the compulsory acquisition orders, in my view, they could not be precluded from pursuing their challenge to the constitutionality of ss. 32 and 40 on the grounds set out in sub-paras. (a) to (g) of para. 16.

17. The second core issue:"good reason"?

17.1 The second core issue – whether there is good reason for extending the time for the initiation of the defendants' defence and counter-claim – only arises if the finding I have made on the first core issue is incorrect. If that finding is incorrect, and if Order 84, rule 21 does apply by analogy to the initiation, in their defences and counterclaims, by the defendants of their challenges to the validity of the consent and the compulsory acquisition orders en route to their pursuit of determination of legal and equitable rights and the remedies to which they are entitled, it is common case that the Court should adopt the principles set out in the passage from the judgment of Costello J. in the *O'Donnell* case, which I have quoted earlier. Therefore, the essential test is whether the defendants have established reasons which both explain the delay and afford a justifiable excuse for the delay.

17.2 In her judgment in *De Róiste v. Minister for Defence*, Denham J. gave guidance as to the approach to be adopted in a particular case where the issue whether good reason exists arises, stating as follows (at p. 208):-

"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;

(i) the conduct of the respondents;

(ii) 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;

(iii) any effect which may have taken place on third parties by the order to be reviewed;

(iv) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished.

Such list is not exhaustive."

17.3 Lest my finding on the first core issue is wrong, I will now consider those factors in the light of the relevant facts, in accordance with the established jurisprudence, on the hypothetical assumption that Order 84, rule 21 applies by analogy.

17.4 The explanation for, and the justification of, the failure on the part of the defendants to initiate proceedings challenging the validity of the consent and the compulsory acquisition orders before 4th November, 2005, by reason of the submissions made, falls to be considered in relation to two phases. The first phase is from the respective dates of the impugned instruments in April and May or June, 2002 and the grant of planning permission for the onshore terminal by An Bord Pleanála on

22nd October, 2004. The second is the period from 22nd October, 2004 to 4th November, 2005.

17.5 In relation to the first phase, the second defendant has averred that, as the overall project was split between the pipeline and the terminal, he believed that the most appropriate way to stop the project was through the planning process in relation to the terminal. In other words, if there was no planning permission for the terminal, there would be no pipeline and the instruments now being challenged would be redundant. The fifth defendant has averred that she agrees with and supports the averments contained in the second defendant's affidavit. I take this to mean, *inter alia*, that like the second defendant, she believes that the most efficient, sensible and economical approach was to oppose the project through the planning process in relation to the terminal and that she did so. She has also averred that, initially, she sought to address her legitimate concerns in relation to the project to, and expected to be listened to, by both the plaintiff and the State parties, but ceased totally on that approach when the Minister refused an oral hearing in relation to "the purported consent to construct the pipeline" in early June 2002. I mention this because it is at variance with what the second defendant has averred in relation to his knowledge of the consent.

17.6 It was strongly urged on behalf of the State parties and the plaintiff that the defendants were not entitled to adopt a "wait and see" approach pending the outcome of the planning application in relation to the terminal which, it would seem, from the judgment of Macken J. in *Harrington v. An Bord Pleanála* [2006] 1 I.R. 389, was originally submitted in April 2001. When one measures the defendants' excuse in the light of the factors listed by Denham J., in my view, the proper conclusion is that a "wait and see" approach is not a justifiable excuse, in the sense of justifying the grant

of an extension of time under Order 84, rule 21. In considering the nature of the impugned instruments and the actions they sanctioned, it has to be recognised that they were discrete components of a major infrastructural project. It must be assumed that the planning of, the compliance with regulatory requirements such as obtaining planning permission for, and the implementation of the project involved enormous expenditure by the plaintiff on an ongoing basis. From the time the consent and the compulsory acquisition orders were granted, the plaintiff, in the absence of a challenge to their validity, incurred expenditure on the project on the assumption that they were valid. While it was open to the defendants to make a tactical decision as to how best to oppose the overall project, if they were confined within the time parameter of Order 84, rule 81, they were not entitled to take a tactical decision that they would postpone a public law challenge to the validity of discrete components of it until it became apparent whether their strategy had worked, because, to adopt the words of Kearns J. in the *Noonan* case, "huge expense and inconvenience inevitably may be expected to arise where such a challenge is not initiated promptly".

17.7 The only other excuse advanced by both defendants for not bringing their challenges to the validity of the consent and the compulsory acquisition orders promptly was that they are persons of limited means. They initially defended the plaintiff's proceedings in person, each having delivered a defence and counterclaim on the 27th May, 2005. Their position is that, prior to the issues in relation to the plaintiff's development in North Mayo, they had no experience of court or legal proceedings, nor had they any understanding of the various methods of bringing proceedings before a court or the procedures and practices involved. In response to that excuse, it was pointed out that the defendants were represented by a solicitor in 2002 when the plenary action in which they were plaintiffs which is referred to in my

judgment of 23rd March, 2006 (at p. 311) was commenced. It was also pointed out that the second defendant was a notice party to the challenge in this Court to the planning permission granted by An Bord Pleanála on 22nd October, 2004, which is now reported as *Harrington v. An Bord Pleanála* [2006] 1 I.R. 388 which, as the report indicates, commenced in January 2005. As is outlined in my judgment of 23rd March, 2006 (at p. 312), the position of the second defendant is that he did not participate in the latter proceedings. Therefore, I attach no weight to the fact that he was named as a notice party in those proceedings. However, I do think it is of significance that the defendants, represented by solicitors, commenced proceedings in 2002, the objective of which was to question the power of the Minister to make the compulsory acquisition orders. In the overall context of the defendants' opposition to the Corrib Gas project, in my view, the excuse of ignorance of public law remedies and court procedure does not stand up as a justification for not challenging the consent and the compulsory acquisition orders, either in the first phase or in the second phase after the grant of planning permission, within the time frame provided for in Order 84, rule 21, if they were confined within it.

17.8 The second defendant also seeks to excuse the second phase of the delay on the basis of the stress and trauma he suffered during the 94 days he was in prison from 29th June, 2005, having been committed for contempt of court for breach of the interlocutory injunction obtained by the plaintiff in these proceedings. That excuse is advanced, notwithstanding that two firms of solicitors were formerly on record for the second defendant in these proceedings in the period from the beginning of July 2005 to the end of September 2005 and a defence and counterclaim was delivered on his behalf by the first firm on 11th July, 2005. In my view, this excuse would not justify

not challenging the consent or the compulsory acquisition orders within the time frame provided for in Order 84, rule 21 either, if that time limit applied.

17.9 In coming to the conclusion that there is not "good reason" within the meaning of Order 84, rule 21, if it were applicable, for excusing the delay on the part of the defendants in instituting proceedings to challenge the validity of the consent and the compulsory acquisition orders applying the *O'Donnell* principles, I think it could be fairly stated that I have applied a more rigorous standard than was applied in the *O'Donnell* case. In that case, Costello J. held that there were good reasons why the plaintiffs had failed to institute proceedings prior to June 1988, because they believed that the legality issue could be adjudicated in proceedings instituted by the defendant either against them or against other householders, who had raised the validity of the orders in other proceedings. In relation to the period after June 1988, the plaintiffs' explanation was that they were contesting their liability to pay water rates, not through the Courts, but with the assistance of three different public representatives. Costello J. found that that was a reasonable explanation as to why they did not institute proceedings until July 1989. He took into account that no third parties had acquired rights which it would be unjust to injure by granting the relief the plaintiffs sought. The fact that granting the relief would cause the defendant administrative and, perhaps, financial problems, did not, in his view, justify the Court in refusing the plaintiffs the relief to which they would otherwise be entitled.

17.10 What distinguishes this case from the *O'Donnell* case is that, if the plaintiff had not decided to change the route of the onshore pipeline and to abandon its entitlement to rely on the consent in relation to the construction and maintenance of the onshore pipeline and the compulsory acquisition orders, declarations that the consent and the compulsory acquisition orders are void would have enormous

consequences for a major infrastructural project. Even though the Act of 1976 does not contain provision for strict cut-off periods for public law challenges such as is to be found in the legislation listed by Kearns J. in the *Noonan* case, the jurisprudence of the Superior Courts in applying Order 84, rule 21 takes account of the policy underlying such provisions in striking the balance between the party in delay and the other interests affected.

17.11 For the foregoing reasons, if Order 84, rule 21 were applicable, I would refuse to extend the period stipulated in that rule so as to enable the defendants to pursue the public law challenges. However, as I have found, that time constraint does not apply as a matter of law.

18. Summary of conclusions

18.1 The reliefs sought by the defendants based on the pleas contained in para. 8 to 10 and 12 to 15 of their points of claim, although formulated as claims for declaratory relief in a plenary action, are, in essence, claims for reliefs which are intended to have the same effect as orders quashing the consent and the compulsory acquisition orders by way of judicial review. As such, although they may be pursued by plenary action, they are within the scope of Order 84.

18.2 In the absence of an express statutory provision to that effect, the time limit for making an application for judicial review provided for in Order 84, rule 21 does not apply by analogy to the pleas and reliefs referred to at 18.1 in the circumstances of this plenary action, where the challenge to the consent and the compulsory acquisition orders was first initiated by the defendants by way of defence to a private law claim brought by the plaintiff against the defendants, in support of which the plaintiff relies on the validity of those instruments to establish the lawfulness of and justify its

actions and conduct against the defendants, which actions and conduct the defendants contend were unlawful and in respect of which they seek remedies.

18.3 If contrary to the conclusions set out at 18.2, the time limit in Order 84, rule 21 does apply by analogy, in accordance with established jurisprudence, the defendants have not established that there is good reason for extending the time provided in Order 84, rule 21(1).

18.4 The matters pleaded in sub-paras. (a) to (g) of paras. 16 of the defendants' points of claim are not merely collateral challenges to the making of the consent and the compulsory acquisition orders, but are *prima facie* arguable grounds on the defendants' substantive challenge the constitutionality of s. 40 and s. 32 of the Act of 1976.

18.5 In relation to the matters referred to at 18.4, the Court's jurisdiction to review the legislation is derived from Article 34.3.2 of the Constitution. No time limit in relation to the initiation of a challenge to the constitutionality of such provisions imposed by a rule of court or by analogy to a rule of court could curtail the court's [illegible] applicant has *locus standi* to bring the challenge.

19. Order

19.1 I propose, subject to any submissions which the parties may make, that there will be an order that the defendants are not barred on the grounds of time, whether by reference to Order 84, rule 21 or otherwise, [illegible] pleaded or the reliefs claimed in the points of claim delivered by the defendants in the public law issues module of these proceedings.