THE HIGH COURT

[2013 No. 4122P]

BETWEEN

PAT SWORDS

PLAINTIFF

AND

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

DEFENDANTS

JUDGMENT of Mr Justice Keane delivered on the 12th day of August 2016

Introduction

1. There are two applications before the Court. The first is the defendant's motion to dismiss the plaintiff's claim on grounds of delay. The second is the plaintiff's motion seeking either a protective costs order, pursuant to the inherent jurisdiction of the Court, or an order pursuant to s. 7 of the Environmental (Miscellaneous Provisions) Act 2011 that s. 3 of that Act applies to these proceedings.

The proceedings

2. The plaintiff is a chemical engineer.

3. The first defendant is sued in his capacity as the Minister responsible for determining national policy on energy matters. The second defendant is the

State and the third defendant is the law officer of the State, so designated by the Constitution of Ireland. For the purposes of the present application, I will refer to the defendants collectively as the State.

4. In the underlying proceedings, the plaintiff claims a number of declarations of right as against the State comprising: various declarations that the State has acted in contravention of the Aarhaus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"); various declarations that the State has acted in breach of EU law; a declaration that the national renewable energy action plan ("NREAP") submitted by the State to the Commission of the European Union pursuant to Article 4 of Directive 2009/28/EC on the promotion of the use of energy from renewable sources ("the 2009 Directive") was adopted by the State in contravention of the Aarhus Convention and in breach of both EU law and the law of the State: an injunction restraining the State from relying upon the present NREAP for any practical purpose; and a mandatory injunction directing the State to comply with the requirements of the Aarhus Convention in the adoption or implementation of any future plan or programme equivalent to the present NREAP.

5. In seeking those reliefs, the plaintiff relies on two principal contentions. The first is that the State, in its development of the NREAP, has failed to properly comply with the provisions of the Aarhus Convention and, in particular, Articles 6 and 7 of that Convention, requiring signatory states to make provision for members of the public to participate in the development of their environmental policies.

6. The plaintiff's second principal contention is that the State failed to carry out a strategic environmental assessment or an environmental impact assessment in respect of the NREAP, as required by the provisions of Directive 2001/42/EC ("the SEA Directive") on the assessment of the effects of certain plans and programmes on the environment and of Directive 85/337/EEC, as amended by, in particular, Directive 2003/35/EC ("the EIA Directive"), as amended, on the assessment of the effects of certain public and private projects on the environment.

7. The State raises three significant preliminary pleas in response to the plaintiff's claims. Those pleas are: first, that the plaintiff's claims are out of time (hence, the present motion to dismiss the proceedings on grounds of delay); second, that, insofar as they relate to the Aarhus Convention, those claims are non-justiciable before the Courts of Ireland because, although Ireland has ratified the Convention, the particular provisions of the Convention at issue in these proceedings do not form part of the domestic law of the State; and third, that, insofar as they relate to State policy in the field of renewable energy, the plaintiff's claims are not amenable to review by the Courts under the principle of the separation of powers.

8. On the merits of the plaintiff's case and in response to the first of the two principal arguments advanced by him, the State pleads that the adoption of the State's NREAP is not covered by Articles 6 or 7 of the Aarhus Convention or that, if it is, the public participation requirements of the Convention were met in the course of the adoption process.

9. In reply to the plaintiff's second principal argument, the State acknowledges that it did not carry out a strategic environmental assessment or an environmental impact assessment in adopting the NREAP but contends, in essence, that the SEA Directive did not apply to the NREAP because the NREAP is a statement (or restatement) of existing State policy and, thus, was unlikely to have any new significant environmental effects, and that the EIA Directive did not apply to the ENREAP because the ENREAP does not set the framework for future development consents bringing it within the relevant annexes to that Directive; does not have likely effects on sites that would require it to be assessed under Directive 92/43/EEC; and is not in a category that would require an environmental impact assessment to be carried out under the EIA Directive.

Background

10. The Aarhus Convention was concluded between members of the United Nations Economic Commission for Europe (UNECE) on the 25th of June 1998. There are sixteen signatories to the Convention, including both Ireland and the European Union ("EU"), of which Ireland is a member.

11. The Convention entered into force on the 30th of October 2001. It was approved by the EU on the 17th of February 2005 and ratified by Ireland on the 20th of June 2012.

12. The 2009 Directive on the promotion of the use of energy from renewable sources was adopted by the European Parliament and Council on the 23rd of

April 2009, which set a target for Ireland of meeting 16% of the her energy requirements from renewable sources by 2020.

13. Article 4(1) of the 2009 Directive requires national authorities to develop what is described as a national renewable energy action plan ("NREAP") and Article 4(2) required member states to notify their NREAP to the Commission by the 30th of June 2010. Ireland notified its NREAP to the Commission in July 2010. Slight modifications were made to it and it was re-submitted in October 2010.

14. Article 6 of the Aarhus Convention deals with public participation in the environmental decision making procedure on specific activities. In material part, it provides as follows:

> '...
>
> 3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public ...and for the public to prepare and participate effectively during the environmental decision making.
>
> 4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.
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> ...
>
> 8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.'

15. Article 7 of the Aarhus Convention requires signatory states to provide for public participation concerning plans, programmes and policies relating to the environment. It provides:

> 'Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.'

16. In preparing its NREAP, the State consulted the public in two ways: first, it conducted a targeted consultation process, in which a large number of bodies, including government departments, regulatory authorities, public utility companies, business and environmental advocacy groups, and other organisations associated with the energy sector, participated. Second, it established a public consultation process. This latter process took place between the 11th of June 2010 and the 25th of June 2010. During that period fifty-eight submissions were received from various persons or parties. The plaintiff did not make a submission at that time.

17. On the 15th of October 2010, the plaintiff made a complaint to the United Nations Economic Commission for Europe (UNECE) Compliance Committee ("the Committee"). The Committee is a body established under Article 15 of the Convention. Its function is to monitor compliance with its provisions. The complaint submitted to the Committee by the plaintiff alleged that the EU had failed to comply with its obligation pursuant to, amongst others, Articles 6 and 7 of the Convention in relation to Ireland's renewable energy policy. At the time the plaintiff made his complaint to the Committee, Ireland was not yet a party to the Convention.

18. On the 29th of June 2012, the Committee adopted certain findings and recommendations concerning the plaintiff's complaints. In the section of that document entitled 'Ireland's NREAP' the Committee found that the requirements of the EU's legal framework for implementing Article 7 of the Aarhus Convention:

> 'are of a very general nature and do not unequivocally point member States, including Ireland, in the direction of the requirements of the Convention when adopting plans or programmes relating to the environment based on EU law, *in casu*, plans related to renewable energy and, more in particular, NREAPs.'

19. The document continued:

> '80. A proper regulatory framework for the implementation of article 7 of the Convention would require Member States, including Ireland, to have in place proper participatory procedures in accordance with the Convention. It would also require Member States, including Ireland to

report on how the arrangements for public participation made by a Member State were transparent and fair and how within those arrangements the necessary information was provided to the public. In addition, such a regulatory framework would have made reference to the requirements of article 6, paragraphs 3, 4 and 8, of the Convention, including reasonable time-frames, allowing for sufficient time for informing the public and for the public to prepare and participate effectively, allowing for participation when all questions are open and how due account is taken of the outcome of the public participation.'

20. The Committee concluded as follows:

'83. Nevertheless, with respect to the consultation with the public conducted by Ireland the Committee finds that it was conducted within a very short time frame, namely two weeks. Public participation under article 7 of the Convention must meet the standards of the Convention, including article 6, paragraph 3, of the Convention, which requires reasonable time frames. A two week period is not a reasonable time frame for the "public to prepare and participate effectively", taking into account the complexity of the plan or programme....The manner in which the public was informed of the fact that public consultation was going to take place remains unclear; neither the [EU] nor the [plaintiff] provided clarity on the matter. The Committee furthermore points out that a targeted consultation involving selected stakeholders, including NGOs, can usefully complement but not substitute for proper public participation, as required by the Convention.

84. Proper monitoring by the [EU] of the compatibility of Ireland's NREAP with article 7 of the Convention would have entailed that the [EU] evaluate Ireland's NREAP in terms of the elements mentioned in paragraph 80 above. The [EU] thus should have ascertained whether the targeted consultation and the public participation engaged in when Ireland adopted its NREAP met the standards of article 7 of the Convention, including whether reasonable time frames were employed and whether the public consultation was properly announced in Ireland. The [EU] cannot deploy its obligation to monitor the implementation of article 7 of the Convention in the development of Ireland's NREAP by relying on complaints received from the public, as it is suggested it does during the public hearings conducted by the Committee.

85. Based on the above considerations, the Committee finds that the [EU] does not have in place a proper regulatory framework and/or other instructions to ensure implementation of article 7 of the Convention by its member States, including Ireland, with respect to the adoption of NREAPs. The Committee also finds that the [EU], in practice, by way of its monitoring responsibility, failed to ensure proper implementation of article 7 of the Convention by Ireland with respect to the adoption of its NREAP. The Committee thus finds that the [EU] in both these respects is in non-compliance with article 7 of the Convention.'

Judicial review proceedings

21. On the 12th of November 2012 the plaintiff initiated judicial review proceedings ("the judicial review proceedings") against the State. The plaintiff initially acted as a litigant in person, but solicitors subsequently came on record for him on the 17th of February 2013.

22. In the statement of grounds filed in support of his application for leave to bring the judicial review proceedings the applicant sought the following reliefs: an order of *certiorari* quashing Ireland's NREAP on the grounds that it did not comply with various provisions of the Convention; an order of *certiorari* quashing an administrative scheme known as the 'Renewable Energy Feed Tariff' ("REFIT"); a number of declarations that Ireland has contravened the provisions of the Convention (including a declaration that the State failed to comply with the provisions of the Convention which require public participation in the formulation of signatory states' NREAPs); and a protective costs order.

23. On the 29th of January 2013 the defendants brought a motion to have the plaintiff's claim in those proceedings dismissed *in limine* on the basis that it had not been brought within the three month time limit for the commencement of judicial review proceedings prescribed by Order 84, rule 21 of the Rules of the Superior Courts ("RSC"). That motion came on for hearing before Kearns P. on the 12th April 2013 and ran for a number of days, culminating in an Order made by the Court on the 16th April 2013 that the matter should proceed instead by way of plenary proceedings. Accordingly, Kearns P. made an order striking out the judicial review proceedings 'for want of form' and, at the same time, striking out the State's motion to dismiss those proceedings.

The present proceedings

24. The plenary summons by which the present proceedings were initiated was issued on the 24th of April 2013. An appearance was entered on behalf of the State on the 10th of May 2013. The plaintiff's statement of claim was delivered on the 17th of June 2013. The State raised a notice for particulars on the 15th of July 2013 and the plaintiff delivered the relevant replies on the 7th of October 2013. A defence to the plaintiff's claim was delivered on the 18th of November 2013. With the consent of the State, the plaintiff delivered an amended statement of claim on the 17th of June 2014.

25. In his original statement of claim, the plaintiff impugned three specific aspects of the State's environmental policy, to wit: the NREAP, the purpose and genesis of which have already been described; the Renewable Energy Feed In Tariff ("REFIT") programme, which is a financial support scheme (with state aid clearance from the European Commission); and the Energy Policy Framework 2007-2020 ("the EPF"), a departmental white paper, the purpose of which is to set out a policy for delivering a sustainable energy future for the State. In his amended statement of claim, delivered with the consent of the State on the 17th of June 2014, the plaintiff has, in effect, dropped any claim for relief in respect of the REFIT programme or the EPF.

26. Having set out in a very general way the nature and history of the underlying proceedings, I now come to the two applications that are before the Court.

Delay

27. The first of those applications in time is the State's motion to have the present proceedings dismissed by reason of delay. That motion issued on the 21st of March 2014. While the relief it seeks is couched as an order dismissing the proceedings on grounds of laches or, in the alternative, the plaintiff's inordinate and inexcusable delay in bringing both his application for judicial review and the present plenary proceedings, the real issue it raises is whether the plaintiff's challenge to the lawfulness of the State's NREAP is prohibited by operation of the time limits applicable to applications for judicial review.

28. The relevant facts, which I do not understand to be in dispute, are the following. Article 4(2) of Directive 2009/28/EC of 23 April 2009 required each Member State, including Ireland, to notify its NREAP to the Commission by the 30th June 2010. The State notified its NREAP to the Commission in July 2010. A slightly amended or modified version of that NREAP was notified to the Commission in October 2010. The plaintiff was certainly aware, no later than the 15th of October 2010, that the State had adopted the NREAP at issue, since that was the date upon which he made the relevant complaint to the Committee concerning the circumstances of its adoption. The plaintiff did not initiate judicial review proceedings until the 12th of November 2012. In those proceedings, the plaintiff sought, amongst other reliefs, an order quashing the State's NREAP. Accordingly, depending on the view one takes of the significance of the State's notification to the Commission of a slightly amended NREAP in October 2010, the plaintiff did not commence his challenge to the lawfulness of the State's NREAP for a period of somewhere

between 25 months and 28 months after its adoption was notified to the Commission.

29. On the 29th January 2013, the State issued a motion seeking to have the plaintiff's proceedings struck out as outside the time limits prescribed for applications for judicial review under O. 84, r. 21 of the Rules of the Superior Courts ("RSC"). That motion came on for hearing on the 12th April 2013 and, on the 16th April 2013, Kearns P. struck out both the motion and the underlying judicial proceedings, while at the same time granting the plaintiff liberty to proceed by way of plenary proceedings.

30. It seems to me appropriate to give the plaintiff the benefit of the doubt on this point and to assume, for the purposes of the present application, that, in striking out the plaintiff's judicial review proceedings while granting him liberty to issue and serve a plenary summons, Kearns P. was invoking an inherent jurisdiction akin to that envisaged under O. 84, r. 27(5) of the RSC, whereby the Court, when hearing an application for judicial review in which the relief sought is a declaration or injunction, may, instead of refusing the application, order the proceedings to continue as if they had been begun by plenary summons. The Supreme Court recognised the existence of such an inherent jurisdiction in *PCO Manufacturing Ltd v Irish Medicines Board* [2001] IESC 46.

31. That being so, it is appropriate to identify the relevant period for the purposes of the present motion as that between the notification of the State's NREAP to the Commission in July or October 2010 and the initiation of judicial review proceedings by the plaintiff on the 12th of November 2012, rather than that

between the former event and the issue of the plenary summons in these proceedings on the 24th April 2014.

32. Equally, however, it does not seem to me correct to say that, in pursuing what must be considered, on any view, a public law remedy in a plenary action, the plaintiff is freed from the constraints of the time limit imposed by O. 84, r. 21 of the RSC. In *O'Donnell v. Dún Laoghaire Corporation* [1991] I.L.R.M. 301, the Court considered the principles relating to delay which apply in cases in which the actions of a public authority are challenged by way of plenary action seeking declaratory relief, rather than by way of application for judicial review. Costello J. set out those principles as follows, at pp. 314-315 of the report:

> 'A declaratory order is a discretionary order arising from the wording of statute which conferred jurisdiction on the courts to make such orders (see Wade, *Administrative Law* 5th ed., p. 523) and it is well established that a plaintiff's delay in instituting plenary proceedings may, in the opinion of the court, disentitle the plaintiff to relief. It seems to me that in considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in O. 84, r. 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under O. 84 time would have been extended. The rules committee considered that there were good reasons why public authorities should be protected in the manner afforded by O. 84, r. 21 when claims for declaratory relief were made in

applications for judicial review and I think exactly the same considerations apply when the same form of relief is sought in a plenary action. Furthermore, it is not desirable that the form of action should determine the relief to be granted and this might well be the result in a significant number of cases if one set of principles on the question of delay was applied in applications for judicial review and another in plenary actions claiming the same remedy. And in plenary actions the effect of delay can in many cases be determined on the trial of a preliminary issue and as speedily as if the issue fell to be determined in an application for judicial review.'

33. At the time when the State's NREAP was notified to the Commission in July or November 2010, Order. 84, rule. 21 of the RSC provided as follows:-

> '(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made.'

34. With effect from the 1st January 2012, O. 84, r. 21 of the RSC was amended (by S.I. 691 of 2011) to provide instead, in relevant part:

> '(1) An application for leave to apply for judicial review shall be made within three months from the date when the grounds for the application first arose.

(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:-

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

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either –

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.'

35. Faced with the decision of Costello J. in *O'Donnell*, the plaintiff advances a range of different arguments to the effect that he should nonetheless be permitted to maintain a challenge commenced no less than 25 months from the date when the grounds for the application first arose. I will address each of those arguments in turn.

i. date when grounds first arose

36. Although not strictly relevant for the purpose of the plenary proceedings now at hand (and, hence, for the purpose of the present application), it is perhaps interesting to note that, in the affidavit that he swore on the 7th November 2012 to ground his application for leave to seek judicial review, the plaintiff averred that he considered that he was within time to bring that application 'given that it is less than three months since grounds for application arose, namely the findings and recommendations of the UNECE Aarhus Convention Compliance Committee on the 16th August 2012.' For the purpose of the present application, no attempt was made to argue on the plaintiff's behalf that the grounds for the plaintiff's challenge to the lawfulness of the State's NREAP somehow arose, or arose only, in the context of the Committee's findings and recommendations of the 16th August 2012.

37. The plaintiff's written submissions instead asserted that 'it is the plaintiff's primary submission that [he] moved (on the 16th November 2012) to challenge the State's actions at the first opportunity after he believed ratification had taken place by Ireland of the Aarhus Convention (29th of September 2012).' Indeed, the plaintiff himself swore an affidavit on the 3rd June 2014 in response to the State's motion in which he avers:

> 'Had Ireland ratified the [Aarhus] Convention then I would have made an application for judicial review. I certainly wanted to.'

38. The plaintiff's written submissions go on to note that Dail Éireann approved the Aarhus Convention in accordance with Article 29.5.2° of the Constitution of Ireland on the 14th June 2012; that Ireland deposited its formal instrument of ratification with the U.N. on the 20th June 2012; and that the Convention

therefore entered into force for Ireland 90 days later on the 18th September 2012 . The plaintiff then submits: 'The limitation period for the judicial review proceedings was three months from this date.'

39. That submission was abandoned in the course of oral argument. For the avoidance of any doubt, there are several reasons why I cannot accept that it is correct.

40. The first reason derives from the important distinction between Article 29.5.2° and Article 29.6 of the Constitution. The former deals with the requirement that any international agreement involving a charge upon public funds be approved by Dail Éireann if it is to bind the State. The latter makes clear that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas. It is the latter provision – and not, as the plaintiff's submissions suggest, the former - to which the Court had regard in *Klohn v An Bord Pleanála* 2011 [IEHC] 196; *NO2GM Ltd v Environmental Protection Agency & Anor* [2012] IEHC 369; *Waterville Fisheries Development Ltd v Aquaculture Licences Appeals Board* [2014] IEHC 522.

41. Thus, and this is the second reason, the State's ratification of the Aarhus Convention in accordance with the provisions of Article 29.5. 2° of the Constitution could not have had the effect, in and of itself, of incorporating the Convention into domestic law. The date upon which the State's ratification of the Aarhus Convention took effect against the State as a matter of international law has no relevance in relation to the application of the appropriate time limit under O.84, r. 21 of the RSC.

42. I am satisfied that the date when the grounds for the plaintiff's challenge to the NREAP first arose cannot have been later than the end of October 2010. It follows that the plaintiff's application for leave to seek judicial review in November 2012 occurred no fewer than 24 months after that date, rather than within the three months permitted under O. 84, r. 21, absent an extension of that period.

ii. Order 84 time limit contrary to EU law

43. At the hearing before me, the plaintiff most particularly relied upon the argument that the application of the O. 84 time limit is impermissible as contrary to EU law. That argument is advanced on three broad grounds: first, that the application of the time limit is contrary to the principle of legal certainty; second, that the application of any such time limit must be postponed until the incorporation of the relevant rights under the Aarhus Convention into the domestic of the State or a determination that those rights are directly effective; and third, that the application of the time limit is contrary to the right of the plaintiff to an effective remedy.

44. In support of the first ground, the plaintiff invokes the decision of the CJEU in *Commission v Ireland (Case C-456/08)*[2010] E.C.R. I-859. There, the CJEU held that the three-month time limit then prescribed by O. 84A of the RSC, applicable to the review of the award of public contracts, was contrary to EU law on two distinct grounds.

45. First, the CJEU held that it was unclear to which decision that time limit applied. The decision-making process impugned in that case consisted of two separate stages, an interim stage and a final stage. The court held that the application of the time limit to decisions made at the interim stage could not have been foreseen and that its application at that stage deprived the right of persons to challenge administrative decisions of its practical effectiveness. The court said:

> '55...the Irish courts may interpret that provision as applying not only to the final decision to award a public contract but also to interim decisions taken by a contracting authority during the course of that public procurement procedure. If the final decision to award a contract is taken after expiry of the period laid down for challenging the relevant interim decision, the possibility cannot be excluded that an interested candidate or tenderer might find itself out of time and thus prevented from bringing an action challenging the award of the contract in question.
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> 56 According to the Court's settled case-law, the application of a national limitation period must not lead to the exercise of the right to review of decisions to award public contracts being deprived of its practical effectiveness...
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> 57 As observed by the Advocate General in point 51 of her Opinion, only if it is clear beyond doubt from the national legislation that even preparatory acts or interim decisions of contracting authorities at issue in public procurement cases start the limitation period running can tenderers and candidates take the necessary

precautions to have possible breaches of procurement law reviewed effectively within the meaning of Article 1(1) of Directive 89/665 and to avoid their challenges being statute-barred.

58 Accordingly, it is not compatible with the requirements of Article 1(1) of that directive if the scope of the period laid down in Order 84A(4) of the RSC is extended to cover the review of interim decisions taken by contracting authorities in public procurement procedures without that being clearly expressed in the wording thereof.'

46. However, it seems to me that this holding cannot avail the plaintiff here since, on any view of the facts that are not in dispute, he is out of time to mount the present challenge. This is not a case in which the resolution in the plaintiff's favour of any possible ambiguity concerning the date upon which the grounds for challenging the State's NREAP arose could bring that challenge within the applicable time limits.

47. The second infirmity that the CJEU identified in O.84A, as it then stood, was the uncertainty in the language of the rule. It provided that challenges to decisions to which it applied 'shall be made at the earliest opportunity and in any event within three months.' The court stated, at para. 75:

'75 It is not possible for parties concerned to predict what the limitation period will be if this is left to the discretion of the competent court. It follows that a national provision providing for such a period does not ensure effective transposition of Directive 89/665.'

48. The State in moving its motion for delay does not rely upon any such general language but, rather, on the simple proposition that the plaintiff's claim was not brought within the three-month time limit prescribed under O. 84, r.21. Nor could the State rely on any such language since, as already described, O. 84 was amended not long after the decision of the CJEU in *Commission v. Ireland*, to remove the requirement of promptness within the three month limitation period, equivalent to the requirement to move 'at the earliest opportunity' within three months under O. 84A, which requirement has also now been removed.

49. It therefore seems to me that the decision of the CJEU in *Commission v. Ireland* is of no assistance to the plaintiff in seeking to defeat the State's motion.

50. It is plain that the imposition of time limits prescribed by national law to actions arising under EU law is permissible as a matter of general principle. In the case of *Denkavit International BV vKammer van KoophandelenFabriekenvoorMidden-gelderland (Case C-2/94)* [1996] E.C.R. I-2827, Advocate General Jacobs made the following statement:

> 'The imposition by a Member State of a reasonable time-limit for taking legal proceedings to challenge a decision cannot be considered to make reliance on Community law virtually impossible or excessively difficult. Such time-limits are an application of the

principle of legal certainty protecting both individuals and administrations.'

51. The CJEU has expressed itself in similar terms. In the case of *Rewe-ZentralfinanzEgand Rewe-Zentral AG v Landwirtschafskammer fur das Saarland (Case 33/76)* [1976] E.C.R. 1989 the court stated:

'the principle of cooperation laid down in Article 5 of the Treaty it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.

Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature…

In the absence of such measures of harmonisation the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.

This is not the case where reasonable periods of limitation of actions are fixed.'

52. Indeed, it is perhaps worthy of note that Article 263 of the Treaty on the Functioning of the European Union ("TFEU") itself prescribes a two-month time limit for bringing proceedings which seek to review the legality of acts of the institutions, bodies, offices, and agencies of the EU.

53. In this context, it is important to bear in mind the purpose served by the imposition of time limits on challenges to the decisions of public authorities. The authors of Wade and Forsyth, *Administrative Law*, 10th Ed.,(Oxford, 2009) state, at p. 561, that:

> '[g]ood administration requires that important decisions, on which many other decisions and actions will depend, should not be able to be set aside long after the event by a successful application or claim for judicial review.'

54. In support of the second ground, the plaintiff relies upon the decisions of the CJEU in *Emmott v Minister of Social Welfare (Case C-208/90)* [1991] E.C.R I-4269 and in *Commission v. Ireland (Case C-13/00)* E.C.R I-2943 *("Berne Convention")* which, he contends, establish the broad proposition that, in circumstances where a Member State is obliged under EU law to provide protection to certain rights under its national law, time limits should only begin to run against litigants seeking to rely on those rights once they have been properly implemented in national law.

55. *Emmott* concerned the failure by the State to implement certain provisions of Directive 79/7 on equal treatment for men and women in matters of social

security. The State sought to rely on certain time limits prescribed by national law in order to have the plaintiff's claim dismissed. The High Court made a preliminary reference to the CJEU seeking its guidance on whether the national authorities were entitled to do so.

56. The CJEU stated:

> 'until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.'

57. In the case of *Denkavit International BV v Kammer van KoophandelenFabriekenvoorMidden-gelderland (Case C-2/94)* [1996] E.C.R. I-2827, Advocate General Jacobs explained the holding of the CJEU in *Emmott* in the following terms:

> 'It seems to me that the judgment in *Emmott*, notwithstanding its more general language, must be read as establishing the principle that a Member State may not rely on a limitation period where a Member State is in default both in failing to implement a directive and in obstructing the exercise of a judicial remedy in reliance upon it, or perhaps where the delay in exercising the remedy – and hence the failure to meet the time-limit -is in some other way due to the conduct of the national authorities. Seen in those terms the Emmott judgment

> may be regarded as an application of the well established principle that the exercise of Community rights must not be rendered 'excessively difficult.''

58. I do not believe that the decision of the CJEU in *Emmott*, whatever its precise parameters, is on point here, since the present case does not concern an attempt by a Member State to rely upon time limits prescribed by national law in the context of the failure of that state to transpose a directive within a deadline prescribed under EU law.

59. The *Berne Convention* case concerned Ireland's failure to implement the Berne Convention for the Protection of Literary and Artistic Works, in default of the requirement imposed by Article 5 of Protocol 28 to the Agreement on the European Economic Area ("the EEA Agreement"), upon all signatory states to the EEA to do so. The Commission addressed a reasoned opinion to Ireland on 17 December 1998 requesting compliance within two months.

60. In finding that Ireland had failed to adhere to the Berne Convention, as required by the EEA Agreement, the CJEU made the following statement:

> 'Further, a Member State cannot plead provisions, practices or situations within its internal legal order in order to justify its failure to fulfil obligations under Community law.'

61. The plaintiff submits that *Berne Convention* establishes a broad general principle that Member States cannot rely upon non-ratification of an international agreement in order to have a plaintiff's action struck out, on the

basis of their delay in bringing proceedings, when the plaintiff's delay in pursuing those proceedings was itself attributable to the State's failure to ratify that agreement.

62. However, in my view the *Berne Convention* case did not concern the question of the extent to which a Member State may rely upon time limits prescribed by national law, in circumstances of alleged default in its obligations under EU law, at all. Rather, that case is concerned with the quite separate question of whether the State, in its failure to adhere to the Berne Convention, had breached the EEA agreement. For this reason, I do not consider that the decision of the CJEU in *Berne Convention* assists the plaintiff's argument.

63. The third ground upon which the plaintiff seeks to rely is his contention that his right to an effective remedy, which is both a general principle of EU law (see, *Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84)*[1986] E.C.R 1651),and a right latterly enshrined in Article 47 of the EU Charter of Fundamental Rights ("EUCFR"), would be violated if his proceedings were to be dismissed on grounds of delay.

64. The *dicta* I have cited above, however, make it plain that the application of reasonable time limits, prescribed in national legislation, to claims brought under EU law, is not inconsistent with the right to an effective remedy. Indeed, after recognising the right to an effective remedy, Article 47 of the EUCFR itself states that '[e]veryone is entitled to a fair and public hearing within a

reasonable time…' It is for the purpose of securing that entitlement that provisions such as O.84, r. 21 exist.

65. For these reasons, I can find no basis to conclude that the application of the O. 84 time limit is contrary to any identified principle of EU law.

iii. abuse of process

66. In the plaintiff's written submissions, the argument is advanced that the present application is either misconceived or an abuse of process in that the plaintiff's judicial review proceedings have been dismissed and the plaintiff has been given leave to issue and serve a plenary summons in relation to the cause concerned. I cannot accept either of those arguments.

67. As noted earlier, the decision of this Court in *O'Donnell v. Dún Laoghaire Corporation* makes clear that there is no misconception in the application of the time limits under O. 84 of the RSC to plenary proceedings seeking declaratory relief in respect of a public law decision. Further, I do not accept that, in striking out the State's application to dismiss the plaintiff's judicial review proceedings when striking out those proceedings, Kearns P either intended or purported to dismiss that application on its merits. To my mind, the only sensible inference to be drawn from the terms of the Order made by Kearns P. on 16th April 2013, in light of the circumstances in which it was made, is that the decision to strike out the State's application to dismiss the plaintiff's judicial review proceedings was a house-keeping measure consequent upon the Court's decision to strike out those proceedings.

68. Further, I am satisfied that it was reasonable for the State to await the delivery of the plaintiff's statement of claim before moving to have that claim dismissed as one covered by the principles identified in *O'Donnell v. Dún Laoghaire Corporation* and that there is no basis for the assertion that, in doing so, the State was itself responsible for some culpable delay.

69. Finally, I do not accept the proposition that the present application has been brought in breach of the rule in *Henderson v Henderson* [1843] 3 Hare 100. There is no suggestion here of the plaintiff here being oppressed by successive suits when one would do. It is the plaintiff who has been given permission to reconstitute his proceedings. The State is not raising a new point in seeking to rely on the O. 84 time limit in these reconstituted proceedings, since that is was it did in the original application for judicial review. The authorities cited by the plaintiff in this regard – *Re Vantive Holdings* [2009] IESC 69, *AA v Medical Council* [2003] 4 IR 302, *Arklow Holidays Ltd v An Bord Pleanála* [2012] 2 IR 95 and *Ashcoin Ltd v Moriarty Holdings Ltd (No. 2)* [2013] IEHC 8 – are readily distinguishable on their facts from this case.

iv. extension of time and prejudice

70. While the plaintiff focussed on the various arguments that I have just addressed in submitting that his challenge is not barred under the O. 84 time limit, the State, presumably in anticipation of the argument that the Court should extend that time limit in exercise of the jurisdiction conferred under O.

84, r. 21(3), directed a considerable part of its case to the potential prejudicial effect of such an extension on the interests of both the State and the public generally. The potential prejudicial effects asserted include: the impairment of the attainment of Ireland's legally binding target (imposed by the NREAP Directive) of satisfying 16% of her energy needs from renewable sources by 2020, with significant cost implications for the State; loss of confidence and reduced investment in the renewable energy sector; damage to the development of renewable energy, together with a correlative increase in the use of fossil fuels within the State; and adverse effects on economic growth, employment, and energy costs. The plaintiff takes issue with these assertions on the basis that they are unsupported and uncorroborated for the purpose of the present application.

71. No application for an extension of time under O. 84, r. 21(3) has been made i this case. It follows that no attempt has been made to persuade the Court that there is good and sufficient reason for doing so or that the circumstances that resulted in the plaintiff's failure to bring his challenge to the State's NREAP within the three month period prescribed were outside his control or could nto reasonably have been anticipate by him. Thus, it seems to me that no requirement arises under Order 84, r. 21(4) for the Court to have regard to the effect that an extension of time might have on the State or a third party, as would otherwise be necessary under O. 84, r. 21(4).

72. If it were necessary to have regard to the possible effects of an extension of time on the State or a third party, it seems to me that I would have to approach

this case as one affecting the public generally and the energy sector of the State's economy in particular, with the result, in my view, that a more rather than less strict of the applicable time limit would have to be adopted; see, for example, *Noonan Services Ltd v Labour Court* [2004] IEHC 42 (High Court) and 14th May 2004, unreported, *ex temp.* (Supreme Court).

Conclusion on delay

73. For the reasons I have set out in the preceding portion of this judgment, I have come to the conclusion that the State is entitled to succeed in its application for an order striking out these proceedings on grounds of delay.

Protective Costs Order

74. The question of the costs of the proceedings is, of course, already before the Court in the context of the plaintiff's application for a protective costs order.

75. In that context there was much debate before me concerning the correct position in law. Yet it seems to me that, in the particular circumstances of this case, the issue is really one of fact.

76. In support of his claim for a protective costs order the plaintiff has made extensive legal submission. First, the plaintiff submits that he is entitled to rely on Article 9 of the Aarhus Convention, on the basis that it has been rendered directly effective by virtue of its adoption into EU law by EU Council Decision 2005/370/EC.

77. Second, the plaintiff relies upon the decision of the Court of Justice of European Union ("CJEU") in the case of *Lesoochranárske zoskupenie (Case C-240/09)* [2011] E.C.R. I-1255 *("Brown Bear")* in support of the argument that the provisions of Article 9(4) have direct effect.

78. Third, he contends that he is, therefore, entitled to rely upon the requirement under Article 9(4) of the Aarhus Convention that the legal review procedures (whether administrative or judicial) that the State is required to make available to him must not be prohibitively expensive, is a directly effective provision under EU law.

79. In *Brown Bear* the CJEU discussed the circumstances in which an international agreement concluded between the EU and non-member countries would be deemed to have direct effect. The court made the following statement, at para. 46 of its judgment:

> 'a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose of and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.'

80. The CJEU held that Article 9(3) of the Convention, which concerns the right of members of the public to have access to judicial and administrative procedures to enable them to challenge acts which contravene environmental law, did not have direct effect.

81. The plaintiff submits that Article 9(4) does satisfy the requirements for direct effect laid down in *Brown Bear* on the basis that it is clear and precise in requiring that proceedings to which it applies not be prohibitively expensive.

82. The plaintiff further submits that, even though it is left to the Member States to determine what is or is not 'prohibitively expensive,' the obligation to fulfil that requirement falls to the courts in the event that the legislature has not adequately implemented Article 9(4).

83. In *Brown Bear* the CJEU made the following statement concerning the responsibilities of the Member States of the EU, and in particular of national courts, in ensuring the effective protection of rights deriving from EU law, at paras 47-51:

> '47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 45).
>
> 48 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise

rights conferred by EU law (principle of effectiveness) (*Impact*, paragraph 46 and the case-law cited).

49 Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 44, and *Impact*, paragraph 54).'

84. Applying these *dicta*, suitably adapted, to the facts of the present case the plaintiff submits that this court is required, as a matter of EU law, to interpret the domestic rules in relation to costs so as to ensure that it will not be prohibitively expensive to bring proceedings seeking to challenge decisions of national authorities in the area of environmental policy.

85. The plaintiff also invokes the EU law principles of effectiveness and equivalence in that regard. The principle of effectiveness requires that national law should provide effective remedies in respect of violations of rights conferred by EU law. The principle of equivalence requires that the remedies and actions available to ensure the observance of national law should be made available in the same way to ensure the observance of EU law. The plaintiff submits on the basis of these principles that the court should make a protective costs orders in his favour, in accordance with the principles applied by the CJEU in making such orders in the environmental context.

86. In making that submission the plaintiff relied upon the decisions of the CJEU in *Edwards v Environment Agency (Case C-260/11)* (CJEU, 11 April 2013) and in *Commission v United Kingdom (Case C-530/11)* (CJEU, 13 February 2014) and the decision of this court (*per* Hedigan J.) in *Hunter v. Nurendale Ltd t/a Panda Waste* [2013] IEHC 430), each of which concerned the requirement laid down by Article 9(4) of the Convention (and incorporated into certain discrete provisions of EU and national law) that environmental proceedings not be prohibitively expensive.

87. In replying to the plaintiff's submission that Article 9(4) of the Convention should be held to be directly effective, the State relied upon the decision of the

Court of Appeal in the case of *McCoy v Shillelagh Quarries Ltd* [2015] IECA 28. In that case, in the context of a discussion of the provisions of Article 9(3) and Article 9(4) of the Convention, the court (*per* Hogan J.) made the following statement:

> '18…it must equally be observed that, as we have noted already, these critical provisions of the Aarhus Convention are themselves expressed to be contingent on the application of national law, so that, for example, within the sphere of application of EU law, these obligations are not regarded as sufficiently clear and unambiguous in themselves so as to create direct effects for the purposes of EU law.'

88. I have concluded that it is unnecessary to express a view on the disputed contention of the plaintiff that he has an entitlement to a protective costs order in the circumstances of this case by operation of EU law.

89. I have reached that conclusion by reference to the facts of the present case and, in particular, by reference to the position concerning the plaintiff's costs expressly adopted by the State.

90. The plaintiff's application for a protective costs order issued on 4th April 2014. It was preceded by a letter to the State written on the 28th March 2014, just one week earlier. That letter invited the State to agree that the present proceedings are covered in their entirety by s. 50B of the Planning and Development Act 2000, as amended. S. 50B of that Act provides that, in relation to the categories of proceedings that it covers, each party shall bear its own costs.

91. On the 17th of April 2014, an affidavit was sworn on behalf of the State in response to the plaintiff's motion. It includes an averment confirming the State's agreement that s. 3 of the Environmental (Miscellaneous Provisions) Act 2011 ("the 2011 Act") and section 7 of that Act applies to these proceedings. S. 3 of the 2011 Act provides that, in the categories of proceedings to which it applies, each party shall bear its own costs. S. 7 allows a party to apply to the Court at any stage of proceedings for a determination that s. 3 applies but, more significantly for present purposes, it also permits the parties to proceedings to agree that s. 3 applies. It is clear to me, therefore, that just such an agreement has been reached in this case.

92. Given the express and unequivocal concession of the State concerning the applicability of both s. 50B of the 2000 Act and s. 7 of the 2011 Act to the present proceedings, it seems to me that the State must be taken as having agreed that it would not seek its costs of these proceedings from the plaintiff, a concession which seems to go as far in protecting the plaintiff from prohibitive expense in the conduct of the present action as any protective costs order could.

93. In those circumstances, it is unnecessary to make a protective costs order in relation to the present proceedings and I do not propose to do so.