Judgment Title: Shell E & P Ireland Ltd v McGrath & ors

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Court: Supreme Court

Composition of Court: Denham C.J., Fennelly J., Clarke J.

Judgment by: Clarke J.

Status of Judgment: Approved

Judgments by	Link to Judgment	Result	Concurring
Clarke J.	Link	Appeal allowed	Denham C.J., Fennelly J.

Outcome: Allow And Substitute Order

THE SUPREME COURT

[Appeal No: 349/2010]

Denham C.J.
Fennelly J.
Clarke J.

Between/

Shell E & P Ireland Limited

Plaintiff

and

Philip McGrath, James B. Philbin, Willie Corduff, Monica Muller, Brid McGarry and Peter Sweetman

Defendants/Respondents

and

The Minister for Communications, Marine and Natural Resources, Ireland and The Attorney General

Defendants to the Counter-claim/Appellants

Judgment of Mr. Justice Clarke delivered the 22nd January, 2013.

1. Introduction

1.1 The proposed construction of an on-shore gas pipeline, to connect the sub-sea wells of the Corrib gas field with an on-shore gas terminal near Rossport in Co. Mayo, has been the subject of significant political and legal controversy for many years. Aspects of that proposal form the backdrop to the issue which this court now has to consider. However, it is important to emphasise, at the outset, that this court is not now concerned with the legality of that proposal still less the merits or otherwise of same and is only indirectly concerned with some of the legal issues which have been canvassed in relation to that proposal.

1.2 In simple terms (and at the very real risk of over simplification) this court is concerned with the time limits which apply for bringing certain types of judicial review applications before the courts and the application of those time limits to the circumstances of this case. These proceedings have a complex procedural history, some of which will require to be considered in order to resolve the issues which arise on this appeal. I will turn to that procedural history in due course. However, for present purposes it is sufficient to note that certain statutory decisions were made by the first named defendant to the counter-claim ("the Minister") which decisions were in favour of the plaintiff ("Shell") and, if valid, facilitate Shell in giving effect to the proposed pipeline. It will be necessary to refer to the specific decisions in due course.

1.3 These proceedings commenced with Shell seeking injunctions and other relief connected with what was alleged to be a wrongful interference by certain local residents and their supporters (including the defendants) with what Shell asserted was lawful work carried on by it in respect of the construction of the pipeline. As part of the defence to that claim the Minister and the other State defendants were joined as defendants to a counter-claim in which the validity of the statutory decisions concerned was challenged. In addition damages were sought in that counterclaim against Shell on the basis that, it was argued, the statutory decisions in question were invalid and as a consequence Shell was said to have had no legal authority for entering onto relevant lands and carrying out relevant works.

1.4 The Minister contended in the High Court that the claim which sought to question the validity of the relevant statutory decisions was out of time. That question was tried as a preliminary issue by the High Court (Laffoy J.) but the Minister's contentions were rejected in a judgment delivered on the 4th March, 2010, [2010] IEHC 363. The Minister and the other State defendants have appealed to this court against that rejection. It follows that this judgment is concerned with whether the Minister is correct in the contention, which he unsuccessfully argued before the High Court, to the effect that it is now too late to question the validity of the statutory measures which are sought to be challenged in the counter-claim in these proceedings. From that brief description of the issues which arise, it is fairly clear that some account of the complex procedural history of these proceedings is necessary in order to understand the precise issues which arise on this appeal. I, therefore, turn to that procedural history.

2. Procedural History

2.1 Shell issued proceedings against the six named defendants on the 4th March, 2005 with a statement of claim being delivered on the 18th April. Damages were sought together with various orders restraining the defendants from a variety of alleged activities in respect of relevant lands at Rossport which had been the subject of compulsory acquisition orders ("CAOs") made by the Minister under s.32 of the

Gas Act, 1976 (as amended).

2.2 As a result of a judgment of Laffoy J. delivered on the 23rd March, 2006, [2006] 2 I.L.R.M. 299, an amended defence and counterclaim were filed on the 30th March, 2006. In that counterclaim, damages were sought against Shell together with various declarations designed to establish that the CAOs were invalid and of no effect, that a consent granted by the Minister under s.40 of the Gas Act, 1976 ("the consent") was void together with various constitutional claims and claims arising under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). By virtue of the reliefs sought in that counterclaim, it was, of course, necessary to join the Minister and the State defendants ("the Minister") as defendants to that counterclaim.

2.3 The Minister filed a defence to the counterclaim on the 27th April, 2006. In that defence, amongst other things, the Minister alleged that the defendants were guilty of *laches* or delay in seeking equitable relief. In addition the Minister asserted that the defendants had failed to comply with the time limits specified in O.84 of the Rules of the Superior Courts in seeking to challenge the validity of the CAOs and the consent. It should also be noted that Shell's claim against the fourth and sixth named defendants was struck out by Laffoy J. for want of prosecution on the 28th September, 2006.

2.4 On the 18th April, 2007 Laffoy J. granted an application brought by Shell in which leave was sought under O.26, r.1 of the Rules of the Superior Courts, to discontinue the proceedings against the remaining defendants. However, the counterclaim remained in being. It is clear, therefore, that from early 2007 onwards the only remaining issues which arose in these proceedings were those which arose on the counterclaim which, as has been pointed out, involves claims by the defendants against both the Minister and Shell in which the validity of both the CAOs and the consent were challenged and in which damages was sought against Shell.

2.5 Thereafter Laffoy J. directed (by order of the 23rd April, 2007) that the public law issues arising on the counterclaim be tried as preliminary issues between the defendants and the Minister. Those issues involved the questions raised as to the validity of both the CAOs and the consent together with issues as to the standing of the defendants to raise the constitutional issues advanced coupled with questions as to whether those issues were moot.

2.6 Points of claim and points of defence were, in accordance with the court's directions, filed. The Minister, in the relevant points of defence, insofar as material to the issues which arise on this appeal, asserted that there had been delay or *laches* in seeking the declarations as to invalidity of the CAOs and the consent and that there had been a failure to comply with the time limits specified in the Rules of the Superior Courts.

2.7 On the 17th December, 2007, Laffoy J. directed that the questions concerning whether the counterclaim was out of time in seeking to raise a challenge to the validity of the CAOs and the consent be tried first. Those matters were heard with judgment being delivered on the 4th March 2010, [2010] IEHC 363. Against the background of that procedural history it is next necessary to turn to the High Court judgment.

3. The High Court Judgment

3.1 Having reviewed the procedural history in some detail Laffoy J. went on, in section 8 of her judgment, to set out the issues which then fell for decision. In so

doing the trial judge identified two core issues in the following terms:-

> *"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."*

3.2 In addressing the first core issue Laffoy J. identified the starting point for any consideration as to whether O.84, r.21 of the Rules of the Superior Courts applied by analogy as being the judgment of Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301. It will be necessary to analyse *O'Donnell* in due course.

3.3 Laffoy J. also noted relevant jurisprudence from the United Kingdom commencing with the decision of the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237 and, perhaps more importantly from the perspective of the case made by the defendants, including the subsequent decision of the House of Lords in *Wandsworth L.B.C. v. Winder* [1985] 1 A.C. 461. Laffoy J. also noted those occasions when both *O'Donnell* and *Wandsworth* had been the subject of judicial comment in this Court.

3.4 On the basis of that analysis Laffoy J. set out, in section 15 of her judgment, her conclusions on the question of whether O.84, r.21 applied by analogy. The trial judge was of the opinion that this case was distinguishable from *O'Donnell*, as these proceedings involve circumstances where the parties had been initially drawn into the action as defendants sued by a private body, whereas *O'Donnell* involved circumstances wherein the affected party had initiated the proceedings against a public body.

3.5 The trial judge also considered the facts and principles enunciated by the House of Lords in *Wandsworth*. While suggesting that the position of the defendants in these proceedings differed from that of the defendant in the *Wandsworth*, Laffoy J. was of the opinion that the defendants' position in this case, "while disclosing a

more complex procedural matrix, is more compelling on the facts than the position of the defendant in the *Wandsworth*case."

3.6 Importantly, at section 15.7 of her judgment, Laffoy J. stated:-

> *"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."*

3.7 The trial judge acknowledged that it was legitimate for the legislature to impose a time limit on a prospective litigant although she suggested that any time limit imposed must be compatible with the unenumerated right to litigate contained in Article 40.3 of the Constitution. Laffoy J. held that no such limitation had been imposed by the legislature in respect of challenges to the CAOs and the consent as the time limits laid down in O.84, r.21 were not statutory in nature. In the absence of a statutory provision, the trial judge held that the defendants were merely obliged to act within a reasonable time, which they had done by responding to Shell's statement of claim within five months. It should, in passing, be noted that the trial judge did accept that the substance of the claim made by the defendants in the counterclaim, although formulated as claims for declaratory relief, amounted to, or were intended to have the same effect as, an application for an order quashing the CAOs and the consent.

3.8 Having concluded that O.84, r.21 did not apply by analogy it was, of course, unnecessary for Laffoy J., strictly speaking, to consider what the position would have been on the second core question had she decided otherwise. As noted by the trial judge it was clear that the challenge to the CAOs and the consent was commenced well outside the time provided for in the rules. However, the rules do permit the court to extend time in an appropriate case. Laffoy J. went on to consider, lest she be wrong on the issue of principle, whether it would have been appropriate to extend time in the event that the time limits provided for in O.84, r.21 did apply by analogy.

3.9 In that regard Laffoy J. concluded that it would not be appropriate to extend time. Her reasoning in that regard can be found in section 17 of her judgment. The trial judge referred again to the decision in *O'Donnell* and identified the appropriate test as being "whether the defendants have established reasons which both explain the delay and afford a justifiable excuse for the delay". However, it was suggested that a "more rigorous standard than applied in the *O'Donnell* case" should be applied in the instant case due to the scale of the other interests affected, being the

enormous potential consequences for Shell's major infrastructural project.

3.10 The judgment carefully addresses each of the reasons put forward by the defendants for their initial inactivity. The defendants had adopted what was described as a “wait and see” approach, believing that the most appropriate manner of preventing the project proceeding was through challenging the grant of planning permission for the terminal. However, this approach neglected to take into account the fact that a substantial amount of work and expense would have already been carried out at that stage in the construction of the adjoining pipeline. Such an approach could not be a justifiable excuse, bearing in mind the scale of the infrastructural project and the associated expenditure.

3.11 The defendants also sought to rely on their limited means and ignorance of public law remedies as a justification for the delay in their actions. Again, these contentions were rejected, the trial judge citing the fact that the defendants had, as far back as 2002, sought to challenge the power of the Minister to make the CAOs.

3.12 Finally, the second named defendant ("Mr. Philbin") also sought to excuse the delay on his part on the basis of the stress and trauma he suffered while committed to prison for contempt of court in July 2005. However, during that time, Mr. Philbin was represented by two firms of solicitors and a defence and counterclaim were delivered on his behalf. As a result, on that basis Laffoy J. was not satisfied that any stress or trauma could provide a justifiable excuse for his inaction.

3.13 Against that judgment the Minister has appealed to this Court. It is of some importance to note that no cross appeal was entered in respect of the finding of Laffoy J. that, if the time limit provided for in the rules applies by analogy, it would not, in all the circumstances of the case, be appropriate to extend time. It follows, therefore, that if the time limits are held to apply by analogy the appeal must succeed on the basis that there would, in that eventuality, be a clear breach of those time limits and no justification, as found by the trial judge, for extending time. Against that background it is necessary to turn to the Minister's appeal.

4. The Minister's Appeal

4.1 In substance the Minister seeks to stand over that part of the reasoning of Laffoy J. in which the trial judge held that, although formulated as claims for declaratory relief in a plenary action, the reliefs sought in paras. 1 – 5 of the prayer of the points of claim were, in essence, claims for reliefs which were intended to have the same effect as orders quashing the CAOs and the consent.

4.2 However, the Minister sought to overturn the decision of the trial judge to the effect that O.84, r.21 does not apply by analogy. The basis for that appeal is set out both in the notice of appeal and in the written submissions filed on behalf of the Minister. In those circumstances it is appropriate to set out in brief terms the argument advanced on behalf of the Minister.

5. The Minister's Case

5.1 In essence, counsel for the Minister contends that the trial judge erred on two separate grounds in failing to find that the delays on the part of the defendants in challenging the validity of the CAOs and the consent disentitled them to the declaratory reliefs sought. First, the High Court was said to be wrong in failing to find that Order 84 Rule 21 of the Rules of the Superior Courts applied by analogy to the defendants' counterclaim. Second, it was asserted that the trial judge had failed to properly consider, independently of whether O.84 might be said to apply by analogy, whether the defendants were guilty of *laches* such that their claim could

not now be permitted to proceed.

5.2 At the hearing, counsel for the Minister sought to rely principally on two arguments in support of the contention that Order 84 Rule 21(1) did apply by analogy. It was submitted that the trial judge had erred in distinguishing *O'Donnell*. The trial judge held that the principles enunciated in *O'Donnell* only apply in circumstances where challenges to measures governed by public law arise in proceedings initiated by a challenger but not in circumstances where such a challenge arises in the context of a defence and counterclaim to an action brought by another private party. It was argued that there was no reason for making a distinction between a party bringing an action and a party defending one, particularly in circumstances where a counterclaim is brought by the defendant and the plaintiff's action has been discontinued. Therefore, it was said, the *O'Donnell*principles should apply in the same manner to the defendants here as they would to a plaintiff in any other public law matter.

5.3 In drawing this distinction between those initiating and those defending an action, it was submitted that an incorrect or overbroad application was made of the decision in *Wandsworth*. The Minister sought to distinguish*Wandsworth* on a number of bases. First, it was submitted that the issue in *Wandsworth* was a private law matter between the defendant and the plaintiff municipal body in question whereas, in the instant case, the remaining counterclaim was argued to involve purely a public law issue. Second, it was suggested that the defendants are here bringing a separate and distinct claim against a third party. Although the defendant in*Wandsworth* did also bring a counterclaim, that counterclaim was against the plaintiff and, it was suggested, added relatively little to the issues in the proceedings other than repeat what was contained in the defence. Third, in *Wandsworth*, it was said that no consideration was given to the issue of time factors or delay, an issue which is at the heart of the present appeal.

5.4 In the alternative if *Wandsworth* is not distinguishable and the principles contained therein did apply to the facts of the present case, it was argued that it was not open to the trial judge to disregard the time limits contained in Order 84 Rule 21. By failing to apply any time restriction, the trial judge gave, it was said, an overbroad and unintended application to *Wandsworth*.

5.5 The Minister's second contention is that Laffoy J. failed to consider the doctrine of *laches* as an independent ground for dismissing the relevant aspects of the counterclaim which issue, it was said, arose independent of her findings in relation to analogical application of Order 84 Rule 21. Although the explanations for the defendants' delay were considered in the context of the applicability of that Order, these explanations should, it was argued, also have been considered in the context of *laches*.

5.6 Against those arguments it is next necessary to turn to the position adopted on behalf of the defendants.

6. The Defendants' Argument

6.1 Counsel for the defendants submit that the trial judge was correct in finding that Order 84 is not applicable by analogy in circumstances where the party claiming declaratory relief did not initiate the action. This submission was based on what was said to be the "paramount principle", identified in *Wandsworth*, that a defendant has a right to defend any action brought against them and can only be excluded from so doing by clear words from the legislature. No legislation, either primary or secondary, has been promulgated in this jurisdiction to restrict that right of a defendant and, as a result, the defendants in these proceedings cannot, it was said,

be precluded from defending the action brought against them by Shell. It was also denied that any significance attached to the fact that the counterclaim was the sole remaining issue in the proceedings, as the counterclaim had to be understood in the context of being an immediate product of the defence.

6.2 It was also contended that the factual circumstances of this case were unique in that the action began as a dispute between two private parties into which the Minister was then joined. In that context the court was asked to consider the effect of a number of English authorities, particularly *Wandsworth*. The speech of Lord Fraser in*Wandsworth* was relied on as an authority for the proposition that a defence to plenary proceedings was distinct and incomparable to an application for judicial review, for in judicial review proceedings all matters are at the discretion of judge; no right or entitlement can be said to exist. On that basis it was argued that the failure to bring to judicial review proceedings does not operate as a complete bar to defending a plenary action in which reliance is placed on a measure which could have been, but was not, the subject of a timely judicial review challenge. It was noted that, in *Wandsworth*, the defendant was granted the declaratory reliefs sought even though his previous judicial review application was refused for being out of time. Counsel also referred to the recent decision of the UK Supreme Court in *Manchester City Council v Pinnock* [2011] 2 AC 104, where the continued application of the *Wandsworth* principles were said to have been upheld. Counsel sought to restrict the application of the *O'Donnell* principles to instances where there was a deliberate attempt to circumvent the requirements of judicial review. This case, in his submission, was not such an attempt. Finally, in respect of the*laches* argument, it was contended that a party must establish some prejudice in addition to mere delay before a Court will exercise its discretion. No evidence of specific prejudice had, it was said, been adduced in this case and therefore, it was not open to the Minister to rely on that doctrine.

6.3 The principal net issue on this appeal is, therefore, as to whether the Minister's argument or the defendants' response is correct as to the application of O.84, r.21 by analogy. If the rule does apply by analogy then it is clear that the appeal must succeed. If the rule does not apply by analogy then it is clear that, subject to the*laches* question, the appeal must fail. Clearly if the Minister succeeds on the issue of the application of O.84 by analogy then it is unnecessary to consider the question of *laches*. However, if the Minister fails on the principal issue then it is necessary to consider whether, nonetheless, the defendants are precluded by *laches* from proceeding with a challenge in their counterclaim to the CAOs and the consent. I now turn to a consideration of the issues raised in respect of Order 84.

7. Discussion – Order 84

7.1 A starting point for any discussion on the law in this area has to be the judgment of Costello J. in *O'Donnell*. It is said on behalf of the defendants that there has been no express approval by this court of those aspects of that decision which concern the seeking of judicial review remedies in plenary proceedings. There have, undoubtedly, been some references to *O'Donnell* in judgments of this court.

7.2 In *Slattery's Ltd v Commissioner for Valuation* [2001] 4 I.R. 91, Keane C.J, approved to the following passage of Costello J. *in O'Donnell* (at p. 315) as a "correct statement of the law":-

> *"The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. 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 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 have 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)."*

However, it is clear that the approval of this court to be found in Slattery's Ltd. related to an analysis of the "good reason" test for extension of time.

7.3 The "good reason" test was again approved by this Court in *Dekra Eireann Teo v Minister for the Environment* [2003] 2 I.R. 270 in the context of Order 84A Rule 4. Reference has also been made to this test *in De Roiste v. Minister for Defence* [2001] 1 I.R. 190, in B.T.F. v Director of Public Prosecutions [2005] 2 I.R. 559 and in *In the matter of Article 26 of the Constitution and In the Matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360.

7.4 Another aspect of *O'Donnell* has also been approved by this Court in *Dublin City Council v Williams* [2010] 1 I.R. 801 where it was confirmed that the "exclusivity principle" as set out by the House of Lords in *O'Reilly v Mackman* does not apply in this jurisdiction. In that case, this court ruled that the legality of a fixed refuse charge could not be raised in the District Court by way of defence to a claim for a civil debt of a public nature. It should, of course, be noted that *Dublin City Council v. Williams* concerned a case in the District Court which court does not have a judicial review or general declaratory jurisdiction. It would not have been open to the District Court to entertain proceedings which sought to challenge, whether brought by judicial review or by seeking declarations, the public law measures which were involved in that case. Different considerations apply to proceedings in the High Court which, of course, has a full judicial review jurisdiction and a wide declaratory jurisdiction as well. Where proceedings are brought in the High Court the only issue is one of the form of the proceedings rather than the jurisdiction of the court to entertain proceedings of that type in the first place.

7.5 Most importantly, in *Murphy & Ors v Justice Flood and Ors* [2010] 3 I.R. 136, Fennelly J referred to *O'Donnell*in the context of alleged delay in bringing judicial review of the interim reports of the Planning Tribunal. At p. 221, he stated:-

> *"Unlike the cases of planning and immigration decisions, there is no statutory provision making judicial review the exclusive means of challenging Tribunal decisions of the sort at issue here. The decision in O'Reilly v. Mackman [1983] 2 A.C. 237 has never been applied in Irish law. This is not to say that the judicial review time limit can be circumvented by resort to plenary action. O'Donnell v. Corporation of Dun Laoghaire [1991] I.L.R.M. 301 represents long established authority to that effect."*

Fennelly J. had previously cited *O'Donnell* as authority for this principle in Blanchfield v Harnett [2002] 3 I.R. 207.

7.6 Whether or not those references, properly analysed, can be said to amount to an express approval of the relevant principles enunciated in *O'Donnell* might be

debateable. Certainly the dictum of Fennelly J. in *Murphy & ors v. Flood* seems to approve of *O'Donnell* as authority for the proposition that judicial review time limits cannot be circumvented by resort to plenary action. However, it seems to me that *O'Donnell* was rightly decided in any event. It would make a nonsense of the system of judicial review if a party could by-pass any obligations which arise in that system (such as time limits and the need to seek leave) simply by issuing plenary proceedings which, in substance, whatever about form, sought the same relief or the same substantive ends. What would be the point of courts considering applications for leave or considering applications to extend time if a party could simply by-pass that whole process by issuing a plenary summons?

7.7 There are, however, further issues which need to be considered. First, there is the rationale of the trial judge which drew on the point (correct so far as it goes) that the time limits which arise in respect of most judicial review applications (there are some exceptions) are to be found only in the rules of court and not in statute and do not expressly refer to the position of a defendant who seeks to challenge a public law measure relied on by the plaintiff either as a matter of defence or as part of a counterclaim. The sort of primary statutory time limits which apply in respect of judicial review in, for example, the fields of planning and environmental law together with immigration law, have no correspondence in a case such as this. It is true, therefore, that the time limits which are said by the Minister to apply by analogy in this case are time limits which are to be found in the rules of court rather than in any statute and in those rules are expressed to refer to claims rather than defences or counterclaims. It will be necessary to consider whether those distinctions make any difference.

7.8 However, first it is appropriate to consider the United Kingdom jurisprudence on which counsel for the defendants placed reliance. The extent to which that jurisprudence is consistent or compatible with the regime which applies in this jurisdiction may be a matter of some legitimate debate. It does need to be noted that the starting point of the United Kingdom jurisprudence is to be found in *O'Reilly v. Mackman*. The House of Lords in that case took a different position to that adopted by Costello J. in *O'Donnell* and held that it was not open to a person, in plenary proceedings, to bring, by means of seeking declarations, the sort of challenge ordinarily brought in judicial review proceedings. There was, thus, from the beginning a divergence between the Irish and United Kingdom approaches. In Ireland it was accepted that challenges to the validity of public law measures could be brought by declaratory plenary proceedings but that when so brought the procedural limitations imposed by the rules of court on judicial review applications applied by analogy. In the United Kingdom the initial position was that no such challenge could be brought by plenary proceedings at all. The decision in *Wandsworth*, which, of course, occurred only two years after *O'Reilly v. Mackman*, must be seen against the background of the original position adopted in the United Kingdom which prevented parties from raising questions as to the validity of public measures in plenary proceedings. Perhaps not surprisingly, but having regard to the position adopted in*O'Reilly v. Mackman*, it was considered necessary to afford rights to defendants to, at least in appropriate circumstances, challenge the validity of measures sought to be invoked against them in the same proceedings in which the invocation of the measure concerned was sought to be enforced.

7.9 It may well be that the subsequent evolution of the jurisprudence in the United Kingdom has to be viewed against the background of the initial position adopted by the House of Lords in *O'Reilly v. Mackman* which, as has been pointed out, differed significantly from the initial position adopted in this jurisdiction. For reasons which I hope will become apparent it does not seem to me to be necessary, for the purposes of resolving this appeal, to reach any concluded view on the precise application of

that United Kingdom jurisprudence in Ireland. However, to the extent which it seems appropriate and necessary for the purposes of resolving this appeal, I have considered the underlying principles which guide that jurisprudence.

7.10 In addition it may well be that there is an underlying principle behind both the jurisprudence in this jurisdiction and that of the United Kingdom. It may well be that a party should not be able to gain an unfair advantage in litigation by means of adopting a particular procedure as the vehicle for that party's claim. There are, of course, sound reasons of policy why there are different types of procedures for different types of cases. Sometimes the reasons why different procedures are followed in different types of cases stem from underlying differences in the types of cases concerned which warrant a different procedural approach. It may well be that a party who seeks to avoid the legitimate procedural requirements applicable to a particular type of case by deploying the procedural device of bringing proceedings in an unusual or atypical way (even if such a process is not prohibited) may find that the courts are understandably reluctant to allow such an advantage to be taken. However, it is again, in my view, unnecessary to reach any concluded views on any such underlying principle so as to be able to resolve this case.

7.11 The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. At least at the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. People are entitled to order their affairs on the basis that a measure, apparently valid on its face, can be relied on. That entitlement applies just as much to public authorities. The underlying rationale for short timeframes within which judicial review proceedings can be brought is, therefore, clear and of significant weight. By permitting time to be extended the rules do, of course, recognise that there may be circumstances where, on the facts of an individual case, a departure from the strict application on whatever timescale might be provided is warranted. The rules do not purport to impose an absolute time period.

7.12 Against that background it does need to be noted that there may well be circumstances in which a defendant, faced with proceedings brought placing reliance on a public law measure, may be justified, in those proceedings, in challenging the validity of the measure concerned even though that party might be, strictly speaking, out of time in maintaining a direct challenge to the relevant measure. However, it does not seem to me that such questions really arise in these proceedings as they are now constituted.

7.13 As has been pointed out, all that remains of these proceedings is a counterclaim in which it is sought to challenge the validity of measures on which reliance is no longer sought to be placed and in which the purported invalidity of those measures is relied on as the basis for a claim in damages. If either Shell or the Minister wished to place continuing reliance on the validity of those measures as a means for pursuing any claim against the defendants then questions such as those which arises in *Wandsworth* might well need to be considered. However, that is not the case here. So far as the damages claim is concerned the only issue of validity which remains concerns the actions taken by Shell at a time when those measures had been adopted in the sense that the CAOs were in place and the consent had been granted, where the measures concerned had not been the subject of any challenge and where the period within which any such challenge should ordinarily have been brought had long since expired. It seems to me that such analysis places what remains of these proceedings firmly into the same category as the proceedings

which were under consideration in *O'Donnell* rather than those which were under consideration in *Wandsworth*. What remains of these proceedings is a challenge to a public law measure designed to underlie a claim for damages rather than a defence to proceedings in which reliance is placed on the measure to maintain a claim against the challenger.

7.14 In that context it does not seem to me that the fact that the proceeding may, when initiated, have had a very different character alters the situation which now pertains. If, on a proper application of the law to the facts, a plaintiff would not be permitted to initiate an out of time challenge to measures which are relied on by a defendant as justifying actions taken, then it does not seem to me that any proper analysis of the situation ought to lead to any different conclusion in the event that a claim for damages is mounted as a counterclaim, but based on a challenge to the relevant measures which in all other respects is identical. That situation must, it seems to me, be so, at the very least, where the issues which arise in the original claim are now no longer before the court.

7.15 It is for that reason that it seems to me that the wider issues, as to the extent to which the *Wandsworth*jurisprudence applies in this jurisdiction and the extent to which it may be necessary to analyse whether there has been an attempt to take unfair advantage of a particular form of procedure, do not arise on the facts of this case. However it may have arisen, the simple fact remains that all that is left in these proceedings is a claim for damages which has, at its heart, a challenge to the validity of the CAOs and the consent brought long outside the time provided for in the rules in that regard and in circumstances where the damages claim requires a finding which renders unlawful actions taken on foot of those measure at a time when they were not subject to timely challenge. In addition it must be noted that, even as the proceedings were originally constituted, the counterclaim went beyond seeking a declaration of invalidity simply as part of a defence but extended to seeking to establish the invalidity of the relevant measures as a basis for pursuing a claim for damages.

7.16 Whatever may be the application of *Wandsworth* and the cases which follow on from it in this jurisdiction (and for the reasons already given it does not seem to me to be necessary to reach a definitive view on that question save to note that that jurisprudence stems in part from *O'Reilly v. Mackman* which does not form part of the jurisprudence in this jurisdiction) it seems to me that such jurisprudence can have no application which would defeat the underlying rationale adopted by the courts in this jurisdiction in *O'Donnell*. I am, therefore, satisfied that *O'Donnell* represents the law in this jurisdiction. In those circumstances a party cannot circumvent judicial review requirements by the device of commencing plenary proceedings or by mounting a counterclaim in such proceedings.

7.17 I would leave to another case the question as to what is to happen where a defendant is sued on the basis of a measure which that defendant wishes to challenge. It may be that the proper approach in such cases is to have regard, in the context of whether it would be appropriate to extend time, to the fact that, to the extent that it may be material, the defendant concerned might only have had a real interest or concern with the relevant measure when sued. In addition it is important to emphasise that the essential nature of the litigation with which the House of Lords was concerned in *Wandsworth* was a private law claim brought by the relevant local authority in its capacity as a landlord. In that capacity the local authority sued for rent. It was the measure fixing the increased rent claimed which the defendant sought to challenge. Whatever may be the appropriate approach to be taken in such a case it seems to me, for the reasons already set out, that such considerations have no application to a case such as this where the challenge to the

public law measure concerned is the only matter remaining in the proceedings and, in any event, where that challenge is wider in scope than would be required simply to defend the proceedings originally maintained. For those reasons it seems to me that those aspects of the defendants' case which placed reliance on *Wandsworth* must fail.

7.18 It follows that the only issue remaining is the principal point on which the trial judge based her reasoning. Does the fact that the time limits which are in issue stem from provisions in the rules which do not make express reference either to matters raised in a defence or by counterclaim, rather than direct and express statutory requirements, alter the situation?

7.19 In this regard it seems to me that it is necessary to return to the underlying basis for the requirement that there be timely challenges to public law measures in the first place. At least part of the reasoning behind such time limits is, as has been pointed out, the need to bring certainty to questions as to the validity or otherwise of such measures so that those who place reliance on them can do so without fear of late challenges. If, as the trial judge found, the absence of an express and directly applicable statutory time limit meant that the defendants could not be debarred from maintaining their counterclaim in these proceedings, then it is hard to see how that same point ought not have led to a different decision in *O'Donnell*. First there was no express statutory time limit which debarred the proceedings in *O'Donnell*. The only barrier was that to be found in the rules and that time limit, as was noted by Costello J., was held only to apply by analogy. If, therefore, the reasoning of the trial judge in respect of the need for an express statutory requirement is correct, then it seems to me to follow that*O'Donnell* would have to be held to have been wrongly decided.

7.20 The rules of court are, of course, a form of secondary legislation. They are made with the authority of the Oireachtas in the form of the enabling provisions of the Courts of Justice Acts 1924-36 and the Courts (Supplemental Provisions) Act 1961 ("the Courts Acts"). That does not, of course, give the rules-making authority carte blanche. It is possible that an argument might be made that measures adopted in the rules go beyond the legitimate delegated powers of rules-making authorities. It might also be, as the trial judge correctly pointed out, that limitations, whether to be found in legislation or in the rules, which affect the ability of a party to maintain or defend proceedings in a reasonable way, might amount to a breach of the rights of such party either to access to the court or to the fair conduct of proceedings (as to the distinction between which see *Farrell v. Bank of Ireland* [2012] IESC 42).

7.21 However, the Oireachtas has conferred on the rule-making authority power to make rules of court. Those rules have, unless declared invalid, the force of law. If it is suggested that a time limit for bringing judicial review proceedings which is to be found only in rules of court is of a different status to a time limit to be found in legislation then such an argument really could only have validity if it were to bring into question the power of the rule-making authorities to introduce those time limits in the first place. If the introduction of time limits for bringing judicial review is intra vires the rule-making authority then it is a legitimate exercise of secondary legislation and amounts to a legal barrier to the bringing of such proceedings outside such time limits subject, of course, to the power contained in the rules themselves to extend time. The fact that such a legal power is to be found in secondary as opposed to primary legislation does not seem to me to affect its status. If it is said that the rule-making authorities do not have the power to impose such time limits then it is hard to see how that point would not apply to all judicial review cases save those where there is an express time limit to be found in primary

legislation. There was, of course, no challenge to the validity of the rules of court, which provide for time limits in respect of judicial review proceedings, before this court. The court must proceed therefore, on the basis that the rules in relation to judicial review time limits are a valid exercise of the power delegated to the rule-making authorities by the Oireachtas.

7.22 On that basis the rules have the force of law and have the same status as time limits to be found in primary legislation except, of course, that the rule-making authorities do not have the power to depart from those time limits which are specified in primary legislation. It is, of course, the case that the type of legislation which has been adopted in recent times in the planning and immigration fields, for example, not only imposes a statutory time limit for the commencement of proceedings but also prevents any question as to the validity of relevant measures being raised save by judicial review. There is no similar provision in respect of challenges outside those fields which have been the subject of specific legislation. No such restriction applies to a challenge in respect of measures such as the CAOs and the consent which are at the heart of these proceedings. However, it remains the case that a judicial review challenge to those measures would be required, as a matter of law, to be taken within the time limits specified in the rules of court or in such extended time as the court might provide. It seems to me to necessarily follow that permitting such a challenge to be brought in a manner which would entirely circumvent those rules would amount to permitting rules which have the force of law as secondary legislation to be circumvented in an inappropriate way. It seems to me to follow that a valid exercise by the rule-making authority of its power to impose, by rule of court, time limits for the bringing of judicial review applications necessarily implies, by analogy, that those rules are applicable to such challenges in whatever way, as a matter of procedure, the challenge concerned may be brought.

7.23 At the relevant time when *O'Donnell* was decided there was no primary legislative time limit applicable in planning cases. For the reasons already analysed I am satisfied that *O'Donnell* was correctly decided. It follows that the difference between rules and primary legislation is not material. It further follows, therefore, that the rules can be taken to apply by analogy to claims which have, as their substance, the seeking of the types of relief ordinarily obtained by judicial review even though framed in another fashion such as in declaratory proceedings. If, therefore, a party is debarred, by reference to judicial review time limits, from maintaining declaratory proceedings to the same end what is the logic of allowing such a party to achieve the same end by including a similar challenge in a declaration to be found in a counterclaim. As already noted I would leave to another case, in which the point was decisive, the question as to what the position should be where the challenge to the measure arises purely as a matter of defence or in the form of a counterclaim which was designed simply to provide a defence by seeking to challenge the measure relied on by the plaintiff. In such a case the precise application of the *Wandsworth* principles would come into full focus. However, the counterclaim in these proceedings is not such a counterclaim. It is not directed simply to challenging the relevant measures for the purposes of providing a defence. It is in addition directed to challenging the measures for the purposes of maintaining a claim in damages. In such circumstances it is properly characterised, in substance, as a substantive claim rather than a defence and, for that reason, there seems to me to be no logical reason for not applying the same strictures as to time as would apply were the defendants to be the moving parties as plaintiffs.

7.24 I am mindful of the fact that the question of whether a claim has been brought within time must, at least in the absence of special and unusual circumstances, be judged as of the time when the claim is brought. It is unlikely that factors occurring after the claim has been brought could have any material effect on the question of

whether the claim was in time. In that context it might be argued that, at the time the counterclaim in these proceedings was commenced, the full claim brought by Shell remained in being. On that basis it might be suggested that the counterclaim was legitimate and in time when first brought and that the subsequent discontinuance or dismissal of the proceedings against the defendants could not alter that situation. If the counterclaim was only concerned with seeking to have the relevant measures declared invalid as a matter of supporting the defence then difficult questions under that heading might well arise, although, in the events that have happened, such a narrow counterclaim, designed only to render the relevant measures invalid for the purposes of supporting a defence to a claim which placed reliance on those measures, would almost certainly now be moot by virtue of the fact that the claim to which such declarations might provide a substantive defence is no longer being pursued. In any event the questions on which I have touched concerning the application of the*Wandsworth* jurisprudence in this jurisdiction might well come to the forefront in a situation where the only purpose of a counterclaim was to provide for such a defence. However, in this case the counterclaim goes much further and represents a substantive claim in its own right. It is in that context that it seems to me that it is appropriate to characterise the counterclaim in these proceedings as a substantive claim rather than a defence. Characterised in that way the counterclaim was always, from the beginning, a substantive claim and the question of whether it was in time can, for that reason, be viewed on the basis of the claim as originally formulated and in the circumstances which then pertained. To the extent that the counterclaim simply was an aid to the defence it is now moot. To the extent that it went further and maintained a substantive claim then it is subject to being questioned on the basis of whether it was taken in time.

7.25 It is next necessary to turn to the distinction made by the trial judge, and relied on on behalf of the defendants on this appeal, between proceedings involving a challenger and a public authority, on the one hand, and proceedings primarily involving, as here, two private parties, on the other hand.

7.26 I cannot see that it makes any difference that *O'Donnell* involved a direct challenge to a public authority whereas the challenge which the defendants seek to mount in this case is against both a public authority (insofar as that authority is a necessary defendant to any claim which asserts the invalidity of an action taken by the authority concerned) and also a private entity which sought to place reliance for the lawfulness of its actions on the validity of a measure taken by the relevant public authority. Either there is a binding time limit in place (subject to extension by the court) or there is not. It is hard to see how there could be any justification for requiring a person who wished simply to set aside a public measure to act within the time limits provided for in the rules for judicial review applications (either because the proceedings were judicial review proceedings or because judicial review time limits applied by analogy in the case of plenary proceedings) but not to apply the same time limits to a challenge which sought to go beyond seeking to have the public law measures concerned rendered invalid by seeking to use that invalidity as a basis for claiming damages against a party who placed reliance on the measures concerned. For the reasons already analysed it does not seem to me to make a difference that the claim in which the challenge is brought is formulated as a counterclaim particularly where the counterclaim is not merely a necessary part of the defence but goes further and seeks to make a substantive claim (in this case in damages) which goes beyond the repetition of the substance of the defence.

7.27 Finally I should deal with the point raised on behalf of the defendants which sought to place reliance on the fact that judicial review is said to be a discretionary remedy and that, as noted in some of the English jurisprudence, a discretionary remedy might be said not to afford an appropriate protection to a defendant who is

sued. For the reasons already analysed it seems to me that it is not appropriate to consider the defendants in these proceedings as being any longer persons who are sued. The claim against them has been dropped. The historical course of these proceedings may explain how the defendants come to be defendants and how their claim in damages and their assertion as to invalidity of the CAOs and the consent are formulated as a counterclaim. However, that historical account does not alter the substance of the situation which now pertains which is that the defendants are now the parties bringing the only remaining claim extant. For that reason alone the considerations which gave rise to the aspects of the English jurisprudence relied on seem to me not to be present in this case.

7.28 In addition, it does seem to me to be appropriate to comment that the fact that a remedy may be said to be discretionary does not imply that the court is, in any real sense, at large as to whether to grant the remedy or not. Indeed, in that context, the term "discretionary" may be somewhat misleading. In its proper context and as was pointed out by Denham J. in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190 at p.209, the term simply means that the court can take into account a range of circumstances in deciding whether to make an order and if so what order should be made. In truth the term "discretionary" simply implies that a particular remedy does not automatically follow from the establishment of a particular set of circumstances and that there may be other factors which can properly be taken into account in deciding whether to grant the remedy concerned. Amongst the circumstances that might well, on the facts of a particular case, be properly taken into account, would be the need to protect the legitimate interests of a defendant who was sued by a party placing reliance on a public law measure which the defendant wished to challenge. That factor, amongst any other relevant circumstances, would need to be taken into account by the court. However, having made those observations, it seems to me that the question of the non-automatic entitlement to judicial review, as identified in the English jurisprudence, does not arise on the facts of this case because the only remaining proceedings are ones in which the challenger to the public law measures in question is the moving party.

7.29 In those circumstances it does not seem to me that there is any basis for distinguishing this case from*O'Donnell*. I am satisfied that *O'Donnell* does represent the law in this jurisdiction. It seems to me that it does not matter that the form of these proceedings is a counterclaim. The position is no different, in the events that have happened, to one in which the defendants were the moving party and instigated a claim in damages against Shell placing reliance on a purported invalidity of the CAOs and the request. Likewise it seems to me that, short of declaring the time limits for judicial review applications contained within the rules as being ultra vires the Courts Acts, there is no basis for suggesting that those time limits do not apply. The fact that the form of these proceedings is a counterclaim in which invalidity of relevant measures is asserted and where damages are claimed based on actions taken in purported reliance on the measures asserted to be invalid, does not seem to me to affect the application of time limits, found in the rules, by analogy.

7.30 It is also worth observing that there is no potential for injustice in such a regime. There may well be circumstances in which a court would consider it reasonable, in all the circumstances, for a party to have refrained from bringing judicial review proceedings challenging the validity of a public law measure until such time as someone sought to invoke the measure concerned against the potential plaintiff or applicant. In those circumstances it is, of course, open to the court to consider extending time precisely because it was not reasonable to expect the person concerned to have brought the challenge until the measure was used against them, although the court might, on the facts of any individual case, have to

weigh other aspects of the general circumstances in the balance.

7.31 However, it should be added that to say that a person, once sued, has then carte blanche in all circumstances to challenge a measure well outside the time when an originating challenge to the measure concerned could have been brought, in circumstances where no extension of time would be appropriate and where reliance had been placed on the measure concerned at a time when there had been no timely challenge to its validity would, in my view, render the regime for timely challenges to public measures largely ineffective and be apt to lead to significant injustice.

7.32 For those reasons it seems to me that the defendants are out of time to mount the challenges which they now seek to bring to the CAOs and the request. I, therefore, respectfully disagree with the trial judge.

8. Conclusions

8.1 For those reasons I would, therefore, allow the appeal of the Minister and substitute an order dismissing the challenge to the validity of the CAOs and the consent on the grounds that the challenges concerned are out of time by reference to the provisions of O.84 which apply by analogy to the counterclaim in these proceedings.

8.2 I would leave to a further case in which said issues might be decisive the question of the extent, if any, to which the *Wandsworth* principles and the jurisprudence of the United Kingdom courts which follows on from them, might have application in this jurisdiction.