[2019] IEHC 662

THE HIGH COURT

[2017 No. 11402 P.]

BETWEEN

CLARE COUNTY COUNCIL

PLAINTIFF

AND

BERNARD MCDONAGH AND HELEN MCDONAGH

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 10th day of October, 2019

Introduction

1. This is an action for a permanent injunction restraining the defendants from trespassing on lands at Ashline, Kilrush Road, Ennis, Co. Clare.

2. The defendants put forward a number of defences and counterclaims directed, variously, to their entitlement to occupy the lands, a promise of a house at Ashline, and the performance by the plaintiff of its statutory functions under the Housing (Traveller Accommodation) Act, 1998.

3. To understand the issues before the court, it is necessary first to look at the facts.

The facts

4. The lands at Ashline were acquired by Clare County Council from St. Flannan's (Killaloe) Diocesan Trust in 1990 and were used thereafter for traveller specific accommodation, initially as a halting site. In 1998 four houses were built on the lands and in 2006 two more were added. There was no evidence as to the cost of the first four houses, but the second two cost €1.7 million.

5. Mr. and Mrs. McDonagh were given a tenancy for one of the first four houses, No. 1 Ashline, on 26th March, 1998. The tenancy was a tenancy from week to week, on the terms of the council's standard form tenancy agreement for Housing Act, 1966 lettings.

6. In the early 2000s there was a problem with feuding amongst the traveller families in Co. Clare. The houses at Ashline and other sites in Clare were the subject of arson attacks and vandalism. By 2009 there were nine houses in the county which were unusable by reason of fire and wanton destruction.

7. On 9th August, 2012 Mr. McDonagh called to the offices of Clare County Council where he spoke with Mr. Colm O'Mahony, then an assistant staff officer with responsibility for housing. By then the other five houses in Ashline had been rendered uninhabitable. Mr. McDonagh said that he wished to leave Ashline and asked Clare County Council to buy a house in Cork for him and his family. He said that he was not interested in going on the housing list in Cork and would only leave if Clare County Council could guarantee to buy him a house or a yard there on which he could put a caravan. Alternatively, Mr. McDonagh suggested that he would be agreeable to Clare County Council "*buying him out"* for a sum of money.

8. Mr. McDonagh then reported that Mrs. McDonagh was unwell and that there was a threat of violence on the site. He said that the house had been petrol bombed five years previously. There was a court case coming up in the following September when members of another family were to go on trial accused of cutting off his nephew's finger. Mr. McDonagh reported an apprehension that if a custodial sentence were to be imposed on those accused, his house and family would be attacked in reprisal. Mr. O'Mahony explained that Clare County Council was not in a position to purchase or build a house for anyone in another functional area.

9. On 16th October, 2012 Mr. McDonagh was brought before Kilrush District Court charged with a number of offences. On 30th October, 2012 he was admitted to bail by the High Court on terms *inter alia* that he would reside at an address in Cork City and observe a curfew.

10. On 1st November, 2012 Mr. O'Mahony had a call from Mr. and Mrs. McDonagh's daughter who renewed the request for a transfer for Mrs. McDonagh to Cork. She reported that Mrs. McDonagh would not leave the house due to fear of being attacked and that she had a letter from the gardaí stating that Mr. and Mrs. McDonagh needed to leave the Ennis area. Mr. O'Mahony explained to Mr. and Mrs. McDonagh's daughter that her parents would need to apply to Cork City Council for assessment and would need to surrender their tenancy in Ashline and return the keys. Miss McDonagh said that she and her mother would come in soon to do so.

11. Mrs. McDonagh's fear was abundantly justified, for on 11th November, 2012, the house was the subject of another arson attack.

12. On the following day Mrs. McDonagh called to see Mr. O'Mahony. She said that she was homeless as a result of the fire the previous night and asked Clare County Council to contact Cork County Council to get a house for her in Cork. Mrs. McDonagh confirmed that she had been receiving her social welfare in Fairhill, Cork, for the previous number of weeks. She then signed a form of surrender of the tenancy but as Mr. McDonagh was a joint tenant, took the form away with her to Cork to get his signature. Mr. O'Mahony advised Mrs. McDonagh that the housing officer would make the decision on approving their housing need once the surrender form had been received and the council received a report on the fire at Ashline from the fire service.

13. Soon after Ms. Siobhan McNulty, a county council engineer, visited the site to survey the damage. The house was extensively smoke damaged, and Ms. McNulty was concerned that the roof had been compromised. There were some white goods, furniture and other possessions in the house, but it was not habitable. Ms. McNulty arranged for the house to be secured by the erection of steel shutters on the doors and windows, and had a barrier erected at the entrance to the site.

14. Following the fire, Mrs. McDonagh and her children moved in for a short time with Mr. McDonagh's brother in Cork and thereafter, until the end of 2013, with Mr. McDonagh's mother in Clare.

15. On 29th November, 2012 Mr. and Mrs. McDonagh called to the housing department of Clare County Council where they met with Mr. O'Mahony and Ms. Catherine Breen. They reported that they did not qualify for housing in Cork and wished to return to Ennis. They said that they wanted to move into No. 5 Ashline and not No. 1, which they thought was unlucky and too big. Mr. and Mrs. McDonagh were advised that No. 5 was only a shell and had no roof. Ms. Breen and Mr. O'Mahony did not think it likely that the council could reconstruct the house given the current financial constraints but said that they would discuss the situation with housing management.

16. On 19th December, 2012 Mr. McDonagh was brought before the High Court on an application by the Director of Public Prosecutions to revoke his bail. Mr. McDonagh's bail was revoked, and he was remanded in custody to Limerick Prison. In due course the criminal charges against him were disposed of and he served a term of three years' imprisonment in Portlaoise Prison.

17. On 25th January, 2013 Mrs. McDonagh called to the housing department with her daughter and granddaughter, were she met Ms. Fiona Mooney, as well as Mr. O'Mahony. Mrs. McDonagh asked for a tenancy in No. 3 Ashline. Ms. Mooney, in evidence, suggested that the previous reference to No. 5 was probably a mistake and that Mrs. McDonagh probably always wanted a tenancy in No. 3. Mr. McDonagh, however, said that they had initially asked for No. 5, which he said had been flood damaged, and later for No. 3, which had "*a bit of smoke damage*". Ms. Mooney explained that the only house in Ennis that the council had ready to move into was a house at 1 Beechpark, which was a traveller specific site, and she offered this house to Mrs. McDonagh. Mrs. McDonagh said that she would not move into Beechpark because a man had killed himself there and she would not be happy there. Mr. McDonagh, in evidence, added that there was objection from the residents in Beechpark.

18. At the meeting in January, 2013 Ms. Mooney explained to Mrs. McDonagh that, as approved applicants, she and her husband had the option of applying for private rented accommodation. Mrs. McDonagh asked that Clare County Council would buy for her a house that was for sale on Golf Links Road, and later suggested, again, that Clare County Council might buy a house for her in Cork. Ms. Mooney explained, again, that Clare County Council had no function in Cork. Ms. Mooney had prepared a written offer of the house at Beechpark but Mrs. McDonagh refused to take the envelope. Having spoken on the telephone to Mr. McDonagh, Mrs. McDonagh said that she only wanted No. 3 Ashline. She would not take the Beechpark house and would not look for private rented accommodation but was going to her solicitor.

19. In February, 2013, No. 1 Ashline was attacked again and, it was common case, burned out.

20. On 13th March, 2013 and again on 10th January, 2014 Mrs. McDonagh was provided with letters addressed to whom it may concern, confirming that she had been a tenant at No. 1 Ashline until November, 2012; that the rent had been paid up to date; and that the site was closed pending refurbishment.

21. In the summer of 2013, with the agreement of Mrs. McDonagh, the council began refurbishment of No. 4 Ashline, with a view to making that house available to her but in August, 2013 that house was burned out.

22. In December, 2013 Mrs. McDonagh moved from her mother in law's house to private rented accommodation, which was arranged though the council, in Ennis and she lived there with her family until August, 2017 when she had to leave that house because the landlord wanted to carry out repairs.

23. On 6th January, 2014 Mrs. McDonagh visited the housing department where she spoke with Mr. Niall O'Keeffe, an administrative officer. Mrs. McDonagh was then living with her parents-in-law in a house in Ennis. Following that meeting Mr. O'Keeffe wrote to Mrs. McDonagh on 9th January, 2014. He said:-

> *"I refer to our meeting on 6th January, 2014 and can confirm that Clare County Council will shortly invite proposals from Approved Housing Bodies to refurbish the vacant Group Housing scheme at Ashline, Kilrush Road, Ennis. This is an objective included in the Draft Traveller Accommodation Programme 2014 – 2018 which will be submitted to Clare County Council for approval before the end of this month.*
>
> *On completion of the refurbishment at Ashline an offer of accommodation will be made to yourself to accept or decline."*

24. When, in September, 2017, Mr. and Mrs. McDonagh had to move out of the private rented house in which Mrs. McDonagh had been living for coming up to four years, they brought mobile homes to the side of the road outside the Ashline site, which had been locked up for coming up to five years. Mr. McDonagh's evidence was that they had no choice but to go back to the side of the road, but he accepted in cross-examination that he and his wife had refused two offers of the house in Beechpark and two more of other houses in Ennis, one at Aisling Estate, Shanaway Road, and another at Cappahard, Tulla Road.

25. In September, 2017 someone tried to break into the Ashline site. Mr. McDonagh declined, on his solicitor's advice, to say whether it was he. Following the attempt to enter the site, the council placed thirteen one tonne concrete bollards across the entrance to the site. On 24th November, 2017 these bollards were moved using a forklift or other heavy machine. Mr. McDonagh declined, on his solicitor's advice, to say whether it had been he who moved the bollards. He acknowledged the presence of a forklift truck on the site but said that he did not know who owned it or for how long it had been there.

26. In a letter to the council of 1st December, 2017 Mr. McDonagh said that he wanted the site at Ashline refurbished for himself and his wife and their six sons. That, he wrote, was the only housing he and his wife wanted from the council. In evidence, Mr. McDonagh said that he wanted a house in a traveller specific development or a halting site. He said that he was open to an offer of social housing, but only if it was a halting site or another traveller group housing scheme. Mr. Niall O'Keeffe, administrative officer,

who spoke to Mr. McDonagh in November, 2017 said that Mr. McDonagh had then said that he wanted Ashline and would not consider anything else.

27. This action was commenced by plenary summons issued on 15th December, 2017. On the same day Costello J. made an order for short service of a motion for interlocutory orders, and on 18th January, 2018 O'Connor J. made an interlocutory order requiring the removal of the caravans and associated vehicles. Following the exchange of pleadings and particulars and the making of discovery on both sides, the action was heard over three days in June, 2019.

The defences

28. The first line of defence is a plea that Mr. and Mrs. McDonagh have a subsisting tenancy in No. 1 Ashline, which the council is obliged to reinstate, and that they are entitled by reason of that subsisting tenancy to occupy the Ashline site.

29. It seems to me that there is a disconnect between the facts and the legal argument. No. 1 Ashline is, and since February, 2013 has been, a burnt-out shell. When in September, 2017 Mr. and Mrs. McDonagh moved onto the site they did not seek to move back into No. 1 but rather brought caravans onto another part of the site. If they had a subsisting tenancy in No. 1, that would not entitle them to put and occupy caravans elsewhere on the site.

30. In any event, I find that Mr. and Mrs. McDonagh do not have a subsisting tenancy.

31. I do not accept the argument made on behalf of the council that the tenancy was surrendered by the signing by Mrs. McDonagh of the form of surrender on 12th November, 2012. The then subsisting tenancy was, as Mrs. McDonagh was advised, a joint tenancy with Mr. McDonagh and a written surrender would have required the signature of both. The form signed by Mrs. McDonagh was not delivered to the council but was taken away by Mrs. McDonagh with a view to having it signed by her husband. In the event, he never signed it.

32. Neither do I accept the argument on behalf of the council that the contract of tenancy was frustrated. In *McGuill v. Aer Lingus Teo*. (Unreported, High Court, McWilliam J., 3rd October, 1983) McWilliam J. set out the principles to be applied when considering whether a contract has been frustrated. The starting point is that frustration occurs when, without default by either party, the contract becomes incapable of being performed. There was no repairing covenant by the council in the tenancy agreement, but it is not contested that the council was obliged under the tenancy to put and keep the house in a habitable condition. It is well settled that frustration requires an unexpected supervening event which fundamentally changes the nature of the outstanding contractual rights and obligations.

33. In this case, as in the case of every lease, it was plainly within the contemplation of the parties that the house might need repair. It is said that the obligation to repair did not extend to rebuilding and that the requirement for reconstruction frustrated the contract.

It seems to me that the possibility that the house might be destroyed by fire, specifically by arson, was plainly within the contemplation of the council, which, following the destruction of the other houses in the scheme had been unable to get insurance, which it previously had, against the risk. It seems to me that the very fact that a risk is insured against shows that the event, if it comes to pass, cannot be said to have been unexpected. Unquestionably, it would have been uneconomic to have reconstructed No. 1. As witness the fate of No. 4 when the council later attempted to refurbish that house for Mr. and Mrs. McDonagh, it would probably have been futile to have rebuilt No. 1. But it is settled law that expense or onerousness will not frustrate a contract.

34. While Mr. and Mrs. McDonagh's tenancy was not surrendered in writing or frustrated, it is clear that it was surrendered by act and operation of law. This may occur in a number of ways, including the delivery to and acceptance by the landlord of possession or the adoption by the tenant of a position inconsistent with the continuation of a tenancy.

35. From the time of the fire on 11th November, 2012 the house was uninhabitable. It was clear from the time of the meeting on 12th November, 2012 that Mrs. McDonagh no longer wished to live in the house. Soon after the council took possession of the house and shuttered it. The rent was never paid thereafter. At the meeting in the council's offices on 29th November, 2012 Mr. and Mrs. McDonagh both made clear that they did not wish to move back into No. 1. While in the case of a private residential tenancy, the taking of another tenancy might not be inconsistent with the continuation of a previous tenancy, it seems to me that the position is different in the case of a Housing Act tenancy. At the meeting on 12th November, 2012 Mrs. McDonagh was told that she and her husband needed to sign a surrender before they could be considered for housing. The substance was that they could not go back onto the housing list while their tenancy in No. 1 subsisted. It is clear than by no later than January, 2013 they had been approved for housing. That approval, and all of the dealings thereafter in relation to Mr. and Mrs. McDonagh's housing needs, were consistent only with the tenancy in No. 1 having been surrendered. Mr. and Mrs. McDonagh were content in the house in Ennis which they occupied between early 2014 and August, 2017 and only left that house because the landlord required possession for repairs. There was certainly discussion of the possible refurbishment or reinstatement of various of the houses in the Ashline development, but not of No. 1.

36. I am satisfied that when the house at No. 1 Ashline was vacated in November, 2012 Mr. and Mrs. McDonagh's intention, then made known to the council, was that they were leaving permanently.Mrs. McDonagh, on behalf of herself and her husband, either abandoned or delivered possession to the council, which either took or accepted possession by boarding it up.

37. The second line of defence pleaded is that the plaintiff is estopped from asserting that the premises were abandoned in circumstances in which it requested the defendants to vacate and committed to refurbishing the demised premises. This is not made out by the evidence. The council did not ask Mr. and Mrs. McDonagh to leave: that was their

decision. Neither did the council commit to refurbishing the premises. Nor, on the evidence, was it ever Mr. and Mrs. McDonagh's understanding that the demised premises would be refurbished.

38. The third line of defence pleaded is that the council has at all times acknowledged and committed to offer Mr. and Mrs. McDonagh permanent accommodation in a new house to be provided as part of a scheme of development which it proposes for Ashline. This is true, but the council's promise could not possibly justify the defendants' occupation of the site in the meantime. In any event, it is quite clear that Mr. and Mrs. McDonagh do not want a new house in the proposed scheme for Ashline because the proposed scheme is not a scheme for traveller specific accommodation. I will deal with this offer of accommodation at Ashline in more detail in the context of the counterclaim.

The counterclaim

39. There are, as I have said, a number of strands to the counterclaim. The first is based on the proposition that the defendants have a subsisting tenancy in No. 1. The second is based on the council's letter of 9th January, 2014. And the third is based on the alleged non-performance by the plaintiff of its statutory functions under the Housing (Traveller Accommodation) Act, 1998.

Subsisting tenancy

40. The counterclaim repeats the pleas that the defendants had a subsisting tenancy in the property and that the plaintiff was obliged to maintain and repair the property and I have dealt with these issues.

41. The first two reliefs claimed by the defendants are a declaration that the defendants are entitled to a subsisting tenancy in No. 1, Ashline, and an order requiring the council to reinstate it.

42. Part of the disconnect between the facts and the pleadings and legal argument in this case is that while the pleadings assert a subsisting tenancy in No. 1 and an entitlement and desire to live in the "*demised premises*", the fact is that this is not what Mr. and Mrs. McDonagh want. On 7th December, 2017 Mr. and Mrs. McDonagh were offered a four bedroomed house at Cappahard, which they refused. Part of the reason for the refusal was that it was not traveller specific accommodation, but part was that it was not big enough. Mr. and Mrs. McDonagh have ten children, ranging in age from fourteen to 33 years. Six of the children are sons, five of whom are married or have partners and their own children. What Mr. McDonagh wants is a halting site, not necessarily at Ashline, which will accommodate him and Mrs. McDonagh, and his five sons and their partners and their children, or, perhaps, six houses at the Ashline site, if that is redeveloped.

43. For the reasons given, I am quite satisfied that the defendants are not entitled to such orders but even if I thought that they were, I could not, in the proper exercise of my discretion, have ordered the council to build a house which the defendants do not want.

The council's promise of a house at Ashline

44. The defendants claim a declaration that the they enjoy a legitimate expectation that they will be housed in Ashline in a traveller specific group housing scheme; and an order requiring the plaintiff to maintain Ashline as a traveller specific group housing scheme and to offer the defendants a house there;

45. The foundation of these claims is the council's letter of 9th January, 2014 which, it is said, must be read in the context that the Ashline site was included in the then draft Clare Traveller Accommodation Programme 2014 – 2018. At the time the letter was written the consultation process was ongoing. The document put into evidence appears to have been the draft as it stood in January, 2014. It was not made clear that the TAP adopted on 10th March, 2014 was the same as the draft, but neither was there any evidence of any difference.

46. As to the applicable principles of law, reference was made to *Glencar Exploration plc v. Mayo County Council* [2002] 1 I.R. 84, *Lett & Co. v. Wexford Borough Council* [2012] 2 I.R. 198, *Glenkerrin Homes v. DLRCC* [2007] IEHC 298, *Abrahamson v. Law Society* [1996] 1 I.R. 403, and *Daly v. Minister for the Marine* [2001] 3 I.R. 513. Mr. Buckley emphasised that, by contrast with estoppel in private law, a legitimate expectation can arise without an express assurance or detrimental reliance.

47. The focus of the argument was on the facts rather than the law. The issue on which the argument focussed was whether the documents could have given rise to a legitimate expectation that the Ashline site would be redeveloped as traveller specific accommodation, but again there was the disconnect that Mr. and Mrs. McDonagh do not want a house in a redeveloped traveller specific scheme in Ashline, but rather six houses in such a scheme, not necessarily in Ashline.

48. In January, 2014, as the evidence and the TAP made clear, the site at Ashline was vacant. The TAP showed that at the end of 2008 there had been six households accommodated in group housing units on the site, and that at the end of 2013 there were none. The TAP showed that:-

> *"At the end of 2013 the group housing schemes at Ashline and Beechpark lie completely vacant, having been the subject of repeated arson attacks to the extent that insurance cover no longer applies. In 2013 alone 4 houses were substantially damaged by fire. Proposals to refurbish this accommodation will be advanced during this programme, notwithstanding the daunting challenges of sourcing finance and securing conditions that will deliver sustainable redevelopment and occupation of the schemes."*

49. The TAP showed an assessment of 94 households as being in existing need and projected 40 new family formations over the life of the programme. Of those 134 existing and projected households, twelve were assessed as being in existing need of group housing and the projection was for a further five. It went on to say that:-

"The Traveller Accommodation Programme will be subject to periodic and statutory review in the context of existing pressures on housing supply and the evolving mechanism for delivering social housing support. Where a need is identified to carry out adaptations or additions to address the accommodation needs of a household the Council will work with the household and relevant agencies to provide an appropriate accommodation solution. Consultation with the Traveller Community needs new stimulus and a fresh approach to be proactive in the implementation and monitoring of progress during this programme."

50. The TAP set out a specific proposal for the Ashline site, which was:-

"Currently completely vacant. Invite redevelopment proposals in partnership with Approved Housing Body."

51. I cannot see in the letter or the TAP a statement amounting to a promise or a representation that the Ashline site would be redeveloped as a group traveller specific scheme. As I read the TAP, the reference to the site as "*vacant Group Housing scheme*" was descriptive of the site and did not amount to a promise that the council would not consider other possible uses of it. This, in my view, necessarily follows from the fact the TAP spelled out an ongoing and serious problem with arson in group housing schemes and the plan to invite proposals from approved housing bodies, generally. Absent such a proposal for redevelopment of the site as a group scheme, the possibility of such redevelopment would not arise. Even if there was such a proposal, the council would need to consider it. The council would need to assess the feasibility of any proposal by reference to the many competing demands on its resources, and the sustainability of any proposed scheme taking into account a whole variety of considerations amongst which would be its recent experience of arson attacks on group schemes and the insistence of incumbent traveller families on dictating to whom other houses in such schemes could be allocated.

52. Moreover, to construe anything in the letter or the TAP as a promise or representation that the Ashline site would be developed for group housing, or that it would not be redeveloped other than for group housing, would be inconsistent with the entitlement and requirement of the council to perform and exercise its statutory functions and powers under the Housing Acts.

53. In fact, what happened is that the council did invite proposals for the redevelopment of the site. There was one proposal only, which was for a scheme of 24 terraced houses. That was assessed by the council as unviable, but the assessment was that a social housing scheme might be viable if additional adjoining land could be acquired. In 2017 the council did acquire adjoining land and now plans the development of the enlarged site for social housing. That social housing will be available to all members of the community, and the council has repeatedly promised that Mr. and Mrs. McDonagh will be offered one of the houses in the new development.

54. I find that Mr. and Mrs. McDonagh have not made out their case that they have a legitimate expectation that they will be housed in Ashline in a traveller specific scheme.

Housing (Traveller Accommodation) Act, 1998

55. The third strand of the counterclaim is a claim for a declaration that the plaintiff has failed to properly implement its obligations under the Housing (Traveller Accommodation) Act, 1998; a declaration that the plaintiff's present proposals for Ashline have been adopted in breach of the Housing (Traveller Accommodation) Act, 1998; a declaration that the plaintiff is not entitled to vary the Traveller Accommodation Programme without due consultation; and damages.

56. Before looking at the basis on which these several orders are sought, it is useful to recall the nature of the duties imposed on housing authorities by the Housing Acts and the function of the courts in reviewing the exercise by housing authorities of their functions and powers under the Acts. The relevant principles are well established.

57. *Siney v. Corporation of Dublin* [1980] I.R. 400 established that a letting by a Housing Authority pursuant to its powers and duties under the Housing Act, 1966 carries an implied warranty that the property is fit for human habitation at the date of the letting, and that the Housing Authority owes a duty of care to the tenant to take reasonable care to ensure that the property is habitable. More importantly for present purposes, it also established that the statutory duties imposed by the Act of 1966 are imposed for the benefit of the public generally, so that a failure to discharge a duty under the Act does not give rise to a cause of action for damages.

58. In *Glencar Explorations plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 the Supreme Court dismissed an appeal from a judgment and order of Kelly J. (as he then was) dismissing a claim for damages on the grounds that there was no direct relationship between an *ultra vires* act under the Planning Acts and the recovery of damages. The Supreme Court found that the decision of the respondent to adopt a mining ban constituted the purported exercise by the Planning Authority of a power vested it in by law for the benefit of the public in general, and not the fulfilment by it of a duty imposed by statute for the specific protection of particular categories of persons, the breach of which would give rise to a cause of action in damages. The *ultra vires* exercise of the power could not of itself provide the basis for an action in damages.

59. In *Ward v. South Dublin County Council* [1996] 3 I.R. 195, Laffoy J. emphasised that:-

> *"It is not the function of this Court to direct a local authority as to how it should deploy its resources or as to the manner in which it should prioritise the performance of its various statutory functions. These are matters of policy which are outside the ambit of judicial review. Moreover, in relation to the function at issue here, the provision of accommodation in the form of halting sites for members of the travelling community to whom a housing authority owes a duty under s. 13, while there may be informed opinions as to how the function would be best performed which differ from the approach being adopted by the housing authority,*

it is no function of the court to adjudicate on the merits between the different points of view."

60. The decision of Laffoy J. in *Ward v. South Dublin County Council* was applied by Baker J. in *Mulhare v. Cork County Council* [2017] IEHC 288, a decision which was upheld by the Court of Appeal [2018] IECA 206.

61. In *McDonagh v. Clare County Council* (Unreported, High Court, Smyth J., 20th May, 2004) [2004] IEHC 184, Smyth J. said:-

> *"The rights conferred by the [Housing] Acts are real and to be honoured and given effect to - but this does not confer absolute and unqualified rights - they are resource dependent. It cannot have been the intention of the legislature that at all times and in all circumstances the housing authority would have available and vacant and ready for occupation either conventional permanent or conventional emergency accommodation (open to the acts of trespass and vandalism disclosed in the papers) in case of emergency. It is for the housing authority to prioritise the building programme necessary to house those entitled under the Acts - and to prioritise those whom it considers entitled to such accommodation under the TAP and/or on the Housing List.*
>
> *In my judgment the respondent discharged their statutory duty to provide suitable and adequate conventional housing for the applicants at No. 8 Oakdown Drive. If, as a result of the applicants leaving that accommodation and living on the side of the road to again create a situation of need and by creating circumstances of emergency or pressure on the housing authority, the housing authority cannot ignore any factual evidence of need but are entitled to take into account the entire circumstances of the applicants including, if it be the case, how a previously stated need which had been satisfied and had been treated or taken advantage of. It is not the duty of a housing authority to yield to a situation of pressure which has in whole or part been voluntarily created by the applicant. Even if in the instant case the respondents failed to provide the type of accommodation that the applicants sought and wanted, such failure, in my judgment, does not amount to, nor is it a breach of statutory duty. The obligation of a housing authority is to respond to a need not a want. An applicant is of course entitled to express a preference for the type of accommodation he/she bona fide believes, grounded on objective evidence, is suited and meets his/her accommodation needs. There is however no obligation on the housing authority to provide immediately such specified accommodation - it must not only assess needs and priorities but have regard to all other persons who have needs and to its availability of accommodation. It is the function of the housing authority to adjudicate on the claims of the applicants, not that of the Court."*

62. The counterclaim pleads the case made in respect of the alleged breach of statutory duty in terms of duty, breach and damage.

63. It is said that the council has consciously and knowingly acted in breach of its statutory duties, and in particular in breach of its obligations under the Housing Acts, in a number of respects.

64. It is said, firstly, that the council had consistently promoted standard housing for traveller needs, above traveller specific accommodation, in breach of the legislative obligation to provide a fully diverse offering of traveller accommodation.

65. Secondly, it is said that the council failed to convene and/or facilitate meetings of the Local Traveller Accommodation Consultative Committee ("*LTACC*") during the period from December, 2015 to December, 2016, at a time when it proposed to adopt measures in its county development plan impacting upon TAP.

66. Thirdly, it is said that the council acted in breach of its statutory duties in consistently electing not to drawdown available funding allocated for the purposes of traveller specific accommodation.

67. Fourthly, it is said that the council acted in breach of its statutory duties in purporting to re-designate Ashline without any or any adequate consultation, including with the LTACC, and fifthly, in purporting to amend or vary the TAP without any or any adequate consultation, including with the LTACC.

68. On the authority of *Siney* and *Glencar*, the council's statutory obligations under the Housing Acts are matters of public law and not private law. While the complaint is that the council failed to provide a fully diverse offering, the case is not made that the council failed altogether to provide traveller specific accommodation, but as to the balance of accommodation provided. This, it seems to me, is plainly a matter which has been left by the Oireachtas to the discretion of the Housing Authorities.

69. Mr. James Connolly S.C., for the council, argues since the complaint is directed to the performance or non-performance of a public law duty, the plaintiff's primary remedy, if any, is by way of judicial review and not a private law action. Mr. Connolly does not say that the procedure invoked is determinative. It is accepted that, in an appropriate case, declaratory relief may be claimed against public bodies by plenary action but submitted that the principles to be applied in such a case are those applicable to a judicial review. The counterclaim in this case was delivered on 17th January, 2018, and it is said that all of the defendants' complaints are directed to matters which occurred significantly outside the time within which an application might have been made for judicial review.

70. Secondly, it is submitted that the court is invited to undertake an open-ended and rolling review of the making and implementation of Clare County Council policy. That, it is said, is not appropriate.

71. I am satisfied that Mr. Connolly is correct on both points.

72. *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301 was a case in which, by plenary summons issued on 21st July, 1989, a householder claimed declarations of invalidity of

orders made by the County Manager fixing water charges, which had been made in 1983, 1984 and 1985, and decisions of Dun Laoghaire Corporation to shut off his water supply which had been made in June and November, 1988. Costello J. (as he then was) found that the plaintiff was not barred from claiming relief merely because he had failed to challenge the impugned orders and decisions by way of judicial review, but said that he would refuse to grant the plaintiff the relief sought unless he was satisfied that there would have been good reasons for extending the time limit of three months that applied to an application by way of judicial review.

73. In *Shell E. & P. Ireland Limited v. McGrath* [2013] 1 I.R. 247 the Supreme Court approved the decision in *O'Donnell v. Dun Laoghaire Corporation*. The Supreme Court held that the time limit for making an application for judicial review provided for in O. 84, r. 21 applied by analogy to claims which had, 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. The Supreme Court said that it would make a nonsense of the system of judicial review if a party could bypass any obligation arising in that system, such as time limits and the need to seek the leave of the court, simply by issuing plenary proceedings which, in substance, sought the same relief or for the same substantive ends.

74. The correctness of Mr. Connolly's second argument, I think, is demonstrated by the cross-examination of the plaintiff's witnesses and the evidence led on behalf of the defendants. Mr. Niall O'Keeffe, who served as an administrative officer with the council between February, 2013 and November, 2018, was cross-examined in relation to the assessment in 2013 of traveller accommodation needs, the appointment and replacement of the LTACC, the adoption and amendment of the traveller accommodation programme 2014 – 2018, and the decision ultimately made to develop the Ashline site for social housing rather than traveller specific accommodation, and so on. Ms. Sarah Clancy, co-ordinator of the Clare public participation network, gave evidence of the difficulty in convening an LTACC in the absence of an organised traveller community in Clare, and of her assessment of the effectiveness of the LTACC. She commented on the tension between the provision of social housing and traveller specific accommodation and suggested that the decision of the council to use the Ashline site for social housing rather than traveller specific accommodation had been preceded by poor consultation practice.

75. All of these matters probed by the cross-examination and addressed by Ms. Clancy are policy considerations which, it is well established, are matters for the housing authority. No less, the run of the counterclaim, after the council had made fairly wide-ranging discovery by reference to very general pleading, appeared to be an attempt to isolate decisions which had not been identified in the pleadings and criticise those decisions on grounds that had not been previously articulated. Costello J. in *O'Donnell v. Dun Laoghaire Corporation* and the Supreme Court in *Shell E. & P. Ireland Limited v. McGrath* [2013] 1 I.R. 247 made it clear that in a case where there is a challenge to a public law decision by plenary proceedings seeking a declaration rather than by way of judicial review, the court will require compliance with the time limits applicable to judicial review.

It seems to me that if a plaintiff in plenary proceedings based on public law grounds is required to meet the time limit prescribed by O. 84, it must follow that he is required also to meet the substantive requirement to specify the relief and grounds. The grounds of the challenge must be legal grounds.

76. If the particulars of alleged breach of statutory duty are to be taken as a statement of grounds, it seems to me that they are hopelessly vague. For example, it is alleged that the council consistently promoted standard housing for travellers needs above traveller specific accommodation, without identifying when or how. It is alleged that the promotion of standard housing over traveller specific accommodation was in breach of the council's obligation to provide a fully diverse offering of traveller accommodation, but it seems to me that this is a non sequitur. The promotion of one over the other is unconnected with the provision of either or both. In any event, the decision as to the mix is quintessentially a matter for the housing authority.

77. Similarly, it seems to me that the reliefs claimed are wholly vague, and not tied back to the particulars of alleged breach of statutory duty. Again, by way of example only, there is a claim for a declaration that the plaintiff has failed to properly implement its obligations under the Housing (Traveller Accommodation) Act, 1998 and in particular the current Traveller Accommodation Programme for County Clare. Such a declaration would condemn the whole TAP. If the date and period of the impugned TAP had been included, it would have been immediately apparent that the challenge came three and a half years or so after the TAP had been adopted and in the twilight of its term.

78. The only dates specified in the particulars are the period between December, 2015 and December, 2016. The complaint is that between those dates, at a time when the council proposed to adopt measures in the county development plan impacting on the TAP, the council failed to convene and/or facilitate meetings of the LTACC. It is not said that the council either between those dates or thereafter adopted measures impacting on the TAP, or what those measures allegedly were, or how whatever they may have been, any such measures impacted on the TAP.

79. In the course of the trial it emerged that what is behind all this is that the site at Ashline was previously included in the Ennis Town Council Development Plan zoned "*T*" and, following the abolition of Ennis Town Council, in the Clare County Council Development Plan as "*residential*". Mr. Liam Connolly, the council director of services, housing, is a qualified town and county planner with twenty years' experience. He explained that the county development plan was realigned following the abolition of Ennis Town Council and that the current zoning permits traveller specific accommodation. There was a certain amount of fuss and bother as to whether the permitted development of the site was a matter of law or a matter on which Mr. Connolly might express an opinion. In the event, the answer was that the current zoning under the county development plan does indeed permit the use of the site for traveller specific accommodation.

80. If the defendants' misunderstanding had been spelled out as a challenge to the re-designation of the site in the Clare county development plan so as to preclude the use of

the site for traveller specific accommodation, on the ground that the zoning of the lands as "*residential*" precluded such use, it would have been exposed by the answer that the zoning did not preclude such use.

81. The height of the evidence is that, for a number of reasons, the consultation with the LTACC was not what Ms. Clancy would have liked or thought that it should have been. Ms. Clancy is an articulate and effective advocate of travellers' rights but any issues as to the quality or effectiveness of the statutory consultation or the balances struck between the competing requirements for social housing and traveller specific accommodation are not justiciable controversies.

82. Mr. Niall Buckley, for the defendants, made and argued the case which was set out on the pleadings but did not engage with the argument that the court could not and ought not decide the issues. Not least, no real answer was offered to the argument that any challenge to the decisions of the council was long out of time, and it was not argued that if an application had been made on 17th January, 2018 for leave to challenge any of the decisions by way of judicial review, there would have been grounds for extending the time. All that was said on behalf of the defendants as to time was that there was a continuing breach of statutory duty, which can only go to the allegation that standard housing was promoted over traveller specific accommodation, which I have dealt with, or, perhaps the suggestion that the plaintiff has consistently failed to draw down available funding, to which I will immediately turn.

83. A very significant part of the defendants' case, perhaps the core argument, is that the council acted in breach of its statutory duties in consistently electing not to draw down available funding allocated for the purposes of traveller specific accommodation. The defendants relied upon the answers given to a number of parliamentary questions which were said to show that the drawdown by the council was consistently a fraction of the money allocated by the Department of Housing and Planning for traveller specific accommodation. A table of figures was produced showing, for each of the years between 2009 and 2018, a figure for "*Funding Allocation*" and a figure for "*Funding Drawdown*" for County Clare. In eight of these years the funding allocation exceeded funding drawdown; in two, funding drawdown exceeded allocation. In 2018 the funding allocation was €853,250, while the funding drawdown was €13,250. The suggestion was that these figures demonstrated that there was money readily and immediately available to Clare County Council which it was not availing of

84. The defendants' misunderstanding rapidly became apparent from the evidence of Mr. Niall O'Keeffe, an administrative officer with the council, and Ms. Fiona Mooney, now an administrative officer, but at the relevant times a senior executive officer with responsibility for housing. The procedure is that housing authorities submit proposals for development which they propose to undertake, together with a budget. Proposals are submitted in January of each year and funds are allocated by the department in April or May. It is only when funds have been allocated that the council can begin the process of designing and building the developments. As the expenditure is incurred by the council,

an application may be made to the department to recoup its expenditure. The allocation is not cash. The figures shown in the table for "*funding allocation*" are figures for approved expenditure which, when incurred by the council, will be recouped by the department. Because of the inevitable lag between approval by the department, construction of the project, payment by the council, and eventual drawdown, the figures given for allocation do not represent money which is readily or immediately available to the councils.

85. I should say, for the avoidance of doubt, that I am not to be understood as saying that if there was money available to a housing authority from central government, a failure to draw it down would necessarily be subject to review by the courts. In this case, for the reasons given, the issue does not arise.

Summary and conclusions

86. The plaintiff is the owner of the lands in Folio CE42569F, Co. Clare, comprising 0.914 hectares, situate at Ashline, Co. Clare.

87. In 1998 the defendants were given a tenancy from week to week in one of four houses which then stood on the site.

88. The defendants' house was badly damaged by fire in November, 2012. The defendants then decided to move out of the house, and they did move out. The house was shuttered up by the plaintiff and the defendants were put back on the housing list. The defendants' tenancy was not surrendered in writing, but it was surrendered by act and operation of law.

89. Even if the defendants' tenancy had subsisted, it would not have justified their occupation of any other part of the site.

90. By the end of 2013 the site was entirely abandoned, and the houses were uninhabitable.

91. The height of what anyone could have legitimately expected from the Clare Traveller Accommodation Programme 2014 – 2018 was that the plaintiff would invite proposals for the redevelopment of the site and give due consideration to any proposals that might be made. The TAP did not say and could not reasonably been understood as a promise or representation either that the site would be redeveloped as a traveller specific group scheme, or that it would not be redeveloped other than as such a scheme.

92. The height of what could have been legitimately expected from the plaintiff's letter of 9th January, 2014 was that if and when the site was redeveloped for social housing, the defendants would be offered one of the houses. The plaintiff has repeatedly confirmed that promise.

93. The defendants' counterclaim for declarations in relation to the implementation by the plaintiff of its obligations under the Housing (Traveller Accommodation) Act, 1998, although pleaded in terms of private law, is a public law challenge to the performance by the plaintiff of public law duties.

94. A challenge to an administrative decision or measure is ordinarily to be made by way of an application by way of judicial review. If the challenge is made by plenary proceedings claiming declarations, the court will impose the time limits applicable to judicial review and will expect the degree of precision and focus that is required before leave can be granted to bring proceedings by way of judicial review.

95. The substance of the defendants' challenge to the performance by the plaintiff of its statutory functions is that the court should make its own appraisal, or review the plaintiff's assessment, of the need for traveller specific group accommodation schemes in Co. Clare, or, perhaps, the desirability of a traveller specific group scheme at the Ashline site. That is not something which the law allows.

96. To the extent that particular decisions or acts by the plaintiff can be identified, they date from 10th March, 2014 when the TAP for 2014 – 2018 was adopted, to 19th December, 2016 when the Clare County Development Plan 2017 – 2023 was adopted. No justification is offered for the delay in the challenge, which was first made in the counterclaim delivered on 17th January, 2018.

97. In any event, so much of the counterclaim is based on the Housing (Traveller Accommodation) Act, 1998 and the Clare Traveller Accommodation Programme 2014 – 2018 is based on non-justiciable issues as to the formulation and implementation of policy and fundamental misunderstanding of the zoning of the lands and the availability of central government funding for the provision of traveller specific accommodation.

98. There will be a permanent injunction restraining trespass on the lands.

99. The counterclaim must be dismissed.