THE COURT OF APPEAL

Court of Appeal Record Number: 2019/463

Collins J.
Costello J.
Haughton J.

Neutral Citation Number [2023] IECA 61

BETWEEN

ALPHONSUS MULDOON

APPELLANT/
PLAINTIFF

- AND –

THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL, AND DUBLIN CITY COUNCIL

RESPONDENTS/
DEFENDANTS

- AND –

BETWEEN

MARY KELLY AS ADMINISTRATOR AD LITEM OF THE ESTATE OF THOMAS KELLY DECEASED

RECORD NUMBER 2019/465

APPELLANT/
PLAINTIFF

- AND –

THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL, AND CLARE CITY COUNCIL

RESPONDENTS/
DEFENDANTS

- AND –

BETWEEN

VINCENT MALONE

APPELLANT/
PLAINTIFF

RECORD NUMBER: 2019/464

- AND –

THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL, AND DUBLIN CITY COUNCIL

RESPONDENTS/
DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 16th day of March 2023

Introduction

1. These joint appeals concern the regulation of taxis and various changes in the regime between 1961 and November 2000. The appellants say that the combined effect of the actions and inactions of the respondents was to create a market whereby individuals who wished to work as taxi drivers were required as a matter of practice to purchase licences to operate as taxi drivers on the secondary market and to do so at a very great expense, and that taxi plates therefore became a very valuable asset. The regime was abolished overnight by the adoption of S.I. 367 of 2000 on 21 November 2000 ("the 2000 Regulations") which resulted in a serious loss to many taxi drivers who had either invested heavily in purchasing a licence or who had intended to rely upon the capital value which had accrued in their licences to provide an income for their retirement. Many taxi men claiming to have suffered loss as a result of the allegedly wrongful actions/inactions of the respondents instituted

proceedings seeking damages. Three proceedings were chosen to be test cases and the outcome of the three test cases will determine the issues arising in the other cases.

2. On 16 October 2015 the High Court, Peart J., delivered judgment in these three test cases and he rejected all of the claims. Each of the appellants appealed the decision. The issues concerning competition law are addressed in the judgment of Collins J. which is delivered concurrently with this judgment. I have had the opportunity of considering that judgment in draft and I agree with the judgment of Collins J. This judgment concerns the balance of the issues arising in these joint appeals and does not address the competition law issues.

Background

3. The trial judge sets out the complex facts in this case in great detail in his judgment which I gratefully adopt. This judgment should be read in conjunction with his findings of facts which are set out in para. 1-127 of the judgment.

4. For decades taxis have been an essential part of the public transport infrastructure of Dublin as well as other cities, towns and throughout the country. The need for a taxi service 24 hours a day was never adequately met in Dublin during the period 1978-2000, the years immediately relevant to these proceedings. The empirical and anecdotal evidence was that, particularly at night-time, queuing for a taxi was the norm and waiting times became longer and longer, reaching unacceptable levels for a major capital city. Efforts were made by the relevant Minister over many years to proceed cautiously and, if possible, by consensus but this proved to be impossible. Ultimately the Minister introduced the 2000 Regulations which in effect eliminated the secondary market in taxi licences by an immediate deregulation or liberalisation of the taxi market. The 2000 Regulations permitted any adult who could pay £5,000 for a taxi licence (and meet other not very onerous qualitative requirements) to apply for and work as a taxi driver. The removal of any restriction on taxi numbers eliminated the

very significant capital value which had built up in existing licences with disastrous economic consequences for many owners.

5. The system of regulation starts with the Road Traffic Act 1961 (the Act of 1961), s.82 of which empowers the Minister to make regulations:-

> *"(1) …in relation to the control and operation of public service vehicles.*
>
> *(2) Regulations under this section may, in particular and without prejudice to the generality of subsection (1) of this section, make provision in relation to all or any of the following matters:*
>
> *(a) the licensing of public service vehicles…"*

6. The Act of 1961 created public service vehicles (taxis) and private service vehicles (hackneys) which operated under different licences and different regimes.

7. In April 1977 the Road Traffic (Public Service Vehicles) (Amendment) Regulations, 1977 (S.I. No. 111 of 1977) ("the 1977 Regulations") were introduced. For the first time provision was made for an *inter vivos* transfer of ownership of a licenced vehicle (be it a taxi or a hackney vehicle) whereby the new owner of the vehicle could make an application for the continuation in force of the taxi licence of the vehicle for the new owner, subject to the approval of the person by the Commissioner of An Garda Síochána as to suitability. Peart J. held that this development was the genesis of a secondary market in the trade of taxi licences. It transformed the licences from a mere permit or licence to drive a taxi into an asset of some value.

8. The question of limiting or controlling the number of licences that could be issued had been under consideration for some years and continued to be the subject of discussion during 1977. The Irish Taxi Federation was concerned that the market was becoming saturated, with a consequential negative effect on its members' income potential and wanted the Minister to introduce some method of restricting the number of licences. This pressure led

to a moratorium being imposed on new applications for licences for one year. This resulted in protests from persons who wished to apply for a taxi licence and who now could not do so. Mr. Kelly, one such individual, sued in respect of the measure, asserting that the Minister had no power under s.82 to adopt regulations which limited the number of taxi licences which could be issued. In *State (Kelly) v. Minister for the Environment* (Unreported, High Court, Costello J. 26 July 1978) Costello J., (as he then was) held that the word *"control"* in s.82(1) of the Act was wide enough to embrace numerical control and therefore he rejected the challenge. The decision of Costello J. in the High Court was upheld on appeal by the Supreme Court.

9. In light of the decision in *State (Kelly) v. Minister for the Environment*, the Minister introduced the Road Traffic (Public Service Vehicles) (Licencing) Regulations, 1978, (S.I. 292 of 1978) ("the 1978 Regulations"). These regulations *inter alia* delegated to local authorities the power to determine the number of new licences to be issued in any given year by the Commissioner of An Garda Síochána.

10. At para. 24 of his judgment Peart J. held as follows:-

> *"...the evidence is that from this time the representatives of the taxi industry were very effective in lobbying local authority representatives who, except in August 1979 when 150 new licences were granted, on an annual basis and over an entire decade voted for no increase in licence numbers. This pattern of voting was in the teeth of a clear and substantial unmet public demand for taxis on the streets. The secondary market in the sale of taxi plates flourished during these years to the point where the taxi plate became a very valuable asset indeed, which could be sold at a high price, or indeed rented out in order to provide a retirement income for its owner. The fact that no new licences were being issued meant that if a person wished to become a taxi owner, the only realistic route was to buy an existing licence. The fact that a large number of people wished to*

do this meant that the cost of buying a licence on the secondary market grew exponentially over the years until "the crash" occurred in November 2000 following the liberalisation of the taxi industry by the introduction of S.I. 367 of 2000 which saw the capital value of existing licences disappear overnight."

The trial judge held that throughout the 1980s and 1990s the demand for taxis was growing as the population of Dublin expanded, as well as tourism and demand generally. Notwithstanding this, the pattern of no new licences being approved and the rise in prices being paid for licences on the secondary market continued into the 1990s. He held that during the 1980s the prices paid for a taxi plate rose from £2,000 to £38,000. By September 1996 prices rose as high as £80,000.

11. In 1991 the Minister introduced the Road Traffic (Public Service Vehicles) (Amendment) Regulations 1991 (S.I. 272 of 1991) ("the 1991 Regulations"). These provided for the issue of 100 new public hire vehicle licences for the Dublin Taxi Meter area and stipulated a new fee structure and new criteria for assessing applications for licences. They introduced a requirement to pay a fee of IR£3,000 in respect of a grant of a new public hire vehicle licence and a fee of IR£3,000 by a new owner where a change of ownership of a public service vehicle was proposed. This modest increase in the number of licences led to a reduction in the costs of licences on the secondary market from £50,000 to £40,000, though the prices did recover thereafter.

12. In his detailed review of developments between 1978 and 2000 Peart J. traces the discontent with the situation which he held seemed to be *"rife on all sides"*. In particular, the problems of demand outstripping supply continued to cause great concern both at departmental and Ministerial level and for consumers.

13. The Minister established an Interdepartmental Committee in May 1991 *"to examine the many and chronic problems that dogged the taxi/hackney industry."* The report also

considered the position of private hire vehicle drivers (hackneys). Due to the increasing size of the unmet public demand for taxi services, particularly in Dublin, there was a significant growth in the number of hackneys who were essentially competing for the taxi market though under different rules. The report recommended that the temporary moratorium introduced in October 1991 on the issue of new hackney licences so as to stabilise the market pending the completion of the review, should be removed again to allow unrestricted entry into the hackney sector of the market.

14. This recommendation led to the introduction by the Minister of S.I. 172 of 1992 which lifted the moratorium on the issue of taxi and hackney licences (which had been imposed by S.I. 272 of 1991) and also provided for the grant of 50 wheelchair accessible taxi licences in Dublin. A number of taxi owners instituted judicial review proceedings, entitled *Hempenstall v. Minister for the Environment* [1994] 2 IR 20, seeking to quash the lifting of the moratorium in respect of the granting of new hackney licences on the basis that it would devalue their constitutionally protected value in their licences. The reliefs were refused on the basis that even if the applicants had succeeded in establishing that the 1992 Regulations caused a reduction in the value of their existing taxi licences (and Costello J. was not satisfied that they had proven this), such a reduction did not constitute an attack upon their alleged constitutionally protected property rights. I discuss the detail of this decision later in this judgment.

15. Following the publication of the Interdepartmental Report in May 1992 a consultation process ensued which continued until 1995 with the introduction of the S.I. 136 of 1995 ("1995 Regulations"). These regulations made local authorities responsible for a great many aspects of the taxi/hackney industry including the fixing of maximum fares, and the determination of the number of licences required to be issued in their areas, and the amount

of fee payable which was to be retained by the local authority in order to defray the cost of administrating the industry and issuing licences.

16. As explained in paras. 68-72 of his judgment, Peart J. found that *"matters dragged on and on, and remained substantially unresolved"*. Various solutions were proposed and defeated. In 1996, 100 wheelchair accessible licences were issued (half the number recommended). The chronic shortfall in the number of new taxi licences is illustrated by the fact that in the Dublin area between September 1995 and July 1996 817 new hackney licences were issued.

17. In early 1997 the four local authorities for the Dublin area agreed to issue 200 wheelchair accessible taxi licences, subject to certain restrictions. There were 969 application for these 200 licences.

18. In 1997 the terms of reference for an independent review of the taxi market were approved by the four Dublin local authorities. The review, conducted by consultants Oscar Faber, issued an interim report in December 1997 and a final report in 1998. The interim report recommended the immediate issue of a further 200 wheelchair accessible licences for a fee of £15,000 in addition to the previous 200 already issued earlier in 1997.

19. In late 1997, An Taoiseach established the Dublin Taxi Forum comprising representatives of Dublin taxi organisations, the Department of the Taoiseach, Environment, Local Government and Public Enterprise, An Garda Síochána, two nominees of the Dublin Transportation Office and a consultative panel representing business and personal customer interests as well as nominees of the managers of the four Dublin local authorities.

20. The trial judge described the situation in June 1998 as "*chronic and intractable*" and referred to the fact that the problems of supply had beset the taxi industry for decades particularly in Dublin. He described the final Oscar Faber Report which issued in June 1998 as detailed, comprehensive and well researched. He recorded that:-

"The report noted the rapid expansion of the city, the growth in tourist numbers, the economic growth of the city, and the fact that there was an increasing awareness of the drink driving laws, all of which conspired to make clear that there was a serious imbalance between supply and demand, especially at peak times, and that this problem was chronic and needed to be addressed with urgency."

21. He summarised the various approaches which were examined and the need for transitional arrangements pending a full entry deregulation in relation to taxis. He quoted para 4.4.2 of the Report as follows:-

"Full and immediate entry deregulation could bring benefits in terms of allowing the supply of taxis to adjust more quickly to demand. However, there are economic and social reasons why immediate deregulation may not be desirable.

There is also some concern that full and immediate entry deregulation might lead to excessive entry into the market which would then take some time to reach equilibrium. That is, potential entrants might gauge the returns to be obtained from supplying taxi services on the basis of those obtaining in the current market, and enter the market in large numbers. This would lead to low actual returns followed by a substantial level of exits from the market. A lead-in period in which the number of licences was gradually increased would allow time for potential entrants to gauge the extent to which market demand remained unsatisfied as supply increases.

However, the principal reason why full and immediate entry deregulation is not desirable is social. Entry deregulation would impact very severely on a minority of individuals who have recently bought licence plates on the open market. Some of these purchasers have invested life-savings or redundancy monies in a plate in the expectation

that the value of the plate would at least be maintained. Under full entry deregulation the market value of the plate will virtually disappear. To some extent, purchase of the plates is regarded as a substitute for pension arrangements.

It might be argued that all investments are subject to some risk and that plate purchasers like other investors should not be entitled to compensation when their investment does not make a good return. However, the scale of the investment relative to their income and the fact that many of the plate holders would have no other assets on which to rely argues for some easing of the impact of entry deregulation on them."

22. In other words, the authors of the Oscar Faber report favoured deregulation over time to allow a *"softer landing"* for the existing licence and to avoid an excessive number of new entrants. The trial judge concluded at para. 92 that the authors would no doubt have favoured a faster track to full entry deregulation if they had not:-

"...felt it necessary to recognise the reality of the secondary market that had developed since 1978 and the serious impact that overnight deregulation would have entailed for licence holders. [The expert group] clearly considered that the solution had to be a proportionate one which reasonably took account of those who would be negatively impacted by deregulation if it was to happen."

23. The Dublin Taxi Forum which had been established by An Taoiseach considered the Oscar Faber Report. The Forum made a number of recommendations in its report in August 1998 including that *"to meet market demand taxi numbers should be increased on a phased basis over the next four years to give a total of 3200 taxi licences at the end of the year 2002"*. The trial judge noted that there was a general acceptance of the need for more licences and that they recommended that *"the Minister should provide that fares and entry to the taxi market continue to be regulated, their functions to be exercised by the Local*

Authorities," and that *"new licences should only be for vehicles which are accessible to the elderly and are wheelchair accessible".*

24. The trial judge summarised the position of the various reports, fora and consultative bodies in para. 91 of the judgment as follows:-

> *"By way of summary it can be seen that Oscar Faber had recommended Option B, namely 350 new licences to be issued per year over a ten year period which would be followed by full entry deregulation. The Dublin Taxi Forum on the other hand was in favour of 820 new licences being issued over a four year period under a modified points system and for wheelchair accessible taxis only. It should be said that even the issue of 820 new licences as supported by the Dublin Taxi Forum would inevitably have some effect on licence values, even though spread out over four years – at least according to the Department (see John Weafer's evidence, Day 15, p.132, Qs. 398-399). The Forum's view on 820 new licences over a four year period was adopted by the Joint Taxi/Hackney Consultative Body established to review the Oscar Faber Report, and this Body made a strong recommendation to the four Dublin local authorities for 820 new wheelchair accessible licences over a three year period, with a review to take place thereafter before any further licences should be issued. That is what was adopted by a majority of Dublin City Council elected members on the 7th December 1998, rather than the Option B preferred approach which as recommended by the Oscar Faber report which would have seen a ten year lead-in period to full deregulation. It will be recalled that part of the thinking for Option B was that the ten year lead-in period prior to full entry deregulation would provide existing licence holders with a 'soft landing' onto full deregulation eventually when the value of the licences on the secondary market would effectively disappear completely".*

25. At para. 93 he held:-

"At local authority level any adoption of a measure leading to deregulation was likely to be problematical as those making the decision would be a majority of elected members, and they presumably would have to had one eye on the political reality that measures that did not meet with the approval of the taxi industry itself would have resulted in more street protests by taxi drivers, and in the past they had demonstrated an ability to organise such protests very effectively, bringing large parts of the city to a standstill with consequent disruption to large sections of the public. Elected members were lobbied by the taxi industry during this period, and would have been aware of the views of the taxi industry representatives. Nevertheless they were mandated to do something constructive to address the appalling situation in which people seeking taxi services in the city were finding themselves on a regular basis and particular at times of peak demand."

26. Since the 1970s the taxi drivers had organised protests in opposition to measures to which they objected, which had severe impacts on the life of the capital city. For example, on 16 March 1979 (the day before St. Patrick's Day) they went on strike, thereby severely impacting tourism in the city. In August 1992, in the height of the tourism season, they went on strike following the lifting of the injunction restraining the issue of new hackney licences. Serious traffic chaos ensued as taxi drivers blocked streets and bridges across the city. The threat of serious disruption to the life of the city was always present if measures with which taxi drivers disagreed were adopted. Indeed, in advance of the adoption of S.I. 3 of 2000, which I shall discuss below, the taxi drivers of Dublin blockaded Dublin airport and organised a number of disruptive street protests.

27. In 1999 the Policy Institute at Trinity College Dublin issued a report in 'Studies in Public Policy' under the title *"The Dublin Taxi Market: Re-regulate or stay queueing?" ("The Fingleton Report*" after the first co-author, John Fingleton). It was published after the

Oscar Faber Report and took a different view on the way to reform the untenable situation. The Fingleton Report favoured a firm decision to move to full deregulation after three years with some ameliorating measures to take account of existing licence owners' interests. The authors stated:

> *"Further consultation or discussion of these issues is neither necessary nor acceptable. The time for action has arrived. Local authorities and central government must now deliver comprehensive re-regulation of the taxi market. They should substantially increase taxi licences over the next two to three years, commit to removing entry barriers, and reform the system for regulating the market. Alternative policies could be open to the interpretation that they amount to window-dressing, with the inference of continued capitulation to the vested interests of a small industry lobby over the broader consumer welfare. Alternatives may give partial relief of the problem for a short period of time, but they will not address the fundamental problem that is created by the restriction on entry to the market. Unless this is tackled resolutely, Dublin will continue to lack an effective taxi service."*

28. At para. 6.2 of the recommendations they stated:-

> *"**Entry to the market should be deregulated over a period of two to three years.** There is no compelling theoretical argument for regulating entry to the taxi market. The experience on the Dublin market suggests that market supply cannot respond to demand, no matter how often the market is reviewed. Deregulation of entry has been successful elsewhere in eliminating the problem of excess demand.*
>
> *Deregulation cannot be done immediately because it would reduce the value of taxi licences on the secondary market to zero. This would penalise those licensees who recently purchased a licence and would generate enormous opposition in the market. We therefore propose a staggered approach to increasing the supply until deregulation*

of occurs. However, it is imperative that this be done as soon as possible and we would propose that firm commitment should [now] be made to deregulation of entry, with three years being the maximum period for this to occur.

Before deregulation of entry, supply should be increased by giving each existing licensee a second licence. The 800 licensees who most recently purchased a licence on the secondary market should get the additional licence immediately and the remainder one year later. There should be no restriction on the sale of these licences to suitably qualified individuals.

This proposal would apply to only the 1974 licences that existed in November 1997. The authority would examine the records on licence transfers and identify the 800 hundred licensees who most recently purchased a licence.

This group would be awarded a second licence immediately. The fact that the excess demand is at least double the current supply means that 800 new licences would still result in a substantial value for a licence on the secondary market. This group could choose to sell one or both licences in order to be compensated for the loss in the value of the licence recently purchased.

The remaining 1,174 would be awarded a second licence one year later. Members of this group would have purchased their existing licence at least eight years previously, and so would not require the same compensation as the first group. This would be reflected in the fact that the value of these licences would be lower because the excess demand in the market would have abated. One year later, licences would be awarded

to any applicant who met the required standards and paid the relevant licence fee. The fast pace of entry would also mean that "cosies" (existing second drivers) would be in the best position to purchase new licences as they would be suitably qualified.

It would be wholly inappropriate for the government to compensate existing licence holders directly for the value of their plates. The value of a taxi plate on the secondary market reflects a monopoly profit in the market. Government policy (following membership of the European Union and in the 1991 and 1996 Competition Acts) toward monopolies in markets with a single monopoly supplier is not just to eliminate this monopoly profit, but also to impose heavy fines (up to 10 per cent of turnover) for abuse of any such dominance. In this case, the only difference is that the monopoly situation is occupied jointly by a group of suppliers. Deregulation accompanied by such compensation would be equivalent to admitting that crime was being committed continually and rewarding the criminal for stopping. Moreover it would set a dangerous precedent for other markets, increasing the incentives for suppliers to lobby for the licensing of entry to their markets.

There is precedent for the policy we outline. When licenced haulage was deregulated in 1978, each existing licence was converted into six licences and full deregulation of entry followed in 1986. Barrett (1991, pages 86 – 89) shows how this resulted in an expansion of the freight market as its efficiency increased."

29. Thus, there had been a number of expert studies addressing the problem, the issues were identified, and possible solutions canvassed. It was clear that deregulation, to a lesser or greater extent, would impact upon the value of licence plates and thus on those taxi drivers who had recently purchased their plates at significant cost. The policy issues concerned how

to implement the required reforms while, as far as was practicable, mitigating the inevitable impact of the reforms on persons who had recently purchased taxi licences.

30. The trial judge concluded that even by the end of 1999 the problems in the city arising from the lack of an adequate number of licences had not been resolved in any meaningful way. Queuing was still a serious problem for citizens and tourists and discontent abounded amongst the taxi consumer market. This was a concern for the Government of the day.

31. On 30 November 1999 the Government approved a proposed measure to offer one new licence to each existing licence holder, with 500 to be wheelchair accessible licences, and there were to be an additional 500 ordinary taxi licences to be allocated in accordance with the existing points system for assessment.

32. On 30 November 1999 the Minister of State at the Department of the Environment and Local Government outlined some of the difficulties in the taxi market and the efforts made to address those difficulties. He stated:-

> *"However, the gradual nature of these improvement policies has disadvantages. The major disadvantage is that Dublin, as capital of a rapidly growing economy, would have to wait until at least the year 2008 before eliminating the problem of current demand for taxi services…*
>
> *As the capital of a rapidly expanding economy, Dublin has seen a rapidly increasing demand for mobility in all travel modes. Numbers passing through Dublin Airport have more than doubled since 1993 and are expected to reach almost 13 million in 1999. There are now approximately 122 hotels in Dublin compared to 88 in 1995, and tourism has become a major industry in the Dublin region.*

The present inadequate supply of taxis in Dublin risks harming the capital's reputation in the eyes of international business people and other visitors; it would also remain a source of frustration to residents of the city. A continuation of this situation for another 8 years, albeit subject to gradual improvements, is not supportable. All of these factors have persuaded the Government that we need a more urgent and accelerated approach to matching Dublin taxi supply and demand. At the same time, we are conscious of the significant investment which many existing taxi providers have made in their industry and livelihood.

The Courts have made it clear that the State does not have a duty to uphold present traded values of taxi licences, but as far as possible, the Government wishes to devise solutions which will in practice be fair to existing taxi service providers as well as providing good service to the public."

33. The proposals were greeted by taxi drivers with a blockade of Dublin Airport and other forms of street protest. Despite this opposition, the Minister made new regulations on 13 January 2000 to give effect to the proposals. These were the Road Traffic (Public Service Vehicles) (Amendment) Regulations 2000 (S.I. 3 of 2000). The trial judge summarised the effect of those Regulations in para. 110 as follows:-

"These regulations maintained quantitative restrictions but at a level that the Minister considered would achieve a reasonable solution to the problems of supply over as short a period as was feasible in all the circumstances, and in a way which he considered was fair, in the sense of taking into account, as he saw it, the interests of existing licence holders who could now apply for an additional licence which they could dispose of on the secondary market. The regulations did not themselves provide

for the grant of licences, but rather they provided for a process whereby existing licence holders would be able to apply for one new licence as explained above."

34. On 7 February 2000, four hackney licence owners were granted leave to challenge S.I. 3 of 2000 on the basis that they would not be entitled to obtain any of the new licences under S.I. 3 of 2000. They claimed *inter alia* that s.82 of the Act of 1961 did not permit the Minister to restrict the issue of new licences to existing licence holders and that the regulations were therefore *ultra vires*. The High Court granted an injunction restraining the issue of any new licences on foot of the new regulations (S.I. 3 of 2000) until such times as those proceedings were determined. In October 2000 in *Humphrey & Ors. v. Minister for the Environment & Ors.* [2000] IEHC 1479, [2001] 1 IR 263 the High Court (Murphy J.) concluded that by virtue of the fact that the Minister was empowered by s. 82 of the Road Traffic Act, 1961, to grant, or indeed, refuse applications for licences in respect of public service vehicles, the Minister was *ipso facto* exercising a measure of indirect quantitative control over the licensing of such vehicles and therefore the Minister was not prevented by s. 82 of the Act from exercising quantitative control *per se* over the licensing of such vehicles.

35. Secondly, he held that while the section provided for the "*control and operation*" of taxis through the introduction of regulations, it did not expressly or necessarily give power to directly restrict numbers and that the Minister, in restricting the number of licences issued in respect of public service vehicles for reasons unrelated to qualitative standards of the vehicles and of the drivers, had fettered the discretion conferred upon him by the section. Thirdly, that any such fettering of the ministerial discretion which affected the rights of citizens to work in an industry for which they may be qualified was impermissible and *ultra vires*, and that there must be a serious doubt over the constitutionality of any such scheme. He quashed the regulations.

36. The Minister did not lodge an appeal against the decision of the High Court. However, the National Taxi Drivers' Union and Thomas Gorman (in his capacity as General Secretary of the Union) had been granted leave to be joined as respondents to the proceedings, and they appealed the decision to the Supreme Court.

37. The Minister did not appeal the decision in *Humphrey*. Instead, on 21 November 2000 the Minister signed the 2000 Regulations. The 2000 Regulations specifically revoked S.I. 3 of 2000, even though it had been quashed by the High Court and they fully liberalised the issuing of new taxi licences. The imposition by issuing authorities of any quantitative restrictions was no longer permissible. The secondary market in taxi licences was eliminated overnight, because anybody who wished to acquire a taxi licence could apply for one and would be issued with a licence provided certain conditions were met and upon the payment of what the trial judge characterised as "*quite a modest fee*".

38. Existing taxi licence holders responded with a serious protest in the form of a complete withdrawal of taxi services in Dublin as well as street blockages and disruptions at Dublin Airport which lasted for over a week. The trial judge described this response as *"inevitable"*.

39. On 28 November 2000, a week after the introduction of the 2000 Regulations, Mr. Gorman applied *ex parte* for leave to challenge the 2000 Regulations. (*Gorman v Minister for the Environment* [2001] 2 IR 414). Kelly J. directed that the application be on notice to the respondents and on 7 December 2000 he granted Mr. Gorman leave to challenge the 2000 Regulations and an injunction restraining their operation until the determination of the proceedings. In March 2001 the High Court (Carney J.) delivered judgment. He held that by revoking S.I. 3 of 2000, the 2000 Regulations interfered with the appellants' right to have their appeal in the *Humphrey* case determined in the Supreme Court and it therefore constituted an unwarranted interference in the judicial process. He quashed Article 3(1)(a),

the provision which had revoked S.I. 3 of 2000. He rejected all other grounds of challenge to the 2000 Regulations.

40. The Minister took certain steps to alleviate the effects of deregulation. He refunded the differences between the fees recently paid to local authorities for the transfer of licences purchased on the secondary market and the new fee for a new licence under the new arrangements. Licence holders were permitted to offset capital outlay against their income tax over a period of five years. He set up a Taxi Hardship Scheme which paid out a total of €17.3m on compassionate grounds. Mr. Muldoon and Mr. Kelly each received €13,000 under this scheme.

The plaintiffs/appellants

41. Mr. Muldoon first applied for a taxi licence from Dublin Corporation in 1994 but there were none available. He worked as a hackney driver for four years prior to purchasing a licence on the secondary market in Dublin in 1998 in the sum of £80,000. He used £40,000 of savings belonging to himself and his wife and he obtained the balance by way of a loan from Bank of Ireland which was secured by a mortgage on his home. He paid a fee of £3,000 to Dublin City Council for the transfer of that licence to him.

42. The pattern in Ennis was similar to that in Dublin City. In 1982 the number of taxi licences was increased from 12 to 20 but otherwise no new licences were issued. Mr. Kelly first applied for a licence from Ennis Town Council in 1998 when he was informed that there were none available. Shortly thereafter he bought his licence in Ennis on the secondary market in 1999 for the sum of £107,000. He took out a 10 year mortgage to enable him to do so, and in addition he pay a fee of £3,000 to Ennis Town Council for the transfer of the licence to him.

43. Mr. Malone purchased his licence in 1973 for £3. He intended to rely upon the capital value which had accrued to provide for this retirement. In 2007 he transferred his licence to his daughter.

The proceedings

44. Notwithstanding the fact that in *Gorman* the High Court had rejected the challenge to the 2000 Regulations, in February 2002 Mr. Muldoon and Mr. Kelly commenced their proceedings by way of plenary summons. Mr. Malone commenced his in November 2002.

Mr. Muldoon's Pleadings

45. Mr. Muldoon issued a Plenary Summons on 6 February 2002 claiming:-

"(a) A Declaration that the Defendants and each of them, their servants and agents enacted and maintained an unlawful, void and illegal regulatory regime for the licensing of small public service vehicles between the years 1978 and 2000.

(b) Damages for breaches of Articles 49, 76, 82 and 86 of the EC Treaty.

(c) Damages pursuant to Irish law and EC law for breach of the plaintiff's legitimate expectation that the Defendants and each or either of them would maintain a lawful and valid regulatory regime for the licensing of small public service vehicles and/or that the Plaintiff would not suffer financial loss by reason of such unlawful and illegal regulatory regimes.

(d) Damages for breach of duty, breach of statutory duty, negligence and/or negligent misrepresentation and/or breach of contract and/or breach of the Plaintiff's constitutional rights.

(e) A Declaration that the defendants or some of them had been unjustly enriched as a result of the illegal regulatory regime operated and/or approved by them.

(f) An order directing the Defendants and each of them to make restitution to the Plaintiff in respect of the unjust enrichment obtained by the Defendants or some of them as a result of the operation of the said unlawful and illegal regime.

(g) Damages in respect of the loss and damage caused and/or occasioned to the plaintiff by reason of the ultra vires acts of the Defendants and each of their respective servants or agents.

(h) Damages for misfeasance in public office.

(i) All necessary accounts and enquiries.

(j) Interests.

(k) Costs."

46. More than four years later, on 8 May 2006 he delivered a Statement of Claim. At para. 6 he pleaded:

"Since 1978 the defendants and each of them provided and established for a legislative regime involving the imposition of quantitative restrictions on new entrants to the taxi industry. By the provisions of Regulations from 1978 onwards the First to Third named defendants empowered the Fourth Named Defendant to determine the number of taxi licences to be issued within its administrative area…"

47. At para. 7 he pleaded that he:

"….wished to enter the taxi industry within the administrative area of the fourth named defendant and on enquiry of the Fourth Named Defendant was advised that no new licences would be issued in its administrative area and accordingly [he] was advised and directed that the only means of entry into the said industry was to purchase an existing taxi licence on the secondary market."

48. In Replies to Particulars and subsequent pleadings Mr. Muldoon clarified that he received this advice in August 1994. As he had no other legal means to enter the market, he

purchased a licence plate for £80,000 and paid Dublin City Council a sum of £3,000 to continue his licence in force. In Replies to Particulars and in subsequent pleadings he clarified that he purchased the licence on 5 April 1998 and that he used his savings of approximately £40,000 and borrowings of £40,000 (which were secured by way of a mortgage over his home) to purchase the licence plate.

49. In para. 8 he claims that *"by reason of the exercise of legislative and administrative functions"* by the respondents and their respective servants and agents *"and by reason of their acts, omissions and defaults"* the appellant was obliged to purchase a taxi licence on the secondary market in a legislatively created and regulated secondary market.

50. At para. 11 he pleaded:

> *"In the premises the Defendant and each of them created an unlawful restriction and in particular an unlawful quantitative restriction on persons entering the Taxi Market and in particular the Plaintiff. At all material times the Defendants their servants and agents acted ultra vires, wrongfully and unlawfully by reason of these said matters the Plaintiff has suffered and continues to suffer loss, (to include economic loss) damage and expense."*

51. In para. 12 he set out the particulars of the alleged wrongs:

> *(a) Regulated the Taxi Industry in such a manner as to impose quantitative restrictions on the entry into the said Market ultra vires the power to regulate the Industry provided by section 5 and 82 of the Act of 1961 (as amended by Section 57 of the Road Traffic Act 1968). The said Acts provide no power to the First named Defendant (for whom the Second and Third named Defendants are liable) to so regulate the market or to restrict entry into the said Market in the manner chosen or at all.*
>
> *…*

(c) …The combination of the bundle of restrictions on entry to the market and the requirement that the Plaintiff incur substantial expenditure resulted ultimately in great loss and damage to the Plaintiff. Had the regime envisaged in 1963 and re-established by S.I. 367 2000 being (sic) in place at the time of his entry to the market the plaintiff would not have suffered this loss."

52. Mr. Muldoon made similar pleas against the fourth named defendant viz. that it had wrongfully failed, refused and neglected to allow for the issue of any new taxi licences between 1978 and 2000. He claimed damages from the fourth named defendant and other reliefs set out in the Endorsement of Claim.

53. The claim is that the regime established by the 1978 Regulations (in combination with the 1977 Regulations which provided for *inter vivos* transfer of licences) was unlawful. Quantitative restrictions on entry into the market breached the requirements of competition law, and the 1978 Regulations were *ultra vires* as the Minister had no power to impose quantitative restrictions on entry into the market. The focus of the claim is on the alleged unlawful entry into the market, rather than on the termination of the secondary market in taxi licences.

54. The 2000 Regulations were not impugned in any way and were only referred to as re-establishing the regime envisaged in 1963. No detail of any alleged breach of any constitutional rights of the plaintiff were pleaded. Mr. Muldoon sought no declaratory relief in relation to the 2000 Regulations.

55. Mr. Muldoon delivered an Amended Statement of Claim in December 2007. At para. 6 he now pleaded:-

"Between 1963 and in or about November 2000, the defendants and each of them enacted and/or maintained in force and/or provided for and/or established and/or implemented and/or benefited from an/or made representations in relation to a

legislative/regulatory regime in respect of the taxi industry. Since 1978, that legislative/regulatory regime involved, inter alia, the imposition of quantitative restrictions on new entrants to the taxi industry. By the provision of regulations made during the period from 1978 until 2000 (inclusive), the First to Third named defendants empowered the Fourth named Defendant to determine the number of taxi licences to be issued within its administrative area and precluded the granting of new taxi licences in excess of the number so determined. …The making, maintenance, in force, and implementation of the said Regulations by the First, Second and Fourth named Defendants, including the provision thereof in respect of the continuation in force of a taxi licence in the name of another person ("transferability"), resulted in the creation of a statutory/regulatory secondary market in taxi licences." (emphasis added)

56. He pleaded that the defendants and each of them created, regulated and maintained a market for the sale and transfer of small public vehicle licences. At para. 11 and 12 he pleaded:-

"11. In the premises, the defendants and each of them created an unlawful restriction and in particular an unlawful quantitative restriction, on persons entering the Taxi Industry, thereby, inter alia, creating a market in which the prices of taxi licences were maintained at very high (and ever-increasing) levels and taxi operators including the Plaintiff were required to pay such prices, together with fees payable to the Fourth Named Defendant, in order to enter into the Taxi Industry.

12. On or about 21 November 2000, the First named Defendant, his servants or agents made the Road Traffic (Public Service Vehicles (Amendment) (No. 3) Regulations, 2000 (S.I. No. 367 of 2000 hereinafter referred to as "the 2000 Regulations") which,

inter alia, removed the quantitative restrictions hitherto imposed on entry to the Taxi Industry and provided for the grant, renewal and continuance in force of taxi licences upon payment of the fee specified therein. Inter alia, the First and Second named Defendants thereby effectively eliminated the secondary market for the transfer and continuance in force of taxi licences and caused an automatic and very substantial reduction in the value of all existing taxi licences including the taxi licence held by the Plaintiff. The Plaintiff will rely upon the 2000 Regulations for their full terms, meaning and effect."

57. Paragraph 12 replaces the plea in para. 12(c) in the original Statement of Claim which referred to the 2000 Regulations as re-establishing the regime envisaged in 1963. He now pleaded that the 2000 Regulations effectively eliminated the secondary market for the transfer of the licences and caused an automatic and very substantial reduction in the *value* of all existing taxi licences, including his. The challenge is still focused upon regulations which restrict entry into the market and asserts that the restriction ended with the adoption of the 2000 Regulations. He does not impugn the 2000 Regulations in this plea.

58. He continued the plea that the first named defendant was not empowered under the Act of 1961 to make regulations which imposed quantitative restrictions on entry into the market. At para. 13(b) and (c) he pleads that both the Minister and the fourth named defendant acted in breach of statutory duty (including the unreasonable exercise of statutory powers) and that they were each guilty of negligence and negligent misrepresentation. It is also pleaded that the fourth named defendant acted in breach of contract.

59. At para. 13(e) he expanded his plea in relation to legitimate expectation as follows:-

"…The Plaintiff entered into the Taxi Industry with that expectation and he continued in the Taxi Industry and financially planned his eventual retirement on that basis, and in particular, on the basis that he would be able to sell his taxi licence in the secondary

market which was authorised, establish, maintained, implemented and/or benefited from by the First, Second and/or Fourth named Defendants. Further, or in the alternative and without prejudice to any other pleas herein, the Plaintiff had a legitimate expectation that…the First, Second and/or Fourth named Defendants would not alter that system – and in particular, would not effectively eliminate the said secondary market and cause an automatic and very substantial reduction in the <u>value</u> of all existing taxi licences – in the manner in which the First named Defendant did when he made the 2000 Regulations…." (Emphasis added)

60. At sub-para. (f) he pleaded:-

"By their acts, omissions and representations in respect of regulation of The Taxi Industry during the period from 1963 <u>to date</u>, the first, second and fourth named defendants breached rights of the plaintiff which are protected by the Constitution of Ireland including, in particular: (i) his right to earn a livelihood; (ii) his property rights; and (iii) his right to be held equal before the law." (Emphasis added).

61. No further details of these claims are provided. While it was pleaded that the 2000 Regulations caused a very substantial reduction in the value of the Mr Muldoon's licence which he had purchased in April 1998, no declaratory relief was sought in respect of those Regulations. He does not plead that the adoption of the 2000 Regulations was *ultra vires* the Minister. As against the fourth named defendant he pleads that there was an effective moratorium on the issuing of new licences for twelve years and a wholly inadequate number of taxi licences were granted for the ten years thereafter.

62. Mr. Muldoon was permitted to amend his Statement of Claim on 14 November 2013 to include a plea that the 1978 Regulations were *ultra vires* because the Minister had no power to delegate to local authorities, including the fourth named defendant, a power to determine and/or fix the number of taxi licences to be issued in specified areas.

63. Thus, in the High Court Mr. Muldoon's case was that the regime which applied between 1978 and November 2000 was unlawful because it purported to impose quantitative restrictions, and the 1978 Regulations which underpinned the regime were *ultra vires* as the Minister had no power to delegate to local authorities a power to determine and/or fix the number of taxi licences to be issued in specific areas. The illegal regime was brought to an end by the 2000 Regulations. It was pleaded that Mr. Muldoon's licence (for which he had paid £80,000 in 1998) was seriously devalued as a result of the abolition of the illegal regime. It was not pleaded that the 2000 Regulations were *ultra vires*. While Mr. Muldoon claimed damages for breach of his constitutional rights, the claim was not particularised and specifically the basis of the alleged breaches of his constitutional right to earn a livelihood and/or to be held equal before the law was not set out. The complaint concerning the devaluation of Mr. Muldoon's licence was that this breached his legitimate expectations that he would be able to sell his taxi licence in the secondary market which had been authorised, established, and maintained by the defendants. It was also alleged that in so acting the Minister and the fourth named respondent acted in breach of statutory duty and were guilty of negligence and negligent misrepresentation. As against the fourth named defendant he alleged that it failed to allow for the issue of sufficient new taxi licences within its administrative area.

Mr. Kelly's Pleadings

64. Mr. Kelly commenced his proceedings with a plenary summons issued on 11 February 2002. The relief sought was identical to that in Mr. Muldoon's plenary summons. The Statements of Claim issued in 2006, 2007 and 2013 were the same as those issued in Mr. Muldoon's proceedings save the particulars which were personal to Mr. Kelly and Ennis Town Council. He pleaded that in or about January 1999 he sought to enter the taxi industry in the administrative area of Ennis Town Council. On enquiring of Ennis Town Council and

the Sergeant of Ennis Garda Station, he was advised that no new licences would be issued in its administrative area and that the only means of entering the market was to purchase an existing taxi licence on the secondary market. He said that he did so on or about 16 February 1999 for the sum of £107,000 and that he paid the sum of £3,000 to Ennis Town Council to continue the licence in force. He pleaded that to finance the purchase and the transfer fee and the purchase of a vehicle, he and his spouse took out a bank loan of £100,000 and withdrew £10,000 from a saving bond.

Mr Malone's Pleadings

65. Mr. Malone commenced his proceedings by way of Plenary Summons on 12 November 2002. The General Endorsement of Claim is identical to that in summonses issued by Mr. Muldoon and Mr. Kelly. Mr. Malone pleaded that he purchased his taxi licence in or about 1972 for the sum of £7[1] and that he held the licence at all material times until he transferred it to his daughter on or about 27 June 2007. He too alleged that by imposing unlawful quantitative restrictions between 1978 and 2000 the defendants and each of them created a market in which the prices of taxi licences were maintained at very high levels and that taxi operators were induced to enter into the market by paying very high prices for taxi licences and that he *"was induced to rely on the said market and in particular the value of taxi licences in that market."* He pleaded that the 2000 Regulations effectively eliminated the secondary market and caused an automatic and very substantial reduction in the value of all existing taxi licences including the taxi licence he held. The pleas of alleged wrongdoing are those previously discussed. He pleaded that he suffered a very substantial loss in the value of his taxi licence, and he was deprived of a substantial asset which he proposed to use for the purposes of a pension. In all other respects the pleaded case was the same as that of Mr. Muldoon and Mr. Kelly.

[1] In fact the trial judge found that he paid £3 for the licence in 1973.

The defences of the State defendants

66. The State defendants pleaded that the plaintiffs in each case had been guilty of gross and/or inordinate and/or inexcusable delay in bringing the proceedings and that the claim or portions thereof were barred by reason of the delay or that they were estopped from proceeding with the claim by reason of the delay or that the claims were barred by virtue of the Statute of Limitations 1957.

67. In response to the amendment to the Statement of Claim in November 2013, the State defendants pleaded that:

> *"Insofar as any claim in damages is sought to be agitated in respect of the alleged unlawfulness of the delegation to local authorities of the power to determine quantitative restrictions, that claim was first included in these proceedings in November 2013 and that claim accrued prior to November 2007."*

68. It was pleaded that s.82 of the Act of 1961 conferred upon the Minister the power to make regulations controlling the number of taxi licences including the power to limit the number of taxi licences and it was denied that any alleged imposition of quantitative restrictions was *ultra vires* the provisions of the Act and/or the powers of the Minister.

69. In relation to the amended plea that the 1978 Regulations were *ultra vires* the powers of the Minister, because he could not delegate his powers to local authorities, it was pleaded:-

> *"It is denied that the alleged or any delegation by the first-named Defendant to local authorities - including the fourth named Defendant – of the power to determine and/or fix the number of taxi licences to be issued in specified areas was ultra vires the provisions of the Road Traffic Act, 1961 and/or the powers of the first named defendant. In circumstances where the first-named Defendant was empowered by virtue of section 82 of the Road Traffic Act, 1961 to limit the numbers of taxi licences,*

it is denied that the alleged or any delegation of that power was ultra vires that Act and/or the powers of the first-named Defendant."

70. At paras. 27A and B it was further pleaded:-

"27A. Further and in the alternative and without prejudice to the foregoing, it is pleaded that the plaintiff is not entitled as a matter of law to recover damages against these Defendants based solely upon the alleged unlawful consequences of a legislative provision, namely S.I. 367/2000, the legal validity of which has already been determined and which is not sought to be quashed by the plaintiff.

The plaintiff is not entitled to damages or any other relief arising from the manner in which the delegated legislation was made (whether in 1978, 1995, 2000, or otherwise) in circumstances where at all times that delegated legislation enjoyed a presumption of validity and of constitutionality and the plaintiff has not sought to have the same quashed."

71. Identical pleas were set out in the amended defence in Mr. Kelly's and Mr. Malone's proceedings.

<u>The defence of Dublin City Council in the Muldoon and Malone proceedings</u>

72. Dublin City Council likewise claimed that the claims and/or a portion thereof are statute barred. It is denied that the powers of the Council were exercised unfairly, unreasonably or disproportionately or that the Council owed the appellants any duty in the exercise of its administrative functions. It is expressly pleaded that it had no liability to the plaintiff in damages in circumstances where the claim for loss and damage only crystallised on the promulgation of the 2000 Regulations. At para. 10 it is specifically pleaded that:-

"…Any claim for damages in respect of the alleged unlawfulness of the delegation to Dublin City Council of the power to determine quantitative restrictions is statute barred having first been made in or around November 2013."

The defence of Clare County Council in the Kelly proceedings[2]

73. Clare County Council said it did not make or maintain in force the regulations at issue in these proceedings. The Council denied that it ever provided for or established a legislative regime involving the imposition of quantitative restrictions on new entrants to the taxi industry. It accepted that it was authorised to regulate, and did regulate, the granting of certain rights relating to the operation of taxis within its administrative area but denied that this constituted regulation and control of the taxi industry in the area. It further submitted that its role was "*purely administrative"* and it implemented the legislative/regulatory regime which had been established by the Minister to the extent that it was authorised and obliged so to do. It submitted that, if the regime had the effects contended for by the appellant, these were not caused by any act or omission of the council but instead were created and/or caused by the Minister.

74. In respect of Mr. Kelly's allegation that it acted in breach of the Constitution or in breach of the Treaty of Rome as amended, Clare County Council claimed that if the Regulations were *ultra vires* the Act of 1961, this was due to the acts of the Minister, and like the appellant, the Council was obliged to obey these Regulations. The Council also maintained that it had acted properly at all times and it denied that it acted in breach of statutory duty, was guilty of negligence or negligent misrepresentation or acted in breach of contract.

75. Clare County Council claimed that Mr. Kelly lacks *locus standi* to make complaints or seek Declaratory or any other relief in respect of its administration of the taxi market

[2] Pursuant to the Local Government Reform Act 2014, Clare County Council subsumed all legal rights and obligations of Ennis Town Council.

between the years 1978 and 1998 as he did not attempt to enter the market during that time and was not in any way affected by the regulation.

The decision to allow the plaintiffs to amend the Statements of Claim

76. When opening the case, counsel for the appellants argued that the 1978 Regulations were *ultra vires* because the Minister lacked the power to delegate the regulation of the numbers of licences to be issued to local authorities. The respondents objected and argued that this had not been pleaded. The appellants maintained that the case was captured by their pleadings. After hearing the parties, Peart J. ruled that this plea was not encompassed in the existing pleadings and gave the plaintiffs liberty to issue a motion seeking leave to amend the Statement of Claim. The motion was heard and on 14 November 2013 the trial judge indicated that he was permitting the amendments sought and gave his reasons for doing so. He said that the time limits provided by the Rules of the Superior Courts which govern court procedures must not be slavishly adhered to if to do so might put justice to the hazard. He believed that the very strict adherence to time limits which was evident sometimes in the past does not represent the present jurisprudence. He held that it was reasonable, for the purposes of the present application, to regard the adverse event for the plaintiffs as being the destruction of the value of their licences brought about as a result of the introduction of the 2000 Regulations. He rejected the argument that time started to run against Mr. Muldoon from 1994 and Mr. Kelly from 1998. While they were forced to buy a licence on the secondary market on those dates, *"that may not necessarily be seen by them reasonably as being an adverse event, nor by the court"*. One view is that they simply exchanged one asset (namely cash) for another (namely a licence). He acknowledged that they saw it as acquiring a valuable asset, which could provide them with either an income or a pension.

77. He held that there was *"undoubtedly delay"* in the issue of the proceedings in February 2002 but he said:-

"This is not a case where everybody simply sat on their hands and woke up late and decided belatedly to commence proceedings following the introduction of the Regulations. There is evidence that Mr. Muldoon at least went to Lavelle Coleman (Solicitors) and by February 2001 some proceedings appear to have been commenced. They were not proceeded with. There was a change of solicitors and eventually…the present proceedings were instituted. So, there was [at] least activity which is a relevant factor."

78. He held that the new ground of unlawful delegation to local authorities was out of time. Delay *"stems from the year 2000 to the present time… Even though the ground is a judicial review type ground, the time limits application (sic) even in judicial review matters, are not absolute."* He was satisfied that an important consideration was the lack of specific prejudice to the defendants in meeting the arguments in respect of the new issue. He noted that the plaintiffs were not seeking to quash the 2000 Regulations and to that extent they were not seeking to interfere with any third-party rights.

79. The fact that a new legal team may have considered that this new ground was one already encompassed within the existing proceedings was not a matter for which the plaintiff should bear responsibility. He had no doubt that the plaintiffs *"from the very get-go were intent on mounting whatever challenges or claims were open to them once the 2000 Regulations were introduced."* He acknowledged that he was making a good deal of allowance to the plaintiffs in relation to an extension of time and he was conscious of the fact that very significant and cogent arguments existed against the amendment. He said *"It would be fair to say that the arguments for and against an extension of time in this case are very finely balanced. Indeed, one could speculate that whichever party succeeds on this application, their opponent would consider it had good grounds for an arguable appeal."* He said that he did not have regard to the merits of the case in deciding whether to permit

the amendment. He referred to the fact that these were sample cases and that other cases were awaiting the outcome of these proceedings and held that *"a factor which I can have regard to is the number of aggrieved parties who want to have their day in court and who sought to have their case brought to court in whatever way their legal advisors thought proper and advisable as far back as February 2002."*

80. He acknowledged *"There is no doubt that the claims as drafted have changed and developed and evolved over the years since 2002 and even in very recent times."* But he held that he should not rule out the arguments at this stage.

81. The appellants appealed the ruling that the pleadings did not include a claim that the 1978 Regulations were *ultra vires* as the Minister had no power to delegate the control of the number of licences to local authorities. The defendants cross-appealed in relation to the order of the High Court permitting the amendment of the proceedings to include a new ground of challenge: that the 1978 Regulations were unlawful because of delegation by the Minister of powers to local authorities and also for a failure to hold that the proceedings insofar as they challenge the 1978 Regulations were statute barred, out of time or should be dismissed for delay and/or acquiescence. In the notices of cross-appeal, it was alleged *inter alia* that:-

(1) The High Court erred in failing to find that the time for the purposes of the new ground ran from 1994 (for Mr. Muldoon) and from 1998 (for Mr. Kelly) when they each first decided to enter the taxi market and could not do so because of the restrictions which they subsequently asserted were unlawful.

(2) Insofar as para. 1 of the General Endorsement of Claim challenges the 1978 Regulations (other than on the new ground) that challenge was time barred as time ran in respect of that challenge from that issue from 1994/1998 respectively

when they each allege that they decided to enter the taxi market and could not do so because of the restrictions which they subsequently said were unlawful.

(3) The High Court erred in failing to hold that the proceedings could have been brought by way of judicial review and accordingly that the procedural constraints applicable to judicial review apply to these proceedings, including the time limits prescribed in O.84 of the Rules of the Superior Courts.

(4) The High Court erred in failing to hold that the rules applicable to the amendment of these proceedings are properly the rules applicable to the amendment of judicial review proceedings.

(5) The High Court erred in ordering that the time for bringing the claims in respect of the 1978 Regulations and the claim based upon the alleged unlawful delegation by the first named defendant of the power to determine the number of taxi licences be granted in specified areas is deemed to have run from the date of the introduction of the 2000 Regulations in circumstances where the appellants alleged that because of the scheme in place since 1978 which they assert were unlawful, they had to enter the market at the relevant time through a secondary market.

(6) The High Court erred in holding that the appellants' claim in relation to the 1978 Regulations is a claim where the adverse effect crystallises by virtue of the secondary market and the complaint is that they were damaged because they had to pay a large sum to enter the market at the relevant date.

(7) The High Court erred in failing to hold that the formal adverse consequence allegedly suffered by the appellants was suffered at the point when they each acquired their licence.

(8) The High Court erred in extending time limits set out in circumstances where the proceedings challenged regulations made in 1978, 24 years before any challenge was brought, the challenge was brought 8 years after Mr. Muldoon and 6 years after Mr. Kelly were affected by the regulations which they then challenged, they had actively participated in and supported the regime and the High Court failed to have adequate regard to *inter alia* the conduct of the appellants and public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished and the appellants had given no such good reason.

82. There was no cross-appeal on Mr. Malone's proceedings.

83. Dublin City Council also cross-appealed in relation to the order extending the time for the appellants to bring a claim based on the alleged unlawful delegation by the Minister of the power to determine the number of taxi licences to be issued in specified areas to Local Authorities be extended to 14 November 2013 in Mr. Muldoon's and Mr. Malone's proceedings.

84. In the Kelly proceedings, Clare County Council also cross-appealed the order of the 14 November 2013. It argued

(1) That the trial judge failed to have any adequate regard to the manner in which the appellant had approached the proceedings up until the opening of the hearing in 2013 and the fact that he had been advancing for many years a claim which had previously been dismissed *i.e.* that the making of regulations providing for quantitative restrictions on the number of taxi licences was *ultra vires* the powers of the Minister.

(2) That the High Court erred in deciding for the purposes of the application that time should be deemed to run from the making of the 2000 Regulations (in effect *"deregulation"*).

(3) That the High Court erred in extending the time limits provided in O.84, r.21 of the Rules of the Superior Courts having further regard to:

(i) the length of time that had elapsed since the introduction of the 1978 Regulations;

(ii) the length of time that had elapsed since the appellant had been affected by the Regulations;

(iii) the large number of people who had been affected by the Regulations over several decades;

(iv) the fact that over thirteen years had elapsed since the impugned Regulations had been replaced by a completely difference regime;

(v) the desirability of bringing and determining actions in respect of public law expeditiously;

(vi) the failure of the appellant to advance any good reason (other than his own personal unhappiness and dissatisfaction) why time should be so extended by the High Court.

85. The appellants filed respondent's notices to the cross-appeals of the respondents. The appellants pleaded that insofar as necessary they would contend that the High Court erred in concluding that the claim that the Minister unlawfully delegated to the council the power to determine from time to time the number of taxi licences to be granted in respect of a given taximeter area was not encompassed by the amended Statement of Claim delivered on 20 December 2007 and/or that it was necessary to seek and obtain leave to deliver a further

amended statement of claim in order to pursue that claim and/or all of the claims which they sought to advance.

The Cross-Appeal on the amendment of the Statements of Claim

86. It is appropriate to deal with the cross-appeal first as, if the respondents are successful on the cross-appeal, this will have a significant impact on the appeals.

87. In their submissions the State respondents argued that the High Court erred in permitting the amendment and extension of time applications on the basis that time ran from the introduction of the 2000 Regulations. This was *"the date of the destruction of the value of the appellants' taxi licences"*. The State respondents argued that time ought to have been adjudged to have run from when the appellants first decided to enter into the taxi market but could not do so because of the impugned restrictions (1994 in the case of Mr. Muldoon and 1998 in the case of Mr. Kelly). They relied upon the decision of the Supreme Court in *De Róiste v. The Minister for Defence* [2001] 1 IR 190 where Denham J. (as she then was) stated at p.203 of the report that:

> *"the court has discretion to extend time if the court considers there is good reason. The onus is on the applicant to meet the conditions. It is for the applicant to show that he has made the application promptly and within the time limit or that there is good reason to extend the time within which the application may be made. The conditions are not rigid as judicial review is a discretionary remedy. There remains in the court an inherent discretion to be exercised according to the requirements of justice in the circumstances of each case"*

88. They referred to the fact that in para. 28 Denham J. listed six non-exhaustive factors to which the court could have regard as follows:

> *"(i) the nature of the order or actions the subject of the application;*
>
> *(ii) the conduct of the applicant;*

(iii) the conduct of the respondents;

(iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed;

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

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

89. In relation to each of these points they observe that the delegated legislation has been in force since 1978, the appellants acquiesced in and actively participated in the regime they seek to challenge, parties relied upon the legality of the regulatory regime after it had been confirmed by the High Court and the Supreme Court (a reference to the decision in *The State (Kelly) v. The Minister for the Environment*) and attempts by the appellants to profit from the system as they were entitled to do but, *per* the respondents, they were not entitled to both seek to profit from the system and then to say that it was unlawful.

90. Dublin City Council also cross-appealed on the basis that the point was raised for the first time during the opening of the case, that the previous ground upon which it had been contended that the 1978 Regulations were *ultra vires* was the alleged absence of any power to limit the number of licences and that this point had been definitively decided against the appellants in *the State (Kelly) v. The Minister for the Environment*. The written submissions did not elaborate on the plea and in oral submissions counsel for the City Council adopted the submissions of counsel for the State respondents.

91. In Mr. Kelly's case, Clare County Council argued that the High Court erred in permitting Mr. Kelly to amend his proceedings, emphasising four points in particular.

"(1) The system prescribed by the 1978 Regulations… had been in operation for over 20 years before the Plaintiff (Mr. Kelly) chose to enter the taxi market and for

over 24 years prior to the issue of the proceedings and for 35 years before he sought to amend his pleadings for the first time to make the argument that the 1978 Regulations were ultra vires the Minister because they purported to delegate the power to determine the number of licences in a licensing area to the relevant Local Authority.

(2) In entering the taxi market Mr. Kelly was not merely aware of the manner in which it had developed since the introduction of the1978 Regulations but relied upon same.

(3) The Plaintiff (Mr. Kelly)'s cause of action in relation to this point crystallised when he sought to enter the market in 1998 (and was not in a position to do so) or, in the alternative and at the latest, at the date when he purchased his licence in 1999.

(4) It is contrary to public policy that public law proceedings of such a nature be allowed to commence so long after the events complained of. The Plaintiff (Mr. Kelly) had no valid ground for seeking to make himself an exception to such policy."

92. In their oral submissions, counsel for each of the respondents argued that all the claims were public law claims. It followed that the appellants were bound by the restrictive time limits established in O.84 notwithstanding the fact that the proceedings were plenary proceedings and that they sought declaratory relief. In this regard they refer to *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301 where Costello J. (as he then was) stated at para. 314 of the report:-

"A declaratory order is a discretionary order arising from the wording of statute which conferred jurisdiction on the courts to make such orders (see Wade "Administrative Law" 5 ed. p. 523) and it is well established that a plaintiff's delay in

instituting plenary proceedings may, in the opinion of the court, disentitle the plaintiff to relief. It seems to me that in considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in Order 84 rule 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under Order 84 time would have been extended. The rules committee considered that there were good reasons why public authorities should be protected in the manner afforded by Order 84 rule 21 when claims for declaratory relief were made in applications for judicial review and I think exactly the same considerations apply when the same form of relief is sought in a plenary action. Furthermore, it is not desirable that the form of action should determine the relief to be granted and this might well be the result in a significant number of cases if one set of principles on the question of delay was applied in applications for judicial review and another in plenary actions claiming the same remedy."

93. Further on, he addressed the meaning of *"good reasons"* employed in the original version of O.84, r.21 with which he was concerned:

"36. 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 <u>test must be an objective one</u> 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 0. 84 r. 21 is on the plaintiff) is that there are reasons which <u>both explain the delay and afford a justifiable excuse for the delay</u>. There may be cases, for example where third parties had acquired rights under an

administrative decision which is later challenged in a delayed action. Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with acquired rights. (The State (Cussen) v Brennan 1981 I.R. 181)." (Emphasis added)

94. In *Shell E & P Ireland Limited v. McGrath* [2013] IESC 1, [2013] 1 IR 247 Clarke J. (as he then was), speaking for 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. 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 leave of the court, simply by issuing plenary proceedings which, in substance, sought the same relief or the same substantive ends. The court expressly approved of *O'Donnell v. Dun Laoghaire Corporation*. The judgment of the Supreme Court was in respect of a counterclaim where all that *"remains of these proceedings is* <u>*a challenge to a public law measure designed to underlie a claim for damages*</u>*."* (Emphasis added)

95. The parallel with these cases is obvious: the appellants likewise have sued for damages based on challenges to public law measures which subtend their claims for damages.

It was submitted that the appellants had no real answer to these authorities and that it followed that all of the claims were in fact out of time when the proceedings were commenced in 2002. In such circumstances the trial judge erred in permitting the appellants to amend their pleadings eleven years after the procedures were cancelled when all claims were already well out of time.

96. On the other hand, it was submitted, if the court was prepared to treat the claim as analogous to a claim in tort, with a six-year limitation period, time commences to run from the date of the enactment of the legislation or the particular decision which is impugned in the proceedings. It does not run from the date at which the loss is crystallised, as was held by the trial judge.

97. The appellants submitted that the trial judge erred in concluding that the delegation issue did not form part of the pleaded case; that the trial judge applied the appropriate principles when he allowed the amendment and that this court should be very slow to intervene to overturn his exercise of his discretion in the circumstances.

98. Arising from debate during the hearing of the appeal, this court asked the parties to address the question as to when time runs in a challenge to delegated legislation as opposed to an administrative decision or primary legislation. The court afforded the parties the opportunity to furnish further written submissions on the issue.

99. The appellants referred to the decision of the Supreme Court in *Mungovan v. Clare County Council* [2020] IESC 17, [2021] 1 IR 199, [2020] 2 ILRM 1. They relied upon the dictum of Charleton J. to the effect that:

> *"Where… what underlies the decision is either delegated legislation or a policy which becomes equivalent to delegated legislation… the continuing nature of the underlying instrument must be part of the analysis in deciding whether a time limit is applicable due to any failure to challenge a particular decision."*

100. Charleton J. held that where an individual was impacted *"on a continuing basis"* they have standing to sue for so long as they are so impacted. The appellants acknowledged that with reference to *"regulations, bye-laws and rigid policies that are their equivalent"* Charleton J. said that *"any person seeking to make such a challenge must have*

standing…and is required…not to drowse away their legal entitlement or sleep on appropriate reaction." They cited the concluding remarks of Charleton J. as follows:

> *"In any issue as to time limits, a court must analyse what is in reality, and in terms of practicality, the question under consideration; a decision on an individual basis or a policy equivalent to delegated legislation by which someone continues to be affected. In the latter case, not challenging does not necessarily remove the right to challenge where there genuinely is an ongoing policy or legislative base affecting an applicant. But, even then, sleeping on rights or acquiescence must be regarded as undermining the prospect of success. That is a matter, however, of assessment in individual cases."*

101. The appellants argued that the secondary legislation which they challenged (the 2000 Regulations[3] and the 1978 Regulations) were continuing legislative measures which continued in their effects on them at all material times prior to (and since) the commencement of their respective proceedings in February 2002. Similarly, the 2000 Regulations were a continuing legislative measure which continued in their effects on Mr. Malone. In a footnote they argued that *"the continuing nature"* of the regulations impugned together with the undisputed facts and *"exceptional circumstances"* underpin

> *"(a) the conclusion that Order 84 time limits are not applicable to the appellants' claim for declaratory relief in respect of the lawfulness of those Regulations; and*
>
> *(b) the conclusion that, even if they were applicable, there is no basis for interfering with the decision of the trial judge in the exercise of his discretion to extend the time in relation to the claims relating to and dependant upon the impugned regulations."*

In that regard they relied upon the decision in *Hillary v. Minister for Education* [2005] 4 IR 333 at p. 381 that *"in all the circumstances of [these] case[s], it would be unreal to*

[3] Assuming for the purposes of this argument that they did challenge the 2000 Regulations.

refuse [the applicants] the relief [they seek] on the basis of the delay complained of, in light of the fundamental defects identified [in the Regulations]."

102. They submitted that Mr. Muldoon and Mr. Kelly were not *"affected only by a particular decision"* or *"just once"*; at all material times, Mr. Muldoon and Mr. Kelly were excluded *"on a continuing basis"* from taxi driver work that was not subject of unlawful and constitutionally impermissible interferences, as distinct from taxi driver work that was the subject of such interferences.

103. The State respondents submitted that in *Mungovan,* Charleton J. drew a distinction for limitation purposes between "*a decision on an individual basis [and] a policy equivalent to delegated legislation by which someone continues to be affected."* He held that *"In the latter case, not challenging does not necessarily remove the right to challenge where there genuinely is an ongoing policy or legislative base affecting the applicant. But, even then, sleeping on rights or acquiescence must be regarded as undermining the prospect of success."* (para. 23 of the judgment)

104. In 2013 Peart J. allowed the appellants to amend their case to include a new ground of challenge to the 1978 Regulations. The State respondents say that *Mungovan* only applies where the relevant delegated legislation had an ongoing or continuing effect on the appellants. Time only commenced to run when the individual appellant was affected and for the duration of the time that the individual was so affected, time might not be regarded as having run though even then if an applicant slept on his right/ was quiescent in the situation, this was a factor to be weighed when determining *"whether a time limit is applicable due to any failure to challenge a particular decision".*

105. The State respondents submitted that the 1978 Regulations had been revoked by the time the appellants initiated their claims and as such it could not possibly be argued that they

were *"continuing legislative measures"* that *"continue and continued in their effect on"* the appellants for the purposes of bringing the proceedings within the scope of *Mungovan*.

106. They pointed out that the claims never encompassed a declaration as to the invalidity of the 2000 Regulations. Insofar as the appellants sought damages based upon the 2000 Regulations, the State respondents argued that, in light of the nature of the challenge to the 2000 Regulations, which is based on the overnight removal of quantitative restrictions and the immediate impact this had on the value of their taxi licences, the appellants cannot argue that the challenge is on a *"continuing legislative measure"* or that it is *"an ongoing policy or legislative base affecting"* them. Therefore, *Mungovan* likewise is of no assistance in respect of the claim based on the 2000 Regulations.

107. The State respondents say that even if it could be said that *Mungovan* applied to the appellants' claims, the appellants have been guilty of precisely the kind of delay in bringing their claims and acquiescence in the impugned regime which was expressly deprecated by Charleton J. They pointed to the fact that, unlike in *Mungovan*, where the applicant applied four times to Clare County Council for inclusion on its register, but was refused on dates ranging from 7 March 2006 to 11 April 2011, and subsequently instituted plenary proceedings on 4 November 2011, the appellants applied for taxi licences (twice in the case of Mr. Muldoon and once for Mr. Kelly) but upon refusal they promptly entered the secondary market and thereby acquiesced in the regime that they belatedly seek to challenge. After his final unsuccessful application, Mr. Mungovan initiated proceedings properly while after their final unsuccessful applications to obtain taxi licences directly from the relevant local authorities, the appellants participated in the allegedly unlawful regime and only brought a challenge to that regime well after it had been revoked.

108. Dublin City Council adopted the submissions of the State respondents on the cross-appeal. It argued that any challenge by Mr. Muldoon or Mr. Malone to the validity of the

2000 Regulations was subject to the judicial review time limits in O.84, r.21(1). notwithstanding the fact that the pleadings had been brought by way of plenary summons. (*Shell v. McGrath* [2013] 1 IR 247 affirming *O'Donnell v. Dun Laoghaire Corporation* [1991] 1LRM 301). Insofar as there was a challenge to the validity of the 2000 Regulations, it was required to be brought by the 21 February 2001. Therefore, Mr. Muldoon's proceedings were approximately one year out of time and Mr. Malone's approximately twenty months out of time.

109. Insofar as the claim is for damages for an alleged breach of constitutional duty, the Supreme Court held in *McDonnell v. Ireland* [1998] 1 IR 134 that a breach of constitutional rights should be treated as a tort for limitation purposes. Accordingly, the limitation period applicable to the appellants' alleged causes of action was/is six years. But in *McDonell*, Barrington J. stated at p.148 that a claim for breach of constitutional rights should not be regarded as a *"wild card"* to be played at any time to defeat *inter alia* limitation periods. Dublin City Council says that the declaration sought in these proceedings could have been brought by way of judicial review. They may not circumvent the limitation periods applicable in O.84, r.21(1) of the Rules of the Superior Courts.

110. They submit that the appellants have adopted the *"unique position that there is no time limit governing their claims"*. The appellants argued that the usual time limits applicable to judicial review cases or cases in which damages are sought do not apply but they declined to state what, if any, limitation period does apply to their alleged causes of action. On day 3 of the appeal counsel for the appellant stated that no limitation period applied and that their claims were capable of being brought at any time at their option. The council submitted that this *"flies in the face of common law and statute."*

111. The council submitted that *Mungovan* did not afford the appellants a *"carte blanche"* to bring their actions whenever they liked. The council submitted that the appellants'

assertions as to the absence of any applicable time limit to their causes of action in itself creates chaos and uncertainty as deprecated by Charleton J. in *Mungovan*. It was submitted that the applicable time limit to their alleged causes of action was six years and that in any event they had *"slept on their rights"* or *"acquiesced"*. In particular, Mr. Muldoon willingly participated in the alleged secondary market by purchasing a taxi licence and Mr. Malone, while identifying the 1978 Regulations as the source of his complaint, did nothing to address same until November 2002. Applying a six-year limitation period (rather than that provided in O.84, r.21(1)) Dublin City Council submitted that Mr. Malone's case for damages for breach of his constitutional rights was statute barred in 1984 and Mr. Muldoon's in 2000. They emphasised that no reason whatsoever had been proffered by either appellant as to why it took them such a lengthy period of time to commence their proceedings.

112. Clare County Council said that the *Mungovan* case did not avail of the appellant in Mr. Kelly's case because his case, as pleaded, was that he made one (and one only) enquiry of the fourth named respondent as to the availability of taxi licences from the fourth named respondent. The whole point of the *Mungovan* decision was that Mr. Mungovan re-applied on several occasions and was met with repeated refusals. Furthermore, Mr. Kelly, upon being advised on foot of the enquiry that there were no available licences for issue at that particular time (January 1999) purchased a taxi licence privately almost immediately. Clare County Council submitted that on the facts of this case Mr. Kelly had not been subject to ongoing continuing delegated legislation. It submitted that the regular O.84 time limits ought to have been applied to the appellant's challenge to the delegated legislation on the facts in Mr. Kelly's case.

Discussion

113. I agree with the trial judge's ruling that the delegation issue was not part of the case prior to the opening of the trial. This is apparent from my analysis of the pleadings and is

underscored by the fact that there was no reference to it in the lengthy written submissions furnished in advance of the trial nor in the issue paper provided to the trial judge. Therefore, it was necessary for the appellants to obtain leave to amend their pleadings in order to advance this argument. The issue for this court is whether Peart J. erred in permitting the amendments in November 2013.

114. In his *ex tempore* ruling the trial judge did not address the decisions in *O'Donnell* and *Shell*. In my judgment, O.84, r.21 ought to have been applied by analogy to these proceedings. The issue whether the Minister had power to delegate to local authorities the power to limit the number of taxi licences issued is clearly a public law issue to which O.84, r.21 applies by analogy. The plenary form of the proceedings does not entitle the appellants to evade the proper application of O.84, r.21 by analogy.

115. In my opinion the trial judge erred in applying the six-year limitation period to the application on the basis that the relief sought was damages. In *Shell*, Clarke J. applied O.84, r.21 by analogy to a counterclaim seeking damages. The fact that there was no direct challenge to the impugned measure did not avail the counterclaimant in that case. The claim for damages was grounded upon an allegedly unlawful measure and accordingly it was appropriate to apply O.84, r.21 by analogy. The same situation in my judgment pertains here.

116. Had the trial judge applied O.84, r.21 by analogy to the application to amend the proceedings, the appropriate limitation was three months from the date when the grounds for the application *"first arose"*. On any matrix the application was considerably out of time and accordingly O.84, r.21(3) to (5) ought to have been applied to the application. Order 84, r.21(3)-(5) provide as follows:

> *"(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial*

review may be made, but the Court shall only extend such period if it is satisfied that:

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

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

(i) were outside the control of, or

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

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

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons."

117. The court may only extend time if it is satisfied that there is good and sufficient reason for doing so. The onus is on the applicant to establish good and sufficient reasons. In addition, the applicant must show that *"the circumstances that resulted in the failure to make the application for leave within the period"* were either outside their control or could not reasonably had been anticipated by them.

118. The trial judge did not address the requirements of r.21(3)(b) at all. In fact, some of his arguments for permitting the amendment would tend the other way. The fact that Mr. Muldoon consulted solicitors in 2001, which the trial judge describes as *"some activity"*, would in my opinion underscore the failure to comply with sub-rule (b). Likewise, the fact

that a new legal team, which apparently refers to the barristers rather than the solicitors, *"may have considered the new ground was already encompassed"* in the proceedings, does not satisfy the sub-rule in my judgment. In passing I should observe that the appellants at all times instructed expert counsel and the fact that a newly instructed counsel may come up with a new point cannot generally be *"good and sufficient reason"* to extend the time limit in O.84. Nor could it properly be described as a circumstance outside of the control of the applicant. The written submissions filed on behalf of the appellants prior to the opening of the case in the High Court, did not advance the delegation issue as a basis for alleging that the 1978 Regulations were *ultra vires* the Minister. It is hard to avoid drawing the conclusion that it was an argument which arose very late in the day. In the circumstances, I cannot accept that the failure to make the case far earlier was outside the control of the appellants nor one which could not have been anticipated by them as required by the sub-rule, nor does it amount to *"good and sufficient reason"*.

119. The sense of grievance which the appellants or other plaintiffs in other pending cases might experience if they are not permitted to advance all possible arguments in the proceedings does not, in my view, satisfy the good and sufficient reason test established by r.21(3) either. As was pointed out in *O'Donnell*, it is an objective test and *"the court should not extend time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings"*.

120. In my judgment the trial judge erred in failing to apply the requirements of r.21(3) to the application to amend the proceedings. Had he done so, he ought to have concluded that the appellants had failed to satisfy the requirements of both (a) and (b) of the sub-rule and, in the circumstances, he ought not to have extended the period of time to allow the new ground to be advanced and he ought to have refused leave to amend the proceedings.

121. The decision in *Mungovan* does not alter my conclusions. Charleton J. held that where an individual was impacted by delegated legislation on a continuing basis they have standing to sue for so long as they are so impacted. The appellants' case is that the 1978 Regulations were unlawful and/or led to a secondary market, and that the introduction of the 2000 Regulations had an immediate and catastrophic affect upon them. The value of their investment was wiped out overnight and Mr. Muldoon and Mr. Kelly were left burdened with the debt they had incurred acquiring the licences on the secondary market and they were now competing with persons who could become taxi drivers without incurring equivalent debts. The 1978 Regulations were repealed by the 2000 Regulations. The 1978 Regulations no longer affected them. I am not persuaded that the appellants continued to be subject to the effects of the 1978 Regulations *"on a continuing basis"* thereafter. Thus, even applying the latitude afforded to parties on the basis of the decision in *Mungovan*, time started to run against the appellants from November 2000, when the 2000 Regulations were adopted, and the time limit expired three months thereafter.

122. In addition, Charleton J. makes it clear that even where there is an ongoing policy or legislative measure affecting the applicant, *"sleeping on rights or acquiescence must be regarded as undermining the prospect of success".* The inaction of an applicant remains relevant. The appellants ought to have been alert to the strict time limits applicable to any challenge to the regulations generally, but in particular after the decision in *Humphrey*, where Murphy J. held in October 2000 that the applicants in that case were out of time to challenge any regulations prior to S.I. 3 of 2000 on the basis that no good reason had been advanced to extend time to do so. The trial judge held that there was an undoubted delay in the issue of the proceedings in February 2002 and he identified the delay in the case before him as running from November 2000 until November 2013. He also expressly acknowledged that the claims had evolved over time.

123. In my judgment it is clear that the appellants may be regarded as having slept on their rights within the meaning of *Mungovan* in failing to raise the delegation issue until November 2013. Applying *Mungovan* to the appellants cases (without even considering the arguments of the respondents) time must be taken to run from the 21 November 2000.

124. *Mungovan* was not concerned with the issue of the appropriate limitation period to apply. Certainly, it is not authority for the proposition that there is *no* limitation period as submitted by the appellants. I am satisfied that the appropriate time limit is that provided in O.84, r.21 which applies by analogy to these proceedings and in particular to the application to amend the Statement of Claim. *Mungovan* is not relevant to this analysis and certainly does not purport to alter the law in *O'Donnell* and *Shell*. Thus, even on the appellants' cases, the proceedings were out of time in February 2002, and they were more than eleven years out of time when the appellants applied to amend their proceedings.

125. In all the circumstances I am persuaded that the trial judge erred in permitting the amendment and I would allow the cross-appeal in relation to the amendment of the proceedings to include the delegated claim.

Are all of the claims out of time?

126. The respondents all strongly urge that insofar as the appellants challenge the 1978 Regulations (or 1995 Regulations) even on the grounds pleaded, they are out of time and their claims ought to have been dismissed on that basis by the High Court.

127. In my judgment their submissions are correct and the trial judge ought to have dismissed the challenges as being brought long after the time permitted under the rules for such challenges. As I have explained, the challenges are all *"public law measures designed to underline a claim for damages"*. The form of the proceedings does not determine the applicable limitation period because O.84, r.21 should apply by analogy to the administrative law claims. This means that the proceedings ought to be brought *"promptly and in any event*

within three months of the date when the grounds for the application first arose."[4] The grounds for the application to challenge the 1978 Regulations, based upon the case advanced, was when those regulations first impacted the individual appellant. In Mr. Muldoon's case this was 1994 (when he first was refused a licence by Dublin Corporation). In Mr. Kelly's case it was April 1998 (when he was refused a licence by Ennis Town Council) and in Mr. Malone's case it was when the 1978 Regulations were adopted. It was accepted that at those points in time they each had standing to sue. The grounds for their application within the meaning of O.84 r.21 first arose at that date because they had been impacted by the measure which they now impugn in a wrongful manner. In particular, Mr. Muldoon and Mr. Kelly say that they should not have been required to purchase a licence on the secondary market at exorbitant cost in order to enter a perfectly lawful occupation. The fact that the value of their investment did not fall until November 2000 does not alter this fact.

128. In those circumstances the challenge to the 1978 Regulations was required to be brought by 1979 (in the case of Mr. Malone), in 1994 (in the case of Mr. Muldoon) and 1998 (in the case of Mr. Kelly). In *Humphrey*, Murphy J. held in October 2000 that the applicants' challenge to the validity of regulations adopted prior to S.I. 3 of 2000 was out of time. Absent any cogent reasons to the contrary, it would be perverse to extend the time to challenge the same regulations which the applicants sought to challenge in *Humphrey* but was held to be out of time, in plenary proceedings brought sixteen months later. The time limits in O.84, r.21 should not1 be circumvented by seeking plenary reliefs for what are in fact public law challenges.

129. The question then is whether *Mungovan* assists the appellants. As I have explained, *Mungovan* does not alter the limitation period but it extends the running of time for so long as an applicant is subject to a measure of continuing effect. Taking *Mungovan* at its height

[4] O.84, r.21(1) as originally enacted

- and ignoring for the purposes of the argument any issues as to acquiescence or sleeping on their rights – the appellants were no longer subject to the 1978 Regulations when they were repealed on 21 November 2000. The fact that they suffered loss to the value of their licences once the 2000 Regulations were adopted does not mean that they continued to be subject to the impugned measures (the 1978 Regulations and the 1991 and 1995 Regulations (the "Quantitative Restriction Regulations")). Therefore, applying the latitude necessary to a case challenging delegated legislation or its equivalent as in *Mungovan*, time for the purposes of O.84, r.21 commenced to run on 21 November 2000. The plenary summonses issued in 2002 were well out of time in the circumstances.

130. Similarly, the claims based upon impugning the 2000 Regulations, but which did not challenge them directly, are also long outside the time limit in O.84, r.21. The effect of the 2000 Regulations on the value of the licences (and on the associated claims) was immediate. The measure did not 'continue' to impact the appellants individually in the manner similar to that in which Mr. Mungovan was affected by the policy decision of Clare County Council. In my judgment, therefore, all of these administrative law claims were instituted long after the time for bringing the claims had passed.

131. In my opinion the trial judge erred in failing to address these fundamental issues and to find accordingly. I would allow the cross-appeal of the respondents and dismiss the proceedings on the grounds that they were brought outside of the time allowed for bringing such claims and that the court had not extended time for them to bring the claims in accordance with O.84, r.21.

132. While this disposes of the appeals with which I am concerned in this judgment, I will nevertheless address the substance of the appeals argued by the appellants. I will not address the respondents' alternative arguments based upon delay and acquiescence.

The issues in the appeals

133. The parties submitted an agreed Issues Paper for the hearing of the appeals. The issues identified which are relevant to this judgment are:

(1) Did the 2000 Regulations breach any of the following rights which are protected by the Constitution of Ireland?

(a) The right of Mr. Muldoon and Mr. Kelly to earn a livelihood;

(b) the right of Mr. Muldoon and Mr. Kelly to be held equal before the law; and

(c) the property rights of Mr. Muldoon, Mr. Kelly and Mr. Malone?

(2) Did the 2000 Regulations entail a reasonable, fair, just and proportionate exercise by the Minister of his powers and/or a breach of statutory duty or negligence on the part of the Minister?

(3) Did the Minister lack the power necessary to make the quantitative restriction regulations which provided for the fixing of the number of taxi licences which could be issued and prohibited the granting of taxi licences in excess of that number?

(4) Did the councils fail to comply with:

(a) their duty to exercise their powers fairly, reasonably and proportionately; and/or

(b) their duty to issue a sufficient number of taxis and wheelchair accessible taxi licences *"to meet all reasonable demands for those services"* and to take such action as was required *"to ensure that the demand for those services is adequately met".*

134. The following issues do not arise in the appeals:

(1) Any challenge to the 2000 Regulations.

(2) Whether the Minister lacked the power necessary to make the quantitative restriction regulations which provided for the delegation of such a power to the councils.

(3) The claim for damages for misfeasance in public office.

The legislation and cases interpreting it

135. Before considering the issues in the appeal it is necessary to look in detail at the regulatory regime as it applied to taxis. Section 5 of the Act of 1961 provides that the Minister may make regulations prescribing any matter or thing which is referred to in this Act as prescribed or to be prescribed. Section 82(1) as originally enacted provides that the Minister may make regulations in relation to the control and operation of public service vehicles. Sub-section (2) provides:

"(2) Regulations under this section may, in particular and without prejudice to the generality of subsection (1) of this section, make provision in relation to all or any of the following matters:

(a) the licensing of public service vehicles;

(b) the licensing of drivers and conductors of public service vehicles;

(c) the payment of specified fees in respect of licences, badges or plates granted under the regulations and the disposition of such fees;

(d) the conduct and duties of drivers and conductors of public service vehicles and of their employers;

(e) the conduct and duties of passengers and intending passengers in public service vehicles;

(f) the conditions (including the use of taximeters) subject to which vehicles may be operated as public service vehicles;

(g) the keeping of specified records and the issue of specified certificates and the specifying of the persons by whom such certificates are to be issued;

(h) the authorising of the fixing of maximum fares for street service vehicles;

(i) matters related to the transition from the repealed Act to the regulations under this section."

136. Initially there were no restrictions on the number of taxi or hackney licences which could be issued. The first regulations adopted by the Minister pursuant to ss.5 and 82 was S.I. 191 of 1963, The Road Traffic (Public Service Vehicles) Regulations, 1963. Part III of the Regulations applied to the licensing of public service vehicles and provided that the Commissioner of An Garda Síochána or an authorised officer was empowered to issue licences. They were not transferable save on death, where they devolved to the licence holder's personal representative and ceased to be in force on the transfer of the vehicle from the personal representative of the licence holder. The Commissioner had power to revoke the licence on certain specified grounds.

137. The next statutory instrument of relevance to these proceedings is S.I. 111 of 1977 (the Road Traffic (Public Service Vehicles) (Amendment) Regulations 1977). Regulation 15 provided for the first time for *inter vivos* transfer of a licence. Regulation 15 was subsequently revoked and replaced by S.I. 292 of 1978.

138. S.I. 268 of 1977, the Road Traffic (Public Service Vehicles) (Amendment) (No. 3) Regulations, 1977, were adopted on 18 August 1977. The effect of these regulations was to eliminate the licensing period for taxis for September 1977. This meant that there was a

temporary moratorium on the issuing of new licences for 1977 and no new licences could be issued until September 1978.

139. These regulations were challenged in three separate proceedings which were heard by Costello J. in June 1978 (*The State (Kelly) v. Minister for the Environment*). It was agreed by counsel in the three proceedings that the point at issue in the three matters was the same. Costello J.'s report of his *ex tempore* decision provided as follows:

> *"The net issue for decision in these cases is whether the Minister had power to make the Statutory Instrument No. S.I. 268 of 1977 which had the effect of limiting the number of taxis in the city of Dublin. The power, if it exists, to make the impugned instrument arises under s.82 of the Road Traffic Act 1961. Under sub-section 1 of that section the Minister can make regulations in relation to the "control" and "operation" of public service vehicles. The word "control" is imprecise but it seems to me to be wide enough to include the power to make regulations which would limit the number of taxis. As to the Marts case (1970 IR 317) on which the prosecutors relied it seemed to me that the power to make regulations under s.6 of the 1976 Act which the court was considering in that case was more restrictive than the power given to the Minister under s.82 of the 1961 Act. The prosecutors submitted that under ss.(3) of s.82 no power to limit the number of taxis exists. In my opinion, the wording of ss.(1) is wide enough to permit the Minister to make the Regulations and he need not rely on ss.(3). I think the Minister acted correctly in making the 1977 Regulations. Accordingly, I will allow the cause shown and discharge the conditional order."*

140. The decision was appealed to the Supreme Court and the decision of the High Court was affirmed. Thus, the Supreme Court upheld the finding that *"control"* in s.82 of the Act of 1961 allowed the Minister to impose what amounted to a temporary moratorium on the granting of any licences for the year 1977 *i.e.,* to limit the number of licences to be issued.

141. Following on these decisions the Minister introduced S.I. 292 of 1978, the Road Traffic (Public Service Vehicles) (Licensing) Regulations, 1978 which has been referred to as the 1978 Regulations in this judgment. These regulations gave the local authorities power to determine the number of new taxi licences to be granted by the Commissioner in a given taxi-meter area and the period for making applications to the Commissioner for new licences. The Commissioner was prohibited from granting licences in excess of the number determined by the relevant local authority. Article 5 provides:

> *"(1) A local authority…shall, from time to time by resolution,-*
>
> *(a) determine the number of new public hire vehicle licences which may be granted during a grant period by the Commissioner in respect of the use of vehicles as public hire vehicles [in the relevant area], and*
>
> *(b) specify a period within which applications…may be made to the Commissioner for the grant of such licences.*
>
> *(2) The Commissioner shall not, during a grant period grant new public hire vehicle licences for use of vehicles in [a taxi meter area] in excess of the number so determined in respect of that period for that area;*
>
> *(3) Where a local authority have not made a determination under sub-article (1) of this article in respect of a grant period the Commissioner shall not grant any new public hire vehicle licences for the use of vehicles as public hire vehicles in the [taximeter areas]of such local authority;"*

142. Under Article 9 of the 1978 Regulations, on the change of ownership of a vehicle (other than by devolution of the ownership on the personal representative of an owner who has died), the new owner of the vehicle may apply to the Commissioner for the continuation in force of the licence granted in respect of the vehicle. The Commissioner retains the power to revoke or suspend licences and where the holder of a licence is convicted of a crime or

offence which in the opinion of the court renders him unfit to hold such a licence, the court also may revoke the licence. The 1978 Regulations did not apply to hackneys.

143. The regulations provide that the appropriate local authorities will determine the number of new taxi licences which may be granted by the Commissioner each year. The regulations do not in terms limit the number of taxi licences. As a matter of law, each of the local authorities named in Article 5 (which included Dublin Corporation and Ennis Urban District Council) had the power to determine that many or no new licences could be granted in any given year.

144. The next relevant statutory instrument is S.I. 272 of 1991, the Road Traffic (Public Service Vehicles) (Amendment) Regulations, 1991. It replaced Article 5 in the 1978 Regulations with a new Article 5. This provided that the new number of taxi licences which may be granted by the Commissioner during the grant period beginning on 24 October 1991 in respect of the Dublin taximeter area shall be not more than 100. It also provided that the fee payable on either the grant of a new licence or the transfer of an existing licence shall be IR£3,000. It imposed a temporary moratorium on the issuing of new hackney licences.

145. On 1 July 1992 the Minister adopted the Road Traffic (Public Service Vehicles) (Amendment) (No. 2) Regulations (S.I. 172 of 1992). These regulations provided for the grant of 50 licences for wheelchair accessible taxis in the Dublin taxi meter area. The fee payable in respect of a grant of such a licence was IR£50. These regulations ended the temporary moratorium on the issuing of new hackney licences.

146. The regime was significantly changed in 1995 by the adoption of S.I. 136 of 1995, the Road Traffic (Public Service Vehicles) (Amendment) Regulations, 1995. These regulations assigned to local authorities certain powers and functions in relation to the licensing of taxis and hackneys. The new licensing authorities were empowered to declare areas to be taximeter areas; to alter the boundaries of taximeter areas; to grant and renew taxi licences

and wheelchair accessible taxi licences and hackney licences; to determine the number of taxis and wheelchair accessible taxis to be licenced in the taxi meter area and to determine fare structures to apply to the taximeter areas. Specifically, Article 8 provides that where a licensing authority has declared an area to be a taximeter area it may determine from time to time that a specified number of taxi licences or wheelchair accessible taxi licences or both may be granted in respect of that taximeter area.

147. Before considering the two Regulations introduced in 2000 by the Minister, it is appropriate to consider the case of *Hempenstall v. the Minister for the Environment* [1994] 2 IR 20. As discussed above, under S.I. 272 of 1991 a temporary moratorium was placed on the issue of new hackney licences. By the Road Traffic (Public Service Vehicles) (Amendment) (No. 2) Regulations of 1992 (S.I. 172 of 1992) the Minister removed the temporary moratorium on new hackney licences on the recommendation of the Interdepartmental Committee in its final report. Taxi owners challenged the validity of the 1992 Regulations in judicial review proceedings. On 10 July 1992 O'Hanlon J. in the High Court gave the applicants leave to seek the follow reliefs:

(a) A declaration that the proposal by the respondent to allow unrestricted applications for hackney licences was an unjust attack on the property rights of the applicants contrary to the provisions of Article 40.3 and Article 43 of the Constitution and any act on the part of the respondent to amend the provisions of S.I. Number 272 of 1991 was unconstitutional, *ultra vires*, null and void and of no effect.;

(b) A declaration that any purported exercise by the respondent of his powers in the manner set out in (a) above was *ultra vires*, void and of no effect, and

(c) An injunction restraining the respondent from introducing any Statutory Instrument which purported to allow unrestricted issue of taxicab licences."

148. Costello J. delivered judgment on the application. He noted that following the introduction of the 1978 Regulations which provided that taxi licences could only be granted in a taximeter area as defined where the local authority for that area made a determination that a specific number of such licences were to be made available on an annual basis and also permitted the transfer of taxi licences *inter vivos* with the result that a thriving market in the sale of licences developed. He noted that since 1963 there had been no restrictions placed on the number of hackney licences which could be granted in any given area. By the 1991 Regulations the Minister imposed a temporary restriction on the issuing of hackney licences and the applicants' claim was that the Minister could not validly lift that restriction. To do so would have *"an immediate and devastating effect"* on their taxi licences and would effectively decimate the value of being a taxi licensee. They argued that the current value of a taxi licence in July 1992 was approximately £44,000 and if the impugned regulation took effect, it would be reduced in value to £3,000. Costello J. held that the applicants had failed to establish that the Minister's actions actually resulted in diminution in the value of their taxi licences and accordingly had failed to establish that an attack on their property rights had taken place. He continued his judgment as follows:

> *"Secondly, even it were established that the making of the Regulations of 1992 resulted in a diminution in the value of the applicants' taxi plates, this would not as a matter of law amount, in my opinion, to an attack on the applicants' property rights. Property rights arising in licences created by law (enacted or delegated) are subject to the conditions created by law and to an implied condition that the law may change those conditions. Changes brought about by law may enhance the value of those property rights (as the Regulations of 1978 enhanced the value of taxi plates by limiting the numbers to be issued and permitting their transfer) or they may diminish them (as the applicants say was the effect of the Regulations of 1992). But an amendment of the*

law which by changing the conditions under which a licence is held, reduces the commercial value of the licence cannot be regarded as an attack on the property right in the licence. It is a consequence of the implied condition which is an inherent part of the property right in the licence.

Thirdly, a change in the law which has the effect of reducing property values cannot in itself amount to an infringement of constitutional protected property rights. There are many instances in which legal changes may adversely affect property values (for example, new zoning regulations in the planning code and new legislation relating to the issue of intoxicating liquor licences) and such changes cannot be impugned as being constitutionally invalid unless some invalidity can be shown to exist apart from the resulting property value diminution. In this case no such invalidity can be shown. The object of the exercise of the Ministerial regulatory power is to benefit users of small public service vehicles. It has not been shown or even suggested that the Minister acted otherwise than in accordance with his statutory powers. Once he did so then it cannot be said that he has thereby "attacked" the applicants' property rights because a diminution in the value may have resulted."

149. He therefore held that the Regulations did not unconstitutionally affect the applicants' property rights.

150. Costello J. held that property rights arising in licences created by law are subject to the conditions created by law and to an implied condition that the law may change those conditions. A change in those conditions which reduces the commercial value of the licence is not an attack on the property right in the licence. A change in the law which has the effect of reducing the property value in a licence does not amount to an infringement of

constitutionally protected property rights as such. Some additional invalidity which exists apart from the result in property value diminution is required.

151. On 13 January 2000 the Minister adopted S.I. 3 of 2000, the Road Traffic (Public Service Vehicles) (Amendment) Regulations 2000. They applied to the Dublin taximeter area. These regulations entitled a qualified person to apply to Dublin Corporation for a new taxi or wheelchair accessible taxi licence. A qualified person was a person who on 31 December 1999 already held a taxi licence or a wheelchair accessible taxi licence granted by the Corporation or who was entitled to renew such a licence or who had been in receipt of an offer for the grant of a wheelchair accessible taxi licence. Persons who were not qualified persons within the meaning of the Regulations could not apply for the 500 new taxi and wheelchair accessible taxi licences which were to be granted in accordance with the scheme to be determined by the Minister.

152. These regulations were challenged in *Humphrey v. The Minister for the Environment* [2001] 1 IR 263. The applicants were either holders of public service vehicle driving licences or hackney licences but did not hold taxi licences. Each of them had applied for a taxi licence and had been refused. In their proceedings they challenged the statutory regime regulating the issuing of the taxi licences. The National Taxi Drivers Union and its General Secretary, Mr. Gorman, were joined as respondents to the proceedings.

153. The applicants applied for a declaration that certain regulations including the regulations introduced by S.I. 3 of 2000 were *ultra vires* the first and second named respondents. The State respondents pleaded that the applicants were precluded from challenging any provision of the regulations prior to S.I. 3 of 2000. The applicants alleged that delegation of the power to new taxi licences was unlawful.

154. Murphy J. held that the applicants were out of time in challenging all of the regulations other than S.I. 3 of 2000. Applying the provisions of O.84, r.21(1), the court could not

extend the period within which applications should be made in respect of those regulations unless there was a good reason for so doing. The applicants said that they were unaware of the possible illegality of the various regulations until recently when S.I. 3 of 2000 *"exacerbated the situation"*. In addition, they argued that delay should not protect regulations which are *ultra vires*. Murphy J. was of the view that the reasons given did not justify an extension of the period as requested and therefore the case was confined to the challenge of S.I. 3 of 2000.

155. Murphy J identified the central issues in the proceedings as at p. 295 of the report *"whether the Minister is empowered under s.82 of the Road Traffic Act, 1961, to restrict the number of taxi licences, to favour incumbents already holding taxi licences and whether he has the power to delegate to local authorities the power to restrict and the power to set a licence fee."*

156. Murphy J. held:

> *"(i) The words "control and operation", as they appear in s. 82 of the Road Traffic Act, 1961, do permit the Minister in question to exercise a measure of numerical or quantitative control over the licensing of public service vehicles. That this is so is apparent simply from the fact that the Minister is empowered to grant licences. By granting or, indeed, by refusing any application for a licence, the Minister is ipso facto exercising quantitative control over the licensing of such vehicles. This fact is not challenged by the fact that a licence may have been granted for qualitative reasons relating to the condition of a particular vehicle or the extent to which the applicant for the licence is qualified to hold a licence.*
>
> *(ii) To frame the central legal question which has been thrown into focus by these proceedings as being that of whether the Minister in question is empowered under the Act of 1961, to exercise numerical control over public service vehicles*

is largely unhelpful at all events, insofar as it deflects the mind from the real issue, which is that of whether the Minister in question is empowered to exercise numerical control over such vehicles in the manner in which he has purported to do under the impugned Regulations of 2000. (Emphasis in the original)

(iii) [The O'Neill case] (O'Neill v Minister for Agriculture [1998] 1 I.R. 539)…is relevant not because it provides authority for the proposition that the Minister may not exercise quantitative control over public services vehicles, which it does not, but rather because:-

(a) it unambiguously rejects the possibility of the Minister fettering his discretion in purporting to exercise quantitative control under the Act;

(b) it casts serious doubt on the constitutionality of any scheme authorised by the Oireachtas which would have the effect of excluding persons from working in an industry for which they may be perfectly well qualified. The scheme at suit in [the case], like the scheme at suit before the court, was "so radical in qualifying a limited number of persons and disqualifying all others who may be equally competent from engaging in the business" that "it may be that such a far reaching power could not be delegated by the national parliament at all", Murphy J. at p. 556.

(iv) The Minister, in restricting the number of licences in the manner under consideration, has fettered the discretion conferred upon him by s. 82 of the Act of 1961. The scheme ostensibly put in place by [S.I. 3 of 2000] represents an exercise of quantitative control and there can be little objection to that per se. However, it is also a blanket restriction which renders nugatory applications from parties other than current taxi licence holders. It represents a fettering of the Minister's discretion which affects

> *the rights of citizens to work in an industry for which they may be qualified and, further, which affects public access to taxis and restricts the development of the taxi industry."*

157. Murphy J. held in 2000 that the applicants were out of time to challenge any of the regulations other than S.I. 3 of 2000 and rejected the argument that they were unaware of the possible illegality of the earlier regulations as affording a good reason to extend time. He also held that the Minister had power to control the number of taxi licences issued by way of regulation and that the issue in the case was whether he did so in a lawful manner. He held that the Minister did not and accordingly, the court held that the impugned regulations were *ultra vires* the second named respondent and he ordered that they be quashed.

158. As discussed earlier in this judgment, the State did not appeal the decision, though the National Taxi Drivers Union and Mr. Gorman did.[5] The Minister adopted the 2000 Regulations on 21 November 2000. The Minister repealed the earlier statutory instrument in its entirety and abolished quantitative restrictions on the issue of taxi licences throughout the State. The two appellants in *Humphrey* and a third plaintiff, Mr. Kearns, sought judicial review of the decision of the Minister to adopt the 2000 Regulations. Carney J. in the High Court quashed the provision of the 2000 Regulations which purported to repeal S.I. 3 of 2000 when an appeal was pending before the Supreme Court in relation to the quashing of those regulations by order of the High Court on the basis that this represented a gratuitous and unwarranted interference in the appellant's right to appeal in *Humphrey v. The Minister for the Environment*.

159. The applicants' case was that the 2000 Regulations were unconstitutional in that they were introduced into law without compensation and therefore amounted to an unjust attack

[5] *Gorman v Minister for Environment* [2001] 2 IR 414

on their constitutionally protected property rights under Articles 40.3.2 and 43 of the Constitution.

160. Carney J. accepted that it is possible to have property rights in a licence which attract constitutional protection, but the extent of the right had to be considered. He said that the nature of the property right enjoyed by the applicants in their licences was specifically addressed in *Hempenstall*. He quoted the second finding of Costello J. which I have cited above at para. 148 and observed:

> *"Thus the property right invoked by the applicants in this case is one which, although recognised as valuable property right, is also a right which is subject to an important qualification in that the licence is at all times subject to the conditions created by law. As Costello J. makes clear this is "an inherent part of the property right in a licence""*

161. Carney J. then cited the third finding of Costello J. quoted above. He endorsed and followed Costello J.'s formulation in *Hempenstall* of the nature and extent of the property rights enjoyed by the applicants in their licences:-

> *"Property rights arising in licences created by law (enacted or delegated) are subject to the conditions created by law and to an implied condition that the law may change those conditions."*

Carney J. held that the decision in *Hempenstall* clearly defined the scope of the property rights enjoyed by a holder of a taxi licence.

162. He pointed out that the applicants in the case before him, as in *Hempenstall*, claimed that they had been subject to an unjust attack on their property rights as a result of a change of law. He answered this argument in the following terms:

> *"The applicants in this case accepted a similar restriction on the exercise of their property rights ab initio. They must have been aware of the risk inherent in the licence that legislative change might affect its value. Dramatic legislative changes had been*

introduced by means of Regulations in 1978 and 1995 and the applicants were under no misapprehension that changes in the licensing scheme effected by means of Regulation could have a considerable impact on the value of their investment. Indeed, such conditions must be necessarily implied if the Minister of State is not to be unduly hampered in exercising his powers under statute in the public interest.

The applicants in the instant case, as well as the applicants in Hempenstall (Hempenstall v. Minister for the Environment [1994] 2 IR 20), have in the past reaped the benefits of legislative change. It is not open to them to complain about such changes in the law having a detrimental effect on the value of their licences. It follows therefore that the actions of the respondents in introducing a scheme of deregulation by means of SI 367cannot constitute an unjust attack as this restriction is inherent in the very nature of a licence. As Costello J. stated in Hempenstall:

> *'... a change in the law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights. Such a legislative change per se cannot be unconstitutional in the absence of some further invalidity.'"*

163. Carney J. then considered whether the absence of any scheme of compensation introduced in tandem with the scheme of deregulation could render the scheme unconstitutional. In *Re Planning and Development Bill, 1999* [2000] 2 IR 321 the Supreme Court was asked to pronounce on the constitutionality of Part V of the Planning Bill 1999 which allowed for a scheme of compensation providing an amount in compensation less than full market value to landowners. The Chief Justice held that:

"There can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property."

But he then went on to hold that there is no right to full compensation in all circumstances. The legitimate objectives of the public interest may call for less than full reimbursement of the full market value.

164. Carney J. rejected the arguments of the applicants in *Gorman* stating:

"1 As the only interference with their rights has been one implemented by means of an implied condition of which the Applicants were fully aware and one which is envisaged by the very terms and conditions under which a licence was held, then it would seem incongruous if the State should be obliged to introduce a concomitant scheme of compensation.

2 Moreover, the interference with property rights is not only justified, but it is minimal in that the applicants are still free to dispose of their licence and also to use it in any way they see fit. There has been no expropriation of their licences.

3. The payments made in the secondary market achieved the objective for which they were made at the time, namely the purchase of a job when jobs were otherwise unobtainable.

4. Finally, the Applicants are mistaken if they believe there is an automatic right to compensation in all circumstances. The very fact that compensation to the full market value of land was denied in Re Article 26 of the Constitution and Part V of the Planning and Development Bill 1999 is sufficient evidence of the fallacious nature of such a contention."

165. The applicants had also argued that the 2000 Regulations were *ultra vires* and void for irrationality. Carney J. set out in full the statement made by the Minister to Dáil Éireann

on 21 November 2000, an extract of which has been cited above. He held that he could not conclude that the Minister acted in an irrational manner or one which flew in the face of reason or common sense. He held that the impugned statutory instrument passed the test of *"reasonableness"*.

166. He also rejected the arguments in relation to an alleged lack of fairness in procedures and to an alleged legitimate expectation and rejected those also. He accordingly refused to quash the balance of the 2000 Regulations.

167. There was no appeal from the decision in *Gorman*.

168. In passing, it may be noted that both *Hempenstall* and *Gorman* were considered by the High Court of England and Wales (Christopher Bellamy QC) in *R(Royden) v Wirral Metropolitan BC* [2002] EWHC 2484 (Admin), [2003] LGR 290. The respondent council had previously adopted a policy of limiting the number of hackney licences it granted. As a result, existing licences had a premium value. The council then decided to remove the numerical limitation. Its decision was challenged by the holder of a hackney licence on a number of grounds, including that the decision constituted an unlawful interference with his property (the licence) contrary to Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The judge rejected that claim, on a number of bases. One of the "*routes*" to the conclusion that Article 1 did not apply was, in his view, by analogy to the reasoning of Carney J in *Gorman*, following the earlier decision in *Hempenstall*. Having quoted extensively from Gorman, the judge stated:

> "*143. Although, as the claimant points out, the texts differ and no Strasbourg jurisprudence is cited, it seems to me that the reasoning of Costello J and Carney J is transposable, at least by analogy, to the present case. Even assuming that a hackney carriage vehicle licence, or its value, constitutes 'property', that 'property' arises solely*

because the legal regime in force in the Wirral which restricted the number of licences in issue. It has been the case, at least since 1985, that the restriction on the number of licences in issue in the Wirral could, in law, be removed. It follows that anyone acquiring a licence after 1985 did so on the implied understanding that that might occur. The 'property' in the licence was, therefore, inherently subject to the possibility of such a change occurring. On this view, there is no 'interference' with the property, since the possibility of 'de-restriction' occurring was always intrinsic to the 'property' itself. This approach may also be expressed in wider terms, with which I myself would respectfully agree, namely that changes in the law which may affect property values, or the value of a business, cannot normally be impugned under Article 1 of the First Protocol solely on the grounds that a change in the law has caused a diminution in value."

169. Mr. Muldoon consulted solicitors in 2001 but did not institute these proceedings until February 2002 when a new firm of solicitors acted for him. His proceedings, and those of his fellow licence holders, seek to advance a case which differs (or which a least is said to differ) from those which failed in *Hempenstall* and *Gorman.* I turn now to address the first issues identified by the parties in the issue paper.

Was there a breach of the appellants' constitutional rights?

170. The appellants assert that rights guaranteed by Art. 40.3.2 and Art. 43 of the Constitution were breached by the respondents. Article 40.3.1-2 provides:

"1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

171. In Article 43 the State acknowledges the right to private ownership of external goods. It guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property and in Article 43.2.2 the Constitution provides that:

"The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

Mr. Muldoon and Mr. Kelly's right to earn a livelihood

172. The most remarkable aspects of these appellants' claim that their constitutionally protected rights have been breached giving rise to a claim for damages, is a complete absence of anything other than a bare plea to that effect. There are no details set out in the pleadings of the case they seek to advance. The High Court was required to glean their case from the submissions advanced at trial. This is not an appropriate way to proceed, and it has contributed significantly to the uncertainty and confusion surrounding the actual case advanced by the appellants.

173. At paras. 170 and 171 of his judgment Peart J. sets out the claim as he understood it to be. All three plaintiffs were claiming damages arising from the elimination of value in their licences as soon as the 2000 Regulations were introduced because those Regulations *"took away their asset value without any adequate scheme of compensation, and were disproportionate to any justifiable objective which the Minister was pursuing by introducing them"*. They say that the Minister adopted overnight deregulation without compensation and thereby breached their property rights. Peart J. continues in para. 170:

"For that claim, Mr Muldoon and Mr Kelly rely also on what they say is the existence of an unlawful regime created by the 1978 Regulations which meant that the only way they could enter the taxi industry and earn their livelihood as a taxi owner was to purchase a licence on the secondary market. Mr Malone… claims damages for the destruction of the value built up in his licence as a result of the secondary market which was created after he bought his licence, but from which he could have benefited were it not for the introduction of the 2000 Regulations."

174. In para. 171 he summarises the claims by Mr. Muldoon and Mr. Kelly that the 1978 Regulations breached their right to earn a livelihood and their right to equal treatment before the law. He says the claim:

"…is founded upon the claim that were it not for the 1978 Regulations they would have been able to enter the taxi industry and earn a livelihood by simply making an application to the Council for a licence whenever they chose to, without having to pay exorbitant sums for their licences on any secondary market, and without having to pay £3000 to the Council in respect of a transfer fee, and furthermore were it not for the 1978 Regulations they would not have lost the value they paid for the licences and any uplift in that value prior to the 2000 Regulations. They also see this background as constituting unequal treatment before the law, presumably on the basis that others seeking employment do not have to buy their job by the expenditure of such large sums of money, and in this way they have been discriminated against."

175. The High Court rejected each of these claims. The court pointed out that under Art. 40.3.2 of the Constitution the State guarantees by its laws to protect as best it can from unjust attack the rights guaranteed by the provision. At para. 177 he concluded:

"In the present case in my view there is no sustainable argument in relation to the plaintiffs' right to earn a livelihood. The licence they each hold enables them to do

that and continue to do that. It has not been removed or revoked in any way, or even delimited in any manner whatsoever as far as the ability to earn a living is concerned. The gravamen of the plaintiffs' claim is that the value of their licence has been removed without any proper scheme of compensation."

176. The Notice of Appeal does not bring any greater clarity to the appellants' claim that their right to earn a livelihood was breached. However, it now appears that the claim is based upon both the Quantitative Restriction Regulations and the 2000 Regulations. It is not clear whether it is, in fact, open to the appellants to appeal the decision of the High Court on the basis that the trial judge failed to hold that the 2000 Regulations breached their rights to earn a livelihood as that appears not to have formed part of the case in the High Court. The protean nature of their case leaves this seriously open to doubt. It is particularly inappropriate, to put it no higher, given that O.84, r.21 applies by analogy to the proceedings. Not only does this underscore the (normal) requirement that a party pleads its case with precision, but it further constrains the appellants in that any expansion or variation of their case may only be made with the leave of the court, and the court may only grant such leave if they satisfy the requirements of O.84, r.21(3). All in all, the respondents have been left facing an ever changing and shifting case in a manner which is less than fair to any litigant.

177. The written submissions provide some clarity in relation to this head of claim. Under the heading "Breaches of constitutionally protected rights" it is submitted that:

"The 2000 Regulations and the failure of the Minister and the State to provide any or any adequate compensation for the losses caused to the plaintiffs involved breaches of the following constitutionally protected rights:

(a) the right of Mr. Muldoon and Mr. Kelly to earn a livelihood;

(b) the right of Mr. Muldoon and Mr. Kelly to be held equal before the law; and

(c) the plaintiffs' property rights.

It is submitted that the State is required to defend those rights and that if a person has suffered damage by virtue of a breach of a right protected by the Constitution the person is entitled to seek redress against the person or persons who infringed that right."

178. The submission focuses on how the appellants assert that their rights to earn a livelihood were interfered with in a manner which was disproportionate, but they do not address how it is alleged that the right has been infringed. This is to put the cart before the horse. The right is not an absolute right and can be subject to legitimate legal restraint and regulated or restricted. An interference with a right must first be established before the court can go on to consider whether the interference with the claimed right is proportionate.

179. In exchanges with the court counsel for the appellants explained that Mr. Muldoon and Mr. Kelly say that they were forced to buy a licence if they wished to pursue their chosen career as this was the only realistic route to becoming a taxi driver. They were required to purchase a licence at great expense on the secondary market (which had been established and was managed by the State) and they thereby incurred significant debts. When the 2000 Regulations were adopted and the value of the licences virtually eliminated overnight, the debt remained. This placed them at a disadvantage *vis-à-vis* others who could now come into the industry without a comparable debt burden. They submitted that their claims did not simply rest on the fact that the 2000 Regulations inflicted pecuniary loss on them or the fact that the 2000 Regulations merely had the effect of reducing their income. It rested also on the manner in which their freedom to work was burdened in contradistinction to new entrants to the market and in contradistinction to people who bought licences in the decades previously without incurring a comparable debt liability. In their written submissions they say they were forced to work longer hours, though in fact the High Court made no finding to such effect.

180. The argument advanced before this court was that the 2000 Regulations constituted an unjust attack on their right to earn a livelihood and no argument was advanced that the 1978 Regulations or collectively the Quantitative Restriction Regulations breached the right to earn a livelihood because, prior to earning a living as a taxi driver, they were required to purchase the licence on the secondary market.

Discussion

181. In *Attorney General v. Paperlink Limited* [1984] ILRM 373 Costello J. held that the right to earn a living is a constitutional right, but it is not an absolute one and may be subject to legitimate legal restraints. In *Shanley v. Galway Corporation* [1995] 1 IR 396 McCracken J. held that the Constitution *"does not impose a positive duty either on the State or any body such as a local authority to which the State may have delegated powers to provide a livelihood for the plaintiff"*. The right is not an unqualified right to any particular livelihood.

182. In *Moyne v. Londonderry Port & Harbour Commissioners* [1986] IR 299 at pp. 316-7 Costello J. considered whether the infliction of a pecuniary loss established that an infringement of the right to earn a livelihood had occurred. He stated:

> *"The further question therefore that arises for consideration is this: assuming that the acts of the Commissioners in this jurisdiction in (a) closing the pier at Carrickarory or (b) restricting its use, caused as alleged a loss of profits to the plaintiffs, does this amount to an invalid infringement of the constitutionally recognised right of each of the plaintiffs to earn a livelihood? For the purpose of answering this question let me assume that the Commissioners acted in breach of their statutory duty. Does it then follow that in addition they acted in breach of a constitutional obligation not to infringe the plaintiffs' constitutionally recognised rights? I do not think so. A wrongdoer may commit a breach of contract, or a tort, or a breach of statutory duty and thereby cause a plaintiff a loss of business profits, but it does not follow that a*

breach of a constitutional obligation has also taken place. <u>The infliction of a pecuniary loss does not in itself establish that an infringement of the constitutionally protected right to earn a livelihood has taken place</u>." (Emphasis added)

183. In these cases, after the adoption of the 2000 Regulations, the appellants still had their taxi licences; those licences were neither appropriated nor cancelled. They could still work as taxi drivers. No change had occurred in relation to either their overheads or the fare structure before or after the adoption of the 2000 Regulations. Simply put, if they could earn a livelihood in January 2000, likewise they could do so in December 2000 or in the years following. When they decided to purchase their licences and to work as taxi drivers, they each decided necessarily that they could earn a living and meet their overheads based on the existing fare structures, which regulated the fees they could charge, and the burden of debt they were incurring when purchasing the licences. There is no evidence that this changed after November 2000. The fact that others may be able to trade more profitably because they do not have the same level of overheads does not mean that the appellants' right to earn a livelihood has been breached. The trial judge made no finding that they earned less than before. Even if the court accepts as a matter of probability that with more taxis on the road the appellants may need to work longer hours to earn the same level of income – and this is by no means certain given the evidence of the chronic shortage of taxi drivers before deregulation and there are no findings of fact as to the numbers of new entrants post November 2000 – the appellants are not entitled to be insulated against competition. Put another way, the State is not required to underwrite their earnings and it does not breach any right to earn a livelihood if, by its acts, it has the effect of reducing the income level of an individual or individuals.

184. This shows that the complaint in relation to their right to earn a livelihood, insofar as it is not merely the pecuniary loss sustained by the devaluation of their licences as their

counsel emphasised, in truth relates to the increase in competition which was brought about by deregulation of the industry. The appellants assert that they have to work longer hours for the same money. It is important to note that the trial judge made no such finding of fact and this court cannot simply assume it to be true. When they each purchased their licences in 1998 and 1999 respectively, they incurred the cost of entry into the market and they intended to work in competition with other taxi drivers. This would include the taxi drivers who had not paid any or any comparable price for their licences. There was no change in that regard introduced by the 2000 Regulations.

185. The gravamen of the complaint was that they were now subject to (unfair) competition from new entrants who did not have the same entry costs which they were forced to incur. In my opinion there is no substance in this as a basis for an alleged infringement of a right to earn a livelihood. They were always competing with taxi drivers with less, or indeed no, debt burdens. People such as Mr. Malone were in competition with Mr. Muldoon. In addition, there were undoubtedly people who purchased a licence on the secondary market for a lesser amount some years previously and they may well have repaid any loan by the time Mr. Muldoon and Mr. Kelly entered the market and thus be competing with them without the need to repay any debt. There may also have been people who recently purchased a licence but without incurring significant levels of debt, by using redundancy payments, savings or inheritance or other sources of income. That being so, their complaint that their right to earn a livelihood was infringed comes down to a complaint that they were subject to an increase in competition from people who had lesser overheads than they, but it was always so. The deregulation simply increased the number of those competitors. It did not deprive them of the ability to continue to *"ply their trade"*. No authority was advanced to support their proposition and I am satisfied that the adoption of the 2000 Regulations did not breach the appellants' right to earn a livelihood as they contend.

186. That being so, it is not necessary to consider whether or not the infringement was proportionate or whether the 2000 Regulations impaired the right to the minimum extent necessary.

187. If, contrary to my understanding of their arguments, the appellants maintain a case that the 1978 Regulations also infringed their right to earn a livelihood, I would agree with the decision of the High Court in dismissing that claim for the reasons he advanced. However, in my opinion, such an argument did not in fact form part of the appeal before this court.

Failure to hold Mr. Muldoon and Mr. Kelly equal before the law

188. Mr. Muldoon and Mr. Kelly argue that the 2000 Regulations treat two groups who are unequally situated in the same way and that this is impermissible under Article 40.1 of the Constitution. Relying on the decision of the Supreme Court (O'Donnell J., as he then was) in *Murphy v. Ireland* [2014] IESC 19, [2014] 1 IR 198, they say that like persons should be treated alike and different persons treated differently by reference to the manner in which they are distinct.

189. They submit that the High Court found that Mr. Malone's factual background is very different to that of Mr. Muldoon and Mr. Kelly, as he purchased his licence as far back as 1973 for £3. Yet, the 2000 Regulations make no distinction whatever between persons like Mr. Malone and persons like Mr. Muldoon and Mr. Kelly or any attempt to address the *"disastrous economic consequences"* which the 2000 Regulations were likely to have and did have for persons like Mr. Muldoon and Mr. Kelly by reason of *inter alia,* the *"vast"* sums they were *"required"* to spend to purchase a taxi licence in the secondary market which resulted from the regulatory regime that the Minister created and maintained since 1978. They say the inequality of treatment was not remedied by the Taxi Hardship Scheme in 2002.

190. In addition, they say the 2000 Regulations were not objectively neutral because of the regulatory framework which they dismantled. The limited class of people, such as the

appellants, who had acquired taxi licences *"was the clear target of the 2000 Regulations"*. The intention and immediate effect of the 2000 Regulations was to immediately expand the class of people who could acquire taxi licences to permit anyone to enter the trade, notwithstanding the devastating impact which that had on people who had incurred very significant capital outlay to enter the taxi market.

191. For these reasons the appellants alleged that the State had failed to hold Mr. Muldoon and Mr. Kelly equal before the law and they were entitled to damages as a result.

192. It is clear from the passages I have previously quoted from the judgment of Peart J. (paras. 171-172) that the trial judge understood the claim in relation to an alleged breach of their right to be treated equally before the law as being based upon the 1978 Regulations and he dismissed that claim on the ground that he could see no possible basis for claiming that the plaintiffs had not been held equal before the law, as the 1978 Regulations applied equally to everybody who wished to apply for a taxi licence.

193. On appeal the plea was based upon the 2000 Regulations, not the 1978 Regulations. Again, it is highly questionable whether this is permissible. Complaint was made that the trial judge did not address the claim based on the 2000 Regulations which, it is said, was made by the appellants. However, as I have previously pointed out, the pleadings are no more than a bare assertion that the right was breached and a claim for damages. It is completely unclear how the appellants allege that their right to be treated equally before the law was breached. This is very unsatisfactory, is unfair to the defendants/respondents and makes it extremely difficult for both the trial judge and this court to deal with the claim. In particular, this is not a court of first instance and ought not to be presented with a case which, it appears, was made for the first time on appeal.

194. It is accepted that both the 1978 Regulations and the 2000 Regulations applied equally to everybody. The complaint is that the regulations impacted different individuals in

different ways. However, far from there being simply two groups of individuals who are differently situate and treated equally, there were in fact a myriad of different factual situations, possibly as many factual situations as there were licence holders. This ranged from persons who had paid a minimal fee for their licences such as Mr. Malone, through to individuals who perhaps paid a fee of approximately £20,000 and which had been fully paid off or who paid £40,000 and were renting the licence as a means of providing a pension during their retirement, through to individuals who may have purchased the licence outright for £80,000 and those who purchased a licence for £80,000 by way of loan which was still extant. This merely illustrates the fact that the regulations necessarily will impact upon a whole range of people differently. If the appellants' case is correct, such a result is impermissible. I do not agree. There is no authority for the proposition that the constitutional guarantee of equality imposes itself in such a fashion. It would effectively nullify the Minister's exercise of regulatory powers because inevitably regulations of general application will impact upon different persons differently. I agree with the submissions on behalf of the State respondents that there is no constitutional requirement that neutral regulations must take account of differing impacts in this fashion.

195. This conclusion is reinforced by the decision in *Fleming v. Ireland* [2013] IESC 19 where the Supreme Court held that:

> *"The Court does not consider that the constitutional principle of equal treatment before the law, as interpreted and applied in its judgments, extends to categorise as unequal the differential indirect effects on a person of an objectively neutral law addressed to persons other than that person."*

196. Applying this *dictum* to the facts in this case, the 2000 Regulations (and indeed the 1978 Regulations) are objectively neutral law and they are addressed to all persons in the

State. The fact that there are different indirect effects upon some licence holders does not breach the constitutional principle of equal treatment before the law.

197. For these reasons I would reject the appeals against the High Court's dismissal of their claims that their constitutional rights to earn a livelihood, and rights to be held equal before the law were breached whether as contended or otherwise.

Was there an infringement of the appellants' property rights?

198. The appellants say that they had property rights in their licences, and in the case of Mr. Muldoon and Mr. Kelly, in the money they spent purchasing their licences, their economic interests in connection with their licences (being the related loans and interest obligations). They accept that the Minister was entitled to deregulate the regime in relation to taxi licences provided there were *"appropriate remedial measures"*. They say in the absence of these appropriate measures, their respective property rights were infringed.

199. In the High Court Peart J. held as follows:

> *"181. It has been recognised in many cases…that the Oireachtas may regulate in the public interest even if to do so diminishes the value of certain owners' property...the conditions under which the licence are held, or the regulatory scheme itself, may be so altered that the value of what he/she has acquired may be diminished or disappear... (State (Pheasantry Ltd) v. Donnelly [1982] ILRM 512, Tara Prospecting v. Minister for Energy [1993] ILRM 771, Hempenstall v. Minister for the Environment [1994] 2 I.R. 20).*
>
> *182. The obligation on the State not to unjustly attack the plaintiffs' property rights in their licences does not in my view extend to any value that may have existed in the licence at the time the 2000 Regulations were introduced. It follows therefore that even if the Minister left himself open to the criticism by the taxi industry that of all the*

options for reform of the industry that appeared open to him he opted for that which would inevitably and forthwith have the greatest effect upon the value that had built up in these licences on the secondary market, the 2000 Regulations did not breach a constitutionally protected right in the property i.e. the licence."

200. The trial judge agreed with the analysis and decisions in *Hempenstall* and *Gorman* and rejected the arguments advanced by the plaintiffs why *Gorman* should not be followed.

201. At para. 184 he held that that in so far as the plaintiffs maintained a claim in relation to the loss in value of the licences premised upon the 1978 Regulations, which created the environment in which that secondary market thrived, he accepted the submissions of counsel for the Minister that the Minister cannot be criticised for doing the very thing which the decision of Costello J. in *The State (Kelly) v. Minister for the Environment* said he was permitted to do - *i.e.* to introduce regulations which enabled the number of licences to be restricted.

Discussion

202. It is first necessary to consider the nature of the right enjoyed by the appellants before determining whether or not their rights had been infringed by the introduction of the 2000 Regulations.

203. Central to this ground of appeal are the application of the two decisions of the High Court in *Hempenstall* and *Gorman* to the facts in these cases and whether this court should depart from these decisions. In *Hempenstall* Costello J. identified the nature of the property right which can exist in a licence:

"Property rights arising in licences created by law (enacted or delegated) are subject to the conditions created by law and to an implied condition that the law may change those conditions."

204. This was not disputed, and it was accepted that the Minister is free at any time to bring in new regulations. It was also clear as a matter of fact that even a relatively modest regulation change may impact the value of licences. When 100 new licences were issued in 1991 the value of licences on the secondary market (temporarily) dropped from £50,000 to £40,000. As was pointed out in *Hempenstall*:

> *"Changes brought about by law may enhance the value of those property rights (as the Regulations of 1978 enhanced the value of taxi plates by limiting the numbers to be issued and permitting their transfer) or they may diminish them (as the applicants say was the effect of the Regulations of 1992)."*

205. I agree with both of these propositions, which have been followed in *Gorman* and approved by the Supreme Court in *Maher v. the Minister for Agriculture* [2001] 2 IR 139. It is clear therefore that the Oireachtas must have intended to empower the Minister to make regulations which may either enhance or diminish the value of the taxi licences. It is important to note that power is given to the Minister in relation to the control and operation of public service vehicles, not solely or even primarily in the interests of the licence holders. It is a general power and the object of the exercise of the power is to benefit users of small public service vehicles (*Hempenstall)*. It follows that the introduction of regulations which have as their effect the diminution in value of the licences of itself were both within the contemplation of the Oireachtas and were not *per se* impermissible. As was pointed out in *Hempenstall*, an amendment of the law by changing the conditions under which the licence is held which has the effect of reducing the commercial value of the licence cannot be regarded as an attack on the property right in the licence.

206. It is merely the consequence of the implied condition which is an inherent part of the property right in the licence.

207. The pleadings show that the claim is based upon the diminution in value of the licences. The High Court held that the loss of value of the licences was the gravamen of their claims. The 2000 Regulations did not deprive the appellants of their licences. It follows that their claim must be in relation to the capital value of their licences as distinct from the licences themselves. That being so, a diminution in the value of a licence, as is claimed in this case, cannot be regarded as an attack on the property right in the licence.

208. Costello J. examined whether a change in the law which has the effect of reducing property values can be said to have been an *"unjust attack"* on constitutionally protected property rights:

> *"Thirdly, a change in the law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights…It has not been shown or even suggested that the Minister acted otherwise than in accordance with his statutory powers. Once he did so then it cannot be said that he has thereby 'attacked' the applicants' property rights because a diminution in the value may have resulted.'"*

209. These passages from *Hempenstall* were expressly approved by Denham J. (as she then was) in *Maher v. Minister for Agriculture* [2001] 2 IR 139 at p.221 where she held:

> *"…the right in a licence is subject to conditions created by law. This is an inherent aspect of the right in a licence. It is a right subject to the policies implemented by provisions at national level. It is a scheme, a policy, in the general interest. By analogy with this case the Community provisions stand in the place of national legislation. The principles and policies of the milk quota scheme are therein provided. It is subject to the same analysis as to a licence created by statute. There are inherent aspects. It is subject to change. It is a scheme in the general interest."*

210. As I have explained the right which the appellants seek to protect is the value of their licences. The property right in the licence may attach constitutional protection, but the value in the licence does not. This is clear from *Hempenstall* and *Maher*. The appellants have produced no authority to support the proposition that the constitutional guarantee of property rights extends to the value in a licence. This is hardly surprising as, by its nature, it is regulated property (indeed, it is property *created* by regulation) and thus subject to change. It follows that the right asserted in this case – the investment value in a licence – is not protected by the Constitution and thus any interference with that value cannot amount to an interference with a property right which is protected by the Constitution.

211. The appellants accept that it was open to the Minister by regulation to change the conditions under which the licences were held. They accept that reducing the value of the licence does not amount to an infringement of the alleged constitutionally protected property right in the licence. Their case is that an invalidity exists apart from the resulting property value diminution which means that they can show that there has been an infringement of their property rights and not merely a devaluation of their licences. The alleged *"other invalidity"* is the breach of their constitutionally protected right to earn a livelihood and their right to be held equal before the law. In my judgment neither of these asserted rights of Mr. Muldoon or Mr. Kelly have been breached or attacked by the 2000 Regulations, still less the 1978 Regulations. Even if this court accepted that this were so – and I have previously explained why I believe that this is not so - it cannot apply to the claim of Mr. Malone. He advances no claim that any right to earn a livelihood or to be treated equally before the law has been infringed. This sits awkwardly, to put it no further, with the fact that the claim in the diminution in the value of the licence is the same for all three appellants. To my mind, they cannot bring themselves within this asserted exception on these bases.

212. Separately, the appellants contend that the Minister adopted the 2000 Regulations in an unfair, unreasonable, unjust and disproportionate exercise of his powers, in breach of statutory duty and negligently, and they say that the adoption of the quantitative restriction regulations was *ultra vires* as he had no power to impose quantitative restrictions.[6] These arguments, if sustained, in themselves will result in a finding that the 2000 Regulations were *ultra vires* and ought to be quashed. There is no requirement to invoke a breach of constitutional rights to property to succeed on this claim. If some *"other invalidity"* exists, the appellants do not need to establish that the regulations are, in addition, constitutionally invalid in order to succeed. However, the argument is fundamentally misplaced because there is no constitutional right to protect the value in a licence, as the conditions upon which it is held are always subject to change, and if such change alters the value of the licence it cannot amount to an infringement of the rights in the licence.

213. Quite apart from these arguments based upon *Hempenstall*, the appellants argued that the trial judge erred in relying on *Hempenstall* because the facts in *Hempenstall* were very different to those in these appeals. While it is fully accepted that the facts are different, nonetheless the nature of the licence in question is precisely the same and the claim that property rights had been infringed by reason of the diminution in value occasioned by the introduction of regulations is the same claim in law. For this reason, I am not persuaded that this Court ought to distinguish *Hempenstall* from these appeals. On the contrary, the principles were endorsed by Denham J. as applicable to licences generally and not confined to taxi licences issued under regulations issued under the Act of 1961.

214. Likewise, the fact that the primary basis upon which the High Court rejected the claim in *Hempenstall* was the fact that the applicants failed to establish as a matter of fact that the

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[6] They also assert that the quantitative restriction regulations are *ultra vires* on the basis that he had no power to delegate such a power to the Local Authorities. However, I have already held that the appellants may not advance this argument in these appeals. As such I have omitted references to this argument.

Minister's actions had resulted in a diminution in the value of their taxi licences does not detract from its relevance as a precedent in this case. This finding of fact does not take away from the statements of principle discussed and which have been endorsed by the Supreme Court and followed both by Carney J. in *Gorman* and the trial judge in this case.

215. The appellants' claim that their property rights in their licences were unjustly attacked by the introduction of the 2000 Regulations had previously been rejected by the High Court in *Gorman*. The applicants sought an order quashing the 2000 Regulations on the grounds *inter alia* that it constituted an unjust attack on their constitutionally protected property rights in their licences and that they were *ultra vires* and void for irrationality. Carney J. approved of and followed the decision in *Hempenstall*. He held that the property right is a right which is subject to an important qualification in that the licence is at all times subject to the conditions created by law. He expressly agreed with the observations of Costello J. that a change in the law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights. He held that *"such a legislative change per se cannot be unconstitutional in the absence of some invalidity"*. He considered that, save for the article which revoked S.I. 3 of 2000 while the appeal in *Humphrey* was pending before the Supreme Court, that no such further invalidity had been identified and accordingly the regulations were valid.

216. The difficulty with the appellants' position in these appeals is that *Gorman* was not appealed, and the appellants have not challenged the 2000 Regulations. *Gorman* has already determined that these very regulations do not breach the asserted constitutionally protected property rights of taxi drivers in their licences. *Gorman* affirms that the Constitution does not protect the value in the licences. It is not appropriate for this court to purport to review the substance of that decision nineteen years later. In any event, the appellants have not addressed the analysis of the High Court nor shown how it is incorrect, though they take

issue with the findings of fact underpinning the conclusions in relation to the lack of compensation.

217. Carney J. considered whether the absence of any scheme of compensation introduced in tandem with the scheme of deregulation could render the scheme unconstitutional.[7] He held that it was not for four reasons:

> *"1 As the only interference with their rights has been one implemented by means of an implied condition of which the Applicants were fully aware and one which is envisaged by the very terms and conditions under which a licence was held, then it would seem incongruous if the State should be obliged to introduce a concomitant scheme of compensation.*
>
> *2 Moreover, the interference with property rights is not only justified, but it is minimal in that the applicants are still free to dispose of their licence and also to use it in any way they see fit. There has been no expropriation of their licences.*
>
> *3. The payments made in the secondary market achieved the objective for which they were made at the time, namely the purchase of a job when jobs were otherwise unobtainable.*
>
> *4. Finally, the Applicants are mistaken if they believe there is an automatic right to compensation in all circumstances. The very fact that compensation to the full market value of land was denied in Re Article 26 of the Constitution and Part V of the Planning and Development Bill 1999 is sufficient evidence of the fallacious nature of such a contention."*

218. The appellants submit that this court should not follow *Gorman*. Far from being minimal, the interference with the property rights of Mr. Muldoon and Mr. Kelly was enormous, in that the value of their licences for which they paid such considerable sums was

[7] The Taxi Hardship Scheme was introduced in 2002, after Carney J. had delivered judgment.

completely eliminated overnight. When they paid for the licences, they were hoping to provide for their future pension, not merely ensuring entrance into the job of a taxi driver. They invested lifetime savings and took out extensive borrowings which were secured as a mortgage on their homes. Their case is that the Minister was entitled to deregulate the market but only if he also introduced appropriate remedial measures. The appellants did not attempt to identify what those should have been, but it seems to me that it must mean compensation. This underscores that the gravamen of the case is the loss of value in the licences, a value which the Minister is not required to protect.

219. Even if it were accepted that a measure of compensation was necessary to ensure the validity of the 2000 Regulations – and, for the avoidance of doubt, that is not my view - the appellants have failed to establish any evidential basis upon which this court could conclude that the level of compensation provided was so inadequate as to render the adoption of the 2000 Regulations an unjust attack on their property rights in their licences. The State established the Taxi Hardship Scheme and paid out a total of €17.3 million. Mr. Muldoon and Mr. Kelly each received €13,000. There was no payment to Mr. Malone, who suffered the loss of his investment but who was not burdened with a debt incurred to purchase a licence on the secondary market in taxi licences. There was no evidence as to the level of debt of Mr. Muldoon or Mr. Kelly either in November 2000 or at the time of the trial, whether they had availed of the capital reliefs to set off income tax liability or the extent (if any) of the diminution in their earnings.

220. In all the circumstances I am not persuaded that this court should depart from the decision in *Gorman* and I would reject the submission that the 2000 Regulations breached a constitutionally protected property right.

Claim of breaches of statutory duty and/or unreasonably exercise of statutory powers and/or negligence of the Minister

221. In the High Court Mr. Muldoon and Mr. Kelly argued that the 1978 Regulations (and the later quantitative restriction regulations) entailed an unreasonable exercise of statutory power by the Minister and a breach of duty and/or statutory duty. They were forced by this regime to spend very significant sums in order to purchase their licences on the secondary market created as a result of the 1978 Regulations. But for those regulations and the regime which they facilitated, at least as operated by the councils in question, they would not have suffered the losses which they have suffered because they would not have been obliged to purchase licences for the sums they did and would have been able to apply for a licence at a time of their choosing without having to wait until one became available on the secondary market.

222. They also claim that the Minister acted in a manner which was unreasonable, disproportionate, discriminatory, arbitrary, unfair, illogical, partial and unjust in adopting the 2000 Regulations having regard in particular to the rights and interests of people like them who were forced to spend very significant sums of money in purchasing a taxi licence in the secondary taxi licence market which was created as a result of the regulatory regime for the issuing of taxi licences operated and maintained by the respondents and which they profited from.

223. Mr. Malone makes no claim for a breach of statutory duty arising from the 1978 Regulations directly. He alleges that the Minister breached his statutory duty by introducing the 2000 Regulations which wiped out the value of his licence which had developed since the introduction of the 1978 Regulations.

224. On appeal, the claim was confined to the 2000 Regulations. It was said that it entailed a failure on the part of the Minister to comply with his statutory duty to exercise his powers under s.82 of the Act of 1961 fairly, reasonably and proportionately, as a result of which the appellants sustained significant losses.

225. At para. 190 of the judgment, Peart J. held that it was necessary for the plaintiffs to establish that insofar as the Minister was under the duty claimed, that the plaintiffs were within the class of persons which the Act indicates as those to whom the duty is owed. In addition, they must also show that the Act evinces an intention on the part of the Oireachtas that damages should flow in respect of a statutory duty by those obliged to act.

226. The appellants assert that statutory bodies have a duty to exercise their powers reasonably, fairly, justly and proportionately, a principle which is not disputed by the State. They assert that the trial judge erred in holding that the Minister did not owe a duty to taxi licence holders in exercising his powers under s.82 of the Act of 1961. At para. 196 of the judgment he held as follows:

> *"…in so far as the Minister owes a duty to act reasonably, fairly, justly and proportionately in the exercise of the powers given to him in section 82 of the Act of 1961, his obligation is to do so in the interests of the general public, and it is the public generally to whom these duties are owed, since it is the general public, and not the individual taxi licence holders, for whom the taxi service exists. It is a public service provided by the owners of small public service vehicles. The Minister's duties arise in relation to the regulation of that public service. If he is in breach of his statutory duties, it is the consumers of that public service who may be heard to complain in relation to issues related to insufficiency of the service provided, and therefore about the lack of sufficient taxis on the streets. There is nothing in section 82 of the Act or the statutory scheme generally which suggests, much less requires, that those regulation [sic] which the Minister might make within the powers granted to him must be such that the underlying value on the secondary market value of the existing licences must not be reduced. To impose such a wide and imprecise duty upon the Minister would require a specific provision in which that duty was clearly stated."*

227. On appeal, in their written submissions the appellants stated:

> *"The Minister was empowered by section 82 of the 1961 Act to make Regulations in relation to the control of taxis, including by way of licensing. The power to make such regulations was one that directly and closely affected the rights of the owners of taxis. At all material times, there was an individual direct relationship between the Minister and the existing taxi drivers by reason of a statutory context. By virtue of the statutory powers conferred on the Minister and the "relevant statutory regime as a whole", the Minister had a duty to exercise his regulatory powers in respect of the holders of taxi licences, fairly, reasonably and proportionately."*

228. The appellants referred to various decisions including *Callanan v. VHI* (Unreported, High Court, Keane J., 22 April 1993 and Unreported, Supreme Court, Blayney J., 28 July 1994) to support their claim that the Minister owned them a duty when exercising his powers under s.82 of the Act of 1961. I do not find the cited case law to be of assistance in construing the duties of the minister under the Act of 1961. As was pointed out by Costello J. in *Moyne*:-

> *"There are, of course, many different types of statutory duty imposed by many different types of statute. Parliament may impose a duty of care on the owners of factories and mines or it may oblige public authorities to provide different kinds of services, or perform a specific statutory function and it seems to me, in considering whether a statute should be construed as having been enacted in favour of an ascertainable class of persons rather than for the benefit of the public generally, that <u>little assistance is to be found from decided cases as each case must turn on a construction of the statute which imposed the duty in question</u>."* (Emphasis added)

229. I completely agree with this statement, and it is noteworthy that the appellants' submissions are not directed towards a construction of the statute with a view to ascertaining whether it imposes the duty they assert. In my view, the trial judge's conclusion as to whom

the duty is owed is correct. It is notable that this also was the conclusion of Costello J. in *Hempenstall*. In my opinion it is very clear that the duty is owed to the public at large.

230. Secondly, as was pointed out by Blayney J. in the Supreme Court, the tort actually committed in *Callanan* was misfeasance in public office rather than a breach of a statutory duty of care and the appellants in these appeals have expressly indicated that they are not pursuing a claim for misfeasance in public office.

231. In my judgment the appellants have not shown, as they are required to do, that they are within the class of persons which the Act indicates as those to whom the duty in respect of the exercise of the powers is owed. Specifically, they have not refuted the finding – one consistently made in the authorities - that the power conferred in s.82 is a public power that must be exercised in the interests of the public as a whole, and not for the benefit of licence holders or people who wish to become licence holders.

232. The State respondents submitted that the appellants cannot establish a breach of statutory duty against the Minister for the manner in which he exercised his regulatory powers because, in exercising those powers, the Minister was not acting in the interests of one identified class of persons but in the interests of the public as a whole. They point to the fact that various interests were at play, including persons who held taxi licences, persons who wished to acquire taxi licences, people who used taxis, business owners, hackney drivers etc. There were potential conflicting interests between these parties. It was for the Minister to conduct the necessary balancing exercise in pursuit of the public interest and not as acting in the interests of one identified class of persons, even a class directly impacted by the exercise of the statutory power.

233. If the duty is owed to the public at large, then no action for a breach of duty will lie. This was held by the Supreme Court in *Glencar Exploration v. Mayo County Council (No. 2)* [2002] 1 IR 84 where Fennelly J. held at p.150:

> *"A duty imposed by statute on a public body will not be held to create a right to damages for its breach unless it can be shown to have within the scope of its intendment a reasonably identifiable protective purpose and identifiable class intended to benefit."*

No argument was advanced to the contrary and this is dispositive of this ground of appeal. In fairness to counsel for the appellants I should record that while this ground of appeal was not formally withdrawn, he acknowledged that *"the authorities present difficulties"*. I agree, and the appellants, in my view, have failed to overcome them.

234. In addition, the appellants have advanced no argument to suggest that the Oireachtas intended that damages should flow in respect of the statutory duty which they allege is owed by the Minister to them. This is an essential element of their claim for damages for breach of statutory duty. It was accepted that para. 6.3 of the judgement of Clarke J. (as he then was) in *Atlantic Marine Shipping Limited v. Minister for Transport* [2010] IEHC 104 correctly set out the law as follows:

> *"In relation to statutory duty per se it is clear from cases such as Moyne v. The Londonderry Port and Harbour Commissioners [1986] I.R. 299 and Sweeney v. Duggan [1991] I.R. 274 that the question of whether a plaintiff is entitled to claim damages for breach of statutory duty must start with the consideration of whether, taking the relevant statutory regime as a whole, it can be said that it was 'intended by the legislature that an aggrieved plaintiff would be entitled to damages.'"*

235. I can see nothing in the terms of s.82 which suggests that this was the intention of the Oireachtas. It is clear from the scope of s.82 that the Minister has a very wide power to make regulations in relation to the control and operation of public service vehicles. It is not confined simply to the licencing of public service vehicles and of drivers and conductors of

public service vehicles. The Minister is expressly empowered to make regulations in relation to the conduct and duties of passengers and intending passengers in public service vehicles (s.82(2)(e)) as well as the other matters specifically set out in ss.2. The breadth of the interests to which the Minister is required to have regard and the matters in respect of which he may make regulations to my mind preclude the court from implying any intention that damages should flow for any alleged breach of duty conferred by this section. For this reason, also, I would reject the appeal in relation to the claim for damages for alleged breach of statutory duty.

236. The appellants did not elaborate on their appeal in relation to the claim that the Minister acted negligently in adopting the 2000 Regulations. They indicated that they relied upon the principles *"addressed"* in *Cromane Seafoods Limited v. Minister for Agriculture* [2016] IESC 6, [2017] 1 IR 119 and *UCC v. ESB* [2020] IESC 38. Neither the cases cited, nor the Notices of Appeal advanced the claim any further. In *Cromane Seafoods*, Charleton J. said that even where the decision maker acts beyond the powers conferred upon him or her, the law of negligence does not apply unless the decision maker has *otherwise* acted wrongfully by misfeasance in public office. That claim was expressly abandoned in these proceedings, and so the claim in negligence against the Minister must fall.

237. Further, a sufficient relationship of proximity must exist in order to impose a duty of care. No such relationship can exist where the powers conferred by the Act of 1961 exist for the benefit of the general public rather than for the benefit of licence holders. In the circumstances, a duty of care cannot arise. I agree with the submissions of the State respondents that it would not be just or reasonable to impose a duty of care in circumstances where the Minister must exercise his or her regulatory power in a context where a range of classes of the public have differing and potentially conflicting interests. In *Kennedy v. The*

Law Society of Ireland (No. 4) [2005] 3 IR 228 Kearns J. (as he then was) held in the High Court at p.251 of the report that:

> *"…to find that a duty of care existed to the solicitor, or to both the public and the solicitor, would be to uphold two incompatible duties and would completely undermine the capacity of the first respondent to exercise proper supervisory and regulatory control of the profession. There is absolutely nothing in the Solicitors Act 1954 or the Regulations of 1984, containing, as they do, measures for the control and sanction of solicitors, which could be interpreted as creating a duty of care to an individual solicitor under investigation."*

238. In this case there are a wide range of potentially conflicting interests, as is apparent from the fraught history of the reform of the taxi industry, and to impose a duty of care in favour of taxi licence holders would be inappropriate where there are myriad conflicting interests and would amount to giving taxi licence holders a form of priority over those other interests. For these reasons, I am satisfied that the appeal in relation to the claim in negligence also should be rejected.

The *ultra vires* claims against the Minister and the State by Mr. Muldoon and Mr. Kelly

239. As I have set out, the case as originally advanced by the appellants was that the adoption of the 1978 Regulations was *ultra vires* the Minister on the basis that s.82 did not confer a power to impose quantitative restrictions on the number of taxi licences issued. During the opening of the case, the argument that the 1978 Regulations were *ultra vires* the Minister's powers under s.82 was made on the basis that it was unlawful to delegate the power given to the Minister to the local authorities as occurred initially in the 1978 Regulations and thereafter in the 1991 and 1995 Regulations (the Quantitative Restriction Regulations).

240. The trial judge permitted the plaintiffs to amend their pleadings to include the delegation plea. Both he and the State defendants were quite clear that as a result, the plaintiffs abandoned the first argument. At para. 148 of the judgment the trial judge notes the submission of counsel for the state that the plaintiffs in their amended statement of claim and overview document on the ultra vires part of the case no longer contended that the Minister did not have the power to restrict the numbers of licences as part of his power to "control" public service vehicles, as had been decide in *State (Kelly).* That being so, numerical restrictions *per se* were accepted to be within the power under the section.

241. At para. 150 Peart J. said:

> *"150. However, given the complete change in the nature of the ultra vires claim being put forward, and the fact that it is no longer based on a lack of power to impose quantitative restrictions per se but rather the delegation of that power…"* (Emphasis added)

In para. 135 he said:

> *"Given the decision of Costello J. in State (Kelly) v. Minister for the Environment (later affirmed by the Supreme Court) it is hard to see how this claim could have been considered worthy of even being pleaded, let alone argued with any expectation of success, even allowing for the fact that the Kelly case was a challenge to earlier Regulations made in 1977. Albeit dealing with a different regulation, it was clearly decided that the word "control" appearing in section 82 was broad enough to include restricting or limiting the number of licences. This inevitable change of tack by the plaintiffs led to an objection by Brian Murray SC for the Minister and the State…"*

242. And at paras. 137 and 138 he said:

> *"137. If the plaintiffs are unsuccessful in seeking a declaration that the Minister and the State enacted and maintained an unlawful, void and illegal regulatory regime by*

means of the 1978 Regulations and other Regulations made between that date and 2000 because the Minister was never empowered to delegate to the local authorities the power to control the numbers of licences, it must follow that their claims for damages against the Minister and the State on that basis falls away [and] fail also.

138. In so far as there appears now to be an acceptance by the plaintiffs that section 82 of the Act of 1961 is broad enough to provide a power for the Minister to impose restrictions on the number of licences to be issued, as part of his power to make regulations in relation to the "control" of public service vehicles…" (Emphasis added)

243. The case as it ran before the trial judge involved the plaintiffs abandoning the original argument that the 1978 Regulations were *ultra vires* the powers of the Minister on the basis that he could not limit the number of taxi licences. Even if he misunderstood their evolving position and if the plaintiffs in fact maintained this argument, the trial judge was of the view that the matter had been definitively decided by Costello J. in *State (Kelly) v. The Minister for the Environment* as affirmed by the Supreme Court. It is clear that had it been maintained, he would have rejected it.

244. The trial judge dealt with the question of whether or not the 1978 Regulations were *ultra vires* predominantly from the point of view of the new argument based on the allegation that the 1978 Regulations amounted to impermissible delegation of the power to limit the number of taxi licences by the Minister to the local authorities. He dismissed this argument and held that the 1978 Regulations were not *ultra vires* the powers of the Minister and therefore refused the declaration sought as the first relief in the proceedings.

245. In their Notices of Appeal, Mr. Muldoon and Mr. Kelly pleaded that the High Court erred in law and in fact in failing to conclude that the regulations which the Minister made

in 1978 and on diverse occasions subsequently whereby the Minister purported to provide for the imposition of quantitative restrictions on the entry into the taxi market were unlawful and void and caused them to suffer loss and damage. In particular, they pleaded that the High Court erred in law and in fact in failing to conclude that the Regulations were *ultra vires* the Act of 1961 and in particular that:

> *"Section 82 does not either expressly or impliedly confer on the Minister a power to provide for the imposition of quantitative restrictions on entry into the taxi market…"*

246. In footnote 131 of their written submissions, they stated *"Insofar as the High Court considered that Mr. Muldoon and Mr. Kelly did not maintain their claim that s.82 of the 1961 Act did not enable the Minister to make regulations providing for quantitative restrictions per se and failed to address that claim, the High Court erred. That claim expressly was and is maintained."* In my opinion the appellants ought, at the very least, to have expressly appealed the trial judge's conclusion that they had abandoned this ground of challenge and/or sought leave to argue this point on the appeal. They did neither, despite the clear terms of the judgment of the High Court. This is not simply a pedantic pleading point, but rather, goes to the heart of their appeal on this issue. Simply put, if a party abandons a point, they will not be permitted to advance it on appeal save with the express leave of the court, which may well not be granted (see *Lough Swilly Shellfish Growers Co-Op Society v. Bradley* [2013] IESC 16, [2013] 1 IR 227). The appellants did not seek the leave of the court to argue a point they had abandoned, and they did not appeal the trial judge's finding that they had abandoned this argument (an understanding he shared with counsel for the State defendants). On this basis I do not accept that it is now open to the appellants to revert to their former argument which they previously abandoned. I would accordingly refuse this ground of appeal.

247. However, without prejudice to this finding, I propose to address the arguments on the merits, so as to avoid the appellants being left with any sense of injustice, whether warranted or not.

248. The appellants argued that there is no express power to limit the number of taxi licences conferred on the Minister in s. 82 and there is no such implied power either. They rely, in particular, on the Supreme Court decision in *O'Neill v. Minister for Agriculture* [1998] 1 IR 539. The case concerned the Livestock (Artificial Insemination) Act, 1947 which was an Act *"for the control of the practice of artificial insemination of cattle, sheep, goats, swine and horses*. Section 3 of the Act empowered the Minister to make regulations for controlling the practice of artificial insemination of animals to which the Act applies. The Minister introduced regulations in 1948 which prohibited the practice of artificial insemination except under and in accordance with a licence granted by the Minister. The Minister had adopted a licensing scheme based on the division of the State into nine areas and decided to grant only one licence in each area. The exclusivity scheme was introduced in order to control disease and to improve the general quality of the national herd. Murphy J. in the Supreme Court held that since the exclusivity scheme was so radical in qualifying limited numbers of persons (9) and disqualifying all others who may have been equally competent from engaging in the business of artificial insemination, the Oireachtas, in using general words, could not have contemplated such a far-reaching intrusion on the rights of citizens. Keane J. held that in adopting this policy the Minister *"had fettered the exercise of the discretion conferred on him by the Act of 1947 by excluding the possibility of granting a licence would which conflict with the exclusivity scheme"*. He was satisfied that the adoption of a policy which fettered the Minister's discretion was *ultra vires*. The appellants emphasised the passage where Keane J. said, at page 543 of the report

> *"Since, the legislation and the regulations apart, the practice of artificial insemination of cattle was a lawful one, it would seem prima facie that any person who can satisfy the first respondent that he has whatever technical qualifications appear appropriate and is in a position to comply with whatever other requirements might reasonably be imposed on him by the first respondent is entitled as a matter of right to a licence. That, however, inevitably raises the question as to whether the first respondent, in considering applications for licences under the Act of 1947, was entitled to adopt a particular policy which might mean that applicants, such as the applicant in the present case, who appeared to be in a position to comply with such threshold requirements, would nonetheless not automatically receive a licence."*

The appellants contend that driving taxis was at all times a lawful occupation and that people were entitled to licences *"as a matter of right"* insofar as any person was able to comply with appropriate qualitative criteria. The case did not involve an analysis of, or turn on, the meaning of the word *"control"*.

249. The appellants submitted that the Act of 1961 is devoid of any principles and policies which could govern regulations which purport to limit the numbers of licences to be issued. Regulations may only be lawfully adopted which give effect to the principles and policies contained in the relevant statute, in this case, the Act of 1961. Regulations which are otherwise adopted, and which do more than give effect to those principles and policies are *ultra vires*. In this case, in the absence of any principles and policies in relation to the limitation of the number of licences to be issued, the Minister had no power to make the 1978 Regulations and the subsequent quantitative restriction regulations. They submitted that this argument was not raised in *State (Kelly) v. The Minister for the Environment* and, therefore, this point was not decided by that case.

250. In *State (Kelly) v. The Minister for the Environment*, Costello J. construed the power conferred on the Minister under s.82 of the Act of 1961. He concluded that *"the word "control" is imprecise, but it seems to me to be wide enough to include the power to make regulations which would limit the number of taxis"*. The judgment was upheld by the Supreme Court. Costello J. construed the word control in the section. He held that it included the power to make regulations which would limit the number of taxis, not merely which had the effect of limiting the number of taxis, as was argued by the appellants. The case is authority for the proposition that there is express power to make regulations which limit the number of taxis.

251. Notwithstanding the fact that *The State* (*Kelly*) was not cited to him, Murphy J. in *Humphrey* independently reached the same conclusion. As I have cited above at para. 156 he held that the words *"control and operation"* in s.82 of the Act of 1961 permit the Minister indirectly to exercise quantitative control over the licencing of vehicles. He rejected the argument that the Minister had no such power simpliciter. He held that the issue in the case before him was whether the Minister was empowered to exercise numerical control in the manner in which he purported so to do under the regulations which were impugned in the proceedings before him (S.I. 3 of 2000).

252. Furthermore, I agree with Murphy J. in *Humphrey* that *O'Neill v. Minister for Agriculture* is not authority for the proposition that the Minister may not exercise quantitative control over public service vehicles.

253. In my opinion, *O'Neill* does not assist the appellants as it was primarily concerned with a minister wrongfully fettering his discretion and establishing a radical exclusivity scheme which divided the country into nine regions and licensed only one practitioner per region, thereby disqualifying all others who may be equally competent from engaging in the business of artificial insemination. All of that was done by administrative fiat and not on the

basis of any legislative measure similar to the legislative measures at issue here, including section 82 itself. The 1978 Regulations did not purport to fetter the Minister's discretion in relation to the number of licences which could be issued (though it did delegate the power to make that assessment to the relevant local authorities). There are instances where the Minister reclaimed the power and issued licences in 1991 and again in 1992. The scheme promulgated by the regulations from 1978 onwards did not impose the radical exclusivity which was central to the decision in *O'Neill*. Certainly, I am not persuaded that the analogy is sufficiently close as to justify this court in departing from the *State* (*Kelly)* and *Humphrey* and applying *O'Neill* (which was not concerned with this particular statutory provision) to the 1978 Regulations instead. In my judgment, the *State (Kelly)* and *Humphrey* each correctly construed the power conferred on the Minister under s.82(1) of 1961. The Minister had power to limit the numbers of taxi licences to be issued and therefore the 1978 Regulations and the other quantitative restriction regulations were not *ultra vires*.

254. The High Court rejected the argument of the appellants that the 1978 Regulations were *ultra vires* as they breached Article 15 of the Constitution due to the alleged absence of any principles and policies in the Act of 1961 which could govern any quantitative restriction on the number of licences to be issued. He held that the issue did not arise on the case they advanced. At para. 151 he held that the proceedings involved a relatively straightforward claim for damages and noted that there was no challenge to the constitutionality of the 1978 Regulations based on an infringement of Article 15 of the Constitution

> *"…where of course the Court would have to consider and determine whether the Act under which the Regulations are made contained sufficient in the way of principles and policies in order to give the necessary guidance as to the extent of the power being given, and the manner in which it should be exercised. This is not a case where the plaintiffs are saying that if the Court finds that the word "control" does not include a*

power to restrict numbers of licences, or alternatively where the plaintiffs contend that if the power to delegate that power to local authorities is found to be within the power to "control" the section is unconstitutional. Nor are these proceedings a challenge by way of judicial review where the Court might be asked to quash the Regulations on the basis that in making them the Minister exceeded his powers."

255. He reviewed the long title of the Act, the wide and general power given to the Minister in s.82(1) to make regulations in relation to the control and operation of public service vehicles, the detailed matters in respect of which regulations could be made without prejudice to the generality of the power in subs.(1) and the fact that the power is a discretionary power affording the Minister a wide degree of latitude as to whether and how he would regulate for the purpose of "the control and operation of public service vehicles"; "It must be accepted by now that this power to regulate includes the power to regulate so as to restrict the number of taxis." As he rejected the plaintiffs' argument that the 1978 Regulation were ultra vires it is to be inferred that these matters were relied upon by him as constituting sufficient principles and policies for the purposes of rejecting the plaintiffs' arguments to the contrary.

256. The word "control" in s.82, in its natural and ordinary meaning implies a restriction, a restraint or a limitation of some kind. The legislature intended to confer a power on the Minister to *"make regulations in relation to the control and operation of public service vehicles*". It has conferred a wide power on the Minister, in contradistinction to the power conferred on the Garda Commissioner under s. 84 of the Act of 1961. The Oireachtas determined that there will be public service vehicles, small public service vehicles and also private service vehicles; the purpose of each class of vehicle is to provide a service to the public. The detail of how this is to be done has been left to the Minister who may make regulations for their control and operation, not simply their operation. It is inherent in a

licensing regime that the numbers of licences will be limited or controlled. Therefore, the mere fact that the numbers are controlled does not of itself exceed the delegated authority of the Minister. The Minister is empowered to adopt regulations to ensure that all three classes of vehicles are licenced with a view to providing a service to the public. This is the policy of Part VII of the Act of 1961. Thus, regulations which control the numbers of licences to be issued are within the principles and policies of the Act. The fact that a particular policy which is implemented by regulations adopted pursuant to a statutory power may not have attained the statutory object does not mean that there are an absence of principles and policies delimiting the exercise of the power or that the purported exercise of the power is *ultra vires*. In my judgment the trial judge was correct to reject the appellants' argument that the 1978 Regulations were void on the grounds that they infringed Article 15 of the Constitution based on alleged insufficiency of principles and policies enshrined in the Act.

257. Accordingly, I would reject this ground of appeal also.

Did the Councils breach a statutory duty owed to the appellants?

258. The appellants claim that following the adoption of the 1978 Regulations and the subsequent quantitative restriction regulations adopted thereafter, Dublin City Council and Ennis Town Council had the power to determine the number of licences in their respective taximeter areas. They failed to issue any new licences for 22 years and failed to issue any adequate number of licences sufficient to meet the public demand within their respective taximeter areas for taxi services. It is pleaded that this amounted to a breach of statutory duty on their parts which occasioned loss to the appellants.

259. The issue is whether within the statutory scheme as a whole, the local authorities owed the appellants a statutory duty which they breached by failing to allow an adequate number of new taxi licences to be issued in the 22 years between 1978 and 2000.

260. The trial judge summarised the case as follows:

"The plaintiffs say also that it was entirely foreseeable by Councils that if they failed to recommend the issue of a sufficient number of new licences annually to meet the ever-increasing needs of the taxi-using public, this would result in an increasing value attaching to existing licences on the secondary market, and it was equally predictable that significant and immediate losses would arise to that clearly identifiable class of persons (i.e. the existing taxi licence holders) whenever liberalisation of the market for licences occurred, as happened in November 2000. They also refer to the fact that under the Regulations each local authority was required to report to the Minister on how the public demand for taxis was being met, and the evidence has been that such reports were not made."

261. The appellants in the High Court relied upon the decisions in *Kennedy v. Law Society of Ireland* and *Callanan v. VHI*. In reply, the councils say that there is no duty within the 1978 Regulations (or any of the other quantitative restrictions), which imposed a duty upon the local authorities to carry out their functions and obligations in the interests of the taxi licence holders, whoever they may be at any particular time. They argued that the duty to determine the number of licences that may be appropriate at any given time in their respective administrative areas was a duty owed to the public at large – those who may wish to avail of a taxi service – not to those persons who happened to hold a licence at any point in time. They also point to the lack of any definable duty to licence holders within the statutory scheme relied upon by the appellants.

262. The appellants argued that they came within a particular class of persons who were intended to be protected by the statutory scheme. In support of this submission, they relied upon the judgment of Henchy J. in *Waterford Harbour Commissioners v. British Railway Board* [1979] ILRM 296. Henchy J. held that it was:-

"well established by judicial authority that, because [inter alia] the plaintiffs came within the range of persons intended to be protected by Section 70(1)…the plaintiffs acquired the necessary locus standi to sue for damages for breach of the duty created by the Statute." (Emphasis added).

263. The appellants argued that individual taxi licence holders were intended to be protected by the 1978 Regulations in the sense that the powers giving to local authorities were required to be exercised in a way which protected their interests. The trial judge rejected this proposition stating:

"I can find nothing in the statutory scheme read as a whole, or even in part, which confirms that to be the case... Those regulations taken individually or together are regulations for the control and operation of small public service vehicles in the public interest. They relate to a public service being regulated in the interests of the public, and not in the interests of a closed group of individuals who own a licence which enables them to participate in the taxi industry. There is no duty within that scheme which is directed to the protection of taxi owners…The Minister's duty was to regulate in the interest of the general public in relation to a necessary public service. By delegating power to local authorities to decide on the appropriate number of licences, he was not creating any obligation upon those authorities to act other than in the same public interest. None of the statutory scheme suggests, much less states, the contrary."

264. On appeal the appellants said that the councils exercised the powers which the Minister conferred on them in relation to the issuing of taxi licences in a manner that was unfair and unreasonable and their duties under the 1995 Regulations to ensure that there was a sufficient number of taxis and wheelchair accessible licences *"to meet all reasonable demands for those services"* and to take such action as was required *"to ensure that the demand for those services is adequately met"*. As a result of this failure, the appellants sustained significant

loss. They relied upon the same legal principles as had been advanced in support of the claim against the Minister for breach of his alleged statutory duty and/or negligence.

265. Dublin City Council submitted that the claim for damages for alleged breach of duty in this case does not lie based on the decision of Keane C.J. in *Glencar (No. 2)* where the former Chief Justice said:

> *"The remedy available to persons affected by the commission of an ultra vires act by a public authority is an order of certiorari or equivalent relief setting aside the impugned decision and not an action for damages."* (Emphasis added).

266. Article 38 of the Regulations of 1995 imposed a requirement on licensing authorities to prepare an annual report on the operation of the Regulations and to publish a notice in a local newspaper indicating the measures it had taken in the previous year in relation to the operation of taxis and wheelchair accessible taxis in that area. The Council asserted that the failure to publish a report and a notice in the newspaper as required by the Article was no more than a technical default which, in any event, did not give rise to a claim in damages. The appellants were not prejudiced by the failure to publish either the report or the notice.

267. They pointed to the fact that in *Cromane Seafoods Limited v. The Minister for Agriculture* [2017] 1 IR 119 the Supreme Court held that the appropriate tort for a wrong committed in the course of an administrative duty is that of misfeasance in public office. No claim of misfeasance in public office was advanced against Dublin City Council and the claim against the Minister was abandoned on appeal. They say that there is no basis for the claims of breach of statutory duty or negligence against Dublin City Council.

268. Counsel for Clare County Council likewise contended that Ennis Town Council owed no duty of care to Mr. Kelly in relation to the administration of taxi licences in its administrative area and that he was not entitled to claim damages for any alleged breach of that duty. While it was accepted that no formal notice was published in accordance with the

provisions of Article 38 of the 1995 Regulations, the substance of the article was complied with in that that the numbers of taxi licences were reviewed periodically and that any breach was *de minimus* and Mr. Kelly could not point to any damage sustained arising from this particular breach. Counsel asserted that Ennis Town Council had not failed in its duty to exercise their powers fairly, reasonably and proportionately under the Regulations.

269. In my judgment the appellants' claim for breach of statutory duty/negligence against the local authorities must fail for the same reasons that it fails against the Minister. The powers were conferred on the local authorities for the benefit of the general public and no duty of care could arise in the circumstances. Likewise, there is nothing in the legislations which suggests that the Oireachtas intended that any breach of duty arising from the exercise of the powers under s.82 of the Act of 1961 could give rise to a claim in damages. For these reasons, I would reject these grounds of appeal also.

Conclusion

270. The substance of the appellants' claims are public law claims. Their claims for damages are based upon public law claims. The form of pleadings is not determinative of the limitation periods applicable. Specifically, public law claims which are normally brought under O.84, r.21 but which are brought by way of plenary proceedings nonetheless are subject to the time constraints set out in O.84, r.21, which apply to these proceedings by analogy.

271. The claims as originally formulated did not include an allegation that the 1978 Regulations and the subsequent quantitative restriction regulations were *ultra vires* the powers of the Minister because he had no power to delegate the regulation of the number of licences to be issued to local authorities. That plea was first raised in November 2013 during the opening of the case. When the appellants applied to amend the pleadings to include this new plea, they advanced no grounds which satisfied the requirements of O.84, r.21(3) of the

Rules of the Superior Courts. As this rule ought to have been applied by analogy to these proceedings, and the amendment ought not to have been permitted.

272. Mr. Malone had standing to sue in relation to the 1978 Regulations from the date of the adoption of the 1978 Regulations. Mr. Muldoon had standing to sue from 1994 when he first applied for a licence from Dublin City Council and was refused. Mr. Kelly had standing from 1998 when he first applied to Ennis Town Council and was not issued with a licence. In respect of their claims based upon the 1978 Regulations and the subsequent quantitative restriction regulations, time started to run for the purposes of O.84, r.21 from these dates. Insofar as the 1978 Regulations and the later quantitative restriction regulations can be regarded as having a continuing impact upon them, the quantitative restriction regulations were repealed on 21 November 2000 with the adoption of the 2000 Regulations. Any expansion of the commencement of the running of time on the grounds set out in *Mungovan v. Clare County Council* ceased upon that date. Therefore, on this basis, the challenges to the quantitative restriction regulations and the claims dependent on those challenges were out of time on 21 February 2001. Furthermore, time started for the purposes of O.84, r.21 on 21 November 2000 in respect of any claim impugning the 2000 Regulations. The three months within which proceedings must be brought without obtaining an Order for the Extension of Time from the court expired on 21 February 2001. The proceedings were commenced by Mr. Muldoon and Mr. Kelly in February 2002 and by Mr. Malone in November 2002. They were all out of time in respect of all of their public law claims and the claims based upon alleged breaches of public law. None of them sought an extension of time to permit them to bring the proceedings, as they were required to do under O.84, r.21. On this basis, all of the claims are out of time and should be dismissed as being outside of the time allowed for bringing such claims.

273. The appellants' right to earn a livelihood was not breached either by the maintenance of the secondary market in taxi licences as a result of the quantitative restriction regulations or by their subsequent repeal. The appellants were still entitled to work as taxi drivers, they were not entitled to protection against competition or to any guaranteed level of income. The infliction of a pecuniary loss does not in itself establish that an infringement of the constitutionally protected right to earn a livelihood had taken place.

274. It is inherent in the nature of a licence that the property rights arising in licences created by law are subject to the conditions created by law and to an implied condition that the law may change those conditions. There is no property right in the value of the licence and therefore a regulation which has the effect of devaluing the licence does not interfere with any property right in the licence. It follows that the value in the taxi licence is not protected by the Constitution and the adoption of 2000 Regulations did not breach any constitutionally protected property right of the appellants.

275. All of the regulations adopted under s.82 of the Act of 1961 were of general application. The fact that the 2000 Regulations resulted in the loss of a major investment on the part of Mr. Muldoon and Mr. Kelly is reflective of the fact that the regulations impacted differently situated persons differently; it does not amount to a failure to hold them equal before the law.

276. Section 82 of the Act of 1961 empowered the Minister to make regulations in relation to the control and operation of public service vehicles. The power was sufficiently wide to permit the Minister to control the number of licences issued. There is no reason for this court not to follow the earlier decisions of the High Court to that effect or the decision of the Supreme Court rejecting the appeal from the High Court in *The State (Kelly) v. The Minister for the Environment*.

277. The powers conferred on the Minister under s.82 of the Act of 1961 were general powers to regulate public service vehicles for the benefit of the general public. There was no duty of care owed to the individual taxi licence holders at any given time to regulate taxis for their benefit. Further, there was no entitlement to damages against either the Minister or the local authorities for any act or omission in relation to the exercise of their powers under the Act of 1961 or regulations adopted pursuant to the Act.

278. For these reasons, I would reject the appeals and I would allow the cross-appeals.

279. I have read the draft judgment of Collins J. in relation to the competition law claims and I agree with same.

280. The respondents have been entirely successful in the appeals and on the cross appeals and accordingly my preliminary view is that the respondents are each entitled to their costs of the appeal, to be adjudicated in default of agreement. If the appellants wish to contend for a different order as to costs, they should contact the office of the Court of Appeal within 14 days to request a short hearing on the question of costs. The appellants may file submissions of up to 1500 words within 14 days of the application for a costs hearing and the respondents shall have 14 days to file submissions in response, limited to 1500 words.

Collins and Haughton JJ. have authorised me to indicate their agreement with this judgment and the proposed orders.