



**THE COURT OF APPEAL - UNAPPROVED**

**Court Of Appeal Record No.: 2023/7  
High Court Record No.: 2011/11095 P  
Neutral Citation No.: [2024] IECA 210**

**Noonan J.  
Binchy J.  
Butler J.**

**BETWEEN/**

**MICHAEL HOEY**

**PLAINTIFF/  
APPELLANT**

**- AND -**

**WATERWAYS IRELAND**

**DEFENDANT/  
RESPONDENT**

**JUDGMENT of Mr. Justice Binchy delivered on the 31<sup>st</sup> day of July 2024**

1. The plaintiff is a businessman who founded a barge hire and boating business, for which purpose he and his then wife incorporated a company named Canalways Ireland Limited. The respondent is a statutory authority, established on 2<sup>nd</sup> December 1999 pursuant to the British-Irish Agreement Act, 1999 and has a statutory responsibility for the management, maintenance, development and restoration of inland navigable waterways, principally for recreational purposes. The waterways under the remit of the respondent are the Barrow Navigation, the Erne System, the Grand Canal, the Lower Bann, the Royal Canal, the Shannon-Erne Waterway and the Shannon Navigation.

2. On 19<sup>th</sup> October 2011, the respondent removed a barge belonging to the appellant, known as Barge 43M, which was sunk south of the 23<sup>rd</sup> lock at Rathangan on the Barrow line of the Grand Canal and subsequently stored it at its premises in New Ross boatyard. The respondent did so because it was of the opinion that the barge was causing an obstruction to the waterway. Before doing so, the respondent had, on 18<sup>th</sup> May 2011, written to the appellant notifying him of the obstruction, and requiring him to remove it within five days, failing which, the letter stated, the respondent would do so and would require the appellant to discharge its costs incurred in doing so. The letter also stated that the appellant had failed to comply with the Canal Bye-laws. This was a reference to the Canals Act, 1986 (Bye-Laws), 1988 (S.I. No. 247/1988) (the “Bye-laws”). The letter cited article 27 of the Bye-laws, which provides, at article 27(3) that “*Where a boat has gone aground or has sunk in any part of the canal property, the boat may be removed and stored by, or on the authority of, the [respondent]*”. Following the removal of the boat by the respondent, the appellant issued these proceedings on 5<sup>th</sup> December 2011. By these proceedings, the appellant seeks, *inter alia*, injunctive relief restraining the respondent from damaging further or disposing of Barge 43M and damages in respect of any damage caused to the vessel in its removal and also damages for interfering with the operations of the appellant’s boatyard.

3. At para. 15.1 of the statement of claim, the appellant claims that the “*actions and failures [of the respondent] has caused damage and prevented the plaintiff from developing a commercial barge transport business*”. This appears immediately following text where the plaintiff claims that Barge 43M was not causing an obstruction, and as such I think it reasonable to infer that this particular claim is directed to the removal of Barge 43M, and that the subsequent claim for damages at para. 5 of the statement of claim includes damages under this heading.

4. While the removal of the appellant's barge appears to have been a catalyst for the issue of the proceedings by the appellant, the proceedings are not confined to matter relating to the barge. On the contrary, they are far more wide ranging and raise multiple grievances that the appellant has had for many years concerning the discharge by the respondent of its statutory functions, in particular so far as concerns the maintenance of the water levels of the waterways under the remit of the respondent, in particular the Grand Canal and the Barrow Navigation. The appellant's core complaint is that the respondent has failed to take such steps as are necessary to maintain sufficient water levels within those waterways so as to ensure that they remain navigable, with the result that the water levels dropped to the extent that the appellant was unable to continue his business. In this regard, the appellant seeks various declaratory reliefs, as well as injunctive relief requiring the respondent, *inter alia*, to maintain "*the canals including the Barrow Navigation and to restore all the water lost to the Navigations*" (para. 35 of the indorsement of claim). The appellant claims damages for breach of his "*legitimate expectation regarding the water abstractions [described in the proceedings, and which are discussed below] from within the catchment of the river Barrow*" as well as compensation under article 41(2) of the Bye-laws (para. 36 of the indorsement of claim). At this point it is expedient to note that article 41 of the Bye-laws makes no provision for compensation under any heading, and, so far as I can ascertain, nor do any other provisions of the Bye-laws. Article 41(2) actually confers an exemption from liability on the respondent, providing, as it does that: "*The [respondent] shall not be liable for the consequences of any stoppage of navigation or delay arising from the execution of [its] duties or responsibilities under the Canals Act, 1986 (No.3 of 1986).*"

5. In the judgment under appeal, the trial judge (Egan J.) summarised the matters raised in the proceedings as follows, at para. 16:-

*“In summary, this judgment will attempt to deal with the 5 reliefs sought in Mr. Hoey’s plenary summons, the reliefs sought in Mr. Hoey’s 22-page statement of claim and the additional 23 reliefs sought in Mr. Hoey’s notice of motion issued in the days prior to the hearing. In order to do so, I will divide the issues raised by Mr. Hoey into three broad categories which I will consider seriatim; first, the removal and storage of Barge 43M; second, the validity of the interference notices [the meaning of which is explained at para. [24] below] issued by Mr. Hoey in 2002; and third, the asserted negligence and breach of duty against [the respondent] (a) in connection with the specific projects [which he claims have caused a reduction in water levels on the Barrow Navigation and], (b) in failing generally to prevent reduction in water levels on the Barrow Navigation and (c) in failing to maintain the contended for minimum draft of the navigation... .”*

6. I do not understand the appellant to have taken any issue in this appeal with the trial judge’s identification of the issues raised by the proceedings. In what is a careful, detailed and comprehensive judgment delivered on 11<sup>th</sup> November 2022, the trial judge brought order and coherence to what can at best be described as a wide ranging and diffuse claim. She carefully considered the evidence, made important findings by reference to the same and dismissed the proceedings in their entirety.

7. If the plenary summons and statement of claim are prolix, the notice of appeal filed by the appellant on 10<sup>th</sup> January 2023 is the very opposite. While the appellant sets out 14 grounds of appeal, they amount to no more than headings and it is expedient to set them out verbatim:

“1. *Breach of Statutory Duty. [annex 1, Part 1 of the British-Irish Agreement Act 1999].*

1.2 *Breach of Section 21 of the Water Supplies Act of 1942. (No 1 of 1942).*

- 1.3 *Breach of Article 14 of the Canals Act Bye-laws 1988 the Draft of the Navigation and the clearance required.*
- 1.4 *Breach of Article 2 (26) (28) and Article 4 (6) and 4 (7) of the Water Framework Directive.*
2. *Pollution and Environmental Pollution.*
3. *Legislation introduced to cover up the breaches of statutory duty. (plus proposed legislation)*
4. *The defendant has lost its authority over the water supply for the Grand Canal, the Royal Canal and the Barrow Navigation.*
5. *Issue estoppel regarding whether or not an Interference Notice had been issued.*
6. *Injunction constitutional right,*
7. *My right to navigate.*
8. *My status of Navigation Authority and the usurpation of the courts powers.*
9. *Unlawful Interference with my constitutional right.*
10. *Due process.*
11. *The Removal of 43 M from a designated location.*
12. *Interference with my property rights.*
13. *The Remedy.*
14. *Costs.”*

**8.** In the section of the notice of appeal dealing with orders sought, the appellant seeks an order setting aside the orders made by the trial judge as well as an order requiring the respondent to maintain and restore the draft of the navigation, by which I understand him to refer to the Barrow Navigation. The appellant also sought relief described in a notice of motion of 28<sup>th</sup> April 2022, which was not provided to the court. In the section of the notice

of appeal designed to facilitate declarations of unconstitutionality, the appellant sought a declaration that the actions of the respondent, in allowing water to be taken from the Barrow Navigation while his “*interference notice*” (a term explained below) is in existence and remains unchallenged, is an unlawful interference with his constitutional right as a “*navigation authority*” as that term is defined in s. 21 of the Water Supplies Act, 1942 (the “1942 Act”).

**9.** It is apparent that the appellant has not included in the Notice of Appeal any grounds of appeal, any errors of law relating to each ground and/or any legal principles related to each ground contrary to the requirements of O. 86A, r. 12(1) and/or Form 6 of Appendix U of the Rules of the Superior Courts. Although these are serious deficiencies in the appeal, it would matter less if they were addressed in the submissions of the appellant, but regrettably they are not. As the respondent has submitted, the appellant’s written submissions, while they develop the headings of grounds set forth in the notice of appeal, nonetheless fail to identify with any clarity the issues in the appeal, the findings of the trial judge that are disputed, or the basis upon which it is alleged the trial judge erred. It is apparent that the appellant is effectively seeking to re-argue the case that he made in the High Court and it is well-established that this is impermissible – see the judgment of MacMenamin J. in *M.C. (A Ward of Court) v. F.C.* [2013] IESC 36 where MacMenamin J. said, at para. 3:-

*“This court does not engage in a complete re-hearing of a case on appeal. It proceeds rather on the facts as found by the trial judge and his inferences based on these facts. ... Furthermore, in Hay v O’Grady, McCarthy J. pointed out that an appellate court will be slow to substitute its own inference of fact for that of the trial judge, where such inference depends upon oral evidence or recollection of fact.”*

**10.** These failures of the appellant, to comply with the Rules of the Superior Courts, to set out with any clarity his grounds of appeal and to identify any errors – factual or legal – on

the part of the trial judge are in my judgment so stark in this instance as to justify the dismissal of the appeal *in limine*. However, since the court proceeded to hear the appeal I have decided, not without some misgivings, to proceed on the basis that I will address those issues that I understand the appellant claims to constitute errors on the part of the trial judge. In seeking to identify those issues, I have read the appellant's written submissions several times and of course I have also had regard to his oral submissions to the Court. I will address the issues raised under the three headings used by the trial judge: The removal of Barge 43M, the validity of the interference notices issued by the appellant in 2002 and 2003 and the asserted negligence and breach of duty of the respondent in connection with certain specified projects, in failing to prevent reduction in water levels on the Barrow Navigation and in failing to maintain a minimum draft for navigation of the Barrow.

### **Removal of Barge 43M**

11. The appellant is the owner of Barge 43M. The trial judge found that this barge had been moored at the same place by the appellant for a lengthy period of time at a dock located south of the 23<sup>rd</sup> Lock at Rathangan on the Barrow line of the Grand Canal. The court heard evidence from a Mr. Shane Anderson, an assistant inspector of navigation with the respondent, that the vessel was sitting on the canal bed, full of water and had been in that condition for a number of months. The appellant did not dispute any of this, save to say that he had deliberately sunk the vessel in order to prevent it from drifting from its mooring into the channel, and thereby causing an obstruction in the canal. The appellant did not however accept that the sunken vessel was causing an obstruction at the time of its removal by the respondent. The respondent on the other hand maintained that it was causing an obstruction, and Mr. Anderson gave evidence that it "*effectively narrowed the channel for other vessels*". However, it appears from Mr. Anderson's evidence that his main concern

was that because the barge was lying on the canal bed, full of water, it was in danger of sliding out into the main canal of the navigation, thereby restricting navigation for other vessels.

**12.** Having heard the evidence of Mr. Anderson and Mr. Hoey, and having reviewed photographs presented to the court by Mr. Anderson, the trial judge concluded that the sunken vessel was taking up at least a third of the available channel of the canal, and that it was, as Mr. Anderson had opined in danger of sliding out further into the main channel of navigation.

**13.** At this juncture, it is helpful to refer to the following provisions of the Bye-laws which are relevant:-

- (i) Article 6, which makes provision for the issue of permits regulating the use of boats on canal property as defined in the Bye-laws. Article 6(8) provides that:

*“Any boat on canal property which is without a valid permit but is being used for a purpose for which a permit is required under these Bye-laws may be removed and stored by, or on the authority of, the Commissioners.”*

- (ii) Article 7(1) which provides:

*“No person shall navigate or moor any boat on the canals unless such boat and the equipment thereof shall be maintained in good and efficient working order, and shall be such that no danger is liable to be caused thereby to any person or property.”*

- (iii) Article 14, which provides that no person shall navigate or moor any boat on the canals if such boat exceeds 1.2 metres in draft, other than with the consent of Waterways Ireland.

- (iv) Article 25, which provides that no person shall moor a boat – at any lock, sluice, barrage, weir or bridge in such a way as to cause damage to or cause an



obstruction to safe use of the said lock, sluice, barrage, weir or bridge; so as to cause danger or obstruct the passage of any boat in any part of the canals; or at the same place on the canals, or within 500 metres of the same place, for more than five days without the appropriate permit from the Commissioners.

- (v) Article 27(1), which provides that the owner, master or person in charge of any boat which has gone aground or sunk on any part of the canal property shall notify Waterways Ireland and take all such steps as may be necessary to refloat the boat or remove it from the canal, and Article 27(3) which provides:

*“Where a boat has gone aground or has sunk in any part of the canal property, the boat may be removed and stored by, or on the authority of, the Commissioners.”*

- (vi) Pursuant to Article 31 of the Bye-laws, any boat, vehicle or object may be removed by or on the authority of Waterways Ireland where same interferes with the use of the canals or canal property.
- (vii) Pursuant to Article 33(1) of the Bye-laws, where Waterways Ireland proposes to remove any boat in accordance with the provisions of the Bye-laws it shall serve notice of its intention on the owner. No specific notice period appears to be provided for.
- (viii) Separately, Article 33(3) provides that where an article in the opinion of Waterways Ireland is likely to become or create an obstruction or danger to canal property, it may be removed without prior notification to the owner.
- (ix) Article 34 of the Bye-laws provides that where any article has been removed and stored in accordance with the Bye-laws there shall be payable to Waterways Ireland by the owner, compensation equal to the cost incurred in the removal and storage. Article 34(2) empowers Waterways Ireland to dispose of any article

which has been removed and stored in any manner they think fit where the owner has not claimed it and paid compensation within one month. Article 34(6) of the Bye-laws provides: *“The Commissioners shall not be liable for any loss or damage arising from the removal, storage or disposal in accordance with these Bye-laws of any article.”*

**14.** At paragraph 44 of her judgment, the trial judge noted that the appellant fully accepted that Barge 43M did not comply with article 7 of the Bye-laws in that it was not maintained in good and efficient working order. The appellant has not appealed from this finding of the trial judge.

**15.** At paragraph 47, the trial judge noted that correspondence issued to the appellant from the respondent invoked articles 25 and 27 of the Bye-laws. The facts as found by the trial judge included that the appellant did not have a permit as required by the Bye-laws, that the barge was not maintained in good and sufficient working order, that it had gone aground in canal property and that it had been moored at the same place for a lengthy period (more than the five days permitted by article 25(1)(d)). These are findings of multiple contraventions of the Bye-laws. The trial judge also found that a notice had been served, on 18<sup>th</sup> May 2011, by the respondent on the appellant, requiring him to remove Barge 43M within five working days, failing which (the notice stated) the respondent would remove the barge itself after which the costs of removal and storage would be billed to the appellant. The appellant did not comply with the notice, and the respondent removed the barge, five months later on 19<sup>th</sup> October 2011, and took it to its premises in New Ross, where it has been stored ever since.

**16.** In all of these circumstances the trial judge was satisfied that the removal of the vessel by the respondent was lawful and in accordance with the powers vested in it pursuant to the Bye-laws. She therefore concluded that there was no conceivable basis upon which the appellant could be entitled to damages against the respondent for the removal of the barge.

She referred to article 34(6) of the Bye-laws, which provides that the respondent shall not be liable for any loss or damage arising from the removal, storage or disposal in accordance with the Bye-laws, of any article, and she noted that there was no evidence to suggest either as a matter of law or fact that Barge 43M was either removed or stored otherwise than in accordance with the Bye-laws.

**17.** The trial judge also considered and rejected other arguments raised by the appellant under this heading. For present purposes, the only one of those arguments that has any relevance – being the only one that has given rise to any ground of appeal – is a claim by the appellant that the area of land where the barge was moored was a “*designated area*” within the meaning of s. 5 of the Canals Act, 1986 (the “1986 Act”). That section of the 1986 Act, which established the general duty of the Commissioners of Public Works in Ireland (whose powers functions and duties under the 1986 Act and the Bye-laws subsequently became vested in the respondent) to maintain, the Grand Canal, the Royal Canal and other waterways as a public amenity, makes provision for the designation of particular parts of the canals and other canal property for particular purposes. The appellant made the case that the area where Barge 43M had been moored by him was an area designated for his use pursuant to s. 5 of the 1986 Act, and that he did not therefore require a permit to moor Barge 43M under the Bye-laws. The trial judge noted however that there was no evidence that the respondent or its statutory predecessor had designated the relevant area pursuant to any enactment for use by the appellant, and she therefore rejected this claim.

**18.** In his written submissions on appeal, the appellant maintains that the trial judge misunderstood his argument, and claims that he had been granted an easement by the respondent of “*unrestricted access to and the use of the canal bank outside our property.*” He refers to two documents exhibited to an affidavit sworn by him on 15<sup>th</sup> February 2022. The first document, exhibit 18 to the affidavit, is no more than a letter of 13<sup>th</sup> May 1997,

from the Waterways Service of the Department of Arts, Culture and the Gaeltacht to the appellant's former spouse wishing her every success with the business venture, and offering to assist the project to "*whatever limited extent*" the Department could. I could not locate the second letter in the papers provided to the Court, and nor, so far as I could see, is it actually an exhibit to his affidavit. But in any case, from the appellant's written submissions, it is apparent that it is no more than another letter from the respondent, and not a deed of grant of easement or a statutory designation of any part of the canal or canal bank of the kind relied upon by the appellant.

**19.** In my view, not only were there conclusions of the trial judge on this issue grounded upon credible evidence, it is inconceivable that she could have arrived at any other conclusions on the evidence that she heard from Mr. Anderson on behalf of the respondent and the appellant himself whose evidence, if anything, served to confirm to a material extent the evidence given by Mr. Anderson.

**20.** The trial judge also observed that, while it somewhat difficult to make sense of the appellant's claim for special damages, it appears that the primary loss which he claims is that of Canalways Ireland Ltd. The trial judge noted that he does not have standing to represent that company by reason of the rule in *Battle & Anor v. Irish Art Promotion Centre Ltd.* [1968] IR 252, and moreover, the company has been dissolved since 2016, and no application to restore the company to the register of companies had been made. To all of that I would add the obvious point that the company is not a party to the proceedings. For these reasons, insofar as the appellant purports to advance any claims on behalf of Canalways Ireland Ltd, it is clear that any such claims cannot be entertained. There is no appeal from this conclusion of the trial judge.

**21.** It follows from all of the foregoing that any grounds of appeal related to the seizure and storage of Barge 43M should be dismissed.

### **The Interference Notices**

22. On 19<sup>th</sup> February 2003, Kildare County Council published a “Notice To Navigation Authorities” pursuant, *inter alia*, to s. 21(4) of the Water Supplies Act, 1942 (the “1942 Act”), notifying “*navigation authorities*” within the meaning of the 1942 Act of a proposal to take a supply of water from the River Barrow, at a location in the townland of Srowland, upstream of Athy, County Kildare. This notice stated that the maximum rate at which it was proposed to abstract water was 40,000 cubic metres in any 24-hour continuous period. Information regarding, *inter alia*, the works proposed for the purposes of the proposed abstraction was provided. The notice also stated that an environmental impact statement had been prepared in respect of the proposal and was available for inspection at the offices of Kildare County Council. The notice went on to state that if no objection was made to the proposal (or if any objection that was made was withdrawn) the proposal would be deemed to have been agreed to and the County Council would proceed with the project. On the other hand, the notice stated, if any objection was made and not withdrawn, the County Council would apply to An Bord Pleanála under the 1942 Act for a provisional order declaring that the proposal may come into force.

23. More relevantly, for present purposes, the notice further continued to state as follows:-

*“Any navigation authority, as defined in section 21 of the Water Supplies Act 1942, of the opinion that the taking of the water, in accordance with the proposal, makes or will make the navigation of such navigable water impossible or unreasonably difficult may make an objection to the proposal by giving to Kildare County Council a written statement comprising an interference notice and stating the reasons why it considers that the taking of the water, in accordance with the proposal, makes or will make the navigation of such navigable water impossible or unreasonably difficult.”*

*The interference notice, and reasons thereof, must reach The Director of Services... not later than 5pm on the Wednesday 12<sup>th</sup> March 2003.*

*If an interference notice to the proposal is duly made, Kildare County Council will consider the objections of the navigation authority, and shall negotiate with the navigation authority for the withdrawal of the interference notice. The navigation authority may withdraw the interference notices at any time by giving written notice to Kildare County Council in that regard. Kildare County Council may apply to the High Court to annul the interference notice under section 21 of the Water Supplies Act 1942.”*

**24.** Provision for service of an interference notice upon a sanitary authority by a navigation authority (as defined in s. 21 of the 1942 Act) is made by s. 21(4) of the 1942 Act. Section 21(1) of the 1942 Act defines “*navigation authority*” as meaning, “*in relation to any navigable water, the person entitled to navigate thereon or to receive tolls or dues in respect of navigation thereon.*” The appellant maintains that he is a “*navigation authority*”, within the meaning of the 1942 Act, and on that basis he purported to serve two interference notices on Kildare County Council, the first on 17<sup>th</sup> January 2002, and the second on 4<sup>th</sup> March 2003. The latter notice was served in response to the notice published by Kildare County Council on 19<sup>th</sup> February 2003. The former notice had been served in response to an earlier proposal of Kildare County Council.

**25.** By his notice of 17<sup>th</sup> January 2002, the appellant objected to the proposed abstraction of waters from the River Barrow, sources of the River Barrow and ground water at Robertstown, Rathangan, Johnstown Bridge, Hybla and the Kildare Bypass, and he cross referred to an objection he had separately advanced, on the same date, to the Council’s proposal to abstract water. The objection was stated to be on the grounds that the taking of such waters in accordance with such proposal would make the navigation of the “*relevant*

*navigable waters impossible or unreasonable.*” This wording is taken from s. 21(8) of the 1942 Act. While the notice served on 4<sup>th</sup> March 2003 is considerably longer than the notice served in 2002, the net point made by each notice is the same: each notice claimed that Kildare County Council is not entitled to abstract water in such quantities as would make the navigation of relevant navigable waters impossible or unreasonably difficult.

**26.** At para. 61 of the judgment under appeal, the trial judge stated:-

*“For reasons which are not entirely clear, although these interference notices were directed to Kildare County Council and not to Waterways Ireland, Mr. Hoey alleges Waterways Ireland acted negligently and in breach of duty in failing to take action on foot thereof for which he claims damages.”*

**27.** So far as I have been able to identify, the allegation to which the trial judge refers in this paragraph is to be found at para. 15 of the statement of claim, where the appellant claims that *“the defendant acted in bad faith by ignoring the Interference Notice which I issued for the protection of the navigation.”* Manifestly, however, this claim is a nonsense. The appellant’s notices were, as the trial judge observed, directed to Kildare County Council. As the trial judge held at para. 66:-

*“66. It further seems to me that even if Mr. Hoey’s interference notices were legally valid, then the primary obligation to respond or “to act on foot” of same would rest with Kildare County Council and not with the relevant navigation authority, Waterways Ireland. It is therefore extremely difficult to conceive of how any act or omission on the part of Waterways Ireland in relation to these interference notices could give rise to a liability on its part and I hold that no such liability is established.”*

**28.** In my view, this conclusion of the trial judge is not just unimpeachable, but it was also inevitable. Whatever about the appellant’s wider claims of breach of statutory duty on the

part of the respondent, it is completely unsustainable to contend that it was negligent or acted in bad faith in failing to comply with a notice served on and directed to another party.

**29.** While that puts an end to any claim grounded on the notices served by the appellant, the trial judge also rejected such a claim on the basis that the notices were in any case not legally valid, because the appellant failed to establish that he is a navigation authority within the meaning of the 1942 Act, and only a navigation authority can issue an interference notice.

**30.** In the court below, the appellant argued that he was a navigation authority for the purposes of s. 21 of the 1942 Act on the basis that Canalways Ireland Ltd held navigation permits for parts of the Barrow Navigation in respect of certain of its barges at the time that the 2003 interference notice issued, and therefore he, the appellant, was entitled to navigate the same, or so he claimed. While the trial judge had doubts as to whether or not the mere holding a permit under the Bye-laws could be equated with an entitlement to navigate for the purposes of s. 21 of the 1942 Act (which doubts I would share), she did not consider it necessary to resolve that issue because, she found, the appellant himself did not hold any permit from the respondent, and he could not rely on any permit that might have been issued to Canalways Ireland Ltd. The latter was the case not least because there is no reference at all to that company on the face of the notices, but also having regard to the dissolution of Canalways Ireland Ltd in 2016. The trial judge also had regard to correspondence drawn to the attention of the court from the appellant's former wife, to the effect that he had no authority to act on behalf of the company. For these reasons, amongst others, the trial judge concluded that the notices issued by the appellant were not issued by a navigation authority and were not legally valid.

**31.** At the hearing of this appeal, the appellant appeared to advance an argument not raised in the Court below, that is that he is a navigation authority for the purposes of the 1942 Act by reason of being a user of the relevant waterways and by reason of his knowledge and



experience in connection with the same. At the same time, he argued that the trial judge erred in considering the issue at all, because, he argued, the validity of the interference notices had been affirmed by the High Court (Roderick Murphy J.) in an application brought by the appellant for interlocutory relief following the issue of these proceedings. The appellant was unsuccessful in his application for interlocutory relief, and was again unsuccessful on appeal to the Supreme Court, but at the hearing of this appeal he nonetheless placed some reliance on the decision of Murphy J. which he claimed estopped the respondent from disputing the validity of his interference notices. This argument is obviously misconceived as the decision of Murphy J. on an interlocutory application could not be determinative of any matters in dispute in the substantive proceedings.

**32.** Apart altogether from the difficulty that the appellant appears to advance an argument in this Court for the first time, this argument – that the appellant could be a navigation authority for the purposes of s. 21 of the 1942 Act just by reason of being a user of waterways, with a particular specialist knowledge of them – is plainly unsustainable. The term has a statutory definition and requires a person to have an entitlement in law to navigate “*navigable waters*” a term which is also defined, or to have a right to collect tolls, which the appellant does not assert. In effect, the appellant has asserted the entitlement based on user or prescription. Even if it was possible to acquire such a right by user, the appellant did not advance any arguments in this Court or in the Court below as to the legal basis upon which any such rights might be acquired, and nor did he adduce any evidence specifically directed to such a claim.

**33.** Furthermore, it is apparent that the definitions of “*navigation authority*” and “*navigable waters*” are interconnected. The definition of the latter is as follows: “*any river or canal on which any person is, by virtue of any enactment, entitled to navigate or in respect of the navigation on which any person is, by virtue of any enactment, entitled to receive tolls*”

*or dues... .”* This strongly suggests that for the purpose of s. 21 of the 1942 Act, the right to navigate must be one conferred by an enactment, but I must stress that I make this point in passing only as it was not one made by the trial judge, and nor was it argued on appeal.

**34.** At the hearing of this appeal, the appellant argued that it was not necessary for the trial judge to enter upon any consideration of the validity of the interference notice, and furthermore that she erred in doing so in circumstances where the 1942 Act prescribes, at s. 21(8), a specific procedure for the annulment of such notices. It is correct that such a procedure is provided by s. 21(8), enabling a sanitary authority to whom an interference notice relating to any proposal has been given to apply to the court for the annulment of such notice. However, the subsection presupposes the service of an interference notice in accordance with s. 21, by a navigation authority, and provides for a mechanism to annul such a notice in specified circumstances, i.e. where the court is satisfied by the sanitary authority that the proposal to which the interference notice relates will not make the navigation of the relevant navigable water impossible or unreasonably difficult. While issues regarding the validity of an enforcement notice might arise in an application under s. 21(8), the sub-section is primarily directed at providing for the resolution by the court of the substantive issues raised in an interference notice.

**35.** In these proceedings the appellant has purported, amongst other things, to hold the respondent – which is not a sanitary authority the purposes of the 1942 Act – in some way accountable for failing to take actions on foot of the notice. The respondent, in its defence, pleaded that the appellant is not a navigation authority and is not entitled to issue an interference notice. In the circumstances, the validity of the interference notice was properly raised by the respondent, and in my view the trial judge was correct to engage with the issue and to arrive at a conclusion as to its validity. The procedure provided for by s. 21(8) of the 1942 Act had no application to the circumstances of the case.

**36.** To conclude on this issue, for the foregoing reasons, I am satisfied that the trial judge was correct in her conclusion that the notices purportedly served by the appellant under s. 21 of the 1942 Act were not legally valid, for the reasons stated by the trial judge. Furthermore, those notices, even if they were valid, imposed no obligation of any kind upon the respondent, being addressed as they were to Kildare County Council.

**Claim that the Appellant has Failed to Prevent Reduction in Water Levels: Reliance on Specified Projects**

**37.** As I observed at the outset, aside from the claim relating to Barge 43M, the appellant's core complaint is that the respondent has failed to take such steps as are necessary to maintain the water levels within the waters in its charge so as to ensure that they are navigable. In advancing his claim, the appellant relies on certain specified projects in respect of which he claims the respondent has failed to take the necessary actions to prevent loss of water and/or pollution to the Barrow Navigation. These projects include the implementation of a plan for the bogs supplying peat to the Edenderry Power Station, after extraction of the peat from those bogs, the implementation of the Kildare Water Strategy, the construction of the Kildare Bypass, and related to that, the abstraction of water at Srowland.

**38.** As the trial judge observed, these projects were undertaken by third parties i.e. Bord na Móna so far as concerns the Edenderry Power Station, and by the Minister for the Environment or Kildare County Council so far as concerns the Kildare Water Strategy, the Kildare Bypass and the Srowland abstraction. The respondent has no powers or functions in connection with those projects and the abstractions of water resulting from those projects. Accordingly, so far as concerns abstractions of water from the Grand Canal, the Barrow navigation or any other relevant waterway as a result those projects, the trial judge held that the appellant had brought proceedings as against the incorrect defendant.

**39.** While the appellant had brought a motion on the day of commencement of the trial in the High Court seeking to join Irish Water, Bord na Móna and Kildare County Council as defendants to the proceedings, that motion was rejected, with the trial judge observing that, by the time of the trial, the proceedings were not only eleven years old, but also insofar as concerns the proposed new defendants, related to activities and projects long since completed. The appellant has not only failed to appeal from these conclusions and decisions i.e. that he had brought proceedings against the wrong defendant, and that he could not join other defendants at the commencement of the trial of the proceedings, he has also failed to advance any argument by way of submissions that these conclusions of the trial judge are in any way erroneous.

**40.** While the trial judge observed that the above conclusions were sufficient to dispose of the substance of the appellant's allegations as against the respondent in relation to the specified projects, nonetheless, in deference to the large amount of research carried out by the appellant, the trial judge considered each of the individual projects and explained why it is that she did not consider that the cause of action asserted is well founded. As mentioned above, the three projects concerned are the Edenderry Power Station, the Kildare Bypass and the Kildare Water Strategy. As a subset of the latter, the appellant also had a particular grievance about abstraction of water at Srowland, Athy.

**41.** So far as the Edenderry Power Station is concerned, the trial judge held, at para. 76, that the court had heard no cogent evidence of any link between the works carried out on the bogs and the alleged water level reductions on the Barrow Navigation of which the appellant complains. Moreover, the appellant had provided no basis whatsoever for asserting that that the respondent was guilty of any act or default in connection with the implementation of a Memorandum of Understanding agreed in 1995 between the European Commission and

Ireland (upon which the appellant relied) relating to the extraction of peat and the retention of 7,000 hectares of land to be retained as wetlands.

42. Similarly, as regard to the construction of the Kildare Town Bypass, the trial judge concluded that there was insufficient evidence of any link between the works carried out to facilitate the construction of the bypass and the water level reduction on the Barrow Navigation of which the appellant complains. The trial judge accepted the evidence of the respondent's witness, Mr. Shane Anderson, that Kildare Bypass did not result in any permanent discernible loss of water from the canal or Barrow Navigation. She further accepted his evidence that, save for one period of time in 2021 during which water escaped from the canal due to an initially undiscovered leak, navigation levels on the Barrow Navigation have always been at an acceptable level such that the Barrow Navigation is and remains capable of being navigated. This led the trial judge to conclude, at para. 79, that "*In the circumstances, Mr. Hoey's claim has clearly not been made out.*"

43. So far as the Kildare Water Strategy is concerned, the trial judge described the appellant's complaint as being that the Water Strategy was not appropriately published by Kildare County Council and therefore that no barge hire company, boat owner or user of the Navigation was consulted. He further alleged that no or no adequate Environmental Impact Assessment of the Kildare Water Strategy was carried out. The trial judge held, unsurprisingly, that these complaints lie, if at all, against Kildare County Council and not against the respondent. On this issue, the trial judge concluded that, aside from the fact that wrong defendant had been sued and that no breach of duty has been made out against the respondent in connection with the Kildare Water Strategy, it is further evident that proceedings seeking to challenge any aspect of the 1999 Kildare Water Strategy are out of time and statute barred. In a footnote, the trial judge added that the same is also true in connection with the appellant's other complaints in relation to the other specified projects,

as well as in relation to the interference notices issued in 2002 (although she did not mention the 2003 notice in the footnote, it may reasonably be inferred that she intended to do so from both the context and her use of the plural). In this regard, I should make it clear that the respondent had expressly pleaded in its defence that the appellant's claim was statute barred.

**44.** The trial judge next considered one element of the Kildare Water Strategy about which the appellant was particularly critical, that being the proposal to abstract water at Srowland, Athy. It was in connection with this proposal that the appellant purported to issue the interference notices.

**45.** The trial judge recorded how, in accordance with the procedure for a proposed abstraction as set out in the 1942 Act, the Barrow Water Abstraction Proposal at Srowland was specifically notified by Kildare County Council to the appellant's company, Canalways Ireland Ltd. In accordance with the relevant procedure, the respondent had made a submission to An Bord Pleanála about this project, expressing concern that the removal of any supply of water from the upper regions of the Barrow Navigation would have a detrimental effect locally on the lower regions of the Navigation. The County Council accepted that the Barrow Navigation experienced difficulty during low flow conditions. The Council and the respondent had a meeting to discuss mitigation measures, and an implementation plan was drawn up to address the problems. The trial judge records that this plan was not acceptable to the appellant, and as a result he served the second of his interference notices.

**46.** Ultimately, however, An Bord Pleanála granted a provisional order in favour of the water abstraction proposal, and in accordance with procedures under the 1942 Act, Canalways Ireland Ltd petitioned the Circuit Court to inquire into the matter. The Circuit Court confirmed the provisional order, and on appeal to the High Court brought by

Canalways Ireland Ltd, the appeal was dismissed and the provisional order approving the project was made absolute.

47. All of the foregoing led the trial judge to conclude that there was no basis upon which the appellant could maintain that the respondent had acted in breach of its duty of care on in breach of statutory duty in relation to the said abstraction.

48. The trial judge then considered the appellant's claim that the respondent had failed in its statutory duty by not issuing an interference notice to Kildare County Council pursuant to s. 21 of the 1942 Act. However, the trial judge noted that s. 21(4) is permissive rather than mandatory and the respondent decided to deal with its concerns in relation to the abstraction by devising an implementation plan in co-operation with Kildare County Council, in order to mitigate and manage water loss. Therefore, the trial judge held, there was no absolute evidence upon which she could conclude that the respondent is guilty of any breach of duty of care or breach of statutory duty in the manner in which it had discharged its duties in relation to the Srowland abstraction.

49. It is apparent that the conclusions of the trial judge regarding the projects discussed above were amply supported by the evidence before her, and I am satisfied that the appellant has failed to identify any error of fact or of law on the part of the trial judge in either her analysis or in the conclusions that she reached regarding the same.

### **General Allegations of Negligence and Breach of Duty**

50. The trial judge then proceeded to consider the alleged breach of duty on the part of the respondent in failing to prevent abstractions generally or to restore the water levels of the relevant waterways, and the appellant's claim that as a result of those failures, the business of Canalways Ireland limited was damaged. The trial judge concluded that there were multiple problems with the claim as advanced.

**51.** Firstly, the trial judge made the obvious point that the appellant cannot recover personally for the losses of Canalways Ireland Ltd. The appellant does not appear to have addressed this issue at all in his grounds of appeal or in submissions.

**52.** Secondly, the trial judge concluded that the claim for damages appears to be time-barred. As already mentioned, this was pleaded by the respondent in its defence to the proceedings. The trial judge noted that the applicable limitation period to a claim in negligence and breach of statutory duty in six years, measured, in the case of a single tort, from the date on which the plaintiff suffered damage, and in the case of the continuing tort, the right of action is restricted to that part of the wrong committed in the past six years. The within proceedings were issued on 5<sup>th</sup> December 2011 and, the trial judge noted, the projects and activities relied upon by the appellant date back to 1995. She held that the appellant had placed no credible evidence before the court that the said projects continued to impact upon water levels in the Barrow Navigation within the limitation period (which would date back to December 2005), and *“still less that this has caused him, or even Canalways Ireland Limited, to suffer any specific and identifiable loss within that period.”*

**53.** The appellant barely addressed this conclusive determination in his submissions. All he said about the issue is that: *“The Kildare water strategy is not statute barred because the EIA directive was not carried out correctly and all the abstractions are without any legal status. (See legal status of the abstractions).”* Unfortunately, this is no adequate response to the conclusions of the trial judge on this crucial issue. While proceedings alleging a failure to undertake properly an environmental impact assessment (“EIA”) might not be subject to a national time limit (and I should stress that this issue was not argued), the appellant did not adduce any evidence to support an argument as to any alleged deficiencies in the EIA to which he refers. Moreover, it is unclear from his submission whether he is suggesting that matters to which he refers relate to the implementation of the EIA Directive, for which the



appellant could have no responsibility, or the carrying out of the EIA relating to the Kildare water strategy.

**54.** In the court below, the appellant also made the case that article 14 of the Bye-laws, which provides that no person shall navigate or moor any boats on the canals if such boat exceeds 1.2m in draft other than with the consent of Waterways Ireland, must be interpreted as requiring Waterways Ireland to maintain the depth of the canal at 1.2m plus 300mm for clearance, in total 1.5m, at all times. The trial judge rejected this argument, observing that article 14 of the Bye-laws is directed to those who use the canal and indicates the maximum depth of vessels, and not a minimum depth that must be maintained by the respondent at all times.

**55.** At the hearing of the appeal, the appellant did not pursue the argument grounded on article 14 of the Bye-laws, but he did rely on an email to him from an official of the respondent dated 3<sup>rd</sup> June 2004, which he submitted amounted to a guarantee that a minimum draft of 760mm would be maintained at all times. He submitted that the trial judge erred in failing to have regard to the content of this email. While the email does describe dredging works that would “*guarantee the 760mm draft quoted in the Guide to the Barrow Navigation*”, in my view it is clear that it is not a guarantee being given by the respondent. Rather the word “*guarantee*” is used to express an opinion that the work under consideration will have the desired effect. Had the appellant wished to contend seriously that this was a legally enforceable guarantee being provided by the respondent to him, for no apparent consideration, he would need to have made detailed legal submissions on the issue, and he did not do so.

**56.** In any case, the trial judge heard evidence of this issue and accepted the evidence of Mr Anderson that, save for one event in 2021, when there was a leak from the canal, the general level of the canal is maintained between 1 and 2m. She also accepted the evidence

of Mr. Anderson that the canal is navigable and that the water level in the canal is reasonable to support navigation. She concluded this point by stating that, since the appellant had furnished no convincing evidence to the contrary, she accepted the evidence Mr. Anderson. This is a conclusion reached by the trial judge based on credible evidence and is not one with which this court can or should interfere, having regard to well settled principles established by *Hay v. O'Grady* [1992] 1 IR 210.

**57.** This conclusion is also sufficient to address the reliance placed by the appellant on another item of correspondence, this being a letter to him from a Mr. Brian Mullan, Head of Civil Engineering Design of the respondent dated 17<sup>th</sup> October 2006. In this letter, Mr. Mullan states that the respondent “*has advised Kildare County Council that if the drop in water levels in the Milltown feeder is permanent and can be attributed to the road works then Kildare County Council will be asked to supply an alternative supply of water for the Grand Canal.*” Given the evidence of Mr. Anderson, it must be the case that the respondent did not see the need to pursue Kildare County Council, as contemplated.

**58.** Moreover, the conclusion of the trial judge on this issue wholly undermines the appellant’s claims in these proceedings and would by itself alone justify the dismissal of the same. Proof of a reduction in the water levels of the canals was fundamental to the case made by the appellant, and his failure to lead any persuasive evidence in in this regard was fatal to his case. As the trial judge observed, the appellant’s case was “*broad and impressionistic*”. He is clearly sincerely of the view that the water levels in the canals have not been maintained sufficient to sustain navigation, and that the responsibility for this rests with the respondent. However, he failed to adduce any evidence that this is so and when asked about this at the hearing of this appeal, he said simply that his interference notices constituted evidence of reduction in water levels. Unfortunately it is not unusual for a litigant in person not to understand that the making of an assertion does not constitute evidence of

the thing asserted. The rules of evidence do not place any obligation on the respondent to disprove an assertion in respect of which the appellant has not adduced any evidence.

**59.** The trial judge also concluded, at para. 98, that no case had been made out that the respondent had acted in an *ultra vires* or otherwise unlawful manner in the carrying out of its statutory functions. Furthermore, she added, that even if such unlawfulness were made out, the appellant had not established that the respondent owed the appellant any specific duty such as could give rise to a right to damages. In yet another conclusion devastating to the appellant's case, the trial judge held that the statutory duties imposed upon the respondent are for the benefit of the public at large and could not therefore give rise to an action in damages by the appellant. She cited the well-known passage from the judgment of Fennelly J. in *Glencar Explorations p.l.c. v. Mayo County Council (No. 2)* [2002] 1 IR 84, wherein the learned judge held, at 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.*"

**60.** The trial judge then proceeded to consider whether or not there was any basis upon which either the appellant personally or Canalways Limited ought to be distinguished from all other persons or businesses that use the inland waterways, such as to permit him to mount a claim in damages. She concluded that there was no basis for such a proposition, and asked, rhetorically, how, therefore, he could establish the requisite proximity of relationship in order for a direct duty of care to him or to Canalways Ireland Ltd to be imposed? Here again, there is no attempt by the appellant to engage with the trial judge's careful analysis and conclusions drawn therefrom.

**61.** One final ground of appeal that I should mention is that the appellant claimed that the trial judge erred in failing to address a number of authorities that were brought her attention.

It is correct that these are not referred to by the trial judge in her judgment. However, with one exception, the cases relied upon are from the neighbouring jurisdiction and relate to a very different statutory regime. Moreover, the cases appear to be cited in order to provide authority for the proposition that it is not open to the respondent to grant any rights over the water supply to the canals within its remit. However, that question does not arise in the instant proceedings, because insofar as water is being abstracted by other statutory authorities, this is in pursuance of statutory powers conferred on those other statutory authorities and is not a consequence of actions taken by the respondent. Whilst in general it is good practice for a judge in his or her judgment to refer to the case law that has been cited in argument, this is not a hard and fast rule. There is no obligation to refer to case law which is clearly irrelevant to the issues in the proceedings or which goes to propositions which are not in dispute between the parties. This is all the more so where, as here, the proceedings raise a multitude of issues. In such circumstances, consideration of irrelevant case law would add unnecessarily to the length of the judgment without providing any clarity or resolution.

**62.** Insofar as the appellant may have raised other issues on appeal to which I have not referred, this is not because they have not been considered, but rather it is because they have no bearing upon the decision of the trial judge and the reasons for her decision. I am fully satisfied beyond any doubt that the trial judge correctly identified and analysed the issues raised in the proceedings, had due regard to the evidence that she heard, and that the findings of fact that she made are supported by that evidence, which was credible evidence. Furthermore, the appellant has failed to identify in his grounds of appeal or submissions any error on the part of the trial judge in her consideration of the matters of law raised by the proceedings, or her conclusions in respect of those matters. I would therefore dismiss the appeal.

**63.** Since this judgment is being delivered electronically, Noonan J. and Butler J. have authorised me to indicate their agreement with it. So far as costs are concerned, my preliminary view is that since the respondent has been wholly successful within the meaning of that term as used in s. 169 of the Legal Services Regulation Act, 2015, it is entitled to an order against the appellant for payment of the costs incurred by it in resisting this appeal. If the appellant wishes to contend for a different order then he should do so by filing submissions, not to exceed 1,000 words. Having regard to the time of year, I would allow a period of six weeks from the date of delivery of this judgment for delivery of any such submissions. In such event, the respondent should file replying submissions, also not to exceed 1,000 words within a further period of four weeks.