

THE HIGH COURT

[2022] IEHC 472

[Record No. 2020/8583P]

BETWEEN

CHRISTIAN MORRIS

PLAINTIFF

AND

**IRELAND, THE ATTORNEY GENERAL OF IRELAND, THE MINISTER
FOR JUSTICE AND EQUALITY, THE MINISTER FOR HOUSING, LOCAL**

GOVERNMENT AND HERITAGE, AN BORD PLEANÁLA,

FINGAL COUNTY COUNCIL, CREKAV TRADING GP LIMITED AND

ATLAS GP LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 27th day of

July, 2022.

Introduction.

1. The issues that arise in this case can be briefly stated in the following way: the applicant is a gentleman, who resides in Howth, Co. Dublin. In March and April 2020, the fifth defendant, An Bord Pleanála, granted permission to the seventh and eighth defendants respectively for strategic housing developments on two sites in the Howth area.

2. The applicant brought two sets of judicial review proceedings challenging those decisions. In one set of proceedings, challenging the decision of March 2020 (hereafter “the Balscadden Road permission”), he was successful; the decision to grant planning permission was quashed. No application has been made by ABP, or the developer, for leave to appeal that decision; so that permission is now extinguished.

3. The applicant also brought a challenge by way of judicial review against the decision of ABP made in April 2020 (hereafter “the Techrete site permission”). That matter was heard by Hyland J. in October 2020. In a reserved judgment delivered on 22nd October, 2020, she refused the reliefs sought by the applicant. The applicant did not seek leave to appeal that decision.

4. By a plenary summons issued on 22nd December, 2020, the applicant instituted these proceedings, in which he seeks, *inter alia*, a declaration that the Planning and Development (Housing) and Residential Tenancies Act 2016 (hereinafter ‘the 2016 Act’) is repugnant to Bunreacht na hÉireann. The plaintiff also sought declarations that both his rights and the rights of the sixth named defendant, Fingal County Council, have been infringed by the provisions of the 2016 Act. He sought a declaration that the fifth named defendant had acted improperly, together with orders quashing the decisions of the fifth defendant made in March and April 2020, which were the subject matter of his previous judicial review proceedings. The plaintiff also sought an order to remit the two planning applications, which had been the subject matter of the two decisions in March and April 2020, for a rehearing “*in such a way as to fulfil the plaintiff’s right as claimed in the herein proceedings, to an appeal on merits*”. The plaintiff also sought an injunction to stay the determination of any applications which might have been made, or which might be made pursuant to the 2016 Act, together with orders against the seventh and eighth defendants to stay

continuation, or commencement of certain building works pursuant to either of the planning permissions that issued by the fifth defendant.

5. Following the entry of appearances by the defendants, motions were issued on behalf of the first, second, fourth, fifth, seventh and eighth defendants, seeking to have the plaintiff's action against them struck out pursuant to O.19, r.28, or pursuant to the inherent jurisdiction of the court, on the basis that the proceedings against the defendants were bound to fail; that the proceedings were frivolous and vexatious and were an abuse of the processes of the court.

6. The defendants make those assertions by reference to the following matters: the decision of March 2020 having been struck down by the High Court, it was frivolous and vexatious to seek to impugn that decision again in these proceedings; s.50 of the Planning and Development Act 2000 (as amended) (hereafter "the 2000 Act") provides an exclusive legal route for challenging certain decisions of the fifth defendant. The decisions, the subject matter of the proceedings herein, come within that section. As such, it was submitted that the plaintiff could only challenge the two decisions by means of judicial review proceedings, which option he had already exercised; it was submitted that the plaintiff could not attempt to effectively challenge those decisions again in these plenary proceedings.

7. The defendants submitted that the present proceedings were an abuse of the processes of the court because they constituted an impermissible collateral attack on the two decisions of An Bord Pleanála, which had already been the subject of judgments of the High Court in the plaintiff's earlier judicial review proceedings; one of which was quashed and one of which was upheld.

8. It was submitted that the plaintiff could not raise the issue of the constitutional validity of the 2016 Act in these proceedings due to the rule in *Henderson v.*

Henderson [1843] No. 3 Hare 100; if he wished to raise the constitutional issue, he should have done so in his judicial review proceedings; as he had not done so, it was submitted that he could not do so in the present proceedings.

9. Finally, it was submitted that if one strips away the challenge to the two decisions; their legal validity having been definitively determined in the two judicial review proceedings brought by the plaintiff, the plaintiff lacked *locus standi* to mount a challenge to the constitutional validity of the 2016 Act, as he could not demonstrate that any of his interests are now, or are likely to be, adversely affected by the provisions of the 2016 Act. It was submitted that having regard to all of these matters, the plaintiff's proceedings herein were bound to fail and therefore constituted an abuse of the court's processes and should be struck out against the moving party defendants.

10. In response, the applicant stated that he had always made it clear that he intended to challenge the constitutionality of the 2016 Act, as he considered that in providing that developers could bypass making an application to the planning authority and only had to make one application for planning permission directly to An Bord Pleanála, the provisions of the 2016 Act were in breach of his constitutional right to a merits based appeal against an initial decision to grant planning permission.

11. The plaintiff maintained that it was an established principle of Irish law that constitutional issues should only be determined when all other legal issues had been determined. In this case he had exhausted his remedies against the two decisions by means of his two judicial review actions. As they had both reached finality, it was submitted that it was entirely appropriate for him to have instituted the within proceedings to challenge the constitutional validity of the 2016 Act.

12. The plaintiff submitted that he was obliged to proceed by way of plenary proceedings to challenge the constitutional validity of the 2016 Act, as it was settled that it was not appropriate for him to do so in judicial review proceedings. It was for that reason that he had not included the constitutional challenge in the earlier judicial review proceedings. It was submitted that in these circumstances, the present proceedings did not fall foul of the rule in *Henderson v. Henderson*.

13. Finally, the applicant submitted that as a citizen, he enjoyed a constitutional right of access to the courts, which meant that he was entitled to present his argument regarding the constitutional validity of the 2016 Act before the appropriate court and to obtain a reasoned judgment thereon. It was submitted that there was no lawful basis on which he should be deprived of the right to have his dispute determined by the High Court. The constitutional issue had not been addressed in the previous judicial review proceedings. It was submitted that in these circumstances, there was no basis on which the court should strike out his proceedings against the defendants at this stage.

14. That is but a summary of the main issues that arise for determination on this application. It is necessary to set out the background to these proceedings. In so doing, it is necessary to look briefly at some of the earlier proceedings brought by the plaintiff against some of the defendants herein.

Background.

15. In 2016, in proceedings bearing the title *Christian Morris v. Glenkerrin Homes (In Receivership), Michael McAteer and Paul McCann* [2016/10655P], the plaintiff sought an injunction to procure the carrying out of certain works in relation to a site in Howth known as the ‘Techrete site’. It appears that the plaintiff had also

instituted judicial review proceedings challenging a planning permission that had been granted in relation to that site. According to an affidavit sworn by the plaintiff on 19th July, 2018, those judicial review proceedings were dismissed in the High Court, which ruling was upheld on appeal to the Supreme Court. The injunction proceedings were brought to secure the carrying out of certain works on the Techrete site to render the site safe. It is not necessary to go into those proceedings any further at this stage.

16. In 2018 the plaintiff instituted judicial review proceedings against Ireland, The Attorney General, the Government of Ireland and various Ministers and against An Bord Pleanála and Fingal County Council [2018/606JR], in which he challenged the constitutional validity of the 2016 Act. His application for leave to proceed by way of judicial review was heard by Meenan J. on 23rd July, 2018, he directed that the *ex parte* application should be made on notice.

17. The application was made on notice before Barniville J. (as he then was) on 21st November, 2018. The learned judge refused the applicant's application for leave to proceed by way of judicial review. The initial order which issued following that hearing, merely stated that the court refused the applicant's application for leave to apply for judicial review.

18. The plaintiff contacted the court to request that the order should recite further reasons that had been stated by Barniville J. in the course of his ruling. The learned judge acceded to that request and a revised order was subsequently issued, which was perfected on 1st February, 2019. As well as refusing the application for leave to apply for judicial review, it provided as follows: -

“And the court doth further declare that the applicant's application for leave has been refused on the basis that the applicant did not require leave and that such refusal is expressly on the basis that it was and is open to the applicant to

commence plenary proceedings challenging the constitutionality of the relevant legislation and is without prejudice to the State's entitlement to raise such defences and objections to such plenary proceedings as it may deem appropriate."

- 19.** On 4th November, 2019, the seventh defendant lodged an application for a strategic housing development at Balscadden Road, Howth, Co. Dublin. This application was lodged with the fifth defendant pursuant to the provisions of the 2016 Act. On 19th November, 2019, the plaintiff lodged an objection to that planning application.
- 20.** On 9th December, 2019, the eighth defendant lodged an application for a strategic housing development at a site known as the Techrete site in Howth, Co. Dublin. This application was lodged with the fifth defendant pursuant to the 2016 Act. On 17th December, 2019, the plaintiff lodged an objection to that planning application.
- 21.** On 2nd March, 2020, the fifth defendant in a decision bearing reference 305828-19 granted permission for the development at the Balscadden Road site (the Balscadden Road permission).
- 22.** On 3rd April, 2020, in a decision bearing reference number 306102-19, the fifth defendant granted permission to the eighth defendant for the development at the Techcrete site (the Techcrete site permission).
- 23.** On 18th June, 2020, McDonald J. gave the plaintiff and the Balscadden Road SSA Residents' Association Limited, leave to bring separate judicial review proceedings challenging the Balscadden Road permission.
- 24.** On 16th July, 2020, the plaintiff was given leave to challenge the Techcrete site permission.

25. On 22nd October, 2020, Hyland J. delivered judgment in relation to the plaintiff's judicial review proceedings concerning the Techcrete site. She upheld the validity of the Techcrete site permission. She refused all of the reliefs sought by the plaintiff in his judicial review proceedings. No application was made for leave to appeal that decision.

26. On 25th November, 2020, Humphreys J. gave judgment in the joint proceedings brought by the Balscadden Road Residents' Association and the plaintiff, challenging the Balscadden Road permission. In his judgment Humphreys J. quashed the Balscadden Road permission. At para. 80 of his judgment, Humphreys J. stated that he was going to grant *certiorari* of the Balscadden Road permission in the form sought at para. D(i) of the statement of grounds in the proceedings brought by the Residents' Association, because the issues on which he found for the applicants more centrally arose in their proceedings, rather than in the proceedings brought by the plaintiff. He provided as follows at para. 80 (ii):

“The Morris case essentially becomes moot on the basis that the decision has now been quashed. But I am not dismissing Morris either, because in Morris the applicant would be entitled to revisit the issues if we were viewing them in an EU law context, but we didn't get to that point. In case matters go further I would be inclined to make no separate order in Morris, but to make an order consolidating the two sets of proceedings so that Mr. Morris would remain a party if matters go further.”

27. For the reasons stated in his judgment, Humphreys J. did not remit the planning application back to An Bord Pleanála. Neither ABP, nor the developer, sought leave to appeal that decision. The final order quashing the Balscadden Road permission was perfected on 17th May, 2021.

28. On 22nd December, 2020, the plaintiff issued his plenary summons in the present proceedings. That was followed by delivery of a statement of claim on 26th April, 2021. The reliefs sought in his pleadings have been set out earlier in this judgment.

29. Following the entry of appearances by the defendants, a notice of motion was issued by the seventh and eighth named defendants seeking an order striking out the proceedings against them on the grounds that the plaintiff's proceedings are frivolous and vexatious and constitute an abuse of the court's processes due to the fact that they are bound to fail. Similar motions were issued by the State defendants, being the first, second and fourth named defendants and also by the fifth defendant. The plaintiff had discontinued his action as against the third defendant.

30. The defendants moved their application pursuant to O.19, r.28 of the Rules of the Superior Courts and pursuant to the inherent jurisdiction of the court to strike out proceedings that are frivolous and vexatious and are bound to fail. Order 19, r.28 is in the following terms: -

“The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.”

Evidence on behalf of the Defendants.

31. The facts in this case were not greatly in dispute between the parties. For this reason, it is only necessary to set out a brief summary of the evidence that was given in the affidavits filed in respect of these motions. The evidence on behalf of the

seventh and eighth defendants was contained in two affidavits sworn by Mr. Patrick Crean, a Director of the two companies. In his affidavit sworn on 8th June, 2021, he set out the reliefs that were sought by the plaintiff in the plenary summons and statement of claim as against the first to fifth named defendants and also as against the seventh and eighth defendants. He set out a history of the proceedings to date. He went on to state that in relation to the Balscadden Road permission, that permission had been quashed by order of the High Court. He confirmed that no application for a certificate for leave to appeal had been made by ABP, or the seventh defendant.

32. In relation to the Techcrete site permission, Mr. Crean noted that in the judgment delivered by Hyland J. on 22nd October, 2020, she had upheld the permission that had issued to the eighth defendant in respect of this site. Her order had been perfected on 6th November, 2020. Mr. Crean stated that the plaintiff did not make any application for a certificate for leave to appeal, nor had he applied to the Supreme Court for a “leap frog” appeal. He stated that he had been advised that the time for making such applications had long since expired. In these circumstances, and as acknowledged by the plaintiff at para. C27 of his statement of claim, those proceedings are now spent.

33. Mr. Crean stated that having regard to the fact that the Techcrete site permission had been upheld in the judicial review proceedings and where the plaintiff had not sought a certificate for leave to appeal against that judgment, the reliefs sought at para. C6 and C8 of the statement of claim constituted an impermissible attempt to impugn the validity of the planning permission contrary to s.50(2) of the Planning and Development Act 2000, as amended. He stated that he believed that the proceedings constituted a collateral attack on the Techcrete site permission and constituted an abuse of process in circumstances where the plaintiff was seeking to

impugn the validity of the permission, on grounds that he could, and should have advanced in the proceedings previously brought by him.

34. Mr. Crean went on to describe the works that had been carried out on the Techcrete site to date. He stated that the work had commenced on the site in November 2020. As of the date of swearing that affidavit, the eighth defendant had expended €1m on the erection of site hoarding; demolition; removal of asbestos; surveying, and works to the basement carpark. He stated that it was anticipated that the cost of the entire build would be in the region of €160m.

35. Mr. Crean swore a supplemental affidavit on 21st December, 2021 in which he gave an update in relation to the works that had been carried out on the Techcrete site. These were described in detail at para. 5 of the affidavit. Mr. Crean stated that by the time of the swearing of that affidavit, the eighth defendant had expended €6.2m on various works on the site. It was anticipated that the costs of the entire build would be in the region of €170m.

36. The evidence on behalf of the first, second and fourth defendants, which parties can collectively be referred to as the State defendants, was given in an affidavit sworn by James P. Maloney, Principal Solicitor in the Office of the Chief State Solicitor, sworn on 29th October, 2021.

37. In that affidavit, he set out the background to the two decisions to grant planning permission that had been made by the fifth defendant in respect of the Balcadden Road site in March 2020 and the Techcrete site in April 2020. He went on to deal with the history of the judicial review proceedings that had been brought by the plaintiff in respect of those decisions. He noted that the plaintiff had failed, refused or neglected to join the State defendants as parties to the two sets of judicial review proceedings. He had further failed, refused or neglected to plead or otherwise

advance in those judicial review proceedings, any arguments impugning or otherwise challenging the constitutional validity of the 2016 Act, or seeking declarations pursuant to the European Convention on Human Rights Act 2003.

38. Mr. Maloney stated that in these circumstances he believed and was advised that the plaintiff was precluded from seeking to issue fresh proceedings challenging for a second time, the decisions which had been the subject matter of the previous judicial review proceedings. Mr. Maloney stated that he believed that the two judgments of the High Court dealing with the two decisions which were challenged in the judicial review proceedings constituted final orders, which rendered the matter moot and/or *res judicata*. He went on to state that the plaintiff was clearly outside the eight-week limitation period within which to apply for judicial review in accordance with s.50(6) of the 2000 Act, as amended.

39. Mr. Moloney went on to state that in circumstances where the plaintiff could not challenge for a second time the two decisions of the Board, which were the subject matter of his judicial review proceedings, his claim against the State defendants was also bound to fail, as he did not have standing and/or was not entitled to challenge the constitutional validity of the 2016 Act in isolation.

40. Mr. Maloney stated that it was his belief that the plaintiff's proceedings herein were unnecessary, improperly constituted, disclosed no reasonable cause of action, were bound to fail and/or constituted an abuse of process.

41. The evidence on behalf of the fifth defendant was contained in an affidavit sworn on 13th July, 2021 by Patrick Reilly, a solicitor in Field Fisher LLP, who are the solicitors on record on behalf of the fifth defendant.

42. At para. 5 of that affidavit, Mr. Reilly stated that from a search of the Courts Service online function, he had identified the following proceedings which had been

brought by the plaintiff against the fifth defendant: *Morris v. An Bord Pleanála* [2016/650JR] which issued on 9th August, 2016, and in which final orders were made on 4th July, 2017; *Morris v. An Bord Pleanála* [2018/847JR] which issued on 18th October, 2018, and in which final orders were made on 12th December, 2018; *Morris v. An Bord Pleanála* [2020/293JR] the proceedings in relation to the Balscadden Road permission; *Morris v. An Bord Pleanála* [2020/407JR] the proceedings in relation to the Techcrete site permission; *Morris v. An Bord Pleanála* [2020/52MCA] which issued on 20th February, 2020, and in which final orders were made on 16th March, 2020. In argument at the bar, counsel stated that there was one further case which had come to light since the swearing of that affidavit, which was a set of proceedings brought by the plaintiff against the fifth defendant bearing record number 2021/971JR, which constituted a challenge to a permission for a development at Deer Park and Howth Castle in Dublin.

43. Mr. Reilly went on to outline the history of the judicial review proceedings brought by the plaintiff in relation to the Balscadden Road permission and the Techcrete site permission, which resulted in the judgments of Humphreys J. and Hyland J. respectively.

44. Mr. Reilly pleaded that in light of the history of those proceedings, the present proceedings constituted a collateral challenge, as the plaintiff had already challenged both decisions and the cases had been heard by the High Court. He stated that in these circumstances, any such challenge was manifestly out of time and the case was not subtended by any specific grounds of relief as against the Board, albeit that the plaintiff was seeking orders against the Board.

45. Mr. Reilly stated that while the plaintiff appeared to be expressly challenging the constitutionality of the 2016 Act in these proceedings, he believed that in the event

that the plaintiff was successful, this would not apply retrospectively and would not invalidate the decisions of 2nd March, 2020 and 3rd April, 2020, or indeed any other decisions of the Board made under the strategic housing development regime which was provided for in the 2016 Act.

46. In relation to the balance of the pleas in the statement of claim, Mr. Reilly stated that he believed that they were primarily directed at the 2016 Act itself, which he believed enjoyed the presumption of constitutionality and conferred specific powers and functions on An Bord Pleanála, which they were obliged to exercise when determining strategic housing development applications.

47. Mr. Reilly noted that in common with the other defendants, he had written to the plaintiff inviting him to discontinue the proceedings against his client, but this offer had not been accepted by the plaintiff.

Evidence on behalf of the Plaintiff.

48. The plaintiff swore two affidavits in response to the defendants' application herein. The first of these was sworn on 2nd December, 2021. In the affidavit, the plaintiff noted that none of the reliefs that he had sought in the Techcrete judicial review had been granted. He stated that having read the judgment of Hyland J., he was satisfied that there was no sustainable ground for a successful appeal, or for applying for leave to appeal the judgment. He went on to state that he was not trying to relitigate any matter. He stated that at no stage in the judicial review proceedings had he tried to litigate any matter concerning the assertion that the 2016 Act was repugnant to the Constitution.

49. The plaintiff went on to state that it was his belief that it would have been inappropriate for him to join the Attorney General as a respondent in the Techcrete

judicial review proceedings, or to seek to agitate constitutional matters in those proceedings. He went on to state as follows: -

“I acknowledge a fundamental distinction between general judicial review and judicial review procedures as set by statute, the Techcrete judicial review being the latter. It is most certainly inappropriate to seek to agitate constitutional matters in the latter, but I further aver that it would also be inappropriate to try so even in the former.”

50. The plaintiff went on to state that had he tried to name the Attorney General as a respondent to the judicial review proceedings, or to raise grounds concerning the constitutionality of the 2016 Act, the court would have been bound to refuse such application, as both a premature and inappropriate transgression of the statutory provision set out for proper judicial review.

51. The plaintiff went on to refer to the judgment of Meenan J. in *O’Doherty and Waters v. Minister for Health & Ors.* [2020] IEHC 209, where it was stated that the proper way to raise constitutional complaints was by way of plenary proceedings. The plaintiff stated that that statement of the law had been upheld by Birmingham P. in his judgment on behalf of the Court of Appeal in the same case; reported at [2021] IECA 59.

52. The plaintiff further stated that the decisions in the *O’Doherty & Waters v. Minister for Health* case made it clear that proceedings raising constitutional issues should be at the end of any other process, litigious or otherwise, whereby all other options available to the aggrieved party had been exhausted.

53. The plaintiff further stated that the burden of proof to refute a plaintiff’s legitimate interest in bringing such plenary proceedings to challenge the constitutional validity of an act, would rest upon the defendant and would be a heavy imperative, if

only to justify why a person might be denied their right to a day in court to argue a matter. In summary, the plaintiff stated that he had initiated the right type of proceedings to agitate a constitutional matter; he had exhausted all other prior options; he had an interest in the matter and he was the best person to raise the constitutional challenge to the 2016 Act. The plaintiff went on to argue that because he had brought judicial review proceedings in relation to both the Balscadden Road permission and the Techcrete site permission, that gave him a sufficient interest to challenge the constitutional validity of the 2016 Act.

54. The plaintiff denied that he was mounting a collateral attack on the two decisions issued by the fifth defendant. However, at para. 29 of his affidavit he stated that as compensation was not a relief sought by him, the only other logical relief was that the decision of the Board as contested by him in both the Techcrete judicial review and herein, should not have effect. In this case it meant that the proposed building should not happen. He went on to state that there was no statutory prohibition on using a constitutional argument to stop a building project, because obviously such statute would automatically be unconstitutional. He went on to state as follows at para. 31: -

“Therefore, having excavated a bit further into the matter than my opponents have to date, I think I have established that in seeking to stop the building project at the Techcrete site from proceeding, I am merely properly applying the next step in a process which started with a planning application, progressed properly to a statutory judicial review and has now progressed properly to constitutionality; therefore I am not falling foul of a Henderson claim or engaging in collateral attack.”

55. The plaintiff asserted that the State defendants had a case to answer in relation to the constitutional validity of the statute. He stated that the Board also had a case to answer, because he had made it clear to them at the time that he had lodged his objection to Techcrete site application, that he would be challenging the constitutionality of the 2016 Act. He stated that in those circumstances the Board should not have proceeded with their decision in relation to the Techcrete site, which was germane to the Techcrete judicial review, until the constitutionality of the fast tracked planning law had been settled. He stated that in his objection, which he had lodged to the planning application in relation to the Techcrete site, he had put the Board on notice of his intention to challenge the constitutionality of the 2016 Act. The plaintiff went on to deal with a number of ancillary matters that need not be set out at this stage.

56. The plaintiff swore a second affidavit on 25th May, 2022. He swore that affidavit for the purpose of putting certain further documentation before the court. In particular, he made the point that judicial review was not the proper avenue to raise the constitutionality of a statute. He stated that his conduct of the litigation to date did not fall foul of the rule in *Henderson v. Henderson*. He stated that the position of Barniville J. was instructive in how he took his overall position to the litigation. He exhibited the orders of Barniville J. in his 2018 proceedings. The plaintiff also exhibited the objection that he had lodged with the fifth defendant in relation to the planning application concerning the Techcrete site. In that objection he had explicitly referred to the issue of his challenge to the constitutionality of the 2016 Act and the orders made by Barniville J.

57. The plaintiff also exhibited an affidavit sworn by him on 19th July, 2018 in the proceedings that he had brought against Glenkerrin Homes in receivership, Michael

McAteer and Paul McCann. The significance of this affidavit will be referred to later in the judgment.

Discussion.

58. It will be helpful to set out certain legal principles that are applicable to the consideration of the issues that arise on the applications brought by the defendants. Firstly, the jurisdiction of the court to strike out proceedings arises under two headings; under O.19, r.28, the court has the power to strike out proceedings which are shown by the pleadings to be frivolous or vexatious. In *Barry v. Buckley* [1981] IR 306, it was held that the court can only make an order under this rule when a pleading discloses no reasonable cause of action on its face.

59. The court also has an inherent jurisdiction to strike out proceedings that are deemed to be frivolous or vexatious, or if it is clear that the plaintiff's claim must fail. The jurisdiction of the court under its inherent jurisdiction is wider than that enjoyed by it under O.19, r.28; the court is not limited to a consideration of the pleadings, but is free to hear evidence on affidavit relating to the issues in the case. The jurisdiction exists to ensure that an abuse of the process of the courts does not take place. In *Ewing v. Ireland and the Attorney General* [2013] IESC 44, it was held that the more radical power enjoyed by the court under its inherent jurisdiction should be used sparingly. A court must take the plaintiff's case at its highest and assume that all the relevant matters which are pleaded by a plaintiff, will be established by him. A court must also take into account that a situation may exist where a simple amendment of the pleadings could "save" the case.

60. The meaning of the words "frivolous and vexatious" have been considered in a number of cases. In *Farley v. Ireland* (Unreported Supreme Court, 1st May, 1997)

Barron J. stated that the words “frivolous and vexatious” are legal terms. They are not pejorative in any sense. It was merely a question of saying that insofar as the plaintiff was concerned, if he has no reasonable chance of succeeding, then the law says that it is frivolous to bring the case. Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious.

61. In *Fox v. McDonald* [2017] IECA 189, Irvine J. (as she then was) stated as follows at para. 20: -

“The word “frivolous” when used in the context of O. 19 r, 28 is usually deployed to describe proceedings which the court feels compelled to terminate because their continued existence cannot be justified having regard to the relevant circumstances: see Nowak v. Data Protection Commissioner [2012] IEHC 449, [2013] 1 I.L.R.M. 207, 211, per Birmingham J. Proceedings which are regularly struck out as “frivolous” or “vexatious” are proceedings clearly destined to cause irrevocable damage to a defendant, such as where a defendant is asked to defend the same claim for a second time or where a plaintiff seeks to avail of the scarce resources of the courts to hear a claim which has no prospect of success. This is the context in which these words are used in this judgment.”

62. Those are the legal parameters within which the jurisdiction of the court to strike out proceedings must be exercised.

63. Turning to consider the substantive legal issues that are raised in these applications, the first of these is s.50 of the Planning and Development Act 2000 (as amended). Section 50(2)(a) of that Act provides, *inter alia*, that a person shall not question the validity of any decision made or other act done by a planning authority, a local authority, or An Bord Pleanála, in the purported performance of a function under

the 2000 Act, otherwise than by way of an application for judicial review under O.84 of the Rules of the Superior Courts. Thus s.50(2)(a) imposes a strict requirement of procedural exclusivity, such that a decision to which this section applies, can only be challenged by way of judicial review proceedings and may not be impugned or challenged in any way in other proceedings. The effect of the phrase “*shall not question the validity of*”, is that the collateral challenging or questioning of the Board’s decision in other types of proceedings, will not be permitted. The decisions made by the fifth defendant in respect of the Balcadden Road permission and the Techcrete site permission, were decisions which come within s.50 of the 2000 Act.

64. There are also very strict time limits provided for the bringing of a challenge to such decisions by way of judicial review. This is provided for in s.50(7), which provides that such proceedings must be brought within eight weeks of the making of the decision. The rationale for s.50 and in particular, the rationale behind prohibiting challenges against decisions when the relevant time limit for challenging them had elapsed, was set out by Clarke C.J. in *Sweetman v. An Bord Pleanála* [2018] IESC 1 at para. 6.1: -

“In K.S.K. Enterprises Ltd. v. An Bord Pleanála [1994] 2 I.R. 128, Finlay C.J. noted (at p. 135) the rationale behind prohibiting challenges against decisions where the relevant time limit for challenging the decision has elapsed:-

“From these provisions, it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against

subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision.””

65. In the present case, it is significant that the eighth defendant has already spent €6.2m on works to the Techcrete site. They propose to spend circa. €170m on the overall development. The eighth defendant is firmly within the class of developer who are intended to be protected from challenges that are brought outside the time limit provided for in s.50 of the 2000 Act.

66. An allied principle that must be applied in conjunction with the provisions of s.50, is the principle that the courts will not allow a collateral attack on decisions that have already been the subject of challenge and determination before the courts, or where such decisions have effectively become immune from challenge due to the efflux of the period within which they may be challenged.

67. In *Sweetman v. An Bord Pleanála*, Clarke C.J. stated that when considering whether there is a collateral challenge mounted to an earlier decision by the means of instituting subsequent proceedings ostensibly aimed at a different target, one had to look at the substance of the proceedings, rather than their form. In particular, one must look at the relief that is actually sought to be obtained as a result of the second set of proceedings. The learned judge stated as follows at para. 6.3: -

“The substance-over-form approach set out by Kelly J. in Goonery was applied by Smyth J. in Lennon v. Cork City Council [2006] IEHC 438, which concerned an attempt indirectly to invalidate an earlier decision of a planning authority, by challenging a second, later direction made by the authority. With regard to the question of identifying such an indirect attack, Smyth J. stated:-

“It is well established that in considering whether proceedings ‘question the validity of a decision of a planning authority on an application for grant of

permission’, one must look at the substance of the relief sought in the proceedings. The fact that a formal order of certiorari is not sought does not necessarily indicate that the validity of the decision is not being questioned.””

68. The rationale behind the rule which prevents the mounting of such collateral attacks on earlier proceedings, was set out by Clarke CJ. at paras. 7.1 and 7.2: -

“7.1 The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or other similar decisions.

7.2 The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like.”

69. The dicta of Clarke C.J. in the *Sweetman* case were endorsed by the Court of Appeal in *Narconon Trust v. An Bord Pleanála* [2021] IECA 307; see in particular paras. 45-47 of the judgment of Costello J.

70. Of particular relevance to the circumstances of this case is the decision of the Supreme Court in *Nawaz v. Minister for Justice Equality and Law Reform* [2013] 1 IR 142. That case concerned s.5 of the Illegal Immigrants (Trafficking) Act 2000, which had provisions very similar to those of s.50 of the 2000 Act. Section 5 of the Illegal

Immigrants (Trafficking) Act 2000 provided that a person shall not question the validity of a deportation order under s.3(1) of the Immigration Act 1999 otherwise than by way of an application for judicial review under O.84 of the Rules of the Superior Courts. The applicant in that case instituted plenary proceedings, in which he asserted that the regime of the 1999 Act was inconsistent with the Constitution in failing to provide him with an opportunity to leave the State voluntarily, in the event that his application for humanitarian leave to remain was denied. The first respondent contended that the substance of the applicant's constitutional challenge amounted to a collateral attack on the deportation process in his case, so that there was an obligation on him to comply with the procedural requirements of s.5 of the Act of 2000 and seek his reliefs by way of judicial review.

71. The Supreme Court held that a constitutional challenge which had as its natural and intended consequence the rendering invalid of a measure set out in s.5 of the Act of 2000, either as already adopted, or to be adopted, was caught by that section and so could not validly be brought by plenary summons. The court further held that the question of whether s.5 of the Act of 2000 was engaged was one to be looked at as a matter of substance, rather than as a matter of form. The question to be asked was whether, if the relief was granted, it would amount to a determination to the effect that a particular type of measure specified in the section was invalid.

72. The court further held that the statutory purpose of s.5 of the Act of 2000, and its equivalent provisions in planning legislation, was to ensure that there was a timely and complete determination of any issues of any sort which might have as their effect the invalidity of one of the types of measures specified in the legislation in question.

73. The court further held that where a judicial review was brought under s.5 of the Act of 2000, and where a constitutional issue was raised, the court could direct in

an appropriate case and in accordance with O.84, r.22(1), that the formal application for judicial review be made by plenary summons rather than by the default method of an application by notice of motion.

74. In the course of his judgment, Clarke J. (as he then was) stated that while the normal procedure is that constitutional issues are raised by means of plenary proceedings, such issues can be raised in judicial review proceedings where that form of proceeding is mandated as the only way to challenge a particular decision. He stated as follows at paras. 47 and 48: -

“47. I should, however, also record my agreement with the views expressed by Barrington J. in Riordan v. An Taoiseach (No. 2) [1999] 4 I.R. 343. In the absence of statutory provision to the contrary, the normal procedure by which a case, in which the primary relief claimed concerns a declaration of invalidity of an Act having regard to the Constitution, should be brought is by plenary proceedings rather than judicial review. However, as was pointed out by Barrington J. in the passage from the judgment in Riordan v. An Taoiseach (No. 2) already cited, there is no rigid rule to that effect. In any event any such practice would have to yield to a contrary statutory requirement.

48. It is important to emphasise that s. 5 of the Act of 2000 clearly contemplates the possibility that challenges to the constitutionality of statutes in the immigration field may be required to be brought by judicial review proceedings. Section 5(3) of the Act of 2000, which limits the power of a party to appeal from the High Court to this court save on a certificate from the High Court, contains an express exclusion in s. 5(3)(b) so that any question as to the validity of any law having regard to the provisions of the Constitution may

be raised as of right on an appeal. As was noted by the trial judge, the section, therefore, clearly contemplates the inclusion of constitutional challenges within judicial review proceedings. As has already been noted there is no express reference to a constitutional challenge to any particular measure in the list of matters whose validity cannot be questioned under s. 5 save by judicial review. Nonetheless the section as a whole clearly contemplates that questions of constitutional validity can arise in proceedings to which the section applies. It clearly follows that the intention of the legislature was that a constitutional challenge, which would have the effect of questioning the validity of one of the listed measures, would itself be caught by s. 5. Otherwise there would be no point in s. 5(3)(b).”

75. While the *Nawaz* case dealt with a different area of law, the similarity of the provisions under s.5 of the Illegal Immigrants (Trafficking) Act 2000 and the provisions of s.50 of the Planning and Development Act 2000 (as amended), are so striking that the decision in that case is highly relevant to the issues that the court must determine on this application.

76. Also relevant to the issues that arise in these applications, is the rule in *Henderson v. Henderson* [1843] 3 Hare 100, where Wigram VC stated as follows at p.115: -

“I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward the whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in

contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.”

77. In *AA v. The Medical Council* [2003] 4 IR 302, Hardiman J. accepted the approach of Bingham L.J. in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1, where he stated that it would be wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in a later proceeding necessarily abusive. He stated that that would be to adopt too dogmatic an approach to what should be a broad merit-based judgment, which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue, which could have been raised before. As one could not comprehensively list all possible forms of abuse, so one could not formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

78. In *Arklow Holidays Limited v. An Bord Pleanála* [2012] 2 IR 99, Finnegan J. noted that the rule in *Henderson v. Henderson* had been applied in the public law area as well as in the area of private law. He stated that it was understandable that it should be applicable in the public law area. It was not just individuals who must be protected from a multiplicity of suits.

79. He stated that given that the general public were affected by the scheme of development in question, which concerned infrastructure for the town of Arklow, which had been seriously delayed notwithstanding its significance to the development of the town and to the citizens for whose benefit the scheme was intended; the rule in *Henderson v. Henderson* it seemed to him must apply with even more force than was the case in *AA v. The Medical Council*. For those reasons he was satisfied that there was no requirement to take a different view of the application of the rule in *Henderson v. Henderson* in public law planning cases. He went on to state as follows at para. 51: -

“There are public policy considerations for the application of the rule in Henderson v. Henderson (1843) 3 Hare 100 in the area of public law which I have already identified. The protection not just of individuals but also public bodies from a vexatious multiplication of suits and the desirability that there should be finality to litigation are two. Efficient and economic use of court time is a third. Relevant in the present case, however, is that it has long been a concern of the legislature that infrastructural projects can be greatly delayed by the planning and related processes and litigation arising therefrom. This has resulted in legislative attempts to ensure that challenges to such projects are dealt with promptly by the courts: see s. 50 of the Act of 2000, as amended by the Acts of 2002, 2006 and 2010. The policy of the legislature would be undermined if issues which could be raised at the first stage of the two stage process were not in fact raised but were litigated piecemeal thereafter.”

80. Finnegan J. went on to note that there could be special circumstances that exist in any given case which may require the non-application of the rule in *Henderson v.*

Henderson. However, he stated that from the cases, it was clear that negligence or inadvertence or accident would not necessarily excuse non-compliance with the rule. It was not possible to attempt to define what may amount to a special circumstance and each case must be considered on its facts and circumstances. Also relevant in deciding whether to excuse non-compliance with a duty to bring forward the whole of one's case, was prejudice suffered by the defendant or respondent. In public law litigation, prejudice to the wider public may also be relevant.

81. An example of where the rule in *Henderson v. Henderson* was not applied, arose in *SM v. Ireland* [2007] 3 IR 283. In that case there were a number of features which took the case out of the normal operation of the rule. While the plaintiff had previously challenged his criminal prosecution for offences of indecent assault on a number of complainants contrary to s.62 of the Offences Against the Person Act 1861, on the grounds of delay, which application had been refused; the court held that he was not prevented by the rule in *Henderson v. Henderson* from subsequently raising an issue as to the constitutional validity of s.62 of the 1861 Act. That was due to a number of factors: the defendants had delayed in seeking to have the proceedings struck out for breach of the rule, until two weeks prior to the commencement date for the plaintiff's trial; additional charges had been laid against him subsequent to the hearing of his judicial review proceedings, meaning that he could not have challenged the constitutional validity of the section in relation to those charges, as they had not been laid at the time of his earlier proceedings. The court held that the plaintiff's proceedings raised a discreet constitutional point, which could not sensibly have been raised as part of the earlier judicial review proceedings.

82. The final legal issue which arises in the context of these applications concerns the issue of *locus standi* to bring the proceedings to challenge the constitutional

validity of legislation. It was submitted on behalf of the State defendants that if the plaintiff was prevented from raising any issues in relation to the substantive decisions of the fifth defendant, having regard to the provisions of s.50 of the 2000 Act, or the rule against collateral challenges, or under the rule in *Henderson v. Henderson*; he could not mount a freestanding challenge to the 2016 Act, as he would not have *locus standi* to challenge the constitutional validity of that act.

83. The law in relation to *locus standi* to bring a challenge to the constitutional validity of legislation was considered in *Cahill v. Sutton* [1980] IR 269. The principles set down in that case were endorsed in the decision of the Supreme Court in *Mohan v. Ireland* [2019] IESC 18, where O’Donnell J. (as he then was) made it clear that in order to mount a constitutional challenge to a piece of legislation, the plaintiff must have an interest that either is, or may be, adversely affected by the challenged piece of legislation. While the word “interest” was wider than having a right that may be affected by the challenged legislation, it still required that the person had to have a tangible interest that would be affected by the operation of the legislation. There was no provision for an *actio popularis* in Irish law. The learned judge stated as follows at paras. 11 and 12:

“11. The decision in Cahill v. Sutton [1980] I.R. 269 contains an important discussion on the justification for a rule of locus standi (and, indeed, for the other prudential limitations on claims challenging the validity of legislation by reference to the Constitution). Standing is not, as a general rule, established by a simple desire to challenge legislation, no matter how strongly the putative claimant believes the provision to be repugnant to the Constitution. It is now clear that there is no actio popularis (a right on the part of a citizen to challenge the validity of legislation without showing any effect upon him or

her, or any greater interest than that of being a citizen) in Irish constitutional law, although, of course, some jurisdictions do permit such claims. Rather, in Irish law, it is necessary to show some adverse effect on the plaintiff either actual or anticipated. Part of the rationale for this rule is discussed in Cahill v. Sutton. Public general legislation exists because a majority of the members of the Oireachtas considered, at some stage, that the legislation was in the public interest. The particular provision challenged may indeed still operate entirely beneficially and helpfully for the great majority of cases. If such a provision is invalidated, it is, in principle, of no effect in law and the area is left unregulated, with the result that citizens may be deprived of the benefit of the provision. The invalidity of legislation is therefore a very significant disruption of the legal order which operates in a blunt and, essentially, negative way. It simply removes a law or an aspect of the law, can put nothing in its place, and yet can throw into question transactions taken on foot of the provision. As Henchy J. in the High Court put it more than a decade earlier in State (Woods) v. Attorney General [1969] I.R. 385, at p. 399:- “It unmakes what was put forth as a law by the legislature but, unlike the legislature, it cannot enact a law in its place. It is clear that if this power, which may seem abrogative and quasi-legislative, were used indiscriminately it would tend to upset the structure of government.”

12. The step of permitting a challenge to the constitutional validity of a piece of legislation should not, therefore, be taken lightly, simply because someone wishes, however genuinely, to have the question determined, but rather should only be taken when a person can show that they are adversely affected in reality. Courts do not exist to operate as a committee of wise citizens

providing a generalised review of the validity of legislation as it is enacted, nor should courts become a forum for those who have simply lost the political argument in the legislature to seek a replay of the argument in the courts, repackaged in constitutional terms. On the contrary, the question of the validity of legislation is treated by Article 34.3.2° as part of the jurisdiction of the Superior Courts only, established under Article 34.1, whose function it is to administer justice between the parties. This normally requires a real case or controversy which the parties require (rather than simply desire) to be resolved in order to establish and justify the court's exercise of jurisdiction, and the possibility of the invalidation of legislation. Accordingly, it is necessary to show adverse effect, or imminent adverse effect upon the interests of a real plaintiff. This has the further benefit, as Henchy J. observed in Cahill v. Sutton [1980] I.R. 269, at p. 282, that:- "normally the controversy will rest on facts which are referable primarily and specifically to the challenger, thus giving concreteness and first-hand reality to what must otherwise be an abstract or hypothetical legal argument".

84. That is a brief statement of the general legal principles that have to be applied by this Court when considering the applications brought by the defendants herein.

Conclusions

85. Having considered the submissions of the parties and the factual background in which these applications are brought and having regard to the legal principles outlined above, the court is satisfied that each of the moving parties are entitled to an order that the proceedings be struck out against them.

86. The court has reached that conclusion for the following reasons: Firstly, the court accepts the submission made on behalf of the defendants that the Balscadden Road permission is no longer extant, it having been quashed by order of the High Court perfected on 17th May, 2021. Accordingly, insofar as the within proceedings seek to set aside that decision and to have the matter remitted to some unidentified body for reconsideration, they are an abuse of the process of the court. That part of the pleadings must be struck out.

87. The court is further satisfied that the proceedings herein constitute a collateral attack on the two decisions granting permission for the developments which had been made by the fifth defendant. That these proceedings concern an attack on those two permissions, is made clear by the reliefs sought in the statement of claim. Those reliefs have been summarised *in extenso* earlier in the judgment. It is not necessary to repeat them here. It is also clear from the content of the affidavit sworn by the plaintiff that the within proceedings constitute a collateral attack on the Balscadden Road permission and more particularly, on the Techcrete site permission. While the proceedings may ostensibly be couched in the terms of a constitutional challenge to the provisions of the 2016 Act, it is clear that some, if not all, of the reliefs sought by the plaintiff concern the quashing of those decisions.

88. The court is satisfied that having regard to the principles laid down in *Sweetman v. An Bord Pleanála*; *Narconon Trust v. An Bord Pleanála* and *Nawaz v. Minister for Justice Equality and Law Reform*, that it is not possible for the plaintiff to attempt in these proceedings to achieve the result of setting aside the Techcrete site permission, when Hyland J. has already determined that permission as valid, in the s.50 judicial review proceedings brought by the plaintiff.

89. Section 50 of the 2000 Act, makes it clear that permissions coming within the terms of that section, can only be challenged by means of judicial review proceedings brought within the time limit provided for in that section. The plaintiff availed of that remedy, but was unsuccessful in obtaining the relief that he wanted in relation to the Techcrete site permission. To allow the present proceedings to continue, in breach of the terms of s.50 of the 2000 Act, would constitute a flagrant abuse of the court's process. Having regard to the clear and explicit provisions of s.50 of the 2000 Act, it is clear that the within proceedings are bound to fail. For this reason as well, the proceedings must be struck out against the defendants.

90. The court is satisfied that having regard to the provisions of s.50 of the 2000 Act, the plaintiff's action herein is not maintainable. Furthermore, the court is satisfied that the present action constitutes an impermissible collateral attack on those permissions. For these reasons, the court is satisfied that the within proceedings are frivolous and vexatious, within the legal meaning of those terms and accordingly the court has jurisdiction both under O.19, r.28 and under its inherent jurisdiction to strike out the proceedings and will do so.

91. The present proceedings also fall foul of the rule in *Henderson v. Henderson*. The plaintiff had initiated judicial review proceedings within time, challenging the two decisions to grant planning permission. He deliberately chose not to include his challenge to the constitutional validity of the 2016 Act in those proceedings, notwithstanding that he was aware of the rule in *Henderson v. Henderson*.

92. His awareness of the rule in *Henderson v. Henderson* is clearly demonstrated by the following: in the plaintiff's replying affidavit of 25th May, 2022, he exhibited an affidavit that he had sworn on 19th July, 2018 in proceedings that he had brought against Glenkerrin Homes (In Receivership), Michael McAteer and Paul McCann. In

the course of that affidavit, he pleaded the rule in *Henderson v. Henderson* against the opposing parties to that action. He stated as follows at para. 4 in relation to an earlier order made by Barrett J. in the proceedings: -

“Nevertheless I cited herein for good order and finality, and also because I believe that Barrett J. should not have granted the aforesaid application of my opponents because they delayed in bringing same application and, furthermore, because they could have brought same application earlier than they did (thereby falling foul of the Henderson principle). Good order and, again, finality dictate that parties who bring late applications which change the fundamental nature or justiciability of a case should be prevented from so doing (let alone being allowed to succeed as did happen herein) unless a very grave injustice is at risk – and nobody has argued any such thing in the case herein.”

93. Secondly, in the course of the hearing before Hyland J. on 2nd October, 2020, in his judicial review challenge to the Techcrete site permission, the plaintiff stated as follows: -

“Oh I know Henderson and Henderson is kind of the great antidote to abusive lay litigants. Henderson is the, you know, the kryptonite to abusive lay litigants, it’s a very important principle and it’s the principle of res judicata and, you know, its something that I’m very, very mindful of as a litigant in person. Res judicata is probably one of the most difficult principles or difficult maxims to get around if you want to litigate something again. It protects people from collateral attack, it protects people from being prosecuted ad nauseum, you know, res judicata is a very, very important principle.... It really keeps the system, it’s – without res judicata we wouldn’t have, we wouldn’t

have a courts system without res judicata so I am very, very respectful of the rectitude of res judicata and how it applies. It doesn't apply here because as we know, I'm not challenging the constitutionality of the statute... I can't, I shall not. And when I went in front of Judge McDonald seeking leave in this case, if I had attempted in my grounds to bring a constitutional matter, Judge McDonald I think would have had no option but to disallow it."

94. From the foregoing, the court is satisfied that the plaintiff was aware of the rule in *Henderson v. Henderson*. That rule mandated that the plaintiff had to include all his grounds of challenge to the impugned decisions in the one set of proceedings. In short, he could have included his constitutional challenge to the 2016 Act in his earlier judicial review proceedings and he should have done so; but he did not. He cannot now seek to ventilate an issue that he could have raised and ought to have raised, in his earlier proceedings.

95. The fact that the State defendants were not parties to the previous judicial review proceedings, does not prevent the rule in *Henderson v. Henderson* operating in this case. The plaintiff ought to have raised his constitutional challenge to the 2016 Act in the judicial review proceedings, which, had he done so, would have mandated the joinder of the Attorney General to those proceedings. Accordingly, the lack of identity of parties between the two proceedings does not prevent the rule from operating in this case.

96. The rule in *Henderson v. Henderson* is not an absolute rule. The court must have regard to the all the circumstances in the case. The court is satisfied that having regard to the expenditure on the site incurred by the eighth defendant to date, as set out in Mr. Crean's second affidavit, this weighs heavily in favour of the rule being applied.

97. In answer to the assertion that the proceedings herein fell foul of the rule in *Henderson v. Henderson*, the plaintiff argued that he could not have brought his constitutional challenge against the 2016 Act in his judicial review proceedings. In this regard he relied on the revised order of Barniville J., as quoted earlier in this judgment. The plaintiff also relied on the decisions of Meenan J. in the High Court and Birmingham P. in the Court of Appeal in *O'Doherty and Waters v. Minister for Health & Ors.* [2020] IEHC 209 and [2021] IECA 59, as support for the proposition that one cannot challenge the constitutional validity of legislation in judicial review proceedings.

98. The court is satisfied that the plaintiff's submissions in this regard are not a correct statement of the law. As was made clear in the *Nawaz* case, not only is it permissible to raise constitutional issues in judicial review proceedings, but it is mandated that such constitutional challenge should be included in any judicial review proceedings brought pursuant to s.5 of the Illegal Immigrants (Trafficking) Act 2000. The reasoning in that case applies *mutatis mutandis* to proceedings brought pursuant to s.50 of the 2000 Act.

99. Furthermore, the court is satisfied that the plaintiff's interpretation of the judgments of Meenan J. and Birmingham P. respectively in the *O'Donnell and Waters v. Minister for Health* case, is not correct. In the course of his judgment in the High Court, Meenan J. accepted the submissions made by counsel on behalf of the respondents that proceedings which sought a freestanding challenge to the constitutional validity of legislation, should be brought by plenary proceedings. However, Meenan J. went on to state that were he to reach the conclusion that the applicants had established an arguable case on the constitutional grounds, the correct course for him to take would have been to order that the proceedings continue as if

they had been begun by plenary summons. However, Meenan J. went on to hold that the constitutional challenge raised by the applicants in that case was not stateable.

100. In his judgment in the Court of Appeal, Birmingham P. noted that while the judge had accepted the submission made on behalf of the respondents, that the challenge to the constitutional validity of the impugned legislation should have been brought by plenary proceedings, that was not the end of the matter, as the High Court judge had taken the view that had he reached the conclusion that the applicants had established an arguable case on the constitutional challenge, that the correct course of action for him to have taken in those circumstances, would have been to order that the proceedings were to continue as if they had been begun by plenary summons.

Birmingham P. went on to state that he was of the view that the High Court judge was clearly correct in that regard.

101. Since the hearing of the applications in this case, the Supreme Court delivered its decision in the *O'Doherty and Waters v. Minister for Health* case on 5th July, 2022; [2022] IESC 32. The court considered the issue as to whether one could challenge the constitutional validity of an act by means of judicial review proceedings. They held that such a challenge was possible where one was also challenging acts or measures that had been taken pursuant to the impugned legislation, which directly affected the plaintiff. While the Supreme Court disagreed with the initial view taken by Meenan J. that proceeding by way of judicial review proceedings in that case was not appropriate; the Supreme Court held that due to the fact that the plaintiffs had challenged specific regulations made pursuant to the impugned legislation, it was appropriate to proceed by way of judicial review; however they noted that Meenan J. had gone on to state that had he been of the view that their constitutional argument had an arguable basis, he would have allowed the proceedings to continue as if started

by plenary summons: see paras. 34-38. Thus, the decision of the Supreme Court does not materially alter the decisions that had been reached by Meenan J. and Birmingham P. on this aspect.

102. The court is satisfied that the correct legal position in relation to constitutional challenges to legislation, is that if one has *locus standi* and if one is challenging the constitutional validity of an act simpliciter, rather than a decision taken, or an act done pursuant to a piece of legislation, then one should proceed by way of plenary action. If one is challenging a particular act, or decision, *inter alia* on the basis that the statutory provision which provides for such act or decision is repugnant to the Constitution, such challenge can be brought by way of judicial review proceedings.

103. The *Nawaz* case makes it clear that a challenge in circumstances where it is mandated by statute that the challenge be brought by way of judicial review proceedings, can include a challenge to the constitutional validity of the underlying act as well as to the impugned decision.

104. This is supported by the fact that s.50A(7) of the 2000 Act, provides that the determination of the court on an application for leave to proceed by way of judicial review pursuant to s.50, is final, unless the court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that there should be an appeal. This means that the right of appeal is curtailed, insofar as it is only permissible if the applicant obtains a certificate from the court giving him leave to appeal. However, sub-s. (8) provides that sub-s. (7) shall not apply to a decision of the court in relation to the validity of any law having regard to the provisions of the Constitution. This clearly shows that the constitutional validity of a law can be raised in the context of a s.50 judicial review application.

105. The plaintiff also relied on the content of the revised order of Barniville J. in his 2018 proceedings. That order was not at odds with the general proposition that it is possible to raise constitutional issues in the context of a s.50 judicial review proceedings. In his 2018 proceedings, the plaintiff was mounting a standalone challenge to the constitutional validity of the 2016 Act. His proceedings were not connected to any particular decision taken by the fifth defendant under the 2016 Act. In these circumstances, Barniville J. was correct to point out that such a challenge had to be brought by plenary proceedings.

106. The plaintiff knew that he could proceed by way of plenary proceedings as of 1st February, 2019, when the revised order was perfected; yet he did not proceed to issue any plenary proceedings challenging the validity of the 2016 Act. In effect, he chose to do nothing.

107. It was not until the decisions to grant planning permission were given in March and April 2020, that the plaintiff instituted his judicial review proceedings challenging the validity of these decisions on various grounds. He chose not to include any challenge to the constitutional validity of the 2016 Act. He made a deliberate choice to hold his hand in that regard. That is something that he was not entitled to do. He should have included all his claims in relation to a particular matter in the one set of proceedings.

108. The plaintiff submitted that it is an established principle of Irish law that constitutional issues will only be determined if it is necessary to do so, if other issues do not dispose of the matter before the court. While that may be correct as a general proposition of procedural practice, it does not mean that one can hold off pleading a constitutional point and await the outcome of other points of challenge, before instituting proceedings to challenge the constitutional validity of an act.

109. What that principle means is that where one has raised a number of issues in relation to a particular dispute, some of which may involve the constitutional validity of legislation, the court will decide the other issues first and if they do not dispose of the matter in its entirety, then they will proceed to decide the constitutional issues.

110. The plaintiff may have been under the mistaken belief that this principle of procedure, meant that he could pursue other avenues of redress, prior to instituting his constitutional challenge. The fact that he may have made a mistake in that regard, cannot afford him a valid excuse for not including his constitutional challenge to the 2016 Act in his earlier judicial review proceedings. Nor does it constitute a valid reason why the rule in *Henderson v. Henderson* should not apply.

111. From some of the plaintiff's statements made in the course of the proceedings, it seems that he may have been under the mistaken impression that he had to exhaust other avenues of challenge to the legislation, before he could mount his constitutional challenge. He may have thought that the position was similar to that which applies to bringing a case before the European Court of Human Rights, which can only be done when one has exhausted all available domestic remedies. If he laboured under that impression in relation to bringing a constitutional challenge before the High Court, he was mistaken. His mistakes in relation to the procedure which should have been adopted, cannot give him a right to bring proceedings that are unsustainable at law.

112. The Rules of the Superior Courts and the rules of procedure that have been developed at common law, have largely been designed to promote efficiency and fairness in the conduct of litigation. It is well settled that litigants who have chosen to represent themselves, are bound by these rules in the same way as parties who have legal representation.

113. In *Reidy v. An Bord Pleanála* [2020] IEHC 423, this Court stated as follows at para. 45: -

“Finally, it is well settled at Irish law, that while the courts will allow some leeway due to the fact that an applicant, or a respondent, may be acting in the proceedings as a lay litigant, the fact that they are so doing, does not mean that they are not bound by the same rules and procedures as other litigants who come before the courts, albeit with legal representation; see Burke v. O’Halloran [2009] 3 I.R. 809; ACC Bank v. Kelly [2011] IEHC 7; Knowles v. Governor of Limerick Prison [2016] IEHC 33 and O’Neill v. Celtic Residential Irish Securitisation plc, No. 9 & Ors [2020] IEHC 334.”

114. For the reasons set out above, the court holds that the plaintiff is bound by the rule in *Henderson v. Henderson*, like all other litigants. He ought to have raised his constitutional challenge to the 2016 Act in his previous judicial review proceedings challenging the two decisions taken under that Act. As he did not do so, he cannot now revive that ground of challenge in these proceedings.

115. Turning to the point raised by the State defendants, the court accepts the submission that, as the plaintiff cannot challenge the impugned decisions due to these proceedings being a collateral attack on a decision that has already been found to be valid in s.50 judicial review proceedings; then if one removes the impugned decisions from the equation, the plaintiff lacks *locus standi* to challenge the constitutional validity of the 2016 Act.

116. If one ignores the two impugned decisions, the plaintiff lacks the necessary interest to allow him mount a stateable challenge to the constitutional validity of the 2016 Act. As was stated in *Mohan v. Ireland*, Irish law does not have provision for an *actio popularis*. For the reasons set out in *Cahill v. Sutton*, as endorsed by the

Supreme Court in the *Mohan* case, a person seeking to challenge the constitutional validity of an act, must have some tangible interest that either has been, or is likely to be, adversely affected by the operation of the impugned legislation.

117. The plaintiff cannot point to any such interest in the absence of the impugned decisions. Accordingly, the court holds that in the circumstances, he lacks *locus standi* to challenge the constitutional validity of the 2016 Act in these proceedings.

118. While the plaintiff may have conflated the right of access to the courts with the right to conduct litigation to a conclusion, insofar as the plaintiff submitted that his right of access to the courts would be unlawfully frustrated if the defendants were to be successful in their applications herein, the plaintiff has misunderstood the nature of a person's right of access to the courts.

119. Such a right does not mean that a person has an absolute right to have every dispute they wish to litigate, proceed to a full hearing and determination before a court. What the right provides, is that every person has the right to institute legal proceedings in relation to their grievances. However, those proceedings may not reach a full hearing for a number of reasons: the proceedings may be struck out because they do not disclose a cause of action known to the law; they may be struck out as being out of time, having regard to a statutory time limit for challenging a decision or act, or as being statute barred under the Statute of Limitations; they may be struck out on grounds of delay or want of prosecution; the proceedings may be struck out against one or all of the defendants because they have no chance of success and are therefore deemed to be frivolous and vexatious and an abuse of the court's process. That is not an exhaustive list of the circumstances in which proceedings may not reach a full hearing.

120. The right of access to the courts means that a person, such as the plaintiff, may institute proceedings against a defendant, but those proceedings are subject to the normal rules of court and the rules of procedure as developed at common law.

121. The right of access to the courts does not guarantee a litigant a right to proceed to a full hearing on the substantive matters the subject matter of the proceedings. The proceedings, even if commenced by a lay litigant, may always be struck out, if the proper application of the rules of court and/or the rules of procedure, or the statutory rules applicable to a particular cause of action, so provide. In *Farrell v. Bank of Ireland* [2012] IESC 42, Clarke J. (as he then was) stated as follows at para. 4.7:

“It is clear, therefore, that there is a significant difference between a measure external to the administration of justice (such as the fiat of the attorney general formerly required to bring proceedings against a Minister) which affects the entitlement of a party to come to court at all and a decision made in the courts, as part of the administration of justice, to the effect that proceedings cannot progress, or cannot progress in a particular way. In the later circumstance the relevant party has had an opportunity to be heard by the court on the issue of how the proceedings are to progress. Such a party is not denied access to the court. If an adverse decision is made the party still has had access to the court even though the case may not proceed as that party might have wished.”

The learned judge went on in para. 4.8 to give a number of examples of where litigants’ proceedings had been lawfully terminated before reaching a full hearing on the substantive issues in the case.

Determination.

122. For all of the reasons set out herein, the court finds that the plaintiff's action against the first, second, fourth, fifth, seventh and eighth defendants, is bound to fail; is frivolous and vexatious in the legal sense and constitutes an abuse of the process of the court. Accordingly, the court directs that the proceedings herein be struck out against each of the moving party defendants.

123. As this judgment is being delivered electronically, the parties will have six weeks within which to file brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

124. The matter will be relisted before the court at 10:30 hours on 6th October, 2022, for a brief hearing, which will be held remotely, for the purpose of finalising the orders in each motion.

125. As requested by the plaintiff, the court will include in its final order a direction that each of the parties have liberty to take up a copy of the DAR, at their own expense, if they wish to do so.