[2019] IEHC 717

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 558 J.R.

BETWEEN

EDWARD MCDONAGH

APPLICANT

AND

GALWAY COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 1 November 2019

INTRODUCTION

1. This judgment is delivered in respect of a claim for damages arising out of the destruction by Galway County Council of a horse owned by the Applicant. This is the second judgment to be delivered in the proceedings. It had been necessary to determine the question of whether the actions of the local authority were *ultra vires* first, before the claim for damages could be addressed. This court ruled that the destruction of the horse was unlawful in a judgment delivered on 10 May 2019, *McDonagh v. Galway County Council* [2019] IEHC 304 *("the principal judgment").* The proceedings were then adjourned for a short period to allow the parties to file written submissions on the claim for damages. Thereafter, evidence and oral submissions were tendered at a hearing on 26 June 2019.

2. Notwithstanding that it has been found to have acted unlawfully in destroying the horse, Galway County Council ("*Galway*") maintains the position that it is not liable to pay damages to the Applicant. Four broad arguments are advanced in support of this position. First, it is said that there are strong public policy considerations which militate against the imposition upon public authorities of liability to pay damages, lest it hamper them in the discharge of their functions. It is suggested that these public policy considerations are not confined to the tort of negligence but extend to *all* torts.

3. Secondly, it is said that the statutory powers under the Control of Horses Act 1996 are exercised for the benefit of the public at large, i.e. as opposed to being for the benefit of a particular class of person, such as horse owners.

4. Thirdly, attention is drawn to what Galway submits are procedural shortcomings inherent in judicial review proceedings which make such proceedings unsuitable for the determination of a claim for damages.

5. Finally, the Local Authority submits that the Applicant has not established ownership of the destroyed animal.

FACTUAL BACKGROUND

6. The factual background has been set out in detail in the principal judgment, and need not be repeated here. It is sufficient for present purposes to record that Galway seized the horse on 11 February 2018 and detained the animal for a number of weeks thereafter. Following on from an unlawful demand for payment of a sum of €3,129.68, and

notwithstanding the making of certain representations to the Applicant on 12 April 2018, Galway proceeded to destroy the horse on 13 April 2018.

STRUCTURE OF JUDGMENT

7. This judgment will be structured as follows. First, the question of whether the conduct of Galway County Council in destroying the horse gives rise to a liability in damages will be addressed. Secondly, in the event that this question is answered in the positive, the quantum of damages will then be assessed.

LIABILITY FOR *ULTRA VIRES* ACTION

8. It is well established that a finding that a public authority has acted *ultra vires* does not, without more, give rise to a liability on the part of the authority to pay damages. Rather, in order for a party affected by the unlawful action of a public authority to succeed in a claim for damages, they must establish that the *ultra vires* act constitutes a tort or entails a breach of statutory duty which sounds in damages.

9. In many instances, the party claiming damages will seek to assert that the public authority has been guilty of the tort of negligence. The present case is unusual in that the Applicant relies primarily upon the less well-known tort of trespass to goods. This tort consists of wrongful interference with the possession of chattels. I will return to discuss the ingredients of this tort at paragraph 39 *et seq*. below.

10. Counsel for Galway, Mr Stephen Dodd, BL, has made a careful submission to the effect that the same type of public policy considerations which restrict the application of the torts of negligence and misfeasance of public office extend to other torts, including, relevantly, the tort of trespass to goods.

11. In order to determine whether this submission is well founded, it is necessary first to examine the case law on public authority liability. Thereafter, the question of the extent, if any, to which the public policy considerations underlying this case law can be translated to the tort of trespass to goods will have to be considered.

12. The judgments of the Supreme Court in *Glencar Explorations plc v. Mayo County Council (No. 2)* [2001] IESC 64; [2002] 1 I.R. 84 ("*Glencar Explorations*") provide a useful starting point for this exercise. The proceedings concerned a claim for damages arising out of a policy adopted by Mayo County Council in its capacity as planning authority. More specifically, Mayo County Council had included as part of its statutory development plan a policy which purported to prohibit the carrying out of mineral development, i.e. mining, within an area of some 300 square miles. The practical effect of the policy had been that any mineral development proposed for the area would represent a material contravention of the development plan and permission would be refused on this basis.

13. This policy was held to be *ultra vires* by the High Court (Blayney J.). The applicant in the proceedings, a mining company, then pursued a claim for damages. This claim was dismissed by both the High Court (Kelly J.) and the Supreme Court.

14. The claim for damages had been predicated upon *inter alia* the tort of negligence. The Supreme Court dismissed the claim. Keane C.J., having carried out a comprehensive review of the case law, posited a test for negligence in the following terms.

> "[…] There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff […]".

15. Applying these principles to the facts of the case before him, Keane C.J. identified a number of aspects of the *ultra vires* act which militated against the imposition of liability on the planning authority. The planning authority, in making the development plan, had been performing a statutory function under the (then) planning legislation, the Local Government (Planning & Development) Act 1963. This statutory function was one exercisable by the planning authority for the benefit of the community as a whole, and not for the benefit of a defined category of persons to which the applicant belonged, i.e. developers. The circumstances were distinguishable from earlier case law where the courts had found that a *housing authority* might owe a duty of care to its tenants in surveying properties, e.g. *Siney v. Dublin Corporation* [1980] I.R. 400.

16. Thus, notwithstanding that it was "reasonably foreseeable" that a *de facto* prohibition on the grant of planning permission for mineral development would result in the developer suffering financial loss, there was no relationship of "proximity" between the developer and the planning authority which would render it "just and reasonable" to impose liability on the latter.

17. Keane C.J. also distinguished between damages in respect of "pure economic loss", and damages, by way of compensation, for injury to persons or damage to property. It was stated that damages for economic loss are normally not recoverable in tort. One exception to this is in the case of local authority tenants.

18. The nature of the public policy issues at play in determining whether a public authority should be liable under the tort of negligence have since been considered in more detail in *Cromane Seafoods Ltd. v. Minister for Agriculture, Fisheries and Food* [2016] IESC 6; [2017] 1 I.R. 119; [2016] 2 I.L.R.M. 81 ("*Cromane Seafoods*"). This case concerned a claim for damages arising out of the manner in which the Irish State had implemented a piece of EU environmental legislation, namely the Habitats Directive (Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora). In brief, the applicants contended that the method of implementation had resulted in their being precluded from carrying out the harvesting of mussels for an unnecessarily prolonged period of time. The "delay" was said to have arisen on account of an earlier failure on the

part of the Minister to carry out regular scientific surveys or monitoring which would have provided the necessary baseline data to allow the Minister to carry out a stage one screening exercise (and a stage two appropriate assessment if required) for the purposes of the Habitats Directive.

19. The majority of the Supreme Court held that the Minister was not liable to pay damages to the applicants. There are a number of strands to the majority judgments, one of which concerns the application of the tort of negligence to public authorities.

20. Giving one of the two majority judgments, MacMenamin J. cautioned against the dangers of imposing liability for operational negligence on public authorities as follows (at paragraph [3]).

> "[…] It requires little imagination to imagine circumstances where the threat, either in prospect, or in retrospect, of an operational negligence claim, might be such as to stifle any administrative action in an area of potential controversy. There is undoubtedly, a strong public interest in ensuring that a proper balance is struck between private and public rights and duties. However, there is perhaps an even stronger public interest in ensuring government actually functions for the general public good, and that administrators do not consider themselves impeded from making any decision for fear of being immersed in a morass of litigation. […]"

21. MacMenamin J. at later points in his judgment emphasised that the Minister, in seeking to implement the Habitats Directive and, in particular, in responding to a then recent judgment of the European Court of Justice (Case C 418/04*, Commission v. Ireland*) was acting on a matter of public interest where specific duties were vested in him and the State. The question of where national priorities lay, or who should receive resources, or where surveys should be carried out first, were all pre-eminently matters for the executive. The judgment also emphasised that the case did not concern the exercise of statutory duties, but rather Ministerial discretion exercised in a particularly difficult situation.

22. Charleton J., delivering the other majority judgment, stated as follows.

> "[…] With the introduction of operational negligence, certainty of law is dissolved and public decision making becomes subsidiary to the views of experts at several removes from the pressures of government. The law has not so developed. The rationale for excluding the exercise of discretionary powers is that where the statutory framework places the decision making power in the context of a choice between action on a particular issue, through the expenditure of funds that may also be needed elsewhere, or in the context of a choice between the allocation or resources insufficient to cover all needs, it is both a matter of policy and administrative choice. Further, it is also the reposing of trust by the legislature in administration and not in the litigation process. In that regard, administration should not have to look to prospective second guessing by the courts, as this would trammel the discretionary power conferred. Instead, in any area of governmental

> activity it would become possible to find an expert to say that a different policy might have enhanced any contended for benefit to litigants, or not taken same away and to construct, through operative negligence, a realm where a duty of care is inventively and artificially owed to all prospective beneficiaries of whatever allocation of resources may be made. [..]

23. The two majority judgments thus identify the rationale for not imposing an overly broad duty of care on public authorities. The rationale emphasises that a public authority should not be impeded from discharging its functions by fear of litigation, and that the courts should not "second guess" the exercise of discretion by public authorities. It is clear from the judgments, however, that this rationale is largely confined to actions by public authorities which involve the making of policy and/or the exercise of discretion. In particular, the making of decisions as to how the allocation of financial resources is to be prioritised is quintessentially a question of policy. The judgments also attached weight to the obligation on the Minister to ensure compliance with the requirements of EU law, in the form of the Habitats Directive.

PUBLIC POLICY CONSIDERATIONS AND CONTROL OF HORSES ACT

24. The rationale which underlies the case law discussed under the previous heading does not apply to the administrative action the subject-matter of the within proceedings, namely the discharge by a local authority of its statutory functions under the Control of Horses Act 1996, for the following reasons.

25. First, the very basis for the imposition of liability to pay damages for the unlawful action complained of, i.e. the destruction of the horse, is entirely different. The liability arises primarily as a result of the failure on the part of the local authority to comply with a condition precedent to the exercise of the statutory power of destruction, i.e. the requirement to serve a valid demand for payment of scheduled fees.

26. The Control of Horses Act 1996 has conferred upon local authorities an exceptional power, namely to destroy a horse owned by a third party without any obligation to pay statutory compensation. This power has been fairly characterised as "Draconian" by the High Court (Hedigan J.) in *Burke v. South Dublin County Council (No. 1)* [2013] IEHC 185. The Control of Horses Act 1996 and the Bye-Laws prescribe few enough constraints on the exercise of this power. One such constraint is that there must be a lawful demand for payment of outstanding charges before the power to destroy the animal can be exercised. On the facts of the present case, this requirement was not complied with. See paragraphs [48] to [54] of the principal judgment.

27. The imposition of liability for a procedural failure of this type does not involve the courts "second guessing" the making of a *policy* decision by a public authority or the exercise of a *discretion* in respect of the allocation of resources. Rather, the courts are simply ensuring that there is compliance with the requirements of the legislation.

28. Secondly, the imposition of a liability to pay damages in these limited circumstances cannot realistically be said to have a chilling effect on local authorities in the exercise of

their powers under the Control of Horses Act 1996. The concern articulated in *Cromane Seafoods* is that public officials would be impeded in making difficult policy decisions, involving the prioritisation of the allocation of financial resources, by fear of their decisions being challenged subsequently. By contrast, a local authority official who proposes to invoke the power to destroy a horse need only ensure that the minimal *procedural* requirements under the Act are complied with.

29. Thirdly, there is a direct causal link between the unlawful action complained of, i.e. the destruction of the horse, and the financial loss suffered by the owner. The unlawful action has resulted in immediate damage to property. This is to be distinguished from the facts of *Glencar Explorations and Cromane Seafoods*: the claim for damages in each of those cases was, in effect, for pure economic loss. This distinction is an important one. None of the concerns as to causation or remoteness discussed in those judgments are applicable to the destruction of a horse. Part of the rationale for limiting the extent of a public authority's liability to pay damages is the difficulty in delineating the scope of that liability. The ambit of public authority regulation of all aspects of modern society is now so extensive that most actions on the part of a public authority could be said to affect the interests of an enormous range of individuals. In particular, the imposition of regulatory controls on the carrying out of development works, such as those at issue in *Glencar Explorations and Cromane Seafoods*, is of such general application that the making of a policy decision has a significant ripple effect. For example, a development plan policy which promotes a particular type of development project in an area will have a knock-on effect for many other landowners. Whereas there will have been no physical damage to their property, that part of the land's open market value which reflects its development potential may, arguably, have been affected. The concepts of remoteness and causation allow for the placement of some limit on a public authority's liability.

30. The destruction of a horse falls at the other end of the spectrum. In contrast to the notional reduction in development potential of land, the property right at issue, i.e. the ownership of the horse, has been entirely extinguished. The justification for imposing liability for damages is stronger.

31. Finally, before leaving this topic, it is salutary to have regard to the following passages from Clarke J. (as he then was) in *Cromane Seafoods.*

> "[82] However, it does not seem to me to follow that every act or omission of a public authority which takes place in the course of the exercise of public power can necessarily be properly characterised as involving the determination of policy, the exercise of a discretion or an adjudicative power. Within the overall context of the exercise of public power, certain actions are purely administrative. The consequences of extending a duty of care in respect of those purely administrative actions may well be far removed from the consequences of extending a duty of care to decisions involving policy, discretion or an adjudicative role. It follows that the weight to be attached, as a countervailing factor, against imposing a duty of care in respect of such purely administrative actions must be much less. It further follows

that there must be cases where, therefore, appropriate scrutiny must lead to the view that there would not be a sufficient countervailing factor to justify excluding a duty of care, on a proportionate basis, in respect of such purely administrative acts.

[83] Why, without good reason and the presence of an appropriate countervailing factor, should public authorities not be liable for the consequences of their actions in exactly the same way as anyone else? It may well be that, in practice, it will be a lot more likely that an appropriate countervailing factor will be found to be present in the actions of public authorities precisely because of the public nature of the functions to which those actions relate. But in the light of the need to guard against giving the State an immunity or, indeed, excessive protection, it seems to me that it is appropriate that a court carefully scrutinise any restriction sought to be imposed on the potential liability of a public authority to ensure that it is justified and proportionate in the light of the public interest sought to be protected. That is not to say that, after appropriate scrutiny, there may well be an entirely appropriate basis, stemming from the public nature of the activity concerned, which would justify treating a public authority differently from a private person. But the court should scrutinise the circumstances of the case to satisfy itself that there truly are countervailing public interest factors sufficient to provide a legitimate basis for excluding a duty of care which might otherwise arise.

[84] The fact that, as in *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, the public authority was carrying out a function designed for the public benefit (in that case the adoption of a development plan) may very well provide such a justification which would withstand scrutiny. Likewise, the position of adjudicative bodies which was considered in *Beatty v. Rent Tribunal* [2005] IESC 66, [2006] 2 I.R. 191, may provide an appropriate justification. Other examples could readily be given."

32. Although Clarke J. was in the minority (together with Laffoy J.) on the outcome of *Cromane Seafoods* on its facts, the foregoing statement on the need to guard against giving the State an immunity or, indeed, excessive protection, appears to me to be applicable to the type of administrative action involved under the Control of Horses Act 1996.

33. In summary, I am not satisfied that Galway's submission to the effect that there are public policy considerations which militate against the imposition of a liability on the part of a local authority for the unlawful destruction of a horse, is well founded. To refuse to recognise such a liability would, in effect, confer an *immunity* on the local authority for unlawful action which results in the direct and immediate interference with the owner's property. The destruction of another person's property is *prima facie* tortious, i.e. the wrongful interference with the property involves the tort of trespass to goods.

34. The Control of Horses Act 1996 provides for limited circumstances in which the destruction of another person's horse may be lawful. If the local authority acts outside its statutory power, then it is liable in damages under that tort.

SEARCH FOR COMPARABLE ACTION BY PRIVATE ACTOR

35. As part of his argument that there should be no liability for unlawful action under the Control of Horses Act 1996, counsel on behalf of Galway had emphasised the following passages from the judgment of Clarke J. in *Cromane Seafoods.*

> "[85] It must, in that context, be recognised that the sort of actions or functions frequently carried out by public bodies or officials may differ very significantly both in their nature and as to their effect from actions or functions carried out by private persons or bodies. It is inevitable, therefore, that whatever general approach is adopted for the purposes of defining the limits of the duty of care, the application of that general approach in practice is likely to differ as between public and private persons or bodies at least when public entities are carrying out functions which are peculiarly within the public domain.
>
> [86] I note this last qualification because, of course, sometimes a public official may simply be doing something which could just as easily be done in a private context. A statutory body charged with, for example, establishing a utilities network (such as electricity) could hardly expect to have a different standard or duty of care applied to it when constructing safe power lines than that which might apply to a private electrical contractor doing much the same thing. A public official who happens to drive a car in the course of their public duties could not (except in very unusual circumstances) expect to be assessed on any different basis to any other road user just because they happen to be driving about in the course of their official business.
>
> [87] But there are functions which public authorities carry out which have no easy parallel in the private sphere."

36. Counsel submits that the detention and destruction of a horse under the Control of Horses Act 1996 similarly involves the exercise of a power in the public domain which has no parallel in the private sphere.

37. With respect, the point being made by Clarke J. in the passages above is not applicable to the action giving rise to the claim for damages, i.e. the destruction of the horse. As appears from the passages cited above, it is necessary to consider both the *nature* and the *effect* of the function being carried out by a public authority. The regulatory functions at issue in *Cromane Seafoods*, i.e. the licensing of the harvesting of mussels, have no obvious analogue in private law. The nature of the function, i.e. the regulation of development projects in the public interest, and the effect, i.e. the financial impact of the temporary loss of development potential, are not ones which normally arise between two private actors. By contrast, the effect upon the Applicant in the present case of the destruction of his horse would have been the same whether carried out by a private actor or by a public authority acting *ultra vires.* In each instance, there has been a direct and immediate financial loss. The action of Galway in causing damage to property seems to me to be closer to the example of the road traffic accidents given by Clarke J.

38. The special feature of the destruction of the horse is that, provided always that the statutory requirements are complied with, this otherwise tortious act does not give rise to liability for damages.

TRESPASS TO GOODS

39. Leading counsel for the Applicant, Mr Michéal P. O'Higgins, SC, characterised the wrong done to the Applicant as the wrongful destruction of his property. Counsel cited the judgment in *Burke v. South Dublin County Council (No. 2)* [2013] IEHC 555 where an award of €10,000 was made in respect of the unlawful destruction of four horses.

40. In his written submissions, counsel identified a number of bases upon which damages might be recoverable, namely, trespass to goods or chattels; detinue; or negligence. It was also submitted that the local authority's action had infringed the Applicant's constitutional right to property. At the hearing on 26 June 2019, most emphasis was laid on the tort of trespass to goods.

41. It seems to me that this is the most appropriate basis upon which damages can be awarded. The tort captures the essence of the complaint made by the Applicant. Moreover, there is precedent from this court which entails the application of the tort to administrative action involving the destruction of animals. The case closest on point is *Farrell v. Minister for Agriculture*, unreported, High Court, Carroll J., 11 October 1995. The case concerned a claim for damages arising from the slaughter ("depopulation") of an entire herd of cattle. The regulations pursuant to which the slaughter had been required were subsequently held to have been *ultra vires* the Diseases of Animals Act 1966.

42. The High Court awarded damages on the basis that the unlawful destruction of the cattle involved a trespass to goods.

> "The tort consists of wrongfully and directly interfering with the possession of chattels. In my opinion there was a direct interference with the Plaintiff's right to possession of his cattle when the Minister, with the mantle of statutory Regulations assumed to be valid around him, constrained the Plaintiff to bring his herd to be slaughtered. The Minister did it knowingly and intended the consequences, though he did not act *mala fides* because he did not know the Regulations were ultra vires. To my mind that is a direct interference with the Plaintiff's right to possession of his animals and therefore the tort of trespass to chattels was committed and the Plaintiff is entitled to damages for the loss suffered."

43. A similar approach is appropriate on the facts of the present case. The action on the part of Galway in destroying the horse was *deliberate* and *wilful* in the sense that euthanasia was the intended outcome. It is not a necessary ingredient of the tort that the officials must have been aware that the action was *unlawful*.

44. The action involved the most extreme form of *interference* with the possession of goods, i.e. the very destruction of same.

45. Counsel on behalf of Galway has drawn attention to the fact that the Control of Horses Act 1996 allows, in principle, for the lawful destruction of a horse in certain circumstances. Counsel submits, therefore, that this is not a case of a public authority purporting to exercise a jurisdiction which it could never have had. With respect, this argument does not advance Galway's position. The fact that actions taken at an earlier stage in the process, i.e. the initial seizure and detention of the horse were valid, does not alter the fact of the subsequent illegality. Galway is not entitled to rely on statutory authority to justify its *consequent* actions in destroying the horse in circumstances where this court has found that the local authority's conduct was unlawful.

46. Had Galway complied with the statutory requirements, then its action in destroying the animal would have been lawful and would not have given rise to any liability for damages on the part of the local authority. In the event, however, Galway acted *ultra vires* in destroying the animal. The cloak of statutory authority thus fell away and cannot be relied upon by the local authority as a defence to the claim for damages.

47. Before leaving this topic, it is appropriate to make two brief observations on the nature of the tort of trespass to goods. First, I am satisfied that it is not necessary to reformulate the tort when applying it to public authorities, such as Galway County Council. The public policy considerations which apply to the more amorphous tort of negligence do not apply to trespass to goods for the reasons set out in detail at paragraphs 24 to 34 above.

48. Secondly, with due deference to the argument advanced on behalf of the Applicant, reliance upon an existing recognised tort provides a sounder basis for a claim than an attempt to rely directly on property rights under the Irish Constitution. The existing tort is ample to cater for the circumstances of the case, and it is preferable to rely on its terms rather than to invoke an ill-defined constitutional tort.

JUDICIAL REVIEW PROCEDURE

49. Counsel on behalf of Galway has submitted that it will rarely be appropriate that damages are awarded in judicial review proceedings having regard to the procedural limitations thereof. It is submitted that any claim for damages should instead have been articulated in separate proceedings before the District Court or the Circuit Court. Objection is made to the fact that particulars of the alleged damages had not been included in the statement of grounds.

50. The procedural objections advanced on behalf of Galway are unfounded. One of the aims of the amendments introduced to the judicial review procedure under the Rules of the Superior Courts 1986 was to allow a claim for damages to be pursued in judicial review proceedings. Order 84, rule 26 of the current version of the Rules of the Superior Courts reads as follows.

> "25(1) On an application for judicial review the Court may, subject to sub-rule (2), award damages to the applicant if:

(a) he has included in the statement in support of his application for leave under rule 20 a claim for damages arising from any matter to which the application relates, and

(b) the Court is satisfied that, if the claim had been made in a civil action against any respondent or respondents begun by the applicant at the time of making his application, he would have been awarded damages.

(2) Order 19, rules 5 and 7, shall apply to a statement relating to a claim for damages as it applies to a pleading."

51. The Rules of the Superior Courts allow for the possibility of a court making orders in judicial review proceedings directing the discovery of documents and the furnishing of particulars.

52. Had Galway required further details of the claim in respect of damages, it would have been open to the local authority to request the furnishing of particulars and/or the discovery of documents. Had the Applicant declined to provide same on a voluntary basis, then Galway could have brought an application before me for such orders. In the event, Galway took no such steps.

53. As noted earlier, the proceedings had been adjourned subsequent to the delivery of the principal judgment. Thereafter, an exchange of legal submissions had been directed, and a hearing for the damages claim had been fixed for a date convenient to the parties. This case management would have been extended to the making of orders for discovery and particulars had either party sought same.

54. It should also be recalled that Galway had been in possession of the horse for the weeks immediately prior to its destruction. Galway had arranged for the horse to be inspected by a vet acting on its behalf. Presumably, therefore, Galway had direct knowledge of the circumstances of the horse. In the event, Galway chose not to call oral evidence from the vet.

55. It has been suggested that Galway is at a disadvantage in that there is no provision for the making of a counterclaim in judicial review proceedings. It is further suggested that whereas Galway had been found in the principal judgment to have served an invalid demand for fees, the local authority nevertheless would have a valid counterclaim for the (lower) level of fees which it might have lawfully charged.

56. With respect, this submission is misconceived. There is no question of Galway now being entitled to recover *any* fees whatsoever in respect of the destroyed horse. This court has already found in the principal judgment that the demand for fees served in April 2018 was invalid in that it incorrectly included charges which were not set out in the Bye Laws. The demand is invalid, and is not capable of being saved. Galway is not entitled to sever the demand, and seek to rely on such part of the fees which it is said *might* have been lawfully charged. Moreover, and more fundamentally, there is no question of a local authority being entitled to recover fees in respect of a horse which it has unlawfully

destroyed. For the avoidance of any doubt, the final order in these proceedings will include a declaration to the effect that the demand for payment is invalid and that there is no balance outstanding in favour of Galway County Council.

57. Galway has also made the point that even taking the value of the claim at its height, namely the €35,000 asserted on behalf of the Applicant, the value of the claim would still fall within the monetary jurisdiction of the Circuit Court. It is further submitted that it is "simply not appropriate" that a matter of this nature should be "troubling" the High Court.

58. It was an inevitable consequence of the nature of the legal challenge made in these proceedings that same had to be pursued before the High Court. Had the Applicant instead brought proceedings before the Circuit Court, he would have been met with the answer that the destruction of the horse was authorised by statute, namely Section 39 of the Control of Horses Act 1996 and/or the Bye-Laws. It was an essential proof of the claim for damages, therefore, that the action of the local authority be declared to be *ultra vires.* The High Court alone has jurisdiction to make such a finding.

59. It is perhaps anomalous that a claim which falls well short of the monetary jurisdiction of the High Court should have to be pursued before that court with the attendant legal costs. This is, however, the consequence of the allocation of jurisdiction. There are certain procedural steps which a respondent who wishes to reduce the potential exposure to legal costs can take. More specifically, a respondent has the option of making an offer to the applicant on a "without prejudice save as to costs" basis. In other words, the respondent, without formally conceding liability in the proceedings, could nevertheless protect itself in relation to costs by making an offer in settlement of the claim which would only be brought to the attention of the court for the purposes of a costs application subsequent to a ruling by the court on the substance of the case. If an applicant had failed to "beat" the offered amount, then this would have adverse consequences for them in terms of costs.

60. Put shortly, the costs rules are sufficiently robust to allow for the introduction of an element of financial reality to judicial review proceedings.

QUANTUM OF DAMAGES: EVIDENCE

61. The Applicant, Mr Edward McDonagh, gave evidence before me at the hearing on 26 June 2019. Mr McDonagh explained that he had purchased a mare which was in foal in October 2010. That mare subsequently gave birth to the horse the subject matter of the judicial review proceedings, *Chief of Colours*. The horse was a skewbald horse, i.e. a coloured horse. Mr McDonagh explained that such horses are potentially more valuable for use in sulky racing.

62. Mr McDonagh was registered as the owner of *Chief of Colours* with the Standardbred and Trotting Horse Association of Great Britain and Ireland. Mr McDonagh explained that the Association issue a unique, lifetime identification number for each horse registered with it. The Association provides a microchip with this information which is then implanted into the animal by a vet. Mr McDonagh produced the original Standardbred Passport issued by the Association in respect of *Chief of Colours.* I am satisfied on the basis of his oral

evidence and on the documentation that Mr McDonagh has established proof of his ownership of the horse. Indeed, the ownership issue was not seriously pressed on cross-examination. Counsel for Galway instead emphasised the absence of a horse licence. Mr McDonagh conceded in cross-examination that he did not hold a horse licence from Galway County Council in respect of the animal.

63. Mr McDonagh gave details of the lineage of *Chief of Colours.* It seems that the ultimate ambition had been that the horse would be put out to stud. The witness accepted in cross-examination, however, that the horse did not have any racing history which would enhance its value for stud purposes. It seems that the horse only ever had five coverings, and there is only one report of any progeny.

64. Mr McDonagh confirmed that he had received two written valuations in respect of the horse, the first in the amount of €35,000 and the other in the amount of STG £1,500. No evidence was, however, called in support of either of these valuations.

65. Galway County Council called evidence from Mr George F. Candler. Mr Candler outlined his qualifications as an auctioneer, valuer, bloodstock and livestock salesman. Mr Candler has been selling horses as an auctioneer in the Cavan Equestrian Centre for the past 40 years, and has also conducted bloodstock sales in Claremorris, Mullingar and Goffs.

66. The witness gave evidence to the effect that skewbald horses are popular as trotters within a limited market. The witness noted that sales were more likely to take place privately rather than at a public auction. The witness suggested that the very most that they would achieve at sale would be in the region of €3,000 to €4,000. This would be for an exceptional animal.

67. In respect of *Chief of Colours*, the witness confirmed that he had seen a photograph of the horse and had considered his pedigree. The witness also confirmed that he had reviewed the Standardbred and Trotting Horse Association of Great Britain and Ireland letter of 19 March 2019 which valued the horse in the region of STG £1,500. Mr Candler suggested a value of €1,500.

FINDINGS OF THE COURT ON QUANTUM

68. The only expert evidence before the court in relation to the value of the horse is that of Mr Candler. As noted above, Mr Candler indicated that whereas an exceptional animal might achieve a sale price of €3,000 or €4,000, the horse the subject-matter of the proceedings was not exceptional. Instead, Mr Candler suggests a value of €1,500. Mr Candler has drawn attention to the lack of racing history, and the very limited coverings to date.

69. Mr Candler noted that sales of skewbald horses of this type are often private sales. The prices achieved at public auction might not therefore represent an entirely accurate benchmark.

70. Taking Mr Candler's evidence into account, I am satisfied that the appropriate award of damages in this case is €2,000. The slight uplift of €500 is intended to reflect the

private/public sales point noted above, and the general inconvenience caused to Mr McDonagh.

71. The justice of the case does not require the award of aggravated damages. Whereas the principal judgment found that Galway County Council had acted *ultra vires,* this arose from its failure to fully observe the procedural requirements of the Control of Horses Act 1996 and to honour the representations made on 12 April 2018. There is no finding of bad faith on the part of the local authority such as to justify aggravated damages.

72. It had been suggested on behalf of Galway that the Applicant had been guilty of contributory negligence in allowing his horse to stray on a public road, which resulted in the detention of the horse and led (ultimately) to its destruction. With respect, it cannot realistically be said that it follows as an inevitable—or even foreseeable—consequence of a horse being lawfully detained that the local authority will thereafter destroy the horse unlawfully. There is no causal link, therefore, between the alleged act of contributory negligence and the unlawful action on the part of the local authority which gave rise to the claim.

73. Finally, whereas it is a cause for concern that the Applicant did not hold a horse licence, it does not follow as a corollary that he is excluded from advancing a claim for damages for the loss of the horse. The Control of Horses Act 1996 makes the failure to hold a licence a criminal offence. The legislation also provides for the possibility of forfeiture of the horse as an *additional* penalty following conviction. Crucially, however, the decision to deprive the owner of his property rights can only be made after a criminal conviction and only by order of a court. No criminal proceedings were taken against Mr McDonagh, and thus his failure to hold a licence did not result in the automatic loss of his property rights in the horse.

CONCLUSION

74. The Control of Horses Act 1996 (and the relevant Bye-Laws) confer upon a local authority a power to detain horses, and, in certain circumstances, to destroy a horse which has been detained. This remarkable statutory power is subject to minimal procedural requirements. In the event that these requirements are complied with, then there is no obligation to pay compensation or damages to the owner of an animal which has been destroyed.

75. On the facts of the present case, and as explained in detail in the principal judgment, Galway County Council acted in excess of its statutory powers in destroying the Applicant's horse on 13 April 2018. Put otherwise, Galway County Council acted *ultra vires* in destroying the animal. The cloak of statutory authority thus fell away and cannot be relied upon by the local authority as a defence to the claim for damages.

76. For the reasons set out in detail at paragraphs 24 to 34 above, there are no public policy considerations which militate against the imposition of a liability to pay damages in such circumstances. The imposition of liability does not involve a court "second guessing" difficult policy decisions made by a public authority. Rather, the imposition of liability to

pay damages is necessary to ensure compliance with the statutory requirements and to vindicate the property rights of the owner.

77. The monetary value of the horse in the present case was modest. Sight must not be lost, however, of the wider principle that, absent countervailing public policy considerations, a public authority is liable for its tortious actions in the same way as a private actor. Were the court to have accepted Galway County Council's arguments, then analogous actions, such as, for example, the wrongful destruction of a herd of cattle, would equally not attract any liability on the part of a public authority to pay damages. This would be contrary to the rule of law.

78. For the reasons set out under the previous heading above, the appropriate award of damages in this case is €2,000.

FORM OF ORDER

79. This court will make an order of *certiorari* quashing the decision of Galway County Council to destroy the horse, *Chief of Colours,* on 13 April 2018, and will also make a declaration that the destruction of the said animal was ultra vires the Control of Horses Act 1996 and the Galway County Council Bye-Laws (1998).

80. The Applicant is entitled to recover the sum of €2,000 in damages as against Galway County Council.

81. For the avoidance of any doubt, the formal order of the High Court will include a declaration to the effect that the demand for payment made by Galway County Council in April 2018 was invalid, and that there is no balance outstanding in favour of Galway County Council in respect of the accommodation or other costs associated with the detention of the horse during the period February to April 2018.

82. I will hear counsel on the question of the appropriate costs order, if any, to make in these proceedings.