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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PAUL MURPHY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE DECISIONS AND ACTIONS TAKEN BY MS ARLENE FOSTER (MLA), MS MICHELLE O'NEILL (MLA), THE FIRST MINISTER (NI), THE DEPUTY FIRST MINISTER (NI), MR GORDON LYONS (MLA), MR DAVID FOSTER, THE DEPARTMENT OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS (NI), AND MS MICHELLE GILDERNEW (MP)

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Mr Tom Fee (instructed by the Departmental Solicitors Office) for Ms Arlene Foster, Ms Michelle O'Neill, The First Minister, the Deputy First Minster, Mr Gordon Lyons, Mr David Foster, DAERA

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COLTON J

Introduction

[1] The applicant is a litigant in person.

[2] The underlying issue in this application relates to the Farm Nutrient Management (FNM) Scheme that was implemented in Northern Ireland between 2005 and 2009.

[3] The structure of the applicant's Order 53 Statement and supporting affidavit contains two parts.

[4] Part 1 examines the legislative background to the FNM Scheme.

[5] Part 2 "*examines the decisions, actions and/or omissions of the proposed respondents after they had been fully informed of, and had been furnished with irrefutable evidence to*

confirm/prove, the serious failings of, and the significant criminal offences [fraud, embezzlement and deliberate environmental pollution] committed under that £212M grant-funded government scheme (the FNM Scheme)."

[6] The applicant requested that the court deal with Part 1 in isolation, as Part 2 of the application depended upon the court's decision in relation to Part 1.

[7] The court accommodated this request and on 5 November 2021 dealt with Part 1 of this application.

[8] In accordance with the court's direction the proposed respondents were put on notice of the application. At the hearing the first seven proposed respondents were represented by Mr Tom Fee of counsel instructed by the Departmental Solicitors Office. The eighth proposed respondent, Ms Gildernew was not represented.

[9] By way of further background in relation to the proceedings, on 15 October 2021 the applicant filed *"emergency applications"* in relation to this application.

[10] In summary he sought –

(i) An explicit, written declaration confirming the applicability of the laws, regulations, codes and standards referred to in Part 1 of his application and to grant a stay on further proceedings to allow that matter to be dealt with.

(ii) An order to the effect that the court should refuse to accept the affidavit and exhibits filed by David Foster, the Director of Regulatory and Natural Resources Policy in the Department of Agriculture, Environment and Rural Affairs (DAERA) on 30 September 2021.

(iii) A declaration to the effect that the affidavit from Mr Foster relates to his role within the DAERA and that it will not be considered by the court to be a submission by or on behalf of DAERA, which is a separate proposed respondent.

(iv) In light of the late submission of Mr Foster's affidavit on 30 September 2021 the applicant sought an extension of time to submit further skeleton arguments.

(v) On the morning of the hearing, the applicant lodged a further emergency application the effect of which was to ask me to recuse myself from considering this case and four other applications brought by the applicant against various public representatives. The basis for that application related to practice directions given in relation to those proceedings from myself and another judge. The essence of his

complaint was that directions had been given to serve those proceedings on the proposed respondents.

[11] At the outset of the hearing on 5 November 2021 I refused to recuse myself as I considered there was no basis for the applicant's complaint. All directions given in relation to the other cases were entirely lawful and in accordance with practice in this jurisdiction.

[12] As indicated the court agreed to deal with Part 1 of the applicant's application before moving to Part 2.

Consideration of Part 1

[13] In truth the resolution of this issue was not contentious.

[14] In his application the applicant ably set out the legislative background to the introduction of the FNM Scheme.

[15] The starting point was European Council Directive 91/676/EEC.

[16] The primary objectives of the Nitrates Directive are set out in Article 1, which confirms:

> *"This Directive has the objective of:*
>
> - *Reducing water pollution caused by or induced by nitrates from agricultural sources, and*
>
> - *preventing further such pollution."*

[17] Article 5 of the Directive required each EU Member State to establish an action programme in respect of each designated Nitrate Vulnerable Zone (NVZ) within their particular State, which they were required to submit to the EEC for consideration and agreement/approval. The Nitrate Action Programme for NI (NAP-NI) was submitted and accepted by the European Commission in October 2006 and deemed to satisfy the requirements of the Nitrates Directive.

[18] In the meantime the then Department of Environment in the exercise of the powers conferred on it by Article 14 of the Water (Northern Ireland) Order 1991 made the Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) Regulations (Northern Ireland) 2003 ("SSAFO Regulations"). These Regulations had been notified to the European Commission and other Member States in accordance with subsequent Directives 98/34/EC of the European Parliament and of the Council (OJ No. F204, 21.7.98 p37) as amended by Directive 98/48/EC of the European Parliament and of the Council (OJ No. L217, 5.8.98 p18).

[19] In order to comply with the requirements of the EU Nitrates Directive the former Department of Agriculture and Rural Development ("DARD") introduced the FNM Scheme which was a government grant funded scheme which provided financial assistance to farmers to install new or improved slurry and manure storage facilities on farms. The Scheme operated between 1 January 2005 and 31 December 2009.

[20] DARD published a specification booklet ("FNMS 5A) which set out the specification for compliance with the SSAFO Regulations in respect of storage facilities for slurry/effluent/dirty water.

[21] Schedule 2 of the SSAFO Regulations sets out the requirements for slurry storage systems. In particular Schedule 2 paragraph 2 provides that:

> *"The base of the slurry storage tank, the base and walls of any effluent tank, channels and reception pit and the walls of any pipes shall be impermeable."*

[22] Para 9 provides that:

> *"Where the walls of the slurry storage tank are not impermeable, the base of the tank shall extend beyond its walls and shall be provided with channels designed and constructed so as to collect any slurry which may escape from the tank and adequate provision shall be make for the drainage of the slurry from the channels to an effluent tank through a channel or pipe."*

[23] The specification booklet issued in relation to the FNMS reinforces the terms of the Regulations. Thus under the heading "*Minimum Specification for items available under Actual Costs Only*", in relation to storage facilities for slurry tanks the specification provides the following:

> *"**23 Below-ground in-situ reinforced concrete tank/reception pit***
>
> *If storing slurry/effluent this item must comply with SSAFO Regulations. A chartered engineer will be required to complete part of the EHS notification form.*
>
> *The structural design detailing a completed construction of this item requires certification by a chartered engineer.*
>
> *The walls and floors of the tank must satisfy the requirements of BS 5502; Part 50; 1993. This standard requires that impermeable concrete construction complies with BS 8007 (as modified by BS 5502; Part 22). The characteristic loads as*

described in paragraph 5 of Part 50 should be used to calculate internal slurry/effluent pressure, external earth pressures, ground water pressure and cover slab loads (design class 2). Concrete in contact with slurry/effluent should be designed in accordance with BS 8007 and BS 8110. The tank should not rely on any self-sealing properties of slurry."

[24] To complete the picture BS 8807 is the British Standard Code of Practice for the design of concrete structures for retaining an aqueous liquid. A key provision from the applicant's point of view is 9.2 of the Code which deals with the testing of structures. It provides as follows:

*"**9.2 Testing of structures***

For a test of liquid retention, the structure should be cleaned and initially filled to the normal maximum level with the specified liquid (usually water) at a uniform rate of not greater than 2m in 24h.

When first filled, the liquid level should be maintained by the addition of further liquid for a stabilising period while absorption and autogenous healing take place. The stabilising period may be 7 days for a maximum design crack width of 0.1mm or 21 days for 0.2mm or greater. After the stabilising period the level of the liquid surface should be recorded at 24h intervals for a test period of 7 days. During this 7-day test period the total permissible drop in level, after allowing for evaporation and rainfall, should not exceed 1/500th of the average water depth of the full tank, 10mm or another specified amount.

Notwithstanding the satisfactory completion of the test, any evidence of seepage of the liquid to the outside faces of the liquid retaining walls should be assessed against the requirements of the specification. Any necessary remedial treatment of the concrete, cracks or joints should, where practicable, be carried out from the liquid face. When a remedial lining is applied to inhibit leakage at a crack it should have adequate flexibility and have no reaction with the stored liquid.

Should the structure not satisfy the 7-day test, then after the completion of the remedial work it should be refilled and if necessary left for a further stabilisation period; a further test of 7 days duration should then be undertaken in accordance with this clause."

[25] At the hearing the court indicated that the applicant had accurately set out the law in Part 1 and that the parties could proceed with the substantial application on that basis.

[26] At the end of the hearing the court made the following order:

> *"1. The applicant's request that the assigned judge recuse himself from these applications and the substantive application is refused.*
>
> *2. The parties can proceed on the basis that the law is accurately stated in Part 1 of the application.*
>
> *3. In respect of the applicant's emergency application 1 no formal order is made.*
>
> *4. In respect of the applicant's emergency application 2 this application is refused – the court will accept the affidavit lodged on behalf of the proposed respondent dated 30 September 2021.*
>
> *5. In respect of the applicant's emergency application 3 no order/relief required.*
>
> *6. In respect of the applicant's emergency application 4, the extension of time sought is hereby granted:*
>
> *(a) the applicant is to lodge any supplementary skeleton argument on or before close of business on 26 November 2021;*
>
> *(b) the proposed respondent shall file any response on or before 3 December 2021.*
>
> *7. If the applicant wishes to make any application to adjourn the five applications before the court he must advise the court by Wednesday 10 November 2021, any such application will be dealt with administratively.*
>
> *8. The assigned judge will rule on the request to recuse himself from the applications referred to in paragraph 7 above.*
>
> *9. The matter shall be listed for a leave hearing on 6 December 2021 at 10.00am before the assigned judge.*
>
> *10. The costs of this application shall be reserved to the Judge hearing the application for Judicial Review."*

[27] The court subsequently granted an application to adjourn four of the applications (referred to as the *"2020 applications"*).

[28] In the meantime the applicant made *"emergency applications"* to the Court of Appeal seeking the same relief as that sought in his applications to this court on 14 October 2021 and 5 November 2021.

[29] On 3 December 2021 the Court of Appeal ordered that the applications to appeal should be referred back to me as no special circumstances were established under Order 59 Rule 14(4) of the Rules of the Court of Judicature (Northern Ireland) 1980 which prevented the Court of Appeal dealing with the applications.

[30] On 6 December 2021, the date for the substantive hearing, the applicant renewed his applications and sought leave to appeal to the Court of Appeal. Leave to appeal was refused and I therefore dealt with the substantive matter.

Hearing on 6 December 2021

[31] As on 5 November 2021, the applicant appeared as a litigant in person and Mr Tom Fee appeared for seven of the eight applicants.

[32] I invited the applicant to elaborate on his application and directed some questions in relation to matters arising from his affidavit. Unfortunately the applicant refused to answer any questions and said that I had all the material I needed in his written application.

[33] I heard submissions from Mr Fee on behalf of seven of the proposed respondents.

The Applicant's challenge

[34] Having set out the legislative background the applicant's fundamental complaint is that when implementing the Scheme the Department failed to ensure that each tank which benefited from a grant was specifically checked by an engineer for leakage in accordance with BS 8007, in particular Section 9.2.

[35] Strikingly he says that this failure was as a result of significant criminal offences including fraud, embezzlement and deliberate environmental pollution. He alleges that the consequences of these criminal offences is the *"fraudulent certification"* of 5,000 new tank structures. In addition a further consequence of the *"criminal failure"* to test those 5,000 new tanks is that they are causing harmful environmental damage and have exposed the UK to an £800M fine from the EU.

[36] He also alleges that the State would be liable for the cost of testing all tanks which received payments under the Scheme, the costs for repairing all leaking tanks and the costs of recovering the grants paid to farmers.

The history leading to these proceedings

[37] It will be seen that the underlying Scheme and the conduct about which the applicant complains occurred between 2005 and 2009.

[38] Whilst the applicant has not exhibited the initiating emails the key correspondence in this matter is a letter from the then Minster of Agriculture, Environment and Rural Affairs dated 25 March 2020. It is worth quoting in full:

> *"**Re: Farm Nutrient Management Scheme (FNMS)***
>
> *Thank you for your recent emails on the topic of the FNMS in relation to the technical aspects of the scheme, British Standards and the requirements on chartered engineers.*
>
> *It is never good to commence a letter with a falsehood. No tanks were built on our family farm under FNMS, no member of my family participated in the scheme.*
>
> *Firstly, I would wish to point out that advice was sought from the then Department of Finance and Personnel Central Procurement Directorate (CPD) regarding the design standards of slurry storage tanks. A registered chartered structural engineer was seconded to the Department.*
>
> *Mr McGlade (whom you refer to in your emails) was employed by the Department as overseeing engineer and provided advice on the details of the requirements on the relevant British Standards.*
>
> *As a result, a risk based approach was taken by the Department with regard to the construction of slurry storage tanks under the FNMS. The structural integrity of any slurry storage tank was deemed to be highest risk as structural failure would incur the greatest pollution risk. In addition it was recognised that site conditions would be variable and this should be considered in the actual design.*
>
> *Hence the scheme required applicants to employ the services of a chartered engineer to design any funded structure for the specific site. This focussed on the design being up to the required standard and confirmation the tank had a minimum 20 year design life with maintenance. This was deemed the best*

method to ensure the structural integrity of all slurry storage tanks and that they were constructed to the correct standards. The chartered status of the engineers employed was to ensure the highest level of professional competence. Mr McGlade supported all such engineers when queries were raised.

The grade and quantity of steel reinforcing used within the floor and walls of the tank was considered an important component within the overall design both structurally and in order to reduce surface cracking. Hence some 700 on site interim inspections were concluded to ensure that the correct grade and quality of steel reinforcing used within walls of below-ground tanks complied with British Standards. Any discrepancies identified at inspection were satisfactorily resolved between the applicant's engineer and Mr McGlade.

Leakage of tanks was deemed to be low risk. Section 9 of BS 8007 details a testing for liquid tightness. The test was not stipulated as a specific requirement in the specification booklet by the Department – just as other individual tests were not individually specified. The booklet also specified the tank should not rely on any self-sealing properties of slurry.

Leak tests were carried out at the expert discretion and judgment of the responsible chartered engineer. If necessary and suspected, engineers would have conducted the leak proof test. This was on a site by site basis. Ultimately the engineer had to declare they were satisfied the tank had been constructed to meet the relevant British Standards, which included this leak test.

The Northern Ireland Environment Agency (NIEA) has been contacted to inquire if there have been any cases they are aware of in terms of leaking slurry tanks. There is anecdotal evidence among inspectors that in general new slurry tanks have not been causing widespread problems. If you have any evidence or suspicion of leaking slurry tanks, please contact NIEA, via their pollution hotline – 0800 807060 – who will investigate these.

Whilst it is not known how many tanks were tested for leaks, its engineers were entrusted with this discretionary step of the process, this does not necessarily mean that none were tested.

I would not concur with your claim that blame has been transferred to the farmers. Rather if there was a case where there was an issue with the slurry tank, the farmer should

contact the engineer/builder involved in the construction to remedy the situation.

In conclusion, I am satisfied that the scheme was operated correctly and there is no current evidence to suggest there is a widespread issue with leaking slurry tanks built under FNMS, therefore there is no need to progress this issue further. The RHI Inquiry was established to investigate the non-domestic Renewable Heat Incentive Scheme and is not relevant to this issue.

Yours sincerely"

[39] This letter exposes the central complaint of the applicant. The Department chose to take a *"risk based approach"* with regard to the construction of the slurry storage tanks under the FNMS. The focus was on the structural integrity of the tank. The specification booklet issued by the Department did not expressly stipulate the requirement to carry out mandatory individual leak tests on each tank. Rather leak tests were carried out at the expert discretion and judgment of the responsible chartered engineer. Ultimately the engineer in question had to declare that they were satisfied the tank had been constructed to meet the relevant British Standards.

[40] For the purposes of a leave hearing the court accepts that it is arguable that this approach was contrary to the requirements of the SSAFO Regulations.

[41] The applicant is particularly critical of the role of the chartered engineers in this Scheme.

[42] The Scheme required participating farmers to employ chartered engineers to design and certify the new tanks. Those engineers who wished to become involved in the Scheme were required to submit a structural design and related drawings for typical Scheme structures to the DARD, for approval.

[43] When the DARD was satisfied that the design and drawings submitted by an applying chartered engineer had met all of the requirements contained in specification booklet FMNS 5A that engineer would then be included on the list of *"approved engineers"* authorised to undertake work on the Scheme.

[44] Since the engineer's design and drawings and certification required compliance with Section 9 of BS 8007 the applicant argues that an engineer's design and drawings should not be approved by the DARD if the mandatory requirements for the testing of completed FNMS tanks for leaks was not included in their design and drawings.

[45] In fact the applicant argues that this mandatory legal requirement was not carried out by engineers, something which the DARD officials endorsed. In particular the template for the *"grant certificate"* which was drafted by and provided

to approved chartered engineers by DARD did not require the chartered engineer to certify that the mandatory leak testing procedure had been carried out.

[46] This failure is at the heart of the applicant's complaint about the Scheme.

[47] Some 8 months after the letter of 25 March 2020, on 26 November 2020 the applicant wrote to the First and Deputy First Ministers, Mr Poots, the then Minister for Agriculture, who sent the reply on 25 March 2020 and Ms Michelle Gildernew, who was the Minister for Agriculture when the scheme was administered. That email contained a "*report*" prepared by him on the FNMS. The report was an examination of the "*unlawful/criminal actions of senior government officials and private sector engineers and the resulting (deliberate) pollution of the natural environment and the Public Accounts Committee (PAC) and the Northern Ireland Audit Office (NIAO) officials and the incumbent DAERA Minister who deliberately concealed those crimes (and their huge financial criminal, environmental, political consequences) on the people of Northern Ireland.*"

[48] That report replicates in large part the Order 53 Statement and affidavit in support of this application.

[49] The accompanying email indicated to the recipients that "*this matter must be taken extremely seriously with appropriate and immediate action taken against all those responsible.*"

[50] On 8 January 2021 the applicant sent a further email to the same recipients indicating that he had received confirmatory emails from the Executive Office, and from DAERA but that he had not received any substantial response which had been promised from DAERA.

[51] On 12 February 2021 a reply was sent by Mr Foster, Director of Regulatory and Natural Resources Policy Division, DAERA. That reply was in the following terms:

> "*Dear Mr Murphy,*
>
> ***Farm Nutrient Management Scheme (FNMS)***
>
> *Thank you for your email to Minister Edwin Poots and The Executive Office (TEO) regarding the FNMS.*
>
> *On behalf of Minister Poots and TEO, I have been asked to respond to your email and attached document title "FNM Scheme Report."*
>
> *The issues raised in your latest correspondence have already been dealt with by previous responses on this matter from Minister Poots. However following your email in November 2020 the Department commissioned an independent review by*

Internal Audit and Fraud Investigation Services on the issues you have raised. That review concluded that there would not appear to be any new information provided which would warrant further investigation/review.

The Department remains satisfied that the FNMS was operated correctly.

It is the responsibility of a chartered engineer to ensure that the relevant British Standards were complied with (including leak testing). The engineers were required to certify to the Department that the tanks met the relevant standards.

If there was a case where there was an issue with the slurry tank, the farmer should contact the engineer/builder involved in the construction to remedy the situation.

If you have any evidence or suspicions of leaking slurry tanks, please contact NIEA, via their pollution hotline – 0800 807060 - who will investigate these.

Yours sincerely"

[52] Mr Murphy responded on 2 March 2021. He was dismissive of the reply and he describes the review conducted by the IAFIS *"as another futile attempt, by government officials, to cover up this huge scandal, conceal the obvious criminality of all those involved (including their colleagues and superiors) and to deliberately misdirect and mislead."* He goes on to say *"The outcome of that `independent' review conducted by the IAFIS, comes as no surprise. In 2010 the very same `independent' IAFIS were informed of the same matter. Despite the evidence submitted to them in 2010 confirming that that criminality had taken place, the `independent' IAFIS acted to deliberately cover it up …"* He further asserts that *"if anything, the `independent' IAFIS must themselves be subject to criminal investigation by the PSNI Fraud Branch and/or by the Serious Fraud Office for the role they played in the facilitation and/or concealment of that same systemic, institutional fraud in 2010 and again in 2021."*

[53] He summarises the position as follows:

> *"Due to an unlawful and fatally flawed risk assessment carried out by senior DARD officials, and the subsequent criminal collusion between senior government officials and chartered engineers, several thousand reinforced concrete slurry/effluent and dirty water tanks constructed under the £212M FNM grant scheme in Northern Ireland, in response to the 1991 Nitrates Directive, were not tested for leaks but were brought into use and were leaking their harmful contents, polluting ground water and natural water course."*

[54] He concludes that if he does not receive a reply by 12 March 2021 that *"properly addresses the issue, and clearly sets out exactly what action you intend to take concerning same, I will conclude that you don't intend to do anything and I will proceed on that basis."*

[55] On 2 April 2021 Mr Foster replies in simple terms:

> *"… The points you raise have already been responded to in previous correspondence with the Department. In the absence of evidence of leaking slurry tanks built under FNMS, no further action has been taken in this matter."*

[56] Mr Murphy writes again to the four previous recipients on 9 April 2021 referring to Mr Foster's reply and asking them to state their personal and official positions and that a failure to provide a response *"will be interpreted as both a person (sic) and an official endorsement of Mr Foster's responses."*

[57] This was followed by a pre-action protocol letter of 23 April 2021 and the issuing of the leave application on 11 May 2021.

[58] The application included Mr Gordon Lyons as the then Minister, Mr David Foster and the TEO who had corresponded on behalf of the Department.

[59] With the leave of the court, the proposed respondents (excluding Ms Gildernew) submitted an affidavit sworn by Mr Foster on 30 September 2021 setting out the background to the Scheme and also referring to two previous reports into the Scheme conducted by the Northern Ireland Audit Office (NIAO) and the Northern Ireland Assembly Public Accounts Committee (PAC) in 2011.

The relief sought by the Applicant

[60] The applicant in his Order 53 Statement seeks the following relief:

> *"(a) Orders of Certiorari to quash/dismiss the prospective decision(s) and/or actions of each of the proposed respondents, whereby they failed/refused to investigate and/or to act upon the extremely serious matters reported/referred to them by the applicant.*
>
> *(b) Orders of Certiorari to quash/dismiss the respective decisions and/or actions of those proposed respondents who, as public servants, deliberately refused/failed to provide the specific information/clarification sought by the applicant. Information/clarification that would serve to clearly and unequivocally establish/confirm their own and their fellow proposed respondents'*

official, statutory and professional duties, obligations and responsibilities concerning those extremely serious matters reported/referred to them by the applicant.

(c) *Declarations that the respective conduct, actions and decisions of each individual proposed respondents are/were:*

(i) breach of their official statutory and professional duties, obligations and responsibilities as elected public representatives (MLAs), government ministers, government departments/agencies and government officials/employees, and/or

(ii) acts of gross misfeasance in public office by elected public representatives (MLAs), government ministers, government departments/agencies and government officials/employees, and/or

(iii) in breach of the Nolan principles and the standards on public life, and/or

(iv) in breach of the Code of Conduct for MLAs in Northern Ireland, and/or

(v) in breach of the Northern Ireland Ministerial Code, and/or

(vi) in breach of the Code of Conduct for civil servants, and/or

(vii) in gross breach of their professional duties and responsibilities and, consequently, in breach for their professional Code of Ethics, and/or

(viii) in breach of their obligations and responsibilities as imposed by the terms of the RHI Inquiry which require them to refer the matter in question to that Inquiry for possible investigation as it concerned the same persons and government agencies/bodies who/which were the subject of the RHI Inquiry, and/or

(ix) in breach of their respective party political manifestos upon which they based their successful political campaigns and secured their seats as MLAs.

(d) *Orders of Mandamus compelling each of the proposed respondents to take all necessary actions to correct their previous failing/errors in regard to the extremely serious matters referred/reported to them by the applicant. In accordance with the requirements of their official, statutory and professional duties, obligations and responsibilities effective at the time when those individual proposed respondents had failed/refused to act. Duties, obligations and responsibilities conferred upon them by:*

(i) *their official, statutory, professional duties, obligations and responsibilities as elected public representatives (MLAs), government ministers, government departments/agencies and/or government officials/employees, and/or*

(ii) *the Nolan principles and the standards on public life, and/or*

(iii) *the Code of Conduct for MLAs in Northern Ireland, and/or*

(iv) *the Northern Ireland Ministerial Code, and/or*

(v) *the Code of Conduct for civil servants, and/or*

(vi) *their professional duties and responsibilities and, consequently, their professional code of ethics, and/or*

(vii) *their obligations and responsibilities as imposed by the terms of the RHI Inquiry which required them to refer the matter in question to that inquiry for possible investigation as it concerned the same persons and government agencies/bodies who/which were the subject of the RHI Inquiry, and/or*

(viii) *the demands of their respective party political manifestos upon which they based their successful political campaigns to secure their seats as MLAs.*

(e) *Compensation.*

(f) *Damages, including punitive damages.*

(g) Costs.

(h) Such further relief as the court may deem appropriate."

The proposed respondents' response

[61] Mr Fee on behalf of the proposed respondents, excluding Ms Gildernew, relies on a number of grounds in his submissions that leave should not be granted. He says the applicant has insufficient standing, there is obvious delay, the matters about which he complains are not amenable to judicial review, the remedies which the applicant seeks are vague in terms of what decisions are impugned and what orders the court can realistically make. He says there are alternative remedies and ultimately the applicant's case is unarguable.

[62] In terms of standing the applicant has not made the case that he is directly affected by the Scheme. Mr Foster in his affidavit does refer to the fact that the applicant *"had some involvement with an application to the FNMS and may have advised on construction of a slurry tank."* He says ultimately that application and tank was the subject of a lengthy dispute between the applicant and DARD. I have received no further detail in relation to this matter but in any event the applicant does not seek to rely on any particular private interest in his affidavit.

[63] It must be remembered that the challenge is not to the Scheme itself but rather the alleged failure of the proposed respondents to deal with the matters raised by the applicant in 2020. Essentially it seems to the court that the applicant is relying on the public interest to establish a standing on the grounds that he is representing the wider public interest since this issue affects the public generally.

[64] There is no doubt that there has been a *"liberalisation"* of the test for standing in practice. The correct approach as to standing was discussed by Lord Reed in *AXA General Insurance Ltd v HM Advocates* [2011] UKSC 46 at para 170 where he said:

> *"For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing*

> *its function to protect the rule of law. I say `might', because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."*

[65] Not everyone who has a strong and sincere interest in an issue will necessarily have standing. By way of example the Mayor of London, who had an obvious interest in tackling crime and in the operation of the criminal justice system as it applies to London, including in relation to support provided for victims of crime was held not to have standing in *R(D) v Parole Board* [2018] EWHC 694 (Admin). The Divisional Court noted at para 111:

> *"The test for standing is discretionary and not hard-edged."*

[66] In the context of this case the applicant is seeking to establish purported inactions by public representatives in response to complaints made by him. Those complaints relate to significant environmental issues. On balance the court considers that the applicant does have standing to bring these proceedings.

[67] There must be a serious issue about delay in this case. Self-evidently the underlying complaint arises from decisions made by the Department in 2005 and continued until 2009. It should be axiomatic that the court could not, consistently with Order 53 and precedent, embark on an examination of whether the Department's approach was lawful some 16 years after the relevant decisions were made.

[68] Of course the applicant says that what he is challenging are not the decisions in 2005 but rather the failure of the proposed respondents to take in effect unspecified actions in response to his allegations made in 2020 that the Scheme was in fact unlawful when implemented and operated.

[69] Even then however there are issues about delay. The Department set out its position on 25 March 2020. Under Order 53 Rule 4(1) of the Rules of the Supreme Court:

> *"An application for leave to apply for judicial review shall be made within 3 months from the date when grounds for the application first arose unless the court considers that there is*

> *good reason for extending the period within which the application shall be made."*

[70] It seems to the court that, on a generous interpretation, the grounds for the application first arose on 25 March 2020. At that stage the mischief about which the applicant complains was clearly set out in the Minister's letter. There was a significant delay between March 2020 and November 2020 when the applicant re-engaged with the Department and the other proposed respondents. It was on 26 November 2020 that he set out his *"report"* and demanded that the recipients take *"appropriate and immediate action."*

[71] It was clear from the letter from Mr Foster on behalf of the Department on 12 February 2021 that the Department remained satisfied that the FNMS was operated correctly. Despite this assertion the proceedings were not issued until 11 May 2021 which was one day within 3 months of the February date.

[72] The court of course retains a discretion to extend the time for leave to apply for judicial review for *"good reason."*

[73] The question of delay in this case needs to be seen in the context of the issues before the court.

[74] In this regard the court refers to the exhibits in Mr Foster's report and in particular the fact that this Scheme has been the subject matter of two significant inquiries in 2011. On 9 March 2011 the Northern Ireland Audit Office issued an extensive report into the Scheme. Specifically the report examined *"how effectively the Department had administered FNMS."*

[75] It described the scope of its examination in the following way:

> *"1.24 We assessed the effectiveness and value for money provided by FNMS, including the economic justification for its introduction and how well the scheme had been implemented by the Department. We also consulted with the Northern Ireland Environment Agency on how it is enforcing the Nitrates Action Programme in Northern Ireland. This included a review of the results of the agency's farm inspection programme, looking in particular at those breaches of the Nitrates Regulations which related to the handling and storage of slurry and manure. The report addresses three broad issues:*
>
> - *The rationale and approval of the Scheme.*
> - *Eligibility and grant take-up.*
> - *The impact of the Scheme."*

It made seven recommendations, none of which related to the complaint raised by the applicant in this case.

[76] On the issue of inspections the report concluded:

> *"3.16 The Department required grant claimants to submit invoices as evidence that work had actually taken place and been paid for. Departmental staff were required to check the adequacy of supporting documentation and professional and technical staff were required to carry out an on-farm inspection on every completed project. This was to verify that work had been completed to the specification required and that all paperwork in relation to invoices and statutory requirements was in place. Our review of sample of case files, confirmed that there was sufficient evidence on file to support grant claims and that inspection visits had been undertaken, as required."*

[77] On 7 December 2011 the PAC of the Northern Ireland Assembly also published an extensive report on the Scheme. The report was critical of how the Scheme was managed and overall it concluded that:

> *"… In a number of key aspects, the Farm Nutrient Management Scheme was poorly planned and badly managed. As a result, it cost many millions of pounds more than should have been necessary to ensure compliance with the European Commission's Nitrates Directive. Combined with the fundamental uncertainty over the extent to which the Scheme is actually contributing to the improvement of Northern Ireland's water quality, the Committee can only conclude that the Scheme provided poor value for tax payers' money."*

[78] The report did not identify any criticism on the issue raised by the applicant. Indeed it was critical that only 15% of farms subsequently participated in this Scheme.

[79] It was critical of how long it took for the pre-approval and inspection process to take place. The main criticism related to whether or not the impact of the Scheme on water quality delivered value for money. The real issue was whether a much reduced scheme, specifically targeting those areas where eutrophication problems were greatest, might have provided a more cost effective option.

[80] The Committee noted that £121M of public money had been spent on the Scheme but that the Department was not able to clearly demonstrate the extent to which this had contributed to improving water quality in Northern Ireland.

[81] Referring to Mr Foster's affidavit, filed on behalf of the Department, he reiterates the Department's position at para 7:

> *"DAERA is satisfied that the scheme was operated correctly and is not aware of the existence of any difficulties of the type referred to by the applicant. The thrust of the applicant's complaint seems to be that various slurry tanks which were within the FNM Scheme are leaking or have leaked. There were checks for leaks following completion of the scheme since 2008, the Northern Ireland Environment Agency (hereinafter NIEA) has carried out a programme of `cross-compliance' inspection under the `Nutrients Action Programme' on a selected sample number of farms each year. It has confirmed that it has no evidence of any widespread issues with slurry tanks funded under by FNMS leaking."*

[82] Returning to context, in deciding whether to grant leave in this case it is essential to return to the fundamental allegation made by the applicant.

[83] In short he makes very serious and extreme allegations about extensive criminal conduct by civil servants, engineers and public representatives. He has simply failed to provide any evidence that this is so. One can validly challenge whether or not the Department took the correct/lawful approach in relation to inspection for leaks post construction but this is a long way from alleging fraud, embezzlement and other serious criminal offences. Allied to this are the alleged consequences of this criminal behaviour. He alleges that there is deliberate and widespread leaking of deep pollutants into the environment in Northern Ireland. He has failed to provide any evidence of this whatsoever. Indeed, the evidence points to the contrary. He argues that the State is liable to an £800M fine from the European Union. Again, there is simply no evidence that this is so. He says that farmers will be forced to incur expense because of a failure by engineers to inspect, but he has failed to produce any evidence of this.

[84] Of course the obvious point is that if there is in fact evidence of criminal behaviour then he should bring this to the attention of the PSNI. When asked if he had done so the applicant failed to respond.

[85] The court turns then to what it has been asked to do in these proceedings. Here the frailties of the application are further exposed. The applicant asks the court to direct public representatives to take unspecified action. The only specific action he suggests is a requirement to refer the matter he raises to the RHI Inquiry. Self-evidently this was clearly outside the scope of the Inquiry which has reported in any event. He alleges breaches of various codes but fails to identify the respects in which any particular code has been breached.

[86] The court considers that it was particularly inappropriate to join Mr Foster as a proposed respondent in these proceedings. He is a civil servant who has simply set out the position of the Department. At all times he and other officials act under the direction and jurisdiction of the relevant Minister. The applicant points to no action by Mr Foster that would remotely give rise to any question of judicial review.

[87] This Scheme was clearly the responsibility of DARD/DAERA. It managed the Scheme and had the responsibility of ensuring that it was lawfully implemented. Any challenges to the operation of the Scheme would therefore properly lie against the DARD/DAERA and its Minister.

[88] Leaving aside arguments about standing and delay the court concludes that there is simply no merit in this application and that the case made on behalf of the applicant is unarguable.

[89] In summary the court concludes:

(i) It is arguable that the approach taken by the DARD in relation to the inspection of slurry tanks for leaks under the FNMS was not in accordance with the appropriate regulations.

(ii) That decision was made in 2005 and cannot now be the subject matter of judicial review. Indeed the applicant does not ask that this be done.

(iii) Since 2005 there have been two significant examinations by public bodies into the administration of this Scheme. They were conducted in 2011.

(iv) The applicant makes allegations of serious criminal offences. He has not produced any evidence to support the commission of such offences.

(v) If there is evidence of criminality, then obviously this evidence should be referred to the PSNI by the applicant.

(vi) The applicant has made allegations about extreme consequences arising from the administration of the Scheme in terms of damage to the environment, potential financial fines by the European Union and financial liabilities to farmers. He has produced no evidence to support these allegations. Indeed the contrary is the case.

(vii) There is no evidence that in responding to the applicant's complaints in March 2020 and November 2020 that any of the respondents have acted unlawfully or in a way that is amenable to judicial review.

(viii) The relief sought by the applicant is vague, unspecified and patently unsuitable as a remedy by way of judicial review.

[90] For all these reasons leave to apply for judicial review is refused.