Unapproved
No redactions required

THE COURT OF APPEAL

Record Number: 2021/320

High Court Record Number: 2021/218JR

Neutral Citation Number: [2022] IECA 278

Costello J.

Collins J.

Allen J.

BETWEEN

DAVID COOPER

Applicant/Appellant

AND

AN BORD PLEANÁLA

Respondent

AND

DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

Notice Party

JUDGMENT of Mr. Justice Maurice Collins delivered on 7 December 2022

BACKGROUND

1. This appeal presents a variety of procedural tangles. Even so, its appropriate disposition appears clear.

2. On 7 February 2020, Dundrum Retail GP DAC applied to the Notice Party (hereafter "*the Council*") for planning permission for the installation of a large outdoor screen at the Dundrum Town Centre, for use for open-air cinema events (Ref D20A/102). That use had been permitted under an earlier permission granted by the Council to a related applicant (Ref D18A/140).[1]

3. The Appellant ("*Mr Cooper*") lives in close proximity to the Dundrum Town Centre. He was concerned with the impact of the proposed development, particularly as regards noise in the evening and at night. At the hearing of this appeal. Mr Cooper told the Court that the area of the Town Centre nearest to his residence had previously been used for fashion outlets but has been transformed into what the Town Centre operator has apparently described as "*a vibrant nightlife hub*", with adverse impact on his residential amenities. In any event, Mr Cooper made a submission to the Council objecting to the proposed development. However, the Council decided to grant the

[1] Mr Cooper sought to appeal the Council's decision to grant that permission decision to An Bord Pleanála but his appeal was rejected as invalid. He subsequently challenged that decision by way of judicial review proceedings which were unsuccessful both in the High Court and in this Court on appeal.

permission sought, subject to a number of conditions. The Council made that decision on 8 December 2020.

4. By virtue of Article 31 of the Planning and Development Regulations 2001 (SI 600 of 2001) the Council was obliged to notify the Appellant of that decision within 3 working days and did so by letter sent on the following day, 9 December 2020. However, Mr Cooper says that he only received that notification on 12 January 2021.

5. Mr Cooper wished to appeal the Council's decision to the Respondent, An Bord Pleanála ("*ABP*"). Section 127(1) of the Planning and Development Act 2000 (as amended, the "*PDA*") sets out the requirements for such appeals, including that they "*be made within the period specified for making the appeal"* (section 127(1)(g)). Section 37(1)(a) PDA provides that appeals to ABP may be brought *"at any time before the expiration of the appropriate period*" and section 37(1)(d) then provides that for that purpose "*appropriate period*" means "*the period of four weeks beginning on the day of the decision of the planning authority*". Section 127(2) PDA provides that an appeal that does not comply with section 127(1) "*shall be invalid*".

6. Mr Cooper lodged his appeal with ABP on 14 January 2021. He says that he contacted the Council on 14 January 2021 (after he received the notification of its decision to grant permission) and was told by a staff member he had until 5 pm that day to lodge his appeal.[2] However, on 19 January 2021 ABP determined that Mr Cooper's appeal

[2] While Mr Cooper placed some emphasis on this point in his submissions, nothing that may have been said by an employee of the Council on 14 January 2021 – *after* the expiry of the statutory appeal period– could conceivably be of any significance.

had not been made within the specified appeal period, on the basis that that period had expired on 13 January 2021. I should explain that section 251 PDA provides that the period between 24 December and 1 January is to be disregarded in calculating any appropriate period or other time limit in the Act. That effectively extended the statutory appeal period to 13 January 2021. As Mr Cooper's appeal was received on 14 January 2021, ABP determined that the appeal was invalid. Mr Cooper was notified of ABP's decision by letter of 20 January 2021.[3]

7. On the following day, 21 January, 2021, the Council issued a formal grant of planning permission in accordance with its earlier decision of 8 December 2020 (hereafter "*the Planning Permission*").

8. On 16 March 2021 Mr Cooper filed a Statement of Grounds, Notice of Motion and Affidavit in the Central Office. The Statement of Grounds and Notice of Motion sought an order of *certiorari* setting aside "*permission granted by DLRCC, 8th December 2020*". In fact, the Planning Permission was not granted on 8 December 2020 but on 21 January 2021, in accordance with the decision to grant permission that the Council had made on 8 December 2020. Reliefs were also sought directed to the use of the screen. However, such reliefs were misconceived and could never have been granted in proceedings such as these. They were, in any event, wholly unsupported by the grounds

[3] ABP's letter erroneously stated that the last day for receipt of a valid appeal was 13 *December* 2020 and that Mr Cooper's appeal had been received on 14 *December* 2020 but these were clearly errors and Mr Cooper did not suggest that he had been misled by them.

set out in the Statement of Grounds. Nothing further will be said here about those reliefs.

9. Notwithstanding the fact that the only substantive relief sought was directed to the Council's decision to grant permission, ABP rather than the Council was named as the Respondent, with the Council named as a Notice Party only. Furthermore, despite its obvious interest in the proceedings – it was, after all, the applicant for and grantee of the Planning Permission – Dundrum Retail GP DAC was not named as a party. It clearly ought to have been named as a Notice Party: *BUPA Ireland Ltd. v. Health Insurance Authority (No. 1)* [2006] 1 IR 201 (per Kearns J at para 26).

10. The grounds for relief set out in the Statement of Grounds did not identify any alleged invalidity in the Planning Permission. Rather, the Statement recites the fact that Mr Cooper had lodged an appeal with ABP on 14 January 2021 but was later told that the appeal was lodged too late. It states that Mr Cooper did not receive notification of the decision to grant permission until 12 January 2021 and that he contacted the Council on 14 January 2021 and was informed by it that the final day for lodging an appeal was that day. It also says that the post office had said that they had delivered the Council's notification on 14 December 2021 but that that was "*incorrect*". That was, it was said, "*the outline of this case."*

11. Sections 50 and 50A PDA govern challenges to planning decisions made by planning authorities and ABP. These provisions apply (*inter alia*) to *"any decision made or other act done by … a planning authority, a local authority or the Board in the performance*

or purported performance of a function under this Act" (section 50(2)(a) PDA). Thus their scope of application extends beyond decisions to grant or refuse planning permission and include other decisions such as the decision made by ABP here that Mr Cooper's appeal was invalid. The validity of any decision or act within the scope of section 50(2) PDA may only be challenged by way of an application for judicial review under Order 84 RSC. Any application for leave to apply for judicial review "*shall be made within the period of 8 weeks beginning on the date of the decision*" (section 50(6) PDA). In certain circumstances, however, that period may be extended by the High Court (section 50(8) PDA).

12. As enacted, section 50 PDA provided that the application for leave should be made on notice. That position was altered by amendments effected by the Planning and Development (Strategic Infrastructure) Act 2006. Applications for leave are now made by motion *ex parte* (section 50A(2)(a) PDA) but the Court hearing an *ex parte* application may direct that it should proceed *inter partes* (section 50A(2)(b) PDA). Leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed (section 50A(3)(a) PDA) and that the applicant has a sufficient interest in the matter which is the subject of the application (section 50A(3)(b)(i) PDA) or satisfies the conditions set out in section 50A(3)(b)(ii) PDA.

13. Under the previous statutory regime, time stopped running for the purposes of the statutory limitation period on the filing in the Central Office and the service on all necessary parties of the notice of motion within such period: *KSK Enterprises Limited*

v An Bord Pleanála [1994] 2 IR 128. For the purposes of the current rules, the application for leave is made when (and only when) the *ex parte* application is actually moved in Court. Filing judicial review papers in the Central Office does not stop time running for the purposes of section 50 PDA. *Heaney v An Bord Pleanála* [2021] IEHC 201; [2022] IECA 123.

14. Mr Cooper's application for leave ought therefore to have proceeded by way of *ex parte* motion, subject to the High Court's power to direct an *inter partes* hearing if it considered it appropriate. In the circumstances, it is unclear why Mr Cooper was permitted and/or directed to issue a notice of motion out of the Central Office. Nonetheless, a motion did indeed issue on 16 March 2022 addressed to ABP and the Council and the application papers were served on ABP on the same day. We were told by Mr Cooper in the course of the appeal hearing that he also served the papers on the Council. If so, the Council appears to have elected not to appear and it did not participate in the application giving rise to this appeal or in the appeal itself.

15. Mr Cooper's motion seeking leave was made returnable before the High Court on 20 April 2021. Prior to that date, ABP, through its solicitors, wrote to Mr Cooper identifying a number of "*procedural issues*" arising in relation to his proceedings and inviting him to withdraw them, which Mr Cooper was not willing to do. On 20 April, the motion was adjourned to 11 May 2021. On that date, ABP informed the High Court that it intended to apply to have Mr Cooper's proceedings struck out and, it seems, was given leave to bring a motion to that end.

16. Mr Cooper does not appear to have formally moved his application for leave on either the 20 April 2021 or 11 May 2021. That certainly was the understanding of Barrett J in the High Court: High Court Judgment (the "*Judgment*"), para 35.

17. ABP's motion issued on 1 June 2021, returnable for 5 July 2021. ABP invoked Order 19, Rule 28 RSC and/or the inherent jurisdiction to seek an order striking out Mr Cooper's judicial review proceedings on the basis that they were out of time pursuant to Section 50 PDA, did not disclose a reasonable cause of action, were improperly constituted and/or were bound to fail. [4]

18. That motion was heard by Barrett J on 5 July 2021 and on 12 July 2021 the Judge gave a written judgment setting out his reasons for making the order sought by ABP. The judgment identified a number of significant defects in the proceedings, as follows:

- The reliefs sought by Mr Cooper did not lie against ABP and ABP was not the appropriate *legitimus contradictor* as what was sought was to set aside a

[4] In my judgment in *North Westmeath Turbine Action Group Ltd v An Bord Pleanála (No 2)* [2022] IECA 126 (Noonan and Whelan JJ agreeing), I expressed doubts as to whether the jurisdiction to strike out a pleading conferred by Order 19, Rule 28 RSC extended to judicial review proceedings, given that the definition of "*pleading*" in Order 125, Rule 1 RSC does not include a statement of grounds or originating notice of motion. As for the *Barry v Buckley* jurisdiction, in *Alen-Buckley v An Bord Pleanála* [2017] IEHC 311 the High Court (Costello J) held that such jurisdiction was exercisable in respect of judicial review proceedings, rejecting the applicant's argument that the appropriate procedure was to bring an application to set aside the leave, relying on the jurisdiction recognised in *Adam v Minister for Justice, Equality and Law Reform* [2001] 3 IR 53. No question of setting aside leave arose here, as leave was never given. *Alen-Buckley* was relied on by the Judge here and no issue was raised on appeal as to the jurisdiction of the High Court to have made the order it did in the circumstances here.

decision of the Council. The proceedings as brought were therefore bound to fail as they disclosed no cause of action against ABP (Judgment, para 13)

- The Statement of Grounds was not adequately particularised (Judgment, para 17)

- To permit Mr Cooper to proceed against ABP would involve a "*flagrant breach of applicable law/rules*" (Judgment, para 19).

- The proceedings were out of time in any event and no purpose would be served in extending the time (Judgment, paras 30-35). It does not appear that any application for an extension of time was ever made by Mr Cooper in any event. As already noted, the Judge noted in this context that no application for leave had been moved at any stage by Mr Cooper (Judgment, para 35).

19. The Judge also held that Mr Cooper's appeal to ABP had not been made within the four week period provided for by section 37 PDA (Judgment, para 25) and that ABP was obliged by section 127 PDA to invalidate the appeal and had no power or jurisdiction to do otherwise (Judgment, para 29). The Judge also noted that, even if the court was to apply a *de minimis* principle, no purpose would be served because there was no cause of action disclosed in the proceedings against ABP (Judgment, para 27).

20. Accordingly, on 17 November 2021, the High Court made an order striking out the proceedings. The operative part of the order reads as follows:

*"And **THE COURT BEING SATISFIED** that the Respondent should be granted the reliefs sought on the basis that the proceedings had not been instituted within the statutory timeframe in section 50(6) of the Planning and Development Act 2000*

*And **IT IS FURTHER ORDERED** that the reliefs sought by the Respondent be granted and that these proceedings be and are hereby struck out."*

21. Mr Cooper lodged an appeal to this Court in December 2021 and his appeal came before the Court for directions on 11 January 2022. At that stage an issue arose as to whether Mr Cooper required the leave of the High Court pursuant to section 50A(7) PDA in order to pursue an appeal. ABP contended that such leave was required. In doing so, it appears to have overlooked the decision of this Court in *North Westmeath Turbine Action Group v An Bord Pleanála* [2020] IECA 355 which held that leave is not required in an appeal such as this, on the basis that the order appealed from is not "*the determination … of an application for section 50 leave or an application for judicial review on foot of such leave"*.

22. In any event, the Court directed Mr Cooper to apply to the High Court for leave and he duly made such an application to Barrett J on 16 March 2022. Notwithstanding the opposition of ABP, the Judge indicated that he was granting leave. The point of law identified orally by the Judge related to the approach to be taken when a party claimed to have received notice of a decision of a planning authority at a point which made it

practically impossible to bring an appeal to ABP. It is clear, however, that the Judge was of the view that, once he had given leave to appeal, this Court would be at large to consider additional points. That is not a correct understanding of the effect of section 50A PDA. Where a point of law is certified, this Court's jurisdiction on appeal is limited to determining that point: see section 50A(11) PDA which is referred to further below.

23. The High Court Order of 16 March 2022 does not identify any point of law. It simply orders "*that the within application for a Certificate for leave to Appeal be and is hereby granted*." In my view, an order in that form clearly does not comply with the requirements of section 50A PDA. Section 50A(7) PDA requires the High Court to certify that its decision "*involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal]*". The Order of 16 March 2022 does not comply with that requirement. Furthermore, it is implicit in that requirement that the point (or points) of law considered to meet the statutory threshold should be identified. If there was any scope for debate on that point – and I do not believe that there is – it is removed by section 50A(11) PDA which provides that, where an appeal is permitted, this Court shall "*have jurisdiction to determine only the point of law certified by the Court under subsection (7) (and to make only such order in the proceedings as follows from such determination).*" That statutory prescription would be set at nought if the certified point of law was not identified by the High Court.

24. ABP then proposed a formulation of the point of law in correspondence which was subsequently approved by this Court, as follows:

> *"Where an appeal from a decision of the planning authority is received by An Bord Pleanála (the Board) from an appellant(s) outside of the 'appropriate period' of four weeks from that decision (as defined in section 37(1)(d) of the Planning and Development) Act 2000) is the Board obliged to invalidate the appeal by virtue of section 127(1)(g) of the Planning and Development Act 2000 or is there a de minimis principle which would allow the Board to accept a late appeal outside of the appropriate period, because of circumstances outside of the control of the appellant(s) and/or the Board?"*

For ease of reference, I shall refer to this point of law as the "*Certified Question*".

25. Prior to the hearing of the appeal, the Court brought the decision in *North Westmeath Turbine Action Group v An Bord Pleanála* [2020] IECA 355 to the attention of the parties and indicated that, having regard to it, the Court was of the view that Mr Cooper's appeal was not governed by section 50A PDA and was not therefore limited to the Certified Question. ABP did not take issue with that position.

THE ARGUMENTS ON APPEAL

26. Mr Cooper presented his appeal himself and did so in a very measured and courteous manner. He indicated that, although he understood that the appeal was not limited to the Certified Question, he did not wish to address any wider issues. The High Court Judge had granted leave on the basis that he could not have been expected to lodge his appeal to ABP within a period of 24 hours. The PDA allowed 28 days for an appeal to be made to ABP and Mr Cooper submitted that it was unacceptable that he should effectively be deprived of his right to bring such an appeal because of the late receipt by him of the notification of the Council's decision to grant permission. In Mr Cooper's submission, the relevant legislation was not "*correct*" because it made no provision for the circumstances that had arisen here and did not give ABP any discretion to extend the statutory appeal period.

27. Mr Cooper did not specifically address how the Certified Question should be answered. He did not contend that the relevant statutory provisions could properly be interpreted as conferring a discretion on ABP to accept a late appeal, whether on a *de minimis* basis or otherwise. On the contrary, his position appeared to be that the statutory provisions were objectionable precisely *because* they afforded no such discretion to ABP.

28. Mr David Browne BL (for ABP) submitted firstly that the issue raised by the Certified Question did not properly arise for determination because his client's decision to reject Mr Cooper's appeal as invalid had not been challenged. Secondly, and in any event, the

Judge had correctly found that the judicial proceedings were out of time. Mr Browne relied on the Judge's finding that, even as of July 2021, Mr Cooper had still not moved his application for leave (Judgment, para 35). Even if it could be said (as the Court suggested in argument) that the application was to be regarded as having been moved (although not determined) when it came before the High Court on 20 April 2021, that was, Mr Browne observed, well outside the statutory 8 week period. No application for an extension of time had been made by Mr Cooper and, in any event, as the Judge had found (Judgment, para 33), no purpose would be served by extending the time in circumstances where no cause of action against his client was disclosed.

29. Without prejudice to these points, Mr Browne also made submissions on the issue raised by the Certified Question. He said that it was clear from the express terms of section 37(1)(d) that the "*appropriate period*" within which an appeal to ABP could be brought began on the day of the decision of the planning authority, not any later day such as the day on which an objector was notified. That proposition was not in controversy. Allowing for the effect of section 251 PDA (to which I have referred above) the "*appropriate period"* here had expired on 13 January 2021. Mr Cooper's appeal was therefore lodged outside the appropriate period. Again, that is not in controversy. It was, Mr Browne continued, clear from the provisions of section 127 PDA that ABP had no power to accept an appeal lodged outside of the "*appropriate period"*. Section 127(1)(g) provides that "*an appeal ... shall ... be made within the period specified for making the appeal or referral*". In turn, section 127(2)(a) provides that "*an appeal .. which does not comply with the requirements of subsection (1) shall be invalid."* Those provisions were, he submitted, clear in their effect and mandatory

in nature and left no scope for any discretion on the part of ABP to accept a late appeal, whether on a *de minimis* basis or otherwise.

30. Mr Browne brought the Court to a number of authorities which, he said, supported that submission, including *McCann v An Bord Pleanála* [1997] 1 IR 264, *Graves v An Bord Pleanála* [1997] 2 IR 205, *Murphy v Cobh Town Council* [2006] IEHC 324, *Southwood Park Residents Association* v *An Bord Pleanála* [2019] IEHC 504 and *Dalton v An Bord Pleanála* [2020] IEHC 27. Further reference is made to some of these decisions below.

31. In his reply Mr Cooper did not significantly engage with the arguments made by Mr Browne and did not address the authorities he had opened as to the interpretation and effect of section 127 PDA.

DISCUSSION AND DISPOSITION

32. The fundamental finding made by the Judge here was that the proceedings disclosed no cause of action against ABP (Judgment, paras 7, 13, 21 and 33). As the Judge noted, no decision or act of ABP was challenged in the proceedings. Specifically, no relief was sought by Mr Cooper in respect of ABP's decision to reject his appeal as invalid pursuant to section 127 PDA (the only decision made by ABP here). The validity of that decision could only have been questioned by way of judicial review proceedings brought in accordance with the provisions of section 50 and 50A PDA and Order 84 RSC. No such proceedings were brought by Mr Cooper and it is much too late for such proceedings to be brought now.

33. In view of his finding that the proceedings disclosed no cause of action against ABP, it is very difficult to understand how the Judge took the view that the Certified Question arose, still less that it satisfied the requirements for certification in section 50A PDA (assuming the application of section 50A). On the Judge's own analysis, the issue of the interpretation and effect of section 127 did not properly arise (and, it may also be observed, he did not appear to think that there was any uncertainty about that issue in any event) and in purporting to certify a point of law addressed to that issue, the Judge was effectively certifying an entirely academic or theoretical issue, whose determination - either way - could not affect the appropriate disposition of ABP's strike-out application. The purported certification of such an issue was, in my view, wholly at

odds with the statutory regime. This Court's function in hearing a certified appeal is to determine a live controversy, not to give an advisory opinion.

34. Of course, the appeal has now proceeded on the basis that section 50A is not engaged. But that does not materially alter the analysis. In the absence of any challenge to ABP's decision to reject Mr Cooper's appeal, the issue of whether it was open to ABP to accept that appeal, though lodged outside the "*appropriate period"*, because of the particular circumstances said to be presented here, simply does not arise.

35. There is no doubt that there is a significant body of High Court authority indicating that the requirements of section 127(1) PDA are mandatory and that the time-limit for bringing appeals to ABP is absolute. Mr Browne very properly drew the Court's particular attention to the decision of the High Court (MacMenamin J) in *Murphy v Cobh Town Council* [2006] IEHC 324. In *Murphy*, the applicant's appeal to ABP had been rejected as invalid on the basis of non-compliance with section 127(1)(e) PDA. That provision requires that an appeal brought by a person who made submissions or observations to the planning authority be accompanied by the acknowledgement by the planning authority of receipt of the submissions or observations. The applicant in *Murphy* had indeed received such an acknowledgement from the planning authority but inadvertently submitted a later letter with his appeal. ABP decided that the appeal was invalid on that basis and that decision was then challenged. Following a review of the earlier authorities MacMenamin J held that the provisions of section 127(1) PDA were mandatory in effect (at page 14). However, he considered that the situation was one

where the *de minimis* rule should be applied as there had been substantial compliance with the statutory requirements (pages 16 - 17).

36. *Murphy* was not concerned with section 127(1)(g) and Mr Browne understandably emphasised the following passage from the judgment of MacMenamin J (at pages 16-17):

> *"The facts of this case are distinguishable from those identified by Lavan J in McCann v An Bord Pleanála [1997] 1 IR 264, at p. 271, and Feeney J. in Rowan v An Bord Pleanála (High Court, Unreported, 26 October 2006) [neutral citation [2006] IEHC 180] where failure of compliance with a mandatory time requirement arose. In both judgments such absence of compliance necessarily entailed a substantive or fundamental non-fulfilment of a statutory procedural requirement, more analogous to a failure to issue a summons within a statutory limitation period."*

37. In *McCann*, the High Court (Lavan J) held that the provisions of the Local Government (Planning and Development) Acts governing appeals to ABP were mandatory in nature and that an appeal made one day outside the statutory appeal period (which was then one month) could not be entertained by the Board or regarded as a mere technical breach. *Rowan* was not directly concerned with the time-limit for appeals.

38. Mr Browne accepted that *Murphy* was authority for the proposition that a technical non-compliance with the mandatory requirements of section 127(1) PDA might be excused

as *de minimis* in certain circumstances. However, he drew the Court's attention to the decisions in *Southwood Park Residents Association* v *An Bord Pleanála* [2019] IEHC 504 and *Dalton v An Bord Pleanála* [2020] IEHC 27 in which the High Court (Simons J and McDonald J respectively) emphasised the very narrow scope of application of the *de minimis* principle in this context. In any event, he submitted, the passage set out above from *Murphy* clearly indicated that any *de minimis* exception had no application to the issue of compliance with the statutory time limit. Here, he said, Mr Cooper's appeal was lodged outside the statutory period and that involved "*a substantive or fundamental non-fulfilment"* of the mandatory requirement prescribed in section 127(1)(g) PDA which ABP had no power to disregard or excuse. Accordingly, it was obliged to reject the appeal.

39. Section 127(1)(g) PDA is, on its face, absolute in its terms. To read section 127(1)(g) as subject to some *de minimis* exception (of undefined parameters) would generate very significant uncertainty in an area of law where (as the authorities have repeatedly emphasised), there is a pressing public interest in certainty and finality. The Oireachtas could have legislated to provide for the extension of the statutory appeal period of 28 days, and/or for the acceptance by ABP of appeals lodged outside that period, in prescribed circumstances (as it has done in respect of judicial review proceedings brought outside the statutory 8 week limit) but it has not done so.

40. Those observations aside, I do not consider it appropriate to address further the issue raised by the Certified Question. As I have said, the issue does not properly arise in the proceedings or in this appeal. It might, even so, be appropriate for this Court to

adjudicate on it. If for instance there were conflicting High Court decisions on the issue, it might appear desirable for this Court to resolve that conflict. But the High Court jurisprudence appears to speak with one voice in this context. Furthermore, the authority of any decision that the Court might give on this appeal would necessarily be limited in circumstances where it has effectively heard argument from one side only on the issue.

41. Given that the issue raised in the Certified Question does not properly arise, and having regard to the fact that Mr Cooper did not seek to address any other issue or advance any argument to the effect that the Judge's findings were otherwise in error, his appeal must fail.

42. It is not, in the circumstances, necessary to address the question of whether Mr Cooper's proceedings were out of time. The Judge concluded that they were and Mr Cooper did not challenge that conclusion. But there is one issue that I wish to mention in this context. It is clear from his Judgment that the Judge was of the opinion that, even as of July 2021, Mr Cooper had done nothing to stop time running for the purposes of Section 50(6) PDA (Judgment, para 35). What section 50(6) provides is that the application for leave be *"shall be made within the period of 8 weeks beginning on the date of the decision."* That requires that the application for leave should be *moved* within the 8 week period; it does not require that the application for leave be *determined* within that period (as already noted, the High Court is empowered to direct that the application for leave proceed on an *inter partes* basis which in many if not most cases will result in the application for leave being determined outside the 8 week period).

43. The Judge was right that filing a statement of grounds was not sufficient to *"stop the clock."* That was confirmed by this Court in *Heaney v An Bord Pleanála* [2022] IECA 123, upholding the decision of Barr J in the High Court which was cited by the Judge. But Mr Cooper had done more than simply file a statement of grounds in the Central Office. He had issued (and had served on ABP and the Council) a notice of motion seeking leave, returnable before the High Court on 20 April 2021. It may be that it was not appropriate that such a motion was allowed to issue but the fact is that it did issue and was listed in the High Court - before, it seems, Meenan J - on 20 April 2021 and again on 11 May 2021. While the Court has not seen a transcript of what occurred on those dates, it seems clear that there was some discussion of the motion, given that ABP asked for and was given leave to bring its strike-out application. That being so, it seems arguable - at least - that Mr Cooper's application for leave ought to be regarded as having been "*made"* on 20 April 2021 or, at the latest, on 11 May 2021. Indeed, if no application for leave was ever made - as the Judge suggested in his Judgment - one wonders what was before the Court that was capable of being the subject of a strike-out application.

44. However, this issue does not require further consideration here. Even if the application for leave was regarded as having been made on 20 April 2021, that was clearly outside the statutory 8 week period. No extension of time was sought by Mr Cooper. In any event, even if an extension of time had been sought and granted, that would not have addressed the fundamental problem that the proceedings disclosed no cause of action against ABP.

45. The Judge was therefore entitled to conclude that the proceedings against ABP were unsustainable and should be struck-out. His jurisdiction to make such an order has not been disputed. However, the order that he made (and was asked by ABP to make) was broader in its terms, striking out the proceedings in their entirety. Mr Cooper did seek relief against the Council (at least to the extent of seeking *certiorari* of the Council's decision to grant permission) albeit that his statement of grounds did not identify any grounds for that relief and that the Council was named as notice party rather than respondent. Section 50(6) would also appear to provide a barrier to any claim against the Council. Nevertheless, the Council did not make any application to strike out the proceedings against it. In the circumstances, I consider that the parties should have an opportunity to address the appropriate form of order to be made by this Court. The issue of costs can be addressed at the same time. The Court will arrange for a further listing of the appeal to allow these issues to be addressed.

46. Mr Cooper clearly has a real sense of grievance that his right to appeal the decision of the Council was effectively set at nought. If the facts are as he asserts, that is understandable. The right of appeal to ABP from decisions of planning authorities is an important one. One of the purposes of the notification obligation imposed on planning authorities by Article 31 of the Planning and Development Regulations 2001 is to enable that right to be exercised effectively: see Article 31(k). Judicial review of the decision of the planning authority is not an adequate substitute for an appeal to ABP, given that the former is concerned only with reviewing the validity of the planning decision whereas the planning merits may be agitated *de novo* before the Board. But

absent any constitutional challenge - and there is no such challenge in these proceedings - any unfairness arising from the operation of section 127 PDA is a matter for the Oireachtas to address.

Costello and Allen JJ have authorised me to record their agreement with this judgment.