THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 730
Record No: 2020/851JR

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN:

KAREN GERAGHTY

APPLICANT

-AND-

LEITRIM COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Cian Ferriter dated this 21st day of December 2022

Introduction

1. These proceedings concern a challenge by way of judicial review pursuant to s.50 of the Planning and Development Act 2000, as amended ("the 2000 Act") to the alleged failure of the respondent ("the Council") to conduct an Environmental Impact Assessment ("EIA") in respect of an urban regeneration development ("the development") in or near the town centre of Carrick-on-Shannon, County Leitrim.

2. The applicant's essential case is that an EIA was mandatory in circumstances where the development constituted urban development in "*a business district*" within the meaning of para. 10(b)(iv) of Part 2 of Schedule 5 of the Planning and Development Regulations 2001, as amended (for ease, "the scheduled paragraph") and where the overall development as amended during design stage exceeded 2 hectares in area (2 hectares being the threshold size to trigger a mandatory EIA for urban development in a business district pursuant to the scheduled paragraph). The Council denies that any mandatory EIA was required on the basis that one quite significant element of the development, being a

public boardwalk on the banks of the River Shannon, was not part of a business district within the meaning of the scheduled paragraph. The Council further maintains that in any event the applicant is well out of time to bring her challenge and does not meet the criteria for an extension of time set out in s.50(8) of the 2000 Act ("s.50(8)").

Background

3. The development in issue in these proceedings involves a regeneration project in the town of Carrick-on-Shannon. The project was the subject of a successful application by the Council for funding from an Urban Regeneration and Development Fund. The applicant lives and has a shop on Main Street in the town. The development, which was undertaken as a single project, was described by the Council as comprising essentially three parts being "street works" (which principally involved works to Main Street, St. George's Terrace (which connected to Main Street) and related approach roads); "car park works" (which involved a car park being installed at a location connected to Main Street by a laneway running near the applicant's property); and "boardwalk works" (which involved the installation of a floating public boardwalk in an area near the town centre on the bank of the River Shannon where two boat companies operate a private dock for boat hire by boat users including tourists).

4. It is appropriate to set out the terms of the scheduled paragraph in context at this point. Paragraph 10 of Schedule 5, Part 2, of the 2001 Regulations provides that "*infrastructure projects*" which meet certain defined thresholds require a mandatory EIA. It provides as follows:

> *"10. Infrastructure projects*
>
> *(a) Industrial estate development projects, where the area would exceed 15 hectares.*
>
> *(b) (i) Construction of more than 500 dwelling units.*
>
> *(ii) Construction of a car-park providing more than 400 spaces, other than a car-park provided as part of, and incidental to the primary purpose of, a development.*

(iii) Construction of a shopping centre with a gross floor space exceeding 10,000 square metres.

(iv) Urban development which would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of other parts of a built-up area and 20 hectares elsewhere. (In this paragraph, "business district" means a district within a city or town in which the predominant land use is retail or commercial use.)"

5. The scheduled paragraph is underlined above. This paragraph gives effect to the provisions of paragraph 10 of annex 2 of the EIA Directive (Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment) ("the EIA Directive").

6. The Council took the view that the entire development was not to be regarded as "a business district" within the meaning of the scheduled paragraph. The Council took the view that only the street works and car park works constituted a business district and that the boardwalk works (which were in an area along the banks of the River Shannon zoned for "riverside development") were not part of that business district within the scheduled paragraph. The combined area of the street works and car park works was well under 2 hectares.

7. If an EIA is required in the context of local authority "own development", s.175 of the 2000 Act provides that the local authority must prepare an EIA report and submit that to An Bord Pleanála ("the Board") for the Board's approval. As the Council was of the view that an EIA was not required here, the project was approved pursuant to s.179 of the 2000 Act and Part 8 of the 2001 Regulations. These provisions govern the process for local authority own development. Subject to certain exceptions, local authority own development is regarded as exempted development and does not require planning permission. It does, however, require a public consultation process which is governed by the provisions of Part 8 of the 2001 Regulations ("the Part 8 process").

8. It is also relevant to note that when the proposed development was initially notified to the public by the Council, the combined area of the three components of the development was less than 2 hectares. This was significant as it meant that, absent any likely

significant effects on the environment, no EIA would have been required in respect of the development, even including the boardwalk area.

9. The Part 8 public consultation process commenced on 28 November 2018 when the proposed development was notified to the public by the Council by way of site notice, the Council's website and newspaper notice. A series of documents were prepared by the Council in connection with the Part 8 process. These documents included a "*Part 8 planning application architect's report*" prepared by the Council's architects, dhb Architects, dated November 2018. dhb Architects also prepared "*Part 8 planning application drawings*" detailing the various elements of the proposed development, and these were also made available as part of the public consultation process. An Ecological Impact Assessment report was commissioned by the Council and it too was made available along with a Traffic and Transportation Assessment Report and a Flood Risk and Drainage Assessment Report. Finally, and importantly for present purposes, an EIA screening report was prepared by the Council's senior planner, Mr. Bernard Greene, and made available as part of the Part 8 public consultation process.

10. After referring to the terms of the scheduled paragraph, the EIA screening report noted (at p.3) that "*The overall area of the proposed development is 1.86 hectares, of which 1.54 hectares are located within the business district. This corresponds to 77% of the two hectare threshold which applies in the case of a business district. The replacement of the existing fixed boardwalk with a floating public boardwalk is not located within the business district and should be excluded from such consideration*".

11. Article 120(3)(b) of the 2001 Regulations provides that any person who considers that a development proposed to be carried out by a local authority would be likely to have significant effects on the environment may, within four weeks of the public notice in relation to the proposed development, apply to the Board for a screening determination as to whether the development would be likely to have such effects. The applicant did not make such an application here.

12. The Council held a public information event on 29 January 2019 in respect of the proposed development. The applicant's family attended the public information event and made a representation about the car park. This was followed by an email from Ms. Linda Geraghty of the applicant's family, dated 15 January 2019, where she stated: "*I wish to gain direct access from property 'Geraghty's' to proposed carpark on 'Flynn's field'*".

13. On completion of the public consultation process, the chief executive of the Council prepared a report as required under s.179(3) of the 2000 Act in respect of the proposed development. This report addressed the various submissions received, including the submission received from the applicant's family requesting provision of direct access from the carpark area to the rear of their property, which property fronted onto the Main Street. The report recommended that the proposed development be proceeded with subject to the inclusion of various conditions. Those conditions envisaged a detailed design phase for the project. While this report is not dated, it was clearly prepared in the period after the public consultation but before the proposed development was put before the Council's elected members for approval on 11 February 2019.

14. The proposed development was approved by the elected members of the Council on 11 February 2019.

15. The Council lodged a CPO application with the Board on 19 March 2019 in relation to the car park works and this was confirmed by the Board on 11 September 2019.

16. Mr. Bernard Greene, the Council's senior planner with responsibility for the project, explained in his affidavit in the proceedings how the design stage occurred from 28 February 2019 until tender documents were issued to the contractors which on 31 October 2019 and 13 December 2019. He averred that:-

> *"As the design was developed, decisions were made at [design meetings] to agree final design details in respect of the various works. The design published at the Part 8 stage was developed during this period until a final design was agreed and included in the tender documents."*

17. It seems that the final agreed design drawings were submitted by the Council's capital projects office to the Council's planning department for consideration in November 2019. The design stage drawings submitted to the Council's planning department in November 2019 were placed on the Council's public planning file at that point.

18. One of these drawings contained a breakdown of the development areas as agreed at design stage which showed a total area of 22,226 m^2, i.e. just over 2.2 hectares. Some

5,153 m^2 of this related to the boardwalk works. This meant that, on the applicant's conception of the development, a mandatory EIA was now required. However, on the Council's view of matters, the area of the business district of the street works and carpark works was still under 2 hectares and, therefore, no mandatory EIA was required.

19. On 13 January 2020, Mr. Greene prepared a compliance submission report which addressed the various alterations to the development which had occurred at design stage ("the January 2020 compliance report"). He expressed the view that these alterations did not constitute a material alteration to the approved scheme such as would warrant a separate Part 8 consultation process. The January 2020 compliance report detailed the principal differences between the scheme as approved in the Part 8 process and the detailed design of the scheme as advanced through the tender stage, including extensions to the boardwalk area works.

20. It is clear from the tender drawings as finalised at design stage that the boardwalk works now involved additional works on the property of the boat yard companies adjacent to the public boardwalk. Mr. Greene described the difference in the area of the boardwalk works in his affidavit as being the result of three separate elements as follows:

> *"(i) Extending the boardwalk by a further 30 metres on the northern end to connect to the existing slipway high level walkway. This would allow looped access along the roadway which serves the Boating Companies property as well as the rear car park serving Leitrim County Council Aras an Chontae complex. This extended the area by approximately 135m2.*
>
> *(ii) Forming a high-level access to the proposed boardwalk at the existing steps adjacent to the rowing club. This extended the area by approximately 980m2. This also included some accommodation works in terms of landscaping and minor alterations to the adjoining car park.*
>
> *(iii) Undertaking of certain agreed accommodation works within the lands of Emerald Star/Locaboat primarily relating to the resurfacing of an existing car parking area. This extended the area by approximately 1,767m2.*

The extent of the boardwalk was reduced in length adjoining the pedestrian link to the People's Park."

21. It is agreed that the final area measurements of the development based on the design stage drawings which went to tender were as follows:

Approach Roads, 4510m2
Flynn's Field [i.e. the car park], 5299m2
George's Street, 4025m2
Main Street, 2575m2
TOTAL ROADS AND PAVING, 16409m2
Marina [i.e. the boardwalk works], 5933 m2
TOTAL PROJECT AREA: 22342m2 = 2.2342ha.

22. The Council's planning department wrote to the senior engineer in the Capital Projects Office of the Council on 18 February 2020 setting out the planning department's view that the differences in the scheme being submitted to tender and the original approved scheme were not so material as to warrant a separate Part 8 consultation process.

23. Mr. Greene averred that the January 2020 compliance report and 18 February 2020 correspondence between the planning department and the Capital Projects Office were placed on the Council's planning file (and therefore public accessible) at the date of their preparation/receipt.

s.50 and the date of the relevant act or decision

24. It is useful at this point to set out the terms of s.50 of the 2000 Act addressing time limits for judicial review applications against planning decisions. Section 50(6) provides that "*Subject to subsection (8), an application for leave to apply for judicial review under* [Order 84 RSC] *in respect of a decision or other act to which subsection (2)(a) applies* [i.e. a decision or act of, inter alia, a local authority in the performance of a function under the 2000 Act] *shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate*."

25. Section 50(8) provides that:

> *"The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—*
>
> *(a) there is good and sufficient reason for doing so, and*
>
> *(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."*

26. The question arises as to when the relevant act was done or decision taken by the Council for the purposes of the s.50 time limit provisions in this case. It is not entirely clear when the Council can be said to have formally approved the alterations to the original approved scheme as reflected in the detailed design drawings. While those drawings appear to have been placed on the Council's publicly accessible planning file in late November 2019, the compliance submission report was prepared on 13 January 2020 and the senior engineer in the Council's capital projects office was notified on 18 February 2020 of the planning department's view that the alterations did not constitute material alterations to the approved scheme and that no fresh Part 8 consultation process was required. The 18 February 2020 letter was placed on the Council's file on that date.

27. It appears from Mr. Greene's affidavit in these proceedings that the Council thereafter proceeded with the project on the basis that those design drawings were approved and the project was constructed on that basis, with construction commencing in March 2020.

28. Given that the internal Council process resulting in the "clearance" of the revised plans from a planning perspective did not occur until 18 February 2020, I propose to proceed on the basis that the relevant decision or act for the purposes of s.50 occurred on 18 February 2020 and the 8-week period in s.50(6) accordingly commenced on that date and ended in mid-April 2020.

The period from 18 February 2020 to the commencement of these proceedings

29. The next event relevant to these proceedings occurred on 7 August 2020, when the Council wrote to "Kathleen Geraghty and the Geraghty family" (which the applicant

accepts included her) by letter of that date. This letter refers to a request for information under the EU Access to Information on the Environment Directive "*in relation to your property at Geraghty's, Carrick-on-Shannon*". It is not clear when that access request was made. This letter set out information in relation to an application submitted by the Council under "*Call 2 of the Urban Regeneration and Development Fund (URDF)*". It attached a document entitled "*Carrick-on-Shannon Phase 2 URDF Application – Architectural Design Concepts May 2020 – DHB Architects*" which was said to comprise "*the full suite of architectural design concepts that was submitted as part of Leitrim County Council's application*". The document supplied with the Council's letter of 7 August 2020 has been referred to as the "May 2020 report". The May 2020 report addresses plans and proposals for a second phase of urban regeneration in Carrick-on-Shannon town centre including proposals that stand to directly impact the applicant's property as her property was earmarked for acquisition for the proposed development of a Leitrim design centre as part of the proposed second phase.

30. As I will come to in more detail later, the May 2020 report contains, *inter alia*, a drawing of the original development (the subject of the Part 8 consultation process) as amended at design stage by November 2019 which set out square meterage in respect of each of the components of the original development as amended at design stage, including the boardwalk component. The overall area of these components, when added together, exceeded the scheduled paragraph threshold of 2 hectares.

31. The applicant's statement of grounds makes reference to discovering the May 2020 report on the Council's planning file and states that this made clear to her that the threshold of 2 hectares was exceeded in the original development but no date for that discovery is provided in either the statement of grounds or her affidavits. I am invited to infer that she did not receive this report until receipt of the Council's 7 August 2020 letter.

32. As I shall return to later, I have no evidence on affidavit as to what steps were taken by the applicant in the period from receipt of the 7 August 2020 letter to 18 September 2020 when she sent a solicitor's letter to the Council.

33. The applicant's solicitor's letter of 18 September 2020 stated that her solicitor still awaited receipt of comprehensive documentation from the Council relating to the Part 8 procedure. This letter also referenced reiterating "*all of the terms of our previous correspondence*" suggesting that the solicitor had been engaged by the applicant some time before then and had sent correspondence to the Council on the applicant's behalf. No such previous correspondence was put before the Court. This letter did reference it being

clear "*from the limited documents which we have been able to review that inter alia the works currently being carried out at the Canon's House are materially different from any authorised development, and in particular that the works now being carried out were never part of any consideration under the said Part 8 procedure*". This letter sought an undertaking that no further works would be carried out to the Canon's House property. The Canon's House property was close to the applicant's property and adjacent to the laneway connecting Main Street to the proposed car park. The letter of 18 September 2020 threatened proceedings in the absence of an undertaking not to carry out any further works on the Canon's House.

34. The Council's solicitors replied by letter of 22 September 2020. That letter made reference to the applicant's solicitor having inspected the planning file for the Part 8 public consultation process in the offices of the planning authority. The 22 September 2010 letter also references a report being prepared by a conservation architect in relation to the proposed upgrade of the existing laneway to the side of the Canon House to provide pedestrian access from the approved carpark to Main Street and the fact that a report prepared by the conservation architect and the planning authority had been provided to the applicant's solicitor. The letter states:

> "*It is the considered view of the planning authority that no amendment to the approved Part 8 Scheme has and is occurring which constitutes a material change and which would necessitate the undertaking of a further public consultation exercise. The basis for this opinion is contained in a report by the senior planner, Mr. Bernard Greene, which report has also been copied for you.*"

35. The report of Mr Greene referred to here is the January 2020 compliance report.

36. The applicant's solicitor replied to the letter of 22 September 2020 by letter of 24 September 2020. In this letter, the applicant's solicitor states:

> "*An appropriate assessment screening report was carried out in a document date stamped at 28 November 2018. Subsequent to that screening – as is acknowledged in the correspondence on the file – there had been a number of amendments and alterations to the plans and in particular as set out in the report of Mr. Bernard Greene, the chief planner, in his report dated 13 January 2020.*"

37. The 24 September 2020 letter then referenced a number of changes to the development as originally approved including to the boardwalk and boat companies' property. The letter also referenced the significant extension of the project from the original calculation of 1.86 hectares and the fact that the 2 hectare threshold had now been exceeded. Mr. Greene's January 2020 compliance report is expressly referenced in that regard. This letter states that "*after many weeks of attempting to obtain information and documentation, such documentation was only made available on 22nd September such that it is only now that the scale of the non-compliance had become apparent*".

38. Importantly, this letter sought an undertaking that no further works would be carried out pending strict compliance with, *inter alia*, the EIA Directive and the 2000 Act and threatened proceedings under s.50 of the 2000 Act "seeking the appropriate injunctive and declaratory relief without any further notice to you whatever".

Application for leave made

39. The applicant's application for leave to apply for judicial review was formally opened on 16 November 2020 and leave was granted on 30 November 2020.

Current position

40. It was averred on behalf of the Council that, as of the beginning of March 2021, the total expenditure on the overall works arising from the Part 8 approval and the implementation of the works was approximately €5,610,690. This has since increased. I was told at the hearing before me in December 2022 that the development was now largely complete.

The applicant's EIA case and the Council's response to that case

41. In order to put in context the time limit issues under s50(6) and (8), which are raised by the Council as a preliminary objection, it is necessary to summarise the applicant's case in respect of alleged non-compliance with mandatory EIA requirements by the Council.

42. The applicant submits that, as the overall area of development exceeded 2 hectares by the time it was amended at design stage and as the development as a whole constituted "a business district" within the meaning of the scheduled paragraph, an EIA was required under the scheduled paragraph. As an EIA was not done, the applicant contends that the Council was in breach of its legal obligations and the Court should now intervene to remedy same.

43. The applicant submits that to seek to excise the boardwalk area from the overall urban development involved in the project would be to undermine the core objective of the EIA regime. She says it would be the antithesis of the purposive approach required by the relevant case law (which emphasises the "wide scope and broad purpose" of the EIA Directive) to allow the Council escape its EIA obligations by artificially cutting out a section of the overall development. Her case is that, on any sensible interpretation, the boardwalk area is part of the same "business district" (within the meaning of the scheduled paragraph) as the area in which the street and car park works are taking place. As counsel for the applicant put it, the relevant focus of the scheduled paragraph was on "use" and the boardwalk is hemmed in on both sides by boat company property which is in commercial use, just as the streets the subject of the street works were hemmed in by commercial and retail use. Furthermore, George's Terrace runs down to near the start of the boardwalk area so that the supposedly different components of the project are in fact connected.

44. In the Carrick-on-Shannon Local Area Plan 2010-2019, the boat companies' property was designated "*mixed use*", while the boardwalk/riverfront area was categorised as "*riverside development*". The rest of the proposed development (including the street and carpark elements) were all in areas zoned for mixed use.

45. The applicant submitted that the precautionary approach mandated by the EIA Directive and the caselaw under that directive would be wholly undermined by permitting the Council to take the approach it has. The fact that some aspect of the boardwalk development was zoned "riverside development" as opposed to "mixed-use" was irrelevant to the application of the discrete test required under the EIA Directive and the scheduled paragraph. Even taking the boardwalk works alone, some 2000 m² of a total of 6000 m² works area was directly in commercial and private property. In short, the boardwalk area was part of "a business district" for the purposes of the scheduled paragraph along with the street work and the car park works. The "predominant use" of the land in this business district as a whole was clearly retail or commercial such that the requirements of the scheduled paragraph were met.

46. The Council for its part submitted that where the scheduled paragraph focused on the question of "use", the question of use had to be viewed through a planning lens. The Council submitted that while there was a single development for regional development funding purposes, there were two quite separate developments for EIA purposes as the boardwalk development was plainly not a business district or part of a business district within the scheduled paragraph because its predominant land-use was not for retail or commercial purposes. The Council averred that its conclusion as to the boardwalk area not being treated as part of a business district along with the street works and the car park was made, "having regard to: (i) the nature of uses in the vicinity of the boardwalk; (ii) the Core Retail Area defined for Carrick on Shannon; and (iii) the land use zoning objective which applies to the location of the boardwalk."

47. As already noted, the relevant local area plans for Carrick on Shannon made clear that the boardwalk area was designated for "riverside development". "Riverside development" was defined in in the Carrick on Shannon Local Area Plan 2010-2019 as "for leisure, amenity and tourism-related uses associated with the River Shannon". The Council submitted that the predominant land-use of the boardwalk area was for leisure, amenity and water-borne tourism which was within the permitted use for "riverside development".

48. The Council submitted that the fact that the riverside development use area adjoined a mixed-use area did not render it a business district or part of a business district. The Local Area Plan stated "*where zoning for mixed use occurs beside zoning for riverside development, the planning authority will curtail the types of developments in these areas to those that would enhance the riverside development*". The purpose of the alterations to the original boardwalk development area was said to be to enhance achievement of the riverside development use of leisure and tourism. Furthermore, the Council's objective in relation to land zoned for mixed use was to develop such lands for "commercial, cultural, residential, retail and related uses". Aa area zoned mixed use was therefore not on its own terms co-extensive with a business district use. This is borne out by the fact that in the mixed-use area immediately adjacent to the boardwalk there was a tennis club, a rowing club, a public park and the Council's offices themselves. The Council accordingly submitted that there was no error in not including the boardwalk works as part of the relevant business district for the purposes of the scheduled paragraph.

49. Counsel for the applicant answered those submissions by contending that the Council's own view of use for zoning purposes could not be determinative of the scheduled paragraph test which focused on actual use and not planning zoning designation. Furthermore, he pointed out that even on its own terms "riverside development" use encompassed tourist-related use which in the case of boat use and hire in the boardwalk area clearly included commercial use and therefore fell within the scheduled paragraph in

any event. Furthermore, the "Core Retail Area" map (contained in the Leitrim County Development Plan 2015 – 2021) relied upon by the Council in support of its arguments in fact was confined to retail use which was too narrow in light of the wording of the scheduled paragraph which included commercial use in addition to retail use, and which map on its own terms did not extend to the whole of the business district as contended for by the Council in any event.

Time Limit Issues

Introduction

50. The applicant seeks an order pursuant to s.50(8) of the 2000 Act extending time for the bringing of the present proceedings and "*declaring that there are good and sufficient reasons for so doing and that the failure to bring the proceedings within 8 weeks of the Council's decision to proceed was due to factors outside the applicant's control*." As set out earlier in this judgment, in my view the act or decision within the meaning of s.50(2)(a) which led to the extension of the overall development area to in excess of 2 hectares occurred on 18 February 2020. Accordingly, the 8-week period in s.50(6) expired in mid-April 2020.

51. In this Court's order of 30 November 2020 granting the applicant leave to bring these judicial review proceedings, the Court expressly reserved for later determination the issue as to whether the within proceedings were commenced in time, stating:

> *"And the Court not accepting that the Applicant has brought the within application in time and reserving to the Judge hearing the substantive case the issue as to whether the Applicant is in time…"*

52. The extension of time application under s.50(8) accordingly now falls for determination by me in this judgment.

Summary of parties' positions on time limit extension application

53. In summary, the applicant submits she could not have brought the proceedings within 8 weeks of the initial EIA screening decision in November 2018, because the 2 hectare threshold was not exceeded at that time. She says she could not have brought her challenge in the context of the detailed design phase, because there was no public notice of the extension in size of the project, no reason for her to suppose it had grown in size, and no reason for her to seek to inspect Council's records from which that information might have been gleaned. The applicant says that she first became aware that something was afoot when she learned of the proposed Phase 2 project involving proposed acquisition of her shop. She then had to clarify what the Council was proposing, which she did in correspondence between 18 and 24 September 2020. She then instituted the present proceedings on 16 November 2020, just under 8 weeks from the date on which that correspondence concluded. In all the circumstances, the applicant says that she has acted promptly and without delay and that she can satisfy the two requirements of s.50(8).

54. The applicant emphasises that as she has identified a clear breach of an important EU environmental protection obligation, the Court should lean very much towards granting the extension of time to ensure that an appropriate remedy for that breach can be provided.

55. The Council maintains strongly that the applicant is irreparably out of time where, in substance, she seeks to challenge the determination by the Council of November 2018 that the boardwalk was not part of a business district within the scheduled paragraph when the time period for challenging that decision has long since passed and where, in any event, the extension of the development embodied in the design plans was available on the Council's planning file (and, therefore, publicly accessible) from late 2019 and early 2020. The Council further submits that even when the applicant was sent specific information in early August 2020 relevant to the area issue, she did not make her application for leave for judicial review until 16 November 2020 such that on any view she cannot satisfy the requirements for an extension of time under s.50(8) of the 2000 Act.

Applicable legal principles

56. The question of the principles applicable to an extension of time application under s.50(8) have been addressed in a series of High Court cases including *Irish Skydiving Club Ltd v*

An Bord Pleanála [2016] IEHC 448, *Sweetman v An Bord Pleanála* [2017] IEHC 46 and *SC SYM Fotovoltaic Energy SRL v Mayo County Council* [2018] IEHC 20. The applicable principles have very recently been authoritatively addressed by the Court of Appeal in the judgment of Donnelly J. in *Heaney v An Bord Pleanála* [2022] IECA 123 ("*Heaney*").

57. As Donnelly J. noted in *Heaney* (at para. 2), two main issues arose in the appeal in that case. The first concerned the point at which the eight-week time limit for bringing proceedings as set out in s. 50(6) of the 2000 Act both starts and stops running. The second concerned the nature of the two-limbed test, pursuant to s. 50(8) of the 2000 Act, that an applicant must satisfy before the High Court may exercise its discretion to grant an extension of time to bring judicial review proceedings. In that case, the appellant had submitted that the fact that the substantive grounds of her judicial review challenge were based on EU law was not sufficiently taken into account in the High Court judgment.

58. Donnelly J. clarified in *Heaney* (at para. 77) that, contrary to indications to different effect in the prior case law (e.g. in *Sweetman v. An Bord Pleanála* [2017] IEHC 46 at para. 6.8), the Court when dealing with an extension of time application under s.50(8) is required to consider "good and sufficient" reason first and thereafter to consider whether the circumstances which resulted in the failure to apply in time were outside the control of the applicant.

59. In relation to the first requirement in s.50(8), that of good and sufficient reason, I take the following principles as being applicable to the exercise of the Court's discretion under s.50(8) from the judgment of Donnelly J. in *Heaney* (the cited paragraph numbers are from that judgment):

    (i) The phrase "*good and sufficient reason*" incorporates a global consideration of the relevant issues (para. 89).

    (ii) A non-exhaustive list of potentially relevant factors was identified by Clarke J. (as he then was) in *Kelly v. Leitrim County Council* [2005] IEHC 11 to include the length of time specified in the statute; the issue of third-party rights; the overall integrity of the planning process itself; blameworthiness (or lack thereof) and the nature of the issues involved (para. 79).

    (iii) The merits of the case are irrelevant to a consideration of the good and sufficient reason question unless the underlying challenge is either

unarguable or is highly meritorious based on a change in jurisprudence (para. 84).

(iv) The question of "*good and sufficient reason*" may include the nature of the issue before the Court (para. 84).

(v) The fact that the underlying proceedings concern EU law (or matters of EU environmental law specifically) is not, *of itself*, a fact that requires an extension of time to be given. It is not a factor that requires particular weight to be attached to it in the assessment of extension of time (para. 96).

60. As noted by Donnelly J. in her conclusion in *Heaney* (at para. 95), in assessing good and sufficient reason,

> *"…the Court is entitled to take a holistic view of all the relevant circumstances, which includes blame on the part of the applicant and that of the authorities, as well as the reasons for the delay. An applicant must engage with the reasons why the application was not made in the time allowed as well as any delay after the time limit expired."*

61. In relation to the second requirement in s.50(8), that of circumstances being outside the control of the applicant, Donnelly J. noted in *Heaney* (at para. 80), that the requirement of "*absence of control*" is a requirement that "*goes beyond an assessment of "blameworthiness", or even lack thereof, as one factor amongst others; rather it requires absence of control by an applicant who seeks an extension*".

Date of the decision under challenge

62. It is appropriate to first address the contention that the applicant's challenge is inexcusably out of time because it essentially involves a challenge to the decision made by the Council in November 2018 not to include the boardwalk area as part of the relevant business district for the purposes of its part 8 EIA screening.

63. I do not believe that it is correct to characterise the decision under challenge in these proceedings as being the decision not to include the boardwalk area in the relevant business district for the purposes of the Council's part 8 EIA screening in November 2018,

or to say that these proceedings involve some form of collateral challenge to that decision. The applicant's case, fundamentally, is that once the development as a whole went over 2 hectares in size the requirements of the scheduled paragraph were then met and an EIA was required. It is true that one essential premise of this case is that the area as a whole was a business district within the scheduled paragraph and that the Council had decided to the contrary in November 2018; however, the other essential premise of the case is that the entire proposed development exceeded 2 hectares and this was not the position in November 2018.

64. In my view, it is correct to characterise the applicant's case as a "threshold" case i.e. that an EIA was required once the threshold area of 2 hectares was exceeded. The fact that the Council had arrived at the view that the boardwalk was not a part of the business district in November 2018 on the facts did not trigger the threshold issue as the threshold issue could not have arisen even if, at that point, the Council had taken the view that the boardwalk was within the business district.

65. Accordingly, I think it is correct to say that the case made by the applicant could only have arisen once the Council by act or decision extended the development as a whole to over 2 hectares. As I have already found, that act or decision occurred in this case on 18 February 2020.

66. I do not regard the applicant's case as coming within the dicta of Humphreys J. in *Reid v. An Bord Pleanála* [2021] IEHC 230, at para. 15, where Humphreys J. held that an alleged substantive illegality with a decision must, in general, have been raised with the decision-maker during the decision-making process and cannot be raised for the first time in a Court challenge as to do so would be "*a form of gaslighting of the decision-maker by seeking to condemn a decision on a point that was never put*". In my view, counsel for the applicant is correct in pointing out the important qualification of that observation by Humphreys J. later in his judgment in that case (at para. 17) namely, that the principle will not apply where the illegality goes to jurisdiction as "*a body can't go beyond its jurisdiction merely due to the silence of an applicant*". In my view, the threshold issue is such a jurisdictional issue.

Analysis of extension of time case

The applicant's initial EU law case

67. It is relevant to note that the applicant's case, as launched, and in respect of which she was granted leave to apply for judicial review, included "*an order pursuant to Article 4(3) TEU and Articles 2-5 of the EIA Directive setting aside any rule of Irish law which would prevent the applicant seeking or obtaining*" the substantive orders she was seeking. In her statement of grounds, she pleaded, in support of this relief, that "*the time limit to challenge the validity of the Council's approval of its project breaches the principle of effectiveness and is contrary to Article 4(3) TEU. Accordingly, section 50(7)* [sic, that should be 50(8)] *should be set aside*".

68. The applicant did not pursue those reliefs at hearing. This is understandable in light of the holding of Woulfe J. (with the majority) in the Supreme Court case of *Krikke v. Barranafaddock Sustainable Electricity Ltd* (Supreme Court, 3 November 2022), where he held (citing the judgment of the CJEU in *Stadt Wiener Neustadt Case* C-348/15, at paras. 40 and 41) that:

> "*…the time limit rules in s.50 governing a challenge to the validity of a planning decision based on the requirements of the EIA Directive comply with both the principle of equivalence and the principle of effectiveness… Such rules, including in particular the rule allowing for an extension of the eight week period, are not less favourable than those governing similar national actions. Such rules do not render practically impossible or excessively difficult the exercise of rights conferred by EU law, considering in particular again the potential for an extension of time." (para. 89)*

69. This finding is also consistent with the analysis of Donnelly J. in *Heaney* albeit in the somewhat different context of rejecting an argument that the principle of effectiveness in EU law required s.50(6) to be interpreted as meaning that time only runs from when the decision was communicated to the person as opposed to from the date of the decision (which is what that provision provides).

70. I think it is reasonable to infer that the applicant had proceeded in the hope that she could overcome her time limit difficulties by reliance on EU law. That line of challenge is not now open to her and, sensibly, was not pursued at the hearing before me. This context may explain why there is no full explanation provided by her on affidavit for the lapse of time between 7 August 2020 and 16 November 2020, a period of some 14 weeks, as I shall turn to below.

The applicant's evidence as to the s.50(2) requirements

71. The applicant stated in her statement of grounds that, when investigating apparent changes to the proposed development, including what she regarded as the demolition of a protected structure (being a boundary wall of the Canon's House property adjacent to hers), she "*found a document on the Council's file entitled Compliance Submission*". This is the January 2020 compliance report. It seems clear from this plea that the applicant consulted the Council's files. As noted earlier, the Council's solicitor's letter of 24 September 2020 refers to the applicant's solicitor having consulted the planning file prior to then. The applicant does not provide a date for when she or her solicitor consulted the Council's files. In similar vein, the applicant in her first affidavit in these proceedings refers to her solicitor finding the May 2020 report "*on the County Council's file*". She does not say when that happened. Mr. Greene pointed out in his replying affidavit that this document had not been placed on the Council's file. She does not seek to explain the apparent error in her first affidavit (and statement of grounds) on this matter in her second affidavit.

72. In her first affidavit, the applicant averred that "*when she tried to determine whether the new works exceeded the threshold, she realised that the original works had actually done so, and that an EIA should have been carried out in respect of them*". She averred that "*this applicant could not have challenged the original decision sooner because I had no reason to question the Council's original size estimate of 1.86 hectares, or to suspect that it was inaccurate, however, it is clear from the 2020 proposal* [i.e. the May 2020 report] *that it was. At page 5 of that proposal, the area of the different elements of the original scheme are set out*". She then sets those measurements out. In fact, the areas set out related to the development as amended at design stage. However, what is clear from these averments is that the applicant was aware from the May 2020 report that the development was over 2 hectares. This is the source of her knowledge in relation to the threshold issue. However, there is no reference to this point in her solicitor's letter of 18 September 2020, sent on her instructions. There is no affidavit from her solicitor in the proceedings as to precisely when this information was identified or brought to his attention. Her solicitor's letter of 24 September 2020 does not reference the May 2020

report area issue but does make arguments as to the threshold of the development now being over 2 hectares by reference to the January 2020 compliance report.

73. The applicant pleaded in her statement of grounds (at para. 14) that the circumstances in which she "*became aware that the Council had erroneously misstated the area of the proposed development, so that it appeared to be less than the threshold for mandatory EIA were outside the applicant's control, and they could not have known that they had grounds to challenge the original proposed development on this basis until they discovered the 2020 phase 2 proposal* [i.e. the May 2020 report]". In her second affidavit in these proceedings the applicant says that, when she brought this case, she "*thought the difference between the original size and the final size was due to an error in the original calculation of area, but Mr. Greene makes it clear* [in his replying affidavit of 19 March 2021] *that the cause of the discrepancy was that further works had been added, and a different and more accurate set of maps has been used*". The applicant does not reconcile that averment with the contents of her solicitor's letter of 24 September 2020. In that letter the fact that the amendments at design stage had increased the area of the overall development to over 2 hectares had been identified and were the subject of submissions to the Council on her instructions.

74. In her second affidavit, the applicant stated that:

> *"My principal concern is that the Council, after it began the works which I am now challenging, turned its eye on my shop. It wants to acquire it, and to force me out and build a 'Leitrim design centre' on the site. I do not want that to happen. When I sought legal advice, I learned that an EIA would be required for the further works involved in demolishing my shop, because cumulatively the entire works in the Marina and town would exceed the 2 hectare threshold. But I also learned that the original works as carried out in fact already exceeded the 2 hectare threshold and should have been subject to EIA in and of themselves; and that there is an ongoing obligation on the Council under European law to rectify the position."*

75. The applicant does not specify when she first sought legal advice.

76. The applicant also states in her second affidavit that she was "*advised and believed that the Council is not entitled to rely on the statutory time limit to defeat a claim of non-compliance with the EIA Directive*". She averred that she was never on notice of the

change in area of the project and there was no public notice of the change either. She avers that in those circumstances "*it is entirely by chance that I discovered the change when I did, and I do not see how I could have discovered it earlier". She goes on to aver that "I have acted as expeditiously as I reasonably could and I believe there is good and sufficient reason to extend that limitation period even if it does apply, in order to remedy the breach by the Council of a European law obligation*".

20 February 2020 - 7 August 2020

77. With some hesitation, in light of the lack of evidence establishing the precise sequence of events leading to the applicant discovering that the area of the development as revised exceeded 2 hectares, I am prepared to accept that a good and sufficient reason was supplied by the applicant for not bringing her judicial review proceedings in the period from 20 February 2020 to 7 August 2020. I arrive at that view because, while information was available on the Council's file from which she could have worked out that the development as designed now exceeded 2 hectares in its entirety, there was no formal public notification of that information (beyond it being placed on the Council's file) and she objectively had no good reason to suspect that state of affairs or to seek out that information in that period. I also accept on balance that she was not aware of that information in this period.

78. I also take the view that the matter was outside her control for the purposes of s.50(8) in that period in the absence of factual knowledge of the 2-hectare threshold being exceeded or any reasonable basis to seek out that information.

79. In arriving at those conclusions, I am inferring on the balance of probabilities that, despite the absence of clear evidence from her in that regard, she (or a solicitor on her behalf) did not, in fact, consult the Council's planning file before 7 August 2020.

7 August 2020 - 16 November 2020

80. However, from 7 August 2020, the applicant on her own case was, in fact, armed with the information which demonstrated that the total development area was now over 2 hectares. While it was submitted that the design drawing for the original development in the May 2020 report which included the changes to the original plans did not mention any

increase in size per se, in my view that document objectively viewed by an interested person, with the benefit of access to advice, did disclose that information and the applicant herself pleads and avers that this document yielded that information. Notwithstanding that fact, she did not move her application for judicial review until some 14 weeks later.

81. On the application of the "good and sufficient reason" test in section 50(8), I think it is appropriate to have regard to the fact that a reasonable person concerned about the Council's compliance with its planning or environmental law obligations in relation to the development, as the applicant clearly was from at least early August 2020, could have consulted the Council's file and obtained the area size information and sought advice in relation to it. No good explanation has been provided on affidavit by the applicant as to what she did between 7 August 2020 and instructing her solicitors to write to the Council on 18 September 2020. She does not explain when she first went to her solicitors. She does not explain whether, and if so when (and if not, why not) she consulted the Council's file between 7 August 2020 and instructing her solicitor to write to the Council on 18 September 2020. She does not explain why it took some 6 weeks from being provided with information making clear that the 2 hectares threshold was exceeded for her to instruct her solicitors to write to the Council.

82. Even working on the basis most favourable to the applicant, namely that she only came into possession of information which demonstrated the increase in size above the 2 hectare threshold on receipt of the January 2020 compliance report on 22 September 2020, she still waited almost eight weeks to issue her proceedings and make her application for leave (which was formally opened before the High Court for time limit purposes on 16 November 2020). The applicant knew by 22 September 2022 that the eight-week period specified in s.50(6) was by then well expired. She needed to move as a matter of urgency once that became clear.

83. Counsel for the applicant submitted that the Court could take judicial notice of the fact that a significant amount of work is inevitably required in the event that a s.50 planning challenge is to be brought in respect of a development such as this and that the Court could accordingly reasonably form the view that an 8 week period was required in order for the necessary legal advice, pleadings and expert material to be assembled before such a challenge could be made. However, the onus is on the applicant to demonstrate by appropriate evidence that there is good and sufficient reason for the relevant lapse of time. I do not in fact have any evidence before me as to the precise timeline of events in the period from 22 September 2020 to 16 November 2020. No proper explanation was provided by the applicant as to why it took some eight weeks from 22 September 2020 to issue and move her application for leave. As noted earlier, her initial pleaded position was

that the time limits applying were contrary to EU law and this may explain why she did not move with urgency in that period. While the Court would, of course, make reasonable allowance for the need to brief counsel, consult experts as necessary, prepare papers and move the leave application, in my view, good and sufficient reason has not been provided as to why that took almost eight weeks (on the applicant's best case) from when the applicant was on clear notice that the act or decision she sought to impugn had happened many months previously and when she knew she was by that point well out of time under s.50(6). I want to make it clear that I am not attributing any blame to her legal team for delay in that period. However, there is simply no explanation provided at all by the applicant on affidavit as to what steps she took in that period and what precise reason she was advancing for her delay in that period.

84. Counsel for the applicant submitted that the applicant's circumstances were close to those arising in the *Flausch* case (Case C-280/18) deciding by the CJEU on 7 November 2019 ("*Flausch*") and considered by Donnelly J. in Heaney. The CJEU in *Flausch* held that the EIA Directive must be interpreted as precluding a Member State from carrying out procedures for public participation in decision-making where the specific arrangements implemented did not ensure actual compliance with the rights of the public concerned. The facts of that case were extreme as they involved a situation where a local island population had no knowledge of a planned tourist development on their island because the authorities had given notice of the planned development in a local newspaper that circulated on a different island. As Donnelly J. noted in *Heaney*, (at para. 41):-"…*the situation in Flausch was particularly egregious, wherein the local inhabitants did not get notice of the launch of the public participation process and could not be deemed to be informed of the final decision granting consent.*"

85. As Donnelly J. noted, the decision in *Flausch* is not authority for the proposition that where authorities delay a person affected cannot be held to time limits (*Heaney*, para. 43). Rather, the blameworthiness of the authorities may be relevant when taking into account the overall circumstances of the case in considering whether to extend time. In my view the applicant's situation is not at all comparable to that which obtained in *Flausch*. Here, the applicant was on actual notice from 7 August 2020 of the fact that the development exceeded 2 hectares. Notwithstanding that fact, she did not move her application for judicial review until some 14 weeks later.

86. Counsel for the applicant pressed the argument that, where the Court was being presented with a contention that an important area of EU law (that of environmental protection) was being breached, this should weigh as a factor in favour of the extension of time to ensure that any breach of EIA requirements is appropriately remedied. He cited in this regard the CJEU's judgment in *Commune di Coridonia* Cases C-196/16 and C-197/16

(26 July 2017) which invoked the principle of cooperation in good faith laid down in Article 4 TEU as requiring Member States to nullify the unlawful consequences of a breach of EU law. While I believe that it is appropriate that I should weigh as a factor in the application to extend time the fact that it is alleged that EIA obligations have been breached, as Donnelly J. made clear in *Heaney* (at para. 96), while it is a factor to be taken into account, it is not of itself a decisive or dispositive one.

87. I do not believe that the fact that EIA obligations are said to have been breached is a factor on the facts of this case which tips the balance of justice in the application of the s.50(8) criteria in the applicant's favour. The reality is that the applicant (through her family) participated in the part 8 process from the outset but never sought at that stage to focus on the potential environmental impact of the project as a whole; rather their concern was in securing access from their property to the proposed car park. The applicant's renewed interest in the planning aspects of the project occurred in response to a concern that her property might be the subject of a CPO for a proposed second phase of the development. Even at that time, she focused on immediately local concerns (such as the demolition of a wall of an alleged protected structure near her property) as opposed to the issue of environment impact-related concerns of the development as a whole which she now seeks to ventilate in these proceedings. The EIA issues were raised by her very late in the day, notwithstanding that she was on notice of the issues relevant to that concern by 7 August 2020. The reality here is that if the applicant wished to urge the Court to intervene to remedy an alleged breach of an EU environmental protective measure, she needed to move with an urgency commensurate with that concern. She did not do so. The matter was urgent from 7 August 2020. Notwithstanding this, the applicant took 14 weeks before making her application for leave to apply for judicial review. No good and sufficient reason has been provided for the entire period of this delay.

88. In the circumstances, in my view, the applicant has not provided good and sufficient explanation for the whole of the period of delay from 7 August to 16 November 2020 (a period when matters were within her control) and her application for an extension of time under s.50(8) must accordingly fail.

Conclusion

89. As the applicant's application for judicial review is out of time, and her application for an extension of time is refused, I do not believe it is necessary or appropriate to express any view on the substantive issues sought to be raised by the applicant in the proceedings.

90. I will accordingly refuse the relief sought.