THE HIGH COURT
JUDICIAL REVIEW

[2023] IEHC 373
[Record No. 2021/308 JR]

CORAJIO UNLIMITED COMPANY TRADING AS MR. PRICE BRANDED BARGAINS

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

KILDARE COUNTY COUNCIL

FIRST NOTICE PARTY

AND

SUPERMACS IRELAND LIMITED

SECOND NOTICE PARTY

JUDGMENT of Ms. Justice Siohbán Phelan, delivered on the 29th day of June, 2023

INTRODUCTION

1. These proceedings concern the change of use of a car sales store to a Mr. Price retail store without planning permission and in reliance on an exemption provided under the Planning and Development Act, 2000 [hereinafter "the 2000 Act"] and, specifically, the Planning and Development Regulations, 2001 (hereinafter "the 2001 Regulations"), namely an exemption under Class 14(a) of Part One of Schedule Two of the 2001 Regulations which exempts development consisting of a change of use from the sale or leasing of motor vehicles to use as a shop. The exemption is claimed in circumstances where the premises was not constructed in accordance with the plans and documentation submitted at planning application stage notwithstanding that it was a condition of planning permission that the premises would be so constructed. The most fundamental question which now arises is whether non-compliance with a condition in relation to the construction of the premises results in the disapplication of an

exemption which might otherwise be available in respect of the change of use of the premises as constructed.

BACKGROUND

2. By Order dated the 25th of August, 2004 Athy Town Council [hereinafter "the Planning Authority"] granted planning permission for a car sales showroom including car repairs, parts store, staff canteen, toilets and administration area and all ancillary site development works to include surfaced area for the display of cards around the proposed building at Gallowshill, Athy, County Kildare. The grant of permission was subject to 34 conditions, the first of which was:

> *"the proposed development shall be retained carried out and completed in accordance with the drawings and documentation submitted to the Planning Authority on 10/12/2003, 10/03/2004 and 19/05/2004, except where altered or amended by conditions in this permission."*

3. Of note, there was no condition restricting the use of the premises to car sales. The premises constructed on foot of this planning permission is the premises the subject of these proceedings. The premises as constructed is symmetrical in shape, in contrast with the premises for which permission was granted. Accordingly, the first condition of the planning was not adhered to and the premises was not developed in accordance with the drawings and documentation which had been submitted to the Planning Authority.

4. The premises was used as a car sales showroom up until the business closed in 2013. The premises is now owned by Supermacs, the Second Notice Party. The Applicant, hereinafter referred to as Mr. Price for ease of reference, is the tenant of the premises first entering into occupation sometime in or about 2016. Mr. Price now carries on the business of a shop from the premises, selling both convenience and lower order comparison goods. On the 3rd of February, 2016 a section 5 declaration was sought from the Planning Authority by a planning consultant on behalf of Mr. Price, then the intended lessee, in respect of the property. The question asked in the referral was:

> *"whether the change of use from the former car garage to use as a retail shop, is development, and or is not exempted development all"*

5. By order dated 24th of May 2016 the Planning Authority decided the use of the former garage for use as a shop is development and is not exempted development. The Planning Authority considered that:

> *"the development carried out on foot of register reference 03/300074 is not in compliance with conditions 2, 4 and 32 of the planning permission, and is therefore on authorised development the restrictions on exemptions in article 9 (viii) of the Planning and Development regulations 2001 to 2015 refer."*

6. By letter dated the 27th of May, 2016 the planning consultant on behalf of Mr. Price referred the declaration issued by the Planning Authority to the Respondent ["hereinafter "the Board"] for review pursuant to s. 5(3) of the 2000 Act. By letter dated the 2nd of February, 2017, the Board notified the planning consultant that it proposed to take into account the fact that the building, as constructed, might not conform to the permission granted having regard to 3 specified aspects:

> *"a) The asymmetrical shape of the building permitted under planning authority register reference number P03/300074, and the more symmetrical shape of the building as constructed, and*
>
> *b) The size of the permitted building, stated to be 588 m² in gross internal floor area, and the size of the building as constructed, stated to be 609 m² in gross retail floor area,*
>
> *c) Photographs on file and publicly available aerial photography."*

7. By letter dated the 8th of February, 2017 the planning consultant responded to the issues raised by the Board in its letter of the 2nd of February, 2017. The response noted that:

(i) the structure as built was substantially in compliance with the grant of permission;
(ii) the size of the structure is marginally bigger, representing a 3% increase approximately, than the permitted structure; and
(iii) the size and symmetry of the building was not disputed but on balance it was considered that the structure was substantially compliant with the grant of permission.

8. Two inspector's reports were prepared in respect of the referral.

9. The first inspector's report dated the 5th of December, 2016 concluded that the change of use was development and was exempted development. This report was prepared before the Board advised that it proposed to take into account that the building, as constructed, might not conform to the permission granted and sought submissions from Mr. Price in this regard. The second report dated the 10th of August, 2017 addressed the issue of whether any deviation of the building as constructed from the terms of the permission would be exempt or whether what would otherwise be an exempted change of use, lost the benefit of exemption because of the breach of condition. The inspector's second report concluded that the change of use was development and was not exempted development by virtue of Article 9(1)(a)(i) of the 2001 Regulations in that the property had been constructed otherwise than in accordance with the permission and that this was a breach of condition 1 of the grant of permission.

10. It warrants mention that Mr. Price commenced trading from the premises before the planning status of the premises was regularised and have been operating from the premises without permission for several years in reliance on a claimed exemption under the 2001 Regulations.

11. By Order dated the 19th of January, 2018, the Board determined that the proposed change of use of the former car sale's premises to use as a shop in Gallowshill, Athy, County Kildare is development and is not exempted development (the 2018 Declaration). The Board accepted that the proposed change of use *"generally come within the scope of Class 14(a) of Part One of Schedule Two of the 2001 Regs"* but considered that the exemption would not apply by reason of Article 9(1)(a)(i) of the 2001 Regulations as the property, as built, differs to the grant of permission and the changes are material in nature and as such there had not been compliance with condition 1 of the grant of permission. It is noteworthy that this decision was not challenged at that time even though the Board found that the exemption in Class 14(a) of Part 1 of Schedule 2 was de-exempted by Article 9(1)(a)(i) where condition 1 of the 2004 permission had been contravened because the premises built was not the premises permitted.

12. On the 15th of May, 2018 the Council served a warning letter on Mr. Price in respect of the property and invited submissions on same. In particular, the warning letter alleged that:

"the conversion and change of use of a car sales showroom, car repairs, parts store, staff canteen, toilets and administration area and all ancillary site development works, including hard surfaced area for the display of cards around the building as permitted under PL Ref. 003/300074 to Mr Price discount retail store supplying household products, toiletries, stationery, toys etc is not exempted development. The car repairs use of the development, as specified under PL Ref. 03/3(74) is not ancillary/incidental to the car sales showroom and its conversion to a shop is not identified as exempted development under the Planning and Development Regulations (as amended). The additional requirements to facilitate the change of use, e.g. signage, car parking etc is also not deemed exempt."

13. By letter dated the 12th of June, 2018, Mr. Price disputed the position adopted by the Planning Authority, save in respect of signage. The Planning Authority responded by letter dated the 3rd of July, 2018 in which they advised that a section 5 referral could be submitted to ascertain whether the change of use was exempted development. On foot of this letter from the Planning Authority, in a letter dated the 29th of August, 2018, Mr. Price sought a further section 5 declaration from the Authority as to whether:

"1. The change of use of the premises from use for the sale are leasing or display for sale or leasing of motor vehicles (Class 14(a) to use as a shop is/is not exempted development, and

2. Whether the internal words are/are not exempted development."

14. The letter of the 29th of August, 2018 making the second referral identified some changes in the property that had occurred since the earlier 2016 Declaration in which it had been found that Article 9(1)(a)(i) operated to disapply the Class 14(a) exemption as there had been a breach of condition 1 of the Planning Permission. Specifically, it was noted that:

(i) the internal mezzanine which did not have the benefit of planning permission had been removed;

(ii) no change of use was required with regard to the car parking as that was provided for under permission Reg. Ref. P03/300074;

(iii) that a landscape scheme was being prepared in agreement with the Planning Authority; and

(iv) the company undertook to remove all unauthorised signage.

15. While Mr. Price acknowledged in this second referral that the change of use from use for the sale or leasing of motor goes to use as a shop is development, it was again contended (albeit in the face of a previous decision of the Board to the contrary) that the change of use is exempted development by virtue of Class 14(a) of Part 1 of Schedule 2 to the 2001 Regulations.

16. By Order dated the 26th of October, 2018, the Planning Authority decided that:

> *"the change of use of the premises from use for the sale or leasing or display for sale or leasing motor vehicles (Class 14(a)) and use as a car repairs and car servicing workshop (as permitted by planning permission ref. 03/300074) to use as a shop is development and is not exempted development, and internal works to facilitate such a proposed change of use is development and is not exempted development by virtue of the fact that the subject premises has not been developed in accordance with the plans and particulars submitted with the planning application ref. 03/300074."*

17. By letter dated the 17th of November, 2018, Mr. Price again referred the declaration made by the Planning Authority to the Board (Reg. Ref. ABP-303034-18). Mr. Price also requested the Board to determine the following further matter:

> *"If the board still consider that the squaring off of the building carried out by the original developer at the time is not substantial compliance, Mr. Price now seek to request whether the rectification of the building back to that which was originally permitted, and the subsequent use of same for use as a Mr. Price exempted development?"*

18. Although site inspections occurred on foot of this application to the Board in February and June, 2019, the inspector's report was only finalised in February, 2020. The inspector records the submissions made on behalf of Mr. Price as follows:

(a) the principal and permitted use of the premises is for sale or leasing, or display for sale or leasing of motor vehicles;
(b) the proposed change of use to use as a shop is a material change of use and constitutes development within the meaning of section 3 of the Act,
(c) the proposed change of use to use the shop is not affected by of the restrictions on development set out in Article 9 of the Planning and Development Regulations, 2001, as amended, and in particular would not endanger public safety by reason of traffic hazard,
(d) the proposed change of use to use as a shop comes within the exempted development provisions of Class 14(a) of Schedule 2, Part 1 of the Planning and Development Regulations, 2001;
(e) the works proposed come within the exempted development provisions of s. 4(1)(h) of the Planning and Development Act, 2000;
(f) the existing sign has not been constructed in accordance with the provisions of Condition No. 1 of Register Reference P03/300074 and is therefore unauthorised and will be removed;
(g) the development is not affected by the provisions of s. 4(4) of the Act, as amended;

19. The inspector notes that the Board is also asked whether, if the Board still considers that the "*squaring off*" of the building carried out by the original developer at the time is not in compliance, the rectification of the building back to that which was originally permitted, and the subsequent change of use of same for use as a Mr. Price retail shop would be exempted development.

20. The inspector notes in her report that the purpose of the referral is not to determine the acceptability or otherwise of the development in respect of the proper planning and sustainable development of the area, but rather whether the matter in question constitutes development, and if so, falls within the scope of exempted development. She records her opinion that the substance of the referral remains unchanged from the previous referral, albeit acknowledging the small changes between the applications. In view of the background and the Board's previous section 5 determination on the question and on the same site, the current planning

enforcement, and sequencing, she considered that the question the subject of the referral should be restated as follows:

1. Is the change of use from a car sales premises to a retail shop "*development*"?
2. Would the rectification of the building back to that original permitted, and the subsequent use of same as a shop be "*exempted development*"?

21. Addressing the definition of "*development*" in s. 3 of the 2000 Act and of "*shop*" in Article 5(1) of the 2001 Regulations, she concluded that the proposed change of use is material in nature and is development and noted that this is acknowledged by Mr. Price in the terms of the referral. She further concluded that the works required to return the structure to that permitted under P.A. Reg. Ref. 03/300074 would constitute development before proceeding to address whether or not the change of use and/or works is exempted development. Although noting that exemptions arise under s. 4 of the 2001 Act and Articles 6 and 9 of the 2001 Regulations, the inspector proceeded on the basis that as the development involves a material change of use, the question of exemption falls to be considered having regard to the terms of Article 6 of the 2001 Regulations and the exemption provided in Class 14(a) of Part 1 Schedule 2 together with Article 9 of the 2001 Regulations restricting the application of exemptions otherwise available. She identified three restrictions under Article 9(1)(a) which she considered relevant, namely, sub-articles (i), (iii) and (viii) but while she concluded that each of these would operate to disapply the Class 14(a) exemption, her final recommendation was limited to reliance on Article 9(1)(a)(i).

22. In her consideration of the application of Article 9(1)(a)(i) in her report she referred to the previous Board finding that the existing premises has a larger footprint and a more symmetrical configuration to that permitted under planning permission register reference number 03/300074, and that the changes from the permitted development are material in nature and would constitute development and would not be exempted development. Having summarized the evidence regarding the increased floor area, she concluded that the increase in floor area would have required planning permission and the alteration from the original layout for which permission was granted altered the appearance of the permitted structure and resulted in an increased in the permitted floor area for which there is no exemption. She further recorded

that the works required to return the structure to that permitted under Planning Register Reg. Ref. 03/300074 were considered material and no exemption applied.

23. By Order dated the 13th of May, 2020, the Board decided that the change of use of the premises for the sale or leasing or display for sale or leasing of motor vehicles to a shop at Gallowshill, Athy, County Kildare is development and is not exempted development. This is the decision which it is sought to impugn in these proceedings. Papers were finalised on the 13 April 2021 and proceedings were commenced on the 19 of April 2021 when an application for leave to proceed by way of judicial review was made before the High Court (Meenan J.).

STATUTORY PROVISIONS

24. Section 2 of the 2000 Act defines the terms "*unauthorised use*" as follows:

> *"unauthorised use" means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—*
>
> *(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or*
>
> *(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;"*

25. "*Unauthorised development*", "*unauthorised structure*" and "*unauthorised works*" are variously defined as:

> *"unauthorised development" means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use;*
>
> *"unauthorised structure" means a structure other than—*
>
> *(a) a structure which was in existence on 1 October 1964, or*

(b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34 of this Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act);

"unauthorised works" means any works on, in, over or under land commenced on or after 1 October 1964, being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34 of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject;

26. As noted by Barrett J. in *Moore v. Minister for Arts, Heritage and the Gaeltacht* [2016] IEHC 150, 561, the combined effect of these definitions under s. 2(1) of the 2000 Act is that a development constitutes unauthorised development for the purposes of s. 2(1) where it is (a) commenced on are after the 1st of October, 1964; (b) not exempted development; and (c) not the subject of a grant of planning permission (or is not being carried out in accordance with the conditions of the grant). Under s. 3 of the 2000 Act, development is defined as including any material change in the use of any structures or other land. Unless exempted under the 2000 Act, planning permission is required for development of any structures or land. Section 4 provides for exemptions as specified under s. 4(1) and further provides in s. 4(2) for classes of development to be exempted by ministerial regulation. Notably, in view of the rectification question which arises as the second question on the referral, s. 4(1)(h) exempts development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures. Although not expressly relied upon in the section 5 referral, s. 4(1)(h) was considered by the inspector and found to have no application given the scale of development. Leave has not been obtained to challenge this finding as irrational or wrong in law.

27. In exercise of the regulatory power under s. 4(2) of the 2000 Act, exemptions are further provided for in the 2001 Regulations (as amended). Regulation 6 of the 2001 Regulations provides that, subject to Regulation 9, development of a class specified in column 1 of Schedule 2 shall be exempt development for the purposes of the Act provided the conditions and limitations specified in column 2 are complied with. Regulation 10 further provides that development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2 shall be exempted development provided that the development, if carried out, would not:

(a) involve the carrying out of any works other than works which are exempted development,

(b) contravene a condition attached to a permission under the Act,

(c) be inconsistent with any use specified or included in such a permission, or

(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and has not been abandoned.

28. Notably, Class 14 set out in Part 4 of Schedule 2 of the 2001 Regulations provides for development consisting of a change of use for sale or leasing of motor vehicles to use as a shop and no conditions or limitations are specified in column 2. This means, accordingly, that such change of use is *prima facie* exempt for planning purposes if the conditions in article 10 are met and the exemption is not disapplied or restricted by article 9. This is the exemption which Mr. Price sought to invoke on its repeat s. 5 referrals. Article 9 provides for restrictions on the application of exemptions and was relied upon by the Planning Authority and then the Board in its impugned decision in this case.

29. Most material to the decision in this case, Article 9(1)(a)(i) provides that development to which Article 6 relates shall not be exempted development for the purposes of the Act if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act. For completeness, it is noted that reliance was also placed at earlier stages of the referral process on Article 9(1)(a)(iii) which disapplies Article 6 exemptions in the case of development which

endangers public safety by reason of traffic hazard or obstruction of road users and on Article 9(1)(a)(viii) which disapplies exemptions where development consists of or comprises the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.

30. Section 5 of the 2000 Act provides that if a question arises as to whether development is or is not exempted development within the meaning of the Act then a referral may be made seeking a declaration on that question from the planning authority (under s. 5(1)) and a review may be sought by the Board within four weeks in respect of a declaration made by the Planning Authority (under s. 5(3)). As summarized above, Mr. Price has availed of the s. 5 referral process on two occasions, the first in 2016 and the second in 2018. It is the Board's decision on review in respect of the second referral which is the subject of challenge in these proceedings.

31. Provisions regarding notification are relevant in circumstances where it is claimed that these proceedings were not initiated within the statutory time period prescribed under the 2000 Act because the Board Order on foot of the s. 5 referral was not served on Mr. Price and Mr. Price was not on notice of the decision. Under Article 79 of the 2001 Regulations the Board is required:

> "*as soon as may be following the making of a decision on an appeal or referral, notify any party to the appeal or referral*."

32. Section 250 of the 2000 Act allows for alternative forms of service including personal delivery, leaving it at the ordinary residence or address specified for service or sending it by prepaid registered letter.

33. Section 50 provides for challenges to decisions of the Board by way of judicial review. Specifically, s.50(2) provides that a person shall not question the validity of a decision of the Board to which it applies otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts 1986, as amended. Pursuant to s. 50(6) an application for leave to apply for judicial review shall be made within the period of 8 weeks

beginning on the date of the decision unless an extension of time is granted under s. 50(8). Section 50(8) provides for an extension of time in the following terms:

> *"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."*

THE BOARD DECISION

34. The Board Order made on the 13th of May, 2020 sets out the matters to which the Board had regard and records that the Board concluded:

(a) the change of use of a former car sales premises to use as a shop is a factual change of use and such change of use would raise material planning issues, including implications in terms of traffic and pedestrian safety, and would, therefore, constitute development within the meaning of s. 3(1) of the Planning and Development Act 2000 (as amended);
(b) the change of use pertaining to the former car sales premises would generally come within the scope of the exemption provided in Class 14(a) of Part 1 of Schedule 2 to the Planning and Development Regulations, as amended;
(c) however, the existing premises on the site has a larger footprint and a more symmetrical configuration compared to that permitted under planning permission register reference number 03/300074 and the changes from the permitted development are material in nature and constitute development and would not have been exempted development;
(d) condition one planning permission register reference number 03/300074 required the development to be carried out and completed in accordance with the drawings and documentation submitted to the Planning Authority, and
(e) the exemption that would generally be available under Class 14(a) is, therefore, restricted under the provisions of Article 9(1)(a)(i).

35. On this stated basis, the more change of use is development and is not exempted development. Unlike the Inspector in her report, no express reference is made by the Board to the second question referred namely, whether rectification of the premises to conform with the specifications provided at planning application stage for subsequent use as a retail store would be exempt development.

36. It is noted that the Inspector whose report records site inspections in February and June 2019 and whose report dated the 28th of February 2020 was referred to as having been considered by the Board addresses this question in more direct terms finding that the change of use is material in nature and is development (as acknowledged by Mr. Price in its reference). As set out above, the Inspector considered that the increase in floor area achieved through the departure from plans and specifications on foot of which planning permission was granted and conditioned would have required planning permission and that works required to return the structure to that permitted would also be considered material and no exemption applies. In those circumstances, she states that it would be reasonable to conclude that the provisions of Article 9(1)(a)(i) "*would not apply*". There is an evident typographical error in the use of the word "*not*" in this context as it is manifestly clear from the terms of the report that the Inspector concluded that no exemption applied to permit the user as a retail store.

37. The Inspector in her report also addressed Article 9(1)(a)(iii) in relation to the disapplication of an exemption by reason of traffic hazard or obstruction to road users and Article 9(1)(a)(viii) in relation to the alteration of an unauthorised structure or a structure the use of which is an unauthorised use whereas the Board confined its decision to a disapplication of the Class 14(a) exemption by reason of Article 9(1)(a)(i). Based on her observations on the occasion of site visits, the Inspector recorded a conclusion that the new use of the premises generated an increase in traffic when compared with its previous use. She also noted the absence of pedestrian crossings in the vicinity of the site. She offered the opinion that a rectification of the structure of the building to bring it into conformity with the building for which planning had been granted would not address this traffic implications arising from the use of the premises and she concluded (repeating her previous typographical error by using the word "*not*") that Article 9(1)(a)(iii) operated to disapply the Class 14(a) exemption. Finally, she found that the existing structure as constructed did not comply with condition 1 of the

parent permission and concluded that the rectification of the building back to that originally permitted would also be unauthorised development.

ISSUES

38. These proceedings were not commenced within 8 weeks of the impugned decision. Accordingly, the first question which I must determine is whether grounds have been demonstrated which would warrant the exercise of my discretion under s. 50(8) of the 2000 Act to extend time for the bringing of proceedings.

39. If time is extended, then the core question which arises for determination is whether a failure to construct a property in accordance with the plans and specifications submitted, a condition of the planning permission granted, results in the disapplication of exemptions which might otherwise be available in respect of a change of use.

40. Separately, Mr. Price contends that there has been a failure to determine the second question referred, namely whether rectification of the building to that which was originally permitted and a subsequent change of use to use as a Mr. Price retail store would be exempted development and no reasons have been given for this failure or omission.

41. Finally, complaint is also made that there was no basis for the Board to conclude that the change of use would have implications in terms of traffic and pedestrian safety.

42. It is now proposed to address each of these issues in turn.

DISCUSSION AND DECISION

Extension of Time

43. Section 50(8) of the 2000 Act provides for a possible extension to the strict 8-week time period where the applicant satisfies the "*cumulative and mandatory*" criteria that: (i) there is good and sufficient reason for doing so; and (ii) 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.

44. The exercise of the power to extend time is guided by the application of principle to the facts and circumstances of a given case rather than the length of time. A helpful recitation of these principles was offered by Baker J. in *Irish Skydiving Club v. An Bord Pleanála* [2016] IEHC 448 at [11]-[15] and Barniville J, in *SC SYM Fotovoltaic Energy SRL v. Mayo County Council (No.1)* [2018] IEHC 20. In *O'Riordan v. v. An Bord Pleanála* [2021] IEHC 1, Humphreys J. (at para. 16) noted "*the natural human tendency to overlook de minimis errors and short delays, but it is clear in the planning context at least that the fact that the delay is short is not relevant*." It is clear from the caselaw that the Courts have been intolerant of even very short delays. This is illustrated by the refusal of an extension of time in the case of a 17-hour delay in *Casey v An Bord Pleanála* [2004] 2 ILRM 296; 5 days after the expiry of the eight-week period in *Heaney v. An Bord Pleanála* [2021] IEHC 201, *O'Riordan v. An Bord Pleanála* [2021] IEHC 1 and *Duffy v. Clare County Council* [2016] IEHC 618; 17 days after the expiry of the eight-week time *Irish Skydiving Club Ltd. v. An Bord Pleanála* [2016] IEHC 448**;** 19 days after the expiry of the eight-week time in *Kelly v. Leitrim County Council* [2005] 2 IR 404 and 25 days after the expiry of the eight-week time in *Cassidy v. Waterford City and County Council* [2017] IEHC 711. What is also clear, however, is that the length of delay, while a relevant factor in deciding whether to grant an extension of time, is not alone determinative and must be considered against the facts and circumstances of the case.

45. In *SC SYM Fotovoltaic Energy SRL*, the principles were distilled with reference to *Irish Skydiving Club* and a number of other authorities in a manner which I gratefully adopt as follows (at para. 72):

> *"72. It is possible to distil from these cases the following principles to be applied when considering an application for an extension of time under s. 50(8) of the 2000 Act (as amended):-*
> *(1) The eight week time limit in s. 50(6) of the 2000 Act (as amended) is a strict time limit and, while the court has a discretion to extend the time in accordance with the provisions of s. 50(8), the provisions of that subsection are to be strictly construed and applied.*
> *(2) The requirements in s. 50(8)(a) and (b) are cumulative and mandatory. It is necessary, therefore, for an applicant for an extension of time to satisfy both subparas. (a) and (b) of section 50(8).*

(3) The court will generally consider first of all whether an applicant for an extension has satisfied the requirements of s. 50(8)(b) i.e. the second part of the test, under which an applicant for an extension must show that the circumstances which led to the failure to bring proceedings within the eight week time limit were outside the control of the applicant. If the applicant cannot satisfy that part of the test, then it is generally not necessary to consider whether the applicant has satisfied the first part of the test (in section 50(8)(a)).

(4) The time for challenging a planning decision covered by the s. 50 of the 2000 Act (as amended) runs from the date of the decision and not from the date on which the applicant first becomes aware of or fully understands the substance of the relevant decision.

(5) In considering whether the applicant has satisfied the requirements of the first part of the test by demonstrating that there is "good and sufficient" reason for extending the time, the reasoning offered by the applicant to demonstrate compliance with this test must relate to the entire of the period of the delay beyond the eight week period and not merely for some part of that period.

(6) To satisfy the first part of the test, an applicant for an extension of time must satisfy the requirement of showing both "good" and "sufficient" reason for the extension. In most cases if a reason is found to be "good", it will be "sufficient" for the purposes of the first part of the test. It is hard to envisage a case where a reason will be found to be "good" but not "sufficient". That is not to say, however, that such a case does not exist.

(7) The court will assess carefully the explanation given for the failure to apply for leave for judicial review within the eight week period. While each case must be considered on its own particular facts, the court will assess carefully and critically any explanation put forward on behalf of an applicant for an extension of time that more information or additional material was required before proceedings could be brought. Of particular relevance in considering an explanation along those lines is the nature of and the reasons for the challenge to the planning decision in question.

(8) Among the factors which may have to be considered by the court in considering an application for an extension of time under s. 50(8) are those factors listed non-exhaustively by Clarke J. in Kelly v. Leitrim County Council, including:- (a) the length of time specified in the 2000 Act (as amended) and the delay beyond that period before the application for leave is sought to be made. (b) Whether third party rights are affected and whether there has been any prejudice to third parties as a result of the delay by the applicant for the extension of time in making the application for leave outside the statutory period (although it is not necessary to demonstrate the prejudice in all cases). (c) The blameworthiness or otherwise on the part of the applicant for the extension and the reasons given to explain the delay which must cover the entire period of that delay."

46. As clear from the foregoing, in *SC SYM Fotovoltaic Energy SRL,* the length of delay is not determinative and regard must be had to all surrounding circumstances advanced in support of and against the grant of an extension of time. As Barniville J. emphasized, in considering whether the applicant has satisfied the requirements of the first part of the test by demonstrating that there is "*good and sufficient*" reason for extending the time, the basis offered by the applicant to demonstrate compliance with this test must relate to the entire of the period of the delay beyond the eight-week period. Furthermore, it is incumbent on a party seeking an extension of time to demonstrate not only that the circumstances for the delay were outside his control, but also that on becoming aware of the decision, the party moved as expeditiously as possible.

47. In this case Mr. Price claims that it first became aware of the Board decision made on the 13th of May, 2020 on the 22nd of February, 2021 when enforcement action was threatened by the Planning Authority. It is quite clear that under Article 74 of the 2001 Regulations the Board is required, as soon as may be following the making of a decision on an appeal or referral, to notify Mr. Price as a party to the referral. There is no evidence of compliance with this duty to notify. While the Board confirm that a direction to serve was given, they have produced no evidence of actual service. It is especially noteworthy that the file discloses correspondence to the Planning Authority and the landlord but not to Mr. Price. Enquiries directed on behalf of Mr. Price, as deposed to on affidavit by a series of appropriately selected deponents, confirm that no notification was received.

48. Having considered the Affidavit evidence filed on behalf of Mr. Price and the Board carefully, I am satisfied on the balance of probabilities that the Board failed in its duty to notify Mr. Price by serving a copy of the decision on it in accordance with Article 74 of the 2001 Regulations and in a manner prescribed under s. 250 of the 2000 Act. This conclusion is supported not alone by the evidence adduced on behalf of Mr. Price following its enquiries but also by the fact that the Board file does not contain copy correspondence notifying Mr. Price, in contrast with other notice parties in respect of whom copy correspondence has been retained on file.

49. The failure to bring proceedings within eight weeks and at any time prior to February 2021 therefore occurred in circumstances where the Board was in breach of its duty to notify its decision and Mr. Price was unaware of the decision or the basis for it. Where Mr. Price was not notified of the decision in breach of statutory duty, then it seems to me that there is good and sufficient reason for delay up until Mr. Price learned of the decision in February 2021.

50. As for the requirement to demonstrate that the failure to move the application arose from circumstances outside Mr. Price's control, in my view fault does not lie with Mr. Price for relying on its statutory right to be informed of a decision when it was made. I consider the Board's treatment of Mr. Price's non-interrogation of delay in responding to the referral pejoratively as "*a passive position*" as somewhat unfair. I do not consider the failure to make active enquiries as a "*choice not to act*" in the sense intended by Creedon J. in *Browne v An Bord Pleanála* [2018] IEHC 829 at [53] where she explained the control criterion in s. 50(8) as requiring *"a failure to act was the result of an inability to act, not a choice not to act."* While it might have been possible for Mr. Price to find out about the decision earlier by direct engagement either with the Board or its landlord, under the statutory framework the notification obligation lay on the Board. This is not a situation like that in *Corbett v. Louth County Council* [2018] IEHC 291 where the applicant saw the site notice but did not investigate the file to ascertain the full nature and extent of what permission was sought for. There is no statutory obligation on Mr. Price to engage in correspondence with the Board to ascertain why it has not yet been notified of a decision or to otherwise investigate whether a decision has been made but not notified. It is not reasonable to impose such an obligation on the facts and circumstances of this case in order to preclude a legal challenge in the face of a breach of a statutory duty to notify.

51. I do not accept as correct the Board's position that Mr. Price's representatives should have made enquiries as to the status of the application after the referral was lodged with the Board on the 20th of November, 2018 and up to the 22nd of February, 2021 when solicitors for the Planning Authority wrote to Mr. Price calling on it to cease use of the Property. This submission falls flat in circumstances where the Board sent correspondence on the 3rd of April, 2019 and 28th of May, 2019 informing the parties to the referral of their delay in dealing with the application. Furthermore, while Mr. Price's planning consultant wrote several letters enquiring in relation to progress on the first referral in 2016, these letters were not effective in

procuring a timely decision or response such that there could have been little incentive to continue correspondence of this nature in relation to the second referral.

52. As the High Court accepted in *Sweetman v. An Bord Pleanala* [2017] IEHC 46, the absence of notification meant that the applicant could not have and could not reasonably be expected to have known about the declaration on a s. 5 referral. Where this lack of knowledge resulted in a failure to make an application within the prescribed period, this was outside the control of the applicant for the extension. I am satisfied that where Mr. Price had not been informed that a decision had been made, as I have found and as by statute it should have been, the failure to make the application for leave within the period so provided was outside the control of Mr. Price within the meaning of s. 50(8)(b) of the 2000 Act.

53. I understand it to have been properly conceded that while the duty to show good and sufficient reason for an extension of time under s. 50(8)(a) extends to the entire period of delay, it suffices to meet the requirements of s. 50(8)(b) for Mr. Price to demonstrate that the initial failure to move within eight weeks arose from circumstances outside its control. This is clear from the language of s. 50(8)(b) which expressly refers to the circumstances which resulted in the failure to make the application for leave within the period provided being outside the control of the applicant for the extension and not any subsequent period.

54. Although the Board did not strongly resist the proposition that the evidence available does not demonstrate compliance with a duty on the Board to serve notice of their decision, it nonetheless strongly contended that an extension of time should not be granted because the proceedings only issued, and the matter was only opened in the High Court on the 13th of April, 2021, some 50 days (or 7 weeks and 1 day) after Mr. Price became aware of the decision. It is contended that in the circumstances, Mr. Price did not move with due expedition and is not entitled for an extension of time up until the date the application was finally opened. Accordingly, it is necessary to consider the period from February to April 2021.

55. Insofar as the February to April, 2021 period is concerned, Mr. Price again argues that it should not be disadvantaged because of the Board's failure to notify and that this constitutes "*good and sufficient reason*" to extend time within the meaning of s. 50(8)(a) in respect of the period following from its first knowledge of the decision. It is contended that fairness and access to justice considerations require that Mr. Price be afforded a reasonable period, in the

order of eight weeks from notice of the proceedings, within which to bring a legal challenge. Reliance is placed on the decision of Humphreys J. in *Dunne v. Kildare County Council* [2023] IEHC 73 in which it is recorded that the parties had conceded that the applicants should be allowed eight weeks from the date they were aware or ought to have been aware of the decision. To the extent that extra justification may be required, Mr. Price relies on the fact that investigations were conducted to establish that the decision had not been served and time was also required to obtain copies of file documentation so that advice could be obtained. Several affidavits were sworn in this regard arising from the fact that s. 250 of the 2000 Act provides for multiple ways in which service could have been effected, raising the possibility that the notice had been received but not communicated internally.

56. The Board does not accept Mr. Price's position regarding the explanation for delay between February and April 2021 and maintains that there has been a failure to demonstrate good and sufficient reason for this period of delay and to explain why the application was not moved earlier. The Board argues that the eight-week time period allowed under the legislation does not run afresh from date of knowledge of the impugned decision and that there is a duty on Mr. Price to demonstrate that steps were taken with due expedition when Mr. Price belatedly learned of the impugned Board decision. The Board relies on the fact that Mr. Price's papers show that the first request made to the Board in respect of obtaining the file was the 12th of March, 2021 (as per affidavit of Declan Crinion at para. 22). The Board complain that no explanation is given for the time-period between 22 February 2021 (when Mr. Price says it first became aware of the Decision) and the 12th of March, 2021. Furthermore, COVID-19 notwithstanding, the Board maintain that Mr. Price was aware or ought to have been aware that the Board's file relating to the decision of 13 May 2020 was available for physical inspection at the Board's offices and there should have been no delay in accessing that file as the operations of the Board were an "*essential service*" and travel to inspect a file was a "*reasonable excuse*" when it came to otherwise impermissible travel. In the circumstances the Board contend that there is no factual or legal basis to support the argument that Mr. Price could not decide on litigation until it obtained a copy of the file documentation.

57. The Board further maintain that even if the Mr. Price did require access to the Board file and were justified in seeking copies rather than attending at the Board's offices (which is not accepted), the file was received on 24 March 2021 but Mr. Price did not move the application for leave for a further three weeks. The Board contend that it is clear in these

circumstances that Mr. Price has failed to move with all possible expedition such as to justify an extension of time under s.50(8) of the 2000 Act. It is not accepted that a good explanation has been provided for much of the "*lost*" time. The Board points to the dearth of information in relation to when lawyers were instructed or how long lawyers took to prepare papers.

58. I readily accept that the case-law establishes that time runs from the date of the decision, not from the date of notification (as found, for example, in *Sweetman v. An Bord Pleanala & Ors* [2017] IEHC 46) and it is therefore necessary to meet the s. 50(8)(a) test in respect of the entire period from May, 2020 until April, 2021 when the application was moved (reiterated in *SC SYM Fotovoltaic Energy SRL v. Mayo County Council (No.1)* [2018] IEHC 20). I consider, however, that it is appropriate to attach considerable importance to the fact that Mr. Price was not notified of the decision in breach of a statutory duty reposing on the Board in circumstances where the restrictive eight-week period fixed under s. 50(6) has been prescribed based on a mandatory duty to notify of the decision. It follows that time limits cannot be applied strictly where there has been a failure on the part of the Board to notify its decision in breach of statutory duty. This is not, however, a licence to delay the institution of proceedings any longer than necessary.

59. Even though it does not operate as a limitation on the commencement of proceedings where there has been a failure to notify the making of a decision, the eight-week period provided for under s. 50(6) remains a relevant benchmark or guide by which to assess any subsequent delay in commencing proceedings. The legislative intention, as clear from the interaction of the provisions of the 2000 Act and the Regulations made thereunder, is that an affected party would have a period of up to eight weeks within which to bring a challenge by way of judicial review. This period is comparatively short and has been chosen because of the requirement for expedition in planning matters but also having due regard to the right to litigate which is constitutionally protected. The eight-week period has been identified as one which represents a fair balance between the rights of an affected person to challenge a decision through legal proceedings and other competing rights and the desirability of expediency and finality, acknowledged as arising in a planning context.

60. While late notification of a decision does not give rise to an entitlement to take a full period of eight weeks from actual notice of the decision to commence proceedings, I consider it material that this is the period which the Legislature selected as reflecting a proper balance

between the competing interests of a potential litigant and others. Accordingly, while there may be circumstances involving, for example, identifiable and specific prejudice to third parties or vested rights where speed will be of very great importance and might lead a court to refuse an extension of time even where proceedings are commenced within eight weeks of becoming aware of the decision sought to be challenged, absent such circumstances any period of less than eight weeks does not require special or detailed explanation. In my view the burden to explain periods of delay of less than eight weeks must be lightened by the fact that the Legislative arm have clearly accepted in fixing an eight week period in the first instance that such a period of time is reasonable to assimilate a decision, to take advice on it, to make important decisions in relation to the bringing of proceedings to challenge that decision and to draft and finalise proceedings.

61. Where the Legislature has signalled that a period of up to eight weeks is an appropriate period for these steps to be taken through the terms of s. 50(6) of the 2000 Act, it seems to me that absent particular circumstances which may include urgency arising because of questions of third-party prejudice or some specific identifiable interest beyond the interest of the Planning Authority in finality or the integrity of the planning system, a period of up to eight weeks from date of knowledge to commence proceedings is *prima facia* reasonable if there has been a breach of statutory notification obligations, as I have found in this case. Indeed, I found no example in the cases cited by the parties of an extension of time being refused when an application was moved within eight weeks of the material information being available to the moving party. In *SC SYM Fotovoltaic* the challenge was brought more than eight weeks after all material information was available (see para. 101 of judgment). Similarly, in *Bracken v. Meath County Council* [2012] IEHC 196 and *Sweetman v. An Bord Pleanala & Ors.* [2017] IEHC 46, while not on notice of the decisions within eight weeks of the decisions, the moving parties then failed to bring applications within eight weeks of the date of knowledge of the decision in either case. In both *Bracken* and *Sweetman* extensions of time were refused but in circumstances where there was a delay of more than eight weeks from notice of the decision in case.

62. As noted by Humphreys J. in *O'Riordan v. An Bord Pleanala* [2021] IEHC 1 the planning context is distinct from purely public law or human rights contexts where the only other actors are public law entities because planning judicial review potential causes prejudice to their private law actors and this necessitates a stricter approach to an extension of time. The

key importance of prejudice as a consideration is well established from dicta in cases such as *Kelly v. Leitrim County Council* [2005] 2 I.R. 404 and *Reidy v. An Bord Pleanala* [2020] IEHC 423. The relevance of prejudice as a compelling consideration in the exercise of a power to extend can also be seen in cases such as *SC SYM Fotovoltaic* where the court was not satisfied to extend time as it was likely that prejudice would be suffered were completion of works delayed by virtue of a challenge to the s. 5 declaration. Barniville J. had regard to the fact that delay in completion was likely to give rise to financial loss. Likewise, in *Sweetman*, it was concluded that the developer (ESB Wind Development Ltd) would suffer actual prejudice and the respondent planning authorities would suffer general prejudice were an extension of time granted and a late judicial review entertained.

63. This case is somewhat unusual in that there are no private law actors whose interests have been identified as affected by an extension of time in these proceedings. I accept that the local authority generally has an interest in finality and in the maintenance of the integrity of the planning process but I find that no special circumstances warranting exceptional expedition have been demonstrated in this case. Accordingly, on the facts and circumstances of this case, I am satisfied that no further special reason to explain delay of less than eight weeks from date of knowledge of the decision, which is *prima facie* reasonable, is required provided the application is moved within that period. To find otherwise would be to unfairly penalise Mr. Price for the failure of the Board whose decision it is sought to challenge. This would mean that the Board would obtain an unfair litigation advantage deriving from its breach of statutory duty to notify. It was acknowledged in *Heaney v. An Bord Pleanala* [2021] IEHC 201 that the blameworthiness of the authorities may be relevant when taking into account the overall circumstances of the case in deciding whether to extend time. In this case the Board's failure to notify the decision as required by statute, the absence of actual as opposed to general prejudice and the fact that the application was moved within eight weeks of knowledge of the decision are the most pressing considerations in my decision that "*good and sufficient reason*" has been demonstrated for an extension of time.

64. Even if I am wrong in this and further explanation is required, Mr. Price has not relied exclusively on its right to be in the position it would have been in had the decision been properly notified but points to the extensive evidence before me regarding enquiries made to establish whether the decision had been notified. These enquiries go beyond what would normally be required in a judicial review where no issue regarding notification arises. I am satisfied that

these enquiries were necessary and appropriate in this case as should it have been the case that the statutory obligation to notify had been discharged but through an internal breakdown in communication not transmitted to the appropriate authority within Mr. Price, then the Board would have had a clear basis to have these proceedings dismissed on a preliminary basis for non-compliance with statutory time-limits. I am satisfied that additional enquiries were warranted to establish whether the decision had in fact been served but overlooked through inadvertence. A failure to make these enquiries risked the bringing of proceedings which were doomed to fail without the merits of the proceedings being determined. It is recalled that the Board has never accepted that the decision was not notified. This remained a live issue right up to the hearing before me.

65. I am further satisfied that some time was also required to assemble the file documents and obtain advice on them notwithstanding that they were publicly available for inspection. The necessity for further enquiries and to assemble the file in circumstances where the decision had not been properly notified leads me to conclude that there was no want of expedition on the part of Mr. Price in proceeding to move an application for leave within eight weeks of first becoming aware of the decision. In circumstances where there is no question of third-party prejudice or vested rights in this case, I consider that if explanation for a delay within a period of less than eight weeks from the date of knowledge of the decision is required, it has been provided. This explanation is adequate on the facts and circumstances of this case.

66. Accordingly, from a global consideration or holistic view (as per Barr J. in *Heaney*) of relevant considerations including a consideration of the steps taken during the eight-week period following notification of the decision, I am satisfied that Mr. Price proceeded with proper expedition following notification of the decision such that when the steps taken during this period is considered together with the failure to notify the decision as required by statute and the absence of actual prejudice it is clear to me that "*good and sufficient reason*" has been demonstrated to exist for an extension of time up to and including the 19th of April, 2021 when the application was moved before the Court. I have further concluded, as noted above, that the initial failure to move within eight weeks was caused by factors outside the control of Mr. Price and arose from the failure of the Board to serve notice of its decision as it is statutorily required to do.

Whether Exemption Available Where Breach of Condition of Planning Permission

67. It is acknowledged on behalf of Mr. Price in submissions on its behalf that it is evident the Board based its decision on its conclusion that there had been a breach of condition 1 of the grant of permission in that the structure had not been constructed in accordance with the drawings and documentation submitted with the planning application in the first instance. Counsel on behalf of Mr. Price rely in their submissions on the fact that the Board did not make any finding that the change of use is in breach of Articles 9(1)(a)(iii) and/or 9(1)(a)(viii) of the 2001 Regulations and found that the exemption which would otherwise avail a change of use from a car salesroom to a shop did not apply by virtue of Article 9(1)(a)(i), making this the basis for the decision. They point to the fact that the Board Order does not record a finding that the change of use would be inconsistent with any use specified in a permission under the Act to argue that there is therefore no breach of condition arising from a change of use.

68. The position adopted by the Board in its Statement of Opposition, in contrast, is that Article 9(1)(a)(i) is triggered where a breach of a condition permission simpliciter occurs. They maintain that the breach of condition does not have to arise from the proposed development. The Board's submission is that the Inspector and the Board were entitled to conclude that the change of use from a vehicle leasing display showroom to a shop fell within the restriction of Article 9(1)(a)(i) of the 2001 Regulations which applies either where a condition to a permission which is previously granted is contravened or where the development would be inconsistent with any use specified in a permission and therefore the exemption conferred by Class 14(a) was dis-applied, as the evidence (including the correspondence of Mr. Price) clearly demonstrated that there was non-compliance with the 2004 Permission.

69. On behalf of Mr. Price it is contended that the Board's interpretation of Article 9(1)(a)(i) is not consistent with the actual wording of the provision and is incorrect as a matter of law. They submit that Article 9(1) refers to the development to which Article 6 relates but that the development with which we are concerned in these proceedings is the change of use of the premises. They submit that the development now in question, namely the change of use, does not contravene a condition attached to a permission as that condition related to the structure of the premises and is unaffected by the change of use. It is contended that condition 1 of the permission required the development *viz.* the construction of the car sales room, to be carried out and completed in accordance with the drawings and documentation submitted to the Planning Authority. It is argued that the fact that this did not occur does not result in a restriction on the application of the exempted development provisions imposed seemingly on

the basis that condition 1 relates to the construction of the building but not its use. It is further submitted that the change of use the subject matter of the referral was not contemplated at the date of grant of the permission and therefore condition 1 did not address same. Fundamentally, the position adopted on behalf of Mr. Price is that a breach of condition 1 relating to the construction of the premises does not occur by reason of the change of use and therefore does not operate to disapply an exemption otherwise available in respect of the change of use.

70. It is established that exemptions must be strictly construed and are subject to being de-exempted. In *Dillon v. Irish Cement Limited* (Supreme Court, 26th of November, 1986), Finlay C.J. stated:

> *"I am satisfied that in construing the provisions of the exemption Regulations the appropriate approach for a court is to look upon them as being regulations which put certain users or proposed development of land into a special and, in a sense, privileged category. They permit the person who has that in mind to do so without being in the same position as everyone else who seeks to develop his lands, namely, subject to the opposition or views or interests of adjoining owners or persons concerned with the amenity and general development of the countryside. To that extent, I am satisfied that these Regulations should by a Court be strictly construed in the sense that for a developer to put himself within them he must be clearly and unambiguously within them in regard to what he proposes to do."*

71. In *Moore v. Minister for the Arts, Heritage and the Gaeltacht* [2016] IEHC 150 (at para. 565), Barrett J. relied on cases such as *Dillon* and stated:

> *"It can be seen that the scheme and structure of the Act of 2000 is that matters of exempted development are either set out in s. 4 of the Act of 2000 or, alternatively, in the Regulations of 2001. ....it is well established that the exempted development provisions of the Act of 2000 fall to be strictly construed, with any person seeking to place reliance on same having to demonstrate that they clearly come within them."*

72. Subsequently, in *Dennehy v An Bord Pleanála* [2020] IEHC 239, Meenan J. found (para. 53) that it could not be the case that the Board was permitted to take a decision to the effect that an otherwise exempt development (the erection of a gate) was not an exempted

development on the basis of a public user which was unlawful. One might extrapolate from this, albeit by analogy, that reliance cannot be placed on unlawful activity in the application of exemption regulations. Mr. Price is seeking the application of an exemption for a change of use and that change of use, in plain terms, necessarily involves the use of the premises which was not constructed in accordance with planning permission. This, in basic terms, is precisely what Article 9 is supposed to prevent, namely exemptions arising for further development taking place on the back of prior non-compliance. As noted by *Simons on Planning Law,* Third Edition, 2021 (at p. 169), exemption is a privilege given to what is otherwise something that needs planning permission. The authors state:

> *"[I]t will be seen that the objective of exempted development is either to remove certain minor or insignificant development from the requirement to obtain planning permission, or to avoid unnecessary duplication of control where development is subject to authorisation and consultation under other legislation."*

73. Whatever about the legislative intention in providing for certain exemptions, in my view the issue raised in these proceedings is resolved on a simple application of the provisions of the planning code as they interact with each other interpreted literally and in accordance with plain English. It is recalled that development is defined under s. 3 as including a change of use. Unless exempt, planning permission is required for all such development. Where there is no compliance with condition 1 of the planning permission, an accepted fact, the expansive definition of "*unauthorised use*" as provided at s. 2 of the 2000 Act operates to make any use of the premises where there has been a breach of a condition of planning permission an unauthorised use for the purpose of the 2000 Act.

74. While I am satisfied that the exemption provided for under Class 14(a) could only ever have been intended to apply where the original use was authorised, Article 9(1)(a)(i) of the 2001 Regulations puts the matter beyond doubt. It provides that development to which Article 6 relates shall not be exempted development for the purposes of the 2000 Act if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act. In view of the accepted breach of condition 1 of the applicable planning permission and the definition of "*unauthorised use*" provided in s. 2 of the 2000 Act, use as a car sales room was never authorised. While the permission was granted for a premises to be used as a car sales room, all use of the premises,

including use as a car sales room, is inconsistent with the use specified in the permission because the permission required a particular structure, and that structure was not provided. It must follow that a change in use which is similarly in breach of condition because the premises has not been constructed in accordance with the condition and remains non-compliant with planning permission, is not exempt.

75. I am satisfied that authority for a use cannot be derived from an existing permission through reliance on exemption provisions where the original use is unauthorised. Exemption provisions operate to assist the compliant developer who carries out development which has been exempted from the requirement to obtain planning permission in respect of changes treated as non-material under the statutory scheme. They do not avail an errant developer in regularising planning status where there has been no compliance with the planning permission granted in the first place.

76. The change of use which Mr. Price seeks to legitimate necessarily involves using the premises and that necessarily involves using a premises that was constructed otherwise than in accordance with its planning permission. As the retained development was not carried out and completed in accordance with the plans and documentation lodged with the application resulting in the 2004 permission, any subsequent development (including the original use and the change of use from former car sales premises to a shop) would be and remain non-compliant and would itself contravene condition 1 of the 2004 permission as set out in the Board Order. The fact that the Planning Authority did not pursue enforcement action in respect of the previous unauthorised use, being use as a car sales room in breach of a condition of planning permission arising from the structure of the building, does not operate to authorise that which has not been authorised and does not change the fact that the planning status of the premises is irregular.

77. I am satisfied that as a matter of law where the existing use is unauthorised because of non-compliance with a condition of planning permission, no exemption applies in respect of a change of that use. It is further my view that the breach of condition in relation to the construction of the premises is continuing rendering all use of the premises as constructed unauthorised.

78. As the Board did not decide that the exemption was disapplied on an application of Articles 9(1)(a)(iii) or (viii), the complaints made regarding the treatment of same by the Inspector do not require to be considered because they were not relied upon by the Board. For completeness I would merely observe in relation to the argument that the Inspector did not identify the extension or alteration to which she was referring and / or that there was ambiguity in the Inspector's report in this regard, that while it is true that (viii) relates to extensions or alterations in a premises, it is clear from the terms of her report that the Inspector proceeded not on the basis that there had been an unauthorised extension or alteration of the property post construction but rather on the basis that she was satisfied that the increase in floor area of the commercial structure would have required planning permission and that the extension to the original structure for which permission was granted is therefore material in nature, has altered the appearance of the permitted structure and resulted in an increase in the permitted floor area for which there is no exemption. Indeed, it is not gainsaid on behalf of the Applicant in its submissions to the Board that the increase in floor area of the commercial structure would have required planning permission.

Whether Failure to Determine Question Referred and Provide Reasons

79. It is argued on behalf of Mr. Price that the Board improperly failed to determine all matters the subject of the referral and the Board Order should be quashed on this basis. This argument is made because Mr. Price had sought a determination on whether, if they rescinded the breaches identified by rectifying the structure of the premises, the change in use would then be exempted development.

80. There is no doubt that the Inspector was alert to this being part of Mr. Price's case and she noted at para. 6.1.6 (and at para. 9.6.8) of the report that in the referral the Applicant stated:

> *"if the Board still consider that the 'squaring off' of the building carried out by the original developer at the time, is not in compliance, Mr Price now seek to request whether the rectification of the building back to that which was originally permitted, and the subsequent use of same for use as a Mr Price would be exempted development"*

81. This part of the referral was reformulated by the Inspector as she was entitled to do (see *Roadstone Provinces v An Bord Pleanála* [2008] IEHC 210). The question was phrased in para. 9.3 of the report as follows:

> "*Would the rectification of the building back to that originally permitted, and the subsequent use of same as a shop be 'exempted development'?*

82. The Inspector did not ignore this question but concluded that given that the structure as constructed does not comply with Condition 1 of the 2004 permission, the "*rectification*" or reversal of the building back to that originally permitted would also be unauthorised development. In so finding the Inspector clearly answered the second question. She concluded that the works of rectification required are not exempted development. Logically, just as the Inspector found that change in the form of the original deviation from the plans which grounded the 2004 permission was development for which permission was required, so too the change back would be development and not exempt.

83. In *Kelly v. An Bord Pleanala* [2019] IEHC 84 Barniville J. addressed a failure to refer to particular matters in a decision as follows (para. 227-229):

> *"It is clear from the decision of the High Court (Kearns J.) in Evans v an Bord Pleanála (Unreported, High Court Kearns J., 7th November, 2003) [2004] WJSC-HC 4037 ("Evans"), that the mere failure by the Board to recite or refer to a particular policy or guidelines "does not in any way prove a failure on the part of the Board to have kept itself aware of such policy", having regard to the rebuttable presumption of validity (as described by McGuinness J. in the High Court in Lancefort and having regard to the onus of proof which rests on the applicant who seeks to challenge a decision of the Board. Both McGuinness J. in Lancefort and Kearns J. in Evans referred in this regard to the earlier decision of Finlay P. in the High Court in Re Comhaltas Ceoltoiri Eireann (Unreported, High Court, Finlay P., 14th December, 1977). This aspect of the decision of Kearns J. in Evans was followed and applied by Costello J. in the High Court in South-West Regional (at paras. 113-114 p.525). 228. It is also well established that in assessing whether the Board has complied with its obligation in s.34(10) to state the "main reasons and considerations" in its decision, it is necessary to consider the position from the perspective of an informed participant. .....Very similar statements*

were made by Clarke CJ. in the Supreme Court in Connelly where he made clear that when assessing a ground of challenge to a decision of the Board based on the inadequacy of the reasons given, it was necessary to consider to consider the position from the point of view of "reasonable observer carrying out a reasonable enquiry" (para. 9.2, p. 472). ……The fact that the Board did not recite in its direction or order that it did have regard to them does not support the applicant's contention that the Board did not."

84. While no reference is made in express terms to the second question in the Board Order, the Board clearly concluded that the change of use of a former car sales premises to use as a shop is a factual change of use and such change of use would raise material planning issues, including implications in terms of traffic and pedestrian safety, and would, therefore, constitute development within the meaning of s. 3(1) of the Planning and Development Act 2000 (as amended). It noted that while this change of use pertaining to the former car sales premises would generally come within the scope of the exemption provided in Class 14(a) of Part 1 of Schedule 2 to the 2001 Regulations (as amended) this exemption could not avail Mr. Price in circumstances where the existing premises on the site has a larger footprint and a more symmetrical configuration than that permitted under planning permission register reference number 03/300074 given that the changes from the permitted development are material in nature and constitute development and would not have been exempted development. It follows that carrying out works to rectify the premises as constructed by bringing it into line with that for which permission had been granted would also constitute development, material in nature, which would not be exempt. This flows as a matter of clear logic from the Board's express findings.

85. The Board went on to rely squarely on condition 1 of the 2004 permission which expressly required the development to be carried out and completed in accordance with the drawings and documentation submitted to the Planning Authority with the result that the exemption that would generally be available under Class 14(a) is restricted under the provisions of Article 9(1)(a)(i). While no express reference is made to s. 4(1)(h) of the 2000 Act permitting works altering a premises which does not materially affect the external appearance in a manner inconsistent with the character of the structure or the neighbouring structures, there is no ambiguity in the Board's rejection of a contention that the changes required to achieve a

rectification of the premises as constructed would be material development involving changes of a scale which are not exempted.

86. The Board evidently concluded that the answer to Mr. Price's difficulty did not lie in rectifying the building as constructed because the deviation from the 2004 permission is material. I am satisfied that the Board fully answered the question referred, albeit without breaking the question down into its component parts. There is no frailty with the decision by reason of a failure to address in direct terms the question submitted. As found by Kearns J. in *Esat Digifone Ltd. v. South Dublin County Council* [2002] 3 I.R. 585, the function of s. 5 is to clarify whether particular works or uses constitute development or exempted development so that the Board could not be confined in some artificial way. The real issue is whether the substance of the question of whether the proposed use or rectification works would constitute exempted development or not has been determined. In this case, I am satisfied that it has been.

87. I am also satisfied that the basis for the decision is discernible from the terms used in the Board Order read together with the Inspector's Report and its earlier decision in respect of the same development. There is no ambiguity as to why the decision was reached. The "*main reasons and considerations*" considered by the Board were fully set out in the Board direction and the Board order when read with the Board inspector's report. Mr. Price has been able to fully articulate its case challenging the decision made with express reference to the reasoning offered

Whether Decision Unsupported by Evidence

88. Particular complaint is made on behalf of Mr. Price in relation to the treatment of traffic issues and reliance on same in concluding that a change in use was not exempt. As already noted Article 9(1)(a)(iii) provides a de-exemption if traffic hazard issues arise. No reference to Article 9(1)(a)(iii) appears in the Board's decision where only Article 9(1)(a)(i) is referred to. The same is true of the Inspector's recommendations. The Inspector sets out her views on traffic hazard in her report (at §9.6.12-§9.6.18), but without then proceeding to record a recommendation based on her conclusions. Accordingly, there is no necessity to consider whether any error of law undermines the application of Article 9(1)(a)(iii) in this case because it was not applied. Rather, traffic arose in another way for the Board.

89. Traffic considerations arose in the context of the Board's consideration of the anterior question as to whether there had been development. Development can involve a change of use, but that change of use must be material. Accordingly, materiality of change of use comes into question when considering whether something is development or not. Both the Inspector and the Board concluded that "*material planning issues*" would arise "*including implications in terms of traffic and pedestrian safety*" and this was expressed by the Board not in a conclusion that an exemption should be disapplied under Article 9(1)(a)(iii) but in the conclusion that the subject matter change of use constituted development.

90. It bears emphasis that while Mr. Price challenges the treatment of the change of use as development with reference to traffic considerations in the case as argued before me, it is not disputed in the terms of the proceedings that the change of use is development. It has always been the accepted premise for referral for a declaration that the change of use is development. In recording its decision that the change of use is material and constitutes development, the Board is therefore merely recording that which has up until now been common case between the parties albeit the Board relies on traffic considerations to explain its' conclusion.

91. Without deciding whether it is legitimate to challenge the Board's conclusion that the change of use is development notwithstanding that this was previously conceded but proceeding to consider the issue raised, in my view there is nothing questionable in the Board considering that a change in use is material by reference to planning considerations such as traffic. While there can be no real doubt that traffic considerations are relevant planning concerns which fall to be considered when addressing the materiality of a change of use, I note that in *Simons on Planning Law* (at para. 2-45, p. 143) it is expressly stated that traffic issues go to materiality. As found by Baker J. in *Ogalas Limited v. An Bord Pleanala & Ors.* [2014] IEHC 487 (at para. 54) matters such as traffic and parking are planning concerns. Baker J. concluded (at para. 55) that the Board was entitled to take into account such general planning considerations in coming to a conclusion that the use had changed materially. The whole point in considering whether a change of use is exempt is to examine the character of the use in planning terms. The concept of the materiality of a change from a car salesroom to a Mr. Price retail store is properly considered by reference to the planning materiality of same which certainly includes matters relating to traffic and pedestrian safety. I cannot accept as correct the contention on behalf of Mr. Price that traffic concerns constituted an "*irrelevant consideration*". Furthermore, in having regard to traffic issues when assessing the materiality

of a change in use and determining that it constitutes development, the Board did not fall into the error identifying in *Readymix Ltd. v. An Bord Pleanala* [2009] 4 I.R. 736 where regard was had to the visual impact of the development when deciding the issue of material change of use in circumstances where its visual impact was irrelevant to the question of use, as contended on behalf of Mr. Price. There is no similar evidence of contamination of the decision-making process by confusing reliance on irrelevant considerations in this case.

92. The criticism leveled against the Board on behalf of Mr. Price is not limited to relevance, however, but the merits of the conclusions arrived at with reference to traffic concerns are also challenged based on a contention that the Inspector carried out no analysis of her own and therefore conclusions regarding traffic hazards are not grounded in evidence. This argument is manifestly not correct. The Inspector carried out two site inspections, on the 18th of February, and the 21st of June, 2019, and reported that at the time of her inspections, which were mid-morning and mid-afternoon and were both mid-week, there were steady flows of traffic in both directions. The Inspector noted (at paras. 9.6.12 to 9.6.14 of her report) that the entrance serving the site is located approximately 50m west of a roundabout site and is accessed directly from the N78 which is a national secondary road. The Inspector also noted that, while there are adequate sight lines and adequate parking within the curtilage of the site, on the day of her inspections there was a steady stream of visitors to the shop unit who arrived by car and no pedestrian crossings in the vicinity of the site.

93. If the nub of the complaint made on behalf of Mr. Price regarding the treatment of traffic in the decision on the section 5 referral is that there was no evidence before the Board in relation to the level of traffic generated by the new use in comparison with the previous use, I do not accept that there is validity to this complaint. On the face of the documentation before me, the Board had sufficient and ample material upon which to make its decision. Having regard to the use of the shop and the location of the premises on the outskirts of the town, the Inspector concurred with the opinion offered by earlier inspectors that the shop unit would generate a significant increase in traffic when compared with the permitted use. It is wrong to allege that all the Inspector did was rely on reports relevant to the 2018 Decision as she clearly went further in agreeing with them. The decision in *Baile Eamoinn Teoranta v An Bord Pleanála* [2020] IEHC 642 cited on behalf of Mr. Price does not assist the argument as that case arose in a very different factual context involving technical, expert evidence. In *Baile Eamoinn Teoranta* planning permission was refused on the grounds that the development posed

a risk to public health. This decision was made in the face of technical evidence to the effect that the treatment plant was of a very high technical standard providing a discharge of liquid which was of very high quality. The Inspector's reservations which led to the refusal of planning were found to have been based on a paradoxical conclusion for which no technical or any evidence was offered. In this case, however, the Inspector was able to make her own observations on traffic based on direct evidence from site visits, including her observation that there were no pedestrian crossings in the vicinity of the site in the context of a change from a car salesroom to a Mr. Price with the relatively obvious difference in those operations or uses. There was no need for technical or scientific assessment to arrive at plainly obvious and common-sense conclusions that use as a Mr. Price would generate more traffic than a car sales showroom. Common sense conclusions regarding matters of traffic and pedestrian safety were open to the Inspector based on her own observations from site visits which she recorded in her report as evidence for the further benefit of the Board in its deliberations.

94. Manifestly the Inspector was also entitled to reach the conclusion that the reduction in floor area would not be of a scale to satisfactorily address the substantive issue which relates to the nature of the use of the structure as a shop and the traffic implications associated with that use. Whereas it is contended that the Board must have erred because the retail space at issue now is smaller than the original floor area of the car sales room, this is to ignore the fact that the traffic concern flows from the difference in traffic generated through the nature of the use of the premises, not the size of the premises. The point which the Inspector sought to make relates to the nature of the difference between what Mr. Price does as a retail store and a car salesroom. The fact that the premises had a reduced size does not detract from the inspector's point that a Mr. Price shop would attract a greater volume of traffic than a car sales room, even if the Mr. Price store is somewhat smaller due to the removal of a mezzanine level. This is not a matter upon which expert, technical evidence is required.

95. Recalling the limited role of the Court in proceedings by way of judicial review where a decision is challenged as unreasonable as succinctly restated in *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929 at [para. 76] and [para. 77] and again in *McGrath Limestone Works Limited v. An Bord Pleanála* [2014] IEHC 382 at [8.0] at [8.1]), it is necessary for the applicant to establish that the Board "*had before it no relevant material which would support its decision*". In this case I am quite satisfied that an adequate evidential basis has been demonstrated for the Board's decision. Mr. Price falls a long way short of meeting the high

threshold which applies in a challenge to the rationality of the decision because of an inadequate evidential foundation for the conclusions arrived at. Indeed, in circumstances where it has always been accepted on behalf of Mr. Price that the change of use in question is material and constitutes development, it is still not clear to me why issue is taken with the basis for the Board's agreement in a conclusion which Mr. Price shares in any event. While I have, for completeness, addressed these arguments, I do not wish to be taken as having found that Mr. Price was entitled to challenge the conclusion that the change of use was development in all the circumstances of this case.

CONCLUSION

96. The fact that I accept that Mr. Price did not receive notification of the decision, whilst a breach of its statutory rights, does not ground relief in circumstances where an extension of time is made and no prejudice flows from the failure to notify. The grant of declaratory relief would serve no purpose where Mr. Price has been able to present a full challenge to the Board's regardless of the delay in issuing proceedings and it has not been claimed that the failure to notify had any further consequence.

97. While Mr. Price has sought to challenge this decision on various grounds, no error of law capable of vitiating the decision impugned in these proceedings nor a flaw in the decision-making process which could ground relief by way of judicial review has been demonstrated. I am satisfied that the Board recites in clear terms in its Order that the change in use is material and therefore development, that this would generally be within Class 14(a) as described above (and as previously found in the unchallenged 2018 Decision), but that the changes to the permitted development being material were in breach of condition 1 of the 2004 permission and therefore Article 9(1)(a)(i) of the 2001 Regulations applied. The Applicant has not discharged the onus of proof upon it to establish that the decision is unsustainable and has failed to rebut the presumption of validity in respect of the Board's decision.

98. It is recalled that the position adopted by the Board in its decision does not mean that Mr. Price may not obtain planning permission. It simply means the exemption cannot apply.

99. There is no proper basis for interfering with the decision challenged in these proceedings. Accordingly, while I will extend time for the bringing of the within proceedings

under s. 50(8) of the 2000 Act up to and including the 19th of April 2021, I will then refuse the substantive relief sought and dismiss these proceedings.