[2024] IEHC 101

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2023.0000975]

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

ALEX AND SHAHLA THOMPSON

APPLICANTS

AND
AN BORD PLEANÁLA

RESPONDENT

AND
KATHY AND BARRY O'DONNELL

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Monday the 26th day of February, 2024

1. An express statutory provision and a mountain of existing caselaw makes clear that time to challenge a normal planning decision runs from the date of the decision. The applicants, who have not shown that they could not have moved within time, were one day late in bringing their challenge on a conventional reading of the law. They now claim that the statute should be interpreted contrary to its settled meaning, or alternatively that time should be extended. Their fall-back argument is that the ordinary application of the time requirement collides with the requirements of EU law.

Facts and legal context

2. The applicants are academic scientists, the first named applicant being an emeritus professor and the second named applicant being a retired geneticist.

3. On 14th March, 2022 the notice party lodged the application with Fingal County Council for the sub-division of an existing site, the provision of a single story infill dwelling to the rear of the site, amendments to the exiting boundary treatment to the side and rear of the site, the provision of 2 parking spaces to serve the proposed dwelling, landscaping and a new connection to the existing waste water and water supply and all associated site works at an address on Howth Road, Sutton, Dublin 13.

4. On 28th April, 2022, the council issued a request for additional information and subsequently issued public notices in respect of additional information on 19th August, 2022.

5. The council then decided to grant permission with conditions, on foot of a planning report dated 28th September, 2022.

6. On 26th October, 2022, the applicants appealed to the board.

7. On 8th March, 2023 the board wrote to the applicants indicating that the appeal would not be decided within the target time-frame of 18 weeks.

8. On 22nd May, 2023, the respondent's inspector, Mr Bernard Dee, carried out a site inspection.

9. On 24th May, 2023, the Inspector issued his report.

10. On 29th May, 2023, the board wrote again to the applicants indicating that the matter would be further delayed.

11. The application was considered at a meeting of the board on 26th June, 2023, at which the board decided to grant planning permission for the development. The Board Direction is dated 26th June, 2023.

12. The Board Order is dated 28th June, 2023.

13. Regulation 74(1) of the Planning and Development Regulations 2001 provides:

> "(1) The Board shall, as soon as may be following the making of a decision on an appeal or referral, notify any party to the appeal or referral and any person who made submissions or observations in relation to the appeal or referral in accordance with section 130 of the Act."

14. This doesn't specify any time limit.

15. On the other hand there *is* a time limit for publication of the material by making it available at the board's office and on the website (or by other means if the board so decides, which generally it doesn't – see *Reid v. An Bord Pleanála* (No. 7) [2024] IEHC 27, [2024] 1 JIC 2401). Section 146(5) and (6) of the 2000 Act provide:

> "(5) Within 3 days following the making of a decision on any matter falling to be decided by it in performance of a function under or transferred by this Act or under any other enactment, the documents relating to the matter—
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> (a) shall be made available by the Board for inspection at the offices of the Board by members of the public, and
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> (b) may be made available by the Board for such inspection—
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> (i) at any other place, or

(ii) by electronic means,
as the Board considers appropriate.
(6) Copies of the documents referred to in subsection (5) and of extracts from such documents shall be made available for purchase at the offices of the Board, or such other places as the Board may determine, for a fee not exceeding the reasonable cost of making the copy."

16. Three days from a decision includes the day of the decision itself unless the context otherwise requires - see s. 18(h) of the Interpretation Act 2005:

"(h) Periods of time. Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period;"

17. The board points out that s. 146(5) of the 2000 Act here refers to 3 days "following" the decision. But "following" is encompassed within the concept of a "period … reckoned from a particular day". The context certainly doesn't "require" a more favourable interpretation from the board's point of view. Applying that, the 3 days expired on Friday 30th June, 2023.

18. The board's compliance with the foregoing was as follows:

(i) as noted above, the three day requirement for making the material available under s. 146(5) ran from Wednesday 28th June, 2023 - that therefore expired on Friday 30th June, 2023;
(ii) notice of the decision was posted to the applicants on Monday 3rd July, 2023;
(iii) this was received on Tuesday 4th July, 2023;
(iv) the report, direction and decision were published on the board's website on Wednesday 5th July, 2023 – 5 days out of time (and also out of time even if I am wrong about the application of s. 18(h)), albeit that the effect of that lateness insofar as concerns the applicants was somewhat blunted by the arrival of the letter the day before; and
(v) the applicants requested a hard copy of the inspector's report and received that on 5th July, 2023.

19. Following receipt of notice of the board's decision, the applicants didn't act with any noticeable speed for a month, during the period 5th July, 2023 to 4th August, 2023, and then took the (legally misconceived) step of corresponding with the board on the latter date, to ask if there was any other basis for the decision than that disclosed on the papers they had. Dissatisfied with a mere acknowledgement dated 15th August, 2023, they wrote again on 16th August, 2023 and only then decided to seek judicial review – at that point there were only 8 days left to bring the proceedings.

20. The applicants also say that they had a lot on their plate in that period including an unfortunate illness of a relative. But without in any way minimising their difficulties, everybody has a lot on their plate all of the time (with the exception of a select few who have reached a state of enlightenment – something I can only speak of with second-hand knowledge). The applicants' difficulties in no way reached the level that would have precluded them acting within time – their real problem was that they mistakenly believed that time ran from notification (as they effectively admit in their joint affidavit at para. 25). One can't be too critical of their lawyers' failure to then bring the proceedings within time seeing as they only had barely more than a week to do so – moreover a week falling in the heart of August – the worst possible time. One might be forgiven for wondering whether – in an era where work-life balance is supposed to be a central feature of modern life, and where it is impossible to go for long without hearing civic and community leaders talking at length about mental health – there might be a case for a provision that time limits including for judicial review would be suspended during the month of August or other critical periods during which there must be a right to disconnect. That said, the court is primarily in the business of applying rather than making law, save where making is properly called for by established doctrines such as to resolve uncertainty, to deal with new and emerging questions not previously addressed, or to protect rights.

21. Assuming (discussed below) that time starts from the date of the decision, the 8-week period expired on 22nd August, 2023

Procedural history

22. The application for leave to apply for Judicial Review was opened on 23rd August, 2023 before Roberts J. at a vacation sitting of the High Court.

23. A motion to admit to the present List (under its previous name) was first returnable on 16th October, 2023. On that date I was minded to grant it but it then transpired that the applicants had failed to notify the notice party of the motion in breach of the Practice Direction then applicable and contrary to the very nature of a notice of motion which requires to be served on the other parties. I then had to reverse my announced intention to admit the matter, and instead to adjourn it.

24. The matter was put back to 6th November, 2023, to enable the applicants to rectify that non-compliance.

25. On 6th November, 2023, all parties having been properly notified, the motion was granted without objection. Had there been an objection it would have been very borderline in terms of the commercial criteria for admission to the list that prevailed at that point (since removed). Leave was granted with an amended statement of grounds to be delivered within 1 week and the originating notice of motion was made returnable for 2 weeks.

26. By letter dated the 8th December, 2023, the Respondent proposed the following directions:

(i) board Opposition Papers due – 8th February, 2024 (excluding Christmas period);
(ii) notice Party Papers due – 15th February, 2024;
(iii) any Replying Affidavit by the Applicants due – 7th March, 2024;
(iv) any Further Replying Affidavit by any other party due – 21st March, 2024; and
(v) matter to be listed For Mention – 8th April, 2024.

27. On 11th December, 2023, the board indicated to the court that they considered the case to be one day out of time, superseding the previous proposed directions.

28. On 18th December, 2023, I gave the applicants liberty to bring a motion seeking an extension of time returnable for 19th February, 2024. This was without prejudice to the fact that the applicants were permitted to maintain their argument that they were within time. It was agreed that if the motion was dismissed that the leave order would be set aside, and that if the motion was granted, that would be the end of the time objection as far as the opposing parties were concerned. Unfortunately the applicants later sought to resile from that agreement, but in fairness quickly rectified that stance when their prior agreement was brought home to them. Perhaps this illustrates that the safest practice in this type of situation is for both sides to bring motions – the applicant to seek an extension of time and the opposing parties to seek discharge of the leave order. However in the present case this little misunderstanding was surmounted and matters proceeded in line with what had been agreed.

29. The applicants were directed to issue the motion by 16th January, 2024 with any replying affidavit by 29th January, 2024 followed by applicants' submissions by 6th February, 2024, board submissions by 15th February, 2024 and notice party submissions by 16th February, 2024 at 13:00.

30. The matter was listed for call over on 19th February, 2024, when it transpired that the applicants had failed to initiate the preparation of a statement of case, and belated compliance was directed. As it happens they had also failed to correctly populate the ShareFile in accordance with Practice Direction HC124, a matter that remained unaddressed. The matter was listed for hearing on 20th February, 2023, and heard on that date with judgment being reserved.

Relief sought

31. The substantive reliefs sought in the statement of grounds are as follows:

"1. An Order of *certiorari* quashing a decision of An Bord Pleanála (the Respondent) made on 28 June 2023 (ref. ABP314936-22) to grant the Notice Party permission for the sub division of an existing site, the provision of a single story infill dwelling to the rear of the site, amendments to the exiting boundary treatment to the side and rear of the site, the provision of 2 no. parking spaces to serve the proposed dwelling, landscaping and a new connection to the existing waste water and water supply and all associated site works at ... Howth Road, Sutton, Dublin 13 ('the impugned decision').

2. Such declarations of the legal rights and/or legal position of the Applicant and/or persons similarly situated and/or of the legal duties and/or legal position of the Respondent and/or Notice Parties as the court considers appropriate.

3. If necessary, an order for the discovery of documentation which is or has been in the power, possession or procurement of other parties hereto and which is relevant to any issue in these proceedings.

4. Further and/or other order or relief.

5. Liberty to apply.

6. Liberty to file further Affidavits.

7. A Declaration that the within proceedings are covered by the protective costs provisions of s.50B of the Planning and Development Act 2000 (as amended), and/or sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 (as amended), and/or otherwise including under the Legal Services Regulation Act 2015 and/or Order 99 RSC.

8. Such further or other order as this Honourable Court shall deem fit.

9. The costs of these proceedings."

Grounds of challenge

32. The core grounds of challenge are as follows:

"Grounds upon which relief is sought:

1. These proceedings concern a decision of An Bord Pleanála ('the Board'), made on 28 June 2023 under file reference no. (ref. ABP 314936-22), to grant permission to the Notice Party. ('the decision') for the sub division of an existing site, the provision of a single story infill dwelling to the rear of the site, amendments to the exiting boundary treatment to the side and rear of the site, the provision of 2 no. parking spaces to serve the proposed dwelling, landscaping and a new connection to the existing waste water and water supply and all associated site works at ... Howth Road, Sutton, Dublin 13, ... ('the proposed development').

PART 1 – CORE GROUNDS

DOMESTIC LAW GROUNDS

1. The decision is invalid and/or *ultra vires* in that the Board has erred in law, misdirected itself in law, acted and/or took into account irrelevant considerations and/or misunderstood and/or overlooked relevant material and/or acted irrationally, where it failed to assess adequately or at all compliance with the development management criteria required to be met by the 'BRE Guidelines 'Site layout planning for daylight and sunlight: a guide to good practice, 2011' ('the BRE guidelines'), the Building Height Guidelines and the Fingal Development Plan 2023 -2029. ('the new development plan')

2. The impugned decision is invalid where it comprises a material contravention of the development plan without a lawful basis to do so. The decision is predicated on the acceptance of the Inspector and the Board basis that the requirements of the Fingal Development Plan 2023-2029 have been met, such that permission may be granted. The failure of the Board to give reasons as to why in breach of the material contravention of the infill development/, being a maximum the proposed development accords with, inter alia, the development management standards of the new development plan, renders the decision to grant permission for the proposed development, irrational void and of no legal effect.

3. The impugned decision is invalid and/or *ultra vires* where the Inspector's analysis and the decision of the Board failed to address the Applicant's submissions as to the impact on the residential amenity of their home at 41 Howth Road, Sutton Cross. In failing to engage with the Applicant's submission concerning inter alia visual obtrusion, overlooking and overshadowing, the Respondent acted irrationally by falling to address the concerns of the applicants herein with regard to his daylight and overshadowing concerns.

EUROPEAN LAW GROUNDS

4. The impugned decision is invalid and/or *ultra vires* in that it contravenes Art.6(3) of the Habitats Directive (and the Birds Directive) and Part XAB of the Planning and Development Act 2000 (as amended) in circumstances where, in purporting to carry out a Screening for Appropriate Assessment: (i) the Respondent reilied [*sic*] on a material error of fact in reaching its conclusion and (ii) the Respondent failed to provide sufficient expertise and conclusions and explicit and detailed reasons in its Screening for Appropriate Assessment which were capable of dispelling all reasonable scientific doubt as to the effects of the proposed development on the conservation objectives and qualifying interests of Baldoyle Bay SAC (Site code 004016) Baldoyle Bay SPA (site code 004016).

5. The Impugned Decision is invalid and contrary to the requirements of the EIA Directive (as amended), the Planning and Development Act 2000 (as amended), and the Planning and Development Regulations 2001 (as amended) including Article 103, Schedule 7 and Schedule 7A, in circumstances where the Respondent failed to provide sufficient expertise screened out significant effects on the environment by way of a preliminary examination without giving reasons for its conclusion.

6. The impugned decision is invalid and/or *ultra vires* where the Respondent erred in failing to consider whether the proposed development would cause a limit value (set out in directive 2008/50 EC and/or Dublin Air Quality Management Plan) to be breached."

Motion before the court regarding time

33. What is before the court is a motion brought by the Applicants dated 16th January 2024. The relief sought in the motion is as follows:

"1. A Declaration that the Applicants were within the eight week time limit as required by Section 50(6) of the Planning and Development Act 2000 (as amended) when instituting the within proceedings on 23 August 2023.

2. If necessary, an order granting liberty to amend the Statement of Grounds to include an order pursuant to s.50(8) of the Planning and Development Act (as amended) extending the period provided for the making of an application for leave to apply for judicial review.

3. If necessary, an order pursuant to s.50 (8) of the Planning and Development Act 2000 (as amended) extending the period provided for the making of an application for leave to apply for judicial review.

4. Such further or other relief as to this Honourable Court shall be deemed necessary.

5. An Order for costs."

34. Normally one seeks declarations as a substantive relief at the hearing rather than by motion, but the court can grant declarations of a procedural nature on a motion as proceedings go along, and in the past has done so particularly in the context of declaratory orders as to costs protection. The declaration sought in the motion is legitimately brought as it involves interlocutory procedural clarification.

35. Maybe in an ideal world the board would have brought a motion to set aside leave to avoid confusion of recollections but in fact what happened as, as recorded in the board's submissions, that "It is agreed that the hearing of this motion will be the determination of the issue relating to time in the Judicial Review".

36. The summary of the parties' positions as set out in the Statement of Case is as follows:

> "The Board has alleged that the application for leave to apply for Judicial Review was moved outside of the time permitted by section 50(6) of the Planning and Development Act, 2000 as amended that the last day for the Applicant to bring the challenge was on the 22 August 2023.
>
> The Notice Party has adopted the same position of the Board.
>
> The Applicant maintains that they were within the 8 week time limit provided for under s.50 (6) of the Planning and Development Act 2000 (as amended) and that time did not expire until the 27 August 2023. Without prejudice to their argument that the application was filed and moved within time, the Applicant also argues that even if the need for an extension arose, they have good and sufficient reason and can demonstrate circumstances outside of their control as they did not receive notification of the decision until a week after the decision was made."

Issue 1 – whether the proceedings are within time

37. The first issue is whether the proceedings are within time. The applicants argue that the board was in breach of its obligation to notify the applicants promptly of the decision and that time only runs from the date of notification.

38. In *Heather Hill Management Company CLG & Anor v. An Bord Pleanála & Anor.* [2019] IEHC 186, Simons J. held that the time limits applied to the final decision and did not cover sub-decisions like AA:

> "81. Were the term 'decision' under section 50B to be interpreted as encapsulating sub-decisions then this would have a knock-on effect on the interpretation of the eight-week time-limit, and would create precisely the type of legal uncertainty eschewed by MacMenamin J. in *Urrinbridge v. An Bord Pleanála*."

39. In *Urrinbridge Ltd. v. An Bord Pleanála* [2011] IEHC 400, [2011] 10 JIC 2802 MacMenamin J. said at para. 33, referring to s. 50(7) of the 2000 Act:

> "In this context, I consider that when a question of the consequential rights of a party arise such as bringing a judicial review, the Act itself clearly envisages that time runs from when notice of the decision is first sent or notified. The logical consequence of this is that the decision (or determination) cannot be binding on any party prior to that point. The legal effect of the determination is coterminous with the giving of notice. The consequence of another interpretation would be to bring about ambiguity and could lead to an effective curtailment of litigation rights of any party to an appeal."

40. However, in *Urrinbridge*, MacMenamin J. only quotes part of the provisions of s. 50(7) – possibly because the issue was more whether the relevant date was the date of the decision or of the prior board meeting. What MacMenamin J. said was:

> "33. Sections 50 and 50A of the PDA 2000 deal with the elapse of time for the purpose of bringing judicial review applications. Pursuant to s. 50(6), an application for leave to apply for judicial review under the Act shall be brought within the period of eight weeks:'…beginning on the date of the decision, or as the case may be, the date of the doing of the Act by the planning authority, the local authority or the Board, as appropriate.' I think this has a broader connotation than describing that which occurs only at a board meeting. Section 50(7) is particularly á propos. It provides:'. . . (7) Subject to sub-section (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act . . . shall be made within the period of eight weeks beginning on the date on which notice of the decision or act was first sent.' (Emphasis added)"

41. But the full text is:

> "(2) A person shall not question the validity of any decision made or other act done by—
>
> (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,
>
> (b) the Board in the performance or purported performance of a function transferred under Part XIV,
>
> (c) a local authority in the performance or purported performance of a function conferred by an enactment specified in section 214 relating to the compulsory acquisition of land, or

(d) without prejudice to the right of appeal referred to in section 37 as read with section 37R—
(i) the competent authority (within the meaning of the Aircraft Noise (Dublin Airport) Regulation Act 2019), or
(ii) the Board in its capacity as the appeal body from decisions of such competent authority, otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the "Order").
(3) Subsection (2)(a) does not apply to an approval or consent referred to in Chapter I or II of Part VI.
(4) A planning authority, a local authority or the Board may, at any time after the bringing of an application for leave to apply for judicial review of any decision or other act to which subsection (2) applies and which relates to a matter for the time being before the authority or the Board, as the case may be, apply to the High Court to stay the proceedings pending the making of a decision by the authority or the Board in relation to the matter concerned.
(5) On the making of such an application, the High Court may, where it considers that the matter before the authority or the Board is within the jurisdiction of the authority or the Board, make an order staying the proceedings concerned on such terms as it thinks fit.
(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.
(7) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(b) or (c) applies shall be made within the period of 8 weeks beginning on the date on which notice of the decision or act was first sent (or as may be the requirement under the relevant enactment, functions under which are transferred under Part XIV or which is specified in section 214, was first published)." [the critical omission from the quotation by MacMenamin J. is underlined]

42. What's apparent when one compares the full text of the provision with the version recited in *Urrinbridge* is that the words cloaked with ellipsis in the latter are absolutely crucial for present purposes (albeit apparently not for the purposes in that case), and their omission appears to have misled the applicants. Generally such punctuation marks are used only to remove irrelevant matter. It is unusual for them to be used to eclipse truly critical and essential qualifications to the text. If one can forgive a brief digressive analogy to make the point more clearly, the only precedent that comes to mind is the use of ellipsis by book publishers to make negative reviewers' quotations more of an endorsement than they might otherwise be. A recent example comes from Jordan Peterson's publisher, Penguin, who at time of writing are publicising Suzanne Moore's review for the *Daily Telegraph* of the book as "hokey wisdom" by quoting it as "... wisdom":https://web.archive.org/web/20230823090348/https://www.penguin.co.uk/books/312989/beyond-order-by-peterson-jordan-b/9780141991191. The book jacket also selectively quoted from an unfavourable *Times* review by James Marriott, who later "praised the 'incredible work from Jordan Peterson's publisher', adding: 'My review of this mad book was probably the most negative thing I have ever written'": https://www.bbc.com/news/entertainment-arts-66520089. The submission made here seem to result in the legal equivalent of this ninja-level reprogramming by selective omission.

43. The critical point here is that the time period running from the date of notification doesn't apply to normal planning decisions of the board (sub-s. (2)(a)). What applies is the rule that time runs from the date of the decision. When MacMenamin J. says that the legislation provides that time runs from notification, that only applies to some types of decision of which this is not one.

44. Ultimately it is hard to improve on the board's submission on the first issue:
"4. … The application was, therefore, *prima facie*, moved out of time and must be dismissed unless the Applicant can obtain an extension of time.
5. The response of the Applicants to this is to suggest that time should only start running from the date on which they received the decision of the Board. The notification of the decision was sent on 3 July 2023 and received by the Applicants on 4 July 2023. That argument is misconceived as section 50(6) of the 2000 Act expressly provides that time starts running from the date of the decision."

45. This is supported by an abundance of caselaw: see *Irish Skydiving Club Ltd. v. An Bord Pleanála* [2016] IEHC 448, [2016] 7 JIC 2907 (Baker J.) at §37, *Kelly v. Leitrim County Council and An Bord Pleanála* [2005] IEHC 11, [2005] 2 I.R. 404, [2005] 1 JIC 2704 (Clarke J.) at §9, *Reidy v. An Bord Pleanála* [2020] IEHC 423, [2020] 7 JIC 3110 (Barr J.) at §44, *O'Riordan v. An Bord Pleanála* [2021] IEHC 1, [2021] 1 JIC 2102 at §10.

46. *Heaney v. An Bord Pleanála* [2022] IECA 123, [2022] 5 JIC 3123 at §§29-43 *per* Donnelly J is to the same effect. This is not *per incuriam* as suggested ambitiously by the applicants. *Urrinbridge* does not decide the contrary for the reasons set out above – rather the latter decision includes some wide language which in fact only applies to a narrow set of decisions.

47. The applicants alternatively appeared to seek to "distinguish" Heaney by making the new argument that no matter what the statute says, it must mean that time doesn't run until notification if the board is in breach of its notice requirements. That claim was demolished by the board in a single strike in oral submissions: "in order to make that argument you have to re-write the Act". The applicants' proposed interpretation is *contra legem*.

48. The only caveat to be added to that punchline is that this conclusion is subject to any argument that the statutory scheme is contrary to EU law, assuming that a plausible argument in that regard could be launched and bearing in mind that this issue has been decided against the applicant's position by the Supreme Court, albeit in a more general context.

Issue 2 – whether time should be extended

49. The applicants say that time should be extended pursuant to s. 50(8) of the 2000 Act, which provides:

> (8) 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.

50. The critical provision here is para. (b). What (b) requires is not that there were circumstances outside the control of an applicant (which is always the case – at times the vast majority of things that happen in life seem to be outside one's control) but such circumstances "resulted in" the failure to apply during the 8 week period. There must therefore be a causative relationship between the outside-the-control factors and the failure to apply in time.

51. Here, while there are various factors that could be said to be out of their control such as the late notice, the ultimate point is that the applicants could have mobilised themselves to bring the proceedings within time. Therefore not doing so was not outside their control. Correspondence with the board doesn't create a situation where failure to bring the proceedings within the time limit is outside the control of the applicants.

52. The fact that the board didn't decide the appeal within 18 weeks and didn't notify the applicants for 6 days doesn't mean that the applicants couldn't have sued within the statutory period. The test is not that things happened outside their control which contributed to delay. The test is that the failure to bring the proceedings in time was caused by, or put alternatively, a result of, the matters outside their control – which it obviously wasn't.

53. What primarily caused the failure to litigate in time was the applicants' mistaken belief as to when time started to run, and their mistaken strategy of writing to the board and awaiting replies rather than consulting lawyers, which they only did coming up to the last minute.

54. Overall and subject only to any hypothetical need for conforming interpretation, the outside-the-control limb of the statutory test is clearly not met here.

55. The question of good and sufficient reason therefore doesn't arise – the requirements of the test are cumulative (hopefully Irish law has not reached the point that we have to have an argument about the meaning of "and").

Fall-back issue as to EU-law compatibility of the domestic scheme

56. The applicants attempted to argue that if the foregoing contentions were incorrect then they would be impugning the EU law compatibility or validity of the rule that time would run from the date of the decision even if the board was in breach of its duty to notify promptly. Such a challenge requires notice to the State and requires to be properly set up. That challenge impliedly includes the possibility that if a statutory provision would otherwise be in conflict with EU law, the court would have to look at whether a conforming interpretation was possible. The legislation as to when time starts to run is clear and is not amenable to a conforming interpretation. Subject to argument, it is not clear that the legislation on extension of time is unamenable to such an interpretation, if such is required, which obviously is going to be denied by the opposing parties.

57. An immediate problem for the applicants is that the time limit in section 50(6) of the 2000 Act has been found to be consistent with the principles of equivalence and effectiveness by the Supreme Court in *Krikke v. Barranafaddock Sustainable Electricity Ltd.* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303 (Woulfe and Hogan JJ.): see in particular para. 89 of the judgment of Woulfe J. At the level of absolute principle, even a final decision of an apex court doesn't absolutely preclude a new point from being raised by a litigant that wasn't addressed in a previous case, particularly because if it didn't arise on the facts of that previous case. A point not argued is a point not decided, as the Supreme Court itself has emphasised – *The State (Quinn) v Ryan* [1965]

IR 70. More delicately, if that's possible, domestic caselaw does not prevent a litigant from raising an EU law interpretation, perhaps based on new European jurisprudential developments, that pulls in a different direction from an apex court interpretation of EU law. But such a scenario isn't something one would want to rush into even at the best of times (these are not the best of times), and in any event the basis for such a revisiting of previous decisions would need to be clear.

58. As against that, the applicants' point seemed to be based on legal certainty, an issue that came up in the judgment of 28 January 2010, *Uniplex (UK) Ltd*., C-406/08, ECLI:EU:C:2010:45. And there is a slightly hint of *Uniplex* about the absence of any time period set out in the 2001 regulations for delivering notice to an appellant of the ultimate board decision – it could be 4 days later or it could be 7 weeks later depending on how the board mobilises itself. Even as regards the issue of non-compliance with the 3-day publication requirement of s. 146, one can see an argument that a period the effective exercise of which varies in practice depending on delay by the decision-maker in publicising its decision could also call into question principles of legal certainty. *Krikke* dealt with a much more extreme situation of attempted collateral challenge after a long delay, and did not address a situation such as arises here where the board itself is in breach of its statutory notification obligations. The applicants also raised issues of inconsistency and inequality whereby different applicants would have different limitations periods in practice, although they didn't develop that by reference to the Charter or otherwise so it's not clear whether that raises any distinct point. Overall I don't think there is any problem in EU law with time running from a decision as opposed to notification, as long as the notification period is reasonably consistent. If the notification period is not consistent, due either to a completely discretionary period to write to appellants, or to a lack of a compensatory extension if the competent authorities are in breach of notification time limits, then there may possibly be an arguable EU point lurking somewhere, subject of course to vigorous counter-argument and submission in due course. Conversely, it may be that there is no issue here at all, or that any such potential issue is not one that these applicants have standing to raise, and if so then that will become clear after such counter-argument, but I don't think it would be correct to reach a conclusion just yet without allowing both sides to develop the point more fully.

59. In such circumstances, I naturally have some doubts and hesitations about being more precise about the issues on which I think further argument would be helpful, but on balance in the more long-term interest of a considered and hopefully correct disposal of the matter, I think it is probably better to share with the parties my current provisional assessment based on the submissions to date that the following questions may arise:

(i) whether the applicants lack standing to make, or are otherwise precluded from making, their various points in the particular circumstances and having regard to the findings in this judgment;

(ii) if not, whether EU law requires the specification in domestic law of a time limit for notification of a decision (which seems to be absent from art. 74(1) of the 2001 regulations) or specification of the precise manner of notification (which is to a quite limited extent discretionary in the wording of s. 146 of the 2000 Act, but this may not be an issue here) if domestic law provides that the time for challenge runs from the date of the decision;

(iii) subject to the foregoing, whether failure to provide notice within a time period so specified (here, s. 146(5) of the 2000 Act) or the provision of notice not subject to any given time limit (as with art. 74(1)) has the result (whether by reason of legal certainty or non-discrimination or otherwise) that either time fixed by domestic law for challenging a decision should not begin to run until either such notice is given or the applicant becomes or ought to have become aware of the decision (whichever is earlier) or alternatively that any discretion to extend time should be exercised in a manner that gives an applicant the benefit of the full period for challenge commencing on the date of notice or actual knowledge, or on which knowledge ought to have been acquired, whichever is earlier.

60. Before we even get to that point however, the next problem is that the applicants didn't take any steps to involve the State as of yet. Contrary to what the applicants seemed to think, it's not up to the court to come up with solutions to that. Rather it's on an applicant to propose in the first instance how an issue like this would be best debated in a way that gives a reasonable opportunity for participation to all interested parties.

61. In fairness to the applicants however, O. 60 RSC doesn't require notice to the State of any argument that legislation is invalid by reference to EU law - it only applies to constitutional validity. So far as I am aware, the State seems to be happy with that *lacuna,* but the absence of such a rule does somewhat excuse or at least mitigate the failure by the applicants to give such notice thus far.

62. In the absence, for whatever reason, of any rules-based requirement to notify the State, I think it is more appropriate to direct notice to the State of this argument rather than dismiss the motion for failure to fulfil an obligation that, which logical, is not actually set out in the rules and

cannot reasonably be read into them given the clear wording of the existing O. 60 RSC limited to constitutional challenges and of O. 60A limited to certain ECHR issues. Examples of *expressio unius* rarely come better than that.

63. A direction to give notice to the CSSO will give the applicants the opportunity to specify how they think the EU law issue should be addressed procedurally, whether by submissions only or perhaps preferably some form of amendment of their pleadings to seek declarations, or otherwise. Other parties can then respond as they consider appropriate.

Summary

64. In summary, without taking from the more specific terms of the judgment:

(i) the parties agreed that the time issue would be determined on the applicant's motion so that if the motion was unsuccessful then leave would be set aside;

(ii) the board was in default of its obligation to publish the decision and relevant materials within 3 days of the decision;

(iii) subject to any argument about legislative validity, the time to challenge a normal planning decision runs from the date of the board's decision, not from when that decision is notified, even if the board is in default of notification obligations;

(iv) the Court of Appeal decision in *Heaney v. An Bord Pleanála* as to when time runs is not *per incuriam* as submitted and nor can it be legitimately distinguished on the basis proposed by the applicants;

(v) subject to statutory validity, the application here was therefore brought one day late;

(vi) subject to a conforming interpretation, there is no basis for an extension of time because the failure to bring proceedings within the 8 weeks was not caused by or a result of the various factors outside the applicants' control, so the statutory test in s. 50(8)(b) of the 2000 Act is not satisfied;

(vii) as regards the EU law compatibility of, or of a strict application of, s. 50(6) of the 2000 Act, as that arises on the particular facts here (which may be an issue not specifically addressed in *Krikke*), in the absence of any obligation in O. 60 RSC to give notice of such an issue to the State, it is appropriate for the court to direct such notice rather than to dismiss the motion for failure to carry out a step that is not actually set out in the rules; and

(viii) once such notice has been given, the parties can advance their proposals as to how that issue should be addressed procedurally.

Order

65. For the foregoing reasons, it is ordered that:

(i) the applicants be directed to serve notice on the CSSO on behalf of Ireland and the Attorney General, within 7 days from the date of this judgment, copied to the other parties, setting out their EU law validity related objections to the time limit procedures in the 2000 Act and their proposals for procedurally managing that objection;

(ii) the matter be listed thereafter for mention on Monday 11th March, 2024;

(iii) the applicant be directed to arrange to correctly populate the ShareFile folder by 09:30 on that date in full compliance with Practice Direction HC124 and in full consultation with the other parties; and

(iv) the CSSO be given access to the ShareFile folder forthwith on providing relevant details to the List Registrar.