THE HIGH COURT

[2018] IEHC 829

[2015 695 JR]

BETWEEN

MAURICE BROWNE AND EILEEN BROWNE

APPLICANTS

AND

KERRY COUNTY COUNCIL

RESPONDENT

AND

JEROME BROWNE

NOTICE PARTY

JUDGMENT of Ms. Justice Eileen Creedon delivered on the 12th of October 2018,

1. By way of Notice of Motion, dated 15 May, 2017, the applicants in this action seek the following reliefs:

(i) An order granting an extension of time within which to seek leave to bring an application for judicial review against the decision of the proposed respondent, An Bord Pleanála made on the 4th May 2016;

and

(ii) Should an extension of time be granted by this Honourable Court, further orders:

(i) Granting leave to the applicants herein to join as co-respondent to these proceedings, An Bord Pleanála;

(ii) Granting liberty to the applicants herein to serve an amended statement grounding an application for judicial review;

(iii) And such further orders or directions as this Honourable Court may deem necessary.

2. The issue, which was argued before the court, is whether an extension of time should be granted to seek leave to bring an application for judicial review against the decision of the proposed respondent, An Bord Pleanála, made on the 4th day of May 2016. Section50A(2)(b) of the Planning and Development Act 2000, as amended, states that it is a matter for the court hearing the application for leave to decide whether the application for leave should be conducted on an *inter partes* basis.

3. There was no appearance on behalf of the respondent or the notice party, however, An Bord Pleanála were represented as the intended respondent. The board made oral arguments and furnished written submissions.

The Law

4. Section 50(2)(a) of the Planning and Development Act 2000, as amended by the Planning and Development (Strategic Infrastructure) Act 2006 and the Planning and Development (Amendment) Act 2010, provides that a person shall not question the validity of any decision made or other act done by a planning authority, a local authority or the board in the performance or purported performance of a function under that act otherwise than by way of an application for judicial review under O. 84 of the Rules of the Superior Courts (S.I. 15 of 1986).

5. Section 50(6) prescribes the eight-week time limit for such applications as follows:

"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."

6. This application for an extension of time is made under section 50(8). It provides that:

"The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that-

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

7. This test has been the subject matter of a number of High Court decisions to include *Irish Skydiving Club Ltd. v. An Bord Pleanála* [2016] IEHC 448, which was cited with approval in *Cassidy v. Waterford City and County Council* [2017] IEHC 711.

8. In *Irish Skydiving*, Baker J described section 50(8) in the following way at paras 9 and 10:

"Section 50(8) (a) is a reflection of the inherent jurisdiction of the court to extend time when it considers that good and sufficient reason exists to so do, but sub paragraph (b) of the subsection contains a restriction on the power such that in addition to being satisfied that good and sufficient reasons exists, the court must be satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the applicant.

Thus, while the court has a discretion it is required by the cumulative provisions of subs. 8 to consider not merely the interests of justice, or the interests of all of the parties, but whether the applicant for the extension can show on the facts that the delay and the reason why he or she is out of time arose from matters outside his or

her control. When a delay arises from circumstances which were within the control of the applicant, the court may not extend."

9. In that case, the court found that the applicant did not satisfy section 50(8)(b). The court was not satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the applicant. For this reason, it was not necessary for the court to make any findings under Section 50(8)(a).

10. In *Cassidy*, Eager J took the same approach and concluded at para 42 that:

"Having regard to the fact that the test is cumulative and that the applicant has in my view failed to satisfy me that he meets the second part of the test, I do not propose entering into a consideration of whether the applicant meets the first part of the test as whether there is good and sufficient reason for extending the time."

11. With regard to the importance of the limitation period, the court in *Irish Skydiving* observed as follows at para 11:

> *"The time limit is strict, and one in respect of which the power to grant an extension is also to be strictly construed. That this is justifiably so has been considered in a number of cases. In* Noonan Services Limited & Ors v. the Labour Court *(Unreported, High Court, 25th February, 2004) Kearns J. explained the policy for a strict approach:*
>
> *'This approach does no more than reflect a growing awareness of an overriding necessity to provide for some reasonable cut-off point for legal challenges to decisions and orders which have significant consequences for the public, or significant sections thereof.'"*

<u>Chronology</u>

12. On the 11th June, 2015 the applicants brought section 160 enforcement proceedings in the Circuit Court to restrain certain development by the notice party.

13. On 15th July, 2015, the Circuit Court upheld the applicant's complaint.

14. On the 2nd October, 2015, the notice party applied to Kerry County Council for retention permission.

15. On 26th November, 2015, Kerry County Council made a decision to grant retention permission to the notice party.

16. On the 21st December, 2015 the applicants were granted leave to apply for judicial review of the decision of Kerry County Council, reference: 2015 695 JR.

17. On the same date, being the 21st December, 2015, the applicants did appeal the decision of Kerry County Council to An Bord Pleanála.

18. On the 31st March, 2016, Kerry County Council made an open offer to compromise these judicial review proceedings. They were listed for the purposes of effecting that compromise before the High Court on the 9th May 2016.

19. On the 4th May, 2016, An Bord Pleanála made a decision to refuse the applicant's appeal and granted retention permission to the notice party.

20. By letter dated the 6th May, 2016, the notice party sent the retention permission granted by An Bord Pleanála to Kerry County Council and asked that no orders of certiorari would be consented to.

21. By letter dated 13th May 2016, the applicants wrote to An Bord Pleanála in an open letter, requesting that An Bord Pleanála provide confirmation on or before the 30th May, 2016 that they would be bound by such orders as might be made by the High Court in respect of the decision of Kerry County Council to grant retention permission to the notice party.

22. An Bord Pleanála acknowledged this letter of the 13th May, 2016 by letter of the 20th May, 2016 but did not respond in substance until the 16th March 2017.

23. By letter dated the 24th May, 2016 from Kerry County Council to the applicants, the Council indicated that in light of An Bord Pleanala's decision in respect of the applicant's appeal, the issue as between Kerry County Council and the applicants in the judicial review proceedings had been rendered moot and that there was no longer a decision of Kerry County Council to quash.

24. On the 3rd June, 2016, Kerry County Council issued a motion for directions including the striking out of these proceedings.

25. On or about the 7th June, 2016, the applicants issued a motion to compel Kerry County Council to file a statement of opposition and an order seeking to join An Bord Pleanála as a notice party. The motion was not served on An Bord Pleanála at that time.

26. On the 28th June, 2016, the eight-week limitation period for challenge to the decision of An Bord Pleanála expired.

27. By letter dated the 16th March, 2017, solicitors for An Bord Pleanála wrote to the applicants in response to their letter of the 13th May 2016 and stated:

> *"The Board apologises for the oversight in not responding substantively to your letter of 13 May last. By virtue of Section. 37(1)(b) of the 2000 Planning Act, the 'decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given'.*
>
> *There is, therefore, at this time, no order of Kerry County Council against which your*
>
> *proceedings can have effect. The only order in being is that of the Board, and it is not the subject of any judicial review challenge at this time. There is no suggestion that it is in itself legally flawed. In order to bring a challenge at this time, you would need to seek and obtain an extension of time from the High Court. Such an order can only be granted if you can satisfy the court that there is good and*

sufficient reason to grant it, and if you can satisfy the court that you could not have moved sooner to bring the challenge.

If such an extension of time is granted, the question will then arise whether the court should quash the Board's decision for the purpose of reviving the Council's decision for the purposes of enabling the latter decision to be quashed.

The Board does not propose to become involved in this matter, and will await any order which the Court may make, given that the proceedings are not aimed at it directly, but it will draw this matter to the attention of the County Council which may choose to rely on it."

28. A motion for directions was heard before O' Connor J of the High Court, sitting in Cork on the 20th March, 2017.

29. On the 21st March, 2017, O' Connor J issued an *ex tempore* judgment allowing the applicant's application to join An Bord Pleanála as named respondent. The decision is currently under appeal by the applicants.

30. On 13th April, 2017, the applicants issued this motion seeking an extension of time.

The Arguments

31. The applicants have made an application for an extension of the period within which to bring an application for judicial review, in reliance on the powers of the court contained in s. 50(8) of the Act.

32. The applicants say that An Bord Pleanála made a decision refusing the applicants appeal on the 4th day of May, 2016. The applicants did not become aware of that decision until they received a letter from the notice party's solicitors, dated 6th May, 2016, outlining same.

33. The applicants say that at this point in time, being May 2016, they were not entirely sure what was going on as it had been anticipated prior to the notice parties letter of the 6th

May, 2016 that all parties would attend before the High Court in Dublin to have the matter ruled.

34. The applicants wrote to An Bord Pleanála by letter, dated the 13th May, 2016 stating that:

> *"These proceedings were issued and served before Christmas and have progressed to the stage where Kerry County Council have accepted that its decision to grant permission was unlawful (although the basis for this illegality is not agreed) and will be quashed by means of an order for certiorari and will not be remitted to Kerry County Council for determination afresh…Our position is that your decision does not affect these Judicial Review proceedings, on the basis that if Kerry County Council is now prepared to accept that its granting of planning permission is invalid and unlawful, that the Appeal to you on the merits, does not affect the legal position…The purpose of this letter is to request from you, to provide in open letter form, on or before the 30th inst., confirmation that you will be bound by such orders as may be made by the High Court in respect of the decision of Kerry County Council to grant Retention Permission on application bearing planning register reference number 15/864 (An Bord Pleanála reference 245940)".*

The applicants say that the response from An Bord Pleanála, dated the 20th May, 2016, while promising a further reply "*as soon as possible*", was essentially an acknowledgment letter only. The applicants acknowledge receipt of a letter from Kerry County Council dated 31st May, 2016, in which Kerry County Council indicated that there was no longer a decision to quash, upon An Bord Pleanala's decision in respect of the appeal and that Kerry County Council proposed to issue a motion for directions as to the future conduct of the case.

35. However, the applicants go on to say that it was by letter dated the 16th March, 2017, that An Bord Pleanála wrote to assert for the first time that the decision of the board, on the appeal, annulled the decision of Kerry County Council:

> *"There is, therefore, at this time, no order of Kerry County Council against which your proceedings can have effect. The only order in being is that of the Board, and it is not the subject of any judicial review challenge at this time."*

The applicants then go on to say that, upon receipt of this letter from An Bord Pleanála dated the 16th March, 2017, it became apparent that there was no other alternative available to the applicants except to join An Bord Pleanála to these proceedings. The applicants indicate that it is correct that they did not seek to join An Bord Pleanála within the eight-week period, running from its decision of the 4th May, 2016. However, they say they believed that at that point in time and indeed when they attended before the High Court on the 9th May, 2016, it appeared that sense would prevail, as Kerry County Council had openly agreed that its decision was made unlawfully and should be quashed and the proceedings would be determined other than by a full hearing. The applicants do, however, acknowledge that the notice party's letter dated the 6th May, 2016, asking Kerry County Council to confirm that it would not agree to an order of *certiorari* likely rendered that belief unrealistic.

36. The applicants say that they notified An Bord Pleanála and brought an application to join them as a third party to these proceedings within the eight-week period, running from the date of the decision of An Bord Pleanála on the 4th May, 2016.

37. The applicants say that Kerry County Council's application for directions was made returnable for the 13th June, 2016 and at that point everything stalled.

38. The applicants say that the delay of the hearing of those motions was outside of the control of the applicants. The applicants say that it was not until the letter sent on An Bord Pleanala's behalf on the 16th March, 2017, that An Bord Pleanála first indicated that it

would not agree to be bound by the decision of this honourable court on the issues raised in these proceedings against Kerry County Council. The applicants say that the delay of An Bord Pleanála in responding between their initial letter seeking the response dated the 13th May, 2016 until the 16th March, 2017 was entirely outside of the control of the applicants.

39. The applicants further say that if An Bord Pleanála had communicated to them the same attitude demonstrated in their letter of the 16th March, 2017, in immediate response to their letters dated the 13th May, 2016 and 3rd June, 2016, the applicants would have brought an application to join An Bord Pleanála at that time, which would have been within the eight-week period provided for in the legislation. The applicants say, that the decision of An Bord Pleanála is a happenstance and was not something within the control of the applicants or indeed any other party other than An Bord Pleanála.

40. The applicants say that these proceedings raise issues of general public importance in the planning realm, they go on to say that none of the parties involved in these proceedings will suffer any prejudice if An Bord Pleanála is joined in these proceedings.

41. With regard to the applicants' assertion that they believed that the proceedings against the board would be unnecessary, the intended respondent argues that the applicants had already fairly conceded that this belief was rendered unrealistic by the notice party's letter dated the 16th May, 2016, long before the limitation period expired. The intended respondent argues that the applicants chose to appeal to the board. They argue that, therefore, the applicants knew or ought to have known that when the board makes a decision it operates to annul the decision of the planning authority. The respondent refers to the case of *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 716, where McGovern J states that:

> *"The provisions of s.37(1)(b) of the Act are quite clear and unambiguous. The effect of that section is that once the Board made its decision, it has the effect of annulling the decision of the planning authority, SDCC [South Dublin County*

Council]. That being so, there is no decision of SDCC which can be challenged. There is no basis upon which the court can go beyond the provisions of the Act. That would be clearly impermissible. At this stage there is simply no decision of SDCC to quash and, therefore, no basis upon which the court can accede to the application to join the planning authority as a respondent in the proceedings".

The intended respondent argues that, as the applicants are represented by solicitor and counsel, they could not have been more alive to the fact that if the board exercised the very jurisdiction the applicants invoked, that their proceedings against Kerry County Council would be rendered moot and that the operative decision would be the decision of the board. It says that if the applicants wanted to challenge the decision of the board they could have done so within the eight-week statutory time limit.

42. With regard to the applicant's contention that they wrote to the board before the limitation period expired, the intended respondent points again to section 50 of the Planning and Development Acts, which it says positively states that no party should question the validity of an action of the board save by judicial review. They say that the action of the applicants in writing to the board reveals only that the applicants were appraised of the facts and information sufficient to instruct solicitors to advise and act on a challenge to the board's decision.

43. It is further asserted that the failure to progress beyond a 'letter before action' was entirely within the applicants' control. The intended respondent asserts that the fact that the board did not make any substantive reply until March 2017 is irrelevant. The applicants say that the letter dated the 13th of May 2016 included a specific deadline for response of the 30th May. The intended respondent says that the applicants' decision to let the correspondence rest without a response from the board as to their imposed deadline was entirely within their control. The applicants, it is argued, cannot simply and unilaterally extend time by writing letters and relying on a non-reply as an excuse for non-

action. In that regard, the intended respondent points again to the case of *Irish Skydiving*. It says that that case highlights that the court must look at the information that the party possessed at the time and determine whether, in truth, the delay stemmed for reasons outside their control. The intended respondent asserts that on the basis of the *Irish Skydiving* case, an absence of reply is no reason for non-progression and that this is irrelevant.

44. With regard to the applicants' assertion that they brought an application to join the board as a third party to these proceedings before the limitation period expired, the respondent opened the terms of the notice of motion dated 7th June, 2016. They quoted paragraphs (b) and (c) in full:

> *"(b) An Order, should the [council] maintain an entitlement to defend these proceedings by virtue of a Decision of An Bord Pleanála, granting liberty to the Applicant herein to notify [the Bord] of these proceedings or, in the alternative, to join [the Bord] as a Notice Party;*
>
> *(c) In the event that An Bord Pleanála be joined, an Order granting liberty to the Applicants herein to amend the reliefs sought in their Statement of Claim to include Declarations as set out in the Schedule hereto."*

The schedule mentioned therein, sought the following additional declarations:

> *"(a) a Declaration that the Respondent is incorrect in its assessment of the effect of a Decision of An Bord Pleanála on these Judicial Review proceedings;*
>
> *(b) a Declaration that a Decision of An Bord Pleanála on Appeal (to uphold the Decision of the Respondent on the merits), is not determinative of the issue of whether the Decision of the Respondent is invalid and void on the basis of the Respondent's failure to comply with its statutory obligations, at first instance;*

(c) a Declaration that the Respondent is incorrect in its interpretation of the effect of section 37 of the Planning & Development Act, 2000 (as amended) in the context of these Judicial Review proceedings;

(d) a Declaration that a Decision of An Bord Pleanála on Appeal cannot cure a defect in a decision of the Respondent at first instance and

(e) a Declaration that an Appeal to An Bord Pleanála and an Application for Judicial Review are not mutually exclusive procedures."

This, the respondent asserts reveals only that the applicants were appraised of the facts and information sufficient to instruct solicitors to advise and act in a challenge to the board's decision. It says that the decision to proceed by way of motion to join the board as a notice party rather than by way of application for leave was entirely within the applicants' control and it was a choice that they made. With regard to the applicants' assertion that proceedings stalled when the council's motion to strike out was given a return date of the 13th June and the applicants' belief that their proceedings could not move on until those motions were disposed of the respondent asserts that the applicants were not restrained from action. It asserts that the applicants chose to ignore the limitation period for proceedings against the board. It says that at all times on or before the 28th June, 2016, the applicants were entirely free to move an *ex parte* application for leave against the decision of the board, in fresh proceedings, entirely separate from these.

45. With regard to the applicants' assertion that the delay in hearing of the council's motion for directions and the applicants' motion to compel opposition papers and join the board as a third party was entirely out of their control: the intended respondent says that while, of course, the delay between when a motion for hearing is ready to be heard and the actual hearing date is beyond the control of the applicants, this delay is irrelevant. The applicants were entirely free to move an *ex parte* application for leave against the decision of the board in fresh proceedings, entirely separate from these. The respondent notes that

it appears that the applicants chose between an application for leave against the board and a motion to join the board as a third party.

46. With regard to the applicants' assertion that they were entitled to delay pending a substantive response from the board to their letter of the 16th May, 2016, and that this delay was entirely out of their control: the intended respondent says that the applicants were plainly appraised of the facts and had information sufficient to instruct solicitors to advise and act on a challenge to the boards' decision. They say that a failure to progress beyond a letter before action was entirely within their control. The intended respondent refers to the case of *Irish Skydiving*. In this case, the applicants argued that the eight-week period only began to run from when the board made its substantive reply to an email from the applicant. In that case they invited the court to excuse the delay before the boards' substantive reply. However, in response, Baker J was firm in concluding that no 'date of knowledge' excuse existed and stated:

> *"There is no ambiguity in the simple terms of the legislation which would permit me to interpret it as suggesting that time began to run when an aggrieved or potentially aggrieved party came to know of the decision. Time is stated to run from the date the decision is made."*

In that case the court went on at para 51 to make it clear that:

> *"The public policy interest in strict time limits in planning matters would not be furthered were a party who knew that his or her rights had arguably been breached,*
>
> *and who knew of a decision well within time to bring an application for judicial review, could seek to argue that time began to run only when it had formulated a decision to bring the challenge. The formulation of a decision to bring a challenge is in the normal way one that would be made on legal advice, but the date when*

legal advice is taken, considered, or decided to be adopted, is not and cannot be the date at

which time begins to run, and to consider otherwise would be to ignore the very clear

language of the subsection which fixes the time limit by reference to the date of the decision, and not either to the date of knowledge or the date when a party impacted by the decision became aware that rights might have been infringed, or the extent to

which that person might be successful in bringing a judicial review."

With regard to the applicants' assertion that the board has made the same error as Kerry County Council and that the applicants have no faith in the independence of the board: the respondent indicates that it is not clear as to how this might be relevant to the application to extend time. It goes on to say that whatever error the applicants allege was made by the board, it is one that was apparent to the applicants at an early time and before the limitation period had expired. The intended respondent goes on to say, in conclusion, that the applicants chose to pursue alternative remedies for the alleged wrongful decision of Kerry County Council and that the applicants invited the High Court to quash the decision by way of judicial review and invited the board to overturn the decision on appeal. At all material times, it is argued, the applicants must be presumed to have known that the dispute would be resolved by the earlier outcome from the two alternative remedies.

47. The intended respondent says that the applicants chose not to apply to restrain the board from making a decision on their pending appeal. The applicants received an open offer from the council on the 31st March, 2016. The proceedings were listed for mention on two occasions before the board made its decision on the 4th May, namely on the 11th April and 25th April, 2016. The intended respondent says that no explanation has been given by the applicants for why the opportunity was missed to compromise proceedings

before the decision was made by An Bord Pleanála. The intended respondent says that having received the open offer from Kerry County Council, the applicants could have withdrawn the then-pending appeal to An Bord Pleanála. It says that would have entirely removed any prospect for the board to make a decision that would render these proceedings moot. It says that each of these factors was entirely within the control of the applicants.

Decision

48. The test that an applicant must meet in an application for an extension of the strict time limits under section 50(8) of the Act is cumulative and mandatory. The court shall not extend the time unless it is satisfied that both limbs of the test are met:

> *"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."*

49. The commencement of the eight-week period is not based on a consideration of when an applicant had formulated a decision to bring the challenge. Section 50(6) clearly links the running of time to the making of the decision:

> *"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."*

50. In this case, the decision was made by An Bord Pleanála on the 4th May, 2016. The applicants became aware of the decision as early as the 6th May, 2016 but no later than the 13th May, 2016. On the 28th June, 2016, the eight-week limitation period expired. The court notes Baker J's ratio in *Irish Skydiving* as relevant in this regard:

> *"The public policy interest in strict time limits in planning matters would not be furthered were a party who knew that his or her rights had arguably been breached,*
>
> *and who knew of a decision well within time to bring an application for judicial review, could seek to argue that time began to run only when it had formulated a decision to bring the challenge. The formulation of a decision to bring a challenge is in the normal way one that would be made on legal advice, but the date when legal advice is taken, considered, or decided to be adopted, is not and cannot be the date at*
>
> *which time begins to run, and to consider otherwise would be to ignore the very clear*
>
> *language of the subsection which fixes the time limit by reference to the date of the decision, and not either to the date of knowledge or the date when a party impacted by the decision became aware that rights might have been infringed, or the extent to*
>
> *which that person might be successful in bringing a judicial review."*

In *Cassidy*, the court mirrored the approach above, concluding that:

> *"Having regard to the fact that the test is cumulative and that the applicant has in my view failed to satisfy me that he meets the second part of the test, I do not propose entering into consideration of whether the applicant meets the first part of the test as whether there is good and sufficient reason for extending the time."*

51. Having considered the arguments and counter arguments made by both sides the Court is persuaded by those made by the intended respondent An Bord Pleanála.

52. With regards to whether the applicants' failure to act before the time limit expired on the 28th June, 2016 arose from circumstances outside of their control: the court opines that, on an examination of the chronology of events, it is clear that the applicants had knowledge, which it clearly articulated in correspondence with the respondent, sufficient to allow it to seek leave to bring an application for judicial review against the decision of the proposed respondent within the statutory eight-week time limit.

53. Section 50(8) allows for the extension of time to challenge a decision of the board in cases where a failure to act was the result of an inability to act, not a choice not to act. The applicants' knew, or ought to have known that the board's decision on the applicants' appeal would in effect annul the decision of the planning authority. Indeed, the court accepts that this was the very jurisdiction that the applicants' were relying on when they initiated their appeal: they hoped that the council's decision to grant retention permission to the notice party would be overturned by the board, rendering the council's order moot. Although the applicants' wrote to the board on 13th May, 2016, before the limitation period expired asking it to confirm that it would be bound by any orders made by the High Court in the aforementioned judicial review proceedings, it should have been clear that as the board had made a decision de novo on the council's grant of permission, it could not be bound by subsequent judicial review proceedings. As such, any application brought by the applicants to join the board as a notice party in relation to proceedings which were on their face moot, were ill-advised at best.

54. The court notes Baker J's ratio in *Irish Skydiving*. Here, the applicant argued that the eight-week limitation period only began to run from when the board made its substantive reply to an email from the applicant. Baker J states at para where she stated at para 37:

> *"There is no ambiguity in the simple terms of the legislation which would permit me to interpret it as suggesting that time began to run when an aggrieved or potentially aggrieved party came to know of the decision. Time is stated to run from the date the decision is made."*

As such, it is clear that the time limit began to run from the date of the board's decision. The applicants have not persuaded that court that they were entitled to wait for a response to their letters to the board before acting. It is not permissible to stall or pause a statutory time period by way of correspondence, especially if the purpose of said correspondence is to request the board to confirm that they will be bound by the outcome of now moot proceedings against Kerry County Council; when the applicants' knew, or ought to have known, said proceedings were now moot following the board's decision. As such, the court is not persuaded that the applicants' failure to act within the eight-week time limit given, was the result of an inability to do so arising from circumstances outside of their control.

55. Arguments advanced by the applicant with regard to whether there is good and sufficient reason to extend time focus on what is argued to be the frailty of the decision making process and not on whether there is good and sufficient reason to extend the time as such. Given, however, that the test is cumulative and that the applicant has failed to satisfy the court that it meets the second part of the test, the court does not propose entering into any consideration as to whether the applicant meets the first part of the test, that being: whether there is good and sufficient reason for extending the time.

56. Accordingly, the court makes an order refusing the application to enlarge the time for the bringing of an application for judicial review against the decision of the proposed respondent, An Bord Pleanála made on the 4th May 2016.