THE HIGH COURT

[2021 No. 218 JR]

BETWEEN

DAVID COOPER

APPLICANT

– AND –

AN BORD PLEANÁLA

RESPONDENT

– AND –

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 12th July 2021.

SUMMARY

This is a successful application to strike out the within proceedings. This summary forms part of the court's judgment.

I

Summary Chronology of Events

1. On 7th February 2020, an application was made to the Council for permission for the use of a digital screen on the premises of Dundrum Shopping Centre. Thereafter, the following chronology ensued:

08.03.2020.	Mr Cooper, who lives in the immediate vicinity of the Shopping Centre, makes a submission to the Council in respect of the application.
25.05.2020.	Council requests further information of the applicant for planning permission.
16.11.2020.	Applicant for permission provides further permission.
08.12.2020.	Council decides to grant the permission sought.
09.12.2020.	By letter of this date the Council notifies Mr Cooper of its decision.
12.01.2021.	Date on which Mr Cooper claims to have received the Council's letter of 09.12.2020.
13.01.2021.	Time within which Mr Cooper may bring an appeal against the Council's decision expires.
14.01.2021.	Mr Cooper lodges his appeal with the Board. He claims that he called the Council (not the Board) on this date and was told that the last date for bringing an application was this date. Beyond his bare averment to this effect, there is no evidence to support this claim. Moreover, what the Council may or may not have said counts as nought *vis-à-vis* the Board.
19.01.2021.	Council determines that the appeal is invalid.
20.01.2021.	Letter of this date sent by Council to advise Mr Cooper that the appeal is invalid.
21.01.2021.	Council's final grant of permission issues.

16.03.2021. Notice of Motion, Statement of Grounds, and Affidavit filed by Mr Cooper. No leave of the court was obtained for the filing of same. It remained the case, when this application came on for hearing on 6th July 2021, that no application for leave had yet been made.

07.04.2021. The letter of 20th January 2021 states that the date for the appeal expired on 13th December 2020 and the appeal was received on 14th December 2020. The Board has explained that these references were typographical errors and that the letter ought to have referred to 13th January 2021 and 14th January 2021. On 7th April 2021, a letter issued to Mr Cooper from solicitors for the Board explaining the just-mentioned typographical error.

II

Mr Cooper's Notice, Statement, and Affidavit

2. As mentioned in the summary chronology, on 16th March 20201 a notice of motion, a statement of grounds, and an affidavit were filed by Mr Cooper. No leave of the court was obtained for the filing of same, and it remained the case, when this application came on for hearing on 6th July 2021, that no application for leave had yet been made.

3. The notice of motion states that the relief being sought is:

> "*An order of* certiorari
> *1. To set aside* [the] *permission granted by DLRCC…*[on the] 8th *December 2020….*
> *2. To restrict the amplified noise after 9 pm.*
> *3. To restrict the use* [of] *amplified sound as…*[no] *speakers appear in the planning application.*

4. To restrict the use of outside noise after 9pm and the use of outside earing. These restrictions….[have] *been imposed on previous planning applications.*"

4. The statement of grounds repeats the reliefs sought and offers the following by way of statement of grounds:

"*On 14th January* [2021], *I lodged an appeal with An Bord Pleanála against the decision of DLRCC….On the 20th January I received a letter from An Bord Pleanála telling me my appeal was lodged too late. In the letter, copy enclosed, An Bord Pleanála have mixed up all their dates. The dates they quote for December are incorrect. I didn't receive the grant or permission notice until 12th January 2021. On the morning of 14th January I contacted planning at DLRCC. They informed me the 14th January was the final date for lodging my appeal, I proceeded to lodge the appeal to be told* [that]*…it was lodged too late in the letter of the 20th January. I contacted the post office. They said they delivered the grant letter on the 14th* [of] *December. This is incorrect. The 12th* [of] *January is the date I received it. This is the outline of this case.*"

5. In the grounding affidavit, Mr Cooper avers as follows:

"*1.* *I, David Cooper, objected to a planning application from early 2020….*

2. *Under the provisions of the 1st lockdown the planning authorities or the Government allowed for an extension of time to object to planning applications.*

3. *I have been informed by staff at the planning office in DLRCC that no such extension has been allowed for further lockdowns.*

4. *I received a letter from DLRCC dated the 9th* [of] *December 2020 of a decision reached on the 8th* [of] *December 2020. I received this letter on the 12th* [of] *January 2021. However, this letter was sent by registered post and I have*

spoken to the postmaster at my local delivery office and he informed me that the letter was delivered to me on the 14th [of] *December 2020. I can't explain how the Post Office records state* [that] *I received the registered letter on the* [14th of]*...December* [when]*...I in fact received it on the* [12th of] *January 2021.*

5. *Upon getting the letter on the* [12th of]*...January 2021, I contacted DLRCC planning department....*[o]*n the* [14th of]*...January 2021 to be informed by the staff member in the planning office that I had until 5 o'clock that day to lodge my planning appeal.*

6. *I got a letter dated 20th January 2021 from An Bord Pleanála. The letter stated that it appeared I wish to make an appeal of the planning decision of the* [8th of]*...December 2020. The letter went on to say* [that] *the last date of appeal was the…*[13th of] *December 2020. It went on to say that my appeal was received on 14th December 2020 and it is regretted that it is therefore regarded as invalid in accordance with section 127…of the* [Planning and Development] *Act as not having made within the period specified for making an appeal….*

7. *I would submit to the court that in the very least the letter refusing to accept my appeal against the planning decision of the* [8th of]*...December must in the very least because of the incorrect information sent to me. Also I received notification from DLRCC planning department that the last day of submitting my appeal was the 14th* [of] *January 2021 before 5 pm. I submit a copy of the submitted documents dated, stamped and timed that shows my appeal application was received at 3.15 pm on 14th January 2021 by An Bord Pleanála.*

8. *In respect of the planning application I have suffered noise issues for the last 20 years, living beside* [what was] *formerly a building site and* [is] *now a shopping centre*

> *where ...building site machinery* [was]*...operated at unreasonable hours. The other issue that occurred was that since 2008/2010 amplified noise has become a big issue on the adjacent area to my property. I have two residential properties in which I live* [at address stated] *and the other residents of my other property are my wife and three children* [at address stated]*....I would beg the court to look at the possibility of restricting the amplified noise in the evenings as has been previously done by previous planning applications by the Town Centre. On weekends and holidays they have been restricted to cease usage at 7pm. On other days they* [are required]*...to cease usage at 9 pm. However, in this planning application no such condition has been inserted and I beg the court to follow the guidelines of the previous restrictions*".

III

Some Issues Presenting

6. In his proceedings, Mr Cooper is seeking an order of *certiorari* to quash the decision of the Council dated 8th December 2020 to grant planning permission for the installation of a digital screen and use as an outdoor cinema. Mr Cooper is also seeking to restrict the 'amplified sound' of the development generally, especially post-9 pm. The Board is named as respondent; however, no grounds of relief have been sought against the Board specifically and the Council has not been named as a respondent.

7. The reliefs pleaded by Mr Cooper do not lie against the Board and the Board is not the appropriate *legitimus contradictor* as what is sought is to set aside a decision of the Council. The Council would be and is the appropriate respondent and the proceedings as brought are bound to fail as they disclose no cause of action against the Board. In passing, the court notes that Dundrum Retail GP DAC, as general partner of Dundrum Retail LP, being the recipient of the grant of permission has not been named as a notice party.

IV

The Present Motion

8. By notice of motion of 1st June 2021, the Board comes seeking, *inter alia*, the following principal relief:

> "*1. An Order pursuant to Order 19, Rule 28 of the Superior Courts…and/or the inherent jurisdiction of* [the court]*…striking out the proceedings on the basis that they are out of time pursuant to s.50 of the Planning and Development Act 2000…and/or do not disclose a reasonable cause of actions and/or are improperly constituted and/or bound to fail*".

9. Order 19, Rule 28 RSC provides as follows:

> "*The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.*"

V

Some Applicable Principles

10. The following points/principles fall usefully to be brought to bear in the context of the within application:

1. Acting pursuant to O.19 RSC and/or the inherent jurisdiction of the court, the court can dismiss proceedings if they do not disclose a cause of action so as to ensure that an abuse of court process does not take place. The power to

dismiss must be exercised sparingly and only in clear cases. (*Barry v. Buckley* [1981] I.R. 206).

2. The jurisdiction to strike out also applies in judicial review proceedings. (See, for example, *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311).

3. An applicant for judicial review must plead a case with particularity (O.84, r.20(3) RSC,[1] *AP v. DPP* [2011] 1 I.R. 729; see also *Alen-Buckley*, *Kelly v. An Bord Pleanála* [2019] IEHC 84, and *Sweetman v. An Bord Pleanála* [2020] IEHC 39).

4. Though an occasional degree of leeway may sometimes be shown, litigants-in-person, like all litigants, are, at root, subject to the same procedural rules as other litigants (see, for example, *Knowles v. Governor of Limerick Prison* [2016] IEHC 33, *Burke v. O'Halloran* [2009] 3 I.R. 809, and *Reidy* v. *An Bord Pleanála* [2020] IEHC 423).

5. A court cannot grant leave to bring judicial review proceedings in the planning law context unless there are "*substantial grounds*" for contending that the decision or Act concerned is invalid or ought to be quashed (s.50A(3)(a) PADA 2000;[2] see also *O'Neill v. Kerry County Council* [2015] IEHC 827).

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[1] This provides as follows:

> "*It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.*"

[2] This provides that "*The Court shall not grant section 50 leave unless it is satisfied that – (a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed*".

6. Further to 5, in order for a ground to be substantial, it must be reasonable, it must be arguable, it must be weighty, it must not be trivial or tenuous. (*McNamara v. An Bord Pleanála and Ors* [1995] 2 I.L.R.M. 125).

7. An appeal/referral must comply with the requirements iterated in s.127 PADA 2000.[3] The use of the word "*shall*" therein is mandatory, not merely directory. (See generally *State (Elm Developments Ltd*) *v. An Bord Pleanála* [1981] I.L.R.M. 108; see also *O'Connor v. An Bord Pleanála* [2008] IEHC 13 and *Southwood Park Residents Association* v. *An Bord Pleanála* [2019] IEHC 504. Not only are the requirements of s.127(1) PADA 2000 mandatory; additionally, the Board is neither required nor permitted to evaluate the particular circumstances which give rise to non-compliance with these requirements (*Micaud Investment Management Ltd v. An Bord Pleanála and Ors* [2018] IEHC 588).

8. Further to 7, if the *de minimis* principle is to be brought to bear in the context of s.127, it must be shown that an appeal substantially complied with the obligation contained in

[3] This provides, *inter alia*, as follows:

> "*(1) An appeal or referral shall—*
> *(a) be made in writing,*
> *(b) state the name and address of the appellant or person making the referral and of the person, if any, acting on his or her behalf,*
> *(c) state the subject matter of the appeal or referral,*
> *(d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,*
> *(e) in the case of an appeal under section 37 by a person who made submissions or observations in accordance with the permission regulations, be accompanied by the acknowledgement by the planning authority of receipt of the submissions or observations,*
> *(f) be accompanied by such fee (if any) as may be payable in respect of such appeal or referral in accordance with section 144, and*
> *(g) be made within the period specified for making the appeal or referral.*
> *(2) (a) An appeal or referral which does not comply with the requirements of subsection (1) shall be invalid.*"

s.127. (*Dalton v. An Bord Pleanála* [2020] IEHC 27; *Murphy v. Cobh Town Council* [2006] IEHC 324).

9. The Board has no power to look behind the express statutory requirements of s.127(1) PADA 2000. The Board's role in this regard is confined to checking whether the requirements of s.127(1) PADA 2000 have been met. The Act makes clear that there is to be no inquiry beyond administering the validity of an appeal against the requirements set out in s.127(1). (*MacMahon v. An Bord Pleanála and Ors.* [2010] IEHC 431).

10. The time limit for bringing judicial review proceedings in the planning context is very strict and is set out in s.50(6) PADA 2000.[4] (See, for example, *MacMahon*, *Linehan and Ors. v. Cork County Council* [2008] IEHC 76, *South-West Regional Shopping Centre Promotion Association Ltd and Anor. v. An Bord Pleanála and Ors.* [2016] IEHC 84, *Irish Skydiving Club Ltd v. An Bord Pleanála and Ors.* [2016] IEHC 448, *Reidy*, *O'Riordan v. An Bord Pleanála* [2021] IEHC 1). Time runs from the date of the relevant decision, not the date of knowledge. (See, for example, *Irish Skydiving* and *Heaney v. An Bord Pleanála* [2021] IEHC 201).

11. Time may be extended if the High Court is satisfied that (a) there is good and sufficient reason for doing so, and (b) the circumstances which resulted in the delay were outside the

[4] This provides as follows:

> "*(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*".

control of the applicant (PADA, s.50(8)).[5] It may be that in certain circumstances, not finding out about a decision for a significant period of time may be a basis for an extension of time (*O'Riordan*).

12. Filing a statement of grounds is not sufficient to 'stop the clock' running: it is necessary formally to move an application in the High Court before the expiration of the eight-week timeframe (See, for example, *KSK Enterprises v. An Bord Pleanála* [1994] 1 I.R. 128; *Reilly v. DPP* [2016] IESC 59; *McDonnell v. An Bord Pleanála* [2017] IEHC 366; *Heaney v. An Bord Pleanála* [2021] IEHC 201).

VI

Application of Principles to Facts

11. The court proceeds below to apply the above-identified points/principles (stated in Bold text below) to the facts at hand, which are stated by way of 'Court Note':

12. 1. Acting pursuant to O.19 RSC and/or the inherent jurisdiction of the court, the court can dismiss proceedings if they do not disclose a cause of action so as to ensure that an abuse of court process does not take place. The power to dismiss must be exercised sparingly and only in clear cases.

13. Court Note: In his proceedings, Mr Cooper is seeking an order of *certiorari* to quash the decision of the Council dated 8th December 2020 to grant planning permission for the installation of a digital screen and use as an outdoor cinema. Mr Cooper is also seeking to

[5] This provides as follows:

> "*(8) The High Court may extend the period provided for in subsection (6)…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.*"

restrict the 'amplified sound' of the development generally, especially post-9 pm. The Board is named as respondent; however, no grounds of relief have been sought against the Board specifically and the Council has not been named as a respondent. The reliefs pleaded by Mr Cooper do not lie against the Board and the Board is not the appropriate *legitimus contradictor* as what is sought is to set aside a decision of the Council. The Council would be and is the appropriate respondent and the proceedings as brought are bound to fail as they disclose no cause of action against the Board.

14. 2. The jurisdiction to strike out also applies in judicial review proceedings.

15. Court Note: Noted.

16. 3. An applicant for judicial review must plead a case with particularity.

17. Court Note: In this case, not only is the statement of grounds not adequately particularised as required; there is also, as mentioned, no cause of action disclosed or reliefs sought against the Board.

18. 4. Though an occasional degree of leeway may sometimes be shown, lay-litigants, like all litigants, are, at root, subject to the same procedural rules as other litigants.

19. Court Note: No degree of leeway could countenance the bringing of the proceedings as formulated by Mr Cooper. That would be to allow him to proceed in flagrant breach of applicable law/rules against a party which is not the *legitimus contradictor*. That cannot properly be allowed to happen.

20. 5. A court cannot grant leave to bring judicial review proceedings in the planning law context unless there are "*substantial grounds*" for contending that the decision or Act concerned is invalid or ought to be quashed.

21. Court Note: There is no cause of action disclosed in the proceedings against the Board.

22. 6. Further to 5, in order for a ground to be substantial, it must be reasonable, it must be arguable, it must be weighty, it must not be trivial or tenuous.

23. Court Note: There is no cause of action disclosed in the proceedings against the Board.

24. 7. An appeal/referral must comply with the requirements iterated in s.127 PADA 2000. The use of the word "*shall*" therein is mandatory, not merely directory. Not only are the requirements of s.127(1) PADA 2000 mandatory; additionally, the Board is neither required not permitted to evaluate the particular circumstances which give rise to non-compliance with these requirements.

25. Court Note: The appeal here has not been brought within the four-week period countenanced by s.37 of the PADA.

26. 8. Further to 7, if the *de minimis* principle is to be brought to bear in the context of s.127, it must be shown that an appeal substantially complied with the obligation contained in s.127.

27. Court Note: The appeal here simply has not been brought within the four-week period countenanced by s.37 of the PADA. Even if the court were to apply a *de minimis* principle, no purpose would be served: there is simply no cause of action disclosed in the proceedings against the Board.

28. 9. The Board has no power to look behind the express statutory requirements of s.127(1) PADA 2000. The Board's role in this regard is confined to checking whether the requirements of s.127(1) PADA 2000 have been met. The Act makes clear that there is to be no inquiry beyond administering the validity of an appeal against the requirements set out in s.127(1).

29. Court Note: As Mr Cooper's appeal was outside the statutory time period, the Board was obliged to invalidate it and had no power or jurisdiction to do otherwise.

30. 10. The time limit for bringing judicial review proceedings in the planning context is very strict and is set out in s.50(6) PADA 2000. Time runs from the date of the relevant decision, not the date of knowledge.

31. Court Note: The proceedings are out of time. Even allowing for the fact that Mr Cooper is a litigant-in-person, he was still under an obligation to move the application within the statutory time period and did not do so.

32. 11. Time may be extended if the High Court is satisfied that (a) there is good and sufficient reason for doing so, and (b) the circumstances which resulted in the delay were outside the control of the applicant. It may be that in certain circumstances, not finding out about a decision for a significant period of time may be a basis for an extension of time.

33. Court Note: The proceedings are out of time. Even allowing for the fact that Mr Cooper is a litigant-in-person, he was still under an obligation to move the application within the statutory time period and did not do so. No purpose would be served by extending time as there is simply no cause of action disclosed in the proceedings against the Board.

34. 12. Filing a statement of grounds is not sufficient to 'stop the clock' running: it is necessary formally to move an application in the High Court before the expiration of the eight-week timeframe.

35. Court Note: No application has been moved to this time (and no purpose would be served by extending time as there is simply no cause of action disclosed in the proceedings against the Board).

VII

Conclusion

36. For the reasons stated above, the court finds itself coerced as a matter of law into granting the relief sought by An Bord Pleanála and hence striking out the within proceedings.

37. As this judgment is being delivered remotely, the court notes that as An Bord Pleanála has succeeded in the within application the court sees no reason why it should not have the costs of this application awarded in its favour. If either of the parties disagree, they might kindly

advise the court registrar or the court's judicial assistant within two weeks of the date of delivery of this judgment and the court will schedule a brief costs hearing thereafter.