[2023] IEHC 431

THE HIGH COURT
JUDICIAL REVIEW
IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

[2022 No. 1039 JR]

BETWEEN

PETER THOMSON AND DOREEN THOMSON

APPLICANTS

AND
AN BORD PLEANÁLA

RESPONDENT

AND
EIRCOM LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 24th day of July, 2023

Facts prior to the impugned decision

1. On 25th June, 2020, the developer applied to Kilkenny County Council for permission to erect a telecommunications mast. The council validated the application on 1st July, 2020. The applicants made a submission to the council objecting to the development.

2. The council's senior executive planner prepared a report. That report concluded that due to the location of the proposed development within the village of Kells, close to existing dwellings and amenities, and having regard to its height and bulk, it would be visually obtrusive, and she felt that the developer had not demonstrated that this was the most suitable site for a mast.

3. A note at the end of the planner's report said that the council should request further information, which it did. That was responded to, and the senior planner then prepared an updated report in which reference was made to section 4.3 of the ministerial guidelines (Telecommunications Antennae and Support Structures, Guidelines for Planning Authorities, July 1996) which states that the visual impact of antennae is an important consideration, and that various areas, including archaeological sites, architectural conservation areas and listed buildings, should be avoided. The report emphasised that the ministerial guidelines also state that "only as a last resort should free-standing masts be located within or in the immediate surrounds of towns or villages," and that the antennae support structure should be "kept to a minimum height consistent with effective operation". Refusal of permission was recommended.

4. In line with that, on 26th November, 2020, the council decided to refuse permission.

5. On 17th December, 2020, the developer appealed, arguing that there was a coverage blackspot and that co-location on masts of other companies would not provide coverage. It argued that the mast use was established at the site of the proposed development. In relation to co-location, it said it was prepared to share its new mast with other operators.

6. The council made a submission to the board. It argued that 5 other telecommunications operators had good to very good coverage in Kells, and that the developer should co-locate on their masts. The applicants also made a submission.

7. The board's inspector recommended refusal of permission on the basis of the ministerial guidelines, in particular para 4.3 which advises that permission should only be granted as a last resort for masts in towns and villages.

8. The board disagreed with all of the foregoing and adopted a decision on 17th June, 2021, granting permission.

Facts after the impugned decision

9. The Applicants say in the statement of grounds (factual paras. 25 and 26) that:

> "… they considered challenging the validity of the Board's Decision. They felt that the Board Decision did not align with the Ministerial Guidelines. The Guidelines make it clear that visual impact is a serious issue. The Board did not address the policy of only allowing development in towns and villages as a last resort. Kells is a village. It has architectural conservation significance and indeed now contains an architectural conservation area under the 2021 Development Plan, adopted in November 2021. (The designation is made under Section 81 of the 2000 Act.) The Applicants considered the Board erred in law in its approach to co-location: it accepted the irrelevant reasoning offered by the Developer that the proposed mast would be made available to other operators, whereas the Ministerial Guidelines make clear that it is co-location on existing masts that must be ruled out before a new mast will be allowed. Clustering of masts must also be ruled out. Accordingly, the Proposed Development did not even approach the threshold required for justification of a new mast in a village. The Applicants considered that the Board had failed to offer adequate reasons,

had failed to direct itself correctly in law as to the proper interpretation of the Plan and the Ministerial Guidelines, and had acted irrationally and unreasonably.

They considered challenging the validity of the Board Decision, but ultimately decided not to, predominantly in light of the costs risk which could materialise. The First Named Applicant also had a concern at the time given his position as a private planning consultant with many dealings with An Bord Pleanála and his concern that his challenge of the Board could lead to repercussions for his clients and his business."

10. On 11th August, 2021, the 8-week period to challenge the decision under s.50(6) of the Planning and Development Act 2000 expired.

11. The developer began construction of the development, but the applicants complained that it had failed to build the project in accordance with the permission. On 15th November, 2021, the applicants complained to the council about alleged non-compliance with the permission. They alleged a series of breaches, including that the foundation was in the wrong location. They sent copies of the complaint to Eircom and its contractor, Delmec.

12. On 17th November 2021, the applicants submitted an application for a declaration under s. 5 of the 2000 Act questioning the works by reference to the permission.

13. On 1st December, 2021, the council issued a warning letter to the developer regarding the alleged unauthorised location of the foundation.

14. On 17th December, 2021, the developer made a submission to the council replying to the warning letter in which it referred to condition 1 of the permission. It stated that works had halted, and proposed to relocate the mast to the correct location and make good the ground.

15. The applicants plead that following the decision and a similar case in Kilmoganny, where clients of the first named applicant were seeking to challenge a similar Eircom mast within a village, and where the outcome was similar (permission having been granted in September 2021), the Applicants began to look at other similar Eircom mast decisions and to monitor new decisions.

16. By early February 2022 they had compiled a list of Eircom mast appeal cases across Ireland made between September 2020 and February 2022 which showed 28 cases determined – all grants of permission overturning council refusals - and 9 cases pending.

17. The applicants go on to say that on 12th February, 2022, Mr Thomson and a neighbour met with John McGuiness T.D. and presented these findings. They say they asked for assistance and advice in how best to bring this to the attention of the relevant government Department with the possibility of the matter being investigated. At this time the applicants say that they had not been examining cases in detail to identify Paul Hyde as the Board member dealing with a high number of cases. They were not aware of the file allocation policy of random allocation and were not aware of the existence of board minutes. It is the minutes which identify the names of the other Members who consider files. Mr Thomson had previously examined the case file with which we are concerned here at the offices of the board, and there were no minutes on that file.

18. The practice of the board seems to be not to keep minutes of the relevant meeting approving a development on the case file – but that policy isn't challenged here. The applicants later became aware of that practice.

19. The applicants wrote to the council on 3rd March, 2022 advising that the original foundation had not been removed as agreed. The applicants say that this now redundant unauthorised foundation still remains on the site.

20. On or about 7th March, 2022, the developer's contractor, Delmec, wrote to the applicants stating that works would be carried out in accordance with the permission, and would take place between 7th and 16th March, 2022.

21. The second foundation was installed in the general location permitted under the permission, but, according to the applicants, at the wrong height. This was brought to the attention of the developer by the applicants on 11th April, 2022. The developer replied the same day advising that it was satisfied with the height of the foundation and that the mast would be erected on 12th April, 2022, which it was.

22. The applicants lodged a second application on 25th April, 2022 for a declaration under s. 5 of the 2000 Act concerning the height of the foundation and mast.

23. The applicants plead that they received an email from John McGuiness T.D. on 27th April, 2022, advising he had sent their information to Minister Darragh O'Brien, to highlight the issue with the board decisions.

24. They say that in April 2022, , newspaper reports were appearing that suggested that questions of lack of impartiality arose in relation to the deputy chairperson of the Board, Paul Hyde, who was the Board member who signed each of the impugned decisions; the other participating member being Michelle Fagan.

25. Initially, the Reports suggested that the concerns related to Mr Hyde's involvement with a property company, H2O Property Holdings Ltd. On foot of these concerns the Minister had appointed Mr Remy Farrell S.C., to investigate the issues raised regarding Mr Hyde and to report.

26. The applicants say that they decided to engage with media organisations in relation to the issue, and forwarded their findings to *The Ditch* on 11th May, 2022. By that time, they had realised that Mr Hyde was linked to most of the cases they had found. The journalist they were speaking to, Mr Roman Shortall, expressed an interest in the information and agreed to review it and speak to them thereafter. They spoke to him the following day and he advised them of the existence of processes within An Bord Pleanála of which they were not previously aware, such as random file allocation and how to source board minutes.

27. On 12th May, 2022, the terms of reference of a report to be conducted in relation to issues concerning the board by Mr Farrell S.C. were published.

28. There was a further warning letter dated 12th May, 2022 to the developer in respect of non-compliance with condition 1 of the permission.

29. The applicants say that on 19th May, 2022, Mr Shortall forwarded copies of some of the board minutes he had obtained from the board relating to some of the Eircom cases. On or just before 26th May, 2022, Mr Shortall advised the applicants that the *Irish Examiner* was also looking into Eircom decisions and passed the applicants' information to that newspaper. From that emerged the first newspaper article on the telecommunication mast issue and the involvement of Mr Hyde in most mast cases: "An Bord Pleanála deputy chair overruled inspectors in vast majority of mast applications" (Irish Examiner, 28th May, 2022) by Mr Cianan Brennan.

30. On 3rd June, 2022, the council followed up with an enforcement notice.

31. The applicants plead that on 4th June, 2022 the applicants emailed the *Irish Examiner* on foot of its article and outlined their desire to have the telecommunication mast decisions included in the Farrell investigation into certain board decisions. However, shortly afterwards they were advised by their solicitors that the scope of the Farrell investigation was not going to be extended beyond 3 particular cases.

32. They made a submission to the Office of the Planning Regulator (OPR) on 6th June, 2022.

33. On 8th July, 2022, the former deputy chairperson, Mr Hyde, resigned.

34. The applicants plead that on 15th July, 2022, they sent their material to the board and requested it be included in the internal review which the board was in the process of carrying out in light of the revelations concerning some cases handled by Mr Hyde.

35. On 18th July, 2022, they were advised by email from the OPR that it was not investigating the behaviour or performance of any individual but was looking into systems and procedures. This email followed a call the applicants had made to the OPR earlier, having not received a response to their email.

36. In response to the enforcement notice, the developer submitted a construction management plan on 29th July, 2022.

37. The applicants plead that there were numerous emails between the applicants and the board concerning their submission. On 7th September, 2022, it was confirmed for the first time that the Eircom files on their list were being included in the internal investigation. The same email advised that, subject to legal advice, the chairperson intended to publish the findings of the report.

38. By 22nd September, 2022, the applicants were aware that there was no formal record of allocation of telecommunications files from board email correspondence.

39. On 26th September, 2022, the applicants' solicitors made an AIE request to the board pursuant to the European Communities (Access to Information on the Environment) Regulations 2007, enquiring about the manner in which the file relating to the Kells board decision was allocated.

40. On 10th October, 2022, media reports indicated that Mr Hyde was being prosecuted. This seems to have been an important event in the applicants' change of mind about not challenging the permission. Mr Thomson advised his solicitors verbally on 10th October, 2022 to draft proceedings and on or after that date counsel advised that the proceedings could be taken.

41. The developer removed the mast on 13th October, 2022. Since that, the mast has not yet been re-erected.

42. The applicants plead that on 21st October, 2022 they received an email from the board advising the report had been discharged to the Chairperson following legal analysis and it was for him to decide what he would do with the report. They say that:

> "Throughout this time, the Applicants had felt they should not take any premature action, and that they should await the publication of the Board's report in order to see if there was any substance to the circulating allegations, and what impropriety, if any, might come to light. However, the non-publication of the report, along with the news that Mr Hyde was being prosecuted, has destroyed, in the Applicants' minds, the last vestiges of credibility in the impartiality of the decision making process".

43. On 24th October, 2022, there was media publication of details from the board's unpublished internal review report.

44. On 29th October, 2022, the board made a statement that the internal review report would not be published following legal advice.

45. On 8th November, 2022, the board confirmed in response to the AIE request that normal planning appeals files are randomly allocated.

Procedural history

46. The proceedings challenging the decision were issued on 28th November, 2022. On that date they were mentioned before Holland J. and adjourned.

47. On 19th December, 2022 I admitted the case to the Commercial Planning & Environmental List, and noted Eircom's representation that the development hasn't been re-erected in whole or in part other than by way of pre-concrete-pouring groundworks. I also noted Eircom's undertaking not to re-erect the development in whole or in part pending final determination of the proceedings without prejudice to their right to retrieve equipment currently on the lands in question. On that basis I changed Eircom's status in the proceedings from a respondent to a notice party and excused them from further participation, with liberty to apply.

48. On 23rd December, 2022 I allowed a first amended statement of grounds.

49. On 20th February, 2023 I granted an extension of time without prejudice to any argument the opposing parties might make, and granted leave on the basis of allowing a second amended statement of grounds.

50. The board then brought a notice of motion filed on 14th March, 2023 seeking to set aside leave. That motion was heard on 4th July, 2023 and listed for mention on 5th July, 2023, when judgment was reserved.

Relief sought

51. The relief sought in the second amended statement of grounds is as follows:

"1. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and Section 50 of the Planning and Development Act 2000 as amended quashing the decision of the First Respondent, An Bord Pleanála (the Board), dated 17 June 2021, file reference ABP-308931-20, to grant permission for erection of a 15m high mobile phone mast at Kells, County Kilkenny, therein described as:

> Proposed Development: The development will consist of the replacement of an existing 10m wooden pole for a 15 metre high free standing communications structure with its associated antennae, communication dishes, ground equipment and all associated site development works. The development will form part of Eircom Limited existing telecommunications and broadband network at Kells Eircom Exchange, Haggard Road, Kells, County Kilkenny.

2. Such declaration(s) of the legal rights and/or legal position of the applicant and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondent~~s~~ and Notice Party as the court considers appropriate.

3. Directions of the type outlined at paragraph 81 of the decision in Reid v Bord Pleanála, [2021] IEHC 362 requiring the Board to investigate and determine, and file one or more affidavits giving a detailed account of:

> 3.1. How it managed the allocation of the file relating to its decision dated 17 June 2021, on file reference ABP-308931-20.
>
> 3.2. How it managed the allocation of files relating to telecommunications masts and antennae generally between 1 January 2021 and 8 July 2022, and in particular how it came about that two Board members, Paul Hyde and Michelle Fagan, were allocated to such a large proportion of such files between those dates.
>
> 3.3. The circumstances leading to the resignation of Paul Hyde.

4. Such further declarations, injunctions and directions as may be appropriate for the purposes of giving full effect to the above relief, or of any matter emerging in the course of such investigation, determination and filing.

~~5. A Declaration that Section 50(7) and / or (8) of the Planning and Development Act 2000 as amended are contrary to Article 34 of the Constitution and invalid, and / or contrary to Article 4(3) and 19(1) of the Treaty on European Union and must be set aside.~~

6. A Declaratory Order confirming that Section 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 apply to the Applicants herein in respect of the Grounds set out at Part E hereof.

7. An extension of time to apply for leave to seek judicial review of the decision of the Board, pursuant to Section 50(8) of the Planning and Development Act 2000 as amended.

8. A stay pending determination of the present proceedings on the re-erection by the ~~Second Respondent~~ Notice Party of, the mobile phone mast and / or telecommunications antennae purportedly authorised by the Decision dated 17 June 2021, file reference ABP-308931-20, to grant permission for erection of a 15m high mobile phone mast at Kells,

County Kilkenny, same having been removed along with the unauthorised foundation for non-compliance pursuant to an enforcement notice issued by Kilkenny County Council.

9. If required, an injunction pursuant to Section 160 of the Planning and Development Act 2000 requiring removal of the mobile phone mast at Kells, County Kilkenny purportedly authorised by Board decision reference ABP-308931-200.

10. Further or other relief.

11. Costs.

12. Discovery for the purposes of grounding the reliefs set out above, including third party discovery against:

12.1. Paul Hyde, c/o An Bord Pleanála, 64 Marlborough Street, Dublin 1

12.2. Sharon Hickey and Sean Hickey

12.3. Promontoria Ltd, c/o Mason Hayes and Curran, Solicitors, South Bank House, Barrow Street, Dublin 4"

Grounds of challenge

52. The core grounds as set out in the second amended statement of grounds are as follows:

"1, The Board Decision is invalid because the Board was affected by bias or the appearance of bias.

2, The Board Decision is invalid because the Board members involved in taking the decision failed to comply with the provisions of the Code of Conduct, contrary to S150(1) of the 2000 Act.

3, The Board Decision is invalid because Paul Hyde entered into a composition or arrangement with creditors as a result of which he was deemed pursuant to S106(13)(d) to have ceased to be a member.

4, The Board Decision is invalid because the Board erred in law in its interpretation of paragraph 9.4.2.1 of the 2014 Development Plan, and / or failed to have any or any adequate regard to the Ministerial Guidelines in breach of Section 28 of the 2000 Act, and / or failed to give any or any adequate reasons for its departure from Ministerial Guidelines and the requirements of the 2014 Development Plan in breach of Section 34(10) of the 2000 Act.

5, There is good and sufficient reason to extend time for bringing of the application for leave to apply for judicial review, and the circumstances of same were outside the control of the Applicants, in accordance with Section 50(8) of the 2000 Act.

6, The Applicants are entitled to the protection against costs conferred by Section 50B of the 2000 Act and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011.

7, The Court should stay the re-erection of the Development, and / or require removal of the Development insofar as same may have been re-erected."

The law in relation to extension of time

53. Leave was granted on the basis that time ought to be extended, but that of course was an *ex parte* application and therefore, like any *ex parte* order, can be reconsidered on an *inter partes* basis (*Adam v. Minister for Justice* [2001] IESC 38, [2001] 3 I.R. 53, [2001] 2 I.L.R.M. 452, [2001] 4 JIC 0506). The wording of the leave order made that clear in any event.

54. The test for extension of time is as set out in s. 50(8) of the 2000 Act:

"(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."

55. Thus there are two limbs to the test. The first limb is that the failure to bring the action within the original 8 weeks is "outside the control" of the applicant. That applies only to the initial period of 8 weeks, not the total period (see *SC SYM Fotovoltaic Energy SRL v. Mayo County Council (No 1)* [2018] IEHC 20, [2018] 1 JIC 2404 (Unreported, High Court, Barniville J., 24th January, 2018) at §72(3)).

56. The second limb is that there is good and sufficient reason for the extension. The existence of good and sufficient reason isn't defeated by the existence of any period, however short, that is not explained – that would be an impossible test because there is always a period here or there which could have been dealt with more quickly. Say an applicant's lawyers take 3 weeks to draft and issue the proceedings – why wasn't it two weeks? That nit-picking can go on indefinitely. But the point is that regard must be had to the whole period – see *SC SYM Fotovoltaic Energy SRL v Mayo County Council (No 1)* at §72(5), *Sweetman v. An Bord Pleanála* [2017] IEHC 46, [2017] 2 JIC 0205 (Unreported, High Court, Haughton J., 2nd February, 2017) at §6.5 *et seq.* and *Reidy v. An Bord Pleanala* [2020] IEHC 423, [2020] 7 JIC 3110 (Unreported, High Court, Barr J., 31st July,

2020) at §43 – not that every second of every minute must be accounted for with a free-standing good and sufficient reason. If the latter was the test, it could never be satisfied.

57. If there is good and sufficient reason for an extension on one ground, that is not defeated by the inclusion in the pleadings of another separate ground where such reason does not exist. One only has to consider the alternative to see why that should be. If an applicant is disqualified from seeking an extension of time because she includes one ground in a proposed statement of grounds which could have been raised originally, that would penalise applicants on a purely technical basis by discriminating against those who (erroneously) include such a ground and have the extension of time refused outright on that basis, as compared with an applicant who limits themselves to grounds for which an extension should be granted. It would be unfair to reject the first applicant outright on all grounds (including those for which an extension is warranted) merely for erroneously including a stale ground. To adopt the creative but totally artificial and legalistic submission to the contrary that was made in the present case would have a disproportionate and unfair impact and would penalise human error in a way that does not serve the interests of justice.

58. The basic rule in relation to good and sufficient reason is that the court has to be reasonably strict, in a commercial context as opposed to a purely human rights context, with the time limit for initiation of the proceedings in the first place (see *per* Murray J. in *Arthropharm (Europe) Ltd v. The Health Products Regulatory Authority* [2022] IECA 109, [2022] 5 JIC 1003 (Unreported, Court of Appeal, 10th May, 2022)). The court can and should be more flexible with amendments to proceedings that were actually brought within time, for reasons explained elsewhere (*e.g.,* by allowing points that were simply overlooked by counsel initially – *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570, [2012] 5 JIC 0103). However, a late initiation of the proceedings in the first place is a more serious matter because it changes the status of the decision from unchallenged to challenged thereby creating fundamental uncertainty as to its status. Mere refinement or rewording of grounds has much less impact on such policy considerations.

59. As pointed out by Simons J. in *Arthropharm (Europe) Ltd v. The Health Products Regulatory Authority* [2020] IEHC 16, [2020] 1 JIC 1402 (Unreported, High Court, 14th January, 2020) at paras. 79-82, an applicant is generally not entitled to hold off on bringing proceedings while awaiting the assembly of all relevant materials, citing *Talbotgrange Homes Ltd. v. Laois County Council and Others* [2009] IEHC 535, [2009] 12 JIC 0203 (Unreported, High Court, McCarthy J., 2nd December, 2009) at para. 66, *Irish Skydiving Club Ltd. v. An Bord Pleanála* [2016] IEHC 448, 2016 WJSC-HC 11483, [2016] 7 JIC 2907 (Unreported, High Court, Baker J., 29th July, 2016) at para. 41, *SC SYM Fotovoltaic Energy SRL v. Mayo County Council (No. 1)*, at para. 100 and *A Foster Mother v. Child and Family Agency* [2018] IEHC 762, [2018] 12 JIC 2102 (Unreported, High Court, Simons J., 21st December, 2018) at para. 121. The principle outlined in *McBain v McDonald* [1991] 1 I.R. 284, [1991] I.L.R.M. 764, 1991 WJSC-HC 912, [1991] 1 JIC 2102 applies by analogy. There, Morris P. noted that a plaintiff, within the limitation period, had access to evidence which "was already available to the plaintiff upon which she could rely in an attempt to persuade the court that on the balance of probabilities the defendant was responsible". The fact that further information became available later "which she believes will copper fasten the matter in her favour" was not a basis to extend the limitation period.

60. *Jerry Beades Construction Ltd v. The Right Honourable Lord Mayor Alderman and Burgesses of the City of Dublin and Others* [2005] IEHC 406, [2005] 9 JIC 0701 (Unreported, High Court, McKechnie J., 7th December, 2005) does not run contrary to this principle because in that case there was no third party being adversely affected by any delay and because the information initially available to the applicant wasn't sufficient to enable it to make the point. There is no analogy here.

61. The current law is that the time (8 weeks in the case of a planning decision) runs from the date of the decision (see *Irish Skydiving v An Bord Pleanála* (at §37) and *Heaney v. An Bord Pleanála* [2022] IECA 123, [2022] 5 JIC 3123 (Unreported, Court of Appeal, Donnelly J., 31st May, 2022) at §34, reflected in O. 84 r. 21(2) RSC), but that is less harsh than it seems because the court will generally (although maybe strictly speaking this has yet to be declared to be an absolute matter of right) allow the full period from the date the applicant knew about the problem, or if earlier, on which a reasonably diligent applicant would have known about the problem (see *SITA UK Limited v. Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 56). Indeed the court is required to allow such a period in cases with an EU law dimension, of which this is one because of the need to consider the EIA and habitats directives in the planning context: see Case C-456/08 *European Commission v. Ireland* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:46), Case C-406/08 *Uniplex (UK) Ltd v. NHS Business Services Authority* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:45), and caselaw discussed in *Marshall v. Kildare County Council* [2023] IEHC 73, [2023] 2 JIC 1705 (Unreported, High Court, 17th February, 2023) (under appeal by the applicants, but this was a point decided in favour of the applicants).

62. The court in deciding whether there is good and sufficient reason should take a holistic view of all of the circumstances: *Heaney v. An Bord Pleanála*. However in doing so, considerations arising from any prejudice to third party beneficiaries of permissions will loom large. Other matters (for example that not all information was to hand, other processes were ongoing, inquiries were in hand, the decision-maker wasn't particularly helping matters, or the law in relation to costs was uncertain) are unlikely to outweigh those major considerations unless they had the effect that an applicant was significantly inhibited from instituting proceedings within time. Not having all of the detail and all of the evidence does not constitute a significant inhibition for this purpose.

Whether leave should be set aside here

63. Whether leave here should be set aside depends on whether time should have been extended, which can be looked at on a ground-by-ground basis (core grounds 5, 6 and 7 do not relate to substantive relief).

64. As regards the question of whether failure to make the point in the first place was outside the control of the applicants, I agree that it was, apart from in relation to the core ground 4 (which deals with points evident on the papers originally). Insofar as the applicants complain that the board erred in law in its interpretation of paragraph 9.4.2.1 of the 2014 Development Plan, and/or failed to have any or any adequate regard to the ministerial guidelines in breach of s. 28 of the 2000 Act, and/or failed to give any or any adequate reasons for its departure from Ministerial Guidelines and the requirements of the Development Plan in breach of s. 34(10) of the 2000 Act, that is a non-starter as a basis to extend time. Those points were evident in the decision from the outset, and failure to bring the proceedings in time was not outside the control of the applicants.

65. Core grounds 1-3 deal with points that would not have been obvious initially to a reasonably diligent applicant, so the "outside the control" test is satisfied. This brings us to the question of good and sufficient reason, which in turn depends on when the applicant knew about the issues sought to be raised, or, if earlier, when a reasonably diligent applicant ought to have known about them. The position in relation to the allegations made in core grounds 1-3 is as follows:

(i) **Alleged bias or objective bias on the part of the board related to lack of random allocation and excessive granting rate.** The applicants knew of the statistical anomalies in mast-related decision-making by February, 2022, although I do appreciate the point that some further information was required in order to allow that anomaly to mature into the sort of legal ground advanced here. Any concerns about non-random allocation can be said to arise not just from that, but once the identity of the decision-makers is known, even if further details are awaited such as whether the board's official stance was whether there was randomisation or not. The applicants learned of how to access board minutes on 12th May, 2022. A reasonably diligent applicant could have got that information within a couple of weeks from that date. Even allowing for that further period, the applicants failed to bring the challenge within 8 weeks from then. The fact that they got further detail subsequently doesn't mean that they didn't have an obligation to move within 8 weeks from knowing enough to bring the challenge. The applicants seem to have been labouring under the fundamental misapprehension that they could wait for the results of investigations and inquiries, whether by the board, Mr Farrell S.C., or somebody else, but that is a totally and indeed fairly self-evidently flawed approach. An applicant isn't entitled to wait for a respondent to admit wrongdoing, or to wait for further evidence once the material meets the minimum level necessary to launch a challenge. She must act independently of such admission or such additional material, and must litigate within the specified period (normally 3 months, but 8 weeks in planning) from the date on which a reasonably diligent person would have had enough information to institute proceedings. There is somewhat more latitude if we are talking about amending a challenge that has already been brought, but we are not dealing with an amendment here.

(ii) **Failure to comply with the provisions of the Code of Conduct, contrary to s. 150(1) of the 2000 Act.** This is primarily a reformulation of the first core ground, as illustrated by the first sub-ground – "Paragraphs 1.1 to 1.11 above are repeated as if set out herein". The applicants had enough to go on to make this point as of mid-2022.

(iii) **Mr Hyde entered into a composition or arrangement with creditors as a result of which he was deemed pursuant to s. 106(13)(d) of the 2000 Act to have ceased to be a member.** This illustrates an interesting point, which is that if a person is invalidly appointed to public office, or if their appointment becomes invalid (say for example a judge is purportedly appointed who is not properly qualified for the office on the date of appointment (see *The State (Walshe) v. Murphy* [1981] I.R. 275)), that appointment doesn't become unchallengeable 3 months after

> the person takes up their role. Such an appointment can be challenged from time to time into the future as the person acts in new matters that affect new potential applicants. Indeed that is itself a sub-set of the more general principle that the interests of justice favour an approach that allows unlawful failures to act, continuing wrongs, or measures of general application, to be challenged from time to time as they affect new applicants, rather than being shielded from the rule of law by a time limit that expires before an individual applicant is in a position to challenge the problem. So the point is not ruled out merely because the alleged composition with creditors (and hence the alleged invalidity of continuing in office) is of some vintage. Instead, the applicants are ruled out because this was all in the public domain long before the present proceedings were instituted. The problem was referred to in an article on 6th April, 2022 in *The Ditch*, "Deputy chairperson of An Bord Pleanála was pursued in High Court for defaulting on investment property loans". It is also addressed in Mr Farrell S.C.'s terms of reference of 12th May, 2022. The applicants didn't bring the proceedings within 8 weeks of the matter coming to light. I accept that details of the alleged composition with creditors have never been released, but you don't need the details to get the basic point. Assuming that a reasonably diligent applicant wouldn't have known of the issue earlier, anyone who found out about Mr Hyde's alleged composition in May 2022 had 8 weeks to challenge a decision made since the date of the composition. Virtually nobody did so, and certainly these applicants didn't. This isn't hindsight – anyone involved in practical planning litigation is very conscious of the time limits and should be aware of the severe risks of sitting on any point for more than 8 weeks after becoming aware of a ground to impugn a decision if no proceedings at all have been commenced. The further detail isn't necessary to do that, and anyway all of that detail could have been obtainable in such hypothetical proceedings through discovery or disclosure. Enough was known in mid-2022 to bring proceedings raising the point, even if subsequent steps to obtain further evidence to advance the point would need to be taken.

66. Insofar as the court should consider holistically all other circumstances above and beyond the critical issue as to when the applicant knew or ought to have known about the problem (*Heaney v. An Bord Pleanála per* Donnelly J. at para. 74), I have done that and have borne in mind all points raised by the applicants, but they don't outweigh the substantial public interest in certainty in a commercial context that is the object and purpose of the time limit (see *inter alia Arthropharm*, *K.S.K. Enterprises v. An Bord Pleanála and Anor* [1994] 2 I.R. 128, [1994] 2 I.L.R.M. 1, 1994 WJSC-SC 1176, [1994] 3 JIC 2403 *per* Finlay C.J. at 135, *Reidy v. An Bord Pleanála per* Barr J. at para. 39)). That important objective is not outweighed by the applicants' complaints that this is a systemic failure, that the board didn't realise and rectify what was going on, or any of the other points made. Of course life would be simpler if the board had got to the bottom of all problems much quicker, but the fact that it didn't do so doesn't remove the unfairness to the developer that would be created by re-opening the decision here. The fact that the applicants have sought directions under *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705 (Unreported, High Court, 27th May, 2021) para. 81 aimed at obtaining information regarding the procedure for file allocation, for example, doesn't get them any further because it doesn't get around the problem that they had enough information to sue at a much earlier time, albeit far from all information. The idea that it was "reasonable" to wait for progress in ongoing inquiries was a profoundly mistaken strategy apart altogether from being an obviously perilous one on its face. An applicant seeking to impugn a decision subject to an expiring time limit for challenge has to do more than merely scrape above the absolute bare minimum requirement of being "reasonable". She has to act with great expedition by moving before the end of the statutory timelines. That doesn't mean there is an obligation to act with expedition *within* the prescribed time limit – that definitely doesn't arise at all in an EU case and probably not even in a domestic law case, provided that the applicant does actually manage to bring proceedings within the period as measured from the date a diligent applicant would have known enough to litigate. A free-standing obligation to act promptly within the time limit would fundamentally undermine legal certainty. The requirement is to act within the prescribed period from the decision, or at the latest from when the applicant knew or ought to have known of it. But the applicants here didn't act with expedition in either sense.

67. The effect of the foregoing is that I would probably have regarded mid-June (a few weeks from 12th May, 2022 to allow for obtaining the minutes) as being the latest date on which the applicants had (or a reasonably diligent applicant would have had) sufficient information to bring proceedings. Eight weeks from then expired in mid-August, 2022. The applicants are out of time and have not established that there is good and sufficient reason to extend time.

68. This case illustrates the general point that a court deciding a case is not a tribunal of inquiry. Yes, reasonable people could conclude that the applicants have advanced the public interest by

ventilating their concerns with *The Ditch* and the *Irish Examiner*, and that those media organisations performed their role effectively in following those matters up. Whatever happens with the present application, the applicants can be happy with that. Yes, the applicants have in the proceedings raised important matters that well surmount the substantial grounds threshold; and yes, most of these matters relate to probity in public life and are issues of general concern. But it's not the court's role to examine matters for the sole reason that they are important or concerning. The importance of an issue is at most a factor (particularly relevant to applications to amend or strike out, for example) but it is not in itself a basis for the court to get involved in the first place. Even an error on the face of a decision doesn't mean that an extension of time isn't required: *per* Woulfe J. in *Krikke v Barranafaddock Sustainable Electricity Limited* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303 at para. 80.

69. The court's role at its most basic (and with a fair bit of over-simplification, and leaving aside the obvious additional obligations such as arise under the Bangalore principles and their domestic equivalents, or other legal duties such as the need to give reasons) is:

(i) to decide issues that properly arise in the proceedings, which in practice is normally limited to the issues raised by one or more of the parties (albeit that occasionally a party might only decide to raise such an issue after engagement with the court during the normal course of debate and discussion at a hearing, which is not in itself impermissible at the level of principle, and albeit that occasionally a court can do something of its own motion, although those situations are normally fairly defined);

(ii) to decide such issues only if they fall within the pleadings, provided that the legal procedure being invoked involves pleadings and that the issues are such that they require to be pleaded;

(iii) to decide those issues only insofar as the parties disagree about them (with only occasional exceptions, such as where parties are agreed on an order that the court doesn't have jurisdiction to make, or that impermissibly interferes with the rights of a person not before the court);

(iv) even then to formally decide such issues only where relevant to the actual order or other business at stake (which doesn't preclude conditional findings, or other *obiter* comments from time to time); and

(v) not to decide such issues other than in accordance with law and the Constitution.

70. The latter point is crucial here. The law, validly enacted by the Oireachtas (see *In re Planning and Development Bill 1999* [2000] IESC 20, [2000] 2 I.R. 321, [2001] 1 I.L.R.M. 81, [2000] 8 JIC 2802) provides for a time limit and for criteria for extending that. Those criteria are not met here. The potential merits of the important points raised by the applicants are not sufficient to overcome that. To extend time here would be unfair to the commercial interests involved. The developer is entitled to rely on its permission unless there is a clear case for a belated challenge. The court also has to bear in mind the various structural asymmetries in planning law in favour of applicants, and to balance those with a reasonably strict approach to time in a commercial context.

71. Ultimately the problem for the applicants is very simple. As of May, 2022, they had concerns, they had information, they even had solicitors. But instead of taking those concerns to the High Court at that point, they went to the media. That is absolutely fine in itself, obviously, and reasonable people might even say commendable to the extent that it served the interests of public debate, active citizenship, and transparency. But failing to bring proceedings in such circumstances means that when they changed their mind and came to court in November, 2022, they were a day late and a dollar short.

Order

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

(i) the order granting an extension of time and granting leave to apply for judicial review be set aside and in lieu thereof there be an order refusing the application for an extension of time and refusing leave to apply for judicial review;

(ii) Eircom be released from their undertaking not to proceed with the development, with effect from the perfection of the order; and

(iii) unless any party applies otherwise by written legal submission within 7 days, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs.