

THE HIGH COURT
JUDICIAL REVIEW

[2023 No. 212 JR]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT
ACT 2000

BETWEEN

TIMOTHY FRAWLEY AND ANNABEL MEEHAN FRAWLEY

APPLICANTS

AND
AN BORD PLEANÁLA

RESPONDENT

AND
EIRCOM LIMITED AND TOWERCOM LIMITED

NOTICE PARTIES

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

1. This matter raises similar issues to those in *Thomson & Thomson v. An Bord Pleanála* [2023] IEHC 431 and much of the legal discussion there should be read as being also relevant here.

Facts

2. On 25th May, 2021, the developer applied to Wicklow County Council for permission to erect a telecommunications mast and associated works at Eir Exchange, Ballymanus Lower, Glenealy, County Wicklow. The applicants made a submission objecting to that. The council's assistant planner reported on 13th July, 2021, noting various negative impacts including a profound negative visual impact on the residential area and on St Joseph's Church, Glenealy, and recommended refusal on visual amenity grounds. The council refused permission on 14th July, 2021.

3. The developer appealed on 10th August, 2021. The applicants made a submission on 1st September, 2021 objecting to the development. The board's inspector recommended refusal of permission. The board disagreed and granted permission on 8th February, 2022.

4. The applicants say that they "considered challenging the validity of the board decision, but ultimately decided not to, predominantly in light of the costs risk which could materialise". They say they:

"... decided not to bring judicial review proceedings when the Decision was adopted, because they were concerned about the risk of an adverse costs order in circumstances where the law was, at that time, uncertain. However, they began to track other mast decisions made by the Board. They looked back at mast decisions it had made in the recent past. They noted that the Board was overturning its inspectors' recommendations in what seemed to them to be a disproportionate number of cases. They made a spreadsheet recording the decisions taken."

5. Ms Frawley avers at para. 28 of her affidavit:

"We saw the reports in the Examiner newspaper on 18 May 2022 by Mick Clifford, 'Do ABP revelations mean Government must plan for wider inquiry?'. We contacted the Examiner on 20 May 2022 stating that we wished to raise concerns regarding the then Deputy Chairperson Mr Hyde in relation to Mast decisions. Cianan Brennan, a journalist with the Examiner responded to us. Further to this we sent the aforementioned spreadsheet to Cianan Brennan, on 24 May 2022."

6. The applicants plead as follows:

"36. On 25 May 2022 the Applicants asked the Board to investigate telecommunications appeal decisions, and sent a dossier of information. They got no substantive reply until 4 July 2022, when the Board stated it would investigate the Applicants' case but could not reopen it. However, the Applicants considered that the response indicated that the role of the Planning Regulator and the Minister would not be so restricted ...

37. The Applicants gave certain information to national newspapers, and liaised with the Minister, Mr Darragh O'Brien, whose office advised the applicants that [Remy] Farrell SC would look at all matters. They believed the Government would ensure reopening of any cases where any adverse findings were made."

7. Ms Frawley avers:

"32. Because of the difficulties we had had getting a substantive reply from Ms Hill [of the board], we had by this time taken our concerns to RTE who were preparing a Prime Time Investigates programme on the emerging issues in An Bord Pleanála. We remained in further contact with the Examiner newspaper, who were continuing to show an interest in the issue of telecommunication mast decision making. They shared our research with Peter Thomson, a planning consultant who was also in contact with the newspaper. This would

have been after the initial reports of concerns about Mr Hyde's involvement in decisions relating to matters where his business associates or extended family had an interest.

33. We liaised with the Minister, Mr Darragh O'Brien. The Minister's office told us that Remy Farrell SC would look at all matters. We continued to have confidence that once Mr Farrell had reported, that the Government would address issues such as the grant of permission by Paul Hyde and Michelle Fagan for the mast in Glenealy.

34. On 7 June 2022 my husband Timothy spoke to the chair of the Oireachtas Housing Committee, Mr Steven Matthews, who is also a local TD in Wicklow. He said the Committee would look at the issue; but we do not believe it ever did."

8. The applicants plead:

"38. The Applicants spoke to the chair of the Oireachtas Housing Committee, Mr Steven Matthews who said the Committee would look at the issue; but they do not believe it ever did. They made contact with the Office of the Planning Regulator, which emailed them the terms of reference of the inquiry the Regulator had begun. They understood from it that all avenues would be looked at and that it would investigate the allegations made. ... They also contacted the Office of the Ombudsman. They were assigned a reference number for their complaint, but the Office of the Ombudsman never reverted to them in relation to that complaint."

9. Importantly, the applicants also plead:

"40. In an interview on 16 August 2022 with the broadcaster, Pat Kenny, the Minister for Housing, Local Government and Heritage, Darragh O'Brien, discussed the allegations of impropriety in the handling of the Board's files, and, when asked to clarify the position relating to the position of people such as the Applicants for whom time to challenge decisions had expired, Minister O'Brien would not be drawn as to what specifically the Government would do but did state 'I think in relation to decisions that have been made, that would be a matter for people to assess when the report has been published itself. But we have a bit more work to do on this.' The Applicants understood from that interview, that the question of reopening existing decisions was not closed as far as the government was concerned."

10. Ms Frawley's affidavit states:

"37. On 16 August 2022, I ... recall listening [sic] the Pat Kenny show where he interviewed the Minister for Housing, Local Government and Heritage, Darragh O'Brien in relation to the government response to the An Bord Pleanála Report (full interview available on <https://link.goloudplayer.com/s/pGMzGmnnCygX>). During this interview Pat Kenny asked 'those permissions that have been given against the run of play if you like by the Board and then if they are found to be tainted in the Remy Farrell investigation or in any criminal prosecution that might follow, what of those permissions that have damaged communities, damaged local amenities are they to stay standing?', Minister O'Brien replied initially in relation to Strategic Housing Developments and then added 'I think in relation to decisions that have been made, that would be a matter for people to assess when the report has been published itself. But we have a bit more work to do on this'.

38. Mr Kenny followed up seeking further clarity on the legal position where developers are 'about to start a development that is tainted, if that is to happen, what then?'

39. Minister O'Brien responded 'I am not saying at this stage, obviously I am somewhat restricted in what I can say in regard to the report at this time but that is why I want to ensure as best as possible that we can publish the report. I have written to the joint Oireachtas committee the chairperson Steven Matthews and all the opposition spokes people on housing as well to inform them of the process and what we have done so far. I think that is another step forward Pat, it is something that I can't comment on right now to be fair, I would say to the OPR review assisted by Conleth Bradley senior counsel as well would [be] a very important one too. The structure within the Board and how the Board operates and the decision making is something that is being looked at and I will be bringing measures to government in September. The other thing that I did discuss with you before is the full review of planning itself which is work that is underway between myself and the Attorney General which we expect to consolidate a planning bill later this year in the autumn which will be the most significant updating of our planning legislation. So, there is a lot of moving parts in this.'.

40. The Minister's public statements as outlined above informed our thinking. We understood that the question of reopening existing decisions was not closed. Timothy was interviewed by a radio station, East Coast FM during the summer of 2022, and he confirmed to them, our understanding that the question of past decisions was not closed."

11. The applicants outline the various major pieces of fall-out from the turmoil in the board, as largely set out in *Thomson & Thomson v. An Bord Pleanála*, and go on to plead:

“43. The Applicants awaited the results of the Board’s internal investigation and report, but then they learned that the Board had decided not to publish it. They did not know what it contained. Even though they had made the allegations, or some of the allegations, that caused the report to be prepared, they were not notified of its outcome.

44. In January 2023 the Applicants learned of another set of proceedings relating to Board approval of telecommunications masts, Peter Thomson and Doreen Thomson v Bord Pleanála, 2022 No. 1039 JR, and learned for the first time that an extension of time to seek relief might be possible. On 2 February 2023, the news website ‘ontheditch.com’ published a copy of the Board’s internal investigation report. The Board’s report revealed, in somewhat oblique language, that the Board agreed that the former deputy chairperson and Ms Fagan had decided cases in a manner that was not in accordance with Board procedures, in particular in relation to allocation of files, and that there was no record of any decision to depart from those procedures.”

12. The applicants instructed their solicitors to draft the present proceedings on 17th January, 2023.

Procedural history

13. Proceedings were filed on 7th March, 2023. The matter was first mentioned to the court on 8th March, 2023, and on 27th March, 2023 I admitted the case to the List. On 24th April, 2023, I directed that leave be sought on notice and joined Towercom Ltd as a notice party. In addition to seeking leave on notice, the applicants also sought to amend their pleadings by motion dated 20th June, 2023. Those applications were heard on 5th July, 2023, when judgment was reserved.

Relief sought

14. The relief for which leave is sought, as that relief is proposed to be amended, is:

“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 Respondent, An Bord Pleanála (the Board), dated 8 February 2022, file reference ABP-311081-21, to grant permission for erection of a 18m high mobile phone mast at Glenealy, County Wicklow, therein described as:

Proposed Development: The construction of an 18 metre monopole support structure (overall height of 19.5 metres) carrying telecommunications antennas, dishes and associated equipment, together with new ground level equipment cabinets, landscaping and all associated site works at Eir Exchange, Ballymanus Lower, Glenealy, County Wicklow.

2. Such declaration(s) of the legal rights and/or legal position of the applicants 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 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 8 February 2022, on file reference ABP-311081-21.

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 finding relating to any matter emerging in the course of such investigation, determination and filing.

5. 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.

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. A stay pending determination of the present proceedings on the erection by the Respondent of the mobile phone mast and / or telecommunications antennae purportedly authorised by the Decision dated 8 February 2022, file reference ABP-311081-21, to grant permission for erection of a 18m high mobile phone mast at Ballymanus Lower, Glenealy, County Wicklow.

8. Further or other relief.

9. Costs.

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

- 1) Paul Hyde, c/o An Bord Pleanála, 64 Marlborough Street, Dublin 1
- 2) Sharon Hickey and Sean Hickey
- 3) Promontoria Ltd, c/o Mason Hayes and Curran, Solicitors, South Bank House, Barrow Street, Dublin 4

Additional Reliefs

13, An extension of time, pursuant to S50(8) of the 2000 Act, to allow the Applicant to bring the additional claim at Core Ground 8.

14, An Order pursuant to Order 31 Rule 12 of the Rules of the Superior Courts for discovery of the commercial agreement or agreements between Eircom Ltd, trading as Eir, and Towercom Ltd, pursuant to which Towercom Ltd became entitled to apply for permission to carry out the Proposed Development and / or entitled to carry out the Proposed Development."

Grounds of challenge

15. The core grounds as proposed to be amended are as follows:

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

2, The Board Decision is invalid because the Board members involved in taking the decision failed to comply with the provisions of the Board's 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 of the 2016 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 adverse 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 erection of the Development pending the determination of the within proceedings.

8, The Board Decision is invalid because the Application for Permission is invalid because it failed to state the name of the applicant for permission, contrary to R18(1)(a) and / or R19(1) of the 2001 Regulations."

16. In the course of the hearing, in response to the replying submissions of the board and after the conclusion of those submissions, the applicant sought to re-word the additional core ground 8 as follows:

"8, The Board lacked jurisdiction to grant permission because the application form, newspaper notice and site notice were invalid as they failed to correctly state the identity of the applicant for permission and accordingly the application was invalid."

The law in relation to grant of leave and extension of time

17. The requirements regarding extension of time are broadly as set out in *Thomson & Thomson v. An Bord Pleanála*.

18. The law in relation to amendment only arises if we get over the hurdle of extension of time.

19. The requirements for grant of leave in planning cases are set out in *Duffy v. Clare County Council* [2023] IEHC 430.

Should leave and an amendment be granted here?

20. Apart from the ministerial comments which the applicants relied on, the applicants here have the same difficulties as those in *Thomson & Thomson v. An Bord Pleanála* and are not otherwise entitled to an extension of time. In essence the reliance interests enjoyed by the developer in a commercial context outweigh such features of the application as might favour the applicants.

21. As regards the ministerial comments, those might indeed have been a legitimate basis for an extension of time if time was still running on the date of the interview but a potential applicant was induced or misdirected into holding off on proceedings on the basis of those statements. But the problem for the applicants is that they seemingly knew of Mr Hyde's alleged financial troubles, and hence of the alleged vacation of his office, from a piece in *The Ditch* in April, 2022. They also knew, to at least some extent, of the anomalies in mast decision-making around that date. So the 8-week period to bring proceedings had already expired as of the date of the ministerial comments.

Those comments don't therefore save the applicants here, even on a holistic overview of all circumstances (*Heaney v. An Bord Pleanála* [2022] IECA 123, [2022] 5 JIC 3123 (Unreported, Court of Appeal, Donnelly J., 31st May, 2022)). Third party rights, specifically the commercial interests of Towercom, are critical here.

22. Considering the grounds in the light of the above, the situation is as follows:

- (i) An extension of time to pursue core grounds 1 to 3 will be refused and thus leave is refused;
- (ii) Core ground 4 is a piggy-back ground that was there all along so an extension of time and leave for that should be refused, at least if there are no other grounds where an extension of time is warranted;
- (iii) Core ground 5 (extension of time) is being disposed of by order now so there is no basis for leave because the extension is being refused;
- (iv) Core grounds 6 and 7 are procedural so will follow the other grounds by being refused; and
- (v) As regards core ground 8 (as sought to be added by amendment), while I appreciate that the applicants didn't know there was a licence agreement, that is basically an indoor management point that doesn't impact on them. The claim that the identity of the applicant for permission could have made a difference because of possible past breaches of planning law is totally hypothetical and speculative and there is no evidence making that even a potential issue here. The Planning and Development Regulations 2001 art. 18(1)(a) and corresponding requirements provide that the applicant's name should be stated. The judicial review applicants here complains that the "applicant" for permission is not the "developer" – but so what. The permission enures for the benefit of the land. The fact that the capacity of the developer was somewhat ambiguous or even shifting (i.e., whether Towercom were acting merely as an agent or in some way as a principal developer) doesn't make the application invalid without something more substantive that would mean that that has some real legal relevance. There are no substantial grounds for the point being made in the amendment, so it is refused on that basis.

23. Like the applicants in *Thomson & Thomson v. An Bord Pleanála*, one can reasonably say that the applicants here have contributed to public debate by bringing their concerns and findings to public attention *via* the media. But not having brought those complaints to the court at the appropriate time, namely within 8 weeks from their coming into possession of the relevant information in or around April, 2022, they are out of time to do so now. There is not good and sufficient reason to extent that time.

Order

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

- (i) the amendment sought be refused;
- (ii) the application for an extension of time be refused;
- (iii) leave to seek judicial review be refused; and
- (iv) unless the parties apply otherwise by written legal submission within 7 days, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs.