

**THE HIGH COURT  
JUDICIAL REVIEW**

[H.JR.2022.1006]

**IN THE MATTER OF SECTION 50 OF THE  
PLANNING AND DEVELOPMENT ACT, 2000, AS AMENDED**

**BETWEEN:**

**SAVE THE SOUTH LEINSTER WAY AND TARA HEAVEY**

**APPLICANTS**

**AND**

**AN BORD PLEANÁLA, MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE,  
IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**SPRINGFIELD RENEWABLES LIMITED**

**NOTICE PARTY**

**JUDGMENT of Humphreys J. delivered on Wednesday the 25th day of October, 2023**

**1.** The South Leinster Way is a walking route that runs south-westwards from the village of Kildavin in County Carlow through part of County Kilkenny to finish in the town of Carrick-on-Suir in County Tipperary. The route is part of the European E8 walking route which links Dublin with Dursey Island off the southwest coast.

**2.** The first named applicant was established on 10th October, 2020. It is an organisation of individuals living in the Castlebanny area in Co. Kilkenny, the aims and objectives of which relate to the promotion of the protection of the environment around the section of the South Leinster Way that they say is impacted by the impugned wind farm development.

**3.** The second named applicant Tara Heavey is chairperson of the first applicant and lives in the zone of influence of the impugned development.

**4.** In relation to the planned wind farm, on 15th December, 2020, the board determined that the proposed development fell within the definition of energy infrastructure in the Seventh Schedule of the Planning and Development Act 2000, thereby satisfying the requirements set out in s. 37A(1) of that Act. The proposed development was considered to be of strategic importance by reference to the requirements of s. 37A(2)(a),(b) and (c) of the 2000 Act and it was decided that an application for permission for the proposed development was to be made directly to the board.

**5.** On 28th January, 2021, the developer therefore applied to the board for planning permission for the development under s.37E of the Planning and Development Act, 2000.

**6.** The application was considered under the SID procedure and the board decided on Monday 26th September, 2022 to grant planning permission to the Notice Party for the construction of 21 wind turbines with an overall blade tip height of 185 metres and ancillary works at Castlebanny, County Kilkenny.

**Procedural history**

**7.** Section 50(6) of the 2000 Act provides that (subject to the power to extend time) "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".

**8.** The last day of that 8 week period was Sunday, 20th November, 2022.

**9.** The grounding affidavit and statement of grounds were filed on Monday, 21st November, 2022. The matter was moved before the court on that date.

**10.** Leave was granted on 23rd January, 2023. An amended statement of grounds was filed on 31st January, 2023.

**11.** Following objections as to time from the opposing parties, the applicants filed a motion on 27th September, 2023 seeking the following reliefs:

"1. Liberty to amend the Statement of Grounds to include an order pursuant to section 50(8) of the Planning and Development Act 2000 extending the period provided for the making of an application for leave to apply for judicial review, insofar as same is necessary.

2. An order pursuant to section 50(8) of the Planning and Development Act 2000 extending the period provided for the making of an application for leave to apply for judicial review, insofar as same is necessary.

3. Insofar as necessary, an order extending the time for seeking an amendment to the Statement of Grounds."

**12.** I am now dealing with that motion. In doing so I am inclined to the view that the applicants should be allowed to amend the statement of grounds to seek relief extending time so I would grant

relief 1 and treat the matter as if that claim had been included in the statement of grounds, without the formality for filing of an amended pleading. That wasn't opposed by the board and was only faintly opposed by the notice party.

**13.** I should also note that relief 3, the extension of time to seek an amendment, is misconceived. The power to amend can be exercised outside the time period for bringing proceedings. The time limit applies to moving the application in the first place, not for amending it later.

**14.** The real question is around relief 2 - whether the applicants are out of time and if so whether time should be extended.

**15.** Separately, the applicants also sought to put in a further replying affidavit, but that only arises if the proceedings survive the time challenge.

#### **Are the applicants out of time?**

**16.** The applicants' case under this heading essentially boils down to an argument that, by analogy with expiry of formal limitation periods on days when the court offices are closed, there should be a presumption of an intention to increase that period until the next working day.

**17.** Ultimately the context here is that at best the applicants' point is an interpretative presumption only. There are two reasons why any such presumption shouldn't be read into the legislation - the commercial context and other express provisions of the 2000 Act. Statutory interpretation involves looking at text, context and purpose, and here all push in the same direction.

#### **The commercial context**

**18.** The problem with the applicants' argument is the commercial context of the time limit for planning cases and the need for certainty. In a context such as this there must be a strict approach: There is a veritable mountain of jurisprudence on this issue so perhaps one can make do with a few examples: *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, [1993] 3 JIC 2403, (Finlay C.J.), *Noonan Services Limited & Ors v. the Labour Court* (Unreported, High Court, 25th February 2004) (Kearns J.), *Irish Skydiving Club Ltd. v. An Bord Pleanála* [2016] IEHC 448, [2016] 7 JIC 2907 (Baker J.), *Kelly v. Leitrim County Council* [2005] IEHC 11, [2005] 2 I.R. 404, [2005] 1 JIC 2704, (Clarke J.), *Shell E & P Ireland Ltd v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247, [2013] 1 JIC 2201, (Clarke J.) at §7.11, *Drumquin Construction (Barefield) Ltd. v. Clare C.C.* [2017] IEHC 818, [2017] 12 JIC 1908, (Coffey J.). The need for expedition in such a situation is a broad principle that applies in other commercial contexts: *Arthroparm (Europe) Ltd v. The Health Products Regulatory Authority* [2022] IECA 109 (Murray J.). This is a situation where there is prejudice to private law actors, not a purely human rights or public law context: *O'Riordan v. An Bord Pleanála* [2021] IEHC 1, [2021] 1 JIC 2102.

**19.** Insofar as the applicants rely on cases on limitation periods such as *Poole v. O'Sullivan* [1993] 1 I.R. 484, [1993] I.L.R.M. 55, 1992 WJSC-HC 4067, [1992] 10 JIC 2302, (Morris J.), which relied *inter alia* on Megarry J. in the English Court of Appeal decision of *Pritam v. S. Russell* [1973] 2 WLR 147, [1973] 1 QB 336, [1973] 1 All ER 617, the notice party is correct that this is distinguishable because "it is a personal injury case and not a planning case, where fundamentally different policy considerations apply". *D.P.P. v. McCabe* [2005] 2 IECCA 79, [2005] 2 I.R. 568, [2005] 6 JIC 0802, (Kearns J.), was also in a very different context.

**20.** Insofar as reliance is placed on Flood J. in *Max Developments Limited v. An Bord Pleanála* 1994 WJSC-HC 1386, [1994] 2 JIC 2502, that seems to have been a leave on notice case so may not be exactly analogous because the doctrine that one has to move a matter in court to commence the proceedings only applies to *ex parte* applications. That said, any interpretation of that case that suggests that a judicial review can be moved outside the statutory period and still be in time cannot be correct in the light of clear later jurisprudence.

**21.** *McGuinness v. Armstrong Patents* [1980] I.R. 289 (McMahon J.) doesn't help as it was decided on a concession.

**22.** The argument that the Oireachtas is presumed to know the law begs the question as to what the law is. That doesn't get the applicants over the line.

**23.** Overall, the commercial context strongly leans against any implied or presumed legislative intention that there are unstated extensions to the 8 week period to be had if court offices are closed.

#### **The express terms of the Act**

**24.** Even if I am wrong on the foregoing, the argument that an interpretative presumption should be read into the 2000 Act is displaced by the fact that the 2000 Act itself has specifically set out what periods of time should be disregarded.

**25.** Section 251 provides:

"Where calculating any appropriate period or other time limit referred to in this Act or in any regulations made under this Act, the period between the 24th day of December and the first day of January, both days inclusive, shall be disregarded."

**26.** In 2020, the Oireachtas included provisions in s.251A of the 2000 Act to disregard certain periods during the COVID-19 emergency.

**27.** Likewise the 2000 Act provides expressly for the extension of the time for giving of notice by the board where the last day is a holiday. But there is no corresponding provision for the disregard of the last day if it is a holiday in the context of time for issuing of proceedings by the applicant. Section 141 of the 2000 Act provides:

"141.—(1) Where a requirement of or under this Act requires a planning authority or the Board to give a decision within a specified period and the last day of that period is a public holiday (within the meaning of the [Organisation of Working Time Act, 1997]) or any other day on which the offices of the planning authority or the Board are closed, the decision shall be valid if given on the next following day on which the offices of the planning authority or Board, as the case may be, are open.

(2) Where the last day of the period specified for making an appeal or referral is a Saturday, a Sunday, a public holiday (within the meaning of the [Organisation of Working Time Act, 1997]) or any other day on which the offices of the Board are closed, an appeal or referral shall (notwithstanding any other provision of this Act) be valid as having been made in time if received by the Board on the next following day on which the offices of the Board are open.

(3) Where a requirement of or under this Act requires submissions, observations or a request to be made, or documents, particulars or other information to be submitted, to the Board within a specified period and the last day of that period is a public holiday (within the meaning of the [Organisation of Working Time Act, 1997]) or any other day on which the offices of the Board are closed, the submissions, observations or request of documents, particulars or other information (as the case may be) shall be regarded as having been received before the expiration of that period if received by the Board on the next following day on which the offices of the Board are open."

**28.** Order 122 RSC isn't relevant because it applies only to time under the rules, not under statute.

**29.** Individually and collectively, these express provisions indicate an intention to exclude any interpretation that there are other implied exceptions to the 8 week period that are not set out.

**Conclusion on the issue of whether an additional day or days should be read into the 2000 Act**

**30.** Having regard to the foregoing it seems to me that on balance one has to read the 2000 Act as not involving an implied additional day or days for an applicant if the final day of the 8 weeks falls on a holiday or a weekend day. I therefore accept as correct the board's proposed summary of the law at para. 28 of its written legal submissions:

"a. There should be no prospective ability to expect that time expiring on a weekend should expire on a Monday – time should run for the 8 weeks.

b. If this poses no difficulty for the Applicant, the Applicant can move within time.

c. If, however, the Applicant actually has an evidenced based issue with this, then the appropriate approach is to accept the time period being as it is, but then apply for an extension of time. However, that extension of time application has to be evidenced based."

**Should time be extended?**

**31.** The applicants therefore need an extension of time. Do they satisfy the test? Obviously not.

**32.** The test requires the cumulative satisfaction of two criteria:

"(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."

**33.** These applicants satisfy neither.

**34.** There is a massive lacuna in the evidential basis for the extension. There was nothing stopping the applicants from acting much quicker and certainly nothing stopping them from organising themselves to make it to court on the previous Friday.

**35.** The fact that the applicants are making an EU law point is not decisive: *Heaney v. An Bord Pleanála* [2022] IECA 123, [2022] 5 JIC 3123 (Donnelly J.) at §96. Strict time limits such as this one are not contrary to EU law: *Krikke v. Barranfaddock* [2022] IESC 41 (per Woulfe and Hogan JJ.).

**36.** There just wasn't anything stopping the applicants from bringing their proceedings within the statutory period. Obviously they were labouring under the erroneous view that they could wait until a day after that period, but human error (including error by lawyers as to the legal position) is not normally good and sufficient reason for an extension of time in a commercial context and is not so here.

**37.** The reference to general comments on behalf of the State on an EU law website (European Union E-Justice portal) really are neither here nor there. There is nothing to suggest the applicants relied decisively on those representations at the time. Rather the website seems to be something they discovered after the event. In the absence of reliance it isn't unfair for the opposing parties here to take the point against the applicants, and in any event the developer is not bound by the website and can't be prevented from objecting to the application.

**38.** Unawareness of the correct limitation period is not good and sufficient reason: §53 of the judgment of Barr J. in *Reidy v. An Bord Pleanála* [2020] IEHC 423, [2020] 7 JIC 3110.

**39.** The fact that the required extension of time is short is irrelevant - see for example the short delays that were nonetheless fatal, because unsupported by good and sufficient reason, in cases such as the following:

- (i) 1 day in *Casey v. An Bord Pleanála* [2004] 2 I.L.R.M. 296, [2003] 10 JIC 1401, (Murphy J.);
- (ii) 1 day in *O'Riordan v. An Bord Pleanála* [2021] IEHC 1 at §16;
- (iii) 1 day in *Marshall v. Kildare County Council* [2023] IEHC 73;
- (iv) 5 days in *Heaney v. An Bord Pleanála* [2021] IEHC 201, [2021] 3 JIC 1903, (Barr J.) and *Heaney v. An Bord Pleanála* [2022] IECA 123, [2022] 5 JIC 3123, (Donnelly J.); and
- (v) 5 days in *O'Riordan v. An Bord Pleanála* [2021] IEHC 1. [2021] 1 JIC 2102.

**40.** The applicants don't really have any good and sufficient reason for their failure to act within the period. The only excuse is that they thought they had until the Monday. That was just human error, but I should note it is quite uncharacteristic of what normally happens in the List, where moving applications by the Friday if the 8 weeks expires on a weekend would be the norm. This application is unusual. But be that as it may it lacks good and sufficient reason. The notice party comments mordantly at pars. 26 and 27 of its written submissions:

"26. Set against the above policy considerations, there is no injustice or prejudice to an applicant for judicial review, insofar as once a decision is made under the 2000 Act, any applicant clearly knows or can calculate whether the last day falls on a weekend and arrange their affairs accordingly. In fact, the very fact that in the 23 years of voluminous amounts of planning judicial review since the enactment of the 2000 Act, that this is first time an applicant has sought to argue the proposition being advanced by the Applicants, of itself demonstrates that this poses no practical difficulties.

27. Moreover, it follows that assuming a five-day week and an even distribution of decisions across any week when decisions or acts are made, that 1 in 5 (20%) of all decisions, namely any decision issued on a Monday, will have its last day on Sunday. However, there is simply no evidence that this has caused any practical issue. It is uniquely the Applicants in this case who seek to rely upon the same on such a novel proposition."

**41.** Secondly, the applicants come nowhere near satisfying the test of the matter being outside their control, even bearing in mind that the delay was fairly short. The applicants haven't even shown that they would have been in a position to move the application if the courts *had* been open on 20th November, 2022 – the grounding affidavit wasn't sworn until after that date. Ultimately by waiting until the very end of the period and then assuming that they had a further day to act, the applicants put themselves in harm's way by depriving themselves of a safety net. It is not the role of the court or the opposing parties to bail them out of a situation of their own making.

**42.** In any event, a misinterpretation of the law is not a factor outside the control of the applicants.

**43.** The inadequacy of the evidential basis for the application is clear when one goes through the various averments on behalf of the applicants. Ms Heavey has sworn two affidavits relevant to this. The first affidavit, sworn in July, 2023, is as follows:

"6. I will first address a preliminary matter that arises from the three sets of opposition papers. The Respondents plead that these proceedings were brought out of time, by virtue of having been opened in the High Court on Monday 21 November 2022 rather than on Sunday 20 November 2021 [*recte* 2022]. The Respondents' plea seems to be that the proceedings would have been in time if they had been stamped, filed and opened on the Sunday, rather than the Monday.

7. I say and believe that the offices of the Courts Service are not open on a Sunday, and it is not possible to stamp or file papers or open a judicial review leave application to the Court, on a Sunday and in such circumstances, there is a grace day, as set out in Order 122, Rule 3 of the Rules of the Superior Courts which states as follows:

"Where the time for doing any act or taking any proceeding expires on a Saturday, Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time

of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open."

8. I say and believe that if this was not so, the time limit for bringing a judicial review application of any decision made by An Bord Pleanála on a Monday would expire 2 days short of the 8-week period allowed in the Planning and Development Act, 2000. I say and believe that it cannot be the case that the 8-week period established by statute, for the bringing of proceedings that I am entitled to bring under EU law, could be shortened to 7 weeks and 5 days by the planning authorities and An Bord Pleanála deciding to sign their decision Orders on a Monday rather than any other day of the working week. Legal submissions on this point will be made by counsel on my behalf.

9. I understand that the European Union E-Justice portal is an online service that is conceived as a future electronic 'one stop shop' for justice information and provides information on justice systems and improving access to justice throughout the EU in 23 languages. Ireland submitted to the E-Justice portal replies to a list of questions on time limits in civil court cases. In response to question 10 "If the deadline expires on a Saturday, Sunday or a public holiday or non-working day, is it extended until the first following working day? Ireland provided the following reply:

" Yes, where the time for doing any act or taking any proceedings expires on a Saturday, Sunday or other day on which the court offices are closed, and where the act cannot therefore be done on that day, that period will expire on the next day on which the court offices are open. This rule applies whenever there is an expiration period "

I beg to refer to the replies submitted by Ireland to the European Union's E-Justice portal, last updated on 16 June 2021, exhibited at TAB 1 of the booklet of exhibits.

10. It is evident to me from the information provided to the public via the European Union's E-Justice Portal by other EU Member States that in those countries as well, deadlines that would otherwise expire on a Sunday are deemed to expire on the next working day. I beg to refer to replies from Finland, Slovenia, Portugal, Austria, Malta, Luxembourg, Latvia, Italy, France, Greece, Estonia, Bulgaria, Sweden, Slovakia, Romania, Poland, Hungary, Netherlands, Lithuania, Cyprus, Spain, Germany, Czech Republic, and Belgium, pinned together and exhibited at TAB 2A to TAB 2X of the booklet of exhibits.

11. I am advised and believe that there are judgments of the Irish and English superior courts which say that the rule of court in relating to time limits for proceedings falling on a Sunday applies to a time period prescribed by Statute.

12. I have instructed my solicitor to seek an extension of time in the event that this Honourable Court takes the view that it is necessary. I understand that at the time of taking these proceedings, there was no practice direction necessitating the inclusion of such a time extension in the reliefs sought. The opposition parties have not said that they would oppose such an application if made."

**44.** As regards para. 7, O. 122 RSC does not apply because this is a statutory time limit. Paragraph 8 is just assertion. Paragraphs 9 and 10 are all well and good but there is no suggestion that the applicants relied on or were misled by the EU website in question. Paragraphs 11 and 12 are in the nature of legal submissions and information.

**45.** The relevant paragraphs of the second affidavit of the second named applicant sworn in September, 2023 are as follows:

"3. An issue has been raised in Opposition Papers as to whether the proceedings are out of time; in particular, the opposition papers contend that since the 8 week period expired over a weekend, the application should have been opened before the weekend rather than the Monday following the weekend. This is not accepted by the Applicants. However, in the event that the proceedings are out of time, the Applicants wish to seek an extension of time.

4. Extension of time was not expressly sought in the Statement of Grounds and on the 24th July the Court gave liberty to issue a motion seeking an amendment of the Statement of Grounds to include a payer [sic] for extension of time.

5. Unfortunately the motion was not issued by the 8th September. I say and believe and am so informed by my solicitors that this was due to an oversight.

6. I cannot state precisely the date on which notification of the Board decision was received, but I can say that the envelope containing the notification is dated 27th September 2022.

7. The Applicants instructed solicitors on the 1st November 2022.

8. I say and believe and am so informed by my solicitors that they emailed the Public Access section of the Board requesting a copy of the Boards minutes on 1 November 2022. Public Access emailed a copy of the minutes on 3 November 2023.

9. I say and believe and am so informed by my solicitors that the Current Practice Direction 119 which took effect on Monday 17th April, 2023 provides "36. Extension of time

is a substantive relief and should be expressly claimed in cases where it arises"; but that the previous Practice Direction 107 (as amended by Practice Direction 114) in force when the proceedings commenced did not expressly state such a requirement."

**46.** Paragraphs 3 to 5 don't have any ongoing evidential content. Paragraph 6 doesn't get the applicants very far and contrasts somewhat starkly with paragraph 7. What's clear is that the applicants waited over a month (out of an 8 week period) before instructing solicitors. What's also clear from paragraph 8 is that the solicitors got the file on 3rd November, 2022 and took a further 18 days to launch the proceedings. Paragraph 9 doesn't really go to any live issue given the earlier terms of the judgment.

**47.** Ultimately what's missing from all of this is anything that would have stopped the applicants from applying within the 8 weeks, or even any averment that they were ready to do so but for the fact that the courts were closed on the Sunday, or any averment that failure to apply within the period was outside of their control.

**48.** All that said, I would not be unduly critical of the applicants' lawyers. From rules of court and from the context of the Statute of Limitations, legal practitioners are familiar with the concept that if the office is closed on the final day, there may be a grace period until the next working day. But it's easy to lose sight of the point that as far as other legislation such as statutory judicial review is concerned, that is only a potential interpretative presumption, not a fixed rule, and it may be displaced by the content or purpose of the legislation concerned – in this case by both.

**49.** But not for the first time, one can only encourage people not to leave it until the last day to try to institute proceedings. If that hasn't already been shown to be a chillingly risky procedure by cases such as *Marshall v. Kildare County Council* [2023] IEHC 73, it surely must be that now. The message to applicants is – try to avoid depleting the energy of the court with this sort of application and instead put in place some kind of margin for error, rather than living for the thrill of a do-or-die scramble to get the last seat on the last helicopter off the embassy roof in Saigon.

**50.** Knocking out an applicant who is a day out seems harsh. But that's inherent in having any boundary rules on anything. We have not yet reached the utterly chaotic and subjective situation where there can be no fixed rules, only the Chancellor's foot. Any dividing line seems arbitrary for the person who is just on the wrong side of it. Time limits become meaningless and unworkable unless they are applied consistently – otherwise we end up with the paradox of the heap. If an extra day is OK, what about two days? And so on *ad infinitum*. That's not to say there can't ever be legitimate excuses, but here we have a statutory test for extension, and the applicants don't meet either limb of it.

**Order**

**51.** For the foregoing reasons, it is ordered that:

- (i) the applicants be permitted to amend the statement of grounds to seek an extension of time and the matter be treated as if that claim had been included without the formality of the filing of an amended pleading;
- (ii) the extension of time be refused;
- (iii) the leave order be set aside and the leave application be dismissed as out of time, with liberty to re-enter the proceedings within 28 days of any appellate court decision that an extension of time is not necessary or that such an extension should be granted;
- (iv) the applicants' application to file a further substantive affidavit be dismissed; and
- (v) unless the parties apply otherwise by written submissions within 7 days, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs.