[2024] IEHC 249

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000013]

IN THE MATTER OF APPLICATION PURSUANT TO SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

BRENDAN DOWLING

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
COSHLA QUARRIES LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Wednesday the 1st day of May, 2024

1. The applicant, a litigant in person, attended at the Central Office and presented papers for an *ex parte* application, but was incorrectly directed to apply by motion on notice. The request for leave, when actually moved, would have been out of time if the rules for *ex parte* applications are to be applied as if the interaction with the Central Office had never happened. By contrast, the leave application would be within time if treated as a motion on notice; a motion that was directed by the Central Office and that was issued by the applicant in compliance with such directions. The primary question here is: should the rules of court should be interpreted in a way that visits upon the head of an applicant the effect of errors committed within the court system itself?

Facts

2. The applicant seeks to challenge a decision of the board made on 15th November 2023 to amend conditions 3(a) and 6 of the Board's Order ABP-308549-20 made on 23rd August 2023 concerning a quarry development owned by the notice party at Barrettspark, Athenry, Co. Galway

3. Mr Dillon for the board avers as follows:

> "4. The application for planning permission came before the Board by way of an appeal lodged by the Applicant against the decision of Galway County Council to grant permission for the proposed development. The appeal was received by the Board on 29 October 2020.
>
> 5. The application for planning permission was considered by a Planning Inspector who submitted a report dated 14 April 2023 to the Board in which it was recommended that permission be granted for the proposed development. ..."

4. We can pause here to note that the inspector's report states at para. 1.2 that the "main quarrying and rock extraction" activity is at the eastern end of the site, so the board was aware that the activity concerned related to rock quarrying.

5. Mr Dillon continues:

> "6. The application was considered by the Board at a meeting on 10 August 2023 at which the Board decided to grant planning permission for the proposed development. That decision is reflected in the Board Direction which is dated 21 August 2023. ...
>
> 7. By Board Order dated 23 August 2023 planning permission was granted for the proposed development. ..."

6. We can now note the wording of two specific conditions in the original board order. Condition 3(a) refers to:

> "permission for further extraction of sand and gravel".

7. Condition 6 refers to "extraction of aggregates" and also limits extraction to above the water table. The full text is as follows:

> "6. No extraction of aggregates shall take place below the level of the water table and shall be confined to a minimum of five meters above the winter water table as specified.
>
> Reason: To protect groundwater in the area."

8. Mr Dillon continues:

> "8. By letter of 28 August 2023 the Board wrote to the parties to the appeal to inform them of the decision. ...
>
> 9. As a matter of course, the Board includes with letters of this nature a notice containing information in relation to applications for Judicial Review. ...
>
> 10. In addition, the Board maintains a section on its website containing information in relation to Judicial Review, which also directs persons to the website maintained by the Citizens Information service. ...
>
> 11. The Judicial Review Notice informs parties that an application for leave to apply for judicial review must be brought within 8 weeks of the date of the decision of the Board.

12. The Board Order, Direction and Inspectors Report were published on the website maintained by the Board on 30 August 2023.

13. Following this, on foot of an email from the Notice Party's planning agent to the Board dated 12 October 2023, the Board became aware of clerical errors in Conditions 3(a) and 6 of the decision of 23 August 2023. ..."

9. The email from the notice party reads as follows:

"Dear Sir/Madam,

I am writing in relation to a grant of planning permission recently issued by the Board for a quarry development at Cashla, Athenry, Co. Galway (Ref: 308549-20)(see attached) and in particular Conditions No.3 and No.6 of the grant of planning permission.

We are the applicant's planning agent.

075 Condition No.3a refers to a sand and gravel quarry where the proposed development is a rock quarry. We assume that this is a drafting error. You might please confirm.

Condition No.6 limits the depth of extraction in respect of the proposed quarry development to a level above the water table and/or a minimum of 5m above the winter water table. We note that limiting extraction to above the water table would be standard condition for sand and gravel extraction and perhaps Condition 6 has been attached to the permission in error based on the assumption in Condition 3a?

The quarry already operates below the water table as outlined in the plans and particulars submitted as part of the planning application and the proposed extraction levels are consistent with this (down to 5mOD).

The approximate existing ground level of the proposed extraction area is 25m OD and the estimated ground water table level is up to 17mOD . The condition imposed by the Board would have a fundamental impact on the extent of the extraction that could be undertaken as part of this planning permission relative to what was sought as part of the planning application. A review of the Inspector's Report does not appear to outline a rationale or justification for the imposition of this condition.

We wish to query whether the conditions referred to above have perhaps been attached to the grant of permission in error?

I would appreciate if you could revert to me on this matter at your earliest convenience as it is a matter of some concern to the applicant.

If you require any further information on this, please do not hesitate to get in touch."

10. It can be noted that while the notice party queried whether this was an error, they did not suggest that this was a mere *typographical* error. There are different gradations of error as the caselaw makes clear, and we will come to that later.

11. Mr Dillon continues:

"14. The application was considered by the Board at a meeting on 8 November 2023 at which the Board decided to exercise its powers pursuant to section 146A(1)(b) of the 2000 Act to rectify errors in Condition 3(a) and Condition 6, which were inadvertently drafted in the Inspector's recommendation by reference to a sand and gravel quarry whereas the application was for a rock quarry, and this error was inadvertently carried over to the Board's original Direction and Order. That decision is reflected in the Board Direction which is dated 8 November 2023. ..."

12. The amendments made are set out in the direction as being

"For condition No. 3(a): delete 'sand and gravel'

For condition No. 6 to read as follows:

The extraction area, including the depths, shall be as indicated in s. 3.3.1 'Proposed extraction area' of the Environmental Impact Assessment Report received by the planning authority on the 21st day of April, 2020.

Reason: In the interests of clarity."

13. Mr Dillon continues:

"15. By Board Order dated 15 November 2023, the said amendments were made to the grant of planning permission. ...

16. The decision of 15 November 2023 was notified to the parties by letter dated 17 November 2023. ...

17. The Additional Direction and Additional Order were uploaded to the Board's website on 20 November 2023."

Procedural history

14. We now come to the issue of time. Mr Dillon outlines the board's contention as to the running of time:

"18. ... The decision of the Board which is under challenge was made on 15 November 2023 and the 8-week period in which an application for Judicial Review can be made commences

on that date. The 8-week period permitted by section 50(6) of the 2000 Act to bring an application for Judicial Review ended on 18 January 2024."

15. The applicant presented himself in the Central Office to file papers on 5th January 2024, within time.

16. What then happened was a series of errors by the Central Office. We don't just have the applicant's word for it – we have contemporaneous documentary correspondence.

17. The applicant avers:

"2. I say that I attended at the High Court Central office on the 5th of January 2024 to lodge the papers associated with the above proceedings within 8 weeks of the decision of the Board;

3. I say that when I was attempting to lodge the aforesaid papers, I requested to see a Judge that day;

4. I say that Central Office refused to allow me to see a Judge and that they would not take the documents if I did not accept a return date 31st January 2024 and instructed me to write that date onto the Notice of Motion and to serve the Affidavit, Notice of Motion and Statement required to ground Application on the other two parties;

5. I say that I received an email from [a named official] in the Central Office timed and dated 4.38pm, Friday the 5th of January 2024, wherein she stated 'The above matter issued today in the High Court and you were given a return date for the 31st of January 2024, this date is incorrect as it should be listed in the Planning and Environment list. The correct return date is the 15th of January 2024 can you please change the date on your notice of motion and serve it on the other side'. - upon which pinned together and marked with the letter D1 I have signed my name prior to the swearing hereof;"

18. We have this email. It reads as follows:

"From: [name]@courts.ie>
Subject: ...
To: [applicant]
Mr. Dowling,
The above matter issued today in the High Court and you were given a return date for the 31st of January 2024, this date is incorrect as it should be listed in the Planning and Environment list. The correct return date is the 15th of January 2024 can you please change the date on your notice of motion and serve it on the other side.
Kind Regards,
[name]
Courts Service,
Central Office,
Four Courts,
Inn Quays,
Dublin 7.
Phone: ...
Email: [name]@courts.ie
Cuimhnigh ar an timpeallacht sula ndéanann tú an ríomhphost seo a phriontáil
Please consider the environment before printing this email
This e-mail and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. Any review, re transmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you have received this e-mail in error, please delete all copies and inform the sender. It is policy of the Courts Service to scan all e-mail for viruses and content maybe monitored for offensive or inappropriate material as defined in the Courts Service Acceptable Usage Policy. If this e-mail has been found to contain a virus or if you deem the contents to be offensive or inappropriate please contact the Courts Service ITSecurity at ...@courts.ie
Tá an ríomhphost seo agus aon chomhad a sheoltar leis faoi rún agus is le haghaidh úsáid an duine nó an aonáin lena seoltar amháin atá siad beartaithe. Tá toirmeasc ar athbhreithniú, athsheoladh, scaipeadh nó úsáid eile an eolais, nó gníomh ar bith a dhéantarbunaithe air ag daoine nó aonáin seachas an faighteoir beartaithe. Má fuair tú an ríomhphost seo trí dhearmad, scrios gach cóip agus cuir an seoltóir ar an eolas faoi. Is é beartas na Seirbhíse Cúirteanna gach ríomhphost a scanadh le haghaidh víreas agus d'fhéadfadhsé go ndéanfar monatóireacht ar ábhar chun gnéithe urghránna nó míchuí a aimsiú de réir mar a shainmhínítear iad i mBeartas Úsáide Inghlactha na Seirbhíse Cúirteanna. Má fhaightear víreas sa ríomhphost seo, nó má cheapann tú go bhfuil an t-ábhar urghránnanó míchuí, téigh i dteagmháil le Slándáil TF na Seirbhíse Cúirteanna ag ...@courts.ie"

19. The applicant takes up the story:

"6. I say that I replied by email on Sunday the 7th of January 2024, informing [the official] that due to prior commitments I would not be able to attend on that date...
7. I say that [she] sent me an email on Monday 8th of January 2024, wherein she stated that 'I can list the matter for the 29th of January 2024.' ...
8. I say that I acknowledged her email on Wednesday 10th of January 2024, ...
9. I say that I have been placed in a position wherein it is alleged that I have not come before this Honourable Court within the required timeframe – to which I contest;
10. I say and believe that due to the behaviour of the Central Office, where I (after being refused audience with a Judge to seek leave within the or any specified time) had no choice but to comply with the instructions of Central Office and the date assigned to me or they would not lodge my papers;
11. I say that it is solely due to the actions of Central Office that I have been placed in this current situation with regard to the time taken to be listed before this Honourable Court;
12. I say and believe that this type of delay which when created by Central Office has been well settled in O'Neill & anor –v- An Bord Pleanála [2020] IEHC 356, at paragraph 23, & 24, which I now open to the Court – 'On 20th January, 2020, Ms. O'Neill filed her statement required to ground the application for judicial review and her supporting affidavit. Very properly, given the terms of High Court Practice Direction PC 74 (dealing with judicial review applications in respect of Strategic Infrastructure Developments) Ms. O'Neill attended in the Central Office of the court and requested to be directed to the appropriate court that specifically dealt with such applications. This is explained in her supplemental affidavit sworn on 17th April, 2020. Regrettably, it appears that the relevant staff of the Central Office, with whom Ms. O'Neill spoke, were unaware of the terms of the Practice Direction and they advised Ms. O'Neill to attend before Meenan J. in the judicial review ex parte applications list on Monday 27th January, 2020. When Ms. O'Neill attended on that day, she arrived early in the Four Courts and tried again to be directed to the court specifically dealing with strategic infrastructure applications. She was given very confusing directions and ultimately, as she explains in her April 2020 affidavit, she made the application for leave before Meenan J. on that day. Having explained what had transpired in terms of the confusing directions given to Ms. O'Neill, Meenan J. apologised for the inconvenience caused. When the matter was subsequently mentioned to me in the Strategic Infrastructure List on 20th February, 2020, I reiterated that apology. It is deeply regrettable that any litigant, and in particular a litigant acting without the benefit of legal representation, would experience a difficulty of this kind in pursuing an application for leave to apply for judicial review. This is especially so in circumstances where such applications are subject to very strict time limits. 24. For completeness, it should be noted that, while both the Board and Ruirside, in their respective statements of opposition raised an issue as to compliance with the statutory time limit provided for in s.50(6) of the 2000 Act, this point was, very properly, not pursued at the hearing'. ..."

20. The application for leave to apply for judicial review was first opened before the court on 29th January 2024. The board and the notice party were legally represented at that mention date and raised an issue about time.

21. On that date I directed time-lines for affidavits and submissions, and fixed a hearing date on the basis of leave on notice.

22. The application for leave to seek judicial review on notice was heard on Monday 15th April 2024, and judgment was reserved on that date.

Relief sought

23. The reliefs sought in the statement of grounds are as follows:

"1. An Order of Certiorari quashing the Respondent's Board Order ABP–308549M-20, made on or about the 15th day of November 2023, wherein the Respondent purported that due to a clerical error, it amended conditions numbers 3(a) and 6 of the Respondent's, Board Order number ABD- 308549–20, made on or about 23rd August 2023, regarding a quarry development owned by, Coshla Quarries Limited, and located at Cashla/Barretspark, Athenry, County Galway;
2. A Declaration that the Respondent has failed to make a decision in this matter in compliance with section 146A(1) of the Planning and Development Act 2000, as amended;
3. A Declaration that the complete replacement of a term or condition and the reason thereto, of a planning permission, cannot, with regard to said Respondent's Board Order, be deemed to be lawfully made due to an alleged clerical error;
4. A Declaration that it is ultra vires the Respondent to rely on their claim that in accordance with section 146A(1) of the Planning and Development Act 2000, as amended, wherein the Respondent overturns and replaces a condition and so purports to amend the

decision to grant permission dated the 23rd day of August 2023 due to an alleged clerical error;

5. A Declaration that the Respondent's Board Order ABP–308549-20 , made on or about 23rd August 2023 which was then purportedly amended by a subsequent Board Order ABP–308549M-20 made on or about the 15th day of November 2023 has materially altered the terms and conditions of the subject matter quarry development;

6. An Declaration pursuant to Section 3 of the Environment (Miscellaneous Provisions) Act 2011 with respect to the costs of this application;

7. A Declaration that the Respondent has failed to make an Order in accordance with the Environmental Impact Assessment Regulations;

8. A Declaration that the Respondent has denied to the Applicant proper procedures during the decision making process in its purported amendment of the aforesaid order;

9. A Declaration that the said Order of the Respondent, made on or about the 15th day of November 2023 is null, void, of no effect and ultra vires the Respondent - it being inter alia a material contravention of the Galway County Development plan.

10. A Declaration that the said Order of the Respondent, made on or about the 15th day of November 2023 has been made contrary to the Applicants Constitutional, natural and legal rights.

11. Further and or other relief.

12. The costs of this application;"

Grounds of challenge

24. The grounds of challenge are largely set out, incorrectly, under the heading of reliefs as listed above. Turning then to what is set out under the heading of grounds, that text is as follows:

"i. The Applicant and his family's dwelling is located on the local road used to access and egress the subject matter quarry development.

ii. The Applicant has made submissions to Galway County Council and on appeal to An Bord Pleanála during the planning application for the Coshla quarry development;

iii. The Applicant and his family's dwelling water supply is from a private water well which is supplied from the same regionally important and vulnerable aquifer as the quarry development site. The aquifer is recorded as highly vulnerable to pollution and can provide rapid conduits to sensitive receptors such as the Applicants water well.

iv. The Respondent has erred in law and in fact by not taking proper account of the, denials by the Notice Party of past flooding at the quarry development site, the inaccuracies and discrepancies contained within the Environmental Impact Assessment Report with regard to it limiting its flood risk assessment to that of Fluvial flooding risk and disregarding Pluvial flooding which has occurred and is recorded within the Galway County Strategic Flood Risk Assessment as having occurred at the subject matter quarry development site;

v. The Respondent erred in law and in fact by its contravention of both the Galway County Development Plan 2015 – 2021 and Galway County Development Plan 2022 – 2028, due to the replacing of condition number 6 to permit development within a flood risk zone while having express notice of the quarry site's history of flooding.

Particulars

Clerical Error

The Respondent relies upon the notion that a 'clerical error' has occurred as the reason to facilitate the replacement of the number 6 condition; when in law and in fact the meaning and definition of a clerical error has been held by the Supreme Court (Hardiman, Fennelly and Macken JJ) in Sandy Lane Hotel Limited v Times Newspapers & ors [2011] 3 I.R. 334, that a clerical error was an error which arose from the mechanical process of writing, transcribing or copying and is entirely distinct from an error which arose from lack of knowledge, mistaken belief or wrong information;

The Respondent's reliance on its purported clerical error, when compared with the definition of a clerical error held by the Supreme Court in Sandy Lane Hotel, would dictate that the Boards dependence on a purported clerical error to facilitate the replacement of a condition and its reason with another completely different one, as in this case, is null, void and of no force or effect."

The law in relation to correction of errors by the board

25. Section 146A of the Planning and Development Act 2000 provides as follows:

"146A.—(1) Subject to subsection (2)—

(a) a planning authority or the Board, as may be appropriate, may amend a planning permission granted by it, or

(b) the Board may amend any decision made by it in performance of a function under or transferred by this Act or under any other enactment,

for the purposes of—

(i) correcting any clerical error therein,
(ii) facilitating the doing of any thing pursuant to the permission or decision where the doing of that thing may reasonably be regarded as having been contemplated by a particular provision of the permission or decision or the terms of the permission or decision taken as a whole but which was not expressly provided for in the permission or decision, or
(iii) otherwise facilitating the operation of the permission or decision.
(2) A planning authority or the Board shall not exercise the powers under subsection (1) if to do so would, in its opinion, result in a material alteration of the terms of the development, the subject of the permission or decision concerned.
(3) A planning authority or the Board, before it decides whether to exercise the powers under subsection (1) in a particular case, may invite submissions in relation to the matter to be made to it by any person who made submissions or observations to the planning authority or the Board in relation to the permission or other matter concerned, and shall have regard to any submissions made to it on foot of that invitation.
(4) In this section 'term' includes a condition."

26. Owens J. in *Pembroke Road Association v. An Bord Pleanála* [2021] IEHC 545, [2021] 7 JIC 2912, took the view that the power to amend for the purpose of ensuring that the operation of the permission will be "otherwise facilitat[ed]" covers the deletion of an *ultra vires* condition:

"25. The wording of s.146A(1)(iii) of the 2000 Act is wide enough to permit the Board to correct the mistake in condition 26 in its decision and order granting permission for this development. The 'operation' of the permission will be 'otherwise facilitat[ed]' within the statutory language if the Board amends its decision and order by removing condition 26 and replacing it with something legally effective which implements its decision that the developer should make a financial contribution to Dublin City Council in lieu of provision of public open space. The Board has indicated that it is prepared to utilise s.146A(1)(iii) to correct condition 26 and I propose to give it an opportunity to do so. This correction will not involve 'a material alteration of the terms of the development'."

27. However we need to note here that the power to amend a permission to facilitate its operation under sub-para. (iii) was not the basis of the amendment in the present case. The board bluntly stated in its order here that:

"The Board decided that a clerical error had occurred."

28. Sure, if the board were for whatever reason hypothetically to find itself re-considering the matter, the caselaw just referred to could turn out to be relevant depending on whether the board decided to go beyond sub-para. (i) (i.e., to amend the order to facilitate the permission rather than purely to correct clerical errors). But sub-para. (iii) just doesn't arise in the present proceedings.

29. As always, we are reviewing the decision actually made and not writing a new one. What was actually relied on in the decision that the board in fact made was the power to correct for clerical errors. A clerical error was effectively defined in *Sandy Lane Hotel Ltd. v. Times Newspapers Ltd*. [2009] IESC 75, [2011] 3 I.R. 334, [2010] 1 I.L.R.M. 411, [2009] 11 JIC 1601. Hardiman J. said as follows:

"In construing Order 63 Rule 1(15) it is necessary first to note that the term 'clerical error' has been the subject of judicial decisions. In *R. v. Commissioner of Patents* , ex parte *Martin* [1953] 89 CLR 381, Fullager J. held that: '… the characteristic of a clerical error is not that it is in itself trivial or unimportant, but that it arises in the mechanical process of writing or transcribing.' In a later case, *re Meres Application* [1962] RPC 182 the term "clerical error" was described as follows in another patent case, in words which plainly followed the case cited above: 'The words 'clerical error' must, I think, be taken to mean a mistake made in the course of a mechanical process such as writing or copying as distinct from an order arising, e.g. from lack of knowledge, or wrong information, in the intellectual process of drafting language to express intentions.' Having regard to the structure of Order 61 Rule 1(15) I believe that the phrase 'errors in the names of parties' must be construed in the same sense as the proceeding phrase, with which it is 'eiusdem generis', 'clerical errors'. Either category of error must be construed in contradistinction from another sort of error arising from 'lack of knowledge or 'wrong information…'. It appears to me, from a consideration of Mr. O'Sullivan's affidavit on behalf of the plaintiff, that the mistake made in this case is not one which can be described as a clerical error, or anything like it. He frankly admits that the name 'Sandy Lane Hotel Co. Limited' was not originally intended to be used in the proceedings. This was because, although he knew of the history of the companies, it was not present to his mind, or to the mind of the lawyers, that the company actually operating the hotel was the Sandy Lane Hotel Co. Limited. This in turn was because, as he very frankly says 'At the time of the change of name in 1997 I thought nothing of the inclusion of the word 'Co.' in the title of the plaintiff.' This is not in my view a clerical error. The error here arose due to a mistaken belief and a failure to ascribe any significance to the

change of name of 1997. This is a misguided state of mind with which one cannot have much sympathy, given that it was made by or on behalf of 'a consortium of businessmen', in the course of a complicated series of arrangements made for tax planning purposes, in which they obviously had the benefit of the best legal and taxation advice.

The consortium running the Sandy Lane Hotel were of the view that it was important for corporate or tax planning purposes that the entity operating the hotel should be the Sandy Lane Hotel Co. Limited. Nor did this simply involve a change of name: there was another, completely different, Company called the Sandy Lane Hotel Limited. The operating Company was a Barbados Company but the latter Company, which appears as plaintiff at present, is a St. Lucia Company. The plaintiff's case would in my opinion have been a stronger one if they had simply failed to get the name of the operating company right. But in the events that happened they actually used the name of an entirely different Company, which however appears to be the parent Company of the operating Company. This in my view is not a clerical error or anything similar to a clerical error. It requires, if it is to be remedied, the substitution of a new entity which co-existed the plaintiff at a l material times. Because of the delay (and there has been gross delay) the defendants might be able to object to the substitution of a new party on the grounds that the statute of limitations has run as against that party. Since this is a separate issue which may well come before the courts, I will say nothing about it. But I would not be prepared to deprive the defendants of the opportunity of raising it."

30. The Supreme Court judgment speaks for itself, but I can also note that the *New Shorter Oxford English Dictionary* (Oxford, Clarendon Press, 1993) vol. I p. 416 defines clerical error in unambiguous terms: "an error made in copying or writing out". This is tied to the secondary meaning of the word "clerical": "Of or pertaining to a clerk or clerks; involving copying out", with a date of the late 18th century (1770-1799). The relevant meaning of "clerk" is "A person employed in a bank, office, shop, etc., to make entries, copy letters, keep accounts and files, etc. Also a person being trained in law", with a date of the early 16th century (1500-1529). The basic concept is that something involving analytic or any thought or consideration happens above the clerk level; something that is an essentially automatic task of mechanical writing or copying is in the clerk zone. An error in thought or analysis, or an error the rectification of which requires thought and analysis, is supra-clerical; an error by typing the incorrect word is clerical.

The issues

31. Leave having been directed to be on notice, there are in effect two issues raised by the opposing parties:

(i) whether the application is out of time; and

(ii) whether the applicant has shown substantial grounds.

Should the application be treated as having been made when the notice of motion was issued?

32. Section 50(6) of the Planning and Development Act 2000 provides:

"(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate."

33. Subsection (2) provides:

"(2) A person shall not question the validity of any decision made or other act done by—

(a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,

(b) the Board in the performance or purported performance of a function transferred under Part XIV,

(c) a local authority in the performance or purported performance of a function conferred by an enactment specified in section 214 relating to the compulsory acquisition of land, or

(d) without prejudice to the right of appeal referred to in section 37 as read with section 37R—

(i) the competent authority (within the meaning of the Aircraft Noise (Dublin Airport) Regulation Act 2019), or

(ii) the Board in its capacity as the appeal body from decisions of such competent authority, otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order')."

34. The concept of when an application is "made" is not defined in the section, and it follows from sub-s. (2) that we are to find that in O. 84 RSC. The basic legal position under O. 84 as the law was understood at the relevant time is that an *ex parte* application is "made" when it is moved in court, whereas an application on notice is "made" when the notice of motion is issued. The

requirement to appear in court wasn't a very convenient position (and its eventual abolition by S.I. 163 of 2024, from 26th April 2024, shows that over the longer term one can lose a battle but win the war: see *Burke v. Minister for Justice and Equality* [2015] IEHC 614, [2015] 10 JIC 1202) but at the relevant time it's the position one has to apply.

35. Under the rules as applied by the legislation, a planning judicial review is made *ex parte*, rather than on notice, unless notice is directed by the court.

36. The stand-out fact here is the fact that the Central Office, in apparent ignorance of the correct legal procedure, directed (or instructed – the semantic term is irrelevant) the applicant, a litigant in person, to issue a notice of motion, which he did on 5th January 2024. Talk about an imbalance of power. It would be absurd to suggest that a personal litigant should have known better than what he was expressly told officially. Furthermore the Central Office is not an independent agency. It is an executive instrument through which the court carries out its constitutional functions.

37. The Central Office generally does an excellent job and the court relies on it with huge gratitude on a daily basis. It doesn't take from that to say that any system is prone to error, to state the obvious. Nor does it hugely matter whether the error here was individual misunderstanding or some more systemic issue about inadequate instruction, and I am not getting into that. So what did the Central Office do wrong here? Let's see:

(i) PD HC124 commenced on 11th December 2023. The proceedings, challenging a decision of the board, should have been assigned to the Planning & Environment List. Instead the Central Office assigned them to the Judicial Review List.

(ii) Even assuming, incorrectly, that this was a matter for the Judicial Review List, it should have gone to a Monday for an *ex parte* application, or a Tuesday if it was a judicial review motion. The date given was a Wednesday which was the date for yet a third list, also irrelevant here, the Non-Jury List.

(iii) When the applicant sought to make an *ex parte* application, he should not have been given a "return date".

(iv) The Central Office did not advise the applicant that the correct procedure was to apply to a judge of the List in open court.

(v) According to the applicant, they declined to facilitate his request to make direct application to a judge, which was the correct procedure.

(vi) They took it on themselves to tell the applicant to issue a notice of motion, which was a totally incorrect form of procedure in the context of an *ex parte* application.

(vii) When, later in the day, they realised that they had advised as to the wrong list, they repeated the incorrect direction regarding a return date.

(viii) They also repeated the incorrect direction regarding the service of a notice of motion.

(ix) They failed to rectify the earlier failure to advise the applicant as to the need to apply in open court.

(x) At all material times the Central Office knew that the applicant was unrepresented, yet he was never informed that time for an *ex parte* application stopped when he appeared in open court (the board makes a big deal of the existence of information on the Citizens' Information website, but this absolutely crucial piece of data is missing from that website also: https://www.citizensinformation.ie/en/government-in-ireland/how-government-works/standards-and-accountability/judicial-review-public-decisions/, accessed 16th April 2024, archived at https://web.archive.org/web/20240416212345/https://www.citizensinformation.ie/en/government-in-ireland/how-government-works/standards-and-accountability/judicial-review-public-decisions/).

(xi) Dare one finally mention the mangled punctuation of the email and the bungled address in the email signature of "Inn Quays" rather than Inns Quay? This doesn't suggest a great deal of attention to detail.

38. The real question is whether, as a result, the application should be treated as having been "made" on 5th January 2024.

39. Sure, it's facile to say that the applicant can be "faulted" for not knowing the law, for not being aware of time limits from previous litigation he was involved in, for ignoring the incorrect Central Office directions, for not kicking up more of a stink, and perhaps for later seeking an adjournment of the date of 15th January 2024 on which he wasn't available. But the damage had been done at that stage given the enormous confusion caused in the Central Office.

40. The board, officiously, rejects the characterisation of the Central Office's instructions to the applicant as a "direction". But that's easy for them to say. Put yourself in the position of a lay litigant having an official refuse your (correct) request to see a judge and giving you an (incorrect) instruction to issue a notice of motion – what else would you call it? Anyway whether we call it a direction, an instruction or something else is semantic. It wasn't a mere helpful suggestion. It had three elements – critically it was an exercise of official power ostensibly on behalf of the court and

the courts system, it was a rejection of the applicant's valid and correct desire to be put in front of a judge forthwith so as to move the *ex parte* application in accordance with the correct procedure, and it was an imperative instruction to issue a motion.

41. The really critical point here is that the Central Office told the applicant to issue a notice of motion. It would be hideously unfair of the court to now say that this direction was *ultra vires* and a nullity and that the applicant is to be held out of time as if that direction was never imposed on him. Since the opposing parties like to play technical gotcha, one can equally say that the direction made by the Central Office was a forensic act that was not challenged by them in any effective way, presumably by way of a timely application to the court to discharge that direction. And even if it was challenged, it has been acted on to the applicant's detriment.

42. For the court to try to disown the effect and existence of the Central Office direction would be grossly unjust to the applicant and to breach his rights and legitimate expectations. Which rights specifically? Perhaps we could start with art. 6 ECHR.

43. While the board raised various hesitations about getting into the Strasbourg perspective on the issue of a fair and public hearing, primarily on the ground that the unrepresented applicant didn't refer to this aspect, s. 2 of the ECHR Act 2003 imposes an autonomous interpretative duty on the court:

> "2.—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
> (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

44. Any given statute only has one meaning – the correct meaning. The court can't give it an incorrect meaning merely because an applicant, especially an unrepresented applicant, doesn't make such an argument.

45. Alito J. (diss.) made that point in *Johnson v U.S.,* 576 U. S. 591 (2015):

> "The Court's only reason for refusing to consider this interpretation is that "the Government has not asked us to abandon the categorical approach in residual-clause cases." ... But the Court cites no case in which we have suggested that a saving interpretation may be adopted only if it is proposed by one of the parties. Nor does the Court cite any secondary authorities advocating this rule. Cf. Scalia, Reading Law §38 (stating the canon with no such limitation). On the contrary, we have long recognized that it is "our plain duty to adopt that construction which will save [a] statute from constitutional infirmity," where fairly possible. United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 407 (1909) . It would be strange if we could fulfil that "plain duty" only when a party asks us to do so. And the Court's refusal to consider a saving interpretation not advocated by the Government is hard to square with the Court's adoption of an argument that petitioner chose not to raise. As noted, Johnson did not ask us to hold that the residual clause is unconstitutionally vague, but the Court interjected that issue into the case, requested supplemental briefing on the question, and heard reargument. The Court's refusal to look beyond the arguments of the parties apparently applies only to arguments that the Court does not want to hear."

46. Given that the court is required to give a statute its correct meaning, the ECHR is something the court has to autonomously bear in mind because otherwise it could end up giving a statue an incorrect meaning, which could also give rise to a breach of the Convention contrary to legislative policy and the international obligations of the State.

47. A related misunderstanding arose in *Clonres CLG v. An Bord Pleanála* [2021] IEHC 303, [2021] 5 JIC 0706:

> "54. On the third point, the notice party raised a preliminary objection, for want of a better word, that since the parties hadn't 'pleaded' the Interpretation Act 2005 or raised it themselves, I shouldn't decide on its application. That is a misunderstanding. Article 34.5.1° of the Constitution identifies three key roles for a judge: to execute the office to which she is appointed, to do so without bias, and to 'uphold the Constitution and the laws'. The fact that a party doesn't mention a particular law in a submission doesn't absolve the court from upholding that law – although obviously, as here, one tries to give the parties a chance to consider it first."

48. In *Casey v. Minister for Housing & Others* [2021] IESC 42, [2021] 7 JIC 1606, Baker J referred to *Rostas v. DPP* [2021] IEHC 60, [2021] 2 JIC 0904 (Unreported, High Court, 9th February 2021) (a case upholding a decision by a District Court judge to amend a charge sheet of her own motion, the prosecution having declined to seek such an amendment):

> "37. The trial judge of her own motion raised the question regarding the publication requirement as potentially important and did invite legal submissions. The fact that neither party advanced a proposition that failure to publish would render the licence invalid could not of itself have prevented the trial judge from concluding as she did. An adversarial system

> of law does not so restrict the adjudicative process as to render it improper for a judge to explore questions of law he or she considers do arise on the pleaded case.
> 38. The adversarial system does not mean that a judge is not actively engaged with the argument and course of the trial, and that the decision of the judge is a syllogism, a logical conclusion arrived at by deduction, and without intelligent questioning and active assessment of law and fact: see the recent observations of Humphreys J. in *Marioara Rostas v. The Director of Public Prosecutions* [2021] IEHC 60 at paras. 41-42).
> 39. A court can do a number of things of its own motion, and many procedural or interlocutory orders are made by or in the course of judicial engagement with the issues and to achieve fairness, and a judge may for reasons of fairness, and with the intention of arriving at a correct answer, invite submissions on any point not already argued in written or oral submissions or which the judge feels has been incompletely addressed. Not to do so could give rise to a result which is wrong in law, or incomplete or likely to create an unsatisfactory precedent.
> 40. Illustrations of where a judge has usefully raised matters of his or her own motion include Hogan J. in *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 where he formulated a new ground of his own motion and re-listed the matter for further argument. In *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29, [2014] 4 I.R. 277, this Court noted without apparent disapproval (see judgment of Fennelly J. at p. 338) that Hogan J. in the High Court had of his own motion taken a point as to compliance with EU legislation, legislation that had not been challenged by the applicant."

49. The system being adversarial doesn't mean the court has to be totally impassive. To repeat that discussion, the court bringing something up needs to be understood as something being done in the interests of justice and not in a partisan spirit.

50. Rakoff J. of the US District Court for the Southern District of New York speaking extracurially said that, "[y]es, occasionally 'the skilled, imaginative lawyer may raise issues that the judge may not even consider on her own,' but this is not nearly as common as a judge raising such issues independently (as a result of having seen the issues raised in similar cases) and then asking the lawyers to address the issues." (https://slate.com/news-and-politics/2017/07/posner-and-rakoff-debate-whether-courtroom-lawyers-ever-make-a-difference.html).

51. So if Hogan J. can "usefully" (*per* Baker J.) introduce into a case the issue of the *validity* of a statue, not argued by any party, it's small potatoes for me to ask how the Strasbourg jurisprudence impacts on an interpretative task that the court has anyway. To produce the correct result, that interpretative task must account for both the Interpretation Act 2005 and the ECHR Act 2003 – and indeed any other principle relevant to establishing the correct meaning - whether any party relies on them or not. Otherwise one could be giving the statute an incorrect meaning.

52. Even if the foregoing was not enough, s. 4 of the 2003 Act requires to the court to take judicial notice of Strasbourg jurisprudence and to take into account the principles of that jurisprudence:

> "4.—Judicial notice shall be taken of the Convention provisions and of—
> (a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,
> (b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,
> (c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,
> and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments."

53. "Judicial notice" means independently of any evidential or other step taken by any party. An enlivening side-note highlighted by the board here is that this involves, in some situations such as here, taking judicial notice of documents not available in either Irish or English. But so be it. That isn't entirely unprecedented because early statute law of the State of which judicial notice is also to be taken is written in Norman French, albeit that the Statute Law Revision Act 2007 has eliminated some of that.

54. One then must pose the question as to whether the board's interpretation of the term "made" in O. 84 RSC in circumstances such as those here would give rise to a violation of the right to a fair and public hearing under art. 6, which includes the right of access to a court. That is also of course a constitutional right.

55. The Council of Europe handbook on that article, *Guide on Article 6 of the European Convention on Human Rights* (2022) states (notes omitted):

"113. The right of access to a court must be 'practical and effective' (Zubac v. Croatia [GC], 2018, §§ 76-79; Bellet v. France, 1995, § 38), in view of the prominent place held in a democratic society by the right to a fair trial (Prince Hans-Adam II of Liechtenstein v. Germany [GC], 2001, § 45). For the right of access to be effective, an individual must 'have a clear, practical opportunity to challenge an act that is an interference with his rights' (Bellet v. France, 1995, § 36; Nunes Dias v. Portugal (dec.), 2003, regarding the rules governing notice to appear; Fazliyski v. Bulgaria, 2013, concerning the lack of judicial review of an expert assessment that was decisive for settling an employment dispute touching on national security; and, regarding the automatic suspension of a judge on account of exercising her right of appeal against a disciplinary decision to remove her from office, Camelia Bogdan v. Romania, 2020, §§ 75-77), or a clear, practical opportunity to claim compensation (Georgel and Georgeta Stoicescu v. Romania, 2011, § 74). This right is to be distinguished from the right guaranteed by Article 13 of the Convention (X and Others v. Russia, 2020, § 50).

114. The rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal or an application for judicial review are aimed at ensuring the proper administration of justice and compliance, in particular, with the principle of legal certainty (Cañete de Goñi v. Spain, 2020, § 36). That being so, the rules in question, or their application, should not prevent litigants from using an available remedy (Miragall Escolano and Others v. Spain, 2000, § 36; Zvolský and Zvolská v. the Czech Republic, 2002, § 51). In particular, each case should be assessed in the light of the special features of the proceedings in question (Kurşun v. Turkey, 2018, §§ 103-104). In applying procedural rules, the courts must avoid both excessive formalism that would impair the fairness of the proceedings and excessive flexibility such as would render nugatory the procedural requirements laid down in statutes (Hasan Tunç and Others v. Turkey, 2017, §§ 32-33).

115. In short, the observance of formalised rules of civil procedure, through which parties secure the determination of a dispute, is valuable and important as it is capable of limiting discretion, securing equality of arms, preventing arbitrariness, securing the effective determination of a dispute and adjudication within a reasonable time, and ensuring legal certainty and respect for the court (Zubac v. Croatia [GC], 2018, § 96). However, the right of access to a court is impaired when the rules cease to serve the aims of 'legal certainty' and the 'proper administration of justice' and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court (Zubac v. Croatia [GC], 2018, § 98). Where inaccurate or incomplete information about timelimits has been supplied by the authorities, the domestic courts should take sufficient account of the particular circumstances of the case and not apply the relevant rules and case-law too rigidly (compare Gajtani v. Switzerland, 2014, and Clavien v. Switzerland (dec.), 2017)."

56. Those latter cases warrant some examination.

57. In *Gajtani c. Suisse* (Requête no 43730/07), Arrêt de 9 septembre 2014, the domestic court had notified the applicant of the wrong period to bring an appeal. The authorities washed their hands of that and suggested that the applicant should have realised the error – clearly the Swiss Government in that case and the board here are birds of a feather. The Strasbourg court's analysis was as follows:

« b. Application des principes susmentionnés

65. En l'occurrence, en vertu de l'article 100 alinéa 2 lettre c) de la LTF, le délai de recours contre les décisions portant sur le retour d'un enfant fondées sur la Convention de La Haye est de 10 jours suivant la notification de l'expédition complète de la décision (paragraphe 27 ci-dessus). Il a déjà été relevé plus haut qu'il s'agissait d'un délai nouvellement introduit dans la LTF et qui était entré en vigueur le 1er janvier 2007 (paragraphes 27 et 28 ci-dessus). L'arrêt du tribunal d'appel du canton du Tessin du 12 juin 2007 a été notifié à l'avocat qui avait représenté la requérante devant cette instance le 19 juin 2007, soit près de six mois après l'entrée en vigueur de la LTF.

66. En se fiant au délai de 30 jours indiqué de manière erronée dans cet arrêt, la requérante a ensuite déposé elle-même un recours en matière civile et un recours constitutionnel subsidiaire (avec demande d'octroi de mesures suspensives) (« ricorso in materia civile e costituzionale con domanda di concessione dell'effetto sospensivo ») le 16 juillet 2007, soit en dehors du délai de 10 jours légalement applicable.

Le Tribunal fédéral a alors déclaré le recours irrecevable par sa décision du 29 août 2007.

67. La Cour se convainc sans difficulté que la mesure litigieuse visait des buts légitimes, en l'occurrence la bonne administration de la justice et le respect du principe de la sécurité juridique.

Il reste à examiner si la décision d'irrecevabilité du Tribunal fédéral était proportionnée à ces buts. Dans cet examen, il convient d'avoir à l'esprit l'article 49 de la LTF selon lequel « [u]ne notification irrégulière, notamment en raison de l'indication inexacte ou incomplète

des voies de droit ou de l'absence de cette indication si elle est prescrite, ne doit entraîner aucun préjudice pour les parties ».

68. La Cour estime que n'est pas en jeu ici l'opportunité d'un délai réduit à dix jours ou sa compatibilité avec l'article 6 § 1. Elle prend acte que ce délai est inspiré par le souci de respecter l'exigence de diligence sous-jacente au principe du retour immédiat de l'enfant enlevé, qui est au cœur de la Convention de La Haye (paragraphe 28 ci-dessus).

69. En revanche, la question qui se pose à la Cour est celle de savoir si le Tribunal fédéral pouvait, sans tomber dans un formalisme excessif, partir de l'hypothèse que la requérante aurait dû ou aurait pu se rendre compte du caractère erroné du délai indiqué par le tribunal d'appel. Le Tribunal fédéral s'est fondé à cet égard sur sa propre jurisprudence bien établie, selon laquelle un requérant ne peut pas invoquer la protection de l'article 49 de la LTF s'il pouvait ou aurait pu reconnaître l'inexactitude à la seule lecture du texte de la loi (paragraphe 30 ci-dessus). Selon la Cour, cette jurisprudence n'est pas nécessairement contraire au droit d'accès à un tribunal au sens de l'article 6 § 1, mais elle ne lie pas non plus la Cour dans son examen concret de la question de savoir s'il y a eu en l'espèce violation de cette disposition.

70. Avant d'examiner les différents arguments soulevés par le Gouvernement à l'appui de sa thèse selon laquelle la manière de procéder du Tribunal fédéral était compatible avec l'article 6 § 1 de la Convention, la Cour rappelle que c'est justement dans le contexte du droit d'accès à un tribunal qu'elle a plus particulièrement élaboré le principe selon lequel il convient d'interpréter et d'appliquer les dispositions de la Convention, instrument relatif à la protection des droits de l'homme, d'une manière qui en rende les exigences concrètes et effectives (voir, notamment, Golder c. Royaume-Uni, 21 février 1975, § 35 in fine, série A no 18 ; Airey c. Irlande, 9 octobre 1979, § 24, série A no 32, et Artico c. Italie, 13 mai 1980, § 33, série A no 37). Dans des circonstances bien différentes, elle a en outre précisé qu'il faut prendre en compte les particularités de chaque cas concret pour éviter une application mécanique des dispositions de la loi à une situation particulière (Emonet et autres c. Suisse, no 39051/03, § 86, 13 décembre 2007).

71. Selon l'argument de la requérante, non réfuté par le Gouvernement, l'arrêt contesté a été notifié à son ancien avocat, qui aurait subitement mis fin à son mandat.

La Cour, à l'instar du Tribunal fédéral et du Gouvernement, admet que c'est en partie à cause de l'ancien représentant de la requérante, qui n'avait apparemment pas informé celle-ci du caractère erroné du délai indiqué, que le recours a été introduit tardivement. Ignorant les motifs et circonstances exactes de ce changement abrupt d'avocat, et consciente du fait que les fautes commises par les représentants des requérants n'engagent en principe pas la responsabilité des autorités en vertu de la Convention, la Cour estime néanmoins qu'il ne s'agit ici que d'un élément parmi d'autres et qu'il faut prendre en compte l'ensemble des circonstances de l'espèce.

72. Le Gouvernement soutient ensuite, à l'instar du Tribunal fédéral, que l'erreur dans le délai de recours était reconnaissable à la seule lecture de l'article 100 de la LTF (paragraphe 31 ci-dessus).

De l'avis de la Cour, cette argumentation est contredite par le fait que le Tribunal fédéral lui-même a entre-temps admis que la teneur de l'article 100 de la LTF n'est pas aisément compréhensible pour toute personne sans connaissances juridiques (« nicht für jeden juristischen Laien ohne weiteres verständlich » ; paragraphe 32 ci-dessus). Si l'on ajoute, entre autres, que la requérante ne se trouvait que depuis peu de temps en Suisse, pays qui lui était étranger, la Cour n'est pas convaincue que l'on pouvait raisonnablement attendre d'elle qu'elle se méfie du délai indiqué dans l'arrêt du tribunal d'appel et, ensuite, le vérifie en recherchant et consultant la législation pertinente.

73. En outre, la Cour observe que l'argument du Gouvernement selon lequel la jurisprudence du Tribunal fédéral n'opère pas de distinction entre partie représentée et partie agissant seule est dépassé depuis le nouvel arrêt de principe du Tribunal fédéral du 12 mars 2009 (arrêt 5A_814/2008, ATF 135 III 374 ; paragraphes 32 et 33 ci-dessus).

74. Réaffirmant la jurisprudence susmentionnée, la Cour estime que, bien que rien n'obligeât la Suisse à offrir un recours devant le Tribunal fédéral contre la décision du tribunal d'appel, étant donné que le législateur suisse a opté pour cette voie, les autorités doivent veiller à ce que son fonctionnement soit compatible avec l'article 6 § 1 et qu'elle ne reste pas illusoire ou théorique. En découle notamment l'obligation pour le Tribunal fédéral de faire montre d'une certaine souplesse lorsqu'il est saisi d'un recours introduit par une partie non représentée, dans la mesure où cette non-représentation est admise (voir, dans ce sens, Assunção Chaves c. Portugal, no 61226/08, §§ 80-84, 31 janvier 2012).

75. En conclusion, la Cour estime que le Tribunal fédéral n'a pas suffisamment pris en compte les circonstances assez particulières de l'espèce et a appliqué sa jurisprudence

pertinente, qui n'est pas en soi contraire à l'article 6 § 1, de manière trop rigide (voir, mutatis mutandis, Assunção Chaves, précité, § 86). En effet, elle a fait subir à la requérante les conséquences d'une faute dont la responsabilité primaire revenait à l'instance inférieure (voir, en ce sens, Platakou c. Grèce, no 38460/97, § 39, CEDH 2001-I), qui avait méconnu le nouveau délai de dix jours applicable en la matière depuis le 1er janvier 2007 (paragraphes 27 et 28 ci-dessus), ce qui apparaît disproportionné par rapport aux buts légitimes visés – en l'occurrence la bonne administration de la justice et le respect de la sécurité juridique –, et cela d'autant plus s'agissant d'une procédure de retour d'enfants selon la Convention de La Haye sur les enlèvements internationaux, à la fois complexe et susceptible d'avoir des conséquences très graves et délicates pour les personnes concernées (voir, mutatis mutandis, Assunção Chaves, précité, § 82).

76. Partant, la Cour estime que les limitations appliquées à l'accès de la requérante au Tribunal fédéral ont restreint le droit d'accès à un tribunal à un point tel qu'il s'en est trouvé atteint dans sa substance même.

77. Compte tenu de ce qui précède, la Cour conclut qu'il y a eu violation de l'article 6 § 1 de la Convention. »

58. The same applies here *mutatis mutandis* – the opposing parties « a fait subir à la requérante les conséquences d'une faute dont la responsabilité primaire revenait à l'instance inférieure ». An interpretation of the word "made" that fails to give status to the fact of the instruction from the Central Office would also be « trop rigide » and « disproportionné ».

59. *Gajtani* refers back to *Assunção Chaves c. Portugal* (Requête no 61226/08) Arrêt de 31 janvier 2012. That was another case about a lay litigant who had not been given adequate information as to the appeal procedure. There, the mere absence of correct information (even without the provision of positive misinformation) was held to give rise to an art. 6 violation:

« b. Appréciation de la Cour

70. L'article 6 § 1 de la Convention garantit à chacun le droit à ce qu'un tribunal connaisse de toute contestation portant sur ses droits et obligations de caractère civil. Ce « droit à un tribunal », dont le droit d'accès constitue un aspect, peut être invoqué par quiconque a des raisons sérieuses d'estimer illégale une ingérence dans l'exercice de l'un de ses droits de caractère civil et se plaint de n'avoir pas eu l'occasion de soumettre pareille contestation à un tribunal répondant aux exigences de l'article 6 § 1 (voir, notamment, Golder c. Royaume-Uni, 21 février 1975, § 36, série A no 18), les garanties devant être assurées devant toutes les juridictions, qu'elles soient du premier degré, d'appel, ou de cassation, une juridiction supérieure pouvant effacer la violation initiale d'une clause de la Convention (De Cubber c. Belgique, 26 octobre 1984, § 32-33, série A no 86 ; Delcourt c. Belgique, 17 janvier 1970, § 25, série A no 11 ; Tolstoy Miloslavsky c. Royaume-Uni, 13 juillet 1995, § 59, série A no 316-B). L'article 6 § 1 garantit ainsi aux justiciables un droit « effectif » d'accès auxdites juridictions pour les décisions relatives à leurs droits et obligations de caractère civil. Les Etats sont libres du choix des moyens à employer à cette fin et ne sont astreints par l'article 6 § 1 à pourvoir à l'assistance d'un avocat que lorsque celle-ci se révèle indispensable à un accès effectif au juge, soit parce que la loi prescrit la représentation par un avocat, soit en raison de la complexité de la procédure ou de la cause (Airey c. Irlande, 9 octobre 1979, § 26, série A no 32).

71. Il ressort de la jurisprudence de la Cour que le droit d'accès à un tribunal n'est pas absolu et se prête à des limitations implicitement admises, notamment quant aux conditions de recevabilité d'un recours, car il appelle de par sa nature même une réglementation par l'Etat, lequel jouit à cet égard d'une certaine marge d'appréciation. Toutefois, ces limitations ne sauraient restreindre l'accès ouvert à un justiciable de manière ou à un point tels que son droit à un tribunal s'en trouve atteint dans sa substance même. En outre, les limitations appliquées ne se concilient avec l'article 6 § 1 que si elles poursuivent un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé (voir, parmi d'autres, Levages Prestations Services c. France, 23 octobre 1996, § 40, Recueil des arrêts et décisions 1996-V).

72. En l'espèce, la Cour note que le requérant était absent lors du prononcé du jugement par le tribunal aux affaires familiales de Lisbonne le 2 avril 2009. Elle relève que la décision lui fut toutefois personnellement signifiée au moment où il se présenta au greffe du tribunal aux affaires familiales de Lisbonne, le 7 avril 2009. C'est ainsi à partir de cette date que commença à courir le délai de 10 jours pour introduire un recours devant la cour d'appel de Lisbonne conformément à l'article 66 de la loi sur l'organisation et le fonctionnement des tribunaux et l'article 685 § 1 du code de procédure civile en vigueur au moment des faits.

73. La Cour constate que le requérant n'a, certes, pas fait appel du jugement devant la cour d'appel de Lisbonne mais il a exprimé son opposition au jugement au moyen de deux

requêtes adressées, par voie électronique, le 9 avril 2009, au procureur général de la République et, le 10 avril 2009, à la Cour suprême.

74. La Cour rappelle que la règle de l'épuisement des voies de recours internes, énoncée à l'article 35 § 1 de la Convention, vise à ménager aux Etats contractants l'occasion de prévenir ou de redresser les violations alléguées contre eux avant que la Cour n'en soit saisie. Cette règle impose donc aux requérants l'obligation d'utiliser auparavant les recours qu'offre le système juridique de leur pays, dispensant ainsi les Etats de répondre de leurs actes devant la Cour. La Cour souligne qu'elle doit appliquer cette règle en tenant dûment compte du contexte. Elle a ainsi reconnu que l'article 35 de la Convention doit s'appliquer avec une certaine souplesse et sans formalisme excessif (voir, entre autres, Ankerl c. Suisse, 23 octobre 1996, § 34, Recueil des arrêts et décisions 1996-V) ; il suffit que l'intéressé ait soulevé « au moins en substance, et dans les conditions et délais prescrits par le droit interne », les griefs qu'il entend formuler par la suite devant les organes de la Convention (Guzzardi c. Italie, 6 novembre 1980, § 72, série A no 39 et Cardot c. France, 19 mars 1991, § 34, série A no 200).

75. La règle de l'article 35 § 1 se fonde toutefois sur l'hypothèse que l'ordre interne offre un recours effectif quant à la violation alléguée (voir, par exemple, Kudła c. Pologne [GC], no 30210/96, § 152, CEDH 2000-XI, arrêt cité dans Charzyński c. Pologne, requête no 15212/03 et dans Tadeusz Michalak c. Pologne, requête no 24549/03, décisions du 1er mars 2005), lequel doit exister à un degré suffisant de certitude non seulement en théorie mais aussi en pratique, sans quoi lui manque l'effectivité et l'accessibilité voulues ; il incombe au Gouvernement excipant du non-épuisement de convaincre la Cour que le recours était effectif et disponible tant en théorie qu'en pratique à l'époque des faits, c'est-à-dire qu'il était accessible, était susceptible d'offrir au requérant le redressement de ses griefs et présentait des perspectives raisonnables de succès (Vernillo c. France, 20 février 1991, § 27, série A no 198 ; Akdivar et autres c. Turquie, 16 septembre 1996, § 66, Recueil des arrêts et décisions 1996-IV; Dalia c. France, 19 février 1998, § 38, Recueil des arrêts et décisions 1998-I). De plus, selon les « principes de droit international généralement reconnus », certaines circonstances particulières peuvent dispenser le requérant de l'obligation d'épuiser les recours internes qui s'offrent à lui (Van Oosterwijck c. Belgique, 6 novembre 1980, §§ 36-40, série A no 40 ; Akdivar et autres c. Turquie, précité, § 69). Ainsi, est dispensé d'exercer un recours interne celui qui établit qu'en vertu de la jurisprudence ce recours est voué à l'échec. Cependant, c'est au requérant qu'il revient d'établir que le recours évoqué par le Gouvernement a en fait été employé ou bien, pour une raison quelconque, n'était ni adéquat ni effectif compte tenu des faits de la cause ou encore que certaines circonstances particulières le dispensaient de cette obligation (Akdivar et autres c. Turquie, précité, § 68).

76. La Cour souligne qu'elle n'a pas pour tâche de se substituer aux juridictions internes. C'est au premier chef aux autorités nationales et, notamment, aux cours et tribunaux, qu'il incombe d'interpréter la législation interne (Edificaciones March Gallego S.A. c. Espagne, 19 février 1998, § 33, Recueil des arrêts et décisions 1998-I). Le rôle de la Cour se limite à vérifier la compatibilité avec la Convention des effets de pareille interprétation. Ceci est particulièrement vrai s'agissant de l'interprétation par les tribunaux des règles de nature procédurale telles que les formes et les délais régissant l'introduction d'un recours (Pérez de Rada Cavanilles c. Espagne, 28 octobre 1998, § 43, Recueil des arrêts et décisions 1998-VIII). Le rôle de la Cour se limite à vérifier la compatibilité avec la Convention des effets de pareille interprétation.

77. En effet, la Cour considère que la réglementation relative aux formalités et aux délais à respecter pour former un recours vise à assurer une bonne administration de la justice et le respect, en particulier, du principe de la sécurité juridique. Les intéressés doivent s'attendre à ce que ces règles soient appliquées (voir Agbovi c. Allemagne (déc.), no 71759/01, 25 septembre 2006) ; la Cour estime ainsi qu'il n'y a pas d'épuisement lorsqu'un recours a été déclaré irrecevable à la suite du non-respect d'une formalité (voir, parmi beaucoup d'autres, Ben Salah, Adraqui et Dhaime c. Espagne (déc.), no 45023/98, CEDH 2000-IV ; Mark c. Allemagne (déc.), no 45989/99 ; Salman c. Turquie [GC], no 21986/93, § 81, CEDH 2000-VII).

78. En l'espèce, la Cour observe que le requérant disposait de la possibilité de faire appel, devant la cour d'appel de Lisbonne, du jugement du tribunal aux affaires familiales de Lisbonne du 2 avril 2009, porté à sa connaissance le 7 avril 2009, recours dont l'efficacité ne prête pas à controverse.

79. Force est de reconnaître que le requérant n'a respecté ni les formes ni les voies de recours pour contester le jugement du tribunal aux affaires familiales de Lisbonne. En effet, le requérant a opté pour formuler son opposition au jugement à deux autorités qui ne

disposaient pas du pouvoir de redresser les violations alléguées. D'une part, le procureur général de la République au Portugal a pour rôle principal de superviser le ministère public et, d'autre part, la Cour suprême n'était pas compétente pour apprécier le recours dans le cas d'espèce. De plus, le requérant aurait dû être représenté par un avocat, l'article 1409 du code de la procédure civile exigeant la représentation de l'appelant par un avocat en phase d'appel. Une demande d'aide juridictionnelle aurait pu interrompre le délai imparti pour l'introduction de l'appel comme l'indique l'article 24 § 4 de la loi d'accès aux tribunaux. Néanmoins, le requérant n'a formulé une telle demande que le 10 août 2009, alors que le jugement avait déjà acquis force de chose jugée.

80. La Cour estime cependant qu'il est légitime de se demander si le requérant a été dûment informé au sujet des démarches à suivre pour contester le jugement du tribunal aux affaires familiales de Lisbonne dans la mesure où il était absent lors du prononcé du jugement, n'était pas représenté par un avocat au cours de la procédure de protection devant le tribunal aux affaires familiales de Lisbonne et disposait seulement d'un délai de 10 jours pour faire appel.

81. Dans une affaire portant toutefois sur une procédure pénale à l'issue de laquelle un individu avait été condamné in absentia, la Cour a jugé qu'en matière d'accès à un tribunal, il importe que les règles concernant, entre autres, les possibilités des voies de recours et les délais soient posées avec clarté, mais qu'elles soient aussi portées à la connaissance des justiciables de la manière la plus explicite possible, afin que ceux-ci puissent en faire usage conformément à la loi. Il en est particulièrement ainsi lorsqu'une personne qui a été condamnée par défaut est détenue ou n'est pas représentée par un avocat lorsqu'elle reçoit notification d'un jugement de condamnation : elle doit pouvoir être immédiatement informée de manière fiable et officielle des possibilités de recours et des délais d'introduction. Il ne s'agit pas d'interpréter le droit ni de prodiguer des conseils que seul un avocat peut faire, mais d'indiquer le suivi qui peut être donné à un jugement (Faniel c. Belgique, no 11892/08, § 30, 1er mars 2011).

82. La Cour estime qu'une procédure de protection d'enfant en danger est complexe non seulement en raison des questions litigieuses qu'elle est appelée à trancher mais aussi en raison des conséquences extrêmement graves et délicates qu'elle présente autant pour l'enfant que pour les parents concernés.

83. La Cour admet que le tribunal aux affaires familiales de Lisbonne a pris toutes les mesures que l'on pouvait exiger de lui pour que le requérant et sa compagne participent effectivement à la procédure.

84. Elle estime néanmoins que des précautions et des diligences supplémentaires auraient dû être prises à partir du moment où le tribunal a constaté que le requérant n'avait pas pris connaissance de la date prévue pour le prononcé du jugement (voir § 39 ci-dessus), de surcroît en tenant compte du fait qu'il n'était pas représenté par un avocat.

85. Or, la Cour observe que le jugement du tribunal aux affaires familiales de Lisbonne n'indique ni le suivi à lui donner ni la date prévue pour l'acquisition de force jugée, la loi portugaise n'exigeant pas, en l'occurrence, que cette information y figure s'agissant de ce type de procédure.

86. Eu égard aux observations qui précèdent, la Cour estime que l'on ne saurait dès lors reprocher au requérant de ne pas avoir contesté le jugement en respectant les formes et les voies prévues par la loi en tenant compte des circonstances particulières de l'affaire.

87. Par conséquent, dans le cas d'espèce, la Cour estime que l'absence d'information de manière claire, fiable et officielle, quant aux voies, formes et délai de recours, à l'égard du requérant ont porté atteinte à son droit d'accès à un tribunal, tel que garanti par l'article 6 § 1 de la Convention.

88. Partant, il y a eu violation de l'article 6 § 1 de la Convention. »

60. As here, *mutatis mutandis*, « ...il est légitime de se demander si le requérant a été dûment informé au sujet des démarches à suivre pour contester le jugement ». Not only was the applicant here not « dûment informé », he was given misinformation. As the ECtHR held, « l'absence d'information de manière claire, fiable et officielle, quant aux voies, formes et délai de recours, à l'égard du requérant ont porté atteinte à son droit d'accès à un tribunal, tel que garanti par l'article 6 § 1 de la Convention ».

61. The *Clavien* decision referred to in the *Guide on Article 6* is *Michel Clavien c. la Suisse* (Requête no 16730/15) Troisième Section Décision de 5 octobre 2017. That was a somewhat different fact situation. Swiss federal law provides as follows, as recorded in the decision of the ECtHR:

« 11. Dans son arrêt concernant la présente affaire, le Tribunal fédéral se référait à son arrêt 5A_704/2011 du 23 février 2012, publié au recueil des arrêts principaux du Tribunal fédéral (« ATF » 138 I 49). Le passage pertinent (considérant 8.3.2) se lit comme suit :

> « On déduit du principe de la bonne foi précité que les parties ne doivent subir aucun préjudice en raison d'une indication inexacte des voies de droit (ATF 117 Ia 297 consid. 2, ATF 117 Ia 421 consid. 2c). Une partie ne peut toutefois se prévaloir de cette protection que si elle se fie de bonne foi à cette indication. Tel n'est pas le cas de celle qui s'est aperçue de l'erreur, ou aurait dû s'en apercevoir en prêtant l'attention commandée par les circonstances. Seule une négligence procédurale grossière peut faire échec à la protection de la bonne foi. Celle-ci cesse uniquement si une partie ou son avocat aurait pu se rendre compte de l'inexactitude de l'indication des voies de droit en lisant simplement la législation applicable. En revanche, il n'est pas attendu d'eux qu'outre les textes de loi, ils consultent encore la jurisprudence ou la doctrine y relatives. Déterminer si la négligence commise est grossière s'apprécie selon les circonstances concrètes et les connaissances juridiques de la personne en cause. Les exigences envers les avocats sont naturellement plus élevées: on attend dans tous les cas de ces derniers qu'ils procèdent à un contrôle sommaire ("Grobkontrolle") des indications sur la voie de droit (ATF 135 III 374 consid. 1.2.2.2; ATF 134 I 199 consid. 1.3.1; ATF 129 II 125 consid. 3.3; ATF 124 I 255 consid. 1a/aa; ATF 117 Ia 421 consid. 2a). »
>
> 12. Des développements supplémentaires concernant la jurisprudence du Tribunal fédéral à ce sujet figurent dans l'arrêt Gajtani (précité, §§ 30 à 33). »

62. In that case, the applicant *was* represented, and the federal rules expressly stated that at least a basic check of appeal periods was required by lawyers, whose duties were « naturellement plus élevées ». In the absence of such a check by the lawyer on record, the strict application of an appeal period despite a mis-statement by the court was held not to be unduly formalistic. Obviously that doesn't apply here.

63. Bearing in mind the obligation to construe national law in a manner conforming to the ECHR, where possible, as well as the applicant's constitutional and EU law rights corresponding to art. 6 of that convention, the inescapable conclusion is that it would be totally unfair and would give rise to a breach of art. 6 ECHR to treat the application as otherwise than having been by motion with effect from the Central Office telling the applicant to proceed in that manner. The application was therefore "made" on 5th January 2024. The later administrative adjournment from 15th to 29th January 2024 is irrelevant because the application had already been "made" at that stage. Even if it wasn't irrelevant, the level of confusion created by the Central Office by that stage was such as to render it unfair if the court were to hold the applicant prejudiced by acting on the assumption that matters were in order at that point.

64. One final aspect deserves mention.

65. The board as a statutory body is obliged, like all public law entities, to carry out its functions in an ECHR-compatible manner where possible. The duty is set out in s. 3(1) of the 2003 Act:

> "3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

66. This is an overarching public law duty on all organs of state, defined in s. 1(1) of the 2003 Act as:

> '"organ of the State' includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised;"

67. That is an autonomous function which mirrors and indeed in certain respects goes beyond the court's autonomous function in relation to statutory interpretation. The concept of functions is wide and includes the submissions a public body makes to a court. That isn't in any way a criticism of the board's lawyers here, who are consistently excellent and who, in fairness to them, were trying to deal on the hoof with the probably unwelcome matter of my evolving concerns about compliance with the Strasbourg requirements. And it's good for the court to have at least a modest level of pushback on occasion, because, apart from being beneficial for one's soul, to speak metaphorically, it does help one think the position through more fully. But I hope on mature reflection that the board will see the need not to adopt any position in argument or otherwise forensically that could create a situation where ECHR jurisprudence is not properly factored in. Sure, a public law body is perfectly entitled to say in a given case that Strasbourg caselaw on its correct interpretation doesn't entitle an applicant to the particular thing she is looking for – let's not get prissy about demanding that people be model litigants. But public bodies should be on board with the basic principle that the courts should consider relevant Strasbourg jurisprudence, autonomously if not otherwise raised, and factor it in where it is relevant with due regard to submissions on its meaning and relationship to the case.

Whether there are substantial grounds

68. We can turn then to the issue of substantial grounds. Given the sub-optimal way in which the pleadings are drafted, this is going to have to involve looking at the issues raised both in the grounds proper and in the reliefs. The first ground is:

> "i. The Applicant and his family's dwelling is located on the local road used to access and egress the subject matter quarry development."

69. That is factual background and not a ground of challenge. The next ground is:

> "ii. The Applicant has made submissions to Galway County Council and on appeal to An Bord Pleanála during the planning application for the Coshla quarry development;"

70. That is also factual background. The third ground is:

> "iii. The Applicant and his family's dwelling water supply is from a private water well which is supplied from the same regionally important and vulnerable aquifer as the quarry development site. The aquifer is recorded as highly vulnerable to pollution and can provide rapid conduits to sensitive receptors such as the Applicants water well."

71. That is a statement of fact and not a legal ground as such. The fourth ground is:

> "iv. The Respondent has erred in law and in fact by not taking proper account of the, denials by the Notice Party of past flooding at the quarry development site, the inaccuracies and discrepancies contained within the Environmental Impact Assessment Report with regard to it limiting its flood risk assessment to that of Fluvial flooding risk and disregarding Pluvial flooding which has occurred and is recorded within the Galway County Strategic Flood Risk Assessment as having occurred at the subject matter quarry development site;"

72. That is all well and good but it doesn't amount to a ground on which to challenge the amendment as such. It relates to the original permission. The location of the extraction site is included in condition 1 by implication and was not created as an issue by the new condition 6.

73. The next paragraph is:

> "v. The Respondent erred in law and in fact by its contravention of both the Galway County Development Plan 2015 – 2021 and Galway County Development Plan 2022 – 2028, due to the replacing of condition number 6 to permit development within a flood risk zone while having express notice of the quarry site's history of flooding."

74. This ground, while purporting to relate to condition 6, does not amount to a substantial ground to challenge the amendment generally or that condition in particular. The point pleaded is that the board permitted development within a flood risk zone but that was something permitted by the original permission and in particular condition 1. The applicant hasn't pleaded anything specific to condition 6 that was unlawful.

75. The final set of propositions under the heading of grounds is as follows (the two paragraphs under the heading "Particulars Clerical Error"):

> "The Respondent relies upon the notion that a 'clerical error' has occurred as the reason to facilitate the replacement of the number 6 condition; when in law and in fact the meaning and definition of a clerical error has been held by the Supreme Court (Hardiman, Fennelly and Macken JJ) in Sandy Lane Hotel Limited v Times Newspapers & ors [2011] 3 I.R. 334, that a clerical error was an error which arose from the mechanical process of writing, transcribing or copying and is entirely distinct from an error which arose from lack of knowledge, mistaken belief or wrong information;
>
> The Respondent's reliance on its purported clerical error, when compared with the definition of a clerical error held by the Supreme Court in Sandy Lane Hotel, would dictate that the Boards dependence on a purported clerical error to facilitate the replacement of a condition and its reason with another completely different one, as in this case, is null, void and of no force or effect."

76. The applicant's point here is that the amendment to condition 6 goes beyond the clerical and is in the realm of correction of a mistake.

77. I don't think the amendment to condition 3 is encompassed by these paragraphs, but if it is, I don't think such a complaint has been made out. There doesn't seem to be enough on the material to say that merely deleting the erroneous surplusage "sand and gravel" goes beyond the clerical.

78. The critical point here is that, at the risk of repetition, we are reviewing the actual decision, not writing a new one. The decision made was pursuant to a specific statutory power that is limited to the clerical. Based on a comparison between the very different wording of the original and revised condition 6, the applicant has shown substantial grounds to argue that the significant wording change to condition 6 goes beyond the merely mechanical process of writing and copying and thus generally beyond the clerical.

79. As a reminder, the original condition 6 was:

> "6. No extraction of aggregates shall take place below the level of the water table and shall be confined to a minimum of five meters above the winter water table as specified.
>
> Reason: To protect groundwater in the area."

80. The new condition was

"6. The extraction area, including the depths, shall be as indicated in s. 3.3.1 'Proposed extraction area' of the Environmental Impact Assessment Report received by the planning authority on the 21st day of April, 2020.
Reason: In the interests of clarity."

81. That is quite a difference in wording, as appears if nothing else from the fact that the concerns about protection of groundwater have disappeared and been replaced by a new concern for clarity. The difference is such that one can conclude that there are substantial grounds for saying it is not an error of the mechanical process of writing and copying. As regards the location of the extraction area specifically, that isn't a new point created by amendment because condition 1 says that the permission was granted in accordance with the plans and particulars submitted. It is very far from clear what the purpose of the new condition 6 is in any event and what the circumstances of its conception and insertion were.

82. Even if clerically the board could explain the deletion of the old condition 6, why add a new condition 6? That seems to be a new decision or point and the board certainly haven't said that what is now in condition 6 is what they intended to say all along but failed to provide for due to a slip in writing and copying.

83. So leave should be granted for these complaints. However in the interests of clarity the applicant should define the complaint by making reference to the specific relevant provision, namely alleged breach of s. 146A(1)(b)(i) of the 2000 Act.

84. Making all due allowances for the applicant being a litigant in person, he has set out some of his other grounds under the heading of "reliefs". I don't think this should be disqualifying and would amount to a purely technical basis to limit a case which has been part of his pleadings from the outset.

85. Leaving aside D1, which *is* a proper relief, the next point is:

"2. A Declaration that the Respondent has failed to make a decision in this matter in compliance with section 146A(1) of the Planning and Development Act 2000, as amended;"

86. I don't think this adds anything because the more specific breaches are referred to elsewhere in the pleadings.

87. Paragraph D3 reads:

"3. A Declaration that the complete replacement of a term or condition and the reason thereto, of a planning permission, cannot, with regard to said Respondent's Board Order, be deemed to be lawfully made due to an alleged clerical error;"

88. While this may not go massively beyond what the applicant already has in his grounds section, there are substantial grounds to include this complaint, with the deletion of the words "a declaration that" and by moving it to under the grounds heading.

89. The next paragraph is:

"4. A Declaration that it is ultra vires the Respondent to rely on their claim that in accordance with section 146A(1) of the Planning and Development Act 2000, as amended, wherein the Respondent overturns and replaces a condition and so purports to amend the decision to grant permission dated the 23rd day of August 2023 due to an alleged clerical error;"

90. That is just a repetition of points made elsewhere.

91. Paragraph D5 is:

"5. A Declaration that the Respondent's Board Order ABP–308549-20 , made on or about 23rd August 2023 which was then purportedly amended by a subsequent Board Order ABP–308549M-20 made on or about the 15th day of November 2023 has materially altered the terms and conditions of the subject matter quarry development;"

92. Again, with the deletion of "a declaration that" and moving this paragraph to under the grounds heading, there are certainly substantial grounds for arguing this point. Again however in the interests of clarity the applicant should define this by adding reference to the specific provision allegedly relevantly breached, that is that the decision was contrary to s. 146A(2) of the 2000 Act.

93. Leaving aside D6, para. D7 is:

"7. A Declaration that the Respondent has failed to make an Order in accordance with the Environmental Impact Assessment Regulations;"

94. Unfortunately this is far too vague to be a proper basis of challenge.

95. Paragraph D8 reads:

"8. A Declaration that the Respondent has denied to the Applicant proper procedures during the decision making process in its purported amendment of the aforesaid order;"

96. In the absence of any specific proper procedure being identified, or the basis for it, this does not amount to a substantial ground.

97. Paragraph D9 is:

"9. A Declaration that the said Order of the Respondent, made on or about the 15th day of November 2023 is null, void, of no effect and ultra vires the Respondent - it being inter alia a material contravention of the Galway County Development plan."

98. As noted above, any argument about contravention of the plan arose at the stage of the original permission, not the amendment.

99. Paragraph D10 provides for:

"10. A Declaration that the said Order of the Respondent, made on or about the 15th day of November 2023 has been made contrary to the Applicants Constitutional, natural and legal rights."

100. Again no rights are identified and no basis to say they have been breached. So no ground can be extracted from this either.

101. The only relevant relief on which leave should be granted is D1 with the exclusion of reference to condition 3(a). There is no need for any declarations or in particular the elaborate declarations at D2 to D5 and D7 to D10 which, as noted above, are in reality grounds of challenge rather than necessary reliefs. The applicant can have leave to seek costs protection at D6 and the *pro forma* reliefs at D11 and D12 for further and other relief and costs.

102. The relevant grounds on which leave is granted are the two paragraphs under the heading "Particulars Clerical Error" and amended grounds based on D3 and D5 and moved from the reliefs section to the grounds section with particularisation regarding the relevant sections, as stated above.

103. The applicant can also insert a section on Factual Grounds at the end of the legal grounds, and provide any necessary factual narrative including what are now grounds i-iii.

104. I am by no means overlooking the prejudice to the notice party averred to on their behalf. And while judicial review is a branch of equity and therefore discretionary, one can't simply exercise discretion against applicants merely because notice parties benefit commercially from decisions and hence may lose commercially if decisions are challenged. Discretion has to be exercised within well-floodlit contours regarding matters such as abuse of the system, mootness and so on. It is not a general get-out clause. The normal way to address the financial hardship to the notice party is to ensure as early a hearing as possible, and the court will endeavour to facilitate any application in that regard.

105. All that said, I don't know if I could beg forgiveness for wondering whether judicial determination of this particular action is the only, or the quickest, way in which the terms of the original permission could be reviewed, but that is of course a matter for the parties.

106. As a final comment, if the parties prefer to saddle up for combat rather than look at alternatives, one might normally be inclined to draw the applicant's attention to the desirability of seeking legal representation. That may be easier now that he has leave, if it's something he wants to explore. The legal system in general and planning law in particular is a minefield, with vast numbers of new mines being laid every day by courts at all levels, in Leinster House, through the making of regulations by Ministers, in the rules committee, and by way of soft law and academic writing, before we get to the vast output of Brussels, Luxembourg, Strasbourg and Geneva. No lawyer could keep up with it all, so a layperson would need an even greater amount of luck, skill or both to keep above water.

Summary

107. In outline summary, without taking from the more specific terms of this judgment:

(i) the term "made" in O. 84 RSC as applied by s. 50 of the 2000 Act means that time stops for an application directed to be made on notice when the motion is issued;

(ii) the term "made" should be construed to mean that where the Central Office directs or instructs a personal litigant to issue a motion, time stops at that point, even if the direction was based on a misunderstanding or disregard of rules of court, unless such a direction is countermanded by the court before it is relied on to the applicant's detriment;

(iii) that is the case anyway but such a conclusion is reinforced where an applicant is not legally represented, and/or is not given correct information, and/or is given misinformation, and/or where the opposing parties did not take steps to apply to the court to set aside such a direction either at all or prior to the applicant's reliance on it causing detriment;

(iv) to fail to construe the legislation and/or rules of court as to time limits in a way that preserves an applicant's right of access to the court in such circumstances would violate art. 6 ECHR and corresponding EU and constitutional rights;

(v) applying that here, the application was "made" when the directed motion was issued on 5th January 2024 and was therefore within time;

(vi) subsequent events were irrelevant because the application had already been made;

(vii) even if contrary to that, subsequent events were not irrelevant, the confusion created by the Central Office was still operative and the applicant should not be

disadvantaged for following the logic of their directions and/or where he had not been informed of the correct procedure; and

(viii) there are substantial grounds to argue that the changes to the terms of condition 6 in the amended permission as compared with the original permission (including by reference to its complete substitution and/or the introduction of new matter) are such as to:

i. go beyond the mechanical process of writing or copying, and therefore as not to constitute clerical error (but instead some other form of error or misunderstanding or subsequent change of mind) and thus was not something that could lawfully be done under s. 146A(1)(b)(i) of the 2000 Act; and/or

ii. amount to a material alteration of the terms of the development contrary to s. 146A(2) of the 2000 Act;

(ix) the applicant should therefore be granted leave to apply for judicial review, subject to the directions as to the terms and extent of such leave as set out in the judgment.

Order

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

(i) the application for leave to seek judicial review be granted on standard terms subject to this order, but limited to:

(a). reliefs D1 (with the deletion of reference to condition 3(a)), D6, D11 and D12; and

(b). the following grounds:

I. the grounds set out in two paragraphs under the heading "Particulars Clerical Error" with the addition of reference to the specific relevant provision, namely alleged breach of s. 146A(1)(b)(i) of the 2000 Act;

II. the ground in D3, to be amended by the deletion of "a declaration that" and by being moved to under the "grounds" heading; and

III. the ground in D5, to be amended by the addition of reference to the specific relevant provision, namely alleged breach of s. 146A(2) of the 2000 Act, and by the deletion of "a declaration that", and by being moved to under the "grounds" heading;

(ii) the applicant be directed to file an amended statement of grounds within 2 weeks from the date of this judgment deleting matters on which leave is refused but also including a new section on Factual Grounds at the end of the legal grounds, providing any necessary factual narrative including what are now grounds i-iii;

(iii) the applicant be directed to issue an originating notice of motion (seeking the limited reliefs on which leave is granted) within 2 further weeks (i.e., within 4 weeks from the date of this judgment) returnable for Monday 10th June 2024; and

(iv) the question of the applicant's expenses be reserved.