

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 1
[2020 No. 806 JR]

BETWEEN

STEVEN O'RIORDAN

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

MKN INVESTMENTS LIMITED

AND CALTRACK LIMITED TRADING AS OMNI PARK SHOPPING CENTRE CONSORTIUM

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on Thursday the 21st day of January, 2021

1. At a board meeting held on 25th August, 2020, An Bord Pleanála decided to grant planning permission to the notice parties for the construction of 324 apartments in three blocks, an 81 bedroom aparthotel, a crèche, a café/restaurant/retail unit and associated development to the northeast of the Omni Park Shopping Centre in Dublin 9. That outcome was embodied in a board decision dated 1st September, 2020, and the formal grant of permission was made by order of the board on 3rd September, 2020.
2. A letter was issued to the applicant (who had been an objector) on 4th September, 2020, informing him of the decision. That was received on 7th September, 2020. The letter notified the applicant of the eight-week period to bring an application for judicial review.
3. The applicant first endeavoured to make the application for leave to seek judicial review on 30th October, 2020 by contacting the Courts Service to seek to lodge papers. Ultimately a statement of grounds was filed on 2nd November, 2020 and the matter was listed before Meenan J. on 16th November, 2020, was adjourned for a week, and was ultimately transferred to the Commercial Planning and Strategic Infrastructure Development List on 26th November, 2020. On the latter date I ordered that leave would be on notice including to the (at that stage proposed) notice parties.
4. On the adjourned date of 10th December, 2020, I formally joined the notice parties and directed the applicant to serve a motion under s. 50A(2)(c) of the Planning and Development Act 2000 seeking leave on notice as well as seeking an extension of time together with an amended statement of grounds and supporting affidavit. The motion was not issued, but no point is actually taken on that.
5. On the adjourned date of 21st December, 2020, I heard the application for an extension of time. I have received helpful submissions from the applicant Mr. Steven O'Riordan, *pro se*, from Ms. Aoife Carroll B.L. for the board and from Mr. Brian Foley S.C. (with Mr. Jarlath Ryan B.L.) for the notice parties. Having heard the matter, I informed the parties of the order being made and indicated that reasons would be given later.

The test for extension of time

6. Section 50(6) of the 2000 Act requires that an application for judicial review to which the section relates be made within a period of eight weeks beginning on the date of the decision in question. Subsection (8) provides that the court may extend that time, but only if:
 - (a). there is good and sufficient reason for doing so; and
 - (b). the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension.
7. While there was some debate about both limbs of the test, in the present case the focus has really been more on s. 50(8)(b) and on whether the circumstances in question were outside the control of the applicant.

The impact on the rights of private law actors

8. As distinct from an extension of time in a purely public law or human rights context, where the only other actors are public law entities, a planning judicial review potentially causes prejudice to private law actors such as the developers here. That reality of prejudice necessitates a stricter approach to extension of time. The key point was identified by Barr J. in *Reidy v. An Bord Pleanála* [2020] IEHC 423 (Unreported, High Court, 31st July, 2020), at para. 39, that "*[i]n essence, strict time limits were imposed so as to give certainty to those who had obtained lawful permissions under the relevant statutory code to embark on development or other activity, safe in the knowledge that once the relatively short time period expired, they were free to proceed on the basis of the lawful permission that they had obtained*".
9. Clarke J., as he then, was in *Kelly v. Leitrim County Council* [2005] 2 I.R. 404 at 412-413, noted that among the relevant factors for extension of time were "*[t]he question of whether third party rights may be affected*" and "*the nature of the issues involved*" including human rights consequences in a deportation context, citing *C.S. v. Minister for Justice* [2004] IESC 44, [2005] 1 I.L.R.M. 81. Those elements reinforce the point that the purely human rights or entirely public law context is different to one such as planning law, where a significant impact on private law third parties may be anticipated.

The time period does not begin when the decision is notified

10. It is clear from *Reidy* at para. 44 *per* Barr J. that the time period for the purposes of the 2000 Act is calculated from the date of the decision itself and not from the date the applicant finds out about the decision (see also *Kelly v. Leitrim County Council* at para. 9). It may be that in certain circumstances not finding out about the decision for a significant period for particular reasons might well be a basis for an extension of time, but that is a separate question from when time begins.

The time period does not exclude bank holidays or vacation periods

11. There is no provision in the 2000 Act for the exclusion of bank holidays from the calculation of the eight-week period. Section 251 of the Act excludes the period between 24th December and 1st January inclusive, but there is no other relevant provision and certainly none of benefit to the applicant here.

Time is not extended by virtue of the COVID-19 emergency in the absence of a ministerial order to that effect

12. Section 9 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 inserted s. 251A in the 2000 Act which allowed for a disregard of certain periods during the Covid emergency. That came into operation on 29th March, 2020 by virtue of the Emergency Measures in the Public Interest (Covid-19) Act 2020 (Part 3) (Commencement) Order 2020 (S.I. No. 100 of 2020). The period up to 20th April, 2020 was disregarded by virtue of the Planning and Development Act 2000 (Subsection (3) of Section 251A) Order 2020 (S.I. No. 129 of 2020), then up to 9th May, 2020 by the Planning and Development Act 2000 (Subsection (4) of Section 251A) Order 2020 (S.I. No. 131 of 2020) and finally up to 23rd May, 2020 by the Planning and Development Act 2000 (Subsection (4) of Section 251A) (No. 2) Order 2020 (S.I. No. 165 of 2020). Section 251A of the 2000 Act is essentially defunct thereafter because it only provides for a one-off extension (albeit itself extendible). Any further extensions are a matter for primary legislation. Indeed the Planning and Development, and Residential Tenancies, Act 2020, s. 5 allows disregard of certain periods during emergencies from time-to-time, but that is all very much dependent on government decisions in each case.
13. While we are on the subject of the latter Act, I hope I can be forgiven for noting in passing that the short title of that Act awkwardly and anomalously contains superfluous commas. One can only hope that this was a one-off lapse and does not become a general practice as it adds nothing to the ease of citation of legislation. Punctuation is a drafting matter for the Office of the Parliamentary Counsel, and adding commas in such an inappropriate manner contrasts unfavourably and conflictingly with the bold decision to drop commas from before year numbers, even where this was provided for in primary legislation (see s. 14(3) of the Interpretation Act 2005).

Ignorance of the law is not a basis for an extension

14. It is clear from *Reidy v. An Bord Pleanála per Barr J.* at para. 53, that mere unawareness of the limitation period or as to how it is to be calculated is not a basis for an extension of time.

The fact that the applicant is a lay litigant is not a basis for an extension

15. It is true that the courts generally give some latitude to lay litigants, but that "*does not mean that they are not bound by the same rules and procedures as other litigants*", per Barr J. in *Reidy* at para. 45.

The shortness of the delay is not relevant

16. I appreciate that the natural human tendency is to overlook *de minimis* errors and short delays, but it is clear in the planning context at least that the fact that the delay is short is not relevant: see *e.g. Casey v. An Bord Pleanála* [2004] 2 I.L.R.M. 296, *Kelly v. Leitrim*

County Council and Irish Skydiving Club Ltd. v. An Bord Pleanála [2016] IEHC 448
(Unreported, High Court, 29th July, 2016).

When did time actually expire?

17. Applying the foregoing principles to the present case, it is clear the time expired eight weeks from the date of the decision. The decision being on 3rd September, 2020, time expired on 28th October, 2020.

Whether time should be extended here

18. Mr. O’Riordan’s latest affidavit (incorrectly entitled “*Amended Affidavit*”) offered a number of explanations as follows:

- (i). the letter from An Bord Pleanála was received on 7th September, 2020 - that is correct, but that in itself is not a basis for an extension of time;
- (ii). he was under the impression that time might have been calculated from the date of the letter - again the applicant’s misunderstanding is not a basis for an extension of time;
- (iii). there was a bank holiday during the eight-week period - that is irrelevant as is the applicant’s misunderstanding about it;
- (iv). he states that “*with all urgency*” he went to a solicitor and requested that his papers be “*stamped and approved*” which seems to mean the swearing of papers that he drafted himself; however, no date for doing this is specified and no explanation has been offered as to how that amounts to a delay outside of the applicant’s control, without which he would have been able to comply with the time limit;
- (v). reliance is placed on dealings with the central office and the Courts Service after 30th October, 2020 - that is all irrelevant because that is after the expiry of the time limit so it cannot amount to a circumstance outside the applicant’s control preventing him from making the application within the time limit;
- (vi). reliance was placed on the pandemic and the fact that Ireland entered level 5 restrictions on 21st October, 2020 - the applicant claims baldly that this “*impacted upon my ability to lodge the relevant documentation*”; but that claim falls flat because he did not try to lodge any documentation before the expiry of the limitation period so problems that arose after he did so try could not be a basis for satisfying s. 50(8)(b) of the 2000 Act; and
- (vii). in oral submissions he made reference to being a lay litigant, but that does not change the substantive legal requirements, especially where there is prejudice to third party private law entities as here.

19. Consequently, the applicant clearly does not satisfy s. 50(8)(b).

Order

20. For those reasons, the orders made were as follows:

- (i) on 10th December, 2020, I added the two corporate developers formally as notice parties; and
- (ii) on 21st December, 2020, I refused the application for extension of time and dismissed the application for leave to seek judicial review as being out of time.