

THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 238
2021 No 771JR

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000
AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL
TENANCIES ACT 2016

BETWEEN

DAVID KELLY, JULIE KELLY,
TONY DALTON, MARY DALTON,
SEAN MOONEY, GRAINNE MOONEY,
MAIRE FORRESTOR, ROSALIND MATHEWS

APPLICANTS

AND

AN BORD PLEANÁLA,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ATLAS GP LIMITED

NOTICE PARTY

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JUDGMENT OF MR JUSTICE HOLLAND delivered the 28th of April 2022

INTRODUCTION & BACKGROUND

1. By Order made the 14th of December 2021, in these proceedings and on foot of an ex parte application in substance moved that day, I granted to the Applicants leave to seek judicial review of the decision² (“the Impugned Permission”) of the Respondent (“the Board) made the 8th July 2021 to grant to the Notice Party (“Atlas” – a company in the Martlet Property Group³) planning permission for the construction of a strategic housing development⁴ of 255 residential units, a childcare facility and associated works at lands of about 2.5 hectares off Church Road, Killiney, County Dublin (“the Site”). In doing so I gave the Applicants liberty to amend in certain respects the Grounds upon which a formal application had been made on 12th August 2021 to “stop the clock” for purposes of the statutory time limit for the making of an application for leave to seek judicial review. I also stayed development on foot of the impugned permission pending further order and in contemplation of an inter partes application for such a stay in due course. No Statements of Opposition have yet been filed.

2. The Applicants are local residents living near the Site and all participated in the planning process before the Board.

3. This judgment was to address two motions heard together. The papers in the two motions are relatively brief but the parties are agreed that I may have regard to such other papers in the proceedings as I find of assistance. As Hardiman J said in **Adam & Iordache**⁵, any order made *ex parte* is provisional only. It is subject to being set aside on foot of an inter partes hearing. Atlas issued a motion to set aside the leave which I had granted. The Applicants issued a motion for a stay, pending trial of these proceedings, of development on foot of the Impugned Permission. The Board played no part in either motion. During the hearing, the parties agreed to adjourn the motion for a stay to the trial of the action. I did so on terms which need not be recorded here. Accordingly, this judgment addresses only the motion to set aside leave.

4. These proceedings are part of a series of litigation. Since the clock was stopped in judicial review, Atlas has commenced plenary proceedings as follows:

- Proceedings 2021/5608P served 30th September 2021 against the Applicants alleging defamation and seeking injunctions accordingly. These proceedings arise out of the contents of a “flyer” which sought to raise community support for opposition to Atlas’s proposed development. While I have seen only the Statement of Claim in that case, it seems clear on the affidavits to

1 The “Clock” had earlier been stopped for purposes of judicial review time limits by an application formally seeking leave.

2 ABP Ref 309807- 21

3 The general counsel of the Martlet Property Group swore an affidavit for Atlas in these proceedings.

4 Within the meaning of The Planning And Development (Housing) And Residential Tenancies Act 2016

5 Adam. Iordache & Others v The Minister For Justice, Equality And Law Reform, Ireland And The Attorney General, [2001] 3 IR 53

hand that all relevant matters are likely to be in issue – including the identity of the publishers of the flyer.

- Proceedings 2021/6059P issued on 2nd November 2021, against the Applicants Sean and Grainne Mooney, claiming damages for defamation of title, nuisance, breach of restrictive covenant, breach of easement and claiming that the Mooneys are estopped from challenging the Impugned Permission. These proceedings assert that the Mooneys, as owners of a home built on land formerly held with the Site by Atlas’s predecessors in title and sold by those predecessors to the developers of what is now the Mooneys’ home, are bound by a covenant, in a deed of sale dated 22nd November 2000 from Atlas’s predecessors in title to those developers, that those developers would not object to any planning permission in respect of the site.
- Proceedings 2021/6260 issued on 11th November 2021 against the Applicants alleging champerty and maintenance by way of the illegal funding of these proceedings by third parties – essentially and allegedly other local residents and residents’ associations - and seeking injunctions restraining the prosecution of these proceedings and the identification of the alleged third parties. A motion for interlocutory injunctive relief is for trial in May 2022 in the Chancery list. Those allegations remain to be considered in those proceedings and did not form part of the basis on which Atlas, in these proceedings, sought to set aside leave.

5. As to the proceedings against the Mooneys, Atlas’s grounding affidavit in the motion to set aside leave, asserts that *“the purchasers of Nos. 1 - 5 St Matthias’ Wood, [including the Mooneys] were on notice that the Site would be developed out on scale and that they further covenanted that they would not object to the application for planning for the Site.”* This repeats an identical averment by Pat Crean, a director of Atlas, by Affidavit sworn 11th August 2021. Mr Crean had exhibited the deed alleged to contain such covenant and Atlas’s grounding affidavit exhibits it again. In such circumstances of repetition, it seemed clear that Atlas intended some stress, in the motion to set aside leave, on this alleged covenant. But at hearing counsel for Atlas disavowed such reliance. This may have been wise as, though I need not now and do not decide the matter, it is by no means necessarily obvious that the deed justifies the bluntly stated averment of a covenant not to object to such a planning application. It certainly does not do so in express terms. Whether it does so implicitly is not for decision in this motion given the position now taken by counsel for Atlas.

6. The Applicants characterise the various actions taken by Atlas as SLAPP⁶ litigation. Atlas deny the accusation and assert that they are simply asserting their various rights as they are entitled to do. Neither side formally seeks that I determine whether the actions taken by Atlas are SLAPP litigation - though the Applicants characterise the motion before me to set the proceedings aside as another front in what they say is Atlas’s SLAPP campaign. It does not seem to me that I can, on the evidence before me, or should in the motions before me and in the absence of detailed argument, make a finding whether Atlas is engaging in SLAPP litigation and, if so, whether the motion before me to set the proceedings aside is part of a campaign of SLAPP litigation by Atlas. Indeed, as far as I

6 Strategic Litigation Against Public Participation

am aware the parameters in law of what may be termed SLAPP litigation, whether it is wrongful in law – for example as a form of abuse of process - the conditions for a finding of its presence and the consequences of such a finding have not, as yet, been the subject either of case law or legislation. However, the issue is certainly topical, and it would not be surprising if a Court were to address it in a suitable case. My declining to address the issue is particular to the motions before me, the evidence before me and the arguments made to me. It is not intended to preclude the issue otherwise being addressed.

7. The affidavits of both sides in both motions are characterised by argument and material proper to submissions rather than affidavit. That is, at least, regrettable and that observation applies to both sides. While it is unrealistic and impractical to be rigid or doctrinaire on the issue given that affidavits will inevitably need to set relevant facts in context to render them and their alleged relevance to the issues comprehensible, nonetheless and, as a general principle, affidavits should, as far as is practical, be confined to assertions of fact. That requires a certain exercise of judgment and proper restraint in the knowledge that the opportunity to make argument and submissions will arise in due course.

8. Without negating my observation that both sides – the Applicants and the Notice Party – have not adhered to the relevant principles in this regard, some averments in this case are particularly to be deprecated. Atlas’s grounding affidavit in the motion to set aside leave contains the following:

“The ability to supply housing to the market is entirely undermined if the decisions of An Bord Pleanála are readily set aside by applicants relying on legal points which have little or no bearing in relation to their actual complaints.”

This passage is argumentative and hyperbolic. Decisions of An Bord Pleanála are not “readily” set aside in the sense in which that word is clearly used here – they benefit in law from the presumption of validity and are set aside only if the Court considers that there are proper legal grounds to do so. There is no evidence adduced, or of which I am otherwise aware, to justify what appears to be a general statement that where such decisions are set aside on proper legal grounds “*The ability to supply housing to the market is undermined*” – much less “*entirely*” undermined. Further, the implication clearly is that the necessity of not undermining the housing market would justify not setting aside a decision even were it legally infirm. While relief in judicial review is discretionary, the averment was not placed in such a context and the implication I have identified is regrettable.

9. A feature of Atlas’s position in both motions is that, for reasons to which I will come, the Applicants’ reliance on environmental grounds on which they impugn the Impugned Permission is insincere in that Atlas says the Applicants in truth “*care little or nothing*”⁷ about the environmental concerns they articulate in the Amended Statement of Grounds (“the Grounds”) but raise them

7 Affidavit of Pat Crean 18/10 21 §23

merely as a means of advancing an ulterior anxiety to frustrate Atlas's proposed development. That is, of course, a point Atlas are entitled to make in pursuance of an argument that the Applicants lack standing in consequence of their alleged insincerity.

10. In pursuit of that argument Atlas, by replying affidavit in the motion to set aside leave, makes certain criticisms – some well-justified - of the affidavit of the deponent for the Applicants, including that the deponent had inappropriately deployed arguments as to housing policy and unwarranted arguments in personam. However, the replying affidavit includes the following, and regrettable, allegation against the deponent for the Applicants:

“He fails to identify the fact that the cohort of people suffering from the shortage of housing is largely the generation beneath Mr. (Deponent). In many ways, this is an intergenerational dispute and controversy, with people established in their homes, like Mr. (Deponent), quite happy to deny the opportunity to others to have affordable housing in the same location because it may impact on their own enjoyment (as they perceive it).”

In this passage I have anonymised the impugned deponent not by way of formal decision in that regard or prohibition on his identification. Rather, I merely see no need to give the accusation against that person greater currency than is required for purposes of this judgment. As an averment by someone who has just deprecated arguments in personam it is, to put it mildly, surprising.

11. In recent cases the High Court⁸ has deprecated “*applicant-shaming*”. In **Enniskerry Alliance**⁹, in terms with which I respectfully agree, Humphreys J said of the question “*Who speaks for Earth?*”:

“Advocate General Kokott in Case C-260/11 Edwards v. Environment Agency, provided one answer: “the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations”¹⁰.

“... the ability of concerned NGOs and individuals to litigate on environmental matters is in practice crucially dependent on a range of preconditions.”

“Another precondition is a society that accepts the respective roles of the actors involved in environmental matters, including the right of applicants to invoke rights under the [Aarhus Convention] and related rights under Irish and EU law and the ECHR. Acceptance of such rights involves not just rejection of penalisation prohibited by the Aarhus Convention, or incitement to such penalisation and other related inchoate wrongs, but more generally repudiating applicant-shaming in cases where such rights are exercised.”

⁸ **Enniskerry Alliance And Enniskerry Demesne Management Company CLG V. An Bord Pleanála** [2022] IEHC 6 (High Court (General), Humphreys J, 14 January 2022), **An Taisce V. An Bord Pleanála (No. 2)** [2021] IEHC 422, [2021] 7 JIC 0205 (Unreported, High Court, 2nd July, 2021), **Save Cork City Community Association CLG V. An Bord Pleanála (No. 1)** [2021] IEHC 509, [2021] 7 JIC 2802 (Unreported, High Court, 28th July, 2021); **Cork County Council V. Minister For Housing, Local Government And Heritage** [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November, 2021)).

⁹ *Supra*

¹⁰ Opinion Of Advocate General, 18th October, 2012, ECLI:EU:C:2012:645, Para. 42

12. In similar vein, in **Save Cork City**¹¹ Humphreys J, speaking inter alia of citizens' constitutional right of access to the Courts, said:

"... parties are entitled to advance their objections or challenges under the Aarhus Convention and in accordance with law. That must be accepted. One has to be concerned about blaming or criticising applicants merely for the fact of engaging in rights of participation and challenge, insofar as such a practice could have the effect of disincentivising the actual exercise of Aarhus Convention rights, or rights under the Constitution (leaving aside abuse of process which most certainly doesn't arise here). Concerningly, applicant-shaming has now become a background feature in a number of planning cases. One must also bear in mind the strong Aarhus anti-victimisation provisions. One can only hope that drawing attention to the issue will help in some small way to stimulate more informed responses and a greater recognition of the entitlement to exercise rights of public participation ..."

13. It is easy to make the catch-cry of "NIMBYism"¹². But, as we shall see, the law has always recognised that those who live close to a development site and who will have to live with what is built on it have legitimate interests as to which they are particularly entitled to be heard before the planning authorities and before the courts. That is in particular because it is inevitable and accepted there are often legitimate but competing interests in play as between developers and local residents. The planning authorities – local and the Board – are the proper bodies to resolve and reconcile, not merely such disputes and differences, but the "loser" to his/her defeat by a demonstrably proper consideration and balancing of the issues in accordance with law. It is in those fora that the concerns of the hypothetical "Nimbyist" are to be addressed, and rejected if appropriate – as is, for that matter, the hypothetical rapacious developer seeking to maximise profit at the expense of all else. I do not suggest either of the present protagonists is in those categories – I merely seek to identify the forum proper to resolution of such disputes. But for that process in those fora to properly function and achieve such resolution it is essential that it proceed in accordance with law. Whether they be NIMBYists or not, objectors are entitled to have decisions to which they object made in accordance with law. Regrettably, but necessarily, the law in this area is complex and difficult. Experience and the caselaw show that, inevitably, such decisions are on occasion not made in accordance with law. Hence the right of access to the Courts, protected by the Constitution and EU Law and recognised in Human Rights Law, and the Aarhus Convention¹³ ("Aarhus"). In **Balz**¹⁴, O'Donnell J addressed the duty to give reasons in planning decisions in terms which seem to me applicable to the importance of the lawfulness generally of such decisions. He described reasons - as

"... fundamental to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be

11 *Save Cork City Community Association CLG V. An Bord Pleanála* [2021] IEHC 509 (High Court (Judicial Review), Humphreys J, 28 July 2021)

12 "Not In My Back Yard"

13 The United Nations Economic Commission For Europe Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters Done At Aarhus, Denmark, On 25 June 1998

14 *Balz V. An Bord Pleanála* [2019] IESC 90 (Supreme Court, O'Donnell J, 12 December 2019)

expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live.”

14. The environmental and environmental law issues raised in this case are not perhaps of the most alarming or strategic variety – an observation not intended to reflect on their validity or invalidity or to suggest that they are unimportant. But they are raised by local residents in respect of a decision with which, as O’Donnell J put it, they *“profoundly disagree, and with whose consequences they may have to live.”* I have no view on the merits: for all I know, any consequences may be minimal and the Applicants should perfectly well be expected to live with them. Atlas’s may be a very meritorious development. That is clearly the view of the Board to which that judgment is entrusted by law, to be exercised in accordance with law. But I agree with Humphreys J that the exercise of the right to test whether the judgment was exercised in accordance with law should not prompt the shaming of those who exercise that right.

15. I should record that Senior Counsel for Atlas at hearing took a very proper attitude and did not seek to rely on the averments described above. Thereby he did his client an appreciable service. Having expressed the views set out above, I have not been influenced in my substantive decision by those averments or my views thereon or, for that matter, by the argumentative character of certain content of the affidavits on both sides.

16. In their Statement of Grounds the Applicants say:

“The Applicants are residents who live in the area immediately adjoining the proposed development. The Applicants are not opposed to development of the site of the proposed development and have no particular objection to an already granted SHD development on the site. However, the Applicants are of the view that the development granted planning permission represents significant over-development of the site.”

17. While remembering that judicial review considers the legality, as opposed to the planning and other merits, of the Impugned Permission, given Atlas seeks to set leave aside by reference to its characterisation of the Applicants’ motives in prosecuting these proceedings, the following initial observations seem appropriate as arising from the foregoing:

- a. It is the express and strategic aim of the proceedings – indeed inevitable from their nature – that the Applicants seek to prevent the effecting of the development the subject of the Impugned Permission. They do so as they consider it would effect overdevelopment of the Site. There is nothing coy or vague as to their expressed intent in this regard.
- b. The Applicants say here that they have *“no particular objection”* to an already granted SHD development on the site. This is a reference to a 2018 planning permission which

will feature further in this judgment. At least some of the Applicants objected to the planning application which resulted in that permission. None sought to judicially review it.

- c. Some of the specific grounds stated in the Statement of Grounds relate to issues which could, at least in general terms, be considered to relate to concerns of overdevelopment. For example, Ground 1 asserts material contravention of the development plan as to the provision of open space; Ground 2 asserts excessive density; Ground 3 asserts material contravention of the development plan as to separation distances between apartment blocks; Ground 4 relates to material contravention of the development plan as to building height, Building Height Guidelines and sunlight/daylight standards; Ground 8 asserts material contravention of Development Plan Zoning Objective A that seeks to '*protect and/or improve residential amenity*' which, it is alleged, will result in severe loss of privacy, overlooking of gardens and houses, overshadowing, noise and nuisance to many surrounding properties as a result of a cramped and over-developed proposal that is clearly unsuitable for the site. Ground 12 asserts material contravention of the development plan by way of inclusion of an excessive number of 1-bed units.

18. Other grounds are less obviously related to overdevelopment concerns: Ground 5 complains of tree loss; Grounds 6 & 7 are technical grounds asserting that the screening determination that EIA was not required should have been preceded by a preliminary examination of the same question and also a failure to provide certain environmental assessment documents¹⁵; Ground 9 alleges erroneous screening out of EIA in light of effect on bats. Ground 10 raises issues as to bats by reference to the Habitats Directive¹⁶; Ground 11 asserts mistransposition of Article 12 of the Habitats Directive such that there is no system of strict protection for the protection of, *inter alia*, bats.

THE MOTION TO SET ASIDE LEAVE

Introduction

19. By Notice of Motion dated 23 December 2021, Atlas seeks, as here relevant, the following reliefs:

- An Order setting aside the grant of leave to seek judicial review
- An Order pursuant to the inherent jurisdiction of the Court striking out the application for judicial review as an abuse of the SHD process and/or as being brought for an improper and/or collateral purpose.

¹⁵ "A statement indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account".

¹⁶ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7)

Notably, the notice of motion does not seek orders:

- Setting aside leave only as to, or striking out, particular grounds on which leave was granted. In the event, that was the substance of the application Atlas moved.
- Setting aside my order as to amending the Statement of Grounds. In substance Atlas so moved.

However, the Applicants, while commenting on these factors as a “retreat” from the reliefs sought in the notice of motion, did not suggest that they were prejudiced thereby. I will consider the merits of the motion as actually moved.

20. As the motion was moved, the question does not now arise of setting aside in its entirety the leave to seek judicial review which I granted *ex parte* or of striking out the proceedings in their entirety. Atlas sought only that grounds 2, 3, 4, 5, 6, 10 and 11 be struck out. Perhaps paradoxically, that retreat from the application to entirely set aside leave – which, if successful, would have obviated the need for a trial - seems to me to amplify the logic behind the view, taken in the cases I consider below, of motions to set aside leave. The logic that such motions are often wasteful of time and costs seems to me to apply, *á fortiori*, to a motion to strike out particular grounds only, such that trial remains in prospect if the motion succeeds.

21. While there was some token resistance by the Applicants to the proposition, there was no real dispute but that a Notice Party such as Atlas has standing to apply to have leave set aside. At least in judicial reviews of the grant of permissions, licences, permits or the like to Notice Parties, it is often, in reality, the Notice Party as beneficiary of such a grant, rather than the decision-maker, who will suffer by any certiorari. Such a notice party has a legitimate interest in upholding the impugned decision and ordinarily can defend it even where the decision-maker does not - **Protect East Meath**.¹⁷ In that case, the notice party was not allowed to defend the decision as the Board had positively consented to certiorari in circumstances suggesting it had taken a genuine view on the substantive prospect of success or failure in the action. Here the Board, far from consenting to certiorari, for now stands mute. And even in **Protect East Meath** McDonald J held that there was no general rule preventing a Notice Party from defending a decision where the decision-maker had consented to certiorari – it depends on the circumstances. For present purposes it need only be said that the logic of **Protect East Meath** implies, at least generally, a right in a Notice Party to move a motion of the kind before me where the Board stands mute. In any event, the entitlement of a notice party to seek to set leave aside was recently accepted in **Dublin 8**¹⁸. Absent argument taking the case out of that general position, I will consider the motion on its merits.

22. The Applicants inevitably drew attention to the fact that the Board had not moved to set aside leave. While, as a practical matter, that deprives Atlas of the Board’s active support which might have assisted its application, in my view it does not diminish Atlas’s entitlement to have its motion considered on its merits.

¹⁷ *Protect East Meath Limited V. An Bord Pleanála* [2020 No. 44 JR] (High Court (Judicial Review), McDonald J, 19 June 2020) §49 & 50 and cases cited herein

¹⁸ *Dublin 8 Residents Association v An Bord Pleanála, Dbtr-Scr1 Fund & Ors* [2022] IEHC 116

23. The motion was moved on an unusual basis. Atlas did not seek by reference to the criterion that leave to seek judicial review in planning matters is to be granted only where the proffered grounds are “substantial”¹⁹, to set aside leave by attacking those grounds as insubstantial. Nor, by reference to the criterion that leave to seek judicial review in planning matters is to be granted only where the Applicants have a “sufficient interest in the matter which is the subject of the application,”²⁰ did Atlas dispute that, in the general sense, the Applicants have locus standi to prosecute these proceedings. As the Applicants are all local residents (at least some living adjacent the Site) and as all participated in the planning process before the Board, an argument to that effect would have been a very uphill struggle for Atlas - as the caselaw I consider below demonstrates.

24. The unusual basis on which the motion was moved was as follows. No doubt as the Applicants, in the ordinary way, undoubtedly had standing to prosecute this judicial review, Atlas argued that the interest of an Applicant, to be “sufficient”, must be “legitimate”. Atlas argued that the Applicants’ interest was not legitimate in that some, only, of the grounds on which they seek to quash the Board’s decision were not in truth grounds about which they care at all. This, at hearing, came to be referred to, not inaccurately, as the “insincerity” argument. Counsel for the Applicants, I think correctly, characterised it as an argument which, in respect of applicants who at very least presumptively by reason of proximity and/or prior participation had sufficient interest, sought to “delegitimise” that interest.

25. Given my observations above as to the content of affidavits on both sides, I had better say that, despite its pejorative connotations, Atlas’s “insincerity” argument, as made by reference to the particular grounds on which leave was granted, was a proper argument made on a proper evidential basis. In brief, Atlas argued that the Applicants had explicitly accepted the prospect of development on the Site on foot of the 2018 planning permission which, Atlas says, exhibits many of the characteristics to which the Applicants object in the Impugned Permission of 2021. Atlas does not argue that the Applicants are in law estopped by their acceptance of the 2018 permission from challenging the Impugned Permission of 2021 or any part of it. Rather it says that the Applicants’ acceptance of the prospect of development on foot of the 2018 Permission is clear evidence that their reliance, as against the Impugned Permission of 2021, on grounds equally applicable to the 2018 Permission which they accept, is insincere such that their interest in such grounds lacks legitimacy and hence is insufficient by reference to the requirement of sufficiency of interest set by S.50A PDA 2000²¹. The Applicants deny insincerity but rest more fundamentally on the assertion that their sincerity or otherwise as to the individual grounds on which they rely in seeking relief is irrelevant.

26. More conventionally, Atlas also argued that some of the Grounds represented points which

19 S.50A(3)(A) PDA 2000

20 S.50A(3)(B) PDA 2000

²¹ Planning & Development Act 2000

the Applicants had not made to the Board in the 2021 planning application. This, argument had two aspects. First, Atlas said it deprived the Applicants of standing on these points. Second, Atlas said it was additional evidence of insincerity as to the grounds in question - I am invited to infer that, if they truly cared about these points, the Applicants would have made them in the planning application.

27. An argument which had featured in Atlas's papers, that the Grounds were generic in the sense of being the same as grounds relied upon in other judicial reviews was, in my view wisely, not pursued. Counsel for Atlas properly observed that a Ground was either correct in law or it was not – whether it had been agitated in other judicial reviews is irrelevant. In this observation is left aside, of course, the possibility that the Ground had been dismissed in another judicial review such as to bind me and render the ground hopeless. But that argument was not made for purposes of this motion.

28. Notably also, and in my view wisely, the phrases “abuse of process” and “abuse of the SHD process”, which appeared in its Notice of Motion, were not deployed by counsel for Atlas at hearing. Nor do they appear in Atlas's written submissions.

Setting Leave Aside – the “Very Plain” test – Adam & Iordache²², Gordon²³ & other cases

29. The law as to setting aside leave to seek judicial review is generally thought to have been authoritatively laid down in **Adam & Iordache**. McGuinness and Hardiman JJ delivered judgments. That Murray J agreed with both deprives either of pre-eminence, which creates a difficulty given the argument, properly made by Atlas, that McGuinness J and Hardiman J differed in respects material to this case. The fact that Murray J agreed with both also suggests that there are no differences or that any are minor. But any impasse seems to me resolved in that subsequently, in **Gordon**, Fennelly J for a unanimous Supreme Court considered the issue and **Adam & Iordache**.

30. Atlas argued, understandably, that in **Adam & Iordache** Hardiman J had said that once it is accepted that the jurisdiction exists to set leave aside, “*it is difficult to justify any hard and fast restrictions on it*”. Atlas argued that this view was inconsistent with and preferable to that of McGuinness J that the jurisdiction should be exercised sparingly and only in plain cases. The Applicants argue that Hardiman J was just countering an argument that the jurisdiction is confined to specific instances such as material non-disclosure or lack of bona fides and was not disagreeing with McGuinness J. I tend to agree and it seems likely that Fennelly J in Gordon did also. In any event, I accept that the jurisdiction is not so confined.

31. Before moving to Gordon, I note that McGuinness J cited, it seems to me approvingly, the 3rd

22 Adam, Iordache & ors v Minister For Justice [2001] 3 IR 53

23 Gordon v The Director Of Public Prosecutions & District Judge McGuinness [2002] 2 IR 369

edition of **Hogan & Morgan**²⁴ as follows:

“The existence of such a jurisdiction was recognised by Carswell J (as he then was) in Re Savage’s Application²⁵. While recognising that the burden on a respondent who moved the court to have the grant of leave set aside was a ‘heavy one’, nevertheless:-

‘If on mature consideration of the facts, and with the benefit of the arguments presented to me by both sides, I now accept that there is not an arguable case on the facts, then I think the leave should be set aside.’

In effect, therefore, this jurisdiction to set aside is but an example in this particular context of a more general power to strike out on the ground that the proceedings are ‘clearly unsustainable’. If anything, however, this jurisdiction to set aside must be even more sparingly exercised, in that the granting of leave by the High Court presupposes in a way that the mere issuing of a plenary summons does not - that the case is at least an arguable one.”

Though this passage no longer appears in Hogan & Morgan – presumably as Savage is superseded by Adam & Lordache - I accept it as a correct statement of the law. I note where it assigns the burden on a motion such as this. However I do not see it, as Atlas suggests, as diluting or diminishing the strength of the view of McGuinness J that exceptional circumstances are required to set aside leave. Even if it expressed a less demanding standard, the views of McGuinness J and of Fennelly J in Gordon bind me. Though entitled to great respect, those of Carswell J do not. But in any event, I see no conflict between them.

32. **Gordon** concerned an application to set aside leave on the basis that the Applicant, instead of proceeding by judicial review, should have appealed his conviction, for driving with excess alcohol in his urine, on what he said was false evidence that the urine sample was taken in the toilet of a garda station medical room which had no toilet. Fennelly J said that the relevant principles had been recently and thoroughly examined in Adam & Lordache – *“particularly in the judgment of McGuinness J”* such that *“the resulting position can be summarised as follows”*. As here relevant, two of the principles Fennelly J listed are:

- *“once leave has been granted, the High Court has inherent jurisdiction to set aside the order granting it;*
- *this jurisdiction should be exercised sparingly and only in plain cases.”*

33. Fennelly J said that the *“concurring”* judgment of Hardiman J in Adam & Lordache *“confirmed the existence of the remedy to set aside leave, but did not express any view on the standard applicable on such applications.”* Fennelly J considered it significant that, on the facts of Adam & Lordache, Hardiman J had considered that leave should be set aside as the judicial reviews were *“all frivolous, vexatious and doomed to fail: indeed they are scarcely recognisable as legal proceedings at*

²⁴ Administrative Law in Ireland (3rd ed), Hogan and Morgan pp 708 to 709 under the heading “Appealing or setting aside the grant of leave”
²⁵ [1991] NI 103 at p 107

all” (Hardiman J had elaborated on this theme). By this I take Fennelly J to mean that even had Hardiman J propounded a different view of the law to that of McGuinness J, his view of the facts would inevitably have resulted in leave being set aside even on the view of the law taken by McGuinness J and on the “very plain” and “exceptional” test she set. That suggests that the view of McGuinness J represents the ratio of *Adam & Lordache*. In any event Fennelly J in *Gordon* so held, so the position is clear to that effect.

34. Fennelly J in *Gordon* cited McGuinness J, in *Adam & Lordache* as approving Bingham LJ in **Chinoy**²⁶ confirming that there is a jurisdiction to set aside leave “*which the court may exercise if it is satisfied on inter partes argument that the leave is one that plainly should not have been granted.*”. It is not a jurisdiction limited to circumstances such as nondisclosure by the Applicant in seeking leave ex parte or new factual developments since leave was granted. But as Fennelly J said, McGuinness J also approved the judgment of Bingham LJ as follows:

“I would however, wish to emphasise that the procedure to set aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave ex parte were to be followed by applications to set aside inter partes which would then be followed, if the leave were not set aside, by a full hearing. The only purpose would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked very sparingly and it is an order which the court will only grant in a very plain case. I am, however, satisfied, as I have indicated, that the court does have discretion to grant such an order if satisfied that it is a proper order in all the circumstances.”

35. Indeed, returning to **Adam & Lordache**, Hardiman J had cited, without apparent disagreement, the English Law Reform Commission²⁷, in turn citing Chinoy, for the English practice as it then was, to the effect that :-

“.. leave will only be set aside if the respondent can show that the judge's decision that the case was fit for further consideration and a substantive judicial review was plainly wrong.”²⁸

Again, we see not merely the standard, but where the burden lies.

36. Fennelly J further cites McGuinness J as follows:

“I would accept ... that this jurisdiction should only be exercised very sparingly and in a very plain case. The danger outlined by Bingham LJ in the passage quoted above would be equally applicable in this jurisdiction. One could envisage the growth of a new list of applications to

²⁶ R v Secretary Of State, Ex P Chinoy [1991] COD 381

²⁷ *Administrative Law: Judicial Review and Statutory Appeals* (1994). At para 9.4

²⁸ Emphases added

discharge leave to be added to the already lengthy list of applications for leave. Each application would probably require considerable argument - perhaps with further affidavits and/or discovery. Where leave was discharged, an appeal would lie to this court. If that appeal succeeded, the matter would return to the High Court for full hearing followed, in all probability, by a further appeal to this court. Such a procedure would result in a wasteful expenditure of court time and an unnecessary expenditure in legal costs; it could be hardly said to serve the interests of justice. The exercise of the court's inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases."

37. Fennelly J contained:

"It follows that the applicant for the order to set aside carries a heavier burden than the original applicant for leave. The latter has to show that he has an arguable case. The former has to establish that leave should not have been granted, a negative proposition. It is both logical and convenient to the administration of justice that this should be so. The leave procedure was intended to provide a filtering process, a protection against frivolous or vexatious applications. The judge at the ex parte stage will scrutinise applications for leave. Obviously his order decisions will not always be right. Hence the need to permit applications to set aside, where clearly unmeritorious²⁹ applications have slipped through the net. There is also a need to be able to set aside orders made where there has been a failure by the applicant to observe the principle of utmost good faith, of which the present case is not an example. On the other hand, to permit this option to operate as a pre-emptive hearing of the substantive trial would defeat the purpose of the judicial review machinery for all the reasons given by McGuinness J and Bingham LJ"

Yet again we see where the burden lies.

38. In my view, the use by Fennelly J of the words "*frivolous or vexatious*" here, as implying a yardstick for setting leave aside, must be treated with some caution in planning judicial reviews. Gordon was not a planning judicial review and in planning judicial reviews and as to the weight of the grounds, the filter at leave stage is set at "substantial", whereas in most non-planning judicial reviews it is set at "arguable". Thus, it may prove somewhat easier to set aside leave in a planning than in a non-planning judicial review. However, it remains that the jurisdiction is to be exercised only in very plain cases and that its exercise will be exceptional.

39. I am both bound and happy to accept the judgment of Fennelly J. I think it falls to be understood in the context that, unlike in most proceedings, which Plaintiffs can issue at will, leave is required to seek judicial review. If only ex parte, but strengthened by the Applicant's duties of disclosure and candour, the Applicant has had to show the court substantial grounds and sufficient interest. Such proceedings are less likely to be unarguable than proceedings the issuing of which

²⁹ Emphasised in oral argument by the Applicants

requires no leave. Yet nothing substantive is finally decided at leave stage nor is the decision-maker or the notice party deprived of or prejudiced in their substantive rights. Of course, to that proposition there is the very considerable qualification that delay pending trial may cause to a respondent or notice party genuine prejudice of financial and other kinds. But, unfortunately, that risk is inevitable in litigation of all kinds. The legal system does its best to mitigate that risk by, in the case of judicial review, first providing the filter of the leave application, second applying **Okunade**³⁰ principles of attempting to identify the least risk of injustice in any application to stay the operation of the impugned decision, and third by the statutory obligation imposed on the Courts by S.50A(10, 11 & 12) PDA 2000 to determine planning judicial reviews “*as expeditiously as possible consistent with the administration of justice*”. While the practicalities of the administration of justice, the complexity of many cases of this type and the necessary system of appeals and even references to the CJEU may unavoidably diminish in practice the reassurance offered by S.50A in this regard, nonetheless the obligation subsists.

40. McGuinness J reiterated her views on these issues for a unanimous 5-judge Supreme Court in **C.S. v. Minister for Justice**³¹ – citing her own judgment in Adam, that of Bingham LJ in Chinoy and that of Fennelly J in Gordon. Notably, Hardiman J was one of those agreeing with her in **C.S.**.

41. I was also referred to **RJG**³² - a case in which Herbert J viewed, as I do, the law governing applications to set aside as having been stated in Adam & Lordache and in Gordon. Herbert J summarised the law, in terms which I respectfully accept, as establishing an inherent jurisdiction to set aside a leave order made by the High Court ex parte. This jurisdiction should be exercised sparingly and only in very clear cases. The burden of proof is on the applicant to establish that leave should not have been granted and is a heavy one. There are otherwise no hard and fast restrictions on the exercise of this jurisdiction. It can be exercised for mala fides but mala fides is not necessary. It can be exercised, for example, for want of sufficient interest, for non-disclosure ex parte, where the court was misled ex parte or for material change of circumstances since leave was granted. More generally, it can be exercised “*In any case, where the Court is satisfied on inter partes argument that the leave was one which very plainly should not have been granted.*” Echoing the practical concerns of McGuinness, Bingham and Fennelly JJ, Herbert J said, “*The Court must not permit applications to set aside leave to operate as pre-emptive hearings of the substantive trial.*” The case is notable in again explicitly assigning the onus of proof in such an application to the party seeking to set aside leave. Other than that, RJG is of no particular significance to the present case as leave was set aside in RJG for non-disclosure only – an issue which does not arise here.

42. In the recent **Dublin 8**³³ case, Humphreys J noted that “*the jurisdiction to strike out a leave order should be sparingly exercised and only in a plain case where leave should never have been granted. In all other cases the issues should be left to the trial of the action.*” He noted that “*an order*

³⁰ Okunade v Minister for Justice [2012] 3 IR 152

³¹ 2005 1 IR 343

³² RJG (Holdings) Ltd v The Financial Services Ombudsman [2012] IEHC 452

³³ Dublin 8 Residents Association v An Bord Pleanála, Dbtr-Scr1 Fund & Ors [2022] IEHC 116

striking out leave is relatively exceptional and should be granted only if it is clear that leave should not have been given, if for no other reason that one would not want to incentivise interlocutory procedural applications (generally it's better for all concerned, as well as quicker, to deal with everything in one hearing rather than multiple hearings)". **Dublin 8** differs from RJG, The English Law Reform Commission and Fennelly J as to the onus of proof. Humphreys J says that *"given the statutory requirement, the situation must be that the applicant has an initial onus to demonstrate standing. Until such time as that onus is overcome to a satisfactory prima facie standard, the burden of proof does not shift to the notice party to displace that."* The "statutory requirement" refers to the specific EU-sourced rules granting what is an unusual extension of standing to NGOs in environmental matters on specific criteria and it may be that Humphrey's view was particular to that issue. And it is not apparent that the sources I have identified were cited to Humphreys J.

43. In any event, in my view nothing here turns on the onus of proof given the present Applicants clearly have general standing as adjacent residents and prior participants. They satisfy Humphreys J's prima facie test. In my view, the onus is on Atlas to, as counsel for the Applicants put it, "delegitimise" their standing.

44. While to a notice party developer the possibility of a short-cut to a knock-out blow to judicial review proceedings is understandably tempting, there can be no doubt that a proliferation of interlocutory applications, whether or not meritorious, often serves primarily to delay rather than expedite resolution and in doing so consumes significant court resources, so exacerbating delays generally. All this to litigate by motion issues which all can be decided at trial in any event. In my view, as with many short-cuts, such motions often prove the longer way home and facilitating that short-cut diverts scarce court resources which could be better used. The jurisdiction to set leave aside certainly exists. But for the reasons stated by McGuinness, Bingham and Fennelly JJ, it *"should be exercised sparingly and only in plain cases."*

45. For the reasons set out above, the jurisdiction to set aside leave should be exercised sparingly and only in very plain cases and the burden of proof is heavy on Atlas to establish that leave should not have been granted. An application to set aside leave at least has the merit of possibly ending the proceedings – so, perhaps, justifying the delay and expense of the motion. *Á fortiori*, that the jurisdiction to should be exercised sparingly and only in very plain cases and the burden of proof is heavy is true in a motion moved, as this one was, over two days, to strike out only part of the case, such that there was no hope that it might end the proceedings.

46. I should add that the fear that such motions generally inefficiently absorb scarce court resources is not merely theoretical. Analogous experience in the past has demonstrated the proposition. Traditionally, leave applications were heard ex parte with, as now, the option of hearing them inter partes in a particular case if thought best. In a legislative attempt at short-cut, the 2000 Act required leave applications to be on notice – apparently in hope of weeding out early claims due to fail. In practice it was found to result in mini-, and sometimes not-so-mini-, trials at leave stage,

duplicating in many cases what had to be done again at trial. Judicial commentary pointed to wasteful duplication of effort and inefficient use of court resources. Clarke J said³⁴, inter alia “*leave applications have now come to take on a life of their own*” and “*have now turned into substantial hearings themselves*”. Time was used up filing affidavits. “*... in many cases, the leave application takes, as here, a number of days at hearing and thus requires to wait for a suitable place in the court list. Where leave is granted, whether on some or all grounds, a second substantive hearing then follows. It is difficult to avoid the conclusion that, at least in a not insignificant number of cases, the process leads to a longer rather than a shorter challenge period.*” The short-cut was found to be the longer way home and in 2010³⁵ the PDA 2000 was amended to revert to the old ex parte leave application, which remains the rule³⁶.

47. That the present motion took most of 2 days court time was no-one’s fault. It was well, efficiently and properly argued on both sides. But that was in a list in which cases are normally assigned 3 days for a full trial. While the outcome may not be as wasteful as were leave applications on notice, that experiment to my mind well-justifies the fears of McGuinness, Bingham and Fennelly JJ of motions to set aside leave becoming a regular feature of the list and the view that the jurisdiction “*should be exercised sparingly and only in plain cases*” – indeed, as McGuinness J said, “*used only in exceptional cases.*”

48. I should say, in fairness to all concerned, that other interlocutory motions are also delaying this case and would have delayed it anyway.

49. Atlas argued for the significance to its position of the reference by Hardiman J in **Adam & Lordache** to an argument as to differences as between the positions of public authorities and others. I do not see that the argument assists Atlas. Hardiman J’s purpose was simply to reject an argument that a limit should be placed on the jurisdiction to set leave aside on the basis that public authorities “*are incapable of suffering the sort of loss that an individual or even a corporate defendant might.*” Hardiman J did not accept that “*because of that characteristic, the orders granted have no effect upon them.*” Far from saying that private bodies were, by their susceptibility to financial damage, more entitled to have leave set aside, Hardiman J’s purpose was to approximate rather than distinguish the positions of public authorities and private bodies such as developers and to reject an argument that public authorities were any the less entitled to have leave set aside in an appropriate case. The prospect of commercial loss likely does underlie the acceptance that a notice party can avail of the jurisdiction to set aside leave – but that was not really disputed in this case and in an event was decided most recently in **Dublin 8**. That prospect of commercial loss is, however, no warrant for a lesser standard for the exercise of the jurisdiction to set aside leave.

³⁴ Arklow Holidays Ltd v An Bord Pleanála, [2006] IEHC 15, Clarke J §3.12 et seq

³⁵ Planning And Development (Amendment) Act 2010

³⁶ Subject to the Court directing a leave hearing on notice in appropriate cases.

Standing – “Sufficient Interest”

Harrington³⁷

50. Macken J decided Harrington in July 2005. The case was part of the Corrib Gas project saga of litigation. Locus standi was disputed in the context that, at that time, S.50 PDA 2000 required not merely that the grounds, but also the applicant’s interest, be “substantial”. Mr Harrington’s general standing in virtue of his participation in the planning process was conceded. But the Board and the developer said he lacked “substantial interest” in raising issues he had not raised before the Board. Atlas relies heavily on this case as analogous to the present case.

51. Mr Harrington said it sufficed that others had raised those issues in the appeal - such that the Board was since then on notice of those issues and was now, in the judicial review, at no disadvantage in defending them. It is important to note that, in deciding against Mr Harrington, Macken J said:

“As has been stated in several cases, consideration of the legislative scheme makes it clear that the Oireachtas intended that s. 50 be stricter than the equivalent section of the earlier Local Government (Planning and Development) Act 1992, which itself adopted a stricter set of criteria applicable to challenges to the grant of planning permissions than previously existed.”

The regime was stricter, inter alia, in that in non-planning judicial review the standing criterion was not “substantial” but “sufficient” interest – a lower hurdle. That had been the criterion in planning judicial review until the 2000 Act raised the hurdle to “substantial”.

52. Macken J explained the reasons behind the raising of the hurdle (in essence that judicial reviews were being treated as if appeals) and cited **Lancefort**³⁸ to the effect that *“The courts are bound in their decisions to have serious regard to that concern”* and that *“In the vast majority of cases, the decision of the first respondent should be the end of the matter. Further proceedings by way of judicial review should be the rare exception rather than the rule.”* Macken J interpreted S.50 PDA 2000 as *“such a strict regime”*, and as in various aspects, including the criterion of *“substantial interest”*, demonstrating:

“... clearly that the Oireachtas has now adopted an ever more stringent set of obligations which must be met before the High Court should permit an applicant to commence judicial review proceedings to challenge the validity of planning permissions.”

53. Macken J explicitly interpreted the criterion of *“substantial interest”* via a *“rigorous approach”* mandated by a *“general approach found”* in *“the legislative history and, in particular, to*

³⁷ Harrington v An Bord Pleanála [2006] 1 IR 388

³⁸ Lancefort Ltd. V. An Bord Pleanála (No. 2) [1999] 2 I.R. 270. At Pp. 309 To 310

the increasingly strict provisions for commencing judicial review proceedings in planning matters put in place by the Oireachtas". Inter alia, she found that the "substantial interest which the applicant must have is one which he has already expressed as being peculiar or personal to him". Macken J rejected Mr Harrington's argument that his standing to raise an issue should be determined by reference to any disadvantage which the Board or other parties might suffer by its being raised - so that, he argued, it sufficed that the grounds he sought to raise in the judicial review had been raised by others before the Board. She did so on her view of the meaning of "substantial interest" but also, it is clear, in the context of the legislative history and the increasingly strict regime which she had described.

54. More generally and in a passage stressed by Atlas as relevant to a "sincerity" criterion of legitimacy of interest, Macken J said the following:

"38 ... I consider that the substantial interest which the applicant must have is one which he has already expressed as being peculiar or personal to him.

39 It is difficult in logic to see how a ground which the applicant for leave has never, up until now and, certainly not during the course of the appeal, expressed himself to have any interest in, can thereupon form the basis for the applicant's "substantial interest in the subject matter of the application" at the leave stage, provided it could have been raised by him during that appeal. Here it could certainly have been, but was not. In that regard, I note that the applicant has not given any indication to the court why the concerns which he now wishes to raise were nevertheless not raised by him in the course of the appeal procedure.

40 If it were the correct interpretation of s. 50 that any person who was a party to a planning appeal, who, while not raising a specific issue himself on that appeal, could nevertheless raise any number of issues raised by other parties, but abandoned by them on the decision being made by the first respondent, there would be, in effect, an "open season" on such appeals. The interpretation proposed by the applicant would have, as its result, that where one party raised three grounds and another party ten different grounds and yet another party five different grounds again and a final party one quite different ground to all the others - a situation which is not at all inconceivable - the party raising the latter single ground could adopt all other eighteen grounds, or some or all of them, in support of an application for leave to issue judicial review, even if never raised by him and even if all three other parties abandoned their position altogether by not challenging the grant of permissions and even if he himself also abandoned his single original ground for objection. Equally, the persons objecting on five grounds could follow the same pattern. And so on. Having regard to the provisions of s. 50 of the Act, this cannot have been the intention of the Oireachtas."

55. It is easy to understand the foregoing passage as logical and why it became the law when the starting point was the legislative history and increasingly strict regime which Macken J had described. But even on its own terms it raises a prospect of lengthy debates – some in interlocutory

hearings - in particular cases as to how much an objector must say or do, and did in fact say or do for example at an oral hearing before a Board inspector (perhaps requiring discovery and perusal of the recording of the oral hearing) or in the text of his/her submission, to successfully, by reference or something more, adopt as his/her own all the points made by other objectors so as to give him/her standing on those points in later judicial review. And as I suggested in one of the **Ballyboden** cases³⁹ without laying down a general rule: *“It is to everybody’s benefit that local groups co-ordinate and assist each other in making submissions to the Board. It minimises repetition and it would pointlessly increase the burden and expense of submissions on the Board if every potential applicant for judicial review had to keep its options open by making submissions covering every point or submitting every document overlapping with and repeating the submissions of other objectors.”*

56. Indeed, Mr Harrington’s argument - that his standing to raise an issue should be determined by reference to any disadvantage which the Board or other parties might suffer in dealing with the issue for the first time in judicial review, so that it sufficed that the grounds he sought to raise in the judicial review had been raised by others before the Board – is also logical. It meets the point, often well-made, that it may be unfair to expect the Board to meet for the first time in judicial review a point which could have been made to it in the planning process.

57. Mr Harrington’s logic is clearer if the starting point differs from that from which Macken J, properly, started. If one starts from the standpoint of the importance of environmental protection and of the role of members of the public in contributing (even in the pursuit of private interests) to the public priority of environmental protection via not just participation in administrative decision-making processes but via also the exercise of access to justice in environmental matters, it is perfectly possible to prefer Mr Harrington’s logic and suggest a very different result in his case in July 2005. Of course, these different standpoints – public participation and access to justice in environmental matters as to be positively fostered - are established in Aarhus. While it was adopted in 1998, Ireland did not ratify it until 2012 (although its implementation in Irish law in many respects preceded ratification). Aarhus first made its presence felt here primarily via the Public Participation Directive in 2003 which required compliance by June 2005. S.50B PDA 2000 as to costs protection, in support of the Aarhus right of access to justice, was introduced in 2010⁴⁰ and Part 2 of the Environment (Miscellaneous Provisions) Act 2011 added to such protection a year later. But in 2005, at the time of Harrington, Aarhus in Irish law was in its infancy. Neither Aarhus nor the Public Participation Directive are mentioned in Harrington.

39 Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes et al [2022] IEHC 7 §245
40 By The Planning And Development (Amendment) Act 2010

Harding⁴¹ & Commission v Ireland⁴²

58. The Supreme Court decided **Harding** in 2008 on the “substantial Interest” criterion. It upheld Harrington to the effect that S.50 PDA 2000 was “to be interpreted having regard to the objective of the statutory provision to restrict the range of persons who could bring judicial review” of proceedings to challenge the decisions of planning authorities and as to the requirement of an interest “*peculiar and personal to the applicant*”. Clarke J later⁴³ noted differences between the judges in Harding as to “*substantial Interest*”.

59. Kearns J cited the “substantial interest” criterion as one of

“..... onerous conditions which can only be seen as restricting in a significant way the citizen’s right of access to the court. Perhaps it would be more accurate to say that the citizen’s entitlement to a judicial remedy is significantly circumscribed by the Act of 2000. Access to court per se is not denied, but an applicant has numerous hurdles to clear before obtaining leave. It is impossible to conceive of these legislative provisions as being intended for any purpose other than to restrict the entitlement to bring court proceedings to challenge decisions of planning authorities. There is an obvious public policy consideration driving this restrictive statutory code. Where court proceedings are permitted to be brought, they may have amongst their outcomes not merely the quashing or upholding of decisions of planning authorities but also the undesirable consequences of expense and delay for all concerned in the development project as the court process works its way to resolution. The Act of 2000 may thus be seen as expressly underscoring the public and community interest in having duly authorised development projects completed as expeditiously as possible.”

Kearns J cited Macken J in Harrington to similar effect.

These remain significant aspects of the public interests – especially so as to Strategic Housing Development. But the balance certainly shifted in the reversion by the 2011 Act⁴⁴ from the criterion of “substantial” to “sufficient” interest and more generally in the context of the heightened value afforded by Aarhus to public participation and access to justice.

60. Kearns J held⁴⁵, with respect to the words “*substantial interest in the matter which is the subject of the application*” in s.50(4)(d) PDA 2000, that the word “*application*” referred to the application for leave to apply for judicial review, while the word “*matter*” referred to the development project itself and the outcome of the planning process in relation to the project and did not refer to the legal proceedings themselves.

⁴¹ Harding v Cork County Council, An Bord Pleanála & Xces Projects Ltd, [2008] 4 IR 318

⁴² Case C-427/07

⁴³ Maxol Ltd v An Bord Pleanála [2011] IEHC 537 §6.2 “In *Harding* differing views were expressed by the three members of the Supreme Court on at least certain aspects of the interpretation of the term “substantial interest”.

⁴⁴ Environment (Miscellaneous Provisions) Act 2011, S.20

⁴⁵ I will consider below the view taken by Kearns J of the legitimacy of private financial or property interests for purposes of locus standi

61. Murray CJ says in *Harding*, that interest must be “*in the development*” and he approves **Cumann Tomás Dáibhis**⁴⁶ to the effect that “*what the phrase 'peculiar or personal' imports is that the proposed development, is one which affects the applicant personally or individually in a substantial way ..*” and “*the “substantial”⁴⁷ interest to be demonstrated by an applicant may not be unique to him or her but that the decision in issue affects the applicant in a manner which is peculiar or personal.*” Murray CJ later refers to an “*interest in the decision which is peculiar and personal to him*”.

62. Thus far, one might consider that *Harding* is authority that the substantial interest required is one merely in the proposed development and/or the outcome of the planning application as opposed to in the individual grounds of challenge. The Applicants pressed that view upon me.

63. But the court in *Harding* differentiated between substantial interest of an environmental nature (which the three judges found absent on the facts) and substantial interest in an alleged procedural error. Finnegan J notes that Mr *Harding* alleged numerous breaches of the PDR 2001⁴⁸ and says, “*I agree with the judgments of Murray CJ⁴⁹ and Kearns J that, with one exception, the breaches and non-compliances relied upon do not involve any interest peculiar or personal to the applicant and could not therefore satisfy the statutory requirement of substantial interest*”.

64. Unlike Mr *Harrington*, Mr *Harding* argued for a more expansive interpretation of the term “*substantial interest*” by reference to the Public Participation Directives⁵⁰. Kearns J rejected that argument as follows:

“Accepting that the Act falls to be interpreted in the light of the terms and objectives of the Directive in question it is also an established principle that such an interpretative approach does not mean that the Act be interpreted contra legem. The interpretation which I have given to the meaning of substantial interest in the context of this case flows directly from the terms of the Act itself. That being, in my view, the plainly correct interpretation of s 50 of the Act of 2000, no issue as to community law arises.”

Importantly, since the 2011 Act substituted “*sufficient*” for “*substantial*”, no such “*contra legem*” obstacle stands in the way of an interpretation of standing consistent with wide standing in environmental judicial review.

⁴⁶ *Cumann Tomás Dáibhis v South Dublin County Council* [2007] IEHC 118, (Unreported, High Court, Ó Neil J, 30th March, 2007)

⁴⁷ Latterly “*Sufficient*”

⁴⁸ Planning and Development Regulations 2001

⁴⁹ See §57 – “*in my view these grounds of complaint and the alleged breaches of statutory procedures arise generally in relation to the planning application and the decision to grant permission. They are not issues which involve an interest which is peculiar or personal to him.*”

⁵⁰ Directive 2003/35/EC, And EIA Directive 85/337/EEC And The IPPC Directive 96/61/EC.

65. Atlas makes the accusation⁵¹ that “... these judicial review proceedings are brought to protect the Applicants' private rights and enjoyment of their area, not for any great public or environmental interests, as the Applicants like to present. The Applicants are concerned about the impact on their property rights and property values in the area if the development proceeds and are concerned they will be inconvenienced in terms of traffic if more people are able to live in the area. These are all private interests of concern to the Applicants.” Kearns J in *Harding* clearly regarded these as entirely legitimate interests – he said:

“..... the framers of the legislation had in mind a range of interests originating in, but not necessarily limited to, considerations of how an applicant's property or financial interests might be affected by the particular development.”

Kearns J hypothesised a new stadium for Manchester United:

“.... if I live next door to the stadium I might be said to have a substantial interest with regard to any proposed building works or other onsite developments in terms of the impact on the value of my property or how my property or business might be affected by increased traffic or other consequential effects. The way I am affected is tangible and immediate and largely derives from the geographical proximity of the proposed development to my property.”

Kearns J went on to observe that it did not follow that the interest was substantial “*although this may often be the case on a particular set of facts.*”. As the “substantial” criterion is now gone, that need not detain us – the point is that such interests are legitimate.

66. By way of emphasising the legitimacy of such private interests, I refer to **Mone**⁵² - a 2010 case in which McKechnie J, applying the “*substantial interest*” criterion and hence the “*peculiar and personal interest*” criterion, favoured the Applicant’s standing, despite his non-participation in the appeal⁵³. McKechnie J did so not merely by reference to geographical proximity but as Mr Mone was “*in direct competition with the developer for the provision of petrol station services*” such that “*There could therefore be no question in my mind but that the Applicant has a significant interest, both in relation to his own property and in relation to the effect the development may have on his business; the development may affect the Applicant, both with regards to his property and financially.*”

67. If only on the basis of *Harding* and *Mone*, it will be seen why I find Atlas’s accusation unconvincing as a rationale for considering that it is “very plain” that the proceedings or any of the grounds should be struck out or set aside.

68. In any event, I find this accusation by Atlas oddly lacking in self-reflection. Atlas anxiously call

⁵¹ Affidavit Of Sarah Rogers 9/3/22

⁵² *Mone v An Bord Pleanála* [2010] IEHC 395

⁵³ *The Circumstances Of Which Were Unusual*

in aid legitimate public policy and interests such as the housing crisis and the urgency of provision of housing. Yet it would be naïve to imagine that Atlas is primarily motivated by those public interests. Much more likely, its primary motivation is its (legitimate) anxiety to maximise profitable development on the Site. It is also easy to imagine that neither as to the Applicants nor as to Atlas are motives entirely private or public: motives are often complex and subtle. I should add that the Applicants, on affidavit, have sought to characterise Atlas as rapacious: for similar reasons, I draw no conclusion on that issue. Just as the public interest harnesses the private interests of citizens to the protection of the environment, it harnesses the private interests of developers to the provision of housing. So, there is no fundamental difference in principle between both sides as to the operation of motives and incentives.

69. In July 2009 the CJEU in **Commission v Ireland**⁵⁴ rejected an argument that the “*substantial interest*” requirement was in breach of, as more restrictive than, the “*sufficient Interest*” criterion of the Public Participation Directives – but it seems to have done so on a pleading point⁵⁵. But, notably, Advocate General Kokott in that case had agreed with Ireland that domestic and EU law concepts of “sufficient interest” were different, opined that the Commission’s complaint was in substance unfounded and that the criterion of “*wide access to justice*” did not impugn the “*substantial interest*” requirement of S.50 PDA 2000 and, in doing so, AG Kokott had specific regard to the “*peculiar and personal*” criterion and to the requirements of Aarhus.

70. Nonetheless, Ireland later reverted to the domestic “*sufficient Interest*” criterion. And in **Grace & Sweetman**⁵⁶ the Supreme Court later observed that “*It may well have been that there was concern that the “substantial interest” test might have failed to meet the requirement of broad access to justice required by article 11.*”

71. **Simons**⁵⁷ traces, in the case law as to standing, what he describes as a move, starting before Harrington, from a victim test of standing to one based on public interest. He says⁵⁸ that “*The public interest in upholding the rule of law was recognised as being particularly strong where planning and environmental decisions were concerned*” and cites, inter alia, **Village Residents**⁵⁹ to the effect that “*[p]lanning is a matter of great public importance and it is not just of interest to the particular parties involved in a particular planning permission. A liberal view should therefore be taken to locus standi*”. In **Lancefort**⁶⁰ Denham J had stated:

⁵⁴ Case C-427/07

⁵⁵ §84 reads: In that regard, inasmuch as, as has been stated in paragraph 49 of this judgment, the commission disputes only the failure to transpose certain provisions – having moreover expressly stated that it did not mean to allege incorrect or incomplete transposition – there is no need to ascertain whether the criterion of substantial interest as applied and interpreted by the Irish courts corresponds to the sufficient interest referred to in directive 2003/35, as that would lead to calling into question the quality of the transposition having regard, in particular, to the competence of the member states recognised by that directive to determine what constitutes a sufficient interest consistently with the objective which that directive pursues.

⁵⁶ *Infra*

⁵⁷ *Simons On Planning Law*, 3rd Ed’n Browne 2021 §12-580 et seq

⁵⁸ §12-584

⁵⁹ *Village Residents Association Ltd v An Bord Pleanála* (No. 1) [2000] 1 I.R. 65, [2000] 2 I.L.R.M. 59

⁶⁰ *Lancefort Ltd. V. An Bord Pleanála* (No. 2) [1999] 2 I.R. 270. At Pp. 309 to 310

“Environmental issues by their very nature affect the community as a whole in a way a breach of a personal right does not. Thus the public interest element must carry some weight in considering the circumstances of environmental law cases and the locus standi of the parties.”

72. It will be apparent that this view tends to erode the requirement described in **Harrington** that the interest in question, *á fortiori* the grounds in question, be “*peculiar or personal to*” the Applicant. Nonetheless Simons⁶¹ describes what was, prior to the 2011 Act⁶², a “*general trend under the “substantial interest” test .. to severely limit the concept of a public interest in planning or environmental affairs.*”

The return to “Sufficient Interest” & Commission v Germany

73. While the “substantial grounds” criterion remains, as do other restrictions on judicial review in planning matters⁶³, the “substantial interest” criterion has been removed by its statutory reversal⁶⁴ to the previous and less-demanding criterion of “*sufficient interest*”. It seems⁶⁵ this was done specifically to reflect the access to justice requirements of Aarhus (in Article 9 of which, as to access to justice, the phrase “sufficient interest” appears) and the Aarhus-inspired amendment of the EIA Directive⁶⁶.

74. This leads Simons⁶⁷ to observe that “*The principles established in this earlier case law cannot be directly translated to the amended requirement of “sufficient interest” which was introduced in 2011.*”. That case law clearly includes **Harrington** and **Harding**. Not least, the amendment to “*sufficient interest*” swept away the “*contra legem*” reasoning on which Kearns J had, in **Harding**, declined to interpret the interest requirement in light of the Public Participation Directives from which the phrase “sufficient interest” was taken to S.50, the Directives having in turn taken it from Aarhus Article 9.

75. A search of the Irish case law has not thrown up any case, after the 2011 Act, in which the “*peculiar and personal*” criterion has been applied.

76. While Aarhus can’t be invoked directly at Irish Law, and this is not the place for a lengthy consideration of the complexities of its status and influence in International Law, EU Law and Irish

61 Simons On Planning Law, 3rd Ed’n Browne 2021 §12-596

62 Environment (Miscellaneous Provisions) Act 2011, S.20

63 For example, the 8-week time limit for commencing planning judicial review

64 Environment (Miscellaneous Provisions) Act 2011, S.20

65 Notwithstanding Case C-427/07 Commission v Ireland. see the reference above to Grace & Sweetman and see also the Long Title to the 2011 Act

66 Then Article 10a – Now Article 11 Of The EIA Directive.

67 Simons On Planning Law, 3rd Ed’n Browne 2021 §12-602

Law, via the EU route of the Public Participation Directives (including Article 11 of the EIA Directive) and the more direct route of the 2011 Act, Aarhus has generally been influential as to access to justice, including as to standing. So, while Aarhus Article 9 and the EIA Directive allow states to determine what amounts to a sufficient interest, that is subject to the proviso that, in doing so, States must not make it impossible or excessively difficult, in practice, to exercise the rights of the public concerned to wide access to justice, with a view to contributing to preserving, protecting and improving the quality of the environment and protecting human health. As to this obligation in EU law, see **Altrip**⁶⁸.

77. In **Commission v Germany**⁶⁹ the CJEU in 2015 held that Germany had failed to fulfil its obligations under Article 11 of the EIA Directive, inter alia, by restricting *“standing to bring proceedings and the scope of the review by the courts to the objections which have already been raised within the time-limit set during the administrative procedure which led to the adoption of the decision.”* The CJEU held that Article 11 did not *“allow restrictions on the pleas in law which may be raised in support of legal proceedings.”* Article 11 *“lays down no restriction whatsoever on the pleas which may be relied on in support of such a review”*⁷⁰ and *“That consideration meets the objective pursued by that provision of ensuring broad access to justice in the area of environmental protection”*.

78. The CJEU rejected an argument based on *“... the efficiency of administrative procedures, although it is true that the fact of raising a plea in law for the first time in legal proceedings may, in certain cases, hinder the smooth running of that procedure...”*⁷¹ In doing so, the CJEU in striking terms recognised that *“the very objective”*⁷² pursued by Article 11 of the EIA Directive⁷³ is *“to ensure that the litigant has the broadest possible access”*⁷⁴ to review by the courts” and that *“that review covers both the substantive and procedural legality of the contested decision in its entirety.”*

79. Article 11 is part of the EU’s effecting of Aarhus Article 9. Article 9 provides that *“What constitutes a sufficient interest shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice ...”*. The word “and” here makes clear that there are two criteria, the second of which is wide access to justice. The influential⁷⁵ Aarhus Compliance Committee has said:

“Although what constitutes a sufficient interest ... shall be determined in accordance with national law, it must be decided “with the objective of giving the public concerned wide

⁶⁸ **Gemeinde Altrip v Land Rheinland-Pfalz**: C-72/12 (2013) C-72/12, ECLI:EU:C:2013:712, [2014] PTSR 311, [2013] All ER (D) 102 (Nov)

⁶⁹ Case C-137/14; Judgment 15 October 2015

⁷⁰ Citing *Bund Für Umwelt Und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, EU:C:2011:289, §37

⁷¹ The CJEU allowed for specific appropriate national procedural rules for ensuring the efficiency of the legal proceedings such as the inadmissibility of an argument submitted abusively or in bad faith.

⁷² Emphasis added

⁷³ and Article 25 of Directive 2010/75 on industrial emissions (integrated pollution prevention and control)

⁷⁴ Emphasis added

⁷⁵ Though its decisions do not bind Irish courts

access to justice” within the scope of the Convention.”⁷⁶

In the same Communication, and as to an analogous issue of States’ entitlement to set criteria in national law for NGO standing in environmental litigation, the Committee recognised that Aarhus allows States a great deal of flexibility in defining which environmental organizations have access to justice but they “*may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment. Accordingly, the phrase “the criteria, if any, laid down in national law” indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception.*”

80. It is important to remember that CJEU decisions on Article 11 of the EIA Directive do not directly apply to cases not invoking Article 11. And neither Aarhus nor decisions of its Compliance Committee directly bind in Irish law to confer enforceable rights on citizens. But they are highly influential and it can be said that the landscape of the law as to access to justice and standing in environmental litigation has changed significantly since Harrington and Harding, progressively influenced by Aarhus both directly and via EU Law, from a project of actively restricting, to a project of positively fostering access to justice in planning and environmental matters – an inflection point being the reversion in 2011 to the “*sufficient interest*”, criterion.

Grace & Sweetman⁷⁷

81. In **Grace & Sweetman** the Supreme Court, in a leave application invoking Article 11 of the EIA Directive, considered the reversion to the standing criterion of “*sufficient interest*”. It held that:

- Member States have a significant discretion as to what constitutes 'sufficient interest'⁷⁸ and standing is to be determined by the application of national rules. This is subject to the important caveat that those rules must be consistent with the “*wide access to justice*” requirement of Article 11 in those cases to which Article 11 applies. And the Courts must interpret the national law “sufficient interest” requirement for standing accordingly.
- The overall approach to standing, applied in judicial review generally, is reasonably flexible⁷⁹ being but a rule of practice subject to expansion, exception or qualification when the justice of the case so requires.
- The starting point – the broad general principle - as to standing in judicial review, is that ordinarily the Applicant must demonstrate that the decision to be impugned has had, or is

⁷⁶ Communication ACCC/C/2005/11 (Belgium) Findings And Recommendations 16 June 2006

⁷⁷ Grace & Sweetman, v An Bord Pleanála, ESB Wind Development Limited, Coillte et al [2020] 3 IR 286

⁷⁸ Citing Gruber v Unabhängiger Verwaltungssenat Für Kärnten (Case C-570/13) EU:C:2015:231

⁷⁹ Citing Cahill v Sutton [1980] IR 269

imminently in danger of having, adverse effect on their interests so as to cause or potentially cause injury or prejudice.

- The application of that broad general principle in respect of many types of challenge may not give rise to any great difficulty. The range of persons affected by a decision or measure to a sufficient extent that they can be described as having been adversely affected by injury or prejudice may be clear, obvious and limited.
- National rules as to standing are no different in environmental cases than in other cases. But the definition of those who may have a sufficient interest, in accordance with Irish law, in an environmental challenge may, because of the very nature of the environmental challenge itself, encompass a wider (potentially significantly wider) group of persons or bodies and may give rise to greater questions of difficulty in determining where the limits of standing may lie.
- A reasonably liberal approach is taken to the sort of interest which must be potentially affected in order to confer standing in environmental cases. Persons clearly can have an interest by virtue of proximity to the proposed development. That involved a broad assessment of whether the legitimate and established amenity or other interests of the challenger could be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question.
- In addition, that broad assessment was required to have regard, in appropriate cases, to the legitimate interest of persons in seeking to ensure appropriate protection of important aspects of the environment or amenity generally.

82. Atlas, understandably, emphasises the Supreme Court’s reference to interests being “legitimate”. The Applicants say the test of legitimacy set by this case is objective as to interest and its sufficiency and that sincerity as to the grounds relied upon in seeking judicial review is irrelevant.

83. The Supreme Court considered it *“important in analysing the recent case law on standing in environmental cases to pay particular regard to whether the case in question was decided at a time during which the “substantial interest” test had been imposed.”* The implication clearly is that such caselaw must now be viewed with caution. The Supreme Court viewed caselaw on the *“substantial interest”* test as still possibly of some assistance – but it is interesting to see why. The court considered that *“it can hardly be doubted but that the “substantial interest” test was stricter than the “sufficient interest” requirement”*. Accordingly, circumstances which met the “substantial interest” test might be readily inferred, *á fortiori*⁸⁰, to meet the “sufficient interest” test. But, obviously, that does not imply that circumstances which did not meet the “substantial interest” test would not meet the “sufficient interest” test.

⁸⁰ Not a phrase used by the Court but it seems to me apt.

84. I respectfully disagree with the argument by counsel for Atlas that the proximity criterion identified in **Grace & Sweetman** was specific to or circumscribed by proximity to a European Site. That Ms Grace lived less than 1km from the European Site assisted her standing specifically despite her non-participation in the planning process. It was held that the fact that the proposed development was intended to take place on a European Site must carry significant weight in the assessment of standing. The protection of such sites involves the legitimate interests of, arguably, every citizen. As I understand the law, in the ordinary way, local residents will have standing to challenge a planning permission decision as to land in their locality. In a particular case questions may arise as to how “local” one must be⁸¹. But as at least some of the applicants here live adjacent the site that question need not detain me here. In any event, **Grace & Sweetman** is clear as follows:

“[54] it is important to emphasise that participation in the process will undoubtedly confer standing.

[56] It is, however, clear that a person who has a sufficient proximity, having regard to the nature of the development and any amenity in the location of the development (which might potentially be impaired), will have standing even without participation. Those who do not have such proximity may reasonably be required to show that they have some interest which is potentially affected and one very clear way of doing that is by demonstrating that interest by participation in the permission process. That is not, however, the only way in which such an interest can be demonstrated.”

The present Applicant have standing – on both the prior participation basis and the local residence basis.

Conway⁸²

85. Atlas relies on Conway. The judgment of Barniville J described it as “*one of the most unusual planning cases to have come before the Irish courts*”. Mr Conway, an environmental activist, challenged the Board’s refusal to permit a proposal by Dublin City Council to develop a civic plaza and ancillary traffic management measures at College Green, Dublin. The Council, though the applicant for that approval, did not challenge the Board’s decision. The Board successfully challenged Mr Conway’s standing on the “sufficient interest” standard. Barniville J applied **Grace & Sweetman** to the effect that, even in cases involving EU law challenges, the national rules on standing applied. Notably, the Board relied on a number of circumstances as disqualifying Mr Conway - which circumstances do not arise in the present case. They included:

⁸¹ See, for example, the facts in *Harding*.

⁸² *Conway v An Bord Pleanála et al* [2019] IEHC 525

- That the decision was a refusal of permission such that no development would ensue and so no prospect of detrimental environmental effect arose – in the present case permission has been granted.
- Mr Conway’s failure to participate in the planning process and the poverty of his explanation of that non-participation. The present applicants did participate.
- Mr Conway lived 80km from the College Green – the present applicants reside locally, at least some adjacent the Site.
- Mr Conway had not suggested that he had any particular connection or interest in the College Green area or that it was of any particular amenity value to him which is or might arguably be impaired by the Board’s refusal to approve the proposed development. That consideration clearly does not apply in the present case
- The Council, which had been refused permission, had not sought to challenge the refusal. This element of the factual matrix led Barniville J to describe the case as most unusual. It is not present in the present case.
- The absence of any possibility of threat to a European Site, National Monument⁸³ or the like.

86. It seems to me particularly notable that in Conway neither of the two factors identified in Grace & Sweetman as conferring standing as of course – physical proximity to the site and prior participation in the planning process – were present. They are both present in the present case and confer standing accordingly. Barniville J was clearly and particularly influenced by the non-participation aspect of the case⁸⁴. Conway is perhaps best viewed as a decision on whether the other facts of that case compensated for the absence of proximity and prior participation so as to confer standing. Unsurprisingly in the circumstances of that case, Barniville J found they did not and, as to the application of the explicitly “*reasonably liberal*” national rules as to standing, it does not seem to me that Barniville J purported to identify any new principles. The case is an orthodox application of those rules. So too was the consideration by Barniville J of the question, recognised in Grace & Sweetman, whether in the particular case the application of national rules as to standing conformed to EU Law requirements of wide access to justice and his conclusion that EU law does not preclude national standing rules from taking account of the challenger’s non-participation in the administrative process which led to the impugned decision. But the question of non-participation simply does not arise on the facts of this case. I do not see that Conway assists Atlas on the standing issue.

Issue-Specific Standing – Points not Raised before the Board - M28⁸⁵, Reid⁸⁶ & Atlantic Diamond⁸⁷

87. Atlas confined their argument in this respect to Ground 6 and Ground 10 – which I will describe later in this judgment.

⁸³ See for example *Mulcreavey v Minister for the Environment* [2004] 1 IR 72

⁸⁴ E.g. §86

⁸⁵ *M28 Steering Group v An Bord Pleanála* [2019] IEHC 929 (High Court (General), MacGrath J, 20 December 2019)

⁸⁶ *Reid V. An Bord Pleanála* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021)

⁸⁷ *Atlantic Diamond Limited v An Bord Pleanála & EWR Innovation Park Limited* [2021] IEHC 322

88. In **M28**, MacGrath J considered a submission that, while the applicant had general standing to mount a challenge to the Board's decision, it would be unfair to permit it to raise an issue not raised before the Board. MacGrath J noted the absence of an automatic preclusion of standing in those who had not participated the planning process. He considered the Irish and European authorities as confirming that:

"... as a matter of law there is no general rule that a prior participant who has not raised particular point before the Board is automatically precluded from raising such points in a court of review. To adopt such a stance might place a person who has not previously participated in a stronger position than someone who has. On the other hand, in my view, neither do the authorities establish an unrestricted right to raise new points. This is particularly so, as was recognised in the Commission v. Germany, where there is evidence of bad faith or a deliberate decision to withhold a point."⁸⁸

89. MacGrath J noted that Clarke J acknowledged in *Grace & Sweetman* that standing in environmental cases involves a broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question. MacGrath J continued⁸⁹:

*"Although these comments were expressed in the context of general standing, as opposed to an objection based on the failure to raise a particular issue, I believe that they must have relevance to the issue raised in this case. While each case must be dependent on its facts, bearing in mind the considerations alluded to in *Grace and Sweetman*, it seems appropriate in determining the locus standi of the applicants in this case, to give consideration to the nature of the illegality or infringement alleged, the consequences of a decision either way, any explanation that is advanced for the failure to raise the issue, and the overall obligations imposed as a matter of European law with regard to a particular process and to the requirement for broad access to justice.*

The nature of the alleged illegality is significant. If the applicant is correct, then the Board has acted ultra vires and has failed to take due account of mandatory requirements in the consideration of matters relating to environmental concern."⁹⁰

90. MacGrath J considered it particularly important that a failure to raise an issue that might have been more fully considered and assessed by the deciding authority, will have deprived other

⁸⁸ §118

⁸⁹ §119 et seq

⁹⁰ MacGrath J went on to consider the specifics of the point raised in the judicial review and the explanation proffered for the applicant's not having raised it before the Board..

parties of the opportunity to deal with the objection on its merits. The court in judicial review is not concerned with those merits and must take care in the consideration of such “new” matters, lest the court is unwittingly led into assessment of those merits - which the expert body statutorily charged with dealing with these matters has not had opportunity to address.⁹¹ MacGrath J endorsed the view that there should be no “*freewheeling competence on the part of judicial review applicants to raise points not raised before the decision maker*”⁹². Nonetheless, and in a decision expressly confined to the facts of that case, even despite his doubting the Applicant’s explanation for not raising the point before the Board⁹³ and consistent with the requirement of broad access to justice, MacGrath J held that the Applicant had standing to raise these “new Issues”. He considered that they had, if obliquely, been addressed by the inspector. He specifically noted that some of the members of the Applicant NGO resided in the immediate vicinity of the quarry in question in that case – a situation analogous to the present case.

91. As to locus standi, M28 turned on, and was confined to, its particular facts. But MacGrath J assessed those facts in application of the general principles which he outlined on foot of a careful review of the caselaw. Generally speaking, while disavowing a “*freewheeling competence to raise points not raised before the decision maker*” MacGrath J was clearly influenced by the view that the broad and liberal approach of *Grace & Sweetman* applied to arguments as to issue-specific locus standi, that residence adjacent the relevant locus was specifically relevant to that issue and that a general rule precluding a prior participant from raising a point he had not raised before the Board could unfairly, or at least paradoxically, place a non-participant who could establish general locus standi (for example, and automatically, by adjacent residence, though that is not the only such possibility) in a better position as to issue-specific standing in judicial review than the prior participant who would, in that sense, be punished for his participation.

92. *Á fortiori* this unwelcome paradox would arise if the logic of Macken J in *Harrington*, adopted under the older stricter regime, were applied to the present regime to deny issue-specific standing as to an issue raised by others before the Board but not by the applicant in judicial review. Further, in such a case, the concern, identified as underlying the refusal of issue-specific standing, that the Board had been deprived of the opportunity to address the issue on its merits, would simply not apply.

93. In my view and as to issue-specific locus standi, M28 is generally of a piece with the next cases I will consider - **Reid** and **Atlantic Diamond** – and at least generally, with the view taken in **Grace & Sweetman** as to the broad and liberal view to be taken of standing in the context of principles of access to justice. M28 is notable for applying that approach not merely to general standing but to issue-specific standing.

⁹¹ §122

⁹² Citing *Barrett J in An Taisce v An Bord Pleanála and Others* [2018] IEHC 640.

⁹³ §123

94. **Reid**, citing **Lancefort**⁹⁴ differs from **M28** in that Humphreys J does recognise a general principle that points not made to the decision-maker may not be made in judicial review. However as Humphreys J lists no less than 16 exceptions, many significant, it seems fair to say that any difference between Reid and M28 may be more formal than practical. I addressed earlier a quasi-exception as to points raised by an Applicant in judicial review which had been raised before the Board, but by others than the Applicant. Another exception is the “Homework” principle identified by Humphreys J in cases such as **Reid** and **Atlantic Diamond**. In the latter, citing the former, he rejected a challenge to the Applicant’s standing to litigate a ground relating to daylight and sunlight analysis which had not been raised before the Board – in the present case Atlas makes a similarly-based challenge. Humphreys J said:

“Notwithstanding that this is a domestic law issue, it comes under the heading of there being no obligation to correct the developer’s homework⁹⁵ ... An objector is not obliged to point out omissions and defects in the paperwork of an applicant before the administrative body in order to enable that application to be more successfully pursued. The objector is entitled to rely on the administrative body to see to all of that, and if that is not done, the point can be raised for the first time in the court.”

95. As stated, Humphreys J in **Reid** lists no less than 16 exceptions to the general principle that an applicant in judicial review can’t put an argument or evidence to the court that was not put before the decision-maker. The list includes the following⁹⁶:

- the complaint of illegality is jurisdictional;
- the applicant in judicial review is not the applicant before the decision-maker and the point amounts to correcting the other party’s homework or pointing out omissions which would have enabled the application which is being opposed to be corrected and improved; such omissions can be left to the decision-maker to address and if not so addressed can be presented by the objector to the court without having first been raised before the decision-maker;
- the complaint engages the principle of access to justice in EU law, such as the provisions of art. 11 of directive 2011/92/EU on EIA ..., or related fields;
- generally, the illegality is one that the applicant could not reasonably be expected to have addressed before the decision-maker;
- failure to raise the point during the process is otherwise explained satisfactorily.

⁹⁴ *Lancefort Ltd. v An Bord Pleanála (No. 2)* [1998] IESC 14, [1999] 2 I.R. 270

⁹⁵ See *Reid v An Bord Pleanála* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021)

⁹⁶ Slightly edited

Issue-Specific Standing - Motive and Interest - Kides⁹⁷, Atlantic Diamond⁹⁸, Mount Cook⁹⁹, Independent v I.A.¹⁰⁰ & Fladgate Fielder¹⁰¹

96. The Applicant cites **Kides**. Ms Kides challenged a planning permission. The planning authority and the permission grantee disputed her standing. The High Court of England & Wales refused leave to seek judicial review. Inter alia, the judge rejected the submission that Ms Kides had no standing at all, but accepted a narrower submission that, on an issue as to affordable housing, she was "*a mere meddler*" and had no standing. He concluded that Ms Kides had no interest in securing provision for affordable housing, but had seized adventitiously on a point of no interest to her. He concluded that it would be an abuse of process for the argument based upon affordable housing to proceed, and refused permission to proceed with that argument.

97. A unanimous Court of Appeal¹⁰² disagreed with the judge. It dealt with the issue of standing as follows;

"[132] That leaves the issue of standing. As to that, it seems to me that there is an important distinction to be drawn between, on the one hand, a person who brings proceedings having no real or genuine interest in obtaining the relief sought, and, on the other hand, a person who, while legitimately, and perhaps passionately, interested in obtaining the relief sought, relies as grounds for seeking that relief upon matters in which he has no personal interest.

[133] I cannot see how it can be just to debar a litigant who has a real and genuine interest in obtaining the relief that he seeks from relying, in support of his claim for that relief, upon grounds (which may be good grounds) in which he has no personal interest.

[134] It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds. Lord Donaldson MR's reference¹⁰³ ... to "the applicant's interest" is, as I read it, a reference to the applicant's interest in obtaining the relief sought: in this case, the quashing of the planning permission.

[135] Accordingly, I would respectfully disagree with the judge's conclusion (in [109] of the judgment) that the appellant be debarred from relying upon the argument based on affordable housing.

[136] In so far as Mr Drabble submitted that the appellant has no standing to bring the proceedings at all, I have no hesitation in rejecting that submission. The appellant has

⁹⁷ R (**Kides**) v South Cambridgeshire District Council and others - [2002] 4 PLR 66; [2002] EWCA Civ 1370

⁹⁸ Atlantic Diamond Limited v An Bord Pleanála & EWR Innovation Park Limited [2021] IEHC 322

⁹⁹ R (Mount Cook Land Ltd) v Westminster City Council - [2003] All ER (D) 222 (Oct)

¹⁰⁰ Independent Newspapers (Ireland) Limited et al v I.A. [2020] IECA 19

¹⁰¹ Land Securities plc and others v Fladgate Fielder (a firm) - [2010] 1 EGLR 111; [2009] EWCA Civ 1402

¹⁰² Jonathan Parker LJ; Laws & Aldous LJ agreeing

¹⁰³ in R v Monopolies and Mergers Commission, ex parte Argyll Group plc [1986] 1 WLR 763, at p773

lived in Longstanton for upwards of 30 years. She plainly has a real and genuine interest in seeking to prevent the substantial development permitted by the planning permission."

98. **Kides** seems consistent with **Atlantic Diamond**. In the latter case Humphreys J not only rejected a challenge to the Applicant's standing to litigate a ground relating to daylight and sunlight analysis which had not been raised before the Board¹⁰⁴ - he also rejected a challenge based on an assertion that the applicant was not personally affected by that issue. In the present case, Atlas makes a similarly-based challenge. Humphreys J said:

*"On the second leg of the standing objection, it is correct that the applicant is not personally affected, but nobody particularly is, given that the people affected will be the owners and occupiers of future apartments. There is no rule that you can only make points in a planning context that you are personally affected by. I do not accept any analogy with the point made in *Dunnes Stores v. An Bord Pleanála*¹⁰⁵, to the extent that it holds that one cannot argue for the constitutional rights of others. That is as may be, but I certainly would not extend that principle any further and it most certainly does not have the consequence that you cannot make a planning objection on a point unless it personally affects you.*

On the contrary, anybody can make a planning objection on any legally cognisable ground. On the facts here, as noted above, if matters were otherwise this point could not be raised by anybody because the people most affected, the potential purchasers, are a class that is yet to crystallise.

21. *More broadly, the enforcement of planning law is crowdsourced to some extent by allowing challenges with looser standing rules than normal public law proceedings. For example, any person can make an application under s. 160 of the Planning and Development Act 2000. More generally environmental litigation is different to normal litigation in a number of ways, including special rules on costs. If and insofar as there was a relevant legal obligation to comply with guidelines under s. 28 of the 2000 Act in respect of daylight and sunlight, the objector was entitled to look to the decision-maker to ensure that that obligation was satisfied. There is a fundamentally different dynamic here from a case where the judicial review applicant is also the applicant in the administrative process. In the latter type of case, if the applicant wants the decision-maker to consider something, generally she has to raise that something herself."¹⁰⁶*

99. The recent SHD case of **Walsh v An Bord Pleanála**¹⁰⁷ is another example of a permission quashed by reference to daylight and sunlight analysis errors which could never have personally or directly affected the applicant for judicial review unless, as seems unlikely, he moved into one of the affected apartments once built. I should say that it is not apparent that a standing issue was argued

¹⁰⁴ See above.

¹⁰⁵ [2016] IEHC 226 (Unreported, High Court, Hedigan J, 4th May, 2016)

¹⁰⁶ Emphases added

¹⁰⁷ [2022] IEHC 172

in that case – but if the point made here by Atlas was a good one, it would seem that Walsh was an obvious case in which to argue it.

100. The Applicant cites **Mount Cook**, in which a landlord challenged a permission its tenant had obtained for alterations to retail premises on Oxford St, London. The landlord’s challenge was part of its attempt to force the tenant to surrender its 999-year lease so the landlord could redevelop the property. A unanimous Court of Appeal¹⁰⁸ considered the question of discretionary refusal of relief by reference to the landlord’s ulterior motive in pursuing judicial review. It stated:

“45. if it had been necessary to consider the point, I would not have refused relief in the exercise of my discretion in reliance on the motive of Mount Cook in seeking it, namely to put pressure on Redevco to sell its lease to Mount Cook rather than - or in addition to - a genuine concern about future loss of retail use in the upper parts of the Building.

46. The essential question for a decision-maker in planning matters is whether representations one way or the other, whatever the motives of those advancing them, are valid in planning terms. judicial review applications by would-be developers or objectors to development in planning cases are by their very nature driven primarily by commercial or private motive rather than a high-minded concern for the public weal. I do not say that considerations of a claimant's motive in claiming judicial review could never be relevant to a court's decision whether to refuse relief in its discretion, for example, where the pursuance of the motive in question goes so far beyond the advancement of a collateral purpose as to amount to an abuse of process. The court should, at the very least, be slow to have recourse to that species of conduct as a basis for discretionary refusal of relief. In any event, it would, as Mr. Steel pointed out, be exceptional for a court to exercise discretion not to quash a decision which it found to be ultra vires¹⁰⁹”

101. In **Independent Newspapers v I.A.** the Applicants sought to quash a circuit judge’s restriction of media reporting of a sentencing hearing . Murray J held it incorrect to refuse relief because Independent Newspapers wished to use the fact of any relief granted in connection with their defence of private law proceedings. Murray J cited **De Smith**¹¹⁰ as in turn citing **Mount Cook** for the proposition that *“The motive of an applicant in making a claim for judicial review – whether commercial or otherwise – should not usually be a relevant consideration in the exercise by the Court of its discretion to grant or withhold a remedy”*. Murray J noted an exception to that rule where the intention of the appellant is abusive of the court process¹¹¹.

¹⁰⁸ Auld LJ; Clarke & Jonathan Parker LJ agreeing

¹⁰⁹ citing *Berkeley v Secretary of State & Ors.* [2001] 2 AC 603, HL, per Lord Hoffmann at 616D-G, approving an observation of Glidewell LJ in *Bolton v Secretary of State & Ors.* [1991] 61 PCR 343, at 343.

¹¹⁰ *De Smith Judicial Review* Eighth Ed. 2018 Para. 18-060 citing *R (Mount Cook Land Limited) v Westminster City Council* [2003] EWCA Civ 1346 at [45]-[46]

¹¹¹ *Sean Quinn Group Ltd v An Bord Pleanála* [2001] 2 IR 505

102. Murray J considered a passage in **Hogan & Morgan**¹¹² which read:

“Relief will not be granted if the purpose is not regarded as legitimate. This ground of refusal is more difficult to identify, but there have been cases where the courts have held that they will not facilitate a litigant who seeks relief for an unmeritorious or ulterior purpose.”

Murray J observed that *“The authorities in the text cited in support of this proposition do not necessarily establish it.”*

103. It seems to me that if an Applicant’s motive will not ordinarily justify discretionary refusal of relief in judicial review, *á fortiori* it can’t generally delegitimise an Applicant’s established general standing to seek relief.

104. It is also of some interest in this context to note the view of Moore-Bick J in **Land Securities v Fladgate Fielder**¹¹³ as to the nature of judicial review. That was a challenge to a planning permission. Moore-Bick J referred to:

“... the public law nature of the proceedings themselves, the essential nature of which is to ensure that a public body complies with the law. That does not mean that the claimant will not be seeking to serve a private interest of its own; in very many cases, it will, and will be expecting to further that interest as a direct or indirect result of obtaining the relief that it seeks. Whatever may be the claimant's private purpose in commencing and continuing the proceedings, however, the public has an interest in ensuring that breaches of the law by public bodies are identified and, where appropriate, corrected.”¹¹⁴

105. This seems to me to echo the observation in **Atlantic Diamond**, consistent with the more general view deriving from Aarhus and answer to the question *“Who speaks for the environment?”*, that environmental protection – and, indeed, protection of public interests in good administration – are, as Humphreys J put it, *“crowdsourced”*. To a considerable degree, and while standing rules serve to exclude such as the frivolous, the vexatious and the merely meddlesome, nonetheless private interests are harnessed to the public good. This is well-illustrated by **Austin v Miller Argent**¹¹⁵ - and in the decline of the *“no private interest”* criterion for PCOs in England and Northern Ireland¹¹⁶. In **Austin**, though declining a PCO on the facts, the Court accepted that a PCO could be made in a private nuisance action. It noted the focus on Aarhus on public participation, and considered there was *“merit in recognising the valuable function which individual litigants can play in helping to ensure that high environmental standards are kept, even if in the process they are also vindicating a private interest.”* The Court accepted that *“the mere fact that the claimant has a personal interest in the litigation does not of itself bar her from obtaining a PCO.”* In similar vein and referring to Aarhus,

¹¹² *Administrative Law 4th Ed’n* §16-167; Now 5th Edition §18-200

¹¹³ *Land Securities plc and others v Fladgate Fielder (a firm)* - [2010] 1 EGLR 111 §94

¹¹⁴ Emphasis added

¹¹⁵ *Austin v Miller Argent (South Wales) Ltd* - [2015] 1 WLR 62; [2014] EWCA Civ 1012

¹¹⁶ **Obasi v The General Medical Council** [2021] NIQB 58

Ouseley J observed in **McMorn**¹¹⁷

“..... there is a significant public benefit in decisions on national environmental law being lawful, and therefore in their lawfulness being tested readily by individuals. The fact that the individual’s livelihood or property value may also be at stake could not disapply the Convention or the CPR, and there is nothing in the text of either to suggest that it does. The Convention is not just for the disinterested environmentalist or national body, but must have recognised that many individuals or ad hoc groups of individuals would be concerned with decisions which affected them personally, as it affected their enjoyment of their property, leisure, area or interests.”

THE FACTS & COMMENT THEREON

106. As recorded above, in their Statement of Grounds at §C the Applicants say:

“The Applicants are residents who live in the area immediately adjoining the proposed development. The Applicants are not opposed to development of the site of the proposed development and have no particular objection to an already granted SHD development on the site. However, the Applicants are of the view that the development granted planning permission represents significant over-development of the site.”

2018 & 2021 Proposals – Table of Comparison & Applicant Submissions to Board in 2021

107. The phrase “already granted SHD development” refers to a planning permission granted in July 2018 for a strategic housing development on the Site to a different Martlet Group company. Atlas emphasise the similarities of the “2018” and the “2012” development. The Applicants say they are very different. A crude and no doubt incomplete, but I think sufficient, comparison can be tabulated as follows:

	Planning Permission		Notes
	2018	2021	
Units	<ul style="list-style-type: none"> • 102 Of which • 68 apartments, • 13 courtyard units • 21 houses 	<ul style="list-style-type: none"> • 255 Of which • 248 Apartments • 7 houses 	<p>The 2021 number of units is 250% of the 2018 number of units</p> <p>The 2021 number of apartments is 365% of the 2018 number of apartments</p>

¹¹⁷ R(McMorn) v Natural England - [2016] PTSR 750, [2015] EWHC 3297 (Admin)

	Planning Permission		Notes
	2018	2021	
Density - uph ¹¹⁸	<ul style="list-style-type: none"> 43 average 	<ul style="list-style-type: none"> 106 average 152 - northern part of site 65 southern – part of site 	The 2021 average density is 247% of the 2018 average density. The 2021 northern part ¹¹⁹ density is 353% of the 2018 average density.
Maximum Building Height - Storeys	4 ¹²⁰ 4-5 ¹²¹	6	As to 2018 I must take as correct the lower figure, taken from the Board's permission
Plot Ratio ¹²²	I do not have plot ratio figures but a submission to the Board by BPS Planning for the Mooney and Kelly applicants asserted that the 2018 plot ratio was "100% less" than the 2021 plot ratio. Mathematically it is difficult to know what to make of this. But it is at least clear that it is intended to convey a very much higher plot ratio in the 2021 than in the 2018 proposed development. In very general terms this is consistent with the density differences, though the two concepts are not precisely linked.		
Tree Loss ¹²³	<ul style="list-style-type: none"> 223 = 81%¹²⁴ Including <ul style="list-style-type: none"> 1 of 2 category A trees¹²⁵ 52 of 75 category B trees 	<ul style="list-style-type: none"> 188 = 68% Including <ul style="list-style-type: none"> 2 of 2 category A trees 42 of 75 Category B trees 	Appreciably fewer trees and appreciably fewer Category B trees will be removed in the 2021 than in the 2018 proposed development. However, detailed information is lacking as to any differences in the locations of tree removal, which trees are being removed and resultant effect on

¹¹⁸ Housing Units Per Hectare.

¹¹⁹ The site can be thought of very roughly as two almost separate squares joined only at a corner of each.

¹²⁰ Per the Board's 2018 Planning Permission and per BPS Planning Submission for the Mooney and Kelly Applicants, apparently citing the 2018 Inspector's Report.

¹²¹ Per Inspector's Report 2021 & Crean Affidavit

¹²² Gross floor area of buildings divided by site area.

¹²³ Per Atlas Affidavit

¹²⁴ Calculated by me from the figures provided – 68/188x223

¹²⁵ information provided at hearing

	Planning Permission		Notes
	2018	2021	
			Applicants' Amenities. BPS Planning for various Applicants complained to the Board in the 2021 process specifically of removal of trees which screen their clients' homes.
Bats	Atlas makes the point that, as to Bats, the 2021 Permission is more protective in that it conditions a further bat survey, whereas the 2018 permission does not.		I do not consider that point well-made. It is clear on the papers that the 2018 permission was issued in the context of bat surveys of 2015 and 2017. The 2021 condition is tolerably clearly a response to the fact that the Bat surveys had not been updated for the 2021 process – as the Applicants' had complained in the 2021 process.
	Atlas makes the further point that, in accepting the 2018 permission the Applicants accept that development could proceed on it now without any further bat survey, whereas such a survey would be required on foot of the 2021 permission.		There is some but limited substance to that point. <ul style="list-style-type: none"> • First, and as stated elsewhere in this judgment, the Applicants are entitled to take an overview of the acceptability of the 2021

	Planning Permission		Notes
	2018	2021	
			<p>permission in all its aspects.</p> <ul style="list-style-type: none"> • Second, regardless of which planning permission is acted upon, any disturbance of bats will be a criminal offence under the Habitats Regulations unless done pursuant to a derogation licence. As bats are known to be in the site, the practical reality of avoiding such a criminal offence in developing on foot of either permission will be the necessity of an expert bat survey of at least some degree and any derogation licence will be framed accordingly.

108. In addition, counsel for the Applicants opened at some length submissions by and for Applicants to the Board in the Planning Application¹²⁶. I need not recite their content here. Some of it has informed the comparative table set out above. Otherwise, the content of those submissions was notable for asserting and purporting to illustrate by pictorial means that, by reason of differences in such matters as design, layout, building location, height and massing, and spatial

¹²⁶ BPS Planning Consultants for the Mooneys and the Kellys and, separately, for Rosalind Matthews. Declan Brassil & Co For The Daltons. Marie Forrester made her own submission.

relation to Applicants' houses, and loss of tree screens, the degree of interference in their amenities, inter alia by overlooking, overbearing and overshadowing, is significantly greater in the 2021 than in the 2018 proposal.

109. I repeat and emphasise that it is no part of my function to exercise any planning judgment of either the 2021 or the 2018 proposal or of any comparison between them. Nor is it for me to judge whether the Applicants are correct in asserting that the 2021 proposal is for overdevelopment of the site. However, as Atlas invites me to infer inconsistency between the Applicants' attitude to the respective development proposals, I am entitled to observe that the tabulated material above amply demonstrates that the two development proposals are very significantly different such that, from a general point of view, a willingness to accept the 2018 proposal in no way implies that the Applicants are being irrational or insincere in their opposition to the 2021 proposal. A decision to oppose a development proposal, or to accept one but not another, may be perfectly properly based on narrow and focussed issues. Or it may equally properly be based on an overview judgment, taking the good with the bad of any proposal and comparing it to the good and bad of any other proposal and what may be thought of as likely other options and reasonable expectations for a site. Or the basis of opposition may lie in a mix of, or somewhere on a spectrum between these approaches. Indeed, depending on circumstances, any of these approaches or variations thereon may significantly inform a decision of the Board in a given case. That is in the nature of planning judgments and decisions. I appreciate that Atlas's insincerity argument is made on the basis of a more granular identification of issues in comparison between the 2018 and 2021 proposals – especially as to trees and bats. But it seems to me that this more general observation, that acceptance of the 2018 proposal of itself in no way impugns the opposition to the 2021 proposal, provides a useful background against which to consider the more granular issues.

DLRCC Report to Board

110. I note that the report to the Board by the Chief Executive of Dun Laoghaire/Rathdown County Council concluded as follows:

“12.0 Conclusion

Although the principle of housing development of higher density has been established at the subject site through extant permission under ABP-301334-18, the proposed development represents a significant change in form and density to that previously permitted. The Planning Authority has significant concern regarding the scale, massing, height, unit mix and form of a number of apartment block elements of the proposed development, which would adversely impact on the character of the receiving environment and would be contrary to the provisions of Policy UDI of the Dun Laoghaire Rathdown County Development Plan 2016-2022 regarding Urban Design Principles. While the overall proposed density of 106 u/p/ha is noted, by virtue of the massing and density of development proposed in the 'northern' portion of the subject site, it is considered that this element of the scheme would represent overdevelopment of this portion of the subject site.

In addition, it is considered that the proposed development would be contrary to the objective 'A' zoning of the subject site, which seeks 'to protect and or improve residential amenity, in that by virtue of its massing, design and proximity to subject site boundaries, the proposed development would adversely impact on the amenities of existing adjacent properties by way of overlooking, and overbearing appearance. The Planning Authority has concern regarding the future amenity value of the proposed scheme due to the layout of same, including separation distances provided between apartment block buildings, and those provided between proposed dwelling house units and apartment blocks on site. Furthermore, it is considered that the proposed development would not accord with the provisions of SPPR 4 of the Sustainable Urban Housing: Design Standards for New Apartments Guidelines (2020) regarding dual aspect apartment in that only 48% of proposed apartments within the scheme would comprise dual aspect units in lieu of a minimum provision of 50% dual aspect units required in a single scheme on a site in an intermediate/suburban location. As such, the proposed development should therefore be refused planning permission."

111. The following section of the report¹²⁷ elaborates on these concerns in the form of suggested draft reasons for refusal of permission by reference, inter alia, to its overall scale, height, massing, built form, proximity to adjoining site boundaries, and the monolithic form of apartment blocks to Church Road in particular, the proposed development would,

- fail to have regard to its surrounding context
- have a detrimental impact on the character of the surrounding area
- adversely impact on the amenities of existing adjacent properties by way of overlooking,
- be visually overbearing when viewed from existing adjacent properties,
- be seriously injurious to the residential amenities of the area and
- depreciate the value of existing adjacent properties,
- represent, in the northern portion of the site in particular, a cramped built form and overdevelopment of the subject site.
- represent an excessive density and would constitute overdevelopment of this site.
- provide for insufficient average daylight factor (ADF) values for proposed apartment units within the scheme
- not accord with SPPR 4 of the Sustainable Urban Housing: Design Standards for New Apartments Guidelines (2020) regarding dual aspect apartments in intermediate/suburban areas.
- contravene the Development Plan as to the proportion of one-bedroom units
- result in a substandard level of residential amenity for future occupants of the proposed residential scheme
- be contrary to the Development Plan and to the proper planning and sustainable development of the area.

112. I emphasise that my purpose in setting out the foregoing content of the Chief Executive's report is in no way to endorse it or to suggest a preference for it over the Board's conclusions. Those issues are not for the court and I have nothing to say on them. My purpose is, rather, to point out

¹²⁷ 13.0 Statement In Accordance With Section 8(3)(B)(II)

that the Applicants' views, though caricatured by Atlas in effect as the NIMBYist opposition of those supposedly "*quite happy to deny the opportunity to others to have affordable housing in the same location because it may impact on their own enjoyment (as they perceive it)*", are in substance echoed as reasons to refuse permission by the Planning Authority whose statutory remit is the "*proper planning and sustainable development of the area*" and who are expert in those considerations as they apply to that area. In particular, the underlined words above, comparing the 2021 proposal to the 2018 proposal (which the Council had not opposed), amply support the proposition that, whether others, including the Board, agree or disagree as they are entitled to do, it is entirely credible and in no way indicative of insincerity to oppose the 2021 proposal while being willing to accept the 2018 permission as a *fait accompli*.

Individual Grounds & Comment thereon

113. The Grounding Affidavit in the motion to set aside leave asserts that the Judicial Review asserts grounds that the Applicants "*care little or nothing about*" or could have raised before the Board but did not. It purports to illustrate these points as follows:-

- (i) Atlas notes that **Ground 2** asserts **density** of the 2021 development in material contravention of CDP¹²⁸ objective RES3 which provides for 20-30uph¹²⁹ in the edge of small towns.

Atlas says the same point could be made about the 2018 development to which the applicants have "*no particular objection*"¹³⁰ as its density was 42.6uph – also in breach of RES3 on the Applicant's analysis. Yet in the 2021 Application the Applicants told the Board that the 2018 density permission was a '*reasonable balance between local concerns and developer's wish to develop these lands to a considerable density*' and that "*42.6uph remains the maximum density that can be achieved on this site*".¹³¹

Atlas's deponent comments: "*It is not clear to me how the Applicants can now, in the judicial review, fairly assert say that the permission is invalid for going outside of the 20-30uph parameter relied upon in the ground for leave.*"

Comment: I reject this argument as formalistic, trite and facile. First, by the time of the 2021 planning process, the Applicants were "stuck" with the 2018 permission which at least some of them had vehemently opposed and they were entitled in submissions in the 2021 application to try to make a virtue of that vice. Second, and more importantly, their general objection is overtly to overdevelopment. It is no doubt based on personal judgments as local residents and, at base, practical judgments as to likely effects rather than technical and legalistic judgments. As the table above shows, there is a considerable difference between the densities of the two proposals. It is

128 County Development Plan

129 Units Per Hectare

130 Citing Statement Of Grounds §C – See Below

131 BPS Submission To An Bord Pleanála P30 & 32

entirely rational on the part of the Appellants, and in no way impugns their sincerity, that they are willing to put up with the 2018 density (if only as a reasonable balance short of their own preferences) but entirely opposed to a proposed multiple of that density. That they had to translate that view of the merits of the application into a legal objection by reference to development plan density standards lower than both the 2018 and 2021 proposals reflects no more than the fact that they exhausted their case on the merits before the Board and judicial review is concerned with legality not merits.

(ii) Atlas notes that **Ground 3** complains that the apartment blocks do not have a **clearance distance** of circa 22 meters in material contravention of §8.2.3.3(iv) of the CDP¹³². Atlas says that the 2018 permission has a number of blocks less than 22 meters distance apart also, and so this cannot be a real complaint of these Applicants.

Comment: I reject this argument as formalistic for similar reasons. Narrower clearance distances are consistent with a complaint of overdevelopment – a point made by the Planning Authority. The comparison may well be one of degree as between the two permissions. Hypothetically, accepting one separation distance of 21 metres in an earlier permission (leaving aside the question of its materiality) does not oblige the Applicants to accept, hypothetically, 5 separation distances of 5 metres in a later application. The Applicants complain of one separation distance in the 2021 permission of less than 8 metres. Of course, I make no finding as to the substance of that complaint, save that it is not “very plain” that it must fail. But there is no evidence of insincerity here. In the end the Applicants complain of illegality.

(iii) Atlas say **Ground 4** is a complaint, as to **daylight** requirements of the Height Guidelines 2018¹³³ and the Apartment Design Guidelines 2020¹³⁴, that 1.5% ADF, rather than 2% applies in some kitchens in some apartments. Atlas say some kitchens in the 2018 units have similar ADF parameters, yet the Applicants can live with the 2018 permission.

Comment: A similar point as to formalism can be made here if, perhaps, with less force. Again, in the end the Applicants complain of illegality. In any event, this was the specific and failed standing complaint made in **Atlantic Diamond** and a similar ground succeeded in **Walsh**. Counsel for the Applicant also says the 2018 Permission issued in July 2018 but the 2018 Height Guidelines issued only in December 2018 and could not have been relied on in that 2018 planning process. Inevitably, the 2018 Order of the Board does not recite that it considered those Height Guidelines. Ground 4 emphasises the Applicant’s reliance in these proceedings on SPPR3 of those Height Guidelines. In short, criticising the Applicants for not objecting in the 2018 planning process by reference to the 2018 Height Guidelines and its SPPR3 is misconceived. Equally, the 2020 Design Guidelines for New Apartments could not have been relied on in that 2018 planning process. But the position is less clear in that regard as Design Guidelines for New Apartments had issued in March 2018 and are listed as matters considered in the July 2018 Order of the Board. While I was not addressed on the issue, I am not aware of any relevant difference between them. Even so, the relevant daylight

¹³² The Grounding Affidavit Does Not At This Point Mention §8.2.3.3(iv) Of The CDP But That Is In Fact The Complaint Of Ground 3

¹³³ Urban Development and Building Heights Guidelines for Planning Authorities December 2018

¹³⁴ Sustainable Urban Housing: Design Guidelines for New Apartments (2020)

standards had not been entrenched in SPPR3 of the 2018 Height Guidelines when the 2018 Permission was granted. It is not “very plain” that Ground 4 must fail.

(iv) **Ground 5** alleges **tree loss** in material contravention of the CDP. Atlas say the tree loss is less under the 2021 permission than the 2018 permission. See the table above. So, Atlas say, “*It is obvious that these Applicants have no interest in this point or standing.*” Atlas also says that under the proposed 2021 development 202 new trees will be planted.

Comment:

- That 202 new trees will be planted is an unconvincing argument for setting leave aside given a CDP objective “To Preserve Trees and Woodland”. Though it might have been relevant to a question of a stay (see **Jennings**¹³⁵) it is not “very plain” that an argument that replacement is not preservation must fail. I make no prejudgment as to how this issue might be decided at trial.
- Atlas argues that, as the Applicants accept the prospect of development on foot of the 2018 permission, they accept the loss of trees it implies, such that their opposition to the 2021 permission on this account is not merely insincere but pointless. Atlas say they could, tomorrow, remove the trees removal of which is permitted by the 2018 permission. So they could - but arguably at the cost, from Atlas’s point of view, of committing it to development on foot of the 2018 Permission. One cannot mix and match elements of inconsistent permissions – see for example **Horne**¹³⁶, **Dwyer Nolan**¹³⁷, **Moore**¹³⁸ and **Simons**¹³⁹. As the point was not argued, I do not say that would be so on the facts of this case and, no doubt, Atlas would take a very different view. I merely say, and for now it suffices to say, that Atlas’s argument is by no means self-evidently or “very plainly” correct.
- For now, and apart from a crude numbers comparison, Atlas makes no effort at a qualitative analysis or analysis of the planning significance (in the sense in which it might bear on the practical attitude of neighbours) of the issue of the effect of tree loss on amenity as between the 2021 and 2018 proposals. The Applicants’ attitude to tree loss, as evidenced in their submissions to the Board, is not merely a numbers issue. They make specific complaints of loss of trees screening their houses and do so in submissions which make various complaints of overbearing, excessive height and the like. It is entirely possible that the effects of tree loss on amenities would be credibly and sincerely, even if subjectively, considered different or even worse in the 2021 proposal than in the 2018 proposal given the underlying complaint of overdevelopment of the site. Even were insincerity a valid basis to set aside leave, insincerity is not “very plain” here.

(v) **Ground 6** asserts that the Board failed to comply with **Article 299B(1)(b)(ii)(II)(c)** PDR 2001, as the Developer had not submitted the required **statement as to environmental**

¹³⁵ Jennings v An Bord Pleanála [2022] IEHC 11

¹³⁶ Horne v Freeney [1982] WJSC-HC2157 – [1982] ILRM 29

¹³⁷ Dwyer Nolan Developments Ltd. v Dublin County Council [1986] 1 IR 130

¹³⁸ Moore v Minister for Arts et al [2016] IEHC 150

¹³⁹ Planning Law, 3rd Ed’n, (Browne) §§5-10 & 5-11

assessments other than under the EIA Directive. Atlas states that the Applicants did not complain of this to the Board in the 2021 process and did not do so in the 2018 process either.

Comment: This issue arose in **Waltham Abbey**¹⁴⁰ and **Pembroke Road**¹⁴¹. It awaits resolution on appeal to the Supreme Court. It also seems to me to fall within the “Homework” principle. It can’t be said to be a ground as to which it is “very plain” that the sparing exercise of the jurisdiction to set aside leave is justified. In any event, counsel for the Applicants point out that this point couldn’t have been raised in the 2018 process as the Article 299B(1)(b)(ii)(II)(c) obligation did not exist at the time.

(vi) **Ground 10** asserts that, as to **bats** entitled to strict protection, the impugned decision is invalid as contravening Article 12 of the Habitats Directive, Article 299(C)(1) PDR 2001¹⁴² and/or Article 27 of the Habitats Regulations¹⁴³ as it failed to apply the correct legal test. It also asserts that the EIA determination on preliminary examination was based on inadequate information submitted by the developer contrary to Article 4(4) of the EIA Directive. Atlas say the Applicants did not raise these points in the 2012 or the 2018 permission processes such that it is not a “core” complaint of the Applicants.

Comment: I am unclear if Atlas relies here on the word “core”. In its favour, I assume not. Grounds are not struck out merely because they are not “core”. In any event, as these are points derived from EU law, it seems to me that to strike them out as not made below could offend against the principle established in **Commission v Germany**¹⁴⁴ as to restrictions on permissible pleas. At very least it is not “very plain” that it would not do so.

Neither is it “very plain” that these issues do not fall within the exceptions identified in **Reid** and **Atlantic Diamond** as arising where the complaint of illegality is jurisdictional. While in former times the distinction in judicial review between jurisdictional and non-jurisdictional error of law was perhaps clearer, the present position in that regard is less clear¹⁴⁵.

In any event, by reference to the text of the submission in the 2021 planning application by BPS Planners for the Kellys & Mooneys¹⁴⁶, counsel for the Applicants has shown that they did in fact complain of the inadequacy of out-of-date bat surveys.

(vii) **Ground 11** complains of failure to properly transpose to the Habitats Regulations 2011 **Articles 12 & 16**¹⁴⁷ of the **Habitats Directive** by way of the creation of a system of strict

¹⁴⁰ Waltham Abbey Residents Association v An Bord Pleanála, O’Flynn Construction Company Unlimited & Ors [2021] IEHC 312

¹⁴¹ Pembroke Road Association v An Bord Pleanála, Derryroe Ltd Et Al

¹⁴² Planning And Development Regulations 2001

¹⁴³ European Communities (Birds And Natural Habitats) Regulations 2011

¹⁴⁴ Supra

¹⁴⁵ See Hogan & Morgan, Administrative Law 5th Ed’n 2019, §10.54 Et Seq And See Feldman, Error Of Law And Flawed Administrative Acts, The Cambridge Law Journal, 73 [2014], Pp 275–314

¹⁴⁶ Submission p156/7

¹⁴⁷ The Core Ground refers to Article 12 only but the particulars explicitly and the reference to Article 54 of the Habitats Regulations implicitly and the references to derogation licences implicitly make clear that Article 16 is also relied upon by the Applicants.

protection of species and a directive-compliant system of derogation licensing as to disturbance of strictly-protected species. Though not one of the grounds identified in oral submissions as not raised with the Board, Atlas says in its grounding Affidavit and in written submissions that an identical complaint could have been but was not made about the 2018 permission and no such complaint was made to the Board in the 2021 planning process, such that it is plain that the Applicants have no actual interest in this point that they contend for.

Comment: For reasons stated above, in my view whether the Applicants have such an interest and whether it is sincere is irrelevant. Nor in my view, is it very plain that the issue would not fall within the “Homework” exception or the exception as to jurisdictional issues identified in **Reid**. With some sense, Counsel for the Applicants say that while theoretically they might have raised the transposition issue with the Board alleging its own motion obligation to remedy any such failure, that may lack reality. While perhaps incorrect in legal theory, I would not be prepared to strike out this ground at this point on that account.

Affidavit of Pat Crean & Affidavits in Motion to Set Aside Leave.

114. The Affidavit of Pat Crean, Director of Atlas, sworn 18th October 2018 was sworn explicitly to evidence “*the motivation that I believe is behind the Applicants’ application for judicial review*”. Its relevant content is summarised in the affidavit grounding the present application and in substance it grounds the present application. In particular, Mr Crean gives an account of a conversation with Brendan Buck of BPS Planning Consultants after the Impugned Permission had issued. As not very relevant, I ignore Mr Crean’s assertion of hostility by Mr Buck. As Mr Crean says his intention was to correct many factual errors by Mr Buck in his submission to the Board, I imagine Mr Buck would have a different perspective - though he has not sworn to it. In any event, I do not see that anything turns on the tone of the conversation.

115. Mr Crean says, and is uncontradicted in this respect, that Mr Buck said that his clients, the Applicants,

- would readily accept the 2018 Planning Permission, notwithstanding that it was vehemently opposed¹⁴⁸ by the Residents Association.
- had instructed their barrister to laboriously review the 2021 Planning Permission with a view to identifying issues that would act as a barrier to the development. I am unclear if the word “laboriously” is Mr Buck’s verbatim or Mr Crean’s gloss – but nothing turns on it.

116. Mr Crean also stresses that in the Applicants’ submissions to the Board in the 2021 planning

¹⁴⁸ Emphasis Added

application, the 2018 permission was “*extolled*” as an example of a reasonable planning decision for this site. In the passages of those submissions opened to me, the 2021 permission is certainly unfavourably compared to the 2018 permission. But that the comparison justifies the use of the word “*extolled*” I do not accept. A later affidavit similarly overstates the Atlas case in describing Mr Mooney as a “*supporter*” of the 2018 Permission. Assuming Mr Crean, quite properly, chose to quote BPS in terms which best illustrated his point, his choice seems to me very unconvincing. Far from extolling the 2018 permission, BPS in effect described it as something up with which the Applicants could put. The quotation reads:

“[t]he extant SHD scheme is referred to throughout this planning application. It represents an example of an ABP decision that local people can live with despite their objections to it at the time.”

117. While I know nothing of the detail of any such objections, Mr Crean’s affidavit makes it clear that the local residents, including, I infer, some or all of the present applicants, “*vehemently*” objected to the application which lead to the 2018 permission.

118. Though purporting to set out to reveal “*the motivation that I believe is behind the Applicants’ application for judicial review*” Mr Crean’s affidavit does not in fact do so. He merely asserts that their motives are not in truth to advance the environmental and other interests articulated in the grounds. He does not assert, as he said he would, what in his view, their true motivations are. Some inkling appears in the Affidavit sworn for Atlas in opposition to the Applicants’ application for a stay. It is asserted that the application “*is a means to achieve a tactical advantage, namely to block the development progressing, and to use the Court process in this pursuit.*”. As a description, not of an attempt for tactical advantage, but of the strategic aim of the entire proceedings – indeed of perhaps all proceedings seeking to quash planning permissions - this description is as unsurprising as it is obvious. It contributes nothing to an allegation of insincerity in the Applicants. Given the mere existence of the proceedings, that they want to block the development is probably axiomatic.

119. As to allegation of insincerity by reference to similarities between the 2018 and 2021 development proposals, the replying affidavit of Sean Mooney says little beyond the assertion that “*It is a complete answer ... that some or all of the Applicants are entitled to take a view on the particular development in 2018 and a different view on the development in 2021.*” He does say that “*The 2018 development in the round was acceptable to me and the other Applicants and I regret that the developer chose to try to shoehorn more development onto the site ...*”. I have omitted from my recitation of this averment argumentative comment which should not have been made.

120. A further affidavit for Atlas in the motion to set aside is, as to its factual content, essentially repetitive and does not add to the picture. Strictly speaking in the form of a submission but in the circumstance understandably, it legitimately objects that Mr Mooney’s affidavits had embarked on

“a series of submissions and points, made in an overly personalised fashion.” Yet it embarks on the same course as that of which it complains.

121. While it was not strongly pressed, I was invited to view as relevant the fact that the present Applicants had not sought to judicially review the 2018 permission as in some way colouring the picture of insincerity which Atlas sought to paint. I respectfully decline that invitation. There are many, varied and generally good reasons for objectors to accept their defeat in planning decisions and not seeking to judicially review it. We in the courts system – judges and practitioners - see the pathology of life. We tend to imagine all contracts are broken, all cars crash sooner or later, all pedestrians trip and fall and all planning decisions are judicially reviewed. Of course that is very largely untrue: most people wisely try to negotiate life without coming anywhere near the Four Courts. So here, far from confirmation of a Damascene conversion from objection to extolling the 2018 permission, the circumstances revealed in the papers before me – even those tendered by Atlas considered alone and including the excerpt from the Statement of Grounds cited above - speak of the Applicants’ resigned acceptance of a 2018 permission to which they had objected but which became unassailably valid on expiry of the applicable judicial review time limits. They speak of Mr Buck in the 2021 Application, taking the advice of Reinhold Niebuhr, and having the wisdom to accept the thing he could not change. Instead he made a virtue of the vice of the 2018 permission to which, he said, the 2021 proposal compared unfavourably. He was entitled to do so. In my view, in general terms these considerations do not in any degree imply insincerity or inconsistency on the part of the Applicants. That is, of course, not at all to say that, as a matter of planning judgment, the Board was wrong to grant permission. Still less is it to say that the Grounds will prevail in law at trial. But they are not the issues now before me.

Conclusions On Standing

122. On the foregoing review of the caselaw, I find that:

- The Applicants need not show that they are personally affected by each individually of the Grounds on which they rely, once they have shown standing in the general sense of proximity and prior participation.
- The Applicants’ standing is not delegitimised by reference to their subjective attitude to – how much they subjectively *“truly, really care about”* - the specific grounds marshalled in support of their legitimate purpose of preventing development on foot of the Impugned Permission. Of course, their purpose and their grounds may ultimately fail, but that does not make them illegitimate in the sense for which Atlas contends, such that leave should be set aside in whole or in part.
- There are limits on the Applicants’ standing to raise grounds not raised before the Board, but these are subject to many exceptions including, for example, the Homework principle.

123. Having regard to these principles and to the factual analysis set out above, I consider that it is not “very plain” as to the proceedings generally, or as to any specific ground, that leave to seek judicial review should not have been granted and I refuse to set leave aside in whole or in part.

THE MOTION TO SET ASIDE AMENDMENT OF GROUNDS

124. While the notice of motion did not seek to set aside my order as to amendment of the statement of grounds, the contemporaneous affidavit grounding that notice of motion clearly did so, in terms following:

“Insofar as the Court permitted the Applicants to amend their grounds or alter the manner in which they have sought to seek relief, I am advised that this is not permissible, in particular in light of the fact that many months had passed since the deadline for making an application for leave had passed. Whilst I do not object to the notion that an ex parte leave application can be subject to amendment, it cannot be the case that applicants could be allowed to enlarge or identify new grounds outside the time period provided for in legislation. One can readily see how this approach could lead to abuse. This is also a matter for further legal submission.”

125. In those circumstances, and even though the motion did not seek such relief, I am amenable to application to me on the basis of that averment. Atlas’s written submissions are laconic on this issue. They consist of two paragraphs¹⁴⁹. The first simply describes the amendments. The second cites no authority. They read as follows:

The Court granted leave to amend grounds on 14 December 2021 as follows:

- (i) Ground 1 to properly identify and particularise what seem to be three additional grounds made apparent in the last paragraph of the particulars of Ground 1, that is as relates to the allegation of a failure to give adequate reasons, a failure to take account of relevant considerations and the proposition that the decision was irrational.*
- (ii) Ground 4 as to the existence of a material contravention of the Development Plan as it relates to height and a failure to comply with section 9(2)(b) of the 2016 Act insofar as concerns the obligation to have regard to the apartment guidelines.*
- (iii) Ground 6 to make a more specific reference to the concept that the inadequacy of the bat surveys and generally the investigation of the position*

¹⁴⁹ §§60 & 61

regarding bats would result in a failure to adequately describe the receiving environment as contemplated by the seventh schedule to the 2001 Regulations.

The planning permission was granted on the 9 July 2021 and the Applicants had 8 weeks to commence proceedings. While it is the case that the application was moved within the 8 weeks, the amendments to the grounds above arose much later and far outside the 8 week period. No application to amend the grounds was brought. The Applicants are therefore out of time to raise these grounds, and leave ought not to have been granted on the basis that they would be entitled to correct errors in their application or raise additional issues.

126. At hearing, counsel for Atlas did not pursue, and disavowed pursuit of, an objection by way of elaboration in respect of the specific grounds amended, the substance of those grounds and the terms of the amendments for which liberty was granted. He drew the amendments to my attention – but no more.

127. Rather, counsel for Atlas confined himself to the simple proposition that it is incorrect to permit an applicant for judicial review to amend its grounds at the ex parte leave application where the substantive application is heard and the amendment permitted after the expiry of the time limit for seeking leave to seek judicial review¹⁵⁰. Counsel argued that the Court may grant leave only in terms of the grounds proffered to the Court before the relevant time limit expired. While he did not rule out the possibility of amendment, counsel for Atlas said that should not occur at the ex parte leave stage but should occur only on foot of a later, inter partes, hearing.

128. The logistics of this issue require a little explanation. The time limit for seeking leave to seek judicial review, set by **S.50(7) PDA 2000**¹⁵¹, is “8 weeks beginning on the date on which notice of the decision ... was first sent”. While **S.50(8) PDA 2000** allows extensions of that time limit, such extensions are difficult to obtain and practitioners, prudently, see compliance with the 8 week time limit as, in practice, a necessity. The time period is, experience shows, short – especially as such applications require complex documents, and significant decisions by putative litigants and their legal and other professional advisors, all the product of careful consideration of perhaps thousands of pages of documents, and careful thought and legal advice. It is no criticism of anyone, or indeed of the time-limits themselves, to observe that applications for leave often – perhaps typically - get to court only shortly before expiry of the time limit.

129. **S.50A(10) PDA 2000** requires the Court to determine an application for leave to seek judicial review “as expeditiously as possible consistent with the administration of justice”. The realities of the

¹⁵⁰ As he said: “..... we're not actually engaging with the substance of it, we were simply making the point that it ought not to have been done on an ex parte basis.”

¹⁵¹ Planning & Development Act 2000

administration of justice, including other demands on court time and resources, are such that it is often, even generally, not possible for the court to hear the leave application in full immediately it is first mentioned in court. The practice therefore has arisen that, on that first occasion, the leave application is briefly opened to the Court with the effect that it is thereby made within the time limit. Colloquially, it is said that this “stops the clock”. Thereupon the application is adjourned to a later date to be heard in full and, typically, thereupon determined. The result often is, and was in this case, that the leave application, though made within the time limit, is substantively heard and determined outside the time limit. In practice, it is not unusual that the process of substantively moving the application, perhaps as a result of inquiry by the judge, results in the applicant’s applying to amend, in greater or lesser degree, the grounds initially proffered to the Court when the clock was stopped. That is what occurred in the present case and it was at that later adjourned hearing, after the expiry of the time limit, that the question of amending the grounds arose and was decided. Typically, and in this case, the amendment was allowed on terms that it be without prejudice to any rights of the Respondent and the Notice Party. Of course, that the foregoing is the practice is not necessarily an answer to the objection now made by Atlas, but it may assist the reader to understand the issue and how it has arisen.

130. While, given the basis on which the application by Atlas was moved, it is not necessary to get into the detail, the context is one in which, undoubtedly, the question whether the relevant time limit has expired is relevant to the determination of an application to amend Grounds. If it has expired it can be said, at least in general terms, that the application to amend is at appreciably greater risk of refusal.

131. At hearing, counsel for Atlas relied, all but entirely, on a single obiter observation by Barniville J in **Conway**¹⁵². Simplifying the sequence of events slightly, Mr Conroy challenged a Board decision published on 17th October, 2018. He opened his application for leave before the High Court on 10th December 2018 and it was adjourned to further hearing. When it came before the court on 21st December 2018, Mr Conroy proffered an undated statement of grounds which named the Board as the sole respondent. On that occasion he also proffered a second statement of grounds which named the State as additional respondents. The court further adjourned the matter in exercise of its jurisdiction to require that the application for leave be heard on notice to the intended respondent. When the leave application came before the court on 31st January 2019, Mr Conroy proffered a further, undated, third statement of grounds. On that occasion, the Board objected to the third statement of grounds as proffered more than eight weeks since the Board’s decision. Ultimately, Barniville J refused leave on the basis that Mr Conroy lacked standing. As to the objection to the amendment, the observation on which counsel for Atlas relied is as follows:

“24. While I have some doubt as to whether an applicant is entitled to amend his or her statement of grounds without leave of the court well outside the time period provided for in s. 50(6) and several weeks after the leave application was first formally opened¹⁵³, I am satisfied that it is in the interests of justice, in this case, that I should consider the issue of the

¹⁵² Conway v An Bord Pleanála & Ors [2019] IEHC 525

¹⁵³ Emphasis added

applicant's standing to bring the proceedings by reference to the most recent statement of grounds on which the applicant seeks to rely, namely, the third statement of grounds."

It is clear that Barniville J did not decide the question posed in the words underlined above. Indeed, he did not even express a view: he merely expressed a doubt.

132. It seems to me important to note that the second and any subsequent occasions on which a leave application comes before the court, en route to its determination, are not separate applications to the court. They are a continuation, following adjournment, of the initial application at which the "clock was stopped". It would in principle be surprising if, by reason of such adjournments, the applicant for leave were to fall foul of the very time limit the initial application had been designed to meet. Indeed, if the applicant were, by reason of the adjournment of the leave application to a date after the expiry of the time limit, to fall foul of the time limit as to amendment of the grounds, one might enquire why (s)he should not fall foul of the time limit in all respects. Absent authority, I confess to seeing no reason in principle to draw such a conclusion. For example, counsel for Atlas did not argue that it had been prejudiced by the timing of amendments (in the sense in which prejudice is properly to be understood) and it is difficult to see what prejudice could have ensued given the first Statement of Grounds formally served on Atlas was the amended version.

133. **Order 84 RSC**¹⁵⁴ provides, in part, as follows:

"20. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

*(2)^[4] An application for such leave shall be made by **motion ex parte** grounded upon:
(a) a notice in Form No 13 in Appendix T containing:*

.....

(ii) a statement of each relief sought and of the particular grounds upon which each such relief is sought,

(iii) where any interim relief is sought, a statement of the orders sought by way of interim relief and a statement of the particular grounds upon which each such order is sought,

.....

(b) an affidavit, in Form No 14 in Appendix T, which verifies the facts relied on.

.....

(3) It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters

¹⁵⁴ Rules Of The Superior Courts

relied upon as supporting that ground.

(4) *The Court hearing an application for leave may, on such terms, if any, as it thinks fit:*

(a) *allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise,*

(b) *where it thinks fit, require the applicant's statement to be amended by setting out further and better particulars of the grounds on which any relief is sought."*

134. Accordingly, it is clear from Order 84 that an ex parte application for leave to seek judicial review must be grounded in a Statement of Grounds, which should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground. Nonetheless, Order 84 is equally explicit that the court has power at such ex parte application to *"allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise"*. **S.50 PDA 2000**, which governs planning judicial review, provides that it shall be judicial review under Order 84. By necessary implication, therefore, S.50 PDA 2000 contemplates amendment of Grounds at ex parte leave applications.

135. That being so, Atlas's argument is reduced to an argument that the power of amendment stated in Order 84 becomes non-exercisable in a leave application made within time if the determination of the leave application is made outside the time limit. If there were doubt as to Atlas's position, that was made clear by the answer counsel for Atlas gave to a question I posed. I asked what he considered the position would be if, at the "clock stopping" application made within the 8 weeks, counsel for an applicant for leave advised in terms broadly descriptive of their substance that at the adjourned hearing outside the 8 weeks certain amendments to the grounds would be sought. Counsel confirmed that on the argument Atlas made, even that would be impermissible.

136. Absent binding authority – and none has been opened to me - I see no reason to favour Atlas's argument. In my view, it in reality impugns the entire practice of "clock-stopping" and adjournment of the leave application - though counsel for Atlas disavowed doing so and made no submissions to that effect. While the general practice could be impugned, it was not. The practice has, in practice, proved necessary to the management of the planning judicial review list given that by reason of their complexity leave applications tend, speaking very generally indeed, to take longer in planning judicial review than in other judicial reviews.

137. In my view, Atlas's argument fails to recognise that the adjourned hearings are a continuation in all respects of the leave application made within time, such that any application to

made the grounds made in that leave application is made within time.

138. As stated, in granting leave to seek judicial review and, in so doing, to file and deliver an amended statement of grounds, by my order I preserved, as is the practice, the right of the Respondent and the Notice Party to object to the amendments. Such objection might have been taken on a variety of bases, some perhaps relating to the specific terms of and/or substantive nature of the amendments. I incline to the view, without so deciding, that in considering any such issue as the inter partes iteration, as it were, of the ex parte application to amend, the onus of justifying the amendment would in the first instance be on the applicant. But, no doubt for good reason, Counsel for Atlas did not impugn the amendments by reference to their specific terms of and/or substantive nature. Rather he confined himself to the argument that amendments may not be made at the adjourned hearing of an ex parte leave application made within the time limit where the issue of amendment arises only at the adjourned hearing held after expiry of the time limit. That is a question of law on which little, if anything, turns on questions of onus. For the reasons indicated above I respectfully refuse the application to disallow the amendments.

CONCLUSION

139. Accordingly, I dismiss Atlas's application in all respects.

140. This judgment is delivered electronically. My provisional view is that the Applicants should have their costs of the motion as following the event of its dismissal. If Atlas disagree they may file written submissions within 14 days of the date hereof. The Applicants may have 7 days to reply thereafter. The case will be for mention on 30 May 2022.

DAVID HOLLAND

28/4/22