



[2024] IEHC 344

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000052]

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

BETWEEN:

BRONAGH HUGHES AND ANDREW SINCLAIR

APPLICANTS

AND

DUBLIN CITY COUNCIL

RESPONDENT

AND

RED ROCK BPRKH LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Wednesday the 12th day of June, 2024

1. *Vigilantibus non dormientibus jura subveniunt.* That principle underlies many procedural rules, and, to take one example, the law in relation to the jurisdictional criterion of time limits has a helpful analogous read-across to the law in relation to exhaustion of remedies. In *Krikke v. Barranafaddock Sustainable Electricity Ltd* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303 a time limits case, Woulfe J. said at para. 88 that the CJEU had “clearly set [that it was] ‘settled case-law ... that, in the absence of EU rules in the field, it is for the national legal system of each Member State to ... lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law’” (para. 88). In that case it was “very difficult for the appellants to argue that the time limits in s. 50 make it in practice impossible or excessively difficult to exercise rights conferred by the EIA Directive, in circumstances where they have never sought to apply for judicial review of the compliance decision and have never tested the operation of the time limit rules” (para. 90). Analogously an applicant who never participated in the planning process or sought to judicially review the failure to seek leave to appeal, or to test the operation of the leave to appeal rules, may also be in a difficult situation. At para. 95, Woulfe J. agreed with Donnelly J. in the Court of Appeal (*Krikke & Others v. Barranafaddock Sustainable Electricity Ltd* [2021] IECA 217, [2021] 7 JIC 3001): “Provided that the principles of equivalence and effectiveness are complied with, a Member State is entitled to provide particular procedural routes that a person challenging a development or development consent must take. Section 50(2) applies to both issues of pure domestic law and to matters of EU Law.” Hogan J.’s judgment was to similar effect on these matters (see para. 28): “the applicants cannot realistically complain of any supposed difficulties attending the eight-week period because they never actually sought to apply for judicial review ... nor, for that matter, did they seek to extend time” (para. 34). The law is clear that an applicant must generally avail of alternative remedies if she wishes to seek judicial review. These applicants failed to properly investigate the planning non-conformity of property they purchased, did not engage a surveyor or otherwise compare the planning permission with the plans of the development as completed or the situation on the ground, took the developer’s statements at face value without checking the situation, and failed to take any steps to seek retention permission themselves, even when they had little choice but to acknowledge the non-conformity. They then failed to participate in the developer’s application to regularise that non-conformity, and stood majestically aloof from that process on the wobbly ground that they had not been consulted themselves, thus depriving themselves of the automatic right to have recourse to the board. We don’t even need to rely on their failure to seek judicial review of the refusal of leave to appeal the retention decision, their failure to sue the developer or anybody else, or even to co-ordinate with the developer to request the latter to appeal, or their failure to challenge the validity of the statutory test for leave to appeal to the board (s. 37(6)(d) of the Planning and Development Act 2000). The question now is whether the former set of failures individually or cumulatively engage the general doctrine, reinforced by statutory provision in the planning context, that an applicant cannot simply challenge a first-instance decision if there are appropriate alternative procedures available that she could avail of, or that she could have availed of but did not.

Geographical context

2. The development site is in the Bushy Park Road area of Rathgar/Terenure in Dublin 6. It consists of a multi-unit development of 8 dwellings, with 13 car parking spaces, of which only 12 were authorised.

Facts

3. Permission for the development was originally sought by application no. 3760-18, which was granted on appeal by the board at reference no. ABP-303532-19.

4. That permission was later amended by applications nos. 3874-19, and 4788-19. Ultimately the permission granted allowed for 8 dwellings and 12 car parking spaces.

5. The development as constructed however did not conform to the permission, both in terms of number of car spaces (13 rather than the permitted 12) but also in terms of the layout – rather than being parallel to the road some were at right angles.

6. The applicants purchased this land in an agreement with the developer dated 13th August 2021, agreeing to pay €1.640M for the privilege, not to speak of VAT, stamp duty and transaction costs. The fact that despite such outlay, three years later they have ended up in a painful legal tangle over a parking space is something that would activate the sympathy of a court. But it doesn't have the effect of relieving the applicants from choosing the correct legal route to resolve that problem.

7. The agreement involved sale to the applicants of the lands marked in red on the map attached to that agreement. In relevant part it comprises the applicant's dwelling and two parking spaces.

8. On 6th September 2021, Robert Turley of DC Turley & Associates consulting engineers signed a certificate (for their client, the developer), provided to the applicants by the developer, stating that "we are of opinion that the Works as constructed are in substantial compliance with the Planning Permission Order as set out in 5 above, insofar as the development is complete". Section 5 of the document refers to the permissions mentioned earlier in the judgment. Was that accurate? The applicants say not, something I don't have to decide, although one can note in passing that it possibly depends on how much of the development was complete on 6th September 2021.

9. Normally, during the conveyancing process, any non-conformity with a permission is addressed one way or the other, one assumes generally by a property survey. In this case, the developer provided the certificate just referred to. That doesn't seem to have been meaningfully challenged or investigated on behalf of the applicants, but was accepted with no questions asked, or at least no effective questions asked and apparently no survey conducted.

10. A planning application was submitted by the developer seeking retention and planning permission from the council on 20th September 2023. This sought permission for alterations to development previously approved under Reg Ref 3760/18 (as amended) as granted on appeal by the board (ABP Ref 303532) dated 26th June 2019.

11. This grant of permission was subsequently amended by Reg Ref 3874/19 and Reg Ref 4788/19.

12. On 20th September 2023, the developer applied to the council for retention permission for: "[A]lterations to development previously approved under Reg. Ref. 3760/18 (and later amended under Reg. Ref. 3874/19 & Reg. Ref. 4788/19) comprising the omission of Condition 13b as attached to Reg. Ref. 3760/18 and the attachment of the replacement Condition to allow for the provision of a management company and retention planning permission for the revision of the site layout plan to provide 1 no. additional car parking space (total no. of car parking spaces increased to 13 no.) with associated general revision to landscaping areas". ("The Proposed Development".)

13. At the time of the submission of the retention application, the developer appears to have been the registered legal owner of the title. While the applicants say that they agreed to buy the freehold and not merely a long lease (which seems to be borne out in relation to the house at least from the deed of transfer), they also say that they are in course of registration rather than that they have actually succeeded in effecting such registration. That implies that the developer remains the registered owner. Indeed as of the date of the hearing, the original folio is shown as intact on landdirect.ie, with 14 pending dealings.

14. In box 7 of the application the developer lists itself as the 'Owner' of the site of the proposed development.

15. The box at 7(b) which states "If applicant is not the owner, please state name and address of owner and include documentary evidence of consent of the owner to make the application" is left blank.

16. A Site Notice was erected dated 20th September 2023. The applicants ignored this and, without making submissions, sat through the procedure, the outcome of which they now complain about.

17. The council's Road Planning Division prepared a report on 27th October 2023 which recommended:

- "Only 12 no. car parking spaces is permitted for the development, and car parking space no. 7 adjacent as per As Built Site Layout Plan dwg. Ref. COM-003.02 shall be omitted".
- 18.** This was for stated reasons as follows:
 "The current standards apply, therefore the provision of an additional space is in excess of Development Plan Standards, and is not acceptable. However, this division has no concerns with the relocation of the car parking spaces from the east to the northern boundary. Parking space no. 7 adjacent to the vehicular entrance shall be omitted. The space is not suitable for cycle parking due to conflicts with parking and vehicular entrance, however landscaping proposal could be conditioned."
- 19.** No submissions were received in response to the planning application.
- 20.** A notice of the council's decision to grant permission was issued to the developer on 15th November 2023. The decision included condition 3:
 "The developer shall comply with the following requirements of the Transportation Planning Division of Dublin City Council;
 a) Only 12 no. car parking spaces is permitted for the development, and car parking space no. 7 adjacent as per As Built Site Layout Plan dwg. Ref. COM-003.02 shall be omitted.
 b) Drawings detailing landscaping proposals in place of car parking space no. 7 shall be submitted to the planning authority for written agreement within 3 months of the date of grant of permission. Works shall thereafter be implemented within the next applicable planting season unless otherwise agreed in writing with the planning authority.
 c) All costs incurred by Dublin City Council, including any repairs to the public road and services necessary as a result of the development, shall be at the expense of the developer. Reason: To ensure a satisfactory standard of development."
- 21.** On 4th December 2023, the applicants' solicitors wrote to the council and drew the absence of their consent to the council's attention.
- 22.** The council responded that as the developer had indicated on the application form that it was the owner of the site "the application was assessed on that basis and therefore deemed to be a valid application". The council suggested that the applicants seek leave to appeal from the Board.
- 23.** The applicants then made an application for leave to appeal the council's decision to the board, pursuant to s. 37(6) of the 2000 Act on 8th December 2023.
- 24.** That was refused. The relevant board direction (BD-014947-24) (ABP-318647-23), dated 3rd January 2024, states:
 "The Board considered that it has not been shown that the development in respect of which a decision to grant permission has been made will differ materially from the development as set out in the application for permission by reason of conditions imposed by the planning authority... Condition 3 does not materially change the permitted car park spaces for the development."
- 25.** The board order (ABP-318647-23) dated 8th January 2024 states:
 "Having regard to the submissions and documentation received in connection with the application for leave to appeal and the condition(s) set out in the planning authority's decision, it is considered that it has not been shown that the development in respect of which a decision to grant permission has been made will differ materially from the development as set out in the application for permission by reason of conditions imposed by the planning authority to which the grant is subject."
- 26.** As noted above, the applicants did not challenge the refusal of leave to appeal by way of judicial review.

Procedural history

- 27.** The applicants instituted the present judicial review proceedings against the unappealed first-instance decision of the council. On 15th January 2024 the matter was opened to the court.
- 28.** The application was listed for mention on 22nd January 2024 when leave was granted.
- 29.** On 19th February 2024 the council appeared on the adjourned date and raised the issue of exhaustion of remedies. Directions were paused and the matter was adjourned to 8th April 2024. On the latter date the option of a modular trial was discussed and this was ordered on 15th April 2024 with limited opposition papers to be filed confined to the grounds that relief should be refused due to failure to exhaust remedies. The council were to give 2 weeks' notice of any intention to enforce the planning permission.
- 30.** On 4th May 2024, a hearing date of 4th June 2024 was fixed. The matter was heard on the latter date when judgment was reserved.

Relief sought

- 31.** The reliefs sought in statement of grounds are as follows:
 "D. Reliefs
 1. An order of Certiorari by way of application for judicial review quashing the Order of the Respondent ('the Council') granting planning permission to the Notice Party ('the

Developer) for permission/retention permission (Local Authority Ref 4512/23) dated 14th November 2023 ('the impugned decision').

2. Such declaration(s) of the legal rights and/or legal position of the applicant and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the respondent as the court considers appropriate.

3. A Declaration that Section 50B of the Planning and Development Act 2000 as amended, and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 and /or Order 99 of the Rules of the Superior Courts and Section 165 of the Legal Services Regulation Act 2015 interpreted pursuant to the interpretive obligations set out in Case C-470/16 North East Pylon Pressure Campaign Limited v. An Bord Pleanála and McCoy and others v Shillelagh Quarries [2015] IECA 28 whereby in proceedings where the application of national environmental law is at issue, it is for the court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention apply to these proceedings.

4. A stay, if necessary, on works being carried out pursuant to the impugned grant of planning permission pending the resolution of these proceedings.

5. Further or other Order.

6. Costs."

Grounds of challenge

32. The core grounds of challenge are as follows:

"Domestic law grounds

1. The impugned decision of 14rd [sic] November 2023 is invalid as the applicant (the Notice Party and the original Developer of the lands) did not have the consent of the Applicants who own part of the land the subject matter of the application and therefore did not comply with the requirements of Article 22(2)(g)(i) of the Planning and Development Regulations 2001, further particulars of which are contained below.

2. The impugned decision is invalid as the impugned decision of the Council was irrational and unreasonable and contained material errors of law, failed to have regard to relevant factors and/or had regard to irrelevant factors, further particulars of which are contained below."

Parties' positions

33. The parties' submissions are helpfully summarised in the statement of case as follows:

"The Applicant's Response

22. The Applicants say the fact that they did not participate in the application for retention permission does not preclude them from seeking to judicially review it. They were not opposed to the application; the difficulty arises from the Council's decision to identify the Applicants' space as the one to be removed. That is not what the application sought.

23. The Applicant says that Section 50A(3)(c) does not oblige them to judicially review the decision of the Board – that would not be an administrative remedy. The Board's decision is not a determination on the requirements of Section 50A(3)(c). Furthermore, the decision of the Board is not a decision in respect of the decision or act concerned – rather it is a separate decision made by a separate decision maker by reference to an entirely different statutory test that does not involve a determination of the substance of the underlying application.

24. Section 50A(3)(c) should not be interpreted as re-introducing the requirement for prior participation which was expressly repealed. While this particular project is not an EIA project, the section should be interpreted in a manner compliant with the requirements of the EIA Directive and the Aarhus Convention.

The Respondent's Response

25. The retention application concerned the retention of all car parking spaces, including that of the Applicants. There is no challenge by the Applicants to the adequacy of the public notice to appraise them of that fact and despite admitting they were aware of the public notices never inspected the plans and particulars.

26. The Applicants were not opposed to the planning application as it would have benefited them if retention was granted. However, having not made a submission they [can't] then complain about the statutory consequences of not having an automatic right of appeal to the Board. It is irrelevant whether the planning application 'sought' to remove a car parking space. The Applicants' car parking space was not constructed in accordance with the permission and so all of the car parking spaces required retention and the Council was entitled to refuse for all or any of the spaces in accordance with proper planning and sustainable development.

27. In commencing the within proceedings, the Applicants – contrary to s.50A(3)(c) of the 2000 Act – have failed to exhaust available appeal procedures and/or other

administrative remedies available to them in respect of the Council's Decision – this includes remedies that the Applicants could have availed of if they had taken appropriate steps, but did not. In this regard:

(i) The Applicants failed to make a submission to the Council on the Developer's application. There is no challenge to the public notice, which is the means to alert persons of a planning application and an invitation to make submission. In this context, it was open to the Applicants to make a submission to the Council as to the alleged absence of their consent to the making of the application – the Applicants failed to do this. The Applicants failed to put this in issue before the Council and have not identified anything in the evidence before the Council which could reasonably be said to give rise to such an issue.

(ii) By failing to make a submission before the planning authority, the Applicant's deprived themselves of an automatic entitlement of an appeal to the Board if the Council had granted permission.

(iii) While the Applicants unsuccessfully sought leave to appeal the Council's Decision to the Board, pursuant to s.37(6) of the 2000 Act, the Applicants failed to follow through on this by challenging the decision of the Board. Instead they challenged the decision of the Council.

(iv) The Applicants have not, to date, taken any steps to regularise the unauthorised development at issue – it was at all material times open to the Applicants to seek retention of the unauthorised development (their car parking space). The Applicants would have benefited from the application as lodged but for the Condition imposed – as matters stand, noting the nature of the Condition (excluding the Applicants' car parking space), they are largely in the same position they were in had the application not been made. Their space remains unauthorised.

(v) The Applicants could seek to have the Developer carry out the development in conformity with the original grant of permission – so that their space (No.7) would be in accordance with the as permitted drawings.

28. In the foregoing circumstances, the Applicants failed to exhaust available remedies and appeals procedures open to them. It is not open to an applicant to elect – due to a failure to consider the application documentation and/or the public notice, or based on the misconceived understanding that landowner consent is the means of alerting persons to making submissions – not to make submissions or observations to the planning authority and/or not to appeal to the Board and then claim no such remedies/appeal procedures were available to them in satisfaction of the test for leave to apply for judicial review. To promote such an approach disincentivises participation in the planning process – a system which is there to accommodate the precise allegations which the Applicant now seeks to advance."

Law in relation to exhaustion of remedies

34. In *G. v. D.P.P.* [1994] 1 I.R. 374 (Finlay C.J.) the Supreme Court identified exhaustion of remedies as a condition for grant of leave, or as put that the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.

35. This is now to an extent incorporated by statute in the planning context. Section 50A(3)(c) of the 2000 Act provides that the Court shall not grant leave unless it is satisfied that:

"the applicant has exhausted any available appeal procedures or any other administrative remedy available to him or her in respect of the decision or act concerned."

36. The concept of exhaustion of available remedies includes remedies that an applicant could have availed of but did not: *Morehart v. Monaghan County Council* [2024] IEHC 100, [2023] 2 JIC 2601. To put it another way, as noted in *Morehart*, "the applicant's failure to seek [a remedy] cannot have the effect of making judicial review appropriate where it would not otherwise be so", as put by counsel (Daniel Donnelly B.L.), recorded in *Crowley v. Allied Irish Banks Plc* [2016] IEHC 154, [2016] 3 JIC 1812; to hold otherwise would be to "reward ... failure". Any other rule would result in chaotic outcomes whereby applicants could simply fail to avail of remedies and then challenge unappealed first instance decisions.

37. As also noted in *Morehart*, that doctrine doesn't preclude an argument by a given applicant that she couldn't have availed of a particular remedy or that there was such a defect of justice as to mean that the remedy is not truly "available". Nor does it preclude an argument that something is a remedy in name only and would not result in a meaningful outcome in favour of an applicant.

38. Provided that the remedies we are taking about were genuinely available and could have resulted in an outcome of benefit to an applicant, the doctrine that available remedies should be availed of rather than judicial review is not a breach of any constitutional right of access to the courts, because the right of access to the courts would remain after the remedy had been availed of. The caselaw relied on by the applicants is of no real relevance in that context.

39. Where an applicant doesn't see fit to avail of a remedy, the resultant block on applying to the court is not unconstitutional or contrary to EU law, but is rather the result of failure to comply with a domestic procedural rule that applies with equivalence as between national and European claims. Nor does such a rule breach the principle of effectiveness – that principle doesn't mean that every applicant has to win. It simply means that every applicant has to be given the opportunity to make their point – if they don't avail of such an opportunity, that's on them.

40. The law is fairly straightforward, but despite that, the applicants raise a dust-cloud of confusion and doubt in their legal submissions and introduce all manner of red herrings and non-sequiturs. In a way one might almost admire the ingenuity of the applicants for the imaginative brainstorming session that came up with the medley of excuses here. The main outcomes of that session are as follows:

- (i) Reliance is placed on *Crofton & Anor. v. An Bord Pleanála* [2024] IESC 12, [2024] 4 JIC 1003 (Donnelly J.) at §37, in relation to statutory interpretation regarding the purpose of the legislation, but the purpose of s. 50A(3)(c) in avoiding inappropriate judicial review when there would have been alternatives available reinforces rather than alleviates the applicants' problems;
- (ii) It is argued that the leave to appeal process is a remedy for a different problem: "The Board's refusal of leave is a decision on whether the criteria in s.37(6) apply; it is not a decision on whether the criteria in s.50A(3) are met." That sounds vaguely plausible on first reading but it overlooks two points. The first is that notwithstanding that a different legal question is involved, leave to appeal does provide a remedy for the decision concerned for the purposes of s. 50A(3), that is it allows the council's decision (against which *certiorari* is now sought) to be overturned. The other point the submission overlooks is that an unchallenged decision becomes an unchallengeably valid decision. Therefore any analysis of the legal status of the council's decision must be viewed in the light of the unchallenged board finding that "it has not been shown that the development in respect of which a decision to grant permission has been made will differ materially from the development as set out in the application for permission by reason of conditions imposed by the planning authority ... Condition 3 does not materially change the permitted car park spaces for the development". That has the effect that it follows that the applicants ought to have anticipated that the retention permission would have resulted in the original permission being upheld as was, and therefore should have participated in the process for the purposes of arguing for retention of their own space.
- (iii) *Grace and Sweetman v. An Bord Pleanála*, [2017] IESC 10, [2020] 3 I.R. 286, [2017] 12 JIC 2401 (Clarke and O'Malley JJ.) is about standing which is a totally different issue.
- (iv) Section 50(4)(c) PDA 2000 as originally enacted required either that "in the case of a decision of a planning authority on an application for permission under this Part, was an applicant for permission or is a prescribed body or other person who made submissions or observations in relation to the proposed development" or "there were good and sufficient reasons for his or her not making objections, submissions or observations, as the case may be." The applicants say that the council's interpretation is reintroducing this through the back door. But it isn't as simple as that – the legislation now embodies a broader doctrine of requiring exhaustion of available remedies, which is broader than but can include the previous concept of making a submission. There is no principled or other basis to say that failure to make a submission can't be included in failure to exhaust remedies merely because it was previously a stand-alone ground to refuse relief.
- (v) The argument is made that a remedy must be after-the-event, and can't relate to any failure before the decision is made. *Reductio ad absurdum* – that means that anyone can judicially review any first-instance decision anywhere in the country without appealing, because failure to make submissions is not a "remedy" on that analysis, and appeal is not an "available" remedy due to the failure to make submissions. While the applicants commendably didn't try to flinch from that logic, it is unlikely to be what the legislation intends.
- (vi) The doctrine of exhaustion of remedies is in a sense a restriction on the constitutional right of access to the courts: *White v. Dublin City Council*, [2004] IESC 35, [2004] 1 I.R. 545, [2004] 2 I.L.R.M. 509, [2004] 6 JIC 1004 (Fennelly and Denham JJ.), *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 I.R. 360, [2000] 8 JIC 2801 (Keane C.J.) at 385, *Clinton v. An Bord Pleanála*, [2006] IESC 58, [2007] 1 I.R. 272, [2007] 1 I.L.R.M. 422, [2006] 11 JIC 0104 (Fennelly and

Denham JJ.). But that only gets the applicants so far. Section 50A is presumed to be valid and isn't challenged in these proceedings. It has a clear meaning which is not something that the court should cut down merely because people who fail to exhaust remedies will therefore not be able to sue. The doctrine that restrictions should be clear and unambiguous doesn't help the applicants because the statutory provision is clear and unambiguous. Any clever lawyer can raise a fog of ostensible doubt and confusion about anything, but that facile exercise doesn't mean that the relevant law is not clear and unambiguous. The role of the court is to give effect to the Constitution and laws, not to whittle them down on the basis of its own view of policy preferences or humanitarian sympathies.

- (vii) The applicants rely on EU law, but have not pleaded any EU legal basis for their challenge. In any event, EU law includes the concept of national procedural autonomy, and the applicants haven't shown a breach of either equivalence or effectiveness. Effectiveness doesn't mean that every applicant has to succeed – only that they have the opportunity to do so if they choose to avail of the appropriate remedies. A rule requiring that almost by definition doesn't breach EU law. The judgment of 15 October 2009, *Djurgården*, C-263/08, ECLI:EU:C:2009:631 and the judgment of 16 February 2006, *Commission v Germany*, C-137/14, ECLI:EU:C:2006:106 don't require a different conclusion.
- (viii) It is suggested that various arguments weren't made in *Morehart*. There is little substance to that, but insofar as the applicants have anything marginally new here, those arguments don't move the dial in any event, now that they have been made.
- (ix) The applicants argue that merits are matters for appeal whereas legality is a matter for judicial review. That is all well and good but it doesn't mean that legality is a matter for judicial review *irrespective of whether an alternative remedy was available*.
- (x) In *Morehart* there was a valid appeal which was an alternative remedy. That is also all well and good but it wasn't the only reason why the application failed. Even if there had been no appeal, alternative remedies were not exhausted.
- (xi) The applicants' failure here is less culpable than in *Morehart*. That may be so but it doesn't mean that there wasn't a failure.

Application of the law to the facts

41. The central problem for the applicants is that their vital interests were tied up in the retention application, and they should have anticipated that the original permission would be upheld, with the risk that somebody would be required to lose a space (there was no reason to think it couldn't be them), yet they failed to make a submission and thus disqualified themselves from appealing as of right. They demand to be spoon-fed by being told specifically that their space might be in the firing line. But any of the spaces could have been in the firing line. The fact that this wasn't spelled out doesn't mean that their failure to participate in the process was not a failure to avail of an available remedy. Their complaint is like the understandable but unfortunately illogical self-pity of the person struck with a fatal diagnosis or other misfortune – “why me?” There is no “why”. Why not you? Objectively speaking, any attempt to seek retention of any unauthorised development runs the very significant risk of a decision upholding the original planning decision. Here, that would have put a space in doubt, which at all material times could have been the applicants' one. Of course the council here claim there was a rationale for removing this particular space, and effectively say that the applicants are misreading the decision to argue otherwise, but we don't need to assess that given that the application fails at a jurisdictional hurdle.

42. The fact that this fits in to a somewhat lackadaisical approach to planning compliance reinforces the problem – the alleged reliance on developer's assurances without checking, the failure to regularise the planning position, the failure to seek retention themselves, the asserted assumption that they need not get involved in the retention application – even though any decision has validity irrespective of issues around owners' consents or anything else unless challenged within 8 weeks: see *Krikke v. Barranafaddock Sustainable Energy Ltd* [2022] IESC 41, [2023] 1 I.L.R.M. 81, [2022] 11 JIC 0303 *per* Woulfe J.

43. The applicants' failure to participate in the process is compounded by the further failure to challenge the refusal of leave to appeal, albeit that here, such a judicial review might also involve a constitutional challenge to the statutory procedure for leave to appeal. The failure to bring the latter proceedings might not constitute a non-exhaustion of an administrative remedy, and in any event they would have had to have had grounds for the proposed proceedings, so I wouldn't want to base the decision here on the lack of a judicial review of the board on a stand-alone basis.

44. In short, with that one qualification, the council are correct that there were at least four administrative remedies open to the applicants (private law action against the developer is not an administrative remedy):

“(i) The Applicants failed to make a submission to the Council on the Developer’s application. There is no challenge to the public notice, which is the means to alert persons of a planning application and an invitation to make submission. In this context, it was open to the Applicants to make a submission to the Council as to the alleged absence of their consent to the making of the application – the Applicants failed to do this. The Applicants failed to put this in issue before the Council and have not identified anything in the evidence before the Council which could reasonably be said to give rise to such an issue.

(ii) By failing to make a submission before the planning authority, the Applicant’s deprived themselves of an automatic entitlement of an appeal to the Board if the Council had granted permission.

(iii) While the Applicants unsuccessfully sought leave to appeal the Council’s Decision to the Board, pursuant to s.37(6) of the 2000 Act, the Applicants failed to follow through on this by challenging the decision of the Board. Instead they challenge the decision of the Council.

(iv) The Applicants have not, to date, taken any steps to regularise the unauthorised development at issue – it was at all material times open to the Applicants to seek retention of the unauthorised development (their car parking space). The Applicants would have benefited from the application as lodged but for the Condition imposed – as matters stand, noting the nature of the Condition (excluding the Applicants’ car parking space), they are largely in the same position they were in had the application not been made. Their space remains unauthorised.”

45. Insofar as the applicants say they didn’t participate because their consent wasn’t sought, that is a dog-ate-my-homework excuse, not materially better than that rejected in *Corbett v. Louth County Council* [2018] IEHC 291, [2018] 4 JIC 1307 (Faherty J.). Consent of the owner is not what triggers the process of public participation. As the council says:

“37. The Applicants’ approach in this regard appears to be one of wilful ignorance as to the nature and extent of the planning application/Proposed Development – an approach which is the very opposite of the ‘vigilant interested party’ and one which is premised on a misunderstanding of the means of notification of a planning application, via the site/newspaper notices. The said notices provide a gateway for public participation in the planning process, including for persons who may be “affected by the proposed development” (see *Monaghan UDC [v. Alf-a-Bet Promotions Limited [1980] I.L.R.M. 64, [1980] 3 JIC 2403]*).

38. The Applicants proceeded on the erroneous assumption that they were not affected by the Proposed Development without actually checking the application documentation and satisfying themselves of what was proposed (noting that what was sought was to regularise the unauthorised car parking spaces – including the Applicants’). The Applicants’ assumption in this regard is premised on a flawed proposition that notice of a planning application is through/via the seeking of consent to the making of an application, as opposed to notice of a planning application by publication of a newspaper notice and site notice.”

46. On points (i) and (ii), the council goes on to validly comment:

“41. The Applicants, through their own inaction and absence of participation in the planning process, have deprived themselves of an appeal to the Board. It is not appropriate that this failure should be visited on the Council by an action for judicial review against the Council, seeking to quash the Council’s Decision on the basis of an issue never raised.”

47. On point (iii), they make the point:

“In fact, insofar as the Applicants have gone so far as to instituting judicial review proceedings they have selected the wrong target, namely the decision of the Council rather than the refusal of leave to appeal by the Board.”

48. To repeat, the only qualification I would make to that it that there would have had to be grounds to bring judicial review against the board’s decision. Whether there were such grounds here was not particularly developed in argument, so I would not base the non-exhaustion conclusion on this aspect alone. But the inaction in that regard certainly doesn’t assist the applicants.

49. On point (iv), the council comment as follows, with a logic that undercuts the whole basis of the present judicial review:

“44. Moreover, while the Applicants complain about the retention application, irrespective of whether the Notice Party lodged this planning application, the Applicants would themselves have been required to lodge a planning application to retain the space, as it is not located in accordance with the original plans for which permission was granted. The Applicants have not disputed this fact.”

50. The upshot unfortunately is that failure to exercise the available administrative remedies is disqualifying for relief by way of judicial review under s. 50A of the 2000 Act.

51. Before concluding, I want to endorse the council's submission that there is much that is "puzzling" about this case. One obvious question is why the applicants didn't simply ask the developer to appeal. That would have cost a postage stamp and would have been a lot simpler than this misconceived judicial review. They could then have put in a submission in the context of the appeal which would have given them a right to seek judicial review. The applicants didn't really have much of an answer to that except that it would have resulted in the present judicial review being put on hold. But on no view would the applicants have been worse off. They also effectively said that they had no control over the retention application or even that it was in effect nothing to do with them – their whole case is that they relied on the developer's assurances of planning compliance almost 3 years ago. But one might have thought that the existence of the certificate could potentially give them some leverage in practical terms. Their passivity in relation to the developer was unexplained. It is not clear to me why both the developer and these applicants are both, apparently, proceeding in a unilateral manner and why a co-ordinated approach doesn't seem to be possible. Indeed not only did the applicants not know why the developer didn't appeal, they didn't seem to know why they didn't ask the developer to appeal.

52. There are lots of other unanswered questions – why was the development certified as compliant in the circumstances for example. And, without being even potentially critical, one might wonder why the developer and their solicitors didn't notice that they were drafting documents for the sale of 13 spaces when only 12 were allowed. *Nemo dat quod non habet* is not merely a helpful suggestion. That's why there are civil and criminal laws in relation to obtaining benefits by means of incorrect statements or actions. Again, that isn't to suggest such laws were not being complied with – that doesn't arise for decision here.

53. The applicants tell an unfortunate story of waking up one morning to find their car parking space, which they had bought and paid for, taken from under their noses by the irrational, unlawful, high-handed, unilateral action of the council without any notice to them. But that narrative doesn't reflect certain key facts. Their space was never authorised, and remained unauthorised after the retention permission. They try to take that out on the council, but even assuming that one could argue that if the action were to go ahead on the merits, there was some infirmity in the decision-making process, something which is hotly contested of course, no amount of infirmity in the retention process is going to make an unauthorised development into an authorised development. This particular speculative judicial review is wholly misconceived. The council is just an easy target given that the applicants can sue with Aarhus protection.

54. The doctrine is not that an applicant can simply choose the most comfortable remedy. She must avail of the most appropriate remedy. That certainly isn't this judicial review. If the applicants haven't become too embedded in their existing doomed strategy one can only encourage them to have a fresh look at their options. Of the possibilities touched on at the hearing, making a fresh retention application, perhaps co-ordinated with the developer, is by far the simplest. To state the obvious, other options include complying with the permission, or taking the loss and selling up. After that one is into litigation, but against who? There are only two logical possibilities (without commenting on whether either or both have merit), the other side and/or its professional advisers, or one's own side. On the latter point, there is minimal information as to what if anything went awry at the applicants' end of the conveyancing that meant that this problem was not picked up. Without in any way suggesting that anybody got anything wrong, given that the same set of solicitors may have advised in the conveyancing and in this judicial review, reasons of prudent self-interest suggest the possibility that those solicitors could consider whether the applicants could have their attention drawn to the option of getting independent legal advice. In any event, there aren't too many great options. But trying to quash an unappealed first-instance administrative decision by way of judicial review is probably the least plausible of any of the possibilities presented.

Summary

- 55.** In outline summary, without taking from the more specific terms of this judgment:
- (i) the general law is that all other appropriate administrative remedies should be exhausted prior to seeking judicial review of a decision;
 - (ii) this generally precludes judicial review where an applicant could have availed of an appropriate remedy but did not;
 - (iii) the concept of availing of an appropriate alternative administrative remedy for a retention decision includes seeking retention permission oneself if that is a legal option, making a submission on the application, appealing the council's decision to the board, or seeking judicial review of a refusal to give leave to appeal to the board if there are legal grounds to do so;
 - (iv) insofar as the foregoing is subject to exceptions, they don't apply here;
 - (v) such a domestic procedural rule is not insufficiently clear and unambiguous, or contrary to the constitutional right of access to the courts or to the EU law principle of effectiveness and equivalence, or otherwise unlawful or invalid; and

- (vi) the applicants here did not operate any of the appropriate alternative administrative procedures and accordingly the applicants' attempt to seek judicial review of an unappealed first-instance decision must be dismissed.

Order

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

- (i) the proceedings be dismissed;
- (ii) the council be released from its agreement to provide advance notice of any intention to take enforcement action; and
- (iii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs.