APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023/286

Allen J.
Meenan J.
O'Moore J.

BETWEEN

PETER THOMSON AND DOREEN THOMSON

APPLICANTS/APPELLANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

EIRCOM LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Allen delivered on the 29th day of July, 2024

1. I have carefully considered in draft the judgment which is to be delivered by O'Moore J. – with which I know that Meenan J. agrees – but I find that I cannot agree.

2. To start at the end, it seems to me that the question of which of the core grounds the Thomsons might be allowed to advance is one that needs to be grappled with and decided

before deciding whether there is good and sufficient reason to extend the time within which the proceedings might be brought. There is no challenge to the finding by the High Court that the inclusion by an applicant for an extension of time of grounds that could have been advanced within time did not preclude a consideration of whether the time should be extended in respect of the grounds not apparent within the prescribed time. To my mind, it would be inconsistent with the scheme of the legislation to contemplate that an extension of time is respect of any ground which became apparent later would refresh or revive any earlier ground in respect of which the time had expired.

3. On 17th June, 2021 the respondent Board decided to grant planning permission to Eircom to erect a fifteen metre mobile phone mast in the village of Kells, County Kilkenny, close to the Thomsons' home. Immediately following receipt of the decision – it is not evident precisely when that was, but it must have been very soon after the decision was made – the Thomsons considered whether they would challenge the decision and took legal advice. They decided that they would not proceed with a challenge.

4. In his affidavit filed on 17th February, 2023 in support of the Thomsons' application for an extension of time, Mr. Thompson acknowledged that they could have challenged the decision *"on certain grounds"* within eight weeks. He did not specifically identify the certain grounds on which a challenge might then have been based but later in his affidavit deposed that they could not then have challenged the decision on the ground of bias, which the Thomsons would now advance.

5. This effectively acknowledged that a challenge to the validity of the decision might have been mounted within time on the ground – proposed Ground No. 4 – that the Board erred in law in its interpretation of para. 9.4.2.1 of the Kilkenny County Development Plan and/or failed to have any or any adequate regard to the Ministerial Guidelines – Telecommunications Antennae and Support Structures, Guidelines for Planning Authorities,

July, 1996, as updated by Circular Letter PL 07.12 19 October, 2012 – in breach of s. 28 of the Planning and Development Act, 2000 and/or failed to give any or any adequate reasons for its departure from the Ministerial Guidelines and the requirements of the Development Plan, in breach of s. 34(10) of the Act of 2000. And, as O'Moore J. notes, this was conceded by counsel at the opening of the appeal.

6. Secondly – as is again noted by O'Moore J. – counsel quite properly brought the court's attention to the existence of a provision in the Act that precludes a challenge to a decision on the ground only of non-compliance with the code of conduct. I understand counsel's concession that proposed Ground No. 2 was not his *"strongest point"* as an acknowledgement that it is not a good ground.

7. As to proposed Ground No. 3 – that the Board decision was invalid because Paul Hyde entered a composition or arrangement with creditors with the result that he was deemed pursuant to s. 106(13)(d)(ii) of the Act to have ceased to be a member of the Board – the height of what is said is that it appears from publicly available High Court records that proceedings were taken against Mr. Hyde and subsequently discontinued and that *"It is unclear if the discontinuation involved or resulted following the making of a composition by Mr. Hyde with his creditors."* The proposed statement of grounds presages an application for *"third party"* discovery by Promontoria Ltd. – which was the plaintiff in an action against four defendants, one of whom was Mr. Hyde, commenced by summary summons in 2017 and discontinued on 30th July, 2021 against one or more of the defendants – and by Sean Hickey and Sharon Hickey, who are the plaintiffs in an action commenced by plenary summons in 2017. This, to my eye, is a pure fishing expedition. As far as the publicly available High Court records go, the action by Mr. and Mrs. Hickey got no further than the issue of a summons. The printout of the case details of the action in which Promontoria was plaintiff shows that two notices of discontinuance were filed on 30th July, 2021 – but not in respect of

which defendants – and goes on to show that the proceedings have since appeared in the High Court non-jury list for mention and for hearing – but not in respect of which defendants. If, for the sake of argument, it might be inferred from the fact that the action brought by Promontoria was discontinued that Mr. Hyde had come to terms with Promontoria, I cannot see how it could be inferred that Mr. Hyde made a composition with his creditors. I do not regard proposed Ground No. 3 as even an arguable, still less a substantial ground.

8. Moreover, as the trial judge emphasised, when the Thomsons decided to launch their proceedings on 10th October, 2022 they knew no more about the alleged composition with creditors than they had on 6th April, 2022 when *The Ditch* reported that Mr. Hyde *"... was pursued in the High Court for defaulting on investment property loans"* or than they had shortly after Mr. Farrell's terms of reference were published on 12th May, 2022. If what is now put up as sufficient to justify a challenge to the Board's decision on proposed Ground No. 3 was sufficient, I can see no good and sufficient reason why the challenge was not brought within eight weeks of May, 2022 and so no good and sufficient reason for an extension of time.

9. O'Moore J. characterises proposed Ground No. 1 as being far and away the most significant of the proposed grounds. In my view, it is the only relevant ground.

10. The foundation of the proposed challenge to the decision on the ground that the Board was affected by bias or the appearance of bias is the statistics set out at para. 8 of O'Moore J.'s judgment which, as he says, were assembled by the Thompsons in the course of their enquiries. O'Moore J., at para. 20, has reproduced the distillation of the facts as found by the trial judge as set out in the written submissions filed on behalf of the Board. To my mind, the critical date in that chronology is 10th October, 2022. That was the date on which the *Irish Times* reported that the Director of Public Prosecutions had directed that Mr. Hyde

be prosecuted and critically, the date on which the Thompsons instructed their solicitors to prepare and issue proceedings.

11. In the course of the opening of the appeal, counsel for the Thomsons initially tried to draw a distinction between the instructions to draft the proceedings and the decision and instruction to issue them but soon accepted that a decision was made on 10th October, 2022 to commence the proceedings. By then, of course, nearly sixteen months had elapsed since the date of the decision, so that the first necessary step would be an application for an extension of time. In the event, the papers were filed and the judicial review proceedings formally opened on 28th November, 2022.

12. The proposed statement of grounds, at para. 43, shows that the Thomsons' enquiries were prompted by the similarity of the decision which they would now impugn and what is said to have been a similar case in which clients of Mr. Thomson – who is a planning consultant – were seeking to challenge a Board decision made in September, 2021 to grant permission for an Eircom mast in the village of Kilmoganny, County Kilkenny.

13. By early February, 2022 the Thomsons had compiled a list of Eircom mast appeal decisions made between September, 2020 and February, 2022 which showed 28 cases determined – all grants of permission overturing Council refusals – and nine cases pending. Mr. Thomson considered the information which he had gathered as of sufficient moment to bring it to his T.D. for his assistance and advice as to how best to bring it to the attention of the Department with the possibility of the matter being investigated.

14. By April, 2022 the Thomsons were aware from media reports that there was a suggestion of a lack of impartiality on the part of Mr. Hyde.

15. By 11th May, 2022 the Thomsons had completed an expanded analysis which they sent to a journalist in *The Ditch*. This analysis showed that Mr. Hyde had been involved in most of the cases identified in it. On the following day, the Thomsons were advised by the

journalist as to how they could obtain copies of the minutes of Board meetings. The statement of grounds shows – although the Board's chronology does not – that at the same time the Thomsons were advised by the journalist of the process of random file allocation among the members of the Board, of which they had not previously been aware.

16. It was said in the course of the oral hearing that although the Thomsons were from then on aware of a general Board policy of random allocation of files, they were not then specifically aware that it was a policy that should have applied to their case. However, whatever they understood about random file allocation was sufficient to prompt them to ask a mathematician, Mr. Seamus Knox, for his opinion as to the probability that one member of a board of ten board members, who is randomly allocated files by a non-board member, might be randomly allocated 42 out of 49 files for determination. In June, 2022 Mr. Knox gave his opinion that the distribution of files to Mr. Hyde was not random. In an affidavit filed on 28th November, 2022 Mr. Knox set out his calculations. The numbers, he said, were so astronomically small that they could be regarded as representing a probability of zero.

17. In an e-mail of 6th June, 2022 to the Office of the Planning Regulator calling for the extension of the inquiry then being conducted by Mr. Remy Farrell S.C., Mr Thomson identified three main issues in respect of the Eircom mast cases which were:-

> *"1. The extraordinarily and disproportionately high number of Eircom mast appeals dealt with and signed off by the Deputy Chairperson (Paul Hyde) at An Bord Pleanála – all of these decisions were appeals by Eircom following refusals by local authorities. In the vast majority of these cases it was another Ordinary Board member (Michelle Fagan) who also sat in on the meetings. Paul Hyde must have allocated these cases to himself.*
>
> *2. The extraordinarily high percentage of cases overturned contrary to the advice and recommendations of Board Inspectors and senior inspectors. An*

investigation could further investigate if inspectors and senior inspectors were persuaded to change their recommendations to support impending decisions to grant permission.

3. *The blatant misinterpretation of Ministerial Guidelines in allowing masts in small towns and villages when alternatives, identified by third parties and Councils, were not examined by Eircom and not addressed in the decision making."*

18. It is clear, then, that the Thomsons were aware from no later than 6th June, 2022 that the files had not been randomly allocated. It is also clear that they were dissatisfied with the manner in which the files had been allocated. It is also clear that they were by then aware of Ms. Fagan's involvement in many of the appeals from which, I think, it can confidently be inferred that the Thomsons had by then accessed the Board minutes.

19. If, following their discussion with the journalist from *The Ditch* on 12th May, 2022 the Thomsons were in any doubt as to whether the Board's general policy of random file allocation applied or ought to have been applied to the decision in respect of the Kells mast, I see no reason why they could not have sought confirmation. In fact, they did; but not until 21st September, 2022 when Mr. Thomson – in the course of an ongoing exchange with Mr. Gerard Egan of the Board – said that he would like to know what the file allocation policies and procedures were. The e-mail shows that Mr. Thomson then knew that the then Chairperson of the Board had given evidence to the Public Accounts Committee to the effect that he and the Deputy Chairperson were responsible for the allocation of files, and that an administrator did the actual random allocation, subject to the workload of individual members at the time of allocation. That, it seems to me, was clearly the basis on which Mr. Knox had long before been asked for his opinion. On the following day Mr. Egan confirmed that the allocation of the files *"... would have been covered in the general arrangements on*

allocation as per the overarching statutory governing provisions in the planning acts and then the implementation of those on the ground on a general principle of random allocation."

20. It seems to me that the Board's e-mail of 22nd September, 2022 no more than confirmed what the Thomsons already knew: if not from the journalist, then from the evidence of the Chairperson to the Public Accounts Committee. Moreover, whatever about the precise policies and procedures which ought to have been followed in the allocation of files, the Thomsons core complaint was that it was not appropriate that virtually all of the Eircom appeals should have been assigned to Mr. Hyde and Ms. Fagan. While in argument this correspondence was relied upon in support of the submission that the time should be extended, the position taken by Mr. Thomson in his affidavit filed on 17th February, 2023 was that it *"... did not address or explain the manner of allocation of files in a comprehensible manner"* and that further enquiries were necessary before – he said – the Board confirmed in a letter of 8th November, 2022 *"... that all files are allocated randomly"*. One way or the other, the Thomsons were no further on in September than they had been in June.

21. I pause here to say that, to my eye at least, the Board's letter of 8th November, 2022 did not in fact confirm or assert that the files had in fact been allocated randomly. That letter first set out the text of a request made by the Thomsons' solicitor on 26th September, 2022 under the European Communities (Access to Information on the Environment) Regulations, 2007 and then the response. The request asked seven questions, the first of which was *"Detail the process by which ABP file number 308931-20 was assigned to Michelle Fagan and Paul Hyde."* The answer – or at least the response – was *"Concerning part (1) of your request, I enclose a document that outlines the process by which files are allocated to Board Members. I enclose the most recent version of this document, which was adopted in September 2022, as it is updated to reflect changes in the board."* What this conveys to me

is that it was the policy of the Board that files should have been allocated in accordance with this process, rather than that they had been so allocated.

22. The trial judge, at para. 67, found that by mid-June, 2022 the Thomsons had (or a reasonably diligent applicant would have had) sufficient information to bring proceedings. In fixing on that time, the judge allowed *"a few weeks from 12th May, 2022 to allow for obtaining the [Board] minutes."*

23. In my view, this gave the Thomsons the benefit of the doubt. To my eye, Mr. Thomson's e-mail of 6th June, 2022 and the enclosed second analysis shows that he by then had the minutes. Moreover, all that the examination of the minutes added to the case was that they showed the involvement of Ms. Fagan in many of the decisions.

24. For my own part, I have no difficulty in following Mr. Knox's evidence of diminishing infinitesimal plausibility. In his affidavit, Mr. Knox set out his detailed calculations. In his affidavit filed on 17th February, 2023 Mr. Thomson recalled that Mr. Knox had initially expressed the likelihood of the random allocation to the same single Board member as similar to three Euro lottery wins – jackpots, I presume – in a row. I can see that in theory the probability of the random allocation of 40 of the 49 cases to two particular Board members would have been even more remote but if the probability of the random allocation to a single Board member was so remote as to amount to a practical impossibility, the margin of additional infinitesimal plausibility calculated by introducing Ms. Fagan into the equation is immaterial. If that is so, it seems to me to follow that the information derived from Board minutes did not add anything.

25. The chronology set out by O'Moore J. at para. 20 shows that between May and October, 2022 the Thomsons engaged with the press, the Board, and the Office of the Planning Regulator but does not clearly show that they established anything which they did not already know on 12th May, 2022. However, as I have said, the submission made to the

Office of the Planning Regulator on 6th June, 2022 included their second analysis, which incorporated the information as to Ms. Fagan's involvement gleaned from the Board minutes. To whatever extent that the Board minutes advanced the basis for any challenge, the Thomsons demonstrably had the information by 6th June, 2022.

26. I agree with my colleagues that in deciding whether or not the extension of time sought ought to be granted, the first consideration is that the Oireachtas has set a very short time limit and that the clear legislative policy is that in the absence of a challenge within that time, the permission should be entirely protected against subsequent challenges. The *dictum* of Finlay C.J. in *KSK Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128, at p. 135 cited by O'Moore J. at para. 24 contemplates specifically the position of a person who had obtained a grant of planning permission, but it seems to me that in principle the time limit goes to the integrity of the planning code. As Clarke J. put it in *Kelly v. Leitrim County Council* [2005] 2 I.R. 404, at p. 412:-

> *"... It therefore seems to me that the question of whether third party rights might be involved in the late challenge to a decision is a factor which the court is entitled to take into account.*
>
> *(c) However it should be noted that ... there is nonetheless a clear legislative policy involved in all such measures which requires that, irrespective of the involvement of the rights of third parties, determinations of particular types should be rendered certain within short period of time as part of an overall process of conferring certainty on certain categories of administrative or quasi-judicial decisions. ... The overall integrity of the processes concerned is, in itself, a factor to be taken into account."*

27. As to what has happened on the ground, O'Moore J. is of the view that Eircom has not sought to act on foot of the planning permission but instead has begun to develop the site

in a manner not consistent with any planning permission. I beg to differ. The evidence is that Eircom first put the foundations of the proposed tower in the wrong location and then installed a foundation at the wrong height, on which it then erected the tower: before eventually removing the second unauthorised development altogether. This conveys to me – as the proposed statement of grounds puts it – that *"[Eircom] began construction of the proposed development but failed to build in accordance with the permission as granted."* Given the institution of the proceedings shortly after the removal of the second unauthorised structure, I find it unsurprising that nothing has been done since.

28. The originally proposed statement of grounds named Eircom as a respondent. The judgment under appeal shows, at para. 47, that Eircom was represented at the hearing of the application for admission to the Commercial Planning and Environmental List on 19th December, 2022 and undertook not to re-erect the development in whole or in part pending the final determination of the proceedings; and that on that basis the High Court judge changed Eircom's status from a respondent to a notice party and excused it from further participation, with liberty to apply.

29. I agree that it is significant that Eircom has not since participated in the proceedings and has not sought to demonstrate the scale and extent of the prejudice which would be caused by an extension of time but, in my view, the unauthorised work demonstrates an intention on the part of Eircom – if not the ability of its contractor – to carry out the permitted development and I would attach no significance to the fact that no further works have been undertaken while these proceedings are pending.

30. I agree with my colleagues that the second significant consideration is the reason for the delay and the evidence offered by the Thompsons in that regard.

31. On the authority of *SC SYM Fotovoltaic Energy SRL v. Mayo County Council* [2018] IEHC 20, [2018] 1 JIC 2404, the requirement that the Thomsons should show that the

circumstances that resulted in their failure to make the application for leave within the prescribed time was outside their control is limited to the initial eight week period and does not apply to the whole period. However, any significant delay beyond that time is a factor to which regard must be had in deciding whether there is good and sufficient reason for extending the time.

32. I entirely agree with the conclusion of O'Moore J. that the High Court judge was correct in his conclusion that the Thomsons had sufficient information by no later than mid-June, 2020 to bring these proceedings. I agree also that the Thomsons were unable to identify any further information which they gathered after mid-May, 2022 which they required to bring the proceedings which they ultimately launched on 18th November, 2022.

33. In the time between 10th October, 2022 when they finally decided to bring the proceedings and 18th November, 2022 when the application was first moved – and thereafter – further information became available to the Thomsons which is said to bolster their case, but the evidence is that the decision made on 10th October, 2022 was made by reference to the information available by 6th June, 2022 at the latest. If that information was sufficient on 10th October, 2022, it was necessarily sufficient on 6th June, 2022. The three propositions at the end of Mr. Thomson's e-mail of 6th June, 2022 to the Office of the Planning Regulator bear a striking resemblance to the now proposed Grounds No. 1 and No. 4.

34. I agree also with what O'Moore J. has to say about the constant reference to legal advice which the Thomsons received. To that I would add that the affidavits did not disclose the date on which the Thomsons eventually decided to move. In his affidavit filed on 17th February, 2023 Mr. Thomson deposed that he thought it possible that there might be some logical explanation for the accumulation of files determined by Mr. Hyde and Ms. Fagan – for example, streamlining or particular expertise – but on Mr. Thomson's evidence, any such doubt was not dispelled until the Board's letter of 8th November, 2022. It follows that any

such doubt did not prevent the decision on 10th October, 2022 could not explain the Thomsons' failure to move by mid-August, 2022.

35. Mr. Thomson, in his affidavit filed on 19th May, 2023, deposed that he and his wife initially decided not to proceed with a challenge because of a fear of becoming liable for the legal costs. That is perfectly understandable. While the law as it stood at the time of the decision of 17th June, 2021 was as set out in the judgment of Simons J. delivered on 29th March, 2019 in *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IESC 186, that decision had been appealed to this Court and the position in the eight weeks following the making of the decision was that judgment was awaited. The judgment of this Court, delivered on 14th October, 2021 ([2021] IECA 259) was in turn appealed to the Supreme Court where, on 10th November, 2022 ([2022] IESC 43) the order of this Court was set aside and that of Simons J. reinstated. It seems to me that whatever apprehension the Thomsons may have had about costs at the time of the originally contemplated challenge was likely to have been heightened by the judgment of this Court when they were considering the possibility of a challenge on the ground of bias. Since the uncertainty in the law was not resolved until after the Thomsons resolved to make their leave application, that uncertainly cannot have explained their failure to move sooner.

36. In the same affidavit Mr. Thomson made much of the seriousness of an allegation of bias and deposed to the advice he had received that it would have been improper and premature to challenge the Board's decision without strong evidence. However, the evidence and information on which the decision was made in October, 2022 to launch proceedings was no different to the evidence and information which was available in June, 2022.

37. The trigger for bringing these proceedings is acknowledged to have been the newspaper report on 10th October, 2022 that Mr. Hyde was to be charged with criminal offences. There was no indication in that report that the intended charges had anything to do

with the decision to permit the Kells mast or any of the other mast decisions and in the event, there was no such connection. I cannot see that the decision of the Thomsons to bring proceedings can be viewed otherwise than as opportunistic.

38. The third principal consideration identified by O'Moore J. is what was described by Humphreys J. in *Dunne v. An Bord Pleanála* [2023] IEHC 73 as *"blameworthy conduct"* on the part of the respondent. Rightly or wrongly, I understood counsel for the Thomsons to agree with the submission of counsel for the Board that any blameworthiness must be relevant to the delay and not the merits of the impugned decision. If I am wrong in this, I agree with O'Moore J. that this is the case. I agree that the evidence is that the Board replied diligently and promptly to the various queries raised by and on behalf of the Thomsons. I am not sure that in this context blameworthiness necessarily requires moral obloquy. It seems to me that delay may arise on either or both sides from oversight or inefficiency or, as in this case, a not unreasonable failure to act, or a decision not to act, which can properly be taken into account without being condemned.

39. The fourth general principle identified by O'Moore J. is the merits of the case. It is here that I begin to diverge from my colleagues.

40. O'Moore J., at para. 31, cites a passage from the judgment of Clarke J. in *Kelly* which, he says – and I agree – suggests a process which allows a respondent to contend that an applicant does not even have an arguable case. While counsel for the Board agreed that a consideration of the merits may be taken into account at the extremes, I do not understand *Kelly* to be authority for the proposition that an applicant for an extension of time is entitled to force the respondent to engage with the merits.

41. As O'Moore J. recalls at para. 15, counsel for the Board was asked – I think that it is not unfair to say pressed – as to what defence there might be if the time were to be extended. The Thomsons obviously believe that they have a strong case. It is evident that they believed

that the grounds identified by them in the weeks following the decision were strong grounds but acknowledged that they were then put off by the risk of an adverse costs order. It follows, it seems to me, that they then recognised the difference between a strong case and an unanswerable case. By mid-June, 2022 the Thomsons had assembled the evidence on which a different challenge might be brought. That evidence was then thought to be sufficient to justify an investigation but not an application for a judicial review. The trial judge found at para. 68, that the Thomsons had *"... raised important matters that well surmount the substantial grounds threshold"* and there is no cross-appeal against that finding. But in my view, there is a critical difference between a strong case and an unanswerable case. To my mind, any argument now that the case which the Thomsons decided to launch when they decided to launch it was unanswerable, is irreconcilable with the fact that they did not launch it when they could have.

42. On the authority of *Kelly,* a respondent is perfectly free to invite the court to consider an extension of time on a stand-alone basis without having regard to the merits of whether there be an arguable case. That, it seems to me, is what the Board has done in this case. I do not disagree with my colleagues that if a case is demonstrably strong, that may be a factor in supporting an extension of time but my colleague's acknowledgement (at para. 34) that this may change in the event that the proceedings go to trial, seems to me to take it out of the category of unanswerable cases.

43. In my view, there is a danger than an excessive focus on the merits may detract attention from a consideration of the other factors which must be taken into consideration, not least the level of control of the applicant, including delay or other *"blameworthy"* conduct on his behalf. I see a danger, indeed, that the merits or apparent merits of the proposed challenge – which is no more than a factor to be taken into consideration in applying the

statutory criteria – might be escalated into a free-standing ground upon which time might be extended.

44. As was acknowledged by counsel for the Thomsons, there are two elements to the test laid down by s. 50(8) of the Act of 2000. First, there must be good and sufficient reason for an extension of time and secondly, the circumstances which resulted in the failure to make the application within time must be shown to have been outside the control of the applicant. An applicant for an extension of time – irrespective of the apparent strength of the case he would make – must fall at the first hurdle if he cannot show that the failure to move within time was not outside his control. Although an applicant for an extension of time who can show that the circumstances which resulted in his failure to make an application for leave within the time provided were outside his control need not show that the circumstances which thereafter resulted in any failure or delay thereafter were outside his control, it seems to me that in a case where there has been significant delay, the responsibility for that delay is a factor which must carry great weight.

45. This, in my view, is not so much a case in which the Thomsons have delayed but a case in which, having gathered their evidence and marshalled their arguments, they decided not to make a leave application but later changed their minds. The fact that the leave application was not made by mid-August – as the judge found and my colleagues and I agree it could have been – was entirely within the control of the Thomson. In my view, to allow an extension of time would undermine the scheme of the legislation which requires that decisions of An Bord Pleanála should be rendered certain within a short period of time as part of an overall process of conferring certainty on those decisions.

46. The fifth important principle identified by O'Moore J. is the public interest. Again, I take a different view. I do not disagree that there is a public interest in the ventilation of the issues which the Thomsons have identified in the manner in which the Eircom mast appeals –

and other telecommunications mast appeals – were dealt with by the Board. I do not disagree that the ventilation of these issues in a court of law might potentially provide a superior way of scrutinising the operations of the Board that will be possible either through journalism or through an internal – or independent external – review. But I agree with the judge that it is not the function of the court to examine matters for the sole reason that they are important and concerning.

47. The function of the High Court on an application for judicial review is to decide the validity of the impugned decision in the particular case. If – as my colleagues contemplate – the proceedings were not defended, it seems to me that the public interest would not have been served by an extension of time. On the other hand, the public interest in upholding the legislative policy of the Act that challenges to decisions of the Board must be brought promptly would, in my view, have been undermined.

48. In my view, the public interest identified by the Thomsons in the issues which they would seek to agitate in open court is a public interest in the processes and procedures followed by the Board in dealing with telecommunications mast appeals generally, rather than the legality of the individual decision made in the Kells case. They are – as citizens – concerned by the statistical anomalies in the decisions of the Board generally and their actions since the anomalies were first identified in February, 2022 – bringing the results of their enquiries to their T.D., to the newspapers, to the Board and to the Office of the Planning Regulator – are consistent with that general concern.

49. For present purposes, however, I see the Thomsons not as citizens but as residents of the village of Kells who, from the time the application for planning permission was first made to Kilkenny County Council on 25th June, 2020, were concerned by the impact of any mast on the amenity of their property. They engaged with the planning process and were understandably disappointed by the decision made by the Board on 17th June, 2021. They

immediately contemplated a challenge to the decision by reference to the Ministerial Guidelines and the County Development Plan and decided against it. Soon after, they identified a line of enquiry which by mid-June, 2022 had brought them to the point that they had assembled sufficient information and identified substantial grounds – theretofore outside their control – on which they might have made an application pursuant to s. 50(8) of the Act for an extension of time; but they did not do so. I agree with the submission of counsel for the Board that the Thomsons are seeking to harness the public interest for their own private interest.

50. I cannot agree with my colleagues that the High Court judge did not take a holistic approach or take into consideration all relevant factors. Nor can I agree that the judge allowed the need for certainty in the commercial context to trump every other factor. I agree with the judge's conclusion that the objective of commercial certainty – and the legislative objective of enduring that challenges to Board decisions are brought promptly – are not outweighed by the Thomsons' complaint of systemic failure.

51. For these reasons, I would have affirmed the decision of the High Court and dismissed the appeal.