



THE COURT OF APPEAL

Record Number: 2023/286
High Court Record Number: 2022/1039 JR
Neutral Citation Number [2024] IECA 196

Allen J.

Meenan J.

O'Moore J.

BETWEEN/

PETER THOMSON AND DOREEN THOMSON

APPELLANTS/APPLICANTS

-AND-

AN BORD PLEANÁLA

RESPONDENT

-AND-

EIRCOM LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 29th day of July, 2024

1. The appellants ("the Thomsons") live in Kilkenny. The notice party ("Eircom") applied on the 25th June, 2020 for permission to erect a telecommunications mast. In the event that the permission were to be granted, and the mast erected, it would be 21 metres from the Thomson's home and 14 metres from the boundary to their back garden.

2. Eircom's application was initially refused by Kilkenny County Council on the 26th November, 2020. Eircom then appealed. The inspector appointed by the respondent ('the Board') recommended refusal of permission. Notwithstanding this, the Board decided on the 17th June, 2021 that permission should be granted.

3. The Thomsons wish to bring a judicial review application to quash that decision. The High Court initially extended time for the bringing of such proceedings. However, on the application of the Board and after a full *inter partes* hearing the High Court (Humphreys J.) ([2024] IEHC 101) set aside the original extension of time. The Thomsons now appeal against that judgment and order.

4. The Thomsons have identified four core grounds which they wish to advance in these proceedings. They are: -

- “(1) The Board Decision is invalid because the Board was affected by bias or the appearance of bias.
- (2) The Board decision is invalid because the Board members involved in taking the decision failed to comply with the provisions of the code of conduct, contrary to section 150(1) of the Planning and Development Act 2000.
- (3) The Board decision is invalid because Paul Hyde entered into a composition or arrangement with the creditors as a result of which he was deemed pursuant to section 106(13)(d) to have ceased to be a member.
- (4) The Board decision is invalid because the Board erred in law in its interpretation of paragraph 9.4.2.1 of the 2014 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 – in breach of section 28 of the 2000 Act, and/or failed to give any or any adequate reasons

for its departure from Ministerial Guidelines and the requirements of the 2014 Development Plan in breach of section 34(10) of the 2000 Act.”

5. The reference to Mr. Hyde at proposed core ground 3 arises because Mr. Hyde was one of the two Board members who decided to grant planning permission to Eircom.

6. At the opening of the appeal, counsel for the Thomsons described proposed core ground 2 as *“not my strongest point, because there is actually a provision in the Act that says that the decision can’t be challenged simply because you didn’t comply with the code of conduct.”* With regard to proposed core ground 4, it is accepted that the grant of permission could have been challenged on this ground within the eight-week period prescribed by s. 50 of the Planning and Development Act, 2000.

7. However, far and away the most significant of the proposed grounds of challenge is that to be found at proposed core ground 1. Indeed, subject to what is submitted at a future date, it appears to be the only proposed ground of appeal with any substance. I should explain why this is so.

8. As a result of the enquiries made by the Thomsons, it appears to be the case (at least on their evidence) that between 2018 and 2022 there were 49 appeals to An Bord Pleanála in connection with applications for permission for the erection of masts by Eircom. The position taken by An Bord Pleanála, in correspondence with the Thomsons, was that the allocation of these appeals to board members for decision was entirely random. However, of the 49 Eircom mast appeal cases, 42 were allocated to Mr. Hyde. Forty were allocated to another Board member, Michelle Fagan. The Thomsons rely upon an affidavit produced by Seamus Knox, a mathematician and part-time lecturer in maths methodologies at Dublin City University and MIC Thurles. The expertise of Mr. Knox is not challenged in the current

application. Mr. Knox has concluded that the probability of one individual member of a board of ten Board members being randomly allocated to 42 out of 49 files for determination can “*be regarded as zero*”; para. 9 of Mr. Knox’s affidavit.

9. The probability of 40 of the 49 cases being allocated to two particular Board members is stated by Mr. Knox as being “*even more remote...*” While a probability which is more remote than zero is a challenging proposition, there is no doubt that counsel for the Thomsons in his submissions to the court did not overstate the evidence (as it currently stands) when he described the allocation of the Eircom mast appeal cases to Mr. Hyde and Ms. Fagan as “*statistically impossible*”.

10. However, the statistical abnormalities identified by the Thomsons do not end there.

11. In cases, such as the current one, where the Local Authority refused Eircom’s application to erect a mast, 79% of these refusals were reversed in appeals on which Mr. Hyde sat. As against that, in the seven mast cases in which Mr. Hyde was not involved only four Local Authority decisions were reversed.

12. In the appeals involving Mr. Hyde, the Board departed from 45% of recommendations made by the Board’s own inspectors. Where Mr. Hyde was not involved, on no occasion was a recommendation of the inspector not followed.

13. In a 2016 review of the Board’s operations, conducted by an independent review group under the chairmanship of Mr. Gregory Jones Q.C., the review group came to the conclusion that departing from the inspector’s recommendation in slightly less than 20% of cases was “*high*”. On that metric, a rate of 45% of cases in which the inspector’s recommendation was rejected by the Board (in the 42 cases in which Mr. Hyde was sitting) would appear to warrant some explanation.

14. For the sake of clarity, I should also note that the 40 cases on which Ms. Fagan sat were included in the 42 appeals on which Mr. Hyde sat. In other words, in a cohort of 49 Eircom mast appeal hearings, an allegedly random allocation of these cases saw Mr. Hyde and Ms. Fagan sitting on 40 of them, with Mr. Hyde sitting on a further two without the company of Ms. Fagan.

At the appeal hearing, counsel for the Board was asked what defence the Board has to the case. The response was illuminating. Initially, counsel responded that this had not been addressed. At a later point in the hearing, counsel dealt with the same question by stating that opposition papers had not been delivered. Finally, when asked whether this was a case where there was no defence, counsel replied: -

“There may be legal arguments in response.”

15. It should also be noted that counsel also appeared to confirm that there was not a single case over the relevant period in which Mr. Hyde allowed an appeal against the grant of planning permission for the erection of a mast by Eircom.

16. As submitted on behalf of the Board, the extension of time which the Thomsons seek is an exceptionally long one. Section 50 of the 2000 Act stipulates that a claim of this sort must be brought within eight weeks beginning on the date on which notice of the decision to grant the permission was first sent. An extension of time can only be granted in accordance with s. 50(a) where the court is satisfied that: -

“(a) there is good and sufficient reason for doing so, and

(b) the circumstances that result in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension.”

17. As already noted, counsel for the Thomsons concede that proceedings could have been brought, based on proposed core ground 4, within the eight-week period. However, the trial judge found - and this is not disputed by the Board on appeal - that it was not possible to bring the challenge based on core grounds 1 to 3 within the eight weeks as the Thomsons did not have the relevant information to allow them to do so within that time.

18. The Board emphasises that the length of the extension sought here is 531 days, and that this contrasts sharply with judgments where extensions for much shorter periods were refused.

19. A helpful distillation of the facts as found by the trial judge is contained in the written submissions of counsel for the Board, which recite what they consider to be the most significant findings. They are as follows: -

- (1) By early February 2022, the Thomsons had identified 28 Eircom mast appeal cases in which grants of planning permission overturned Local Authority decisions refused permission. This covered the period September 2020 to February 2022, and it is described as "*the first analysis*".
- (2) On the 12th February 2022, the first analysis was presented to John McGuinness T.D. by Mr. Thomson, who asked that this would be investigated by the relevant government department.
- (3) As of April 2022, the Thomsons knew from media reports that there was a suggestion that there was a lack of impartiality on the part of Mr. Hyde.
- (4) On the 11th May, 2022 an expanded analysis - described as "*the second analysis*" - compiled by the Thomsons was forwarded to Mr. Roman Shortall,

a journalist at the Ditch Media outlet. From this analysis, the Thomsons could see that Mr. Hyde was involved in most of the cases identified in it.

- (5) By the 12th May, 2022 the Thomsons had become aware of how to obtain Board meeting minutes, as Mr. Shortall had told them how this could be done.
- (6) On the 12th May, 2022, the terms of reference for an inquiry by Remy Farrell S.C. were published. Mr. Farrell had been commissioned to carry out a report into a number of matters involving Mr. Hyde, including the alleged composition with creditors which constitutes proposed core ground 3 in these proceedings.
- (7) On the 19th May, 2022, Mr. Shortall provided some relevant Board minutes to Mr. Thomson. These covered certain of the decisions included in the second analysis.
- (8) By the 26th May, 2022, Mr. Shortall advised Mr. Thomson that the Irish Examiner was also investigating telecommunications mast decisions. In an article of the 28th May, 2022, and based at least in part on the second analysis, the Irish Examiner published an article entitled "*An Bord Pleanála Deputy Chair Overruled Inspectors in Vast Majority of Mast Applications*". Mr. Hyde was the Deputy Chair of the Board.
- (9) On the 4th June, 2022, the Thomsons emailed the Irish Examiner in connection with the telecommunication mast decisions and the Farrell investigation.
- (10) On the 6th June, 2022, the Thomsons made a submission to the Office of the Planning Regulator including the second analysis.

- (11) On the 8th July, 2022 Mr. Hyde resigned from An Bord Pleanála.
- (12) On the 15th July, 2022 the Thomsons emailed the Board the second analysis.
- (13) On the 18th July, 2022 the Office of the Planning Regulator informed the Thomsons that it was concerned not with individuals but rather the systems and procedures of the Board.
- (14) On the 7th September, 2022 the Board confirmed that mast files identified by the Thomsons formed part of its own internal review which would be published, subject to legal advice.
- (15) By the 22nd September, 2022, the Thomsons were aware from email correspondence with the Board that there was no formal record regarding the allocation of telecommunication mast files.
- (16) On the 26th September, 2022, the Thomsons' solicitors sought information from the Board regarding the Board file for the decision which the Thomsons wished to challenge.
- (17) Very importantly, on the 10th October, 2022 the Irish Times reported that the Director of Public Prosecutions had instructed that Mr. Hyde be prosecuted. This was the day, the court was informed, that the Thomsons finally gave instructions that proceedings were to be prepared and issued.
- (18) On the 24th October, 2022, the Irish Examiner reported some extracts from the Board's unpublished internal review.
- (19) On the 29th October, 2022, the Board issued a statement confirming that the internal review would not be published as a result of legal advice.

- (20) On the 8th November, 2022, the Board responded to the Thomsons' access to information request made on the 26th September, 2022.

The proceedings issued on the 28th November, 2022.

- 20.** The conclusion of the trial judge, on these facts, is set out at para. 67: -

“67. The effect of the foregoing is that I would probably have regarded mid-June (a few weeks from 12th May, 2022 to allow for obtaining the minutes) as being the latest date on which the applicants had (or a reasonably diligent applicant would have had) sufficient information to bring proceedings. Eight weeks from then expired in mid-August, 2022. The applicants are out of time and have not established that there is good and sufficient reason to extend time.”

- 21.** The parties did not differ greatly in their submissions as to the import of the relevant authorities on the question of “*good and sufficient reason*”. A range of factors can be taken into account in considering whether such reasons exist. In the nature of things, over time the principles to be considered have been supplemented, reemphasised, and restated. The trial judge himself, in *Dunne v Kildare County Council* [2023] IEHC 73, sets out a list of relevant factors, as follows: -

- “(i) The legislative policy and the overall integrity of the process;
- (ii) the length of the statutory limitation periods;
- (iii) the level of control by the applicant over the lapse of time, including delay or other blameworthy conduct on behalf of the applicant;
- (iv) any positive steps taken by the applicant to advance the matter;

- (v) any other reasons contributing to delay generally;
- (vi) the level of explanation by the applicant;
- (vii) the attitude of the opposing parties;
- (viii) any blameworthy [conduct] of the respondent or notice party;
- (ix) any demonstrated prejudice to the opposing parties, third parties or the public interest caused by the delay;
- (x) the rights and interests of the applicant, the nature of the claim and the issues involved;
- (xi) the rights and interests of third parties or the public interest insofar as such matters favour an extension;
- (xii) the rights and interests of opposing parties, third parties or the public interest insofar as such matters militate against an extension;
- (xiii) the merits of the case;
- (xiv) the commerciality of the context or otherwise;
- (xv) all other relevant circumstances...”

22. It is impossible to complain that this list of factors is not a comprehensive one. Rather than slavishly go through the list of factors, I intend to emphasise the ones which, in my opinion, are the more important in deciding whether or not the extension of time sought should be granted. In this regard, I note that counsel for the Board accepted that the standard of review is that set out by Irvine J. in *Collins v The Minister for Justice* [2015] IECA 27 referring back to the judgment of MacMenamin J. in *Lismore Builders Limited* (in

Receivership) v Bank of Ireland Finance Limited [2013] IESC 6. This was summarised by counsel (at p. 46 of the Transcript) as follows: -

“So it seems to be a bit of a hybrid ... in that the court can re-decide, but it will look at the what the High Court has done, it will afford deference and it will re-decide more readily if there is an identifiable error. But it is not the case that its jurisdiction of intervening is predicated on identifying a clear error in the first instance.”

23. The first consideration is that the Oireachtas has set a very short time limit for the launching of any challenge to decisions of the type which the Thomsons seek to impugn in these proceedings. To use the language of Finlay C.J. in *KSK Enterprises Limited v An Bord Pleanála* [1994] 2 I.R. 128 at p. 135, the Oireachtas intended “*greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the Planning Authorities...*”. It follows, as the then Chief Justice observed, that: -

“... It was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision.”

24. As it happens, Eircom have not sought to act on foot of the permission granted. Instead, the evidence suggests that Eircom began to develop the site in a matter not consistent with any planning permission. While the Thomsons contend that this should be a reason to extend time, I do not think that that logically follows. An unauthorised development can be restrained in other ways. It does not in itself undermine in any way the entitlement which Eircom has to treat the permission granted in its favour as conclusive unless there is a challenge within the prescribed eight-week period. Having said that, it is a notable feature

of these proceedings that Eircom has not sought to build in accordance with the permission which the Thomsons now seek to set aside and, equally importantly, it has not participated in these proceedings nor has any evidence been advanced as to the precise and specific prejudice which would be caused to Eircom by allowing the Thomsons the extension of time. At item (ix) of the principles set out by Humphreys J. in *Dunne*, he refers to “*demonstrated prejudice*”. While prejudice to Eircom is to be assumed, in that granting the extension of time would place in jeopardy the permission which Eircom has secured, the scale and extent of that prejudice has not been “demonstrated” in any meaningful way.

25. The second significant consideration is the reason for the delay and the level of detail provided by the Thomsons in that regard. On the motion to set aside the extension of time, the Board has delivered two affidavits and the Thomsons have delivered one. However, the earlier affidavits of the Thomsons also address in some significant level of detail the steps they have taken to bring the proceedings. I have three observations about these explanations.

26. In the first place, I do not believe that any of the evidence put forward by the Thomsons disturbs the findings of fact by the trial judge, as summarised in the submissions of the Board (which I have set out extensively) and at para. 67 of the judgment. The Thomsons had (or should have had) sufficient information to have brought these proceedings by mid-August of 2022.

27. Secondly, the Thomsons have not been able to identify any further information which they gathered after the end of May 2022 which they required to bring the proceedings that they ultimately launched. The trigger for bringing these proceedings appears to have been a report on the 10th October, 2022 that Mr. Hyde was to be charged with criminal offences. Candidly, counsel for the Thomsons accepted that news of this prosecution “*was a significant part in [the decision to commence the case]*”. In fact, it is difficult to see any

other factor apart from the prosecution of Mr. Hyde which caused the Thomsons to give the instructions to the solicitors on the same day. It should be noted that the charges against Mr. Hyde had nothing whatsoever to do with the matters which the Thomsons seek to agitate in this litigation. To that extent, the decision of the Thomsons to bring the proceedings could be viewed as somewhat opportunistic.

28. The third aspect of the evidence is the constant reference, in a number of affidavits delivered on behalf of the Thomsons, to legal advice which they received. The repeated reliance on legal advice to justify delay, or to support decisions made in the litigation, is understandable and sometimes justifiable. However it creates an unfortunate inequality of arms between the person relying upon this advice and the other side. It must be understood by every deponent who relies upon the legal advice they have been given that, in so deploying that advice, in many cases they will have waived privilege in respect of it. In most such cases, the other side would be entirely justified in requiring that copies of the advice be furnished to it for the purpose of replying to any evidence in which that advice is featured. This is something which the lawyers for the Board felt they did not have to do in this case, but it is a factor which may feature in other applications where a party seeks to justify their position by reference to legal advice that they claim to have received.

29. The third principal consideration is what is described in *Dunne* as “*blameworthy conduct*”. As this was teased out with counsel, there was a lack of certainty as to whether that blameworthy conduct was in respect of the delay in bringing the proceedings or as to the merits of the case. In principle, I think that blameworthiness (at least on this point) is relevant to the delay in bringing the case rather than the merits of the action. No blameworthy conduct on the part of the Board or, indeed, on the part of Eircom is alleged in that respect. Indeed the Board appears to have responded diligently to the various queries

raised over time by the Thomsons. Equally, it is difficult to describe the conduct of the Thomsons as having the character of moral obloquy that blameworthiness connotes.

30. The fourth general level of principle is the merits of the case. In *Kelly v Leitrim County Council* [2005] 2 I.R. 404, starting at p. 413, Clarke J. considered whether the merits of the case were relevant in exercising the discretion to extend time. Ultimately, Clarke J. suggested a process which would allow a respondent to contend that an applicant did not even have an arguable case. Having done so, he stated at page 415: -

“Such a procedure enables a respondent who feels that it can be demonstrated simply that an applicant has no arguable case to invite the court so to find and thus reject the application for an extension. If a respondent feels that the issues which would need to be canvassed in order to determine whether it is an arguable case are complex and would lead to delay then such a respondent is perfectly free to invite the court to consider the extension of time on a stand alone basis without having regard to the merits of whether there be an arguable case. As the decision will be entirely one for the respondent concerned no prejudice to such a party can take place.”

31. The current situation is the obverse of this. In these proceedings, the Thomsons contend that they have a remarkably strong case and that it would therefore be unjust to refuse to allow them to bring it. On this issue, I agree with the argument made by counsel for the Board, which is that a consideration of the merits of the case “*may be taken into account at the extremes*”; p. 73 of the Transcript.

32. Indeed, this is the position adopted by Murray J. (with whom Costello and Haughton JJ. agreed) in *Arthroparm (Europe) Ltd. v The Health Products Regulatory Authority* [2022] IECA 109. At para. 125 of his judgment, Murray J. observed: -

“125. I agree with the observations of Simons J. in *DPP v. Samantha Tyndall* [2021] IEHC 283 (at para. 47) that ‘*there are dangers in embarking upon an elaborate assessment of the underlying merits on an application to extend time*’. In *GK v. Minister for Justice* Hardiman J. was doing no more than confirming that where a case is not shown to be arguable, this is one factor that must be taken into account in determining whether to extend time. In *MO’S*, conversely, the applicant’s case was extremely strong to the point that the only extant issue in the proceedings was whether time should be extended because, as a result of the decision of this court which gave rise to the late application for leave, it was accepted that the applicant would prevail in his case if he obtained an extension. Between these two extremes lie the vast majority of applications of this kind, and in those cases the court has no role in determining the merits of the action. Were the position otherwise, an application for an extension of time would be converted into a trial of the merits, defeating at least part of the purpose of the rule giving rise to the necessity to seek an extension of time in the first place.”

33. The approach taken by Hardiman J. in *G.K. v Minister for Justice* [2002] 2 I.R. 418 by Clarke J. in *Kelly*, and as described by Murray J. in *Arthroparm* with regard to cases that struggled to be described as arguable is plain. If an applicant cannot even establish an arguable case, this is clearly a factor to take into account in determining whether or not time should be extended in order to allow the applicant to bring proceedings. However, it also appears from the judgment in *M. O’S v Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 I.L.R.M. 149, as described by Murray J. in *Arthroparm*, that if a case is demonstrably strong this can be a factor supporting an extension of time. On the facts and arguments placed before us, the case which the Thomsons seek to advance appears to be a strong one. This may, of course, change in the event that the proceedings ever go to trial. It

is also not the function of this court (or any court) in deciding on an extension of time to interrogate, analyse or provisionally decide the detail of a case which does not lie at one or other extreme. However, based entirely on the presentation to us, the current case is a strong one on the merits.

34. The fifth important principle is the public interest. There is undoubtedly a public interest in grants of planning permission being considered conclusive within the statutory eight-week period. There is also a public interest in having a planning regime which complies, and is seen to comply, with basic concepts of integrity. As these proceedings may yet go to trial, one must be reticent about describing in overly vivid terms the gist of the allegations which the Thomsons make against the Board. It is sufficient to say that very serious questions are raised by the actual allocation of Eircom mast appeal cases to Mr. Hyde and Ms. Fagan, allegedly on a random basis. Quite apart from that, the outcome of the appeals is something that gives cause for concern, as does the widescale overriding of recommendations from inspectors appointed by the Board. Apart from cases of actual corruption, which it must be emphasised is not even alleged let alone sought to be proven in these proceedings, it is difficult to imagine a more serious form of allegations being made against a planning authority.

35. There is a very strong public interest in allowing the Thomsons' allegations to be explored through the vehicle of these proceedings. The ventilation of these issues in a court of law provides a potentially superior way of scrutinising the operation of the Board than is possible either through journalism or through an internal review (the contents of which may or may not be made public).

36. It is, of course, possible that the exploration of these public interest issues will never happen. The proceedings may be settled before they go to trial. An Bord Pleanála may not

defend them. However, these possibilities must be weighed against the certainty that the Thomsons will never be able to agitate these issues in open court if their appeal on the extension of time is dismissed.

37. In my view, the trial judge did not place sufficient weight on the public interest aspect of the litigation. He found (at para. 66): -

“... I have ... borne in mind all points raised by the applicants, but they don't outweigh the substantial public interest in certainty in a commercial context that is the object and purpose of the time limit ... That important objective is not outweighed by the applicants' complaints that this is a systemic failure, that the board didn't realise and rectify what was going on, or any of the other points made.”.

38. This approach does not involve a holistic and full consideration of the various relevant factors, many of them competing. Instead, adopting this approach one would never grant an extension of time, regardless of what matters of public interest were engaged, because of the need for certainty in a commercial context. While certainty in a commercial context is a singularly important consideration, it does not in every case trump every other factor.

39. At paragraph 68 of his judgment, the trial judge compared litigation with Tribunals of Inquiry. That is a perfectly fair comparison to make. As I have pointed out, these proceedings may never go to trial. However, in permitting the proceedings to advance by extending the time the court is not assuming the trappings or powers of a commission or of a Tribunal of Inquiry. It is simply taking into account the fact that these very serious allegations about a systemic failure on the part of An Bord Pleanála will never be considered by a court (at least in these proceedings) should the Thomsons not be allowed to advance them.

40. Finally, at para. 70, and having referred again to the “*important points raised by the applicants*”, the trial judge went on to note that an extension of time will be “*unfair to the commercial interests involved.*” It has already been noted in my judgment that prejudice to Eircom can be taken for granted, though Eircom has not troubled itself to give any evidence about the precise scope of such prejudice. However, in every case in which there is an extension of time to challenge the grant of planning permission some prejudice will be caused to the commercial developer; at the very least, they are at risk of losing the planning permission which they had obtained. In a case such as the present, with very detailed and uncontradicted claims about the operation of the body which is at the centre of planning in Ireland, the prejudice to Eircom should not stand in the way of concluding that there is good and sufficient reason to extend the time.

41. The public interest in the systemic issues raised by the Thomsons about the operation of the Board over a number of years constitutes a good and sufficient reason to extend the time within which these proceedings might be brought, up to and including the date they were issued.

42. I would allow the appeal. I propose that the appeal be listed for mention at 9.30 am on the 31st day of July 2024 to decide any outstanding matters, including which core grounds the Thomsons are to be allowed to advance and the costs of the current motion. Allen J and Meenan J agree with the listing of the appeal on that date. Meenan J agrees with my judgment on the appeal.