Neutral Citation Number: [2008] IEHC 76

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

2007 No. 692 J.R.
2007 No. 127 COM

BETWEEN

DENIS LINEHAN, COLLEEN SHANNONN, MAURICE CRONIN, JOE CRONIN, PATRICK DENNEHY, MARY CARMEL DENNEHY, JOHN O'CONNOR, GERALDINE O'CONNOR AND MAIREAD CRONIN

APPLICANTS

AND
CORK COUNTY COUNCIL

RESPONDENT

AND
W.E.D. CROSS ENERGY LIMITED

NOTICE PARTY

Judgment of Ms. Justice Finlay Geoghegan delivered the 19th day of February 2008.

1. By notice of motion issued on 14th June, 2007 and served on the respondent and notice party on 19th June, 2007, the applicants seek leave to apply by way of judicial review for an order of *certiorari* quashing the decision of the respondent of 2nd May, 2007, to grant planning permission to the notice party under planning reference no. 06/12438.

2. The application was admitted to the Commercial List by order of Kelly J. of 22nd October, 2007. The parties agreed that, in the event that the Court granted leave to seek judicial review, the full hearing of the substantive judicial review action would be heard immediately thereafter. The respondent filed a notice of opposition without prejudice to its contention that the applicants were not entitled to leave on 14th December, 2007. The notice party did not file any notice of opposition but did file an affidavit indicating opposition to the granting of leave and substantive relief and at all stages indicated that it would participate in the proceedings.

3. The only relief in respect of which leave was sought at the hearing was for the order of *certiorari* referred to above. The decision being challenged is a decision of the respondent to grant permission to the notice party for the construction of two wind turbines of up to 85m hub height and up to 80m blade diameter, two transformers, site tracks and associated works at Lacka Cross, Lackanastooka, Ballydesmond, County Cork. The application for such permission was made to the respondent on 20th November, 2006.

4. The applicants are all persons who reside in the vicinity of the site on which it is proposed to construct the wind turbines. The single ground upon which they seek leave to challenge the validity of the decision of the respondent is set out at para. 13 of the statement of grounds:

> "13. The Applicants as interested parties who wished to make observations and submissions regarding the said application for the placing of wind turbines at the location specified by the Notice Party have been denied their legal rights by the actions of the servants or agents of the Respondent and in the circumstances the said application is invalid and ought to be quashed and/or the Respondent acted *ultra vires* their powers in considering the application in the absence of consideration of the submissions and observations of the Applicants. Further, the Applicants wish to have their observations and submissions regarding Application 06/12438 considered prior to any decision by the Respondent regarding the merits of the application and whether it accords with the proper planning and development of the area concerned."

5. The respondent and notice party have objected to the form of the statement of grounds as only reciting facts and not disclosing the ground upon which it is contended that the decision of the respondent is invalid. I do not accept that objection. It is clear from para. 13 that the applicants contend that the decision is invalid as it was ultra vires the respondent to take the decision in factual circumstances (set out in the earlier paragraphs of the statement of grounds) where they contend they were wrongfully denied their legal right to make submissions/observations on the application of the notice party and have those considered by the respondent.

6. This application is subject to ss. 50 and 50A of the Planning and Development Act, 2000, as inserted by s.13 of the Planning and Development (Strategic Infrastructure) Act, 2006 (hereinafter referred to as the Act of 2000). The following portions of those sections are relevant to the issues in the leave application:

> "…
>
> 50(2) A person shall not question the validity of any decision made or other act done by–
>
> (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,
>
> …
>
> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order').
>
> …
>
> (6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.
>
> …

(8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that–

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

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

…

50A(2) An application for section 50 leave shall be made by motion on notice (grounded in the manners specified in the Order in respect of an *ex parte* motion for leave)–

(a) if the application relates to a decision made or other act done by a planning authority or local authority in the performance or purported performance of a function under this Act, to the authority concerned and, in the case of a decision made or other act done by a planning authority on an application for permission, to the applicant for the permission where he or she is not the applicant for leave.

…

(3) The Court shall not grant section 50 leave unless it is satisfied that–

(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a substantial interest in the matter which is the subject of the application, or

…

(4) A substantial interest for the purposes of subsection (3)(b)(i) is not limited to an interest in land or other financial interest.

(5) If the court grants section 50 leave, no grounds shall be relied upon in the application for judicial review under the Order other than those determined by the Court to be substantial under subsection (3)(a).

…"

7. Leaving aside the time constraints, to which I will return, as appears from s. 50A(3)(a) the Court may not grant leave unless it is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed. This is the first issue which I propose to address. Both the respondent and notice party submit that there are no substantial grounds for contending that the decision of the respondent of 2nd May, 2007, to grant permission to the notice party is invalid or ought to be quashed.

8. Certain of the facts upon which the applicants seek to rely are disputed by the respondent. No notices to cross-examine have been served by any party. Counsel for the respondent accepted, correctly in my view, that where on the affidavits sworn in the proceedings there is a direct dispute between the averments of the deponents as to relevant facts, for the purposes of the leave application the Court should make an assumption in favour of the applicants.

9. This appears consistent with the approach of the Supreme Court in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374. That case concerned an application made *ex parte* for leave to issue an application for judicial review pursuant to O. 84, r. 20 of the Rules of the Superior Courts, 1986. It was not an application on notice to the respondent nor was there a requirement of "substantial grounds" imposed by statute. Finlay C.J. in his judgment, at pp. 377, 378, (with which the other members of the Court agreed) set out five matters of which an applicant must satisfy the court in order to obtain leave ex parte to issue judicial review proceedings. These include at paragraph (b):

"That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review."

10. Applying this principle by analogy to an application on notice under s. 50 of the Act of 2000, where the relief sought is an order of *certiorari* of a decision of the planning authority it appears that the applicant must satisfy the court that the facts averred in the grounding affidavit or affidavits would be sufficient, if proved, to support substantial grounds for contending that the decision is invalid or ought to be quashed.

11. In expressing this view, I do not wish to be taken as excluding the possibility of a court considering it appropriate, in a particular case, to determine a disputed fact as part of a leave application. It is possible that there could be facts in dispute which are so central to the existence or absence of substantial grounds that it would be considered appropriate even at the leave stage to determine by cross-examination or otherwise disputed facts. A respondent might adduce independent documentary evidence in conflict with averments of an applicant's deponent. However, it appears to me that these would be the exception and that, in general, the approach consented to in these proceedings is the one which ought to be taken by the court on a leave application to which s. 50 and s. 50A of the Act of 2000 applies.

12. There are also facts which are not in dispute which are relevant to the determination of the issue as to whether the applicants have satisfied the Court that there are substantial grounds for contending that the decision herein is invalid or ought to be quashed.

13. The applicants and respondent agree that the notice party made a prior application to construct two wind turbines in October, 2006 and that it was given a reference number 06/11641 by the respondent. The first named applicant, Mr. Linehan, avers that the

white site notice put up by the notice party for the purposes of that application described the notice party as "W.E.D. Cross Energy Ltd.". It is common case between the applicants and the respondent that such application was recorded by the respondent as having been received from "WED Cross Energy Ltd". Further, that the respondent determined that such application was invalid and so notified the notice party in the above name by letter of 7th November, 2006.

14. The affidavit sworn by Mr. Costello on behalf of the notice party does not dispute the averments of Mr. Linehan or the deponents on behalf of the respondent in relation to the first application made. There is no evidence of a change of name by the notice party at the relevant time or the existence of any other company with a similar name. The Court therefore assumes, for the purposes of the leave application, that there was a prior application by the notice party for the construction of two wind turbines and that such application was recorded by the respondent using an incorrect name for the notice party.

15. On 17th November, 2006, the notice party erected a yellow site notice as required by the respondent for the purpose of compliance with article 19(4) of the Planning and Development Regulations, 2001 (S.I. No. 600 of 2001), as amended by article 8 of the Planning and Development Regulations, 2006 (S.I. No. 685 of 2006), (hereinafter referred to as "the 2001 Regulations"). A copy of that site notice has been exhibited by Ms. O'Sullivan, a deponent for the respondent. It indicates that the name of the notice party is stated therein as "W.E.D. Cross Energy Limited". An application for planning permission was then made in the name "W.E.D. Cross Energy Ltd." and received by the respondent on 20th November, 2006. That application was given the reference number 06/12438 by the respondent. It was recorded under the name "W.E.D Cross Energy Ltd". It differed from the name on the application form by the omission of a full stop after "D" and "Ltd". It differed from the name on the site notice by the similar omission of the full stop after "D" and the abbreviation of "Limited" to "Ltd".

16. The respondent has on its website (www.corkcoco.ie) a planning enquiry system. This is described by Ms. O'Sullivan, a senior executive officer in the planning department of the respondent, as "an internet searchable database of planning applications which is accessible from the Cork County Council website". Further, she explains that this allows any person to "search by means of either Application number, Applicants Name or Development Location in respect of specified range of dates". In addition to the search terms it appears that the planning enquiry system also includes a digitised site location map. Ms. O'Sullivan explains that, if a search result shows a planning application and a person then clicks on the application, it will be illustrated on the digitised site map. She further explains that it is also possible to search via the digitised site map by clicking on the map and zooming in on a particular area. She has exhibited a copy of the printout of the search form used for the planning enquiry system.

17. The first set of facts in dispute relate to searches carried out by or on behalf of the applicants on the respondent's computerised planning enquiry system and whether the first named applicant, Mr. Linehan, has adduced evidence which should satisfy the Court that he made a search such that if the notice party's second application, with reference number 06/12438, had been correctly entered on the respondent's computer planning enquiry system it ought to have been disclosed. Further, if this is so, whether the Court should, for the purposes of the leave application, assume some error occurred for which the respondent is responsible which meant that its planning enquiry system did not disclose planning application 06/12438 on the making of a proper search.

18. Mr. Linehan avers at para. 7 of his first affidavit that he –

> "interrogated the computerised planning enquiry system on 13th December, 2006 entering the search terms 'WED Cross Energy Ltd.' and 'W.E.D. Cross Energy Ltd.' together with Munster Joinery Ltd. and Gardini Ltd."

19. It is common case that the entry of such names would not have resulted in disclosure of the application. Where a search term such as a name is used there must be absolute conformity between it and the named entered on the system. Ms. O'Sullivan, at para. 15 of her affidavit, explains that where a particular search term is used "the system will only return the precise matching text". It is accepted that the omission of the full stop after the letter "D" in the recording of the name of the applicant would have precluded the application being found, even if a search was entered in this form.

20. Mr. Linehan in the same paragraph then states:

> "I also input the Townland names of Lackanastooka, Lacka and Lacka Cross to complete an extensive search of the area on which the proposed development was to take place."

21. The respondent accepts that if any one of those three names or combination of those names was inputted by Mr. Linehan as a stand-alone search (without the applicant's name) that it ought to have disclosed the application if it was then properly entered on the system. Whilst the notice party in its site notice, advertisement and application form had incorrectly spelt the townland as "Lacknastooka" instead of "Lackanastooka" (emphasis added) the respondent, in the particulars entered, correctly identified the place as "Lacka Cross, Lackanastooka, Ballydesmond".

22. Counsel for the respondent submits that Mr. Linehan, at para. 7 of his affidavit, does not make it clear whether on 13th December, 2006, he entered the place name independently of any of the applicant names which he entered. For the purposes of the leave application, on a full reading of para. 7 and in the absence of cross-examination of Mr. Linehan, I am prepared to accept that the averment of Mr. Linehan is to the effect that he also separately inputted the three townland names identified.

23. The only other evidence given by Mr. Linehan of searches made on the computer is of a very general nature. At the end of para. 8 of his first affidavit, having referred to a conversation with an official of the respondent on 13th December, he states:

> "Following that conversation your deponent frequently interrogated the computerised planning enquiry system and also frequently telephoned the office of the Respondent but was always informed that there was no such fresh application."

24. This evidence is of such a general nature that the Court could not make any assumption as to the facts which might be proved at a hearing.

25. The final evidence given on behalf of the applicants in relation to carrying out searches on the planning enquiry system of the respondent is the combined evidence of Mr. Linehan and a work colleague of his, a Mr. Declan Murray, whom he states he contacted on the morning of 4th January, 2007. By this time, Mr. Linehan had discovered that the notice party had made an application under reference no. 06/12438 but that the time for making submissions or observations had expired on 2nd January, 2007.

26. Mr. Murray, in his first affidavit, states that he received a telephone call from Mr. Linehan, who was at the planning department of the respondent, at approximately 10.00 am on 4th January, 2007. Further, he states that Mr. Linehan requested him to check the respondent's computerised planning enquiry system for the planning application reference numbers 06/12438 and 06/11141. In a

second affidavit sworn, Mr. Murray explains that the reference to 06/11141 in his first affidavit is incorrect and that instead he was asked to search 06/11641. It appears probable that the error was made in swearing the first affidavit insofar as he states, at para. 3 of his first affidavit, that having searched for planning application no. 06/11141 the search showed "details of an application for planning permission for 2 Wind Turbines for WED Cross Energy Limited including a site map depicting the southern site only (of the overall application) outlined in red". That was the first application, given the number 06/11641 by the respondent.

27. Mr. Murray also avers in his first affidavit, at para. 3, that: "Upon checking and interrogating the computer system for ref. no. 06/12438 no results or reference maps were available". He also avers, at para. 4 of the same affidavit, that he continued to check the database system at ten to fifteen minute intervals until approximately 11.30 am for planning application no. 06/12438 at which time the system finally displayed "a planning application for W.E.D. Cross Energy for 2 wind turbines". It is noted that this averment may be incorrect in the inclusion of a full stop after the letter "D" as all the computer printouts disclosed by the deponents for the respondent showed the name without this third full stop.

28. The evidence of Mr. Murray must be considered firstly in the context of what had occurred in the respondent's planning office at County Hall immediately prior to Mr. Linehan making contact with him. At para. 12 of Mr. Linehan's affidavit, he states:

> "I say that on 4th January, 2007 at or about 9.15 a.m. you deponent and Colleen Shannon attended at the Planning Office of the Respondent and asked to see the Notice Party's planning application. I say that your deponent was informed at that time by a servant or agent of the Respondent that the Notice Party's application had been found to be invalid. I say that your deponent responded that I had been told on the previous day that a fresh planning application had been made. I say that the servant or agent of the Respondent searched again for the application and after some time found it, bearing the planning reference 06/12438. At that stage your deponent requested to speak to a supervisor of the Respondents department."

29. In accordance with the explanations given on behalf of the respondent about the working of the planning enquiry system, it appears probable that if the details of the planning application with reference no. 06/12438 had been properly entered on the database for the planning enquiry system then it ought to have been retrievable by Mr. Murray inputting the planning reference number. The Court must assume that Mr. Murray knew how to operate the system. He had succeeded in obtaining the earlier planning application by inputting the reference number for that application.

30. Affidavits were sworn on behalf of the respondent by Ms. O'Sullivan, senior executive officer in the planning department of the respondent, and Mr. Moore, a staff officer in the public office of the planning department. Both deponents, as is usual, state in para. 1 of their affidavits that they make the affidavit "from facts within my own knowledge save where otherwise appears and where so otherwise appearing, I believe the said facts to be true and accurate". They each then proceed to make averments about the computerised planning enquiry system and the receipt and entry of the details of the application 06/12438. Mr. Galligan S.C., on behalf of the applicants, objected to the admissibility of certain paragraphs of Ms. O'Sullivan's affidavit on the basis that it was hearsay. No notice had been given to the respondents of any objection being taken to the admissibility of the affidavits. In those circumstances, I was not prepared to entertain the application in the course of the hearing of the leave application.

31. Nevertheless, it appears to me to be an inescapable conclusion from the content of the affidavits that, unfortunately, each of these deponents deposed to facts relating to the entry of the details of planning application 06/12438 which as a matter of probability were not within their own knowledge. They have not indicated in their affidavits that such facts were not within their own knowledge or the person by whom they were informed of the relevant information as they ought to have done. I make this observation without intending to criticise the deponents concerned as it is probable that the affidavits were drafted for them by lawyers on instructions. It is important that all lawyers drafting affidavits for lay deponents make clear what averments the deponents are making of their own knowledge and those which they are not. Further, if there is an averment included which is not within their own knowledge but based upon information supplied to them by another person, it is important that this is made clear, that such person is identified and the grounds for the deponent's belief that the facts are true is stated. Mr. Galligan drew attention to O. 40, r. 4 of the Rules of the Superior Court, 1986 which states:

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted ..."

32. It is unnecessary for the purposes of this application (as I did not entertain the application from Mr. Galligan to strike out portions of the affidavits) to consider whether an application for leave is or is not an interlocutory application for the purposes of this rule.

33. There is no evidence from the respondent of any search it had carried out on or before 4th January, 2007, on the planning enquiry system with a term which ought to have disclosed the application bearing reference no. 06/12438. I am not satisfied that there is any evidence adduced by the respondent which displaces the assumption to which the applicants appear entitled on the evidence referred to of both Mr. Linehan and Mr. Murray that, as a matter of probability, neither the input of a relevant townland name nor the planning reference number as a search term in the planning enquiry form resulted in the disclosure of the application made by the notice party on 20th November, 2006 and given the planning reference no. 06/12438, prior to approximately 11.30 am on 4th January, 2007. Accordingly, I propose considering the question as to whether the applicants have adduced substantial grounds for contending that the decision of the respondent of 2nd May, 2007, is invalid upon inter alia a factual basis that Mr. Linehan did on 13th November, 2007, carry out a search in the online planning enquiry system of the respondent by inputting a townland name which ought to have disclosed the notice party's application but did not do so. Further, (in the absence of evidence from the respondent that planning application 06/12438 was recoverable on an appropriate search on the planning enquiry system prior to 11.30 am on 4th January, 2007,) the Court should assume for the leave application that the failure of the planning enquiry system to disclose the notice party's application on Mr. Linehan's search was caused by some error or omission in inputting the data for which the respondent is responsible.

34. The second relevant set of facts relate to the searches which the applicants and in particular Mr. Linehan could have conducted but did not conduct, even on the respondent's website.

35. Ms. O'Sullivan, at para. 9 of her affidavit, states that in addition to the searchable planning enquiry system "the Weekly Reports" of planning applications are also available online on the respondent's website. She further explains that the Weekly Reports supply a separate list for each week for each of the following:

> "Planning Applications Granted, Planning Applications Received, Planning Applications Refused, Invalid Planning Applications and also Further Information Received or Validated Applications."

36. Further, Ms. O'Sullivan, at para. 13 of that affidavit, states that application 06/12438 was entered on the Weekly Report Lists for applications received for the week ending 24th November, 2006. She also states that "In addition an extract from the Council's internet which shows that the above 'List' was created and published to the Council's internet site on the 29/11/06 is also attached". She then exhibits a copy of the applications received list and also an extract from the Council's internet site showing the list (Tab 6 of her booklet of exhibits). The documents exhibited by Ms. O'Sullivan support the facts (some of which may be hearsay) as stated by her. One of the documents which bears a date at the top left hand corner of the 29/11/2006 and at the top right hand corner, a time of 08:52:16, and is designated page 17 is headed:

> "Cork County Council
>
> Planning Applications
>
> Planning Applications received from 20/11/2006 to 24/11/2006".

37. The fourth entry on the page is under file number 06/12438 with the applicant's name "W.E.D Cross Energy Ltd". It records a planning application received on 20/11/2006 for the construction of 2 wind turbines of up to 85m hub height and up to 80m diameter, 2 transformers, site tracks and associated works at Lacka Cross, Lackanastooka, Ballydesmond.

38. Mr. Ger Moore a staff officer in the public office of the planning department of the respondent in his affidavit, at para. 5, deposes that the respondent's relevant list of applications received was available at the public counter from 29th November, 2006 and that this included application 06/12438.

39. The applicants have not given any evidence that any one of them, nor any person on their behalf, either searched the Weekly Lists on the respondent's website or consulted the hard copy of the list which was available at the public counter on any date prior to the expiry of the time limit for the making of submissions on 2nd January, 2007.

40. I am satisfied that the relevant facts on this issue which the Court should assume for the purposes of the leave application are that the respondent did enter the details of application 06/12438 in its Weekly List (with the slightly incorrect name of the notice party, omitting a full stop after the letter "D") and that such Weekly List was available both on the respondent's website and at the public counter in the planning department from 29th November, 2006. Further, that the applicants did not search or consult such Weekly Lists.

41. The third set of facts relevant to the issue of substantial grounds are the alleged telephone calls with enquiries made by Mr. Linehan and Ms. Shannon to the offices of the respondent. Mr. Linehan avers, at para. 6 of his first affidavit, that on 28th November, 2006, he contacted the office of the respondent and was told by an unnamed servant or agent of the respondent that planning application 06/11641 had been invalidated. Mr. Linehan also avers, at para. 8 of his first affidavit, that he contacted by telephone the office of the respondent on 13th December, 2006, to enquire about the matter and that he was "told by a servant or agent of the Respondent that application 06/11641 had been invalidated and that there was no new application received from the Notice Party". He says that he was surprised and told this unnamed person of the yellow site notice, that person then checked for any new or any further applications concerning a wind farm or wind turbines and told him that no application of that nature had been received by the respondent.

42. Mr. Linehan also deposes that following that conversation on 13th December, 2006, he "also frequently telephoned the office of the Respondent but was always informed that there was no such fresh application". He then deposes specifically that on 15th December, 2006, he asked whether the notice party had made a fresh application arising from the yellow site notice and was told again by an unnamed servant or agent of the respondent that no such application had been received. He finally states that on 3rd January, 2007, he contacted by telephone the office of the respondent and asked whether the notice party had made a fresh application arising from the new site notice. He states that on this occasion he was told that an application had been received and that the deadline for making submissions had expired on 2nd January, 2007.

43. The only other relevant evidence is that of Ms. Shannon who deposes that on 18th December, 2006, she contacted the office of the respondent at County Hall Cork and requested "if the Notice Party had submitted an application for planning permission to erect 2 wind turbines at Lacka Ballydesmond Co. Cork". She states that she was informed, again by an unnamed servant or agent of the respondent, that no application had been submitted or received since the invalidated application reference no. 06/11641.

44. The respondent and notice party submit that, insofar as the applicants seek to rely on a ground that Mr. Linehan and Ms. Shannon were given misleading or wrong information by or on behalf of the respondent, the averments to which I have referred do not discharge the onus on an applicant to give and prove in evidence the facts upon which he relies. In particular, it is contended that in the absence of evidence as to the precise terms of the enquiry put to the relevant official of the respondent and identification of that person, the Court should not find that the applicants have given affidavit evidence which if proved could lead to a factual finding that the applicants were given misleading relevant information by or on behalf of the respondent.

45. I have concluded that the facts deposed to by Mr. Linehan and Ms. Shannon would, if proved at the hearing, only be evidence of the following. Mr. Linehan on 13th and 15th December, 2006, and possibly on additional days, made unspecified enquiries in relation to a further application for planning permission from the notice party to unspecified persons which did not result in the disclosure of the planning application received on 20th November, 2006 with reference no. 06/12438. Whilst the evidence from Ms. Shannon is a little more specific, it is still given in general terms insofar as she states she requested "if the notice party had submitted an application for planning permission …". She does not state what name she gave for the notice party. She states that she was informed that no application had been submitted or received since the invalidated application reference no. 06/11641. That application, of course, was recorded in the name WED Cross Energy Ltd. If the enquiry Ms. Shannon made was in relation to that name as it appears to have been, insofar it elicited a reference to the planning application no. 06/11641, then, of course, any search made by an official on the computer records for that name would not have found the subsequent application.

46. The evidence given on behalf of the applicants by the affidavits of Mr. Linehan and Ms. Shannon in relation to the oral enquiries made does not establish with sufficient precision facts which, if proved at the hearing, would establish that it was some act or omission of a servant or agent of the respondent in responding to such oral queries which was the cause of the failure to disclose the planning application from the notice party received on 20th November, 2006. Accordingly, on this aspect of the application, I have concluded that the evidence of Mr. Linehan and Ms. Shannon does not support a challenge to the validity of the decision based on a factual assertion that the failure by the respondent to disclose to them the application made by the notice party on 20th November, 2006, bearing planning reference no. 06/12438 in response to their oral enquiries was caused by any error or omission of the respondent.

47. Accordingly, the only relevant factual basis for the alleged substantial ground for contending that the decision of the respondent is invalid which must be considered is the apparent failure by the respondent to input the details of the notice party's application made on 20th November, 2006, in such a way that it was disclosed by a search made using a relevant search term on the respondent's planning enquiry system on its website on or about 13th December, 2006.

48. The legal submissions made, on those facts, in support of the single ground upon which the applicants seek leave to challenge the validity of the decision of the respondent to grant planning permission may be summarised as follows. The respondent is bound to exercise its statutory jurisdiction and take the decisions required thereunder in accordance with the principles of fair procedures. The applicants are persons entitled under the statutory scheme to make observations/submissions on the notice party's application for planning permission. They come within the ambit of persons to whom fair procedures must be accorded. Any decision taken by the respondent in breach of the applicant's right to fair procedures is ultra vires the respondent. The decision challenged herein was taken in breach of such rights. The breach alleged (which is factually supported) is that the respondent, in providing a computerised planning enquiry search system to enable the public obtain information about planning applications, failed due to error or omission to input the data relating to the notice party's planning application with reference 06/12348 in such a way that it was disclosed on the planning enquiry search system by searches including relevant words such as the townland names.

49. The respondent does not admit any error or omission made by it in the inputting of the data referable to the notice party's planning application on the computerised planning enquiry search system. However, the respondent and notice party also submit that even if, as has now been done, the Court were to conclude that there was evidence adduced by the applicants sufficient for leave purposes to establish as a matter of probability that such error or omission may have occurred, it does not and cannot constitute a substantial ground for contending that the decision to grant a planning permission challenged herein is invalid.

50. Both the respondent and notice party, whilst not denying the obligation of the respondent to act in accordance with the principles of fair procedures in the discharge of its statutory duty, submit that what is required by such principles must primarily be determined by the statutory obligations imposed on the respondent and notice party in relation to disclosure of the existence of a planning application. They draw attention to and rely upon the fact (which is not in dispute) that the respondent's planning enquiry system searched by Mr. Linehan is not maintained pursuant to the respondent's statutory obligations and is a voluntary (i.e. non-statutory) information system for the benefit of the public.

51. No breach of statutory obligation by the respondent or notice party is alleged. The notice party, in particular, submits that it is entitled to the benefit of a valid decision once it and the respondent have complied with their statutory obligations in the procedure leading to the decision on the planning application. It submits that even if (which it is not contending) there has been some act or omission by the respondent in the inputting of data to the voluntary computer planning enquiry system which could amount to a breach of duty to the applicants, such error cannot in the absence of a breach of statutory duty invalidate the decision to grant a planning permission to the notice party.

52. It is necessary to consider these opposing submissions in the context of the statutory scheme for disclosure and publication of planning applications. An applicant for planning permission such as the notice party is required to give two notices: a notice of intention to make the application published in a newspaper, as specified in article 18 of the 2001 Regulations and a site notice erected in accordance with article 19 of the 2001 Regulations. This must be done within a period of two weeks prior to the making of a planning application (article 17(1) of the 2001 Regulations). The particulars which must be included in the advertisement and notice are specified in the 2001 Regulations and include the place at which the application may be inspected and the requirement for submissions to be lodged within five weeks of the date of receipt of the application by the planning authority.

53. The planning authority is obliged by s. 7 of the Act of 2000 to keep a register for the purposes of the Planning Acts. Section 7(2)(a) obliges it to enter in the register particulars of any application made under the Act. The register must incorporate a map enabling a person to trace any entry in the register. The register must be kept in a form which enables copies to be made and must be kept at the offices of the planning authority and made available for inspection during office hours.

54. The planning authority is also obliged by article 27 of the 2001 Regulations not later than the fifth working day following a particular week to make available a list of the planning applications received by the authority during that week ("the Weekly List"). Article 27 specifies the details which must be entered in the Weekly List in respect of each planning application. Article 27(5) requires that the Weekly List be available for not less than 8 weeks for inspection and to be made available in or at the offices of the planning authority and in each public library and mobile library in the functional area of the authority in a position convenient for inspection during office hours and at any other place or by any other means including electronic form that the authority considers appropriate. Article 27(5)(b) requires copies of the list (at a reasonable fee) to be made available to members of the public at the office of the planning authority and also to be sent on request to members of the public. There are also certain specific provisions in relation to giving notice to particular persons which are not relevant to the issues in these proceedings.

55. The respondent herein has availed of the power given it by article 27(5)(a) of the 2001 Regulations to maintain the Weekly Lists in electronic form.

56. On the facts of this application, the notice party did erect a site notice and placed the advertisement in the newspaper. Mr. Linehan saw the site notice on 17th November, 2006.

57. It is, of course, possible that a person may advertise in a newspaper and place a site notice and not follow this up with an application for planning permission. It is also possible that an application made may be considered by the planning authority to be invalid in accordance with article 26 of the 2001 Regulations and be returned. In that case, an entry to that effect must be made in the planning register.

58. The statutory scheme envisages that the register maintained by a planning authority pursuant to s. 7 of the Act of 2000 and the Weekly Lists required by article 27 of the 2001 Regulations be the primary source of information in relation to planning applications made and received by a planning authority. The scheme requires that the latter, in particular, be widely available and expressly facilitates the Weekly Lists being made available in electronic form. That is clearly for the purpose of enabling members of the public to ascertain whether a planning application has been received by a planning authority and, if so, on what date the application was received in order that they may, if they wish, exercise their right to make a submission or observation on the application. Such submission or application must be made within a period of five weeks of the receipt by the planning authority of the application in accordance with article 29 of the 2001 Regulations. Where it is received after that period, article 29(3) obliges the planning authority to return the submission or observation and notify the person that it cannot be considered by the planning authority.

59. Mr. Linehan, the first named applicant, states, at para. 3 of his first affidavit, that he works as an architectural technician and is

"very familiar with planning procedures". He also states that for this reason he was nominated by the applicants to co-ordinate their objections to the notice party's wind turbine development. Mr. Linehan has given no evidence of any attempt to consult the Weekly Lists either in electronic form or in hard copy nor any attempt to consult the planning register of the respondent. There is no suggestion that he was in any way prevented from doing so or was unaware of the existence of these records.

60. The statutory scheme envisages public advertisement and site notices by an applicant for planning permission signalling the intention to make an application, followed up by the maintenance by the planning authority of the list of applications received in an easily accessible format both at the planning office and in public libraries in hard copy and, if a planning authority so decides, in electronic form. It does not impose on a planning authority an obligation to notify the public of applications received. It is a matter for those members of the public who wish to make submissions or observations on an application signalled by advertisement and site notice to inform themselves whether an application has been made. This will normally be done by consulting the accessible records which a planning authority is required by law to maintain.

61. Having regard to the statutory scheme, it appears to me that, where both the applicant for planning permission and the planning authority have complied with their statutory obligations in relation to disclosure, publication and the maintenance of the relevant records of planning applications received, there would have to be exceptional factual circumstances for the Court to find that there had been a breach of fair procedures in excluding a member of the public from making observations/submissions where that member of the public did not consult either the Weekly Lists or the planning register of the planning authority and had not been either prevented from doing so or relieved of any obligation to do so. Fair procedures will always depend upon the relevant facts and therefore I do not exclude the possibility that such exceptional factual circumstances might exist.

62. On the facts assumed for the leave application, the question is whether the provision by the respondent of the planning enquiry system and the searches carried out by Mr. Linehan thereon relieved the applicants of any further obligation to ascertain whether a planning application had been made by searching or consulting the Weekly lists and/or planning register. I have concluded that it did not. Mr Linehan states he is familiar with planning procedures. He must have been aware of Weekly Lists and of the planning register. The planning enquiry search form contains the following on the page under the form.

> "Disclaimer
>
> While every care has been taken to display accurate information, Cork County Council will not be held responsible for any loss, damage or inconvenience caused as a result of any inaccuracy or error within. Should you need to rely on information provided in these pages please obtain separate confirmation from the staff at the Planning Public Counter."

63. Whilst this might be better worded (to refer, for example, to the definitive Weekly Lists and planning register kept pursuant to the statutory obligations) it does not suggest that a search by the planning enquiry system is to be regarded as providing fully reliable information or intended to replace consultation with the Weekly Lists or planning register. On the contrary, it draws attention to the need to obtain confirmation from the staff at the planning public counter.

64. Accordingly, I have concluded on the facts herein that the applicants were not relieved of their obligation to search or consult the Weekly Lists or planning register to ascertain whether a planning application had been made by the notice party by reason of the search carried out on the planning enquiry system by Mr. Linehan. Further, there were no other exceptional factual circumstances.

65. The applicants sought to rely on the decision of Roderick Murphy J. *in O'Connor & Ors. v. Cork County Council* (Unreported, High Court, 1st November, 2005) as supporting their contention for the existence of substantial grounds on the facts herein. However, that reliance appears misplaced for the following reasons.

66. In *O'Connor & Ors. v. Cork County Council* the basis of the application, as appears from page 4 of the judgment, was that the applicants' rights to object to the planning application had been frustrated by the failure of the respondent to comply with the statutory requirements. On the facts therein it appears to have been common case that the planning application was not entered by the respondent in the relevant Weekly List of applications received between 28th February 2005 and 4th March 2005. This appears to have been caused by the respondent incorrectly inputting the year of the planning application as "2004" rather than "2005". The evidence given on behalf of the applicants included evidence of consulting the relevant Weekly Lists. In his judgment, Murphy J., having referred to the omission of the relevant application in the Weekly List on the computer and the computer printout produced to him, stated (at p. 11):

> "The planning authority, in making a facility available to the public, must ensure its accuracy. It is not submitted that members of the public, the applicants in the present case, have an obligation to search the planning file when there is a computerised facility made available. While this is not the actual record it is provided to facilitate the public and must, necessarily, be accurate.
>
> Mr. Shine has fairly said that it was unfortunate that the second application of the notice party did not appear on the planning list furnished to Mr. O'Sullivan, one of the applicants, as a result of an error whereby the date of the planning application was input as 2004 rather than 2005".

67. The above statement of Murphy J. relates to the obligations of the respondent in making available the Weekly List, (required by statute) on the computer. I would respectfully agree with it. If a planning authority opts to make available the Weekly Lists on its website (as article 27(5)(a) of the 2001 Regulations expressly permits) then it must ensure the accuracy of those lists in computerised form. The public are entitled to rely on such lists as containing all applications received in the relevant week and is not required to consult the Weekly List in hard copy.

68. In making the above cited observations, Murphy J. was not referring to a computerised planning enquiry system which is not required to be maintained by statute such as the one at issue in these proceedings. Further, even if that decision is to be understood as imposing on the respondent a duty to the applicants to ensure the accuracy of any computerised planning enquiry system, Murphy J. was not addressing, in that judgment, the issue which arises herein as to whether a breach by the respondent of such duty is a breach of the applicants' rights to fair procedures such that it vitiates the validity of a planning decision taken by the respondent where there has been no breach of statutory duty by the respondent or the notice party and the applicants have failed to consult with or search the Weekly Lists or the planning register required to be maintained pursuant to statute.

69. I have concluded, on the facts of this application, that the applicants have not made out substantial grounds for contending that the decision of the respondent of 2nd May, 2007, to grant planning permission to the notice party under planning reference no. 06/12438 is invalid or ought to be quashed by reason of the alleged breach of the applicants' rights to fair procedures in the process

leading to the decision.

Other Issues
70. As I have concluded that the applicants have not established substantial grounds for contending that the challenged decision is invalid or ought to be quashed, it is not strictly necessary for me to consider any other issues between the parties in the proceedings. There was, however, one objection of general importance raised by the notice party in relation to the time limit for commencing proceedings to which s. 50 of the Act of 2000, as inserted by s. 13 of the Act of 2006, applies and to which I consider I should make reference. As appears from s. 50(2), set out above, a person may not now question the validity of "any decision made or other act done" by *inter alia* a planning authority other than by way of application for judicial review. Section 50(6) requires the application to be made within a period of eight weeks beginning on the date "of the decision or, as the case may be, the date of the doing of the act by the planning authority".

71. On the facts herein, the applicants expressly seek to challenge the decision to grant planning permission of 2nd May, 2007. This application was commenced within eight weeks of that date. However, the basis of the challenge to that decision is that the respondent took it in breach of the applicants' rights to fair procedures in that they were prevented from making observations/submissions in the five week regulatory time limit by reason of the facts set out already herein.

72. The affidavits filed herein disclose that following the discovery of the second application for planning permission by the applicants in early January, 2007 and of the fact that the five week period had already expired, there were further communications between Mr. Linehan and representatives of the respondent. Mr. Linehan, at para. 16 of his first affidavit, states that on 17th January, 2007, he met with the senior planner and local area planner of the respondent who told him that they were constrained to consider the merits of the planning application without the benefit of the applicants' objections or submissions. The notice party contended that on such facts there was, on that date, either a decision made by the respondent and communicated to the applicants that it would proceed to consider and determine the application for planning permission without the benefit of the applicants' submissions or that there was an "act done" within the meaning of s. 50(2)(a) of the Act of 2000, in the sense of proceeding to a consideration and determination of the application without the benefit of submissions from the applicants. Further, that whilst the order of *certiorari* sought is of the decision to grant permission of 2nd May, 2007, the applicants were also, in the proceedings, questioning the validity of the decision communicated by the senior planner to Mr. Linehan on 17th January to proceed to consider and determine the planning application in the absence of submissions from the applicants. It was this procedure of the respondent which was alleged to constitute the breach of fair procedures. The submission of the notice party was that the validity of the decision of 17th January could only be questioned in an application for judicial review commenced within 8 weeks of that date (subject to an extension under s. 50(8) which did not apply).

73. Whilst counsel for the applicants disputed this submission and the contention that s. 50(2)(a) (as amended) should be so construed it appears appropriate to draw attention to the submission made by the notice party and to indicate that it appears to be at least arguable. I do this without making any final determination, as this is not necessary on the facts herein. However, I draw attention to the issue to indicate that it may no longer be safe for an applicant to await a final planning decision to which s. 50 of the Act of 2000, as inserted by the Act of 2006, applies before making an application for judicial review, if the grounds include questioning the validity of an earlier procedural decision or act done by the planning authority. Such decisions or acts may now have to be challenged as they occur.

74. I note in passing that in the case of *O'Connor & Ors. v. Cork County Council*, referred to above, the applicants, as soon as they learnt of the expiry of the five week period and the intention of the respondent to proceed to consider and determine the planning application in the absence of their submissions, commenced the application for leave to issue judicial review. There does not appear to have been any point taken that there was no decision or act done by the respondent capable of being challenged at that stage in the planning procedure. Sections 50(2)(a) and 50(6) will have to be construed in the context of the clear intention of the Oireachtas in the Act of 2000, as amended by the Act of 2006 , to impose strict and short time limits for the challenging of decisions in the planning process.

Relief
75. There will be an Order dismissing the application for leave to issue judicial review herein.