Neutral Citation Number: [2009] IEHC 136

THE HIGH COURT

2006 1043 JR

BETWEEN

SEAMUS TREACY

APPLICANT

AND

CORK COUNTY COUNCIL, THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

AND

KIERAN COUGHLAN AND CLAIRE RIORDAN

NOTICE PARTIES

JUDGMENT of Mr. Justice Hedigan delivered on the 24th day of March, 2009

1. On 4th July, 2006, the notice parties herein were granted planning permission by Cork County Council ("the respondent") in respect of a proposed development at Colla in Schull, County Cork. The applicant is seeking leave to apply for judicial review by way of *certiorari* of the respondent's decision to grant planning permission to the notice parties; he is also seeking three related declarations.

The leave threshold

2. The threshold for the grant of leave in the present case is governed by s. 50(4)(b) of the Planning and Development Act 2000, as amended by s. 50A(3) of the Planning and Development (Strategic Infrastructure) Act 2006. The court must therefore be satisfied that there are *substantial grounds* for contending that the decision is invalid or ought to be quashed, and that the applicant has a *substantial interest* in the matter which is the subject of the application.

Factual background

3. On 16th March, 2006, the notice parties lodged an application for planning permission with the respondent in respect of a proposed development on their site at Colla. This involved the demolition of structures that are currently on the site, and the construction of three dwellings and related wastewater treatment units. The notice parties appended a copy of their site notice and a notice placed in the 'Irish Examiner', each of which indicated that submissions or observations could be made to the respondent within five weeks of the date of receipt of the application for planning permission, upon payment of a fee of €20. This meant that submissions could be made to the respondent until 19th April, 2006.

4. The site in respect of which the notice parties sought planning permission is immediately adjacent to a holiday home owned by the applicant who resides in Northern Ireland. On 13th April, 2006, the applicant and his wife made a submission to the respondent seeking to register their objection "in the strongest possible terms" to the proposed development. The submission continued as follows:-

> "We have seen a copy of the objections lodged by Pat and Susan Lucey to the above planning application. We adopt their objections in their entirety."

5. The Luceys' objections were annexed to the applicant's submission, which added the following three objections:-

> "1. We understand that the Applicant is a well-known property developer who, it is apparent from the plans, is squeezing three properties into the smallest possible sites. It is obvious that these applications are a "stalking horse" for a more substantial development application in the future.
>
> 2. A grant of permission for the proposed development would be inconsistent with recent previous refusals of planning permission.
>
> 3. The proposed development is inconsistent with the Cork County Development Plan for West Cork – for example see para. 8.17 thereof."

6. The applicant's secretary faxed the submission on 13th April, 2006, to the offices of the respondent and sent a hard copy thereof by post on the same day; the applicant was not in Belfast at the time. The fax was received by the respondent on 13th April, 2006 and the hard copy on 18th April, 2006. By letter dated 25th April, 2006, the respondent acknowledged receipt of the applicant's submission and returned it to him, indicating that it was invalid as it was not accompanied by the appropriate €20 fee. That letter did not advert to the fact that the five-week time limit set by Article 29 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), for the making of a submission, had expired on 19th April, 2006. Instead, it informed the applicant that if he wished for his submission to be taken into consideration, he should "return same with the full fee of €20.00 within 5 weeks of 16/3/06, the date of receipt of the application." The applicant was informed that if his submission was not received before that date, it would be considered invalid and returned to him.

7. The applicant did not seek to challenge the validity of the respondent's decision to declare his submission invalid. Instead, he resubmitted his submission on 4th May, 2006, enclosing the fee, this notwithstanding that the five-week time limit had expired a fortnight earlier. Thereafter, the respondent indicated to him that the five-week time limit had passed and that it could not therefore accept the submission.

8. Meanwhile, on 25th April, 2006, Seán Taylor, an Executive Planner with Cork County Council, compiled a report stating that the submission made by the Luceys was valid. By letter dated 2nd June, 2006, an architect acting on behalf of the notice parties, informed the respondent that there had been meetings between the Luceys and the notice parties, and that the Luceys' concerns had been taken into account and the notice parties' drawings had been revised accordingly. On the same day, the Luceys informed the respondent that they were not raising objections to the proposed development, as amended.

9. As noted above, the respondent granted planning permission to the notice parties in respect of the proposed development on 4th July, 2006. In the decision, it was noted that account was taken of the valid submission made by the Luceys. On 31st July, 2006, the applicant sought to appeal the respondent's decision to An Bord Pleanála. By letter dated 2nd August, 2006, the applicant was informed that his appeal was invalid in accordance with section 127(2)(a) of the Planning and Development Act 2000, as it was not accompanied by an acknowledgment by the planning authority of receipt of a submission on the application for planning permission; the applicant was further informed that the acknowledgment that he had submitted "did not relate to a valid submission made in accordance with article 29 of the Planning and Development Regulations 2001." He was also notified that the time period to lodge a valid appeal (*i.e*. four weeks from the date of the planning decision) had expired; thus, it is clear that he would not have been able to bring his appeal even if his resubmitted appeal had been accompanied by the appropriate acknowledgment.

10. The hearing of the within challenge took place on 3rd and 4th July, 2008. At the end of the first day, the applicant's case against the second, third and fourth named respondents ("the State respondents") was discontinued with no order as to costs; a number of the grounds were also dropped, as were a number of the reliefs sought.

The relevant law

11. The Planning and Development Regulations 2001 implement the Planning and Development Act 2000; they consolidate all previous Regulations made under the Act of 2000, and they replace the Local Government (Planning and Development) Regulations 1994-2000. They came into operation on 21st January, 2002 and 11th March, 2002. Article 29 thereof regulates the making of submissions/observations. Article 29(1)(a) provides as follows:-

> "Any person or body, on payment of the prescribed fee, may make a submission or observation in writing to a planning authority in relation to a planning application within the period of five weeks beginning on the date of receipt by the authority of the application."

12. Article 29 (1)(b) indicates that submissions should contain the name, address, telephone number and email address of the person making the submission, and should indicate the address to which any related correspondence should be sent.

13. Article 29(2) provides as follows:-

> "Subject to article 26 [which sets out the procedure that applies upon receipt of a planning application], the planning authority shall acknowledge in writing the receipt of any submission or observation referred to in sub-article 1 as soon as may be following receipt of the submission or observation."

14. Article 29 (3) of the Regulations provides that where a submission is received by the relevant authority after the expiry of the five-week period set out in Article 29 (1)(a), the authority "shall" return to the person concerned the submission or observation and the fee received and notify the person that their submission or observation cannot be considered by the planning authority.

15. Article 168 prescribes the payment of a fee for the making of submissions/ observations in respect of planning applications. Article 168 (1) provides:-

> (a) Subject to sub-articles (2) and (3), a fee shall be paid to the planning authority by a person or body who makes a submission or observation to the planning authority regarding an application for permission.
>
> (b) The amount of the fee payable to the planning authority shall be the amount indicated in column 2 of Section 2 of Schedule 10[…]."

The relevant Schedule prescribes the fee of €20. Article 168 (2) indicates that the payment of a fee is not required when a submission is made by specified bodies, including a local or State authority. Article 168(3) provides that where one submission is made by a person or body, no further fee shall be payable where a further submission is made by that person or body in respect of the same application.

16. The Minister's power to make regulations providing for the payment of fees to planning authorities derives from s. 246 (1)(b) of the Planning and Development Act 2000. Section 246 (4) further provides as follows:-

> "Where under regulations under this section a fee is payable to a planning authority or local authority and the person by whom the fee is payable is not the applicant for a permission, approval or licence, submissions or observations made, as regards the relevant application, appeal or referral by or on behalf of the person by whom the fee is payable, *shall not* be considered by the planning authority or local authority *unless the fee has been received* by the authority." (Emphasis added)

I. The applicant's submissions
17. The applicant is seeking an order of *certiorari* quashing the decision of the respondent to grant planning permission to the notice parties, and a stay on the implementation of the permission granted. In addition, he is seeking three declarations, which may be summarised as being to the following effect:-

a. That the respondent was obliged to acknowledge receipt of the submission made by the applicant in relation to the notice parties' planning application "as soon as may be" after receiving the submission;

b. that because the respondent did not acknowledge the applicant's submission "as soon as may be", it deprived the applicant of an opportunity to pay the appropriate fee within the appropriate period; and

c. that the respondent was not entitled to wait until after the expiration of the appropriate period before notifying the applicant that his submission would not be considered on account of his failure to pay the fee.

18. In general, the applicant submits that he was unable to see the site notice affixed to the site of the proposed development because he resides in Northern Ireland and was not in the area of circulation of the 'Irish Examiner', in which the application for permission was notified to the public. He argues that there is no obligation to pay a fee to make analogous submissions to the Planning Service in Northern Ireland.

19. The applicant submits that he has a "substantial interest" in the matter which is the subject of the planning decision, in accordance with s. 50(4) of the Planning and Development Act 2000, because, as a result of the decision, he was denied the right to have his submissions considered and was subsequently denied the right to appeal the said decision.

(a) Failure to acknowledge receipt "as soon as may be"
20. The applicant's primary complaint is that the respondent failed to acknowledge receipt of the applicant's submission "as soon as may be" after receiving the submission, and thereby breached its duties under Article 29(2) of the Regulations of 2001. The applicant points out that although the submission was sent by fax and by post on 13th April, 2006, and was stamped "Received" on 18th April, 2006, no acknowledgment was forthcoming from the respondent until 25th April, 2006. It is complained that this was not "as soon as may be", and it is submitted that the actions of the respondent prevented the applicant from participating in the decision making process and in the appeals process. The applicant submits that his omission was inadvertent and would have been immediately rectified if it had been brought to his attention "as soon as may be" after the respondent received his submission.

(b) Application of the five-week time limit
21. The applicant also contends that the five-week time limit under Article 29(1) of the Regulations of 2001, applies to the making of a submission, but not to the payment of the prescribed fee. It is said that Article 29(1) does not specify any legal consequence of the non-payment of the fee within five weeks; more specifically, it does not mandate the return of a submission that is not accompanied by the prescribed fee or that such a submission should not be considered. The applicant further submits that Article 29(3) does not address the consequences of a situation where the submission is received within the initial five-week period but the prescribed fee is received thereafter.

(c) Payment of fee as directory requirement only
22. The applicant submits that Article 29 is not phrased in mandatory terms, whereas analogous provisions relating to planning applications are so phrased; it is submitted that the fee is therefore directory only. The applicant argues that Article 26 (3) of the Regulations of 2001 is phrased in mandatory terms, such that a planning application "shall be invalid" if the planning authority considers that the requirements set out therein have not been complied with. It is also contended that it is instructive to consider section 127 of the Planning and Development Act 2000: s. 127(1) (f) thereof provides that a planning appeal or referral "shall" be accompanied by such fee (if any) as may be payable, and under s. 127 (2) (a), an appeal or referral "shall be invalid" if it does not comply with the requirements set out in sub-sections (a) to (g) of section 127 (1). It is contended that the applicant's failure to pay the prescribed fee was not, by analogy, fatal to the validity of his submission on the basis of an application of the principle of statutory interpretation *expressio unius exclusio alterius* (the express mention of one thing excludes all others).

23. Further, or in the alternative, the applicant contends that because the respondent accepts payment of the prescribed fee by cheque within the five-week time limit, this constitutes a waiver of the requirement that a submission/observation must be accompanied by the prescribed fee. It is submitted that as the authority can waive that requirement, it cannot be a mandatory requirement. It is contended that by posting a cheque to the authority, a person making a submission is merely making a promise to pay the prescribed fee, but is not actually paying the fee. Thus, a cheque is not a payment, but, rather, an order to the bank to pay the bearer of the cheque upon demand. Where the person making a submission encloses a cheque, and the submission is received close to the expiry of the five-week time limit, it is likely that the authority will not receive payment of the prescribed fee until the limit has expired as the authority might not present the cheque at a bank for some time and once it has done so, it takes three to five working days to clear into the authority's bank account. In the alternative, the cheque may bounce after the submission has been accepted and considered by the planning authority.

24. The applicant further submits that in the absence of any statement in Article 29 as to the consequences of non-payment of the prescribed fee, substantial compliance with Article 29 is all that is required and it is contended the applicant satisfied that requirement. Reliance is placed on *R. v. Secretary of State for the Home Department, ex parte Jeyeanthan* [2000] 1 W.L.R. 354 which, according to the applicant, eschews the mandatory/directory classification of statutory requirements in favour of a broader approach which focuses on the consequences of non-compliance.

II. The respondent's submissions
25. The respondent, Cork County Council, submits that the applicant should not be granted leave, as he has not established a substantial interest or substantial grounds within the meaning of s. 50(4) of the Planning and Development Act 2000.

26. With respect to the absence of a "substantial interest", the respondent contends that the applicant has not shown how the grant of planning permission would impact upon him or upon his property. It is argued that the nature of the observation made by the applicant to the respondent in this case must be contrasted to submissions which he made in the past in relation to the same site and similar proposed developments; it is contended that those submissions, in

contrast to the submission at issue in the present case, were very substantial and detailed. It is submitted that the applicant's submission in the present case was merely trivial or technical, and it is argued that he based his objection to the grant of permission on the basis that he lived close by. It is further submitted that it is unclear whether an interest in the statutory right to object may constitute a "substantial interest", with the Court being referred to the somewhat differing judgments of Murray C.J. and Kearns J. in *Harding v. Cork County Council* [2008] IESC 27.

(a) Failure to acknowledge receipt "as soon as may be"
27. The respondent contends that the requirement to acknowledge receipt "as soon as may be" relates only to submissions that are accompanied by the prescribed fee; it is submitted that submissions that are unaccompanied by the prescribed fee are invalid and are dealt with by Article 29(3). It is argued that this conclusion is supported by the purpose of an acknowledgment under Article 29(2), which is, according to the respondent, to allow an appeal to be brought to An Bord Pleanála by the person who made a valid submission. It is accepted that planning authorities should, perhaps, acknowledge receipt of invalid submissions, in terms of openness, but it is submitted that the statutory obligation relates only to valid submissions.

28. Further, and in the alternative, it is submitted that the respondent did, in fact, acknowledge receipt of the submission "as soon as may be", in compliance with Article 29(2). Reliance is placed on the judgments of Murray C.J. *Harding v. Cork County Council* [2008] IESC 27, Peart J. in *The Minister for Justice, Equality and Law Reform v. J.B.F.* [2006] 3 I.R. 411, and Geoghegan J. in *McCarthy & Anor. v. Garda Siochána Complaints Tribunal* [2002] 2 I.L.R.M 341. It is argued that it would have been entirely unreasonable to expect the respondent to act within twenty-four hours of receiving the applicant's invalid submission on 18th April, so as to bring to his attention the invalidity of the submission and to allow him to make a new submission, accompanied by the fee, before the expiry of the five-week time limit on 19th April.

29. It is further contended that by delaying until the fifth of the five weeks allowed to him to make the submission, it was entirely the applicant's fault that his failure to pay the prescribed fee was not brought to his attention in time for him to lodge a new submission. It is also submitted that the applicant could have contacted the respondent to confirm that his submission had been accepted, but did not do so.

(b) Application of the five-week time limit
30. The respondent complains that the applicant's argument with respect to the non-application of the five-week time limit to the payment of the required fee was not advanced in the statement of grounds or as part of the reliefs sought, and was not even raised in the applicant's legal submissions. It is contended that the applicant cannot now amend his statement of grounds as he is outside of the eight-week period allowed under s. 50(4) of the Planning and Development Act 2000.

31. That, notwithstanding, the respondent contends that it would be impossible to operate the system by which planning applications are considered and determined if people making submissions and observations could pay the appropriate fee whenever they chose up to the last minute before the planning authority came to its decision. It is submitted that the planning authority also has an interest in the timely disposal of planning applications. Reliance is placed on *Maye v. Sligo Borough Council* [2007] I.E.H.C. 146, where Clarke J. noted, at para. 4.14, that although the planning scheme contemplates giving people an opportunity to become involved in the planning process, the level of that opportunity must be seen against the overall background of the Planning and Development Act 2000, which, he noted, permits a final decision to be made by the relevant planning authority as early as five weeks after an application for planning permission is first made.

32. It is therefore submitted that the payment of the fee must be interpreted as a condition precedent to the making of a submission or observation, to be fulfilled at the same time as the making thereof. Thus, if the fee is paid, a submission or observation can be made; if not, it cannot. It is contended that there cannot be some sort of roving timeline for the payment of the fee.

(c) Payment of fee as directory requirement only
33. The respondent submits that it is clear from the use of the word "shall" in Article 29(1) and Article 168(1) of the Regulations of 2001, and in s. 246(4) of the Act of 2000, that the payment of a prescribed fee is mandatory in order for a submission to be valid. Reliance is placed on *Calor Teo v. Sligo County Council* [1991] 2 I.R. 267. In that case, an application for planning permission was made on 12th May, 1989, and the payment of the full amount of the prescribed fee was effected on 30th June, 1989. Barron J. held that an application for planning permission was not validly made under s. 10(2) of the Local Government (Planning and Development) Act 1982, until 30th June, i.e. the date on which the correct fee was paid.

34. It is contended that it was the responsibility of the applicant to ensure that the prescribed fee is paid. It is argued that notice of the requirement to pay the fee was both displayed on the site notice and published in the 'Irish Examiner', and that the requirement of informing members of the public of their entitlement to made submissions was thereby fulfilled. It is contended that the applicant was aware of the requirement to lodge the prescribed fee, having previously made submissions accompanied by the prescribed fee. These include a submission made in respect of an application by Martin O'Donovan for work to a hotel on the site at Colla (and a third party appeal in respect of the grant of permission to Mr. O'Donovan); a submission made in 2001 with respect to a planning application by the owner of the hotel on the site at Colla; and a letter written in 2003, indicating that if permission was granted to the owner of the hotel, the applicant would appeal.

35. Reliance is placed on *Openneer v. Donegal County Council* [2006] 1 I.L.R.M. 150. In that case, the applicant made two submissions in respect of an application for planning permission, but paid only one €20 fee; the planning authority returned both submissions to him, deeming them to be invalid. The applicant contended that he had been wrongfully deprived of the opportunity to make submissions. Macken J. held that the applicant was "not entitled to lay the blame on the respondent for the error made." She noted as follows:-

> "The regulatory scheme in relation to planning provides for the payment of a fee in respect of any submissions to a planning application. […] The site notices, both of them, gave a clear indication of the charge to be paid in respect of any objection being lodged to either of them. In the circumstances, it was for the applicant to ensure that the statutory or regulatory requirements, duly notified to him by means of the site notices, were complied with. While the respondent made an attempt to bring the deficiency in fees to the attention of the applicant, this did not

exonerate the applicant from the obligation to ensure that the appropriate fee was made."

36. Macken J. further held that there was no obligation on the planning authority to contact the applicant by telephone so as to bring the matter to his notice within a period of time that would have permitted him to remedy matters. She found that there were no substantial grounds, and she refused leave.

37. With respect to the applicant's arguments as to the practice of accepting cheques, the respondent relies on *Maher v. An Bord Pleanála* [1993] 1 I.R. 439. In that case, the respondent rejected the notice parties' appeal against the grant of permission to the applicant on the basis that the prescribed fee had not been paid; the appeal was submitted by hand on the last day on which the appeal could be lodged, and had been accompanied by a blank cheque. The applicant argued that the payment of the fee was not a valid payment, on the basis that the payment would not be received until the amount for which the cheque was made out was transferred from the drawer's account. It was submitted that this could, clearly, take place on the day on which the cheque was delivered, which was the last day of the period specified for the bringing of an appeal. Blayney J. rejected this submission as follows, at page 446:-

> "The essential question to be considered is this. Where the prescribed fee is paid by a cheque, and the cheque is accepted by the respondent in payment of the fee and is subsequently honoured in the normal way, when is the fee received by the respondent? Is it received when the cheque is accepted by the respondent or when the amount of the cheque has been transferred from the drawer's account to the account of the respondent? I have no doubt that the former construction is the correct one. If the time the prescribed fee was received was to be the date when the amount of the cheque was transferred to the respondent's bank account, it would be impossible for an appellant to know, when lodging an appeal, if his payment of the prescribed fee by cheque was going to be in time. Such uncertainty could not have been intended by the legislature. Furthermore, since payment by cheque is an accepted normal method of payment in business transactions, if payment in this way was not to be permissible, it would need to have been expressly excluded in the section. So, I hold that where a prescribed fee is paid by cheque, the fee is received by the respondent on the day the cheque is delivered to it, provided the cheque is subsequently honoured in the normal way."

(d) Failure to act "promptly"

38. The applicant served the within proceedings in the final week of the eight week period allowed under s. 50(4) of the Planning and Development Act 2000, (as amended). The first named respondent contends that the applicant should be denied leave on the basis that he failed to institute proceedings promptly in accordance with O. 84, r. 21 of the Rules of the Superior Courts 1986, which it contends applies in conjunction with the eight-week time limit set out in section 50(4). Reliance is placed on the judgment of Macken J. in *Harrington v. An Bord Pleanála [*2005] 1 I.R. 388 and *Openneer v. Donegal County Council* [2006] 1 I.L.R.M. 150, and a number of judgments of the English and U.K. courts to similar effect (see *R. v. North West Leicestershire District Council, ex parte Moses [*2000] Env. L.R. 443; *R. v. Briston City Council, ex parte Anderson* (Unreported, Collins J., 9th March, 1998). It is submitted that the applicant should have issued proceedings after the planning authority returned his submission to him on 25th April, 2006.

(e) *Locus standi*

39. The State respondents' primary contention was that the applicant has no *locus standi* to bring this challenge. It was argued that the applicant has failed to adduce any, or any adequate evidence, to demonstrate that any property right of his is adversely affected by the proposed development, and that he lacks what has been described as issue-specific locus standi in that he never sought to raise before the planning authority any issue of the type now being raised. Reliance was placed on *Cahill v. Sutton* [1980] I.R. 269, and *Lancefort v. An Bord Pleanála* [1999] 2 I.R. 270.

40. It was submitted that by analogy with the principle of judicial self-restraint in constitutional matters, the court should be reluctant to determine issues relating to the ECHR other than at the suit of a properly qualified applicant. Reliance was placed in that regard on *Hynes v. An Bord Pleanála & Ors*. [1997] I.E.H.C. 182.

III. The notice parties' submissions

41. Kieran Coughlan, who is one of the notice parties, has attested that the applicant was aware of the requirement to lodge the appropriate fee, that he is familiar with the planning process in Ireland, and that he has previously availed of his entitlement to make observations in respect of planning applications. Mr. Coughlan states that the applicant and his wife lodged a submission to the respondent in July 2001, in respect of a planning application that had been made by the previous owners of the site in Schull that is now owned by the notice parties. Mr. Coughlan further states that the applicant sought leave to appeal in August 2003, from any decision of the respondent in respect of a further planning application that was then being considered in respect of the same site. Mr. Coughlan has also exhibited a further submission made by the applicant and his wife in respect of a further planning application in respect of the same site in January, 2005; on that occasion, the applicant paid the correct fee. In addition, Mr Coughlan refers to the decision of Murphy J. in the High Court on 21st July, 2005, to grant an order of *certiorari* in respect of a decision of the respondent to grant permission for a similar development to the previous owners of the site now owned by the notice parties. According to Mr Coughlan, the issue in that case was the alleged failure to provide, within the prescribed time limits, information and a response to notice for further information issued by the respondent.

42. In corroboration of the evidence of Mr. Coughlan, Cathal de Baróid, an Administrative Officer in Cork County Council, has attested that the applicant and his wife made submissions in respect of a planning application made by the previous owners of the site now owned by the notice parties, and that the applicant and his wife lodged a third party appeal, accompanied by the appropriate fee, to An Bord Pleanála when permission was granted. A copy of that submission is exhibited. Mr. de Baróid further states that in July, 2001, the applicant made submissions or observations on earlier planning applications in relation to the site and in August 2003, they sought leave to appeal against any grant of permission by the respondent. A copy of each of those letters is exhibited.

The court's assessment

43. I turn, firstly, to the respondent's submission that the applicant failed to move promptly within the meaning of O. 84, r. 21 of the Rules of the Superior Courts. In that regard, the argument might well be made that the applicant did not act promptly by waiting until the last of the eight weeks available to him under s. 50(4) of the Planning and Development Act 2000, and it may also be arguable that the eight week period is an outer limit – like the three and six month limits set out in O. 84, r. 21 - and that there is a requirement to act promptly within that eight week limit. Nonetheless, in the Supreme

Court decision of *Dekra Éireann Teoranta v. Minister for Environment and Local Government* [2003] 2 I.R. 270, Fennelly J. stated at page 302:

> "[A] claim cannot normally be defeated for delay if it is commenced within the relevant period. There would need to be some special factor such as prejudice to third parties . . ."

Fennelly J. reiterated this approach while speaking for the majority of the Supreme Court in *O'Brien v. Moriarty* [2006] 2 I.R. 221, where he stated at page 237 that:

> "[M]atters have not reached the stage where an application made within time can be defeated in the absence of some special factor."

No prejudice has accrued to any of the parties by reason of the delay in the present case. In the absence of such prejudice, I do not consider it appropriate in the present case to refuse leave on that basis.

(i) Substantial interest

44. The applicant is required to show a "substantial interest" in the matter that is the subject of the application. The only specific reference in the legislation as to what might be meant by "substantial interest" is to be found in s. 50(4)(d) of the Act of 2000, which states that a substantial interest is not limited to an interest in land or other financial interest. Kearns J. in *Harding v. Cork County Council* [2008] IESC 27 held that the "matter" in question is the grant of permission in respect of the proposed development, and the term "application" refers to the judicial review application.

45. The requirement to show a "substantial interest" is a higher threshold than the requirement to show a "sufficient interest" in order for leave to be granted under O. 84, r. 20(4), and higher also than the equivalent section of the Local Government (Planning and Development) Act of 1992, which had itself adopted a stricter set of criteria applicable to challenges to the grant of planning permissions than previously existed (see *Harrington v.* An Bord Pleanála [2005] 1 I.R. 388). It has, as was noted by Kearns J. in Harding v. Cork *County Council* [2008] IESC 27, significantly heightened the bar for objectors who seek to bring judicial review proceedings, and significantly circumscribes the right to a judicial remedy. Kearns J. was careful to point out that s. 50(4) does not deny the right of access to the courts; rather, it erects a number of hurdles that must be overcome before leave to apply for judicial review is granted.

"Substantial interest"

46. Section 50A(4) provides that a "substantial interest" in this context is not limited to an interest in land or other financial interest. In his judgment in *Harding v. An Bord Pleanála* [2008] 2 I.L.R.M. 251 at 259, Murray C. J. described this test as "vague and lacking in precision". It seems to be for the Courts to interpret and apply this notion of "substantial interest" as best it can. The Chief Justice continued in this judgment:-

> "The phrase is not susceptible to a general or all embracing definition or formula covering all cases".

In *Harrington v. An Bord Pleanála* [2006] 1 I.R. 388, Macken J. stated that consideration of the legislative scheme makes it clear that the Oireachtas intended that s. 50 impose stricter conditions than the equivalent section of the earlier legislation in this area. She added that the obligations imposed upon an applicant in relation to establishing a substantial interest must be construed and applied strictly, although a clear abuse of process or a serious failure to apply the law correctly should not escape judicial scrutiny. She continued at page 403:-

> "While I accept the applicant's argument that the Act makes it clear such substantial interest may be wider than an interest in land, or a financial interest and therefore, in theory, it can cover a wide variety of circumstances, I consider that the substantial interest which the applicant must have is one which he has already expressed as being peculiar or personal to him."

47. This requirement of a peculiar or personal interest was also considered and applied by O'Neill J. in *O'Brien v. Dun Laoghaire Rathdown County Council* [2006] I.E.H.C. 177 and also in *Cumann Thomas Daibhis v. South Dublin County Council* [2007] I.E.H.C. 118. In the latter case he stated:-

> "In my view, what the phrase "peculiar or personal" imports is that the proposed development the subject matter of the application is one which affects the applicant personally or individually in a substantial way, as distinct from any interest which the wider community, not so personally and individually affected, might have in the proposed development".

48. The applicant submits that his substantial interest exists because of his deprivation of the right to appeal to An Bord Pleanála against the planning permission granted to the notice parties. In my view, this is not the kind of interest to which s. 50 refers. The interest to which it refers must be in the application for planning permission itself. An insubstantial interest in such a planning permission cannot be converted into a substantial interest because of the loss of the right to appeal to An Bord Pleanála in respect of the decision made therein. The hold otherwise would be to elevate form above substance. Other than this claim to a lost right of appeal, the applicant makes no real claim to any substantial interest in his pleadings herein. The high point of his claimed interest is that his holiday home is located nearby. During the hearing it was, in fact, difficult to determine where exactly his property was located in relation to the notice parties' property. It became clear that it was below and out of sight of that property, a large part of which itself had no sight of the applicant's property. The two properties were adjoining, although the proposed housing development would be at some distance from the applicant's property.

49. It seems to me that in the light of the above case law and the principles to be derived therefrom, the onus lies upon the applicant to prove to the court that he has a substantial interest and this, in my view, he has demonstrably failed to do. On this ground the applicant must therefore fail. I feel obliged to note, however, that even if he had satisfied the court as to his having a substantial interest sufficient to entitle him to challenge the decision to grant planning permission, his grounds are so weak and insubstantial that I would not have granted the order and declarations sought.

50. I take this view of the grounds because on the evidence and submissions I am compelled to the following findings;

(a) The initial failure to lodge his objection was entirely the applicant's fault. He had participated previously in making objections concerning the very same site on a number of occasions and was well aware of the need to include the required fee. He had no entitlement to rely upon the planning authority to remedy this failure on his part.

(b) The letter of the 25th April, 2006, notifying him that his objection which had arrived in hard copy by post on 18th April, 2006, was invalid, was sent to him one week after and was therefore sent within a reasonable time, in my view. On this basis, it appears to me that he was notified "as soon as may be". I do note in passing that I accept the respondents' submission that this requirement relates only to submissions properly made, i.e. accompanied by the appropriate fee. This letter may not have been as clear as it could have, in that it indicated that he should submit his objection within a time period which had already expired. This, however, was of no consequence as the time had expired and nothing he did could remedy that.

(c) This finding of invalidity was never challenged.

(d) The applicant's submission of his objection was clearly invalid as a submission must be accompanied by the required fee and if not, is invalid. Any other interpretation of the statutory requirement, in my view, would do violence to the plain meaning of the statute. As to the acceptance of payment by way of a cheque, the law in this regard was clearly set out by Blayney J. in *Maher v. An Bord Pleanála* [1993] 1 I.R. 439 where he held:-

"Where a prescribed fee is paid by cheque, the fee is received by the respondent on the day the cheque is delivered to it, provided the cheque is subsequently honoured in the normal way."

For the above reasons, I refuse the order and declarations sought.