THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

[2006 No. 197 J.R.]

BETWEEN

JOHN PAUL CONSTRUCTION LIMITED

APPLICANT

AND
THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT

RESPONDENT

AND
LOSAID TEORANTA

NOTICE PARTY

Judgment of Mr. Justice Kelly delivered the 15th day of August, 2006.

Introduction
1. In October, 2003 the applicant (John Paul), which is a building contractor, entered into a design and build contract with the notice party (Losaid) which is a developer. The contract was in respect of a development known as The Tramway, Old Blessington Road, Tallaght, County Dublin (the development).

2. The development involved a mix of residential and commercial units.

3. The residential portion of the development consisted of student accommodation. Losaid intended that to be a qualifying development for the purpose of obtaining certain tax reliefs.

4. John Paul carried out the work and a certificate of practical completion of the development was issued by Cullen Payne architects on 20th December, 2004.

5. In this application John Paul seeks to challenge the manner in which the respondent (the Minister) dealt with an application for certain certificates in respect of the residential part of the development.

6. There has been a good deal of confusion on the part of John Paul as to the certificates which were sought. The certificates were misdescribed and mischaracterised in the application which was made to Peart J*. ex parte* on 20th February, 2006 and which resulted in leave being granted to bring this application. It was not until receipt of the replying affidavit from the Minister that the correct position appears to have been appreciated by John Paul. The fact that John Paul was not the applicant for such certificates may have been the cause of its confusion. It has certainly contributed to the difficulties which John Paul faces in endeavouring to obtain the reliefs sought in these proceedings.

The Certificates in Suit
7. In its statement of grounds and grounding affidavit John Paul contended that Losaid applied for a certificate of reasonable cost and a floor area compliance certificate in respect of the development. The grounding affidavit went into some detail as to the certificates required in order to be able to rely upon the provisions of s.50 of the Finance Act, 1999, which inserts Part 11A into the Taxes Consolidation Act, 1997.

8. In fact, no application was made for certificates of either of those types.

9. It is now accepted that the actual application made was for certificates of compliance pursuant to Part 10, Chapter 11 of the Taxes Consolidation Act, 1997, as amended by the Finance Act, 2002. This has resulted in John Paul having to amend both the reliefs sought and the grounds for them.

Progress of the Application
10. The application for the certificates of compliance was received by the Minister on 18th December, 2003. The document has been exhibited by the Minister and it is quite clear that it is an application for certificates of compliance in respect of a third level student accommodation scheme. The application was made on a standard form. The form is called an HPF2 form.

11. It is contended that the making of such an application was subject to the same conditions as those applying to the award of a grant to first time buyers of new houses. These conditions are set forth *inter alia* in a document intituled "HA 1 Explanatory Memorandum". The relevant version of that document has also been exhibited by the Minister. The version exhibited by John Paul has no application to these proceedings since it was produced in April, 2004 and thus postdated the application in suit.

12. On 23rd December, 2003, the Minister wrote to Losaid requesting further information on the application before an inspection of the project could be carried out.

13. This request was responded to and the information sought provided.

14. On receipt of this information the Minister's file was referred to a senior inspector of his Department, a Mr. Rafter. On 22nd April, 2004, Mr. Rafter wrote to Losaid seeking further information on the project. That was responded to on 17th May 2004, and the inspector visited the site shortly thereafter. He noted what he considered to be an unconventional form of construction in use and informed John Paul's construction representative on site of his concerns in that regard.

15. Shortly after that a representative of the parent group of Losaid spoke to the inspector concerning the issues which had been raised by him.

16. On 11th June, 2004, the inspector wrote to Losaid indicating that a certification by a competent body as to the suitability of the wall construction used and its compliance with the building regulations was required by the Minister.

17. The letter (insofar as it is relevant) read as follows:

"Further to our telephone conversations, additional information received and my recent site visit, I confirm as follows;

1. The form of construction being used in the external walls is of an unconventional system (metal studwork, rain screens and external insulation systems). Certification by a competent body (NSAI, Irish Agrement Board or equivalent) as to their suitability and compliance with the Irish Building Regulations is required.

2. The compartment wall construction is single studwork with the services (electric wires etc.) contained therein. This form of construction also requires similar certification……

Further consideration of your application cannot be made until all the above information is received."

18. On 22nd July, 2004, a letter was sent to the Minister by the representative of the parent group of Losaid. It read as follows:-

"I refer to your letter of 11th June, 2004 and my fax of 6th July, 2004, regarding the above application. I was awaiting information from our building contractor, John Paul Construction and our architects, Cullen Payne, before replying to your letter.

1. John Paul Construction has assured us that the British Board of Agreement (sic) (BBA) will certify the form of construction used in the external wall. We will forward the relevant documentation in due course.

2. John Paul Construction has assured us that the form of construction used in the compartment walls will be certified. We will forward the relevant documentation in due course……

I trust the above is of assistance and I look forward to your comments. Should you wish to discuss any of the above points please do not hesitate to contact me."

19. A further meeting took place on 12th August, 2004. At that meeting the Minister's inspector was asked if a letter of intent concerning certification from the BBA would suffice. He made it clear that it would not.

20. In December, 2004, Losaid submitted what it contended was the appropriate certificate from the BBA. A further document issued by the BBA called an Irish Building Regulation Statement was furnished to the Minister's representatives on 17th December, 2004. These documents were reviewed as a matter of urgency but were found to be unsatisfactory.

21. On 5th January, 2005, a meeting was held in the Custom House attended by representatives of John Paul, Losaid, its architect and the Minister. At that meeting the Minister's representative outlined the need for certification of the systems which had been used in the construction. In particular, reference was made to the two cladding systems used with the Stanta system which had been used. The Minister's representatives confirmed that the certification received did not cover two particular aspects of concern to them. However, they made it clear that if the BBA or equivalent body issued the necessary certification then they would issue the certificates in suit. No further certification was received from the BBA.

22. On 26th January, 2005, a further meeting took place on the site. This included representatives of all those who had attended on 5th January and in addition representatives of Stanta. Certification of the construction system used by an appropriate body was the main item discussed. The Minister's representatives made it clear that the certification received was not satisfactory. They again pointed out that if the BBA provided appropriate certificates there would be no difficulty in issuing the certificates of compliance. They had been very concerned about the inclusion of electrical services in the compartment walls. At this meeting they were assured that all fire stopping of electrical service boxes in compartment walls had been fully completed and checked. However, when the contractor opened a small trial sample it was found that the fire stopping material had not been applied in one of the boxes.

23. On the afternoon of the same day representatives of the Minister met a Mr. Mike Dunlea of Stanta and a Mr. Charles Westbrook of Mtech Consulting, a U.K. based firm which assisted Stanta in its certification application to the BBA. Once again the Minister's representatives outlined the issues which needed to be dealt with by way of certification of the building system. They were given to understand that Stanta would further pursue the outstanding certification issues with the BBA.

24. On 4th April, 2005, Losaid wrote to the Minister seeking formal written reasons as to why the certificates of compliance had not been issued. This was responded to on 20th April, 2005. Losaid was told that the Minister was still awaiting certification from a competent body in relation to the external walling systems used. It was further told that the Minister's representatives had asked for further clarification on the certification received that would deal with the single stud compartment wall system and its compliance with the building regulations. This letter also responded positively to a request from Losaid to discuss proposals with regard to the walling systems.

25. Further meetings were held on 26th June, 2005 and 28th September, 2005. At the first of these, the Minister's representatives met Mr. Russell Windsor, a consultant, and at the second they met representatives of the Building Research Establishment. At these meetings the issues to be addressed by way of certification of the building system used were stated but no further certification was received.

26. On a number of other occasions during 2005, the Minister's representatives met Mr. Dunlea of Stanta. On one such occasion he handed them a folder containing technical documents relating to the Stanta systems in general. In that folder there was a letter from a Mr. Toomey, a consultant, to Eoin Madden of Stanta, in which Mr. Toomey drew the conclusion based on a report by ARUP Consulting Engineers that "*it is quite clear that the external wall as assembled does not comply with the Irish building regulations*". Mr. Toomey also gave an outline of certification in general and in particular the type of approval bodies notified for that purpose.

27. On 26th October, 2005, representatives of Losaid met the Minister's representatives (including Mr. Rafter) with a proposal to modify the buildings. That proposal was made in the context of John Paul being unable to secure certification of the system from the BBA. It was in those circumstances that Losaid decided to modify the construction of the external walls.

28. On 21st November, 2005, Losaid submitted detailed proposals dealing with those modifications. In essence the proposal was for the building of an extra layer of block work cladding to the exterior of the building and the removal of services from compartment walls. They also involved the installation of cavity barriers to achieve full vertical fire compartmentation.

29. These proposals were considered by the Minister's representatives. They took the view that they met the concerns which they had previously raised in that the form of external wall construction which was proposed was in substantial conformity with the BBA certificate produced in December, 2004 and met all concerns in the matter of fire compartmentation.

30. By letter dated 1st December, 2005, the Minister notified Losaid that the remedial proposals were accepted subject to three conditions. Those conditions were met and on 23rd December, 2005, certificates of compliance for 24 units were granted by the Minister commensurate with the progress of works on site. At the time of swearing the principal replying affidavit on 20th March, 2006, it was anticipated that the remaining certificates would issue on satisfactory completion. It is accepted that that has taken place and all certificates have now been issued by the Minister to Losaid.

31. That, however, was not the end of the matter. Around Christmas 2005, John Paul furnished a report to the Minister. It came from a company called Atkins Limited and furnished an opinion on materials and systems usage at the project. This report was referable to the initial wall construction and not to the construction which was actually carried out. This was seen by the Minister's representatives as being an attempt by John Paul "*to turn back the clock*". The report did not deal with the modifications which had been carried out and in respect of which certificates of compliance had been issued. The other strange feature was that this report was submitted at the instance of John Paul and not Losaid which was the applicant for the certificates of compliance.

32. In any event the Minister's representatives regarded the Atkins report as superficial, lacking in proper scientific analysis and without reference to the Irish building regulations. It had also been made clear to Losaid on a number of occasions that what was required was not a report such as that submitted by Atkins but rather certification by a competent authority.

33. It is not necessary for the purposes of this judgment to recount the toing and froing that took place between John Paul's representatives and the Minister's in respect of this report. It is sufficient to record that at all times the Minister's representatives made it clear that they did not accept the Atkins report which was, in their view, flawed in many respects. A detailed critique of the report is to be found in the Minister's letter of 27th March, 2006.

34. The final chapter in these comings and goings was the receipt by the Minister's representatives of a letter of 10th February, 2006, from John Paul's solicitors which antedated the ex parte application to Peart J. That letter was written in the same mistaken belief concerning the certificates sought as was the application to Peart J.

Losaid's Position
35. Although remaining neutral on this application the attitude taken by the Minister's representatives on the facts is to a great extent supported by an affidavit filed on behalf of Losaid and sworn by Raymond Mellon, one of its directors.

36. Losaid engaged ARUP Facade Engineering to review the compliance of the development as originally constructed with the relevant building regulations. That firm reached the following conclusion:-

> *"In conclusion, the systems installed on the Tallaght development cannot be considered as certified on the basis of the provided technical documentation. Relying on this documentation alone, the systems cannot be considered to be in compliance with the Irish building regulations."*

37. This was of course the main matter of concern to the Minister.

38. Subsequently John Paul and Losaid appointed Buro Happold to investigate the matter. They concluded that the systems used in the construction of the development required external certification. They put John Paul and Losaid in contact with the British Research Establishment. Subsequently the representatives of the British Research Establishment informed John Paul and Losaid that certification might not be achieved and, even if it could, the process might take a year or more and would be very expensive.

39. It was on receipt of such advice that Losaid decided not to proceed with the procedure to obtain external certification of the works undertaken for it by John Paul. Rather, it decided to propose the modifications which were approved. This decision to modify the construction was to a considerable extent influenced by the delay which would be involved in trying to obtain certification for the original works and the fact that the deadline for tax relief in respect of the development was July, 2006.

The Position between John Paul and Losaid
40. Losaid has now brought a claim against John Paul arising from its alleged failure to complete the contract works in accordance with the contractual terms. The losses allegedly arising from John Paul's alleged breach of contract include, but are not limited to, Losaid's inability to sell the dwellings in the project.

41. Losaid contends that significant and expensive remedial works were undertaken in order to obtain the necessary certificates of compliance.

42. It contends that John Paul has been guilty of a number of breaches of the duties and warranties undertaken by it in the design and build contract. It particularly relies upon John Paul's warranty that it would use reasonable care and skill to ensure that the design of the works would comply with the Building Control Act, 1990 and all regulations made thereunder.

43. Losses of some €4,176,607 are alleged to have been sustained by Losaid. The dispute between Losaid and John Paul is at present at arbitration. John Paul intends to defend that claim.

Gravamen of John Paul's Complaint
44. Despite its errors as to the certificates which were sought, John Paul contends that what it describes as the gravamen of its complaint remains the same. It is that the Minister acted *ultra vires* in deciding not to issue the certificates in suit in respect of the development in its original form.

45. The attitude of the Minister was quite clear. Given the unconventional nature of the construction he required certification by a competent body in respect of it. None of the reports which were produced met the Minister's requirements. Such reports as were made available, did not establish compliance insofar as materials used or methods of construction with the building regulations. The apparent failure to comply with the relevant building regulations was a major concern for the Minister.

46. These proceedings call into question the Minister's entitlement at law to adopt the attitude which he did. This argument involves a detailed consideration of *inter alia* s. 372 AM of part 10, chapter 11 of the Taxes Consolidation Act, 1997, as inserted by s. 24 of the Finance Act, 2002 and s. 4 of the Housing (Miscellaneous Provisions) Act, 1979 and the so called Carltona principle. (*Carltona v.*

Commissioner of Works [1943] 2 All E.R. 560). Before any consideration of these arguments, however, it is necessary to adjudicate upon a number of preliminary objections which are raised by the Minister as to John Paul's entitlement to bring these proceedings.

The Minister's Objections
47. There can be no doubt but that John Paul was not the applicant for the certificates of compliance. It was not the developer of the project. It was not the intended beneficiary of any tax relief which might be obtained by means of the certificates of compliance. In all of its dealings with the Minister, John Paul acted as the agent of Losaid.

48. Losaid's application for certificates of compliance was ultimately successful. True it is that such certificates were issued only after modifications to the construction were carried out, but they were nonetheless granted. How then, it is asked by the Minister, can John Paul seek certiorari to quash a decision to refuse to issue certificates of compliance when they have in fact been granted?

49. It is quite clear that throughout all of the dealings which both Losaid and John Paul had with the Minister from the time when the issue as to the unconventional nature of the construction used arose and the Minister made it clear that additional certification would be required before he could issue certificates of compliance, neither Losaid nor John Paul ever suggested that the Minister was devoid of the power to so require. Rather, they appear to have attempted to comply with the Minister's requirements but were unable to do so. When it became apparent to Losaid that it was not going to be able to get such certificates within a timescale which it considered appropriate, the parting of the ways between it and John Paul occurred. It agreed to modifications and ultimately obtained the certificates of compliance. It was not until much later that there was ever any suggestion made that the Minister did not have legal powers to do as he did. That question was raised by John Paul in the context of the claim being made against it by Losaid which is the subject of the arbitration.

50. The Minister contends that John Paul does not have a sufficient interest to warrant the court granting or even considering to grant the reliefs sought.

51. He argues that this application involves the court being asked to rule on whether, in the event that the initial application had been pursued to the end (without the modifications to the construction) and the Minister had refused a certificate in respect of it he would have been lawfully entitled to do so. Neither of these events ever in fact occurred.

52. It is also contended by the Minister that in order to establish *locus standi* a party must have a direct interest in the outcome of the judicial review proceedings. The mere fact that the position of a party under a private law contract between it and its principal might be affected by the outcome of judicial review proceedings cannot per se confer a standing which would not otherwise arise.

John Paul's Standing
53. Much of the now well established case law on *locus standi* was argued during the hearing before me.

54. The recent decision of the Supreme Court in *Construction Industry Federation v. Dublin City Council* [2005] 2 I.R. 496 reviews many, if not all, of the authorities on this topic.

55. In that case Gilligan J. concluded inter alia that the constituent members of the Construction Industry Federation were persons who would be affected by the operation of a development contribution scheme. The Federation had a common interest with those affected because it represented them as its members. Thus he took the view that it would not be appropriate to adopt a restrictive approach to the question of standing and accordingly found that the Federation had locus standi to challenge the development contribution scheme. Ultimately he went on to refuse the relief sought on the merits.

56. The Federation appealed to the Supreme Court. The City Council sought to argue an issue as to the *locus standi* of the Federation. The City Council had not however cross appealed or served a notice to vary. Notwithstanding those *lacunae* the Supreme Court ruled at the commencement of the hearing that the City Council was entitled to argue the question of *locus standi* on the authority of the decision in *A.A v. Medical Council* [2003] 4 I.R. 302, without the necessity for either a notice of cross appeal or application to vary. It thus proceeded to deal with the issue of locus standi as a preliminary issue. It found against the Federation and thus the appeal was dismissed.

57. In the course of his judgment McCracken J. recited the provisions of Order 84, rule 20(4) of the Rules of the Superior Courts which mandates the court not to grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

58. He then considered the decision of the Supreme Court in *Cahill v. Sutton* [1980] I.R. 269, which, of course, dealt with a constitutional challenge to a section of the Statute of Limitations. The principles in that case were regarded by him as very relevant to judicial review proceedings such as the one I am dealing with in this case.

59. He quoted with approval the following passage from the judgment of Henchy J. in Cahill v. Sutton:-

> *"While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, the case tends to lack the force and urgency of reality. There is also the risk that the person whose case is being put forward unsuccessfully by another may be left with a grievance that his claim was wrongly or inadequately presented."*

60. McCracken J. commented that whilst that quotation expresses a general principle it is not intended to amount to an absolute rule. He then considered the application of the principles of *Cahill v. Sutton* in respect of judicial review applications. He pointed out that in *Lancefort Limited v. An Bord Pleanála* (No. 2) [1999] 2 I.R. 270, there was an express approval of the application of those principles to questions of *locus standi* in judicial review applications. He then considered the judgment of Keane C.J. in *Mulcreevy v. Minister for Environment* [2004] 1 I.R. 72. That case dealt with a challenge to the planned route of a motorway in circumstances where the applicant had no private interest in the proceedings.

61. He also considered a number of English cases on the topic but concluded that to allow the Federation to make its case without showing any damage to itself the court was being asked to deal with a hypothetical situation which he described as being "always undesirable".

62. It is argued that John Paul has standing because the alleged unlawful action of the Minister has a direct impact on its financial interest. It is said that a determination in its favour on the merits on this judicial review will be of considerable assistance to it in its defence of Losaid's claim at arbitration.

63. The approach of the Supreme Court in the *Construction Industry Federation* case makes it clear that questions of standing have to be decided by reference to the circumstances of the individual case. General principles such as were expressed in *Cahill v. Sutton* do not amount to an absolute rule. Indeed there may well be cases on the judicial review side where "*an applicant who has no financial interest in bringing the application may, nevertheless, have the locus standi to do so*".

64. Having regard to the circumstances of this case, I am not convinced that it can be said that John Paul has the necessary *locus standi* to bring these proceedings. Not merely was it not the applicant for the certificates but the issue of the certificates would not have afforded any fiscal benefit to it. Over and above that, the application for the certificates was ultimately successful. Losaid makes no complaint against the Minister concerning any of its dealings with him. Indeed both it and John Paul raised no issue as to the legal entitlement of the Minister to behave as he did but rather sought to satisfy his requirements in that regard.

65. Furthermore, a consideration of the substantive legal issues of this case would necessarily involve the court in ruling on whether or not in the event that the initial application had been pursued to the end and the Minister had finally refused a certificate he would have been lawfully entitled to do so. That is to engage the court in dealing with a hypothetical situation which *pace* McCracken J. is "always undesirable".

66. In my view John Paul does not have an entitlement to pursue this claim for judicial review in such circumstances. It has invoked this remedy with a view to obtaining a litigious advantage in private law proceedings that are extant as between Losaid and it.

67. I believe that I am fortified in my approach by reference to a recent decision of Laffoy J. in the case of *Lennon v. Limerick City Council* [2006] I.E.H.C. 112.

68. Whilst the judge in that case was dealing with an application to strike out the claim brought by Mr. Lennon, the first part of her judgment deals with his *locus standi* to institute those proceedings.

69. Mr. Lennon was an engineer who acted on behalf of Richard Costello. Mr. Costello was served with an enforcement notice by Limerick City Council under s. 154 of the Planning and Development Act, 2000. The notice was dated 23rd July, 2004 and required the removal of an unauthorised canopy at a premises in Limerick City. The notice was not complied with and in March, 2005, the District Court directed that the works be carried out and in addition imposed fines.

70. Eight days after the service of the enforcement notice Mr. Lennon, acting as Mr. Costello's engineer, submitted a planning application for retention of the canopy. On 24th September, 2004, the planning authority returned that application stipulating seven separate deficiencies in it and holding that it did not constitute a valid planning application. Correspondence ensued between Mr. Lennon and the City Council in which he took issue with the respondent in respect of the alleged deficiencies. The City Council stood over and, at the time of Laffoy J.'s judgment, continued to stand over the invalidity of the planning application.

71. Against that background Mr. Lennon instituted proceedings by means of special summons. In those proceedings he claimed "*a declaration that Richard Costello made a valid application on 31st August, 2004, for permission to retain the existing canopy at no. 3 Georges Quay, Limerick City*".

72. In his affidavit grounding the summons Mr. Lennon averred that he was a member of John Paul Lennon and Company, consulting engineers, who were acting on a contingency pro bono basis for Mr. Costello in his planning application.

73. In resisting an application to have the proceedings struck out for want of standing Mr. Lennon contended that, although he had no beneficial interest in the lands the subject of the planning application, he had a potential beneficial interest in the application for permission because the contract which he had made with Mr. Costello was that no fee or expense would be paid unless retention permission for the canopy was granted by the planning authority. That is, in effect, similar to the case made here where John Paul contends that an unlawful action on the part of the Minister impacts directly on its financial interests.

74. Laffoy J. had no hesitation in rejecting Mr. Lennon's claim. She said:-

> *"The applicant has no estate or interest in no. 3 Georges Quay, and, accordingly, he could not make a valid planning application in relation to that property. In any event, the application to which the proceedings relate was not made by him, it was made by Richard Costello. As the applicant could not make a valid planning application in relation to no. 3 Georges Quay, and, in fact, did not make the application the subject of these proceedings, it follows that he has no standing to bring proceedings in this court seeking a declaration as to the validity of the application."*

75. In my view the same line of reasoning applies in the present case with the added complication from the point of view of John Paul that, in addition, it asks the court to make an adjudication upon a hypothetical state of affairs which never came to pass.

Alternative Remedy

76. There is a further matter which also militates against John Paul being entitled to advance these proceedings. It is the existence of an alternative remedy in the form of an appeal to the Appeals Commissioners pursuant to the provisions of s. 372 AT of the Taxes Consolidation Act, 1997 (as inserted by s. 24 of the Finance Act, 2002) or s. 18 of the Housing (Miscellaneous Provisions) Act, 1979.

77. This argument is put forward by the Minister on the basis that the presence of this appeal mechanism is a bar to relief by way of judicial review. I think the more correct approach is to treat the existence of such an appeal not as a bar to relief but, rather, a factor for the court to consider in exercising its discretion. Whether that be the discretion to refuse standing or to refuse the substantive relief makes no difference from the point of view of this case.

78. It is argued by John Paul that the appeal mechanism does not provide an alternative remedy, because the basis for the challenge by John Paul is that the Minister did not have the power to require the BBA or similar certification. I am not convinced that that is so having regard to the wording of the section.

79. Section 372 AT reads:-

> *"An appeal to the Appeal Commissioners lies on any question arising (my emphasis) under this chapter (other than a*

question on which an appeal lies under s. 18 of the Housing (Miscellaneous Provisions) Act, 1979) in the like manner as an appeal would lie against an assessment to income tax or corporation tax, and the provisions of the Tax Acts relating to appeals apply accordingly."

80. That wording seems wide enough to accommodate the complaint made in these proceedings. What cannot be denied however is that the only person who could prosecute such an appeal would be Losaid since it was the applicant for the relief.

81. In *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168, Keane C.J. said:-

"The submission on behalf of the plaintiff that the High Court retains an inherent jurisdiction to determine a person's liability to tax, notwithstanding the existence of the machinery for assessment on appeal provided under the relevant legislation, is not well founded. It is clear that it was the intention of the Oireachtas, in enacting the elaborate procedures for the determination of a tax payers liability by assessment and appeal to the Appeal Commissioners, accompanied by a right of appeal to the Circuit Court and a provision for the determination of questions of law arising by way of case stated in the High Court, to provide an exclusive machinery for the ascertainment of a tax payers liability."

82. If an exclusive machinery has been provided by statute to have questions of the type sought to be raised in these proceedings dealt with, I do not see why this court should provide an alternative mechanism and afford a *locus standi* to John Paul which it would not have in respect of the statutory appeal mechanism. This is a further matter which I take into consideration in the exercise of my discretion in holding that John Paul does not have the necessary standing to prosecute this application for judicial review.

Delay

83. Even if I am wrong in the conclusion which I have arrived at as to the lack of standing on the part of John Paul to prosecute this application, there remains a further objection which is raised by the Minister. It is that of delay.

84. Earlier in this judgment under the heading "Progress of the Application" I set out the history of the application for the certificates of compliance. It is quite clear that in June, 2004, the Minister's inspector told Losaid that a certification by a competent body as to the suitability of the wall construction used and its compliance with the building regulations was required by the Minister. That much was clear both to Losaid and to John Paul and neither of them took issue with the Minister's requirements in that regard. Indeed, as I have already pointed out, from that time on they were endeavouring to satisfy the Minister's requirements in relation to such certification.

85. The case which is now sought to be made on the legal merits is that the Minister had no entitlement at law to have regard to the nature of the materials or the methods of construction which were used in the student accommodation. John Paul submits that he was not entitled to have regard to the fact that the materials and methods of construction were unconventional. In essence, it contends that the Minister was obliged to issue a certificate notwithstanding his concerns that the building did not comply with the relevant building regulations.

86. Given that the Minister's position was made clear in June, 2004, it is said that it was incumbent upon John Paul to make its application for judicial review *"promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari unless the court considers that there is good reason for extending the period within which the application shall be made*". (O.84, r,21(1) RSC) *Certiorari* is one of the reliefs sought here.

87. The clock began to tick in June, 2004.

88. The present application was commenced on 20th February, 2006, approximately 20 months after the Minister made his position clear. That is not a compliance with Order 84, rule 21(1) of the Rules of the Superior Courts. I must therefore consider whether good reason has been demonstrated for extending the period in which the application can be made.

89. In *De Roiste v. Minister for Defence* [2001] 1 I.R. 190, Denham J. identified a number of factors to be taken into account in deciding whether there is good reason to extend time. She said:-

"In analysing the facts of the case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as –

(i) The nature of the order or actions the subject of the application;

(ii) The conduct of the applicant;

(iii) The conduct of the respondents;

(iv) The effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed;

(v) Any effect which may have taken place on third parties by the order to be reviewed;

(vi) Public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished.

Such list is not exclusive. It is clear from precedent that the discretion of the court has ever been to protect justice."

90. In the present case it is to be noted that John Paul and Losaid accepted the requirements of the Minister from the time that they were communicated in June, 2004, onwards. At the end of 2005, Losaid opted to modify its building so as to be able to provide the Minister with the necessary documents to obtain the certificates of compliance. Such certificates were then obtained promptly. John Paul made no case of illegality on the part of the Minister until the commencement of these proceedings. Losaid has never done so.

91. The decision of Kearns J. in *Sloane v. An Bord Pleanála* has some relevance, [2003] 2 I.L.R.M. 61. There the judge was dealing with an application for leave to apply for judicial review pursuant to s. 50 of the Planning and Development Act, 2000. The applicants, who were a group of local residents, had to establish substantial grounds as required by that section. They sought to challenge a decision of An Bord Pleanála to approve a road construction scheme in Co. Louth. They were refused relief. Whilst the applicants

brought their claim within eight weeks from the date of the decision as is prescribed by the statute, their challenge was not so much to the decision of An Bord Pleanála but, rather, to the refusal during the enquiry to broaden its scope.

92. Kearns J. said:-

> *"Finally, and perhaps in the end most importantly, I feel that this whole application must fail by reason of delay. In reality, the applicants challenge is not so much to a decision of the respondent, but to the refusal of the planning inspector to broaden the terms of the enquiry during the course of same in Dundalk in September, 2000. As the grounding affidavits and written submissions lodged on behalf of the applicants make clear, it was that refusal to broaden the scope of the enquiry so as to take into its consideration the various alternative routes to Northern Ireland which lies at the heart of this entire case. The decision not to broaden the enquiry started the clock ticking insofar as an application of this nature is concerned. In my view there were no grounds whatsoever for letting matters drift on, purely because other residents had commenced other judicial review proceedings, or because the applicants in some vague way hoped that the respondent might come to some conclusion which favoured their position."*

93. Similar considerations arise here. Losaid and John Paul continued to deal with the Minister's representatives in an effort to comply with his requirements. They did not raise any issue as to the lawfulness of those requirements. It was not really until the commencement of these proceedings that John Paul raised any such issue. John Paul is a substantial commercial entity and has available to it as much advice, legal and otherwise, as it requires. If it did not choose to take legal advice as to the Minister's entitlement until 2006, that is its own business. But it cannot use that as a basis for seeking an extension of time.

94. There is a further feature which I must, having regard to the decision of the Supreme Court in *Lancefort v. An Bord Pleanála* [1999] 2 I.R. 270, take account of. There Keane J. said this:-

> *…*
>
> *But it would, in my opinion, be a significant injustice to a party in the position of the notice party to be asked to defend proceedings on the ground of an alleged irregularity which could have been brought to the attention of all concerned at any time prior to the granting of permission, but which was not relied on until the application was made for leave to bring the proceedings."*

95. In the present case John Paul did not attempt to bring the alleged or any irregularity to the attention of any of the parties concerned during the lengthy correspondence and meetings which took place with the Minister's representatives. Neither did Losaid, the person most concerned, if there was any such irregularity. No attempt was made to invoke the statutory appeal mechanism. In my view, the views of Keane J. in *Lancefort* have application here. It is not appropriate to ask the Minister to defend proceedings on the ground of an alleged irregularity which could have been, but never really was, mooted at any time prior to the commencement of these proceedings.

96. Taking all matters into account I am of opinion that no sufficient case has been made out for an extension of time to enable this judicial review to proceed.

97. It is, of course, argued by John Paul that the application has been made within time. This is done by alleging that the decision in suit was made on 9th January, 2006. Indeed all of the reliefs sought, whether *certiorari, mandamus* or declaratory refer to an alleged decision communicated on that date to refuse to issue the certificates of compliance.

98. This line or argument is wholly unconvincing, devoid of reality and takes no account of the whole course of dealings with the Minister. Not only that, but it fails to have regard to the fact that in the preceding month certificates of compliance had been granted in respect of 24 of the units. How could the court grant *certiorari* (or its declaratory equivalent) to quash a supposed decision of 9th January, 2006, to refuse certificates which had already been granted on 23rd December, 2005? There was in reality no such decision on that date.

99. I am satisfied that the application for judicial review was made long out of time and that there is no basis for an extension of time to permit it to be further prosecuted.

100. Taking my lead from the approach of the Supreme Court in the *Construction Industry Federation* case, I will not proceed to consider the substantive elements of the application.

Conclusion

101. This application is dismissed on the basis that John Paul does not have the necessary legal standing to prosecute it. If I am wrong in that conclusion, it was guilty of delay in the commencement of the application and there are no excusing circumstances which would warrant the court extending time. The application is dismissed.