Neutral Citation Number: [2010] IEHC 385

THE HIGH COURT

JUDICIAL REVIEW

2009 1103 JR

Between

MICHELLE MORRISON

Applicant

-And-

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

Respondent

-And-

MARY KAVANAGH and DESMOND KAVANAGH

Notice Parties

Judgment of Mr. Justice Hanna delivered the 7th day of October, 2010

This is an application for leave to seek judicial review and, if successful at the leave stage, the orders the applicant seeks are, *inter alia*, an order of *certiorari* quashing the decision of the respondent dated 3rd September, 2009 ("the decision") purporting to approve a compliance submission made by or on behalf of the Notice Parties arising out of a condition (condition No. 5) attached to decision of An Bord Pleanála dated 24th August, 2007 and a declaration that the said decision is *ultra vires*, void and of no legal effect.

The applicant and the notice parties are owners and occupiers of adjoining residential properties in Dalkey in Co. Dublin. The substance of the dispute the subject matter of the proceedings concerns the removal of trees and other works by the notice parties on their property contrary, the applicant alleges, to the planning permission granted to them. The planning process engaged in by the notice parties (including, it must be observed, involvement by and on behalf of the applicant) was somewhat protracted and involved a number of planning decisions. I do not propose to recite here the entire history of this process.

Background

On or about 19th June, 2009, a compliance submission for the purposes of condition No. 5 of what was the third permission was received by the respondent planning authority from the notice parties. The said compliance submission enclosed a drawing which was referred to in the proceedings as the Ledbetter compliance drawing, being a compliance drawing prepared for the purpose of condition No. 5 of the third permission by G.T. Ledbetter Design. The said compliance drawing showed trees Nos. 1938, 1940, 1932, 1943, 1944, 1945, 1947 and 1949 ("the 1940 series") as being retained as per the Murray landscape plan on foot of which the third permission was granted.

The compliance submission made under or pursuant to condition No. 5 is at the heart of this dispute. Condition No. 5 specifically required the developer/notice parties to carry out replacement tree planting and provided as follows:

> "5. Replacement tree planting shall take place in the first planting season after construction of the proposed dwellinghouse. Details in this regard shall be submitted to and agreed in writing with the planning authority prior to commencement of development.
>
> Reason: In the interest of visual amenity."

Condition 1 is also relevant and it refers back to two earlier permissions and provides as follows:

> "1. The development shall be carried out in accordance with the terms and condition attached to the planning permissions granted under An Bord Pleanála appeal Ref. Nos. PL06D.209177 and PL06D.217012, except as amended to conform with the plans and particulars lodged in connection with this application and with the following conditions.
>
> Reason: In the interest of clarity."

Condition No. 1 of the third permission/the permission the subject of these proceedings required a landscape plan which was submitted with the first planning application, described throughout this judgment as "the Murray landscape plan", save to the extent that this plan may have been necessarily modified by the two subsequent permissions.

The applicant's case is essentially that the compliance drawing on foot of which the compliance decision was made by the respondent was not in accordance with condition No. 1 of the third permission and, in particular, that it was not in accordance with the Murray landscape plan.

The applicant lodged a number of other appeals and references with the respondent and An Bord Pleanála and these other proceedings and the outcome of same are referred to and exhibited in the affidavits filed on behalf of Mr. Trevor Dobbyn, of de Blacam and Meagher, sworn on 31st May, 2010, wherein the decision of the Bord made on 24th May 2010 is exhibited.

The Law
Section 50A(3) of the Planning and Development Act, 2000 (as amended) provides that the Court shall not grant leave under s. 50 unless it is satisfied that there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed and the applicant has a substantial interest in the matter which is the subject of the application.

The Applicant's Submissions

Substantial interest
The notice parties purchased the lands the subject of this dispute in or about September, 2001. The applicant, having some concerns about the manner in which the lands would be developed by her neighbours, entered into an agreement with the notice parties regarding the development. In essence, this agreement involved the notice parties agreeing to provide adequate and appropriate tree planting and screening to protect the visual amenity and privacy of the applicant's dwelling. In consideration for this agreement, the applicant agreed not to oppose the three planning applications subsequently made by the notice parties herein.

As a result of the Murray landscaping report, any tree not listed for felling was to be retained and it would be necessary to submit an application to the planning authority to modify the existing permission in order to remove the trees. In relation to the dwellinghouse actually constructed by the notice parties, Mr. McConville, arborist on behalf of the applicant, avers as follows, at para. 17 of his affidavit of 28th October 2009:

> "In my professional opinion, the sheer bulk, height and mass of this building and its proximity to Kilross House [the applicant's dwellinghouse] rendered it critically important to retain existing trees on the site in accordance with the terms and conditions of the granted permissions and to provide replacement tree planting where trees have been removed from the lands so as to ensure a reasonable level of protection for the visual amenity of Kilross House and to protect its privacy and other residential amenities. I say and believe that this is what is envisaged by the terms and conditions of the three permissions granted, including condition Nos. 1 and 5 of the third permission, in particular."

It is submitted on the applicant's behalf that she has a significant or weighty interest in the matter the subject to of the application and that that interest is affected by or connected with the proposed development.

The applicant submits that the purpose of the Murray landscape plan, an integral component of the permission granted, cannot now be achieved as a consequence of the compliance order made by the respondent. The consequences of the compliance order for the applicant in terms of the failure of the notice parties to provide for the planting of trees in accordance with the plan are set out in detail in the applicant's affidavits supporting her application.

It is submitted that the applicant has a substantial interest in compliance with the Murray landscape plan and with condition No. 5 of the planning permission. In this regard, the applicant asserts that it has been established that once a person has demonstrated that his or her property is sufficiently proximate to the proposed development to be affected by the development, then he or she is entitled to insist that any decision to grant permission or to issue a compliance decision is reached in accordance with law.

Substantial grounds
The applicant alleges that there are substantial grounds for her contention that the respondent's decision is invalid and ought to be quashed. It is submitted that any compliance drawing submitted pursuant to condition No. 5 must comply not only with that condition but also with condition No. 1 which refers back to the terms and conditions of the earlier two permissions granted to the notice parties.

The applicant submits the development in question constitutes unauthorised development in that the compliance drawing submitted by the notice parties indicates the location of an unauthorised entrance which was in fact the subject of an enforcement notice served on the developer by the planning authority. In these circumstances, it is submitted that the respondent planning authority should not have endorsed the unauthorised development by agreeing a compliance submission referable to such unauthorised development.

The applicant submits that the compliance submission furnished by the notice parties and approved or accepted by the respondent did not comply or conform with the terms and conditions of the three cumulative permissions in thee main respects:

Unauthorised development/the location of the vehicular entrance:

The compliance submission related to an unauthorised development and it was made out of time – it was not therefore capable of valid acceptance or approval. In particular, the applicant submitted that the unauthorised vehicular entrance necessitated the removal of one tree which had been clearly marked for retention under the Murray landscape plan and the placing of the entrance in that location rendered the planning of a replacement tree impossible. The applicant argues that it was contrary to public policy for the respondent to accept as valid a compliance submission which related to an unauthorised development and in respect of which the respondent itself subsequently served an enforcement notice. It is submitted that the decision of the respondent to accept the compliance submission was *ultra vires* as it amounted to an acceptance of an illegality in the form of the unauthorised development and that therefore the compliance decision issued by the respondent on foot of that *ultra vires* acceptance is also null and void and of no legal effect. In this regard, the applicant relies on the decision of the Supreme Court in the licensing case of *An Application by Thomas Kitterick* [1971] 105 ILTR 105, where, at p. 109 of his judgment, Walsh J. held as follows:

> "… the critical time in so far as the actual premises are concerned is the point at which the licence is applied for under section 17. If at that stage the premises have been erected even in strict accordance with the plans submitted to the Court originally but have been erected in violation of other statutory provisions or whose then conditions does not comply with the requirements of other statutory provisions it appears to me to be quite contrary to the public policy of the

Courts that a licence should be granted notwithstanding the illegalities." (Emphasis added)

Replacement tree planting not provided for:

The second ground upon which the applicant challenges the decision is on the basis that the compliance drawing did not contain any reference to or provision for replacement tree planting as required by the Murray landscape plan. The trees marked for retention in the Murray plan could not be removed, the clear implication of the relevant conditions. The applicant further submits that a number of other trees have also been removed and have not been illustrated as being for replacement in the compliance drawing. Again, the applicant emphasises the requirement to replace trees set out in the Murray plan which provides:

"… all trees removed for this reason [are] to be replaced where possible." (My emphasis)

(3) The compliance drawing did not reflect or provide for the proposed additional planting as provided for in the Murray landscape plan. In all, the applicant submits there was extensive and substantial non-compliance with the Murray plan and that these non-compliances, taken cumulatively, amount to substantial grounds for judicial review. In the present case, the applicant submits the notice parties failed to show trees as per the Murray plan in their compliance drawings. They seem to have interpreted "trees" as including shrubs, an interpretation which the applicant argues is clearly at odds with the Murray plan.

The Court's Discretion

The applicant submits that the relevant statutory provisions do not envisage the exercise of any discretion by the Court at the leave stage. In this regard, the applicant relies on a passage from Simons (2nd ed.: 2007) *Planning and Development Law* (Thomson Roundhall) where, at p. 595, it is stated as follows:

> "… there are at least two factors which militate against the introduction of discretionary factors at the leave stage. First, it is clear from the formula posited by Carroll J. in *McNamara v. An Bord Pleanála (No. 1)* that it is not the function of the High Court on the leave application to try 'to ascertain what the eventual result would be'. As it is at least arguable that the discretion does not properly fall to be considered until the merits of the application have been determined, it might be thought that to do so at the leave stage would offend against the principle by involving an element of second-guessing the merits. Secondly, the term 'substantial' in the statutory criterion 'substantial grounds' suggests that at the leave stage the High Court is concerned only with the substantive merits of the applicant's case; again, the essence of the discretionary nature of the judicial review remedies is that the discretion is independent of the substantive merits."

Furthermore, the applicant referred the court to the decision in *Cumann Thomas Daibhis v. South Dublin County Council* [2007] I.E.H.C. 118, where O'Neill J. observed that an argument as to whether the relief sought in judicial review proceedings would confer any practical benefit on the applicant was a matter going to the Court's discretion and was not therefore a factor which would warrant the refusal of leave.

In any event, the applicant argues that even if it were appropriate for the Court to exercise its discretion at the leave stage, there are substantial reasons why the Court should not exercise such discretion to refuse relief in circumstances where trees marked for retention in the Murray landscape plan were removed.

Application to Amend the Statement of Grounds

The court, on this application, must decide whether the applicant should be granted leave to amend her Statement Required to Ground the Application for Judicial Review in order to argue that the respondent's compliance decision is invalid as it was procured on foot of a serious misrepresentation of fact and/or was made as a result of a significant mistake of fact on the part of the respondent.

In an affidavit sworn on 7th April, 2010, a Mr. Joseph McConville, Arborist on behalf of the applicant, averred at paragraph 13 of his affidavit that following an inspection of Mount Alverno, the notice parties' address, from an adjoining property, presumably the applicant's, carried out on 16th March, 2010, he noted that the said 1940 series of trees had been removed, despite the compliance submission to the contrary. These trees were indicated to be retained in the Murray landscape plan and the Ledbetter compliance drawing.

No information was provided in Mr. Dobbyn's affidavit, Mr. Dobbyn of de Blacam and Meagher being an agent of the notice parties herein, concerning the fact of these trees having been removed or the date on which the removal occurred. In fact, no clarification as to the date when the removal occurred was given to the Court until Friday, 11th June 2010, when Senior Counsel on behalf of the notice parties confirmed that he trees had been removed on some date in June, 2009. The applicant argues that the date of removal of the trees is significant in light of the compliance submission made by the notice parties that they had not been removed. As stated above, the said submission was dated 19th June, 2009.

On 3rd September, 2009, the respondent planning authority gave its agreement or approval to the notice parties' application pursuant to condition No. 5. On 10th June, 2010, Ms. Mairead Coghlan B.L., on behalf of the respondent, indicated that it was her understanding that the trees were felled after the date of the decision of the respondent on 3rd September, 2009. There is therefore some controversy over when exactly the trees were felled but felled they were.

The applicant submits that the respondent planning authority made its compliance decision under a misapprehension of the true factual position regarding the trees, specifically the retention of the 1940s series of trees, in that they had not been advised and were not aware of the unauthorised felling of same. The applicant now seeks to claim that the decision was obtained on foot of a serious misstatement of fact or misrepresentation and that accordingly there is at the very least an arguable basis for contending that the compliance decision is invalid on grounds of having been obtained on foot of a misstatement of fact in the compliance drawing and/or by a significant mistake of fact made by the respondent planning authority.

The issue for the determination of the court, if the applicant succeeds in this application, is whether or not the trees in question were felled before or after the filing of the compliance submission by the notice parties.

The applicant avers in her affidavit grounding the current applicant that the issue of the dates on which the trees had been felled only came to light on 11th June, 2010. In a letter of that date, the applicant's solicitors sought confirmation as to the precise date upon which the trees had been removed and in particular, whether it occurred before or after the filing of the compliance submission. Information was also sought as to whether the respondent was informed of the felling of the trees prior to the making of its decision and if so, when and how this occurred.

The Respondent's Submissions

The respondent stands by its decision of 3rd September, 2009, which it says was a valid acceptance of the compliance submission of the notice parties made in compliance with and pursuant to their obligations under condition no. 5 of the planning permission granted by An Bord Pleanála on 24th August, 2007.

A relevant potion of the respondent's decision of 3rd September, 2009 is as follows:

> "The applicant [the notice parties in these proceedings] has submitted a landscaping layout plan, drawing No. 7, which shows the proposed additional/replacement tree and shrub planting for the site. The proposed planting scheme is acceptable to the Planning Authority. Given the topography of the site, and degree of rocky outcrop and shallowness of soil covering, the proposed mix of planting types is satisfactory. The applicant has also submitted, by fax, a letter confirming that the landscaping works outlined in the submission will be completed by March 2010.
>
> In this regard, it is considered that the above submission is a satisfactory response to compliance under Condition No. 5 of the permission granted by An Bord Pleanála Ref. No. PL.06D.222926." (Emphasis added)

The respondent submits that the real issue for determination by this Court is the proper construction of condition no. 5 of the third permission granted to the notice parties. Again, the relevant provisions of condition no. 5 merit repeating here:

> "Condition 5. Replacement tree planting shall take place in the first planting season <u>after construction</u> of the proposed dwellinghouse. <u>Details in this regard shall be submitted to and agreed</u> in writing with the planning authority <u>prior to commencement of development</u>.
>
> Reason: In the interest of visual amenity." (Emphasis added)

The portions of condition no. 5 underlined here are of importance. The respondent emphasises that these highlighted components of the condition have all been complied with and hence its decision of 3rd September 2009 was a valid and *intra vires* decision in that the planting was to take place after construction, the details of the planting were submitted and were agreed prior to the commencement of the development.

The respondent argues that the applicant's real problem with their decision to accept the compliance submission stems for the applicant's dissatisfaction with the manner in which the respondent did or did not address the detail of the replacement tree planting in that it is felt that this was not dealt with in sufficient detail. The respondent points out that this is dissatisfaction with the merits of the decision, not the method by which it was reached, and that it is therefore not an appropriate issue for judicial review and ought instead to have been dealt with by way of an appeal. It is also submitted, in a similar vein, that it is not appropriate for this Court to supplant its own view as regards the replacement tree details for that of the respondent expert body and that that is not an appropriate exercise for the Court to embark upon.

The respondent submits that, as is clear from condition no. 5, the details of the replacement tree planting was to be a matter to be agreed upon between the notice parties and the respondent.

Lack of Substantial Interest within the meaning of s. 50A

The respondent submits the applicant does not have a substantial interest in the matter the subject of the application in the manner required by s. 50A(3)(b)(i) of the Planning and Development Act, 2000, as amended. In particular, it is submitted that the applicant failed to file any affidavit demonstrating that she had a substantial interest within the eight week time period provided for by the legislation. Mr. McConville, an arborist, swore the grounding affidavit. The applicant did not file an affidavit in this matter until after the respondent and notice parties filed their affidavits in which they stated that the applicant did not have a substantial interest in the matter as required by s. 50A of the Planning Acts. The respondent highlights the fact that the applicant swore her first affidavit in this matter on 7th April 2010, some seven months post the decision of the respondent that she seeks to challenge and it is submitted that this is out of time for the purposes of demonstrating substantial interest. According to Murphy J. in *Casey v. An Bord Pleanála*:

> "All the facts relied on must be before the Court within the time limit prescribed unless otherwise allowed by the Court. If the respondent and/or notice parties were to have filed affidavits the applicant may, if allowed by the Court, file further affidavits."

The crux of the respondent's submission, based on *Casey*, is that it is not sufficient that an arborist swore an affidavit in support of the applicant or on the applicant's behalf in order to ground the application for judicial review in the absence of an affidavit from the applicant herself wherein she asserts her substantial interest in the matter.

Lack of Substantial Grounds

The respondent submits that the applicant has not demonstrated that there are substantial grounds for contending that the decision is invalid or ought to be quashed.

Belated compliance with a Pre-commencement Condition
The respondent says that it is not the case that a pre-commencement condition must be complied with prior to commencement and that belated compliance with a pre-commencement condition is possible.

In this regard, the respondent relies on *Mountbrook Homes Ltd. v. Oldcourt Development Ltd.* [2005] I.E.H.C. 171, which involved a refusal of Peart J. to grant judicial review of a planning decision where certain pre-commencement compliance conditions had not been complied with in time. As a result of the *Mountbrook* decision, the respondent argues that it is clear that the courts adopt a balanced approach to non-compliance with pre-commencement conditions and that a court can require belated compliance with a pre-commencement condition. This "balanced approach" to non-compliance was, the respondent's submit, also adopted by Finnegan J. in *O'Connell v. Dungarvan Energy Ltd*. (Unreported, High Court, Finnegan J., 27 February, 2000) where it was held as follows:

> "… the granting or withholding of injunctive relief is a matter of discretion to be exercised in accordance with established legal principles. Even if satisfied that there had been non-compliance with the planning permission on the basis of the demolition and replacement of the steel structure I would not be prepared to grant an injunction in the circumstances of this case. The circumstances relevant to such refusal are the following:
>
> 1. The variation in the context of the completed development is of trifling materiality;
>
> 2. The variation is necessary to satisfy the concerns of the Environmental Protection Agency reflected in condition 8 of the Integrated Pollution Control Licence;
>
> 3. The respondent acted in good faith and consulted the planning authority in relation to the proposed variation,
>
> 4. The attitude of the planning authority to the variation…;
>
> 5. The variation will have no effect upon the applicant and other residents of the area;
>
> 6. The serious consequences of delay for the respondent."

The respondent submits that it is clear from the permission granted by the Board and the conditions attached thereto that the details in relation to the planting of replacement trees was to be agreed with the respondent. The respondent was furnished with detailed drawings, the Ledbetter drawings, and accepted same as being in compliance with condition 5 of the permission.

Crucially, it is submitted that even if there was non-compliance with pre-commencement conditions, it does not follow that the entire development is an unlawful development. This is dealt with in the judgment of Barr J. in *Eircell Ltd. v. Bernstoff* (Unreported, High Court, Barr J., 18 February, 2000) in which the learned judge rejected the submission that these pre-commencement conditions should be strictly interpreted and that subsequent compliance could not make lawful what was unlawful. He said:

> "It was argued on behalf of the applicants that as the requirements in question were conditions precedent to the commencement of development, they should be strictly interpreted and subsequent compliance does not render legal what was already an unlawful development… [T]he conditions in question have been complied with… [I]t is abundantly clear on the facts that the relief sought under section 27 should not be granted. No court should make an order which is potentially futile. If the mast were declared to be an unlawful development, no doubt application would be made to the planning authority for a retention order and in the circumstances that would be granted for the asking."

Similarly, in *White v. McInerney Construction Ltd* [1995] 1 I.L.R.M. 374, Blayney J. held as follows:

> "The learned trial judge found that there had not been a literal compliance with the conditions but that it would be unreasonable to bring the development to a halt when the planning authority had agreed to it, and in the exercise of his discretion he refused to grant the injunction sought by the applicant."

The respondent also made that point that not every deviation from permitted development constitutes an unauthorised development. In this regard, the respondent referred to the decision of Finnegan J. in *O'Connell v. Dungarvan Energy Ltd*. (Unreported, High Court, Finnegan J., 27 February, 2001). In the course of his judgment, Finnegan J. quoted with approval from a decision of Lord Denning in *Lever Finance v. Westminster L.B.C*. [1971] 1 Q.B. 222, where it was stated, at p. 230, as follows:

> "In my opinion a planning permission covers work which is specified in the detailed plans and any immaterial variation therein. I do not use the words 'de minimis' because that would be misleading. It is obvious that, as the developer proceeds with the work, there will necessarily be variations from time to time. Things may arise which were not foreseen. It should not be necessary for the developers to go back to the planning committee for every immaterial variation. The permission covers any variation which is not material."

This begs the question, of course, of whether what is complained of in these proceedings was or was not material. The respondent submits and urges the Court to accept that there has been substantial compliance with condition no. 5 and that the true objective or spirit of the planning condition has been fulfilled.

The availability of an alternative remedy
The respondent submits that the applicant could, at any time after the commencement of the works, brought section 160 proceedings in relation to the impugned development. She was aware that no formal compliance agreement pursuant to condition no. 5 was in place prior to commencement of the works and she was aware that the works had commenced.

The respondent informed the Court that the planning authority informed the applicant that any individual breaches were to be dealt with in the enforcement process if the planning authority were of the view that such breaches had occurred.

An Bord Pleanála

The respondent argues that in the planning appeal, the applicant made the case that the notice parties were in breach of a previous planning permission, namely the third permission and she put all of the matters at issue in this judicial review before the Board.

The respondent submits that the fourth and fifth planning permission as granted by An Bord Pleanála on 24th May 2010 amend and supersede the third planning permission the subject of the application for leave to seek judicial review. Furthermore, the applicant has already raised the concerns before this Court to An Bord Pleanála and same were considered and dealt with by the Board in the issuing of the fifth permission.

De minimus non curat lex
The respondent submits that if the respondent erred, its error was *de minimus* and should therefore be disregarded. It is submitted that there has been substantial compliance with the requirement of the true objective of the condition – there has been a decision in writing agreeing the detail of the tree and shrub planting prior to the first planting season after the construction of the dwellinghouse.

It is argued that the applicant cannot show that she has suffered any real loss or prejudice in the legal sense. The complaint made by her in these proceedings is in the nature of a technical breach and is not one, the respondent submits, to justify leave of the Court to seek judicial review. *The State (Toft) v. Galway Corporation* [1981] I.L.R.M. 439 is illustrative of this point. Here, an application for planning permission had been made on behalf of a company which was called Spirits Rum Ltd. Although in fact the company's proper title was Rum Spirits Ltd., the planning permission was nonetheless granted. The error here was an innocent mistake made up of a mis-description of the real name of the company. O'Higgins C.J. held as follows:

> "I think there are sound reasons to justify the decision of the learned trial Judge. I would, however, go further. *Certiorari* is at all times a discretionary remedy. In exercising a discretion as to whether the remedy should be granted regard should be had not only to the harm which the applicant for the remedy alleges but also to his conduct. It is said with justification that *certiorari* issues *ex debito justitiae* where an aggrieved or complaining person can point to his legal rights being affected by the order or decision sought to be annulled. In such circumstances a court will be more concerned with dealing with the irregularity than with the conduct of the prosecutor. In this case, however, the appellant can only point to the inconvenience or disadvantage to him of a similar business to his own being opened in adjoining premises. He can point to no legal right of his being infringed by the Order made by the Galway Corporation."

In this case, the position, of course, is quite different to that in the *Toft* case. The applicant here does assert an infringement of her legal rights, specifically her right to privacy which she says is infringed by the failure on the part of the notice parties to comply with condition no. 5 of the planning permission in relation to the planting of replacement trees.

In its concluding submissions to the Court, the respondent again submitted that the Court must take the fourth and fifth grants of planning permission into account in its consideration of whether the development was authorised or not and that it must look at the *de facto* position rather than a historical one based purely on the third permission.

The Notice Parties' Submissions
The notice parties submit that none of the grounds advanced by the applicant constitute substantial grounds for contending that the respondent's decision is invalid and ought to be quashed. The notice parties argue that as regards the applicant's dissatisfaction with the decision of the respondent on the compliance submission, judicial review proceedings do not constitute a forum for an appeal on the merits of a decision of an expert body such as the respondent.

The notice parties submit that the application for leave must be considered by reference to the provisions of the Planning and Development (Strategic Infrastructure) Act 2006 and that the provisions of ss. 50 and 50A of the Planning and Development Act 2000, as amended, regulate the present application.

Time Limits

The notice parties also submits that the applicant was out of time in the making the application in circumstances where the proceedings were only issued on the last day of the time allowed and they assert that they await proof as to when the proceedings were served upon the respondent. They further refer to the obligation to move promptly imposed by Order 84 rule 21 of the Rules of Court.

Again, as regards the time issue, the notice parties argue that the obligation on an applicant to issue proceedings including evidence on affidavit setting out their case must be discharged within eight weeks and that the applicant in this case is outside that time period in that she filed further affidavits which were of an impermissible nature in that they contained averments of a factual nature which were essentially an attempt to cure deficiencies in her initial affidavits. The further affidavits filed by the applicant outside the eight week period raised new grounds and sought, the notice parties argue, to establish substantial interest in a manner that had not been set out in the original affidavit.

Substantial Interest
As regards the applicant's argument that she may seek a s. 160 injunction in which case she does not need to demonstrate a substantial interest, the notice parties submit the applicant merely raises this possibility in circumstances where she has entirely failed to establish substantial interest in the matter as required by s. 50 within the time provided for and that no reason has been given for the delay of over five months from the last day for the proceedings to have issued before an affidavit was sworn by her in which she suggests a possible intention to seek a s. 160 injunction.

Interpretation of Condition No. 5
In *Re X.J.S. Investments Ltd*. [1986] I.R. 750, McCarthy J. held that Development Plans, because they are not drawn up by skilled

draftsmen, should not be subjected to the tenets of construction that would be applicable to legislation, but should be properly construed in their ordinary meaning as would be understood by members of the public. This approach was subsequently echoed by Barr J. in *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527. Although the *Tennyson* and *Re X.J.S.* decisions related to interpretation of development plans, the courts have subsequently applied the same principles to the interpretation of planning permissions and the conditions attached thereto. In this regard, the notice parties urge the Court to interpret condition no. 5 in a manner that would be understood by members of the public rather than, for example, to use a purely literal interpretation.

Thus, the notice parties submit that the interpretation of the ordinary wording of condition no. 5 leads to the conclusion that the purpose of that condition was to ensure that replacement tree planning would take place in the first planting season after construction of the dwellinghouse the subject of the planning application.

They submit that the material decision made by the respondent which the applicant seeks to challenge was a decision which in essence simply acknowledged that the notice parties had submitted a landscaping layout plan (drawing no. 7), which shows the proposed additional/replacement tree and shrub planning for the site. The respondent then stated that the proposed planning scheme was acceptable to it as a planning authority. The decision – some of which is set out earlier and which bears repeating here – concluded as follows:

> "In this regard, it is considered that the above submission is a satisfactory response to compliance under Condition No. 5 of the permission granted by An Bord Pleanála Ref. No. PL. 06D.222926."

That, in essence, is the sum total of the decision being challenged.

"Prior to commencement of Development"

The notice parties submit that condition no. 5 required a compliance submission to be made to the respondent and for that submission to be agreed in writing "prior to the commencement of development". In reply to the applicant's claim that the compliance submission was not made prior to the commencement of development as required by condition no. 5, the notice parties submit that it is clear that, in an appropriate case, belated compliance with a pre-commencement condition is permissible.

The notice parties referred the Court to the decision of Dunne J. in *John Craddock Ltd. v. Kildare County Council,* where it was held that technical breaches of a number of conditions did not render a decision invalid once there was substantial compliance with the planning permission as granted. In this regard, the notice parties urged the Court to note the lack of any need for absolute compliance in every respect with condition no. 5 and that substantial compliance is what matters.

The notice parties also argued that there is a difference between conditions which expressly preclude development from commencing until a certain requirement has been satisfied and, other the other hand, conditions that require certain things to be done before the commencement of development.

Decision

There is substantial conflict between the parties to this application as to the relevant factual aspects of the case. For example, there is a significant dispute in relation to the precise date upon which the trees in question were felled.

I am satisfied that the application was made within time. The notice parties were keen to emphasise the fact that the applicant brought the within proceedings on the last day permitted by statute for doing so and submitted to the Court that this was reflective of a lack of substantial interest. The application was brought on the last day but it was nonetheless brought within time. Given the significant prior history of engagement by the applicant in the planning process and the evident manifestation of her concerns regarding the trees I see no merit in the notice parties' point on the time issue.

I am of the view that the applicant in this case does have a substantial interest in the decision the subject matter of the proceedings. That decision pertains to or is relevant to development work being carried out in a site adjacent to the applicant's property and it has a bearing on the removal of trees by the notice parties and other related issues which clearly affect or have the potential to affect the applicant's enjoyment of and amenity in her own home. In *Harding v. Cork County Council* [2008] 2 I.L.R.M. 251, the Supreme Court held that:

> "… in order to enjoy a substantial interest within the meaning of s.50 of the Act of 2000, it is necessary for an applicant to establish the following criteria:
>
> (a) That he has an interest in the development the subject of the proceedings which is 'peculiar and personal' to him.
>
> (b) That the nature and level of his interest is significant or weighty.
>
> (c) That his interest is affected by or connected with the proposed development."

It would strike me as artificial in the extreme to say the applicant did not have a substantial interest in this particular development given the history of her involvement with the notice parties in relation to it and its proximity to her private dwelling with all that that entails, not least in terms of privacy and visual amenity.

I do not accept the respondent's contention that the applicant cannot demonstrate a substantial interest in circumstances where she did not swear an affidavit within 8 weeks setting out the basis for any such interest. An affidavit was sworn by Mr. McConville, the arborist retained by the applicant, and that affidavit was sworn in support of the application and on the applicant's behalf and within time. In it, the nature of the applicant's interest is clearly set out and the relevant history of her involvement in the matter. The subsequent affidavits filed by or on behalf of the applicant merely augment or supplement that interest.

As for the grounds of challenge, under s. 50 of the Planning and Development Act, 2000 as amended by the Planning and Development (Strategic Infrastructure) Act, 2006, leave shall not be granted to the applicant unless the High Court is satisfied that there are substantial grounds for contending that the decision of the respondent is invalid or ought to be quashed. In *McNamara v. An Bord*

Pleanála (No. 1) [1995] 2 I.L.R.M. 125, Carroll J. held as follows:

> "In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned in trying to ascertain what the eventual result would be. I believe I should go no further than satisfying myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has been decided in another case) could not be said to be substantial. I draw a distinction between the grounds and the arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it sound or not. If I consider a ground, as such, to be substantial, I do not also have to say that the applicant is confined in this argument at the next stage to those which I believe may have some merit."

The essence of the grounds of challenge advanced by the applicant in this case relates to the failure of the notice parties to comply with condition no. 5 of the third planning permission issued to them and the acceptance by the respondent of a compliance drawing from the notice parties in relation to condition no. 5 which the applicant says should not have been accepted by virtue of its non-compliance with that condition. They say that the template for compliance with this condition was the Murray landscape plan, that the notice parties have failed to comply with this plan in a number of important respects and that the respondent ought not to have allowed such a fundamental derogation from the terms and conditions of the permissions granted.

In response, the respondent argues that this ground is not substantial in that failure to comply with a pre-commencement condition does not render a development unlawful and is not, of itself, fatal to a decision. The respondent argues that the courts have on many occasions in the past held that belated compliance with a pre-commencement condition may be valid in certain circumstances and that failure to comply with or strictly adhere to a pre-commencement condition is not of itself fatal to any decision of a planning authority. In such circumstances, it is submitted that this ground is not a substantial ground of challenge.

I am afraid I cannot agree with this approach to the issue of substantial grounds. The applicant's complaints in relation to the alleged failure to adhere to condition no. 5 are neither trivial nor tenuous. I am not concerned at the leave stage with ascertaining what the eventual outcome will be or whether the applicant's argument about the obligation to comply with pre-commencement conditions will ultimately be successful. It is quite clear at this stage that I am to go no further than satisfying myself that the grounds adduced by the applicant "substantial". If it were the case that non-compliance with pre-commencement conditions could never be regarded as a good or arguable or weighty point, then any challenge made in reliance on such a complaint could not be substantial. However, the matter is not black and white. The approach the Court may ultimately take to the issue of the failure to comply with condition no. 5, including whether there was any such failure, is, in my view, a matter for substantive hearing at a later stage.

I grant leave to bring judicial review proceedings having been satisfied that the applicant has adduced substantial grounds to do so.