THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

[2016 No. 715 JR]

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANÁLA AND CORK COUNTY COUNCIL, KERRY COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ESB WIND DEVELOPMENT LIMITED

NOTICE PARTY

Judgment of Mr. Justice Robert Haughton delivered on the 2nd day of February, 2017.

1 Introduction

1.1 By application filed in the Central Office on 14th September, 2016, which was moved ex parte before Humphreys J. on 10th October, 2016, the applicant was granted leave to bring judicial review proceedings seeking, *inter alia*, the following reliefs:-

> "(1) An order of *certiorari* by way of application for judicial review quashing the determination of the first named respondent to grant planning permission (appeal ref: PL08.PA0044) in respect of the construction of a windfarm at Grousemount, Co. Cork and Co. Kerry which said decision was made on the 21st July, 2016.
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> (2) An order of *certiorari* by way of application for judicial review quashing the determinations of the second and third named respondents pursuant to section 5 of the Planning and Development Act 2000 as amended dated the 1st day of April 2015, and the day of 6th of May 2015 determining that the construction of the grid connection servicing the proposed development was exempted development.
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> (3) A declaration that the decisions of the first, second and third named Respondent was in breach of and contravenes Directive 92/43/EEC on the contravention of wild habitats and flora and fauna (the Habitats Directive) and Direction 2011/92/EU of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment ("the consolidated Environmental Impact Assessment (EIA) Directive"), the Birds Directive 2009/147/EU and the jurisprudence of the European Court of Justice (ECJ) and the Court of Justice of the European Union (CJEU).
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> (4) A declaration that section 5 of the Planning and Development Act 2000 is contrary to European law and the Aarhus Convention and in particular, the said provisions violate the public participation provisions of the EIA Directive, Birds Directive, Habitats Directive and the Public Participation Directive 2003/35/EC.
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> (5) A declaration that the fourth and fifth named respondents have failed to proper[ly] implement the Habitats Directive and Birds Directive. In particular, the fourth and fifth named respondents have failed to ensure the creation of a coherent list of sites of community interest for the protection of wild habitats, fauna, and birds.
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> (6) If necessary, an order extending time for seeking the above relief."

1.2 As the applicant was out of time for seeking judicial review in respect of the s. 5 decisions of the second and third named respondents made in 2015, an application was made to Humphreys J. for an extension of time for making the leave application, and the first operative part of his Order of 10th October, 2016, reads:-

> "that the Applicant's time for making the said application for leave to apply for judicial review be and the same is hereby extended up to and including the 14th day of September 2016."

It appears therefore that the leave judge extended time for bringing the leave application up to the date upon which papers were first lodged in the Central Office (14th September, 2016), but in giving leave to apply for the relief at no.(6) did so upon the basis that the judge trying the substantive issue could be asked to grant "if necessary, an order extending the time for seeking the above relief".

1.3 In the motions before the court the second, third and fourth named respondents seek to set aside leave so granted against them in respect of reliefs (c) at sub-paragraphs(2),(3), and (4) in the statement of grounds on grounds of delay.

2 The Motions

2.1 Following the granting of leave, the notice party promptly applied to have the proceedings admitted to the Commercial Court, and on foot of an affidavit sworn by John Kelly on 10th October, 2016, McGovern J. so ordered.

2.2 By notice of motion filed on 16th November, 2016, the third named respondent Kerry County Council applied for the following reliefs:-

> "(1) An order setting aside the Order of this Honourable Court (Humphreys J.) made on 10 October, 2016, granting the

Applicant leave to apply for judicial review as against the Third Named Respondent on grounds of delay and/or being out of time having regard to the time provisions contained in Section 50 of the Planning and Development Act 2000 (as amended).

(2) Further and/or in the alternative, an Order dismissing the proceedings against the Third Named Respondent on grounds that the proceedings are out of time and that the Applicant is not entitled to an extension of time to bring these proceedings as against the Third Named Respondent pursuant to Section 50(8) of the Planning and Development Act 2000 (as amended)."

2.3 A similarly worded application was brought on behalf of the second named respondent Cork County Council by notice of motion also filed on 16th November, 2016.

2.4 By further notice of motion filed on 24th November, 2016, on behalf of the fourth and fifth named respondents ("the State") orders were sought:–

"(1) … setting aside … the reliefs set out at paragraph 4 of the said [leave] Order and Notice of Motion, and on the grounds, set out at paragraphs. e(13) and e(14) of the Statement Required to Ground an Application for judicial review, on the grounds of delay and/or that the application for leave was not made within the time limited by section 50 of the Planning and Development Act 2000 (as amended) and/or Order 84, Rule 21 of the Rules of the Superior Courts;

(2) Further and/or in the alternative, an Order dismissing the Applicant's claim against the State Respondents for the reliefs sought at paragraph 4 on the grounds that the claim is out of time and that the applicant is not entitled to an extension of time to seek the relief sought and that his claim for the relief sought is therefore bound to fail;

(3) In the alternative only, an order directing that the matters identified at (2) above be determined in advance of any hearing of the substantive judicial review proceedings by way of a modular trial or alternatively as preliminary issues."

2.5 On 21st November, 2016, McGovern J. directed that the set aside/delay issues raised in these notices of motion should be determined by this Court as a preliminary matter. While no formal order of McGovern J. was put before this Court, it did not appear that he had gone so far as to direct a modular trial on a preliminary point of law related to the delay issue. Having heard submissions on this point I determined that it was appropriate for this Court to determine the respondents' motions in the first instance as applications to set aside the leave orders, insofar as the reliefs sought at paras. 2, 3 and 4 were concerned.

2.6 The substantive hearing of these proceedings has been fixed for 7th March, 2017. The first named respondent appeared as a matter of courtesy at the hearing of evidence and then withdrew. The court had the benefit of written and oral submissions from the remaining respondents, the notice party and the applicant.

3 Setting Aside Applications – The Test to be Applied

3.1 The leading authority is *Adam v. Minister for Justice* [2001] 3 I.R. 53. There the Supreme Court held that the High Court had an inherent jurisdiction to set aside an order granting leave to apply for judicial review that had been made on the basis of an *ex parte* application, including cases where there was an absence of *mala fides*. Hardiman J. emphasised that an application to set aside an order granting leave was not in any sense an appeal from the judge of the High Court who granted the original leave. At p. 77 he stated:

"In my view, any order made *ex parte* must be regarded as an order of a provisional nature only. In certain types of proceedings, either the apparent requirements of justice or the requirements of its administration mean that a person will be affected in one way or another by an order made without notice to him and therefore without his having been heard. This state of affairs may, depending on the facts, constitute a grave injustice to the defendant or respondent. In the context of an injunction, only a very short time will normally elapse before the defendant has some opportunity of putting his side of the case. In judicial review proceedings the time before this can occur will normally be much longer. This clearly has the scope to work an injustice at least in some cases."

Hardiman J. approved certain observations of McCracken J. in *Voluntary Purchasing v. Insurco Ltd.* [1995] 2 I.L.R.M. 145, including the following at p. 147:-

"… An *ex parte* order is made by a judge who has only heard one part to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that that is not suggested in the present case. However, in the interest of justice it is essential that an ex parte order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be quite unjust that an order could be made against a party in its absence and without notice to it which could not be reviewed on the application of the party affected."

Hardiman J. went on to state at p. 79:-

"In my view, once it is accepted that the jurisdiction invoked here by the respondents exists, it is difficult to justify any hard and fast restrictions on it."

3.2 In her judgment McGuinness J. at p. 72 stated that:-

"… this jurisdiction should only be exercised very sparingly and in a very plain case."

She gave as her reason for this, at p. 72, the following:-

"One could envisage the growth of a new list of applications to discharge leave to be added to the already lengthy list of applications for leave. Each application would probably require considerable argument - perhaps with further affidavits and/or discovery. Where leave was discharged, an appeal would lie to this court. If that appeal succeeded, the matter would return to the High Court for full hearing followed, in all probability, by a further appeal to this court. Such a procedure would result in a wasteful expenditure of court time and an unnecessary expenditure in legal costs; it could be hardly said to serve the interests of justice. The exercise of the court's inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases."

3.3 The question whether delay in bringing the leave application could be a basis for seeking an order setting aside the leave order was raised in *McD v. the Commission to Enquire into Child Abuse* [2003] 2 I.R. 348. There the Commission established a deadline of 31st July, 2001 for persons who suffered abuse to have an opportunity to recount that abuse. A period of grace was added up to 10th August, 2001. The applicant sent in his application on 23rd August, 2001, and it was refused on the basis that it was out of time. On 24th June, 2002 the applicant was granted ex parte leave to seek judicial review of the refusal. The Commission applied to set aside the leave order. At p. 364 Ó Caoimh J. stated:-

> "It is important to note that this court is not concerned with the merits of the applicant's case for judicial review insofar as it has already been determined that he has established an arguable case in regard to the impugned decision.
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> …
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> I am satisfied that delay in applying to the court for leave can constitute a ground upon which leave will be refused and I am also satisfied that it may be a central factor in an application such as this. However, in light of the observations of Denham J. in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190, I am satisfied that while delay of itself may not be sufficient for this court to set aside an order granting leave, it is a matter that may be addressed in light of other circumstances in the case."

In setting aside the leave order in that case Ó Caoimh J. had regard to the fact that the case related to the application of a time limit legitimately set by the Commission, and with which the applicant had failed to comply.

3.4 In *De Róiste* the Supreme Court was concerned with O. 84, r. 21 of the Rules of the Superior Courts which requires that an application for judicial review be made promptly and in any event within three months from the date when the grounds for the application first arose, or six months where the relief sought was *certiorari*. Denham J. (as she then was) makes a number of general observations on judicial review and delay, and the extension of time, from p. 203 of the judgment. The onus was on the applicant to show that he had made the application promptly and within the time limit. She observed (p. 203) that:

> "The conditions are not rigid as judicial review is a discretionary remedy. There remains in the court an inherent discretion to be exercised according to the requirements of justice in the circumstances of each case."

At p. 204 she stated:-

> "This concept of delay is analysed from both the procedural and substantive aspect. The court in exercising its discretion goes further than a merely procedural analysis. In this case there are no statutory limitations and the court exercises its full discretion."

3.5 The same general discretion under O. 84, r. 21(1) governed the decision of Ó Caoimh J. in *McD v. the Commission*. To that extent the present case is different because there is a statutory time limit of eight weeks prescribed by s. 50(6) of the Planning and Development Act 2000 (as amended), and a further statutory provision in s. 50(8) prescribing the circumstances in which the court may extend time for a party to bring an application for leave to seek judicial review. As will be seen later in this judgment, the courts have taken a stricter view in relation to this eight week time limit and the approach that the courts should take in determining whether or not to extend time. Accordingly the applicant's reliance on *McD* and *De Róiste* to the effect that delay of itself could not be sufficient to set aside the order granting leave and was merely a matter to be considered in the light of other circumstances of the case, does not apply, or at least not with the same force, in the context of judicial review of planning applications.

3.6 Accordingly I have come to the conclusion that a court may set aside an order granting leave to seek judicial review in a planning case where time was extended where the delay of *itself* is significant or egregious, and particularly where the delay has led to actual prejudice. However, the court accepts the overarching principle that an order to set aside should not be made unless the leave was one which plainly should not have been granted. The court also accepts that this is a jurisdiction that should be exercised sparingly for the reason advanced by McGuinness J. in *Adam*.

3.7 The court therefore approaches these motions on the basis that the onus is on the moving party respondents to satisfy the court that the application for leave to seek judicial review was out of time, and that the order of Humphreys J. extending time was so plainly incorrect that it should be set aside.

4 Relevant Provisions of the Planning and Development Act 2000 (as amended)

4.1 The impugned determinations of the second and third named respondents were made pursuant to s. 5 of the Planning and Development Act 2000 (as amended) ("the 2000 Act"). This is the provision under which an application may be made to a local planning authority for a declaration as to whether or not a development is exempted from the requirement of planning permission or approval under the 2000 Act. Section 5 so far as relevant provides:-

> "(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.
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> (2) (a) Subject to paragraph (b), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under *subsection (1)*, and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.
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> (b) A planning authority may require any person who made a request under *subsection (1)* to submit further information with regard to the request in order to enable the authority to issue the declaration on the question and, where further information is received under this paragraph, the planning authority shall issue the declaration within 3 weeks of the date of the receipt of the further information.
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> (c) …
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> (3) (a) Where a declaration is issued under this section, any person issued with a declaration under *subsection (2)(a)* may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

(b) Without prejudice to *subsection (2)*, in the event that no declaration is issued by the planning authority, any person who made a request under *subsection (1)* may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under *subsection (2)*.

(4) …

(5)The details of any declaration issued by a planning authority or of a decision by the Board on a referral under this section shall be entered in the register."

4.2 Section 4 of the 2000 Act in subs. (1) stipulates certain exempted developments, and under subs. (2) the Minister is empowered by regulation to provide for "any class of development to be exempted development". Subsection (4) is relevant to these proceedings and provides:-

"(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

4.3 It is of the essence of the applicant's challenge to the s. 5 references, which relate to the development of the grid connection for the proposed Grousemount wind farm, that they required environmental impact assessments (EIA) and/or appropriate assessment (AA) (of adverse effect on Special Areas of Conservation, or on habitats and/or species protected under under the Habitats Directive in candidate Special Protection Areas). The applicant complains that neither EIA nor AA were carried out by the second or third named respondents before making their declarations on 6th May, 2015 and 1st April, 2015 respectively, and criticises the 'screening out' of any requirement for EIA or AA.

4.4 Under s. 7(1) of the 2000 Act a planning authority is required to keep a register, and under subsection (2) it must enter in that register *inter alia*:

"(h) particulars of any declaration made by a planning authority under section 5 or any decision made by the Board on a referral under that section".

4.5 This is the only act of publication required by the 2000 Act in respect of s.5 declarations. It does not require publication by advertisement or site notices of the making of an application for a declaration, and there is no provision requiring or permitting public participation in the decision making process. The planning authority "may request other persons e.g. an adjacent owner or occupier, to submit information". The planning authority must, where the owner or occupier is not the applicant for a declaration, issue it's declaration to the owner and occupier of the land in question. Apart from these provisions the process, at least until a declaration is issued, is private to the applicant for the declaration and the relevant planning authority, and only achieves publication in the limited form of being placed on the local planning authority register under s. 7 if and when the declaration of exemption issues.

4.6 Secondly the category of party who have a right to appeal a declaration, or refusal of a declaration, appears to be limited to:-

(1) The applicant for the declaration;

(2) The owner of the land in question;

(3) The occupier of the land in question.

as these are the only parties coming within the phrase "any person issued with a declaration".

5 Section 50

5.1 The challenge to the decisions of the second and third named respondent in respect of the s. 5 declarations fall within s. 50(2)(a) of the 2000 Act insofar as they are challenges to a decision made or other act done by *"(a) a planning authority, local authority or the Board in the performance of purported performance of a function under this Act."*

5.2 Section 50(6) of the 2000 Act prescribes the time for bringing an application for leave to apply for judicial review:-

"Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board as appropriate".

5.3 An extension of time may be granted by the court subject to the requirements set out in s. 50(8) which states:-

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

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

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

5.4 It is common case that the 8 week time limit for challenging the decision of the second named respondent expired on 30th June, 2015, and that time for challenging the decision of the third named respondent expired on 27th May, 2015.

5.5 Accordingly the primary issue that arises is whether, in extending time for making the application for leave to apply for judicial review up to and including 14th September, 2016 in respect of the s. 5 declarations, and in the light of all the affidavit evidence before the court at the *inter parties* hearing, the leave order may be considered to be "plainly incorrect".

6 Construing and Applying s. 50(6) and s. 50 (8)

6.1 Perhaps the most important decision in respect of s. 50 is the oft quoted judgment of Clarke J. in *Kelly v. Leitrim County Council and An Bord Pleanála* [2005] 2 I.R. 404. There the applicant sought leave to seek judicial review *inter alia* of a decision of the Board

relating to the use of its property, which decision was made pursuant to s. 5 of the 2000 Act. However the applicant exceeded the statutory time limit by some nineteen days. He argued that as a consequence of difficult personal circumstances and conflicting advice from Counsel, he had been unable to requisite steps to institute proceedings. Clarke J. refused to extend time. He quoted with approval the judgment of Finlay CJ. in *K.S.K. Enterprises Limited v. An Bord Pleanála and Anor.* [1994] 2 IR 128, where at p. 135 he said:-

> "It is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."

While *K.S.K.* concerned the former provision, which did not provide for an extension of time, Clarke J stated at p410 that:-

> "the broad principle referred to must be equally applicable to s. 50 of the Act of 2000. It should also be noted that provisions broadly similar to s. 50 have been introduced in other areas of administrative or quasi-judicial decision – making in recent times."

At p. 411 Clarke J. added:-

> "For completeness it should be noted that the original absolute time limit provided for in planning matters was the subject of significant constitutional challenge commencing with the decision of Costello J. in *Brady v. Donegal County Council* [1989] I.L.R.M. 282. It was doubtless to meet such constitutional concerns that the discretion to extend such shortened time limits was introduced by amendment into the planning process and also included in the other areas to which similar processes have been applied."

Clarke J. then set out factors which may be considered prior to taken a decision to exercise the discretion to extend time. At p. 411 he stated:-

> "Without being exhaustive it seems to me that the following factors may need to be considered prior to a decision as to whether or not to exercise a discretion conferred to extend time of the type referred to above:-
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> (a) The length of time specified in the relevant statute within which the application must be made…..Obviously the shorter the period of time which a person has to make application to the court, the easier it may be to show that despite reasonable diligence that person has been unable to achieve the time limit.
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> (b) The question of whether third party rights may be affected. It is clear from the passage from *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128 referred to above that one of the matters which the Supreme Court identified in that case as forming part of the legislative intention was that, in particular, a person who had obtained planning permission should be put, within a short period of time, in a position where that planning permission, if not challenged, was absolute. Similarly the clear intention behind the time limits provided for in respect of public procurement matters is that both the public authorities who would wish to get on with the projects which were the subject of the public contract concerned and a successful tenderer for such contract should be entitled to know for certain that the contract can go ahead within a short period of time. It therefore seems to me that the question of whether third party rights might be involved in the late challenge to a decision is a factor which the court is entitled to take into account.
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> (c) However it should be noted that notwithstanding the point made at (b) above, there is nonetheless a clear legislative policy involved in all such measures which requires that, irrespective of the involvement of the rights of third parties, determinations of particular types should be rendered certain within a short period of time as part of an overall process of conferring certainty on certain categories of administrative or quasi-judicial decisions. Therefore while it may be legitimate to take into account the fact that no third party rights are involved, that should not be regarded as conferring a wide or extensive jurisdiction to extend time in cases where no such rights may be affected. The overall integrity of the processes concerned is, in itself, a factor to be taken into account.
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> (d) Blameworthiness. It is clear from all the authorities to which I have been referred in each of the areas to which stricter rules in respect of judicial review have been applied that one of the issues to which the court has to have regard is the extent to which the applicant concerned may be able to explain the delay and in particular do so in circumstances that do not reflect any blame upon the applicant. However in that context it should be noted that McGuinness J. in *C.S. v. Minister for Justice* [2004] IESC 44; [2005] 1 I.L.R.M. 81 at p. 101 said:-
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> "There is, it seems to me, a need to take all the relevant circumstances and factors into account. The statute itself does not mention fault; it simply requires 'good and sufficient reason'. The dicta of this court in the reference judgment quoted earlier indicate many factors which may contribute to 'good and sufficient reason'. By no means all of these can be attributed to fault or indeed absence of fault, on the part of the applicant."
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> While the blameworthiness (or the lack of it) on the part of the applicant is, therefore, a relevant factor it is only one such factor to be weighed in the balance.
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> (e) The nature of the issues involved. Both this court and the Supreme Court in *C.S. v. Minister for Justice* [2004] IESC 44; [2005] 1 I.L.R.M. 81 seem to have had regard to the severe consequences of deportation to a State where fundamental rights might not be vindicated. The consequences of being excluded from challenging a planning or public procurement decision, while significant, are not in the same category.
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> (f) The merits of the case. Some considerable argument took place during the course of the hearing before me as to whether the merits of the case in the sense of whether the applicant had established an arguable case was a factor which could properly be taken into account. In favour of that proposition reliance was placed upon the judgments of the Supreme Court in *G.K. v. Minister for Justice* [2002] 2 I.R. 418 in which Hardiman J., at p. 423, delineated the approach to applications for extension of time as follows:-
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> "On the hearing of an application such as this it is, of course, impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of

an arguable case. In addition, of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed."

6.2. It has also been recognised that the time limit of 8 weeks is strict and one in respect of which the power to grant an extension is also to be strictly construed. In *Irish Skydiving Club Ltd. v. An Bord Pleanála* [2016] IEHC 448 the applicant sought to challenge a s. 5 referral declaration in which the Board declared that the use of the Kilkenny airfield for sponsored parachute jumping was a development and not an exempted development. The decision of the Board was made on 14th January, 2015 and leave was given by Eagar J. on 27th March, 2015, some 17 days outside the prescribed period. The issue of delay was raised by way of preliminary objection which was determined by Baker J. at a modular hearing. She refused to make an order enlarging the time. In her judgment she explored the wording in s. 50(8), and the separate and cumulative requirements of subpara. (a) "good and sufficient reason" and (b) "the circumstances that resulted in the failure to make the application for leave within the period so provided where outside the control of the applicant for the extension". She stated:-

> "9. Section 50(8)(a) is a reflection of the inherent jurisdiction of the court to extend time when it considers that good and sufficient reason exists to so do, but sub paragraph (b) of the subsection contains a restriction on the power such that in addition to being satisfied that good and sufficient reasons exists, the court must be satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the applicant.
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> 10. Thus, while the court has a discretion it is required by the cumulative provisions of subs. 8 to consider not merely the interests of justice, or the interests of all of the parties, but whether the applicant for the extension can show on the facts that the delay and the reason why he or she is out of time arose from matters outside his or her control. When a delay arises from circumstances which were within the control of the applicant, the court may not extend.
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> 11. The time limit is strict, and one in respect of which the power to grant an extension is also to be strictly construed."

In support of the latter proposition Baker J. cited with approval a number of cases including *Noonan Services Ltd. & Ors v. the Labour Court* (unreported, High Court, 25th February, 2004) - Kearns J.;. *MacMahon v. An Bord Pleanála & Anor*. [2010] IEHC 431 - *Charleton J; Linehan & Ors. v. Cork County Council & Anor* [2008] IEHC 76 - Finlay Geoghegan J. and more recently, *South-West Regional Shopping Centre Promotion Association Ltd. & Anor. v. An Bord Pleanála & Ors.* [2016] IEHC 84 - Costello J. Baker J. observed at para. 16 of her judgment that "All of these judgments noted the public policy considerations reflected in the imposition of strict and short time limits". Returning to the subject at para. 49 of her decision Baker J. stated:-

> "49. The test that an applicant must meet in an application for an extension of the strict time limits under s. 50(6) of the Act is cumulative and mandatory. The Court shall not extend the time unless it is satisfied that both tests are met …
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> 50. The running of time in judicial review is not based on a consideration of when an applicant became aware of the decision sought to be challenged, and in my view the legislation clearly links the running of time to the making of the decision. The company knew from its search on the website of the Board, at some time during the day on 29th January, 2015, that a decision which it regarded as flawed and serious for its ongoing land use had been made, and at that point in time it knew the date of the decision and the basis for it, which were transparent and obvious from the documents on the website.
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> 51. The public policy interest in strict time limits in planning matters would not be furthered were a party who knew that his or her rights had arguably been breached, and who knew of a decision well within time to bring an application for judicial review, could seek to argue that time began to run only when it had formulated a decision to bring the challenge. The formulation of a decision to bring a challenge is in the normal way one that would be made on legal advice, but the date when legal advice is taken, considered or decided to be adopted, is not and cannot be the date at which time begins to run, and to consider otherwise would be to ignore the very clear language of the subsection which fixes the time limit by reference to the date of the decision, and not either to the date of knowledge or the date when a party impacted by the decision became aware that rights might have been infringed, or the extent to which that person might be successful in bringing a judicial review.
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> 52. What the applicant contends, it seems to me, is for a test which fixes the running of time with not merely the date of knowledge of the making of a decision, but the date at which an applicant, having taken legal advice, comes to a decision to take the risk of commencing the litigation. That assertion has no basis in the authorities."

6.3 In circumstances where the applicant in the present proceedings only became aware of the s. 5 declarations in September 2015, counsel for the applicant appeared to urge on the court that the 8 week period did not begin to run until the applicant became aware of the declarations. That submission is not sustainable in light of the established jurisprudence, which flows from the express wording of s. 50(6) that the 8 week period commences on "the date of the decision or, as the case may be, the date of the doing of the act by the planning authority". Clearly therefore the relevant dates were 1st April, 2015 and 6th May, 2015 in respect of the third and second named respondents' decisions respectively. It cannot be contended that the 8 week period commenced in September 2015 when the applicant first became aware of the declarations.

6.4 Counsel for the applicant in written and oral submissions further suggested that provided an applicant seeking an extension of time satisfied the requirements of s. 50(a)(b) i.e. satisfied the court that the circumstances which resulted in the failure to make the application for leave within the eight week period were outside of his control, then "There is no requirement for the applicant to justify not moving in any other period." (para. 22 of the applicant's written submissions).

6.5 This argument must fail on the express wording of section 50(8). As Baker J. stated in Skydiving, subclauses (a) and (b) in s. 50(8) are cumulative and mandatory requirements. The requirement "of good and sufficient reason" relates to the reasoning that the court finds satisfactory for extending time over the entire period for which an extension of time is required. It is not a limited by the wording of the subsection to any particular period of time, and in particular is not limited to the period of eight weeks immediately following the impugned decision. To give it such a limited interpretation would be to ask the court to rewrite section 50(8). It is quite clear from a reading of the subsection as a whole that the requirement at (b) is additional, and restricts the generality of the application of the requirement at (a).

6.6 Secondly if the construction contended for by the applicant was correct it would have the result that the court would only look to the eight week period immediately following the decision to ascertain of whether the circumstances resulting in failure to make the application for leave within the requisite period were outside the control of the applicant and whether the same circumstances amounted to good and sufficient reason for not making the application in time. Such a restricted construction was clearly not

intended by the Oireachtas and would have the effect of requiring the Court to disregard all delay by an applicant arising after the expiry of the eight week period in assessing whether those good and sufficient reasons for extending time were in existence. This could lead to absurd results, and would be a licence to a party aggrieved by an unlawful and planning decision to sit on their rights.

6.7 In pursuing this submission counsel argued that the phrase "the High Court may extend the period …" indicates that the High Court has a general discretion to extend time, and that the following phrase "but shall only do so if it is satisfied that …" is merely indicative of a threshold that the applicant must reach. I find this unpersuasive and in conflict with the plain wording of the subsection read as a whole, and the principle that the requirements of (a) and (b) are cumulative.

6.8 The applicant seeking an extensive of time must therefore firstly satisfy the court that the circumstances that result in the failure to make the application for leave within the period of eight weeks were outside of his or her control. Thereafter the applicant for extension must satisfy the court that there is good and sufficient reason for an extension. This phrase requires that the reason be both "good" and "sufficient". Moreover it is incumbent on the applicant to satisfy the court that such good and sufficient reason encompasses the entirety of the period from the expiry of the eight weeks up to the date upon which the leave application was made in the High Court, or at any rate the date upon which the leave papers were lodged in the Central Office.

7 Chronology and Relevant Facts
7.1 On 4th March, 2015 the notice party ESB International applied to the third named respondent for s. 5 declaration that works comprising the installation of a new 110kv underground cable circuit (UGC) to form a link between the existing Ballyvouskill 220/110kV substation and the permitted, but not yet built, substation at Coomtaggart 110kV constituted exempted development. On the same day the notice party made a similar application to the second named respondent for a s. 5 declaration in respect of that portion of the grid connection works located within the functional area of Cork County Council. The UGC was proposed to be installed primarily along the public road network over a distance of approximately 29.5 kilometres from the existing Ballyvouskill substation to the proposed and permitted Coomtaggart Wind Farm, with an additional 1.3 kilometres along a permitted access road to the planned (but not yet permitted) Grousemount Wind Farm. The design provided for the provision of ducting within the road structure, inside which the cables would be installed. The proposed development included joint bays, representing junctions along the extreme ends of the route connection, and through which the cables are subsequently pulled. The development would involve excavation of trenches approximately 0.6 metres wide and 1.2 metres deep, to accommodate ducting 0.6 metres wide. The proposal also provided for horizontal drilling for the purpose of traversing beneath water courses in the bedrock or substratum. In totality the grid connection proposed was 30.8 kilometres, with joints/access points every 3/4's of a kilometre of so. The bulk of the grid connection development proposed was to be in Co. Cork.

7.2 As is apparent from the application to the second named respondent, the application was accompanied by a number of documents supportive of the application and claiming that it came within Class 26 and Class 16 of the Planning and Development Regulations 2001 (SI. No. 600 of 2001) (as amended). Class 26 development is "the carrying out by any undertaker authorised to provide an electricity service of development consistent of the laying underground of mains, pipes, cables or other apparatus for the purpose of the undertaking". Accompanying the application were a number of reports, including:-

(1) UGC Construction Methodology Report

(2) Traffic Management Report

(3) AA Screening Report

(4) Ecology Reports (Terrestrial & Aquatic)

(5) EIA Screening Report

(6) Cultural Heritage Report.

7.3 Having obtained its own internal reports the second named respondent sought further information by letter dated 7th April, 2015. The first query concerned the potential for the works to give rise to a negative impact on the Mullaghanish to Musheramore SPA, and particular concern over the possible disturbance of Hen Harrier breeding. The second concern was the potential for the works to negatively impact on St. Gobnet's Wood SAC, and in particular salmon and fresh water pearl mussel species and habitats, with an expressed concern that "in relation to the Sullane river, it is noted that there would be significant risk of adverse impacts on the population of Freshwater Pearl Mussel in this river if it was required to cross this river using open trench technology. This could arise if it is determined that conditions are not suitable for Horizontal Directional Drilling." The third query related to the possibility that consent might be required from the Department of Arts, Heritage and the Gaelteacht, and a deregulation license from the National Parks and Wildlife Service in relation to any possible disturbance of the breeding site or resting place of strictly protected species such as otter. The second named respondent replied to each of the points raised by letter dated 13th April, 2015, confirming that it had commissioned a qualified Ecologist to complete Hen Harrier breeding season monitoring within the SPA prior to work on the grid connection within the SPA, confirming that an Ecological Clerk of Works would be appointed with particular reference to the crossing of the Sullane river for the duration of the works, and that the Horizontal Directional Drilling for crossing that river would be the technique implied.

7.4 The third named respondent did not raise a request for information, but obtained reports from its own County Archaeologist, it's Biodiversity Officer and a Planner's Report. The Biodiversity Officer report undertook a screening for the purposes of the Habitats Directive and opined that Appropriate Assessment was not required. The Planner's Report concluded that an EIA was not required, and recommended that a declaration be granted to the effect that the proposed works were development which was exempted development.

7.5 On 1st April, 2015 a s. 5 declaration issued from the third named respondent to ESB confirming that the construction of the UGC constituted development which is exempt development.

7.6 On 6th May, 2015 the second named respondent made a similar declaration of exempted development by reference to "the information and plans submitted by you on the 9th March and 13th April, 2015", and added:-

> "Please note that any material departure from the external finish as submitted may remove the development from the Exempted category and require the submission of an application for Permission under the Act.
>
> *This exemption does NOT itself empower a person to carry out a development unless that person is legally entitled to do*

so."

The Declaration sets out the documentation considered and the second named respondent's various conclusions including that the laying of the UGC was a type of development coming within Class 26, that the area to be excavated in that field comprised substantially of an existing road network area of the SPA and that the area subject to the works would be substantially returned to it's pre-existing state after completion; that the laying of the underground cable would have "no significant effect, in terms of disturbance of habitats or species, on the ecology of the proposed Special Protection Area or Special Area of Conservation"; and that the provisions of Article 9(1)(a)(vii) of the Planning and Development Regulations 2009, as amended – which has the effect of restricting what would otherwise be exempted development if it consists of certain described works of excavation – had no application.

7.7 On 7th September, 2015, the notice party lodged its application with the strategic infrastructure division of the Board for approval of the construction of a Wind Farm at Grousemount, Co. Cork and Co. Kerry (PL08.PA0044). This application was made pursuant to s.37E of the 2000 Act.

7.8 Notwithstanding the s. 5 declarations the applicant asserts that both EIA and AA were required in relation to the grid connection. He further asserts that insofar as s. 5 of the 2000 Act does not require public notification, and gives the public no opportunity to participate, this is contrary to fair procedures and natural justice and is contrary to European law and the Aarhus Convention, and that in particular the provisions violate the public participation provisions of the EIA Directive 2011/92/EU, the Birds Directive 2009/147/EU, the Habitats Directive (Directive 92/43/EEC), and the Public Participation Directive 2003/35/EC.

7.9 In the affidavit sworn by the applicant on 12th September, 2016 in support of his application for leave to seek judicial review he avers that he only became aware of the fact of the s. 5 reference during the course of the application to An Bord Pleanála but "… I was already outside of the 8 week period to commence judicial review" (para. 21). He elaborates on this in a further affidavit sworn on 2nd December, 2016 in response to the respondents' applications to set aside the leave order. At para. 4 he says:-

> "I say that I initially became aware of this development when it was listed on the AnBordPleanála website. I say that the application was lodged in AnBordPleanála on 7th September, 2015 and appeared in the weekly list on the 16th September, 2015."

7.10 On 17th September, 2015 the applicant emailed the second named respondent requesting a web link for the s. 5 file. This was misdirected and a further request was made by him on 23rd September, 2015. On 25th September, 2015 the second named respondent acceded to his application but as the papers had not been "scanned in" it was necessary to send on photocopies. Copies of the entire file D.215.15 were duly forwarded to the applicant on 8th October, 2015.

7.11 On 12th October, 2015 the applicant sought to appeal to An Bord Pleanála the s. 5 declaration made by the second named respondent on 6th May, 2015.

7.12 The Board by decision dated 19th October, 2015 decided that the purported appeal of the applicant was invalid pursuant to s. 127(1)(g) of the 2000 Act (as amended), which requires that an appeal or referral be made within four weeks. The question of whether the applicant had any locus standi to appeal to the Board does not appear to have been addressed but at any rate is not given as a reason for rejecting the appeal.

7.13 The applicant did not attempt to appeal the s. 5 declaration of the third named respondent. The applicant however wrote to Kerry County Council on 12th October, 2015 requesting that he be supplied with that Council's entire file in respect of the s. 5 reference EX392. By letter dated 11th November, 2015 the third named respondent refused his request but stated:-

> "I am advised by the Planning Department that they do not scan section 5 declarations and therefore they are not available for perusal on their website. However, the information you are looking for is available to view in our Planning Department, Kerry County Council, by appointment, 066 718 3582. The office is open from 9:00a.m. to 5:00p.m. Monday to Friday excluding Bank Holidays.
>
> They further advise that a copy of the Planners Report can be supplied but there may be copyright issues relating to documents submitted by the applicant."

7.14 On 29th October, 2015 the applicant lodged a one page observation/submission in relation to the Wind Farm application stating:-

> "The Environmental Impact Statement for this development states on page 1 of the NTS.
>
> *Planning Permission (Ref. 15/262) for Coomtaggart Substation was granted by Kerry County Council in August 2015. Kerry County Council (Ref. EX392) and Cork County Council (Ref. D215.15) have separately declared for the portions of the cable route in their area that it constitutes exempt development, meaning that a requirement for planning permission in accordance with the Planning and Development Acts does not arise.*
>
> The application and the Environmental Impact Statement do not include the grid connection making the application and the Environmental Impact Statement invalid."

7.15 It appears from paras. 19 and 20 of the further affidavit of the applicant sworn on 2nd December, 2016 that at some point he sought legal advice in relation to the possibility of challenging the s. 5 referrals, and consulted with a solicitor. While not expressly stated as to when this consultation took place, it is at least implicit that it occurred in or about October or November 2015. Thus in para. 30 he states that:-

> "In the circumstances, I felt the correct thing to do was to make a submission to the Board and await that determination on the substantive development"

and in para. 31 he states:-

> "I believe that had I tried to commence these proceedings in or about November 2015, some 4 to 5 months after the decisions had been made, I would have been met with the argument that I was then out of time and also premature …"

7.16 On 21st July, 2016 the Board granted permission to the notice party for the Wind Farm development.

7.17 On 14th September, 2016 and within eight weeks of the decision of the Board, the applicant applied for leave to seek judicial review. Insofar as the applicant as his first relief seeks an order of *certiorari* quashing the decision of the Board in respect of the construction of the Wind Farm, his application was not out of time, and regardless of the outcome of these motions the applicant is entitled to pursue that challenge at the substantive hearing.

7.18 From the forgoing it may be concluded that the applicant became aware of the s. 5 declarations that the grid connections were exempt at some point in time between 7th September, 2015 and 17th September, 2015 when he requested a copy of the second named respondents s. 5 declaration file.

8 Evidence of Notice Party/ESB reliance on the s.5 Declarations

8.1 In affidavits sworn by Mr. John Kelly on behalf of the notice party, the contents of which are not disputed by the applicant, facts which it is said to give rise to prejudice by reason of the delay in seeking leave are set out. In his first affidavit sworn on 10th October, 2016 Mr. Kelly refers to the intended operating company, Kerry Wind Pallas Ltd., having applied for acceptance of the Wind Farm into REFIT 2 (Renewable Energy Feed in Target), operated by the Department of Communications, Energy and Natural Resources, which provides a feed-entire support scheme in respect of guaranteeing renewable generators with a minimum price of electricity delivered to the grid over a fifteen year period. That applicant company is a wholly owned subsidiary of the ESB. There are conditions attached to the REFIT 2 Scheme that must be complied with, including executing a Power Purchase Agreement with a licensed supplier, entering into a grid connection agreement with an appropriate system operation, obtaining authorisation to construct and a license to generate from the Commission for Energy Regulation, and obtaining planning permission.

8.2 The documentation, and in particular the grant of planning permission and grid connection agreement were required to be submitted before 31st December, 2016. Mr. Kelly deposes to the fact that since March 2016 the Grousemount Wind Farm has had the benefit of an agreed grid connection offer from EirGrid plc., but it is necessary for the notice party to have certainty in respect of the lawfulness of the permission granted by the Board at the earliest possible date. Furthermore the REFIT 2 deadline for commencement of significant construction works is 31st December, 2017. In addition to the importance of avoiding delay Mr. Kelly emphasises the significance of the development which is expected to generate in excess of 110MW making it one of Ireland's largest renewable energy projects. At para. 19 of his affidavit he says that the Grousemount Wind Farm represents an overall investment by the notice party in the order of €200 million in renewable infrastructure, of which some €20 million had already being expended. In para. 20 he states:-

> "It is envisaged that this project will create between 80 and 100 construction jobs and a smaller number of permanent jobs once the Wind Farm becomes operational".

8.3 In his second affidavit sworn on 17th November, 2016 he expands on these matters but more particularly refers to works already carried out on the grid connection:-

> "19. I say and believe that, in circumstances where there was no challenge to the validity of the decisions made by either planning authority to make section 5 declarations within the eight-week period provided by statute, the Notice Party's contractors commenced certain construction works in respect of the 31 kilometre grid connection development in March 2016.
>
> 20. As at 18th November, 2016, approximately 6850 metres of ducting has been installed on that portion of the grid connection route located in the functional area of Kerry County Council. The total length of the ducting to be installed in the functional area of Kerry County council is 7250 metres. It is intended that the remaining 400 metres of ducting will be installed in early 2017. In relation to the section of the grid connection route located in the functional area of Cork County Council, as at 18th November, 2016 approximately 800 metres of ducting has been installed, with the remainder planned for installation at end of 2016 and during 2017. The total length of the ducting to be installed in the functional area of Cork County Council is 23550 metres."

The court was informed by counsel for the notice party that this work of installation of the grid connection has been ongoing since Mr. Kelly swore his second affidavit.

9 The legal basis for the challenge to the impugned decisions and s.5 of the 2000Act

9.1 As the 'merits' of the challenge to the impugened decisions is a factor to which the court should have regard when considering an extension of time it is appropriate to mention these briefly. In doing so this court does not seek to review the leave decision in so far as the leave judge has already determined that there are "substantial grounds" (s.50A(3) of the 2000 Act).

9.2 The legal basis for the applicant's challenge to the validity of An Bord Pleanála's determination to grant planning approval for the Wind Farm is the decision of Peart J. in O *Grianna and others v. An Bord Pleanála and others* [2014] IEHC 632. That case concerned the Board's determination to grant permission in respect of a wind farm comprising some six wind bind turbines and associated buildings, but the proposed development did not include the grid connection, detailed plans for which were not yet known. The applicants asserted that the Wind Farm and its grid connection were together one project and that the entire project should have been screened/assessed for EIA and AA. At para. 27 of his judgment Peart J. states:-

> "27. I am satisfied that the second phase of the development in the present case, namely the connection to the national grid, is an integral part of the overall development of which the construction of the turbines is the first part. … The wind turbine development on its own serves no function if it cannot be connected to the national grid. In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the Directive."

9.3 The applicant contends that the grid connections for the Grousemount Wind Farm, being an integral part of the project, should have undergone EIA/AA screening and assessment by the Board and he contends that this did not happen. At Ground 12 of his Statement of Grounds he contends that "similarly, the works required for the grid connection also require AA and EIA", and that accordingly the determinations made under s. 5 by the second and third named respondents are wrong in law. The applicant asserts that as a matter of fact and circumstance the screenings undertaken by the second and third named respondents were incorrect and that EIA and AA were required in respect of the consideration of the s.5 references.

9.4 He contends that by adopting a two stage approach – s.5 referrals for the grid connections, and s.37A for the windfarm approval – there was so-called project-splitting contrary to EU law.

9.5 As to his challenge to the validity of s. 5 of the 2000 Act under European law, he further pleads in his Statement of Grounds as

follows:-

> "13. The procedure under s. 5 of the Act does not require public notification and the public concerned, including the applicant herein has no opportunity to participate in the decision making. Similarly, the public is not notified of the decision and/or of any right to take judicial review. This is contrary to fair procedures and natural justice. In particular having regard to the within referral, concerning exclusively whether or not an EIA or an AA is required, the provisions of the EIA and the Public Participation Direction and the Aarhus Convention require that the public be given an opportunity to participate in such decision making. This is not permitted or facilitated under the provisions of section 5. Accordingly, the said section is contrary to European law."

10 Summary of Facts relevant to an extension

10.1 The applicant in his affidavits gives a number of reasons which it is claimed justify the extension of time for challenging the s. 5 declarations and s. 5 itself. The respondents and notice party brought further facts to the courts attention. The factors raised by the applicant may be summarised as follows:

> (1) That he only became aware of the fact of the s. 5 references during the course of the application by the notice party to the Board, whereupon he wrote to the Board on 12th October, 2015 seeking to appeal the second named respondent's s. 5 declaration. He points out that he was already outside of the eight week period for seeking judicial review of the s. 5 declarations at that point in time.
>
> This is the only basis for extension of time raised in the applicant's first affidavit of 12th September, 2016, and accordingly was the only factual basis for an extension of time presented to the leave judge.
>
> The following further reasons appear from the affidavit that the applicant swore on 2nd December, 2016 in response to the applications to set aside:
>
> (2) He points out that s. 5 referrals are not advertised or otherwise notified to the public and that he had no way of knowing of their existence, or of the determinations. He asserts that there are a great many s. 5 referrals to planning authorities and it would not be logistically possible to track all such referrals or determinations by attending at the public counters in thirty-one planning authorities.
>
> (3) He only received the second named respondent's s. 5 file with their letter of 8th October, 2015.
>
> (4) He was not furnished with the third named respondent's file.
>
> Having regard to his age (74) and condition (he suffers from a back and leg injury and does not drive) and the fact that he lives in North Mayo, it was not "in order for me to inspect the public file in Kerry".
>
> (5) He also says that his income is limited to the old age pension and he would not have the resources to spend on hotel rooms and photocopying fees. He considered appealing the determination of the third named respondent but "at the time, I did not have the necessary fee".
>
> (6) He considered that he had two alternative remedies:-
>
> (a) Appeals to the Board in respect of the s. 5 declarations; and
>
> (b) The substantive planning application of the notice party which was then being considered by the Board.
>
> He did in fact attempt to appeal the second named respondent's s.5 declaration but was out of time.
>
> (8) He sought legal advice in relation to the s. 5 referrals and to the possibility of obtaining an extension of time to judicially review same. This appears to have been in or about November 2015. The advice received was that the s. 5 declarations related to development that was part of the overall Wind Farm project, and that following the *O'Grianna* decision the grid connection could not be divorced from the Wind Farm; that the Board would have to approach the application before it in the light of *O'Grianna*; and that any judicial review proceedings brought (at that time) against the s. 5 declarations "would be likely to be considered premature pending the determination of the Board".
>
> (9) That he did seek to appeal the s. 5 declaration of the second named respondent, but the appeal was rejected as having been made outside the permitted time.
>
> (10) That he believes that the Board is the competent authority obliged to take all measures to remedy the failure to carry out assessment of environmental effects of the project as a whole, and he expected that the Board would rectify what he suggests were deficiencies in the consideration of the s. 5 referrals.
>
> 10.1 The respondents/notice party on their part emphasise:
>
> (a) The length of delay – of over one year.
>
> (b) That the applicant was aware of the time limit for bringing judicial review proceedings, and was therefore aware that the eight week period had expired in respect of the third named respondent's s. 5 declarations on 26th May, 2015, and in respect of the second named respondent's s. 5 decisions on 30th June, 2015. He confirmed that having been involved in many judicial review cases he is fully aware of this eight week time limit. He does not dispute the averment of Mr. Kelly to the effect that he has been a party in over thirty separate judicial review proceedings.
>
> (c) The applicant having become aware of the s.5 Declarations failed to seek leave promptly.
>
> (d) Having received legal advice the applicant still failed to seek leave, and sat on his rights. The fact of having sought legal advice was not, but should have been, brought to the attention of the leave judge.
>
> (e) The notice party acted on foot of the s.5 declarations and would suffer actual prejudice if the time extension were to

be confirmed. The second and third respondents would suffer general prejudice in that its s.5 declarations in general would be at risk of late judicial review after the period of 8 weeks had elapsed.

11 Discussion

11.1 Section 5 does not require that there be any public notification of a referral, and there are no statutory consultees, and no right of the public to participate. The evidence that the applicant was unaware of the s. 5 referrals, or the declarations of exemption made on 1st April, 2015 and 6th May, 2015, until some date in September 2015, was not contested. The absence of notification or publication in the circumstances meant that the applicant could not have, and could not reasonably be expected to have, known about these declarations.

11.2 On these facts it is clear that the applicant satisfied the test at s. 50(8)(b) namely that the circumstances that resulted in his failure to make an application for leave to seek judicial review of the s. 5 declarations within the period of eight weeks from the date of those declarations "were outside the control of the applicant for the extension".

11.3 The court must then consider s.50(8)(a). The onus is on the applicant seeking an extension of time to demonstrate "good and sufficient reason" for such extension covering the entire period at least up to the date that papers seeking leave were lodged on 14th September, 2016. The court approaches this aspect upon the basis that the applicant first became aware of the referrals and declarations at some point between 7th and 17th September, 2015. At that stage the applicant became aware that the referrals related to the grid connection, and that declarations of exemption had been made. He must also be taken to be aware at that time that the exemptions necessarily meant that each local planning authority was determining that EIA and AA were not required – this follows because as a matter of law as s.4(4) of the 2000 Act provides that no development that requires EIA or AA can be exempted development.

11.4 The applicant was well aware that he was already outside of the time limit for bringing judicial review of the s. 5 declarations. Such was his familiarity with planning law that he was also familiar with the requirements for seeking an extension of time under section 50(8). This is a factor that this Court is entitled to take into account. It was incumbent on him to act promptly from the time he became aware of the declarations. In a case that bears some similarity to the present one, Bracken v Meath County Council [2012] IEHC 196, Birmingham J dismissed judicial review proceedings initiated by the applicants and seeking to review s.5 declarations of exemption which they only became aware of some six months on. He held:

> "18. Turning to the substantive issue, in this case the applicants were completely unaware of the declaration that has been made until the 17th November, 2011. In the circumstances of this case and, in particular, given the history surrounding the development which had seen Circuit Court proceedings commenced by the applicant's late mother and compromised, there can be no question of the applicants being out of time and refused an extension, before they were aware of the declaration. However, once they learnt of the Declaration of Exemption it was incumbent on them to move with all possible expedition. This they singularly failed to do. I find the explanation of waiting for a replying affidavit in the Circuit Court proceeding quite unconvincing. In mid/late November the applicants found themselves affected by a decision made more that six months earlier. If they were to succeed in mounting a challenge, no further time could be lost, but instead further time was allowed to pass, including approximately five weeks after the replying affidavit was delivered in the Circuit Court.
>
> "18.[sic] In my view the good and substantial reasons which would have justified extending time ceased to have effect around the 8th December or thereabouts and thereafter there were not good and substantial reasons in existence justifying an extension of time. Moreover, from a date fairly shortly after the 17th November, 2011 it was very plainly, to echo the language of Hardiman J., not the situation that the failure to commence judicial review proceedings was due to circumstances beyond the applicant's control. Far from that being the case, the applicants, on their own account, consciously and deliberately decided to defer action."

11.5 It may be said that to have attempted to challenge the s. 5 declarations without first reviewing the s. 5 referral files might have been inadvisable. Having regard to the lapse of time it was incumbent on the applicant, if intending to pursue judicial review, to obtain and review those files "with all possible expedition". He did this with the second named respondent, and was in a position to consider their file on or shortly after 8th October, 2015. At that point in time he was or ought to have been in possession of such planning authority information as he might have required to seek leave of the court to challenge the validity of that decision. He did not do so.

11.6 The third named respondent declined to send him a full copy of their file but did proffer the Planner's Report. There is no evidence that the applicant took up that offer, and it could have been sent to him in the post. Quite possibly that report would have given him sufficient further information to launch proceedings. He has only himself to blame for that omission. They also offered inspection, and again the applicant did not take up that offer – he says for logistical/financial reasons.

11.7 The court cannot accept as "good or sufficient" reason the personal or financial difficulties raised by the applicant in terms of inspecting the third named respondents s. 5 file, or commencing proceedings in 2015. This is particularly so in the case of this applicant who avers that he has an interest in renewable energy and wind farm developments, and a particular interest in the protection of habitats and wild flora and fauna, and professes concerns that Irish planning decision-making complies with the European legislation relating to EIA and AA. In the sense that the applicant is geographically remote from the development of the Grousemount Wind Farm and associated grid connection, but chooses to be interested and involved in the planning process related to those developments, he must accept as a possible consequence of that interest or involvement that he will need to inspect local planning authority files, and indeed that he may need to visit and inspect the project location. While, looked at from the applicant's personal perspective, his age, physical condition and financial circumstances may amount to good reason for his delay, it cannot have been intended by the Oireachtas that such personal circumstances would amount to "sufficient" reason for a court to extend time, or at any rate as sufficient to grant anything other than a short extension of time. To decide otherwise would be contrary to the intention of the legislator which, as has been noted, was to confine, in a manner that balances the rights of developers and planning authorities with those of objectors, the opportunity for persons to impugn the validity of planning decisions. It would also be inconsistent with the approach taken by the courts as to the strictness of time limits, and the extension of time limits, in planning judicial review. It is further inconsistent with the fact that the applicant was in a position to take legal advice at that time, and indeed that he was financially and otherwise in a position to commence the present proceedings in September, 2016.

11.8 If, which this court does not accept, the applicant had good and sufficient reason not to commence proceedings in the autumn, those reasons ceased to be valid after he had taken legal advice in or about November, 2015.

11.9 Turning to the first of the two alternative remedies suggested by the applicant, namely appeals to the Board in respect of the s. 5 declarations, the first and obvious point is that he did not appeal the third named respondent's declaration. Secondly his appeals were out of time and it is abundantly clear from s. 5 of the 2000 Act that the board has no power to extend time for appeals. Thirdly as this Court has observed earlier the right to appeal is restricted to "any person issued with a declaration" (s. 5(3)), which in turn is restricted to the person seeking the declaration and the owner / occupier of the land in question (s. 5(2)(a)). Notwithstanding that this was not given as a reason by the board in its refusal to accept the appeal of the second named defendant's s.5 declaration, the applicant does not appear to have had any statutory right to appeal either of the declarations. Whether this is right as a matter of EU law in entirely another matter.

12 Prematurity

12.1 The second "alternative remedy" – really one of prematurity - suggested by the applicant is the substantive planning approval application of the Notice Party which was then under consideration by the Board, and which he asserts could and should have resulted in full EIA/AA of the entire project including the grid connection. The applicant felt, and was so advised in November, 2015, that a challenge to the s. 5 declarations would be premature pending the decision of the Board on the wind farm approval application, and that judicial review is a matter of last resort, and he should await the outcome of the Board's decision – which was delivered on 21st July, 2016.

12.2 In support of the prematurity argument the applicant relied on *O'Grianna*. As has been said, that case on project splitting is central to the merits of his challenge to the Board's decision, and is a ground upon which he obtained leave and which it is not sought to have set aside. However it is necessary to give it some further consideration to assess whether that decision could of itself amount to "good and sufficient" reason to delay any challenge until after the Board's decision.

The circumstances considered by Peart J. in *O'Grianna* were somewhat different. In that case the details of the connection to the national grid were unknown when approval was sought and given for the windfarm. It is correct to say that Peart J. determined that the grid connection was an integral part of the overall development and the construction of the turbines but he carefully stated:-

> "In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the Directive." (para. 27)

He repeats this in para. 28 where he states:-

> "…then in due course when the details of the connection to the national grid are known, a cumulative assessment of the environmental impact of both can be carried out…"

His decision does not go so far as to say that separate EIA / AA of the grid connection must be carried out. Nor does his decision deal with the status of an earlier s.5 declaration of exemption in respect of the grid connection, or the impact of such a declaration on a later application for planning approval.

If the advice to or belief of the applicant in November, 2015 was that this decision bound the Board to carry out full and separate EIA/AA of the grid connection, it was at best an opinion or belief on a matter of the law on which the jurisprudence was unclear or inconclusive. The court notes in passing that in its decision in the present case the Board states:-

> "The Board completed an Environmental Impact Assessment in relation to the proposed development and concluded that, by itself and in combination with other development in the vicinity, including the proposed grid connection route, and subject to the implementation of the mitigation measures proposed, the effects of the proposed development on the environment are acceptable."

In other words it says it carried out a cumulative EIA. Further with regard to AA the Board's decision states that:-

> "In completing the screening exercise, the Board adopted the report of the Inspector and concluded that, by itself or in combination with other development in the vicinity, including the proposed grid connection route, the proposed development would not be likely to have a significant effect on any European Site in view of the Site's conservation objectives, and that a Stage 2 Appropriate Assessment (and submission of a Natura Impact Statement) is not, therefore, required."

It was therefore unsafe and unsound for the applicant in November, 2015 to reserve such right and opportunity as he had at that time to seek an extention of time to seek leave to judicially review the s.5 declarations based on *O'Grianna*.

12.3 Further in that the applicant relies on the legal advice that he obtained in November, 2015 for delaying issuing proceedings, it is a matter of concern to this Court, and one that is raised by the respondents, that this only appeared for the first time in the applicant's second affidavit sworn on 2nd December, 2016, and was not brought to the attention of the leave judge. It is well established that an applicant moving ex parte has an obligation of candour to the court, and to bring to the court's attention all matters that are or could be relevant to its decision. In not disclosing to the leave judge that the applicant had sought legal advice in November, 2015, on foot of which he decided not to seek judicial review of the s. 5 declarations at that time, the applicant was failing to disclose a material fact. This is a further factor that this Court is entitled to take into account in determining the set aside applications, although I do not consider it to be of great importance on this occasion given the applicant's admitted extensive and intimate knowledge of domestic and EU planning law and practice.

12.4 In further support of the 'prematurity' argument counsel for the applicant adverted to a recent decision on the nature and status of a s. 5 declaration. This was considered by the Court of Appeal in *Killross v. ESB* [2016] IECA 207, in the context of a s. 160 injunction application. Hogan J., delivering the judgment of the court held:-

> "27. In my view, it is clear both from a consideration of these authorities and an examination of this question from first principles that the High Court cannot go behind a determination in a s. 5 reference in the course of a s. 160 application. One can arrive at this conclusion for a variety of different – if overlapping - reasons.
>
> 28. First, it can be said that as the planning authorities (or, the Board, as case may be) determined that the works in question represent exempted development, it necessarily follows that no planning permission is required. The logical corollary of this conclusion is that the development in question cannot by definition be 'unauthorised' within the meaning of s. 160 if no planning permission is required so that consequently any such s. 160 application is bound to fail.

> 29. Second, it could equally be said that the s. 160 application represents a collateral attack on the decision of the planning authority, since it effectively invites the Court to re-visit the merits of the issue which had already been determined in the course of the s. 5 determination. This is further re-inforced so far as the present proceedings are concerned, since *Killross* elected to challenge the validity of three of the s. 5 determinations in judicial review proceedings and failed in that endeavour.
>
> 30. Third (and related to it the second argument), could be said that the s. 160 proceedings represents an attempt indirectly to challenge the validity the s. 5 determinations otherwise than by means of the judicial review requirement specified by s. 50 of the 2000 Act."

12.5 This decision is significant and in the court's view tends to support the proposition that in November 2015 the applicant could not afford to risk delaying his challenge. While it might have been thought, before *Killross*, that a s. 5 declaration was no more than a declaration that a particular development was exempt from the requirement of planning permission or approval, it clearly does have a status in itself. It establishes that a particular development is not "unauthorised", and the High Court cannot go behind that, and cannot permit a collateral attack. As the Court of Appeal found, a s.160 application in respect of an "exempted" development is bound to fail. Although not adverted to in *Killross*, because it did not arise, it must logically follow from s. 4(4) of the 2000 Act (which provides that a development cannot be an exempted development if an EIA or AA is required) that the High Court cannot entertain a collateral challenge to a s. 5 declaration on the basis that an EIA or AA is required. The s.5 declaration is a matter that can only be reviewed by appeal to the Board, or by judicial review brought in time in the High Court, and after that it is beyond attack.

12.6 Further it is self evident that the s. 5 declarations of the second and third named respondents were not decisions of the Board, and arose under a different jurisdiction to that invoked by the application to the Board for approval of the Grousemount Wind Farm – a Strategic Infrastructure Application considered under s. 37E of the 2000 Act. The above considerations serve to emphasise the difference between the two applications, the s. 5 references being made to different planning authorities.

12.7 Counsel for the applicant sought to counter this by arguing that the s. 5 declarations were preliminary or administrative acts or decisions leading to the determination by the Board on the Strategic Infrastructure approval application, such as to justify the deferral of a leave application in November 2015. He relied on *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* [2016] IEHC 300, where Humphreys J. refused leave to challenge the validity of an application for Strategic Infrastructure Development which was pending before the Board on the grounds that it was premature. Among the grounds of challenge included was that the application was invalid because it was not lodged by the correct applicant who would fall within s. 182A of the 2000 Act, as carrying out the proposed electricity development, and that the EIS was inadequate. Humphreys J. held the proceedings to be premature stating at para. 213:-

> "213. The challenge of this type must therefore be held to be premature. It may be that development consent will be refused, in which case the applicants will have no further complaint. If the application is granted, and the applicants at that stage wish to pursue judicial review, they will in accordance with the statutory intention have to demonstrate substantial grounds. An interpretation that an approach that the present application is premature serves that statutory purpose and best husbands the resources of the court.
>
> 214. An application of this type must therefore be viewed as premature not just in relation to matters that can be specifically resolved by the decision-maker (in this case, everything other than the challenge to the ministerial designation), but also as to any matters that will be resolved as a matter of practicality by a favourable decision (thus, if the board finds against EirGrid, the challenge to the designation is resolved by being rendered moot)."

Humphreys J. went on to state at para. 239:-

> "(h) Section 50 must therefore be interpreted as meaning that substantive and determinative acts and decisions of a local or planning authority or the board which are not capable of being substantively re-visited in the final decision are the type of acts and decisions to which the section applies. Administrative, subordinate, minor, tentative, provisional, instrumental or secondary steps taken are not acts or decisions to which s. 50 applies. In general therefore, the date on which time begins to run must be taken to be the date of the final decision complained of, although there may be exceptional cases where an interim decision is so substantive and determines rights and liabilities irreversibly and to such an extent as to warrant it being regarded as a decision to which s. 50 applies. Thus only a formal decision having irreversible effects triggers the start of the running of time for the purposes of s. 50.
>
> (i) By way of example, s. 50 has no relevance to decisions such as steps in the pre-statutory process, decisions to accept and process an application, decisions to convene or conduct an oral hearing, or a decision to issue an opinion as to the contents of the environmental impact statement under section 182E."

12.8 In the court's view, by reason of the differences between s. 5 declarations and s. 37E infrastructural applications to the Board, prematurity does not arise in the instant case under domestic law. The s. 5 declarations were subject to a right of appeal to the Board albeit restricted. They were not "administrative, subordinate, minor, tentative, provisional, instrumental or secondary steps" within the Strategic Infrastructural approval process governed by s.37E. As *Killross* demonstrates, they were of significant legal effect, and not capable of challenge or review before the High Court – save by way of judicial review brought in time. They were "formal decision(s) having irreversible effects". Thus they could not be substantively reviewed by the Board. When not appealed within 4 weeks or subjected to judicial review within 8 weeks they became final and binding in their own right, and their correctness could not be revisited by the Board. I therefore accept the submissions by the respondents to the effect that the s. 5 declarations, and the grant of planning approval, were discrete and distinct decisions which were made by different planning authorities exercising different jurisdiction under the 2000 Act and concerning different, albeit related, development. The applicant could not afford to ignore them in November, 2015.

12.9 Counsel for the applicant relied to the same effect on the decision of the House of Lords in *R v. London Borough*, Ex P Burkett [2002] UKHL 23, in support of the contention that he had no obligation to seek review of the s. 5 declarations even after he became aware of them in October/November 2015. There, the court considered the time limits for judicial review in the context of European law. In reference to Council Directive 97/11/EEC (the amending Directive concerning environmental assessment), Lord Steyn stated at p. 1599:-

> "The Directive creates rights for individuals enforceable in the courts …. There is an obligation on national courts to ensure that individual rights are fully and effectively protected: see the Berkeley case, at pp 608D (Lord Bingham of Cornhill) and 618B-H. The Directive seeks to redress to some extent the imbalance in resources between promoters of

major developments and those concerned, on behalf of individual or community interests, about the environmental effects of such projects."

While this may be accepted as a general proposition, that case does not assist the applicant because the House of Lords held that under the law of the UK the planning authority resolution, unlike the s.5 declaration, "…is not a juristic act giving rise to rights and obligations. It is not inevitable that it will ripen into an actual grant of planning permission." This contrasts with the finding of the Court of Appeal in Kilross as to the status of s.5 declarations.

13 EU Law

13.1 Counsel for the applicant also called in aid in case law of the Court of Justice of the European Union, in relation to domestic law time limits for the review of decisions in which the EIA Directives are engaged. Article 11 of Directive 2011/92/EU, so far as relevant, states:-

> "1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> (a) having a sufficient interest, or alternatively;
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
>
> 2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.
>
> 3. …
>
> 4. …
>
> 5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

13.2 Counsel accepted that under this provision, Member States have the freedom to legislate in relation to the time limits applicable to the review of relevant decisions. However, he argued that s. 50(8) lacked a requisite certainty because of its discretionary nature, and that the s. 5 decisions fell foul of the requirement that they did not contain practical information in relation to the appeal procedure, and more particularly, the right to seek judicial review.

13.3 He relied on *Uniplex (UK) Limited v. NHS Business Services Authority* C-406/08. That was a public procurement case in which review provisions in the UK Public Contracts Regulations 2006 required that judicial review proceedings must be:-

> "…brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the court considers that there is good reason for extending the period within which proceedings may be brought".

The court held that this provision gave rise to uncertainty:-

> "41. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made 'promptly' within the terms of that provision.
>
> 42. As the Advocate General observed in para 69 of her opinion, a limitation period whose duration is placed at the discretion of the competent court is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665.
>
> 43. It follows that the answer to the first part of the second question is that Article 1(1) of Directive 89/665 precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly."

13.4 It was submitted that while the eight week period provided for in s. 50(6) was certain and predictable, to interprete s.50(8) as enshrining an additional obligation to act promptly thereafter would not be certain or predictable in its effects.

13.5 *Uniplex* was a case concerned with public procurement. In my view there are differences in the EU and domestic rules and regulations relating to public procurement processes on the one hand, and planning and environmental matters on the other, that are material. Fundamentally, procurement is a contractual process driven by commercial motives, and regulated only to encourage and ensure compliance with free and fair movement of goods and services within the EU. Time limits within a procurement process are usually strict and immutable, or only extendable in the most exceptional circumstances – see for example, this Court's decision in *BAM v. NTMA* [2016] IEHC 546.

13.6 Leaving aside such considerations, *Uniplex* is not authority for the proposition that, once there is a certain and predictable period within which review proceedings must be initiated, any extension thereof that is discretionary is a contravention of Article 11. As counsel concedes, the eight week period in s.50(6) is certain and predictable – unlike in *Uniplex* where, even if proceedings were instituted within the three month period, but were not brought "promptly", they could be held to be out of time. Such a provision was inherently uncertain. Section 50(6) gives certainty to any person aggrieved with a planning decision. If there was no s. 50(8), it may be questioned whether the eight week time limit of itself would infringe EU law. Of course, the absence of any power to extend time under the former provision was held unconstitutional, and led to the enactment of s. 50(8). But the effect of that discretionary power is not one that can be used to cut down the basic period (unlike the UK provision in *Uniplex*) but rather one that can only be used to extend time. It, therefore, exists for the benefit of the applicant, who for reasons outside of his or her control was unable to seek

leave in time, and has good and sufficient reason for an extension.

13.7 Counsel also relied upon the following passage from the judgment of the court in *Uniplex* to support the argument that time only starts to run from the 'date of knowledge':-

"32. It follows that the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see, to that effect, Universale-Bau and Others, paragraph 78)."

However this passage must be read in the context of public procurement. This is apparent from the immediately preceding paragraphs:-

> "30. However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject matter of proceedings.
>
> 31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."

13.8 Section 50(8) clearly allows the court to consider when the applicant for judicial review of a planning decision first became aware or ought to have become aware of the impugned decision. As found in Skydiving the eight week period does not commence on the date of knowledge. However, it is of essential relevance to the exercise by the court of its discretion to extend time in any particular case because the effect of s. 50(8)(b) is that a court considering extending time must consider when the applicant first became aware of the decision where the applicant claims that the access to such knowledge was outside of his or her control.

13.9 The applicant's argument based on *Uniplex* as to uncertainty in the s. 50(6) time limit and the s. 50(8) power to extend time, and the suggestion that time only runs from the 'date of knowledge' must therefore be rejected.

14 Non-notification of right to appeal or to seek judicial review

14.1 Counsel further submitted that the s. 5 declarations did not contain the necessary notification of the right of appeal or right to seek judicial review, and hence that time was correctly extended by the leave judge. Counsel relied on the decision in *Commission v. Ireland* (C-427/07) in which the applicant was entitled to be provided with practical information on how to challenge a planning decision. It is as a result of that decision that such information is now provided by the Board in the form of a judicial review notice accompanying all of its decisions. The court held:-

> "96 As regards the fifth argument, it must be borne in mind that one of the underlying principles of Directive 2003/35 is to promote access to justice in environmental matters, along the lines of the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters.
>
> 97 In that regard, the obligation to make available to the public practical information on access to administrative and judicial review procedures laid down in the sixth paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, amounts to an obligation to obtain a precise result which the Member States must ensure is achieved.
>
> 98 In the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters."

14.2 Based on this, counsel submitted that judicial review notices should have been published notifying the public concerned of their rights to take judicial review in respect of the s. 5 declarations and the time limits applicable.

14.3 This argument goes more to the merits of the challenge to s.5 as infringing EU law, rather than extension of time. Notwithstanding the lack of public notices and notification, the applicant did, in fact, become aware of the s. 5 declarations in September 2015. He also admits that he was aware of the eight week time limit and the jurisdiction of the court to extend time for seeking leave in appropriate circumstances in accordance with s. 50(8). He cannot, therefore, use this argument as one that justifies the extension of time in his case. Had he commenced his challenge within a reasonable time of becoming aware of the s. 5 declarations, he would have stood a reasonable prospect of obtaining an extension of time, and if successful, he could have pursued his challenges to those decisions and to the validity of s. 5 under European law. It is true that the leave judge was satisfied that this ground was substantially arguable sufficient to warrant the grant of leave, but this cannot excuse this applicant for the further delay of nine or ten months before commencing the present proceedings.

15 Gruber

15.1 Counsel for the applicant also placed particular reliance on the decision in *Gruber v. UVK* (C-570/13 of 16th April, 2015). That was a request for a preliminary ruling, and concerned a development consent for the construction and operation of a retail park on land bordering property belonging to Ms. Gruber. The competent Austrian authority had determined at a preliminary stage on 21st July, 2010 that the development did not require EIA. As a neighbour Ms. Gruber raised objections to this on 8th March, 2011, but the development consent issued without prior EIA on 21st February, 2012. She brought an action for annulment of that decision. However, notwithstanding that as a neighbour she had the right to raise objections during the consent procedure, under Austrian law the right to bring an action reviewing the consent decision was reserved to the project applicant, the participating authorities, and the Ombudsman for the environment, and the municipality concerned. The following extracts from the judgment of the court are relevant:-

> "36. Article 11(3) of Directive 2011/92 provides that Member States are to determine what constitutes a sufficient interest or impairment of a right, consistently with the objective of giving the public concerned wide access to justice. In that regard, the second paragraph of Article 9(2) of the Aarhus Convention provides that a sufficient interest or impairment of a right is to be determined 'according to the provisions of domestic law and in accordance with the objective of giving the public concerned wide access to justice'. In compliance with this objective, the implementation of

that condition of admissibility is a matter of national law.

37. It should also be recalled that where, in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness)…"

15.2 Having referred to the relevant provisions of Austrian law, the court proceeded:-

"42. Having regard to that provision's terms, it appears that persons falling within the concept of 'neighbour' may be part of the 'public concerned', within the meaning of Article 1(2) of Directive 2011/92. Those 'neighbours' can bring an action only against a consent granted for the construction and operation of a facility. Since they are not parties to the procedure examining whether an EIA need be carried out, they cannot challenge that decision in the context of an action against the development consent decision. Thus, by restricting the right to bring an action against decisions examining whether an EIA need be carried out in relation to a project only to the project applicants, the participating authorities, the ombudsman for the environment … and the municipality concerned, the UVP-G 2000 deprives a large number of individuals from exercising that right to bring an action, including, in particular, 'neighbours' who may meet the conditions laid down in Article 11(1) of Directive 2011/92.

43. That near general exclusion restricts the scope of Article 11(1) and is accordingly incompatible with Directive 2011/92.

44. It follows that an administrative decision not to carry out an EIA taken on the basis of such national legislation cannot prevent an individual, who is part of the 'public concerned' within the meaning of that directive and satisfies the criteria laid down in national law regarding 'sufficient interest' or, as the case may be, 'impairment of a right', from contesting that administrative decision in an action brought against either that decision, or *against a subsequent development consent decision*." [Emphasis added]

15.3 With due respect to counsel, this decision relates to a different point, not raised in these proceedings, namely the validity of domestic legislation limiting the categories of person who may challenge a preliminary decision screening out the need for EIA, and in particular legislation that prevents neighbours taking that challenge. Such a point might be raised in the context of the limited right of appeal to a s. 5 declaration – rather surprisingly neighbours are not amongst those who can appeal such a declaration to the Board. However, that is not a point taken in these proceedings, and indeed, the applicant who resides in Co. Mayo might not have locus standi to raise such a point. Whatever may be said of the limitations of s. 5, s. 50 does not limit the categories of a person who may bring proceedings by way of judicial review challenging a planning decision, including a declaration under section 5. If the applicant were able to satisfy the High Court that he was entitled to an extension of time within which to seek leave, he would be entitled to challenge the validity of the s. 5 declarations. Gruber, therefore, does not assist him.

16 Third Party Prejudice

16.1 As Clarke J. in *Kelly v. Leitrim County Council* stated, when listing some of the factors that may be relevant to a court considering extending time:-

"…It therefore seems to me that the question of whether third party rights might be involved in the late challenge to a decision is a factor which the court is entitled to take into account."

16.2 This is very relevant in the present case. Had the applicant sought and obtained leave to seek judicial review of the s. 5 declarations in late 2015, he could also have sought a stay or injunction preventing the ESB from carrying out works the subject matter of the declarations i.e. work on the grid connection pending the trial on those proceedings. Even if he had not sought or obtained a stay or injunction, it is unlikely that work on the grid connection would have commenced. At any rate, in the absence of any injunction, or any request that work not commence, that work in fact commenced in March 2016, and progressed apace.

16.3 The applicant still did not seek an injunction notwithstanding averments in the affidavit of Mr. John Kelly sworn on 10th October, 2016, on behalf of the notice party, to the effect, that it was moving forward with the project including the grid connection and negotiations with EirGrid plc in relation to linking to the grid, and that it had a construction programme of some eighteen months, and time constraints in relation to the Refit 2 Scheme.

16.4 In the supplemental affidavit sworn by Mr. Kelly on 17th November, 2016, he deposes to the extent to which ducting had already been laid pursuant to the two s. 5 declarations: at that time approximately 6850m of the ducting due to be installed in Co. Kerry, the total length being 7250m; and 800m within the Cork County Council functional area. In circumstances where there was no challenge to the validity of the s. 5 decisions, the notice party was lawfully entitled to treat the grid connection works as exempted development, and to proceed with the works. In so doing, it is clear that it expended considerable monies – this is part of a €2m overall wind farm/grid connection development – and is commercially obliged to forge ahead in this fashion in order to meet deadlines.

16.5 I am satisfied that there was significant third party prejudice. While this is a factor that was not brought to the attention of the leave judge, there is no evidence that this was due to any lack of candour on the part of the applicant. It may well be that he was unaware that such works had commenced in March 2016, in Co. Cork and Co. Kerry, simply because he was residing in Co. Mayo. Be that as it may, there were, before this Court, significant new material facts relevant to the question of extension of time. It is a very significant factor that this Court takes into account in finding that the applicant is not entitled to an extension of time within which to challenge the s. 5 declarations.

17 The Remedial Obligation

17.1 The applicant further argues that if this Court sets aside the order granting extension of time for leave to seek judicial review in respect of the s. 5 declarations, this Court will be in breach of the general remedial obligation to ensure that there is an effective remedy for breaches of the EIA Directives, and/or failure to carry out AA under the Habitats Directive. It is argued that as s. 5 declarations cannot be revisited by the High Court (*Killross*), they effectively entitle the developer to carry out the development, and therefore constituted development consent for the purposes of the EIA Directives. At para. 59 of his written submission, counsel for the applicant develops this:-

"That being so, the development that will be carried out on foot of the s. 5 declarations will be immune from enforcement. If the applicant is correct and this development requires consent, EIA and AA, then, the development will be carried out in

breach of EU law. Moreover, the fact that this breach or the possibility of the development being carried out without such consent and assessments only crystallised when the Board granted permission without consenting or assessing the grid connection. This is when the breach of EU law in fact occurred, the granting of a consent without assessing the entire development. It is the applicant's case that the State, and this Honourable Court, is under an obligation to remediate breaches of Community law. As no development has yet been commenced, and all of the parties, including the developer are State bodies, this is particularly significant in the instant case…."

17.2 A number of points may be made in answer to this argument. Firstly, it is based on an incorrect factual assumption that the development work had yet to be carried out – as averred to in Mr. John Kelly's second affidavit, the construction work on the grid connection had already commenced as of March 2016.

17.3 Secondly, the submission only serves to emphasise the importance of the applicant moving to seek an extension of time for leave to seek judicial review as promptly as possible after the expiry of the eight week period from the making of the declarations, and after he had become aware of them in September 2015.

17.4 Thirdly, the applicant has obtained leave to challenge the validity of the Board's approval. As part of that substantive challenge, it remains open to the applicant to argue that the Board's decision infringes the obligation to remediate breaches of Community law.

17.5 Were this Court to decide otherwise, it would mean that s. 5 declarations could be subjected to judicial review many months, if not years, after the time permitted for judicial review or any reasonable extension that might be allowed under s. 50(8) has expired, purely on the basis of a remedial obligation. This is emphatically not what the Oireachtas provided in the 2000 Act, nor is it how the Irish courts have consistently construed and applied s.50(8). Article 11 of the Directive, in giving Member States the power to legislate for effective review procedures, cannot have intended the remedial obligation to have such an over-arching effect. In the present case by the time leave was granted in September 2016 well over one year had elapsed from the date of expiry of the eight week period. The applicant simply cannot circumvent the fact that he sat on his rights for a period of some ten months, in the course of which substantial works were actually carried out by the notice party.

17.6 The court will therefore set aside the leave granted to seek the reliefs sought at paragraph (c)(2) and (3) against the second and third named respondents.

18 Declaratory relief that Section 5 is contrary to European Law

18.1 The State parties submit that the consequence of the court setting aside the grant of leave to apply for judicial review in respect of the s. 5 declarations is that the challenge to the validity of s. 5 sought at para. 4 of the statement of grounds – which is effectively a claim against the State respondents, and a general attack on s. 5 which it is said breaches European law - must also be set aside. It is argued that if the applicant is not entitled to pursue a challenge in respect of the s. 5 declarations, he then has no standing to bring a general challenge to the validity of s. 5, and in any event, the same time limits apply.

18.2 The grounds for the general challenge to s. 5 are those set out in paras. e(13) and e(14) of the statement of grounds. Ground e(13) asserts that the s. 5 procedure is flawed because it does not require public notification, and the public concerned have no opportunity to participate in the decision making, contrary to fair procedures and natural justice and contrary to the EIA Directives, the Habitats Directive, the Public Participation Directive and the Aarhus Convention. It is noteworthy that this ground is worded in general terms, and without reference to the second and third named respondents' s.5 declarations.

18.3 Ground e(14) pleads that the applicant only became aware of the fact of the s. 5 declarations when addressing the approval application to the Board, that he was out of time to appeal to the Board, that the approval application "left no doubt" but that EIA and AA were required, and that at this point he was already out of time.

18.4 Counsel for the State argued:-

(1) that these two grounds amount to a collateral attack on the s. 5 declarations. As such, the same time limit which applies to the s. 5 declarations applies also to the challenge to the lawfulness of s. 5 under EU law.

(2) that the applicant does not have any locus standi to challenge the validity of s. 5 under European law.

18.5 Counsel for the applicant argued that the time limit of 8 weeks did not apply to a challenge to legislation, and that the failure of the 2000 Act to require notification of s.5 referrals brought about the situation where the applicant was unaware of the declarations in time. He argued that here there were direct attacks on the s.5 declarations and the Board's decision. He further argued that the attack on s.5 itself would not necessarily and as a natural consequence undermine these two particular s.5 declarations and was not therefore a collateral attack. As a fall-back position Counsel advised the court that the applicant wished to challenge s.5 even if he is not permitted to challenge the actual s.5 declarations, and emphasised that in such circumstances the applicant would not be pursuing any collateral challenge to the s.5 declarations but rather pursuing points related to the absence of public participation in the referral process. He would be seeking purely declaratory relief in respect of s.5.

18.6 It is appropriate first to refer to the provision of the 2000 Act relating to the interest that an applicant must establish in order to obtain leave to seek judicial review of planning matters. Under s.50A(3) of the 2000 Act (as amended) the court granting leave must be satisfied that –

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

(b) (i) the applicant has *sufficient interest* in the matter which is the subject of the application,…"

Section 50A(4) now provides:-

"(4) A *sufficient interest* for the purposes of subsection (3)(b)(i) is not limited to an interest in land or other financial interest." [Emphasis added].

The word '*sufficient*' was inserted in both subsections by s.20 of the Environment (Miscellaneous Provisions) Act, 2011.

18.7 Having determined that the applicant cannot now challenge the s.5 declarations it is necessary to revisit the question whether

he has "sufficient interest" to be permitted to continue with his general challenge to s.5.

18.8 What is "sufficient interest"? This must be considered on a case by case basis, but the very requirement suggests some constraints on what can suffice. It clearly means more than an idle, passing, casual or 'mere interest'. Implicit is that there should be some real connection between an applicant and the matter in suit to give the "interest" relevance or foundation.

Further the definition must be read in the context of the reference in s.50A(3)(b)(i) to "…the matter which is the subject of the application". Section 50A(1) also defines "section 50 leave" to mean :–

> "…leave to apply for judicial review under the Order in respect of a decision or other act to which section 50(2) applies".

Therefore a section 50 leave means a leave in respect of "a decision or other act" of the Board or a local or planning authority.

18.9 At the level of principle therefore the applicant needs to demonstrate "sufficient interest" by reference to a particular decision or other act of the Board or local or planning authority – it is not "sufficient" to bring a free-standing challenge to a statutory provision without such connection. The leave must engage a particular planning decision.

18.10 The applicant is not a statutory consultee in respect of s.5 referrals, the s.37E application, or indeed any planning applications. He had no role in the particular s.5 planning referrals. He has no direct or indirect relationship or proximity, physical, legal, commercial or otherwise, to the Grousemount windfarm or grid connection, other than through his submission to the Board on the windfarm approval application. But that involvement cannot give him "sufficient interest" in the earlier, different, s.5 referrals. He will not be impacted personally by the windfarm project. Absent any leave to challenge the s.5 referrals his only interest is an individual with a general and well-informed interest in protection of the environment and ensuring that the State and planning authorities comply with their EIA/AA obligations under domestic and EU law. In my view this is not "sufficient interest" to entitle him to make a general attack on s.5 itself.

18.11 This conclusion may also be reached by another route, namely by analogy to the test applied by the courts in assessing sufficiency of interest to bring a constitutional challenge. Counsel for the State referred the court to *Nawaz v. Minister for Justice* [2013] 1 I.R. 142, where the Supreme Court clarified, in the context of a challenge to the constitutionality of s. 3 of the Immigration Act 1999, that a party only has locus standi to challenge the constitutionality of a statutory provision if "imminently affected by a decision made or about to be made under it". This test was stated by Henchy J in *Cahill v Sutton* [1980] I.R. 269 at 286 thus:

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that person's interests have been adversely affected or stand in real or imminent danger of being adversely affected, by the operation of the statute."

Also mentioned in the judgment of Clarke J in *Nawaz* is the earlier decision of *The State (Lynch) v Cooney* [1982] I.R.337. In a much-quoted passage Walsh J stated at p.369:-

> "The question of whether or not a person has sufficient interest must depend upon the circumstances of each particular case. In each case, the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is greater importance to be attached to the facts because it is only by an examination of the facts that the court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates."

18.12 The applicant has singularly failed to establish how he personally (or any other person on whose behalf he might be entitled to speak) can maintain that he has been or would be adversely affected by the s.5, as a matter of fact or law, if leave to challenge the particular s.5 declarations is set aside. This is emphasised by the fact that having become aware of the s.5 declarations he took no action for a period of some ten months or so, and does not seem to have been aware that the construction work on the grid connection commenced in March 2016.

18.13 His arguments simply do not address "sufficient interest" or the State's argument based on *Nawaz*, and no other authority was cited. In light of the strict regime established by the 2000 Act for the challenge of planning decisions, it cannot be accepted that a stand-alone challenge can be mounted to a provision such as s.5 without engaging any s.5 decision and independent of the time limits in s.50. His general section 5 challenge was dependant on the leave granted to challenge the second and third named respondents' declarations, and when that leave is withdrawn his general claim that s.5 infringes European law is not one that he has sufficient interest to pursue in these proceedings.

18.14 Further to now permit a general challenge to s. 5 would be to allow a collateral attack on the s. 5 declarations, or at least the validity of those declarations insofar as they were relied upon by the Board in reaching its approval decision. In its decision the Board relied on the planning history of the lands, and from the Inspector's Report (which is to be read with the decision) that history includes the s.5 grid connection declarations (see para. 1.3.3).

18.15 I am not, therefore, satisfied that the applicant was or is entitled to such extension of time as he required in order to bring a stand alone challenge in respect of s. 5 of the 2000 Act, or that he has sufficient interest to maintain such a challenge.

19 Conclusion

19.1 For these reasons I am satisfied that this is a very plain case in which the court should exercise the jurisdiction to set aside part of the leave order on grounds of exceptional delay, and, in respect of the challenge to s.5 itself, lack of sufficient interest. I am further not satisfied that the applicant has made out good or sufficient reason for extending time.

19.2 I will grant orders setting aside the order of Humphreys J. made on 10th October, 2016, insofar as it granted the applicant leave to seek judicial review in respect of the reliefs sought at paragraph (c) in sub-paragraphs 2, 3 and 4 of the statement of grounds. The substantive application for judicial review may, therefore, proceed on the basis that the applicant is permitted to seek the reliefs sought at paragraph (c) in sub-paragraphs 1, 5, 6, 7 and 8, upon the grounds pleaded in paragraph (e) of the statement of grounds relevant to those reliefs.