THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 624 J.R.]

IN THE MATTER OF SS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED BY THE PLANNING AND DEVELOPMENT (STRATEGIC INFRASTRUCTURE) ACT 2006, THE PLANNING AND DEVELOPMENT (AMENDMENT) ACT 2010 AND THE ENVIRONMENT (MISCELLEANOUS) PROVISIONS ACT 2011

BETWEEN

DESMOND CORBETT AND KAY CORBETT

APPLICANTS

AND

LOUTH COUNTY COUNCIL

RESPONDENT

AND

MINISTER FOR EDUCATION AND SKILLS

NOTICE PARTY

JUDGMENT of Ms. Justice Faherty delivered on the 13th day of April, 2018

1. By Order of Meenan J. dated 25th July, 2017, the applicants were granted leave to apply by way of judicial review for the following reliefs:

> (i) An order pursuant to s. 50(8) of the Planning and Development Act, 2010 as amended ("the 2000 Act") extending the time for the bringing of judicial review proceedings in respect of planning permission 13/520053 which took effect on 1st August, 2013.
>
> (ii) An order restraining the respondent and notice party from completed the ESB substation at the Marshes, Dundalk, Co. Louth pending the determination of the within proceedings.
>
> (iii) An order of *certiorari* quashing that part of planning permission 13/520053 which authorises the construction of an ESB substation at the Marshes, Dundalk, Co. Louth.
>
> (iv) An order directing the demolition of that portion of the ESB substation that has been constructed.

Background

2. In or about 2013, Dundalk Town Council decided to develop lands known as the Marshes, Dundalk, Co. Louth for use as a school premises with associated recreational grounds and a public park. This process was governed by s. 179 of the 2000 Act and Part 8 of the Planning and Development Regulations 2001 S.I. 600/2001 ("the 2001 Regulations").

3. As part of the process of public consultation and reporting to the members of the Town Council, the Town Council was obliged to do, *inter alia*, the following:

> (i) Include in the published site notice details about the nature and extent of the development, in accordance with Article 81(2)(b) of the 2001 Regulations;
>
> (ii) Include in the plans to be exhibited for inspection by the public the elevations of the various buildings the subject of the proposed development in accordance with Article 83(1)(c)(ii) of the 2001 Regulations; and
>
> (iii) Include in any report given by the Manager of the Council to the elected members information about the nature and extent of the proposed development, pursuant to s. 179(3)(b)(i) of the 2000 Act.

4. On or about 15th May, 2003, the Town Council published a site notice. In addition to identifying where the plans in respect of the development could be reviewed and that any submissions in respect of the development should be lodged with the Town Council, the site notice recorded the following about the proposed development:

> "The development will consist of the construction of a new build two storey, part single storey, 1,000 pupil post primary school at the Marshes, Dundalk, Co. Louth, with associated Public Park, and associated site development works including car parking, hard play areas, GAA sized football pitch and access roads".

At the same time as the site notices were published, drawings in relation to the proposed development were made available for inspection at the offices of the Town Council. The drawings reveal that an ESB substation was planned for construction proximate to the applicants' premises. The plans and particulars of the proposed development were available for public inspection from 15th May, 2013 until 26th June, 2013 at Dundalk Town Council and at the respondent's County Council Offices. Submissions or observations with respect to the development were to be submitted in writing and lodged with the Town Council by 10th July, 2013.

5. In May, 2013, the first named applicant reviewed one of the two site notices which had been erected at the proposed site. He also reviewed a concept drawing which was exhibited in the vicinity of the site notice. According to the first named applicant's grounding affidavit sworn 25th July, 2017, having reviewed the aforesaid documents, he discussed the matter with the second named applicant and both resolved that, as they were fully in favour of the construction of the school and there was nothing in either of the notice or the concept design which gave cause for concern, they would not lodge an objection to the development. He further avers that as no site notice was erected at the entrance to the site nearest his residence, this indicated to him that there would be no impact on

the residents to the east of the development.

6. On 17th July, 2013, the Manager reported to the members of the Town Council.

7. As required by s. 179(3) (b) (i) of the 2000 Act, the Manager included in her report a summary of the nature and extent of the development. She recorded, *inter alia*, that "the proposal comprises of three main elements":

1. School building;

2. School sports amenities; and

3. Public Park.

8. Under the heading "*Design Considerations*", it was stated that "the elevations are generally two storey in design with a part single storey elevation to the eastern end of the school to mitigate any impact on the existing houses to the east". Specifically the report recorded: "the building is a modern design with contemporary elements and houses the following facilities:

- 29 general classrooms plus specialist teaching areas;
- General Purpose area/Dining and support areas;
- Physical Education Hall with associated changing rooms and stores;
- Music room, library, Special Needs Area;
- Technology areas, Home Economics; Art rooms and Dress Design;
- Science Laboratories, Computer/Business/Design rooms;
- Staff room, administrative offices;
- Pupil social areas, toilets;
- Plant rooms including ESB substation.

9. Under the heading "*Residential Amenity*", the report stated;

> "The subject proposal has been designed to respect the adjoining residential land uses to the east. In this regard the building line set back from third party residential property is such the proposal will not result in any overlooking of overshadowing. Moreover it is considered the nature of the proposed uses is such that it will not result in any loss of residential amenities of the area. Any flood lighting associated with the playing fields should have restricted hours and management of pitches shall be included in the contract documents."

10. There was no resolution in the Town Council amending the plans as referred to in the Manager's report and consequently the proposal that had been presented to the elected members was sanctioned as a statutory permission pursuant to s. 179(4)(b) of the 2000 Act on 1st August, 2013.

11. On 3rd May, 2017, the applicants noticed digging close to the wall of their property which bounds the Marshes in Dundalk. Contact was initially made with the builders present on the site and, after enquiry, on 5th May, 2017 the applicants were advised that an ESB substation was under construction. Thereafter, the applicants engaged with Council staff and with an elected member of the Town Council. A member of staff from the Town Council, Frank McGee, engaged with the applicants and indicated that as the plans had approval there was no means by which he could deviate from the location of the ESB substation. Thereafter, the applicants engaged with their local TD, Mr. Declan Breathnach, to write to the notice party in respect of the location of the substation. An exchange of correspondence between Mr. Breathnach and the notice party took place between 1st June, 2017 and 9th June, 2017.

On 1st June, 2017, Mr. Breathnach wrote to Mr. Eamon Cusack, Principal Officer in the Devolved Projects Section in the notice party's department, as follows:

> "A problem (a minor one) if sense prevails relates to the location of an ESB substation immediately backing onto the residents of nos. 1-10 Bishop's Court on the north eastern side of the site
>
> …
>
> While the residents are none to pleased … and are understanding that the planning process is long completed unfortunately they were not aware of the size and scale of this building which incorporates in addition to the substation a store room.
>
> Having spoken with senior officials in the LMETB and while recognising the importance of the substation to the overall college campus it is mine and others belief that excluding all other portions of the building, with the exception of the actual substation, would be a reasonable compromise."

12. This letter was replied to on 6th June, 2017 by Mr. Cusack who confirmed there were store rooms attaching to the ESB substation. He advised that the store rooms were for the Enginering/Metal Works and Construction Studies/Material Technology specialist rooms in the main building and that revisiting or relocating the stores rooms was not feasible at this stage of the project as it would involve a re-design of the ground floor layout to reposition specialist rooms elsewhere in the new building to align with the relocated stores. Same would accrue significant additional fees together with abortive contractor costs for work carried out to date. It was also stated that the delivery of the project would be hugely delayed. Accordingly, it was advised that a re-design of the project was not feasible.

13. Mr. Breathnach replied on 8th June, 2017 reiterating that "a solution for now could be to leave out the store rooms altogether … and only build the substation." He went on to state:

"I really do feel for the residents in this case, and that of anyone had looked at these plans from the residents' point of view in the first place, the substation and store rooms would never have been allowed to be built backing onto their properties."

14. On 8th June, 2017, Deputy Breathnach wrote to the Minister, Mr. Richard Bruton, repeating the contents of his prior letters to Mr. Cusack and again suggesting, *inter alia*, that "a reasonable compromise would be to only build the substation portion of the offending building and relocate the store rooms to another location on the site." He repeated his belief that the "particular structure should never have been located where it is if the architects had looked at the location from the residents' perspective". This letter was acknowledged by the Minister's department on 9th June, 2017.

15. The within proceedings were commenced on 25th July, 2017.

16. The legal grounds upon which the applicants claim relief are as follows:

(i) There is good and sufficient reason, and circumstances that were outside the control of the applicants, justifying an extension of time within which to bring the within proceedings as the applicants' failure to lodge a submission in the planning process associated with the planning application , or bring judicial review proceedings within the appropriate periobd of eight weeks after the granting of permission, was caused entirely by the failure of the Town Council to publish a site notice in accordance with the 2001 Regulations and a concept design that accurately relayed the fact that an ESB substation was to be constructed as part of the development.

(ii) The site notice in respect of the proposed development breached Article 81(2)(b) of the 2001 Regulations by failing to include reference to the nature and extent of the development in that notice, and in particular, the fact that the development would include an ESB substation.

(iii) The site plans made available for inspection by members of the public and elected members of Dundalk Town Council breached Article 83(1) (c) (ii) of the 2001 Regulations in as much as the said plans did not include any reference to the elevations of the buildings the subject of the plans and in particular the elevation of the substation.

(iv) The Manager's report to the elected members breached s. 179(3)(b)(i) of the 2000 Act in that the report did not accurately record the nature and extent of the development:

(a) The report failed to record the fact there would an ESB substation located on the grounds of the school independent of the school buildings and/or;

(b) The report mistakenly recorded that the ESB substation was to be housed in the School Building, when it was to be a separate structure proximate to the applicants' premises;

(c) The report mistakenly recorded that there was to be no building against the boundary line close to the residential buildings in the east of the site, when the plans disclosed that the substation was to be built right up against the boundary wall of the applicants' residence;

(d) The report mistakenly recorded that there would be no impact on the residential area to the east of the development.

(v) The statements in the Manager's report as to the impact of the development on the residential area to the east of the development, including the residence of the applicants was irrational and/or without any evidential basis.

(vi) The elected members did not have all relevant information when considering whether to exercise their authority to modify the plans submitted for public observation or not pursuant to s. 179(4) of the 2000 Act.

17. It is accepted by all parties that the within proceedings raise five distinct issues:

(i) Whether the applicants should be afforded an extension of time to pursue the reliefs sought;

(ii) Whether the site notice was defective and in breach of statutory requirements;

(iii) Whether the plans made available for inspection by the public were defective and in breach of statutory requirements;

(iv) Whether the Managers' report was defective and in breach of statutory requirements and;

(v) Insofar as the statutory permission at issue is defective, whether the discretion of the Court should be exercised in favour of the applicants.

Extension of time

18. Section 50(8) of the 2000 Act stipulates that in order to secure a extension of time to bring a judicial review application outside the period of eight weeks from the date of the statutory decision at issue, the moving party must demonstrate:

(a) good and sufficient reason for failure to move within time, and

(b) that the circumstances giving rise to the failure to move within time were outside the control of the moving party.

19. It is acknowledged by the applicants that the application for leave to apply for judicial review was made well outside the eight week time limit prescribed by s. 50(6) of the 2000 Act.

20. The strict nature of the time limits imposed by s. 50 of the 2000 Act has been acknowledged in numerous cases. In *MacMahon v.*

An Bord Pleanála [2010] IEHC 431, Charleton J. noted that "*the Oireachtas clearly intended to impose strict time limits for the challenging of decisions in the planning process*". In *Linehan & Ors. v. Cork County Council* [2008] IEHC 76, Finlay Geoghegan J. noted that the time limits were "*strict and short time limits*". In *South-West Regional Shopping Centre Promotion Associate Limited v. An Bord Pleanála* [2016] IEHC 84 Costello J. also noted the *"strict limitation period of eight weeks".*

21. As regards the concept of "good reason" for an extension of time, in *O'Donnell v. Dun Laoghaire County Council* [1991] ILRM 301, Costello J. clarified that the concept of the good reason denotes an objective test that demands that an applicant explain the delay at issue and that that explanation must in turn provide a basis to excuse the delay. Further, it is necessary for the Court to consider what impact an extension of time will have on third party rights, consistent with the authority of *State (Brennan) v. Cussen* [1981] I.R. 181, as endorsed in numerous subsequent cases, including *Copymoore Limited v. Commissioner of Public Works* [2014] 2 I.R. 786.

22. As can be seen, in addition to establish good and sufficient reason for the failure to move within the requisite time limits, s. 50(8) of the 2000 Act also demands that an applicant demonstrate that the cause of the delay was outside his or her control.

23. In *Irish Skydiving Club Limited v. An Bord Pleanála* [2016] IEHC 448, Baker J. commented on the jurisdiction of the Court to extend time under s. 58(8) in the following terms:

> *"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.*
>
> *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.*
>
> *11. The time limit is strict, and one in respect of which the power to grant an extension is also to be strictly construed. That this is justifiably so has been considered in a number of cases. In Noonan Services Limited & Ors v. the Labour Court (Unreported, High Court, 25th February, 2004) Kearns J. explained the policy for a strict approach:*
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> > *"This approach does no more than reflect a growing awareness of an overriding necessity to provide for some reasonable cut-off point for legal challenges to decisions and orders which have significant consequences for the public, or significant sections thereof.""*

24. Baker J. also highlighted that "*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."* (at para. 49).

25. The case made by the applicants for an extension of time is that the defective site notice (a matter for which, the applicants say, the respondent was entirely responsible) and the confusion created by the presence of the concept drawing immediately adjacent to the site notice that did not depict the entire development, (again a matter for which the respondent was entirely responsible) are, independently and together, objective reasons that explain and justify the delay on the part of the applicants in bringing the within proceedings.

26. The respondent and the notice party submit that the reason advanced by the applicants for not moving within the statutory time frame fail to meet the test set out in s. 50(8) of the 2000 Act. It is essentially contended on behalf of the respondent and notice party that the applicants' explanation does not even begin to justify the delay, either the first delay period of almost four years after the grant of permission or the second period of delay, namely, a period of almost twelve weeks from when the applicants say they learned of the ESB substation on 3rd May, 2017 to the time they commenced the within proceedings (25th July, 2017).

27. The applicants allege that the admitted delay in instituting the within proceedings arose from the fact that the site notice in respect of the proposed development did not expressly refer to the ESB substation. They assert that it was legally required to do so. They say the fact that it did not was a factor outside of their control and which explains their failure to instigate proceedings within the statutory timeframe. They also contend that there was good and sufficient reason as to why they did not take immediate legal action following their becoming aware of the proposed ESB substation on 3rd May, 2017.

28. The submission made on the part of the respondent and the notice party is that the applicants' clear failure to move with expedition after 3rd May, 2017, on top of an already four year delay since June 2013, militates against an exercise by the Court of its discretion to extend the time. This is particularly so where the school has been under construction since 2013.

29. As the alleged defective nature of the site notice is intrinsically bound up with the applicants' reason for not instituting proceedings within the statutory timeframe, it is thus necessary to consider the applicants' argument as to the alleged defective nature of the site notice and the extent to which the applicants were actively misled.

30. Before doing so, it is perhaps apposite at this juncture to refer to the applicants' other grounds of challenge. In addition to their argument as to the defective nature of the site notice, the applicants also challenge the permission granted on the basis that the plans available for inspection did not comply with Article 83(1) (c)(ii) of the 2001 Regulations which provides that a local authority shall make available for inspection:

> *"such plans and drawings, drawn to a scale of not less than 1:1000, as are necessary to describe the proposed development."*

31. The applicants contend that the precise dimensions of the ESB substation were not properly set out and not clearly available for inspection.

32. In the affidavit of Ms Emer O'Callaghan, Acting Senior Executive Planner, with the respondent, sworn 28th August, 2017, she refers to Drawing No. SK-20170517-01, which, it is averred provided "adequate information about the intended elevation of the substation". It is now accepted by the respondent and the notice party that in fact Drawing No. SK-20170517-01 (being a 2017 drawing) was not the drawing which was on display in 2013. What was on public display in 2013 was Drawing No. 1004 and Drawing

No. 6943. Drawing No. 1004 shows the location of the proposed ESB substation and store rooms proximate to the Bishop's Court residential area and the applicants' home. There is reference on both of these drawings to "[n]o dimensions to be scaled from the drawing".

33. In his affidavit, sworn 25th July, 2017, the applicants' Planner, Mr. Tony Ewbanks, who reviewed the plans which were on public display in 2013, avers that while the plans record that an ESB substation was to be constructed, "in no drawings are the precise dimensions, that is the height, width and length, of the structure recorded. Mr Ewbanks states that while it was possible to discern those measurements using a scale ruler, he doubted whether "members of the public who inspected those drawings, or indeed members of the elected council, had access to such an implement when reviewing the drawings.

34. Using a scaled ruler, Mr. Ewbanks ascertained that the dimensions of the substation as presently envisaged are as follows:

> (i) Width of the building is 10.4 metres, which faces north;
>
> (ii) Length of the building is 14.4 metres, which travels east west away from the applicants' residence;
>
> (iii) Height of the building is 4.4 metres at the northern end slopping to 2.8 metres of the southern end.

35. Mr. Ewbanks "rough estimate" as to the extent to which the substation would overshadow the applicants' house and garden was 1.5 metres or 4.9 feet above the applicants' garden wall rising to 3.5 metres or 11.4 feet above the applicants' garden at the northern end.

36. Both the respondent and the notice party submit that neither Article 83(1)(i) nor Article 83(1)(ii) of the 2001 Regulations make reference to precise dimensions. It is submitted by the respondent that the drawings which were on display in 2013 were to scale, as required by the Article 83 of the 2001 Regulations. Counsel for the respondent also submits that had the applicants viewed the plans in 2013 they could have requested the Council to provide them with the dimensions. Having not taken a step to go and look at the plans, the applicants cannot now be heard to complain about the matter. It is further contended that the applicants' complaints about the site plans are not borne out when viewed against the requirements of the 2001 Regulations and Mr. Ewbanks' concession that it was in fact possible to ascertain the precise dimensions using a scale ruler.

37. The notice party submits that it cannot be said that the plans do not provide an adequate or meaningful description of the proposed development. The notice party also makes the case that any alleged deficiency in the plans cannot give rise to a complaint by the applicants as they expressly acknowledge that they never consulted the plans and placed no reliance on them. It is submitted that insofar as the applicants appear to suggest that members of the public or the elected members may have been misled, that is a purely speculative suggestion on their part.

38. In response, counsel for the applicant contends that the applicants did not become involved in the public consultation process because they were misled by the site notice and took comfort from the concept drawing that was also posted at the site. Counsel also suggested that the defective plans may also have played a role in the applicants' non involvement in the consultation process given that no one brought to their attention that an ESB substation was going to be constructed behind their house. I regard the latter submission as purely speculative.

39. I am satisfied, at this juncture, that consideration of the question of whether the plans available for public inspection were defective and in breach of statutory requirements is not germane to the issue of whether time should be extended. Such consideration must await the Court's determination on the issue of the alleged inadequacy of the site notice, said by the applicants to be the reason why no objection was made to the ESB substation during the consultation process and why no challenge was brought within the requisite timeframe.

40. The applicants' complaint with regard to the Manager's report is that contrary to the mandatory requirements of s. 179(3)(b)(i) of the 2000 Act, which requires that the report "*describe the nature and extent of the proposed development and the principal features thereof, and shall include an appropriate plan of the development and appropriate map of the relevant area*", at no point under the heading "Nature and Extent of the Development" did the Manager state that part of the development was to construct an ESB substation and that it was to be located away from the school building. It is contended that the Manager's report is couched in terms which suggested that the ESB substation was an integral part of the school when that was not in fact the case. It is also the applicants' case that the drawings which accompanied the Manager's report did not identify the ESB substation or its scale and that, furthermore, no reference was made to the proposed storage areas which are also to be constructed. It is submitted that it cannot be said that the elected members were given a proper description of the proposed development.

41. The substantive errors in the Manager's report are said by Mr. Ewbanks to be as follows:

> (i) The report says that the ESB substation is to form part of the school building when it is separate from the school building, which is what the plans record.
>
> (ii) Contrary to the report stating that the proposed development will not result in any overlooking or overshadowing and that the residential amenity to the east of the development (which includes the applicants' home) will not be compromised, Mr. Ewbanks' view is that the height, width and proximity of the substation "greatly compromises the amenity of the applicants' residence" and which, Mr. Ewbanks asserts, is evident from the photographic evidence before the Court.

42. The applicants also rely on the affidavit evidence of Councillor Mark Dearey, an elected member of the respondent, who avers, *inter alia*, that "it was never made clear that an ESB substation was to be constructed away from the main school building and immediately beside the residential community to the east of the school" and that he accepted assurances given in the Manager's report that "no adverse impact on amenity value enjoyed by the residents would follow and that there was to be no undue overlooking or overshadowing." Councillor Dearey also states:

> "Had the Manager's Report indicated loss of amenity value or such significant overlooking and overshadowing that as now contemplated, I believe I would have sought amendments to the proposal."

In essence, the case made by the applicants is that by reason of the inaccuracies in the Manager's report the entire process is flawed.

43. On behalf of the respondent, it is denied that the Manager's report breached the provisions of the 2000 Act. In her affidavits sworn 28th August, 2017, and 9th October, 2017, Ms O'Callaghan takes issue with Mr. Ewbanks' contention that the ESB substation is a separate building and avers that the substation "is integrated with the rest of the school building by way of a wall". She asserts, essentially, that there was no misleading of the elected members, as alleged by the applicants. In response to Councillor Dearey, Ms O'Callaghan also points to the fact that Councillor Dearey attended a presentation on the development on 26th March, 2013.

44. On behalf of the notice party, it is submitted that no errors arise in the Manager's report in particular given that the report clearly refers to "Plant Rooms including ESB substation", and in circumstances where the report was accompanied by an appropriate plan of the proposed development and area map. It is further submitted that the elected members would have been fully aware of the intention to provide a substation from the presentation given on 26th March, 2013.

45. It has not been contended by counsel for the applicants (nor could it be) that the issues raised by the applicants with regard to the Manager's report has any bearing on the question of whether the Court should extend the time in this case. Accordingly, the extent to which the applicants' complaint regarding the Manager's report requires to be addressed will only arise if the applicants are given an extension of time to challenge the planning decision. It is to this latter issue the Court now turns, and to the question of the applicants' reliance on the site notice and concept drawing as the reason for their not having objected to the ESB substation within the requisite timeframe or challenged the planning decision within the requisite eight week period following upon the planning permission which took effect on 1st August, 2013.

The site notice

46. In his affidavit sworn 25th July, 2017, Mr. Ewbanks avers that "[i]n my experience where an ESB substation is to be a distinct aspect of a development, as here, it is always recorded in the site notice as a structure which is the subject of the application for permission". The first applicant's affidavit sworn 25th July, 2017, exhibits a number of site notices all of which contain reference to an ESB substation. The first of these relate to a planning application to Dundalk Town Council in 2006 in respect of a private development of retail and residential units at a site adjoining Bishop's Court, where the applicants reside. This notice makes reference, *inter alia*, to an "ESB 38kv transformer station". It is common case that the applicants objected to this proposed development in December 2006. They listed the proposal to build and ESB substation as a basis for their objection, in addition to objecting to the "scale, bulk and enormous height" of the proposed development.

47. A site notice erected on 17th February, 2017, in connection with the building of a secondary school in Athenry, Co. Galway, listed, *inter alia*, "provision for an ESB substation and external store". A site notice erected by Waterford City Council on 12th July, 2017, under Part 8 of the 2001 Regulations, advised that the proposed development comprised, *inter alia*, the installation of an "electrical substation". Both a website notice and site notice referable to a proposed residential development in Dunleer, Co. Louth by Louth County Council (the respondent in the within proceedings), dated 25th April, 2017, also advised that the development would include an "ESB substation".

48. In its statement of opposition, the respondent denies that the failure of the site notice in issue in these proceedings to refer to an ESB substation is inconsistent with normal practice, as alleged by the applicants. In her affidavit sworn 28th August, 2017, Ms. O'Callaghan, rejects any criticisms of the site notice. She avers that both the newspaper notice and the site notice stated that the development would consist of the construction of a new build two storey, part single storey, one thousand pupil primary school with associated public parking and associated site development works including car parking, hard play areas, GAA sized football pitch and access roads. She goes on to state that the use of the term "including" in the site notice "made it clear that the works were not limited to those matters described in the Site Notices" She avers that "any party interested in the nature and scope of the said development was afforded adequate opportunity to attend at the offices of either Dundalk Town Council or Louth County Council and to inspect and/or to purchase a copy of the plans and particulars of the proposed development". She further avers that while it is clear from the first applicant's affidavit that neither he or the second applicant availed of the opportunity to inspect the plans, it was the case that the plans and particulars of the proposed development were inspected by Mr. Gerry Murphy "on behalf of, *inter alia*, the Applicants in his capacity as Chairman as the local residents association".

49. With regard to the position adopted by Mr. Ewbanks, she states:-

> "I say and believe that it is not necessary for a Site Notice to detail each and every element of a proposed development but instead to indicate the nature and extent of the proposed development and to advise that Plans and Particulars of the proposed development will be available for inspection. I say and believe that the Site Notices, the subject matter of the within proceedings, are in compliance with statutory requirement and are not defective as allowed or at all."

50. Insofar as reliance is placed by the first applicant on the objection that was made to a proposal to build a substation in 2006, Ms. O'Callaghan avers that the 2006 application:-

> "involved an application for permission of the development of a mixed use scheme of four buildings ranging in height between one and seven storeys comprising, *inter alia*, fourteen retail units, one hundred and forty five apartment units, a crèche and five hundred and eighty five surface level car parking spaces on which development included the construction of a 38KV transformer substation. The substation, the subject matter of the within proceedings is a 10KV substation."

51. She further avers that the applicants' objection to the 2006 proposed development was not confined to the size or power of the substations but included an overall objection to what the applicants describe as "the enormous height" of the proposed 2006 development.

52. Ms. O'Callaghan also avers that the concept drawing on which the applicants rely related to an earlier plan by the respondent to develop a more extensive public park on the site in issue in these proceedings. She states that presence of the concept drawing on site predated the erection or advertisement of the site notice for the construction of the school.

53. In his further affidavit sworn on 11th September, 2017, the first applicant refutes the respondent's contention that an ESB substation is an ancillary matter which can be excluded from a site notice. Moreover, he avers that the concept drawing was relied on by the applicants as part of the objective evidence which explained why neither he nor the second applicant attended at the respondent's offices to inspect the plans. He denies any suggestion that Mr. Murphy of the residents association acted as the applicants' agent. He avers that had the applicants become aware through conversations with Mr. Murphy, or any other party, of the proposed ESB substation, they would have no excuse for failing to file an objection in time or for failing to institute proceedings within time.

54. In his further affidavit sworn 13th September, 2017, Mr. Ewbanks reiterates his view that an intended ESB substation is invariably

included in a site notice.

55. The notice party echoes the respondent's contention that there was no obligation to record a reference the site notice to the proposed ESB substation. The third party denies the applicants' characterisation of the substation as a substantial structure or that it will impact significantly on the residential amenity of the applicants' home.

56. In his affidavit sworn 21st September, 2017, Mr. Eamonn Cusack, on behalf of the notice party, disputes the applicants' contention that the absence of a reference to an ESB substation in the site notice excused their failure to inspect the application in the respondent's offices, including the appropriate drawings and plans which were on public display and which clearly showed the location of the ESB substation.

57. In response to Mr. Ewbanks' evidence that no explanation was given as to why a substation was needed to service the new school, Mr. Cusack avers as follows:-

> "When constructing a new school, the Department does not provide an ESB substation unless required to do so by the ESB. However, ESB substations are now standard requirements for large standalone school developments.
>
> The New School is a green field stand-alone building. The MIC required for it as determined by the Design Team's mechanical and electrical engineer is 218kVA, resulting in an ESB substation being required on the site of the New School. The location of the ESB sub-station was determined having regard to consultations the ESB who approved its final design and location. The cabling from the substation will be underground. ESB substations now require a land transfer to the ESB and the introduction of wayleaves for access as part of the land transfer. As a consequence, the ESB retains ownership of the substation and it is responsible for installing the necessary technical equipment."

58. He further avers that the planning report submitted by the notice party's architects clearly outlined the requirement for a substation. In response to Mr. Ewbank's suggestion that ground could have been excavated so that the ESB substation could have been located partially below ground, he avers that the Design Team had in fact advised that the level of the existing ground was required to be raised to the proposed new ground floor level of the new school because of flood risk. This determined the floor levels of the new school, including the ESB substation.

59. Following Mr. Cusack's affidavit, the first applicant swore his third affidavit on 9th October, 2017, wherein he avers, *inter alia*, as follows:-

> "I wish to record that the respondent when it advertised to develop other lands previously, made reference to the fact that the development would include an ESB substation in the relevant site notice, which raises the question as to why this was not done in the course of the planning process at issue here.
>
> Mr. Cusack takes issue with the concerns that both my wife and I have about being proximate to an ESB substation, and…classes our views as unreasonable. However, he does not address or acknowledge in any way the enormous impact the structure will have on our residential amenity.
>
> In addition to the adverse residential impact, the structure will compromise the value of our property."

60. In the latter regard, the first applicant exhibited a report of Michael Lavelle, Auctioneers and Valuers, which indicates that the presence immediately adjacent to the applicants' property of an ESB substation or of an imposing structure would result adversely on the value of the applicants' property, namely a reduction from the existing €400,000 value to between €300,000 and €350,000, with the lower end of this scale being more realistic.

61. On 9th October, 2017, Mr. J.P Murphy, an engineer retained by the applicants, swore an affidavit in which he averred that "there is no technical, engineering or planning requirement that demands that the ESB substation be located where it is presently being constructed adjacent to the applicants' residence and Mr. Cusack does not attempt to argue that there is". He states:-

> "The ESB substation could, with the necessary planning consent, be constructed at a location removed from the applicants' premises. I have prepared a drawing which locates the substation to the north of the school building and I can see no reason why the substation could not be built there. Indeed, the substation could be built within or along the periphery of the development site in close proximity to the public domain, roads and footpaths."

62. He further states that "if the ESB substation and storeroom are allowed to remain in their present location, they will have a very damaging effect on the applicants' residence, which would be permanent".

63. On 9th October, 2017, Ms. O'Callaghan responded to the affidavits sworn on 11th September, 2017 and 13th September, 2017, respectively, by the first applicant and Mr. Ewbanks. Ms. O'Callaghan makes reference therein to the respondent's "Development Management Guidelines 2007" which state, *inter alia*, that a public notice should be drafted "so as to give a brief indication as to the nature and extent of the proposed development and is not required to go into excessive detail". She refers to the fact that under Class 29 of the "Exempted Regulations" "any electricity undertaking of development consisting of construction or erection of a unit sub-station for the distribution of electricity at a voltage not exceeding nominal value of 20kv" is exempted development. She refutes the first applicant's contention that the substation is being built up against the boundary wall of his property. She avers that the substation "is at two removes from the wall of the Corbett property". In response to Mr. Ewbanks' contention that it was "usual practice" to include a reference to ESB substations in site notices, Ms. O'Callaghan again repeats the contention that a substation of 20kv is exempt under class 29 of the Exempted Regulation. In her later affidavit of 11th October, 2017, she avers, *inter alia*, that "the fact of the matter is that an ESB substation is an integral and essential part of the school development, the construction of which does not pose a risk of the health and safety of the pupils or people living in the vicinity of the school and the construction of which building does not negatively or adversely impact upon people living nearby to it."

The applicants' submissions

64. It is submitted on the applicants' behalf that the defective nature of the site notice in issue in the present proceedings deprived them of the opportunity to engage with the public consultation process. By reason of the contents of the site notice, coupled with the contents of the concept drawing located adjacent to the site notice, the applicants had no reason to object to the respondent's planning application. It is further submitted that the respondent has not identified on affidavit any situation where any local authority has accepted as adequate a site notice without reference to an ESB substation, where it is proposed to build such a structure.

65. It is contended that the absence of any reference in the site notice to the fact that the development would involve the construction of an ESB substation constituted a failure on the part of the respondent to indicate the nature and extent of the development as required by Article 81(2)(b) of the 2001 Regulations. Four reasons are advanced in support of this position. Firstly, Mr. Ewbanks' evidence that an ESB substation is a significant feature of a development. Secondly, it appears to be established planning practice that when a site notice is published relevant to a development incorporating an ESB substation, the site notice includes reference to the intention to construct the substation. Thirdly, a previous site notice in respect of the development of the lands upon which the school is to be built included reference to the fact that the development would include the construction of two ESB substations. Fourthly, the respondent itself has observed this practice, as can be seen from the site notice relating to a development in Dunleer, exhibited in the within proceedings.

66. While acknowledging that the Court, in considering whether to extend the time, must consider whether an extension would unfairly prejudice third party rights, (a matter which both opposing parties, and the notice party in particular, call in aid in their objection to the extension of time), counsel submits that the applicants have adduced clear and cogent engineering evidence that the only real prejudice to the notice party will be the cost of demolishing the existing ESB substation. Counsel submits that this must be weighed against two factors. Firstly, the fact that the applicants will suffer irreparable harm to the amenity and value of their property if the ESB substation is completed. Secondly, the notice party is not an entirely independent third party. It was intimately involved in the planning process, as is clear from the affidavit of Mr. Cusack.

The respondent's submissions

67. In essence, it is the respondent's contention that the applicants had requisite notice of the development pursuant to the 2001 Regulations. The site notice detailed the proposed development of a 1,000 pupil school. Counsel submits that any reasonable person would comprehend that it was a large development and that there would be substantial buildings on site. It is submitted that the content of the site notice adhered to the words and spirit of Article 81(2)(b) of the 2001 Regulations. Moreover, there was specific reference in the site notice that the plans were available for inspection in the County Council offices. Accordingly, there was a duty on the applicants to go to the respondent's office and inform themselves.

68. There is no reasonable basis for the applicants to have relied on the concept drawing as giving them comfort that there was nothing to be concerned about given that they must have known from the site notice that a 1,000 pupil school would require a large number of facilities. For the applicants to inform themselves as to what might be constructed adjacent or near their property, it was incumbent on them to peruse the plans available for inspection in the respondent's offices. Had they done this in the requisite period between 15th May, 2013 and 26th June, 2013, the first thing they would have seen on the plans was the ESB substation. They could then have put in an objection which would have had to be dealt with by the respondent.

69. It is further submitted that the site notices exhibited by the first applicant which have reference to ESB substations thereon all relate to ESB substations of 38kv. In the present case, the proposed substation is 10kv, as deposed to by Ms O'Callaghan.

70. It is clear from the 2001 Regulations that all that is required to be identified in the site notice is the "nature and extent" of the development. While there can be debate about the level of detail that is required, if the site notice does as provided for in the Regulations, it is thereafter incumbent on a person to enquire about any further detail. Therefore, the first applicant should not have stopped at just looking at the site notice.

71. While the respondent is not necessarily saying that a person would know from the site notice that the proposed development would incorporate an ESB substation, the site notice nevertheless was sufficient to alert an interested person that what was proposed was an extensive development.

72. Notwithstanding the references in Ms O'Callaghan's affidavits to "exempted developments, it is not the respondent's case that the development of the ESB substation is an exempted development. Rather, the reference in Ms. O'Callaghan's affidavits that the carrying out by any electricty undertaking of a development of a substation at a voltage of not exceeding 20kv constitutes an exempted development is to demonstrate that the Oireachtas did not consider that the development of a 20kv substation required a planning permission. Counsel submits that in those circumstances, the omission from the site notice in the present case to a reference to an ESB substation cannot be regarded as significant since it would be an exempt development under the 2001 Regulations if applied for by an electricity undertaking.

73. Counsel also submits that the site notice in the present case was of such sufficiency as to indicate to "a vigilant interested party" what was being contemplated. The applicants were not misled by the omission of any reference to an ESB substation. The applicants' remedy lay within themselves. They could have inspected the plans if they wished to have more information. The purpose of the public notice is to draw to the public's attention the fact that a development is proposed on the site where the notice is posted and to draw to the public's attention the fact that plans and drawings showing what is proposed are available for inspection. The purpose is not to inform members of the public of the detail of the design but that the public be given a general impression of the type of development proposed. Accordingly, there is no question of the Court having to take cognisance of any margin of discretion enuring to the respondent as to what the site notice should contain as the purpose of Article 81(2)(b) was met by the site notice in this case.

74. It is further submitted that if the Court were to find that a mention of the proposed ESB substation in the site notice would have assisted the applicants, its omission was not fatal as the plans, which were available for the applicants to view, clearly denoted that a substation was to be constructed.

75. This is not a case where it is alleged no notice was given. It is not a case where the applicants allege that they did not see the notice on site. The first applicant clearly saw the notice and decided not to take any further steps to go and inform himself as to exactly what was being proposed.

The notice party's submissions

76. The notice party does not dispute that the purpose of Article 81 of the 2001 Regulations is to inform members of the public of the nature of the proposed development and that further details and plans are available for public inspection. It is submitted however that what is in issue in the within proceedings is the nature of the obligation imposed by Article 81(2)(b) of the 2001 Regulations. The applicants appear to contend for an interpretation and application of Article 81(2)(b) that requires that it must include all "significant features" of a proposed development. It is submitted that this is at variance with the language of the provision, which clearly states that all that is required is that the site notice "indicate the nature and extent of the proposed development", not its significant features.

77. It would be absurd, as the applicants appear to contend, to interpret Article 81(2)(b) as requiring a site notice to contain an

exhaustive list for each and every significant element of a proposed development in addition to all of the matters prescribed in Articles 81(2) to (5). It is clear that the public notification as to the detail of the proposed development should be contained in the plans and particulars which are required under the 2001 Regulations to be made available for inspection. Accordingly, Article 81(2)(b) is only one aspect of an integrated framework for public participation.

78. As disposed to by Ms. O'Callaghan on behalf of the respondent, regard must be had to the actual wording of the site notice in issue in the within proceedings. It stated that the development would consist of the construction of a new build two storey, part single story, 1,000 pupil school with associated Public Park and associated site development works "including" car parking, hard play areas, GAA sized football pitch and access roads. Accordingly, by use of the word "including", the description was not exhaustive and it was apparent to any person reading it that there were other elements to the proposed development.

79. It is further submitted that insofar as the applicants' complaint is as to the location of the building containing the substation and store rooms, that complaint does not arise at all from the wording of the site notice. The reason that the applicants were unaware of the location of the ESB substation and store rooms is because they did not review the plans, not because of any alleged deficiency in the site notice.

80. The fact that the applicants, having read the site notice, chose not to inspect the plans or make submissions in relation to the proposed development does not establish that the site notice was in breach of the provisions of Article 81(2)(b) of the 2001 Regulations. Nor can it provide a basis to impugn a development consent process which concluded in 2013.

81. Insofar as the applicants asserts that it is established planning practice that all site notices relating to proposed developments which include an ESB substation must expressly refer to the ESB substation when indicating the nature and extent of the proposed development, the sole evidence for this is the affidavit of Mr. Ewbank and a number of site notices exhibited in the first applicant's affidavit. It is submitted that this does not constitute adequate evidence of planning practice particularly when Ms. O' Callaghan's evidence disputes any mandatory requirement to expressly refer to ESB substations in site notices.

82. As regards the applicants' reliance on alleged defects in the site notice in aid of their application to extend time, fundamentally, the applicants have not addressed or met what is the first limb of the test set out in s. 50(8) of the 2000 Act, namely, that the reason objection was not made to the ESB substation was that the circumstances which prevented the objection being made were outside of the applicants' control.

83. It is further submitted that there is no objective basis on which the applicants can say that they were entitled to draw comfort from the concept drawing in addition to the site notice. There was no basis at all for the applicants to rely on the concept drawing given the clear reference in the site notice to the proposed construction of a thousand pupil school. The concept drawing, when viewed against the site notice, could only have led to further questions from the applicants which should then have impelled them to view the plans. In all the circumstances, the applicants cannot objectively contend some four years after the erection of the site notice that it was reasonable for them to rely on the site notice and the concept drawing as a basis for an extension of time in this case.

84. With regard to the second relevant time period, namely, 3rd May, 2017 to 25th July, 2017, Counsel submits that even if 3rd May, 2017 was the appropriate timeframe, the delay on the applicants' part of almost twelve weeks before seeking relief is inexcusable. If already out of time since the making of the decision (as the applicants were), they were obliged to move with all possible expedition, which they did not do. It is not sufficient for the applicants to simply rely on the fact that public representatives took up their cause as a reason for not seeking timely relief once they discovered the existence of the ESB substation on 3rd May, 2017.

85. Contrary to the applicants' assertions that an extension of time would not result in any prejudice to third parties, that is not the case. That is an untenable proposition in light of the evidence set out in Mr. Cusack's affidavits where he clearly and fairly set out the adverse consequences if the construction of the ESB substation is not permitted. These include not just adverse financial and operational consequences for the notice party, but to other members of the public including perspective school children.

86. It is urged that the Court when considering the application for an extension of time should consider the need for certainty in the planning process. The notice party and the respondent, who relied on the Part 8 approval to approve the expenditure of significant Exchequer funds, and members of the public, are entitled to rely on the fact that any challenge to the Part 8 process should have been brought long ago.

Considerations

87. It is acknowledged by all concerned that the language used in Article 81(2)(b) is mandatory. Accordingly, the local authority is obliged to set out "the nature and extent" of the proposed development in the site notice. An express statutory requirement cannot be disregarded on a *de minimis* basis, as is clear from *McAnenley v. An Bord Pleanála* [2002] 2 I.R. 763.

88. What is required in public notices has been considered by the courts on a number of occasions. In *Keleghan v. Corby* [1976] 111 ILTR 144, McMahon J. found a planning permission invalid on the grounds that the site notice did not properly alert the public to what was being proposed. He found that the advertisement published by the applicant "*entirely inadequate to put the public who might be concerned on notice of what the permission required involved*", the purpose of the notice being "*to give members of the public who maybe concerned with the development an idea whether the development looked for is the kind that may affect their interest*." In that case, the application, which was for permission to erect three temporary prefabricated classrooms at a secondary school where the grounds were very extensive, did not convey to the people residing in a cul-de-sac that the development might possibly include a roadway giving access to the school through the cul-de-sac.

89. In *Monaghan UDC v. Alf-a-Bet Promotions Limited* [1980] ILRM 64, Henchy J., with regard to Regulations identical to Article 81(2)(b), stated as follows:

> *"[O]ne of the primary objects of the published notice – if not the primary object – is to enable interested members of the public to ascertain whether they have reason to object to the proposed development, the efficacy of the notice in this case was negatived by the omission from it and indication of the real nature or extent of the proposed development. No member of the public could have been expected to glean from the general words "alterations and improvements" that the development permission sought was for what we now know it to have been, namely, the conversion of what had been a drapery shop in the town of Monaghan into a betting office and amusement arcade. The publication of such a veiled and misleading notice was a substantial and flagrant breach the statutory requirement that the application be in accordance with the Regulations."*(at p. 68)

90. In the same case, Griffin J. observed:

> *"it is a well established rule of construction that the ordinary sense of words used in a statute or in regulations made thereunder is primarily to be adhered to; that requirements in public statutes which are for the public benefit are to be taken to be mandatory or imperative; and that provisions which on the face of them appear to be mandatory or imperative cannot without strong reason be held to be directory. In its ordinary sense shall is to be construed as mandatory or imperative. This is the word which is used in Articles 14 and 15 and therefore the requirements should ordinarily be held to be mandatory unless the failure to comply with them is not substantial".*

He went on to state:

> *"The purpose of the Acts therefore is to ensure proper planning and development, not in the interest of the developer, but in the interest of the common good. The primary purpose of the requirements of Articles 14 and 15 in relation to the notice in newspapers is to ensure that adequate notice is given to members of the public, who maybe interested in the environment or who maybe affected by the proposed development, that permission is sought in respect of that development, so as to enable them to make such representations or objections as they may consider proper."* (at pp. 72-73)

91. In *Blessington Developments v. Wicklow County Council* [1997] 1 I.R. 273 Kelly J., in adjudicating, *inter alia*, on whether a newspaper advertisement sufficiently indicated the proposed development, considered the matter from the perspective of whether "*the notice would alert any vigilant interested party to what was contemplated*". Finding that the newspaper notice was sufficient notice in that case, Kelly J. stated:

> *"In my view, the notice would alert any vigilant interested party to what was contemplated. If they wished to have further information as to precisely what was envisaged, they could have inspected the plans submitted with the planning application."*

It is the applicants' contention that any vigilant person reading the site notice in issue here would not have been alerted to the proposal to build an ESB substation, as they should have been.

92. In *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 541 Haughton J. rejected an argument that a site notice was in breach of the Regulations because it failed to give sufficient details and information of all elements of the proposed development – a wind farm. More specifically, it was contended in that case that the notice was defective because it failed to refer to the blade length and rotar diameter of the wind turbines. Haughton J. held as follows:

> *" 40. I also accept that there is no requirement under the 2000 Act or the Planning Regulations to state in the site notice the blade length and rotor diameter. The most important physical feature is the overall height of the proposed structure. This was correctly stated, and would have alerted members of the public to the nature of the proposed development. Beyond this the details of the planning application, including the drawings showing a sample turbine with a height of 126.6 metres made up of rotor blade length of 45 metres and with a hub height of 81.6 metres could be inspected on line or at the local planning authority offices. Further there was no evidence whatsoever to suggest that the applicants or any members of the public were under any misapprehension as to the overall height of the turbines or the maximum height of the component parts. This ground of challenge therefore cannot succeed."*

93. In asserting that it is not expected that every detail of a proposed development be set out in the site notice, Ms O'Callaghan, on behalf of the respondent, in her affidavit sworn 9th October, 2017, quotes Section 3.4 of the respondent's 2007 Guidelines which provides, *inter alia*:

> "The purpose of the [site notice] is to inform the public of the proposed development and alert them as to its nature and extent. Third parties may then examine the files in detail at the planning office…and if they so wish may lodge a submission or objection… The public notice should …be drafted so as to give a brief indication as to the nature and extent of the proposed development and is not required to go into excessive detail".

Section 3.4 also states that "as a rule of thumb, a notice is not required to include details that can reasonably be assumed to be part of a normal part of development."

94. It is acknowledged by all concerned that had the first applicant, upon reading the site notice, taken up the invitation to view the plans, he would immediately have been aware of the intention to construct an ESB substation as part of the development. As already stated, the essence of the applicants' case is that they cannot be faulted for not going to view the plans since it was incumbent on the respondent to refer to the proposed ESB substation in the site notice, as is contended was the established practice.

95. The question which arises is whether the evidence put before the Court by the applicants, by way of the site notices exhibited in the first applicant's affidavit, is sufficient to show that it was the established practice to include a reference to ESB substations in site notices where it is proposed to build such a structure and if so, whether its omission from the site notice in issue here misled the applicants.

96. Undoubtedly, three site notices bearing dates 17th February, 2017, 25th April, 2017 and 12th July, 2017, as exhibited by the first applicant, include reference to ESB substations, without, I note, reference to any particular wattage. The site notice of 25th April, 2017 was erected by the respondent in accordance with "Part 8 Article 81" of the 2001 Regulations in respect of the proposed development of, *inter alia*, eighty residential units, access roads and boundary walls and fencing. The 2006 site notice exhibited in the first applicant's affidavit was erected by a development company who sought permission from Dundalk Town Council for a retail and residential development. This notice specifically referred to a 38KV substation.

97. Overall, by dint of the evidence adduced by the first applicant, and in the absence of any examples of site notices proffered by the respondent of developments involving the construction of ESB substations which routinely did not refer to such substations (excepting the respondent's sworn evidence that it was not the practice to include a reference to ESB substations), the Court is prepared to find that there is an established practice to refer to ESB substations in site notices where it is proposed to construct such a structure. To my mind therefore, the respondent's failure to include reference to the substation in the site notice could be said, with regard to the period 15th May, 2013 to 3rd May, 2017, to have misled the applicants such as to constitute "good and sufficient reason" why they did not make objection to the proposal to build an ESB substation by 10th July, 2013 and consequently, there would be good and substantial reason to extend the time limit, if the Court was satisfied that after 3rd May, 2017, the

applicants moved with expedition to seek relief. However, the test set out in s. 50(8) also requires the Court to be satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the applicants.

98. With regard to the period 15th April, 2013, to 3rd May, 2017, (the latter date being the date of the applicant's discovery of the construction of the ESB substation), it is submitted on behalf of the notice party that the applicants have not established that the failure to object was outside their control. Counsel contends that the applicants cannot establish this as the complaint they now make about the ESB substation was readily discernable.

99. Counsel for the applicants submits that the respondent's concession that first applicant would not necessarily have known from the site notice that an ESB substation was to be built, if the Court accepts that the site notice should have referred to an ESB substation, then it follows that there was a failure by the respondent to describe the nature and extent of the development, and that this failure deprived the applicants of an opportunity to object to the substation.

100. The question which arises is whether the failure of the site notice to refer to the substation (coupled with the presence of the concept drawing) deprived the applicants in fact of an opportunity to object. It is common case that in May, 2013, the first applicant saw the site notice and the reference therein for the public to review the plans. Had the applicants reviewed the plans, the proposed development of the ESB substation would have been apparent to them. The applicants do not allege that they could not go the respondent's offices to view the plans – rather, they elected not to do so. It is thus contended by the respondent and the notice party that it cannot be said that the failure to object was outside of the applicants' control but rather was a choice made by them not to view the plans. I find myself constrained to agree with this submission. Albeit that the applicants had no control over the contents of the site notice, they nevertheless became aware that the site notice advised of the construction of a new build two storey, part single storey 1000 pupil post primary school "with associated Public Park, and associated site development works, including car park, hard play areas GAA size football pitch and access roads."

101. As conceded by the respondent in the course of the within hearing, a member of the public reading the site notice would not be expected to presume that the development would include an ESB substation. However, I agree with the respondent's and notice party's submissions that the Court must take cognisance of the word "including", as appears in the site notice, and which, on any reading, suggests that the associated site works referred to in the site notice were not exhaustive. This, to my mind, is an important factor in addressing the question as to whether the applicants were entitled to take comfort from the wording of the site notice and from the concept drawing, and whether it can be said that the failure to object to the planning application was outside of their control. It seems to me that the use of the word "including" was, at the very least, an invitation to any person reading the site notice to enquire as to what, if any, other associated site works were being contemplated for development. Having viewed the site notice, the first applicant was alert to the size and scale of the school, which was to comprise a part two storey and single storey development and which would require external facilities, not all of which, by dint of the use of the word "including", were listed in the site notice. Therefore, it could not be reasonably assumed by the first applicant that the proposed development works, as listed in the site notice, were exhaustive. I also find, in this regard, that the applicants could not reasonably take comfort from the concept drawing, given what in fact was referred to in the site notice.

102. As required by the 2001 Regulations, the site notice specifically advised that plans were available for inspection at the offices of Dundalk Town Council and Louth County Council. The mandatory requirement on those who seek planning permission to direct members of the public to the availability of the plans for inspection is to ensure that members of the public are apprised of what exactly the proposed development consists of. The reference in the site notice to the availability of the plans for inspection is not to be taken by those reading the site notice as merely a secondary mechanism for the provision of information over and above the contents of the site notice.

103. Overall, the Court is not satisfied that the applicants have established that the failure to object to the ESB substation within the prescribed statutory period was outside their control.

104. Even if I am wrong in so holding and it can be said that the circumstances that resulted in the applicants' failure to challenge the decision at any point between 1st August, 2013 and 3rd May, 2017 were outside their control, there remains the issue of the second relevant time period in this case.

105. The Court accepts as a matter of fact that the applicants first became aware of the construction of the ESB substation on 3rd May, 2017. It is not the case that the applicants then had eight weeks to from 3rd May, 2017, or indeed any particular timeframe, in which to challenge the decision. It is well established in case law that the applicants were required to move with expedition, once they became aware of the planning decision in respect of which they complain.

106. In aid of her submissions that the applicants should not be denied an extension of time because they did not immediately challenging the planning decision after learning of the ESB substation, counsel cited the decision of Costello J. in *O'Donnell v. Dun Laoghaire Corp.* [1991] ILRM 301. In that case, Costello J. opined, *inter alia*, that the fact that the applicants had engaged with public representatives as opposed to immediately launching a legal challenge should not debar them from relief on the grounds of undue delay.

107. As far as the present case is concerned, even allowing for the applicants' liaison with the respondent in the immediate aftermath of 3rd May, 2017, and factoring in the applicants' reliance on Deputy Breathnach's engagement with the notice party until 8th June, 2017, I am satisfied that that the applicants have failed to establish that they acted with all reasonable expedition post 3rd May, 2017.

108. I agree with the notice party's submission that the correspondence which passed between Deputy Breathnach and the notice party between 1st June, 2017, and 8th June, 2017, (the content of which has been referred to earlier in this judgment) cannot be regarded as good or sufficient explanation for the applicants not moving with expedition, particularly in circumstances where Deputy Breathnach's representations to both the respondent and the notice party suggested that the ESB substation would remain where it was and that the stores only would be relocated or not built. Thus, the applicants cannot reasonably rely on proposals to relocate, or not build, the storerooms in order to justify their failure to bring proceedings expeditiously after 3rd May, 2017.

109. Furthermore, no convincing explanation has been offered for the failure to act with expedition in the weeks between Deputy Breathnach's letter of 1st June, 2017 to the respondent's department and the leave application which was made on 25th July, 2017.

110. Accordingly, I am satisfied, even allowing that the applicants' ignorance of the ESB substation up to 3rd May, 2017 could amount to good and sufficient reason for an extension of time, that it cannot be the case that such ignorance could continue to constitute good and sufficient reason after 3rd May, 2017, given the state of the applicants' knowledge after that date. In my view, taking the

applicants' case at its height, "good and substantial reason" ceased to have effect on 1st June, 2017, when it had to had to have been apparent to them, from the contents of Deputy Breathnach's correspondence, that what was being proposed to the notice party was that the ESB substation would remain *in situ* and that the storerooms would be relocated or not built. Furthermore, there is no concrete evidence before the Court to suggest that after 1st June, 2017 (or at best by 8th June, 2017 being the date of Deputy Breathnach's last letter), the applicants had an expectation of a resolution.

111. As put by Haughton J. in *Sweetman v. An Bord Pleanála* [2017] IEHC 46:-

> *"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."* (emphasis added)

To paraphrase Charleton J. in *Copymore Ltd. v. Commissioners of Public Works in Ireland,* the common good and certainty in the planning system has to be given a heavy weighting in this case, particularly in light of the delay which ensued after 3rd May, 2017.

112. I also find that the applicants cannot satisfy the Court that in the period 3rd May, 2017 to 25th July, 2017, there were circumstances outside of their control which can account for the failure to move with expedition to seek relief.

113. In the course of the within hearing, the Court was referred by the notice party to *Bracken v. Meath County Council* [2012] IEHC 196. In that case, the applicant sought an extension of time to challenge a determination made pursuant to s. 5 of the 2000 Act. The decision was to the effect that the substitution of a single larger window for two windows was exempted development. The recipient of the determination commenced works in reliance on same some months later. The applicants for judicial review, who were neighbouring landowners, had not been a party to the s. 5 reference and had only become aware of the existence of the determination when, in response to a complaint in respect of the works, they were informed of the s. 5 determination. At that stage, the applicants had already instituted enforcement proceedings pursuant to s. 160 of the 2000 Act. The eight week time limit for instituting judicial review proceedings had long since expired at the time the applicants first learnt of the existence of the s. 5 determination. Rather than apply for an extension of time to bring judicial review proceedings, the applicants initially decided to await sight of a replying affidavit in the s. 160 proceedings. After receipt of same, they did not seek to apply for judicial review for another five weeks. In refusing to extend time, Birmingham J. held that once the applicants first learnt of the s. 5 determination, it was incumbent on them to move with "*all possible expedition*" thereafter. Birmingham J. stated:-

> *"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 than 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. 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 applicants' control. Far from that being the case, the applicants, on their own account, consciously and deliberately decided to defer action. In these circumstances it is very plain that the applicants cannot hope to meet the requirements of s. 50(8)(b) and in these circumstances I must accede to the respondents' application."*

114. Birmingham J.'s sentiments were echoed by Haughton J. in *Sweetman v. An Bord Pleanála*, when he stated:-

> *"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."*

115. On behalf of the applicants it is submitted that their circumstances are not akin to those which pertained in *Bracken* since, in the latter case, a decision was made by the applicants to defer any action notwithstanding that they knew of the decision within the statutory timeframe. It is submitted that that is not the situation in the present case given the applicants' unawareness until 3rd May, 2017 that an ESB substation was to be built. Counsel also points to the finding by Birmingham J. in *Bracken* that "*there can be no question of the applicants being out of time and refused an extension, before they were aware of the declaration*". Counsel submits that this is of relevance in the present case in circumstances where the applicants only became aware of the existence of the substation on 3rd May, 2017.

116. Counsel also maintains that the factual matrix in *Sweetman v. An Bord Pleanála* is different to that of the applicants given the finding by Haughton J. that the applicant in *Sweetman* knew of the decision for at least a year prior to mounting any challenge. It is thus contended that there is no merit in the respondent's and notice party's arguments that the applicants failed to move with expedition after they became aware of the construction of the ESB substation on 3rd May, 2017. It is submitted that it is clear from the correspondence which passed between Deputy Breathnach and the notice party's department that local representatives were engaging with the respondent on site.

117. Notwithstanding the aforesaid submissions, I am satisfied that that the *dicta* of Birmingham J. and Haughton J., respectively, is relevant to the second relevant time period in this case, most particularly in light of the applicants' failure to act immediately after 1st

June, 2017, when it was abundantly clear that what was being proposed by Deputy Breathnach appeared to be the polar opposite of what the applicants were hoping to achieve. The applicants were by that stage in possession of all relevant information for the purposes of mounting a challenge and given that the planning decision was made almost four years previously, it was incumbent on them to move with expedition. In all the circumstances, I find that the requirements of s. 50(8) have not been met.

118. Accordingly, the Court proposes making an order refusing to enlarge the time for the bringing of this within application.