Neutral Citation Number [2006] IEHC 295

THE HIGH COURT
COMMERCIAL

[2005 No. 1323 J.R.]

BETWEEN

THOMAS HARDING

APPLICANT

AND
CORK COUNTY COUNCIL AND AN BORD PLEANÁLA

RESPONDENTS

AND
XCES PROJECTS LIMITED
NOW KNOWN AS KINSALE HARBOUR RESORT DEVELOPMENTS LIMITED

NOTICE PARTY

Judgment of Mr. Justice Clarke delivered 12th October, 2006.

1. Introduction

1.1 In these proceedings the applicant ("Mr. Harding") seeks to challenge a decision of the first named respondent ("Cork Council"). Cork Council has given notice that it intends to grant the notice party ("Kinsale Ltd.") a planning permission for the erection of what is described an "integrated tourism resort comprising of hotel, a conference building, a resort centre building with guest reception, offices, restaurant, bar and ancillary features, three storey spa building, overlapping terraced car parking facilities, hotel support services building, 18 hole golf course and driving range, golf academy, starter hut, golf clubhouse, no. 4 maintenance buildings, equestrian centre with no. 19 lodges outside the outside arena, indoor arena, amenity block with second indoor arena, stables, workshop, feed store building, no. 192 resort lodges/apartments, car parking, no. 3 ESB sub-stations, demolition of one residential property, waste water treatment facility, underground bicycle treatment plant, irrigation tank, foul pumping station, site development and landscaping works".

The proposed development is at Preghane, Ballymacus, Kinsale in Co. Cork and subject to planning reference register 04/9262. The location is at a headland some little distance from Kinsale town. The relevant decision of Cork Council was made on 17th October, 2005. Mr. Harding was one of a number of persons and bodies who made observations as part of the planning process, directed towards persuading Cork Council to refuse permission. Some of those persons (but not Mr. Harding) have appealed the notice of intention to grant permission to the second named respondent ("the Board"). That appeal is now stayed pending the resolution of this application. The reasons for that stay are to be found in the judgment of Kelly J. in *Harding v. Cork County Council* [2006] 2 ILRM 392.

1.2 The application with which I am currently concerned is an application for leave to seek judicial review which, by virtue of s. 50(4)(b) of the Planning and Development Act 2000(as amended) ("the 2000 Act") can only be granted where there are (1) "substantial grounds for contending that the relevant decision is invalid or ought to be quashed" and also where (2) it can be shown that the applicant concerned "has a substantial interest in the matter which is the subject of the application".

1.3 Counsel for Cork Council and counsel for Kinsale Ltd. have raised two preliminary questions which, it is contended, ought to be determined in advance of a consideration of whether there are substantial grounds for seeking to challenge the decision of Cork Council. It is said that if either, or both, of those preliminary issues are resolved against Mr. Harding, it will be unnecessary to consider the substantive leave application.

1.4 Those issues stem from contentions that: -

> (a) Mr. Harding does not have a substantial interest in the subject matter of the application, sufficient to qualify him to be enabled to seek judicial review of the decision under s. 50(4)(b); and
>
> (b) The challenge, being one to the decision of a planning authority, gives rise to circumstances where an appeal to the Board is the appropriate remedy placing reliance on the decision of the Supreme Court in *State (Abenglen) v. An Bord Pleanála* [1984] I.R. 381.

1.3 In addition this application raises a significant number of issues in respect of the substantive judicial review itself which will, in the event that the applicant succeeds in overcoming those preliminary objections, require to be resolved.

2. Should the Preliminary Issues be Tried First

2.1 The first question which needs to be addressed is as to whether objections to standing and objections based on the adequacy of an appeal to the Board as a remedy are, indeed, matters which should be determined before embarking upon a consideration of whether an applicant has established substantial grounds. In *Ballintubber Heights Ltd v. Cork Corporation* (Unreported, High Court, Ó Caoimh J., 21st June, 2002) Ó Caoimh J. noted that the planning acts envisaged that standing issues should be determined at the leave stage.

2.2 Subject to one caveat, I am satisfied that it is appropriate to address standing before going on to consider the grounds of challenge. Subject to a similar caveat, I am satisfied that an issue as to the adequacy of appeal should also be dealt with prior to considering whether there are substantial grounds for challenge. If a planning authority or the Board or, indeed, a notice party can satisfy the court that the person seeking judicial review does not have a sufficient interest to meet the test set out in s. 50, then it does not seem to me to be appropriate for the court to go any further in a consideration of whether there are substantial grounds for the challenge. Furthermore in cases where those parties persuade the court that an appeal to the Board would be an adequate remedy then it is, again, unnecessary to consider whether there are substantial grounds. In either case a decision as to whether there are, or are not, substantial grounds would be redundant. In such circumstances it would be unnecessary for the court to embark on a consideration of the strength of the grounds put forward for suggesting that the decision under challenge is invalid.

2.3 It seems to me, however, that while the above should generally be the approach of the court in such circumstances, it should not be adopted as a rigid or inflexible rule and there may be circumstances where, for a variety of reasons, it may be appropriate for the court to adopt a different approach. One example of such circumstances arises, at least in part, in this case.

2.4 In order to determine the standing of an applicant to challenge a decision in the planning process it is, amongst other things,

arguably necessary to consider the basis of the proposed challenge with a view to assessing whether the applicant has standing to raise the grounds sought to be relied on.

2.5 Similarly it may be necessary to consider, in respect of each of the complaints which the applicant seeks to rely upon, the question of whether that ground of complaint can be adequately dealt with by an appeal to the Board. On at least one view of the law (an issue to which I will, necessarily, return) it is possible that the court may, at a substantive hearing, amongst other things, have to consider the cumulative effect of a number of complaints in determining whether those complaints, taken as a whole, would amount to a sufficient departure from the appropriate statutory process to justify taking the view that the decision of the planning authority should be quashed on the grounds of significant or fundamental non-compliance with that statutory process. At the leave stage the court may have to consider whether there are substantial grounds to argue for such a proposition on the facts of the case.

2.6 Where an applicant raises one or a small number of grounds, then it may be easy, in advance, to take a view as to whether those grounds, if they were found to be good grounds, could, even cumulatively, be regarded as a sufficient basis for quashing the order of a planning authority on the basis that the statutory right of appeal to the Board would be inadequate. Where, however, as here, a multiplicity of grounds are relied upon, and where it at least possible that the court may be satisfied that substantial grounds might be found to exist in respect of some but not all of those grounds, it may be that the court might have to adopt a somewhat different approach.

2.7 In such circumstances it seems to me that it is likely that the court will first have to consider whether, on the assumption that all of the grounds put forward are valid, such a finding would give rise to circumstances where an appeal would nonetheless be an adequate remedy. If that be the case then there is no point in going on to consider whether substantial grounds exist for the contentions of the applicant concerned.

2.8 If, however, the court takes the view that it at least possible that the cumulative effect of all of the issues complained of by the applicant might render the process before the planning authority so flawed that it would justify reaching a conclusion that an appeal would not be an adequate remedy, then it may be necessary for the court to consider each of the grounds put forward to ascertain whether there are substantial grounds for the applicant's contention. In the event that the applicant succeeds in persuading the court in respect of some, but not all, of the grounds relied on, then it may be necessary to revisit the question of the adequacy or otherwise of an appeal to the Board based upon a review of those grounds in respect of which it has been successfully established that the applicant has substantial grounds for challenge. It might, for example, arise on the facts of an individual case that the applicant concerned asserted grounds which either individually or collectively would justify a conclusion that an appeal was not an adequate remedy. However when those grounds are examined to determine whether each met a substantial grounds test some may fall away. A different conclusion might well be reached as to whether (again individually or collectively) the remaining grounds, in respect of which the applicant has met a substantial grounds threshold, would give rise to a situation where an appeal was not an adequate remedy.

2.9 It, therefore, seems possible that it may be necessary, at least in some cases, to leave open the possibility of revisiting what would otherwise be the preliminary issues of substantial interest and adequacy of appeal until after the question of whether substantial grounds have been established has been dealt with. This is more likely to arise where there are a multiplicity of grounds advanced and, thus, a wide range of bases on which the applicant might, theoretically, be granted leave. Indeed a similar possibility of being required to revisit such issues might equally arise at a substantive post leave hearing where a yet further refinement of the basis on which the process might be said to be flawed might occur.

2.10 Subject to that caveat I propose addressing the two preliminary issues in turn on the basis that if it is possible to conclude at this stage that Mr. Harding lacks standing or that an appeal would be an adequate remedy, it will be unnecessary to consider whether the substantial grounds test is met. In that context it is appropriate to turn first to the question of whether Mr. Harding has established a sufficient interest to justify treating him as having standing to challenge the decision of Cork Council in this case.

3. *Locus Standi*/Substantial Interest

3.1 Section 50(4)(b)(iv) of the 2000 Act provides that leave shall not be granted unless the High Court is satisfied "that the applicant has a substantial interest in the matter which is the subject of the application". The only specific reference in the legislation as to what might be meant by "substantial interest" is the provision contained in s. 50(4)(d) to the effect that a substantial interest is not limited to an interest in land or other financial interest.

3.2 In *Harrington v. An Bord Pleanála* (Unreported, High Court, Macken J., 26th July, 2005) the following is stated: -

> "As has been stated in several cases, consideration of the legislative scheme makes it clear that the Oireachtas intended that s. 50 be stricter than the equivalent section of the earlier Local Government (Planning and Development) Act of 1992, which itself adopted a stricter set of criteria applicable to challenges to the grant of planning permissions than previously existed. This is because there is in place an extensive statutory scheme under which members of the public may object to the original grant before a planning authority and may also appeal to and be heard by an independent appeal body, namely the Board. To that appeal scheme the statute also provides for the nomination of certain designated parties, who have an automatic right to be heard, with a view to ensuring wide ranging representation in planning matters from diverse interest groups".

3.3 It is clear, therefore, that the 2000 Act introduced a stricter set of criteria than had been in place under the 1992 Act and those authorities which stem from the period when that latter Act was in force need to be viewed against that background.

3.4 At an overall level Macken J. went on to conclude that: -

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

3.5 In *O'Shea v. Kerry County Council* [2003] 4 I.R. 143 Ó Caoimh J. determined that a general interest that the law be followed was not, of itself, a substantial interest. The applicant in that case had failed to establish how she was affected by the permission concerned and was not, therefore, regarded as having established a sufficient interest to justify bringing judicial review proceedings.

3.6 Again in *Ryanair v. Aer Rianta* [2004] 2 I.R. 344 Ó Caoimh J. declared that: -

> "While the requirements of s. 50 of the Act of 2000 include the obligation for an applicant to show "substantial interest", this has not been the subject of any significant judicial guidance to date. However it is clear that the nature of the interest in question is not limited to an interest in land or other financial interest. It is clear, however, that an applicant directly affected by a proposed development will, in all probability, have a "substantial interest"". On the facts of that case a user (albeit a substantial commercial user) of the airport concerned was not found to have a sufficient interest to permit a challenge.

3.7 As was pointed by Ó Caoimh J. in *Ryanair* it seems likely that persons who have a direct property or financial interest in a proposed development will have a sufficient interest to give them standing to challenge planning permission decisions made in respect of such a development. As is also clear from the legislation itself, and from the authorities to which I have referred, the concept of substantial interest clearly goes beyond purely property or financial interests. The real question of principle which arises in this case is as to the criteria by reference to which a person may be said to have a substantial interest even though they do not have a financial or property interest at stake. I now turn to that question.

3.8 As pointed out by Macken J. in *Harrington* the interest which the applicant must have is one he has expressed as being peculiar or personal to him. It seems to me that it, therefore, follows that the interest which an applicant asserts as conferring standing on him must either be one which he has asserted in the course of the planning process (either expressly or by implication as deriving from the case he makes) or is one where there is a reasonable basis to assume that the matters giving rise to the relevant interest would have been asserted by the applicant concerned were his involvement in the process not interfered with by the matters which are contended for in the proceedings to represent a breach of proper process in the planning application.

Therefore it seems that the first criteria that must be considered is whether it can properly be said that the interests sought to be relied on as meeting the threshold have been asserted (or would, were it not for the contended breach of process, have been asserted).

3.9 However, even where the interest contended for has been asserted, that does not, of itself, establish that the interest is "substantial". Very many persons may have some sort of "interest" in one sense of the word in any given planning application. To take but a simple example, an application for a significant housing development which, it is contended, might have an adverse effect on traffic, is something which might be of some relevance to a large number of persons. However the degree of relevance is dependent upon the extent to which it might reasonably be said that the person (or an organisation representing a group of persons) may be affected. The fact that one might, on occasion, visit the relevant area (for, for example, personal, social or sporting reasons) might, in one sense, give one an interest in the traffic in that area but it could hardly be said to be a "substantial interest". On the other hand a residents' association representing an adjoining area who might wish to put forward an argument that there would be a very significant impairment of their ability to move in and out of their housing estate would undoubtedly have a much more significant interest.

3.10 Furthermore it should be noted that the nature of the proposed development itself, both as to its scale, and the extent to which it might be said to alter the area in which it is located, can have the potential to increase the range of persons who might legitimately be said to have a significant interest in the matter. For example a minor extension to an individual house located in an unobtrusive part of a provincial town would be unlikely to be of legitimate significant interest to any but those in its immediate vicinity. A major redevelopment of the town centre, which could have an effect on the way in which all of the residents of the town had an ability to enjoy the amenities of the town could, at least in principle, have the potential to give rise to a much wider range of persons having a significant interest in the development.

3.11 It seems to me, therefore, that having identified the interest which an applicant has either expressed (or might be taken to have been prevented from having expressed) the court should, by reference to that interest, identify the importance of the interest by reference to criteria such as:

> (a) the scale of the project and the extent to which the project might be said to give rise to a significant alteration in the amenity of the area concerned. The greater the scale and the more significant the alteration in the area than the wider range of persons who may legitimately be able to establish a substantial interest;
>
> (b) the extent of the connection of the applicant concerned to the effects of the project by particular reference to the basis of the challenge which he puts forward to the planning permission and the planning process;
>
> (c) such other factors as may arise on the facts of an individual case.

3.12 Insofar as this court has dealt with the degree of connection necessary to establish "substantial interest", it would appear that a strict approach has been applied. For example in *O'Brien v. Dun Laoghaire Rathdown County Council* (Unreported, High Court, O'Neill J., 1st June, 2006) a bona fide concern over a proposal to demolish and rebuild in like form a building within sight of the applicant's residence was considered insufficient. Such a strict approach is consistent with the views expressed by Macken J. in *Harrington*.

3.13 In the context of the above it is then necessary to turn to the matters relied upon on behalf of Mr. Harding to suggest that he has a "substantial interest" in the subject matter of the application in this case.

3.14 In the affidavit grounding the application for the judicial review, Mr. Harding describes himself and his relationship with the area in which the proposed development is located in the following way:

> "I am a professional sailor and a retired merchant seaman, ships boson. I currently live at 3 Ardbrack Heights in Kinsale. I have lived all my life in the area of Kinsale Harbour and grew up as a child in the Ballymacus area where the notice party proposes to carry out the development the subject matter of these proceedings. I am intimately familiar with the area as members of my family still reside there and own land adjacent to the property owned by the notice party. I am intimately familiar with the area from the sea as I frequently conduct sailing trips in the area".

The issue of standing having been raised in a replying affidavit, Mr. Harding returned to the matter in a further affidavit where he stated the following: -

> "I do not accept that it is necessary for me to establish that I have a financial interest in order to establish locus standi to bring these proceedings. The whole purpose of the planning code is to allow third parties to participate in the planning process. It is intended that people who have an interest in the environment may participate in the process. It is not as if I am a stranger to the area and seeking officiously to intervene in respect of a planning application which will have little or

no impact upon myself or the environment where I live. I grew up in Ballymacus and have lived all my life in the area. I love the sea and my entire life has grown from my association with Ballymacus. My immediate family, an uncle and cousins, own houses right in the middle of the proposed development and my uncle Charles Harding owns a very significant portion of the headland. I wish to show that I have a constant and continuous interest in the area and I constantly visit the area even though I personally live in Kinsale. I frequently visit the area both by land and by sea and I believe that my longstanding association with the area which was my home and is in close proximity to my current home gives me a substantial interest in the matters the subject matter of these proceedings".

3.15 On that basis it seems to me that the interest asserted stems, in summary, from three matters: -

(a) that Mr. Harding grew up in the area of the proposed development and retains family connections with the area

(b) that Mr. Harding lives in Kinsale which is, apparently, some two to three kilometres from the headland where the proposed development is due to take place; and

(c) that Mr. Harding has a significant interest in the sea and for that reason, and the matters referred to at 1 and 2 above, visits the area of the proposed development both by land and sea on a relatively regular basis.

It would also appear, as argued by counsel for Cork Council, that Mr. Harding has spent a significant amount of time since his childhood at sea and it is by no means clear on the affidavit evidence as to the regularity of his contact with the area while at sea. In that context it should be noted that Mr. Harding would now appear to be retired and has been living at his current address at Kinsale for approximately 14 months as of the date of the swearing of the affidavits.

3.16 Insofar as Mr. Harding seems to place some reliance on the fact that family members live in close proximity to the proposed development I do not believe that this, of itself, could confer sufficient interest to give him standing. Counsel for Mr. Harding clarified this aspect of his case by indicating that Mr. Harding did not seek to rely upon the standing of those family members, but placed reliance on their close connection with the lands the subject of the development application as part of establishing Mr. Harding's association with the area.

It should be recalled that many of those who made observations contrary to the grant of planning permission to Cork Council have appealed the grant of planning permission to the Board and that appeal is pending. It seems that at least some of the persons who have appealed are local landowners (including some members of Mr. Harding's family). Those persons are entitled to advance their own case in the manner which they have chosen and it does not seem to me to be open to Mr. Harding to seek to rely on any interest which they may have. Shorn of those persons' direct interest, it seems to me that Mr. Harding's own personal interest, under this heading, is confined to the fact that he is from the area and has, understandably, occasion to visit it on a reasonably regular basis. Such a factor would not, in my view, certainly of itself, confer standing.

3.17 The two other matters contended for suggest that Mr. Harding, as a resident of nearby Kinsale, with a personal and family connection with the headland and an interest in the sea has a genuine interest in seeking to have the headland kept in an undeveloped state. I am satisfied that, under the traditional test for standing, it is probable that that state of affairs would have afforded Mr. Harding a sufficient connection to establish an interest in the matter and thus justify standing. However I am not satisfied that the degree of connection which he has set out in his affidavits meets the more stringent test introduced in the 2000 Act of a "substantial interest". I have come to that view notwithstanding the fact that the development is, manifestly, of a significant scale and such as would, if it goes ahead, be likely to bring about a material alteration in the headland itself. Thus I would be inclined to the view that the scope of persons who might be able to establish that they have a substantial interest in this project would be wider than might be the case in respect of projects significantly smaller in scale or those which would not be likely to bring about significant change in the area in which they are located. However notwithstanding that I accept that the scale of and nature of the project extends the scope of those with a "substantial interest" to a wider boundary it does not seem to me that Mr. Harding comes within that extended scope. I accept that his interest is more than that of a mere bystander. I accept that his concerns in relation to the development of the headland are genuine. However it seems to me that the test of "substantial interest" requires something more than a familial connection with an area coupled with a pattern of visiting the area as a former native and as a sea faring person.

3.18 In all the circumstances I have come to the view that Mr. Harding has failed to meet the substantial interest threshold imposed by the 2002 Act.

However lest I be wrong in that conclusion it seems to me appropriate that I should go on to consider the other preliminary issue raised on behalf of Cork Council and Kinsale Limited. I now turn to the question of the adequacy of appeal.

4. Appeal and Adequate Remedy

4.1 In *State (Abenglen) v. An Bord Pleanála* [1984] I.R. 381 Henchy J. at p. 405, said the following: -

"… where Parliament has provided a self-contained administrative and quasi judicial scheme, postulating only a limited use of the Courts, certiorari should not issue when, as in the instant case, use of the statutory procedure for the correction of error was adequate (and, indeed, more suitable) to meet the complaints on which the application for certiorari is grounded".

4.2 In *Lancefort v. An Bord Pleanála* [1999] 2 I.R. 270 Lynch J. said the following: -

"By the code of legislation embodied in the Local Government (Planning and Development) Acts, 1963 – 1992, the Oireachtas has established two tiers of independent and qualified bodies to administer the Acts and to ensure proper standards of planning and development throughout the State. The first tier of such bodies comprises the local authorities and their planning departments staffed by qualified persons. They have the duty of ensuring proper standards of planning and development through their local areas. The second tier is of course the first respondent which is the national authority charged with ensuring proper planning and development throughout the State when there is an appeal to them from decisions of the local planning authorities. Again, the first respondent is staffed by appropriately qualified people …

In the vast majority of cases, the decision of the first respondent should be the end of the matter. Further proceedings by way of judicial review should be the rare exception rather than the rule …"

4.3 *In Kinsella v. Dundalk Town Council* (Unreported, High Court, Kelly J., 3rd December, 2004) Kelly J. on the facts of the case before

him, came to the view that:-

> "In my view the Applicant has in his right of appeal to An Bord Pleanála not merely an adequate but a preferable remedy to that which is sought here. I do not perceive that these proceedings display any of the exceptional characteristics which would justify the court in intervening in the self contained planning process. Thus were it necessary I would be inclined to refuse this application on the basis of the existence of an adequate alternative remedy. Given that the Applicant has availed himself of that right my inclination to refuse would be all the stronger".

4.4 That a consideration of whether an appeal to the Board may be an adequate (or perhaps more appropriate) remedy is, therefore, clearly a matter which the court has to consider. However counsel for Mr. Harding draws attention to the decision of O'Donovan J. in *Eircell v. Leitrim County Council* [2000] 1 I.R. 479 where this court came to the following view:-

> "I have no doubt but that I am entitled to exercise that discretion (to refuse relief) in favour of the applicant and furthermore that it is in the interests of justice that I should do so; if for no other reason than that the public at large are entitled to know that the planning authority cannot ride rough shod over principles of constitutional justice and fair procedures which, in the event that the applicant has chosen to appeal to the Minister against the decision of the elected members of the respondent council to revoke the said grant of planning permission, was unlikely to have come into the public domain".

4.5 Counsel for Mr. Harding also drew attention to the decision of the Supreme Court in *Stefan v. Minister for Justice Equality and Law Reform* [2001] 4 I.R. 203 where Denham J., speaking for the court makes clear that amongst the appropriate considerations to be taken into account in deciding whether to consider granting judicial review in respect of a decision made at the first part of a two part process (in that case the process involving applications for refugee status) the court should have regard to the legitimate entitlements of persons involved in the process to avail, in accordance with the statutory or administrative regime concerned, of both stages in the process.

4.6 Having considered those authorities it seems to me that there is no real conflict between the views expressed in *Abenglen*, *Lancefort* and *Kinsella* on the one hand with those expressed in *Eircell* and *Stefan* on the other hand. Where a statutory or administrative regime establishes a two part process, persons are entitled to each of the opportunities for establishing their case which that process gives them. It should, of course, be noted that the process may not confer exactly the same rights at each stage. Thus, for example, in the refugee process the initial consideration by the Refugee Applications Commissioner is based, in the ordinary way, on a questionnaire and interview, while the appeal before the Refugee Appeals Tribunal more closely resembles a quasi adversarial hearing with oral evidence and, typically, representatives of both sides.

4.7 Similarly the planning process (at least insofar as it relates to those who might colloquially be described as "objectors") creates a significantly different process at the separate stage of the initial application before the planning authority on the one hand and an appeal (if one be brought) to the Board, of the other hand. At the stage of an initial application the entitlement which an "objector" has is to make observations and, in certain cases, further observations as to the reasons why the planning permission as sought should not be granted. Where an appeal is brought to the Board and, in particular, where the Board decides that it is appropriate to conduct an oral hearing then an "objector" has a much wider entitlement analogous to the position of a party in litigation. At the stage when the application is being considered by the planning authority, there is no provision for an oral hearing, for the exchange of submissions, or the production of documents. Each of those procedures is available on appeal to the Board. In addition the entitlements of different parties to the process may vary. As pointed out by Murphy J. in *State (Haverty) v. An Bord Pleanála* [1987] I.R. 485 (at p. 493) the rights of objectors (as opposed to developers) are towards the end of the spectrum identified in the judgment where rights are confined to making observations.

4.8 Where, therefore, it is said that a party is entitled to a proper determination at both stages of a two stage process, that should not be taken as indicating that the proper conduct of the process at each stage must necessarily be the same.

4.9 Where the second stage of the process amounts to a form of appeal which might be said to be at least analogous to a full rehearing (that is to say where the appeal body has to consider, itself, the merits or otherwise of the issue under consideration rather than simply reviewing the decision reached at first stage), there will always be aspects of the process at first stage which will not be relevant to the appeal at all. This is the case even in those court processes where a full rehearing is provided to appellants. In such a case, for example, a decision on the admissibility of evidence taken at first instance would be of no relevance on the appeal where the Appeal Court will make its own mind up on the admissibility of the relevant evidence if it is sought to be tendered again. The fact that the evidence might have been wrongly admitted or excluded at first instance does not, in such a case, provide a ground of appeal. The mere fact that a person in such a situation does not have the ability to raise, on the appeal, the fact that evidence was, (say) wrongly admitted at first instance does not mean that an appeal will not be an adequate remedy. The reason is, of course, that the full rehearing will allow the case to be decided only on evidence which the Appeal Court determines to be admissible. The real entitlement of the party concerned is to have the merits of his case properly determined. He does not, of itself, necessarily have an entitlement to have each and every ruling made at first instance revisited by the Appeal Court unless that issue is raised again at the rehearing in which case it will be determined as the Appeal Court sees fit.

4.10 It does not, therefore, seem to me that the mere fact that an issue in respect of which complaint is made relating to the first stage of a two stage process will not be dealt with by an appellant body dealing with the second stage, necessarily means that an appeal would not be an adequate remedy. The appeal is an adequate remedy if the appeal body comes to a fair and proper decision considering all appropriate matters. Different considerations may well apply where there is a limited form of appeal and where, therefore, the process engaged in at first instance continues to affect the overall result notwithstanding the appellate procedure.

4.11 It should, however, be noted there may be cases where, even though there be a full rehearing or even (as here in the planning process) a wider hearing on appeal, the second stage is, in unusual circumstances, tainted by what occurred in the first stage. For example in *Jerry Beades Construction Ltd v. Dublin Corporation (*Unreported, High Court, McKechnie J., 7th September, 2005) McKechnie J. noted, at p. 73, that the Board in that case, though blameless, was under a misapprehension as to material matters by virtue of the issue complained of (successfully) in relation to the process engaged in while the matter was being dealt with by Dublin Corporation. Similarly a failure in the first stage process may be such as effects the jurisdiction of the whole process including the decision taken at the second stage.

4.12 It seems to me likely, therefore, that an appeal will be regarded as an adequate remedy in a two stage statutory or administrative process unless either: -

> (a) The matters complained of in respect of the first stage of the process are such that they can taint the second stage

of the process or effect the overall jurisdiction; or

(b) the process at the first stage is so flawed that it can reasonably be said that the person concerned had not been afforded their entitlement to a proper first stage of the process in any meaningful sense.

4.13 Thus, for example, where a planning authority may be found (as O'Donovan J. found in *Eircell*) to have ridden "roughshod over principles of constitutional justice and fair procedures" it could reasonably be concluded that the applicant in that case (notwithstanding having available an appeal to the Minister) would have been deprived of the reality of any meaningful first stage. Where, however, the matters complained of are not such as would either give rise to a reasonable apprehension that the second stage would itself be tainted, have its jurisdiction removed, or were such as could be said to have deprived the applicant concerned of a meaningful first stage, then it seems to me that an appeal should, ordinarily, be regarded as an adequate remedy and this court should not entertain an application for judicial review in respect of the first stage.

4.14 In that context it will be necessary to consider the grounds put forward on the part of Mr. Harding to assess whether, either individually or collectively, they might be said, if ultimately made out, to have deprived Mr. Harding of his entitlement to a proper first stage process to a sufficient extent to warrant treating an appeal to the Board as an inadequate remedy. No grounds are advanced which, in my view, could lead to a conclusion that the appeal process would be tainted or would lack jurisdiction.

4.15 Before considering those grounds, I should deal with an issue raised by counsel for Mr. Harding. It was submitted that the decision by Kelly J. in these proceedings, which led to a stay being placed on the appeal to the Board, amounts to a determination that an appeal would not be an adequate remedy. I am not satisfied that the judgment can be read in that way. It is clear that Kelly J. was satisfied that he could (and in fact did) apply ordinary interlocutory injunction principles to the question of the stay. In those circumstances, it does not seem to me that it can be said that any final conclusion could have been reached as to whether an entitlement to judicial review might be affected by an analysis of whether an appeal might be an adequate remedy. In those circumstances I now turn to the grounds of challenge.

5. The Grounds of Challenge

5.1 The issues which Mr. Harding raises as grounds for his challenge are many and varied. Amongst the grounds are a series of contentions concerning an allegation that the manner in which Cork Council dealt with alterations in the nature of the planning application, (subsequent to its submission to the Council, and prior to the decision to grant permission), amounted to an effective exclusion of persons in a position such as Mr. Harding from an opportunity to make observations in relation to the development in respect of which permission was finally granted.

5.2 The full grounds relied on may be summarised as follows: -

(A) It is contended that the planning application has been determined by Cork Council other than in accordance with the requirements of the law in the following manner:

(i) A request for further information dated the 24th February, 2005 is alleged to be *ultra vires* and/or not in compliance with the requirements of Article 33 of the Planning and Development Regulations, 2001 ("*the 2001 Regulations*") on the basis of the following contentions. It is said that:

(a) The request for further information contained a number of requirements which sought the submission of revised plans or drawings altering the proposed application, as distinct from further information in relation to the application

(b) The power to request further information was exercised for what is said to be an improper purpose (i.e. to preserve Kinsale Ltd.'s tax relief) and/or, that Cork Council took into account an irrelevant consideration, i.e. the fact if Kinsale Limited was required to re-apply for planning permission, no tax relief would, in practice, be available for the hotel element of the proposed development.

(c) In so far as it might be suggested that the revised plans were sought in reliance on Article 34 of the 2001 Regulations, it is said that the plans submitted constituted a radical alteration of the planning application which did not constitute a "*modification*" for the purpose of the said Article.

(ii) In the alternative, it is alleged that Cork Council failed to comply with the statutory obligation imposed by virtue of Article 34(4) of the 2001 Regulations to declare the application to have been withdrawn after the period of six months from the date of the requirement for further information, in circumstances where it is said that Kinsale Limited failed to comply with the requirement under paragraph 6 of the request for further information dated the 24th February, 2005 within the relevant period of six months from the date of the letter.

(iii) It is alleged that Cork Council decided to grant planning permission on foot of revised plans and drawings that were received by Cork Council other than in accordance with permission regulations for the following reasons:

(i) It is said that revised plans and drawings were not received in accordance with an invitation issued by Cork Council pursuant to Article 34 of the 2001 Regulations.

(ii) It is alleged that the revised plans and drawings constituted a radical alteration of the planning application such as to, in effect, constitute a new application.

(iv) It is alleged that Cork Council engaged in consultation with Kinsale Limited after the planning application was submitted in circumstances where it is said that the provisions of the 2000 Act and the 2001 Regulations only permit a planning authority to enter into such consultations prior to the submission of a planning application and in accordance with the requirements of section 247 of the 2000 Act.

(v) It is alleged that Cork Council purported to exercise its powers pursuant to Article 35 of the 2001 Regulations to require Kinsale Limited to publish a further statutory newspaper notice in relation to the further information and/or revised plans received by the planning authority in response to the said request for further information dated the 24th February, 2005. It is alleged that the exercise of Cork Council's powers in that regard was *ultra vires* and/or that the notices issues or published did not comply with the requirements of Article 35. In that context

(I) It is said that the power to require an applicant for permission to publish a statutory notice in the

circumstances outlined under Article 35 only applies where the information and/or revised plans and drawings have been received in accordance with the requirements of the 2001 Regulations, which is said not to be the case having regard to the alleged invalidity of the Article 33 request for the reasons referred to above.

(II) Furthermore it is alleged that Cork Council did not notify Mr. Harding "as soon as may be" following receipt of the further information and/or revised plans, drawings or particulars, as required by Article 35(1)(b).

(III) In addition it is said that neither the notice published by Kinsale Limited in the Irish Examiner on the 26th September, 2005, nor the notice issued to Mr. Harding, referred to the fact that revised plans had been received in relation to the planning application as required by Article 35(1)(c)(iv).

(IV) Finally it is said that the relevant notices referred to further information in relation to effects on the environment having been furnished, without indicating that such information related to a revised proposal.

(vi) It is contended that the Environmental Impact Statement ("EIS") submitted by Kinsale Limited did not comply with the requirements of Article 94 of the 2001 Regulations in so far as the revised proposals were concerned. It is also alleged that there was no additional information concerning the likely significant effects of the revised proposals furnished such as to comply with the requirements of Part 10 of the 2001 Regulations and, in particular, Article 94 thereof, as interpreted in the context of Council Directive 85/337/EEC, as amended by Council Directive 97/11/EC on the assessment of the effects of certain public and private projects on the environment.

(vii) It is further alleged that Condition No. 72 of the decision to grant planning permission is ultra vires for the reasons more particularly set out at paragraph E. (xxxviii) of the Statement Required to Ground the Application for Judicial Review. In particular the relevant condition is said to have been imposed other than in accordance with the requirements of section 34(4)(a) of the 2000 Act in so far as the condition required Kinsale Limited to carry out works on lands outside the site, which lands were at all material times not within the ownership or control of Kinsale Limited.

(viii) It is also alleged that Cork Council failed to provide a statement as required by section 34(10)(b) of the 2000 Act indicating the main reasons for not accepting the recommendations, *inter alia*, contained in the Report of the Senior Planner, Nicholas Mansergh, dated the 14th October, 2005, and in the report of the Senior Executive Planner, which recommendations were to refuse permission for the proposed development, as altered by the revised plans submitted. In the First Schedule to the decision of Cork Council made on the 17th October, 2005, the Council placed reliance on the Report of the County Architect. However it is said that the report (dated the 30th September, 2005) of the County Architect does not contain any recommendation as to whether the planning application should be granted or refused permission but merely contains suggestions as to how various elements of the development might be treated. The Report of the County Architect is said not to contain any reasons or justification for departing from the recommendations set out in the reports of the Senior Planner and Senior Executive Planner.

(B) Furthermore the decision of Cork Council is alleged to have been made other than in accordance with fair procedures for the following reasons.

(i) It is said that the fact that the County Architect entered into consultation with Kinsale Limited after the planning application was submitted in relation to issues of re-design gave rise to a reasonable suspicion of bias and/or a real likelihood of bias in favour of Kinsale Limited in circumstances where interested members of the public, including Mr. Harding, were excluded from this consultation process. It is also said that those facts constituted a breach of fair procedures and, in particular, a breach of the principle of *audi alteram partem*.

(ii) In all the circumstances of the case, it is said that the period of two weeks fixed by Cork Council for members of the public to respond to, what is said to be a radically re-designed planning application, was wholly inadequate to afford interested members of the public, including Mr. Harding, an adequate opportunity, properly to respond to the revised proposal. Furthermore, it is said that the letter dated the 26th September, 2005 from Cork Council to Mr. Harding did not indicate that revised proposals had been received from Kinsale Limited but merely indicated that further information had been received.

(iii) It is alleged that Cork Council attached Condition No. 72 to its decision to grant permission in circumstances where the relevant condition required the carrying out of development comprising road improvements which were not the subject matter of the application for permission.

5.3 As will be seen a central theme in the grounds put forward concerns the manner in which the application appears to have altered from the time of the original application to that in respect of which notice of intention to grant permission was actually granted.

5.4 Part of the context in which it is alleged those issues arise concerns what appears to be the fact that, in order to retain the benefit of significant tax advantages, it was necessary that the permission (if it was to be granted), should be in respect of an application submitted before the 31st December, 2004. In substance it is contended that that time limit led to the application being dealt with in an inappropriate way in a number of respects. Most particularly it is said that as a result of there being dissatisfaction on the part of Cork Council with certain aspects of the proposal as submitted, a process was engaged in for the purposes of arranging for revised plans to be submitted which would meet Cork Council's requirements. It is said that the time limitation to which I have referred could only be met within the confines of the existing planning application and that the process utilised to achieve that end was both flawed and, to an extent, contrived.

5.5 In particular a number of complaints are made about the way in which that process was handled. In order to understand a key element of the relevant contentions it is necessary to address the respective terms of Articles 33 and 34 of the 2001 Regulations.

5.6 Article 33(1) provides for the circumstances in which a planning authority may seek further information. The Regulations provide that the seeking of further information gives rise to an extension of time for the consideration of the planning application but also

(under sub article (4)) to a provision which deems the planning application withdrawn if the information is not supplied within six months from the notice requiring further information.

5.7 Article 34, on the other hand, concerns a situation where a planning authority, having considered the application concerned, is disposed to grant a permission subject to modification and, in that context, invites the applicant to submit revised plans incorporating such modifications.

5.8 The distinction is illustrated by the decision of O'Leary J. in *Ilium Properties Limited v. Dublin City Counci*l (Unreported, High Court, O'Leary J., October 15th 2004) where the following is stated: -

> "The power of the planning authority to request further information under this Article is limited to matters which fall within Article 33. Article 33 requests should not (indeed cannot) be used to vary a planning application. Variation can only be done by agreement or by condition (and in these circumstances to a limited extent only in view of the public interest in planning applications) or by re-application. If a planning authority cannot get agreement or cannot apply suitable conditions to its decision it must accept or refuse the application as submitted. The authority is not the developer and should stay within its remit".

5.9 It is, therefore, clear that Article 33 is designed to deal with a situation where the planning authority is in need of further information to enable it to consider whether or not to grant permission in relation to the application as made subject, if appropriate, to such alterations as may validly be imposed by condition. Article 34 is concerned with a different situation where the planning authority has already made up its mind that it would be prepared to grant permission provided that certain modifications are made and seeks revised plans and documentation to incorporate the relevant modifications.

5.10 It should also be noted that Article 35 requires that in the event that further information or modified plans involve significant additional data, there is an obligation to re-open the matter to further public observation.

5.11 On the facts of this case it is alleged that a letter written by Cork Council of 21st January, 2005 is, at a minimum, confused as to whether what is being sought in that letter is further information under Article 33 or modifications under Article 34 or both. Indeed, on Mr. Harding's case, that letter is, in itself, grounds for quashing the planning decision by virtue of the failure to specify which was involved. Be that as it may, it is the case that modified plans were submitted. The process of the involvement of the Council and its officials in developing those modified plans in conjunction with Kinsale Limited is also alleged to be in breach of the proper role of the Council as identified by O'Leary J. in *Illium*. It is also said that the scale of the alterations as set out in the revised plans amount to something that cannot reasonably be described as a modification. In any event Cork Council considered that the modifications were sufficiently substantial to warrant re-involving the public in the process and required Kinsale Limited to publish a planning notice which bore the heading, as required by the planning authority of "further information". It is thus said that the re-involvement of the public in the process (including the involvement of Mr. Harding) was done in a misleading way resulting in part from the confusion that had been generated by failing to distinguish between a further information requirement and a request for modified plans at the very beginning.

5.12 If each of the complaints made in relation to this aspect of Mr. Harding's case were to be made out then there would be grounds, in my view, for taking the view that he had been improperly excluded from a reasonable opportunity to involve himself in that aspect of the process which resulted in a consideration of what, on any view, must be a development which is at least in some material respects different from that applied for. In addition, if other of the grounds which he contends for are established, part of the reason why such exclusion may have occurred was by virtue of the need to maintain the tax status of the development by the grant of a permission on foot of the existing application rather than on foot of a new application incorporating the modifications required to make the matter acceptable to Cork Council. While obviously the merits of the proposal as modified can be fully dealt with in the appeal process, I am not persuaded that in the event that Mr. Harding was to succeed in relation to all or many of the grounds which he puts forward and which I have briefly outlined above, it could not be said that there has been a sufficiently substantial failure in the public consultation process before the local authority such as would lead to a conclusion that Mr. Harding had been substantially denied an opportunity to involve himself in the process relating to those revised or modified plans.

5.13 In making this latter point I should emphasise that nothing which I have said should be taken as expressing a view on the merits or otherwise of any of the points raised even on a substantial grounds basis. Detailed counter arguments were advanced by counsel on behalf of Cork Council and by counsel on behalf of Kinsale Limited. In addition further factual matters were adverted to by counsel such as the fact that Mr. Harding's objection to the scheme appears to have been one at the level of being opposed in principle to any development and that, therefore, he had not expressed any particular interest in the precise nature of the development and thus might be said not to have been significantly prejudiced by any contended for inability to involve himself in the making of observations in relation to the modified plans.

5.14 The purpose of the above brief analysis of the basis of Mr. Harding's challenge is simply for the purposes of reaching a conclusion as to whether, if that challenge were to be made out in substantial part, it could be said that an appeal would be an adequate remedy in respect of the relevant issues. For the reasons which I have indicated, I am satisfied that it is at least possible that the cumulative effect of all or most of the grounds advanced (particularly those to which I have made specific reference) are such that, if they were to be established not just at the leave stage but at a substantive hearing, such grounds might give rise to a situation where it would be appropriate for the court to conclude that Mr. Harding had suffered a sufficiently significant impairment of his entitlement to the proper consideration of his objection at the planning authority stage, so as to justify forming the view that an appeal would not necessarily be an adequate remedy.

5.15 In those circumstances I am not satisfied that it has been established, at this stage, that an appeal would necessarily be an adequate remedy.

6. Conclusions

6.1 For the reasons set out I am, therefore, satisfied that Mr. Harding has not established a sufficient "substantial interest" to give him standing. I am not, however, satisfied that if he had standing, it would be appropriate, at this stage, to regard an appeal as an adequate remedy. If, therefore, I had been satisfied that Mr. Harding had standing, I would have proceeded to consider each of the individual grounds put forward for the purposes of determining whether there were substantial grounds shown under each heading. In the event that I was persuaded that there were substantial grounds for some, but not all, of Mr. Harding's contentions I would have then returned to the question of whether an appeal might be said to be an adequate remedy. In considering that question afresh I would, of course, have had regard to only those grounds in relation to which I was satisfied that a substantial basis for challenge had been shown.

6.2 However in the light of the fact that I have taken the view that Mr. Harding has not standing to mount this challenge in the first place it does not seem to me to be necessary to embark upon that exercise. I would therefore propose refusing leave.