APPROVED

[AMENDED]

THE HIGH COURT

[2023] IEHC 686

Record No. 2022/ 225 JR

Between:

JOHN HOGAN

Applicant

-and-

DONEGAL COUNTY COUNCIL

-and-

AN BORD PLEANÁLA

Respondents

-and-

(BY ORDER OF THE HIGH COURT OF 14th NOVEMBER 2022)

CONOR MCENIFF AND BRIAN MCENIFF

Notice Parties

JUDGMENT (*ex tempore*) of Mr. Justice Conleth Bradley delivered on 21st day of November 2023

INTRODUCTION

Preliminary

1. The decisions of Donegal County Council ("the council") dated 15th April 2021 and of An Bord Pleanála ("the Board") dated 4th November 2021 which the applicant (who is a litigant in person) seeks to challenge by way of judicial review relate to their respective grants of planning permission for *the retention* of a change of use from a tennis court to a garden enclosure and the construction of a polytunnel for flower growing at a site adjacent to dwelling house at Dinglei Coush, Bundoran, County Donegal.

2. This application is a contested *inter partes* application for *leave* to apply for judicial review pursuant to the provisions of section 50 of the Planning and Development Act 2000 (as amended) (the "2000 Act") and, insofar as it is legislatively incorporated, Order 84 of the Rules of the Superior Courts, 1986 (as amended) ("RSC 1986").

3. I heard submissions from Mr. Hogan ("the applicant"), from Ms. Ellen O'Callaghan BL (for the council), from Mr. David Browne SC (for the Board) and from Mr. Ciarán Doherty BL for the notice parties.

Statutory provisions

4. The principal statutory provisions which arise for consideration in this case include the following:

5. Section 50(2) of the Planning and Development Act 2000 ("the 2000 Act"):

"A person shall not question the validity of any decision made or other act done by— (*a*) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act…otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) …".

6. Section 50(6) of the 2000 Act provides:

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

7. Section 50(8) of the 2000 Act provides:

"The High Court may extend the period provided for in *subsection (6)* or *(7)* within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that (*a*) there is good and sufficient reason for doing so, and (*b*) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

8. The provisions of section 37(1)(a) and (b) of the 2000 Act are addressed below in the context of a preliminary point being raised about the status of the decision of the council when the Board has made a decision on an appeal.

THE DECISION OF DONEGAL COUNTY COUNCIL

9. On or about 26th February 2021 the council deemed valid an application (Planning Register Number 21/50321) from Nollaig McGovern care of James Keenan for retention permission for development of land comprising (1) a change of use from tennis court to garden enclosure (2) erection of a polytunnel for flower growing and all associated site works at Dinglei Coush, Magheracar, Bundoran, County Donegal.

10. Approximately five numbered third party submissions were received by the council. On behalf of the applicant, on 29th March 2021, the applicant's planning consultant, Mr. Gerard Convie, had made a submission to the council where a number of matters were raised, including *inter alia* that the then proposed polytunnel would materially contravene the provisions of the Donegal County Development Plan 2018-2024 and the provisions of the Bundoran and Environs Development Plan 2009-2015, would have an adverse impact on neighbouring properties including their devaluation, was contrary to the development plan policy and further referenced the glare and impact on adjacent commercial properties. Similar issues were raised in the other third party submissions. An objection, for example, to the retention application was received by the council on 1st April 2021 from Patricia Masterson for the following reasons, which, in summary, were that the retention application was (1) not compatible with the residential area (2)

could lower the value of adjacent property (3) expressed concern about noise from motors associated with the running of the polytunnel (4) expressed concern about possible vermin from waste.

11. On 12th April 2021 a planning report on behalf of the council recommended that permission be granted subject to six conditions for the following reasons and considerations:

> "*Having regard to the location of the subject site within the urban area of Bundoran, outside of and removed from any sensitive designations, to the nature and scale of the development and the policies of the current development plan, it is considered that subject to compliance with the conditions below, the proposed development would not injure the amenities of the area, would not be prejudicial to public health and would not endanger public safety by reason of a traffic hazard. Accordingly it is considered that the proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area*."

12. On 15th April 2021 the council issued a ***notification*** of decision to grant retention permission for development of land comprising (1) a change of use from tennis court to garden enclosure (2) erection of a polytunnel for flower growing and all associated site works at Dinglei Coush, Magheracar, Bundoran, County Donegal subject to six numbered conditions. The notification decision advised that the development would be only authorised when notification of final grant was issued.

13. The planning file which has been put before the court includes the planning authority's file which in turn contains a number of photographs including photographs of the polytunnel by itself and relative to its surrounding environment. The photographs, which are photocopied on paper, are clear and give a good indication of the subject of the retention application.

14. The decision of the council was appealed to the Board by the applicant on 11th May 2021, which was within the statutory time period for an appeal. The report of the Board's Senior Planning Inspector (Paul Caprani) dated 13th October, 2021 outlines the applicant's grounds of appeal as follows:

    - *"It is argued that during the course of the application and the construction of the polytunnel that there have been serious breaches in planning regulations that have been brought to the attention of Donegal County Council, the Ombudsman, the Minister for Planning and Local Government and the Office of the Planning Regulator.*
    - *Various irregularities as to how the application was dealt with by Donegal County Council are set out, including redacting personal information contained on file.*
    - *There is no engineer's report, visual impact study or EIAR submitted with the application. Furthermore, as the application is for retention of planning permission it is argued that a substitute consent application is required in this instance. In this regard reference is made to the Supreme Court ruling of*

July, 2021 which ruled that substitute consent is inconsistent with EU Environmental Law.

- *The previous tennis court on site is more compatible with the zoning objective for the site. It is argued that it was Bundoran's only tennis court and was regularly used by tourists and children.*
- *The removal of the tennis court is contrary to many of the policies in respect of tourism and leisure set out in the development plan. It is not appropriate for the community to rely solely on recreational facilities provided in schools in the area. Independent recreational facilities should be provided for the town of Bundoran.*
- *The erection of an industrially sized polytunnel to replace a tennis court negatively impacts on the amenity of the existing dwellings at Dinglei Coush.*
- *It is suggested that there are some inaccuracies on the maps submitted with the application and it is noted that certain people's houses within the vicinity of the site are highlighted while others are not.*
- *There are inadequate parking facilities on site as there is a high demand for existing recreational facilities in the area.*
- *The sun glare arising from the polytunnel could give rise to significant road safety concerns. There is also a lack of road signage in the area which could exacerbate traffic safety. The development could give rise to significant road and traffic*

congestion and there are numerous dangerous bends in the vicinity of the site.

- *The polytunnel gives rise to significant levels of light glare into the internal rooms of dwellings in the vicinity. It also gives rise to excessive heat generation.*
- *The proposal will give rise to a serious devaluation of property and will undermine tourism in the area.*
- *There is a gas storage tank in the vicinity of the site which represents a serious environmental hazard.*
- *It is suggested that the polytunnel is too large for domestic use only.*
- *The polytunnel and enclosed garden could be used as a place of public assembly and in such situations a fire cert is required. As it presently stands the proposal represents a fire hazard.*
- *The garden enclosure and polytunnel will have no disability access certification as required under the Building Control (Amendment) Regulations 2018.*
- *There are no Covid signs or hand sanitisers on display.*
- *The construction of a polytunnel is a ruse to construct two semi-detached dwellinghouses on site at a later date.*
- *Any boundary treatment implemented by way of condition will not stop the light pollution from the polytunnel.*
- *A number of other conditions are also questioned in the grounds of appeal in terms of their usefulness to allay the third-party concerns.*

- *Numerous maps, letters, doctors certs etc. are attached to the grounds of appeal."*

15. On 4th November 2021 the Board granted permission for the retention of (1) a change of use from tennis court to garden enclosure and (2) erection of polytunnel for flower growing and all associated site works at Dinglei Coush, Magheracar, Bundoran, County Donegal subject to four numbered conditions.

16. A important preliminary issue arises for consideration in the context of the initial decision of the council.

17. It is submitted by Ms. O'Callaghan BL, on behalf of the council, that its decision of 15th April 2021 was annulled by operation of law (namely, section 37(1)(a) and (b) of the 2000 Act) when the Board made its decision of 4th November 2021.

18. Before considering this preliminary point, it is noted that Mr. Hogan alleges a series of complaints against the council which are not relevant to the challenge which he seeks to make against the council's decision dated 15th April 2021 to grant retention permission in this application for leave to apply for judicial review. These include complaints alleging *inter alia* the following*:* that the council never listened to his side of the story; that the fire officer had signed off on the retention application; his view that there was a public interest aspect to his case, and the events around it, which should be further inquired into by a ministerial or government appointed investigation; he questions the role of Bundoran Tidy Towns, Discover Bundoran and persons involved in these groups, and the role of the notice parties; he refers to the failure to publish the Mulcahy report on alleged planning

irregularities in Donegal which he says may have obviated his need to bring these proceedings; he says that he was required to engage Mr. Gerard Convie, planning consultant. These matters and Mr. Hogan's allegations in relation to same are not relevant to his seeking to obtain the leave of the court to challenge the council's decision dated 15th April 2021 by way of judicial review.

19. I now, therefore, address the preliminary point raised by Ms. O'Callaghan BL.

Appeal to An Bord Pleanála

20. In this regard, section 37(1)(a) and (b) of the 2000 Act provides for appeals to the Board and specifically provides as follows:

> "*(a) An applicant for permission and any person who made submissions or observations in writing in relation to the planning application to the planning authority in accordance with the permission regulations and on payment of the appropriate fee, may, at any time before the expiration of the appropriate period, appeal to the Board against a decision of a planning authority under section 34.*
>
> *(b) Subject to paragraphs (c) and (d), where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance* ***and the decision of the Board shall operate to annul the decision of the planning authority as from the time when***

it was given*; and subsections (1), (2), (3) and (4) of section 34 shall apply, subject to any necessary modifications, in relation to the determination of an application by the Board on appeal under this subsection as they apply in relation to the determination under that section of an application by a planning authority."* (Emphasis and underlining added)

21. This precise issue was addressed in the relatively recent decision of the High Court (Ferriter J.) in *Yennusick v. Wexford County Council and An Bord Pleanála* [2023] IEHC 70, where Ferriter J. stated the following at paragraphs 13 and 14 of his judgment:

"*13. In my view, the Council is correct in its fundamental submission to the Court that the applicants are simply not in a position to seek leave to challenge the Council's decision in light of the provisions of s.37(1)(a) of the 2000 Act. That subsection provides that 'where an appeal is brought against a decision of the planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given'. It has been made clear in the authorities that the effect of this provision is that once the Board hands down a decision on an appeal from a decision of the planning authority, the planning authority's decision is annulled: see e.g. People over Wind v the Board [2015] IEHC 271, para 272. This applies even where the Board's decision is subsequently held to be invalid: see McCallig v An Bord Pleanála (no.1) [2013] IEHC 60 (at para. 83).*

14. As the applicants appealed the Council's decision to the Board, and the Board gave a decision on that appeal, the Council's decision is now a nullity. There is accordingly no basis for the court to entertain an application for leave to apply for judicial review in respect of that, now annulled, decision. It follows that the question of an extension of time to make such an application must also fail."

22. Having regard to that part of the judgment of Ferriter J. in *Yennusisck* which addresses section 37(1)(a) of the 2000 Act, I similarly find, on the facts of Mr. Hogan's case, that as the council's decision was appealed to the Board and the Board gave a decision on that appeal on 4th November 2021, the council's decision is now a nullity and is not open to challenge by way of an application for leave to apply for judicial review (or by way of an application for an extension of time to seek leave to apply by way of judicial review) pursuant to the provisions of section 50 of the 2000 Act.

23. As Ms. Callaghan's first point disposes of the entire case as against the council, it is unnecessary to deal with her three supplemental arguments (namely that the application is out of time (statute-barred); that Mr. Hogan in fact appealed to the Board within the time prescribed by the 2000 Act and there was therefore no basis for an extension of time; the threshold of substantial grounds cannot be reached when the actual decision has been annulled).

24. Leave (and, by corollary, an extension of time) are therefore refused to challenge the decision of the council dated 15th April 2021 because this decision was annulled by operation of law.

25. The remaining decision which requires to be considered is the decision of the Board made on 4th November 2021.

THE DECISION OF AN BORD PLEANÁLA

26. As stated earlier, on 4th November 2021 the Board granted permission for the retention of (1) a change of use from tennis court to garden enclosure and (2) erection of polytunnel for flower growing and all associated site works at Dinglei Coush, Magheracar, Bundoran, County Donegal subject to four numbered conditions and for the following reasons and considerations:

> *"Having regard to the zoning objective relating to the site which seeks to make provision for new and maintain existing recreational facilities it is considered that, subject to compliance with the conditions set out below, the retention of the polytunnel and garden enclosure would not seriously injure the amenities of the area or of property in the vicinity, would not be prejudicial to public health and would be acceptable in terms of traffic safety and convenience. The development proposed for retention would, therefore, be in accordance with the proper planning and sustainable development of the area*."

27. The four conditions in the Board's decision of 4th November 2021 were as follows:

> *(1) The development shall be retained and completed in accordance with the plans and particulars lodged with the application, except*

as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be retained and completed in accordance with the agreed particulars. Reason: in the interest of clarity.

(2) The polytunnel shall not be used for commercial/retail use. Reason: To define the terms of the conditions and in the interest of orderly development.

(3) Details of the proposed boundary treatment including any fencing and hedging shall be agreed in writing with the planning authority prior to the commencement of development. Reason: In the interest of visual amenities.

(4) Surface water and drainage arrangements including the attenuation of surface water shall be agreed in writing with the planning authority prior to the commencement of development. Reason: In the interest of public health.

28. Mr. Browne SC made oral submissions and furnished detailed written legal submissions on behalf of the Board arguing that the applicant had not satisfied the test which would warrant an extension of the 8 week period being granted by the court, and in the event that an extension was ordered, that the applicant had failed to establish the statutory threshold of substantial grounds.

Delay

29. Having regard to my determination that the decision of the council was annulled by operation of law when the decision of the Board was made, the question of seeking an extension of time arises in the context of the Board's decision.

30. Mr. Hogan did not challenge the decision of the Board dated 4th November 2021 within the 8 week period prescribed under section 50(6) of the 2000 Act. The question which arises in the context of the application by Mr. Hogan for an extension of time is whether or not Mr. Hogan satisfies the requirements of section 50(8) of the 2000 Act which provides that the court may extend the period within which an application for leave may be made but shall only do so if it is satisfied that (a) there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension.

31. In assessing this matter, all of the parties have referred to the decision of the Court of Appeal (Donnelly J.) in *Heaney v An Bord Pleanála* [2022] IECA 123.[1]

32. While Mr. Hogan initially referred to the decision of the Supreme Court in *Éire Continental Trading Co. Ltd. v Clonmel Foods Ltd.* [1955] I.R. 170, he addressed the matters which the Court of Appeal identified in the *Heaney* judgment and which this court is now required to consider.

[1] The Court of Appeal was comprised of Donnelly J., Ní Raifeartaigh J and Collins J. (with Donnelly J. giving the judgment of the court).

33. In *Heaney* the Court of Appeal (Donnelly J.), at paragraphs 57 to 65 of her judgment, confirmed that an *ex parte* application for leave to apply for judicial review is only "made" when it is moved in open court and that it is insufficient to rely on the fact that the statement of grounds and verifying affidavit have been filed in the Central Office of the High Court.

34. Further, it is worth repeating that the question which arises in the context of the application by Mr. Hogan for an extension of time is whether or not Mr. Hogan satisfies the requirements of section 50(8) which provides that the court may extend the period within which an application for leave referred to may be made but shall only do so if it is satisfied that (a) there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension.

35. The judgment of the Court of Appeal in *Heaney* was applied by the High Court (Ferriter J.) in *Yennusisck v. Wexford County Council and An Bord Pleanála* [2023] IEHC 70 (which I referred to earlier in the context of section 37 of the 2000 Act) and in *Geraghty v. Leitrim County Council* [2022] IEHC 730.[2]

36. At paragraph 57 of his judgment in *Geraghty*, Ferriter J. states:

[2] In his judgment Ferriter J. also referred to *Irish Skydiving Club Ltd v. An Bord Pleanála* [2016] IEHC 448, *Sweetman v An Bord Pleanála* [2017] IEHC 46 and *SC SYM Fotovoltaic Energy SRL v Mayo County Council* [2018] IEHC 20.

"*As Donnelly J. noted in Heaney (at para. 2), two main issues arose in the appeal in that case. The first concerned the point at which the eight-week time limit for bringing proceedings as set out in s. 50(6) of the 2000 Act both starts and stops running. The second concerned the nature of the two-limbed test, pursuant to s. 50(8) of the 2000 Act, that an applicant must satisfy before the High Court may exercise its discretion to grant an extension of time to bring judicial review proceedings...*"

37. Ferriter J. then, at paragraphs 58 to 61 of his judgment in *Geraghty*, further summarises the applicable legal principles which were set out in the judgment of the Court of Appeal (Donnelly J.) in *Geraghty* as follows:

"58. Donnelly J. clarified in Heaney (at para. 77) that, contrary to indications to different effect in the prior case law (e.g. in Sweetman v. An Bord Pleanála [2017] IEHC 46 at para. 6.8), the Court when dealing with an extension of time application under s.50(8) is required to consider 'good and sufficient' reason first and thereafter to consider whether the circumstances which resulted in the failure to apply in time were outside the control of the applicant.

59. In relation to the first requirement in s.50(8), that of good and sufficient reason, I take the following principles as being applicable to the exercise of the Court's discretion under s.50(8) from the judgment of Donnelly J. in Heaney (the cited paragraph numbers are from that judgment):

(i) The phrase 'good and sufficient reason' incorporates a global consideration of the relevant issues (para. 89).

(ii) A non-exhaustive list of potentially relevant factors was identified by Clarke J. (as he then was) in Kelly v. Leitrim County Council [2005] IEHC 11 to include the length of time specified in the statute; the issue of third-party rights; the overall integrity of the planning process itself; blameworthiness (or lack thereof) and the nature of the issues involved (para. 79).

(iii) The merits of the case are irrelevant to a consideration of the good and sufficient reason question unless the underlying challenge is either unarguable or is highly meritorious based on a change in jurisprudence (para. 84).

(iv) The question of 'good and sufficient reason' may include the nature of the issue before the Court (para. 84).

(v) The fact that the underlying proceedings concern EU law (or matters of EU environmental law specifically) is not, of itself, a fact that requires an extension of time to be given. It is not a factor that requires particular weight to be attached to it in the assessment of extension of time (para. 96).

60. As noted by Donnelly J. in her conclusion in Heaney (at para. 95), in assessing good and sufficient reason,

'...the Court is entitled to take a holistic view of all the relevant circumstances, which includes blame on the part of the applicant and that of the authorities, as well as the reasons for the delay. An applicant must engage with the reasons why the application was not

made in the time allowed as well as any delay after the time limit expired.'

61. In relation to the second requirement in s.50(8), that of circumstances being outside the control of the applicant, Donnelly J. noted in Heaney (at para. 80), that the requirement of 'absence of control' is a requirement that 'goes beyond an assessment of "blameworthiness", or even lack thereof, as one factor amongst others; rather it requires absence of control by an applicant who seeks an extension'."

38. Accordingly, when dealing with an extension of time application under section 50(8) of the 2000 Act I am required, first, to consider all matters in assessing whether there are "good and sufficient" reasons for extending the time period of 8 weeks, and, thereafter (or second), to consider whether/ if *the circumstances* which resulted in the failure to apply in time were *outside the control* of Mr. Hogan. [3]

Chronology

39. The table below sets out the general chronology in this case.

Date	**Decision/Action**	**Time**
15/4/21	Donegal CC grants retention permission	
May 2021	Applicant appeals to the Board	Within statutory period
4/11/21	The Board grants planning permission	
7/1/22	Last day for applying for judicial review	8 week period expires

[3] See *Heaney v An Bord Pleanála & Clare County Council & Anor* [2022] IECA 123 per Donnelly J. at paragraph 77.

16/3/22	Applicant files papers in the Central office and issues proceedings	2-3 months after the expiry of the 8 week period +4 months after the decision of An BP
7/11/22	*Ex parte* application moved by applicant in the High Court (stop the clock)	+1 year after the Board's decision

The relevant dates

40. In this case, the expiry of the 8 week period to challenge the decision of the Board of 4th November 2021, ended on 7th January 2022.

41. Mr. Hogan lodged or filed his papers on 16th March 2022 in the Central Office, approximately 4 months and 12 days after the decision of the Board, but did not make his *ex parte* application to the court until 7th November 2022, approximately 1 year and 3 days after the decision of the Board on 4th November 2021. Accordingly, *the entirety* of the period of delay *beyond* the 8 week period is from the 7th January 2022 (when the 8 week period expired) to the 7th November 2022 (approximately 10 months) when the *ex parte* application was made in the High Court: see *Corajio Unlimited Company v An Bord Pleanála* [2023] IEHC 373 at paragraph 46 per Phelan J.

42. The lodgment or filing of papers in the Central Office does not, however, stop time running.

43. As mentioned earlier, in *Heaney* (at paragraphs 57 to 65 of the judgment), the Court of Appeal (Donnelly J.) confirmed that an *ex parte* application for leave to apply for judicial review is only "made" when it is moved in open court and that it is insufficient to rely on the fact that the statement of grounds and verifying affidavit have been filed in the Central Office of the High Court. The time period which Mr. Hogan has to address is the period of over one year from the decision of the Board on 4th November 2021 to his moving the *ex parte* application on 7th November 2022.

44. Mr. Hogan suggests that the following reasons explain the delay in this case and furthermore that they support his submission to the court that there is good and sufficient reason for extending the time and that during the applicable period matters were outside of his control:

    (i) Mr. Hogan submits (and this is also referred to in correspondence dated 28th July 2023 to the Managing Solicitor of the Legal Aid Centre in Donegal, which was referred to by Mr. Browne SC for the Board) that he suffers from Visual Spatial Dyslexia which he says makes it difficult for him to articulate his thoughts on paper and "to get things done";

    (ii) Mr. Hogan refers to his experiencing anxiety;

    (iii) Mr. Hogan refers to his experience of depression;

    (iv) Mr. Hogan refers to his undergoing marriage counselling;

    (v) Mr. Hogan refers to his upset and grief arising from his uncle's death to whom he was very close;

    (vi) Mr. Hogan states, that as a litigant in person, he was not aware that in order effectively to stop time running an application (*ex parte*) must be made in court and that he should have been informed of this requirement when he filed his papers on 16th March 2022;

(vii) Mr. Hogan states, that in assessing, these matters, the court should not attribute to him, the same knowledge and experience of a qualified lawyer.

(viii) Mr. Hogan says that he does not understand why he was not granted legal aid.

45. The first issue which I have to assess is whether the factors which Mr. Hogan raises amount to good and sufficient reasons such that the court should grant an extension of time.

46. As pointed out Mr. Hogan submits that he suffers from Visual Spatial Dyslexia which he says makes it difficult for him to articulate his thoughts on paper and "to get things done". Mr. Hogan refers to his experiencing anxiety and depression. Mr. Hogan exhibits correspondence from Bayview Family Practice (Dr. Alex Lockley) which is dated 20th January 2023 which *inter alia* confirms that he is being treated for anxiety and depression which, it is stated, have been exacerbated by his ongoing issues with the council. A letter from a Couples and Relationships Counsellor dated 18th January 2023 states that Mr. Hogan and his wife were attending counselling between January and May 2022 and the long term difficulties with the council was a contributory factor in their attending counselling. It is clear that Mr. Hogan has found the entire issue concerning the retention application for the polytunnel to be distressing.

47. Having regard to the medical, familial and personal issues raised by Mr. Hogan and referred to above, I am not satisfied that there is good and sufficient reason for extending the 8 week period in this case. Mr. Hogan had appealed the initial decision of the council within the time period provided for in the 2000 Act and had engaged a planning consultant to that effect. As a participant in the appeal, the Board had communicated with Mr. Hogan on 13th September 2021 (by letter from Lisa Quinn,

Executive Officer) stating that it intended to determine the appeal *before* 5th November 2021 (it in fact determined the appeal on 4th November 2021). Further the 8 week period expired on 7th January 2022 but it was not until over two months later – the 16th March 2022 – that Mr. Hogan had filed, what are detailed and comprehensive papers, comprising this application, in the Central Office. Notwithstanding his illness and other difficulties during this period, Mr. Hogan was able to deal with the initial appeal to the Board through his planning consultant and draft papers for filing in the Central Office, albeit that this was not done until 16th March 2022.

48. In relation to not moving the *ex parte* application until the 7th November 2022, over a year after the Board's decision which was granted on the 4th November 2021, Mr. Hogan states, that as a litigant in person, he was not aware of the requirement to move the *ex parte* application in court in order effectively to stop time running. He submits that he should have been informed of this requirement when he lodged his papers on the 16th March 2022. Presumably, in making this assertion, Mr. Hogan is saying that he should have been informed of this fact by the Central Office of the High Court. I do not accept that Mr. Hogan is correct in that regard or that his failure to be aware (or, on his view, to be informed) of the requirement to actually make the *ex parte* application in court is a good and sufficient reason such that he should be granted an extension of time to cover either the 4 month and 12 day period (from when he filed his papers in the Central Office on the 16th March 2022 or the period of just over 1 year from the decision of the Board on 4th November 2021 and his moving the *ex parte* application in court on 7th November 2022.

49. In considering these matters, I have had regard to the fact that Mr. Hogan is a litigant in person. I have not placed any reliance or weight on that fact that Mr. Hogan in correspondence, which was placed before the court, *inter alia* indicated that he did not need a solicitor because he had studied Company law and Administration and had sufficient knowledge of the law to address the judicial review proceedings with or without legal aid. Mr. Hogan does not have legal experience and is not in the same position as a practicing lawyer.

50. However, in *Reidy v An Bord Pleanála* [2020] IEHC 423, the High Court (Barr J.) observed at paragraph 45 that,

> *"…it is well settled at Irish law, that while the courts will allow some leeway due to the fact that an applicant, or a respondent, may be acting in the proceedings as a lay litigant, the fact that they are so doing, does not mean that they are not bound by the same rules and procedures as other litigants who come before the courts, albeit with legal representation: see Burke v. O'Halloran [2009] 3 I.R. 809; ACC Bank v. Kelly [2011] IEHC 7; Knowles v. Governor of Limerick Prison [2016] IEHC 33 and O'Neill v. Celtic Residential Irish Securitisation plc, No. 9 & Ors [2020] IEHC 334."*

The decision of the Court of Appeal in *Heaney* makes it clear that time runs from when the *ex parte* application for judicial review was made. In this case that was 7th November 2022.

51. Accordingly, I am not satisfied that there are good and sufficient reasons for extending the 8 week period and I refuse Mr. Hogan's application in this regard.

52. I have now to consider whether, or if, the circumstances which I have set out above which resulted in the failure to apply in time were *outside the control* of Mr. Hogan.

53. When all of the above circumstances are viewed holistically, I am not satisfied that these matters were outside of Mr. Hogan's control during the relevant period from 4th November 2021 (the Board's decision) to the moving of his *ex parte* application, over one year later, on 7th November 2022 (and adjourned to the 14th November 2022). Mr. Hogan states that he in fact lodged the *ex parte* paperwork in March 2022 but did not have it listed.

54. Mr. Hogan submits, referring to the *Heaney* decision that everything was outside of his control and that he had, for example, no control over the legal aid backlog. He submits that he applied for legal aid at the end of December 2021 and was told to apply for an adjournment. He states that he cannot understand how he had no legal representation.

55. The letter on behalf of the Legal Aid Board from the Law Centre (Letterkenny) dated 6th December 2022 *inter alia* refers to Mr. Hogan's application for legal services being received on *30th November 2022* (which is over one year after the date of the Board's decision on 4th November 2021), that the waiting period is for 2 months and increasing, and suggests that M. Hogan attend court on 24th January 2023 with the letter from the Law Centre dated 6th December 2022 and make an application for an adjournment on the basis that he is awaiting legal representation. This is all occurring, however, over a year after the Board's decision.

56. It also appears that Mr. Hogan contacted the Legal Aid Board on Christmas Day 2021 at approximately 2.30pm by e-mail but was having technical problems and received a response dated 29th December 2021 Mr. Hogan states that he followed up on this phone

call in February 2022 and filed papers, as advised by the Legal Aid Board, in March 2022 but did not have it listed.

57. A further letter dated 20th June 2023 from the Law Centre (Letterkenny) indicates that when Mr. Hogan made an application for legal aid in relation to the Board's decision he was already out of time and that a consultation took place on 22nd February 2022. This correspondence suggests it was made clear to Mr. Hogan that he did not have legal aid in this matter and that the sanction received was limited to obtaining counsel's opinion only and that the choices open to him were to pursue the matter as a litigant in person or through a private solicitor. Mr. Hogan provided documentation on 1st March 2022 to facilitate obtaining counsel's opinion. A brief was sent to counsel on 8th March 2022 and an opinion was received on 24th August 2022 to the effect that any application for judicial review would be unsuccessful as he was out of time and there were no substantial grounds.

58. Accordingly, having regard to the circumstances, set out above, which resulted in Mr. Hogan's failure to make the application for leave within the period of 8 weeks, I do not consider that these matters were outside the control of Mr. Hogan and I refuse his application for an extension of time in this regard.

Notice Party

59. Mr. Ciarán Doherty BL appeared on behalf of the Notice Parties, essentially as a matter of courtesy to the court, as Mr. Conor McEniff and Mr. Brian McEniff had been joined as notice parties by order of the High Court.

60. Mr. Doherty BL referred me to an email from the applicant to the High Court Registrar dated 1st March 2023 in which the applicant referenced correspondence from Mr. McEniff's solicitor, Mr. Murray of Reed and Sweeney Solicitors, which confirmed that Mr. Brian McEniff did not have any legal ownership in the tennis court and the applicant indicated his intention to ask the court to reconsider the decision to join Mr. Brian McEniff to the proceedings. In a similar vein, the applicant indicated a wish to ask the court to replace Mr. Connor McEniff as a notice party with either of one two companies which he referred to as Clavinova Investment Ltd or its parent company McEniff Bundoran Limited.

61. Mr. Doherty also referred me to a letter dated 28th February 2023 from the applicant to the Notice Parties' solicitor which confirmed a similar position from the applicant.

62. Mr. Doherty also adopted the Legal Submissions on behalf of the council and the Board.

Question of Substantial Grounds

63. Mr. Hogan has not brought this application within the eight week time period prescribed by section 50(6) of the 2000 Act.

64. Further, as indicated above, I am not satisfied that Mr. Hogan has established that there are good and sufficient reasons for extending the 8 week period in order to bring an application for judicial review and further, having regard to the circumstances set out above, which resulted in Mr. Hogan's failure to make the application for leave within the period of 8 weeks, I do not consider that these matters were outside the control of Mr. Hogan.

65. Notwithstanding my findings in this regard, I now consider whether the grounds posited by Mr. Hogan, would – if an extension of time had been granted – pass the threshold of substantial grounds, namely whether the grounds are reasonable, arguable and weighty and not trivial or tenuous*: McNamara v. An Bord Pleanála* [1995] 2 ILRM 125; *Yennusisck v. Wexford County Council and An Bord Pleanála* [2023] IEHC 70.

66. Mr. Hogan's objection surrounds the effect of the polytunnel on the use of his guest house and his principal ground is that the decision of the Board was *irrational*. He submits that an environmental impact assessment should have been carried out. He submits that there is a material contravention of the applicable development plans. Mr. Hogan complains about the constitution of An Bord Pleanála and the manner of the inspection carried out by the Board's inspector suggesting that photographs were taken on an overcast day rather than on when there was sunlight and when the glare would be apparent. He suggests, for example, the polytunnel is being used for commercial purposes rather than being a community type garden and that the report of the Board's Inspector (Mr. Caprani) dated the 13th October 2021 is contradictory. He suggests that the UK guidelines in relation to polytunnels should have been followed in terms of calculating where they can be located relevant to residential areas. He asks rhetorically who will want to sit in a B&B with light bouncing off of the polytunnel. He states that his family property will be devalued and questions the extent and manner of the foundation upon which the polytunnel has been erected and the use of iron rods.

67. It is certainly the case that Mr. Hogan is very critical of the fact that retention permission has been granted for the polytunnel by both the council and the Board. However, the

legal prism upon which Mr. Hogan seeks to articulate this displeasure is stated at paragraph (5) of his Statement of Grounds where it is stated "The decisions to grant planning were totally irrational and no reasonable [sic.] person could have made such a decision…" (there is also procedural fairness pleaded in paragraph (6) of the Statement of Grounds mainly against Donegal County Council (and I have already determined that its decision has been annulled by operation of law).

68. The threshold of irrationality is a high threshold and I do not consider that the Inspector's Report and the Board's decision including its adoption of the Inspector's report (as provided for in its direction dated 1st November 2021) could in any way be deemed to be irrational or unreasonable having regard to the material which was before it and in the sense those terms are understood in the jurisprudence from *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39. The oft-quoted *O'Keeffe* formula (or limitations) is that a court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that, on the facts as found, it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.[4] These limitations have been described as being of particular importance in relation to the decision of planning authorities and An Bord Pleanlála.[5]

69. In the assessment section of the inspector's report (paragraph 10 on internal page 10 of 18) dated 13th October 2021, Mr. Caprani begins his assessment of a number of matters including, inter alia, perceived irregularities in the assessment of the application by the

[4] *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39, 71; *Meadows v Minister for Justice and Equality* [2010] IESC 3, [2010] 2 I.R. 701.
[5] *The Board of Management of St. Audoen's National School v An Bord Pleanála* [2021] IEHC 453.

council, the commercial aspect of the proposed development, compliance with land use zoning, impact on residential amenity, need for EIAR, parking and traffic, conditions and contributions, requirements under other codes, other issues. In relation to residential amenity, for example, he inter alia states that he notes from his site inspection and photographs that green netting was attached externally above the roof of the polytunnel which, in his view, would significantly reduce the potential for glare from the structure. In relation to the question regarding an EIAR, he finds that having consulted Schedule 5 of the Planning and Development Regulations Parts 1 and 2, it was not apparent that the provision of a polytunnel fell within any classes of development for which an EIAR is required and, in his view, there appeared to be no basis therefore on which to request an EIAR, observing at paragraph 10.5.1 (internal page 14 of 18) that "*Furthermore, I consider that the modest nature of the proposed development and its location within an urban area would not warrant or justify the requirement for an EIAR even where the nature of the development comprises of a class of development for which EIAR is required.*"

70. I find, therefore, that Mr. Hogan has not met the threshold of establishing substantial grounds.

71. Mr. Hogan is not, of course, without a potential remedy in respect of any alleged compliance issues which may arise.

72. As set out earlier in this judgment, the Board's decision has a number of conditions including at condition 2 the stipulation that the polytunnel shall not be used for

commercial retail use. There are, therefore, statutory enforcement processes open to planning authorities and citizens should the need arise.

ORDERS

73. Accordingly, I refuse Mr. Hogan leave to apply for judicial review to challenge the decision of Donegal County Council dated 15th April 2021. I also refuse him leave to apply for judicial review to challenge the decision of An Bord Pleanála dated 4th November 2021.

74. I will hear the parties in relation to any further consequential or ancillary orders.

75. When this matter came back before me on Tuesday 19th December 2023, Mr. Hogan indicated that having considered the judgment he did not wish to seek an appeal. He sought clarification on matters at paragraphs 53, 54 and 56 which have been addressed. Counsel for the Respondents and the Notice Parties confirmed that there should be no order as to costs and I so ordered.