THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 103 J.R.]

BETWEEN

JOHN CASSIDY

APPLICANT

AND

WATERFORD CITY AND COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 24th day of November, 2017.

1. This is a judgment in relation to an application made by the respondent for an order setting aside the grant of leave to seek judicial review of the decision of the respondent dated 8th November, 2016 to make a draft Tree Preservation Order (TPO) herein pursuant to s. 205 of the Planning and Development Act 2000, as amended (the Act) and/or an order striking out these proceedings on the basis that the application for leave to bring the proceedings was not brought within the time limit permitted by s. 50(6) of the Planning and Development Act 2000, as amended and that there are subject to this Honourable Court, no grounds for an extension of this period in accordance with s. 50(8) of the Act.

2. The applicant is the owner, in fee simple, of lands situated at Branch Road Tramore, Co. Waterford and commonly known as "Bookies Wood" (The Lands). The Lands comprise some 2.45 hectares with a dense covering of trees over three-quarters of the Lands, mainly along the lower half of the Lands facing the public road.

3. Pursuant to s. 40 of the Forestry Act 1946, the Department of Agriculture, Food and Marine granted the applicant a Limited Felling Licence, reference FL 17695 dated 11th January, 2016, in respect of the Lands. The Felling Licence authorises and entitles the applicant to carry out the felling of the sycamore trees situated within 2.45 hectares of the Lands as outlined in red on the map attached to the Felling Licence, subject to the conditions specified in the Felling Licence. The authority for the felling operations conferred by the Felling Licence is exercisable for the period of two years commencing on 11th January, 2016 until the 11th January, 2018. The applicant's home adjoins the Lands and there is access from his residence.

4. In recent years, the applicant began to receive a significant number of complaints from local residents. These complaints fall into two categories: local residents complained that the Lands were being used by third parties for antisocial behaviour including the hosting of cider parties and soiling and littering of the lands. Secondly, some residents complained that the lines of sycamore trees were casting shade onto local residents' property and interfering with natural light flow. There was also a complaint that there was a danger posed by wind blow affecting the trees situated along the border between the Lands and the neighbouring properties. To meet these concerns, the applicant commissioned and paid for a survey of the lands; he retained a tree surgeon and he applied for and obtained the Tree Felling Licence in order to lawfully carry out the limited tree felling operations his expert had advised him to carry out. The applicant's tree surgeon commenced the tree felling works on 13th October, 2016. However, the works were interrupted when the respondent County Council made a draft Tree Preservation Order on the 8th November, 2016, pursuant to s. 205 of the Planning and Development Act 2000, as amended.

5. This is the order being challenged in the proceedings which the respondent now seeks to have dismissed. On the applicant's case the effect of the impugned order is to unlawfully prohibit and prevent the applicant from carrying out the felling of sycamore trees and scrub on any part of the 2.45 hectares of land specified in the Felling Licence issued to him by the Department. He claims the impugned order prevents him from doing precisely what he is entitled to do under the Felling Licence that was granted to him by the Department. In the proceedings, the applicant seeks an order pursuant to s. 50(8) of the Planning and Development Act 2000 as amended and/or an order pursuant to Order 84, Rule 21 (3) of the Rules of the Superior Courts, extending the eight week period for the bringing of the within proceedings specified in s. 50(6) of the Planning and Development Act 2000 on the basis that there is good and sufficient reason for doing so and that the circumstances that resulted in the failure to make the application for leave to bring these proceedings within the eight week period were outside the control of the applicant as per s. 50(8) of the Planning and Development Act 2000, as amended.

6. Also listed before the court is the respondent's motion seeking an order setting aside the grant of leave to apply for judicial review against the decision of the respondent dated 8th November, 2016 to make a draft Tree Preservation Order (TPO) herein pursuant to s. 205 of the Planning and Development Act 2000 as amended and/or an order striking out these proceedings on the basis that the application for leave to bring the proceedings was not brought within the time permitted by s. 50(6) of the Planning and Development Act 2000 as amended and that there are, subject to this no grounds for extension of this period in accordance with s. 50(8) of the Act.

7. On the 6th February, 2017, the applicant obtained the leave of this Court (obtained leave from Noonan J.) to apply by way of judicial review for the orders and reliefs sought in para. D of the statement of grounds dated 2nd February, 2017. The principle relief sought by the applicant is an Order of certiorari by way of an application for judicial review quashing the draft Tree Preservation Order (TPO) No. 1 of 2016 made by the respondent pursuant to s. 205 of the Planning and Development Act 2000, as amended. The date on which the respondent made the impugned decision was the 8th November 2016. Section 50 (6) of the Planning and Development Act 2000, as amended, provides that an application for leave to apply for judicial review of any decision pursuant to that Act must be made within eight weeks of the date of the decision or as the case may be, the date of the doing of the relevant act by the decision-maker. Allowing for the nine day Christmas period specified in s. 251 of the 2000 Act, the eight week time limit for bringing these judicial proceedings expired on 12th January, 2017. The applicant applied and obtained leave from Noonan J. to bring these judicial review proceedings on 6th February,2017, being 25 days or three and a half weeks after the expiration of the eight week time limit.

8. The principal issue before the court is whether the applicant is entitled to an Order extending the time for the bringing of these judicial review proceedings pursuant to s. 50(8) of the 2000 Act and/or Order 84 Rule 21 (3). In order for the applicant to be entitled to an order extending the time for the bringing of these judicial review proceedings, s. 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:

(a) There is good and sufficient reason for doing so; and

(b) That 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."

9. If the Court decides that the applicant is entitled to an order extending the time for the bringing of these judicial review proceedings pursuant to s. 50(8) of the 2000 Act and/or Order 84 Rule 21 (3), it necessarily follows the respondent's motion falls away and must be dismissed.

10. Section 50 of the Planning and Development Act 2000 deals with judicial review of applications, appeals and referrals and other matters.

11. Section 50 (6) 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 eight 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."

12. It was agreed that the power of the High Court to extend time under s. 50(8) of the 2000 Act involved the exercise of a discretion and in exercising this discretion a number of authorities were opened by both sides.

13. Before analysing the issues which must be decided by this Court, a useful agreed **chronology was provided by the parties as follows:**

Chronology

1. 11th January 2016 – applicant obtained Felling Licence under the Forestry Act 1946 from the Department of Agriculture, Fisheries and Food.

2. 13th October 2016 – the applicant commenced felling operations under the Felling licence on the Lands.

3. 21st October 2016 - telephone conversations between the applicant and Hugh O'Brien of the respondents.

4. 22nd October 2016 - applicant resumed felling operations under the Felling licence on the Lands.

5. 8th November 2016 – decision of the respondent to make the proposed TPO. On the same date, the applicant had left the jurisdiction.

6. 10th November 2016 – An Garda Siochána directed the applicant's tree surgeon to cease felling operations under the Felling licence on the Lands.

7. 25th November 2016 – the applicant returned to the jurisdiction and received the proposed TPO.

8. 1st December 2016 – applicant's Freedom of Information (FOI) request to the respondent.

9. 20th December 2016 – the respondents reply to the applicant's letter dated 1st December 2016.

10. 21st December 2016 the respondent's reply received at the applicant's home by which time the applicant had already left the jurisdiction.

11. 30th December 2016 – the respondent's decision on the applicant's Freedom of Information request.

12. 5th January 2017 – the applicant returned to the jurisdiction.

13. 11th January 2017 – the applicant phoned the senior planner of the respondent.

14. 12th January 2017 - the time limits described by s. 50(6) of the 2000 Act expired.

15. 25th January 2017 – the applicant's solicitors warning letter.

16. 29th January 2017 – the respondent telephoned the applicant seeking a meeting agreed to by the applicant.

17. 1st February 2017 – the respondent's solicitors wrote to the applicant's solicitors contending that the case was premature.

18. 3rd February 2017 – the meeting between the applicant, the respondent and their representatives.

19. 6th February 2017 – the applicant applied to bring the present judicial review.

The relevant legal principles

10. The power of the High Court to extend time under s. 50(8) of the 2000 Act involved the exercise of discretion, and in the exercising of this discretion the High Court is required to consider the interests of justice.

11. In *De Róiste v. Minister for Defence* [2001] 1 I.R. 190, Denham J. observed at p. 204, in relation to the old Order 84 and the obligation to move for judicial review promptly:

"This concept of delay is analysed from both the procedural and substantive aspect. The court in exercising its discretion goes further than a merely procedural analysis."

Denham J. continued at p. 208:

> "There are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors - a judgment. In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject of the application; (ii) the conduct of the applicant; (iii) the conduct of the respondents; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive. It is clear from precedent that the discretion of the court has ever been to protect justice. When criminal convictions are in issue the matter of justice may be very clear. However, it is the circumstances of each case which have to be considered."

12. In *John Kelly v. Leitrim County Council and An Bord Pleanála* [2005] 2 I.R. 404, Clarke J. held that a court, in deciding whether to exercise its discretion to extend time from the bringing of an application under s. 50 of the 2000 Act, would have regard to the following non-exhaustive list of factors:

> (a) The length of time that was specified in the statute to make such an application, as the more demanding the timeframe the easier it would be to prove that, in spite of reasonable diligence it was not possible for the applicant to comply with the define time limit.
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> (b) Whether any third party rights were affected by the delay particularly given the legislative intent that a grant of planning permission if not challenged within a certain period of time, should be absolute.
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> i. The fact that the absence of any prejudice to a third party would not confer on a court any wider jurisdiction to extend time.
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> ii. The applicant's personal responsibility to the delay in initiating proceedings.
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> iii. The import of the proceedings for the applicant.
>
> iv. At the election of the respondent whether the applicant had an arguable case.

13. The court also notes the decision of *K.S.K. Enterprises Ltd. v. An Bord Pleanála, Lowstrand Properties Ltd., and The Attorney General* [1994] 2 I.R. 128, at p. 135, where the Supreme Court in considering the earlier provisions applicable to such applications for judicial review in planning matters held that:

> "From these provisions, it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities…"

14. The court was referred to the decision of Baker J. in *Irish Skydiving Club Ltd. v. An Bord Pleanála and Ors (as notice party)* [2016] IEHC 448.

15. In this case the applicant sought to challenge the decision of the respondent that its use of an airfield was a development, and was not an exempted development. The decision was made on 14th January, 2015. Accordingly, the time for seeking leave to challenge that decision expired on 10th March, 2015. The applicant was granted leave on 22nd March, 2015, seventeen days later. The applicant argued, however, in the application to extend time, that the court should apply a date of knowledge test and further that the respondent had delayed in replying to certain correspondence.

16. Baker J., in this case, reviewed a number of authorities and held that on the date of knowledge argument:

> "37. There is no ambiguity in the simple terms of the legislation which would permit me to interpret it as suggesting that time began to run when an aggrieved or potentially aggrieved party came to know of the decision. Time is stated to run from the date the decision is made."

17. Baker J. also rejected the applicant's argument that the respondent had deliberately delayed in replying to correspondence. She stated:

> "40. No authority has been advanced for the proposition that the Board ought to have identified to the applicant in the course of the correspondence in February, 2015, that the time for seeking judicial review was short and fast approaching its statutory limit. The applicant was under no legal disability. The minutes of its meeting and its correspondence with the Board show it had a degree of legal knowledge and within a few hours of coming to know of the decision, the company was in a position to articulate a complaint regarding the procedures adopted by the Board and that its rights to fair procedure had been infringed by the absence of notice."

18. She continued in relation to the case:

> "53. Having regard to the fact that the test is cumulative, and that the applicant has in my view failed to satisfy me that it meets the second part of the test, I do not propose entering into a consideration of whether the applicant meets the first part of the test, whether there is good and sufficient reason for extending the time. However, I do note that the arguments advanced by the applicant with regard to this ground for the extension of time are focused on what is argued to be the frailty in the decision-making process, and not on whether there is good and sufficient reason to extend the time as such, and the applicant has made no argument or advanced no evidence that justifies an extension of time.
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> 54. I consider that the applicant was in possession of all of the relevant facts and information at the latest on 5th February, 2015, or probably earlier on 29th January, 2015. It had control of all of the relevant factors at that stage and had sufficient information and knowledge to instruct solicitors to advise and to act on its behalf."

Submissions by counsel for the respondent
19. Counsel for the respondent who is seeking an order to set aside the grant of leave to apply for judicial review, made the following submissions:

1. The proposed TPO was made on 8th November, 2016 and in accordance with s. 50(6) of the Act, the time limit for bringing the leave application ran from that date. Counsel argued that the date of knowledge of the applicant had no relevance to when this period commenced, and insofar as the applicant contends that he was not aware of the proposed TPO until later, to support an argument that the circumstances which led to his failure to seek leave within the time allowed were outside his control, the applicant has stated at para. 18 of his affidavit, that the tree surgeon retained by him was advised of the proposed TPO on 10th November, 2016 and paras. 13 to 16 of the applicant's affidavit sworn on 15th May, 2017, grounding his application for an extension of time, confirms that he was made aware of the fact of the proposed TPO if not the detail, on 10th November, 2016.

2. Counsel submitted that it was unclear as to when the applicant had been served with the document, however he submitted that it was clear that the applicant received the proposed TPO well before the time before challenging it had expired. The applicant, as was the case in the *Irish Skydiving* case, was in a position to formulate and articulate his complaint that his rights had been infringed.

3. Counsel pointed to the applicant's letter dated 1st December, 2016, this was a detailed letter to the respondent, setting out the basis for the challenge now being brought in these proceedings. That letter, indeed, specifically warned the respondent that "in default of an appropriate response from you and if steps are not taken to proceed to issue a final order, I intend to apply to the High Court for leave to judicially review the decision of the respondent, to issue the draft order and/or final order pursuant to s. 205 of the Planning Acts in circumstances where I have the lawful authority to fell trees on the lands. If necessary, this letter will be relied upon for the purpose of grounding an application against you for the costs of any such proceedings." Counsel for the respondent submitted that it is clear from this letter that whether or not the applicant had sought legal advice prior to 1st December, 2016, he was actively contemplating an application for judicial review, to vindicate the rights asserted in that letter and later in these proceedings. The letter was sent at a time when there was still a period of some 43 days or just over six weeks, within which an application for leave could have been brought. He submitted that the court in the *Irish Skydiving* case had refused to extend time where a threat of litigation had been made, with only 34 days left to seek leave and no explanation was offered as to why the applicant did not move within that period.

4. Counsel submitted that by the time the applicant's solicitors first wrote to the respondent on the 25th January, 2017, the time limit for seeking leave had already expired.

5. Counsel indicated that the applicant had pointed to a number of circumstances which, the applicant claims, resulted in his failure to apply for leave within the time limit permitted by law, which he further claims were outside his control.

(i) The applicant had received a copy of the proposed TPO on 25th November, 2016. at the latest. However, he had been aware since 10th November, 2016, of its existence and that it restricted the cutting of trees on his land. It was open to the applicant to return home to deal with this and it cannot be that his decision to remain in Spain until 25th November, 2016, amounts to a circumstance outside the control of the applicant.

(ii) Even if it could be shown that the applicant was not in a position to consider a judicial review challenge until 25th November, 2016, he waited for a period of more than eight weeks thereafter before initiating judicial review proceedings. In these circumstances even if the second condition under s. 50(8) had been fulfilled, there could be no good or sufficient reason for extending time where a period of greater than the statutory time limit had run from the date upon which he was actually fully aware of the terms of the TOP.

(iii) Counsel argued that it was not accepted that the applicant could not deal with the issue pending a response to his correspondence of 1st December, 2016. The information sought by the applicant was available for inspection on a public file as advised by the respondent on 20th December, 2016. That letter made it clear that the respondent had no intention of withdrawing the proposed TPO as demanded by the respondent in his letter of the 1st December, 2016, under threat of judicial review proceedings. (iv) The fact that the applicant chose to leave the country for a further period until 5th January, 2017 (at a time when he threatened an application for judicial review, leave for which had to be sought prior to the 12th January, 2017, it respectfully submitted that it be characterised as a circumstance outside the applicant's control)

(v) The respondent did not have the alleged or any duty to meet, consult or engage with the applicant as suggested by the applicant in circumstances where the applicant had clearly indicated his intention to challenge the proposed TPO by way of judicial review. The applicant was perfectly entitled to make submissions on the proposed TPO in accordance with the provisions of s. 205 of the Act, and is invited by the respondent in correspondence dated 1st February, 2017. The alleged failure by the respondent to engage with the applicant (during the period which he was entitled to seek leave) is not a circumstance beyond the control of the applicant and there is no indication of why he elected not to follow through with his threatened proceedings until after the time for doing so had expired.

6. Counsel for the respondent suggested that the applicant had sought to rely on discussions and events prior to the date of the proposed TPO. In particular, the conversation between the applicant and Mr. O'Brien of the respondent in which on 21st October, 2016, there was a tape recording of a conversation between John Cassidy and Hugh O'Brien. In the course of this conversation there is clearly reference to a previous application by the applicant to build houses and the Court will revert to this subsequently. Counsel submitted there was clearly a significant dispute about what was said during the course of this conversation. Counsel for the respondent submitted that these conversations can have no relevance whatsoever to an application for an extension of time and that the court is not required to determine the disputed factual issue, and the applicant could have been left in no doubt about the respondent's attitude to the cutting of the trees when the proposed TPO was made.

7. Counsel for the respondent submitted that the applicant had sought to rely upon attempts to reach an accommodation with the respondent in relation to the proposed TPO. These discussions however and attempts to resolve matters took place after the time limit for leave applications had expired and he submitted that they cannot be material to an application for an extension of time. He submitted that the applicant had not established a "good and sufficient reason" for the extension of time and further has failed to demonstrate that the circumstances, which resulted in his failure to apply for leave in time, were beyond his control. He submitted that he was in a position to submit a formal letter asserting the alleged breach of his rights and threatened judicial review proceedings at the time when there was still over six weeks for him to make such an application. The affidavits filed by the applicant while seeking to stress the merits of his claim, do not provide any evidence on which the court should consider there is "good and sufficient reason" for the extension of time now sought, as opposed to reasons for entertaining the relief sought in the substantive proceedings.

8. Counsel submitted to the extent that it may be relevant, either in the context of whether there is good and sufficient reason or otherwise in the exercise of the inherent jurisdiction of the court. He submitted that the failure of the applicant to disclose certain matters to the court on the *ex parte* application as described in Mr. O' Brien's affidavit sworn on 28th May, 2017 are significant.

a. Portions of the Tramore local plan area which specifically refer to the trees protected by the proposed TPO and the respondent's stated objectives to protect and preserve those trees particularly in the circumstances where the applicant had exhibited (at para. 8 of his grounding affidavit sworn on the 2nd February, 2017) an extract from the Tramore local plan area to indicate the lands in question are formally zoned for residential use.

b. His failure to refer to the planning history of the lands of which he was aware and which the respondent and An Bord Pleanála has specifically addressed the value of the trees in question, the felling of which was at the time of those planning applications and is contrary to the expressed objectives contained in the local area plan.

Submissions on behalf of the applicant

20. Counsel on behalf of the applicant submitted that the evidence before the Court established that there were circumstances beyond the control of the applicant that resulted in the applicant's failure to bring the judicial review proceedings within the time limit, within the meaning of subparagraph (b) of s. 50(8) of the 2000 Act.

21. He set out firstly by reason of his absence from the jurisdiction at the time of the making of the proposed TPO on 8th November, 2016 the applicant did not receive or have opportunity to read or consider the proposed TPO or have the opportunity to consider the terms of the TPO, or consider his options until he returned to this jurisdiction on the 25th November 2016 some seventeen days after the making of the proposed TPO. He submitted that the period of seventeen days during which the applicant was unable to deal with the proposed TPO or consider his response to it was by reason of his absence from the jurisdiction and was outside of the applicant's control within the meaning of s. 50 of the Act and he submitted that considered of a proportion of the eight week time limit the period of seventeen days during which the applicant was unable to deal with the proposed TPO by reason of his absence from the jurisdiction was extremely significant.

22. The Applicant submitted that upon his return to the jurisdiction on 25th November, 2016, he took the entirely reasonable and *bona fide* view that the best means of attempting to resolve the matter would be to deal and engage with the respondent directly through correspondence, negotiation and face to face meetings. Thereafter and within the time limit, the applicant made *bona fide* efforts and attempts to engage with the respondent through correspondence and telephone contact. The timing and content of the respondent's responses to the applicant were outside the control of the applicant.

23. The applicant wrote to the respondent by letter dated 1st December, 2016, setting out his concerns about the proposed TPO and requesting the respondent to withdraw it. The timing and content of the respondent's reply to the applicant's letter dated 1st December, 2016, was a matter entirely outside the control of the applicant. It is submitted that it was entirely reasonable for the applicant to await a substantial response from the respondent to this correspondence before taking any further step. However, the respondent did not respond to the applicant's letter dated 1st December, 2016, until the 20th December, 2016. The court notes that the eight week period expired on the 12th January, 2017.

24. He submitted that the respondent has chosen not to explain the reason why the respondent did not reply to the applicant's letter dated 1st December, 2016 until the 20th December, 2016, and that the respondent's letter dated 20th December, 2016 did not substantively address any of the concerns set out by the applicant in his letter dated 1st December, 2016.

25. He submitted that by the time the respondent's letter dated 20th December, 2016, was received at the applicant's home on the 21st December, 2016, the applicant had already left the jurisdiction for the Christmas period. Through a combination of the timing of the respondent's letter dated 20th December, 2016, the commencement of the Christmas period and the absence of the applicant from the jurisdiction from the 21st December, 2016 until 5th January, 2017, the applicant was deprived of the opportunity to deal with the respondent's letter dated 20th December, 2016 at the time it was received. The applicant was only in a position to deal with the respondent's letter dated 20th December, 2016 after the end of the Christmas holiday. He submitted that the combination of factors was clearly outside the control of the applicant.

26. He also submitted that it was material to note that excluding the nine day Christmas period specified in s. 251 of the 2000 Act, the time limit was running during the period between the receipt of the respondent's letter on 21st December, 2016 and the return of the applicant to the jurisdiction on 5th January, 2017.

27. On his return to the jurisdiction in January 2017, the applicant continued his efforts to contact the respondent directly about the matter with a view to seeing if a compromise could be achieved through meetings and negotiations. Inter alia, the applicant telephoned the senior planner of the respondent about the matter on 11th January, 2017, the senior planner was not available to take the applicant's call on 11th January, 2017 and the applicant left a message with the respondent with a request for the senior planner to telephone them back. The respondent did not return the applicant's telephone call at any stage. The applicant respectfully draws the attention of the court to the fact the respondent did not explain why they did not return the applicant's telephone call in its affidavits.

28. Counsel submitted that the applicant was not in a position to advance matters any further until the respondent reverted to the applicant and until the applicant had had the opportunity to meaningfully engage with and meet with the respondent, again the failure of the respondent to respond to the applicant's requests in this regard was completely outside the control of the applicant.

29. He submitted that notwithstanding the earlier and repeated attempts and efforts to engage with the respondents made by the applicant within the time limit, the respondent for the first time requested to meet with the applicant on the 29th January, 2017 after the applicant's solicitors' warning letter was sent on 25th January, 2017 and moreover after the time limit had expired. The respondents have not explained the reasons why the respondent only contacted the applicant to request a meeting for the first time on 29th January, 2017 after the warning letter dated 25th January, 2017 was sent.

30. A meeting between the applicant, the respondent and their respective representatives finally took place on 3rd February, 2017 but did not result in a compromise. To summarise the matters as follows:

> (i) There were two significant periods of time during the running of the eight week time limit during which the applicant was unable to consider, deal with or take steps on foot of the decision by the respondent by reason of the circumstances outside of his control and in particular the seventeen day period after the making of the proposed TPO during which the applicant was outside the jurisdiction.
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> (ii) The applicant took the entirely reasonable and *bona fide* view that the best means of attempting to resolve the matter would be to deal and engage with the respondent directly through correspondence, negotiation and face to face meetings. Thereafter and within the time limit, the applicant made *bona fide* efforts and attempts to engage with the respondent through correspondence and telephone contact. The timing and content of the respondent's responses to the applicant were entirely outside the applicant's control, the respondent did not meaningfully respond to the applicant until 29th January, 2017 after the time limit had expired. He submitted that the requirement to demonstrate that the circumstances that resulted in the delay outside the control of the applicant was a requirement that should be interpreted reasonably and sensibly and should not be applied in a manner that is unduly rigid or strict. It is the policy behind the time limits for judicial review which are to ensure that public law disputes are dealt with when they are ripe, that it should not be understood to incentivise parties to litigate prematurely. It would be contrary to the public interest to encourage administrators not to engage with reasonable requests for information or to encourage litigants to issue expensive legal proceedings prematurely without at least trying to sort out the issues by correspondence, and for these reasons the applicant submitted that there was sufficient evidence before the court and which the court may be satisfied that there was circumstances beyond the control of the applicant that resulted in the applicant's failure to bring these judicial proceedings within the time limit within the meaning of subparagraph (b) of s. 50(8) of the 2000 Act.

Good and sufficient reason to extend the time limit

31. Counsel for the applicant submitted that in all of the circumstances of this case there is good and sufficient reason to extend the time limit for bringing these judicial review proceedings within the meaning of s. 50(8)(a) of the 2000 Act. He summarised the factors as follows:-

> (a) There will be no prejudice caused to any third party in the event that the decision in time is extended and no third party had acquired any rights as a result of the decision of the respondent to make the proposed TPO that would be prejudiced or affected in the event the time is extended.
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> (b) The underlying merits of the applicant's case.
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> (c) No personal blame for the delay in commencing these judicial review proceedings attaches to the applicant.
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> (d) In all the circumstances the length of delay in commencing the proceedings, three and a half weeks or 25 days, was not inordinate.
>
> (e) The conduct of the respondent.
>
> (f) The novelty and nature of the issues.
>
> (g) The effect of the impugned decision on the applicant.

32. He then analysed these factors and in relation to the second factor, he submitted that the applicant obtained leave to bring the present judicial review proceedings on 6th February, 2017 and that Noonan J. determined that there were insubstantial grounds for contending that the decision of the respondent to make the proposed TPO on 8th November, 2016 is invalid as follows:-

> (b) The proposed TPO is *ultra vires* the provisions of s. 205 of the 2000 Act or *ultra vires* the powers of the respondent under s. 205 of the 2000 Act in that the respondent did not make the proposed TPO for stated reasons and/or the respondent did not provide stated reasons for the making of the proposed TPO as required by s. 205 of the 2000 Act.
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> (c) The proposed TPO is *ultra vires* the provisions of s. 205 of the 2000 Act.
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> (d) The proposed TPO unlawfully interferes with the applicant's rights, entitlements and/or obligations pursuant to the Felling Licence.
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> (e) The proposed TPO is *ultra vires* the provisions of s. 205 that the proposed TPO unlawfully declares the trees on the land specified the schedule Table 1 and Table 2 of the proposed TPO to be of special amenity value.
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> (f) The proposed TPO is *ultra vires* the provisions of s. 205 of the 2000 Act and/or *ultra vires* the powers of the respondent under of s. 205 of the 2000 Act in that the proposed TPO unlawfully prohibits and/or prevents the applicant from cutting down, topping and or lopping of the Sycamore trees on the land so as may be necessary for the prevention and/or abatement of a nuisance and/or hazard.
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> (g) The proposed TPO is *ultra vires* the provisions of s. 205 of the 2000 Act and/or *ultra vires* the powers of the respondent under of s. 205 of the 2000 Act in that the proposed TPO unlawfully prohibits and/or prevents the applicant from cutting down, topping and or lopping of trees on the land which are dying or dead or have become dangerous.
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> (h) The proposed TPO is *ultra vires* the provisions of s. 205 of the 2000 Act and/or *ultra vires* the powers of the respondent under of s. 205 of the 2000 Act in that the respondent excluded a material and/or relevant consideration and/or failed to take into account the material and/or relevant consideration when making the proposed TPO, namely the

existence of the Felling Licence issued by the applicant under s. 40 of the Forestry Act.

(i) The proposed TPO is disproportionate in its effect upon the legal rights and entitlements of the applicant pursuant to the Felling Licence and disproportionate in its effects upon the constitutional rights of the applicant in particular but not limited to the applicant's constitutional rights as guaranteed by Article 40.3 and Article 43 of the Constitution of Ireland.

32. Counsel argued that in the light of the respondent's decision not to deliver its statement of opposition in replying affidavits, the applicant submits that in having regard to whether the underlying merits of the applicant's case for good and sufficient reason to extend the time the court must take the applicant's case at its height. Counsel submitted that there was no personal blame for any of this attaching to the applicant for the delay in commencing these judicial review proceedings. He submitted there were three features of the conduct of the respondent to which the court should have regard in exercising its discretion as to whether or not to extend time. It is submitted that these three features of the respondent constitute good and sufficient reason to extend time.

(a) Notwithstanding *bona fide* efforts and attempts made by the applicant within the time limit to engage and meet with the respondent with a view to resolving the matter directly through meetings and negotiations the respondent did not meaningfully engage with the applicant or respond to the applicant until 29th January, 2017 when the respondent telephoned the applicant seeking a meeting. This was seventeen days after the expiration of the time limit and four days after the solicitors warning letter dated 25th January 2017.

(b) In this context the statement and representations made by the respondent to the applicant through his solicitors on 1st February, 2017, is immaterial and he quotes from the respondent's letter dated 1st February, 2017:-

> "It seems to our client that it is premature for (the applicant) to take any court action pending engagement and consultation between them, specifically our client has asked yours to meet consider issues arising and to see if some accommodation can be reached before (the respondent) proceeds with the s. 205 process".

(c) There is credible evidence before the court that the respondent has given untrue and/or misleading evidence on affidavit to the court about certain representations made by the respondent to the applicant during conversations between the applicant and Hugh O'Brien of the respondent that took place on 21st October 2016.

33. Counsel for the applicant argued that the judicial review proceedings involved the interpretation of the meaning and scope of the provisions of s. 205 of the 2000 Act and the resolution of issues concerning the *vires* of planning authorities under s. 205 of the 2000 Act. It appears there is no reported or unreported written judgment which the superior courts have considered s. 205 of the 2000 Act or the lawfulness of Tree Preservation Orders made thereunder by the planning authorities. He submitted that these proceedings directly raise a novel issue of law of general importance; that is the relationship between a Felling Licence granted by the Department of Agriculture under forestry legislation and the Tree Preservation Order made by a planning authority under the 2000 Act concerning the same subject matter and in particular which takes prevalence over the other as a matter of law.

34. He said the applicant undoubtedly has a clear personal interest in having this issue of law determined by the court.

35. Counsel for the applicant noted that the respondent complained the applicant had failed to disclose in his grounding affidavit grounding the application for leave the extracts from the Tramore Local Area Plan 2014-2020 in the planning history of the lands and in particular the decision of An Bord Pleanála dated 21st July, 2014, to refuse an application against the respondents' refusal to grant planning permission for the construction of nine houses on the lands. The respondent contends that these were material matters that ought to have been disclosed to the court at the *ex parte* stage. The applicant submits that the respondent's claims in this regard are not relevant or material to the determination of the respondent's application to strike out the within judicial review proceedings and/or to set aside the grant of leave or the applicant's motion to extend time and he also submitted that the applicant did disclose to the court at the *ex parte* leave stage that the respondent on its own account accorded significant amenity/environmental value to the trees on the land.

36. He submitted that as far as the planning history of the lands and in particular the decision of An Bord Pleanála dated 21st July, 2014, to refuse an appeal against the respondents' refusal to grant planning permission for the construction of nine houses on the lands is concerned, it is submitted that this factor is not referred to in the grounding affidavit, that the fact that that this factor is not referred to in the grounding affidavit is not material to this courts' decision having regard to the reasons why the applicant was seeking to fell the trees on the lands is the subject matter for the proposed TPO. In all the circumstances, counsel for the applicant submits that:-

(a) There were circumstances beyond the control of the applicant that resulted in the applicant's failure to bring these judicial review proceedings within the time limit within the meaning of subparagraph (b) of s. 50(8) of the 2000 Act.

(b) There is good and sufficient reason to extend the time limit for bringing these judicial review proceedings within the meaning of s. 50(8)(a) of the 2000 Act.

(c) It is manifestly in the interests of justice that this court should exercise its discretion pursuant to s. 50(8) of the 2000 Act in favour of the applicant and extend the time.

The circumstances beyond the control of the applicant that results in the applicant's failure to bring the Judicial Review proceedings within the time limit

37. The applicant had obtained a Felling Licence on the 11th January, 2016 from the Department of Agriculture, Fisheries and Food. The applicant's Tree Surgeon commenced the tree felling works under the licence on the 13th October, 2016. On the 8th November, 2016 the respondent made a draft Tree Preservation Order pursuant to s. 205 of the Planning and Development Act 2000.

27. The applicant and his wife were in the process of travelling to Spain on the 8th of November, 2016. Sergeant Whelan of An Garda Síochána called to the lands and directed the tree surgeon to stop the felling operations on the basis that he had received notice regarding the TPO which was served on the 10th of November, 2016.

28. At 5:00pm on 10th of November, 2016, Bernadette Guest of the respondent telephoned the applicant to advise him that all tree felling works on the land must stop.

29. He had also been contacted by the tree surgeon. Despite this information the applicant returned to Ireland on 25th of November, 2016, seventeen days after he had left and fifteen days after he had received notice of the TPO and that all the work had stopped. He says he was formally served on the 25th of November, 2016 when he returned to Ireland and he said that it was only on receipt of the proposed TPO on 25th of November, 2016 that he was in a position to consider and ascertain the meaning and content of the proposed TPO.

The Letter of the 1st of December, 2016

30. Exhibited to the grounding application of the applicant was the applicant's letter to Billy Duggan, Director of Services, Waterford City County Council. In that letter the applicant makes the following points:-

> (i) He indicated that he wished to object to the making of the draft order and held a valid tree felling licence issued under s. 40 of the Forestry Act 1946 by the Minister for Agriculture, Food and Marine. He said that this licence authorises the cutting down or uprooting of mature sycamore trees in an area of 2.45 hectares on his lands.
>
> (ii) He makes the point that under s. 205(11) of the Planning Act, no tree protection order shall apply to the cutting down, topping or lopping of trees and he says that according to the proposed TPO 1/2016 this would not apply to these trees which are the subject of the tree felling licence.

31. He then seeks information on the basis upon which a decision was made to issue the draft order and he seeks full details of any inspection of the trees which had been identified on the site and any site inspection report setting out the reasons why he believed the trees are a special amenity value. He further states that from speaking to his tree surgeon, that when the council's representative attended the site on the 10th of November, 2016 that the council's representative a guide that the trees had already been felled ought not to be cut and he suggests that the proposed TPO order did not in any way relate to the trees felled.

32. He then asks for confirmation within fourteen days of his letter that the draft order would be withdrawn by Waterford City and County Council and in default of an appropriate response from the council and if steps are taken to be proceed to issue a final order he states that he intends to apply to the High Court for leave to judicial review the decision of Waterford County Council to issue the draft order or final order pursuant to s. 205 of the Planning Acts in circumstances where he has lawful authority to carry out the work of the felled trees on the land.

33. This letter to the council sets out what in effect is a relief which was subsequently sought in the judicial review and largely summarises the reliefs sought in the statement required to ground the application for judicial review.

34. The respondent responded to this letter on the 20th December, 2016. The respondent replied on the 6th of December, 2016 initially acknowledging the FOI Request and on the 20th of December, 2016 the senior executive planner acknowledged receipt of his letter dated the 1st of December and advised that he could review the tree preservation order file in their offices of the Planning Department and specifying the time. The letter also stated that the tree preservation order process was commenced and it is not proposed to withdraw it as requested. This appears to have been sent to the applicant on the 21st of December but he had left the jurisdiction and did not return to Ireland until the 5th of January, 2017. This amounted to another fifteen days.

35. The applicant returned to Ireland on the 5th of January, 2017 and he inspected the respondent's file concerning the proposed TPO on the 13th of January, 2017. The time limits described by s. 50(6) of the 2000 Act expired on the 12th of January, 2017 and it was not until the 25th January, 2017, thirteen days later that the applicant's solicitors warning letter was sent.

36. The applicant is a bright, intelligent man who had the ability to tape a conversation with Hugh O'Brien of the respondent on the 21stOctober, 2016 and whilst the court could understand his travelling to Spain with his wife in November of 2016, the Court finds it difficult to understand why having written a strong letter suggesting judicial review proceedings to the council, he then decided to leave the country again for fifteen days.

37. At any stage after the sending of the letter of the 1st December, 2016, to the council he could have instructed his solicitors to write a formal letter and at any time between then and the 12th January an application could have been brought to the High Court seeking judicial review proceedings. In fact, the application was only made to Noonan J. on the 6th February, 2017.

38. The jurisprudence relating to these amended rules for applying for judicial review is new and the older cases such as *K.S.K. Enterprises Ltd. v. An Bord Pleanála*, *Lowstrand Properties Ltd., v. The Attorney General* [1994] I.R. 128, *Toma Adam and others v. The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General* [2001] 3 I.R. 54 and the decision of Clarke J. in *John Kelly v. Leitrim County Council* [2005] 2 I.R. 404. They reflect a discretion which the court has to extend time in certain circumstances which is not reflected in the legislation under s. 50(6) of the Planning and Development Act 2000, as amended. It is interesting to note that in *K.S.K. Enterprises Ltd. v. An Bord Pleanála*, Finlay C.J. stated at p.135 :-

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

39. Of far greater assistance is the decision of Baker J. in *Irish Skydiving Club Ltd. v. An Bord Pleanála & Others* [2016] IEHC 448. Baker J. states:-

> "9. Section 50(8)(a) is a reflection of the inherent jurisdiction of the court to extend time when it considers that good and sufficient reason exists to so do, but subpara. (b) of the subsection contains a restriction on the power such that in addition to being satisfied that good and sufficient reasons exist, the court must be satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the applicant.
>
> 11. The time limit is strict, and one in respect of which the power to grant an extension is also to be strictly construed …"
>
> 14. The strictness of the time limit has been noted in a number of cases, and by way of example, Charleton J. in *MacMahon v. An Bord Pleanála & Anor.* [2010] IEHC 431 noted that the "the Oireachtas clearly intended to impose strict time limits for the challenging of decisions in the planning process"."

At para. 49 Baker J. states:-

> "The test that an applicant must meet in an application for an extension of the strict time limits under s. 50(6) of the Act is cumulative and mandatory. The court shall not extend the time unless it is satisfied that both tests are met…"

At para. 50 she stated:-

> "The running of time in judicial review is not based on a consideration of when an applicant became aware of the decision sought to be challenged, and in my view the legislation clearly links the running of time to the making of the decision…"

40. In this case Mr. Cassidy became aware of the decision whilst abroad in Spain on or around the 10th of November, 2016. He chose then to stay outside of the jurisdiction for another fifteen days and then having written a letter which could well have grounded an application for judicial review, leaves the country on the 21st of December and does not return for another fifteen days.

41. Paragraph 51 of the *Irish Skydiving Club* judgment Baker J. said:-

> "The public policy interest in strict time limits in planning matters would not be furthered were a party who knew that his or her rights had arguably been breached, and who knew of a decision well within time to bring an application for judicial review, could seek to argue that time began to run only when it had formulated a decision to bring the challenge. The formulation of a decision to bring a challenge is in the normal way one that would be made on legal advice, but the date when legal advice is taken, considered, or decided to be adopted, is not and cannot be the date at which time begins to run, and to consider otherwise would be to ignore the very clear language of the subsection which fixes the time limit by reference to the date of the decision, and not either to the date of knowledge or the date when a party impacted by the decision became aware that rights might have been infringed, or the extent to which that person might be successful in bringing a judicial review."

Decision of the Court

42. Having regard to the fact that the test is cumulative and that the applicant has in my view failed to satisfy me that he meets the second part of the test, I do not propose entering into a consideration of whether the applicant meets the first part of the test as whether there is good and sufficient reason for extending the time.

43. I consider that the applicant was in possession of all of the relevant facts and information at the latest on the 20th December, 2016 and that he had sufficient information and knowledge to instruct solicitors to advise and to act on his behalf.

44. In those circumstances, I propose to make an order refusing to enlarge the time for the bringing of this application to set aside the order of Noonan J. dated the 6th February, 2017.