

JUDICIAL REVIEW PROCEDURE UNDER THE PLANNING AND DEVELOPMENT ACT, 2000

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I. INTRODUCTION

Section 50 of the Planning and Development Act, 2000 stipulates a special judicial review procedure for specified decisions of planning authorities and of An Bord Pleanála.¹ Restrictions on challenges to certain decisions of planning authorities and of An Bord Pleanála had first been introduced under the Local Government (Planning and Development) Act, 1976, but were considerably tightened under the Local Government (Planning and Development) Act, 1992, which inserted sections 82(3A) and (3B) into the Local Government (Planning and Development) Act, 1963. The special judicial review procedure has been modified in a number of respects under section 50 of the Planning and Development Act, 2000; the key amendments are as follows. First, the range of decisions subject to the special judicial review procedure has been expanded. Secondly, the *locus standi* or standing requirement has been put on a statutory footing and the standard has been ratcheted from one of ‘sufficient interest’, to ‘substantial interest’. There is also a requirement that an applicant have previously participated in the statutory planning process. Thirdly, the time limit has

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¹ Section 50 is fully commenced as and from the 11th March, 2002. It would appear from the transitional provisions under the Planning and Development Act, 2000, and from Article 207 of the Planning and Development Regulations, 2001, that the procedure under section 50 will only apply to decisions in respect of the which the (initial) application for planning permission was made subsequent to the 11th March, 2002.

been changed from two months to eight weeks, and a power to extend the period has now been introduced. Fourthly, provision has also been made whereby judicial review proceedings challenging the decision of a planning authority might be stayed in preference to a statutory appeal to An Bord Pleanála.

It is proposed to examine each of these changes in further detail, in turn.

II. DECISIONS PROTECTED

A. General

In the case of a planning authority, the special judicial review procedure applies to two types of decision. First, a decision on an application for planning permission under Part III of the Act. This category would include a decision on an application for approval (properly, a subsequent planning permission) pursuant to an outline planning permission. (It should be noted that the duration of the planning permission is expressly encompassed as forming part of the decision on the application for planning permission.)² The second type of decision is that of the local authority as to whether or not to proceed with proposed local authority development under section 179. Local authority development in its own functional area is exempted development but certain prescribed development is subject to a form of public consultation procedure.

In the case of An Bord Pleanála, a wider range of decisions is protected by the special judicial review procedure. Specifically, three types of decision are covered. First, a decision on any appeal or referral. This category includes not only decisions on an appeal from a decision by a planning authority on an application for planning permission but any appeal. This produces the anomalous result that section 50 applies to some decisions of An Bord Pleanála in circumstances where the equivalent decision of the planning

² Section 41.

authority, at first instance, is subject to conventional judicial review.³ For example, in connection with the revocation of planning permission, the decision of An Bord Pleanála, on an appeal, is subject to section 50,⁴ whereas the planning authority's decision at first instance is not.⁵ The second category of decisions protected is those of An Bord Pleanála in respect of environmental impact assessment of local authority development. The third category of decisions comprises those in relation to the compulsory acquisition of land. Under Part XIV of the Act, An Bord Pleanála has taken over the function of the Minister of the Environment and Local Government in respect of the confirmation of compulsory purchase orders, and the environmental impact assessment of certain projects under the Roads Acts, 1993 – 1998.

B. Decisions not protected

It should be noted that the special judicial review procedure provided for under section 50 does not apply to all decisions by a planning authority, or by An Bord Pleanála. For a start, only decisions made by a planning authority in its capacity as such can be protected. Thus, a decision of a planning authority *qua* landowner, for example, would not benefit from section 50 and, indeed, might not be susceptible to judicial review at all.⁶ Less obviously, though, the various decisions of a planning authority in the context of the making and varying of the statutory development plan are subject to

³ The courts lean against such a construction where possible: *O'Connor v. Dublin Corporation (No. 1)* [2000] 3 I.R. 420; [2001] 1 I.L.R.M. 58. It is submitted that in the example cited next in the text, there is no other interpretation open.

⁴ ‘Appeal’ is defined under section 2 as ‘*an appeal to the board*’.

⁵ The decision is not a ‘*decision on an application for a permission*’. See, by analogy, *O'Connor v. Dublin Corporation (No. 1)* [2000] 3 I.R. 420; [2001] 1 I.L.R.M. 58.

⁶ cf. *Browne v. Dundalk U.D.C.* [1993] 2 I.R. 512; [1993] I.L.R.M. 328.

conventional judicial review.⁷ The refusal of planning permission for past failures to comply with planning permission is treated separately, and it is expressly provided that an opinion formed shall not be a decision on an application for planning permission.⁸

Even in the context of an application for planning permission, the range of decisions protected is limited. For example, it would seem that a ‘determination’ made by An Bord Pleanála as to points of detail under a planning condition,⁹ or in relation to an agreement in respect of social and affordable housing,¹⁰ is not governed by section 50.¹¹

It would also appear that section 50 only applies to the final decision to grant or to refuse planning permission and not to interim decisions of an informal nature which might be made in relation to any particular matter arising in the course of an appeal or application.¹² A challenge to an interim decision does, of course, run the risk that it might be dismissed as being premature;¹³ this, however, is a matter going to discretion rather than to procedure.

III. TIME LIMITS

The time limits for the issuing and serving of proceedings are modified under section 50(4). Under the

⁷ It is to be noted, however, that certain *grounds* of judicial review are excluded; section 12(16).

⁸ Section 35.

⁹ Section 34(5).

¹⁰ Section 96(5).

¹¹ See, by analogy, *O'Connor v. Dublin Corporation (No. 1)* [2000] 3 I.R. 420; [2001] 1 I.L.R.M. 58; *The State (Fingal Industrial Estates Ltd.) v. Dublin County Council* (Supreme Court, unreported, 17 February 1983).

¹² *Huntstown Airpark Ltd. v. An Bord Pleanála* [1999] 1 I.L.R.M. 281 (decision of inspector to refuse to direct production of documents).

¹³ *Huntstown Airpark Ltd. v. An Bord Pleanála* [1999] 1 I.L.R.M. 281. Cf. *Hughes v. An Bord Pleanála* [2000] 1 I.L.R.M. 452.

previous legislation, the time limits were generally two months commencing on the date on which the decision was 'given'. Under section 50(4) the relevant period is eight weeks, with provision for the High Court to extend the period. Moreover, the dates from which the period is reckoned are different. In the case of a decision on an application for planning permission, or on an appeal or referral, the period is eight weeks commencing on date of the decision.¹⁴ This is not necessarily the date on which notification of the decision is received.¹⁵ In the case of the other prescribed decisions *viz.* those in connection with proposed local authority development under section 179; the environmental impact assessment of local authority development under section 175; or in discharge of compulsory acquisition functions under Part XIV, the period is eight weeks commencing on the date on which notice of the decision was first published.

In reckoning the time periods, the first day of the eight week period should be included, and the last day excluded.¹⁶ The better view is that the time limit expires on midnight of the last day.¹⁷

In order to comply with the time limits, it is sufficient that the proceedings be issued and served on all the statutory parties within the prescribed period;¹⁸ it is not necessary that the application for leave to apply should actually have been

¹⁴ The date of the '*decision*' is not the same as the date of the '*grant*'; *Henry v. Cavan County Council* [2001] 2 I.L.R.M. 161.

¹⁵ *Keelgrove Developments Ltd. v. An Bord Pleanála* [2000] 1 I.R. 47.

¹⁶ Interpretation Act, 1937.

¹⁷ *Lancefort Ltd. v. An Bord Pleanála* (High Court, unreported, 13 May, 1997).

¹⁸ *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128; *Keelgrove Properties Ltd. v. An Bord Pleanála* [2000] 1 I.R. 47; [2000] 2 I.L.R.M. 168; *Murray v. An Bord Pleanála* [2000] 1 I.R. 58. *cf. McCarthy v. An Bord Pleanála* [2000] 1 I.R. 42.

moved before the High Court, or even listed for hearing, within the eight week period.¹⁹

There are conflicting indications as to whether or not the requirement under Order 84 rule 21 that an applicant move promptly, survives the introduction of a statutory time limit.²⁰ It is submitted that the better view is that it does not. In interpreting the provisions of the previous legislation, the courts had regard to legal certainty as the touchstone by which the provisions might be construed.²¹ It is submitted that to introduce a concept of promptness into what is already an extremely tight time limit will only give rise to confusion, and is unnecessary.

A. Extension of time

Section 50(4)(a)(iii) empowers the High Court to extend the prescribed period. Under the previous legislation, the time limits were absolute and the High Court had no jurisdiction to extend time.²² Once the time period had expired, even an invalid planning permission was immune from challenge. This new provision remedies a possible defect in the previous legislation: the absence of any

¹⁹ *cf. Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527 (conventional judicial review application).

²⁰ The decision in *O'Connell v. Environmental Protection Agency* [2002] 1 I.L.R.M. 1 suggests that the requirement to move promptly does survive. It is arguable that the finding in *Lancefort Ltd. v. An Bord Pleanála* (High Court, unreported, 13 May, 1997) that the time period expires at midnight, and that the ordinary rules as to reckoning the date of service under Order 122 do not apply, indicates that the statutory time limit is the only restriction on time.

²¹ Reference is made to *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128, and *Keelgrove Properties Ltd. v. An Bord Pleanála* [2000] 1 I.R. 47; [2000] 2 I.L.R.M. 168. In each of these cases, judgment was informed, in part at least, by a desire to promote legal certainty.

²² *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128; *Blessington Community & District Council Ltd. v. Wicklow County Council* [1997] 1 I.R. 273.

exception to the time limits had led to allegations that the previous legislation may have been unconstitutional.²³

The provision is phrased in the negative: ‘the High Court shall not extend the period [...] unless it considers that there are good and sufficient reasons for doing so’. It is probable that the onus is on the applicant to establish that the time period should be extended.²⁴ The Supreme Court have indicated in relation to the similarly worded provisions of the immigration legislation that if a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court’s discretion, and however understandable the delay may be in the particular circumstances.²⁵

Although similar wording is used in Order 84 rule 21, it is probable that cases in respect of that rule will be of limited assistance as a guide to the application of section 50(4)(a)(iii), for the following reasons. One of the factors militating against the exercise of the discretion to extend time in conventional judicial review *viz.* prejudice to third parties, is effectively built-in to applications under section 50. The

²³ See, for example, *Blessington Community & District Council Ltd. v. Wicklow County Council* [1997] 1 I.R. 273. The applicants in that case were ultimately held not to have the necessary *locus standi* to mount a constitutional challenge. See also *White v. Dublin Corporation* (High Court, unreported, 25 May 2001). The High Court decision in *Brady v. Donegal County Council* [1989] I.L.R.M. 282 indicated that the analogous provisions introduced by the Local Government (Planning and Development) Act, 1976 were unconstitutional. The matter was disposed of on other grounds in the Supreme Court and the point remained open. The reasoning evinced in the subsequent decision in *Tuohy v. Courtney* [1994] 3 I.R. 1 (in the context of the Statute of Limitations), however, suggests that had the courts to consider the matter again the provisions might well have been upheld as constitutional. See also *In re Illegal Immigrants Bill 1999* [2000] 2 I.R. 360.

²⁴ See by analogy *De Róiste v. Minister for Defence* [2001] 1 I.R. 190; [2001] 2 I.L.R.M. 241.

²⁵ *G.K. v. Minister for Justice Equality and Law Reform* (Supreme Court, unreported, 17 December 2001).

courts have recognised on a number of occasions that there is a need for short time limits in respect of challenges to planning permissions.²⁶ Save in cases where the developer himself is the applicant, an application for judicial review will almost always result in prejudice in terms of blighting a planning permission. If the existence of such prejudice were to assume the same significance in the context of section 50 as in conventional judicial review, the power to extend time would be rendered nugatory as there would be very few extensions of time granted. It is submitted, therefore, that prejudice to the developer cannot be decisive.

Secondly, the primary counterpoint to insistence on strict compliance with time limits is the reluctance on the part of the courts to allow a legal wrong to remain unrighted, even in the case of appreciable delay.²⁷ This consideration applies with even greater force to judicial review of planning decisions where the rights of a third party objector will be joined in the balance by the community's interest in environmental matters. The dynamic is therefore different from the tension between private rights and good administration, typical of conventional judicial review.

In the circumstances, it is probable that the main focus in any application to extend time will be on the conduct of the applicant and, in particular, as to whether or not the delay on his or her part has been contributed to by the developer. For example, if the delay was caused by some defect in the public notices which the developer is required to publish then it would seem equitable that the time period be extended.²⁸ Similarly, if the developer makes radical

²⁶ *Cavern Systems Dublin Ltd. v. Clontarf Residents Association* [1984] I.L.R.M. 24; *Brady v. Donegal County Council* [1989] I.L.R.M. 282; *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128; *McCann v. An Bord Pleanála* [1997] 1 I.L.R.M. 314. See also *In re Illegal Immigrants Bill 1999* [2000] 2 I.R. 360.

²⁷ cf. *De Róiste v. Minister for Defence* [2001] 1 I.R. 190; [2001] 2 I.L.R.M. 241.

²⁸ See for example the facts as initially found by the High Court in *Brady*

amendments to the proposed development by way of the submission of modified plans without further public notice, any delay in the institution of judicial review proceedings may be referable to the developer's own conduct.²⁹ It would be necessary for the applicant to demonstrate personal prejudice. For this reason, the test for delay must be more objective in the context of the judicial review of planning decisions; those hostile to a development cannot overcome the problem of delay by finding someone ignorant of the relevant facts to mount a challenge.³⁰

The fact that a party has sought to avoid service, or failed to nominate solicitors to accept service when requested, might be grounds for extending time.

In the absence of culpability on the part of the developer, the conduct of the applicant will need to be examined. One of the primary considerations must be the applicant's state of knowledge as to the making of, and the circumstances surrounding, the decision to be impugned.³¹ The length of the delay will obviously always be a relevant factor.³² Other relevant factors might include the complexity of the legal issues.³³

v. Donegal County Council [1989] I.L.R.M. 282.

²⁹ See, for example, the facts of *White v. Dublin Corporation* (High Court, unreported, Ó Caoimh J., 25 May, 2001). Cf. *Irish Hardware Association v. South Dublin County Council* (High Court, unreported, Butler J., 19 July 2000).

³⁰ *R. v. North West Leicestershire District Council ex parte Moses* [2000] 2 J.P.L. 1287.

³¹ *Ní Éili v. Environmental Protection Agency* [1997] 2 I.L.R.M. 458 at 466; *O'Connell v. Environmental Protection Agency* [2002] 1 I.L.R.M. 1.

³² *C.K. v. Minister for Justice Equality and Law Reform* [2002] 1 I.L.R.M. 81 (The Supreme Court appeal was determined on narrower grounds on 17 December, 2001). See also *De Róiste v. Minister for Defence* [2001] 1 I.R. 190; [2001] 2 I.L.R.M. 241 (extremely long delay, without cogent explanation and justification, may itself represent a ground for refusing relief).

³³ See by analogy *O'Connell v. Environmental Protection Agency* [2002]

It would seem that the applicant may well have any inefficiency on the part of his legal advisers imputed to him.³⁴ Similarly, a change of legal representation might not excuse delay.³⁵ Thus where an applicant has knowledge of the making of the decision, delay on the part of his legal advisers may not be sufficient to ground an extension of time.³⁶

It may be the case that a more forgiving standard should be applied in cases where the developer himself seeks to challenge the decision; the element of prejudice is obviously lessened.³⁷ (There would, however, appear to be less excuse for delay on the part of the developer as he is unlikely to be unaware of the making of the decision.)

IV. SUBSTANTIAL INTEREST

As stated above, section 50 introduces a requirement that an applicant have a 'substantial interest' in the matter which is the subject of the judicial review application. It is further provided that a substantial interest is not limited to an interest in land or other financial interest.³⁸ To the extent that the language used is different from that of 'sufficient interest' under Order 84 rule 20(5), it is to be assumed that the criterion of 'substantial interest' was intended to introduce a different standard. The draftsman gives no indication, however, as to what this other standard might involve.

³⁴ I.L.R.M. 1.

³⁵ *C.K. v. Minister for Justice Equality and Law Reform* [2002] 1 I.L.R.M. 81 ((The Supreme Court appeal was appeal determined on narrower grounds on 17 December, 2001).

³⁶ *Ní Éili v. Environmental Protection Agency* [1997] 2 I.L.R.M. 458 at 466.

³⁷ See *In the matter of an application by Burkett* [2001] J.P.L. 775.

³⁸ The fact that the High Court is now empowered (under section 50(4)(g)) to amend the planning permission and does not necessarily have to set it aside in its entirety may encourage developers to bring limited challenges to aspects of the planning permission.

³⁹ Section 50(4)(d)

Under the previous legislation, the issue of whether or not a particular applicant had standing to bring judicial review proceedings had been treated as a mixed question of law and fact. Factors to be considered were whether the development affected the applicant directly;³⁹ the public interest in upholding the rule of law;⁴⁰ and the public interest in planning and environmental matters.⁴¹ It is proposed to consider the position of each of these three categories of applicant, separately.

A. Applicant directly affected by development

It is almost certainly the case that an applicant directly affected by the proposed development would have standing under the criterion of 'substantial interest'. The courts have traditionally regarded such persons as having a sufficient interest to maintain challenges to planning decisions:

[T]he issue of sufficient interest is one capable of objective assessment and relates to the impact on personal situation, ranging from the liability of a rate payer to pay his share of the

³⁹ *Chambers v. An Bord Pleanála* [1992] 1 I.R. 134; *Seery v. An Bord Pleanála* (High Court, unreported, Finnegan J., 2 June, 2000); *O'Connell v. Environmental Protection Agency* [2002] 1 I.L.R.M. 1. See also *E.S.B. v. Gormley* [1985] I.R. 129 (subsequent purchaser of lands held to have a special interest).

⁴⁰ *Murphy v. Wicklow County Council* (High Court, unreported, 19 March 1999); *E.S.B. v. Gormley* [1985] I.R. 139; *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99; *Attorney General (Martin) v. Dublin Corporation* (High Court, unreported, 12 February, 1979): 'Under our constitution it is as much the duty of the State to render justice against itself in favour of citizens as it is to administer the same between private individuals'.

⁴¹ See *Blessington Heritage Trust Ltd. v. Wicklow County Council* [1999] 4 I.R. 571 and the cases cited therein. See also *Village Residents Association Ltd. v. An Bord Pleanála* [2000] 1 I.R. 65; [2000] 2 I.L.R.M. 59: 'Planning is a matter of great public importance and it is not just of interest to the particular parties involved in a particular planning permission. A liberal view should therefore be taken to *locus standi*'.

cost of the luncheon had by members of Dublin Corporation to the damage to the plaintiff's business and licensing provisions covered in *East Donegal Co-operative Livestock Mart Ltd. v. Attorney General* [1970] I.R 317.⁴²

A distinction should be drawn, however, in this context between the concepts of *locus standi* and *jus tertii*. The fact that an applicant has standing to challenge a decision (*locus standi*) does not necessarily mean that he is unrestricted in the arguments which he can make on the application (*jus tertii*). In particular, the statutory requirement to establish 'substantial grounds' of challenge may mean that an applicant is precluded from raising technical defects in circumstances where he was not affected by same. Strictly, this latter point does not go to standing,⁴³ but some decisions have conflated the concept of *locus standi* with that of *jus tertii*. For example, in *Halpin v. Wicklow County Council*,⁴⁴ O'Sullivan J. held that an applicant affected by the impugned decision did not have standing to raise a point against a public notice in circumstances where he personally had not

⁴² per McCarthy J in *Chambers v. An Bord Pleanála* [1992] 1 I.R. 134 at 142. See also *Seery v. An Bord Pleanála* (High Court, unreported, Finnegan J., 2 June 2000), at p. 12: "In the present case I am satisfied that the facts which are not in dispute clearly establish the applicants as affected by the permission granted. Their dwelling immediately adjoins the proposed development and at all times they expressed a concern about the proximity of the houses on the proposed development to their own dwelling house. They have sufficient interest and accordingly, *locus standi*." See also *O'Connell v. Environmental Protection Agency* [2002] 1 I.L.R.M. 1.

⁴³ For an example of the distinction being observed, see *E.S.B. v. Gormley* [1985] I.R. 129 at 157 (a member of the public with 'a special interest' was permitted to raise arguments as to defects in a public notice in circumstances where she had not been prejudiced by those defects). See also *Seery v. An Bord Pleanála* (High Court, unreported, Finnegan J., 2 June, 2000).

⁴⁴ High Court, unreported, O'Sullivan J., 15 March 2001.

been prevented from making submissions.⁴⁵ The practical significance of such conflation may not be great, however: even if it did not go to the issue of *locus standi*, the fact that an applicant was not personally prejudiced by an alleged defect would in any event be relevant to the exercise of the High Court's discretion to withhold relief;⁴⁶ it would also go to the statutory requirement of 'substantial grounds'.⁴⁷

B. Public interest in upholding the rule of law

Traditionally, the public law remedies admitted of an element of *actio popularis*: the distinction between *locus standi*, and the court's jurisdiction to refuse relief as a matter of discretion where the applicant for relief had no real interest in the proceedings and was not a person aggrieved by the decision, is emphasised in the decision of the Supreme Court in *The State (Abenglen Properties Ltd.) v. An Bord Pleanála*.⁴⁸

It is submitted that this element of *actio popularis* will be modified by the requirement for 'substantial interest', and that it will no longer be enough for an applicant simply to insist on compliance with the rule of law. Although it is expressly provided that the criterion of 'substantial interest'

⁴⁵ An even more dramatic example of such conflation is provided by *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

⁴⁶ *Cunningham v. An Bord Pleanála* (High Court, unreported, Lavan J., 3 May 1990).

⁴⁷ *Blessington & District Community Council Ltd. v. Wicklow County Council* [1997] 1 I.R. 273.

⁴⁸ [1984] I.R. 381 at 393. See also the *dicta* of Fennelly J in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190 at 220; [2001] 2 I.L.R.M. 241 at 270. Insofar as the decision in *E.S.B. v. Gormley* [1985] I.R. 129 suggests that a planning permission was invalid not by reason of prejudice or disadvantage to the person challenging it but by reason of a want of power and jurisdiction in the planning authority, it would also appear to support an *actio popularis*. It should be noted however that those proceedings were taken by 'a member of the public with a special interest' (at 157).

does not require an interest in land or other financial interest, it is difficult to believe that a generic interest in the rule of law would be regarded by the courts as substantial. Indeed, even prior to the new legislation, an impatience with pedantic litigants was evident from certain judgments. The term substantial may be contrasted with the term 'procedural'. It could be argued that in the absence of a more development-specific concern, a person invoking the rule of law alone, has a procedural interest only.

C. Public Interest in the Environment

It is unclear whether even the addition of the public interest in the environment will allow a litigant without a property or financial interest to shade it, and achieve a substantial interest. The notion of a public interest litigant, which had previously been adverted to in litigation under the planning legislation,⁴⁹ had evolved into a more concrete concept with decisions such as that of Denham J. in *Lancefort Ltd. v. An Bord Pleanála*,⁵⁰ or of O'Higgins J. in *Springview Management Company Ltd. v. Cavan Developments Ltd.*⁵¹ An analogy was drawn with constitutional cases, where the courts had also accepted a move from victim related standing to one of public interest. Denham J stated that:⁵²

Environmental issues by their very nature affect the community as a whole in a way a breach of a personal right does not. Thus the public interest element must carry some weight in considering the circumstances of environmental law cases and the locus standi of the parties.

⁴⁹ See, for example, *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 at 114.

⁵⁰ [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

⁵¹ [2000] 1 I.L.R.M. 437.

⁵² *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270 at 292; [1998] 2 I.L.R.M. 401 at 420.

Although the concept had initially been put forward as part of an analysis of the *locus standi* of limited liability companies, it was soon extended to personal litigants with the decision in *Murphy v. Wicklow County Council*.⁵³ Kearns J. held that the applicant in that case had demonstrated a genuine interest in the matter and was in a position to present expert evidence on a range of points, all of which were pertinent to the huge stake the public at large had in relation to the proper and lawful management of the Glen of the Downs.

It remains to be seen whether a public interest will be regarded as a 'substantial interest' for the purpose of section 50. The better view would appear to be that it should be. The planning legislation places emphasis on the right of public participation. If public participation is to be excluded at the level of judicial review, one would have expected that express language would have been used. Instead, it is provided that a substantial interest is not limited to an interest in land or other financial interest.

There is an argument to be made that in certain cases a public interest litigant has a stronger claim to standing than even a neighbour or other individual more directly affected.⁵⁴ A public interest litigant may be in a position to mount a more carefully selected, focused, relevant and well argued challenge than a private litigant.⁵⁵ One of the objectives of a standing requirement is to avoid the crank litigant: it would seem to follow from this that the quality of presentation which a litigant is able to bring to a case should be a relevant factor in determining standing. It is submitted that this should inform the interpretation of 'substantial interest'. An analogy can be drawn with constitutional challenges: it appears that

⁵³ High Court, unreported, Kearns J., 19 March, 1999.

⁵⁴ *R. v. Inspectorate of Pollution ex parte Greenpeace Ltd. (No. 2)* [1994] 4 All E.R. 329.

⁵⁵ *R. v. Inspectorate of Pollution ex parte Greenpeace Ltd. (No. 2)* [1994] 4 All E.R. 329.

the inability, for pragmatic reasons, of suitably qualified plaintiffs to take an action may allow other less directly affected plaintiffs to proceed.⁵⁶

1. Limited liability companies

The change from ‘sufficient’ to ‘substantial’ does not appear to advance (by alteration or clarification) the legal position in connection with limited liability companies. The law in this regard had been clarified by decisions such as *Blessington Heritage Trust Ltd. v. Wicklow County Council*,⁵⁷ and *Lancefort Ltd. v. An Bord Pleanála*,⁵⁸ and it is submitted that these authorities are unaffected by the change in language.

The ordinary rules in relation to standing apply, with necessary modifications, to limited liability companies. The fact that a company’s property or financial interests may be affected by the planning decision being challenged would, as in the case of a natural person, appear to be sufficient to found standing.⁵⁹ It is important to note, however, that for any property interest to be relied upon, the relevant property must be held by the company itself. It is not possible for the members of a company to seek to have their own property interests imputed to the company in order to supply a ‘substantial interest’: the fact that members of the company have property rights does not in some way afford the company a property right.⁶⁰ The legal person of the company is capable of holding property in its own right and thus it is

⁵⁶ *Iarnrod Éireann v. Ireland* [1996] 3 I.R. 327; [1996] 2 I.L.R.M. 161 at 190.

⁵⁷ [1999] 4 I.R. 571.

⁵⁸ [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

⁵⁹ *Malahайд Community Council Ltd. v. Fingal County Council* [1997] 3 I.R. 383; *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

⁶⁰ *Springview Management Company Ltd. v. Cavan Developments Ltd.* [2000] 1 I.L.R.M. 437. cf. *R. v. Leicester City Council & Ors. ex parte Blackford and Boothcorpe Action Group Ltd.* [2000] J.P.L. 1266 at 1278.

not necessary to have regard to the property of its members. It is only in the case of an anthropomorphism such as *bona fides* that it is necessary to look through to the members of the company.

In circumstances where it is sought to found standing by reference to the public interest, it is submitted that characteristics (such as, for example, the promoters' commitment to environmental affairs) may be imputed to the company. The Supreme Court in *Lancefort Ltd. v. An Bord Pleanála*⁶¹ had recognised that there were valid reasons for which persons concerned with planning or environmental issues might legitimately decide to associate in the form of a limited liability company,⁶² and the fact of incorporation should not *per se* be a bar to standing. It also appeared from the majority judgment in *Lancefort Ltd. v. An Bord Pleanála*⁶³ that not even the fact that a company was incorporated after the planning decision under review had been made, would be fatal to standing, in circumstances where there was an identity of interest between persons who had objected at an earlier stage and the applicant company. The standing of the company in such cases should then fall to be determined on the same basis as in the case of individual litigants seeking to assert a public interest; whether or not this might constitute a 'substantial interest' has been discussed above.

It would appear to follow from all of the foregoing that the fact that individual members of a company would have standing in their own right does not necessarily indicate that the company would have standing. This depends on the basis on which standing is founded. In the case of public

⁶¹ [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

⁶² See also *Village Residents Association Ltd. v. An Bord Pleanála* [2000] 1 I.R. 65 at 72; [2000] 2 I.L.R.M. 59 at 66: 'it is unwieldy and unwise to try and mount litigation in the name of or on behalf of an unincorporated association'. *R. v. Leicester City Council & Ors. ex parte Blackford and Boothcorpe Action Group Ltd.* [2000] J.P.L. 1266 at 1278.

⁶³ [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

interest litigation, it is submitted that the interposing of a company between the individual members of the company and the court does not affect the issue of standing. Conversely, if the objective of the litigation is to protect private property interests, it would seem that the property interests engaged must be those of the company, and not of its individual members. The dividing line between private and public interest is less clear in the context of local issues.

The main distinction between a corporate litigant and an individual litigant is in relation to costs. A concern had been expressed in a number of cases that a company might be used to shield individual litigants from liability for legal costs. The Supreme Court indicated in *Lancefort Ltd. v. An Bord Pleanála*⁶⁴ that this concern might be addressed by the making of an order for security for costs under section 390 of the Companies Act, 1963. Laffoy J. was more explicit in *Village Residents Association Ltd. v. An Bord Pleanála (No. 2)*.⁶⁵ In response to an argument that the provision of security for costs might be a *quid pro quo* for affording *locus standi*, Laffoy J stated as follows:

In my view, when the court is invited on a challenge to standing to infer that objectors to planning decisions have clothed themselves with limited liability for the less than pure motive of conferring immunity against costs on themselves and the challenge is successfully resisted, on a subsequent attempt to resist an application for security for costs by the company, the *bona fides* of the members of the company requires cautious consideration.⁶⁶

⁶⁴ [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

⁶⁵ [2001] 2 I.L.R.M. 22.

⁶⁶ [2001] 2 I.L.R.M. 22 at 33. See also *R. v. Leicester City Council & Ors. ex parte Blackford and Boothcorpe Action Group Ltd.* [2000] J.P.L. 1266 at 1278 ‘The costs position can be dealt with adequately by requiring the provision of security for costs in a realistically large sum’.

2. Failure to participate

The requirement to demonstrate a ‘substantial interest’ is supplemented by an additional statutory requirement as to participation in the planning process. Specifically, as stated above, section 50(4)(c) provides that leave to apply for judicial review shall not be granted unless the applicant shows to the satisfaction of the High Court either that the applicant had made objections, submissions or observations during the planning process or that ‘there were good and sufficient reasons’ for not making such objections, submissions or observations. To a large extent, this statutory requirement was foreshadowed by the majority judgment of the Supreme Court in *Lancefort Ltd. v. An Bord Pleanála*⁶⁷ wherein it was indicated that failure to raise a ground of objection before the relevant planning body, might preclude an applicant from relying on such a ground in subsequent judicial review proceedings.⁶⁸ The impact, if any, of the new legislative provision on this principle is unclear. To the extent that the legislative provision is less demanding (in that it focuses on the fact of participation, without there being any express requirement to have raised specific grounds of objection), it might be argued that it should be interpreted as intended to temper the harshness of the principle in *Lancefort Ltd.* As against this, as the Supreme Court in *Lancefort Ltd.* had detected an onus to raise grounds of objection as part of the requirement (under the previous legislation) to demonstrate a ‘sufficient interest’; this may be unaffected by the introduction of the new statutory requirement, in circumstances where there continues to be a parallel statutory requirement to demonstrate a ‘substantial interest’.

⁶⁷ [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

⁶⁸ See also *Murphy v. Wicklow County Council* (High Court, unreported, Kearns J., 19th March, 1999). Kearns J. ruled that the applicant did not have locus standi in respect of one particular ground of challenge, viz. the adequacy of an environmental impact statement, for reasons including the fact that the applicant had not participated in the statutory procedure.

As stated above, an exception to this requirement to have participated is provided in case of ‘good and sufficient reasons’. It is submitted that there are at least two, and possibly three, broad circumstances which would meet this exception. First, where the failure to participate was as a result of some default in compliance with the regulations as to public notice of the application. For example, the nature and extent of the proposed development might not have been properly stated, and this may have lulled the applicant for judicial review into not making an objection.⁶⁹

Secondly, although the particular applicant for judicial review may not have made objections, submissions or observations, his concerns may have been raised before either the planning authority or An Bord Pleanála by others. It would be unwieldy were each and every individual objector required to make his or her own submission to the relevant planning body; it would seem reasonable to allow general representations to be made.⁷⁰ This reasoning would seem to apply *a fortiori* to circumstances where individual objectors subsequently associate through the medium of a limited liability company. The company, as applicant in judicial review proceedings, should be allowed to point to the previous participation of its (future) promoters.⁷¹ (The position in relation to security for costs has already been considered above.)

The existence of a third possible head requires a consideration of the objective of the new legislative provision. If the mischief which the provision is intended to

⁶⁹ *Monaghan U.D.C. v. Alf-a-bet Promotions Ltd.* [1980] I.L.R.M. 64

⁷⁰ See, by analogy, *Chambers v. An Bord Pleanála* [1992] 1 I.R. 134. See also *Village Residents Association Ltd. v. An Bord Pleanála* [2000] 1 I.R. 65 at 72; [2000] 2 I.L.R.M. 59 at 66: ‘it is unwieldy and unwise to try and mount litigation in the name of or on behalf of an unincorporated association’.

⁷¹ *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401; *R v. Hammersmith and Fulham L.B.C. ex parte People before Profit Ltd.* (1980) L.G.R. 322.

remedy is to ensure that objections are made to the relevant planning body so as to allow it consider the point and possibly forestall a subsequent judicial review challenge (for example, by deciding to require an environmental impact statement), then provided the objection is made, the identity of the person making the objection would appear to matter not. If this is the case, it would be unnecessary (in contrast to the second head above) for the applicant for judicial review to demonstrate any connection with the person who had made the objection, provided that the ground of objection had been advanced.

V. STAY ON JUDICIAL REVIEW PROCEEDINGS

Section 50(3) purports to give legislative force to the concept of a self-contained administrative code.⁷² The High Court is empowered to stay judicial review proceedings before it pending the making of a decision by An Bord Pleanála in relation to a parallel statutory appeal. Little direction is given under the legislation, however, as to the circumstances (beyond the mere existence of an appeal or referral) in which it would be appropriate to exercise this discretion; the only statutory criterion (which is apparently a condition precedent to the exercise of the power) is that the court ‘considers that the matter is within the jurisdiction’ of An Bord Pleanála.

A. Mechanics of Application for Stay

Section 50(3) provides for an application to be brought by An Bord Pleanála, or any party to an appeal, to stay judicial review proceedings where the matter is within the jurisdiction of An Bord Pleanála. The limitations on the applicability of section 50(3) should be noted. First, the provision applies only in respect of a decision of a planning

⁷² This represents an advance on the little used provisions of Order 84 rule 20(5) which allowed the High Court to adjourn an application for leave to apply for judicial review pending an appeal or the expiry of time for an appeal.

authority: a choice of remedies does not arise in the context of judicial review of a decision of An Bord Pleanála. Secondly, there must be an appeal pending before An Bord Pleanála; thus the fact that the applicant for judicial review arguably should have proceeded by way of statutory appeal is irrelevant if neither he nor any other person, in fact, invoked the appeal mechanism. (It should also be noted that the appeal does not necessarily have to be made by the applicant for judicial review, nor, indeed, is it necessary even that the applicant for judicial review be a party to the appeal). Thirdly, the application for a stay can only be made by An Bord Pleanála or a party to an appeal. Generally, there will be a high level of coincidence between the parties to the appeal, and those persons joined in the judicial review proceedings (whether as respondents or as notice parties). For example, the applicant for planning permission is a mandatory party to both an appeal, and judicial review proceedings. Occasionally, however, a person may be a party to the judicial review proceedings (whether under Order 84 rule 22(2) or (6) as a person directly affected, or pursuant to order of the High Court under section 50(4)(d)(iv)) but not be a party to the appeal.⁷³

The application may be brought ‘at any time’ after the ‘bringing’ of an application for leave to apply for judicial review. It is submitted that the term ‘bringing’ envisages a stage equivalent to the making of the application. As an application for leave to apply is made upon the issue and service of the notice of motion seeking leave to apply for judicial review,⁷⁴ it would appear that an application for a stay may be made in advance of the actual hearing of the leave application. An issue would then arise as to which

⁷³ See, e.g. the facts of *Village Residents Association Ltd. v. An Bord Pleanála (No. 2)* [2000] 4 I.R. 321; [2001] 2 I.L.R.M. 22 where it was suggested that it might be necessary to join the owner of the lands in the proceedings in circumstances where the applicant for the planning permission was a mere lessee.

⁷⁴ *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128.

application should be heard first: the application for leave to apply for judicial review, or the application for the stay. On one view, if the purpose of the application for the stay is to expedite the statutory appeal process by staying any competing parallel judicial review proceedings, it would appear more effective to address the application for a stay first, rather than embark on a possibly lengthy hearing on the leave application. As against this, however, in order to identify the issues raised on the judicial review proceedings, it may be necessary to examine in some detail the grounds of challenge advanced in the statement of grounds, and, rather than replicate this exercise at a later stage (in the event of a stay not being granted), it might be more pragmatic to determine the two applications at the one hearing.

B. Matter within jurisdiction of An Bord Pleanála

The statutory criterion under section 50(3) is whether or not the matter is within the jurisdiction of An Bord Pleanála. The precise meaning to be attributed to the term ‘matter’ is unclear, and it is submitted that there are two viable interpretations, a broad one, and a narrow one. On the broad interpretation, the term ‘matter’ would be rendered as ‘the appeal or referral’. Thus, the test would be whether or not the appeal or referral was properly before An Bord Pleanála. This would require consideration of whether or not the defect alleged in the decision of the planning authority subsisted so as to affect the jurisdiction of An Bord Pleanála. The decision of An Bord Pleanála on appeal operates to annul the decision of the planning authority, and thus the fact that the decision of the planning authority may have been invalid does not *per se* prevent An Bord Pleanála from having jurisdiction to entertain the appeal.⁷⁵ Certain defects at the planning authority stage can, however, continue to subsist even before An Bord Pleanála,⁷⁶ and in such circumstances

⁷⁵ Section 37(1)(b), Planning and Development Act, 2000. See also *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 52

⁷⁶ *Hynes v. An Bord Pleanála* (No. 2) (High Court, unreported,

An Bord Pleanála does not have jurisdiction to entertain the appeal. For example, the fact that the applicant for planning permission did not have the minimum requisite interest in the lands the subject matter of the application,⁷⁷ would render an application for planning permission invalid⁷⁸ and any decision to grant planning permission, whether by the planning authority or by An Bord Pleanála, would be voidable. For the purposes of section 50(3) then, on the wide interpretation, the High Court would simply have to consider whether the legal grounds of challenge raised in the judicial review proceedings were ones which, if well founded, would impact on the jurisdiction of An Bord Pleanála, or were ones which were spent by the time the appeal/application reached An Bord Pleanála. In many cases, the grounds of challenge would fall into the latter category,⁷⁹ and, accordingly, it would be open to the High Court to stay the judicial review proceedings on the basis that the matter was within the jurisdiction of An Bord Pleanála.

On the narrow interpretation, the term ‘matter’ would be rendered as the ‘grounds on which the decision is challenged’. This definition would require that, in addition to confirming that the appeal itself was properly before An Bord Pleanála, the High Court would also have to consider whether An Bord Pleanála had the competence to address the issues raised in the judicial review proceedings: were they matters within the board’s jurisdiction? This is a discrete issue: An Bord Pleanála does not have jurisdiction to determine other

McGuinness J., 30 July 1998).

⁷⁷ For the requirements as to interest, see *Keane v. An Bord Pleanála* [1998] 2 I.L.R.M. 241.

⁷⁸ *Hynes v. An Bord Pleanála* (No. 2) (High Court, unreported, McGuinness J., 30 July 1998).

⁷⁹ For example, an allegation that the proposed development would involve a material contravention of the development plan, or that there had been a failure to comply with public notice requirements, would not normally affect the jurisdiction of An Bord Pleanála. (*Cf.* Planning and Development Act, 2000, section 37(2)).

than simple questions of law,⁸⁰ nor, necessarily, to provide redress for breach of procedure.⁸¹ The mere fact that an appeal is validly before An Bord Pleanála does not indicate that an appeal is a complete substitute for judicial review. Under the previous legislation, this point was readily illustrated by reference to material contravention of the development plan.⁸² An Bord Pleanála took free of the restrictions imposed on the planning authority in connection with granting planning permission for a development which would involve a material contravention of the development plan. Thus, An Bord Pleanála were not compelled to inquire into an allegation that the planning authority had acted *ultra vires* in granting planning permission in material contravention of the plan; the illegality, if any, was spent by the time the matter reached An Bord Pleanála. The High Court was the only forum in which this issue would have to be canvassed and, in order to vindicate the rule of law, therefore, judicial review ought to be allowed.⁸³

The position where the judicial review proceedings involve an allegation of breach of fair procedures is more complicated. There are strong *dicta* to the effect that a fair

⁸⁰ *The State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 388 at 393.

⁸¹ *The State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 388 at 393; *Eircell Ltd. v. Leitrim County Council* [2000] 1 I.R. 479; [2000] 2 I.L.R.M. 81.

⁸² Specifically, section 26(3) of the Local Government (Planning and Development) Act, 1963, and section 14(8) of the Local Government (Planning and Development) Act, 1976. The position is not as clear-cut under the Planning and Development Act, 2000 in that under section 37(2), the issue of material contravention retains some significance before An Bord Pleanála.

⁸³ *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527. Cf. *Kennedy v. South Dublin County Council* (1998) 5 I.P.E.L.J. 31; *Byrne v. Wicklow County Council* (High Court, unreported, Keane J., 4 November 1994).

appeal does not necessarily cure an unfair initial hearing;⁸⁴ the structure of the administrative scheme may be such that a person is entitled to two proper hearings and thus even where the second hearing is unexceptionable, this may not make up for the loss of a first bite at the cherry. The extent to which this logic might apply to the two tier decision-making system provided for under the planning legislation is uncertain. On one view, the planning process involves a unified decision-making structure, with provision for a two stage hearing.⁸⁵ It is a peculiar feature of the process that many of the *indicia* of fair procedures are absent from the planning authority stage.⁸⁶ For example, there is no provision for an oral hearing, the formal exchange of submissions, or the production of documents; these are, however, available on appeal to An Bord Pleanála. The scheme is therefore to be distinguished from those where there is only a limited right of appeal, and where, for this reason, a want of fair procedures at the initial stage could not be remedied by an (attenuated) appeal. The opposite is true: there is a full blooded right of appeal, with An Bord Pleanála hearing the matter *de novo*, as if the application for planning permission had been made to it in the first instance. If anything, the scheme is top heavy in

⁸⁴ For a recent example, see *Stefan v. Minister for Justice Equality, and Law Reform* (Supreme Court, unreported, 13 November, 2001). Cf. *Bane v. Garda Representative Association* [1997] 2 I.R. 449 at 477. See also *Eircell Ltd. v. Leitrim County Council* [2000] 1 I.R. 479; [2000] 2 I.L.R.M. 81; *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497.

⁸⁵ See also *Gammell v. Dublin County Council* [1983] I.L.R.M. 413 where a distinction was drawn between an appeal against an effective decision, and a procedure whereby an aggrieved person may make submissions before a decision becomes effective. In the case of the planning legislation, it could be argued that there is only ever one effective decision in circumstances where a decision of An Bord Pleanála expressly operates to annul the decision of the planning authority, and the initial decision of the planning authority does not constitute the grant of planning permission: it is only in the case of there being no appeal (or an appeal withdrawn) that the planning authority can then proceed to make an actual grant of planning permission.

⁸⁶ See the *dicta* in *McCann v. An Bord Pleanála* [1997] 1 I.R. 264 at 271.

that the range of procedural safeguards is far greater at the appeal stage. Accordingly, it would appear difficult to argue that, as a matter of statutory interpretation, the scheme should be analysed as providing an entitlement to two self-contained hearings. Rather, the appeal stage is integral to the process in circumstances where the procedures available at the planning authority stage are always insufficient. It would be anomalous were judicial review to lie in respect of a breach of the limited fair procedures available at the planning authority stage, whereas in the case of an inherent and arguably more fundamental defect (for example, the absence of the possibility of an oral hearing), the only remedy would be by way of appeal.

Finally, it is necessary to consider briefly an intermediate category of grounds of challenge, as follows. In the case of certain otherwise subsisting defects, An Bord Pleanála has the ability to rescue its own jurisdiction by remedying the defect. In other words, the judicial review proceedings allege an identifiable legal defect, but one which is within the competence of An Bord Pleanála to address or remedy. For example, the omission of an environmental impact statement from an application in respect of development for which an environmental impact statement is required would render a decision invalid. This is a defect which subsists before An Bord Pleanála. An Bord Pleanála is empowered under the Planning and Development Regulations, 2001, to call for an environmental impact statement even in circumstances where one had not been submitted at the planning authority stage.

In the case of this intermediate category of grounds of challenge, the answer to the question as to whether the matter is within the jurisdiction of An Bord Pleanála or not is contingent on An Bord Pleanála exercising the relevant power to remedy the otherwise subsisting defect. It may well be, however, that at the time of the application for the stay under section 50(3) the board will not yet have considered the exercise of such a power.

It is submitted that judicial review proceedings involving challenges of this type fall to be treated as follows. On the broad interpretation, a ‘wait and see’ attitude must be adopted. The judicial review proceedings must initially be stayed as the applicant cannot, at that stage, demonstrate that it is inevitable that An Bord Pleanála’s jurisdiction is destroyed. If An Bord Pleanála subsequently fails to exercise the remedying power, however, then the stay on the judicial review proceedings should be lifted. The applicant for judicial review has laid down a marker as to the defect by issuing and serving the judicial review proceedings and, accordingly, provided that An Bord Pleanála has not made a decision on the substantive appeal, is not open to the criticism that he has waived his right to object to the defect alleged.⁸⁷ In the event that a decision has been made on the substantive appeal, the applicant might be entitled to issue and serve fresh proceedings challenging the decision of An Bord Pleanála, free from any criticism that he had waived the objection by allowing an appeal to be pursued before An Bord Pleanála.⁸⁸

If the broad test is failed, then it is not strictly necessary to consider the additional requirements of the narrow approach to interpretation separately: in the case of a subsisting defect, a failure by An Bord Pleanála to exercise the remedying power would destroy its jurisdiction even under the broad interpretation.

⁸⁷ Cf. *Max Developments Ltd. v. An Bord Pleanála* [1994] 2 I.R. 121. The desire to avoid such criticism gives rise to the intriguing possibility that an applicant himself might seek to stay his own judicial review proceedings.

⁸⁸ Cf. *Max Developments Ltd. v. An Bord Pleanála* [1994] 2 I.R. 121.