THE HIGH COURT

[2020 No. 417 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

JOHN WALSH and JOAN WALSH

APPLICANTS

– AND –

AN BORD PLEANÁLA

RESPONDENT

– AND –

RAY SINNOTT

FIRST NAMED NOTICE PARTY

– AND –

WATERFORD CITY AND COUNTY COUNCIL

SECOND NAMED NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 22nd July 2021.

SUMMARY

These are judicial review proceedings in which the applicants have unsuccessfully come seeking "*1. An order of* certiorari*…quashing the decision of the respondent to grant* [a] *permission….2. A Declaration that the Respondent erred in law and/or acted* ultra vires *in granting* [the] *permission…where it failed to consider the Applicant's ground of appeal/objection relating to the validity of the planning application. 3. Further and/or in the alternative, a declaration that the Respondent erred in law and/or acted* ultra vires *in granting permission…where the planning application did not comply with Article 22(2)(g) of the Planning and Development Regulations 2001 (as amended)*". This summary forms part of the court's judgment.

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1. On 19th September 2019, a planning application form signed by "*Ray Sinnott on behalf of Congreve Trust*" and indicating the applicant to be "*Ray Sinnott on behalf of Congreve Trust*" was submitted to Waterford City and County Council (as planning authority) for a development described therein as being "*to replace the existing agricultural entrance with a domestic entrance to provide access to my residence at Mount Congreve, Kilternan, County Waterford. The site is within the curtilage of a protected structure*".

2. As regards the meaning of the phrase "*on behalf of*", as deployed in the planning application that has yielded the within proceedings, the court has been referred to *R. v. Toohey,* ex parte *Attorney General* (1980) 145 CLR 374 where the High Court of Australia was called upon to construe the meaning of the phrase "*on behalf of*" as used in a particular provision of the Aboriginal Land Rights (Northern Territory) Act 1976. The Australian High Court's judgment in *Toohey* notes, by reference to the judgment of Latham C.J. in *R. v. Portus*, ex parte *Federated Clerks Unions of Australia* (1949) 79 CLR 428, that "*The phrase 'on behalf of' is, as Latham C.J. observed…'not an expression which has a strict legal meaning'*". Latham C.J. seems correct in this observation. However, leaving aside for a moment whether the meaning

of a phrase as deployed in Australian statute enacted in Canberra in 1976 and construed in Canberra in 1980 by reference to a judgment delivered in Canberra in 1949 has any relevance to the meaning of the phrase when deployed by an Irishman in correspondence written in 2019 in Kilmeaden, it does not seem to the court that it can with any seriousness be contested that there is any doubt presenting in what is meant by identifying "*Ray Sinnott on behalf of Congreve Trust*" as the applicant for planning permission: the words clearly mean that Mr Sinnott is the person who is applying for planning permission, not in his own right, but on behalf of the Congreve Trust (or, more particularly, the trustees of that trust). That is not really a matter of interpretation; it is just the plain English meaning of the words, the most natural meaning, and, in reality, the only plausible meaning.

3. On 1st October 2019, the planning authority wrote to Mr Sinnott acknowledging receipt of the planning application. On 2nd October 2019, the applicants in the within application submitted a written objection to the planning authority in respect of the proposed development which raised issues, *inter alia*, concerning the identity of the applicant and the ownership of the lands in respect of which planning permission was sought. On 11th October 2019, the planning authority completed the form entitled "*Planning Application – Confirmation of Receipt of Valid Planning Application*". On 12th November 2019, a planner's report was compiled by an executive planner with the planning authority, which records the applicant as "*Ray Sinnott on behalf of Congreve Trust*". Complaint is made by Mr and Mrs Walsh that the report purports to set out the submissions raised by them but does not duly consider the (with respect, unconvincing) concerns raised by them in relation to the identity of the applicant and the ownership of the lands in respect of which planning permission was sought.

4. A chief executive officer's order was made on 12th November 2019 granting permission for the proposed development, subject to two conditions. The applicants in the within application, with the assistance of their planner, Mr Thompson then lodged a statutory appeal against the decision of the planning authority to the Board by way of letter dated 5th December 2019. They contended, *inter alia*, that Mr Sinnott had no authority to make the planning application and did not have the required consents to make same. A response to the grounds of appeal was lodged by Mr Michael Whelan, who was assisting with the application, on 14th January 2020. In that response he stated:

"*As stated in all documentation submitted as part of this planning application, Mr Ray Sinnott is acting on behalf of Mount Congreve Trust and does not claim to be the owner of the property. This planning application had to be made in order to provide a future access to the dwelling occupied by Mr Sinnott bit owned by Mount Congreve Trust….The applicants will be relying on the goodwill of the new owners for temporary access*".

5. Mr Whelan succinctly captures the obvious truth of matters in this response.

6. The Board's inspector in his report of 28th February 2020 was guilty of a certain infelicity of language, referring to Mr Sinnott as the applicant, rather than referring to him as acting on behalf of the Congreve Trust. It is not entirely clear to the court whether this was an error or some sort of shorthand reference, but even if it was an error, the court does not see that it invalidates the decision or transforms Mr Sinnott into something that he was not.

7. By way of Board direction dated 10th March 2020, the Board indicated that it had considered the submissions on file and the inspector's report and decided to grant permission generally in accordance with the inspector's recommendation for the reasons set out and subject to specified conditions. On 12th March 2020, a Board order was made granting the permission with revised conditions.

8. By notice of 6th July 2020, Mr and Mrs Walsh have come to court seeking the following principal reliefs:

"*1.* *An order of* certiorari*…quashing the decision of the respondent to grant* [the] *permission….*

2. *A Declaration that the Respondent erred in law and/or acted* ultra vires *in granting* [the] *permission…where it failed to consider the Applicant's ground of appeal/objection relating to the validity of the planning application.*

3. *Further and/or in the alternative, a declaration that the Respondent erred in law and/or acted* ultra vires *in granting*

> [the] *permission…where the planning application did not comply with Article 22(2)(g) of the Planning and Development Regulations 2001 (as amended)*".

9. Article 22(2) of the Regulations of 2001 provides, *inter alia*, as follows:

> "*A planning application referred to in sub-article (1) shall be accompanied by – (g) where the applicant is not the legal owner of the land or structure concerned – (i) the written consent of the owner to make the application…*").

10. There was considerable discussion at the hearing of this application of the purpose of Art.22(2)(g) of the Regulations of 2001, not least because that purpose is relevant when it comes to (a) how the court might exercise its discretion in the context of judicial review proceedings, and (b) the level of engagement that can reasonably be expected and required of the Board in terms of the level and extent of reasoning in an inspector's report as to title.

11. In this regard, the court has been referred, *inter alia*, to the judgment of Simons J. in *Heather Hill Management Co CLG v. An Bord Pleanála* [2019] IEHC 450 and, in particular, his observation that the purpose of Art.22(2)(g) "*is to guard against making of frivolous or vexatious planning applications by persons with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development*", also noting in this regard that "[I]*t is doubtful whether An Bord Pleanála is required to interrogate issues of title at all*". All of this, with respect, seems perfectly correct; however, the court does not understand Simons J. to be suggesting in this regard that when title is expressly raised by an appellant as an issue, that issue may go unaddressed in the appeal decision that follows. Indeed, it is clear from, for example, *McCallig v. An Bord Pleanála* [2013] IEHC 60 and *South-West Regional Shopping Centre v. An Bord Pleanála* [2016] IEHC 84, at paras.85-86, that any issue raised in relation to validity on appeal must be considered by the Board. (There is in any event just a touch of, to coin a term, 'Appeals Procedure 101' about this. As a matter of basic appeals procedure, if a point as to validity is raised on appeal it should be dealt with on appeal, though where it is not dealt with or is inadequately dealt with does not yield the necessary and/or inevitable consequence that such decision cannot be let stand as a matter of law). However, it is clear from the judgment in *Hynes v. An Bord Pleanála* [1998] IEHC 127 (and indeed the

judgment in *Heather Hill*) that the degree of analysis required of the Board when it comes to title issues is relatively limited. Thus, in *Hynes* v. *An Bord Pleanála* [1998] IEHC 127, McGuinness J. observed, at para. 47, *inter alia*, as follows:

> "*There remains the question of the validity of the Developer's original application. While the Judgment of Costello J in the* O'Keeffe *case makes it clear that it is the decision of the Planning Authority that founds the jurisdiction of An Bord Pleanala, no question of the validity of the original application arose in that case, and I would not interpret the Judgment as meaning…that An Bord Pleanala could simply ignore a situation where the original planning application was* ***clearly invalid****. I accept that the primary duty of vetting a planning application and ensuring that it is in accordance with the relevant regulations lies with the Planning Authority but one must ask whether An Bord Pleanala would have jurisdiction to adjudicate on an appeal where the application* ***on its face*** *was one which would be considered invalid under the criteria set out by the Supreme Court in the* Frescati *case?* "
> [Emphasis added]

12. So McGuinness J. sees a role for the Board in this regard but one that is curtailed (hence the words "*clearly invalid*" and "*on its face*").

13. Why would the role of the Board be curtailed in the manner contemplated by McGuinness J. in *Hynes* and by Simons J. in *Heather Hill*? For good reason as it happens. The relevant reasons are succinctly identified by the Department of the Environment, Heritage, and Local Government in its *Development Management Guidelines for Planning Authorities* of June 2007. There, the Department states, *inter alia*, as follows, at para. 5.13:

> "***Issues relating to title to land***
>
> *…The planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution in the Courts….*[W]*here in making an application, a person asserts that he/she is the owner of the land or*

structure in question, and there is nothing to cast doubt on the bona fides of that assertion, the planning authority is not required to inquire further into the matter. If, however, the terms of the application itself, or a submission made by a third party, or information which might otherwise reach the authority, raise doubts as to the sufficiency of the legal interest, further information may have to be sought under Article 33 of the Regulations. Only where it is clear from the response that the applicant does not have sufficient legal interest should permission be refused on that basis. If, notwithstanding the further information, some doubt still remains, the planning authority may decide to grant permission. However, such a grant of permission is subject to the provisions of section 34(13) of the [PADA 2000, by virtue of which]*...the developer must be certain under civil law that he/she has all rights in the land to execute the grant of permission.*"

14. So, if the question of validity is raised in a planning appeal, how is the Board to approach that issue in a manner that complies with *Hynes*, *Heather Hill*, and the other case-law referred to above? When considering title matters it seems to the court that the following approach suffices:

(1) As a matter of basic appeals procedure, it must consider the issue raised.

(2) If the want of title is clear, the Board can refuse permission if it is clear that what presents is a frivolous or vexatious planning application by persons with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development.

(3) If, *prima facie*, someone has a sufficient interest or the dispute as to same goes to issues that the Board is not competent to resolve then the Board can grant planning permission, knowing that it is subject to s.34(13) of the PADA 2000 which provides that "*A person shall not be entitled solely by reason of a permission under this section to carry out any development*".

(4) If the Board is found to have erred in considering the issue of validity when raised, a review court may in deciding how best to proceed have regard to, *inter alia*, (a) the level of engagement that can reasonably be expected and required of the Board in terms of the level and extent of

reasoning as to title issues in a planning inspector's report, (b) the purpose of Art.22(2)(g) of the Regulations of 2001, (c) (a point the court has repeatedly had to make in a surprisingly large number of judicial review proceedings) the fact that perfection is not a standard that the law demands of the decisions of decisionmakers, and (d) whether in the particular circumstances presenting in any one case, any purpose is served by the court exercising its discretion so as to grant any of the reliefs sought by an applicant.

15. It was suggested at the hearing that it was necessary for the court to resolve the issue of who was the applicant for planning permission here, Mr Sinnott or the Congreve Trust. The court respectfully does not consider that that is entirely correct. Its task is to consider whether any of the bases canvassed for the reliefs sought are sufficient to justify the court exercising its discretion in the within proceedings so as to grant one or more of the reliefs sought. In that context it seems to the court it can legitimately have regard, when deciding how to proceed, to, for example, the weakness of the argument that a planning application form which is signed by "*Ray Sinnott on behalf of Congreve Trust*" and which indicates the applicant to be "*Ray Sinnott on behalf of Congreve Trust*" is in fact a planning application made by Mr Sinnott in his own right and on his own behalf. However, it also seems to the court that it would be wrong of it to conclusively determine on the balance of probabilities where the truth of matters lies in this regard: that would be a matter for the Board if the court quashed its appeal decision and remitted matters to it for fresh consideration. It may seem in this regard that the court, to use a colloquialism, is 'splitting hairs', but the court does not see that this is so: for it to proceed as just indicated is to adhere to the role of this Court as a review court, not an appeal court, and to respect the role of the Board as decisionmaker. Be all the foregoing as it is, this may nonetheless be a useful juncture at which to address, even if only as a courtesy, a number of additional points that were raised at the hearing and which touch broadly on who the applicant was:

– first, some effort was made at the hearing to suggest that the cover letter that went in with the planning application (which cover letter was on Mount Congreve notepaper and signed by Mr Sinnott in his capacity as Estate Manager) was somehow in error in that it did not indicate that Mr Sinnott owns the land in respect of which the planning permission was sought, or that he was making the application on behalf of the trust and also did not state how he had been authorised to make the application. It is true that the cover letter states "*my application*". However, if the suggestion is that Mr Sinnott should instead have stated something along the lines of 'my application which is being brought by me on behalf of Congreve Trust as stated in

the attached form and not in my own right', that is respectfully rejected by the Court for two reasons. First, no-one proceeds through life writing letters, even quite formal letters, in so stilted a manner. Second, it is clear which application the letter and its author mean to refer to, *viz.* the application to which the cover letter is a cover letter, which also just happens to be a form which twice refers to Mr Sinnott's making the application "*on behalf of the Congreve Trust*".

– second, in the section of the application form (Box 5) where the details are sought of the "*Person/Agent Acting on Behalf of the Applicant (if any)*", objection was taken by Mr and Mrs Walsh to the fact that the only person named here is Mr Whelan. There is no doubt that Mr Sinnott's name could (or could also) have appeared at this point; however, no legal issue arises from the fact that it did not; nor is there any legal limit on the number of agents and/or sub-agents that an applicant may rely upon. What matters in this regard is that a planning application form state the truth of matters and that, with respect, is precisely what the impugned form states. Thus it indicates that Mr Sinnott is a human being who is applying for planning permission, not in his own right but on behalf of Congreve Trust AND that in the application process the assistance of Mr Whelan has been engaged. There is nothing wrong in any of that.

– third, the planning application form states, *inter alia*, under the heading "*Description of Proposed Development*" (at Box 9), "*Planning permission to replace the existing agricultural entrance to my residence at Mount Congreve.*" It was suggested at the hearing that the reference to "*my residence*" indicates that the application was being made by Mr Sinnott in his personal capacity. The court, with respect, does not read matters so. Mr Sinnott was acting on behalf of the trust, he applied for planning permission on behalf of the trust, and he described the permission being sought as one that will provide access to "*my residence*" on the Mount Congreve Estate (which is the house that he lives in as Estate Manager). The reference to "*my residence*" in this regard involves but normal usage of the English language.

– fourth, the planning application states under the heading "*Pre-Application Consultation*" that a meeting was held with "*Ray Sinnott (Applicant)*". Three points might be made in this regard. First, it may be that this text means simply to indicate that Mr Sinnott appeared for the applicant. Second, if the text means that Mr Sinnott is the applicant, it is an error. The application form is otherwise perfectly clear that the applicant is "*Ray Sinnott on behalf of Congreve Trust*", so not Mr Sinnott in his own right. Third, if the suggestion is that every time Mr Sinnott is mentioned in the application form or indeed elsewhere in all the documentation before the court he should

constantly be referred to as, for example, "*Ray Sinnott on behalf of Congreve Trust*" (or conversely that the applicant should constantly be referred to as, for example, 'the Congreve Trust (Ray Sinnott acting)' the court does not see that a person completing a planning application form or planners in considering the relevant application is or are required to engage in such a stilted and unnatural usage of English. What matters from an applicant's perspective is that a form state the truth of matters and (as was indicated above) that is precisely what the impugned form states. What matters from a decisionmaker's perspective is that it has a proper understanding from a form of who the applicant/landowner is; and here the decisionmakers could not but have had a proper understanding from what is an adequately completed application form.

– fifth, it was suggested at the hearing that the correct applicant was the trustees of the trust. The court sees nothing untoward in the fact that a person other than a trustee would seek and be authorised to progress the desires of the trust/ees to secure planning permission.

– sixth, it was suggested that there is no such person as the Congreve Trust. It is true that there is no such legal person. But there is undoubtedly a trust arrangement known as the Congreve Trust (which is in fact referred to as such by Mr and Mrs Walsh in their initial letter of complaint to the planning authority of 2nd October 2019) and the court sees nothing wrong that (a) the trust should be referred to in its shorthand form or that (b) a person other than a trustee would seek and be authorised to progress the desires of the trust/ees to secure planning permission. Planning application forms and planning decisions are not a matter of incantation; everything therein need not be perfectly stated for the law to work its magic and yield a planning permission that will withstand judicial review; a planning applicant may err, a planning decisionmaker may stray, and still a planning permission that is sound in law may emerge.

16. By way of general note the court notes that (a) notwithstanding that it has mentioned certain surrounding documentation such as the cover letter and notwithstanding that the planning inspector sometimes slips in referring to Mr Sinnott plain and simple as the 'applicant', the planning documentation, most particularly the planning application form, is the primary document of focus in these proceedings in terms of identifying who the applicant was, (b) the applicant is stated plainly and simply in the planning application form to be "*Ray Sinnott on behalf of Congreve Trust*", a form of wording which the court respectfully does not see remotely to possess the ambiguity that Mr and Mrs Walsh contend for, and (c) both the planning

inspector's report and the Board Order (whereby the planning permission is granted) both commence by formally identifying the applicant as 'Ray Sinnott on behalf of Mount Congreve Trust'.

17. The court turns now to consider some of the exhibits that were before it.

18. [1] First, the initial letter of objection of 2nd October 2019, sent by Mr and Mrs Walsh to the planning authority. This states, *inter alia*, as follows:

> "*I am objecting to a planning application submitted by Ray Sinnott on behalf of Mount Congreve….*
>
> *When we bought our house from the late Ambrose Congreve fifteen years ago, we were given a guarantee that the entrance concerned only ever be used for agricultural purposes, If this planning application is granted it will completely invade our privacy and security and knock €100,000 off the value of our house….*
>
> *The proposed entrance to the house will be 500 to 600 metres long and will cost thousands…who will pay for this – taxpayers' money? City Co. is making this application to City Co., who make planning decisions, so automatically they will get it. As we said previously, Mr Sinnott was told what he needed to do by City Co.…Also we noticed* [that on the]*...planning application…Ray Sinnott was down as the owner of the house, he informed us that the house is owned by the Trust*".

19. A number of points arise from this letter. First, the court notes that, as counsel for Mr and Mrs Walsh observed, the letter was written before Mr and Mrs Walsh had engaged any professionals to advise them. However, there is nothing to suggest that either Mr or Mrs Walsh is anything other than perfectly competent and the letter is perfectly fine in what it expresses and how it is expressed. Second, the letter shows that Mr and Mrs Walsh clearly understood the application to be an application "*submitted by Ray Sinnott on behalf of Mount Congreve*". Third, the reference to "*City Co. is making this application to City Co.*" is of note. What is being raised

by Mr and Mrs Walsh in this regard is a conflict of interest point and that can only have been raised if and because they clearly understood that the planning application was being made for a Trust whose trustees include Council-related persons. Fourth, the observation that "*As we said previously, Mr Sinnott was told what he needed to do by City Co*" is suggestive that Mr and Mrs Walsh accepted that Mr Sinnott is authorised to do as he has done in making the application on behalf of the Trust.

20. [2] Second, the submissions made on appeal to the Board (by which time Mr and Mrs Walsh had professional assistance). These observe, *inter alia*, as follows:

> "*It is considered* [that] *the applicant has no authority to make the application. He is merely an employee on the estate. The application site is part of the Mount Congreve estate which is in State ownership and held in trust by Waterford City and County Council. The written consent of the Office of Public Works which has responsibility for State property or Waterford City and County Council as trustee for the State should have been obtained by Ray Sinnott for the purposes of making the application. In addition, at section 10 of the application form it is stated* [that] *Ray Sinnott on behalf of the Congreve Trust is the owner having acquired it…in 2018. The property was not sold in 2018 although Waterford City and County Council became the trustee in 2017 having acquired this role in lieu of what had been the Mount Congreve Estate Trust*".

21. Again, as one can see, the case being made to the Board is that the Council is a trustee of the trust. (In point of fact it seems to be certain Council-related persons who are among the trustees). A similar point is made to this Court when Mr Walsh in his grounding affidavit avers as follows:

> "*23. I say that it is unclear…who the trustees of the Mount Congreve Trust are. It appears that the OPW and the trustees named by the Mr Congreve estates* [*sic*] *were initially trustees of the property in 2012. However, it appears that this may have changed further in 2018, with the transfer to the council, with reports indicating that the mayor,*

outgoing mayor and Chief Executive were appointed interim trustees. It may be noted that the decision to grant permission in the first place was made by the Chief Executive".

22. Thus, as can be seen, the consistent case of Mr and Mrs Walsh is that the Council was central to the operation of the Trust and that the application was invalid absent a consent from the Council to same. In this regard, it is worth recalling the following:

– first, it was the Council that validated the application. So if the application was made without its consent, would it not have said so when it came to validating the application?

– second, it was the Council (as planning authority) that granted the planning permission at first instance. Again, if the application was made without its consent, would it have granted the permission?

– third, the Council was also a party to the appeal before An Bord Pleanála, yet never lodged an objection to the effect that it owned the land and objected to the permission that had been sought (of it) and granted (by it). So there was simply no 'red flag' for the Board in terms of suggesting that what presented before it was, to borrow from *Heather Hill*, "[a] *frivolous or vexatious planning* [application] *by* [a person]*...with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development*".

23. There was suggestion in the course of these proceedings that as Mount Congreve Estate is publicly owned, the within application is some form of *actio popularis*. With respect, it just is not. The within proceedings, lawfully and legitimately, have been brought by Mr and Mrs Walsh to protect and advance their own self-interest. There is nothing wrong in their acting to protect their own self-interest and no possible criticism could be made of them in this regard. However, their proceedings, with every respect, just are not some form of *actio popularis*. Indeed, if one harks back to their initial complaint letter of 2nd October 2019, it will be recalled that it flagged as critical concerns that "*If this planning application is granted it will completely invade our privacy and security and knock €100,000 off the value of our house*". Those are private interests with no public dimension. Though the court does not really need to examine this issue further, it recalls in this regard the following observations of Keane C.J. in *Mulcreevy*

v. Minister for the Environment, Heritage and Local Government [2004] 1 I.R. 72, at paras.12-13, under the heading "*Locus Standi*":

> "*12* *While the applicant accepts that he has no private interest in these proceedings, it is not suggested that he has brought them for any other reason than to ensure that the national monument is not damaged irreparably, as he claims it would be, by the second respondent carrying out the motorway project without the necessary statutory consents, approvals and licences.*
>
> *13* *It has been made clear in decisions of the High Court and this court in recent times that it is not in the public interest that decisions by statutory bodies which are of at least questionable validity should wholly escape scrutiny because the person who seeks to invoke the jurisdiction of the court by way of judicial review cannot show that he is personally affected, in some sense peculiar to him, by the decision.*"

24. Mr Mulcreevy was a gentleman who had no private interest at stake in the proceedings he brought. He simply wanted to prevent a national monument from being destroyed. In the within proceedings, Mr and Mrs Walsh are a long way from the position of Mr Mulcreevy – and the notion that his position and that of the applicants in these proceedings is somehow comparable does not withstand scrutiny. It follows that any notion that Mr and Mrs Walsh enjoyed some wider form of *locus standi* because these proceedings were brought on behalf of the nation (general public) fails for the simple reason that these proceedings were not brought as some form of *actio popularis* on behalf of the nation (general public).

25. In passing, there was suggestion at the hearing that because a trust is not a legal person and only a legal person can make a planning application then, if the applicant was not Ray Sinnott and was in fact the trust, there was no valid planning application at all. Two observations arise to be made in this regard:

– first, it is not correct that only legal persons can make a planning application. It is true that the "*Directions for Completing this Form*" which appear to the rear of Form No. 2 under Art 22 of the Regulations of 2001 states at point 2 that "*'The applicant' means* ***the person*** *seeking the planning permission, not an agent acting on his or her behalf*" [Emphasis added]. Also of interest in this regard is s.32(2) of the PADA 2000 which provides that "*A* ***person*** *shall not carry out any development in respect of which permission is required by subsection (1), except under and in accordance with a permission granted under this Part*" [emphasis added]. As it happens, however, there is no definition of the word "*person*" in the Act of 2000 or the Regulations of 2001. So one is required in this regard to fall back to the Interpretation Act 2005 which provides, in s.18(c), that "*'Person' shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly*". Thus, an unincorporated body of persons which does not have legal personality is nonetheless a "*person*" within the meaning of the Act of 2000, and a "*person*" may make a planning application and carry out a development. There is no preclusion in the Act of 2000 or the Regulations of 2001 on a person coming within the wider s.18(c) definition of "*person*" being also a "*person*" within the meaning of the Act of 2000 or the Regulations of 2001. The court accepts that Henchy J. stated in *State (Finglas Industrial Estates) v. Dublin County Council* [1983] 2 JIC 170, at para.5, that "*The Minister's planning permission was invalid for having been granted to a non-existent legal person*" and that "[I]*t is inherent in the planning code that the planning authority and the public shall have an opportunity of vetting the planning application in the light of, amongst other matters, the identity of a named and legally existing applicant*". However, that decision was handed down before the enactment of the Act of 2000, the making of the Regulations of 2001 and the enactment of the Act of 2005 and, it seems to the court, cannot reliably be relied upon as having survived those two enactments.

– second, the Board with its planning expertise is not concerned with the fine legal distinction of whether it is the trust or the trustees who own the Congreve estate; what matters to the Board is that the trust had a sufficient legal interest to develop the lands and to implement any planning permission granted on foot of the planning application. So the fact that "*Ray Sinnott on behalf of Congreve Trust*" is listed as the applicant (and the court sees the words "*Congreve Trust*" as but common shorthand for the trustees of the trust acting as trustees) did not deprive the Board of jurisdiction to hear and decide the appeal and to grant planning permission.

26. The court turns next to the question whether the Board engaged properly with the submissions of Mr and Mrs Walsh concerning the question of title.

27. It is clear from para.7.1.2 of the planning inspector's report that he is proceeding on the basis that "*The existing house…owned by the Mount Congreve Trust and currently occupied by the applicant, is located within the grounds of the estate*". At page 100, the inspector notes, at para.7.5.2 that "*Validation* [under Art.26] *of the planning application is a matter for the planning authority and the planning authority accepted the application as submitted*" (which again is correct). All that said, even counsel for the Board, in his oral submissions, accepted that the inspector "*didn't go on and spell out the Board's general approach to these types of issues…and then go on to say that there is no basis for refusing permission on sufficiency of interest grounds because the trust owns the lands*". However, it seems to the court, in all the circumstances presenting, that while the report might perhaps better have addressed the particular issue of validity, as raised by the applicants, in the grand scheme of things it makes no difference given the singular weakness of the argument made by Mr and Mrs Walsh that a planning application form which (a) is signed by "*Ray Sinnott on behalf of Congreve Trust*" and (b) indicates the applicant to be "*Ray Sinnott on behalf of Congreve Trust*" is actually (c) a planning application made by Mr Sinnott in his own right and on his own behalf.

28. In fairness to the inspector he makes entirely clear, at para. 7.1.2 of his report, that the Trust (in effect the trustees) is the applicant so the inspector might, if given the chance, contend that the court is being a little over-ambitious on his behalf in suggesting that the report could perhaps better have addressed the particular issue of validity. After all, if the Trust was, in the inspector's view, the applicant, then there could be no question of the trust requiring a consent of itself as landowner, *i.e.* Art. 22(2)(g) simply did not come into play. (And again, the court cannot but recall in this regard that by virtue of the decision in *Hynes*, the Board would only refuse the permission if "*the original planning application was clearly invalid*….[or] *the application on its face was one which would be considered invalid under the criteria set out by the Supreme Court in the* Frescati *case*", neither of which eventualities presented here).

29. In passing, the court's attention has been drawn, in the context of the question whether the Board engaged properly with the submissions of Mr and Mrs Walsh, to the judgment in *Hellfire Massy Residents Association v. An Bord Pleanála and Ors.* [2021] IEHC 424, where the

observation is made, at para. 64, that "[T]*he obligation for reasons does not require micro-specific detail, but rather the main reasons for the main issue*". The court is not sure that that judgment is as helpful to An Bord Pleanála as it might imagine: one can likely get through an awful lot of dense detail before one arrives at the level of the "*micro-specific*"; however, the court accepts that the Board is not required in its decisions to consider every detail of every aspect of every issue before a Board decision can be held to be good at law. All administrative decisions involve real-life actions by imperfect decisionmakers and a degree of imperfection in people and process is ever to be expected.

30. It will be clear from the reasoning in the preceding pages that Mr and Mrs Walsh are unfortunately not going to succeed in this application. So although issues of *locus standi* and discretion have been raised, they do not have quite the significance that they might otherwise have raised. Nonetheless as they were raised, the court turns now to consider them.

31. Mr and Mrs Walsh clearly have *locus standi* generally under s.50A of the PADA 2000 to challenge the Board's decision. However, the fact that one has *locus standi* under s.50A of the PADA 2000 does not mean that one then has unlimited standing to raise any and every point that one wishes to make, here to rely on other people's property rights (or, more exactly, rules to protect those rights). In this regard the concept of *jus tertii* comes into play. Treating with the distinction between *locus standi* and *jus tertii*, Hogan and Morgan in *Administrative Law in Ireland*, 5th ed., para. 18-266, observe as follows:

> "*In turning to a definition, one should note that the concept of* jus tertii *has not really yet been treated judicially* [in Ireland] *as a separate category. The distinction between the two concepts is that* locus standi *involves the litigant's status in relation to the administrative action (or law) and its consequences, whilst* jus tertii *refers to his position* vis-à-vis *the particular defect in the administrative action or law, of which complaint is made and, in particular, whether it is competent for him or her to rely on the rights of a third party in order to advance his or her argument. The practical rationale for this rule was well put by Hardiman J. in* A v. Governor of Arbour Hill Prison *[2006] I.R. 88 at 187*:

> 'The *jus tertii* rule is a very necessary regulation of locus standi….It prevents the proliferation of litigation and the expense and uncertainty it causes by requiring that each litigant must show that on the facts of his situation he is personally affected by the law he challenges. It prevents necessary and important laws from being struck down on a purely hypothetical supposition which may never arise in real life and avoids the taxpayer having to fund the holding of pointless moots".

32. So for all that the inter-relationship between *locus standi* and *jus tertii* may seem abstruse (an impression perhaps compounded by the use of Latin terminology in an age when few people have a Classical education) *jus tertii* is, as Hardiman J. makes clear in *A*, "*a very necessary regulation of* locus standi".

33. Six points have been made in the written and oral submissions of counsel for Mr and Mrs Walsh on the issue of *locus standi*.

34. <u>Point 1</u>: "*Firstly, there is no basis for issue specific* locus standi…..*The Applicants clearly have an interest in the proposed development and there is no legal authority to support a contention that a standing requirement applies to specific grounds.*"

35. There is nothing in s.50A which disapplies the recognised rule of *jus tertii*. The courts in judicial review proceedings concerned with planning law have generally applied this rule, albeit as an issue of *locus standi*. An example of this is offered by the recent judgment in *Hellfire Massy*, at para.54, where the court there observes, *inter alia*, as follows:

> "*A point is made that because Ballyroan Library (where plans were meant to be on display) was closed for nine days due to the Covid-19 emergency, there was a breach of s. 175 (5)(d)(i) regarding public notice. There are three reasons why this cannot succeed: (i). the applicant was not inhibited from making a submission, and as noted above in fact did so. It cannot now make a fair procedures point on behalf of someone else and does not have standing to do so.*"

36. Although the last sentence refers to "*standing*", in fact what is being treated with in the just-quoted text is a *jus tertii* point, *viz.* that the applicant could not rely on the fair procedures rights of other parties to invalidate the decision there impugned.

37. This Court treated with the issue of *jus tertii* in *North East Pylon Pressure Campaign Ltd v. The Minister for Communications, Energy, and Natural Resources* [2017] IEHC 338, where, in Part XVIII of that judgment, it observed as follows:

> "***[219]*** *The thrust of the within judgment, which is not at all favourable to the applicants, is such that the issue of* jus tertii *(in effect the pleading of the rights of a third party) is not of the significance that it might otherwise have been. Be that as it may, the court considers that (i) while, in broad terms, the applicants have standing to bring the within proceedings, (ii) when the court has regard to the observations as to standing made by Henchy J. in* Cahill v. Sutton *[1980] IR 269, 283, as applied in the context of judicial review applications in* Lancefort Ltd. v. An Bord Pleanála *(No. 2) [1999] 2 IR 270, it does not see that either of the applicants, neither of them being landowners, has the requisite standing to make such claims as were made in their pleadings and submissions concerning allegedly affected landowners. That, to borrow from the phraseology of Henchy J., seems to the court to be a near-classic example of allowing* 'one litigant to present and argue what is essentially another person's case'."

38. What is clear from *Hellfire Massy* and *North East Pylon* is that any notion that the moment an applicant in judicial review proceedings passes through the gates of s.50 they are at large to make any points of any nature that they might wish to make is mis-founded. Article 22(2)(g) is designed, at root, to protect the rights of the true landowner and Mr and Mrs Walsh in raising Article 22(2)(g) arguments concerning the alleged absence of necessary landowner consent offend against the *jus tertii* rule.

39. <u>Point 2</u>: "*Secondly, the matter of landowner consent goes to the jurisdiction of the Board.*

40. This point focuses in on the point that in *Sweetman v. An Bord Pleanála* [2021] IEHC 2016, at paras. 27-30, Hyland J. stated as follows:

> '[I]*n respect of the argument that this is a hypothetical argument given that no landowner or any other person has complained about their lack of consent, the requirements of Article 22(2)(g)…go to the jurisdiction of the Board to deal with the application….Therefore the Board must satisfy itself that the application has been made in accordance with permission regulations. The cases of* Hynes*…and* McCallig*…make it clear that the Board should consider whether it has jurisdiction to adjudicate on an appeal….*
>
> *Because the consequences of a planning application submitted in breach of Article 22(2)(g) are that the application is invalid, and because those provisions are fully applicable to a consideration of an appeal by the Board, this is not a case where a complaint about lack of consent is hypothetical absent a complaint by an affected landowner….Therefore, if any issue is raised about the existence of that jurisdiction….I am satisfied that the issue is not hypothetical and should be determined.*"

41. The court understands from counsel for the Board that the Board intends to appeal the landowner consent point touched upon in the above-quoted text, albeit that the Board's intention in this regard is now in abeyance pending the response to a referral to the European Court of Justice that was made following on a re-opening of the judgment in *Sweetman*. It is interesting to know what the Board may intend in this regard. However, the court notes that, regardless of whatever view the Board may make of any one High Court judgment, unless and until that judgment is reversed (and it may never be reversed) it continues to be a standing judgment of the High Court, as worthy of respect and deference as any other such judgment. Precedential force is not determined or diminished by litigant perception or intent.

42. Of more significance is the fact that the *jus tertii* point made in the within proceedings was not addressed by the judgment in *Sweetman* (nor does it seem from the judgment that it was

even raised). Thus Hyland J. does not consider the proposition that Mr Sweetman was not entitled to rely on grounds that in substance were grounded on the property rights of others; and hence *Sweetman* just does not address the *jus tertii* point that is being raised in the within application. As a consequence, this Court can reach its own view on the *jus tertii* point raised. In this regard the court (a) holds firm to the truth that there is a distinction to be drawn between *locus standi* and *jus tertii* and (b) sees nothing in the PADA 2000 or otherwise in planning legislation to suggest that the Oireachtas intended to abandon this fundamental distinction in legal principle, the significance of which was touched upon by Hardiman J. in *A*. Neither does the court see that in conferring landowner protection in Art.22(2)(g) (the object of which, to borrow again from *Heather Hill*, *op. cit.*, "*is to guard against* [the] *making of frivolous or vexatious planning applications by persons with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development*") it was intended thereby to confer on all of us a power or entitlement to police the entitlements of private landowners.

43. Article 22(2)(g) falls to be complied with but the court does not see that a universal right arises or was intended to arise to enforce it. A person may enjoy *locus standi* under s.50A, yet (as here) enjoy (through the application of the principle of *jus tertii*) no right to police compliance with Art.22(2)(g) by virtue of not being an affected landowner.

44. <u>Point 3</u>: "*Thirdly, an important dimension to these proceedings is that the Board accepts that Mount Congreve Estate is owned, on trust, by the State for the benefit of the public….Therefore, even if the Applicants were not adjoining landowners, they would have standing to raise the issue of the absence of landowner consent.*"

45. In this regard Mr and Mrs Walsh seek to rely on the *actio popularis*/*Mulcreevy* point already touched upon – and respectfully considered by the court, for the reasons already stated, to be an unmeritorious point.

46. <u>Point 4</u>: Mention is made in the letter of 2nd October 2019 of some form of guarantee that Mr and Mrs Walsh allege to have received when they purchased their property from the predecessor in title to the Trust.

47. (It will be recalled in this regard that they stated in their letter that "*When we bought our house from the late Ambrose Congreve fifteen years ago, we were given a guarantee that the*

entrance concerned only ever be used for agricultural purposes"). If Mr and Mrs Walsh are the beneficiaries of some sort of legal binding commitment in this regard from the Trust's predecessor in title, they can, should they consider this appropriate, seek to enforce that right by way of litigation against the Trust. This is precisely the type of litigation contemplated by s.34(13) of the PADA 2000. But whatever the form of right that Mr and Mrs Walsh may enjoy in this regard it does not authorise them to proceed in the within application in breach of the *jus tertii* rule.

48. <u>Point 5</u>: "*Fourthly, a further consideration is the wide access to justice provision under the Aarhus Convention. The Applicants fall within the definition and scope of 'the public concerned' under Art.2(3).*"

49. Two points might be made in this regard. First, it is useful to recall the judgment of Clarke C.J. in *Conway v. Ireland* [2017] 1 I.R. 53, where he observes as follows at paras.[9]-[11]:

> "***[9]*** ...[A]*s a matter of Irish constitutional law, the Aarhus Convention cannot, save to the extent that it may be* 'determined by the Oireachtas'....
>
> ***[10]*** *However, that is not an end to the matter. As noted earlier, the European Union is itself a subscribing party to the Aarhus Convention. Furthermore, the European Union has adopted measures designed to ensure that, within the ambit of European Union law, the obligations which it undertook by subscribing to the Aarhus Convention are met. It is on that basis that counsel argued that obligations arising under the Aarhus Convention or under the relevant implementing measures at European Union level…form part of Irish law. While there may…be some legitimate debate about the precise extent to which the Aarhus Convention itself can be said to apply in Irish domestic law, the fact that the European Union is itself a subscriber to the Convention and that the European Union has adopted measures designed to implement the Convention in its laws*

means that, at least in that indirect way, the Aarhus Convention has some application in Ireland.

[11] *However, it is important to emphasise that, in so saying, it needs to be recognised that it is insufficient in Ireland simply to mount a claim based on an alleged breach of the Aarhus Convention. It is necessary to demonstrate that a relevant provision of the Aarhus Convention is material either because it has the potential to be directly effective itself as a matter of European Union law, because the Convention may be relevant in interpreting measures of the European institutions designed to give effect to its provisions, or because it is said that, in some other way, European Union law requires the application of the Convention in Ireland. A simple claim based on an allegation of a breach of the Aarhus Convention must necessarily fail as a matter of Irish law. A claim that a relevant provision of the Aarhus Convention may be applicable or influence the proper interpretation or application in Ireland of European Union measures as a matter of European law is a different matter which needs to be considered on its merits.*"

50. So, the Aarhus Convention is part of the domestic law of Ireland and can be relied upon in Irish courts only to the extent that it is integrated in the European Union legal order and those European Union rights can be relied upon in courts in Ireland.

51. Secondly in this regard, the court recalls the judgment of the European Court of Justice in *Case C-470/16 North-East Pylon Pressure Campaign and Anor. v. An Bord Pleanála and Ors.* [ECLI:EU:C:2018:185], the effect of which is that so far as possible when working in the area of national environmental law within the scope of European Union law the courts should interpret national law insofar as possible in compliance with the 'not prohibitively expensive' and wide access to justice rules.

52. Third, the court's attention has been drawn to the judgment given in the protective costs order limb of *Heather Hill Management Co. v. An Bord Pleanála* [2019] IEHC 186, where Simons J. observes as follows, at para.92:

> "[T]*he issues raised—save with the single exception of the landowner consent issue—are all ones which come within the* subset *of the subset of national environmental law which comes within a field of EU environmental law. (Insofar as the costs of the landowner's consent issue is concerned, the costs associated with this net issue are likely to represent such a small proportion of the overall costs as not to justify separate treatment).*"

53. Having regard to the just-mentioned points it seems to the court that the Aarhus Convention point made by Mr and Mrs Walsh does not extend to the landowner consent point in issue in these proceedings (which is the critical point in these proceedings). And it is also perhaps worth noting that there is nothing in the Aarhus Convention in any event that would require the State to dis-apply the rule against *jus tertii*. Nor in any event is the development in issue a development that is within the scope of the EIA Directive. Plus all of the planning and development points raised by Mr and Mrs Walsh were addressed by the planning inspector and have not been the subject of any legal challenge by them.

54. **<u>Point 6</u>: Mention was made by counsel for Mr and Mrs Walsh of the AIE Directive, albeit very much as a tangential point.** With respect, that Directive is not mentioned in the pleadings and has no relevance to the issue of *locus standi*.

55. The court considers that Mr and Mrs Walsh are excluded by the *jus tertii* rule from seeking to rely upon Art.22(2)(g) as they have. The parties will also have seen that the court has in any event come down on the side of the Board in terms of the substantive points presenting. However, even if the court were wrong in all of this, even if Mr and Mrs Walsh had succeeded on one of the criticisms that they have levelled at the Board in the within proceedings, the court would in any event have exercised its discretion against them and refused all of the reliefs sought. Why so? The court considers hereafter the 'issue' of discretion.

56. If one returns to the *Hynes* case, which might reasonably be described as representing the genesis of the line of existing authorities which relate to the validation responsibility of the Board *vis-à-vis* Art.22(2)(g), among the observations made by McGuiness J. in that case were the following, at para. 56:

> "*the remedy of* certiorari *is discretionary. As was pointed out by the learned Henchy J in the* McCabe *[*v. Harding *[1984] I.L.R.M. 105] case, it would be open to the developer, if the Applicant succeeds in her proceedings, to lodge a fresh application, and there is no reason to suppose that, even if he failed at the Planning Authority stage, he would not again succeed on appeal to An Bord Pleanala. This would involve very considerable delay and expense, without any ultimate gain to the Applicant and her fellow objectors. Thus considerations of discretion would also weigh against a decision to quash the determination of An Bord Pleanala made on the 25 June, 1997.*"

57. McGuinness J. might almost have been writing of this case. There is simply no reason to believe on the facts here presenting that if the impugned decision were quashed on the basis that a trustee ought to have acted for the trust or that the application should have been made by Mr Sinnott alone, armed with a consent from the Trust (and the court, for the reasons already stated, sees no reason to quash on either ground) that precisely the same end would not be arrived at, with a like permission being granted again as the planning merits of the application (which have not been challenged by Mr and Mrs Walsh) would be unchanged. So a clear question of futility presents in terms of granting the order of *certiorari* that is sought, even if the court were minded to grant the order of *certiorari* sought and, for the various reasons stated, it is not.

58. The court also recalls in this regard the penultimate line of the judgment of Herbert J. in *McCallig* that "*In my judgment, the appropriate remedy to be granted to the Applicant in this case, is a Declaration that the decision of the Respondent insofar as, and to the extent that it purports to decide to grant planning permission in respect of or in any manner affecting the land of the Applicant or any part of it, is void.*" What is the significance of this line? The significance is this: Ms McCallig had stated to the Board that her lands had been included in an application without her consent, the Board did not consider this matter, and Herbert J. held that

the Board erred in this regard; however, he did not quash the planning permission; instead he held simply that it was invalid *vis-à-vis* Ms McCallig.

59. Notably, if one brought the logic of Mr and Mrs Walsh to Ms McCallig's case, the Board there did not have jurisdiction to hear the appeal, the planning permission was granted *ultra vires* the Board, and hence the only relief that could properly have followed was an order of *certiorari*. But that is not how Herbert J. proceeded. Instead he tailored the relief in the matter before him specifically to protect the property rights of Ms McCallig but went no further than that. This is notable because it brings one right back to a key issue that the Board has rightly sought to emphasise in these proceedings, *viz*. the purpose of Art.22(2)(g), which is, to borrow again from *Heather Hill*, *op. cit.*, "*to guard against* [the] *making of frivolous or vexatious planning applications by persons with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development*").

60. The court also recalls *Buckley v. An Bord Pleanála* [2015] IEHC 572. That was a case concerning a windfarm in which one of the landowners, Mr Buckley, gave his consent to the making of a planning application which was lodged and validated. Then Mr Buckley wrote to the planning authority stating that he wanted to withdraw his consent. A question then arose whether the Board was deprived of jurisdiction because there was no landowner consent for the purposes of Art.22(2)(g). The court rejected the argument that there was not compliance with Art.22(2)(g) because the consent was there when the application was made. Cregan J., in the course of his judgment, observed, *inter alia*, as follows:

> "***[81]*** *The Respondent's and Notice Parties' fall-back position was, that if there was an issue about the validity of the planning permission, it was open to the court to make an order that the planning permission was only invalid with respect to the Applicants' lands.* [Court Note: This, of course, is the approach adopted by Herbert J. in *McCallig*]. *If I had not upheld the Respondent's and Notice Parties' submissions on the legal issue of withdrawal of consent, I would have been disposed to make such an order* [*i.e.* a limited order tailored to protect Mr Buckley's property rights and to go no further.]"

61. That decision is clearly of interest in terms of what the court was prepared to do in the exercise of its discretion.

62. Finally, there is the very recent decision in *Pembroke Road Association v. An Bord Pleanála* [2021] IEHC 403. There, Owens J. was considering an argument that an applicant for planning permission for a proposed strategic housing development (SHD) had to be the same entity that engaged in statutory pre-application consultation procedures. In his judgment, Owens J. observes, *inter alia*, as follows:

> "*49. Proof of standing is necessary to protect property rights of an owner of a site from adverse consequences arising from conditions in permissions or refusals of permission on planning applications brought by vexatious interlopers relating to that site.*
>
> *50. The requirement in the 2016 Act that any 'prospective applicant' have sufficient interest in the site in accordance with s.3 must be satisfied when the pre-application process is initiated. Proof of consent of owners of a site removes at the outset any issue that an intended application might lead to a planning result which could adversely affect property rights in the site of those who have not consented to the application for permission. Both the definition of 'prospective applicant' in s.3 and the regulations make clear that any written consent of an owner must relate to the application for permission and not just to the pre-application process.*
>
> *51. In this case no issue concerning adverse impact on property rights of other owners of the site arose because the person then identified as the 'prospective applicant' had sufficient 'interest' when the pre-application process was set in motion. Lordglen established this in accordance with the regulations. When the application for permission was lodged, Derryroe also established sufficient 'interest' in the*

site in accordance with the regulations by producing letters from the owners consenting to the application.

52. *Pembroke Road Association is entitled to seek judicial review on planning grounds. However, its interest in upholding a rule requiring that an applicant be the same person as the 'prospective applicant' is not based on any claim that it owns the site or should intervene in the interest of owners to protect their property rights. There was no need for the Board to weed out either the pre-application process or the planning application on this ground. Judicial intervention is not necessary to enforce property rights of owners of the site.*

53. *I was referred to the judgment of Hyland J. in* Sweetman v. An Bord Pleanála and Others *[2021] IEHC 16. I agree with Hyland J. that examination in a planning application of the interest of an applicant in the site is 'jurisdictional'.* ***This is, of course, not the full story because the person protected by law is the owner of the site and the purpose of planning regulations relating to ownership or other interest in the site is to give effect to this protection.***

54. *In* Sweetman v. An Bord Pleanála and Others*[2021] IEHC 16, the applicant for judicial review was not able to demonstrate that the applicant for permission did not have written consent from all landowners affected. The approach taken by the Court meant that it was unnecessary to consider whether it would be appropriate in exercise of discretion to grant or refuse judicial review. The issue of whether the application for judicial review would have succeeded if, perchance, he could have shown some small portion of the site to be outside ownership or consent did not arise. While he had general standing to challenge the decision of the Board,* ***it did not necessarily follow that a court should nullify the permission if he could demonstrate some minor defect of this sort.***

55. *I have considered the two authorities cited by Hyland J. In* McCallig v. An Bord Pleanála and Others*[2013] IEHC 60, the applicant for judicial review showed ownership of part of a site which was the subject of a planning application made without her consent. She therefore had an interest in how the outcome of that application affected her land. She demonstrated that information provided in the planning application was misleading on this aspect.*

56. *In* Hynes v. An Bord Pleanála and Others*[1998] IEHC 127 (Unreported, High Court, 30 July 1998) McGuinness J. decided that the applicant for permission had sufficient 'interest' in the site for the purposes of the test laid down by Henchy J. in* Frescati Estates Limited v. Walker *[1975] I.R. 177. An infringement of article 18(1)(d) of the Regulations of 1994 which misdescribed the nature of the interest of the developer in part of the site was considered to be minor. It was clear that the developer did not set out to mislead the public or the planning authority. The planning authority itself owned this part of the site and consented to the planning application.*

57. *For these reasons I consider that the decision in* Sweetman v. An Bord Pleanála and Others*[2021] IEHC 16 does not assist on the issue of whether Pembroke Road Association ought to be given judicial review. Ownership of the site is the only value which I can identify as underpinning any requirement in the 2016 Act that a 'prospective applicant' must be the same person as the applicant. The statutory pre-application process did not involve the public. Nothing in what happened worked to the disadvantage of either the planning authority, the Board, the public, or the owners of the land or involved any underhand or misleading activity by either Lordglen or Derryroe*" [Emphasis added].

63. The court notes in particular the portions of the text that are emphasised which seem thoroughly consistent with *Hynes*, *McCallig*, and *Cregan*, *i.e.* exercising judicial discretion so as to tailor the relief granted to the facts presenting (and in the landowner consent context, only so far as is necessary to protect the rights of the landowner).

Conclusion

64. The court considers that Mr and Mrs Walsh are excluded by the *jus tertii* rule from seeking to rely upon Art.22(2)(g) as they have. The court has also come down on the side of the Board in terms of the substantive points presenting. However, even if the court is wrong in all of this, even if the parties had succeeded on one of the criticisms that they have levelled at the Board in the within proceedings, the court would in any event, and for the reasons stated above, have exercised its discretion against Mr and Mrs Walsh and refused all of the reliefs sought. The reliefs sought are therefore respectfully refused. The court will hear the parties as to costs.