[2023] IEHC 154

THE HIGH COURT

JUDICIAL REVIEW

[2020 No. 54 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN:

THOMAS REID

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

INTEL IRELAND LIMITED

NOTICE PARTY

AND

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 61 JR]

IN A MATTER PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

THOMAS REID

APPLICANT

AND

AN BORD PLEANÁLA

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

INTEL IRELAND LIMITED

NOTICE PARTY

AND

THE HIGH COURT

JUDICIAL REVIEW

[2022 No. 1134 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

THOMAS REID

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

INTEL IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 28th day of March, 2023.

1. The applicant's farm is located adjacent to the Intel campus in County Kildare. He notes on affidavit that his residence, Hedsor House, was constructed around 1760. His family have been in occupation of the lands since 1904. This is the ninth written decision in relation to proceedings brought by the applicant either involving Intel or, prior to that, a proposal to acquire the applicant's lands. The present judgment deals with applications in three judicial reviews brought by the applicant, which I shall refer to as the 2020, 2021, and 2022 proceedings.

2. In *Reid v. Industrial Development Agency* [2013] IEHC 433, (Unreported, High Court, 19th June, 2013) Hedigan J. dismissed a challenge by the applicant to the compulsory acquisition by the Industrial Development Agency (IDA) of his house and lands. In *Reid v. Industrial Development Agency* [2015] IESC 82, [2015] 4 I.R. 494, [2016] 1 I.L.R.M. 1, McKechnie J. for the Supreme Court, set aside Hedigan J.'s decision and held that the IDA's proposed acquisition was invalid.

3. On 5th October, 2017, the board granted the first permission relevant to the proceedings for a development by Intel. The application in that case involved environmental impact assessment (EIA).

4. A second relevant application for development was made on 1st February, 2019 through normal planning procedures. Permission was granted by Kildare County Council and the applicant appealed on 13th June, 2019, and made a request for an oral hearing.

5. On 5th September, 2019, the board decided to refuse an oral hearing, and the applicant was so notified on 6th September, 2019.

6. On 21st November, 2019, the board granted permission for the development. This was challenged in the 2020 proceedings [2020 No. 54 JR].

7. In those proceedings, Chris Clarke, on behalf of the board, swore an affidavit on 5th August, 2020, exhibiting the file, and swore a further affidavit on 4th December, 2020 (an unsworn version having previously been served on 29th October, 2020) exhibiting the minutes of the meeting that took the decision not to hold an oral hearing. The minutes are an important document for an understanding of the matter because they establish that the decision was taken by a board composed of two rather than three members. As explained below, the quorum is normally three but there were exceptions at the relevant time.

8. The board granted a third relevant permission on 30th November, 2020, which was for a modification to the 2017 and 2019 permissions. This third permission is challenged in the 2021 proceedings [2021 No. 61 JR].

9. In *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204, (Unreported, High Court, 12th April, 2021), I excluded certain evidence prior to the hearing of the 2020 proceedings.

10. In *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705, (Unreported, High Court, 27th May, 2021), (see Kieran Lynch (2021) 3 I.P.E.L.J, 138), I dismissed the 2020 proceedings.

11. In *Reid v. An Bord Pleanála (No. 3)* [2021] IEHC 593, [2021] 10 JIC 0606, (Unreported, High Court, 6th October, 2021), I refused leave to appeal and made no order as to costs.

12. In *Reid v. An Bord Pleanála (No. 4)* [2021] IEHC 678, [2021] 11 JIC 0202, (Unreported, High Court, 2nd November, 2021), I confirmed the costs order after the applicant sought to reopen it for the purpose of making additional arguments.

13. In *Reid v. An Bord Pleanála* [2022] IESCDET 39, the Supreme Court refused Leapfrog leave to appeal.

14. In *Reid v. An Bord Pleanála (No. 5)* [2022] IEHC 687, [2022] 12 JIC 0902, (Unreported, High Court, 9th December, 2022), I granted leave in the 2021 proceedings challenging the third relevant permission, on certain grounds.

15. The applicant says that in December, 2022 he became aware of the difficulty regarding the absence of a quorum. On 21st December, 2022, he brought a fresh set of proceedings seeking to challenge the 2019 permission, the 2022 proceedings [2022 No. 1134 JR]. He subsequently brought a motion to reopen the judgment in the 2020 proceedings, which is essentially seeking the same relief from a different and more appropriate vantage point.

The requirement for a quorum of three

16. Prior to a statutory amendment made in 2022, the board was required to sit with a quorum of three members save where determined by resolution to the contrary. Section 108 of the Planning and Development Act 2000 provided as follows at the relevant time:

> "108.— (1) Subject to subsection (1A) (inserted by section 41) a quorum for a meeting of the Board shall be 3.
>
> (1A) The Board may determine by resolution, if so requested by the chairperson (or the deputy chairperson if the chairperson is not available or where the office of chairperson is vacant) where he or she is of the opinion that it is necessary to ensure the efficient discharge of the business of the Board, that the quorum for a meeting of the Board, or, notwithstanding *section 112(2)*, a division of the Board referred to in *section 112*, should be 2.
>
> (1B) The resolution referred to in *subsection (1A)* shall specify the functions of the Board or division of the Board which may be performed in a meeting with a quorum of 2 and the period of time during which the specified functions may be performed.
>
> (1C) The chairperson or deputy chairperson shall not request a resolution of the Board referred to in *subsection (1A)* for the purposes of any matter falling to be determined by the Board or division of the Board under this Act in relation to—
>
> (*a*) development that would materially contravene the relevant development plan,
>
> (*b*) strategic infrastructure development, or
>
> (*c*) a development or class of development referred to in regulations made under *section 176*.

(1D) If, in determining by vote a question at a meeting of the Board or a division of the Board with a quorum of 2, the voting is equally divided, the matter that is the subject of the vote shall be referred to a meeting of the Board with a quorum of 3 and *section 111(4)* shall apply in relation to the determination of the question."

17. A resolution of 26th July, 2019 was made pursuant to sub-s. (1A). This was not published, although the board says it would have been available on request. This provided that the necessary quorum in respect of certain functions of the board should be two, including a case where the board was dealing with "(p) Decision as to whether or not an oral hearing shall be held (in the case of normal planning appeals but not in the case of any matter relating to Strategic Infrastructure Development, Local Authority projects or Compulsory Acquisition or where an Environmental Impact Statement or a Natura Impact Statement has been submitted with the case.)"

18. The applicant did not actually get sight of the resolution until quite recently, but the board rightly calls this a "canard", because (even leaving aside the fact that he didn't go looking for it) the applicant was on notice from the terms of sub-s. (1C)(c) that a planning application subject to EIA (and therefore to which s. 176 of the 2000 Act applied) could not be made the subject of the lower quorum. The applicant was also aware at all material times that the impugned second permission was one where an EIA report had been submitted. Even though the board disputed that this was strictly required, the fact that an EIA report was (to the applicant's knowledge from the outset, as illustrated by it being referred to in the 2020 proceedings when initiated) part of the application, was sufficient to put the applicant on notice of, and on inquiry regarding, a potential issue in relation to a quorum from the date when he had reason to believe that the number of members attending the actual meeting in question was less than three. I would not fault the applicant for not investigating the quorum issue at a time when there was no reason to suspect that there was any problem – a party to litigation can't be expected to have almost perfect knowledge of every unlikely thing that might have occurred or to have clairvoyance of what may emerge. So the fact that the applicant could have gone looking for the minutes earlier doesn't matter because he had no reason to suspect they would show illegality and hence had no particular need to seek them. But one has to act when one gets solid reason to suspect something is amiss. Such reason was supplied on 29th October, 2020 when the applicant was given the minutes of the meeting in question. He did not need a copy of the

resolution on that date to be on sufficient notice of the point from that date onwards because he, personally or through his advisers, had actual or constructive knowledge of the terms of the legislation. Had the applicant sought to amend his pleadings at that point, or within 8 weeks of that date, that application would have been granted virtually as of right. Even after the 8 weeks, the applicant would still have had at least a puncher's chance of bringing the point in by way of amendment as long as the proceedings were still live (basing himself, presumably, on lawyers' oversight). But we are dealing now with a very different situation – an attempt to reopen the final outcome of decided litigation. Lawyers' oversight carries little or no weight in that context.

19. Following recent turbulence in the board, and in particular the revelation that the quorum provision had apparently been breached on a number of occasions, the law has been amended to provide for a minimum quorum of three at all times. The present matter involved one of those apparent breaches, and the main question is what, if anything, the court should do about that breach now.

Issues

20. Five basic issues were raised in the set of applications with which I am now dealing, as follows:

(i) whether to reopen the order in the 2020 proceedings;

(ii) costs of the leave application in the 2021 proceedings;

(iii) leave to appeal in the 2021 proceedings;

(iv) the application to amend the 2021 proceedings; and

(v) leave on notice in the 2022 proceedings.

Application to reopen the order in the 2020 proceedings

21. By notice of motion filed on 16th February, 2023, the applicant sought orders reopening the 2020 proceedings and permitting an amendment to the statement of grounds to raise a new issue regarding the lack of a quorum when the board decided to refuse an oral hearing.

22. In submissions at the initial hearing of the motion on 8th March, 2023, the applicant complained about disclosure by the board and sought additional information which essentially fell into three categories:

(i). the decision-making process generally;

(ii). the possibility that the board might have known of the quorum problem before the 2020 proceedings were finalised; and

(iii). the possibility that the board was not aware of the problem until much later so that it would be unrealistic to expect the applicant to have been so aware.

23. The first of these headings is an invitation to embark on an unfocused roving inquiry into the whole process after the case has been dismissed. That is not normally an appropriate procedure, and it is certainly not appropriate here.

24. I considered that the latter two points could be addressed by the board clarifying when it knew of the problem, so I adjourned the matter to enable the board to deal with that on affidavit and to allow the applicant to also file an affidavit.

25. I received further submissions in the light of the affidavits on 20th March, 2023 when judgment was reserved.

26. There is no basis from the affidavits to suggest that the board was aware of the problem during the hearing of the 2020 proceedings or prior to their finalisation. It is clear that the issue came to light around July, 2022 following the receipt of a media inquiry from Mr Roman Shortall of *The Ditch* website (www.ontheditch.com) on 29th June, 2022.

Merits of the application to reopen

27. The applicant's grounding affidavit in the 2022 proceedings also represents his position on the application to reopen the 2020 proceedings. That position is as follows:

> "For reasons outside of my control, I was not aware until 16 December 2022 that the Board, by allowing my application for an oral hearing to be determined by a 2 person board, had acted contrary to the law."

28. The real problem with this submission is that it comes nowhere near reaching the level of exceptional breach of constitutional rights envisaged in the caselaw in order to enable a final order of the court to be reopened: see *Greendale Developments Ltd No. 3* [2000] 2 I.R. 514, [2001] 1 I.L.R.M 161, *Abbeydrive Developments Limited v. Kildare County Council* [2010] IESC 8, [2010] 2 I.R. 397, *Student Transport Scheme Limited v. Minister for Education and Skills* [2021] IESC 35, [2021] 6 JIC 1401 (Unreported, Supreme Court, 14th June, 2021), *Lavery v. D.P.P. (No. 3)* [2018] IEHC 185, [2018] 3 JIC 1310 (Unreported, High Court, 13th March, 2018). There is no evidence of improper withholding of information by the board. The evidence implies internal failure of procedures and human error, but that

by no means equates to proof of the sort of intentional wrongdoing that would allow a court to revisit a final order.

29. It is also not without relevance that the applicant himself was threatening litigation as of June, 2022 according to an article by Mr Mick Clifford in the *Irish Examiner*, which envisaged that the applicant would be seeking to reopen the 2020 proceedings on foot of revelations concerning the board ("Farmer wants Intel permission revisited after Paul Hyde allegations", 11th June, 2022). While the applicant's solicitor has perfectly reasonably explained why nothing happened on foot of that threat at the time, or at all, until December, 2022, it does not follow that the applicant should be permitted to reopen a final order merely because he has not acted unreasonably. An applicant has to do more than that bare minimum in order to obtain an extraordinary order such as sought here. It seems to me that it cannot be said here that the applicant's constitutional rights have been fundamentally infringed in such a way to make it unjust that the 2020 proceedings should remain dismissed. Essentially all that has happened is that a technicality has come to light which didn't occur to the applicant or his advisers during the previous proceedings. The fact that parties may miss out on making points that didn't occur to them during proceedings is just a consequence of the necessary balance inherent in the orderly process of dispute resolution as between flexibility to raise points during proceedings with a strong degree of finality thereafter.

30. As noted above, while oversight or omission is a legitimate basis for allowing an amendment in the context of currently live proceedings, subject to arguability, lack of irremediable prejudice and the interests of justice (that is what happened in *Keegan v. Garda Síochána Ombudsman Commission* [2015] IESC 68), it is, on its own, certainly nowhere near enough to allow the re-opening of a final order of the court.

Costs of the leave hearing in the 2021 proceedings

31. While the applicant initially applied for the costs of the leave hearing in the 2021 proceedings as against both opposing parties, after some discussion the parties agreed to an order reserving costs with liberty to apply for the costs, including prior to the determination of proceedings, on foot of a written legal submission. If the applicant decides to so apply, he needs to deal *inter alia* with the statutory architecture, but the parties may add any other issues they wish. The hypothesis that the applicant will need to deal with is the proposition that s. 50B(2) of the 2000 Act, namely the default no order as to costs, must apply to the costs of interlocutory relief as well. It is notable that "relief" includes

interlocutory relief, as appears from sub-s. (1)(c). A default no order as to costs of interlocutory matters makes sense because if the costs protection rule does not apply to interlocutory costs, then an applicant could easily be saddled with prohibitive costs arising from interlocutory matters alone, which would defeat the statutory purpose and contravene the Aarhus Convention and EU law. On the other hand, a conforming interpretation is very much available.

32. On such an interpretation, the literal effect of sub-s. (2A) would be that apart from perhaps limited cases like stays where interlocutory relief was obtained directly as a result of the acts or omissions of an opposing party, the costs of interlocutory applications should be considered as an adjunct to the substantive relief and thus should await the determination of whether an applicant is entitled to any final relief before disposing of such costs. Generally, costs of interlocutory matters don't arise directly and as such from acts of the respondents and notice parties. Rather they arise indirectly as a consequence of the need to litigate the underlying issue. Hence the need to first establish whether the applicant gets any substantive relief that is attributable to such acts, before returning to the (on this hypothesis, reserved) costs of interlocutory matters which would follow as an adjunct. That is consistent with the discretionary nature of sub-s. (2A): "the costs…may". Exercise of such a discretion requires the court to retain seisin of the costs of such interlocutory matters as of the time at which it is determined whether the applicant is entitled to substantive relief.

33. There could be a wide range of potential situations calling for interlocutory determination, including in no particular order:

(i) setting aside leave;

(ii) leave on notice;

(iii) admission to the list;

(iv) remittal;

(v) leave to appeal;

(vi) reference to the CJEU;

(vii) costs issues;

(viii) issues regarding the form of orders;

(ix) costs protection;

(x) contested directions;

(xi) amendment of pleadings;

(xii) liberty to defend proceedings;

(xiii) stays;

(xiv) SLAPP-type satellite issues;

(xv) directions regarding disclosure or discovery;

(xvi) cross-examination;

(xvii) extension of time; or

(xviii) amendment of or reopening of orders.

34. Any rule as to the interaction between sub-ss. (1), (2), and (2A) would have to make sense as applied to all the different contexts that could arise, and the general default of reserving interim and interlocutory costs would at least be consistent even if it might differ in certain respects from other litigation. But all that awaits argument and decision at a later point or in another case.

Leave to appeal in the 2021 proceedings

35. The law on leave to appeal has recently been summarised by Barniville J. (as he then was) in *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC 231, [2022] 4 JIC 2601 (Unreported, High Court, 26th April, 2022) at para. 32 and by Holland J. in *Monkstown Road Residents Association v. An Bord Pleanála* [2023] IEHC 9, [2023] 1 JIC 1907 (Unreported, High Court, 19th January 2023).

36. The applicant requests certification of the following question:

"If the Board's Inspector (and the Board in adopting the Inspector's report), in carrying out screening for appropriate assessment are of the view that it would have been "useful" if more detail had been presented, and such information is not sought by the Board,

(a) Has the screening assessment been conducted on the basis of best scientific knowledge within the meaning of section 177U(1) PDA 2000?

(b) Where the information in question has been seen and reported on by the Developer's Consultants but not submitted as part of the planning application, is such information to be regarded as "not reasonably available" for the purposes of *People Over Wind v. An Bord Pleanála* [2015] IECA 272?

(c) Is the requirement that the risk of significant effects on a European site be excluded on the basis of objective information satisfied?

(d) Does the fact that the Inspector expressed that view create a doubt as to effects on a European site, or demonstrate that a reasonable expert in the position of the board would have seen such a doubt on the face of the materials, for the purposes of the test identified in *Reid v. An Bord Pleanála* (No. 2) [2021] IEHC 362?"

37. The preamble establishes that the point is totally fact-specific. The question, therefore, does not warrant further consideration, as it clearly cannot meet the statutory test. It is also relevant that, during the process itself, the applicant did not seek the further detail on which the whole question hinges. The applicant characterises the procedure that was adopted here as involving the withholding of material and injects a lot of drama into the question. This sounds most impressive, but the case does not raise any such issues. There is no "practice of with-holding … material" either as alleged in submissions or at all. All that happened was that in this case it was not considered necessary to seek further detail from the developer because the board was satisfied in any event that impacts on air quality would "likely be minimal and confined to a very localised area around the site" (para. 7.4.3 of the inspector's report). The point is totally fact-specific.

38. The applicant submits that " … the question of whether the evidential requirements on an Applicant of the *Reid No 1* test are met where an issue is raised by the Board's Inspector is of widespread importance for many judicial reviews". But the premise of that is totally incorrect. The board's inspector did not "raise" any issue. On the contrary, it was clearly considered that there was no issue which would have required the furnishing of further information.

39. Even if the applicant had raised a question that properly arises on the facts, he falls at the first stumbling block, because as put by the board, "[q]uestions related to the application of existing principles to an individual case do not, in general, meet the threshold for certification."

Application to amend the 2021 proceedings

40. The applicant sought the following amendment to the 2021 proceedings:

"To amend Ground E24 by the addition of the words underlined so that it reads as follows:

'No EIA screening was conducted for the impugned development. The First Respondent's Inspector excluded the need for an EIA "at preliminary

> examination" without making an EIA screening determination. The Board Decision and Order is silent on the issue of EIA even though the scale of the development that is being extended is such that it meets the threshold for more than one category in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended namely 6(d), Storage facilities for petrochemical and chemical products, where such facilities are storage to which the provisions of Articles 9, 11 and 13 of Council Directive 96/82/EC1 apply;10(a) Industrial Estate Development and 10(b) Urban Development, and requires screening pursuant to paragraphs 6(c), 10 and 13 of Annex II of the EIA Directive'". [underlining omitted]

41. The applicant has already been through a number of iterations of the statement of grounds:

(i) the original statement was filed on 29th January, 2021;

(ii) I allowed an amendment 24th March, 2022;

(iii) I allowed a further amendment on 10th October, 2022; and

(iv) the leave judgment of 9th December, 2022 permitted further amendments.

42. He now seeks to be allowed a fifth iteration.

43. The notice of motion seeks relief pursuant to O. 28 rr. 1 or 6 RSC, but in fact the appropriate legal basis is O. 84 r. 23(2) RSC. I will treat the application as being made under the latter provision.

44. Insofar as the opposing parties complain that the amendment is made "out of time", this is a complete misconception. The eight-week time limit for the institution of planning judicial review (or the three-month limit for other judicial reviews) applies to the bringing of the proceedings in the first place. It does not apply to amendments. Indeed the rules would not make sense on such a basis because they expressly authorise the amendment of proceedings at any time after the grant of leave, and it is self-evident that with the possible exception of an amendment sought when a judicial review application is before the court for the very first time, any statutory period for the initiation of proceedings would have long expired by the time any such later amendment fell to be considered.

45. While there are of course virtuous exceptions, opposing parties generally tend towards being incapable of allowing themselves to acknowledge a distinction between the

procedure applicable to bringing proceedings in the first place and that applicable to seeking amendments. Unfortunately the present case is an example of that.

46. As held *in B.W. v. Refugee Appeals Tribunal* [2017] IECA 296, [2018] 2 I.L.R.M. 56, the three limbs of the *Keegan* test are arguability, explanation and the absence of irremediable prejudice. These are viewed in the light of the overall test of the interests of justice.

47. While it is true that in some of the caselaw, what is described as an "entirely new case" may call for a higher degree of good and sufficient reason, it is important to note that the concept of an "entirely new case" is not a technical term, but essentially a rhetorical move, or perhaps more benignly, a way of saying that in the particular circumstances the interests of justice do not favour an amendment without an elevated level of good and sufficient reason. However, on any view there is no way in which the addition of one further limb of EIA applicability to a case where two other limbs of EIA applicability have been in the pleadings from the outset could be described as even remotely approaching a new case. And to go further and call that an "entirely" new case would be to drain language and logic of meaning, and to substitute in their place an exercise in mere adversarial vigour. At worst, what is proposed is the modest extension of a broad point (the point that EIA screening was required) that was always in the pleadings.

48. It seems appropriate therefore to turn to the three limbs of the *B.W.* test.

Explanation

49. As regards explanation, it is true that the affidavit of the applicant of 21st December, 2022 didn't explain why the point was not included earlier, contrary to the direction I gave when granting leave. However, a further affidavit has since been filed by the applicant's solicitor basically saying that the point did not occur to counsel originally. While that seems stark, it is all the explanation that could ever be offered for an oversight, and something similar was accepted in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570. Insofar as the applicant is alleged not to have explained the delay in raising the issue, the same point applies. By definition, error or oversight cannot normally be explained much further. In a typical situation (which is what happened here), an applicant's lawyers overlook the point initially but seek to include it in the proceedings once they become aware of it and while the proceedings are still live and an amendment can be made without derailing matters. The issue is then normally focused on arguability, prejudice

and the interests of justice. But as far as explanations go, it seems to me that, much as in *Keegan,* lawyers' oversight does provide a sufficient explanation.

Substantial grounds

50. As regards arguability, or substantial grounds in the planning context, issue is joined on whether there are adequate grounds for the amendment. The classification adopted in *Reid (No. 5)* for this purpose was essentially as between

(i). points that had already been clarified;

(ii). points that were capable of being clarified within the limited confines of a leave application; and

(iii). all other points.

51. Having considered the submissions, this seems to me to be a category (iii) point. The meaning of class 6(d) in Schedule 5, Part 2 of the Planning and Development Regulations 2001 has not been decided already, and is not readily clarifiable in the limited context of an application to amend the pleadings. Thus, I consider it substantial for current purposes but obviously that is without prejudice to any defence that may be maintained at the full hearing.

Irremediable prejudice

52. As far as irremediable prejudice is concerned, it is true that the applicant has already amended the statement of grounds, but that is not disqualifying generally and certainly not here (indeed the power to amend even includes adding back something deleted by a previous amendment: *per* O'Donnell J. in *O'Neill v. Applebe* [2014] IESC 31, [2014] 4 JIC 1003 (Unreported, Supreme Court, 10th April, 2014) at para. 14). Legally cognisable prejudice does not include having to deal with a potentially winning point. Thus, merely because the amendment would "include a distinct new legal ground", the opposing parties are not, as submitted, irremediably or improperly prejudiced. It is true that the additional affidavit evidence may be required, which might be a problem if such a requirement would derail an existing hearing date that had been fixed. That would be prejudice – but there is no such date fixed here as we are not at that stage yet. Opposition papers generally have yet to be filed. That is in a context where Intel did not particularly rush the proceedings along and did not pursue a proposal to admit the case to the Commercial List until quite a long time after first suggesting it (and after initially withdrawing that suggestion).

Interests of justice

53. Considering all the circumstances here, it seems to me that it is in the interests of justice to permit the proposed amendment. Doing so allows the applicant to make his best case and does not impose any irremediable or unfair consequences on the opposing parties. Indeed, refusing the amendment would simply confer on them a windfall benefit arising from the applicant's lawyers' oversight at the stage of initiating the proceedings. That would be a disproportionate response.

Leave on notice in the 2022 proceedings

54. As a general rule, where an applicant has already challenged a decision and had her proceedings dismissed, she cannot simply ignore that and bring fresh proceedings challenging the same decision. The correct procedure is to seek to reopen the earlier order.

55. While the 2022 proceedings in form challenge the oral hearing decision as well as the permission, in substance that is a mechanism to challenge the permission. In substance and in reality, the 2022 proceedings cut across the order in the 2020 case, so the appropriate way for an applicant to proceed in such circumstances would be to seek to vacate the existing order in the earlier proceedings rather than to act as if that order was not there.

56. Thus, leave in the 2022 proceedings must be refused in any case, even if the applicant here had a point, which he doesn't.

57. Even if hypothetically, I am incorrect about that and if a lesser test of extension of time was applicable, rather than the *Greendale* test for reopening the order, it seems to me that the applicant has not met that either. Especially in a commercial context or where third party rights are at stake, or both (things can be a little more flexible for a purely human rights case), it is appropriate that the court should be reasonably strict with the question of extension of time. That said, one doesn't have to act within the initial 8 weeks if the information required to make the point isn't reasonably available initially. But as explained above, the point was available to the applicant as of 29th October, 2020. Eight weeks from then expired in December, 2020. The notion of wandering into court in December, 2022 seeking leave on this basis is a complete non-starter. It would be unfair to Intel to allow their permission to be put in question at such a remove.

Order

58. The order made on 8th March, 2023 was:

(i) in the 2020 case, that

(a). the board have liberty to file a further affidavit and

(b). the matter be listed for further submission on the 13th March, 2023;

(ii) in the 2021 case, that

(a). costs of the leave hearing be reserved with liberty to the applicant to apply for such costs, including in advance of the determination of the proceedings, on the basis of a written legal submission that would *inter alia* address the statutory architecture in accordance with the judgment of the court, and

(b). there be liberty to the applicant to file a further affidavit regarding amendment of pleadings by 10th March, 2023; and

(iii) in the 2022 proceedings, that

(a). additional affidavits in the 2020 proceedings may be relied on in the 2022 proceedings and

(b). the matter be further heard on 13th March, 2023.

59. The order now being made is as follows:

(i) in the 2020 proceedings, that:

(a). the applicant's motion be dismissed; and

(b). unless submissions to the contrary are received within 7 days of this judgment (exclusive of vacations), the foregoing order be perfected on the basis of there being no order as to costs;

(ii) in the 2021 proceedings that:

(a). leave to appeal on foot of the leave judgment be refused;

(b). the applicant have liberty to file a further amended statement of grounds incorporating the amendment sought, to be filed within 7 days of this judgment (exclusive of vacations);

(c). the matter be listed for mention on a date to be notified by the List Registrar; and

(d). unless submissions to the contrary are received within 7 days of this judgment (exclusive of vacations), the foregoing order be perfected on the basis of costs of the amendment application being reserved and there being no order as to costs of the leave to appeal application; and

(iii) in the 2022 proceedings, that:

(a). leave to seek judicial review be refused; and

(b). unless submissions to the contrary are received within 7 days of this judgment (exclusive of vacations), the foregoing order be perfected on the basis of there being no order as to costs.