[2024] IEHC 100

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2023.0000308]

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

BETWEEN:

JOHN MOREHART

APPLICANT

AND
MONAGHAN COUNTY COUNCIL

RESPONDENT

AND
ABBOTT IRELAND

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Monday the 26th day of February, 2023

1. Settled caselaw, reinforced by specific legislation in the planning context, requires an application to exhaust available appeal remedies before seeking judicial review. The applicant seeks leave to challenge a first-instance decision of Monaghan County Council, having failed to appeal that decision to the board. The time for appeal ran out at a time when he was outside the country. Does that failure preclude the present challenge?

Facts

2. The applicant owns Bellamont Forest House, Co. Monaghan, and refers to the history of the property at para. 5 of his grounding affidavit. There is a judicial connection in that the original owner was Thomas Coote, previously Recorder of Dublin (*i.e.,* chief magistrate, although apparently not Lord Chief Justice as stated in some public domain material). This is elaborated on in other public domain material (specifically the NIAH) as follows:

> "Bellamont House is an iconic building of national importance set in a dramatic demesne landscape. It is considered the best and earliest example of a Palladian villa in Ireland. The house was designed [for] the Coote family by their cousin, Sir Edward Lovett Pearce (d.1733), who was the leading exponent of Palladian architecture in Ireland. Having trained under the English Baroque architect Sir John Vanburgh (1664-1726) Pearce's short but successful career included the former Parliament House on College Green, Dublin and many town and country houses including Summerhill House in Co. Meath and two houses on Henrietta Street in Dublin. Bellamont Forest is his most important house design to have been built and the association with this very important architect makes it one of the most significant country houses in this country. Pearce used architectural motifs derived from Palladio's Italian villa designs, including the Venetian window arrangements with continuous sills, pedimented window surrounds, and Doric portico. The portico had originally been proposed in antis as an open loggia within the plan at the expense of the entrance hall. Instead, placed prostyle it aims to affirms a kind of moral dignity about the architecture and its patron. More prosaically, additional space was gained for the entrance hall, and the external portico was better suited to the Irish climate than an open loggia. The plan has all the compactness of a Palladian villa. The simple treatment of the main stairs may seem surprising, tightly compressed as it is in a narrow space off the hall with none of the gravitas of theatre that has come to be associated with the country house staircase. However the modesty of the main stair does not anticipate the impressive columnar bedroom lobby, the encircling effect of its Tuscan order and oval lantern, an oblique reference perhaps to the centralised plan of Palladio's Villa Rotonda. It was a theme to be revived later at Russborough and Bellinter by Richard Castle. Bellamont is one of the few houses in Ireland with a mezzanine storey as expressed in the north and south elevations. The interior displays elements of artistic importance, in particular the finely tooled decorative plasterwork, but also in the carvings of the marble and stone fireplaces in the principal rooms and marble busts of the Coote family. Though a modestly sized country house, Bellamont uses symmetrical design and use of red brick to promote a sense of solidity for a house perched on an exposed elevated site enjoying spectacular views of the surrounding lakes and Dromore River. The farm and stable yards located to the north-west of the main house would once have been necessary to support the running of a large country house and together with the entrance gates and gate lodges form an important group of demesne related structures."

3. Those following such matters will recall that we met Lovett Pearce before as the reputed architect of the Hellfire Club (see *Hellfire Massey v. An Bord Pleanála* [2021] IEHC 424, [2021] 7 JIC

0201 para. 1) and as trustee for a time of the lands on which Clonliffe seminary was built (*Sherwin v. An Bord Pleanála* [2023] IEHC 26, [2023] 1 JIC 2701 para. 3).

4. The applicant's property lies along the county boundary (which runs along Dromore River and in particular Dromore Lough, which is owned by the applicant, he avers) and is just across that boundary from the notice party's facility in Co. Monaghan. The applicant has something of a history with the notice party and has contested some of its previous permissions.

5. On 29th November, 2022, the notice party made an application to the council pursuant to s. 34 of the Planning and Development Act 2000 and the Planning and Development Regulations 2001 for development comprising, *inter alia* expansion to the facility to provide additional warehouse, laboratory, office and staff capacity; the change of use of warehouse to a tower that will facilitate ingredient storage and blending; and the demolition and removal of prefabricated equipment, plant and yard, plus associated site works.

6. The applicant did not make any submission on the application.

7. Article 20 of the Planning and Development Regulations 2001 provides for a period of 5 weeks for a site notice to be in place:

> "In addition to the requirements of article 17(1)(b), a site notice shall be maintained in position on the land or structure concerned for a period of 5 weeks from the date of receipt of the planning application by the planning authority, shall be renewed or replaced if it is removed or becomes defaced or illegible within that period and shall be removed by the applicant following the notification of the planning authority decision under article 31."

8. The 5 weeks expired on 11th January, 2023 allowing for the Christmas period.

9. On 1st February, 2023 the council decided to grant planning permission for the Development (Planning Reg. Ref. No. 22/497).

10. On 28th February, 2023, that decision was appealed to the Board (ABP-315932-23) by An Taisce. The applicant has made a submission in respect of the An Taisce appeal, which has yet to be determined.

11. On 28th February, 2023, the applicant made an application to the board pursuant to s. 37(6) of the 2000 Act for leave to appeal to the board. This was refused on 24th March, 2023.

12. The applicant challenged that refusal by way of judicial review in May, 2023 (High Court Record No 2023/532 JR). The board conceded the proceedings, an order of *certiorari* was made on consent and the matter was remitted to the board.

13. On 9th January, 2024, the board, on that remittal, again refused the applicant's application for leave to appeal the Council's decision. The applicant indicates that this will be subject to further judicial review.

Procedural history

14. The applicant sought leave to apply for judicial review of the council's decision on an *ex parte* basis on 28th March, 2023 in the judicial review list. Under procedures then operative, that application was not dealt with at that stage but was adjourned ultimately to 19th September, 2023.

15. On 19th September, 2023, the matter came before a vacation judge, who ordered that the application for leave to apply for judicial review be heard on notice to the council and notice party. Without in any way taking from the right of any court to make such an order, and with no information having been clearly identified by the applicant as to the rationale for that order in this particular case, one might nonetheless make the general comment that maybe the present matter is a cautionary tale for the practice of leave on notice. Had the matter made its way into the List as an *ex parte* application, leave might have been granted without too much excavation of the issues, and the matter then simply adjourned pending the outcome of matters involving the board, thereby avoiding the need for the expenditure of energies on the part of three legal teams and the court in the present clash of arms. My assessment, which could be wrong, is that the opposing parties might have accepted a general adjournment made in that context, and might not have made the effort to apply to set aside leave in such a scenario. No doubt by the time this whole *contretemps* makes its way to Strasbourg, Luxembourg or Geneva it will have been long forgotten that all such endeavours might have been spared but for an *ex parte* and *ex tempore* direction during the vacation, probably made fairly rapidly and without a whole lot of context if my own vacation experiences are much to go on. That isn't a complaint or a criticism of course, merely a musing as to the way that issues can take a decisive turn or develop a life of their own, due to the most minor happening or the metaphorically whimsical roll of a die.

16. On 6th November, 2023, the council applied to have the proceedings admitted into the Planning and Environment Division of the High Court (under its previous name). The case was admitted and a hearing date was assigned for the contested leave application of 5th December, 2023.

17. The council uploaded a replying affidavit (Adrian Hughes) to ShareFile on 16th November, 2023. The Notice Party, Abbott Ireland filed a replying affidavit (Darren Gaffney) on 17th November,

2023. Monaghan County Council filed submissions opposing leave on 17th November, 2023. Abbott Ireland filed submissions opposing leave on 17th November, 2023.

18. The matter was then adjourned because applicant indicated that if leave to appeal was granted, on remittal, by the board, it would not maintain these proceedings. The application was adjourned to the 29th January, 2024 to await the outcome of the remitted application for leave to appeal the council's decision before the board.

19. On 29th January, 2024, noting that the board refused leave to appeal, following remittal, the matter was assigned a new hearing date of the 20th February, 2024. The leave application on notice was heard on that date and judgment was reserved.

Relief sought

20. The substantive reliefs sought in the statement of grounds are as follows:

"1. An Order of *Certiorari* quashing the notification of decision of the Respondent County Council dated 01 February 2023 granting permission to the Notice Party for a proposed development comprising of the expansion to an existing facility so as to provide for additional warehouse capacity, laboratory areas, ancillary office and staff facilities, as well as the change of use of an existing warehouse to accommodate industrial processes as well as 4 powder silos, new waste water treatment plant as well as the relocation of existing water tanks, the provision of a new water in main around the north and east of the existing factory building, construction compounds as well as underground surface water sampling points, car parking and ancillary development, all on lands at Dromore West, Cootehill, County Monaghan and which was the subject matter of application planning register reference no. 22/497.

2. A Declaration that application 22/497 fails to comply with Part IV Chapter 1 Articles 16 to 23 of the Planning and Development Regulations, 2001 (as amended) and consequently the decision of the Respondent Planning Authority is *ultra vires,* invalid and void.

3. A Declaration that the Respondent failed to comply with Article 28(1)(a), (b), (c), (d), (f), (g), (l), (m) of the Planning and Development Regulations, 2001 (as amended) and consequently the decision of the Respondent Planning Authority is *ultra vires*, invalid and void.

4. A Declaration that the development the subject matter of the application 22/497 is subject to a mandatory Environmental Impact Assessment having regard to schedule 5 of the Planning and Development Regulations 2001 and consequently the decision of the Respondent Planning Authority is *ultra vires*, invalid and void.

5. Such Declaration(s) of the legal rights and/or legal position of the Applicant and/or Respondents and/or persons similarly situated as the Court considers appropriate.

6. An Order providing for the costs of the application and an Order pursuant to Section 50B of the Planning and Development Act, 2000, as amended and or Section 3 of the Environmental (Miscellaneous Provisions) Act 2011, as amended with respect of the costs of this application

7. Further and other relief."

Grounds of challenge

21. The core grounds of challenge are as follows:

"Part 1 – Legal Grounds: Core Grounds

1. The application planning reference 22/497 fails to comply with the requirements of Articles 16 to 23 of the Planning and Development Regulations, 2001 (as amended) and consequently the decision of the Respondent Planning Authority is *ultra vires*, invalid and void.

2. The Respondent Planning Authority failed to comply with its obligations under Article 28 of the Planning and Development Regulations, 2001 (as amended) which requirement is mandatory and in circumstances where the application was made in breach of the Respondent's statutory obligations, the aforesaid decision is *ultra vires*, invalid and void.

3. The preliminary examination for the purposes of Council Directive 2011/92/EU and/or Council Directive 2014/52 EU is based on a fundamental mistake where the documentation submitted and relied upon by the Respondent states that the water abstraction point is located on lands within the ownership of a third party and it is the matter of an agreement with that third party whereas the said abstraction point is located on the Applicant's lands and the basis upon which the preliminary examination of the development for the purposes of Council Directive 2011/92/EU and/or Council Directive 2014/52 EU is premised on a fundamental mistake of fact and law.

4. The Respondent Planning Authority erred in law in the manner in which it conducted the preliminary examination for the purposes of Council Directive 2011/92/EU and/or Council Directive 2014/52 EU in circumstances where it did not have the necessary plans and

documentation identifying the development the subject matter of the application and in particular did not have any information or details or data on the location where water used in connection with the Notice Party's manufacturing facility is abstracted from, the details of that abstraction and the effect of that abstraction on the river system. In circumstances where the development was not described or assessed as required under the regulations the said preliminary examination could not have complied with the statutory test required under Council Directive 2011/92/EU and/or Council Directive 2014/52 EU

5. The existing installation requires an Environmental Impact Assessment by virtue of the scale and extent and increase in operations since the date of the submission of the last EIS in 2002 and having regard to schedule 5 of the 2001 Regulations.

6. The existing installation requires an Environmental Impact Assessment by virtue of the scale and extent and increase in operations since the date of the submission of the last EIS in 2002 and having regard to schedule 5 Part 1 paragraph 11 of the 2001 Regulations.

7. The Development the subject manner of the Application 22/497 requires a mandatory Environmental Impact Assessment by virtue of Schedule 5 Part 2 Paragraph 7 (c) of the Planning and Development Regulations 2001.

In the alternative the Respondent failed to consider the said Wastewater Treatment Plant as part of its consideration as to whether a mandatory Environmental Impact Assessment was required and accordingly the Respondent's determination is *ultra vires*, invalid and void.

8. The failure of the Respondent Planning Authority to refer the application to the said statutory consultee is in breach of the requirements of Article 28 and the said decision consequently is contrary to statute, *ultra vires*, invalid and void.

9. The Respondent planning authority failed to have regard to the proposed development in Application 22/497 and was required to consider whether the proposed development was a material contravention of the Monaghan County Development Plan and/or the Cavan County Development Plan by virtue of the impact of the development on protected structures and in particular on the demesne of Bellamont Forest House and Dromore Lough/River and the effect of the reduction of water between the pumphouse/abstraction area on the Applicant's lands to where the abstraction to the Notice Party's facility occurs as well as the impact of the discharge of effluent adjoining the bridge and the visual impact of the proposed development on views from the Bellamont Forest Demesne and its impact on the setting of the house and grounds and the alteration of its character. These considerations and the failure to carry out this assessment cannot be remedied in any appeal to An Bord Pleanala and requires to be determined at first instance. The Respondent furthermore failed to ensure 1) that it had adequate information in which to carry out the said assessment and 2) that there were adequate plans and particulars lodged that complied with the requirements of the Planning and Development Regulations 2001 and schedule 7 & 7A and the said deficiency cannot be corrected on any appeal to An Bord Pleanala nor could any assessment be carried out for the purposes of the Development Plan provisions in the light of this inadequacy.

10. The Respondent could not have carried out a Screening for Appropriate Assessment (AA) for the purposes of Council Directive 92/43/EEC in circumstances where the information that was provided in respect of the critical issue relating to the effects of water abstraction was not provided and/or misconstrued particularly in circumstances where the land upon which this abstraction occurs belongs to the Applicant, and where it was a critical and important part of any such Screening to determine the nature of the abstraction, the quantity of that abstraction, the effect on the waters arising from that abstraction, the discharge of waters back into the river as well as the effect of the increased discharges, and the failure to identify, consider and assess these issues are such as to be incompatible with an assessment required for the purposes of Council Directive 92/43/EEC.

11. The Respondent Planning authority has a duty to ensure compliance with the requirements of Council Directive 92/43/EEC and was required, in the absence of any appropriate assessment having been carried out for the existing operation, to consider the totality of impacts from the overall operation in its consideration as to whether a stage 2 assessment for the purposes of Council Directive 92/43 EEC be carried out."

Parties' submissions

22. The parties' positions on the Issues are set out in the Statement of Case as follows (some emphasis added):

"The Applicant's Position

The Applicant herein seeks Leave of this Honourable Court to Review the decision of Monaghan County Council in respect of Register reference 22/497 made on the 1st February 2023. In respect of this application for leave, the Applicant's position is that:

The Applicant has a substantial interest – the Applicant is the owner a historically and architecturally significant home adjacent to the site the subject matter of the application.
The Applicant has substantial Grounds – The Applicant, in his Statement Required to Apply for Judicial Review has set satisfied the requirement in Section 50 of the Planning and Development Act 2000 in respect of the test for Judicial Review. The Applicant has set out substantial Grounds for the contention that, the decision of the Respondent is invalid and void, the defects in the decision of the Respondent cannot be remedied on Appeal, that the Applicant does not have an alternative adequate remedy available to him. The Applicant relies on all of the grounds set out in the Statement filed herein.
The application for leave to apply for Judicial Review was brought withing 8 weeks of the making of the decision. The Applicant made an application before the High Court dated 28th March 2023 within the 8 week period prescribed by Section 50 of the Planning and Development Act 2000, as amended.
The Applicant by virtue of the matters set out is entitled to leave to apply for Judicial Review in terms of paragraph D on the Grounds set out at Paragraph E of the Statement grounding the application for Judicial Review.

<u>The Council's Position</u>

The Respondent's note that the Applicant's grounds of challenge, in summary, comprise:

- Alleged non-compliance with the 2001 Regulations
- Alleged errors relating to Environmental Impact Assessment ('EIA')
- Alleged Material Contravention of the Monaghan County Development Plan and/or the Cavan County Development Plan.
- Alleged errors relating to Screening for Appropriate Assessment.

The Respondent's position is, for the reasons set out in the Respondent's Written Submissions, that the Applicant has failed to exhaust his alternative remedy – noting the extant appeal before the Board which he is participating in and raising similar grounds to those advanced in the within proceedings.
The Respondent's further contend that the grounds raised in these proceedings by the Applicant pertain to matters which the Board is capable of adjudicating on in the extant appeal (in relation to which no stay has been sought).

<u>Abbott's Position</u>

The Applicant in its summary set out above does not refer to the requirements of section 50A(3)(c) of the Planning and Development Act 2000, as amended which provides that the High Court shall not grant leave unless it is satisfied that 'the applicant has exhausted any available appeal procedures or any other administrative remedy available to him or her in respect of the decision or any concerned'.
It is Abbott's position that the Court should refuse to grant the Applicant leave to apply for judicial review to challenge the Council Decision on the basis of the existence of an alternative remedy, namely a right of statutory appeal, which has been invoked by An Taisce and which the Applicant is an observer to. Furthermore, an appeal to the Board is an adequate alternative remedy.
The Applicant advances 11 grounds of challenge, and it is Abbott's position that these are all matters that the Board can consider and determine on appeal."

Law in relation to criteria for a planning leave application

23. In *Duffy v. Clare Co. Council* [2023] IEHC 430, [2023] 7 JIC 2404 I attempted to set out how the *G. v. D.P.P.* [1994] 1 I.R. 374 criteria had evolved in line with later caselaw/ statute law as follows, in relation to planning cases (some of which is relevant to other cases):

(i) the applicant has standing by way of having a sufficient interest (O. 84 r. 20(5) RSC, s. 50A(3)(b)(i) of the 2000 Act);
(ii) the facts averred in the affidavit would be sufficient, if proved, to support a substantial ground for the form of relief sought by way of judicial review (*G. v. D.P.P.* [1994] 1 I.R. 374 as modified by s. 50A(3)(a) of the 2000 Act);
(iii) on those facts a substantial case in law can be made that the applicant is entitled to the relief which he seeks (*G. v. D.P.P.* as modified by s. 50A(3)(a) of the 2000 Act);
(iv) compliance with time limits, normally 8 weeks in the planning context (s. 50(6) and (7));
(v) capacity of the applicant (as a matter of general law – only an issue in applications by unincorporated bodies);
(vi) exhaustion of remedies, or as put in *G. v. D.P.P.*, that the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure (s. 50A(3)(c) inserted by s. 22 of the Planning and

Development, Maritime and Valuation (Amendment) Act 2022, which has been in force since 20th October, 2022 by virtue of the Planning and Development, Maritime and Valuation (Amendment) Act 2022 (Commencement of Certain Provisions) (No. 3) Order 2022 (S.I. 523 of 2022));

(vii) compliance with relevant procedural requirements, particularly other provisions of O. 84 RSC or the terms of High Court Practice Direction HC119 – although normally this would affect the specifics of any leave in how the reliefs and grounds should be worded, rather than whether leave should be granted at all; and

(viii) there are no other grounds to warrant refusal of leave on a discretionary basis (see *North East Pylon Pressure Campaign Limited & Ors v. An Bord Pleanála (No. 1)* [2016] IEHC 300, [2016] 5 JIC 1215 (Unreported, High Court, 12th May, 2016), which refers to triviality or lack of good faith for example).

Law in relation to the availability of an alternative remedy

24. As noted above, s. 50A(3)(c) of the 2000 Act provides that the Court shall not grant leave unless it is satisfied that:

> "the applicant has exhausted any available appeal procedures or any other administrative remedy available to him or her in respect of the decision or act concerned."

25. The concept of an "available ... remedy" implies that it must be adequate to some substantial degree. One can also note that the legislation is phrased not just in terms of appeal but also other administrative remedies. But it doesn't mean anything called an appeal, only one that is basically effective. One need not pursue extraordinary or exceptional appeals or remedies, only ones that are reasonably "available". An obvious example is that, as every law student knows, there is an appeal from the District Court to the Circuit Court, but that doesn't mean that every act of the District Court should be remedied by appeal. Substantive errors on the merits, yes. But judicial review points like wrongfully refusing to deal with a case and repeatedly adjourning it – obviously not (for reasons that are both principled and that arise from practical knowledge and experience – one can imagine the response of most Circuit Court judges if asked to manage their District Court's lists as well as their own: see *JNE v. Minster for Justice* [2017] IEHC 96 at para. 10).

26. Arising from the statutory provision, there are two particular questions for present purposes:

(i) is adequacy of remedies to be judged by including consideration of remedies that the applicant could have, but didn't, avail of? and

(ii) if not, is the status of being an observer in a planning appeal an available effective remedy albeit perhaps not entirely as effective as being an appellant?

27. As to the first issue, the answer is clearly Yes. As submitted by the council at para. 10 of submissions:

> "… the reference to 'available' appeal procedures, means procedures available if an applicant had taken certain steps or actions. Clearly it would undermine the same if an applicant chose not to make submissions or observations to the planning authority and/or not to appeal to the Board and then claimed no such appeal procedures were 'available' in satisfaction of the test for leave. Equally, an applicant cannot avoid the same by only raising certain points on an appeal and/or observation to the Board and then claiming that they do not have a remedy to address points not so raised. It is clear that the notion of remedy is an objective test and not the subjective view of an applicant."

28. That doesn't preclude an argument by a given applicant that she couldn't have availed of a particular remedy or that there was such a defect of justice as to mean that the remedy is not truly "available". But what it means is that "the applicant's failure to seek [a remedy] cannot have the effect of making judicial review appropriate where it would not otherwise be so", as put in the immortal submission of counsel (Daniel Donnelly B.L.), recorded in *Crowley v. Allied Irish Banks Plc* [2016] IEHC 154, [2016] 3 JIC 1812. As submitted by the council here, to hold otherwise would be to "reward … failure".

29. As to the second issue, that doesn't necessarily arise having regard to the answer to the first issue, but the answer is also Yes. I don't accept that an observer is confined to the scope of an appeal by an actual appellant. Section 130 of the 2000 Act provides:

> "130.—(1) (a) Any person other than a party may make submissions or observations in writing to the Board in relation to an appeal or referral, other than a referral under section 96(5).
>
> (b) Without prejudice to subsection (4), submissions or observations may be made within the period specified in subsection (3) and any submissions or observations received by the Board after the expiration of that period shall not be considered by the Board.
>
> (c) A submission or observation shall—
>
> (i) be made in writing,
>
> (ii) state the name and address of the person making the submission or observation and the name and address of any person acting on his or her behalf,

(iii) state the subject matter of the submission or observation,
(iv) state in full the reasons, considerations and arguments on which the submission or observation is based, and
(v) be accompanied by such fee (if any) as may be payable in accordance with section 144.
(2) Submissions or observations which do not comply with subsection (1) shall be invalid.
(3) The period referred to in subsection (1)(b) is—
(a) where notice of receipt of an environmental impact assessment report is published in accordance with regulations under section 172(5), the period of 4 weeks beginning on the day of publication of any notice required under those regulations,
(b) where notice is required by the Board to be given under section 142(4), the period of 4 weeks beginning on the day of publication of the required notice,
(c) in any other appeal under this Act, the period of 4 weeks beginning on the day of receipt of the appeal by the Board or, where there is more than one appeal against the decision of the planning authority, on the day on which the Board last receives an appeal, or
(d) in the case of a referral, the period of 4 weeks beginning on the day of receipt by the Board of the referral.
(4) Without prejudice to section 131 or 134, a person who makes submissions or observations to the Board in accordance with this section shall not be entitled to elaborate in writing upon the submissions or observations or make further submissions or observations in writing in relation to the appeal or other matter and any such elaboration, submissions or observations that is or are received by the Board shall not be considered by it.
(5) Subsections (1)(b) and (4) shall not apply to submissions or observations made by a Member State or another state which is a party to the Transboundary Convention, arising from consultation in accordance with the Environmental Impact Assessment Directive or the Transboundary Convention, as the case may be, in relation to the effects on the environment of the development to which the appeal under section 37 relates."

30. Sub-section (4) does not confine the observer to the scope of an appeal but merely limits the opportunity for further rejoinder and elaboration. In that sense one could say that being an observer is not quite as effective as being an appellant but that doesn't render it an ineffective mechanism for participation in the planning process.

31. All of that said, the doctrine of alternative remedies should not be used to unfairly limit points an applicant can make. Generally therefore insofar as a particular process couldn't address some aspects of an applicant's points, she should normally be allowed to make those points in any ultimate judicial review. A court shouldn't compel an applicant to avail of a substantially-but-not-entirely-effective procedure and at the same time preclude the applicant from ultimately making any points in the eventual challenge which could not be addressed within that procedure.

32. Thus if for example an applicant was demonstrably not in a position to appeal herself and could only be an observer, and if the underlying appeal in relation to which the observation was made was withdrawn (thereby depriving her of that route of engagement altogether), then a challenge to the first instance decision would not be out of time if brought by that person within 8 weeks of such withdrawal. While that might perhaps sound striking at first hearing, such a conclusion is a logical end-product of the principle that forcing a litigant into availing of a mechanism that can't provide an remedy in some particular respect can't generally be used to deprive that litigant of such a remedy. That principle is not absolute in the sense that some elements of a remedy are always going to fall away to an extent that that is inherent in an appeal. The first instance body gets something wrong – well, that's a slam-dunk win for the would-be applicant - except that she has to appeal first. On doing so, the appellate body then gets the thing right. So the challenge is "lost". But not unfairly so.

33. Applicants in that situation always say that they have lost the right to two valid and correct decisions. The answer to that is that there is (although one doesn't like to say so too loudly) no such right. Indeed such a "right" would eliminate the doctrine of exhaustion of remedies altogether. The first instance decision only has to be ostensibly valid, that is not tainted by such a breach of natural justice or fairness (say, where the District Court refuses to make a decision) as to make it appropriate for immediate judicial review. It is the decision that ends the process that has to be robust.

34. It would be different if something major fell unfairly through the cracks without being properly considered by anybody in a way that created a decision which permitted of a subsequent challenge. It is thus a necessary corollary that an applicant may be able to revisit earlier parts of a process once the final decision is in, although not if those parts have been superseded by the final decision (which is presumptively the case in a full appeal such as the District Court-Circuit Court relationship or that between a council and the board).

Application of the law regarding an alternative remedy

35. The applicant avers as follows:

"23. I say that my family and I spend a significant amount of time outside the jurisdiction and when I am away I have instructed my caretakers of the estate, in the light of the history and the number of applications made by Abbotts in the last few years, that the site be regularly monitored because I know that there will be a requirement in any application to erect a site notice which must be visible and legible from the public road.

24. I say that while the perimeters of my property are routinely inspected, I say that there was no site notice which was legible from the public road and which could identify the proposed development, the subject matter of the application. On my return to Bellamont on or about 20 March 2023 I did a walk over of the site boundaries immediately thereafter and I discovered that the site notice was not legible from the public road, and I beg to refer to photographs of the site notice which I took and are exhibited at TAB 8 of the booklet of exhibits."

36. He goes on to say:

"25. By virtue of the deficiencies in the Public Notices, the manner in which the application was formulated and lodged, the failure by Abbott's to put me on notice of the making of its application in circumstances where it was required to do so, my absence from the jurisdiction during the submission period I say that I was not aware of the application until 31 January 2023, after the date for the making of a valid submission to Monaghan County Council had expired. I say that I instructed my Solicitors to make a written observation to Monaghan County Council in respect of the application and I say that submission was hand delivered to Monaghan County Council early on the morning of 01 February 2023. I say that that submission was returned by letter of the same date advising that my submission could not be considered as it was received outside the statutory period, and I beg to refer to a copy of that submission exhibited at TAB 9 of the booklet of exhibits."

37. That is notable for what it omits. He says he found out about the application on 31st January, 2023 – but doesn't say how. Is this due to the "caretakers"? If so, there is no basis to say why they didn't see the notice during the relevant 5 week period which had already run out at that point. There are no dates of their inspections, or even much in the way of granular evidence that there were inspections at all beyond a sweeping generality.

38. Obviously the planning authority inspected the site notice and found it in order. There is no basis to show that that was incorrect during the relevant 5 week period, whatever about the alleged illegibility after that period.

39. It is not clear why the notice wasn't photographed until March, 2023. Presumably the caretakers could have done so if they were in fact under sufficiently rigorous instructions and were doing the required patrols in an effective manner. The photograph doesn't seem to be actually exhibited despite the wording of the applicant's affidavit, and nor have we any evidence from the caretakers. The notice here was in the same position as that for three previous applications by Abbott and that location didn't cause difficulty before (see affidavit of Darren Gaffney para. 20).

40. The inescapable factual conclusion here is that the applicant did not appeal because he was outside the jurisdiction and therefore was not aware of the planning application. The various alternative excuses in his affidavit don't hold water. Let's look at those individually:

(i) "the deficiencies in the Public Notices" – no deficiencies during the relevant 5 week period have been demonstrated evidentially to the level of substantial grounds or indeed at all, still less any causal link between alleged illegibility and the failure to appeal; if someone had been properly instructed to be on regular lookout for notices, they would have alerted the applicant as soon as they saw something, rather than saying to themselves, in effect: "how odd, I've been asked to look for planning notices but there's some kind of illegible notice, can't be a planning notice since it's not legible, probably best not to report it, photograph it or get a second opinion, the obvious thing is to keep that information completely to myself and just walk on without a backward glance";

(ii) "the manner in which the application was formulated and lodged" – that didn't stop the applicant from appealing and no substantial grounds otherwise have been shown – indeed I am not even sure what this complaint means or whether it means anything in particular;

(iii) "the failure by Abbott's to put me on notice of the making of its application in circumstances where it was required to do so" – but there are no substantial grounds to show that the notice party was obliged to specifically notify the applicant of anything beyond the newspaper notice and site notice which were addressed *urbi et orbi* and not to the applicant specifically, and no substantial grounds to challenge the adequacy of those notices during the 5 week period itself; and

(iv) "my absence from the jurisdiction during the submission period" – now the applicant is cooking with gas. But failing to avail of a remedy because one is abroad is still failing to avail of a remedy.

41. As regards the obligation to exercise the alternative remedy of appeal, the critical point is that an applicant is required to exhaust available alterative remedies that exist, not merely alternatives that she in fact avails of. Failure to exercise an option of the former type can preclude judicial review. That doesn't mean that an applicant who doesn't appeal can never challenge the ultimate board outcome, but it does mean that she can't challenge a first-instance appealable decision in a situation where she could have, but didn't, appeal that decision, and where appeal would have been a reasonably effective remedy in the circumstances.

42. Here, the evidence falls short of showing to the substantial grounds threshold that the applicant was incapable of appealing himself.

43. Furthermore, while the applicant in oral submissions calls his status as an observer "an extremely precarious and restricted form of participation", that is not correct. At worst, being an observer is not quite 100% as effective as being an appellant but it is still a somewhat effective remedy and certainly one that an applicant is required to pursue for the purposes of a planning judicial review, even if the applicant was in fact precluded from appealing, which has not been shown.

44. For clarification, it follows from that latter difficulty that if hypothetically An Taisce withdrew its appeal, the applicant doesn't have a right to come back and challenge the council's decision. That is because he has come a cropper on the more fundamental point that he didn't show that he couldn't have himself appealed the decision.

Application of other criteria for grant of leave

45. Having regard to the foregoing it is not necessary to consider the other criteria for leave but some of the grounds pleaded do overlap with the issues relevant to alternative remedies on which I have found there to be no substantial grounds.

Summary

46. To summarise without taking from the more specific terms of the judgment:

(i) Before taking any judicial review, an applicant should normally avail of any more appropriate remedy first. That almost invariably means appealing a first instance process rather than challenging it by judicial review, unless there is a breach of justice such as bias, clear unfairness, refusal to make a decision, or other limited exceptions.

(ii) Whether an applicant has availed of appropriate alternative remedies is to be judged by reference not just to the remedies that she *has* sought but also by reference to the remedies she *could have* availed of but did not. Failure to seek a remedy does not render judicial review appropriate when it would not otherwise be so.

(iii) Furthermore, a remedy such as an appeal should first be availed of if it is substantially effective even if not demonstrated to be entirely so, on the basis that the applicant is not thereby legally precluded from raising in any ultimate judicial review points which could not have been addressed by the remedy.

(iv) Here the applicant failed to appeal and hasn't established substantial grounds to show that he could not have done so. Rather he was simply outside the country and has given inadequate further detail.

(v) Independently of that, his remedy as an observer gave him ample status to make his points to the board and constitutes an available remedy. A challenge to the council's decision is therefore a premature intervention in a yet-to-be-complete process. Either way there are no exceptional circumstances or likely injustices warranting departure from the normal approach here.

47. Finally, not that the applicant needs me to say this, he is by no means without a remedy. First of all he has his proposed judicial review in relation to the refusal of his leave to appeal application. Secondly, once that is disposed of, either he will be able to appeal or alternatively he will be involved anyway in An Taisce's appeal barring any unforeseen events. When there is an outcome on either the existing or the proposed appeal he can challenge that if unfavourable. As a purely abstract proposition, you can lose a battle and win the war, although the latter still has to be fought for and the former position does not necessarily stand in a causative relationship to that outcome. But it is not currently obvious that the applicant necessarily loses anything critical by the refusal of the present leave application.

Order

48. For the foregoing reasons, it is ordered that:

(i) the application for leave to seek judicial review be dismissed; and

(ii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs.