Procedural Obstacles to Public Interest Litigation

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The purpose of this seminar is to examine some obstacles to public interest litigation. I have been asked to comment on procedural obstacles and also to say a few words about costs. I don't intend to provide a definition of what might constitute public interest litigation but at the outset it might be useful to note the comments of Mr Justice Dyson in *R v Lord Chancellor* (ex parte Child Poverty Action Group) CBAG [1991] 1 WLR 347, who was presented with an application for a pre-emptive order as to costs. In that context, he drew a distinction between ordinary private law litigation on the one hand and public interest challenges on the other. He said:

> *The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own.*

This analysis of the characteristics of a public law challenge has been adopted in Ireland, in *McEvoy v Meath County Council*[1] and in *Sinnott v Martin*[2]. The judgments referred to are judgments on the issue of costs. In the *McEvoy* case, the applicants were awarded 50% of their costs, even though they were refused the judicial review reliefs sought. In the second case, which involved an election petition, the applicant for costs was a Notice Party. The application for costs was unsuccessful. For our purposes this morning, the key characteristics identified by Mr Justice Dyson and accepted by the High Court here is that public interest litigation may not involve the promotion of any private interest in the outcome of the proceedings. It is trite to point out that no litigant would institute proceedings unless they had some interest in the outcome, but I think for public interest litigation to be properly so characterised, the litigant must not stand to gain any material or financial advantage in the outcome of the proceedings. It is not the purpose of this seminar to explore whether litigants who seek no material benefit from litigation should be treated in some way differently to others. Even public interest litigants may be said to derive personal benefit from a successful outcome of proceedings. The benefit may be, for example, political or environmental in nature, and it may be shared by many in the community. Many of you will recall that the result of the divorce referendum was challenged by Mr Hanafin in **[CME to insert]**. He unsuccessfully challenged the result of the referendum but was awarded his costs. That challenge was capable of being described as public interest litigation, but it may fairly be said that Mr Hanafin was pursuing a private political agenda in overturning the

[1] High Court, unreported, 24th January 2003
[2] High Court, unreported, 31st March 2004.

result of the divorce referendum and seeking to ensure that divorce would not be available in Ireland.

Public interest litigation may take many forms and is not restricted to the judicial review arena, but in this paper I would like to focus on the obstacles presented to public interest litigants who seek judicial review of decisions of the State or its agencies.

Locus standi / sufficient interest

The first obstacle facing any litigant in the judicial review arena is the requirement to establish that he or she has sufficient standing to maintain the proceedings. Locus standi in public law challenges in Ireland has become an unnecessarily complex area of law. In a real sense, the standing rule has evolved from obstacle to barrier. Both the legislature and the courts have applied a locus standi requirement in a manner which seeks to prevent applicants from arguing the substance of their cases. On one view, the Irish courts have yet to expressly adopt what is referred to as the modern rule as to standing expressed in *R v Inland Revenue Commissioners ex parte National Federation Of Self-Employed And Small Businesses*[3]. That rule was expressed by Lord Diplock when he said there would be a grave lacuna in public law if "outdated technical rules of locus standi" prevented a person bringing executive illegality to the attention of the courts.

The approach of the House of Lords serves to emphasise the purpose of judicial review, which is to ensure that the courts maintain a supervisory role in respect of the acts of the other branches of government. In England and Wales the courts, when presented with a serious argument as to illegality on the part of the State, will not be overly concerned with the behaviour and characteristics of the party presenting the argument. It appears that the Irish courts have sidestepped this approach on a number of occasions. A careful reading of the landmark decision of *G v DPP*[4] might suggest that the rule has been judicially approved in Ireland. However, when the matter was argued in *Lancefort v An Bord Pleanála*[5], the Supreme Court declined to expressly adopt a modern rule on locus standi and dealt with the issue of locus standi in a manner which I will address later.

In my opinion, the application of the locus standi rule, whether in judicial review proceedings or in any other proceedings, ought to be used only to exclude the

[3] [1982] AC 617
[4] [1994] 1 IR 374
[5] [insert ref]

unmeritorious applicant. In the classic formulation of Henchy J. in *Cahill v Sutton*[6] , he said, "*the purpose of the rule is to exclude the meddlesome or vexatious litigant.*"

It should of course always be open to respondents in public law challenges to object to a review of State decisions because of the motivation or the behaviour of the applicant but over reliance on the Irish expression of the principle detracts from one of the most important functions of the courts in a rule- based modern democracy

Rules as to standing

Rules as to standing derive from the common law and also from statute. Listeners will be well familiar with many of the decisions involving constitutional challenges. In such cases, the primary rule requires the challenger to establish that the impugned provision deprives him or her or may deprive him or her of a particular constitutional right. In *Cahill v Sutton*, the Supreme Court listed the justifications for the imposition of a requirement of locus standi. They may be summarised as follows:

(i) To avoid running theoretical or abstract cases. The rule seeks to ensure that a litigant comes to court to protect his or her own interests and not the interests of a third party. The court indicated that a person arguing another's case may fail to do that case justice.

(ii) Secondly, it was stated that the purpose of the rule was to exclude the litigious person or the crank, the obstructionist, the meddlesome, the perverse or the officious man of straw. The court also stated that the standing rule would prevent political opposition to a legislative act being in the courts, having failed in the Oireachtas.

(iii) Finally, the court indicated that the rule was designed to prevent the negative consequences resulting from a possible vacuum in the wake of the striking down of legislation.

The first of these considerations is one which should carefully be considered by public interest litigants. It is not possible for a litigant to argue another person's case. This was demonstrated in *Norris v Attorney General*[7]. The Supreme Court had no difficulty entertaining Mr Norris' challenge to legislation prohibiting homosexual acts, but he was refused permission to advance arguments based on marital privacy in support of his contention that the legislation was unconstitutional. The court invoked the idea of *jus*

[6] [1980] 1 IR 269
[7] [1984]

tertii which prohibits litigants from asserting the rights of third parties in support of their case where the argument is not relevant to the actual position of the litigant.

Apart from constitutional challenges, the requirement that a litigant have locus standi finds expression in the rules governing judicial review. Order 84 Rule, rule 20(h) of the Rules of the Superior Courts provides that an applicant must have "sufficient interest" in the matter to which the application relates. The first observation I wish to make is that the requirement of Order 84 that a litigant has sufficiency of interest seems to be indistinguishable from the requirement for locus standi in constitutional challenges. In the planning and environmental law field, the connection between the locus standi rule and the requirement for sufficiency of interest highlights obstacles for litigants in this field. As I have indicated, the constitutional law cases seem to require that one's constitutional rights be affected by the legislation sought to be challenged. Is the same true in relation to a litigant motivated by a desire to protect the environment and express what he or she considers to be a desire to protect the public interest? Before answering that question directly, let us look at the decision of the Supreme Court in *Lancefort v An Bord Pleanála*. In those proceedings, the applicant was a company limited by guarantee which had been formed following the decision of An Bord Pleanála to grant planning permission for a hotel development in the centre of Dublin. The members of the company had been involved in a campaign to overturn the decision of An Bord Pleanála because it granted permission for the demolition of listed buildings. The illegality alleged against the planning permission was that no environmental impact statement had been submitted, in breach of European law and Irish law requirements. If ever there was a case which highlighted the procedural obstacles faced by applicants for judicial review, this perhaps is the example par excellence. The locus standi of the corporate applicant was challenged unsuccessfully at the leave stage and at the judicial review proper. The applicant was unsuccessful in its substantive arguments in the High Court. On appeal to the Supreme Court Mr Justice Keane, for the majority, ruled that the applicant did not have locus standi to challenge the planning permission. Interestingly, the Supreme Court did not refuse locus standi on the basis that the corporate applicant was formed after the decision and was not affected by the decision to which the application for judicial review related and was not affected in any way by the planning permission – although these considerations are mentioned. The basis of the ruling appears to have been that no explanation was offered to the Supreme Court as to why the absence of an environmental impact statement was not addressed to An Bord Pleanála when the members of the corporate applicant had appeared there at an oral hearing represented by counsel or. The court decided that it would be unfair and unjust to the developer Notice Party to be required to face an allegation as to the absence of an environment impact statement when this could have been addressed to the board.

It appears to me that the majority of the Supreme Court confused the locus standi of the applicant with the discretion of the court to refuse judicial review reliefs. The more appropriate approach in my view would have been to have recognised the locus standi of the applicant and then to have dealt with the substantive argument. I interpret the decision of the Supreme Court as one which sought to avoid entertaining the applicant's challenge to the planning permission because it involved an allegation that community law had been breached. It is possible that the Supreme Court concluded that, because of the special nature of community law, they might find it difficult to find that the Environmental Impact Statement Directive had been breached and then, because of the behaviour or characteristics of the applicant to have refused reliefs.

This approach appeared to ignore a fundamental aspect of the analysis of an applicant's locus standi. In *East Donegal Co-Operative Livestock Mart v Attorney General*[8] it was held that the issue of an applicant's sufficient interest is one capable of objective assessment and that it "*relates to the impact on personal situation, ranging from the liability of a rate payer to pay his share of the cost of the luncheon held by the members of Dublin Corporation to the damage of the plaintiff's business and licensing provisions*…"

What emerges from the dictum in East Donegal is that it is not possible to lose locus standi. Either one has locus standi or one does not.

It is a question of law and fact, it is one that is capable of objective assessment. In *Lancefort*, the Supreme Court held that the conduct of the Applicant deprived it of locus standi. I respectfully suggest that this is a mistaken approach, and that the conduct of the applicant is a matter which ought to be weighed in exercising discretion as to whether to grant relief or not.

The extent to which the locus standi rules constitutes an obstacle or barrier to litigants may best be judged by reference to the other important dictum of Hench J. in Cahill v Sutton where, having enunciated the principles stated above, added that the rule is a rule of practice only and that it is subject to expansion, exception, or qualification when the justice of the case so requires. In this context the judge said, "*there will be cases where the want of normal locus standi on the part of the person questioning the constitutionality of the statute may be overlooked if in the circumstances of the case there is a transcendent need to assert against statute the constitutional provision that has been invoked*."

[8] [1970] IR 317

This important caveat foreshadowed the decision of the House of Lords in the Self-Employed Persons decision (supra). It appears to have found further and more recent echo in *Mulcreevey v Minster for the Environment*[9]. In that case, a resident in County Kerry challenged the decision of the Minister to grant a consent for the demolition of a national monument. The case was one of a series challenging the treatment by the executive of heritage artefacts which lay in the path of the south eastern motorway at Carrickmines in Co. Dublin. The national monuments legislation provided for the joint consent of certain persons for works which might interfere with the national monument. By statutory instrument, the number of parties involved in the giving of the consent was reduced. This was the issue that was litigated in the judicial review proceedings. In the Supreme Court, Keane CJ said:

> *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 peculiar sense to him by the decision.*

This approach contrasts notably with the approach of the Chief justice in Lancefort, just discussed.

In the *Irish Penal Reform Trust Limited and Others v Governor of Mountjoy Prison and the Minister for Justice, Equality and Law Reform and Ireland*[10], the applicant NGO instituted plenary proceedings seeking declaratory reliefs claiming that the defendants had failed in their constitutional obligations to provide adequate psychiatric treatment etc. for prisoners in Mountjoy men's prison and Mountjoy women's prison and that treatment of second and third named plaintiffs breached their constitutional rights. The second and third named plaintiffs were inmates suffering from psychiatric illnesses. The first issue which came before Gilligan J. was whether the personal plaintiff had locus standi. He rejected a claim that the personal plaintiff's claims were limited to their "very own personal circumstances". He said:

> *They seek through their claim constitutional remedies in respect of systematic deficiencies in the manner in which prisoners with psychiatric difficulties are treated in Mountjoy. Whilst the second and third named Plaintiffs do seek a wide variety of declarations in relation to alleged practice at Mountjoy men's and women's prison, it*

[9] [2004] 1 IR 72
[10] unreported, Gilligan J., 2 September 2005

> *would be wholly unjust to allow what may be systematic deficiencies to go unchallenged.*

He also said:

> *If the second and third named plaintiffs were to be denied standing, no other plaintiff would be in a position to challenge these alleged systematic deficiencies, since any plaintiff's claim would limited to their own personal circumstances. This would mean that alleged systematic failings in the manner in which inmates with psychiatric difficulties are treated would be totally immune from challenge, and this cannot be the purpose sought to be achieved by the locus standi rules.*

This case is an interesting illustration of the points under discussion this morning. The defendants had raised the locus standi issue as an obstacle in proceedings which had, at least, some of the characteristics of a public interest challenge. The personal plaintiffs overcame the objection of the defendants, because the judge felt that the issue they raised was important and there appeared to be no persons in a better position to make the particular complaints. Ultimately, the locus standi rule was not a barrier to the relief they sought, but it may certainly be characterised as an obstacle which had to be overcome.

Mr Justice Gilligan also dealt with the locus standi of the corporate plaintiff. The Irish Penal Reform Trust Limited was described by the judge as having been formed in 1994 by individuals concerned with conditions in the prison system, that it was a non governmental organisation enjoying charitable status. The judge noted that the trust "has nothing to gain itself by [the institution or prosecution] of the proceedings". Having considered the decision of *SPUC v Coogan*[11] (where the NGO plaintiff had locus standi to address threats to the unborn) Mr Justice Gilligan said:

> *The simple fact is that Cahill v Sutton allows, in plain terms, for the relaxation of the personal standing rules that those prejudiced may not be in a position to adequately assert their constitutional rights. If a person is incapable of adequately asserting his constitutional rights, for whatever reason, I am of the view that Cahill v Sutton would support a relaxation of the personal standing rules, provided the relevant person or body is genuine, acting in a bona fide manner, and has a defined interest in the matter in question*.

[11] [1989] UR 734

This approach to locus stand – although given in the context of a constitutional case – is broad enough to permit public interest litigation to proceed without the need to establish personal locus standi. The rule of practice is capable of being adapted to the particular circumstances of any public interest case in a manner which prevents the crank or meddlesome litigant from usurping the courts.

Public interest litigants with a particular interest in environmental and planning matters face very substantial hurdles in challenging decisions of planning authorities and of An Bord Pleanála. These hurdles are set to be added to by the Planning and Development (Strategic Infrastructure) Bill, if it is enacted.

The obstacles created by the planning code are well known. Objectors to planning applications must pay a fee to have their objection considered. Generally, they may not appeal unless they have made the paid objection to the planning authority. Judicial review of the decisions of the planning authority and An Bord Pleanála are governed by Section 50 of the Planning and Development Act, 2000. In this paper I will comment on one particular obstacle created by Section 50(4)(b)(iv) which provides that "*leave shall not be granted unless the High Court is satisfied…that the applicant has a substantial interest in the matter which is the subject of the application*."

A number of decisions have interpreted the phrase "substantial interest". The first of these is *O'Shea v Kerry County Council*[12]. Kerry County Council gave planning permission for development in Kenmare County Kerry. The applicant in the proceedings was a neighbouring landowner. His challenge related to the allegation that the site notice had not been erected in compliance with the planning regulations. The allegation was that the site notice was not in a position that was clearly visible, and that as a result he was unaware of the planning application until the date of the decision to grant permission. Judge Ó Caoimh, in relation to the substantial interest matter, said:

> *This is a new provision in the planning code, it has not been the subject matter of any prior decision whereby assistance can be given as to its construction. However, by reference to the provisions of Section 50(4)(d) of the Act of 2000, it can be seen that the term 'substantial interest' is not to be narrowly construed. The subsection reads as follows:*
>
> *A substantial interest for the purposes of paragraph (b) is not limited to an interest in land or other financial interest.*

[12] [2003] 4 IR 143

> *Clearly, different circumstances may arise giving a substantial interest to the applicant concerned. For example, an applicant may be able to show that he or she is directly affected by the proposed development. I am satisfied that the fact that a member of the public may have an interest in seeing that the law is observed is not such as to amount to the existence of "a substantial interest" within the terms of the section.*

The judge went on to say that "*although she was the owner of adjoining land, she had failed to show in what manner she would be affected by the proposed development*."

The judge said "*the applicant has indicated that she is the owner of the land over which a right of way exists to the golf club. No particular point has been made by the applicant showing how she will be affected by the proposed development*."

It appears to me that the learned judge went too far by insisting on personal impact. The requirement of the subsection is that the applicant has a substantial interest in the matter which is the subject of the application.

The applicant's interest in the decision of the planning authority may be said to have been twofold. The first aspect of her interest in the decision is that she was prevented from participating in the decision making process by the alleged deficiencies of the site notice and that she was thereby prevented from appealing the decision of the planning authority to An Bord Pleanála. The second aspect of her interest in the planning decision is in the development which would result from the execution of the decision. She believed that the development if carried out would have certain negative consequences. It appears to me that the learned trial judge went too far in insisting on a clear expression of personal impact from the development described in the decision which is the subject matter of the proceedings. It ought to have been enough for the applicant in that case to demonstrate a connection with the decision under review, even if that connection was her exclusion from the process which led to the decision.

It is also of note that Ó Caoimh said that:

> *Clearly different circumstances may arise giving substantial interest to the applicant concerned. For example, an applicant may be able to show that he or she is directly affected by the proposed development. I am satisfied that the fact that a member of the public may have an interest in seeing that the law is observed is not such as to amount to the existence of a 'substantial interest' within the terms of the section.*

It is difficult to see how a narrow interpretation of the subsection, insisting on personal impact as it does, sits with the minority judgment of Denham J. in the Lancefort v An Bord Pleanála decision. Ms Justice Denham noted that the "decisions on the constitutional validity of statutes are useful [in the context of locus standi] as there has been a development from the concept of locus standi as victim-related (the plaintiff proving a detriment, actual or apprehended) to a jurisprudence where public interest parties have been adjudged to have standing[13]. Having reviewed the case-law from Cahill v Sutton to McGimpsey v Ireland[14] (where Barrington J held that it would be inappropriate for the court to refuse to hear the plaintiff's case on the grounds of lack of locus standi, particularly since the plaintiffs were patently sincere and serious people who had raised an important constitutional issue which affected them and thousands of others on both sides of the border) Denham J said, "*these cases establish a useful analogy to the applicant's situation. The move from victim-related standing to one of public interest is of particular relevance to environmental issues*."

Commenting on the public interest nature of the litigation, she said:

> *In certain public law cases and in actions reviewing the constitutionality of laws, principles of locus standi have been developing to include persons acting in the public interest. Whilst this is not a case where the constitutionality of an act is in issue, the nature of the litigation (claiming to protect the environment) is analogous, in that it is a public interest case. It is not similar to an action to an individual seeking to protect an individual right. In this case, a legal person is seeking to protect the environment – for the public benefit. Consequently, principles which have enabled public interest litigants to litigate for the protection of the constitution are relevant also to litigation to protect other public interests such as the environment*.

The learned judge concluded, "*environmental issues, by their very nature, affect the community as a whole in a way a breach of an individual personal right does not. Thus the public interest element must carry some weight in considering the circumstances of environmental law cases and the locus standi of its parties*."

In concluding that Lancefort Limited did have locus standi, Judge Denham summarised her views as follows:

> *The principles of locus standi have been extended by the courts in some cases to situations where concerned citizens have sought to protect the public interest. The*

[13] Lancefort v An Bord Pleanála (No. 2) [1999] 2 IR 270 at 286, 287
[14] [1988] IR 567

analogy of those cases, where the constitutionality of laws was queried, shall be applied in this case… This approach is just, aids the administration of justice, would not permit the crank, meddlesome or vexatious litigant to thrive, and yet enables the bona fide litigant for the public interest to establish the necessary locus standi in the particular area of environmental law where the issues are often community rather than individual related. The administration of justice should not exclude such parties from the courts.

As an aside the judgement of Denham J., though the sole dissenting judgement was not expressly rejected by the other members of the Supreme Court.

The decision of Ó Caoimh J., insisting on personal impact, should be considered against the comments of Keane J. in Lancefort v An Bord Pleanála (No. 2)[15] where he said:

At the same time, it must be borne in mind that, as pointed out by Finlay CJ in ESB v Gormley [1985] IR 129, where a challenge by a person afforded locus standi in a case such as this succeeds, the planning permission is set aside not because any direct injury to the applicant has necessarily been established, but because of the jurisdictional frailty in the decision which is the paramount objective of certiorari to remedy.

Mr Justice Ó Caoimh also gave the decision in Ryanair v Aer Rianta[16]. His view of planning judicial review proceedings in this case certainly suggests that the emphasis of the court should be on its supervisory jurisdiction – the prevention of executive illegality – rather than on requiring evidence of personal impact on an applicant for judicial review.]where he declared:

While the requirements of Section 50 of the Act of 2000 include the obligation for an applicant to show 'substantial interest', this has not been the subject of any significant judicial guidance to date. However, it is clear that the nature of the interest in question is not limited to an interest in land or other financial interest. It is clear, however, that an applicant directly affected by a proposed development will in all probability have a substantial interest.

[15] [1999] 2 IR 270 at page 310
[16] [2004] 2 IR 334

The matter of 'substantial interest' was most recently addressed by the High Court in Harrington v An Bord Pleanála[17] which involved a challenge to the grant pf planning permission for the controversial Corrib Gas terminal in Co. Mayo. Judge Macken said:

> *As has been stated in several cases, consideration of the legislative scheme makes it clear that the Oireachtas intended that Section 50 be stricter than the equivalent section of the earlier Local Government (Planning and Development) Act of 1992, which itself adopted a stricter set of criteria applicable to challenges to the grant of planning permissions than previously existed. This is because there is in place an extensive statutory scheme under which members of the public may object to the original grant before a planning authority, and may also appeal to and be heard by an independent appeal authority, namely the Bord. To that appeal scheme the statute also provides for the nomination of certain designated parties, who have an automatic right to be heard, with a view to ensuring wide ranging representation in planning matters from diverse interest groups.*

She further declared:

> *The Act of 2000 adopted an even more strict approach overall to the rights of third parties to object to the grant of planning permissions than that found in those cases heard under earlier legislation, once a full appeal has taken place, inter alia, by requiring that an applicant should have, not just a status as an "aggrieved party" as was the position under earlier legislation, or even a "sufficient interest" as was the case under the Act of 1992, but rather a "substantial interest", a clearly more onerous test.*

Macken J. then went on to address the specific requirement of showing substantial interest, stating:

> *Having regard to the legislative history, and in particular to the increasingly strict provisions for commencing judicial review proceedings in planning matters put in place by the Oireachtas, it seems to me that in deciding what is intended by the phrase "substantial interest in the matter which is the subject of the application", an equally rigorous approach must be adopted. The interpretation of that phrase in the proviso to Section 50(4) of the Act of 2000 must be informed by the general approach found in the legislation to the question of appeals of this nature provided, however, that the legislation is not applied in such a restrictive manner that no serious legal*

[17] Unreported, High Court, Macken J., July 26th 2005

> *issue legitimately raised by an applicant could be ventilated, or which would have as its effect the inability of the courts to check a clear and serious abuse of process by the relevant authorities, such that either event might thereby remain outside the supervisory scrutiny of the Courts, a factor also considered by Keane, J. in the case of Lancefort supra.*
> *While I accept the applicant's argument that the Act makes it clear such substantial interest may be wider than an interest in land, or a financial interest, and therefore, in theory it can cover a wide variety of circumstances, I consider that the substantial interest which the applicant must have is one which he has already expressed as being peculiar or personal to him.*

The concluding remark of Macken J. as to what is intended by the phrase 'substantial interest' in the legislation is possibly a matter of some concern to public interest litigants. It stands in contrast to what Denham J in *Lancefort* described as the 'victim related nature' of locus standi.

Judge Macken's comments should also be noted for the emphasis they place on interpretation of the rule in a manner which does not prevent the court exercising its supervisory jurisdiction in judicial review matters. It will be recalled that what Macken J decided was that the failure of the applicant to personally raise an issue as to the meaning of the Seveso Directive (Major Accident Hazards Directive) deprived him of the necessary substantive interest to pursue the complaint in the High Court, even though the issue had been addressed at length before An Bord Pleanála by other parties. In the event, Judge Macken entertained the applicant's argument at the leave stage as to the meaning of the Directive and disagreed with that interpretation of that Directive. The interesting question is what might have happened if she had agreed with the applicant even though she had found that he did not have a substantial interest by reason of his failure to raise the question of the meaning of the Directive at An Bord Pleanála.

The best way to understand the Harrington case is to read it backwards. If the judge had agreed with the applicant's interpretation of the Directive, in all likelihood she would have decided that he had substantial interest to raise the matter because of the importance of the point, even though he had failed to raise the matter before An Bord Pleanála personally.

In Garrett Simons' "Planning and Development Law", he notes that the position of Kearns J. in *Murphy v Wicklow County Council*[18] was that the applicant had demonstrated

[18] Unreported, High Court, Kearns J March 19th 1999

a genuine interest in the matter and was in a position to present expert evidence on a range of points, all of which were pertinent to the huge stake the public at large had in relation to the proper and lawful management of the Glen of the Downs. Mr Simons wonders whether public interest of the sort expressed by Lancefort Limited would be regarded as a substantial interest for the purposes of Section 50. There is certainly enough judicial authority to support the proposition that campaigning non-governmental organisations with a track record on environmental matters and with a record of interest in a particular planning controversy would have a substantial interest. The organisation would be expected by the courts to have made submissions to the decision making authorities and to have raised points before those authorities which might be the subject of judicial review proceedings. A combination of Judge Denham's analysis of locus standi in public interest cases and the approach as to locus standi which emphasises that it is a rule of practice only which is capable of expansion depending upon the facts of any case suggests that such a litigant should be entitled to bring important controversies to the High Court for adjudication. However, the conservative approach adopted as to the meaning of Section 50 and the concept of substantial interest is cause for concern. In my view, neither the State nor affected third party developers have anything to gain from placing substantial procedural obstacles in the way of judicial review proceedings. The public interest litigant will, when truly motivated, persist with the litigation. The obstacles created by statute and narrow judicial interpretation merely ensure that the litigation addresses those procedural issues rather than the substantive matters. It would be a better use of everyone's time, including obviously of judicial resources, if the litigant who is not a crank and who acts genuinely in the public interest is permitted to use its resources to argue the substance of the matter, rather than addressing a technical and otiose argument on procedural issues. Neither the courts nor the State should be concerned with protecting State decision makers from the consequences of their mistakes.

Costs

Having looked at legal obstacles faced by public interest litigants I would like to say a few brief words about more practical obstacles. I am referring to the issue of costs. The possibility of facing a bill of hundreds of thousands of euro having lost a public intgerest is the single greatest obstacle for any litigant. It an even greater obstacle for a litigant who does not seek to protect a personal material or financial interest.

The earliest written reserved judgment dealing with whether an unsuccessful litigant should be awarded costs would appear to be the case of TF v Ireland and the Attorney

General[19]. The case involved a constitutional challenge to the provisions of the Judicial Separation and Family Law Reform Act 1989 in which the Plaintiff was unsuccessful. The Chief Justice said:

> There is no doubt but that the appeal before this Court involved issues of considerable public importance and it was desirable in the public interest, that a decision on the issues involved be reached as early as possible having regard to the situation, in respect of many orders made pursuant to the provisions of the Act which would arise if the plaintiff Appellant had been successful in his challenge to the impugned provisions of the Act… Whilst this case was of considerable importance to the parties involved, it was also of considerable importance to the parties involved in at least 3,000 cases in which orders had already been made under Judicial Separation and Family Law Reform Act 1989.

The next substantive treatment of the issue of an unsuccessful litigant's costs arose in *O'Shiel v Minister for Education and Science, Ireland, the Attorney General*[20]. In awarding the unsuccessful plaintiff costs, Laffoy J. said as follows:

> In my view the issues raised in these proceedings have significance which extends beyond the sectional interests of the Plaintiffs and whether Cooleenbridge School should be funded by the State. For the first time, the Court has had to consider the extent of the State's obligation to provide for free primary education in the context of the guarantee of parental freedom of choice contained in Article 42. I think it is in the broader public interest that the extent of the obligations and rights created by Article 42 be clarified, particularly in the context of a total absence of legislation defining and delimiting the obligations and rights in question, the context in which these proceedings were determined. I think it is also significant that the primary beneficiaries of these proceedings, had they been successful, would have been children, who have to rely on their parents to invoke the Court's jurisdiction to vindicate their constitutional rights[21].

This issue also came to be addressed addressed is *McEvoy v Meath County Council*[22]. The Plaintiffs challenged the validity of the Meath County Development Plan, alleging that the zoning of land for residential use contravened the Strategic Planning Guidelines for

[19] Unreported, Supreme Court, 27th July 1995
[20] Unreported, High Court, 10th May 1999.
[21] See pages 8 and 9 of the judgment.
[22] High Court, 24th January 2003.

the Greater Dublin area. The Plaintiffs were unsuccessful, and a separate hearing on the costs issue was heard by the trial judge, Mr Justice Quirke. Judge Quirke referred to "*the special category of case in which the court will award costs to an unsuccessful plaintiff*[23]".

The trial judge also noted the statement by Denham J. in *Lancefort Limited v An Bord Pleanála*[24] where the special nature of environmental cases was addressed. Having accepted that the litigant and members of the litigant company were acting in the public interest, Denham J. said:

> *I am satisfied in this case on the facts that the applicant has expressed a valid public interest in the environment. The issue of the environment presents unique problems, not only in the courts. In much litigation on e.g. personal injuries or as to individual constitutional rights, the party is obvious. In litigation on the environment, however, there are unique considerations in that often the issues affect a whole community as a community, rather than an individual per se.*

In deciding to grant the plaintiffs 50% of their costs, Quirke J. said as follows:

> *Neither of the applicants is seeking, in these proceedings, to protect some private interest of his own. As Denham J. declared in the Lancefort case, an aspiration by an applicant in proceedings such as these to act in the public interest ... 'must be analysed also in the circumstances of each case.' I am satisfied in the circumstances of the instant case that the applicants have acted solely by way of furtherance of a valid public interest in the environment and in particular in the interests of those communities who are affected by the planning considerations applicable to the greater Dublin area.*

The trial judge said:

> *I am however also satisfied that the proceedings herein have raised public law issues which are of general importance where the applicants have no private interest in the outcome of the proceedings and they therefore comprise a 'public interest challenge' of the kind described by Dyson J. in the context of the jurisdiction as to pre-emptive costs orders.*

I am also satisfied that in exercising my discretion as to costs in this case I am entitled to take into account some findings of fact which I have made and I believe that it is

[23] See page 2 of the judgment.
[24] [1999] 2 IR 270

appropriate that I should do so having regard to the fact that I have concluded that these proceedings comprise a bona fide public interest challenge."

Neither this case nor the judgement of Laffoy J in awarding the unsuccessful applicant in Dunne v Dun Laoghaire his costs can bring any great comfort to potential litigants.

In the paper following this you will hear about steps which can be taken to gain some certainty as to costs prior to proceedings being heard.

Refer to: Dunne v Dun Laoghaire
Salafia
Harrington
Curtin – Hanafin
Norris