THE HIGH COURT

[2022] IEHC 451

[Record No. 2018/17JR]

BETWEEN

CAROL DONNELLY AND CAVAN BETTER WASTE MANAGEMENT

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CAVAN COUNTY COUNCIL AND WILTON WASTE RECYCLING

NOTICE PARTIES

JUDGMENT of Mr. Justice Barr delivered electronically on the 30th day of March, 2022.

Introduction.

1. In a written judgment delivered on 21st December, 2021, the court refused the applicants' application for relief in respect of a decision of the respondent to direct that planning permission be granted for a waste recycling facility in the townlands of Lismagratty and Corranure in County Cavan. That judgment is reported at [2021] IEHC 834.

2. On 28th January, 2022, having received submissions from the parties, the court directed that the formal order of the court would be to refuse all the reliefs sought by the applicants, with no order being made as to costs.

3. Subsequent to that, the applicants furnished written submissions to ground their application for leave to appeal pursuant to s. 50A(7) of the Planning and Development Act, 2000, as amended. The respondent filed written submissions in opposition to that request.

4. In an email dated 11th March, 2022, the solicitor for the second named notice party, which was the beneficiary of the planning permission, adopted the submissions of the respondent. They also requested the court to fast-track whatever decision may be made on the applicants' application for leave to appeal, as the second named notice party was fearful that it might lose the benefit of the planning permission by efflux of time, due to the fact that planning permission had originally been granted on 10th November, 2017 and their understanding was that unless the works were substantially underway by in or about 10th November, 2022, they would not be able to get an extension of the planning permission. Accordingly, if either the decision herein, or any appeal that may be allowed, were not determined in the very near future, there was a good chance that the second named notice party would lose the benefit of its planning permission by efflux of time.

5. This judgment deals with the applicants' application for leave to appeal.

Submissions on behalf of the applicants.

6. The applicants submit that the following questions of law of exceptional public importance arise from the judgment delivered by the court and in respect of which leave to appeal ought to be granted:

"*(1) In circumstances where there is an error of fact or law on the face of a planning decision, the interpretation of which affects the outcome of an Appropriate Assessment under the Habitats Directive, does the High Court have jurisdiction to allow such a permission to and/or was the Court correct to treat the error as being within the jurisdiction of the decisionmaker and not liable to certiorari?*

(2) As a matter of EU law can a planning permission be legally valid in circumstances where there exists an error on the face of the record which goes to appropriate assessment and if so, is the High Court under an obligation to quash a permission in such circumstances to remedy such an error?

(3) In the context of appropriate assessment, is it open to the High court to overlook identified lacunae in the information before the Board in respect of the watercourses crossing the site, and to itself determine same was 'not greatly relevant' (para 126) in circumstances where the competent authority did not make such a determination itself?

(4) In the context of appropriate assessment, does the Court have the jurisdiction to consider that the importance of a key mitigation measure (in the form of self-certification of the absence of invasive species) is 'somewhat lessened' (paragraph 154) by the fact that the waste will be transported to the site in sealed containers and be processed indoors (in circumstances where the evidence before the court was that waste would be delivered in open skips and trailers) particularly in circumstances where the Board did not make any similar determination and continued to rely on this mitigation measure in the AA purportedly carried out?

(5) In the context of a judicial review of an appropriate assessment is a court entitled to form its own view on the merits of (and lack significance of) mitigation measures in circumstances where the competent authority itself had not reached or expressed a similar view in carrying out and recording its own assessment?

(6) In the context of AA, what matters may be left over to post consent agreement with a planning authority? In particular, can the entire detail of a self-certification scheme in respect of control of non-invasive species (the terms of which and efficacy of which are completely unknown) be left over to post consent agreement?"

Decision of the court.

7. Section 50A(7) of the Planning and Development Act 2000, as amended, provides as follows:-

"*(7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the [Court of Appeal] in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal].*"

8. The principles which the court must apply when determining an application for leave to appeal pursuant to s. 50A(7) of the Act, are well settled. They were set out in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250; which principles have

been followed in many subsequent cases. In the course of his judgment in the *Glancré* case, MacMenamin J. set out the following principles:-

> "*1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.*
>
> *2. The jurisdiction to certify such a case must be exercised sparingly.*
>
> *3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.*
>
> *[...]*
>
> *5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.*
>
> *6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (Raiu).*
>
> *7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional".*
>
> *8. Normal statutory rules of construction apply which mean inter alia that "exceptional" must be given its normal meaning.*
>
> *9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.*

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

9. In *Ogalas v. An Bord Pleanála* [2015] IEHC 205, Baker J. accepted the *Glancré* principles and stated as follows at para. 4:

"*McMenamin J. summarised the law applicable to a grant of certificate in Glancré Teoranta v. An Bord Pleanála [2006] IEHC 250 and I will not repeat the ten criteria outlined by him at pp. 4 and 5 of his judgment but accept his proposition that it is not sufficient for an applicant for a certificate to show that a point of law emerges in or from a case, but an applicant must show that the point is one of exceptional public importance and must be one in respect of which there is a degree of legal uncertainty, more than one referable to the individual facts in a case. There must be a public interest in requiring that the point of law be clarified for the common good, but to an extent, if there exists uncertainty in the law, and because clarity and certainty in the common law is a desirable end in itself, and important for the administration of justice, if it can be shown the law is uncertain the public interest suggests an appeal is warranted*."

10. In *Dublin Cycling Campaign v. An Bord Pleanála* [2021] IEHC 146, McDonald J. made the following observations in relation to cases which involve the application of well-established principles of law:

"*40. It will not normally be enough for the purposes of an application under s. 50A(7) for a party to complain that the High Court did not properly apply established legal principles to the particular facts of the case. However, as Simons J. noted in Halpin v. An Bord Pleanála [2020] IEHC 218, there may,*

nonetheless, be some cases where a point of law of exceptional public importance may emerge from the manner in which well-established principles were applied. In this context, Simons J. referred to the approach taken by the Supreme Court (in the context of applications for leave to appeal to it) in B.S. v. Director of Public Prosecutions [2017] IESCDET 134 where the court stated:-

> *'It obviously follows from what has just been set out that it can rarely be the case that the application of well-established principles to the particular facts of the relevant proceedings can give rise to an issue of general public importance. It must, of course, be recognised that general principles operate at a range of levels. There may be matters at the highest level of generality which can be described as the fundamental principles applying to the area of law in question. Below that there may well be established jurisprudence on the proper approach of a Court to the application of such general principles in particular types of circumstances which are likely to occur on a regular basis. The mere fact that, at a high level of generality, it may be said that the general principles are well established does not, in and of itself, mean that the way in which such principles may be properly applied in different types of circumstances may not itself potentially give rise to an issue which would meet the constitutional threshold. However, having said that, the more the questions which might arise on appeal approach the end of the spectrum where they include the application of any principles which might be described as having any general application to the facts of an individual case, the less it will be*

> *possible to say that any issue of general public importance arises. There will, necessarily, be a question of degree or judgment required in forming an assessment in that regard in respect of any particular application for leave to appeal. However, the overall approach to leave is clear. Unless it can be said that the case has the potential to influence true matters of principle rather than the application of those matters of principle to the specific facts of the case in question then the constitutional threshold will not be met*.'"

11. In *Ross v. An Bord Pleanála* [2015] IEHC 484, Noonan J. stated as follows in relation to the circumstances where a party may seek to appeal in respect of a point on which the applicant had not been granted leave to proceed by way of judicial review:

> *"Accordingly, it would appear that the applicants now seek to appeal on a ground in respect of which no leave to apply for judicial review was granted. I cannot conceive how an appeal could lie in such circumstances. It would be an unusual state of affairs, to say the least, if an appellate court were asked to determine an appeal on the basis of a point that was never even pleaded, less still the subject matter of a grant of leave."*

12. The essence of the applicants' submission on its application for leave to appeal, is that, in deciding that the word "facility" in condition 7 was clearly a typographical error, which had to be interpreted as meaning "building", (see paras. 172-175 of the judgment), the court had found that there was an error on the face of the record in respect of which it had not granted *certiorari* and that that raised a point of law of exceptional public importance and that it was in the public interest that that point be determined on appeal.

13. The court does not agree that any point of law of exceptional public importance was involved in resolving that issue. It has to be remembered that the issue in relation to the wording used in condition 7, was only raised for the first time in counsel for the applicants' reply to argument by counsel for the respondent. It was not a point raised in the applicants' statement of grounds, nor was it a ground on which they had been given leave to proceed by way of an application for judicial review.

14. The court decided that issue on the narrow ground of interpretation of the condition in the context of the overall planning application and in light of the adoption by the respondent of the recommendations of the inspector. The court is satisfied that the resolution of that issue did not raise any point of law of exceptional public importance.

15. The court has considered the applicants' remaining submissions in light of the test set down in the *Glancré* decision and in subsequent cases. The court is satisfied that its judgment herein did not decide any novel points of Irish or European law. The judgment merely applied well-established legal principles, that had been set down by the CJEU in *Holohan v. An Bord Pleanála* (Case 461/17), which had been followed in the subsequent Irish decisions of *Sliabh Luchra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 88 and *Kemper v. An Bord Pleanála* [2020] IEHC 601.

16. The judgment did not raise or consider any new points of law, nor did it deviate from the principles established in previous case law, so as to give rise to any point of law of exceptional public importance.

17. The judgment dealt with the issues raised by the applicants on the facts of the case that were before the court. The judgment did not have any wider implications,

that would have any major bearing on other cases that may be brought before the courts in the future. Of course, being a written judgment of the High Court, it will have some precedent value for future cases, but that does not mean that it raised, or decided, any points of law of exceptional public importance.

18. The court is not satisfied that there were any points of law of exceptional public importance raised either in the judgment itself, or as a result of it. The court refuses to grant leave to the applicants to appeal its decision herein.

19. A further factor which supports the court in its view, is the justice of the case from the point of view of the second named notice party. There is an issue of justice raised where it is established that a party, who obtained a planning permission as far back as November, 2017, may lose the benefit of its permission by efflux of time, due to the fact that multiple legal challenges are brought against the permission which it had obtained. While that of itself would not be sufficient to deny leave to appeal, if the court were of the view that there were points of law of exceptional public importance that needed to be decided, it is nevertheless a factor that has to be taken into account. However, for the reasons set out earlier, the court is entirely satisfied that no such points of law of exceptional public importance are raised in its judgment herein.

20. Accordingly, the court refuses the applicants' application for leave to appeal. In line with its previous decision, there will be no order as to costs arising out of this application for leave to appeal.