[2025] IEHC 3

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2024.0000049]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

NAGLE VIEW TURBINE AWARE GROUP

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
COOM GREEN ENERGY PARK LIMITED

NOTICE PARTY

(No. 2)

JUDGMENT of Humphreys J. delivered on Friday the 10th day of January 2025

1. The way recourse to appellate courts is meant to work is that if a point arises that needs high-level clarification, it gets clarified, and is then applied at trial level in future cases. An appellate judgment is not merely the opening bid in a first round of negotiations with applicants who seek ever-more-elaborate "clarifications" of the clarification, until they get an applicant-friendly answer. The same applies *mutatis mutandis* to opposing parties, albeit that, speaking purely empirically, they tend to be less reluctant to accept the logical implications of adverse outcomes. As regards the points at issue in the present proceedings, the High Court previously dismissed a challenge relating to the board's treatment of wind energy guidelines in *Balz and Heubach v. An Bord Pleanála* [2018] IEHC 309 (Unreported, High Court, Haughton J., 30th May 2018). On leapfrog application for leave to appeal, the Supreme Court identified that "[t]he points sought to be argued relate to the manner in which the Board conducted an Environmental Impact Assessment and concern the status of ministerial guidelines and the proper consideration by the Board of submissions on such guidelines by members of the public", and granted such leave to appeal: *Balz v. An Bord Pleanála* [2019] IESCDET 39 (Clarke C.J., Charleton J. and O'Malley J., 30th May 2018). In *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 367, [2019] 12 JIC 1202, the Supreme Court *per* O'Donnell J. considered the Wind Energy Development Guidelines 2006 and laid down how they were to be dealt with, allowing the appeal in doing so, albeit with some obvious reluctance. I then applied *Balz* in the substantive decision in the present case, *Nagle View v. An Bord Pleanála (No. 1)* [2024] IEHC 603 (Unreported, High Court, 1st November 2024). The applicant now seeks leave to appeal, demanding yet further clarification, although of what is not entirely clear.

Procedural history

2. A quick recapitulation of the procedural history is relevant. The application for leave to apply for judicial review was opened on 15th January 2024.

3. Leave to apply for judicial review was heard and granted on 29th January 2024 and liberty was given to amend the statement of grounds.

4. The amended statement of grounds was filed on 2nd February 2024.

5. A statement of opposition was filed on behalf of the board on 26th April 2024.

6. A statement of opposition was filed on behalf of the notice party on 9th May 2024.

7. The matter was then heard on 22nd October 2024, when judgment was reserved subject to agreement that the parties could, in sequence, add short written comments drawing attention to relevant exhibits. Further submissions were then received.

8. On 1st November 2024, the proceedings were dismissed in the No. 1 judgment. Following that, the applicant delivered submissions seeking leave to appeal, undated, but the file name suggests a date of 1st December 2024. The board delivered submissions dated 9th December 2024 and the notice party delivered replying submissions dated 11th December 2024. The leave to appeal application was listed for hearing on Monday 16th December 2024 and judgment was reserved on that date.

Applicable legal principles

9. There was no huge debate as to the applicable principles regarding leave to appeal which are well canvassed at this stage and referred to in the parties' submissions. The really crucial points are that, particularly for an appeal in the planning area where certainty is of statutory importance:

(i) A point must be one that **transcends the facts** and not merely one that arises in the fact-specific context of a particular case: see analogously and albeit non-precedentially, *Patrick McCaffrey & Sons Limited v. An Bord Pleanála* [2024] IESCDET 145 (Dunne, Hogan and Collins JJ., 29th November 2024).

(ii) An appeal should **resolve doubt rather than create doubt where none exists** – this is consistent with the views of Baker J. in *Ógalas v. An Bord Pleanála* [2015] IEHC 205, 2015 WJSC-HC 22497, [2015] 3 JIC 2008 (Unreported, High Court, 20th March 2015) that an appeal may be necessary in the public interest to resolve doubt. But if no doubt exists, the function of the appeal mechanism is not to introduce new uncertainty into the system. As the notice party submits here, "where the law is not uncertain, the public interest suggests an appeal is not warranted". Hence the fact that a point is "novel" is not determinative as to whether a point is suitable for the granting of a certificate: *Callaghan v. An Bord Pleanála* [2015] IEHC 493, 2015 WJSC-HC 4417, [2015] 7 JIC 2405 (Unreported, High Court, Costello J., 24th July 2015). And as Hyland J. observed in *Maguire T/A Frank Pratt & Sons (No. 2)* [2023] IEHC 209, [2023] 3 JIC 1307 (Unreported, High Court, 13th March 2023) at §27: "[c]learly the mere fact that an applicant for leave disagrees with a conclusion in the judgment cannot be relied upon to characterise the state of the law as being uncertain".

(iii) Questions about the **application of established principles** to particular facts are unsuitable for appeal in such a context: *Reid v. An Bord Pleanála (No. 3)* [2021] IEHC 593 (Unreported, High Court, 6th October 2021) at §7: "the issue of whether principles were correctly applied in a specific case is not normally a question of law of exceptional public importance and indeed is not a pure question of law at all." See also analogously and non-precedentially *Eco Advocacy CLG v. An Bord Pleanála*, *Keegan Land Holdings Limited*, *An Taisce - The National Trust for Ireland and Earth AISBL* [2024] IESCDET 62 (Charleton, Woulfe and Collins JJ., 27th May 2024).

(iv) The point should **not be launched in the abstract** but should actually arise on the facts. Thus the point of law must reflect a correct understanding of the decision of the High Court (*Monkstown Road Residents Association* [2023] IEHC 9 (Unreported, High Court, Holland J., 19th January 2023) at §9(d)).

(v) The point must **fall within the pleadings**: *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála & Ors.* [2024] IESC 28, [2024] 7 JIC 0402 (Unreported, Supreme Court, 4th July 2024) *per* Murray J. at paras. 39 *et seq*.

(vi) Any assertion of problems in practice caused by a judgment must be **backed up with evidence**: see analogously and non-precedentially, *Phoenix Rock Enterprises v. An Bord Pleanála & Ors* [2023] IESCDET 97 (Dunne, Baker and Donnelly JJ., 20th July 2023) at §22 and §30, which dealt with an argument that alleged uncertainty in the law was creating alleged difficulties in practice, but rejected this on the basis that there was "no evidence before the High Court that the quarry industry was being seriously affected by the issues in the case", and that "[t]he decision in this case was fact-specific to this quarry and it must be recalled that the role of the Supreme Court on an Article 34 appeal is not to give advisory opinions but to deal with the controversy at issue between the parties once the constitutional thresholds have been met". See also *McCaffrey and Sons Ltd v. An Bord Pleanála* [2024] IEHC 476 (Unreported, High Court, Gearty J., 26th July 2024) at §3.7.

(vii) The nature of the project and the risks of further delay are **factors going to the public interest**: see per McGovern J. in *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 387, 2015 WJSC-HC 6876, [2015] 6 JIC 1805 (Unreported, High Court, 18th June 2015) at §15 and §16. See also analogously and non-precedentially *Eco Advocacy CLG v. An Bord Pleanála, Keegan Land Holdings Limited, An Taisce - The National Trust for Ireland and Earth AISBL* [2024] IESCDET 62 (Charleton, Woulfe and Collins JJ., 27th May 2024): "The Court must have regard to the potential impact upon the notice party of any further delay in these proceedings".

The applicant's first proposed point of law

10. The applicant's first point is:

"Has the Board conducted as 'complete as possible' (Case C 50-09) an assessment of the noise impacts of the proposed development in circumstances where no assessment has been made of the character of the noise (and in particular amplitude modulation) that will be emitted from the wind turbines and or steps that could be taken to mitigate same?"

11. The problem with this is that it is based on a false premise. It was not the case that there was no consideration of the character of the noise. I can't improve on the notice party's submission here:

"18. Accordingly, it is not the case, as assumed by the Applicant in Question 1, that the Court held that the EIA Directive does not require any assessment or mitigation of noise character, including amplitude modulation. Rather, the Court held, on the facts of this case, that: (i) the Board did assess noise character, and in particular amplitude modulation,

> including as to whether a condition should be imposed to mitigate amplitude modulation, when carrying out the EIA, and (ii) the Applicant had not established any unreasonableness in the carrying out of that EIA. Question 1, therefore, does not arise on the facts as determined by the Court."

12. One thing that there is no doubt about for the purposes of an appeal or otherwise is that an applicant in judicial review bears the overall onus of proof: *per* Denham J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 at p. 743. Indeed the onus remains on an applicant even when in a constitutional challenge it is proved that constitutional rights have been interfered with – *O'Doherty and Waters v. The Minister for Health* [2022] IESC 32, [2023] 2 I.R. 488, [2022] 1 I.L.R.M. 421 *per* O'Donnell C.J. at para. 116. The applicant's problem here is that it didn't establish evidentially that there was a lacuna, incompleteness or unreasonableness in the board's assessment. That is something that has to be not merely asserted but proved.

13. Here the applicant didn't progress from the former to the latter. Thus one has to agree with the board's view of the conclusions of the No. 1 judgment which are rooted in that failure:

> "No certifiable issue of law of exceptional public importance can be identified in these findings, which are based on findings of fact as to what the Board did and the failure of the Applicant to establish evidentially the relevant grounds and thereby discharge the burden of proof that rests upon it."

The applicant's second proposed point of law

14. The applicant's second point is:

> "Has the Board properly considered the proper planning and development of the area of the development without assessing or mitigating the impacts of noise character of the proposed development on nearby sensitive receptors including the homes of the members of the applicant?"

15. Again this is based on a false premise of lack of assessment. The notice party correctly states the position:

> "22. Once again, it is not the case, as assumed by the Applicant in Question 2, that the High Court held that proper planning and development does not require the assessment of noise character on nearby dwellings. Rather, on the facts of this case, [the court] found that the Board's Inspector did consider noise impacts on nearby dwellings, including noise character, and that the Applicant had not established any error in the decision of the Board in that context."

16. The previous points apply to this question as well. There is a separate problem which is that failure to "properly conside[r] the proper planning and development of the area of the development" is not a pleaded ground. It therefore can't be a proper basis for an appeal.

The applicant's third proposed point of law

17. The applicant's third point is:

> "Does the decision of the Supreme Court in Balz -v- ABP only preclude the refusal to consider submissions in limine or does it have a wider application?"

18. The problem with that question is that it does not relate to the actual decision here. The No. 1 judgment does not hold that the only relevance of *Balz* is dismissal *in limine* of points. At para. 123(i), I addressed *Balz* more broadly saying "there is no analogy with *Balz* – on the facts the board did not dismiss anything *in limine*, did not fail to consider matters more up to date than the 2006 guidelines, did not consider itself bound by those guidelines, did not fail to consider the applicant's submissions and did not fail to consider the question of best practice".

19. Anyway the question is impermissibly abstract. The proposition that any given case represents is something to be addressed in the concrete factual situation of the next case and the one after that. One can't take a single case in isolation and demand that it be given a "wider" interpretation, in an academic manner that doesn't attempt to show what that involves, how the judgment proposed to be appealed failed to do that in the light of the actual pleadings on the issue and submissions actually made at the time (not creative reprogramming having sight of the judgment or other *esprit d'escalier* stuff after the event, what O'Donnell J. referred to as "the principle of delayed eloquence" (*The People (D.P.P.) v. Rattigan* [2013] IECCA 3, [2013] IECCA 13, [2013] 2 I.R. 221, [2013] 2 JIC 1901, [2013] 2 JIC 1905, at p. 245), how the result would have been different if there was such a "wider" interpretation, but above all how such an interpretation is a plausible cause of existing doubt that needs to be resolved. That's where the applicant comes up short.

20. Indeed as the board points out, it is totally unclear as to how I am supposed to have misinterpreted *Balz* or how this alleged misreading made any difference to the outcome. As the board puts it, the complaint is one of misinterpretation "in some unidentified sense".

21. If one wants a textbook example of a roving, write-an-essay type of appeal question, this is probably as good as it gets.

22. Another way of putting it is to say that the applicant is going nowhere with an appeal based on a complaint that established law was wrongly applied, so it has to dress that up as a complaint that established law was misunderstood. But in the absence of any basis for that, this looks and sounds like the former type of complaint in substance. If it waddles like a duck and quacks like a duck it just might be a duck.

23. As the board submits:

> "A general advisory opinion as to what Balz means is unnecessary and not a point of law in respect of which certification is required. Respectfully, there is no uncertainty arising in the law as regards what the Supreme Court judgment in Balz means. The judgment speaks for itself (see by analogy Hellfire Massy (No.5) at §41(vi) and 43; GR Wind Farms 1 Limited [2024] IEHC 390 at §23; B & Anor v. B.B & Ors [2023] IEHC 632 at §11; Odeh [2019] IEHC 574 at §16) and has been applied in the present case in a conventional manner without issue."

The public interest

24. Insofar as concerns the public interest, the applicant asserts at para. 27 of submissions that "the conflict between noise nuisance and energy production is bedevilling both the public concern and the wind industry". It alleges at para. 29 of submissions, that the effect of the No. 1 judgment is that "the Board can continue to ignore sound character in its assessment of noise".

25. The problem with these alarming statements and others of a similar ilk is that they are abstract complaints that don't reflect the findings that the board did not ignore sound character, and insofar as they are at all relevant to the facts here, evidence to demonstrate how the judgment creates the alleged or any problems has not been produced. As put by Gearty J. in *McCaffrey and Sons Ltd v. An Bord Pleanála* [2024] IEHC 476 (Unreported, High Court, 26th July 2024) at §3.7: "an evidence-free submission cannot be a basis for the certification of questions of law to an appeal court."

26. On the contrary, the public interest is strongly the other way. The development will provide significant renewable energy in line with local, regional, national and EU policy, backed up by legal instruments referred to in the No. 1 judgment. In the context of the climate emergency and of the need for energy independence in the light of the Russian Federation's full-scale criminal war of aggression against Ukraine, I agree with the notice party that "it is directly relevant that EU law has recognised renewable energy projects as being in the overriding public interest" as stated in Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652. So public interest in favour of such projects has a legal and not merely a policy basis.

27. These proceedings have delayed the project by almost a full year so far (with further delay a virtual certainty as a result of the inevitable application for leapfrog leave to appeal, an application that will take time to determine either way). There is no convincing counterbalancing reason why an appeal would be in the public interest at all, let alone in such a way as to outweigh the damage to the public interest of further delay in the matter.

28. While it was a huge step forward for clarity in the law, one delicate consequence of the decision in *Heather Hill v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313, [2022] 11 JIC 1004 (Murray J.) is that where unsuccessful environmental litigation causes prejudice or other harm to a developer or other private law entity, the court is for almost all practical purposes powerless to remedy that *via* costs against an applicant or an undertaking as to damages. That has got to be a factor that must at least slightly introduce some restraint into the setting of the bar for appeals in such cases. A costs-protected applicant can inflict as much economic harm as it likes on a developer (not that that is the intention as such, of course), and there are only the most limited set of instruments available to counter-balance that (indeed even in the case of a frivolous application, costs can't be prohibitively expensive). One such instrument is to be at least somewhat restrained in allowing such litigation to continue at multiple levels.

29. Finally, insofar as the applicant's real complaint is the allegedly outdated nature of the 2006 guidelines, the existence of old guidelines may create a policy problem (not something that can be resolved by an appeal in this case) but it doesn't in itself create a legal problem. As held in *Balz*, the guidelines are something to which regard should be had, but regard can also be had to more up-to-date material. From a legal point of view, there is nothing to see in that procedure, no crisis that demands appellate intervention, no ticking time bomb that appellate courts must rush to defuse. Courts can only facilitate the right of parties to the process to make updating submissions in any given case (a principle already established in *Balz*), and encourage the updating of policies (I take the opportunity to add such encouragement here, in case the Department is listening). Courts can't compel the latter to happen, in the absence of a justiciable standard (and this isn't a case pleaded along those lines). In principle, the adoption of updated policy guidelines is a matter for

Government, not something to be dictated from the Four Courts. In any event, as I say, it can't be an outcome of any conceivable appeal in the absence of a relevant plea.

Summary

30. In outline summary, without taking from the more specific terms of this judgment:

(i) the questions are based on non-factual premises that either mis-state the facts, do not arise in the present case, cannot be pursued given the absence of a factual foundation and the applicant's failure to produce evidence establishing its propositions, run contrary to established law (such as on the burden of proof), include unpleaded points, incorrectly characterise the judgment and/or are impermissibly vague;

(ii) the claim that the judgment will cause problems in practice is evidence-free;

(iii) insofar as concerns the public interest, the proposition that renewable energy projects support the public interest is reinforced by EU law and national policy;

(iv) further delay will prejudice the developer, something that the court can't remedy in costs or otherwise; at least some degree of restraint in allowing further appeal following failed litigation must be a factor going to the public interest; and

(v) the applicant's fundamental complaint as to the lack of existence of updated ministerial guidelines isn't anything that an appellate court can do anything about in any hypothetical appeal in the present case given that the cases isn't pleaded in a way that could rectify that.

Order

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

(i) the application for leave to appeal be dismissed; and

(ii) that order and the order dismissing the proceedings, with no order as to costs, be perfected forthwith as the final order in the proceedings with no further listing.