

## THE HIGH COURT

## JUDICIAL REVIEW

[2013 No. 486 J.R.]

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

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

P. PLUNKETT LIMITED, WESTMEATH COUNTY COUNCIL,  
CAVAN PEAT LIMITED, HART PEAT LIMITED, NANCY HENNESSY,  
EAMONN CREGGY, MICHAEL BRADY, JOHN PATRICK MURTAGH,  
JOHN REILLY, PÁDRAIG HILL, CLOVER PEAT

NAMED NOTICE PARTIES

JUDGMENT of Mr. Justice Meenan delivered on the 7th day of December, 2018.

**Introduction**

1. On 9 March 2018 the Court delivered judgment on an application for *certiorari* quashing the determination of the respondent made on 3 May 2013 (*Friends of the Irish Environment v An Bord Pleanála* [2017] IEHC 136). The applicant had sought a determination from the respondent as to whether certain peat extraction works in the townlands of Lickney/Newcastle, Doon, and Carlanstown, County Westmeath were or were not exempted development.

2. In the course of my judgment I set out the relevant provisions of the Planning and Development Act 2000 (as amended) (the Act of 2000) and reviewed correspondence that passed between the various parties involved.

3. Essentially, I found that as the determination of the respondent would affect the property rights of the owners and occupiers of the lands that such persons were required to be on notice of the application. At para. 30 I stated: -

"30. In applying the principles set out in the authorities referred to, it is clear to me that I cannot conclude that the decision of the respondent to dismiss the referral was either irrational or unreasonable. Given the absence of information as to who owned and/or occupied the lands in question and the basic legal requirement that such persons be on notice of the referral, I cannot reach any other conclusion."

4. At the hearing of the action, the applicant submitted that the respondent ought to have utilised the provisions of s. 250(1)(d) of the Act of 2000 whereby notice could be given to the relevant person(s) by affixing it in a conspicuous place on or near the land or the premises. Further, the respondent could dispense with the need to give notice where there are reasonable grounds for doing so and where such "will not cause injury or wrong" as is provided for in s. 250(7).

5. It was submitted by the respondent that had the necessary information been provided by the applicant the respondent could have made a determination and that this still remains the case. Indeed, it was pointed out in other cases that travelled in tandem with the instant case where the respondent had the necessary information it did make a determination (see *Bulrush Horticulture Ltd -v- An Bord Pleanála & ors; Westland Horticulture Ltd & ors -v- An Bord Pleanála & ors* [2017] IEHC 58).

**Points of law**

6. The applicant seeks to have the following points of law certified for appeal under s. 50A(7) of the Act of 2007.

(i) What extent, if any, must An Bord Pleanála take into account the requirements of Article 2(1) of the EIA Directive in exercising its discretion under s. 5 of the PDA 2000 and/or its powers under s. 250(1) (d) and/or s. 250(7)?

(ii) By what criteria are matters of "planning judgment" to be identified? In particular do matters of fair procedures come within that concept?

(iii) Where the Board decides not to exercise its powers under s. 250(1) (d) and/or s. 250(7) is it obliged to give any reason for not doing so?

Principles to be applied:-

7. Section 50A(7) of the Act of 2000 provides:-

"(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 Supreme Court 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 [the Court of Appeal]".

8. The leading authority on the principles to be applied in an application such as this are to be found in *Glancre Teoranta v. An Bord*

*Pleanála* [2006] IEHC 250 where MacMenamin J. set out criteria to be applied:-

- "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.
4. ...
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. These principles have been considered in a number of decisions. In particular I refer to the judgment of Clarke J. (as he then was) in *Arklow Holidays Ltd v. An Bord Pleanála* [2008] IEHC 2 where he stated at para. 4.3:-

"[T]his court's view as to the strength or weakness of the argument in favour of the intending appellants point of view on the issue concerned, is not relevant in determining whether it is an important point of law or not. Subject to the caveat that no certificate could be given where the law is clear and the intending appellant has, therefore, lost on the basis of an application of clear and established legal principles to the facts of his case, I agree that the court should not attempt to consider what the chances of the intending appellant on appeal might be."

10. In the context of the questions which the applicants seek to have certified for appeal I refer to the following passage, at para. 9, of the decision of Noonan J. in *Ross v. An Bord Pleanála* [2015] IEHC 484:-

"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."

### **Application of principles**

11. I now propose to examine, in turn, the three questions which the applicant seeks to have certified for appeal.

12. I set out these questions in para. 6 above and will follow the same numbering:

(i) I am satisfied that the point of law referred to in this question did not arise in the application before me and thus does not arise out of the decision I gave. There is no reference in the judgment to Art 2(1) of the EIA Directive and thus I can see no basis upon which I could certify this question.

(ii) Again, this point does not arise out of my judgment. The issue involved was not an alleged breach of fair procedures but rather a decision of the respondent that it did not have sufficient information to make the determination sought. I cannot see the "uncertainty" of the principle that if a determination is going to be made concerning a person's property rights that such person should be on notice of it. The fact that the respondent did not utilise other forms of notice, or indeed dispense with the need for notice, was within its discretion and there are well-established principles set out in the authorities as to the basis upon which a court can review that discretion. Therefore, I will not certify this point.

(iii) What is encompassed in this question is an alleged failure by the respondent to give reasons for not exercising its powers under the sections referred to. It must be pointed out that the applicant did not obtain leave to argue this point as so it is not dealt with in the judgment. Applying the decision of Noonan J. in *Ross v An Bord Pleanála*, referred to above, there is no basis for certifying this point.

### **Conclusion**

13. I am satisfied that the decision of this Court on the application for judicial review has not involved any point of law of exceptional public importance. The Court reached its decision by simply applying well established principles to the facts of the case. Indeed, as has been referred to at para. 5 above, if the applicant obtains basic information concerning the identities of the owners and/or occupiers of the lands involved then it can renew its application for a determination under s. 5 of the Act of 2000.