

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2013 No. 505 J.R.]**

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

**BETWEEN**

**ÓGALAS LIMITED (TRADING AS HOMESTORE AND MORE)**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**SLIGO COUNTY COUNCIL**

**FIRST NAMED NOTICE PARTY**

**AND**

**SLIGO CHAMBER OF COMMERCE**

**SECOND NAMED NOTICE PARTY**

**AND**

**PATRICK DOHERTY ANSON LOGUE AND WILLIAM MOFFETT C/O THE JOINT RECEIVERS KEIRAN WALLACE AND PATRICK HORKAN**

**THIRD NAMED NOTICE PARTIES**

**JUDGMENT of Ms. Justice Baker delivered the 20th day of March, 2015**

1. This judgment relates to an application by the applicant for a certificate of leave to appeal a decision delivered by me on the 23rd October, 2014 by which I refused to quash the decision of An Bord Pleanála made on the 23rd May, 2013 pursuant to s. 5 of the Planning and Development Act 2000 (the Act of 2000).

2. There is no dispute between the parties as to the legal principles applicable to the granting of a certificate from the court to appeal a decision under the Planning Code, and the law is well established. The application is made to the court which delivers the judgment at first instance pursuant to s.50A(7) of the Act of 2000 (as amended). An appeal lies only with leave of the court, which leave shall only be granted where the court certifies that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal be taken. By virtue of s.75 of the Court of Appeal Act 2014 reference to the Supreme Court in s. 50A(7) of the Act of 2000 are to be construed as a reference to the Court of Appeal.

3. Two questions then arise for this court in deciding whether to grant the certificate namely:

- a) Whether a point arises of exceptional public importance.
- b) That it is desirable in the public interest that an appeal should be taken.

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

5. The applicant seeks a certificate on what it asserts is a point of law, and one of exceptional public importance, and this was initially formulated as follows:

*"In what circumstances is a decision of An Bord Pleanála pursuant to s. 4 of the Planning and Development Act 2000 not vitiated by identifiable errors in the report of its appointed Inspector?"*

6. The question has been reformulated following argument in the course of the hearing before me and the following is now the question proposed:

*What are the appropriate criteria for determining whether a decision of the Board under s.5 of the Planning and Development Act 2000 is invalid by reason of identifiable errors of law in the inspector's report, and were those criteria applied correctly in the present case?*

### **The judgment sought to be appealed**

7. I delivered judgment on the 23rd October, 2014 in which I refused the applicant's application for an order that the Board had erred in coming to a decision made pursuant to s. 5 of the Act of 2000 regarding the use by a store operated by the applicant at Sligo Retail Park, Sligo. In the course of my judgment I found that the Inspector appointed by the Board had made some errors in her analysis, and in particular she fell into an interpretative error in that she incorrectly placed emphasis for the purposes of her analysis on the 2012 Retail Guidelines, rather than the applicable Guidelines, those of 2000.

8. I held however that while the Inspector did fall into this error, that the error was not reflected in the decision of the Board, and that the Board engaged in a reasoned analysis of the material before it, came to a decision which was within jurisdiction, and did not slavishly follow the Inspector's report such that the decision of the Board was not impacted by the identified errors in this report.

### **The submissions of the applicant**

9. The applicant argues that a point of law arises from my decision, namely one as to the methodology of the Board, and if and how it must expressly distance itself from erroneous reasoning of an inspector. In particular it is argued that it is uncertain whether the judgments of Ryan J. in *Michael Cronin (Readymix Limited) v. An Bord Pleanála* [2009] 4 I.R. 736 and of Kelly J. in *Cork City Council v. An Bord Pleanála* [2007] 1 I.R. 761 require the Board to expressly, clearly and unambiguously distance itself from erroneous reasoning of its Inspector, or whether in the light of *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, it is sufficient for the Board to demonstrate that it had some relevant evidence to reach the conclusion that it did, argued by the applicants to be the approach favoured of O'Neill J. in *M & F Quirke and Sons & Anor. v. An Bord Pleanála & Ors.* [2009] IEHC 426.

10. It is argued that the test as explained in *O'Keeffe v. An Bord Pleanála* is not sufficiently nuanced to deal with the question that arises the present context, namely where an identified error is found in a report of an inspector, what method must be employed by the Board to show that it has properly distanced itself from the error, and whether the Board ought to provide sufficient information in its decision to indicate in a clear and unambiguous matter how it had dealt with and distinguished such errors.

### **The submissions of the respondent**

11. Counsel points me to *M & F Quirke and Sons & Anor. v. An Bord Pleanála & Ors.* where O'Neill J. held that an error in an inspector's report could not vitiate the entirely separate exercise of the Board by itself contained and separate jurisdiction to make a decision. He said the following:-

*"The status of the error in question was no more than that of any other piece of mistaken information which the respondent was free to consider and reject in the overall discharge of its statutory function. The decision of the respondent, on its face, contains no such error"*

12. Counsel argues that the different rules of the Board and the inspector are clear. In *Craig v. An Bord Pleanála* [2013] IEHC 402 Hedigan J. set out with admirable clarity the different roles as follows:-

*"The inspector recommends but the Board decides. The decision is given by the Oireachtas to the Board and not to the inspector. That such a scenario is contemplated by the planning infrastructure provided by law is demonstrated by the provision requiring the Board to state its reasons when it does not follow the inspector's recommendation."*

13. He also gives the example of Clarke J. in *Maxol Limited v. An Bord Pleanála* [2011] IEHC 537 where he drew an inference that the reasoning of the Board was the same as the reasoning of the Inspector, but he did so because he found no evidence to suggest that the view adopted by the Board itself differed from the views contained in the Inspector's report.

14. Kelly J. in *Cork City Council v. An Bord Pleanála* has also clarified the law in this area. After reviewing the inspector's report Kelly J. concluded that the Inspector had fallen into error in interpreting a development contribution scheme made by Cork City Council, and that the misinterpretation of the scheme found its way into the decision of the Board which he held was therefore wrong in law. He drew an inference that the Board had adopted the reasoning of the inspector in arriving at its decisions, and he did so because the Board did not differ from the recommendations made by her, nor was there an obvious dissent from her line of thought. Kelly J. in that case identified the process of reasoning and the interconnection between the fact-finding exercise of the inspector and the decision making process of the Board, and in doing so he identified the legal test which a court on review would apply, a test which is on all fours with the test explained by Clarke J. and Hedigan J. in the cases I mentioned above, and which I myself applied in the decision in the instant case.

### **Discussion**

15. I do not accept that there is uncertainty in the law. The judgment of Clarke J. in *Maxol Limited v. An Bord Pleanála* is perfectly clear, and requires some evidence to be identifiable if an inference is to be drawn that the Board did not wholly adopt the reason of its Inspector. Hedigan J.'s statement of law and his identification of the differing roles of the inspector and the Board also admits of no uncertainty, nor can I find any conflict or difference between that legal test as identified by Hedigan J. and those identified and applied by O'Neill J. in *M & F Quirke and Sons & Anor. v. An Bord Pleanála & Ors.* and by Clarke J. in *Maxol Limited v. An Bord Pleanála*.

16. There is no legal uncertainty as to the respective roles of the inspector and the Board, and I cannot put the test any clearer than it was put by Hedigan J., namely that the Board decides and the inspector recommends. The inspector's recommendation is part of the evidence or part of the mix of evidence or part of factors that are taken into account by the Board but the decision must always be the decision of the Board.

17. I take the view that there is no legal uncertainty as to how the Board must operate and how it must treat the Inspector's report. If, and this is apparent from some of the examples that I have mentioned above, the Board does not distance itself from an inspector and if the inspector's report contains an error then the Board's decision may be vitiated. As long as the Board acts in accordance with its functions and decides the case on the basis of the evidence before it, including an inspector's report but also including any other report, arguments and submissions before it, it is correctly performing its statutory function.

18. The inspector plays a central role in the planning process and one that has been the subject of a number of High Court decisions. The interplay between the findings and recommendations of an inspector and the final adjudicative process is one of importance to the planning process generally, and is one that potentially arises in many planning decisions at first instance and before the Board.

19. The statutory function of the Board is adjudication and the point sought to be certified as appropriate to an appeal is how that adjudication should engage with the inspector's report, and in that regard one can envisage a spectrum of decisions where the Board

agrees with a report of an inspector and adopts his or her recommendations, and cases where the Board departs from them in whole or in part. In all of these cases the Board engages with the evidence and recommendations by way of a process of adjudication. I do not accept that there is any uncertainty in current law as to the means by which a deciding body has to show its reasoning process. The decision maker has to reach a reasoned decision based on the evidence and it may for that purpose, and depending on the complexity of the matter, require to set out in detail the weight it gives to certain facts and recommendations. The Board must do so in the same way as any other body charged with an adjudicative function, and there is nothing unique in the function vested in the Board that requires clarification by an appellate court of how the adjudicative process ought to be engaged.

20. Further, the applicant argues that if the jurisprudence relating to the requirement on a deciding body to give reasons is to be properly incorporated into the process, then the jurisprudence requires that the Board expressly identify those errors and expressly distance itself from them. The applicant argues that this particular point is one of law, one as yet unresolved by the Irish courts, and of sufficient importance in the process in general to merit a certificate.

21. With respect to the applicant's arguments I cannot accept that counsel is correct. This is because there is no uncertainty in the law with regard to the requirement on the part of a decision making body to come to a reasoned decision, and there is no uncertainty in the law as to the respective roles of an inspector and the Board in the decision making process. It goes without saying that these two clearly established lines of authority will, in a given case, come to be engaged and whether one or both arise in a given case is attributable to either the particular factual nexus, or perhaps the ingenuity of counsel. There can however be no uncertainty in the minds of those working with the legislation and the decision making role of An Bord Pleanála that that role must be understood in the context of the general law that governs the making of administrative decisions, and the general law that governs both the requirement that reasons be given and that decisions be made on reasonable or not irrational grounds.

#### **Question of fact**

22. Further, it seems to me that the question sought to be certified is really a question of fact, namely whether I was correct in my finding of fact that the Board did properly distance itself from the errors in the Inspector's report, or, as I put it, did not "slavishly follow" the Inspector's report. That particular question is specific to this case, arises primarily as a question of fact, and insofar as there is a mixed question of fact and law it is not one of general legal importance or in respect of which there is an absence of clarity.

23. I accept the argument by counsel for the respondent that there was evidence before me of the very type that was missing in *Maxol Limited v. An Bord Pleanála*, and I identified that evidence in my judgment, and noted the difference between the two approaches and concluded from the sequence of documents, that the omissions in later documents pointed quite clearly to the fact that the Board had considered the interplay between the two sets of guidelines and correctly adopted the relevant guidelines for the purpose of its exercise.

#### **Conclusion**

24. In the light of the above it seems to me that I must refuse the certificate and I do so on the following grounds. The point sought to be certified is not a point of law in respect of which clarification is required, and no differing approaches or methodologies have been identified before me that would suggest that recent judgments identify two or more different approaches to interpretation. Further, the point raised is in truth a question of fact arising from my decision.

25. In all the circumstances I refuse the certificate.