Neutral Citation [2015] IEHC 387

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No. 685 J.R.]**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000,**

**AND IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**DUNNES STORES**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**INDEGO**

**FIRST NAMED NOTICE PARTY**

**AND**

**SOUTH DUBLIN COUNTY COUNCIL**

**SECOND NAMED NOTICE PARTY**

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 18th day of June, 2015**

1. This is an application brought for leave to appeal an order of this Court made on 21st May, 2015. In that order, the court refused the applicant's application for leave to apply by way of judicial review to challenge the decision of South Dublin County Council to grant planning permission to Indego, the first named notice party and also to join South Dublin County Council as respondent to the judicial review proceedings and amend those proceedings to add additional relief and grounds against both the Council and An Bord Pleanála. The court also refused an application to extend time for bringing the application to join South Dublin County Council. The judicial review application concerned a determination of the meaning of s. 37(1)(b) of the Planning and Development Act 2000, and this Court determined that the meaning of the section was clear and unambiguous.

2. The application now before the court is brought pursuant to s. 50A(7) of the Act which states:-

> *"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 to the Supreme Court."*

While this would now encompass the Court of Appeal, it is likely that in cases certified for appeal on the grounds that they involve a point of law of exceptional public importance and that the appeal is desirable in the public interest that such matters would go straight to the Supreme Court. This would involve an application to the Supreme Court having regard to Article 34.5.4o of the Constitution.

3. The point of law advanced by the applicant for consideration of the Appeal Court is:-

> *"Whether section 37(1)(b) of the Planning and Development Act 2000, which provides that the decision of An Bord Pleanála on appeal shall operate to annul the decision of the planning authority as and from the time when it was given, precludes challenging the decision of the planning authority after the Board has made its decision when the grounds of challenge against the planning authority raise grounds of pre-determination bias and/or a reasonable apprehension that the planning application has been prejudged which only came to light after the Board had made its decision."*

4. Objection has been taken to the question posed on the grounds that it assumes certain matters to be established whereas these are in dispute. The notice parties do not accept that there was any pre-determination of the planning application.

5. The principles governing an application for a certificate are those set out by the High Court in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, and *Arklow Holidays Limited v. An Bord Pleanála* [2008] IEHC 2. These principles are as follows:-

> (a) the decision must involve a point of exceptional public importance;
>
> (b) it must be desirable in the public interest that an appeal shall be taken to the Supreme Court;
>
> (c) there must be an uncertainty as to the law; and

(d) the importance of the point must be public in nature and transcend the individual facts and parties of any given case.

6. While the applicant argues that no certificate is required in order to appeal the decision to refuse to extend time under s. 50(8), it seems to me that in this particular case the application for an extension of time is so bound up with the issues in the judicial review application that an appeal on that point could not have any real meaning if the substantive judicial review proceedings could no longer continue. In any event, this is probably a matter for the appeal court.

7. The applicant argues that if the court is correct in holding that s. 37(1)(b) precludes a challenge of a decision of a planning authority after the Board has made its decision, it effectively means that a planning authority can act with impunity safe in the knowledge that if no party finds out about their decision being actuated by bias or fraud until after the Board makes its decision, that its decision making process is immune from judicial scrutiny. They say that this is a matter of ***exceptional public importance***.

8. The applicant says that the proposed point of law involves ***a point of law that is of public interest*** which should be decided by the appellate court. Their argument is based on the following:-

(i) A failure to grant leave will mean the integrity of the planning process is undermined and the planning authority is free from scrutiny.

(ii) A failure to grant leave will mean that a planning authority can act with impunity including where fraud has taken place.

(iii) If s. 37(1)(b) does not permit a decision of planning authority to be quashed a legislative amendment may be needed.

(iv) A planning authority could obtain a pecuniary advantage where its decision is not permitted to be challenged.

9. The second named respondent (SDCC) argues that the Planning Acts established a scheme whereby an applicant has two separate and distinct considerations of its planning application by two separate and distinct bodies. If a person is dissatisfied with the planning authority decision, he can either judicially review the decision or go to the Board who will look at the matter *de novo*. Thus, the planning authority's decision is not free from scrutiny and the integrity of the planning process is protected by s. 37 of the Act. In order to achieve an effective functioning of the system, it is important that from the time the Board's decision is made, the planning authority's decision is treated as never having existed and is annulled.

10. Counsel for the second named notice party (SDCC) argued that, effectively, the applicant was trying to raise the planning authority's decision from the dead so as to kill it again. The court was referred to *O'Brien v. PIAB* [2007] 1 I.R. 328, as authority for the proposition that to revive a decision that has been clearly annulled is a waste of court time and resources.

11. The first named notice party (Indego) argued that the section involved a trade off between a situation where every decision of a planning authority could go to the Court of Appeal and/or Supreme Court and the public interest in ensuring that the planning system operates in a timely manner. Counsel for the first named notice party argued that s. 37(1)(b) is unambiguous and perfectly clear and there cannot be any question as to what it means.

12. On the subject as to whether there is any ***uncertainty as to the law***, the applicant relies on the judgment of McKechnie J. in *Beades v. Dublin County Council* [2005] IEHC 406 at para. 70 – 72. The applicant argues that McKechnie J. had stated that if there is a question in relation to the process as to whether natural and constitutional justice had been complied with, this is a matter that can be investigated by the court and is not immune from judicial scrutiny. On reading the text of his judgment, it is clear that this was not the question which arose for his consideration and the remarks are *obiter*. In my earlier judgment in this case, I held that the *Beades* judgment was distinguishable from this case on the facts. That decision was made almost ten years ago and long before the enactment of section 37(1)(b). I have held that the terms of that section are clear and unambiguous and that there is no basis upon which the court can go beyond the provisions of the Act. The equivalent provisions of the previous planning legislation, s. 26(5)(b) of the Local Government and Planning Act 1963, are the subject of an authoritative judgment by the High Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The notice parties submit that the judgment in this case is entirely consistent with *O'Keeffe*. The respondent also relies on the dicta of Clarke J. in *Arklow Holdings Limited v. An Bord Pleanála*, where he said at para. 4.3:-

> *"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 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 applicant on appeal might be."* (Emphasis added)

13. In short, the notice parties argue that as s. 37(1)(b) is clear and unambiguous, no certificate should be granted. The court was referred to *Arklow Holdings Limited v. An Bord Pleanála* (Supra) where Clarke J. stated:-

> *"…the whole basis on any appeal is that this court may be wrong and I have to assess the grant or refusal of a certificate in this case on the basis that I may be wrong unless, perhaps, it might be said that the law was so clear that there would be no legitimate basis for requiring a ruling from the Supreme Court on this matter."* (Emphasis added)

14. The jurisdiction to certify a case such as this must be exercised sparingly. See *Glancré Teoranta v. An Bord Pleanála* (Supra). In this case, I have already held that the section is clear and unambiguous and in those circumstances, it is difficult to see how any substantial grounds could be said to exist that might involve a point of law of exceptional public importance.

15. In circumstances where the court has held that s. 37(1)(b) is clear and unambiguous, there is no difficult point of law in which the views of the Court of Appeal or Supreme Court are required for the public interest. The court is also entitled to take into account the nature of the development and the issues involved in the case and the potential consequences of a significant further delay in the matter being resolved by the court.

16. Merely raising a question as to a point of law does not point to its uncertainty. The decision of this Court on the judicial review applies the legislative scheme in an unexceptional fashion and was stated to be clear and unambiguous. In those circumstances, there is no difficult point of law in which the views of the Court of Appeal or Supreme Court are required for the public interest. Indeed, in considering the public interest, the court has to take into account that there are competing public interests at stake and not simply those of the applicant. The section at the heart of these proceedings is one designed to meet the public interest in having any issues dealt with expeditiously and with certainty to ensure that major public infrastructural projects are not unnecessarily delayed. I see nothing in the points sought to be certified that transcend this case nor that it is of exceptional public importance. Furthermore, there is no uncertainty as to the law, given that I have held that the section is clear and unambiguous.

17. I am not satisfied that the applicant meets the test set out in *Glancré Teoranta v. An Bord Pleanála or Arklow Holdings Limited v. An Bord Pleanála* and I therefore refuse leave to appeal.