THE HIGH COURT

COMMERCIAL

[2017 No. 558 J.R.]

[2017 No. 144 COM.]

BETWEEN

KLAUS BALZ AND HANNA HEUBACH

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

CLEANRATH WINDFARM LTD.

SECOND NAMED NOTICE PARTY

Judgment of Mr. Justice Robert Haughton delivered on the 1st day of October, 2018.

1. In my judgment delivered on 30th May, 2018 I dismissed the applicants claim for judicial review of the decision of the respondent ("the Board") dated 25th April, 2017 and recorded in the Board Direction dated 16th May, 2017 granting permission to the second named notice party Cleanrath Windfarm Ltd. ("Cleanrath") for the construction of an eleven turbine windfarm at Cleanrath, Inchigeelagh, Co. Cork ("the impugned decision").

2. This judgment relates to an application by the Applicants for a certificate for leave to appeal, pursuant to s. 50A(7) of the Planning and Development Act, 2000 ("PDA 2000"), as inserted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, and as amended by s. 74(1) of the Court of Appeal Act, 2014. As so amended s. 50A(7) provides:-

> "The determination of the Court of an application for s. 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 the 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 shall be taken to the [Court of Appeal]".

3. It was not in dispute that the principles relating to consideration of certification under s. 50A(7) are those set down by Clarke J. (as he then was) in *Arklow Holidays Ltd. v. An Bord Pleanála* [2008] IEHC 2, and MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250. In *Arklow Holidays* Clarke J. stated:-

> "2.2 It is clear from the decisions of the Supreme Court in *KSK v. An Bord Pleanála* [1994] 2 I.R. 128, *Irish Asphalt v. An Bord Pleanála* [1996] 2 I.R. 179, and *Irish Hardware Association v. South Dublin County Council and Others* [2001] 2 I.L.R.M. 291, together with numerous decisions of this Court, that the policy behind the section is that there should be a greater degree of certainty and expedition in the determination of planning judicial reviews.
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> 2.3 In a number of decisions of this Court the requirements of the section have been analysed in some detail and it is clear that a number of tests must be met:-
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> (i) There must be an uncertainty as to the law in respect of a point which has to be of exceptional importance; see for example *Lancefort v. An Bord Pleanála* [1998] 2 I.R. 511.
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> (ii) The importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case. *Kenny v. An Bord Pleanála (No. 2)* [2001] 2 I.R. 704. It is the case that every point of law arising in every case is a point of law of importance. *Fallon v. An Bord Pleanála* [1992] 2 I.R. 308. That, of itself, is insufficient for the point of law concerned to be properly described as of "exceptional public importance".
>
> (iii) The requirement that the court be satisfied "that it is desirable in the public interest that an appeal should be taken to the Supreme Court" is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance. See *Kenny (No. 2).* On that basis, even if it can be argued that the law in a particular area is uncertain, the court may not, on the basis, inter alia, of time or costs, consider that it is appropriate to certify the case for the Supreme Court. *Arklow Holidays Ltd. v. Wicklow County Council and Others* (Unreported, High Court, Murphy J., 4th February, 2004)."

4. In *Glancre Teoranta*, MacMenamin J. reviewed the authorities and at pg.4 stated:-

> "I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.
>
> 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. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (*Kenny*).

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."

5. To this it should be added that the court should stand back from its principal judgment and assess the certification application from a neutral point of view. Thus if another view of the law is reasonably possible, it is not for the court considering certification to assess the merits of the arguments or the strength of the appeal – see comments of Costello J. in *Callaghan v. An Bord Pleanála* [2015] IEHC 493.

6. The commercial implications of the further delay that an appeal will entail may be a consideration where the public interest is engaged. As Costello J. observed in *Callaghan* :

8. In the case of *People Over Wind v. An Bord Pleanála & Ors* [2015] IEHC 393 , Haughton J. was asked to certify points of law in relation to a judicial review relating to a large wind farm which was to be developed by Coillte. In opposing the certificate, Coillte argued that the inevitable delay consequent upon such an appeal would have very damaging commercial consequences such that the development might in fact not proceed. It was pointed out that the proposed development, if carried out, would contribute very significantly to the renewable energy targets of the State. Haughton J. held that essentially this was a private commercial interest and while it was a factor to be taken into account in the court's assessment as to whether or not the grant of a certificate was in the best interest of the public, it was not determinative.

9. Similar considerations apply in this case. The proposed development, if carried out, is likely to contribute significantly to the State's renewable energy targets. However, it is a private development being carried out for commercial gain. Therefore, the fact that the delay may have an extremely detrimental impact upon the commercial viability of the project is a factor to which the Court may have regard but it is not determinative of the matter, notwithstanding the potential to contribute significantly to the State's renewable energy targets."

Questions for which Certification is Sought

7. The applicant seeks certification in respect of three questions:-

(1) Whether the obligation on the Board, under Article 3 of the EIA Directive (and the corresponding domestic requirement of s. 171A PDA) includes an obligation to assess, investigate, examine, analyse and evaluate each of the submissions or observations validly made to the Board pursuant to Article 6 of the EIA Directive, including submissions based upon

a. credible scientific evidence relevant to the environmental effect of windfarm noise;

b. scientific criticism of the 2006 Wind Energy Development Guidelines ("the 2006 Guidelines");

c. scientific criticism of ETSU-R-97.

(2) Whether the Board is permitted to exclude from its assessment (and in exercising its statutory discretion whether or not to apply the 2006 Guidelines), on the basis that they were not "*relevant planning considerations*", scientific criticisms of the Guidelines and ETSU-R-97.

(3) Whether the obligation on the Board under Article 8 of the EIA Directive, to consider certain information in the development consent procedure, form part of the process of impact assessment required under Article 3 of the EIA Directive."

Questions 1 and 2

8. These two questions are similar, the main difference being that Question 1 specifies the obligations of the Board arising under Article 3 of the EIA Directive and the corresponding domestic provision in the PDA 2000, s.171A, whereas no separate legal basis is

mentioned in Question 2. In their written submissions the applicants noted the overlap between these questions and at hearing Counsel for the applicants further accepted this overlap, and that the legal basis for both questions is Article 3, and the obligations that it creates as interpreted by the ECJ, and he argued the two together. I therefore regard question 2 as a subset or partial restatement of question 1, and I propose to address them together.

9. In essence the questions concern the statement in the Inspector's report, which (as I found) must be taken to have been adopted by the Board, that the scientific materials relied upon by the applicants to suggest that the 2006 Guidelines, and ETSU-R-97 were outdated/not fit for purpose need not be considered as they were not "a relevant planning consideration." The applicants seek to appeal on the basis that, contrary to my decision, these scientific materials had to be considered and evaluated as part of the EIA, or at least had to be considered so that the Board could determine whether or not to apply the 2006 Guidelines in carrying out the EIA , it being common case that the Board could decide not to apply them in any particular case.

10. The court's decision on this aspect includes discussion of whether, as a matter of EU law the Board was obliged under Article 3 of the EIA Directive (and the corresponding domestic requirement of s. 171A PDA 2000) to examine and assess all the scientific evidence presented on the applicant's behalf as to the effect of windfarm noise, and specifically scientific criticisms of the 2006 Guidelines and ETSU-R-97. The applicants accepted the court's interpretation of the Article 3 duty as being to assess, examine, analyse and evaluate the "substance of the information" (the phrase used in *Commission v. Ireland,* Case C-50/09, at para. 40), and accepted in general terms the court's decision that the Article 3 obligation "extends only to submissions that are of substance and bear on the direct or indirect effect of the proposed development", (paragraph 68 of my judgment), and extends only to information that "relate(s) to the effects of the particular project for which approval is sought" (para. 61). However, the applicants argued that this Court took too narrow an interpretation and misconstrued the Board's obligations under Article 3 by treating as irrelevant the scientific information tendered by the applicants because it challenged the 2006 Guidelines and the science on which they are based.

11. The applicants argued that the Board must consider the scientific evidence submitted in order to decide whether or not to apply the 2006 Guidelines (which it is not bound to apply). Secondly it was argued that to ignore such evidence would mean that Ireland could, by domestic guidelines, unlawfully limit and circumscribe its EU law obligations to perform EIA to provide the high level of environmental protection which is the objective of the EIA Directive. Thirdly it was argued that to ignore it would conflict with the Board's obligation to "… undertake both an investigation and analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned …" (*Commission v. Ireland*, Case C-50/09, paragraph 40). Counsel argued that if this involves the Board making a 'value judgment' in respect of the continuing scientific validity of noise guidelines then that is, contrary to what is stated in para.70 of my judgment, precisely the kind of judgment that the Board as an expert tribunal is expected to make.

12. Thus it was argued that in the light of *Commission v Ireland* the court's decision creates uncertainty that requires to be clarified on appeal. It was urged that this uncertainty will now arise not only in windfarm planning applications where objectors may challenge the relevance and applicability of the 2006 Guidelines as being out of date, but also in any planning matter where government guidelines have to be considered by a planning authority.

Discussion

13. The applicants' contention, as pleaded and pursued at hearing, was that the 2006 Guidelines are not a strong enough protection against turbine noise effect, and they relied on the various scientific papers that were submitted. This raised two issues: firstly, whether as a matter of law the Board was entitled to rely on the 2006 Guidelines which were alleged to be deficient; secondly whether as a matter of substance in respect of this proposed development there should be lower noise limits than those set out in the 2006 Guidelines.

14. It is only the first of these issues that was the subject of my judgment (paragraphs 55-76) and is the basis for requesting certification in questions 1 and 2. I accept the Board's submission that this was in substance an argument about vires, to the effect that the Board could and should have addressed the scientific evidence and decided that the 2006 Guidelines were not "fit for purpose" and should not be applied. It was not in substance an argument about EU law and whether or not the Board carried out an EIA of the noise effects of the proposed development in accordance with Article 3.

15. The Inspector concluded that the applicants' submissions that the 2006 Guidelines were not "fit for purpose" based on the body of scientific criticism of ETSU-R-97 submitted was "not a relevant planning consideration", and I found that this was the reason why the Board did not engage in detailed analysis of the scientific papers (paragraph 72) [The Inspector and Board did engage with the scientific papers insofar as they concerned the phenomenon of "amplitude modulation" – and although the applicants' complaints in respect of such treatment were rejected by this court it is noted that no question for certification was pursued in respect of that subject.]. In paragraph 71 I decided, following in part the reasoning that I expressed in *Element Power v An Bord Pleanala* [2017] IEHC 550 (a decision that was not appealed) as a matter of domestic law, that the Board could not decide that the statutory 2006 Guidelines were not to be applied as this would be *ultra vires* the powers and functions of the Board. I held that "….it is difficult to see how [the Board] could come to a fully reasoned policy decision to override a statutory guideline".

16. In my reading of questions 1 and 2 the applicants have not sought certification in respect of any question suggesting that the decision was wrong in law on the issue of vires under domestic law. I have therefore come to the conclusion that the points of law based on Article 3, and a suggested conflict with the interpretation of Article 3 obligations in *Commission v. Ireland*, that the applicants seek to pose in questions 1 and 2, do not emerge from the real case made on the pleadings or at hearing, and fail to engage with the reasoning expressed in paragraphs 70-72 of my judgment.

17. Furthermore I am not satisfied that the law is uncertain, or that my decision is in such conflict with *Commission v Ireland* as to create uncertainty. The core reason for my decision is expressed in paragraph 68 where, after citing with approval certain passages from Costello J. in *O'Brien v An Bord Pleanala* [2017] IEHC 733, I stated:

> "68. I find this point persuasive, and it tends to confirm the view of this Court that the EIA Directive does not go so far as to require a planning authority to conduct a thorough evaluation and assessment of *every* [*sic*] submission put forward to it. Rather the Board must take all submissions into consideration, but the duty to examine, analyse and evaluate extends only to submissions that are of substance and bear on the direct and indirect effect of the proposed development."

As stated early in this judgment, fundamentally the applicants do not disagree with this statement of principle, and I am of the view that it does not conflict with the judgment of the ECJ in *Commission v Ireland*.

18. Moreover, although it may well have occurred or be possible in the future, no evidence was presented to the court to demonstrate that root and branch objection to the 2006 Guidelines (based on ETSU-R-97 being outdated), has been raised in

submissions in respect of other windfarm planning applications or other windfarm judicial reviews, or that it arises on a frequent basis. It must therefore be questioned whether the suggested points of law would resolve "other cases". Even if a point of law of public importance could be said to arise, I am not satisfied that it is of such exceptional public importance that it transcends the facts of the present case.

Question 3
19. This question as worded is somewhat vague. It appears to concern the sequences mandated by the EIA Directive for planning authorities for the examination and analysis required for carrying out EIA under Article 3, on the one hand, and the Article 8 obligation to "take into consideration in the development consent procedure" the results of consultation and information gathered under Articles 5, 6 and 7, on the other hand.

20. It is undoubtedly the case that in *Commission v Ireland* C-50/09 the court said that obligations under Article 8 arise at the end of the decision-making process, and are not to be confused with the Article 3 assessment which must be carried out "before the decision-making process" (paragraph 40). However, although these are distinct obligations, it has never been contended, nor do the applicants allege, that this means there must be an entirely separate preliminary process i.e. that the EIA must be completed and the result published before the planning authority embarks on a second process and considers the relevant information and decides whether to approve the proposed development. Although this may be the practice provided for in most other EU member states, our domestic law implementation of the EIA Directive means that after all the requisite information has been gathered a planning authority can undertake EIA (and, indeed Appropriate Assessment), and, if satisfied with those assessments, can proceed to give a development consent decision *without embarking on a new process*, and can give its decision and reasons on all aspects on the one occasion/in the one document.

21. There is no uncertainty as to this legal position, and no authority was cited to suggest that the distinct obligations under Articles 3 and 8 must be processed entirely separately. *Commission v Ireland* was concerned with the failure of the State to expressly transpose Article 3 to ensure the proper carrying out of EIA, and not with any criticism of the statutory provisions that allow EIA and AA, where these are required, to be undertaken within the same development approval process.

22. Usually much of the information gathered in the planning application/appeal process that is relevant to direct and indirect effects of a proposed development, which must be subjected to "examination, analysis and evaluation" for the purpose of EIA, will also be relevant to AA and to consideration of consent under Article 8. Given this overlap in information there is merit in a process that enables the planning authority to undertake all its consideration and analysis, and to take the component decisions that it is required to take, in what might loosely be described as a combined process, and to deliver its combined decision at the one time in one primary document.

23. In the view of the court this is what occurred in the present case. In the Board's Direction of 16 May, 2017, and in its Decision of 19 May, 2017 its overall decision and "Reasons and Considerations" are given, and then sections are devoted sequentially to "Appropriate Assessment Screening", "Appropriate Assessment", "Environmental Impact Assessment" and finally "Proper Planning and Sustainable Development Considerations". It is worth recalling what the Board said under EIA:

> "Environmental Impact Assessment
>
> The Board considered that the Environmental Impact Statement submitted with the application, the additional documentation submitted at application and appeal stage and all other submissions on file, were adequate in identifying and describing the direct, indirect, secondary and cumulative effects of the proposed development. The Board adopted the Inspector's report on the environmental impact of the development and concurred with his conclusions. The Board completed an environmental impact assessment and concluded that the proposed development, subject to compliance with the mitigation measures proposed, and subject to compliance with the conditions set out below, would not have unacceptable effects on the environment."

The Board is here stating that it carried out and completed an EIA, and while it is not explicitly stated that this was done before it proceeded to consider all information submitted and decided whether to approve the proposed development, this is implicit from the wording and the fact that in the next section the Board proceeds to deal with "Proper Planning and Sustainable Development Considerations". It is also apparent when the Inspector's report is taken into account in the overall consideration of the impugned decision.

24. Accordingly, there is no real basis in the Board's decision or in the applicants' challenge to that decision for posing the third question.

25. The recent decision of the Supreme Court in *Connelly v An Bord Pleanala* (unreported, Supreme Court, 17 July, 2018) supports this conclusion insofar as it addresses the level of reasoning that should be given by the Board in respect of EIA, and the differing level of reasoning required in respect of AA. The general principle is that there must be adequate information to allow a party to assess whether a proper EIA has been carried out, and to the extent that the Inspector's report is adopted this is material from which the reasons may be ascertained. Clarke C.J. stated:

> "10.7 At this stage of this judgment I do not propose to deal with the separate requirements identified earlier in respect of the grant of permission following on from an AA or whether a case involving an EIA requires different or additional reasoning.
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> 10.8 I have already identified the materials by reference to which the reasons can be ascertained. Obviously, the starting point has to be to consider the reasons given in the Decision including the reasons given for the application of various conditions. However, as noted earlier, it is obvious from the Decision that it came at the end of a process involving the Inspector's report and the further information thereafter supplied. It follows that it would be obvious to any reasonable observer that the reasons given by the Board in the Decision must be seen in the context of the Inspector's report, including the matters on which the Inspector did not express concern, together with the problematic issues identified by the Inspector and the manner in which those issues were addressed in the additional information supplied including the NIS."

Later in his judgment the Chief Justice concluded, in respect of EIA:

> "14.2 I am also satisfied that the Decision and any other materials which are either expressly referred to in it or can be taken by necessary implication to form part of the reasoning, provide adequate information to enable any interested party

> to assess whether an appropriate EIA has been carried out. I would also reverse the judgment of the High Court in relation to those issues."

26. In the present case the Board considered that the EIS and additional information and submissions were adequate in identifying and describing the direct, indirect, secondary and cumulative effects of the proposed development. The Board adopted the Inspector's report on the environmental impact of the development and adopted his conclusions, and states that it "completed an environmental impact assessment". That wording combined with the Inspector's report is sufficient reasoning. The Inspector's report in section 10 demonstrates a comprehensive EIA, dealing separately with the various elements from "Human Beings" to "Traffic and Transport", including a section on "Noise & Vibration", and it deals in each sub-section with proposed mitigation measures. In his Conclusion (paragraph 10.13) he expresses satisfaction that the EIS, additional information and submissions "comprehensively addresses the likely significant impacts" and he states:

> "I would be satisfied that the applicant has complied with the requirements of the Regulations. The proposed development will not have any significant impact on the environment."

27. Nowhere does the decision or Inspector's report suggest that an Article 3 EIA was conducted *after* a decision to grant approval, or that the Board in some way conflated its obligations under Article 3 with those under Article 8. There is therefore no evidential basis for question 3.

28. Instead question 3 seems to originate from words plucked from paragraph 66 of the judgment in which I referred to all the materials collected in the planning process and stated "…these must then be considered by the decision maker (Article 8), and that process leads into and is part of the "examination, analysis and evaluation" required to complete the EIA" (Article 3 and s.171A of the PDA 2000)." While I accept that the reference to "leads into" is not felicitous to the sequence of analysis and consideration advised by the ECJ in *Commission v Ireland*, this does not of itself establish a point of law, or merit certification for an appeal. The context is important: the main purpose of paragraph 66, as appears earlier in the text, was to approve as correct a statement of Costello J. in *O'Brien v An Bord Pleanala* [2017] IEHC 733, where she was considering the interplay between s.171(A) and s.171(1G)(c) of the PDA 2000, and where she stated "Consideration of the submissions or observations is part of the process whereby the Board examines, analyses and evaluates the potential effects of the proposed development upon the environment". Accordingly, the point raised in question 3 does not arise from or transcend the facts of the case.

29. As no points of law of exceptional public importance have been raised the application for a certificate is refused.