THE HIGH COURT

JUDICIAL REVIEW

BETWEEN

[RECORD NO. 2016 542 JR]

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANALA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SHARON BROWNE

NOTICE PARTY

THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO. 2016 868 JR]

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AN TAISCE

APPLICANT

AND

AN BORD PLEANALA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SHARON BROWNE

NOTICE PARTY

JUDGMENT of Mr. Justice Robert Eagar delivered on the 14th day of January 2019

1. On the 19th October 2017, this Court delivered a judgment in these related proceedings and refused the reliefs sought.

2. The applicants now seek to obtain a certificate pursuant to s. 50 A (7) of the Planning and Development Act 2000, as amended. S. 50 A (7) provides as follows: -

> "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."

3. The appellate jurisdiction of the Supreme Court referred to in s. 50 A (7) is now vested in the Court of Appeal by virtue of s. 7 A (2) of the Courts Act 1961, inserted by s. 8 of the Court of Appeal Act 2014.

4. This Court adjourned this application from time to time, pending the decision of the Supreme Court in *Callaghan v. An Bord Pleanala* [2018] IESC 39.

5. The applicable principles in respect of an appeal under s. 50 A (7) are set out in *Glancre Teoranta v. An Bord Pleanala & Anor* [2006] IEHC 250. The following principles were outlined by MacMenamin J. having reviewed a number of authorities: -

> (a) 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.
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> (b) The jurisdiction to certify such a case must be exercised sparingly.
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> (c) 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.
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> (d) 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).
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> (e) 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.
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> (f) 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).

(g) 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".

(h) Normal statutory rules of construction apply which mean inter alia that "exceptional" must be given its normal meaning.

(i) "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.

(j) 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.

6. In *Glancre*, McMenamin J. said in considering the requirement to obtain leave to appeal: -

> "It is clear that the statutory regime which has been devised by the legislature indicates an interest to ensure that the planning process is not to be hampered by a completely unrestricted access to the court which may cause harmful delays. I am satisfied that it is a restriction to be lifted only in exceptional cases."

7. The principles identified by MacMenamin J. in *Glancre* were adopted and followed by Clarke J. in *Harding v. Cork County Council* [2006] IECH 450, which added a caveat that there might be some cases where the point did not arise from the decision because, due to inadvertence it might not have been considered in the judgment.

The questions to be certified

8. In para. 55 of the court's judgment, counsel for the applicant submitted that in this para., the court appears to determine that the applicants in the within proceedings would be entitled to participate fully in the application for substitute consent and that there would be a full panoply of participation.

9. Para. 55 of the court's judgment is as follows: -

> "The application for leave is limited to input (in accordance with the legislation) to that of the developer and the planning authorities. However, once leave is granted actual application for substitute consent then involves the full panoply of participation. The legislative intention of the Oireachtas is clear."

10. The applicant proposes the following points of law for certification: -

> (1) Is the public entitled to participate in the determination as to the existence of exceptional circumstances and/or the circumvention of EU law in the decision to grant substitute consent? If so, where does such participation occur?
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> (2) In particular, is the public entitled to make submissions on the issues of exceptional circumstances and circumvention of EU law after leave has been granted to apply for substitute consent and can or must the Board consider same in its ultimate determination on the subject of the substantive application?
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> (3) Does the absence of an express statutory provision mandating the receipt of submissions mean that an administrative decision maker must refuse to accept and/or consider any submissions received?
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> (4) In particular does section 117(2)(g) entitling the Board to consider any matters it considers relevant give a discretion to An Bord Pleanala to consider third party submissions and/or have regard to the matters contained therein?

11. Turning first to questions 1 and 2, counsel for the applicant stated that these questions arise from the uncertainty in the court's judgment. The court's judgment suggested there is no right to participate at the leave stage and that full participatory rights will be available later in the process.

12. Counsel for the applicants submitted that the full panoply must mean that the issue remains live in the substitute consent application and can be revisited in the ultimate determination.

13. He submitted that if this was not the effect of the court's judgment then the applicant's case has not been answered. He submitted that there was not an answer to a complaint that public participation is required in the context of a leave to apply application to say that the full panoply of participation will occur in the later substantive application process, if that subsequent participation does not include the making of a submission as to the entitlement of a person to obtain substitute consent having regard to the requirements of EU law. He submitted that for such participation to be meaningful, those issues must remain open for consideration. He submitted that the effect of the court's judgment must be that it was open to the applicants to ventilate again the issue of exceptional circumstances and circumvention of EU law in the substantive substitute consideration application. He also indicated that both applicants had previously had similar submissions rejected in other substitute consent applications and he says that in other proceedings the High Court has determined that there is in fact no jurisdiction to reconsider these issues at the substantive application stage and he submitted that this seems to be at variance with this Court's determination in the within proceedings and gives rise to considerable uncertainty.

14. Counsel for the applicant quoted from the decision of Barrett J. in *An Taisce v. An Bord Pleanala* [2018] IEHC 315. In that case, the same applicant has been told that the decision to grant leave to apply for substitute consent is final and cannot be revisited and he argued that a determination of the Court of Appeal in the context of what he suggested was the difference between the two cases is essential to clarify the law on the issue. He further argued that having regard to the public participation provisions of the EIA Directive and the Aarhus Convention the judgment of this Court is unclear or contrary to the proposition that it must occur at the earliest stage possible when all options are open to the decision maker.

15. He also referred to the decision of the Supreme Court in *Callaghan v. An Bord Pleanala* [2018] IESC 39 and he quoted from para. 6.6 of the judgment of the Supreme Court (Clarke C.J.) as follows: -

> "This point, however, seems, in effect, to be virtually identical to the question which I hope shortly to address concerning the extent to which matters determined in the context of the SID can be revisited at the substantive stage. Clearly if such matters cannot be revisited then the Court would have to give serious consideration to the impact of Union law in

> that regard, for it might well give rise to a situation where material matters had been definitively and finally determined prior to the permitted involvement of a legitimately interested party. However, whether that be so in itself depends on the proper answer to the interpretative question as a matter of national law as to whether matters which might have to be considered in the context of determining whether it was appropriate to go down the SID route can be re-opened. On one view it might well be the case that no issue of European Union law could arise under that heading, at least provided that all matters remained open for consideration at the substantive development consent stage. Against that background it follows that it is necessary first to turn to the question of the extent to which any matters may be said to have been irrevocably decided by the preliminary decision to go down the SID route such that the matters concerned could not be re-opened at the development consent decision making stage. I therefore turn to that question."

He further quoted from Clarke C.J.'s judgment at para. 7.10: -

> "It seems to me to clearly follow that, unless the relevant legislation contains clear provision to the contrary, the proper interpretation of legislation involving a two stage process must be that any matters determined at an earlier or preliminary stage where an interested party is not entitled to be heard must remain open for full re-consideration at the stage when a final decision potentially affecting the rights or obligations of any individual is to be made. It follows in turn that the default position in this case must be that the Board cannot be bound or influenced by its earlier decision to go down the SID route when considering the strategic importance of the proposed development in the context of making a final decision as to whether to grant permission."

He argued that the determination of this Court seemed to be at variance with the decision in *Callaghan*.

16. Counsel for An Bord Pleanala submitted a number of observations on the principles outlined in *Glancre Teoranta v. An Bord Pleanala & Anor* (previously cited) and *Dunnes Stores v. An Bord Pleanala* [2016] IECH 263. The Board made the following observations: -

> (1) The requirements under s. 50 A (7) are cumulative thus the point must be of exceptional public importance and separately it must be in the public interest that the appeal should be brought.
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> (2) The point must be more than one of pubic importance; it must be of exceptional public importance. This is significant because in planning terms all points of law regarding the operation of the PGA affect the public. There must be something serious and significant about the point of law on which it is alleged the trial judge has erred.
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> (3) It is well established that the certification jurisdiction is one to be used "sparingly".
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> (4) The clear legislative intention is that planning cases should generally be confined to the High Court.
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> (5) The applicants are under a positive requirement to show that some public interest is served by an appeal in the sense that the Court of Appeal is required in the public interest to deal with the points identified. He quoted from Dunnes Stores v. An Bord Pleanala [2015] IEHC 387 where McGovern J. laid emphasis on the need for uncertainty and held in the context of the application therein: -
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> > "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."

17. Counsel for An Bord Pleanala submitted that the protracted timeline of this case runs contrary to the intention of providing for an expedited planning process. The application for leave to apply for substitute consent was made on the 20th November 2015. That was granted and it remains the case to this date that the Board has not progressed to determine the matter by reason of a constant threat of a stay application. Although the Board does not make submissions directly on this, it highlights however the public interest in the conclusion of litigation where that litigation has taken – on any reasonable stretch – a long time.

The first two questions

18. Counsel argued that it is absolutely incorrect to suggest that the court's judgment created the uncertainty contended by the applicants. He characterised the proceedings concerning the contention that - as a matter of right – the public are entitled to make submissions to the Board on an application for leave to apply for substitute consent. He submitted that it was entirely clear that the legislative scheme conferred no such right. Second, there was no provision in the European law that would require such a right, and the court accepted those arguments.

19. The applicant however now refers to a different issue which this Court was not asked to determine. That issue relates to the extent to which the entitlement to apply for substitute consent can be revisited by the Board once leave has been granted. The Board had submitted that that cannot be, in the sense that the Board cannot later determine that no leave should have been granted and in that sense retrospectively determined there is no jurisdiction. The Board can, however, when carrying out the EIA and substitute consent decision making process consider anything that is relevant to that and cannot say that the leave stake has conclusively determined anything that can legitimately arise at the substitute consent stage. The applicants state that the court's conclusion as set out in para. 55 creates "considerable uncertainty". Of course, the applicants point out that this is precisely what the High Court rejected in *An Taisce v. An Bord Pleanala* [2018] IEHC 315. Therein, Barrett J. considered and rejected the case that the entitlement to apply for substitute consent can be reopened on the substitute consent application. In other words, the determination as to whether there are exceptional circumstances to permit the application to be made is made finally at the leave stage. The Board cannot determine that no leave should have been granted and he submitted that it could not seriously be contended that the High Court in this case has in some way "thrown a spanner in the works" and delivered a judgment which states that the judicial product of this case has determined a matter not before the court and then to pass to the alleged conclusion in that respect as creating uncertainty with regard to other jurisdictions and the applicant is simply wrong when it says this judgment creates "considerable uncertainty" to supposedly supporting the notion rejected in *An Taisce v. An Bord Pleanala* [2018] IEHC 315 that the issues regarding "exceptional circumstances" and the entitlement to apply for substitute consent remain live at the applicant stage. They submitted that para. 55 of the judgment of this Court was clearly pointing out that once leave is granted, the applicants would have a role as defined by law in making submissions on the application for substitute consent. In this respect, the court was clearly dealing with the applicant's contention that the law required a submission right to be implied earlier, and the court rejected that it is simply not credible or reasonable to suggest that in para. 55, the court inherently determined that, in fact, issues that were in the grant of leave are "reopened at the substantive stage". That is not the issue before the court.

20. Counsel for the Board referred to the applicant's reference to *Callaghan v. An Bord Pleanala* (a Supreme Court decision). That case concerned the argument that the public were entitled to make submissions to the Board during the time at which the Board is considering whether its proposed development would be regarded as a Strategic Infrastructure Development (SID). Before its successful submission in the High Court, the Court of Appeal and the Supreme Court, that neither the scheme of the legislation or any provision in European law or indeed constitutional law supported either: (a) the existence of the right; or (b) the need to imply such a right. In that case, the applicant has suggested that at the SID the Board was finally determining the matters relating to EIA. The applicant said that since the Board had to carry out an EIA and since participatory rights applied to the EIA, then if those matters were finally determined at the SID stage, then EIA matters were determined without public input. The Supreme Court rejected that argument. The Supreme Court concluded that the EIA must be the subject of public participation. However, it concluded that nothing on the SID finally determined anything that could arise at the EIA stage for EIA purposes. The whole point is that nothing that could be relevant to the Board's later consideration of the substantive application for substitute consent has been finally determined by the grant of leave. The only matter that has been finally determined is the entitlement to apply for substitute consent. Anything that could possibly arise such as relevant to the EIA that is then carried out remains live. The only matter that has been finally determined is the entitlement to apply for substitute consent.

21. Counsel for the Attorney General stated that the jurisprudence was clear in that the mere fact that a point of law may have emerged from a case is insufficient to satisfy the test set out in s. 50 A (7) of the PPA, 2000, but rather the burden lies on the applicant to demonstrate the two distinct and separate elements of that test, namely that the point of law raised is of exceptional public importance and second that there is a public interest in having that point of law clarified, in particular where the applicant demonstrates that the law is uncertain. He quoted from Costello J. in the High Court in *Callaghan v. An Bord Pleanala* [2015] IEHC 493 at para 6: -

> "6. The point raised must be important to cases other than the case in issue, it must transcend the facts of the particular case and help in the resolution of future cases. It must also be of exceptional importance.
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> 7. It is a separate requirement that it is also desirable in the public interest that an appeal should be taken. As was pointed out by Baker J., in *Ogalas Ltd (pleading as Home Store and More) v. An Bord Pleanala & Ors* [2015] IEHC 205, clarity and certainty in the common law is a desirable end in itself and important for the administration of justice. So if it can be shown that the law is uncertain then the public interest suggests that an appeal is warranted. Obviously this is not always the case."

He then went on to deal with the first and second questions raised, and quoted from paras. 54 – 56 of the judgment of this Court: -

> "54. The focus of the judgment in the *Commission v. Ireland* related to retention, that is the ability to retrospectively obtain development consent in circumstances where the development has taken place without the relevant investments. The availability of substitute consent is restricted and an application for substitute consent can only be made in very limited circumstances and the provisions of s. 177 (d) clearly establish that what might be described as the closed nature of the Board's consideration of an application for leave.
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> 55. The application for leave is limited to input (in accordance with the legislation) to that of the developer and the planning authority. However, once leave is granted, the actual application for substitute consent then involves the full panoply of participation, the legislative intention of the Oireachtas is clear.
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> 56. Counsel for the applicant argues that this court should direct that there is a right for members of the public to make submissions in relation to an application for leave for substitute consent. However, it is clear that the legislation in this planning situation is clear. It is also noted that once leave is granted, the applicant can make such submissions as it thinks fit having regard to various divisions under s. 177 K (2)."

22. He argued there was no uncertainty on the meaning effect of the judgment as alleged and the reference to a full panoply of participation rights at para. 55 was not unclear. It clearly refers to the right to participate in all aspects of the decision that are up for consideration at the substantive application for substitute consent. He quoted from para. 37 of the court's judgment as follows: - "37. Section 177 H (1) gives a clear and unambiguous right to make submissions on the application "any person other than the applicant for substitute consent or for planning authority may make submissions or observations in writing to the Board in relation to an application for substitute consent". He submitted that the applicants have misunderstood and/or misunderstood the judgment. He also submitted that the court's decision in the judgment in relation to public participation is in this regard entirely consistent with the settled jurisprudence of the European Court and indeed with the recent decision of Barrett J. in *Merriman v. Fingal County Council* [2017] IEHC 695, where it is held there was no right to public participation in relation to a decision to extend the duration of a planning permission under national and/or EU law.

23. In respect of the first two questions, the court is satisfied that there is no uncertainty raised by the judgment of the court as argued by counsel for the applicants. They have clearly failed to demonstrate any point which is even of public importance, much less exceptional importance. It is also clear that the clear legislative intention is that planning cases should be generally confined to the High Court and the applicants in this case have failed to show that an appeal is required to the Court of Appeal in the public interest to deal with the points identified. Finally, the court is stating that the law is clear and the jurisprudence is clear and no point can arise.

The third and fourth questions

24. Counsel for the applicant submitted the decision of the court is to the effect that unless there is an expressed statutory bar to receive submissions, then they cannot be received. This is regarded as of no relevance. This would mean that unless information is sought from a planning authority by the Board in respect of an application for leave, then the Board can only have regard to submissions received from the developer. It is submitted that this is at variance with the scheme and purpose of the legislation and is also unduly restrictive in its application.

25. In response, counsel for the Board submitted that this did not arise from the judgment, it is faced with no reference at all to the specific legislative provisions in this case and its generality does not meet the s. 50 A (7) threshold. It is also somewhat beside the point because the answer is clearly "no", but that answer does not assist anything, and submitted there is no point to the question as it is phrased.

26. Counsel on behalf of the Attorney General said that the proposed point of law simply does not arise in the judgment and submitted that the judgment of the court addressed was a discrete question of law whether the applicant had a right to make submissions to the respondent in the context of an application for leave to apply for substitute consent pursuant to s. 177 C and D of the PPA 2000

as amended and quoted from para. 56 of the court's judgment. Counsel for the applicant argues that this Court should direct that there is a right for members of the public to make submissions in relation to an application for leave for substitute consent. However, it is clear that the legislation in this planning situation is clear. It also noted that once leave is granted, the applicants can make such submissions as they think fit having regards to the various divisions under s. 177 K (2). The court is satisfied that no right to make submissions at the application for leave stage should be implied on behalf of the applicants.

27. Counsel for the Attorney General argued that there was no suggestion in the judgment that the finding necessarily has wider implication and the third proposed question is based on an incorrect interpretation of the judgment and in fact not a point of law which arises from the judgment.

28. In relation to Question 3, the court is satisfied that this point does not arise from the judgment of the court and in these circumstances cannot be the subject of a certification by this Court, and clearly agrees with counsel for both respondents that it is a point of law based on an incorrect interpretation of the judgment.

29. In relation to the fourth proposed question, counsel on behalf of the applicant makes no real submissions in relation to para. 2, question 4. Counsel for the Board submitted that the point of law seems to reflect the case that the Board's actual discretion was improperly exercised and concluded that the fourth question does not add anything in the sense that the applicants have not even argued that this Court's substantive conclusion, that there is no right to make the submission, is legally flawed.

30. Counsel on behalf of the Attorney General confirmed the court's view that the applicant has not addressed any submissions to this particular question which reflects that it is not a question that arises from the judgment and therefore is not appropriate for considerations.

31. In relation to Question 4, the court is satisfied that the applicant has made no effort to submit that there was a question of law that arises in the court's judgment, those circumstances are satisfied that the court should not certify pursuant to s. 50 A (7) of the PPA. In these circumstances the court is refusing to certify that its decision involves the point of law of exceptional public importance and it is desirable in the public interest that the case should be put to the Court of Appeal.