Neutral Citation [2016] IEHC 624

THE HIGH COURT

[2014 No. 488JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING & DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

KATHLEEN CONNOLLY

APPLICANT

– AND –

AN BORD PLEANÁLA

RESPONDENT

– AND –

CLARE COUNTY COUNCIL AND MCMAHON FINN WIND ACQUISITIONS LTD

NOTICE PARTIES

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Overview

1. On 14th June last, the court gave judgment in the above-titled proceedings. An Bord Pleanála, which was unsuccessful in those proceedings, considers that certain points of law of exceptional public importance arise from that judgment and that it is desirable in the public interest that an appeal be brought. An appeal from the judgment of a trial court usually proceeds without further regard to the trial judge, save perhaps as regards seeking that the trial judge put certain incidental or transitional arrangements in place pending such appeal. The difficulty that presents for An Bord Pleanála as regards bringing an appeal from the court's decision of 14th June is that, by virtue of s.50A(7) of the Planning and Development Act 2000, as amended, the Oireachtas has decided, it would appear with the intention of bringing some finality to planning matters, that no appeal shall lie from a decision, such as that of 14th June, "*save with leave of the* [High] *Court which leave shall only be granted where the [High] 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…".* An Bord Pleanála has therefore returned to ask the court to grant the requisite certificate in respect of one or more of seven points of law of exceptional public importance that it contends to arise from but a single judgment.

II. Applicable Law and Legal Principles

2. In its judgment in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 263, the court has considered the law applicable to an application such as that now presenting and proceeds by reference to the law as identified there. The critical principles applicable were identified by McMenamin J. in *Glancré Teoranta v. Mayo County Council* [2006] IEHC 250 and have been accepted as correct, *inter alia*, by the High Court in cases as various as *Harding v. Cork County Council* [2006] IEHC 450, *Sweetman v. An Bord Pleanála* [2016] IEHC 374 and in the decision of this Court in *Dunnes*. Indeed, although the law is in a constant state of evolution, the *Glancré* principles represented a correct statement of relevant law in their time and continue to represent a correct statement of relevant law at this time. This Court would but emphasise that, to borrow from s.50A(7), what must be identified is "*a point of law of exceptional public importance*". That a point of law may relate to a matter of some private significance does not suffice to convert it into "*a point of law of exceptional public importance*", even where the party claiming such a point to arise is a public body. Moreover, a point of law of exceptional public importance is, by its nature, not just a point of law of public importance (itself a difficult enough hurdle to jump) but of a degree of public importance that is exceptional (a still higher hurdle to be vaulted). In this last regard, the court cannot but note that in the within case it is claimed that the court's judgment of 14th June last raises up to seven points of law of exceptional public importance; in *Aherne & ors v. An Bord Pleanála & ors* [2016] IEHC 536, a very recent s.50 judgment that issued while the text of the within judgment was being finalised, some six points of law of exceptional public importance were claimed to arise (all of which were rejected by the court in that case). That two judgments would be contended to raise, between them, some thirteen points of law of exceptional public importance suggests, at the very least, that there is something of a yawning chasm growing between bar and bench as to the true nature of exceptionality.

III. Alleged Divergence in Authority

3. The court's decision in its judgment of 14th June last rested to a significant extent on the decision of the Court of Justice of the European Union in *Mellor* [2009] ECR I-3799, the decision of Clarke J. in *Christian v. Dublin City Council* [2012] IEHC 163, and the decision of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400. An Bord Pleanála maintains that the court has interpreted s.172(1J) of the Act of 2000 to require more from An Bord Pleanála than one finds in four decisions by three judges of the High Court last year, *viz. Ratheniska v. An Bord Pleanála* [2015] IEHC 18, *People Over Wind v. An Bord Pleanála* [2015] IEHC 271, *McEntee v. An Bord Pleanála* (Unreported, High Court, Moriarty J., 10th July, 2015) and *Aherne v. An Bord Pleanála* [2015] IEHC 536. This is a contention that does not hold true when one engages in even a limited analysis of those other cases. So, for example:

- *Ratheniska* concerned a case in which An Bord Pleanála followed a broadly positive inspector's analysis. In the present case, there was a rather contrary inspector's report which was not unfailingly positive and was overtaken by further information that involved a complete re-design of the relevant development. There is therefore a striking divergence in the facts and no conflict between the decisions made in that case and this.

- in *People Over Wind*, s.172(1J) was considered. However, the court concluded in that case that there was no deficiency in the assessment; in effect it was the manner in which An Bord Pleanála's file was kept that was the issue. Again, this bears no resemblance to the facts at issue in the within case where specific deficiencies in the assessment were contended and found to arise.

- in *Aherne*, the case appears to have progressed more on the basis of arguments by the applicant that An Bord Pleanála had failed to discharge its obligations under s.34(10) of the Act of 2000, as opposed to An Bord Pleanála's functions under

s.172(1J). This last provision is not the subject of any particular analysis by Noonan J. Certainly there is nothing in Noonan J.'s analysis that appears to depart from this Court's analysis in its judgment of 14th June last.

- in *McEntee*, further information was received after the report of the inspector that, while given to the inspector, was not assessed by the inspector. This information did not relate to a re-design but was simply further information. The applicant sought to argue that the determination of An Bord Pleanála was contrary to s.172(1J). However, the court held that this argument had not been pleaded in the statement of grounds, and so it was never considered by the court.

4. Also mentioned by the parties is the decision of Barton J. earlier this year in *Balz v. An Bord Pleanála* [2016] IEHC 134. That judgment issued after the hearing of Ms Connolly's application and before the court issued its judgment of 14th June last, but was considered by the court in its judgment at the invitation of the parties. Far from presenting some divergence in case-law, the court expressly concluded, at para. 29 of its judgment of 14th June, that it saw nothing in, *inter alia*, the decision in *Balz, "that would cause it to depart from or vary the reasoning applied, or conclusions reached, in this judgment"*. The court remains of that view.

5. In any event, by reference to the foregoing, An Bord Pleanála seeks the certification of the following two questions:

> *"[1] In the context of s.172(1J) of the Planning Acts and the carrying out of an environmental impact assessment, where the Board does not agree with the recommendation of its inspector and sets out the reasons for its disagreement, what are the requirements on the Board in its decision to set out in positive terms those aspects of the inspector's report or those aspects of the documents before the Board that it accepts?*
>
> *[2] Where the Board has in the reasons for its decision included a statement that it generally adopted the inspector's assessment of environmental impacts, with the exception of the matters set out in the decision, and has concluded that the proposed development would not have unacceptable effects on the environment, what more (if any) is required of the Board in setting out its 'evaluation of the direct and indirect effects of the proposed development'?"*

6. It is not entirely clear to the court that these are truly points of law; the questions seem to involve the An Bord Pleanála seeking direction as to its practices and procedures. But insofar as these questions do raise points of law as to the applicable obligations, those have been answered clearly in the court's judgment of 14th June last. Section 172(1J) is plain in its meaning and effect; no cause for certification arises. The court will, therefore, decline to certify Questions [1] and [2].

IV. Appropriate Assessment

7. By way of third proposed question, An Bord Pleanála proposes to appeal as to whether "[3] *In cases where an appropriate assessment is carried out, to what extent can a failure or inadequacy of reasons given for a screening decision under section 177U(6) of the Planning Acts invalidate the ultimate decision of the Board?*"

8. Section 177U(6) is clear in meaning and purport. It requires that An Bord Pleanála record and give notice of a positive screening for appropriate assessment. An appropriate assessment done without recording and notifying the screening determination is not done in accordance with law. Thus it does not seem to the court that there is any point of law arising: the statutory duty arising is clear, and there is an abundance of case-law on the consequences of breach of statutory duty. The court will therefore decline to certify Question [3].

9. An Bord Pleanála also proposes that the following questions should be certified:

> *"[4] If the conclusion of the Court rests of the standard of Board's reasons, is it appropriate to conclude that the Board has not carried out an AA where that has not been proven?*
>
> *[5] In order for the Board to have made complete, precise and definitive conclusions on AA, what degree of reference is the Board permitted or required to have to documents and matters before it?*
>
> *[6] Is the Board entitled in setting out its conclusions on AA to refer to and incorporate the contents of another document (whether that be the Inspector's Report or NIS or other document) by referring to same and indicating its agreement or adopting of same without further express citation from same?*
>
> *[7] In assessing the Board's reasons, what standard of knowledge ought to be presumed of the applicant for judicial review and to what extent can reference be made on behalf of the Board in the course of the judicial review proceedings to materials that were before the Board and which are publicly available? In particular to what extent can that material be referred to where (i) the material in question was generated by the Board itself in the course of the decision-making process and/or (ii) the material is expressly referenced on the face of the Board's decision?"*

10. As to [4], An Bord Pleanála appears to be querying whether, if an applicant fails to prove that An Bord Pleanála has lawfully completed an appropriate assessment, the court cannot conclude that an appropriate assessment has not lawfully been done. This is not a point of law arising from the court's decision. For in its judgment (as in *Mellor* and *Kelly*), the court concluded that An Bord Pleanála's decision was unlawful, not by reference to some such conclusion aforesaid but by reference to the fact that, in its decision, An Bord Pleanála had failed to provide proper information. The court will therefore decline to certify Question [4].

11. As to [5], it is clear from *Kelly* that An Bord Pleanála must provide complete, precise, definitive findings regarding the effects of a proposed development on a European site. It is trite to observe that reference may be had by An Bord Pleanála in this regard to such materials as have been placed before it, but an assessment of these materials is required and patently this must feature in the decision of An Bord Pleanála. There is nothing uncertain about the obligations presenting for An Bord Pleanála in this regard: they are clearly set out in European law and in the decisions of *Sweetman* and *Kelly*, which were applied by the court in its judgment of 14th June. Indeed, to the extent that there is any issue arising in this regard, and the court does not consider that there is, it would arise (if it arose, and it does not) from those earlier decisions, not from the court's decision of 14th June. The court will therefore decline to certify Question [5].

12. As to [6], An Bord Pleanála effectively asks whether it can conduct an appropriate assessment and record same by reference to other documentation. Again, as indicated previously above, there is no uncertainty or ambiguity as regards the legal obligations arising: they are clearly set out in European law and in the decisions of *Sweetman* and *Kelly*, which were applied by the court in its judgment of 14th June. How the obligations are to be discharged in a particular case will depend on the facts of that case. The court will therefore decline to certify Question [6].

13. As to [7], it is well to recall that in this case the inspector did not purport to carry out an appropriate assessment, the inspector never saw the Natura Impact Statement, and An Bord Pleanála did not undertake or record its own assessment. The standard of knowledge of Ms Connolly is irrelevant in the context of those facts and the court's decision must be viewed in the context of those facts. The court will therefore decline to certify Question [7].

V. Form of Present Application

14. Section 50 applications are typically heard by the judge who delivered the judgment that is claimed to raise one or more points of law of exceptional public importance. When this Court queried at the end of the hearing of the within application whether it is not curious that the judge who issues the original judgment should decide a subsequent s.50 application, all of the counsel present in court nodded vigorously. They were right to do so. In theory, the judge who issued the original judgment is being asked to determine in a detached and clinical manner whether one or more points of law of exceptional public importance arises from that judgment. In practice, if the s.50 application is unsuccessful the disappointed applicant will unavoidably be left with the sour sense that if only some judge other than the judge who delivered the original judgment had heard the s.50 application the applicant might have stood a better chance of success. In truth, trial judges do not feel attachment to judgments that they have issued. Once a judgment issues they become *functus officio* and if, say, a s.50 application is later brought in respect of that judgment, they will seek to arrive at a sensible decision in that application, as in others. But one judge is as good as another in deciding whether a point of law of exceptional public importance arises from a particular written decision; and counsel are eminently capable of explaining some point of fact or law on which a judge other than the trial judge may require assistance by virtue of coming fresh to matters in a s.50 application. So if the process of s.50 applications is not to be perceived by would-be appellants as inherently coloured against them, notwithstanding that judges may themselves know such perception to be unfounded, there seems, to this Court, to be good reason why the present practice as to the hearing of s.50 applications should change, with such applications typically being heard by a judge other than the judge who issued the original judgment. In that way, any sense on the part of a disappointed applicant that s/he would have fared better with a judge other than the judge who issued the original judgment can be (and it needs to be) avoided. This is especially important when one recalls that, thanks to s.50A(7) of the Act of 2000, a refusal of a s.50 application effectively closes out any prospect of appeal. The court's comments in this Part V are, of course, entirely obiter.