Neutral Citation: [2015] IEHC 590

**THE HIGH COURT**

**COMMERCIAL**

**[2014 No. 579 JR]**

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

**BETWEEN**

**EDWARD BUCKLEY**

**AND**

**EDEL GRACE**

**APPLICANTS**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**ECOPOWER DEVELOPMENTS LIMITED**

**NOTICE PARTY**

**AND**

**DEPARTMENT OF ARTS HERITAGE AND THE GAELTACHT (DAHG)**

**NOTICE PARTY**

**JUDGMENT of Mr Justice CREGAN delivered on 16th day of September, 2015.**

**Introduction**

1. On 29th July, 2015 I gave my first judgment in this case in which I refused the application to quash a decision of An Bord Pleanála (the Board) made on 12th August, 2014 to grant planning permission to Ecopower Developments Limited to build wind turbines in County Tipperary. The Applicants have now sought a certificate for leave to appeal my decision pursuant to s.50 A (7) of the Planning and Development Act 2000. This second judgment deals with this application for a certificate for leave to appeal.

**Relevant Statutory Provisions**

2. Section 50 A (7) of the Planning and Development Act 2000 provides as follows:

> *"(7) 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." (Emphasis added).*

3. The following subsection is only tangentially relevant but I set it out here for the sake of completeness. Section 50 A (8) provides as follows:

> *"(8) Subsection (7) shall not apply to a determination of the Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution."*

4. In *Glancré Teoranta v. An Bord Pleanála and Mayo County Council* [2006] IEHC 250 McMenamin J. considered the effect of these statutory principles. At page 3 of his decision he states as follows:

> *"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.*
>
> *There have been a number of decisions in relation to the meaning of a test of exceptional public importance. Amongst these are Kenny v. An Bord Pleanála [2002] 1 ILRM 68, Raiu v. Refugee Appeals Tribunal [2003] 2 I.R. 63, Lancefort Limited v. An Bord Pleanála [1998] 2 I.R. 511, Fallon v. An Bord Pleanála [1992] 2 I.R. 380, Irish Press v. Ingersoll [1995] 1 ILRM 117, Ashbourne Holdings v. An Bord Pleanála (Kearns J., 19th June, 2001, Unreported) and Arklow Holidays Limited v. An Bord Pleanála (Clarke J., the High Court, 29th March, 2006 Unreported).*
>
> *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. Moreover in *Arklow Holidays Ltd v. An Bord Pleanála and Others and Wicklow County Council and Others* [2006] IEHC 102 Clarke J. stated as follows (at para. 3.1 of his decision):

*"2.3 In a number of decisions of this court the requirements of this section have been analysed in some detail and it is clear that a number of tests must be met:*

*(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.*

*(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 Limited v. Wicklow County Council and Others (Unreported, High Court, Murphy J., 4th February, 2004)."*

6. I turn now to the application of these principles to the application in this case.

**The questions raised in the certificate for leave to appeal**

7. The Applicants were seeking to have three questions certified for leave to appeal. These are as follows:

*Question 1 - Does An Bord Pleanála have jurisdiction to consider the validity of a planning application when determining a matter on appeal?*

*Question 2 – If the Board does not have jurisdiction to consider the validity of a planning application and a landowner's property is subject to a grant of planning permission where consent to that application and development has been withdrawn, is this in breach of a landowner's property rights and accordingly in breach of Article 40.3.2 and/or Article 43 of the Constitution, and Article 8 and Article 1 of the First Protocol of the European Convention on Human Rights?*

*Question 3 – When carrying out an Environmental Impact Assessment (EIA) what is the relationship between an assessment in the Inspector's report and final determination, and are planning authorities (and the Board on appeal) required to comply with the 2013 guidelines and expressly evaluate an Inspector's assessment?*

8. Although these three questions were put before the court and were the subject of detailed written legal submissions, counsel for the Applicants indicated that his clients did not wish to pursue question 2 and were not seeking a certificate in respect of this question. Given that this question (of whether there was a breach of the landowner's property rights and accordingly a breach of Article 40.3.2 and/or Article 43 of the Constitution and the Articles of the European Convention of Human Rights) had not even been raised during the course of the hearing – and indeed were not the subject of the leave to issue judicial review – the withdrawal of this question was, in my view, correct.

9. However counsel for the Applicants still sought to argue that the constitutional point was also relevant to the first question. When questioned on this issue counsel accepted that he was not seeking to argue that the interpretation of Article 22 (2) (g) was contrary to the Constitution, but rather that there was, in effect, a constitutional context to the interpretation of this issue because his client's property rights were affected. Counsel for the Board and for the Developer submitted that in all such planning applications property rights were affected. I will consider this issue in further detail later in this judgment.

**The first question**

10. I have considered the submissions made by the Applicants in respect of the first question. However, to a considerable extent, all of these submissions are a re-arguing of matters already decided by me in my first judgment. They are, in effect, an attempt to elaborate upon arguments which they made during the course of the hearing or, to engage with my judgment and to argue why, in

their view, the judgment is incorrect. Whilst that might be understandable in an application for a stay pending an appeal in a different type of case - where an appellant must establish that there are *bone fide* grounds of appeal - it does not assist the Applicants in circumstances where they need to address the statutory requirements - that there should be a point of law of exceptional public importance - and the manner in which that section has been interpreted by the courts.

11. Indeed the submissions by the Applicants do not really engage with the statutory criteria or the criteria set out in the case law despite the length of the submissions.

12. For example, many pages of the Applicants' submissions are given over to arguments about the *Frascati* decision, a decision which had been the subject of extensive submissions during the hearing by all parties and which were considered in my judgment. It is not clear to me why the Applicants sought to re-argue these points in such length given the clear statutory criteria which apply in an application of this nature.

13. Moreover the Applicants in their written submissions set out a number of arguments about the issue of the implementation of the planning permission in circumstances where Mr. Buckley is not now consenting to the use of his lands. However, as submitted by the Board these matters are irrelevant to the application for a certificate of leave to appeal because my decision only dealt with the validity of the planning application and the question of the implementation of the permission is, as I put it in my judgment, a matter for another day. It is not clear to me why the Applicants persisted in making these submissions but, in any event, I am of the view that they are *nihil ad rem* in respect of the statutory criteria of whether the point of law is of exceptional public importance and desirable in the public interest to justify a certificate.

14. Moreover the Applicants submitted that the Court applied a "literal approach" to the question of statutory interpretation in circumstances where a "schematic or teleogical approach" is more appropriate. However I do not accept this submission. In my view, it is clear from my judgment that the scheme of the Act as a whole was also considered and that I accepted various submissions made by counsel for the Board and the Developer in this regard.

15. However the most substantive objection to granting a certificate in respect of the first question posed by the Applicants is that, (as has been stated by McMenamin J. in *Glancré Teoranta)* the point of law must arise out of the decision of the High Court. Having considered the submissions, I am of the view that this question does not arise out of my decision.

16. Even if it did, I am satisfied that the law as to the interpretation of statutory provisions does not give rise to any particular uncertainty as applied to the interpretation of the statutory section in this case. Therefore I do not believe that the first question meets the test of whether it is a point of law of exceptional public importance and desirable in the public interest as required by the statute.

17. Although the second question has been withdrawn by the Applicants they nevertheless seek, in some way, to rely on a constitutional argument in respect of their first question. It is therefore necessary to address this point.

18. As the Board submitted to the court, the argument about a breach of Constitutional and Convention rights which is now canvassed is entirely new. It did not form any part of the grounds upon which leave was sought and granted and it was not in the case. As they stated "to put it bluntly, the point of law proposed does not arise from the decision of this Honourable Court because it was never in the case to begin with". I agree with this submission. The argument about a breach of Constitutional or Convention rights was never even mentioned - let alone argued - in the course of the hearing. It cannot therefore now be introduced into the case at this stage in order to argue that the questions of law which are raised are questions of law of exceptional public importance and in the public interest. This Constitutional and/or Convention rights argument did not even arise from a discussion or consideration of such a point of law during the hearing - which is the fifth criterion set out by McMenamin J. in *Glancré Teoranta*. It is difficult to see therefore on what basis the Applicants sought to raise this constitutional point at this late stage.

19. As Noonan J. stated in *Ross v. An Bord Pleanála* [2015] IEHC 484:

> *"Accordingly, it would appear that the applicants now seek to appeal on a ground in respect of which no leave to apply for judicial review was granted. I cannot conceive how an appeal could lie in such circumstances. It would be an unusual state of affairs, to say the least, if an appellate court were asked to determine an appeal on the basis of a point that was never even pleaded, less still the subject matter of a grant of leave."*

**The third question of law**

20. The third question of law in respect of which the Applicants seek a certificate involves two separate issues. These are (1) the relationship between an assessment in the Inspector's report and the final decision of the Board (i.e. did the Board "adopt" the Inspector's report) and (2) whether the Board is required to comply with the 2013 Ministerial Guidelines. These issues are however inter – related.

21. One of the submissions made by the Applicants in respect of the Ministerial Guidelines argument is that, although there is a general requirement that a point of law which is sought to be certified must arise out of the decision of the High Court, "this is subject to the exception that where the High Court inadvertently fails or neglects to deal with a point which was raised in the course of written submissions and/or argument, that point can be raised where it could have affected the results of the proceedings and a party should not be deprived of its entitlement to raise the point in the certificate application".

22. Thus the Applicants submit that because they argued that the Board's decision did not comply with the 2013 Ministerial Guidelines and because I did not expressly deal with that argument in my decision, that they are therefore now entitled to seek a certificate in respect of this point as being a point of law of exceptional public importance and in the public interest.

23. In order to consider and assess this argument it is necessary to consider afresh the argument which was made by the Applicants in respect of the 2013 Ministerial Guidelines during the course of the hearing and the context of that argument.

24. In the Applicants' submission in respect of the question as to whether the Board had "adopted" the report of the Inspector, the Applicants made a number of submissions. The Applicants' essential argument was that the Board had not "adopted" an Environmental Impact Assessment (EIA) because it had not "adopted" the Inspector's Report.

25. Their strongest argument in support of this issue was that there was a statutory obligation on the decision maker to "adopt" an Environmental Impact Assessment. This obligation derived from Article 1 and 2 of Directive 2011/92/EU. The Applicants also referred

to the decision of *Commission v. Ireland Case* C-50/09 [2011] I-00873 in which the CJEU held that the national provisions relied on by Ireland had not properly implemented Article 3 of Directive 85/337. This was subsequently implemented in Ireland by means of part X of the Planning and Development Act 2000.

26. Section 172 of the Planning and Development Act 2000 provided that an Environmental Impact Assessment shall be carried out by the planning authority, or the Board as the case may be, in respect of an application for consent for proposed developments. This statutory section implemented the findings of the CJEU in *Commission v. Ireland.*

27. Section 172 (1H) of the Act provided that:

> *"In carrying out an Environmental Impact Assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers." (Emphasis added).*

28. As I noted in my decision at para. 94, the key argument of the Applicants, in respect of this point in the case, was based on s.172 (1H) which provides that in carrying out an Environmental Impact Assessment the Board "may have regard to and adopt" any reports prepared by its officials. The Applicants' submission was that when one considered the legal test, and considered what the Board did in this case, that what the Board did fell short of the legal test. Their argument was that the Board had not "adopted" the Inspector's report. They submitted that because the Board had only stated that the EIA of the inspector was "noted" rather than "adopted" it meant that the Board did not in fact carry out a proper EIA as it is required to do under the statute.

29. Thus the strongest argument made by the Applicants on this question was that there was a statutory obligation on the Board and that the Board had failed to fulfil it. I considered that argument and rejected it for the reasons set out in my judgment.

30. The argument which was made by the Applicants during the course of the hearing in relation to the Ministerial Guidelines was a subsidiary argument to the argument in relation to the statutory section.

31. The essence of the Applicants' argument in relation to the guidelines can be summarised as follows: The Department of the Environment, Community and Local Government published guidelines in 2013 entitled "Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment." In para. 4.2 of the guidelines it is stated that in order to comply with the requirements of Act and the Directive, it is essential that an assessment of the environmental effects of relevant projects is carried out by the competent authority and that the assessment is clearly documented with a "paper trail" being available for public scrutiny and to facilitate and defend any legal challenge. At para. 4.4 it states that the EIA Directive and the Planning Act require that an assessment be carried out by the competent authority, i.e. the planning authority or the Board. It is, accordingly, necessary that the decision-maker in the planning authority or in the Board, as appropriate, carries out an assessment.

32. The Applicants also relied on appendix 5 of these guidelines which, they say, provides a template of a decision maker's statement on the EIA and which expressly states that "It is considered that the report dated the _____ (generally) contains a fair and reasonable assessment of the likely significant effects of the development on the environment. The assessment as reported is adopted as the assessment of (name of planning authority or the Board)…" (Emphasis added).

33. It is clear therefore that the essential point made by the Applicants is that the Ministerial guidelines provide that the Board should "adopt" the assessment of the planning inspectors.

34. However "guidelines" are simply that: they are guidelines. It is the statutory section which must be interpreted. The guidelines may, of course, be an aid to the interpretation of a statutory section. However in this case they do not particularly advance an interpretation - one way or the other - of the statutory section. The essential argument of the Applicants was that the statutory section, s.172 (1H), provides that the Board may have regard to and "adopt" any reports prepared by its officials. The Applicants argued that, on the facts of this case, the Board did not "adopt" its Inspector's report. I considered that argument and rejected it. I held that the Board had indeed adopted the report of its inspectors for the reasons set out in my judgment. Given that I had considered the statutory section (and considered the Applicants' arguments in respect of this statutory section) and rejected them, it was not necessary for the purposes of my judgment to consider the argument on the guidelines. The argument on the guidelines did not advance the Applicants' argument in any way. Having considered and rejected the Applicants' stronger argument it was, in my view, neither necessary nor appropriate in the course of an already lengthy judgment to recite and reject all the weaker arguments of the Applicants.

35. Therefore I do not accept the submission of the Applicants that, because I did not deal expressly in my judgment with one of their weaker arguments, this argument can now be elevated into a point of law of exceptional public importance such that it should be certified as a suitable question for an appeal. In my view, that is to entirely ignore the structure of the Applicants' legal submissions and the running of the case. It is true that a submission was made in respect of the guidelines. However the guidelines have no binding legal force. It is the statutory section itself which sets out the statutory obligation on the Board and which I found was fulfilled. It therefore follows, *a fortiori*, that if I concluded that the Board fulfilled the statutory obligation required of it under s.172 (1H) that it thereby also fulfilled the Ministerial Guidelines.

36. The other part of the third question raises the question of what is the relationship between an assessment in the Inspector's report and the final determination of the Board. This matter was the subject of detailed submissions during the course of the hearing by all parties. I specifically reviewed all the case law in respect of this matter at paras. 107 to 118 of my judgment. In particular I considered the decision in *Ní Eili v. the EPA*, Unreported Supreme Court, 30th July, 1999 (Murphy J.), *Maxol v. An Bord Pleanála* 2011 IEHC 537 (Clarke J.), *Fairyhouse Club Limited v. An Bord Pleanála* Unreported High Court, 18th July, 2001 (Finnegan J.), *Cork City Council v. An Bord Pleanála* [2007] 1 IR 761 (Kelly J.), and *Ogalas v. An Bord Pleanála* [2015] IEHC 205 (Baker J.). As Baker J. stated in *Ogalas* at para. 15 which I set out in my earlier judgment:

> *"I do not accept that there is uncertainty in the law. The judgment of Clarke J. in Maxol Ltd 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."*

37. It does not appear therefore that there is any uncertainty in respect of this area of the law and particularly not such uncertainty as to elevate it to a point of exceptional public importance and desirable in the public interest to certify it for appeal.

38. I am satisfied therefore that the first part of question 3 does not meet the threshold of a point of law of exceptional public importance in any way. The law in this area is not uncertain. Moreover the question of whether the Board "adopted" the report of the

inspector is one which is specific to the facts of this case. Indeed the Applicants' argument - in circumstances where they accept that the Inspector's report was a substantive EIA - then boils down to whether as a matter of substance the Board "adopted" the Inspector's report or a technical argument as to whether the Board did not use the word "adopt" and should have done so. I have found against the Applicants on both those points. There is, in my view, no point of law of exceptional public importance and desirable in the public interest which requires an appeal to be heard in this matter.

39. Moreover, as the Board and Developer submitted, the status of the 2013 guidelines was not specifically pleaded in the statement of grounds.

40. Therefore the question of the status of the 2013 guidelines could not give rise to a point of law of exceptional public importance where leave to apply for judicial review was neither sought nor granted on this issue.

41. The Board in their replying legal submissions in this application stated at para. 49:

> *"The guidelines were referred to in Mr. Buckley's replying affidavit and in the Applicants' written submissions on their application for judicial review as providing support for their primary ground that by 'noting' rather than 'adopting' its Inspector's environmental impact assessment, the Board had failed to carry out a lawful EIA."*

In my view that is a fair summary of the argument as advanced by the Applicants during the course of the hearing. The issue of the guidelines was advanced as a subsidiary argument by the Applicants. It was subsidiary to their main argument which was that the Board had not adopted the EIA as it was required to do under the statute. If it was required to do so under the statute it was of course required to do so under the guidelines.

42. In any event there is no ambiguity about the status of the guidelines. Section 28 (1) of the Planning and Development Act 2000 provides that the Minister may, at any time, issue guidelines to planning authorities and the planning authorities shall have regard to these guidelines in the performance of their functions. But, in any event, in circumstances where I held that the Board did, as a matter of fact and as a matter of law, adopt the Inspector's report it follows therefore that the Board did have regard to the ministerial guidelines.

43. At para. 105 of my judgment I stated "the legal requirement on the Board to adopt an environmental impact assessment is one of substance. I am satisfied that, in substance, the Board did carry out an environmental impact assessment through its inspector and that it adopted his report".

44. At para. 117 of my judgment I also stated "I am of the view that it is clear that the Board did 'adopt' the Inspector's report and carry out an appropriate EIA in accordance with its statutory obligations".

45. Moreover as leave was never sought or granted in respect of any ground relating to the 2013 EIA guidelines, an appeal cannot lie in respect of this point (see *Ross v. An Bord Pleanála*).

46. I am also of the view that as the meaning of the phrase "have regard to" has been considered on a number of occasions by both the Supreme Court and the High Court, (see *Glencar Explorations Plc v. Mayo County Council* (No. 2) [2002] 1 I.R. 84, *McEvoy v. Meath County Council* [2003] 1 I.R. 208 (High Court, Quirke J.) and *Tristor Limited v. Minister for the Environment Heritage and Local Government* [2010] IEHC 397), it is not necessary or appropriate to certify it as a question of law of exceptional public importance.

47. Accordingly I am of the view that there is no basis for certifying any part of question 3 as a point of law of exceptional public importance.

**Conclusion**

48. In the light of the statutory section – s. 50 A (7) of the Planning and Development Act 2000 - and in the light of the criteria for determining whether a certificate should be granted which has been set out in the case law, I am of the view that the two questions which the Applicants seek to have certified as questions of law of exceptional public importance and as desirable in the public interest should not be so certified. Applying the criteria set out by McMenamin J. in *Glancré Teoranta* I would conclude as follows:

(a) Neither of the questions raise points of law of exceptional public importance.

(b) Even if they did, the jurisdiction that certifies such a case must be exercised sparingly. I do not believe that on the facts of this case I should exercise my jurisdiction to certify these questions.

(c) I am not satisfied that the law on either question stands in a state of uncertainty.

(d) In respect of the first question, the point of law does not arise out of the decision of the High Court. Even if it did, I do not believe it is a point of law of exceptional public importance.

(e) In respect of the third question, the first part of the third question (i.e. the relationship between the Board and the inspector) is not in a position of uncertainty and the second part of the third question (i.e. the status of the guidelines) was not specifically raised in the leave or in the statement of grounds.

(f) Moreover I do not believe that either question is so "desirable in the public interest" as to justify a certificate.

(g) I do not believe that the points of law raised transcend the individual facts of this case.

49. In the circumstances I refuse the application for a certificate for leave to appeal in respect of both questions.