THE HIGH COURT

[RECORD NO. 2016/754 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING

AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

SINEAD FITZPATRICK AND ALLAN DALY

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

GALWAY COUNTY COUNCIL AND APPLE DISTRIBUTION INTERNATIONAL

NOTICE PARTIES

JUDGMENT of Mr. Justice McDermott delivered on the 1st day of November, 2017

1. The applicant seeks a certificate from the court for leave to appeal the judgment delivered on 12th October, 2017 in the above titled proceedings pursuant to s. 50A(7) of the Planning and Development Act 2000 (as amended) which provides:

> "The determination of the court … of an application for judicial review … shall be final and no appeal shall lie from the decision of the court to the Supreme Court... 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."

The reference to the Supreme Court is now to be construed as a reference to the Court of Appeal pursuant to ss. 74 and 75 of the Court of Appeal Act 2014 and section 7A(2) of the Courts Act 1961 as inserted by section 8 of the 2014 Act.

2. The principles applicable to the determination of whether a certificate should be granted under the section were considered by MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 and summarised as follows:

> "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.
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> 2. The jurisdiction to certify such a case must be exercised sparingly.
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> 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.
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> 4. …
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> 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.
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> 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*).
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> 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".
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> 8. Normal statutory rules of construction apply which mean inter alia that "exceptional" must be given its normal meaning.
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> 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.
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> 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."

These principles have been endorsed and applied in a number of decisions including *Arklow Holidays Limited v. An Bord Pleanála* [2008] IEHC 2, *Ashbourne Holdings Limited v. An Bord Pleanála* [2002] IRLM 321, *Kenny v. An Bord Pleanála* (No. 2) [2001] 1 I.R. 704, *Ógalas Limited (t/a Homestore and More) v. An Bord Pleanála* [2015] IEHC 205, *Callaghan v. An Bord Pleanála* (No. 3) [2015] IEHC 493 and *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 387.

3. The proposed points advanced by the applicant for certification are: -

> "(i) To what extent does interconnectivity or interdependence between various developments need to be considered in determining whether or not a development is a stand alone development? In circumstances where a development proposed comprises the construction of a 20 acre grid connection and is expressed to be constructed to power a development of 240 MW, can such development be consented to without considering the effects of the power demand of such development? Similarly, where a development is part of an overall masterplan but can be constructed independently, is this potential independence determinative of its status as a stand alone development?
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> (ii) When presented with an application for development consent for a "stand alone project" that forms part of a larger

envisioned "masterplan" development, is it lawful under the Environmental Impact Assessment (EIA) Directive (2011/92/EU as amended by Directive 2014/52/EU) to assess the "masterplan" for the purposes of Article 5(1) (d) and Annex IV (2), relating to the alternatives assessment (including assessment of alternative locations), while simultaneously only assessing the "stand alone project" for the impact assessment required under Article 5(1)(d) and Annex IV (5).

(iii) What is the legal extent of "as far as practicable" in the context of the scope of an EIA of a development that is the first phase of an overall masterplan? In particular, where the broad parameters of the overall masterplan are known (and are fundamental to the sites location for the development proposal) to what extent can the lack of precise detail prevent the conduct of an assessment?

(iv) In the event of the Board being unable to assess the entire masterplan development what is the Board's obligation to assess the development as a stand alone development, and in particular to assess the impacts and sustainability of the development in terms of site location and consideration of alternatives?

(v) What is the obligation to identify the main effects of the development and the main measures to reduce or off set same under National and EU law? What is the Board's obligation to record such identification, and is it met by the adoption of an inspector's report that itself highlights and identifies deficiencies in the information provided and questions the mitigation proposed (or indeed, concludes negatively in respect of same)?"

4. The applicants were granted leave to apply for judicial review in respect of the Board's decision to grant permission for a project involving the construction of one data hall and ancillary services together with an associated grid connection at Athenry, Co. Galway. A declaration was also sought that the decisions of An Bord Pleanála were in breach of Directive 2011/92/EU of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment and the related jurisprudence. Leave was granted on thirteen grounds which are addressed in the judgment. The applicants submit that the questions set out above constitute points of law that arise from the judgment. The draft points proposed at (i) to (v) above are heavily focused upon the circumstances of the particular overall project contemplated by Apple and a suggested obligation on the Board to carry out an EIA in respect of the company's masterplan to construct eight data halls and ancillary services together with the associated grid connection which will ultimately be the conduit for power to the entire complex if it were fully constructed and operational. It is clear that it is not envisaged that the plant would operate at full capacity in the near future. It is anticipated that full capacity may be reached in 2030 to 2035.

5. The development or project which was the subject of the initial consent or permission application to Galway County Council which was ultimately granted by An Bord Pleanála constituted the first phase of the more extended project. Permission was also granted by An Bord Pleanála in respect of the infrastructural grid connection development through which electricity will be supplied to the data hall in respect of which permission has been granted. The maximum consumption of electricity in respect of the phase one data hall is 30MW of electricity which will not be required until approximately 2023. The applicants submit that because of the enormous potential environmental effect of the production and consumption of this amount of electricity on the climate and on the national grid, the entire masterplan should have been the subject of an Environment Impact Assessment (EIA).

6. This proposition underpins the grounds upon which leave was granted and the judicial review hearing was conducted. In this regard, the court is satisfied, and it is accepted by the applicants, that there is a considerable overlap between the questions set out at (i) to (iv). The court considers that they consist of a critique of the court's determination of the issues set out in its judgment. The court sought to distil from the questions posed at (i) to (iv) a point of law of exceptional public importance upon which a certificate under s. 50A(7) might be granted but is not satisfied that one exists.

7. Counsel for the applicants accepted without abandoning any of the potential questions set out in paras. (i) to (iv) that there was some overlap and interconnection between them and submitted that the proposed issue was best summarised in point (ii). It posed the question:-

> "When presented with an application for development consent for a "standalone project" that forms part of a larger envisioned "masterplan" development, is it lawful under the Environment Impact Assessment (EIA) Directive … to assess the "masterplan" for the purposes of Article 5(1)(d) and Annex IV(2) relating to the alternatives assessment (including assessment of alternative locations), while simultaneously only assessing the "standalone project" for the impact assessments required under Article 5(1)(b) and Annex IV(5)."

This issue is presented in various different forms as it was during the hearing of the application. The question whether the interconnectivity or interdependence between various developments needs to be considered when determining whether or not a development is a standalone development is raised in point (i). A question is posed whether a grid connection with a capacity of 240MW could be the subject of a consent without considering the effects of the power demand of that development. In point (iii) the question is posed as to the "legal extent" of "as far as practicable" in the context of the scope of a EIA of development that is the first phase of an overall masterplan. It was submitted that the phrases "as far as practicable" or "as far as practically possible" are unclear. The applicants question the extent to which a lack of precise detail ought to prevent the conduct of an EIA where the broad parameters of the overall masterplan are known. In point (iv) a question is posed as to the Board's obligation to assess the entire development and all of its impacts and sustainability including site location where it is unable to assess the entire masterplan development. The main point advanced by the applicants at this stage is that as a matter of exceptional public importance the court ought to certify as a point of law whether the 240MW development could be subject to a consent or permission together with phase one permission without considering the effects of the power demand of the entire development at this stage and whether it is essential as a matter of European law to conduct an EIA in respect of the entire masterplan before considering the grant of permission.

8. It is clear from the submissions made in the course of this hearing that the test which the applicants and respondents agree should be applied in a situation of this kind is that set out by Advocate General Gulmann in Case C-396/92 *Bund Naturschutz in Bayern v. Freistaat Bayern*. The relevant extracts from the opinion are set out at pp. 37 to 40 of the judgment. Of particular importance was para. 71 which states:-

> "The important question in the present connection is not, however, which projects are to be subject to an Environmental Impact Assessment. It is whether, in connection with the Environmental Impact Assessment of the specific project, there is an obligation to take account of the fact that the project forms part of a larger project, which is to be carried out subsequently, and in the affirmative, the extent to which account is to be taken of that fact. The subject matter and content of the Environmental Impact Assessment must be established in the light of the purpose of the Directive, which is, at the earliest possible stage in all the technical planning and decision making processes, to obtain an overview of the

effects of the projects on the environment and to have projects designed in such a way that they have the least possible effect on the environment. That purpose entails that as far as practically possible account should also be taken in the Environmental Impact Assessment of any current plans to extend the specific project in hand."

9. The applicants have not identified any uncertainty in the principle adumbrated by the Advocate General or in its interpretation subsequently in Friends of the *Curragh Environment v. An Bord Pleanála* [2006] IEHC 243 or *Bowen-West v. Secretary of State* [2012] Env. L.R. 22 or any of the other authorities cited in the judgment.

10. It is useful to reprise the third question referred for the opinion of the court in *Bund Naturschutz in Bayern* to which the Advocate General's opinion is addressed. The question posed was whether the word "project" in the Directive was to be understood as meaning in its application, in that case to motorways and express roads that the environmental impact:-

> "(a) is to be assessed solely for the section of a road link for which development consent has been sought, or
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> (b) in addition to the area covered by that section, for the road link as a whole?"

The Advocate General confirmed that the Directive should not be interpreted to mean that an Environment Impact Assessment is mandatory for projects other than the specific projects submitted by developers to the competent authorities to obtain authorisation to carry out construction or other works "even if the actual application relates to only one part of a longer road link which as normally happens in practice, is to be constructed in stages". The fundamental principle is that an EIA must be carried out for projects in respect of which the public or private developer is seeking development consent. Otherwise there would be difficulties in laying down what comprises "an entire project" when that concept is not the same as "a specific project in respect of which an application has been submitted". It was noted that there could be difficulties in carrying out an EIA pursuant to the Directive for projects which had not yet been worked out in detail. It was self-evident that the Directive could not indirectly have the effect of forcing a Member State to depart from the normal practice according to which long road links were executed by constructing sections over staggered periods. It was also accepted that the purpose of the Directive should not be circumvented by presenting them in a form which rendered an Environment Impact Assessment meaningless. They should not be circumvented by a definition that is overly strict or otherwise inappropriate "in the light of the purpose of the Directive". All parties were satisfied that this case was not one in which Apple sought to avoid the carrying out of an EIA by project splitting. Although the Board did not carry out an EIA which subjected the likely effects of the possible future construction and operation of seven additional data centres nevertheless it did not exclude consideration of their potential effects and the power likely to be required for same "as far as practically possible".

11. This Court was satisfied that the extent to which the EIA of a specific project was required to take account of the fact that the project forms part of a larger project was to be established in the light of the purpose of the Directive which was "at the earliest possible stage in all the technical planning and decision making processes, to obtain an overview of the effects of the projects in the environment and to have projects designed in such a way that they the least possible effect on the environment". An important sentence from the Advocate General's opinion is contained at para. 71 quoted already:-

> "That purpose entails that as far as practically possible account should also be taken in the Environment Impact Assessment of any current plans to extend the specific project in hand."

12. This Court having considered the submissions of all parties in respect of the application of that legal principle to the facts of the case reached the following conclusion:-

> 71. The court is satisfied that the Inspector and the Board in its decisions took into account the fact that the project which forms the basis of the application for the permissions granted in this case forms part of a larger project which is to be carried out subsequently. The court has also considered whether at the earliest possible stage in all the technical planning and decision making processes to date the purpose of the EIA in obtaining an overview of the effects of the project on the environment and to have projects designed in such a way that they have the least possible effect on the environment has been achieved. It is achieved if "as far as practically possible" account is taken in the EIA of any current plans to extend the specific project in hand. The court is satisfied that it is clear from the information sought and gathered by the Inspector and by the Board, and the considerations set out in the evidence adduced before the court, that the obligations cast upon the Board have been fully discharged. Future contingencies and occurrences in relation to future aspects of the project have been extensively explored and considered in the course of this process. It is abundantly clear that the possible future expansion requirements of the developers were considered. The Board concurred with and adopted the Inspector's assessment which, inter alia, included an extensive assessment of later potential phases of the project relevant to the assessment of the site location and in assessing the potential material impact in terms of climate change of a future build out of the masterplan.
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> 72. The court is not satisfied that there was any obligation to carry out an EIA of the entire masterplan which was not the subject of the planning permission application. Of primary concern to the competent authority is the development in respect of which the EIA is required."

13. The court is not satisfied that there is any uncertainty about the legal principle applicable in a case such as this and which it applied. The principles of the Directive and the basis upon which they should be applied have been clearly set out in the Advocate General's opinion as also applied in numerous CJEU, UK and Irish authorities considered in the judgment. The court is satisfied that the points of law (i) to (iv) posed by the applicants and said to arise out of this judgment are concerned with the application of these clear legal principles to the facts of this particular case.

14. The court was satisfied that the Board considered the relevance of the masterplan development to the issues which arose in the course of its consideration. In particular, it considered its relevance to the determination as to whether the selection of the development site outside Athenry was justified. It is clear that any subsequent permissions in relation to any further phases of the development will require a full EIA on the full extent and effects of the extended permission sought and any cumulative effects which may arise which will be considered at that stage. The court was satisfied that the Inspector and the Board understood that future permission would be required for an expanded development beyond phase one. This was one of the circumstances taken into account in the decision to grant permission. The court was also satisfied that the Board had considered the overall potential for a change in circumstances including potential national policy developments, the availability of green sources of power, the effect of electricity consumption on climate change and on the national grid infrastructure but that these were best considered at the time of any additional phase of development which would require permission. The court was satisfied that that was the type of "practical and reasonable consideration" appropriate to the determination of consent or permission in respect of the phase one development.

15. There is a heavy emphasis in the submissions made in the course of this application on the facts of the particular case and the merits of the original application for judicial review. The court is not satisfied that any of these points are "points of law of exceptional public importance". Each of them concerns how the relevant legal principles should be applied to the facts of this case. Thus the court is not satisfied that the proposed points "transcend … the individual facts of [this] case". Furthermore, the court is not satisfied that these points satisfy the requirement that their resolution is "desirable in the public interest".

16. In *Arklow Holidays Ltd. v. An Bord Pleanála* [2007] 4 I.R. 112 Clarke J. considered the question whether it was in the public interest to grant a certificate to appeal. In reaching the conclusion that it was not appropriate in that case he stated:

> "24. … The public interest, in an issue such as this, needs to take into account the nature of the development proposed and the potential consequences of a significant further delay in the matter being finally disposed of before the courts. While it is undoubtedly the case that issues and questions concerning the public nature of the project involved are not necessarily decisive (it would be wrong to say that the public importance of the project concerned must necessarily outweigh all other considerations in the case), such factors are, nonetheless, in my view, matters which have to be taken into account by the court in assessing whether it is in the public interest to grant the certificate. Having regard, on the one hand, to the importance of the issue raised by counsel on behalf of the applicant and, on the other hand, to the importance of the project and the consequences of the likely delay that would be incurred, I have come to the view that it would not be in the public interest to grant a certificate notwithstanding my finding that the point of law raised by counsel on behalf of the applicant is a point of law of exceptional public importance."

In a further reference to this issue in *Arklow Holidays Ltd. v. An Bord Pleanála* (No. 2) [2007] 4 I.R. 124 Clarke J. added that:-

> "An early resolution of legal questions concerning all projects is an important aspect of the statutory regime and, in my view, such a policy applies with particular force in respect of major public infrastructural projects."

This approach to public projects was also said to be applicable to private projects in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 263 (per Barrett J. at para. 13). The particular interest of the public in this case relates primarily to the issues raised concerning the effect of future power consumption nationally and on the climate. There are other public issues concerning employment and industrial development in the West of Ireland. A further significant public issue might have arisen if there were some legal uncertainty as to the principle that applies to a consideration of larger projects in the future and the appropriate level of EIA that should be carried out in respect of such projects. As indicated I do not consider that any uncertainty applies in relation to that legal principle or its application. Furthermore, insofar as an appeal might delay this project further, the court would be slow to presume that there would be any unreasonable delay in the processing of any appeal properly taken to the Court of Appeal or indeed the Supreme Court or such as would give rise to the same level of concern as that expressed by Clarke J. in respect of the proposed appeal in the *Arklow Holidays Ltd*. Case. That case concerned the completion of important public works related to public health and safety. The project in this case is a private project with a public dimension and I do not find the argument concerning delay to be as compelling as in the case of that kind of public project.

17. The court is not satisfied in relation to points (i) to (iv) that the decision of the court involves a point of law of exceptional public importance because the legal principle applicable to the facts of this case is clear and well established and also because the court does not consider in the circumstances of this case that it is in the public interest that an appeal be taken having balanced the importance of the issues raised on behalf of the applicant, the importance of the project and the consequences of any likely delay.

18. The applicants' last point (v) raises an issue concerning the obligation by the Board to identify the main effects of the development and the main measures to reduce or offset these effects under national and European Union law. The question is posed whether the Board's obligation to record the identification of the main effects of the development and measures to reduce same is met by the adoption of the Inspector's report which is said to highlight and identify deficiencies in the information provided and question the mitigation measures proposed. This Court was satisfied that the Board's decisions in the two cases under review when read together with the Inspector's reports constituted an adequate record of the EIA carried out by the Board in both cases and was in compliance with its statutory obligation. The court is satisfied that there is no legal uncertainty on this issue. The court is satisfied that it is well established that if the Board accepted the Inspector's report and did not deviate from it or reject any of its conclusions the Board is taken as in effect adopting the Inspector's report. (*Maxol v. An Bord Pleanála and Ors* [2011] IEHC 537 per Clarke J.; *Fairyhouse Club Ltd v. An Bord Pleanála* (unreported High Court 18th July, 2001 per Finnegan J.); *Ogolas v. An Bord Pleanála and Ors* [2015] IEHC 205 per Baker J. ; *Edward Buckley v. An Bord Pleanála* [2015] IEHC 572 per Cregan J. at pp. 39 to 44 *and Ratheniska Timahoe and Spink (RTS) Substation Action Group v. An Bord Pleanála and Eirgrid plc*. [2015] IEHC 18 per Haughton J. at para. 85).

19. The applicants submit that there is no record of any determination in respect of the sustainability of the first phase of the development and whether it was acceptable or sustainable to permit a single data hall and the substation on its own absent the balance of the masterplan. It is submitted that site location is assessed and justified solely on the basis of the entire masterplan. The court is satisfied that the law in relation to the recording of the Board's decision is clear from the authorities cited above and in the judgment. Each of the issues which are set out in the applicants' submissions and points have been addressed at length in the Inspector's report. The matter is dealt with at paras. 27 to 42 of the judgment. The court concluded in relation to site selection:-

> 42. … The court is satisfied that the Board adopted the Inspector's report and his findings in relation to the issue of site location which were in favour of the development. It was clearly satisfied to adopt his opinion that the eight halls were necessary at this time. It is clear that the Inspector on the basis of the information presented concluded that the case made concerning the need in terms of a projected increase in data storage demand and the likelihood of significant change in technology use was "robust". He thought that the alterative scenario of the development of new technology rendering conventional data centres obsolete "unlikely". He concluded that Apples case was convincing regarding the likely increase and demand for data storage and the need for development of additional storage capacity in the future. The court is satisfied that while the issue was regarded as fundamental both by the Inspector and for the Board in its consideration, the Board accepted the case made by Apple based on the Inspector's conclusions and recommendations which it was entitled to do. Consequently, the court is not satisfied that the Board did not give any consideration to this issue or did not record its determination in that regard. That element of ground 2 is rejected. Furthermore, the suggestion that the Board's conclusion in relation to that issue is unreasonable and irrational is not sustained having regard to the contents of the Inspector's report and the decision of the Board."

The court was also satisfied that the Inspector considered and assessed the potential environmental impact of later phases of the development insofar as that was practicable or reasonably possible but ultimately concluded that such an assessment was best made at a later stage when a future planning permission accompanied by an appropriate Environment Impact Assessment in respect of same was made in respect of later phases of the development. The court has set out in some detail the review carried out by the Inspector

in his report which was ultimately adopted by the Board in the judgment which quotes extensively from the relevant sections of the report.

20. The court is not satisfied that the applicants have established that point (v) constitutes a point of law of exceptional public importance or one in respect of which there is a degree of legal uncertainty. Insofar as any issue of law is raised the court is satisfied in relation to the recording of the Board's decision that the law is well established and was applied in the judgment. The applicants have not succeeded in establishing that it is in the public interest that this point of law be revisited.

21. The court is also satisfied that many of the arguments addressed in the applicants' submissions on this application seek to reargue aspects of the case which were the subject of argument before the Inspector and later before this Court in the course of the judicial review. It seems to me that much of this argument is based on the fact that the applicants disagree with the Inspector's conclusions and disagree with the court's application of the legal principles which govern the issues in this case as they are applied to the facts of this case. In essence none of the five points advanced transcend the facts of this particular case. The court is not satisfied that the applicants meet the criteria set out in the authorities for the certification of a point of law of exceptional public importance under s. 50A(7) in respect of any of the five points advanced.

22. For all of the above reasons the application is refused.