THE HIGH COURT

2017 No. 151 JR

IN THE MATTER OF AN APPLICATION PURSUANTTO THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 AND 50B

OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

IN THE MATTER OF AN APPROCAL GRANTED UNDER SECTION 182B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

Between:

NORTH EAST PYLON PRESSURE CAMPAIGN LIMITED

First Named Applicant

– and –

MAURA SHEEHY

Second Named Applicant

– and –

AN BORD PLEANÁLA

First Named Respondent

– and –

THE MINISTER FOR COMMUNICATIONS, ENERGY

AND NATURAL RESOURCES

Second Named Respondent

– and –

IRELAND AND THE ATTORNEY GENERAL

Third and Fourth Named Respondents

– and –

EIRGRID PLC

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 11th January, 2018.

I

Background

1. On 22nd August, 2017, the court delivered its judgment (the 'principal judgment') in *North East Pylon Pressure Campaign Ltd & anor v. An Bord Pleanála & ors* [2017] IEHC 338. The within application is brought by the applicants pursuant to s.50A(7) of the Planning and Development Act 2000, as amended, which provision requires, as a pre-requisite to the bringing of an appeal from the principal judgment, here by the applicants, that this Court certify that its decision in the principal judgment involves (1) a point of law of exceptional public importance, and (2) that it is desirable in the public interest that an appeal should be taken to the Court of Appeal.

2. By way of preliminary remark, the court recalls its observations in *Connolly v. An Bord Pleanála* [2016] IEHC 624, para.14, concerning current general practice whereby the judge who hears a principal planning dispute also decides on a later, related s.50A application, a practice the optics of which appear open to criticism and the necessity for which is open to question. However no objection has been made by any of the parties to the within proceedings to the fact that the principal application has been, and the within application is being, adjudicated upon by the same judge.

II

Guiding Law and Principle

3. The court respectfully adopts the legal principles identified by MacMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, 4-5, as the guiding principles that inform its adjudication of the within application. Some additional points might usefully be noted in the context of the within proceedings:

> (1) what the court is concerned with is identifying and certifying issues of law. Issues of fact are not appropriately the subject of certification and issues which depend on the Court of Appeal reversing findings of fact which have been made by this Court are not amenable to certification. This first point assumes a particular significance when one realises that a number of the purported points of law of exceptional public importance contended for by the applicants in the within application rest on factual predicates that are the complete opposite to what was determined by the court in the principal judgment.
>
> (2) the court is concerned with issues of law that arise out of the principal judgment. (This is the fifth point made by MacMenamin J in *Glancré*). By definition, issues that were not argued before the High Court do not arise out of the

principal judgment. By the same token, issues which are justified on the basis of arguments which were never advanced to the court are not capable of certification by reference to those arguments.

(3) a point well traversed in the authorities (see *e.g., Dunnes Stores v. An Bord Pleanála* [2016] IEHC 263) is that discrete questions which may be of importance in the context of the facts of a particular case but which are constrained in their likely future application by those very facts, and are thus in no sense systemic, ought not to be certified.

(4) the court is concerned only with issues of law in respect of which the law stands in a state of uncertainty. (That is the third point identified in *Glancré*). The court, obviously, is not entitled to assume that its decision was correct; however, it is entitled to interrogate each of the issues that are advanced to see if, based upon the arguments advanced in favour of certification, there can be identified any argument which is likely to generate actual and genuine uncertainty in the future. If the law, objectively viewed, is clear, there is no issue capable of certification.

(5) the first limb of the test for certification is focused on whether the point(s) of law contended for is (are) exceptional, *i.e.* unusual or untypical in terms of importance. All points of law are important to the parties in the case. What is required for a certificate to issue under s.50A(7) is an importance which, to use a colloquialism, 'stands out'. It should be obvious that there is an issue of law that is of a kind that is untypical in its implication.

(6) the court is solely concerned with permitting the invocation of an appellate jurisdiction. It is not concerned with permitting a consultative case stated or an advisory opinion from the court on an issue of law that may or may not appear interesting, or which may or may not appear, in the abstract, to be significant. It follows that it is appropriate for the court to ask itself 'What difference will it make in the event that an appeal is permitted and the matter that is the subject of appeal is determined in a particular way?' Or, to put matters in a more colloquial style 'Does the issue raised have 'real world' consequence?' Issues that do not strike to the heart of the relief which is claimed are not properly certifiable. Issues that have no practical consequence in the litigation should not be certified.

(7) a point touched upon in the second point in *Glancré*, the jurisdiction to certify falls to be exercised sparingly. Proposed certified questions which are based on future hypotheses which may never happen cannot appropriately be certified.

(8) it must be the case, by definition, that an issue of law which is of exceptional public importance is one capable of precise expression, precise definition, and clear and concise justification. Because the jurisdiction is concerned with issues which transcend the facts of a case; such issues must be capable of expression in a manner that stands independently of the facts of the case. In the within application most, if not all, of the questions presented to the court fail that test. They are based upon predicate upon predicate, factual assumption upon factual assumption and, in many cases, factual assumptions which are directly the opposite of determinations made by the court.

4. When the court brings the just-mentioned eight propositions to bear in the context of the application now before it, all of the applicants' issues fall by reference to one of them, some of them fall by reference to all of them, and most of them fail most of them… and that is before one comes to the second limb of the certification test and the question of whether it is desirable in the public interest that an appeal should be taken to the Court of Appeal.

III

Purported Points of Law of Exceptional Public Importance

(i) Points 1 and 2.

a. Text.

5. Points 1 and 2 read as follows

> *"1. Whether, for the purposes of national/domestic law, where a European Regulation has direct effect on a Member State, and in circumstances where the Member State seeks to designate functions contained within said Regulation to a domestic statutory body, does such designation require a national implementing measure, such as domestic legislation so as to create a legislative basis upon which the functions of the domestic statutory body can be extended and upon which such a body can act, or whether there is any degree of formality required to designate such a body?*
>
> *2. Whether it is permissible to designate new functions to and/or extend the functions and role of a domestic statutory body by way of private letter from a representative of a Minister of Government where the referable European Regulation requires designation by the State?"*

b. Analysis.

6. If the court looks to the text of Points 1 and 2, what is striking about both questions is that there is no follow-through as to what the consequences might be for the decision in this case. There is no suggestion that if either those questions are answered in a way favourable to the applicants that it has any practical outcome for the decision-making process. Instead there are abstract questions, but nothing in those questions which has any real world consequence. In particular, there is nothing which would affect the outcome of these proceedings. From start to finish, the applicants make no complaint as to what An Bord Pleanála did, no complaint that An Bord Pleanála was not qualified to be designated as a competent authority, no suggestion that designation was done by mistake or that the Government is seeking to resile from that designation. It is a purely technical point, a point which, to borrow from the wording of Clarke J. in *Arklow Holidays Ltd v. An Bord Pleanála* [2008] IEHC 2, para.5.5 "*could have had no possible bearing on the merits of the process under review other than formal compliance*", such technicality being, and *Arklow Holidays* is testament to this, a feature that can be factored into this Court's discretion whether or not to grant leave to appeal.

7. There was nothing new or novel in the court's judgment in relation to the PCI Regulation, *i.e.* Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17th April, 2013 on guidelines for trans-European energy infrastructure (O.J. L115, 25.4.2013, 39). The court applied well-established principles of European Union law, and it is significant that the case-law relied upon by the court in this regard was of particularly seasoned vintage, dating, in the case of European case-law, from the 1970s (Case C-34/73, *Variola v. Amministrazione Italiana delle Finanze* (1973); Case C-39/72 *Commission v. Italy* (1973)) and in terms of domestic

case-law, from the turn of this century (*Maher v. Minister for Agriculture and Food* [2001] 2 I.R. 139). These well-established principles were simply brought to bear in a particular factual context. Curiously, the applicants do not take issue with the court's finding that it is a question of fact and degree as to whether implementing legislation is required in relation to a European Union regulation. They do not say that the court was incorrect, that the judgment was decided *per incuriam*, that the *Variola* decision no longer applies, that Maher does not apply…there is no substantive criticism made of the findings of the applicability of the PCI Regulation. And that presents a fatal difficulty for the applicants because unless there is uncertainty in the law, the court cannot properly grant leave to appeal; that is clear from *Glancré*.

8. When the court looks to the applicants' submissions, it is clear that they have confused two separate issues. The issue with which this Court was concerned was the narrow issue of designation and the mode or modality of that designation. But what the applicants seek to do is to attribute to the court a finding that it never made, *viz*. that it is now the position that a statutory body can act 'outside the four corners' of its statutory discretion. A number of cases are referred to by the applicants, which were not opened to the court at the principal hearing, and which point to the fact that a statutory body cannot, for example, operate outside its statutory remit. That fact is accepted, but it is not what the case was about. In this case it is quite clear where the Board's functions come from, they are found in the directly applicable PCI Regulation, held by the court to be (as it is) prescriptive in this regard.

(ii) Points 3 and 4.

a. Text.

9. Points 3 and 4 read as follows:

> *"3. Whether a decision, which on its face leaves a number of matters to be determined subsequent to the determination by other statutory bodies and/or where statutory consents are necessary, comprises a Comprehensive Decision for the purposes of the Projects of Common Interest ('PCI') Regulation?*
>
> 4. *Whether, in circumstances where the development as identified by the applicant does not contain the accesses required for the construction of the development and where such access includes the construction of entrances, access roads, bridges and consists of development as defined in Section 3 of the Planning and Development Act, 2000, as amended, and which cannot comprise exempted development by virtue of the provisions of Section 4(4) of the Planning and Development Act, as amended, and where such accesses require to be subject to an EIA* [environmental impact assessment] *and AA* [appropriate assessment], *whether such development can be subject to a comprehensive decision under the PCI Regulation in the absence of the inclusion of such accesses required for the development?"*

b. Analysis.

10. Points 3 and 4 are new issues that were never raised in the application before the court and cannot be certified. In fact no leave was granted to argue these points before the court at the hearing of the principal application. No certification point can arise in relation to a point of law that was not within the scope of the leave granted, not the subject of argument and, consequently, not the subject of the principal judgment. What the applicants appear to contend is that they are points that might arise in another case. They might, but just because they are points that someone might litigate in the future does not mean that they arise from the principal judgment in the manner contemplated by *Glancré*. What is sought in an application such as that now presenting are points that can be deployed *contra* the High Court before the appellate court, not points that might conceivably be litigated in some future litigation.

(iii) Points 5 and 6.

a. Text.

11. Points 5 and 6 read as follows:

> *"5. Whether the De Facto Doctrine operates under Irish law?*
>
> *6. Whether, if the de facto doctrine does operate under Irish Law, does the Doctrine operate so as to validate an unlawful designation of powers/functions to a domestic statutory body so as to confer that body with jurisdiction in circumstances where the issue in respect of the designation was raised prior to the decision on foot of such purported designation was made?"*

b. Analysis.

12. As to Points 5 and 6, the court's observations in the principal judgment as to the *de facto* designation are *obiter dicta*. Moreover, they also do not have an independent existence free from the PCI Regulation point. So as the court has decided to refuse leave to appeal in relation to the designation issue, it follows as a matter of logic that it cannot grant leave to appeal in relation to the *de facto* designation point. The reason for this is as follows: if the court were to certify the *de facto* issue alone, the Court of Appeal would be invited to rule on that issue in *vacuo, i.e.* the Court of Appeal's ruling, even were it to favour the would-be appellants, would make no difference to the outcome of the proceedings because the core issue (the designation issue) would not fall to be adjudicated upon. In short, Points 5 and 6 are moot, given the court's conclusion as to Points 1 and 2.

(iv) Points 7, 8 and 9.

a. Text.

13. Points 7, 8 and 9 read as follows:

> *"7. Whether the submission of an application which requires Environmental Impact Assessment (EIA) and Appropriate Assessment (AA) with no proposals for, or no detail, in respect of access arrangements in respect of which the*

construction of the development and the carrying out of an EIA the decision on which delegates aspects of the development and in particular the accesses to same to third parties (being the respective County Councils in conjunction only with the applicant for the development) is in compliance with the EIA Directive and Habitats Directive and Public Participation Directive as transposed into Irish law?

8. Whether, in the absence of any requirement to make a separate application for development consent for accesses which are necessary in order to construct the development, it was legally permissible for the Respondent to delegate the authorisation of such accesses to bodies (being the County Councils) in circumstances where those bodies had no legal authority to carry out the EIA and/or AA for the development in question and no authority to issue a comprehensive decision under the PCI Regulation?

9. In particular and without prejudice to Ground 8 above, whether, in the absence of any requirement to make a separate application for development consent for accesses which are necessary in order to construct the development, it was legally permissible for the Respondent and/or in compliance with Irish and European Community law including the Public Participation Directive, to delegate the authorisation of such accesses to bodies (being the County Councils) in circumstances where the person over whose land access was proposed to be located will remain unaware of what is being proposed and would have no right to participate in the approval process or make submissions in respect of same or to be notified of the decision in question to permit a review to be engaged in?"

b. Analysis.

14. Points 7, 8 and 9 are utterly unclear in their terms and intended consequence which in itself would seem to the court to prevent their being certified; however, they are in any event each so rooted in the very particular features of the case that they cannot be said to transcend the case. Point 7 references the situation where there are *"no proposals for, or no detail in respect of access arrangements"* and thus is premised on a factual scenario which is precisely opposite to what the court found to present. Points 7 and 8 also fail because they raise an issue under the Habitats Directive and, apart from the unexpected appearance of the whooper swan in argument at the principal hearing, there was no argument addressed to the court in written or oral submission in relation to that directive. When one looks at Point 8, one might almost imagine that An Bord Pleanála delegated the carrying out of an EIA/AA to other bodies (which it did not). The court's conclusion was that An Bord Pleanála carried out an EIA and did it properly. As to Point 9, the issue as to want of public awareness as to what was being proposed and/or varied was obliquely pleaded in the statement of grounds, not taken up in submission, and the level of public participation was commented upon favourably by the court at para.150 of its judgment. Moreover, and with respect, the applicants cannot keep agitating the public awareness point without engaging with the substance as to exactly what point of law of exceptional public importance is contended to arise in this regard. Merely repeating a point does not make it a point of law of exceptional public importance, even if a would-be appellant considers that the trial court got the point wrong or that the end result was unfair; more is required to come within the parameters of s.50A(7). Moreover, when the court stands back and looks to the substance of what was in issue in this regard, all that occurred is that the court considered a relatively straightforward criticism about 'leaving over' matters that has been addressed in, e.g., *People over Wind v. An Bord Pleanála* [2015] IEHC 271 and *Sweetman v. An Bord Pleanála* [2016] IEHC 277, and thus cannot be seen as raising some point of controversy which requires resolution in the manner contemplated by s.50A(7).

(v) Points 10, 11 and 12.

a. Text.

15. Points 10, 11 and 12 read as follows:

"10. Whether, in circumstances where no application was made for consent for the development of access routes and where, during the course of the oral hearing conducted by an Inspector appointed by the Respondent, numerous variations were proposed by the applicant for the development to those access routes which had been the subject of the EIS, which variations were not adopted by the Board or referred to in the decision of the Respondent where it adopted, in its reasons and considerations, the report of its Inspector, and in circumstances in which the public and landowners in question had not been informed of same or given an opportunity to make submissions or observations in relation to same, the access routes as proposed to be varied, can be considered to be those which have been [the] *subject of the Environmental Impact Assessment of the Respondent and, if so, whether such Environmental Impact Assessment has been carried out in compliance with the Public Participation Directive as transposed in*[to] *Irish Law?*

11. Whether in circumstances where the Respondent has referred to including in its approval under Section 182B various matters but has set out expressly in relation to the Environmental Impact Assessment carried out by it those matters it has had regard to, which matters do not include any of the variations proposed by the applicant for the development during the hearing but not made known to the public or in respect of which any opportunity for submissions was given to the public, the Court is entitled to hold that the Board has carried out an Environmental Impact Assessment on the access routes as proposed to be varied by the applicant for the development?

12. Whether An Bord Pleanála can delegate to local authorities the approval and decision-making power in respect of aspects of a development for which consent is applied for under Section 182A and which is governed by Section 182B of the Planning and Development Act, 2000 which requires an EIA and AA, together with the Construction and Environment Management Plan the Traffic Management Plan and Waste Management Plans including the locations of construction accesses as part of such development and aspects of same with the potential to give rise to significant impacts on the environment including the locations and method of construction of bridges over tributaries of European Sites?"

b. Analysis.

16. As the court understands Points 10, 11 and 12, what the applicants seek to contend on appeal are certain points about the limits of *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 and what might be styled '*Boland*-type' conditions. So, first, it is contended that s.182A/B developments are not compatible with conditions like Condition 3(c). This, however, was not argued before the court and so makes no appearance in the principal judgment; the point that was argued was that the EIA had not been done properly. (In any event, the point seems rather to overlook the import of s. 182B(5) of the Act of 2000). Second, it is contended that Condition 3(c) is not compatible with *Boland*, that the reasons given were not good enough and that there was no guidance in them for the planning authority. Again, however, this was not argued before the court and so makes no appearance in the principal judgment. The point

made which the court did address was whether too much was left over. Third, as to its being a point of law of exceptional public importance as to whether or not a developer is entitled to put further information before An Bord Pleanála (here concerning the access routes) during the EIA process, the court admits to surprise at the notion that a developer could not provide more information on the actual environmental impact of an access route that it intended to pursue; that would seem to be in the face of what is in fact expected in this regard. Again, however, the foregoing was not argued before the court and so makes no appearance in the principal judgment. Fourth, there appears to be a substantive allegation that inadequate participation under the EIA directive was afforded to the public. That has been dealt with as a straightforward matter of fact in the principal judgment without, *e.g.,* deploying some interesting or novel concept of participation. Finally, the court cannot but note that Point 10 assumes that An Bord Pleanála did not consider the access routes whereas the court determined that it did.

17. In passing, the court notes that there are some quite loaded assumptions in Points 10, 11 and 12:

– Point 10 refers to

> *"circumstances where no application was made for consent for the development of access routes and where, during the course of the oral hearing conducted by an Inspector appointed by the Respondent, numerous variations were proposed by the applicant for the development to those access routes which had been the subject of the EIS, which variations were not adopted by the Board or referred to in the decision of the Respondent",*

but, at para.218 of its judgment, the court observes that

> "[N]*otwithstanding the assessment by the inspector, notwithstanding the clarity as to the temporary access routes… notwithstanding the fact that An Bord Pleanála adopts, in relation to the environmental impact assessment, the inspector's report, notwithstanding the fact that An Bord Pleanála refers to and had regard to all documentation on file, notwithstanding that An Bord Pleanála refers to and had regard to the submissions made at the oral hearing…the court is asked to believe that the Board addressed its order to temporary access routes frozen in time for no apparent reason, notwithstanding the process of assessment which had been undertaken and notwithstanding the specification by the developer of what the modified routes actually were. That…is a remarkably difficult construction to place on the decision and not one that the court places upon it."*

So one of the assumed facts being put forward by the applicants to preface their point of law of exceptional public importance is expressly determined against the applicants in the judgment.

– Point 11 queries

> "[w]*hether in circumstances where the Respondent has referred to including in its approval under Section 182B various matters but has set out expressly in relation to the Environmental Impact Assessment carried out by it those matters it has had regard to, which matters do not include any of the variations proposed by the Applicant for the development made during the hearing but not made known to the public or in respect of which any opportunity for submissions was given to the public, the Court is entitled to hold that the board has carried out an Environmental Impact Assessment on the access routes".*

That is the same essential point as is raised in Point 10, *viz*. whether in circumstances where the Board has not carried out an environmental impact assessment, the court can state that it carried out an EIA, But that factual premise simply does not arise from the court's judgment which, again, was determined clearly and without novelty in this regard.

– Point 12 queries

> "[w]*hether An Bord Pleanála can delegate to local authorities the approval and decision making power in respect of aspects of the development for which consent is applied for under Section 182A and which is governed by Section 182B of the Planning and Development Act 2000 which requires an EIA and AA, together with the Construction and Environment Management Plan, the Traffic Management Plan and Waste Management Plan including the locations of construction accesses as part of such development and aspects of same with the potential to give rise to significant impacts on the environment including the location and method of bridges over tributaries and European sites."*

This seems but another way of 'repackaging' the point as to whether Condition 3(c) holds good at law. The reason argued by the applicants at hearing as to why it was not good at law was that it left over too much, but the applicants lost that point. So the applicants are effectively putting forward a materially different view in a bid to run the same point. Unfortunately for the applicants, however, that materially different view is not something that arises from the principal judgment.

(vi) Points 13 and 14.

a. Text.

18. Points 13 and 14 read as follows:

> *"13. Whether the interpretation of an undertaker who is entitled to apply for development consent under Section 182A of the Planning and Development Act 2000, as amended, requires a restrictive interpretation in light of the fact that the application herein will affect the title of the properties and homes of parties implacably opposed to the proposed development and the impact that such application and decision on foot of same will have on the property rights of persons whose homes and/or property are likely to be adversely devalued and impacted by same?*
>
> *14. Whether, in circumstances where the Notice Party herein who was the applicant herein under Section 182A and who had and has no legal interest in the vast majority of the lands concerned and no consent of the vast majority of landowners whose lands are the subject-matter of an application and who has no statutory or other entitlement to enter such lands to carry out such development without consent and who has confirmed that it does not intend to construct the development (but instead to make the Electricity Supply Board to do so which in turn would use contractors), can validly make an application under Section 182A of the Planning and Development Act, 2000 as amended?"*

b. Analysis.

19. Point 13 is addressed to the entitlement of EirGrid to make the application. The court does not see how this issue, which was not pressed at hearing can suddenly become a ground on which it is said that there is a point of law of exceptional public importance justifying certification. Moreover, while the applicants now want the Court of Appeal to determine whether a more restrictive interpretation has to be given, the question that immediately presents is 'To what end?' The applicants do not say that that restrictive interpretation would offer, with every respect and deference to the Court of Appeal, anything other than an interpretation. That simply cannot be a point of law of exceptional public importance and it is not in the public interest that that be appealed.

20. As to Point 14, effectively the same point arises. The applicants took a clear legislative provision, imputed uncertainty to it and lost the point. The court looked at s.182A and said, in effect, 'there is no requirement as to landowner consent'. But that this should be so does not raise a point of law of exceptional public importance. There is no uncertainty in how the court addressed the meaning of the provision. There is no point of law of exceptional public importance in this that warrants an appeal, no affirmative benefit to the further pursuit of the case. The court discounted an imputation of uncertainty and said the section is clear; that does nothing to bring matters within the scope of the circumstances in which a certificate would issue pursuant to s.50A(7). However it is sought to ground this argument, the court (and the applicants) cannot escape the terms of the applicable legislation which yields no uncertainty: there is no requirement therein as to legal interest or landlord consent in this regard.

(vii) Points 15 and 16.

a. Text.

21. Points 15 and 16 read as follows:

> *"15. Whether the EIA Directive requires, in any consideration of alternatives, that the choice of the options selected must be based on environmental grounds, can a choice which is predominantly based on costs be consistent with the obligations under the Directive?*
>
> *16. Whether, in circumstances where another division of the High Court has referred to the European Court of Justice a question at issue herein in relation to alternatives and obligations arising under the EIA Directive, and declared the matter, as a matter of domestic law, not to be an acte clair, and where it is accepted that such matter is relevant to the proceedings before the Court, was it appropriate for the Court to determine the issue, without distinguishing the case before it from that in which the reference to the European Court of Justice had been made or providing a comprehensive explanation for departing from such a finding, proceed to determine the matter?"*

b. Analysis.

22. As to Point 15, this argument was not the argument that the applicants ran with in their application. It was not argued that an option cannot be discounted on a costs ground. The applicants contended that there should be a full assessment of all rejected alternatives. The case was not about the basis for such discounting. One gets to appeal the case that one has brought and in which judgment was rendered, not some alternative case that might have been brought but which was not and in which judgment, in consequence, was not rendered.

23. Point 16 is based on an incorrect assumption. It infers that the court did not distinguish *Holohan & ors v. An Bord Pleanála* [2017] IEHC 268. It did, at paras. 163 and 175 of the principal judgment, in the latter of which paragraphs the court made it clear that the Srananagh-Turleenan route was not an alternative. Moreover, the applicants did not ask the court to make a reference to the Court of Justice and never asked the court to adjourn the matter pending the outcome of the previous reference. It is, therefore, to put matters at their very mildest, odd, that the application for leave to appeal would now be used to put down some type of 'placeholder', effectively to abide the outcome of what is in fact a decision on entirely different facts and circumstances.

24. Curiously, it was acknowledged at the hearing of the within application that there had been no determination of the type contemplated by the text of Point 16, so it is not clear how the principles of *stare decisis* could then be engaged. But even leaving all that aside, what is raised in this regard is a fact-specific complaint as to *stare decisis*. There is nothing in that complaint, even without the frailties to which the court has just pointed, that transcends the within case, no point of law of exceptional public importance that arises.

(viii) Points 17 and 18

a. Text.

25. Points 17 and 18 read as follows:

> *"17. Whether, having regard to the language the Courts have used in the line of jurisprudence stemming from Cahill v. Sutton, do the personal circumstances of the Applicants herein entitle them to raise the arguments relating to the Constitutional and European rights in order to ensure adequate protection and adequate access to justice?*
>
> *18. Whether the First-Named Applicant which is a non-governmental organisation dedicated to the protection of the environment and which has represented landowners for over a decade and has actively engaged with a developer on behalf of the landowners and their rights, and who has written authorization from said landowners to represent them and who has dealt with the developer and ABP on a number of issues including access to and use of their land, has standing to raise Constitutional issues and/or European Rights issues on behalf of the landowners, who are not named parties to the proceedings, or is each individual member of the company required to bring their own separate proceedings?"*

b. Analysis.

26. As to Point 17, the court is driven to ask 'what arguments?' One would imagine on reading Point 17 that at issue was a judgment

of the High Court where the court had looked at the applicants, identified their personal circumstances and said 'Those personal circumstances are not enough to allow you to raise rights arguments about European and constitutional rights'. But in fact the court's judgment said the reverse; it said that the only persons who could raise the specific points were the persons who had in fact pleaded them.

27. As to Point 18, it seems to the court that a fundamental confusion arises on behalf of the applicants in this regard as between (a) standing entitlements and (b) the requirement to prove a case. A NGO might have all the standing in the world to raise points; that does not relieve it of its evidential burden: the advantage of litigating under corporate form does not have the result that broad and unproven allegations become more cogent solely on the strength of the corporate applicant's name; what is required is that the case made on behalf of members be set out, something that was not done in this case. The applicants had standing, but the cases that they were making were fact-specific and those facts were not put in issue.

(ix) Point 19.

a. Text.

28. Point 19 reads as follows:

> *"19. In circumstances where another division of the High Court has, in separate proceedings, found that the Applicants have not delayed in bringing proceedings, and where such a finding has not been appealed, and no further delay is alleged, can the Court in these proceedings implicitly or expressly depart from such findings, and, if it is so entitled, is the Court required to set out the basis upon which it has departed from the other division of the High Court?"*

b. Analysis.

29. This purported point of law of exceptional public importance focuses on the interaction between the judgment in a leave application in a previous related judicial review application (*North East Pylon Pressure Campaign Ltd v. An Bord Pleanála* [2016] IEHC 300) and the principal judgment (rendered in a second judicial review application). As is clear from para.97 of the principal judgment, the court declined to make any conclusive finding in relation to the issue of delay. It follows that the point contended for does not arise out of the decision of the court in the principal judgment. That suffices to deal with this purported point of law of exceptional public importance. However, the court cannot but note in passing that in any event (1) it is well-established that an issue addressed at the leave stage, even at an *inter partes* hearing, can be revisited at the hearing of the substantive application for judicial review (see, e.g., *Lancefort v. An Bord Pleanála* [1999] 2 I.R. 270, 311), and (2) delay is not just an issue at the leave stage; it also bears on the substantive application for judicial review (*O'Flynn v. Mid-Western Health Board* [1991] 2 I.R. 223, 236).

IV

Desirable in the Public Interest?

30. It will be recalled that under s.50A(7) the court must certify both 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*". [Emphasis added]. Even if the court was satisfied (and it is not) that among the plethora of purported points of law of exceptional public importance contended for by the applicants there was (and there is not) one or more actual points of law of exceptional public importance, the court is not satisfied that the second limb of the test for certification "*that it is desirable in the public interest that an appeal should be taken*" is met in the within application. The court recalls in this regard the observations made concerning the public interest by (i) Clarke J. in *Arklow Holidays Ltd v. An Bord Pleanála* [2007] 4 I.R. 112, para. 24, (ii) this Court in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 263, paras. 13 and 14, and the regard had to "*the importance of the project*" by McDermott J. in *Fitzpatrick v. An Bord Pleanála* [2017] IEHC 644, para. 17. When it comes to the public interest presenting in the context of the project that is the focus of the within proceedings, the court recalls in this regard the affidavit of Mr Fitzgerald, Eirgrid's Director of Grid Development and Interconnection, who averred, inter alia, as follows, when application was made to have the within proceedings admitted to the Commercial List of the High Court:

> *"14. The proposed North-South 400kV interconnector will deliver a number of significant technical and related benefits which support the delivery of the key policy objectives of competitiveness, sustainability and security of supply for both Ireland and Northern Ireland. At present, in order to ensure system stability across the island of Ireland, power flows on the existing 275kV interconnector (between Louth and Tandragee) are limited to a value well below its nominal capacity. This restriction is applied due to the potential impact on security of supply of an unexpected outage of the existing interconnector. At higher power flows, such an outage would lead to unacceptable voltage and frequency stability issues.*
>
> *15. The proposed interconnector will significantly reduce the risk of system separation, as it will provide a separate power flow independent of the existing interconnector. I say that system separation is the complete electrical disconnection of one part of a transmission network from another part of the transmission network – in this case, the electrical separation of two systems North and South, which would result in every circuit connecting North and South being switched out, leaving both systems operating separately from one another. If such a system separation event occurs suddenly and unexpectedly whilst there was a high level of power flow on the existing 275kV interconnector, then the consequences would be an oversupply in one system and a deficit in the other system, leading to a high possibility that automatic protection equipment would disconnect supplies in either or both power systems leading to extensive blackout conditions across the island.*
>
> *16. In addition to providing an effective solution for the risk described above, a number of further benefits will arise from the development of the North-South 400kV interconnector as a result of the removal of existing constraints on power flow transfers between Ireland and Northern Ireland, which include improving competition by reducing the constraints restricting efficient performance of the all-island single electricity market (SEM). The SEM was established in November 2007, commencing the trading of wholesale electricity in Ireland and Northern Ireland on an all-island basis. The aim of the SEM is to promote cross-border trading in electricity for the benefit of all consumers on the island of Ireland. The absence of a second North-South interconnector at present means that a significant infrastructure bottleneck exists which restricts power flows between the two systems. The existing reliance on a single interconnector is considered to be a significant constraint to ensuring an efficient electricity market. The constraint creates inefficiency in the market, due to the operational limits on transfer capacity and, therefore, excess cost for consumers because it prevents the*

most efficient generators having unconstrained access to the market at all times.

17. I say that studies by EirGrid and SoNI have calculated annualised benefits to the market from the delivery of the second North-South interconnector in the order of €20m per annum in 2020 rising to a range of between €40m and €60m per annum by 2030."

31. However much sympathy one entertains, and the court entertains considerable sympathy, for the persons whose lands and lives are impacted by the intended development that is the focus of the within proceedings, it seems to the court, with every respect, that the public interest averred to by Mr Fitzgerald in the just-quoted text outweighs any possible element of public interest claimed by the applicants in respect of an appeal. The court must admit too that it finds certain of the claims of public interest identified in the applicants' submissions to be factually unsound. So, for example, they refer to ELF (electric field) issues; yet neither the planning inspector nor An Bord Pleanála found any claim in respect of ELF to be substantiated, so it just cannot successfully be raised as supporting a public interest dimension to the appeal. Nor does the fact that certain landowners are opposed to a project demonstrate in and of itself that there is a public interest in granting leave to appeal on particular points of law.

V

Excessively Optimistic Section 50A Applications

32. In *Connolly v. An Bord Pleanála* [2016] IEHC 624, para. 2, another application brought under s.50A(7), the court noted that the fact "[t]*hat 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."* This case is an example par excellence of the problem that the court sought to touch upon in that earlier judgment. It would require the most remarkable of circumstances and the most remarkable of judgments to throw up 19 points of law of exceptional public importance. Although the development that underpins the within case has stirred up considerable, and entirely understandable, angst and anger among the applicants, the facts at play are not especially remarkable, and neither, in truth, is the principal judgment; yes, that judgment is long, but that is testament more to the abundance of points raised at hearing than their innate complexity. The court notes too that a disappointing feature of the within application is the extent to which the purported points of law of exceptional public importance contended for, rest on facts which are contrary to those that have been found by the court to present and/or concern legal questions which were not raised in the principal application and/or reference case-law that was never opened to the court at the principal hearing. If would-be appellants will not temper their understandable but so often unmerited enthusiasm for coming afresh to court following the issuance of the initial judgment in planning law proceedings and (a) contending for the existence of abundant points of law of exceptional public importance where no such points present (often patently so), thus (b) consuming the time and resources of their opponents in attending unnecessarily protracted s.50A applications that were at all times clearly doomed to fail (whether wholly or in large part), they may yet find that this falls, in appropriate cases, to be reflected in costs orders issuing, at the least, on a solicitor and client basis, in order that a court might express its disapproval of conduct that it considers inappropriate.

VI

Conclusion

33. For the reasons aforesaid, the within application must fail.